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Jared Palmer

BRIEF FOR PETITIONER

No. 2010-CV-0654

IN THE
SUPREME COURT OF THE STATE OF MARSHALL
FALL TERM 2010

AARON MURPHY,
Petitioner,
v.
MARSHCODE CORPORATION,
Respondent.

ON APPEAL FROM THE
MARSHALL COURT OF APPEALS FOR THE FIRST DISTRICT

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STANDARD OF REVIEW

This Court reviews summary judgment motions *de novo*. (R. at 3.)

OPINIONS BELOW

The opinion of the Marbury County Circuit Court (MCV-08-227), granting summary judgment in favor of MarshCODE on all three counts, is unreported. The opinion and order of the Marshall Court of Appeals for the First District (Case No. 2009-CV01-0416), affirming the circuit court's grants of summary judgment, appear at pages 3-13 of the Record.

STATEMENT OF THE CASE

Statement of the Facts

MarshCODE is a genetic research company that formed in 1997 in the State of Marshall. (R. at 4). It has created the country's largest DNA database using DNA from voluntary donors. (R. at 4). MarshCODE required that every volunteer donating before 2009 sign a Participation Agreement (the "original agreement"), which states the parties' rights and responsibilities and includes a strict privacy policy. (R. at 4). The original agreement's privacy policy states that MarshCODE secures and encrypts donors' genetic information to provide maximum protection. (R. at 14). It further provides that MarshCODE uses a unique identifier for each donor to avoid associating donors' genetic information with their personal information. (R. at 14-15). Under the policy, MarshCODE can use personal information only under certain limited circumstances, none of which involve commercial enterprise. (R. at 15). MarshCODE reserved the option to unilaterally modify the terms and conditions by posting the changes to its website and notifying donors using their preferred methods of communication. (R. at 14).

Aaron Murphy ("Mr. Murphy") is a minister at the Church of Primary Saints (the "church") in the State of Marshall. (R. at 5). As a minister, Mr. Murphy has preached his small church's views on various issues, including pre-marital sex and homosexuality. (R. at 5). Mr. Murphy sometimes promoted the church's views over radio and television broadcasts. (R. at 5). In 2000, years before becoming a minister at the church, Mr. Murphy donated his genetic material to MarshCODE to advance scientific research. (R. at 5). He signed the original agreement and provided MarshCODE with a saliva sample and contact information. (R. at 12). Subsequently, Mr. Murphy moved from the city of Marshall to Rosewood, but forgot to notify MarshCODE. (R. at 5).

In 2008, MarshCODE shifted its business model from strictly scientific research to consumer-oriented commercial services. (R. at 4). In particular, MarshCODE developed a commercial service called "Build

Your Family Tree" ("Family Tree"). (R. at 4). Family Tree enables subscribers to compare their DNA with the DNA of (1) other Family Tree subscribers and (2) donors already in MarshCODE's enormous database, in the hope of finding a match. (R. at 4, 19). Before launching the new service, MarshCODE tested its viability using a "test database" that randomized donor names to ensure that programmers would not see the donors' identities. (R. at 7). Once MarshCODE deemed Family Tree viable, it modified the service to pull donors' information from the production database rather than the test database. (R. at 7). The production database linked donors' genetic and personal information so that any identified matches would be correct. (R. at 7).

When Family Tree functions properly, it sends an email to a subscriber's match, inviting him or her to share personal information with the subscriber. (R. at 4). This restrictive safeguard ensures that the subscriber only gains access to the match's otherwise restricted personal profile if the match accepts the invitation. (R. at 5).

Sometime after December 23, 2008, MarshCODE notified its donors that Family Tree would launch on January 1, 2009, again promising in a modified Participation Agreement (the "modified agreement") to protect donors' private information. (R. at 5, 18-19). The modified agreement informs donors that "MarshCODE employs robust, multi-layered encryption and authentication methods and conducts regular audits to protect" its donors' privacy interests. (R. at 19). It also stresses that "participation in activities and services that involve personal information is voluntary." (R. at 19). A donor may request that MarshCODE delete his or her automatically-generated Family Tree account, which could take up to seventy-two hours to take effect. (R. at 19). Mr. Murphy did not know about either the modified agreement or his participation in Family Tree because he never received the notices MarshCODE sent to him via traditional mail and email; both returned undeliverable. (R. at 6).

In March 2009, a twenty-two-year-old, gay woman named Billie Who used Family Tree to search for her biological father, who had abandoned her and her mother upon learning of the pregnancy. (R. at 5). Family Tree informed Ms. Who that it had found a match, and she invited the match to share personal information using the service's 'invite' feature. (R. at 6). Due to a functional flaw, however, the service (1) misidentified Mr. Murphy as Ms. Who's match, and (2) displayed his full personal profile without first obtaining his consent. (R. at 6).

Falsely believing that Mr. Murphy was her father, and angered by his views on homosexuality, Ms. Who sought revenge. (R. at 6). She went public, and news that Mr. Murphy had fathered and abandoned her spread rapidly through the media and blogosphere. (R. at 6). As a result of the scandalous rumors, Mr. Murphy's church demoted him to administrative duties. (R. at 6). It has not allowed him to preach or appear on

behalf of the church since. (R. at 7). Although Mr. Murphy vehemently denied the false claims, church members and the majority of his community condemned him and called for his resignation. (R. at 6). The paparazzi followed him and camped outside his home, causing Mr. Murphy to become highly distraught and to fear appearing in public. (R. at 6).

Upon learning of the mistake, MarshCODE conducted an investigation and learned that Family Tree had malfunctioned. (R. at 6-7). First, Family Tree was pulling donor information from the test database rather than the production database, which resulted in the false identification of Mr. Murphy as Ms. Who's match. (R. at 7). It is unknown whether this resulted from technical or human error. (R. at 7). Second, the restrictive safeguard protecting Mr. Murphy's personal profile failed. (R. at 6). MarshCODE publicly apologized and admitted that Mr. Murphy is not related to Ms. Who. (R. at 7).

Preliminary Statement

In June 2009, Mr. Murphy filed suit in Marbury County Circuit Court against MarshCODE for (1) defamation, (2) false light invasion of privacy, and (3) breach of contract. (R. at 2, 7). Following discovery, MarshCODE moved for summary judgment. (R. at 7). The circuit court granted the motion with respect to all three claims, holding that MarshCODE was entitled to judgment as a matter of law because Mr. Murphy did not demonstrate genuine issues as to any material fact pursuant to Marshall R. Civ. P., Rule 56(c). (R. at 3, 7). Mr. Murphy appealed. (R. at 3).

On May 8, 2010, the Marshall Court of Appeals for the First District reviewed the grant of summary judgment *de novo* and affirmed. (R. at 3). The First District held that the defamation and false light claims both implicate the First Amendment, and a heightened actual malice standard applied. (R. at 8-9, 11). It added that Mr. Murphy failed to establish genuine disputes as to the publication and actionability elements of the defamation claim. (R. at 8-9). As to the false light claim, the court found that Mr. Murphy did not establish a genuine dispute as to the publicity and offense elements. (R. at 10-12). Last, the Court of Appeals held that the breach of contract claim failed because the original agreement did not constitute a binding contract as a matter of law. (R. at 12-13).

On July 19, 2010, this Court granted Mr. Murphy leave to appeal. (R. at 2).

SUMMARY OF THE ARGUMENT

The circuit court erred when it granted summary judgment in favor of MarshCODE because Mr. Murphy has demonstrated facts to support the elements of the (1) defamation, (2) false light invasion of privacy, and (3) breach of contract claims.

First, Mr. Murphy has provided facts to support the defamation claim. MarshCODE made a false and defamatory statement about Mr. Murphy when it told Ms. Who that he was her father. Because this matter concerns Mr. Murphy's private life, a negligence standard applies rather than the First Amendment's actual malice standard. Mr. Murphy has demonstrated that MarshCODE acted either negligently or with actual malice. Finally, Mr. Murphy has shown both general and special harm resulting from the defamatory statement.

Second, Mr. Murphy has also demonstrated facts that support his false light invasion of privacy claim. The parties have stipulated that MarshCODE portrayed Mr. Murphy in a false light. MarshCODE publicized the false portrayal when it transmitted it to all 140,000 subscribers of Family Tree, including Ms. Who, and used the Internet as the medium of transmission. Any reasonable person would find the false portrayal highly offensive. Furthermore, like with defamation, Mr. Murphy has shown MarshCODE acted either negligently or with actual malice.

Finally, Mr. Murphy has satisfied the elements of his breach of contract claim. The original agreement constituted a binding, unilateral contract. Because Mr. Murphy substantially performed, MarshCODE had an obligation to perform as well. MarshCODE breached the contract when it (1) failed to safeguard Mr. Murphy's private information and (2) used his information for a commercial service without his consent. Mr. Murphy has also shown that he suffered harm resulting from the breach.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE DEFAMATION CLAIM BECAUSE GENUINE DISPUTES EXIST AS TO EACH ELEMENT.

