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THE THIRTIETH ANNUAL

JOHN MARSHALL INTERNATIONAL MOOT COURT COMPETITION IN INFORMATION TECHNOLOGY AND PRIVACY LAW

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BENCH MEMORANDUM: LIABILITY FOR POSTING A RECORDED LECTURE ONLINE

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IN THE SUPREME COURT OF THE STATE OF MARSHALL

DONNIE DOLLAR.	)	
Petitioner-Defendant-,	)	
Appellant,	)	
	)	
v.	)	No. 2011-CV-1001
	)	
MAYOR PETER PAYOFF,	)	
	)	
Respondent-Plaintiff-	)	
Appellee.	)	

BENCH MEMORANDUM

I. INTRODUCTION

Donnie Dollar is appealing a reversal of a trial court order granting summary judgment in his favor in Mayor Peter Payoff's lawsuit based upon an internet posting of a law school lecture about Payoff. Payoff alleges that Dollar is liable for, *inter alia,* violations of the Marshall State Eavesdropping Statute, tortious interference with a contractual relation, and public disclosure of private facts.

II. PROCEDURAL HISTORY

Payoff's complaint, filed in the Marshall County Circuit Court, alleged violations of the Marshall State Eavesdropping Statute, tortious interference with a contractual relation, and public disclosure of private facts. Following discovery, Dollar moved for summary judgment on all three counts. The circuit court granted Dollar's motion as to all three counts. Payoff appealed to the First District Court of Appeals, which reversed the circuit court's order. The court of appeals reversed summary judgment as to the violation of the Marshall State Eavesdropping Statute 75 MSC §25-1 because it found that a classroom discussion qualifies as a conversation under the statute. The court reversed summary judgment as to the tortious interference with contractual relations claim because it found that Dollar's intent is a question of fact for a jury. The court reversed as to the publication of private facts on the basis that Payoff is entitled to some privacy regarding his mental health, despite his fame.

Dollar then petitioned for leave to appeal to the Supreme Court of Marshall. The Supreme Court granted leave to appeal the reversal of the summary judgment order on all three counts.

III. BACKGROUND INFORMATION

The Marshall State University Law Center Student Handbook has a section relating to recording of classes. Section 14 states:

> Any student, faculty member, or administrator wishing to record any class or portion of a class must first obtain the permission of the instructor or any party teaching or conducting a presentation in class prior to the recording for each class session or portion of a class session. Such party does not have to be directly employed by Marshall State University Law Center. Students found in violation of this section will be dealt with by the Marshall State University Disciplinary Board in compliance with Section 25 of this handbook.

The Marshall State Eavesdropping Statute, 75 MSC §25-1:

> (a) A person commits eavesdropping when they:
>
> (1) Knowingly and intentionally use an eavesdropping device for the purpose of hearing or recording all or any part of any conversation or intercepts, retains, or transcribes electronic communication unless they do so with the consent of all of the parties to such conversation or electronic communication.
>
> (b) Definitions:
>
> (1) An eavesdropping device is defined as anything used to hear or record a conversation, even if the conversation is conducted in person.
>
> For the purposes of this section, the term conversation means any oral communication between 2 (two) or more persons regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation.
>
> (2) For purposes of this section, the term electronic communication means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or part by a wire, radio, pager, computer, electromagnetic, photo electronic or photo optical system, where the sending and receiving parties intend the electronic communication to be private and the interception, recording, or transcription of the electronic communication is accomplished by a device in a surreptitious manner contrary to the provisions of this Article.
>
> (c) Civil remedies to injured parties.
>
> (1) Any or all parties to any conversation upon which eavesdropping is practiced contrary to this section shall be entitled to the following remedies:
>
> (a) To an injunction by the circuit court prohibiting further eavesdropping by the eavesdropper and by or on behalf of their principal, or either;
>
> (b) To all actual damages against the eavesdropper or their principal or both;
>
> (c) To any punitive damages which may be awarded by the court or by a jury.

IV. STATEMENT OF FACTS

The parties have stipulated that the court of appeals decision shall serve as the record on appeal. The court of appeals decision[1] sets forth the facts of the case as follows:

The Marshall State University Law Center is located in Marshall City, which is the capital of Marshall State. Marshall City has approximately two million residents. The law school has approximately 1,500 law students and eighty full time faculty members. In addition to the full time faculty, the school also employs a number of adjunct faculty members. These adjunct professors are experienced attorneys who teach in their area of practice. The adjuncts are not employees of the law school, but instead are contract employees. The adjunct's contract runs the length of one semester. The adjuncts must sign a new contract at the start of each semester.

Marshall State University Law Center has an extensive student handbook that sets forth the policies and procedures of the law school. Each student receives a copy of the handbook during student orientation. Although they receive a copy of the handbook, the students are not required to sign anything attesting that they have read all the policies and are required to comply with the polices stated in the handbook. Section 14 of the handbook discusses the recording of lectures at the school. This policy is clearly set forth in the handbook for each student, because the State of Marshall has a very strict eavesdropping statute.

Charlie Cheatem is a criminal defense attorney and an alumnus of Marshall State University Law Center. Cheatem gives back to the school by teaching as an adjunct professor of law. Cheatem teaches advanced trial advocacy as he is a highly skilled trial attorney. He has won many favorable outcomes for his high profile clients throughout the years.

Peter Payoff is the former Mayor of Marshall City. Payoff is also an alumnus of the Marshall State University Law Center. After passing the bar, he entered private practice for several years before marrying the daughter of a prominent City Councilman. Payoff then began climbing the political ladder at City Hall. Mayor Payoff has been married to his wife, Priscilla, for the past thirty years. Payoff has always spoken of his strong marriage and family values while on the campaign trail. Mayor Payoff always prided himself on the fact that he had never ended up on the wrong side of the law, not even receiving a parking ticket. Mayor Payoff literally was a boy scout, having received his Eagle Award for de-

1. R. at 3-12. The remainder of the Statement of Facts presented here is set forth verbatim as it appears in the court of appeals decision; the footnotes have been renumbered.

veloping a system of delivering meals to the homebound elderly of Marshall.

While in office, Mayor Payoff drew a hard line on any sort of theft, including theft of office supplies. He once demoted a fire department captain to lieutenant for allowing firefighters to drive a fire truck to the grocery store, saying that it amounted to theft of city owned fuel. Additionally, he had a very public spat with the president of the police union because he felt that officers who accepted discounted coffee and meals from local businesses amounted to theft by undue use of authority.

Shortly after Mayor Payoff left office one year ago, he was indicted in the Circuit Court of Marshall County stemming from alleged corruption during his nearly twenty-five years in office. Mayor Payoff had allegedly exerted undue influence with the city's licensing and regulation committee on behalf of one of his friends, in that Payoff allegedly illegally pressured the committee to approve a building permit for his friend and developer Tim Borland. It appeared as though the mayor used his position to inappropriately aid a long time friend and campaign donor.

Subsequent to leaving office, Mayor Payoff was arrested in a predawn raid on his home. The media photographed Payoff in his jogging suit and handcuffs as sheriff's deputies escorted him out of his home. Due to his notoriety and the nature of his alleged crimes, the judge allowed Mayor Payoff free on bond while awaiting trial. In fact, Mayor Payoff had made a celebrity of himself in the media during the pre-trial publicity. He granted every interview request from any reporter that wanted to talk to him. Mayor Payoff repeatedly told the reporters that he was an honest mayor and that the evidence would prove his innocence. He even repeatedly told the media that he would testify at his trial in his own defense.

