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2004 John Marshall International Moot Court Competition in Information Technology and Privacy Law: Brief for the Petitioner, 23 J. Marshall J. Computer & Info. L. 587 (2005)

Ryan Dry

Angela Hamilton

Jason Newman

2004 MOOT COURT COMPETITION

BENCH MEMORANDUM

PATRICIA GERDES
TIM SCAHILL
OTTO SHRAGAL
RICHARD C. BALOUGH
LESLIE ANN REIS

IN THE SUPREME COURT OF THE STATE OF MARSHALL

RAMON JACQUES, Plaintiff-Appellant,	)	
v.	)	No. 2004-CV-0306
GRAND OUT PATIENT CENTER Defendant-Appellee.	)	

I. INTRODUCTION

This case is an appeal by Ramon Jacques ("Plaintiff-Appellant") of the order of the First District Court of Appeals affirming the trial court's decision to quash a subpoena for the medical information of a "John Doe" defendant based upon a state law that prohibited the disclosure of medical information except in limited circumstances; and a cross-appeal by Grand Out Patient Center ("Defendant-Appellee") of the order of the Court of Appeals reversing the order of the trial court granting summary judgment to Defendant-Appellee and dismissing Plaintiff-Appellant's one-count complaint for public disclosure of a private fact.

PROCEDURAL HISTORY

The Circuit Court found Plaintiff-Appellant's treatment for alcohol abuse was a private fact and that publication of the treatment could be

offensive to a reasonable person.[1] However, the Circuit Court found public disclosure of such treatment could be a legitimate concern to the public because of both his role in a group that advocated the reinstatement of Prohibition and his wife's role as a candidate for public office.[2] As a result, the Circuit Court granted Defendant-Appellee's Motion for Summary Judgment and dismissed the complaint. The Court of Appeals reversed, holding that Defendant-Appellee's Motion for Summary Judgment should be denied. The Court of Appeals agreed with the Circuit Court that publication of unauthorized pictures allegedly showing Plaintiff-Appellant in a therapy session for alcohol abuse could be offensive to a reasonable person. However, the Court of Appeals found, contrary to the Circuit Court's order, that Plaintiff-Appellant's treatment was not of legitimate public concern since he was not subject to public scrutiny or part of a public debate or discourse.

As to the request by Defendant-Appellee Grand Out Patient Center ("Center") to quash a subpoena for medical records of the "John Doe" defendant, the Circuit Court found that state law prohibited the disclosure of any medical records of John Doe. The Circuit Court found the *Health Insurance Portability and Accountability Act of 1996* ("HIPAA") allowed for disclosure of medical information pursuant to a subpoena.[3] However, HIPAA can be trumped when state law is more restrictive.[4] The State of Marshall has enacted a statute that prohibits the disclosure of medical records to anyone other than the patient or for purposes of peer review.[5] Since the state law is more restrictive than the provisions against disclosure in HIPAA, the Circuit Court granted the Center's motion to quash the subpoena. The Court of Appeals affirmed.[6]

II. STATEMENT OF THE CASE

The undisputed facts in this case are as follows.

Ramon Jacques, Plaintiff-Appellant, is the husband of Betty Jacques. Betty was a newcomer to politics in 2002 when she sought the Crocker Party's nomination for an open Congressional seat.[7] She was a multi-millionaire who accumulated her wealth through her publishing business that was based on providing helpful hints for home cooking, interior design and family life. She gave away large portions of her fortune to "Families for Families" a group that advocated abstinence from drink-

1. R. at 9.
2. *Id.*
3. R. at 11.
4. *Id.*
5. 210 Marshall Stat. 85/6.17; R. at 12.
6. R. at 11-12.
7. R. at 2.

ing. When she ran for her party's nomination, her platform included strengthening family values and advocated the reinstitution of Prohibition.[8] She easily won the March primary and was leading in the polls to win the fall election.