A plaintiff alleging the tort of defamation must show: (a) a false and defamatory statement; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence; and (d) a showing of either general or special harm. Restatement (Second) of Torts § 558 (1977). Here, Mr. Murphy has demonstrated facts that satisfy all four elements of the defamation claim. First, the statement about Mr. Murphy's relationship with Ms. Who was false and defamatory. Second, MarshCODE published the communication when it released the false and defamatory

statement to Ms. Who. Third, the system malfunction evidences negligence, which is the appropriate standard of proof under the First Amendment. Even if a heightened actual malice standard applies, Mr. Murphy has shown MarshCODE's reckless disregard. Finally, Mr. Murphy need not show special harm to sustain the defamation action because the statement is defamatory *per se*. Alternatively, if this court determines that Mr. Murphy must show special harm, he has done so. Because Mr. Murphy has shown facts to prove the elements of defamation, the circuit court erred in granting summary judgment.

A. *Mr. Murphy Has Shown that MarshCODE's Communication Constitutes a False and Defamatory Statement.*

Because both parties stipulated that MarshCODE's statement that Mr. Murphy fathered Ms. Who was false, Mr. Murphy only needs to show that it was defamatory to satisfy the first element of the defamation claim. Restatement (Second) of Torts § 558 (1977). A communication is defamatory if it tends to "harm 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." *Id.* at § 559; *see also Bryson v. News Am. Publ'ns*., 672 N.E.2d 1207, 1214 (Ill. 1996). A statement can be defamatory in one of two ways: (1) *per se*, if the statement is so obviously and materially harmful that a court may presume injury to the plaintiff's reputation or (2) *per quod*, if the plaintiff must prove the defamatory meaning through extrinsic facts.[1] *Kolegas v. Heftel Broad. Corp.*, 607 N.E.2d 201, 206 (Ill. 1992). Even though MarshCODE's statement to Ms. Who was defamatory *per se*, Mr. Murphy has also shown its defamatory meaning through extrinsic facts.

1. *MarshCODE's Statement Is Defamatory Per Se Because It Portrays Mr. Murphy as an Unfit Minister.*

Statements that one is unfit for or acted in a manner incompatible with his or her trade or profession are defamatory *per se*. Restatement (Second) of Torts §§ 570, 573 (1977). In particular, "charges against a clergyman of . . . moral misconduct" are defamatory *per se* because they "affect his fitness for the performance of the duties of his profession." *Id.* at § 573 cmt. c. For example, in *King v. Tanner*, the court suggested that a "false allegation of fathering a child out of wedlock" would be defamatory *per se* if levied against a minister. 539 N.Y.S.2d 617, 620 (N.Y. Sup. Ct. 1989). As teachers and spiritual role models, ministers must possess

1. The distinction between defamatory *per se* and *per quod* appears in this section because the first element of defamation requires that the statement be defamatory. However, this distinction is only relevant for a minority of jurisdictions with respect to requiring a showing of special harm for slander as discussed below. *See infra* Part I.D.

"a pure and even unsuspected moral character" to adequately serve in their profession. *Potter v. N.Y. Evening Journal Publ'g. Co.*, 74 N.Y.S. 317, 320 (N.Y. App. Div. 1902); *see also Chaddock v. Briggs*, 13 Mass. 248, 254 (1816). Additionally, there is no requirement that the statement specify the trade or profession of the plaintiff in order to be defamatory *per se*. *Hickerson v. Masters*, 226 S.W. 1072, 1073 (Ky. 1921).

Because MarshCODE stated that Mr. Murphy fathered an abandoned child, it called into question Mr. Murphy's professional integrity as a minister, which is defamatory *per se.* When his church community learned he had abandoned his child and concealed her existence, it condemned him and called for his resignation. The community's harsh reaction to MarshCODE's defamatory statement demonstrates that MarshCODE portrayed Mr. Murphy as unfit for his profession as a minister.

2. Even if the Statement Is Not Defamatory Per Se, Extrinsic Facts Show that It Is Defamatory Per Quod.

If one must look to extrinsic facts to discern a statement's defamatory meaning, then it is defamatory *per quod*. *IBP, Inc. v. Hady Enters., Inc.*, 267 F. Supp. 2d 1148, 1164 (N.D. Fla. 2002). A defamatory meaning exists when a statement exposes a plaintiff to "loss of professional reputation, mental anguish, or embarrassment." *Kanjuka v. MetroHealth Med. Ctr.*, 783 N.E.2d 920, 928 (Ohio Ct. App. 2002). To illustrate, the statement, "Jon went to the park last weekend," is defamatory *per quod* if those hearing the statement know that "park" means "liquor store" and that Jon is under twenty-one. *See* Restatement (Second) Torts § 563 cmt. e (1977). As long as the statement is reasonably susceptible to a defamatory interpretation, whether it is truly defamatory is a question of fact for the jury. *N. Ind. Pub. Serv. Co.*, v. *Dabagia*, 721 N.E.2d 294, 301 (Ind. Ct. App. 1999).

Here, extrinsic facts show that MarshCODE's statement has a defamatory meaning. MarshCODE announced that Mr. Murphy is Ms. Who's biological father. Ms. Who's biological father impregnated her mother and then abandoned both Ms. Who and her mother when he learned of the pregnancy. MarshCODE's statement is reasonably susceptible to a defamatory interpretation because it implied that Mr. Murphy was an irresponsible and immoral father for abandoning his daughter. These implications are defamatory because a reasonable jury could conclude that they exposed Mr. Murphy to "loss of professional reputation, mental anguish, [and] embarrassment."

B. *MarshCODE Published the Defamatory Statement.*

An unprivileged communication of a defamatory statement by any means to a third party constitutes a publication. Restatement (Second) of Torts § 577 cmt. a-b (1977); *Hecht v. Levin*, 613 N.E.2d 585, 587 (Ohio 1993). Specifically, electronic transmissions of a defamatory statement satisfy the publication requirement. *In re Perry*, 423 B.R. 215, 267 (Bankr. S.D. Tex. 2010). Here, Mr. Murphy has satisfied the publication requirement because (1) MarshCODE transmitted the defamatory statement electronically to at least Ms. Who and (2) Mr. Murphy never consented to the transmission. Therefore, MarshCODE's electronic transmission of the defamatory statement to Ms. Who satisfies the publication requirement.[2]

C. *Mr. Murphy Satisfied the Appropriate First Amendment Standard of Proof by Showing Either MarshCODE's Negligence or Actual Malice in Communicating the Defamatory Statement to Ms. Who.*

Tort claims that arise out of speech, like defamation, implicate the First Amendment.[3] The First Amendment requires that plaintiffs in such cases show that the defendant acted with actual malice if: (1) the defamatory speech targets a public figure or (2) the subject of the speech concerns a matter of public interest. *Hustler Magazine v. Falwell*, 485 U.S. 46, 51-52 (1988); *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964) (noting that the purpose of the actual malice standard is to ensure free debate on public issues).

Because individuals' private lives do not implicate the public interest, private persons may prove the defendant's culpability under a lower standard of proof than actual malice. *Gertz v. Robert Welch*, *Inc.*, 418 U.S. 323, 342-45 (1974); *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*, 104 Cal. Rptr. 352, 362 (Cal. Ct. App. 2010) (adding that the First Amendment does not shield "sheer morbidity or gossip" about another's private life). Actual malice requires that a defendant either (a) know the statement is false at the time of delivery or (b) exhibit

2. "The accidental communication of matter defamatory of another to a third person is not a publication if there was no negligence." Restatement (Second) of Torts § 577 cmt. o (1977). As discussed below, MarshCODE was at least negligent in its publication. *See infra* Part I.C.3.

3. False light invasion of privacy claims implicate the First Amendment for the same reason. Much of the analysis in this section thus also applies to the false light claim below. *See infra* Part II.C.

reckless disregard as to its truth or falsity. *Hill*, 385 U.S. at 387. Here, Mr. Murphy is a private individual, and the defamatory statement concerns his private affairs. He therefore need only show MarshCODE's negligence. Mr. Murphy has shown that MarshCODE assumed a duty to protect its clients' privacy and reputational interests, and breached that duty when it informed Ms. Who that Mr. Murphy was her father. Even if the court applies the First Amendment's actual malice standard, Mr. Murphy satisfied that requirement by showing MarshCODE's reckless disregard.

1. Mr. Murphy Is a Private Individual, and Thus Is Subject to a Lower Standard of Proof than Actual Malice.

MarshCODE's assertion that Mr. Murphy is a public figure is without merit. There are two types of public figures. General public figures are those who have attained "general fame or notoriety in the community" by virtue of "pervasive involvement in the affairs of society." *Gertz*, 418 U.S. at 352. Because this standard is so high, courts should not "lightly assume" that someone is a general public figure. *Id*. Limited purpose public figures also attain a significant degree of fame, but for a narrow and particularized controversy existing before and giving rise to the defamatory statement. *Davis v. Keystone Printing Serv., Inc.*, 507 N.E.2d 1358, 1363 (Ill. App. Ct. 1987); *see also Gertz*, 418 U.S. at 352. Simply because one is "associated with a matter that attracts public attention" does not make him a public figure. *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 167 (1979). Courts should "caution . . . against 'blind application'" of the actual malice standard. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 45 (1971) (citing *Hill*, 385 U.S. at 390), *abrogated on other grounds by Gertz*, 418 U.S. at 323.