As a result of the pretrial publicity, Mayor Payoff signed a contract to appear on the reality show of billionaire Ronald Crump. The contract included a morals clause stating the contract would be null and void if Mayor Payoff is found to be engaged in, or has been engaged in, any immoral conduct not disclosed to the producers. The producers knew of the current allegations against him, but believed Mayor Payoff was innocent and he would be exonerated at trial. The current corruption charges were specifically excluded from the morals clause in the contract. After the Crump contract was signed, Sensational Press Publications and Mayor Payoff signed a contract to write and publish Mayor Payoff's biography. Because the publisher considered the publicity from the reality show to be necessary for the book's successful publication, completion of the reality show was a condition of the book's publication. Mayor Payoff agreed to these contract terms because he no longer had a source of income to provide for his family due to the fact his pension payments were being withheld pending resolution of the criminal charges. News of

Mayor Payoff's indictment, arrest, and these contracts made national headlines.

Charlie Cheatem agreed to represent Mayor Payoff. As a matter of course, Cheatem and Mayor Payoff signed the standard engagement letter that Cheatem gives to all his clients. This engagement letter contained standard provisions regarding confidentiality of information that Mayor Payoff told Cheatem. This provision was in accordance with the disciplinary rules governing attorneys in the State of Marshall.

Cheatem and Payoff met many times to discuss the case and the strategy Mayor Payoff's defense team would take at trial. Mayor Payoff told Cheatem, in confidence, he was worried certain information regarding his mental health disorder, kleptomania, would be discovered. When Cheatem inquired, Mayor Payoff told him that during his entire life he struggled with kleptomania. He could not keep his hands off Pete Rose Baseball cards. Every time he went to a card store he would steal Pete Rose baseball cards. Some were worth pennies and others, like a mint condition 1963 Topps rookie card could sell for thousands of dollars. Mayor Payoff told Cheatem that he had been seeking counseling for this condition at the University of Marshall Hospital. Cheatem told Mayor Payoff not to worry because such information was protected by attorney-client privilege.

Mayor Payoff's trial commenced at the Criminal Courts Building in the Circuit Court of Marshall County. The start of the case coincided with Spring Semester of Marshall State University Law Center. Cheatem decided he could use this case as a teaching tool for his Advanced Trial Advocacy students. He would often use what happened in the courtroom to teach his class at night. The trial lasted nearly two months and received daily media attention. Every day of the trial the former mayor stood in front of the media and professed his innocence. He even went so far as to say he was going to testify. At the end of the state's case in chief, the defense, led by Charlie Cheatem presented its case. In the end, Mayor Payoff decided not to testify, in part because he did not want to answer questions and partly on the advice of his counsel. The jury returned without a unanimous verdict, which was required for conviction under the Marshall State Criminal Code. After five days of the jury being deadlocked, the judge declared a hung jury. The defense team took this as a victory, but the state promised to retry Mayor Payoff at the earliest possible time.

Cheatem was scheduled to teach his Advanced Trial Advocacy class at the Marshall State University Law Center the day the jury came back without a decision. Prior to teaching his class, Cheatem and Payoff went to celebrate at a local establishment. After a few drinks, Cheatem invited Payoff to his class to meet his students. Payoff happily agreed.

Cheatem began class at six o'clock by introducing Mayor Payoff. Mayor Payoff informed the class of the jury's decision and then discussed some of the trial strategies, including Cheatem's decision not to have Payoff take the stand. Payoff told the students that he really wanted to testify especially since he had promised the media and the people of Marshall City, but Cheatem had advised him that it is generally a very bad idea for a defendant to testify in his own defense.

On the day in question, Donnie Dollar, a student in Cheatem's Advanced Trial Advocacy class missed the first few minutes of class and did not want to interrupt Mayor Payoff by asking Professor Cheatem for permission to record the class. Dollar assumed that it would be alright to record the class, because Cheatem had generally granted permission to any student who wanted to record a class. Dollar slipped into his seat, pulled out his mini-recorder, and began recording class. The recording began just as Mayor Payoff was talking about not testifying in his own behalf. After 45 minutes, Mayor Payoff finished discussing the trial and thanked Cheatem for all his hard work. With the Mayor's departure from class, Cheatem dismissed the class for its break.

Donnie Dollar was excited he had not missed Mayor Payoff's discussion because he came from a well-known, politically influential family from Marshall County. His father, Dudley Dollar was the head of the Donkey Committee, the political party that opposes the former Mayor. Donnie Dollar, an average student, wanted to prove to his father that he was worthy of the family's fortunes. Donnie Dollar's brother, David, was also quite politically active. David published a blog on the politics of Marshall and a few weeks back, he had a blog post discussing his concern about Payoff's book and TV deals. A few hours after David published the aforementioned blog post, Donnie posted a comment to his brother's blog about the TV and book deals, stating, "Payoff is going to make a fortune by talking about his crooked life. Someone should really stop these deals from happening."

Upon returning to the classroom, Cheatem called class to order and began discussing Payoff's decision not to testify in his own behalf. Cheatem reiterated that "one important reason defendants should not testify is because it can open the door to embarrassing questions about personal matters, mental disorders, and other potentially prejudicial material." A student in the front row asked Cheatem what he meant exactly. Cheatem went on to explain that, "for example, if it was revealed that a defendant had the mental disorder kleptomania, it could be extremely prejudicial, especially in cases involving fraud and dishonesty." Shortly thereafter, Cheatem, realizing he should not have said anything about kleptomania in his lecture, concluded class.

Dollar decided to place the recording of the lecture on the school's webpage for the Advanced Trial Advocacy class. In addition to posting

the recording, Dollar commented that, "the reason Payoff did not testify at his trial was to avoid disclosing that he had the mental disorder kleptomania." Students had permission to write and post items onto the school's website, much like a message board, provided they complied with The Marshall State University Law Center's Code of Conduct and Student Handbook rules. The site could be accessed only by the students in the Advanced Trial Advocacy class. However, there were no technological safeguards in place by the school to keep the students from taking the material and posting it on other locations.

Several students who had skipped the class listened to the lecture and found it very interesting. They began to post comments about the fact that they could not believe that Mayor Payoff was a thief. In this discussion string posted on the website, Donnie Dollar stated that the bribery charges against Mayor Payoff were probably true as the former Mayor had a problem with stealing. Since Mayor Payoff's trial was the talk of the Marshall City legal community, one student linked the recording on the school's website to his personal SpaceBook page. Once this lecture recording was posted to the students SpaceBook page, others posted it to their pages and the national media began playing it in conjunction with coverage of the Mayor's bribery charges. The recording was eventually heard by millions of people world-wide. One such person who heard the recording was Mr. Crump. Pursuant to the morals clause in the contract Crump had with Payoff, the deal was terminated for cause. As a result of no longer being on the television show, the book deal was subsequently cancelled. Mayor Payoff is believed to have lost out on millions of dollars.

Not only did he lose the contracts with Crump and Sensational Press Publications, many of Mayor Payoff's strongest supporters have turned on him, thinking that a mayor who steals must be corrupt. Through the discovery process for the second trial of Mayor Payoff, it was determined that certain witnesses against the former Mayor lied about paying bribes. The State dropped the bribery charges, but the corruption charges were reset for trial.