In July 2002, a Web site located at http://www.drunkenhusband.com was created. This Web site was accessible to anyone with an Internet connection. It contained a number of pictures purported to be of Plaintiff-Appellant at and in the Grand Out Patient Center, a facility well known in Betty's Congressional district as a rehabilitation hospital for alcohol and drug abusers. The existence and content of the Web site was reported in the *Daily Whitewater Reporter*, which reproduced some of the pictures from the Web site.[9]

There were six photographs on the Web site that were attached to the complaint in this case and marked as exhibits. The first photograph showed Plaintiff-Appellant entering the front of the Center. Both parties agree that the photograph was taken from the street and that the picture clearly shows the face of Plaintiff-Appellant Ramon.[10] The second picture was taken inside the Center in a reception area and Ramon's face was clearly visible.[11] The remaining four photographs appear to have been taken during a clinical session in the Center. No face was clearly visible in any of the four photographs. However, the body shape and the shirt of one individual were similar to that in the images showing the Plaintiff-Appellant entering the Center and at the Center's reception desk.[12]

There is no evidence presented in the record that anyone other than Betty and the reporter from the *Daily Whitewater Reporter* visited the drunkenhusband.com Web site.[13] However, the resulting media coverage of the drunkenhusband.com Web site and rumors about Ramon spread quickly. Betty lost the fall election by a wide margin.[14]

Even though Betty campaigned on the issue of family values, she kept concealed from the public the fact that she and Ramon had been separated since early 2001. Ramon went along with the happily-married charade during the campaign.[15]

Unlike Betty, Plaintiff-Appellant Ramon did not seek publicity. He was and is a private person. Ramon's picture never appeared in any campaign advertisements for Betty. He infrequently appeared with her dur-

8. R. at 3.
9. App. 2.
10. R. at 7-8.
11. R. at 8.
12. *Id.*
13. R. at 3.
14. *Id.*
15. *Id.*

ing the campaign.[16] The only public activity in which he participated was his involvement in "Families for Families." Ramon served as president and presided over "Families for Families" conventions since 1999. Because of the pictures on the Web site and subsequent negative publicity, he was forced to resign from "Families for Families."[17]

Plaintiff-Appellant's mother, Martha, and his father, Mitchell, had suffered from severe alcoholism. Prior to 2002, Ramon had suffered from alcoholism and depression and had been treated for those conditions several times.[18] As a result of the Web site, the negative publicity and Betty's campaign loss, Ramon became distraught and required medical treatment for severe depression, including hospitalization.[19]

In February 2001, Ramon sought treatment at the Center. As part of the intake procedure, each patient at the Center was required to sign a medical release form and was given a copy of the form along with a statement of the Center's patient privacy policy. The policy stated in part that "all medical records shall remain strictly confidential and will not be released to any party without the express written permission of the patient."[20] Ramon did not authorize the release of any of his medical records nor did he authorize the taking of any pictures while he was under treatment. Moreover, the Center had a policy restricting the use of cameras. At the entrance to the Center is a sign that read "[t]he use of cell phones and the taking of any pictures are strictly prohibited inside this facility."[21]

Sometime during the months of February and March 2001, another Center patient surreptitiously took a number of digital photographs of Ramon and of counseling sessions as well as other Center activities. The photographs came into the possession of Center employee Lee D. Gordon, a nurse's aide. Gordon registered the drunkenhusband.com domain in his own name. He put up the Web site and posted the pictures at issue on the drunkenhusband.com Web site for all to see.

Gordon did not like Betty or her position on family values, drugs and alcohol. He feared that if Prohibition were reinstated he would lose his job at the Center since there no longer would be alcoholics in need of treatment. In fact, at one point, he told a co-worker that someone must do something to derail Betty's campaign. The comment was reported to Gordon's supervisor but no action was taken by the Center at that time.[22] However, some months later, Gordon was fired by the Center

16. R. at 4.
17. *Id.*
18. *Id.*
19. R. at 3.
20. R. at 4.
21. R. at 5; App. 3.
22. R. at 5.

when Center management became aware of the Web site and Gordon's role in it.

When he was hired, Gordon filled out an application form that included a question as to whether he had been convicted of any crime. He falsely answered "No." In fact, he had been charged with burglary ten years before for his part in breaking into the Crocker Party's headquarters. He pled guilty to a misdemeanor charge of unlawful trespass.[23]

In December 2002, Plaintiff-Appellant Ramon filed a one-count complaint against both the Center and John Doe alleging invasion of privacy by public disclosure of private facts. At the time he filed the lawsuit, Ramon also issued a subpoena to the Center to obtain information that would lead to the identity of John Doe, the person who took the pictures. The subpoena also sought certain medical history information of John Doe. The Center declined to provide the information claiming it was protected from disclosure by Marshall's *Medical Privacy Act*, 750 Marshall Stat. 58/7.16. Ramon responded that under the provisions of HIPAA, he was entitled to the information since he had issued a valid subpoena. The trial court agreed with the Center and quashed the subpoena. Since Plaintiff-Appellant Ramon could not otherwise identify John Doe, he was forced to dismiss John Doe from the lawsuit.