In *Davis*, the Illinois Appellate Court considered facts highly similar to those here. 507 N.E.2d at 1361. In that case, a newspaper article alleged that Davis, a minister, encouraged his parishioners to engage in homosexual behavior. *Id*. The lower court found that Davis was a limited purpose public figure because he, among other things, (1) routinely appeared on television and radio, (2) met with politicians throughout the nation in support of veterans, and (3) was involved in a scandal years earlier involving homosexual advances to young men. *Id.* at 1362-63. The appellate court reversed, and stressed that those facts did not evidence a "preexisting public controversy" giving rise to the newspaper's defamatory and false statements. *Id.* at 1363. The prior accusation that Davis had engaged in sexual misconduct coupled with his prior appearances on television and radio did not establish a basis for the newspaper's false and defamatory statements. *Id*.

Here, Mr. Murphy is not a general or limited purpose public figure. First, Mr. Murphy's church never expanded beyond a small group of people. Second, like in *Davis*, Mr. Murphy's television and radio appearances to speak on matters of religion fall short of establishing limited purpose public figure status. Third, no preexisting controversy precipitated MarshCODE's announcement that Mr. Murphy fathered Ms. Who. MarshCODE has provided no evidence that Mr. Murphy participated in public debates relating to fatherhood or child abandonment.

MarshCODE's reliance on *Wilson v. Daily Gazette Co.* is misplaced because the legal factors that the court applied in that case confirm that Mr. Murphy is a private rather than public figure. 588 S.E.2d 197, 207 (W. Va. 2003). Specifically, the court addressed whether Wilson, a high school student noted for basketball and football, was a limited purpose public figure after a local newspaper alleged that he exposed himself after winning a basketball game. *Id*. at 200. The court considered whether (1) the plaintiff voluntarily engaged in "significant efforts" to sway public opinion, (2) the debate existed prior to the defamatory statements, and (3) the plaintiff "had access to channels of communication" to rebut the statements. *Id*. at 206. Applying those factors, the court overturned the lower court and held that Wilson was not a limited purpose public figure. *Id*. at 207. Notably, the court stressed the fact that no prior controversy existed before the Gazette published the false allegation. *Id.*

Here, like in *Wilson*, MarshCODE and the circuit court failed to identify a preexisting controversy giving rise to MarshCODE's false and defamatory statement. While it is true that Mr. Murphy has spoken on the subject of pre-marital sex as a minister at a small church, MarshCODE's false statement also reflects an entirely distinct subject matter that was not part of that preexisting controversy. Specifically, the defamatory and false statement here concerns Mr. Murphy's role as a father because it suggests that he abandoned his child and her mother. MarshCODE has not provided any evidence that Mr. Murphy participated in public discourse on fatherhood or abandoned children. Furthermore, MarshCODE mistakenly identifies homosexuality as a preexisting controversy when it is actually a red herring. MarshCODE's false and defamatory statement did not refer to Ms. Who's sexual orientation. The public controversy over homosexuality did not give rise to MarshCODE's false and defamatory statement. Therefore, Mr. Murphy's prior comments on homosexuality and pre-marital sex did not bear on the question of whether he is a limited purpose public figure. Because the facts do not support the conclusion that Mr. Murphy is a general or limited purpose public figure, a lower standard of proof applies.

2. Even if Mr. Murphy Is a Public Figure, a Lower Standard of Proof Applies Because the Statement Concerns a Purely Private Matter.

A more important distinction than that between public and private figures is the difference between the public interest in free speech and the "need for judicial redress" for tortious speech. *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976). Even if the plaintiff is a public figure, the "actual malice" standard of proof does not apply to defamatory or false statements concerning private matters because such matters are not in the public interest. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985). Simply because an event attracts media attention does not transform it into a matter of public concern. *Wolston*, 443 U.S. at 167; *see also Dairy Stores, Inc. v. Sentinel Publ'g Co.*, 516 A.2d 220, 229 (N.J. 1986) (noting that "not everything that is newsworthy is a matter of legitimate public concern"). For example, in *Firestone*, even though dissolution of the plaintiff's marriage attracted media attention, it was not a public controversy because it related to the private relationship between the plaintiff and her husband. 424 U.S. at 454. Whether "speech addresses a matter of public concern must be determined by [its] content, form, and context . . . as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-48 (1983).

Here, MarshCODE's defamatory statement relates to a private family relationship, which is not a matter of public concern. Any father-daughter connection between Mr. Murphy and Ms. Who fails to raise a topic of legitimate public interest because, like in *Firestone*, it relates to a private familial relationship. For MarshCODE to argue that the statement is a matter of public controversy worthy of public concern belies the company's explicit promise to safeguard the identity of familial matches. MarshCODE promised that in the event of a match, donors could choose to share their identities in a "trusted environment." (R. at 16.) Additionally, MarshCODE used a restrictive safeguard to prevent automatic disclosure of match information. MarshCODE's conduct illustrates its own understanding that the defamatory falsehood communicated to Ms. Who related to a purely private matter.

3. Mr. Murphy Demonstrated MarshCODE's Culpability Under a Lower Standard of Proof than Actual Malice.

The Constitution allows Mr. Murphy to prove MarshCODE's culpability under a lower standard of proof because he is a private individual and this matter concerns private affairs. The tort of defamation requires a showing of at least negligence on the part of the defendant in making a false and defamatory statement. Restatement (Second) of Torts § 558 (1977). In assessing a defendant's culpability under the lower standard, the trier of fact should consider both the "nature of the interests that the

defendant was seeking to promote" and the reasonably foreseeable "extent of the damage to the plaintiff's reputation." *Id.* at § 580B cmt. h.

Mr. Murphy provided evidence that would allow a reasonable trier of fact to conclude that MarshCODE acted culpably. First, MarshCODE assumed a special duty to protect both its subscribers' privacy interests and their ability to choose how MarshCODE disseminates their personal information. It recognized its duty in the original agreement it authored, and twice reaffirmed its duty in subsequent announcements. Second, MarshCODE breached that duty when, in a rush for profit, it conveyed Mr. Murphy's personal profile in a manner that erroneously stated a paternal relation with Ms. Who. Third, MarshCODE admitted that Family Tree malfunctioned. In turn, the malfunction resulted in the false and defamatory statement that injured Mr. Murphy. Finally, Mr. Murphy suffered both reputational injury and mental anguish. On the facts presented, a reasonable jury could find that MarshCODE acted negligently.

4. Even if a Heightened Actual Malice Standard Applies, a Reasonable Jury Could Conclude that MarshCODE Acted with Reckless Disregard.

MarshCODE acted with reckless disregard when its Family Tree service conveyed false and defamatory information to Ms. Who.[4] To show reckless disregard under the actual malice standard, a plaintiff must prove that the defendant either, (1) made false or defamatory statements with a "high degree of awareness of . . . probable falsity" or (2) "entertained serious doubts as to the truth of [the] publication." *Harte-Hanks Communc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989) (citing *Garrison v. La.*, 379 U.S. 64, 74 (1964); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)). Circumstantial evidence of the defendant's state of mind or motive, though not dispositive, weighs on the question of reckless disregard. *Id*. at 668.

Mr. Murphy produced evidence that would allow a reasonable jury to find that MarshCODE acted with reckless disregard. First, MarshCODE knew its Family Tree service posed serious privacy and reputational risks. During testing of the service, MarshCODE used a test database that randomized subscriber names in order to protect "the identity of data subjects from the programmer." (R. at 7). Cognizant of the privacy and reputational risks, MarshCODE attempted to incorporate additional safety features into Family Tree. As crafted, the service should have, (1) correctly identified individuals with common DNA, and

4. Note that this section applies with equal force in the false light invasion of privacy section below. *See infra* Part II.C.

(2) let a matched individual decide whether to disclose personal information.

Had Family Tree worked properly, Mr. Murphy's private information would not have been erroneously released to Ms. Who, and he would not have suffered injury. However, MarshCODE never used the safety features because Family Tree accessed the randomized test database and released Mr. Murphy's full personal profile to Ms. Who, implying that they were related. Despite acknowledging the significant harm that could result from false identifications, MarshCODE neglected to ensure that, (1) Family Tree accessed the correct database, and (2) the restrictive safeguard worked properly, thus allowing the match to choose whether to disclose personal information. This court should reverse the grant of summary judgment because a reasonable jury could conclude that MarshCODE acted recklessly.