V. ISSUES PRESENTED FOR REVIEW

Three issues are raised on appeal: (1) whether the appellate court erred in reversing summary judgment in Donnie Dollar's favor on Peter Payoff's claim of a violation of the Marshall State Eavesdropping Statute; (2) whether the appellate court erred in reversing summary judgment in favor of Donnie Dollar on Peter Payoff's tortious interference with contractual relations claim; and (3) whether the appellate court erred in reversing summary judgment in favor of Donnie Dollar on Peter Payoff's claim of public disclosure of private facts.

VI. ANALYSIS

A. STANDARD OF REVIEW

Summary judgment is a procedural device that enables a court to dispose of part or all of a case prior to trial. In the State of Marshall, summary judgment is governed by Rule 56 of the Marshall Rules of Civil Procedure. Under this rule, summary judgment is proper only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.[2] The court considers the pleadings, depositions, answers to interrogatories, admissions, and affidavits in assessing whether summary judgment is proper.[3] 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."[4]

An appellate court reviews a grant of summary judgment *de novo,* applying the same standard as the trial court.[5] The reviewing 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.[6] The moving party has the burden of identifying the material facts which are without genuine dispute and support the entry of summary judgment in favor of the moving party.[7] The non-moving party, for its part, must identify which material facts raise genuine issues of dispute.[8] Because the entry of summary judgment "is a drastic means of disposing of litigation,"[9] it should be granted only when the moving party's right to relief is "clear and free from doubt."[10] However, the mere fact that there exists "some alleged factual dispute between the parties"[11] or "some metaphysical doubt as to the material facts"[12] is insufficient to defeat a motion for summary judgment.

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2. MARSHALL R. CIV. P. 56(c) (cited at R. 3). Rule 56(c) is similar or identical to the corresponding provision of the federal rules, FED. R. CIV. P. 56(c).

3. FED. R. CIV. P. 56(c).

4. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

5. Delta Sav. Bank v. U.S., 265 F.3d 1017, 1021 (9th Cir. 2001).

6. *Anderson*, 477 U.S. at 255.

7. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

8. *Id.* at 324.

9. Purtill v. Hess, 489 N.E.2d 867, 871 (Ill. 1986).

10. *Id.*

11. *Anderson,* 477 U.S. at 247 (emphasis omitted).

12. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

B. VIOLATION OF MARSHALL STATE EAVESDROPPING STATUTE 75 MSC §25-1

General

The Marshall State Eavesdropping Statute is located in the Marshall State Code and is attached to the court record above.[13] Under the statute, a person cannot use an eavesdropping device to record all or any part of a conversation without the consent of all the parties to the conversation.[14] The Marshall State Statute is a criminal statute, which provides civil remedies if violated.[15] If the act is violated, civil remedies include an injunction prohibiting further eavesdropping, actual damages, and punitive damages.[16]

Dollar's alleged violation of the Eavesdropping Statute

Payoff's first claim against Dollar alleges that he violated Marshall State's eavesdropping statute when failed to ask Cheatem whether it would be acceptable for him to record that day's lecture. Under Marshall State law a person commits eavesdropping when they: "knowingly and intentionally use an eavesdropping device for the purpose of hearing or recording all or any part of any conversation. . .unless they do so with the consent of all the parties to such conversation."[17]

Donnie Dollar will likely argue that he did not violate the Eavesdropping Statute and that the trial court's grant of summary judgment should not have been reversed. Dollar will likely argue that there is no expectation of privacy in a classroom setting. Additionally, Dollar will likely argue that the eavesdropping statute does not apply to him because he was a participant in the conversation or classroom discussion and as such the statute does not apply to him.[18]

In arguing there is no expectation of privacy in a classroom setting, Dollar may cite to *State v. McLellan*. In this case, the defendant was caught on school surveillance video stealing items.[19] The court ruled that the defendant had no expectation of privacy in a classroom setting because it was not an area he had exclusive control over.[20] "A reasonable expectation of privacy. . .exists in an area given over to an employee's

13. 75 MSC § 25-1.
14. *Id.*
15. *Id.*
16. *Id.*
17. 75 MSC § 25-1(a)(1).
18. Kipping v. Ill. Dept. of Emp't Sec., 52 Ill. Ct. Cl. 211, 215 ("[t]he Eavesdropping Act does not govern the recording of a conversation by a party to that conversation; it governs the taping by an outside party to the conversation.") (citing People v. Rodriguez, 680 N.E.2d 757 (Ill. App. Ct. 1997)).
19. *See* State v. McLellan, 744 A.2d. 611, 612-13 (N.H. 1999).
20. *Id.* at 614.

exclusive use."[21] As a guest at the school, Payoff did not have exclusive use over the classroom where the recording occurred. As an adjunct, Cheatem also did not have exclusive control over the classroom because he is a contract employee who teaches at the school part-time. The court in *McLellan* noted, "the classroom in this case was not an area over which the defendant enjoyed exclusive use and control. . .the classroom was an area open to students and staff."[22] Dollar should argue that since the classroom is an area open to all, Payoff should not have had an expectation of privacy.

Payoff may counter that *McLellan* is factually distinguishable from the facts of the present case. The defendant in *McLellan* was an employee of the school.[23] Payoff on the other hand, was not an employee of the school and was recorded not by the school, but by a student in the class.

In arguing that the Marshall State Eavesdropping Statute does not apply to a classroom lecture because it does not qualify as a "conversation" as defined by the statute, Dollar may cite *DeBoer v. Vill. of Oak Park*.[24] In *DeBoer*, plaintiff sued the village in part because a village attorney recorded a rally held in a public space inside of the village hall.[25] Plaintiff alleged that this recording was done without the consent of the parties in attendance and thus violated the statute. The judge in *DeBoer* dismissed the eavesdropping count because the rally failed to meet the statutory definition of "conversation." In doing so, the court reasoned that the statute prohibits the recording of conversations between individuals in attendance at a public event, "not the remarks made by speakers at such events to those in the audience."[26]

Based on *DeBoer*, Dollar could argue that his recording of the class section is not covered by the statute and therefore he has no civil liability for taping the class without asking for permission from the instructor first. Dollar could argue that Cheatem, as the instructor has the floor and is the leader of the classroom discussion and that the students in the lecture are members of an audience there to listen. Therefore, under the *DeBoer* Court's reasoning, the statute would only prohibit the recording of conversation which might take place among the students who are essentially members of the audience. Since Cheatem was the primary speaker and the record does not reflect a back and forth amongst the

21. *McLellan*, 744 A.2d. at 614 (citing United States v. Taketa, 923 F.2d 665, 671 (9th Cir. 1991)).

22. *McLellan*, 744 A.2d. at 614.

23. *See generally id.*

24. DeBoer v. Vill. of Oak Park, 90 F. Supp. 2d 922 (N.D. Ill. 1999).

25. *Id.*

26. *Id.* at 924.

students, as defined by the statute a conversation had not taken place.[27] Dollar could then argue that Marshall State's eavesdropping statute does not apply to his recording of the classroom section because one person speaking to an audience does not create a conversation as defined by the statute.

Payoff may counter by arguing that a classroom setting leads inherently to the creation of a classroom setting and that the statute should apply to Dollar's recording of Cheatem's lecture. This position is supported by P*lock v. Bd. of Educ. of Freeport Sch. Dist. No.145*, where special education teachers brought a declaratory judgment action against the school district.[28] Under a policy approved by the school district, special education classrooms were recorded.[29] The special education teachers did not give their permission to be recorded and argued that the school board's policy violated Illinois's statute against eavesdropping. In that case, the school district's main argument was that teaching does not meet the definition of conversation as defined by the statute and that the teachers have no expectation of privacy in their classrooms.[30] Payoff could argue that a classroom setting is one which a dialogue between student and teacher would naturally lead to a conversation in the classroom setting.[31] It is important to note, that the *Plock* Court, in dicta, made a distinction between classroom interactions between students and teachers in elementary special education classes and a lecture that would typically be found on a college campus in a large lecture hall.[32] Dollar may counter that the majority's holding in *Plock* does not apply to the current factual scenario because Dollar recorded Cheatem at a university in a large lecture hall setting, the kind of which the court in Plock distinguished from a special education classroom.

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27. *Id.* ("[a]ll of this comports with our colloquial understanding of 'conversation' as involving an *exchange* – that is, mutual discourse as opposed to a statement or declaration by one person alone.") .

28. Plock v. Bd. of Educ. of Freeport Sch. Dist. No. 145, 920 N.E.2d 1087 (Ill. App. Ct. 2009).

29. *See id.*

30. *Id.* at 1092.

31. *Id.* at 1093 ("[a]s properly stated by the trial court, the conduct of 'teachers imparting knowledge to students and the students asking and answering. . .questions is easily distinguishable from public speeches.'").

32. *Id.* at 1092 ("Specifically, the [school board] argues that teachers must adhere to specific lessons plans and are not employed to engage in an open-ended verbal give and take with their students. The speech-like communication that the defendant describes might occur at a university where a professor delivers a lecture to a large audience of students.").

The Eavesdropping Statute and Privacy Considerations

In determining whether parties intended a conversation to be confidential "calls for a determination as to whether the, 'circumstances. . .reasonably indicate that any party to such communication desires it to be confined to such parties,' or whether the circumstances are such that 'the parties to the communication may reasonably expect that the communication may be. . .recorded.'"[33] The analysis hinges on whether the circumstances surrounding the lecture could have led to an expectation that the conversation would not be recorded. The totality of the circumstances include the fact that the handbook required teacher consent to record and the fact that Dollar never asked permission to record the class. Additionally, the lecture was held in a large lecture hall full of students, where class had regularly been recorded in the past.

Courts have relied on several factors to determine whether a party had an expectation that his or her oral statements were meant to be kept private:

> (1) the volume of the statements; (2) the proximity of other individuals to the speaker. . .(3) the potential for the communications to be reported; (4) the actions taken by the speaker to ensure his or her privacy; (5) the need to employ technological enhancements for one to hear the speaker's statements; and (6) the place or location where the statements are made.[34]

Dollar is likely to argue that Cheatem and Payoff had no expectation of privacy when he was recorded by Dollar during the classroom lecture. Dollar will likely argue that as an enrollee in Cheatem's Advanced Trial Advocacy class he was a participant, even if only passively listening to classroom discussions, and as such Cheatem and Payoff had no expectation of privacy between themselves and Dollar. "There can be no expectation of privacy by the declarant where the individual recording the conversation is a party to that conversation."[35] Dollar will likely argue that by simply being enrolled in the class and in attendance for lecture that day, no eavesdropping occurred because he was participating in the conversation. Dollar may also argue that he was recording the lecture to create an accurate record of the lecture for him to recall at a later date.[36]

Dollar could also turn to *Deeter v. Angus* for the contention that the circumstances of the classroom lecture would reasonably suggest that

33. Warden v. Kahn, 160 Cal. Rptr. 471, 477 (Cal. Ct. App. 1979).

34. State v. Duchow, 749 N.W.2d 913, 920-21 (Wis. 2008).

35. People v. Herrington, 645 N.E.2d 957 (Ill. 1994). In *Herrington*, a conversation between the defendant and the victim was recorded by the Quincy Police Department. Defendant alleged this conversation violated the Illinois Eavesdropping Statute. The appellate court found that no violation had occurred.

36. *Id.* at 959 ("This recording enabled the [person making the recording] to preserve a more accurate record of the conversation.").

there was no expectation that the conversation in class would be confined to just the parties there.[37] Dollar will argue that Payoff should have reasonably expected that the lecture could have been overheard and recorded.[38] Dollar may also argue that there is a diminished expectation of privacy in a classroom and that Payoff should have expected to the lecture to be recorded because of that diminished expectation.[39]

Payoff is likely to argue that regardless of privacy issues, he and Cheatem did have an expectation against the unauthorized recording of the classroom lecture. Payoff and Cheatem as the primary speakers during the lecture, took steps to ensure the lecture would not be recorded and as such would remain private.[40] Furthermore, neither consented to the recording of the lecture as required by the student handbook. Payoff will likely cite *People v. Siwek*. In *Siwek*, the defendant's phone conversation with a police informant was recorded without his knowledge.[41] The *Siwek* Court noted the eavesdropping protection covered all conversations regardless of whether they were private in nature.[42] Payoff may also turn to *Warden v. Kahn*, where the court stated that a conversation should be deemed confidential when one party reasonably believes that the conversation was intended to stay between the parties.[43] Payoff reasonably anticipated that the lecture would stay between just the students in the classroom and not be recorded because no student asked for permission to record the class. Payoff is likely to argue that even though the lecture was not intended to be a private conversation, Dollar still violated the eavesdropping statute because it applies to all conversations, regardless of the nature of the conversation.

Payoff is likely to point to the dissent in *People v. Herrington*, in which Justice Bilandic referenced the fact that the majority inappropriately applied the eavesdropping statute. Again, in Herrington, only one party to a conversation consented to the recording.[44] Payoff will likely argue that Justice Bilandic's application of the eavesdropping statute is correct and that all parties to a conversation need to consent before they can be recorded. Specifically, neither Cheatem nor Payoff explicitly consented to the recording of the conversation, which is required by both

37. *Id.*

38. Deeter v. Angus, 224 Cal, Rptr. 801, 807 (Cal. Ct. App. 1986).

39. *Duchow*, 749 N.W.2d at 922.

40. *Id.* at 921.

41. People v. Siwek, 671 N.E.2d 358, 360 (Ill. App. Ct. 1996).

42. *Id.* at 363 ("The previous version of the eavesdropping statute. . .excluded conversations which a party did not intend to be private.").

43. *Warden*, 160 Cal. Rptr. at 477.

44. *See Herrington*, 645 N.E.2d at 959 ("Pursuant to the plain and clear language of the statute, the legislature has directed that *all* parties to a conversation must consent before recording a conversation. This requirement was not satisfied.").

Marshall State Statute and school policy.[45] As such, since no one asked to record the class, per both the statute and school policy, Payoff will argue that they had an expectation that no one was recording the conversation.

Implied Consent

Dollar may also argue that Payoff had impliedly consented to the recording of lecture because he had never refused to allow the recording of class the entire semester.[46] Implied consent has been defined as, "consent exists where a person's behavior manifests acquiescence or a comparable diminution of his protected rights."[47] The Illinois Supreme Court elaborated, "the circumstances relevant to an implication of consent will vary from case to case, but will ordinarily include language or acts that tend to prove that a party knows of, or assents to, encroachments on the routine expectation that conversations are private."[48] Dollar will likely argue that Cheatem's consent to record the class was implied because he had never denied anyone the right to record class in the past, which led Dollar to believe that recording this particular lecture would be no different.