Second, despite promises to regularly audit Family Tree, MarshCODE failed to notice an ongoing malfunction. MarshCODE commenced an investigation only after the error resulted in serious damage to Mr. Murphy. The investigation revealed that a pre-launch modification had failed. Specifically, prior to launching Family Tree, MarshCODE evaluated its viability using the randomized test database. Once it deemed the service viable, MarshCODE modified it to retrieve personal records from the production database instead. It then launched the service on January 1, 2009. Nearly three months later, Family Tree incorrectly transmitted Mr. Murphy's personal profile to Ms. Who. During its investigation, MarshCODE discovered that the reason for the incorrect match was because the service was still drawing from the randomized test database instead of the production database. These facts suggest that MarshCODE's service was malfunctioning for nearly three months and that MarshCODE did not regularly audit the service as promised. Therefore, a reasonable jury could conclude that MarshCODE acted with reckless disregard as to the truth or falsity of identified matches.

Finally, MarshCODE used Mr. Murphy's genetic and personal information despite strong evidence that he never received notice of his participation in Family Tree. MarshCODE sought to provide notice to Mr. Murphy by email and traditional mail, however, both notices returned undeliverable. At this point, rather than try to contact Mr. Murphy again by another other means, or remove him from the database, MarshCODE instead decided to capitalize on Mr. Murphy's genetic material and use it for commercial gain. The failure to obtain Mr. Murphy's permission for the wholly new use of his DNA strongly evidences MarshCODE's reckless disregard for Mr. Murphy's privacy interests and rights to control use of his personal information.

A reasonable jury could find that MarshCODE acted with reckless disregard based on, (1) the system malfunction, (2) the failure to adequately audit, and (3) the failure to obtain Mr. Murphy's consent. Therefore, this court should reverse the grant of summary judgment.

D. *Mr. Murphy Has Shown Both General and Special Harm, and Thus the Defamatory Statement Is Actionable Whether It Is* Per Se *or* Per Quod.

Under some circumstances, a plaintiff may recover for defamation without proving special harm. *See*, *e.g.*, *Vanover v. Kan. City Life Ins. Co.*, 553 N.W.2d 192, 196-97 (N.D. 1996). A minority of states require a plaintiff to prove special harm if the defamatory statement is *per quod* rather than *per se*. *Id*. at 196-97; Restatement (Second) of Torts § 570 (1977).

Mr. Murphy does not need to prove special harm for two reasons. First, MarshCODE's defamatory statement is libel, which never requires a showing of special harm. Second, if the State of Marshall recognizes a distinction between *per se* and *per quod*, MarshCODE's statement is defamatory *per se*, which also does not require a showing of special harm. Even if MarshCODE's statement is defamatory *per quod*, Mr. Murphy has satisfied the special harm requirement. Therefore, Mr. Murphy has established the fourth and final element of the defamation claim, and the circuit court erred in granting summary judgment.

1. Requiring a Showing of Special Harm Denies a Plaintiff the Ability To Recover for Significant Reputational Injury.

In jurisdictions that distinguish between libel and slander, defamatory communications over the Internet "are considered libel." *Too Much Media, LLC v. Hale*, 993 A.2d 845, 864-65 (N.J. Super. Ct. App. Div. 2010) (noting that Internet postings are just as permanent as other traditional forms of written publications); *see also Mathis v. Cannon*, 573 S.E.2d 376, 377 (Ga. 2002). Libel never requires a plaintiff to show special harm. Restatement (Second) Torts § 569 (1977). Because MarshCODE transmitted its defamatory statement over the Internet, it constitutes libel and Mr. Murphy need not show special harm.

Even if MarshCODE's defamatory statement is slander *per quod*, requiring a plaintiff to prove special damages frustrates the main purpose of the tort of defamation, which is to allow a plaintiff to publicly vindicate his or her good name. *Vanover*, 553 N.W.2d at 197. Because "people consider their reputation 'a major factor in a satisfactory existence,'" requiring a plaintiff to prove special harm in a defamation action is inappropriate. *Id.* at 197 (quoting *Toney v. WCCO Television*, 85 F.3d 383, 395 (8th Cir. 1996)). Moreover, a statement with an implied defamatory

meaning is no less damaging than a statement that is defamatory on its face. *Rice v. Simmons,* 2 Del. 417, 429 (Del. 1838). Therefore, requiring a plaintiff to prove special harm simply because a communication's defamatory meaning is implied rather than overt denies victims with valid claims an opportunity to recover for significant reputational harm. The State of Marshall should thus not require Mr. Murphy to show special harm.

2. Mr. Murphy Only Must Show General Harm Because the Statement Is Defamatory Per Se.

If a statement is defamatory *per se*, a plaintiff need not show special harm. Restatement (Second) of Torts § 569 cmt. b (1977). As noted above, Mr. Murphy has demonstrated that MarshCODE's statement is defamatory *per se*. *See supra* Part I.A.1. Therefore, Mr. Murphy's reputational harm suffices for purposes of actionability.

3. Even if MarshCODE's Statement Is Defamatory Per Quod, a Reasonable Jury Could Conclude that Mr. Murphy Suffered Special Harm.

If the State of Marshall, for whatever reason, requires a showing of special harm, Mr. Murphy has satisfied this requirement. To show special harm, a plaintiff need not provide an exact dollar amount. *See* Restatement (Second) of Torts § 575 cmt. b (1977). For example, proof of demotion establishes special harm. *Id*. Likewise, "loss of the society, companionship and association of friends may be sufficient when their hospitality or assistance has been such that it can be found to have a money value." *Id.*; *see also Pettibone v. Simpson*, 66 Barb. 492, 494 (N.Y. Sup. Ct. 1873) ("Refusal of gratuitous entertainment to the slandered party, by a person by whom she had been accustomed to be gratuitously entertained is sufficient, by way of special damage, to sustain the action."). Special harm may also be the loss of future employment opportunities. Restatement (Second) of Torts § 575 cmt. b (1977). The plaintiff must also show that the special harm resulted from the defamatory statement. *Id.* at § 575. The defamatory statement is the legal cause of any special harm suffered even if the defendant made it only to one person who then repeated it to others so as to have "repercussive effects" on the defamed person's reputation. *Id.* at § 576 cmt. e.

Mr. Murphy has demonstrated that he suffered three types of special harm resulting from MarshCODE's defamatory statement. First, Mr. Murphy's small church suspended and then demoted him. Second, Mr. Murphy lost the "society, companionship and association" of his friends and church community. Third, the defamatory statement hurts

Mr. Murphy's chances to find employment as a minister at another church. Therefore, Mr. Murphy has established special harm.

II. THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT ON THE FALSE LIGHT CLAIM BECAUSE A REASONABLE JURY COULD CONCLUDE THAT MR. MURPHY SATISFIED ALL THE ELEMENTS OF THE CLAIM.

False light invasion of privacy occurs when one portrays another (1) in a false light, (2) before the public, and (3) in a highly offensive manner. Restatement (Second) of Torts § 652E (1977). As with defamation, the standard of proof for the defendant's culpability turns on whether the false portrayal concerns a public figure or touches on a matter of public interest. *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 250-51 (1974); Restatement (Second) of Torts § 652E caveat (1977).

Because MarshCODE admits that the announcement it made to Ms. Who was false, thereby establishing the first element of the claim, Mr. Murphy only has to establish that MarshCODE (1) publicized the false portrayal and (2) did so in a highly offensive manner. He has provided evidence to satisfy both elements. First, Family Tree's malfunction enabled all 140,000 subscribers, including Ms. Who, to infer an erroneous genetic connection with Mr. Murphy, thereby satisfying the publicity element. Second, Mr. Murphy has satisfied the offense element because a reasonable person would find the false portrayal highly offensive. As noted above, Mr. Murphy demonstrated both MarshCODE's negligence and actual malice in making the false portrayal, thereby satisfying the First Amendment's standard of proof. *See supra* Part I.C.1-2. Therefore, because Mr. Murphy has shown facts sufficient to support each element of the false light claim, the circuit court erred when it granted summary judgment.

A. *A Reasonable Jury Could Conclude that MarshCODE Publicized the False Portrayal.*

To satisfy the publicity element, a defendant must (a) communicate the false portrayal "to the public at large" or (b) convey it in a way that makes it "substantially certain to become . . . public knowledge." Restatement (Second) of Torts § 652D cmt. a (1977). The publicity element reduces to a question of whether the portrayal was a "private [or] public communication." *Id*. Whether one publicized a false portrayal is a question of fact for the jury. *Johnson v. K mart Corp.*, 723 N.E.2d 1192, 1197 (Ill. App. Ct. 2000).

MarshCODE sufficiently publicized its false portrayal of Mr. Murphy in three respects. First, MarshCODE enabled all 140,000 Family

Tree subscribers to infer an erroneous genetic connection with Mr. Murphy by granting them access to his personal profile similar to a social networking site. Second, under the special relationship exception, because the false portrayal convinced Ms. Who that she was Mr. Murphy's daughter, relaying it to her alone is sufficient for the publicity requirement. Third, MarshCODE's use of the Internet to disclose matches facilitated rapid dissemination of the false portrayal to the public at large. Therefore, a reasonable jury could conclude that Mr. Murphy has satisfied the publicity element.