Dollar will likely point to *People v. Ceja*, in which the defendants were recorded over an intercom at a police department to prove his contention that Cheatem had given his implied consent to record the classroom lecture.[49] The defendants in *Ceja* were repeatedly told that they were being recorded. One of the subjects at the station even said, "Hey, they can hear what we are saying."[50] At trial, defendants objected to the presentation of the recording, which was made at the police station. The Court ruled that the defendant should have been aware that his conversations with his cellmates where being recorded because he had been repeatedly warned that his conversations were being recorded.[51] Dollar, could also argue that by consenting week after week to being recorded, Cheatem would have also consented for the lecture in which he was unable to ask permission because of his late arrival.[52]

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45. *Id.* at 960 ("The defendant here did not expressly or impliedly consent to the recording of his conversation with the alleged victim. . .The defendant was under the assumption that his conversation with the alleged victim was private.").

46. *See* R. at 6 ("Dollar assumed it would be alright to record the class, because Cheatem had generally granted permission to any student who wanted to record a class.").

47. People v. Ceja, 789 N.E.2d 1228 (Ill. 2003) (citing Griggs-Ryan v. Smith, 904 F.2d 112, 116 (1st Cir. 1990)).

48. *Id.* at 1241.

49. *See generally id.*

50. *Id.* at 1237.

51. *Id.* at 1241 ("We cannot say that the trial court manifestly erred in concluding that defendant was aware that his statements were electronically monitored.").

52. *See* R. at 6 for contention that Dollar arrived to Lecture late.

Payoff will likely counter by arguing that he did in fact have an expectation that class would not be recorded and that his consent would always have to be given prior to recording of class per the provision in the student handbook. Payoff will argue that he could never impliedly consent to a recording of classroom lecture because the law school's manual explicitly requires consent by the instructor prior to recording a classroom lecture.[53] Cheatem had not given permission to Dollar to record the class. To argue this point, Payoff will likely point to *Shefts v. Petrakis*, a case in which the company the plaintiff was working for had an employee manual and policy in place which allowed for management to monitor use of the company's email system.[54] In that case, the court ruled that because the plaintiff knew the contents of the employee manual, which allowed authorized personnel to view employee email, that he did not have a reasonable expectation of privacy under the Illinois Eavesdropping Statute.[55] Payoff will also likely rely on *State v. DuBray*. In *DuBray*, the defendant was a prisoner at a federal prison in Montana.[56] The defendant argued phone conversations should not have been used at his trial because they violated state eavesdropping laws.[57] Upon entering the prison the defendant was given a handbook informing him that his phone conversations were subject to recording.[58] He signed a page acknowledging he understood what was in the handbook.[59] The court ruled that the defendant was aware the conversations were subject to monitoring because of the handbook.[60] Payoff will likely argue that the Marshall State Law Center had a policy in place which required permission from the instructor before a classroom discussion could be recorded. Payoff will argue that Cheatem could not have impliedly consented because under the policy of the law school implied consent could not be granted. An instructor had to explicitly consent each and every lecture. Cheatem had not consented and as such the Marshall State Eavesdropping Statute was violated.

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53. R. at Appendix A. "Any student, faculty member, or administrator wishing to record any class or portion of a class must first obtain the permission of the instructor or any party teaching or conducting a presentation in class prior to the recording for each class session." *Id*. This is found in Section 14 of the Marshall State University law Center Student Handbook.

54. Shefts v. Petrakis et al., No. 10-cv-1104, 2010 U.S. Dist. LEXIS 129974, at *6 (C.D. Ill. Dec. 8 2010).

55. *Id.* at *33 ("The Court finds that he did not have a reasonable expectation of privacy in his communications after the manual went into effect.").

56. State v. Dubray, 77 P.3d 247, 252 (Mont. 2003).

57. *See id.* at 253.

58. *See id.* at 263.

59. *See id.*

60. *Id.* "We hold that because [the defendant] was aware that his telephone conversations were subject to monitoring and recording no [violation of the eavesdropping statute]. . .occurred." *Id.*

C. TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS

Payoff's second claim alleges that Dollar is liable for tortious interference with contractual relations. To succeed on his claim, Payoff must prove five elements: 1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; 2) the defendant knows of the contract; 3) the defendant intentionally induces the third-party not to perform the contract; 4) and in doing so acts without justification; and 5) resulting in actual damage to the plaintiff.[61] A tortious interference with contractual relations cause of action recognizes that a person's business relationship is a property interest which is entitled to protection from unjustified tampering.[62] Payoff's claim is based on his contracts with Ronald Crump and Sensational Press Publications.

The circuit court granted summary judgment against Payoff on the basis that Dollar did not have the requisite intent to interfere with the contract when he gave truthful information.[63] The court of appeals reversed the circuit court finding that the truthfulness of the statement does not bear on the intent of the defendant.[64] Specifically, the court held that intent is a question of fact that a jury is to decide.[65]

Existence of Valid Contract

The first element of the tort is the existence of a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person.[66] A "valid contract" is a contract that is fully operative in accordance with the parties' intent.[67] A valid contract is created by: (1) an offer; (2) an acceptance; (3) a meeting of the minds; (4) mutual consent to the terms by both parties; and (5) execution and delivery of the contract with the intent that it be mutual

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61. Gupton v. Son-Lan Dev. Co., 695 S.E.2d 763, 770 (N.C. Ct. App. 2010). *See also* RESTATEMENT (SECOND) OF TORTS § 766 (1979):

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

62. Allstar Music, Inc. v. Eckhoff, 629 N.E.2d 816, 821-22 (Ill. App. 1994).

63. *See* R. at 10, relying on Miller v. Lockport Realty Grp., Inc., 878 N.E.2d 171, 179 (Ill. App. 2007) ("There is no liability for interference with a contractual relation on the part of one who merely gives truthful information.").

64. *See* R. at 11.

65. R. at 11.

66. *Gupton*, 695 S.E.2d at 770.

67. BLACK'S LAW DICTIONARY (9th ed. 2009).

and binding.[68] Execution and delivery are not always required because a party may accept a contract, and indicate its intent to be bound to the terms, by acts and conduct in accordance with the terms.[69]

Dollar is likely to argue that the contracts between Payoff, Crump and Sensational Press are not valid contracts. He is likely to argue that the contracts were not valid from their creation because Payoff's conduct, namely his kleptomania, was not conduct in accordance with the terms of the contract.[70] The morals clause of the Crump contract specifically stated that the contract would be "null and void if Mayor Payoff was found to be engaged in, or has been engaged in, any immoral conduct not disclosed to the producers."[71] "Kleptomania" is an impulse control disorder where the sufferer is unable to resist urges and impulses.[72] It is a crime to steal. Because Payoff engaged in and has been engaged in immoral conduct, the contracts were not valid upon their creation.

Payoff is likely to argue that the contracts are valid. He will argue there was an offer, acceptance, a meeting of the minds and mutual consent to the terms. He will also rely on the fact that the Marshall Court of Appeals held that "[t]here is no doubt that there were two valid and enforceable contracts in this matter."[73]

Defendant's Knowledge of the Contract

In order to be liable for tortious interference with contractual relations, the defendant must have had knowledge of the contract.[74] A defendant need not have specific details of the business arrangement or relationship in order to sustain a cause of action.[75] The plaintiff may show that the defendant had knowledge of facts or information that, upon further reasonable inquiry, would have led that defendant to discover the existence of a business expectancy.[76] Intentional interference

68. Prime Prod., Inc. v. S.S.I. Plastics, Inc., 97 S.W.3d 631, 636 (Tex. App. 2002).

69. Augusta Dev. Co. v. Fish Oil Well Serv. Co., Inc., 761 S.W.2d 538, 544 (Tex. App. 1988).

70. *Id.*

71. *See* R. at 5.

72. *See* Mental Health Illnesses, WEBMD.COM, http://www.webmd.com/mental-health/mental-health-types-illness (last visited Sept. 12, 2010).

73. *See* R. at 10.

74. *Gupton*, 695 S.E.2d at 770.

75. Malatesta v. Leichter, 542 N.E.2d 768, 780-81 (Ill. App. 1989).

76. *Id.*; *see also* Cont'l Research, Inc. v. Cruttenden, Podesta, & Miller, 222 F. Supp. 190, 199 (D. Minn. 1963) ("It is enough to show that defendant had knowledge of facts which, if followed by reasonable inquiry, would have led to a complete disclosure of the contractual relations and rights of the parties."), *and* Guice v. Sentinel Tech., Inc., 689 N.E.2d 355, 364 (Ill. App. Ct. 1997) ("[F]or purposes of setting forth a cause of action for intentional interference with contract, the plaintiff need only allege knowledge by [the defendant] of the [contract].The [exact] date upon which such knowledge was acquired by [the

"presupposes knowledge of the plaintiff's interests, or at least of facts which would lead a reasonable man to believe in their existence."[77]

Dollar is not likely to contest knowledge of the contracts. His own words show he had at least some knowledge of them. He could claim that he only heard about them second hand. He could also claim that he had no idea there was a morals clause or of the terms of the contracts. He could argue that his lack of knowledge of what would terminate the contract could not make his actions in intentional inducement to breach them.

Payoff is likely to claim that Dollar had knowledge of the contracts because he posted about them on David Dollar's Blog.[78] Specifically Dollar stated, "Payoff is going to make a fortune by talking about his crooked life. Someone should really stop these deals from happening."[79] Payoff will claim these statements would lead a reasonable man to believe Dollar knew of the existence of the contracts.

Defendant's Intentional Inducement of the Third Party Not to Perform the Contract

a. Intent

The third element of tortious interference with contractual relations is intentional inducement of the third-party not to perform the contract.[80] A defendant can act with the necessary intent by either acting for the primary purposes of interfering with the contract, desiring to interfere while acting for some other reason, or where the defendant knows that the interference is certain or substantially certain to occur as a result of his action.[81] In addition, interference must be improper. Even though an actor may know that interference will result, if the primary purpose of the conduct is legitimate, then the conduct may not be

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defendant] is irrelevant, provided acquisition of that knowledge preceded the alleged conduct of interference.").

77. WILLIAM L. PROSSER, LAW OF TORTS § 129, 941 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 766 cmt. i (1977).

78. R. at 6.

79. *Id.*

80. *Gupton*, 695 S.E.2d at 770.

81. RESTATEMENT (SECOND) OF TORTS § 766 cmt. j (1979); Neider v. Franklin, 844 So.2d 433, 437 (Miss. 2003) (A showing of specific intent is not required to support a claim of tortious interference with contractual relations; "rather, intent can be inferred when a defendant knows a contract exists between two parties and does a wrongful act that he is certain or reasonably certain will interfere with the contract."); *see also* RESTATEMENT (SECOND) OF TORTS §8A (1977):

> The word "intent" is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.

actionable.[82]

Dollar may argue that he was not "substantially certain" his actions would result in Payoff's contracts being terminated. He could argue that he had no knowledge of the morals clause, which was what ultimately terminated the contract.[83] He might also rely on the trial court's finding that the statements were truthful and he cannot be held liable under *Miller v. Lockport Realty Group, Inc*.[84] He could also argue that his statements that went along with the web-post of the lecture were opinions and not fact, thereby making the purpose of his actions legitimate.[85] He could also argue that he was justified in posting the lecture on-line because the public has a right to know of Payoff's indiscretions.

Payoff may claim that Dollar's posting of the lecture and his statements amount to fraudulent representation. "Fraudulent representation" exists when, to knowledge or belief of its utterer, representation is false in a sense in which it is intended to be understood by recipient.[86] Payoff may further claim that the lecture alone was not harmful since Cheatem only talked in generalities, and he never specifically stated that Payoff has a mental disorder. Payoff will contend it was the statement made by Dollar, "the reason Payoff did not testify at his trial was to avoid disclosing that he had the mental disorder kleptomania."[87] He may also claim this statement was meant for the world to believe he was a kleptomaniac. He will try to negate Dollar's use of *Miller v. Lockport Realty Group, Inc*. by claiming that the statement, although truthful, was not known to be true by anyone but his attorney Cheatem and that what Cheatem knew was held private under the attorney-client privilege.

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82. RESTATEMENT (SECOND) OF TORTS § 767 (1979):

In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:
(a) the nature of the actor's conduct,
(b) the actor's motive,
(c) the interests of the other with which the actor's conduct interferes,
(d) the interests sought to be advanced by the actor,
(e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
(f) the proximity or remoteness of the actor's conduct to the interference and
(g) the relations between the parties.

83. *See* R. at 7.

84. *Miller*, 878 N.E.2d at 179.

85. Soderlund Bros., Inc. v. Carrier Corp., 663 N.E.2d 1, 10 (Ill. App. Ct. 1995) ("Matters of fact are distinguishable from expressions of opinion . . ."); *see* PROSSER & KEATON ON TORTS § 128, 968 (W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, David G. Owens eds., 5th ed. 1984) ("[A] number of cases have subscribed to the view that opinion statements of competitors are not actionable").

86. RESTATEMENT (SECOND) OF TORTS § 767 cmt. c (1979); *see also Miller*, 878 N.E.2d at 179.

87. R. at 7.

b. Causation

As part of the burden to prove intent on behalf of the defendant, the plaintiff must prove that the defendant's actions actually caused an interference with a contractual relation.[88] In *Meyers v. Levy*, the plaintiff, a high school football coach, alleged the defendant, a parent, made disparaging remarks about him in a petition for his removal to the superintendent, and he was ultimately terminated as coach; however, plaintiff failed to rebut the uncontroverted testimony of the superintendent that the decision to terminate was not made by the petition, but because of the defendants drug problem.[89] The court of appeals affirmed the entry of summary judgment on the interference claim because there was no evidence to support causation.[90]

Dollar will likely argue that he did not cause the contracts to be terminated. He will argue that he simply posted the lecture for his classmates and his statements were opinions not meant to induce a termination of the contracts. Dollar will claim that the fact that another student took his post and placed it on SpaceBook was an unexpected act of a third party that would relieve him of any causation.[91]

Payoff will likely argue that but for Dollar's post of the lecture and statements online, Crump and Sensational Press would have no reason to terminate their contracts with him. There was no mention in the record that Payoff disclosed to anyone other than Cheatem about his mental disorder. Cheatem's statements by themselves do not claim that Payoff was a kleptomaniac. The statements were generalizations. It was Dollar's linking the lecture with the claim that Payoff had kleptomania that set the ball rolling for causation.

c. Damages

In order to prevail on a claim for intentional interference with a contractual relation the plaintiff must prove actual damage.[92] Even where

88. *See* Meyers v. Levy, 808 N.E.2d 1139, 1153 (Ill. App. Ct. 2004); *see also* Ventas, Inc. v. HCP, Inc., 647 F.3d 291, 313 (6th Cir. 2011) (stating that under Kentucky law, plaintiff alleging tortious interference with prospective contractual relation must show that defendant's improper interference was the but-for cause of plaintiff's injury).

89. *Meyers*, 808 N.E.2d at 1153.

90. *Id.* at 1153-54.

91. *See* R. at 7. One student linked the recording from the school's website to his personal SpaceBook page.