1. MarshCODE Publicized the False Portrayal When It Granted All 140,000 Subscribers Access to Mr. Murphy's Profile.

Publication of a false portrayal in a newspaper, radio broadcast, or similar kind of public forum satisfies the publicity element of false light invasion of privacy. Restatement (Second) of Torts § 652D cmt. a (1977). Posting information to social networking profiles like MySpace is "materially similar . . . to a newspaper publication or a radio broadcast" because the public at large may easily access the information. *Yath v. Fairview Clinics*, 767 N.W.2d 34, 43 (Minn. Ct. App. 2009). Where a defendant posts false portrayals in public forums, like social networking sites, it does not matter how many members of the public view the post. *Id.* at 43-44 (noting that "the number of actual viewers is irrelevant"). A restrictive safeguard may turn an otherwise public forum into a private one. *Id*. at 44.

In *Yath*, the plaintiff sued for invasion of privacy after the defendant posted the plaintiff's confidential medical information, including details of an extra-marital sexual relationship, to an unrestricted MySpace page. *Id.* at 38-39. The district court granted the defendant's summary judgment motion. *Id*. at 40. Overturning the district court, the Court of Appeals of Minnesota directly addressed whether the defendant's posting on MySpace constituted publicity.[5] *Id*. The court held that such a posting met the publicity element despite the failure to show that "a sufficient number of people had seen the webpage." *Id*. at 42.

Here, MarshCODE's actions satisfy the publicity requirement because it configured Family Tree in a manner resembling a social networking site. Subscribers may, similar to MySpace or Facebook, "invite" other subscribers to reveal personal information. Like users of Facebook or MySpace, subscribers of Family Tree may only access another's personal profile if the other subscriber has granted permission. When Family Tree malfunctioned, the restrictive safeguard stopped working and effectively turned the service into a public forum. Once that

5. Note that Minnesota, like Marshall, relies on the Restatement's understanding of publicity. Restatement (Second) of Torts § 652D (1977).

happened, any of the service's 140,000 subscribers, like Ms. Who, could access Mr. Murphy's profile without first obtaining his permission. Because the system accessed the randomized test database, all 140,000 subscribers could have inferred a false familial relation with Mr. Murphy, provided the service randomly selected his name. This is exactly what happened when Ms. Who used the "invite" feature. Therefore, like in *Yath*, even if Ms. Who was the only subscriber to view Mr. Murphy's profile, the fact that thousands of others could have viewed it is sufficient to show publicity.

2. Even if MarshCODE Did Not Grant All Subscribers Access to Mr. Murphy's Profile, Communication of the False Portrayal to Ms. Who Alone Constitutes Publicity Under the Special Relationship Exception

If the plaintiff has a "special relationship with the [person or persons] to whom the information is disclosed," the plaintiff need not show widespread publicity. *Johnson*, 723 N.E.2d at 1197; *Olson v. Red Cedar Clinic*, 681 N.W.2d 306, 309 (Wis. Ct. App. 2004). Under this exception, publicizing to one person suffices. *Doe v. Methodist Hosp.*, 690 N.E.2d 681, 693 (Ind. 1997); *Olson*, 681 N.W.2d at 309. Special relationships include "fellow employees, club members, church members, [and] *family*." *Doe v. TCF Bank Ill., FSB*, 707 N.E.2d 220, 221 (Ill. App. Ct. 1999) (emphasis added). Delivery of false information to a person close to a plaintiff "may be just as devastating" as though conveyed to the public because a negative reaction of one close to a plaintiff often leads to greater embarrassment for the plaintiff. *Miller v. Motorola, Inc.*, 560 N.E.2d 900, 903 (Ill. App. Ct. 1990); *see also Beaumont v. Brown*, 257 N.W.2d 522, 531 (Mich. 1977), *overruled on other grounds by Bradley v. Saranac Cmty. Schs. Bd. of Educ.*, 565 N.W.2d 650, 658 (Mich. 1997).

Here, MarshCODE sufficiently publicized the false portrayal when it informed Ms. Who that she shared a special relationship with Mr. Murphy. Believing she found the father who abandoned her before she was born, Ms. Who reacted explosively. Even though Mr. Murphy never in fact fathered Ms. Who, neither MarshCODE nor Ms. Who realized that until after Ms. Who repeated the false portrayal to the public. Ms. Who reacted exactly the way anticipated by the special relationship exception, and thereby caused Mr. Murphy to suffer a greater embarrassment than had MarshCODE relayed the false portrayal to a disinterested third party. Therefore, under the special relationship exception, a reasonable jury could conclude that Mr. Murphy has satisfied the publicity requirement.

3. MarshCODE Sufficiently Publicized the False Portrayal Because It Conveyed It to Ms. Who in a Readily-Transferrable Electronic Format

The Internet is a forum known for brewing falsehoods. More than with newspapers, radio, or other means of communication, users of the Internet "have tremendous power to harm reputation." Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 855, 863 (2000). Because the Internet has "remove[d] barriers to being heard," false statements spread like wildfire and thus are substantially certain to become public knowledge.[6] *Id*. at 895. MarshCODE portrayed Mr. Murphy in a false light on the Internet, which enabled Ms. Who to rapidly spread the false portrayal to the public at large through the blogosphere. As such, Mr. Murphy satisfied the publicity requirement because MarshCODE transmitted the false portrayal over the Internet.

B. *A Reasonable Jury Could Find the False Portrayal Highly Offensive*

To recover for false light invasion of privacy, the false portrayal must be "highly offensive to a reasonable person." Restatement (Second) of Torts § 652D (1977). Whether a reasonable person would be highly offended is a question of fact for the jury. *Romaine v. Kallinger*, 537 A.2d 284, 296288-89 (N.J. 1988); *see also Prosser and Keeton On the Law of Torts* § 14 (W. Page Keeton et al., eds., 5th ed. 1984) (citing *Strickler v. NBC*, 167 F. Supp. 68 (S.D. Cal. 1958)). Before sending the question to the jury, however, a court must first consider the false portrayal and surrounding context to determine whether it "is capable of the [offensive] meaning assigned to it by [the] plaintiff." *Romaine*, 537 A.2d at 290. If the false portrayal could convey the assigned meaning, then the jury determines whether a reasonable person would find it highly offensive based on the following factors: " the degree of the intrusion, the context . . .and circumstances surrounding the intrusion as well as the intruder's motives . . . , the setting into which [the defendant] intrudes, and the expectations of those whose privacy is invaded." *Hill v. NCAA*, 865 P.2d 633, 648 (Cal. 1994). Some jurisdictions emphasize the objec-

6. For examples of how rapidly rumors proliferate on the Internet, consider Wonder Years actor Fred Savage's untimely and unrealized death arising from a drunk driving accident. App. A. Alternatively, consider comedian Bill Cosby's fourth and most recent death and resurrection. App. B. For yet another example, consider Chief Justice Roberts's recent and never actualized resignation from the U.S. Supreme Court. App. C. Indeed, the Supreme Court has recognized how quickly people can share information over the Internet. *See MGM. Studios, Inc. v. Grokster*, 545 U.S. 913, 923 (2005) (defendant held liable for contributory infringement of copyright after its service enabled customers to quickly copy and transmit billions of music files to share with people all over the world).

tive nature of this inquiry and instruct the jury that a hypersensitive individual's reaction is not a reasonable one. *See Wolfson v. Lewis*, 924 F. Supp. 1413, 1421 (E.D. Pa. 1996); *Thomason v. Times-Journal, Inc.*, 379 S.E.2d 551, 554 (Ga. Ct. App. 1989); *Lovgren v. Citizens First Nat'l Bank of Princeton*, 534 N.E.2d 987, 990 (Ill. 1989).

Here, Mr. Murphy understood MarshCODE's false portrayal to imply that he abandoned his daughter and her mother. The evidence strongly suggests that the false portrayal conveyed that meaning. MarshCODE informed Ms. Who that Mr. Murphy is her father. Ms. Who's actual father abandoned her and her mother. The next logical step is to conclude that Mr. Murphy is the biological father who abandoned Ms. Who and her mother. Therefore, because the false portrayal is capable of the offensive meaning Mr. Murphy attached to it, the question of whether a reasonable person would have taken offense is one for the jury.

A jury applying the *Hill* factors could conclude that a reasonable person would find the false portrayal highly offensive. First, MarshCODE's false statement exhibited a high degree of intrusion because it disclosed Mr. Murphy's private genetic and personal information. Second, the context provides another reason for offense because MarshCODE betrayed Mr. Murphy's trust when it abruptly changed its business model to use sensitive genetic and personal data for profit. Third, the circumstances surrounding the intrusion reveal that MarshCODE intended to extend maximum protection for its donors' privacy interests. Both the original and modified agreements contain privacy policies that emphasize the importance of confidentiality. Fourth, MarshCODE invaded Mr. Murphy's fundamental zone of privacy concerning his family, a setting that the nation has long recognized as important.[7] MarshCODE's implication that Mr. Murphy abandoned his family constituted a personal affront to Mr. Murphy's character and morals. Finally, Mr. Murphy expected a high degree of privacy concerning use of his genetic and personal information because he signed an agreement promising such privacy. Combined, these factors show that any reasonable person would be highly offended at MarshCODE's false portrayal of Mr. Murphy. Therefore, MarshCODE's argument that Mr. Murphy is a hypersensitive individual is without merit, and a reasonable jury could conclude that Mr. Murphy has satisfied the final element of his false light claim.

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7. *See*, *e.g.*, *Michael H. v. Gerald D.*, 491 U.S. 110, 123-24 (1989) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and traditions.") (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)); *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976) (dissolution of a marriage is a matter of private concern because it concerns the internal affairs of the family).

C. *Mr. Murphy Has Satisfied the Appropriate First Amendment Standard of Proof*

Like with defamation, the First Amendment imposes an actual malice standard of proof on plaintiffs alleging false light invasion of privacy if the invasion concerns a public figure or a matter of public interest. *Hustler Magazine*, 485 U.S. at 52; *Hill*, 385 U.S. at 387-88. For private individuals and private matters, however, both the Supreme Court and the Restatement have permitted individual states to apply a lower standard of proof as long as it is not strict liability. *Cantrell*, 419 U.S. at 250-51 (1974); Restatement (Second) of Torts § 652E caveat (1977). Several states have chosen to apply a lower standard of proof.[8] Applying a lower standard of proof reflects the principle that private individuals are "more deserving of recovery" because they are "more vulnerable" than public figures. *Gertz*, 418 U.S. at 345. Marshall should follow the Supreme Court's reasoning and, like other states, adopt a lower standard for private persons and private matters.

As noted above, if this Court holds that Mr. Murphy is a private individual or the false portrayal concerns private matters, Mr. Murphy has demonstrated facts to establish at least MarshCODE's negligence. *See supra* Part I.C.3. Also as noted above, even if this Court holds that a heightened actual malice standard applies, Mr. Murphy has demonstrated MarshCODE's reckless disregard. *See supra* Part I.C.4. Mr. Murphy has satisfied the First Amendment standard of proof because he has demonstrated either MarshCODE's negligence or reckless disregard.

III. The Circuit Court Erred in Granting Summary Judgment on Mr. Murphy's Breach of Contract Claim Because Genuine Disputes Exist as to All Four Elements

To defeat a motion for summary judgment on a claim for breach of contract, a plaintiff must establish genuine disputes as to four elements: (a) existence of a contract; (b) performance of its conditions by the plaintiff; (c) breach by the defendant; and (d) resulting damages. *Kopley Gr.*

8. *See, e.g., Braun v. Flynt*, 726 F.2d 245, 257 (5th Cir. 1984) (suggesting that a private individual may seek compensatory damages without showing malice); *Reader's Digest Ass'n v. Superior Court*, 690 P.2d 610, 616 (Cal. 1984) (distinguishing public from private persons for purposes of determining the level of culpability); *Fils-Aime v. Enlightenment Press, Inc.*, 507 N.Y.S.2d 947, 950 (N.Y. App. Term 1986) (applying a "grossly irresponsible" standard for private individuals bringing privacy actions); *West v. Media Gen. Convergence, Inc.* 53 S.W.3d 640, 647-48 (Tenn. 2001) (adopting negligence as the standard for private individuals alleging a defamation privacy cause of action); *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 905 (Utah 1992); *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 77 (W. Va. 1984) (noting that defendant publisher must exhibit "at least negligence" in privacy suit brought by private plaintiff).

V., L.P. v. Sheridan Edgewater Props., 876 N.E.2d 218, 226 (Ill. App. Ct. 2007). Mr. Murphy has presented evidence showing that the original agreement constitutes a binding contract, which Mr. Murphy substantially performed and MarshCODE breached. Additionally, Mr. Murphy showed that the breach resulted in damages. Therefore, because Mr. Murphy has established all four elements, the circuit court erred when it granted summary judgment.

A. *The Original Agreement Constitutes a Binding Contract and Contains the Essential Terms*

The original agreement constitutes a binding contract because the terms of the offer were definite and Mr. Murphy accepted those terms for valuable consideration. The modified agreement is invalid because its terms are outside the scope of what Mr. Murphy and MarshCODE contemplated when they made the agreement. The original agreement thus obligates MarshCODE to perform under its terms.

1. The Original Agreement Constitutes a Binding Contract

One who makes a definite offer, which the offeree accepts for valuable consideration, is bound by the terms of the resulting contract. *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 626 (Minn. 1983). In determining whether a contract is binding, courts first look to whether the parties intended to be bound. Restatement (Second) of Contracts §201 (1981). When an agreement includes a policy statement, courts often consider the relative use of language in the statement to determine whether the parties considered it binding. *See, e.g., Pratt v. Heartview Found.*, 512 N.W. 2d 677, 678 (N.D. 1994); *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 741 (Minn. 2000) (holding that only specific statements about policies are binding). For example, in *Stewart v. Chevron*, the court found that the words "shall," "will," and "must" indicated that the contract's policy statements were binding. 762 P.2d 1143, 1145-46 (Wash. 1988). In *Duldulao v. Saint Mary of Nazareth Hosp. Ctr.*, language such as "cannot," "are required," and "are never" indicated that the policy statements were binding. 505 N.E.2d 314, 318 (Ill. 1987). A definite offer develops into a binding contract if the offeree accepts the offer and gives valuable consideration by either (a) giving an exchange promise, which forms a bilateral contract, or (b) acts of performance, which form a unilateral contract. Restatement (Second) of Contracts § 32 (1981).

MarshCODE made a definite offer because, like in *Stewart* and *Duldulao*, the privacy policy statements in the original agreement contained mandatory language. For example, it stated that Mr. Murphy's "genetic and phenotypic information *will* be kept in a secured protected

research database," and that anytime his "information is used, MarshCODE *will only* refer to [his] unique identifier . . . , which *will only* be accessible by the MarshCODE database analysts." (R. at 14) (emphasis added). Furthermore, it provided that Mr. Murphy's "personal information *will never be* associated with [his] genetic information." (R. at 14) (emphasis added). Not only did MarshCODE use mandatory language, describing in detail its own obligations, it also specifically provided that Mr. Murphy could accept the terms and conditions by signing the agreement. Such language constitutes a definite offer.

The original agreement instructed Mr. Murphy to "read these terms and conditions carefully [because] signing this form constitutes acceptance of them." (R. at 14). It also provided that Mr. Murphy could elect to participate in the genetic research program by donating a saliva sample. Mr. Murphy signed the agreement, thereby accepting MarshCODE's offer. He also gave valuable consideration for the offer by providing MarshCODE with his saliva sample as requested. Therefore, because Mr. Murphy accepted the offer and gave valuable consideration by an act of performance, the original agreement became a binding, unilateral contract.

MarshCODE erroneously relies on *Grenier v. Air Express Int'l Corp.*, to argue that the privacy policy statements in the original agreement are not contractual. 132 F. Supp. 2d 1198 (D. Minn. 2001). In that case, the plaintiff sued his employer for failing to pay him incentive bonuses. *Id.* at 1199. However, because the incentive program "unambiguously vest[ed] discretion in the defendant" to determine what business qualified for the incentive bonus, the court held that no contractual obligation existed. *Id.* at 1201. *Grenier* is distinguishable from our case because the original agreement did not vest MarshCODE with discretion to determine the meaning of terms in the agreement. To the contrary, the agreement included specific and definite promises about the confidentiality of donors' information.

2. *The Original Agreement Contains the Essential Terms of the Contract*

MarshCODE's unilaterally-modified agreement was invalid and failed to supersede the original agreement for four reasons. First, the modifications were outside the scope of what MarshCODE and Mr. Murphy anticipated when they made the contract. Second, because Mr. Murphy received no notice and was unaware of the modifications, the changes are unenforceable due to lack of mutuality. Third, because the original agreement deliberately limited MarshCODE's ability to distribute Mr. Murphy's information to commercial services, MarshCODE could not thereafter invoke the modification clause to effectuate the

same purpose without Mr. Murphy's consent. Fourth, the State of Marshall should enforce genetic research companies' promises to protect donors' confidentiality so as to avoid deterring others from participating in important genetic research.

a. The modifications are invalid because the parties did not contemplate them at the time they made the original agreement

In determining the essential terms of a contract, courts look to the parties' shared intent at the time they signed the contract. Restatement (Second) of Contracts § 201 (1981). While one party to an agreement may reserve the option to unilaterally modify terms, modifications must be limited to terms "whose general subject matter was anticipated when the contract was entered into." *Badie v. Bank of Am.*, 67 Cal. App. 4th 779, 791 (Cal. Ct. App. 1998). If a party unilaterally modifies the agreement to add an entirely new, unanticipated term that is detrimental to the other party, it breaches the implied covenant of good faith and fair dealing. *Id.* at 796. The Restatement, like the *Badie* court, also protects a party entering into a standardized contract against unforeseeable modifications by the drafting party. Restatement (Second) of Contracts § 211 (1981). Under the Restatement's reasonable expectations doctrine, "where the other party has reason to believe that the party manifesting [assent to a standardized agreement] would not do so if he knew that the agreement contained a particular term, the term is not part of the agreement." *Id.*

In *Badie*, a bank exercised its option to modify the terms of a credit agreement. 79 Cal. Rptr. 2d at 276-278. The modifications required the credit holders to submit disputes to arbitration. *Id*. Because the original agreement contained no mention of arbitration, the court found that there was no reason for the customer to anticipate the modification. *Id.* at 287. By adding an entirely new term "not within the reasonable contemplation of the parties when the contract was entered into," the bank had breached the covenant of good faith and fair dealing. *Id.* at 284. Therefore, the court found the clause unenforceable. *Id.* at 291.