92. *Gupton*, 695 S.E.2d at 770; RESTATEMENT (SECOND) OF TORTS § 774A (1979):

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

the defendant's improper conduct caused inconvenience, the plaintiff must show consequential loss or damage to satisfy this element.[93]

Dollar will likely argue that there was no guarantee of payment. He will likely argue that the contracts were at-will and could have been terminated at anytime.[94] He will argue Payoff cannot prove he was entitled to the benefits of the contract without performance. Performance was due at a later date, mainly the conclusion of his criminal trial. He will argue there are too many variables to negate payment of the contract and therefore, Payoff cannot prove damages. Alternatively, Dollar could argue that if the Court is convinced that damages have been incurred but the amount cannot be proved with reasonable certainty, it should award nominal damages.[95]

Payoff will likely argue that he is entitled to compensatory and punitive damages.[96] He will argue that he should be entitled to the loss of profits to be made out of the expected contracts.[97] Payoff will claim the contract is not an at-will employer/employee contract but he is an independent contractor.[98] He will argue that these contracts were terminated because of Dollar and that he has been monetarily damaged because of Dollar's actions. He will also argue he is entitled to damages

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(2) In an action for interference with a contract by inducing or causing a third person to break the contract with the other, the fact that the third person is liable for the breach does not affect the amount of damages awardable against the actor; but any damages in fact paid by the third person will reduce the damages actually recoverable on the judgment.

93. *See* Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc., 546 N.E.2d 33, 38 (Ill. App. 1989).

94. *See* Kerr v. Johns Hopkins University, No. L–10–3294, 2011 WL 4072437 *4 (D. Md., 2011) (An at-will contract means that an employee can be terminated or disciplined "for any reason, even a reason that is arbitrary, capricious, or fundamentally unfair.") and RESTATEMENT (SECOND) OF TORTS § 766 cmt. g (1979) (The fact that the contract is terminable at will, however, is to be taken into account in determining the damages that the plaintiff has suffered by reason of its breach).

95. *See* RESTATEMENT (SECOND) OF TORTS § 774A cmt. c (1979).

96. *See* RESTATEMENT (SECOND) OF TORTS § 774A(1)(b) (1979).

97. *See* RESTATEMENT (SECOND) OF TORTS § 774A cmt. b (1979):

In the case in which a third person is prevented from performing a contract with the plaintiff, the plaintiff may recover for the loss of profits from the contract. When it is the plaintiff himself who is prevented from performance of his contract with a third person, he may recover for expenses to which he is put or for other pecuniary losses incurred in making his performance good. And when the defendant's interference is with prospective contractual relations, the plaintiff may recover for the loss of profits to be made out of the expected contracts.

98. *See* Ross v. Ninety-Two West, Ltd., 412 S.E.2d 876, 881 (Ga. Ct. App. 1991) (to determine relationships in a contract for performance the test is whether the contract gives, or the employer assumes, the right to control the time, manner, and method of executing work as distinguished from the right merely to require certain definite results in conformity to the contract.).

for his emotional distress and harm to reputation.[99]

D. PUBLIC DISCLOSURE OF PRIVATE FACTS

Payoff's third claim is for public disclosure of private facts. To sustain an action for public disclosure of private facts a plaintiff must show: (1) public disclosure; (2) of a private fact; (3) which would be offensive and objectionable to the reasonable person; and (4) which is not of legitimate public concern.[100] Dollar's claim is based on the fact that his mental disorder, Kleptomania, was disclosed by Dollar on the internet.

The circuit court granted summary judgment against Mayor Payoff on this claim. The court of appeals reversed the circuit court ruling finding that Payoff is entitled to some privacy rights despite his fame and the fact that he sought help for his mental disorder is not of legitimate concern.[101]

Public Disclosure

Public disclosure may consist of a communication made to a large or potentially large number of persons, or a communication made to a particular group of persons, even if that group is not objectively large when the plaintiff has a "special relationship" with this group.[102] It is not an invasion of privacy to communicate a fact concerning one's private life to a single person or even to a small group of persons.[103] On the other hand, any publication in a newspaper or a magazine, even of small circulation, or in a handbill distributed to a large number of persons, or any broadcast over the radio, or statement made in an address to a large audience, is sufficient to give publicity within the meaning of the term.[104] So long as the nature of the publicity ensures that it would reach the public, there is publicity.[105] The publicity element of an inva-

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99. *See* RESTATEMENT (SECOND) OF TORTS § 774A(1)(c) (1979).

100. Shulman v. Group W Productions, Inc., 955 P.2d 469, 478 (Cal. 1998); s*ee also* RESTATEMENT (SECOND) OF TORTS § 652D (1977):

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
> (a) would be highly offensive to a reasonable person, and
> (b) is not of legitimate concern to the public.

101. *See* R. at 11.

102. Cordts v. Chicago Tribune Co., 860 N.E.2d 444 (Ill. App. Ct. 2006) (generally, to satisfy the publicity element of the tort, plaintiff must show that information was disclosed to public at large; however, publicity requirement may be satisfied when disclosure is made to small number of people who have "special relationship" with plaintiff); Olson v. Red Cedar Clinic, 681 N.W.2d 306, 309 (Wis. App. Ct 2004).

103. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

104. *Id.*

105. Vassiliades v. Garfinckel's Brooks Bros., 492 A.2d 580, 588 (D.C.1985).

sion of privacy claim is satisfied when private information is posted on a publicly accessible Internet Web site.[106] Determination that publicity occurred does not require a large actual audience and does not depend on whether the content offered through the medium is of general interest to the public, but rather on whether the content is conveyed through a medium that delivers the information directly to the public.[107]

Here, Cheatem's lecture was posted to the school's webpage for the Trial Advocacy Class by Dollar.[108] In addition to posting the recording, Dollar commented that, "the reason payoff did not testify at his trial was to avoid disclosing that he had the mental disorder kleptomania."[109] Several students listened to the lecture and began posting comments about the Mayor being a thief.[110] Dollar noted on the discussion board that the bribery charges against the mayor were probably true because he has a stealing problem.[111] Another student in the class copied the lecture to his SpaceBook page and it was then transmitted worldwide.[112]

Dollar may argue that the posting on the school's web-site was not publicity because the school website was not accessible to the public at large. He may rely on *Bodah v. Lakeville Motor Express, Inc.*, where the Supreme Court of Minnesota found that a trucking company that had distributed names and social security numbers of 204 employees to its terminal managers via facsimile did not constitute publication, as required to establish invasion of privacy.[113] The court found that the dissemination to managers of the company by fax was not substantial certainty that the information would become public.[114] Dollar could claim that he posted the lecture and comments on the school's web page intended only for the students; he in no way foresaw another student taking it and disseminating it on-line. He will likely argue that the posting was not on a public website and should not constitute publicity.

Mayor Payoff will likely rely on *Yath v. Fairview Clinics, N.P.* to show that his private information was posted on a publicly accessible website.[115] Payoff will argue that it matters not how many people heard the lecture, but the fact that Dollar had posted it on a site where it was

106. Yath v. Fairview Clinics, 767 N.W.2d 34, 42-45 (Minn. Ct. App. 2009).
107. *Id.* at 43.
108. *See* R. at 7.
109. *See id.*
110. *See id.*
111. *See id.*
112. *See id.*
113. Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550, 552-53 (Minn. 2003).
114. *Id.* at 557-58.
115. Yath v. Fairview Clinics, 767 N.W.2d 34, 42-45 (Minn. 2009).

accessed by many others and copied to other web sites constitutes a publication.