In the original agreement, MarshCODE reserved the option to revise the terms and conditions "by updating the relevant posting on MarshCODE's website and by sending out relevant notices to [Mr. Murphy], using [his] preferred method of communication." (R. at 14). The modified agreement purported to (1) allow MarshCODE to use Mr. Murphy's genetic and phenotypic information for commercial services and (2) relax the privacy policy by cancelling a number of its confidentiality obligations under the original agreement. This case is similar to *Badie* because, while Mr. Murphy knew MarshCODE could revise the terms and conditions, nothing in the original agreement would have caused him to

anticipate that MarshCODE would relax the privacy policy and use his information for something other than genetic research. Also, when MarshCODE presented the standardized, original agreement to Mr. Murphy, it knew that the only incentives it provided for agreeing to donate were (a) the promotion of scientific research and (b) the promise to keep donors' information strictly confidential. MarshCODE was therefore aware of a strong likelihood that Mr. Murphy would not assent to the agreement without those incentives. Thus, the modifications failed to become a part of the agreement based on the reasonable expectations doctrine and because the parties did not contemplate the changes at the time they made the original agreement.

b. The modifications are unenforceable due to lack of mutuality because Mr. Murphy received no notice of and never consented to them

Many states have held that unilateral modifications to a contract are invalid unless the non-drafting party manifested assent to the modifications.[9] *See, e.g., Kortum-Managhan v. Herbergers NBGL*, 204 P.3d 693, 698-99 (Mont. 2009); *Douglas v. U.S. Dist. Court*, 495 F.3d 1062, 1066 (9th Cir. 2007) (holding that "a party can't unilaterally change the terms of a contract; it must obtain the other party's consent before doing so") (citing *Union Pac. R.R. Co. v. Chi., Milwaukee, St. Paul & Pac. R.R. Co.,* 549 F.2d 114, 118 (9th Cir. 1976)).

Courts have been more accepting of modifications in situations where the plaintiff received adequate notice. *See, e.g., DIRECTV, Inc. v. Mattingly*, 829 A.2d 626, 631 (Md. 2003) (holding that because "respondent did not have adequate notice. . . [he] could not have voluntarily assented to arbitration"); *Discover Bank v. Shea*, 827 A.2d 358, 364-65 (N.J. Super. Ct. Law Div. 2001) (holding that because notice was inadequate and plaintiff had not affirmatively assented, the modification was unenforceable). Courts have identified two important considerations for determining whether notice is adequate. First, courts look to see if there was a delay before the modifications went into effect. *See, e.g., Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997) (holding that a contract became valid after the consumer failed to opt out of being bound by the terms after a thirty-day waiting period). Second, courts also look at the manner in which the drafting party sent the notice; "stuffing" the notice in a bill, for example, is insufficient. *See Kortum-Managhan*, 204

9. Often, these courts have looked at such questions in the context of consumer credit and lending statutes, and therefore the cases are not completely analogous to general contract law. *See, e.g.,* U.C.C. § 3-2053.205 (1974). Nevertheless, it is useful to consider the factors those courts and legislatures relied on for determining the validity of unilateral modifications.

P.3d at 700-01 (holding that a "bill stuffer" was insufficient notice because the recipient may not have seen it or become aware of the modifications); *Badie*, 79 Cal. Rptr. 2d at 291.

In *Douglas*, the defendant moved to compel arbitration based on a clause that it added to an agreement with the plaintiff. 495 F.3d at 1065. The defendant posted the revised conditions on its website. *Id.* at 1066. The court held that because (1) the original agreement did not require the plaintiff to periodically check the website for changes to the terms and (2) the plaintiff received no other notice of the modifications, mutual assent was lacking and the changes were unenforceable. *Id.*

MarshCODE's modifications are invalid because of lack of mutuality and inadequate notice. First, Mr. Murphy did not receive notice of the modifications, and MarshCODE knew this because the notices returned undeliverable. Like the plaintiff in *Kortum-Managhan*, Mr. Murphy was unaware of the modifications and thus could not give his voluntary consent. As such, mutuality was lacking and the modifications are invalid. Second, MarshCODE uploaded Mr. Murphy's private genetic and contact information to Family Tree before he could exercise his right to opt out. Therefore, there was no waiting period. Furthermore, even if a donor submits a request to opt out, MarshCODE may take an additional seventy-two hours to process the request, thereby prolonging unauthorized use of the donor's information. This also weighs in favor of finding the modifications invalid.

c. Because the original agreement limited MarshCODE's ability to distribute Mr. Murphy's information for commercial use, MarshCODE could not thereafter invoke the modification clause to effectuate the same purpose

An interpretation of a term that is consistent with the other terms of the agreement is preferable to one that leaves other terms ineffectual, unreasonable, or without meaning. Restatement (Second) of Contracts §203(a) (1981). MarshCODE argues that the unilateral modification clause allows it to alter the terms of the original agreement so that it may use Mr. Murphy's private genetic and contact information for Family Tree. However, this expansive reading of the clause is entirely inconsistent with another provision of the original agreement that deliberately restricted MarshCODE's right to release Mr. Murphy's private information to third parties or commercial companies.[10] To read the unilateral modification clause so broadly renders ineffectual MarshCODE's promise not to release Mr. Murphy's information for com-

10. The limited circumstances include if release of the information is legally required, for ethical reasons, to enforce the agreement, to respond to certain claims, and to protect users. (R. at 15).

mercial use. Therefore, the "preferable" interpretation of the unilateral modification clause does not permit MarshCODE to invoke the clause to use Mr. Murphy's information for commercial services, such as Family Tree, without his consent.

d. The State of Marshall should enforce genetic research companies' promises to protect donors' confidentiality so as to avoid deterring others from participating in important genetic research

The State of Marshall should not allow research-based companies to unilaterally modify privacy policies to use donors' data for commercial services without their consent. Such modifications ignore the original intent of the donors when they agree to provide their personal and genetic information. Scientific research is extremely important to our developing society. *See, e.g.*, Jon Beckwith, *The Human Genome Initiative: Genetics' Lighting Rod*, 17 AM. J.L. & MED. 1, 7-8 (1991) (stating that genetic research "will speed up discovery of new genes that are disease-connected or related to other biological processes such as development" and perhaps lead to discovering cures for certain diseases). Allowing such substantial and unforeseeable modifications without requiring consent of the donors would deter others from participating or assisting in important genetic research.

B. *A Reasonable Jury Could Conclude that Mr. Murphy Substantially Performed and Therefore Is Entitled To Enforce the Original Agreement Against MarshCODE*

To recover on a claim for breach of contract, a plaintiff must demonstrate that he or she substantially performed the terms of the contract. *Pepsi Midamerica v. Harris*, 232 S.W.3d 648, 653-54 (Mo. Ct. App. 2007). The doctrine of substantial performance applies when both parties have breached the contract; it allows a plaintiff who has committed a minor breach to recover so long as the "benefits received by [defendant] are far greater than the injury done to him by the [plaintiff's] breach." *Zemco Mfg., Inc. v. Navistar Int'l Transp. Corp.*, 270 F.3d 1117, 1126 (7th Cir. 2001) (quoting *Dove v. Rose Acre Farms, Inc.*, 434 N.E.2d 931, 933 (Ind. Ct. App. 1982)). Substantial performance is generally a question of fact for the jury. *Id.*

The original agreement required Mr. Murphy to provide his genetic and phenotypic information to MarshCODE. It also required him to provide contact information and keep that information up-to-date. Mr. Murphy provided his genetic, phenotypic, and contact information, but inadvertently forgot to update his contact information when he moved. MarshCODE contends that because Mr. Murphy failed to perform all of

his contractual obligations, he may not recover for breach of contact. This argument, however, fails to distinguish between material and non-material breaches.

Three factors are relevant for determining whether a failure to perform is material:[11] whether (1) it significantly deprived the other party of a reasonably expected benefit, (2) the breaching party would suffer substantial forfeiture,[12] and (3) the breaching party's behavior comports with the standards of good faith and fair dealing. Restatement (Second) of Contracts § 241 (1981). There is no dispute that Mr. Murphy forgot to provide MarshCODE with his updated contact information, but the question is whether his failure to do so amounted to a material breach of the agreement. A reasonable jury considering these factors could conclude that Mr. Murphy substantially performed.