Private Fact

A private fact is one that has not already been made public.[116] Liability cannot be based upon that which the plaintiff himself leaves open to the public eye.[117] It also follows from the use of the term *private* fact that the reader or recipient of the private fact not have prior knowledge of that fact: there can be no liability where the publicity given involves facts with which the recipient is familiar.[118] Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close friends.[119]

Dollar will likely argue that Mayor Payoff is a public figure and his actions while Mayor are of public concern.[120] A public figure is defined as a person who, by his accomplishments, fame, or mode of living, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs, and his character, has become a "public personage."[121] To be included in this category are those who have achieved some degree of reputation by appearing before the public.[122] It includes anyone who has arrived at a position where public attention is focused upon him as a person.[123] Mayor Payoff has done all these things and is a public figure. Payoff clearly has arrived at a position where public attention is focused on him in the area of ethics and morality. He is pledging his innocence in bribery charges and that he is not a criminal. He went so far as to chastise other civil servants regarding theft.[124] Thus, as a public figure Payoff has lost, at least to facts relating to kleptomania and theft, his right to privacy.[125]

Payoff is likely to argue that is privacy rights should not be violated despite his public servant status. He will likely cite to the record and

116. Harris v. Easton Pub. Co., 483 A.2d 1377, 1384 (Pa. Super. Ct. 1984).

117. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977).

118. Harris, 483 A.2d at 1384.

119. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977) (Sexual relations, for example, are normally entirely private matters, as are family quarrels, *many unpleasant or disgraceful or humiliating illnesses*, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget).

120. *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. e (1977).

121. PROSSER & KEETON, *supra* note 85.

122. *Id.*

123. *Id.*

124. *See* R. at 4. Demoting a fire department captain to lieutenant for allowing firefighters to drive a fire truck to the grocery store citing theft of city owned fuel. Also police officers who accept discounts for coffee and meals amounted to undue use of authority.

125. PROSSER & KEETON ON TORTS, *supra* note 85.

Gallela v. Onassis, which shows that even a highly popular former First Lady of the United States maintains privacy rights despite her fame.[126] He will likely argue that kleptomania is an unpleasant, disgraceful, and humiliating illness and is a private fact according to the Restatement (Second) of Torts.[127]

Offensive and Objectionable to the Reasonable Person

Whether or not the publication was highly offensive to a reasonable person, is a factual question usually left for a jury to decide.[128]

Dollar is likely to argue that the fact that Mayor Payoff is a kleptomaniac is not offensive or objectionable to the reasonable person. The act itself is offensive, but the fact that Payoff has a mental disorder is not. Dollar will likely cite to *Nelson v. Glynn-Brunswick Hosp. Authority*, which found that oral disclosure of physician's diagnosis with hepatitis C to hospital administrators did not constitute *publication*, and even if hospital's letter informing organization of health care professionals, physician's employer, of his diagnosis constituted a publication, the letter was not offensive to the reasonable health care professional.[129] He should argue that there is no stigma attached to people with mental illnesses or those who seek treatment for them. Payoff has inserted himself into the ethical and moral debate by chastising others while he himself has been unethical while in office.

Payoff is likely to argue that he had no intention of bringing his mental health issues to light. He might rely on *Doe v. Mills*.[130] In *Doe*, the plaintiff alleged that the defendants publicized the fact that they made a decision to have an abortion despite their intent to keep this matter "private and confidential."[131] They alleged further that the publicity was highly offensive and was deliberately calculated to embarrass and humiliate them.[132] After being presented with these facts, the court held that they could not say that a reasonable person would not be justified in feeling seriously aggrieved by such publicity, thus finding that the "highly offensive" element was met.[133] Payoff will argue that when compared to the case at hand it is clear the "highly offensive" element is met. Similar to *Jane Doe,* he clearly intended to keep his mental health issues private and confidential. He had told no one besides his attorney of his problem and he refused to testify on his own behalf to keep the private

126. R. at 11; Gallela v. Onassis, 487 F.2d 986, 1004-05 (2d Cir. 1973).
127. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977).
128. Robert C. Ozer, P.C. v. Borquez, 940 P.2d 371, 378 (Colo. 1997).
129. Nelson v. Glynn-Brunswick Hosp. Auth., 571 S.E.2d 557, 564 (Ga. Ct. App. 2002).
130. *See* Doe v. Mills, 536 N.W.2d 824 (Mich. Ct. App. 1995).
131. *Id.* at 829.
132. *Id.*
133. *Id.*

matter from becoming public knowledge. Cases have recognized this fact and have held that medical procedures such as abortion, and procedures that involve personal choices with regard to medical treatment, are private matters.[134] As illustrated by the court in *Doe*, publication of these personal choices can be highly offensive, which can in turn lead to a successful invasion of privacy claim.[135]

Not of Legitimate Public Concern

The public has an interest in learning about the matters. When a matter involved with claim for publication of private facts is a legitimate matter of public concern there is no invasion of privacy.[136]

Dollar is likely to argue that the fact Payoff admitted to kleptomania is a matter of public concern. Dollar will likely argue that Payoff voluntarily placed himself in the public eye when he became mayor and the fact that he is a habitual thief is a matter of concern for the public at large. The proper inquiry is to determine whether the disclosure at issue is newsworthy. To support this contention, Dollar will likely cite to, *Shulman v. Group W Productions*, where plaintiffs, who where victims in a car accident, were filmed by the defendant production company at the accident scene.[137] In that case, the California Supreme Court ruled that the video of the accident scene was a matter of public concern because the content was newsworthy.[138] Dollar will argue that he did not violate the Marshall State Eavesdropping Statute, so the recording and revelation of Payoff's kleptomania was legally obtained.[139] Additionally, whether the mayor steals is a matter of public concern because the electorate has the right to know whether an elected official is a thief.

Payoff is likely to argue that his kleptomania is not a matter of legitimate public concern. Payoff will argue that his kleptomania is an intensely private mental disorder for which he had been seeking professional help. Furthermore, when the revelation was made, Payoff he was no longer mayor. Payoff will likely argue that since he was no longer in public office, his kleptomania is no longer a matter of public concern. To support this, Payoff will cite to *Virgil v. Time Inc.*, where a surfer at first consented to a magazine article, but then later withdrew

134. Swickard v. Wayne Cnty. Med. Exam'r, 475 N.W.2d 304, 314-15 (Mich. 1991).

135. *Doe*, 536 N.W.2d at 824; *Swickard*, 475 N.W.2d at 309-12.

136. *See* Cox Bd. Corp. v. Cohn, 420 U.S. 469 (1975).

137. *See* Shulman v. Grp. W Prod., Inc., 955 P.2d 469 (Cal. 1998).

138. *Id.* at 487 ("We agree with the defendants that the publication of truthful, lawfully obtained material is a matter of legitimate public concern is constitutionally privileged and does not create liability under the private facts tort.").

139. The legal arguments of whether Dollar violated Marshall's eavesdropping statute are referenced above.

his consent.[140] In that case, the court noted that not every piece of information on every person will be considered of a legitimate public concern. "The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say he had no concern."[141] Payoff will argue that a reasonable person would say they have no concern in the fact that he is a kleptomaniac because he is no longer in public office and as such it does not affect the public at large. Payoff will argue prying into his public life in such a way is just "morbid" and "sensational."

140. *See* Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975).

141. *Id.* at 1129 (citing RESTATEMENT (SECOND) OF TORTS § 652D, cmt. f (1977).).