The Illinois Appellate Court has elaborated on the first factor. *In re Liquidation of Inter-Am. Ins. Co. of Ill.,* 768 N.E.2d 182(Ill. App. Ct. 2002). In *Inter-Am. Ins. Co. of Ill.*, Inter-American and ERAC entered into an agreement where Inter-American agreed to pay premiums to ERAC, and ERAC agreed to provide reinsurance. *Id.* at 185. The parties also agreed that Inter-American would maintain an asset portfolio. *Id.* at 185. The court found that Inter-American's failure to maintain the portfolio was not a material breach of the agreement. *Id.* at 193-94. It had substantially performed by paying the premiums, its main obligation, and was therefore entitled to enforce the contract against ERAC. *Id.*

Here, the original agreement's main purpose was for Mr. Murphy to provide his information for MarshCODE's research and for MarshCODE to keep Mr. Murphy's information confidential. The contact information obligation was a relatively minor provision because, like ERAC in *Inter-Am. Ins. Co. of Ill.*, MarshCODE received the primary benefit it bargained for when it received Mr. Murphy's genetic and phenotypic information. Mr. Murphy's failure to update his contact information did not injure MarshCODE, and because he performed his main obligation, he should be entitled to enforce the agreement against MarshCODE.

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11. There are five factors total, but two are inapplicable to this case: "the extent to which the injured party can be adequately compensated for . . . the benefit of which he will be deprived" and "the likelihood that the party failing to perform . . . will cure his failure." Restatement (Second) of Contracts § 241 (1981). MarshCODE does not require any compensation for Mr. Murphy's failure to update his contact information because it suffered no injury, and it is not looking for Mr. Murphy to cure his failure at this time.

12. In *In re Wolfe*, the court described the rationale behind considering this factor: "Perfect performance . . . is not required in an imperfect world. The doctrine of substantial performance was devised as an 'instrument of justice'. Its purpose is to avoid forfeiture on account of a technical, inadvertent or *unimportant* failure to perform." 378 B.R.Bankr. 96, 104 (Bankr. W.D. Pa. 2007).

Under the second factor, if the court were to find that Mr. Murphy materially breached the agreement, he would forfeit his ability to recover for the significant reputational harm arising from release of his personal information. Mr. Murphy provided valuable personal and genetic information to MarshCODE and suffered severe reputational injury when MarshCODE failed to keep his information confidential, as promised. Therefore, his inadvertent failure to comply with a minor provision should not preclude him from recovering for breach of contract.

Under the third factor, "[g]ood faith performance . . . of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." Restatement (Second) of Contracts § 205 cmt. a (1981). Examples of bad faith performance include "evasion of the spirit of the bargain . . . [and] willful rendering of imperfect performance." *Id.* at § 205 cmt. d. Mr. Murphy acted in good faith when he provided MarshCODE with his genetic and personal information, which he knew MarshCODE expected under the contract. Mr. Murphy's failure to update his contact information was not willful or intentionally evasive. He simply forgot to notify MarshCODE when he moved. Therefore, this factor also weighs in favor of finding that Mr. Murphy's failure to perform was immaterial and that he substantially performed under the contract.

A reasonable jury could conclude that MarshCODE, in receiving Mr. Murphy's personal, genetic, and phenotypic information for its research, received benefits that far outweighed any injury it suffered when Mr. Murphy did not provide updated contact information. Therefore, Mr. Murphy has established a genuine dispute as to this material fact and may recover for MarshCODE's breach.

C. *A Reasonable Jury Could Conclude that MarshCODE Breached the Original and Modified Agreements*

Whether a party breached a contract is a question of fact for the jury. *Hanging Rock Iron Co. v. P.H. & F.M. Roots Co.*, 10 F.2d 154, 154 (7th Cir. 1925). A reasonable jury could conclude that MarshCODE breached the agreement regardless of whether the original or modified terms constituted the essential terms of the agreement. When MarshCODE released Mr. Murphy's personal information to Ms. Who, it breached its promises in the original agreement to "provide maximum protection from unauthorized access" and to ensure that Mr. Murphy's "personal information [would] never be associated with [his] genetic information." (R. at 14.) The release of Mr. Murphy's information also constituted a breach of the modified agreement, which obligated MarshCODE to (1) "employ[ ] robust, multi-layered encryption and authentication methods," (2) "conduct[ ] regular audits . . . to protect

against unauthorized access . . . ," and (3) obtain Mr. Murphy's consent to participate in Family Tree. Therefore, Mr. Murphy has established a genuine dispute as to the element of breach.

1. A Reasonable Jury Could Conclude that MarshCODE Breached the Original Agreement

MarshCODE breached its obligation to keep Mr. Murphy's information confidential. The original agreement stated that MarshCODE would use "the same encryption as banks and other financial companies so as to provide maximum protection from unauthorized access." (R. at 14.) Despite promising to provide maximum confidentiality and protection, MarshCODE disclosed Mr. Murphy's full personal profile to Ms. Who when she used the program's invite feature. Based on these facts, a reasonable jury could conclude that MarshCODE breached its promise to provide maximum protection. Additionally, MarshCODE's use of Mr. Murphy's information for Family Tree without his consent also constitutes a breach of the original agreement. MarshCODE used Mr. Murphy's information for commercial services, despite its promise to keep that information private and the fact that the parties had only contemplated using the information for scientific research.

2. Even if the Modified Agreement Superseded the Original, a Reasonable Jury Could Conclude that MarshCODE Breached the Modified Agreement

"When the parties to a . . . contract have not agreed with respect to a term which is essential . . . , a term which is reasonable in the circumstances is supplied by the court." Restatement (Second) of Contracts § 204 (1981). In *Wood v. Lucy,* the parties agreed that the plaintiff had the exclusive right to market and sell the defendant's products. 118 N.E. 214, 214 (N.Y. 1917). Although the contract did not expressly state that the plaintiff would use reasonable efforts to market and sell the products, the court held that without such efforts the contract lacked "business efficacy." *Id.* at 214-15. Therefore, the promise to make reasonable efforts was an implied term of the agreement. *Id.* at 215.

Here, under the modified agreement, a participant, upon receiving notice of the modifications, can opt out of participating in Family Tree. The modified agreement states that "participation in activities and services that involve personal information *is voluntary*." (R. at 19) (emphasis added). This statement implies that MarshCODE had to obtain some form of consent from Mr. Murphy. Like in *Wood*, without such an implied obligation, the term "voluntary" would lack efficacy. MarshCODE structured the revised conditions so that it could assume that participants had given their implied consent to participate in the services if

they did not opt out after receiving notice of the modified agreement. However, as applied to Mr. Murphy, MarshCODE was not warranted in assuming that he consented to MarshCODE's use of his information for Family Tree. The notices sent to Mr. Murphy returned undeliverable, which alerted MarshCODE that Mr. Murphy was unaware of his participation in the service. Therefore, MarshCODE knew that Mr. Murphy's failure to opt out did not demonstrate implied consent. Nevertheless, MarshCODE uploaded Mr. Murphy's private information to the service, breaching its promise that his participation would be voluntary.

MarshCODE also breached its assumed obligations under the modified agreement when it failed to protect Mr. Murphy's personal information from access by unauthorized third parties. The agreement stated that MarshCODE would use sophisticated encryption methods and regularly audit its systems to protect against unauthorized access. MarshCODE claims that it designed Family Tree to prevent automatic disclosure of personal information, and in the case of a match, participants could choose whether to respond or share information. Despite these obligations, a full personal profile of Mr. Murphy automatically appeared on Ms. Who's screen when she used the service's invite feature. Therefore, a reasonable jury could conclude that MarshCODE breached the modified agreement when it failed to encrypt Mr. Murphy's information or take reasonable steps to prevent automatic disclosure. As noted above, a reasonable jury could also conclude that MarshCODE breached the agreement by failing to regularly audit its systems, as promised. *See supra* Part I.C.4.

D. *A Reasonable Jury Could Conclude that MarshCODE's Breach Caused Mr. Murphy To Suffer Harm*

Two purposes of awarding damages for a breach of contract claim are (1) to put the plaintiff "in as good a position as he would have been in had the contract been performed," and (2) to "grant relief to prevent unjust enrichment." Restatement (Second) of Contracts § 344 (1981). Because MarshCODE released Mr. Murphy's private information to Ms. Who, leading her to inform the media that he was her father, Mr. Murphy's church condemned him and called upon him to resign as a minister. Although MarshCODE publicly apologized and admitted it made a mistake, Mr. Murphy lost his reputable position in the church and has been discredited among his family and community. A reasonable jury could conclude that the harm suffered by Mr. Murphy directly resulted from MarshCODE's breach. In order to put Mr. Murphy in as good a position as he would have been in had MarshCODE not breached the contract, the court should award him an amount that would compensate him for the significant damage done to his reputation. Additionally, MarshCODE was unjustly enriched in receiving Mr. Murphy's valuable

genetic and personal information without reciprocating by performing its own contractual obligation to keep it confidential. The court should therefore also grant Mr. Murphy an amount equal in value to the benefits he conferred upon MarshCODE.

Because Mr. Murphy has demonstrated genuine disputes as to each element of the breach of contract claim, this Court should reverse the grant of summary judgment.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Honorable Court REVERSE the decision of the Marshall Court of Appeals for the First District and remand to a jury.

Respectfully Submitted,

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Attorneys for Appellant