In a separate order, the Circuit Court granted Defendant-Appellee's Motion for Summary Judgment on the single invasion of privacy, public disclosure of private fact count. In making its ruling, the Circuit Court stated that it agreed with Defendant-Appellee's motion that the Center was not liable for any invasion of privacy since (1) any disclosure by Gordon was unauthorized by the Center and outside the scope of his employment; (2) the images did not clearly show that the person was Plaintiff-Appellant Ramon or that he was under treatment by the Center; and (3) the disclosure of the fact was newsworthy in light of Plaintiff-Appellant's wife's political campaign and thus was a protected privilege under the First Amendment.

In reversing the Circuit Court's two orders, the Court of Appeals first reinstated the cause of action for invasion of privacy. The Court of Appeals found that (1) there was a material issue of fact as to whether the Center should have taken action against Gordon to prevent him from being in contact with Plaintiff-Appellant; (2) taken as a whole, a reasonable person could infer that the images of the person under treatment at the Center was Plaintiff-Appellant; (3) the posting of pictures on the Internet of a person under treatment for alcohol abuse could be offensive to a reasonable person; and (4) the disclosure of Plaintiff-Appellant's treatment was not newsworthy since although his wife was running for office,

23. R. at 5-6.

Plaintiff-Appellant himself kept his alcohol abuse private and was of no legitimate public concern.

Second, the Court of Appeals agreed that it was proper for the Circuit Court to quash the subpoena to the Center for certain medical records. In its opinion, the Court of Appeals found that the state statute restricting the disclosure of medical information was more restrictive than federal law and, as a result, the state statute controlled what information could be made available by the Center.

III. ISSUES PRESENTED FOR REVIEW

Two main issues have been raised on appeal: (1) Whether the Court of Appeals erred in holding that the fact that a spouse of a candidate who advocated the reestablishment of Prohibition was undergoing alcohol abuse treatment is not newsworthy and the publication of photographs on the Internet of his treatment is the disclosure of a public fact. (2) Whether the Court of Appeals erred in finding that a state medical privacy statute was more strict than HIPAA and therefore fell under an exception to HIPAA thus preventing the disclosure of medical information pursuant to a proper subpoena.

In discussing the two main issues, the parties may address two other issues. The first is whether Defendant-Appellee should be held liable for the actions of its employee Lee D. Gordon in posting the images on a Web site that he owned and maintained separate and apart from his duties at the Center. The second issue is whether the fact that the subpoena sought facts to identify the second defendant in the case rather than information concerning an "innocent" third party should affect the Circuit Court's ruling.

IV. ANALYSIS

A. Did the Court of Appeals err in holding that the fact that a spouse of a candidate who advocated the reestablishment of Prohibition was undergoing alcohol abuse treatment was not newsworthy and publication of photographs on the Internet of his treatment was the disclosure of a private fact?

The one-count complaint of Plaintiff-Appellant was for the tort of invasion of privacy, namely, publicity given to private facts. The State of Marshall has enacted a statute that follows the *Restatement (Second) of Torts* (1977) governing claims for invasion of privacy. Its applicable section states:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his/her 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.

In order to prevail, Plaintiff-Appellant must demonstrate that (1) there was publication or publicity given (2) to a private fact (3) the publication of which would be highly offensive to a reasonable person and (4) not of legitimate concern to the public. Over time, the elements needed to prove a publication of a private matter action have been stated in various ways; however the four basic elements: the fact at issue concerned private matters, the fact was publicized, the publication brought shame or humiliation to a person of ordinary sensibilities and it is not a matter of legitimate public concern must all be shown. *Y.G. & L.G. v. The Jewish Hosp. of St. Louis & Multi-Media KSDK Inc.*, 795 S.W.2d 488, 498 (Mo. App. 1990).

1. *Publication or Publicity*

As illustrated above, the first element Plaintiff-Appellant Ramon must prove is the "publicity" element. "Publicity" as it is used in the *Restatement (Second) of Torts*, which has been adopted by the State of Marshall, differs from the term "'publication,' as that term is used . . . in connection with liability for defamation." *Restatement (Second) of Torts* §652D cmt. a. "Publication," in that sense, is a term of art, which includes any communication by the defendant to a third person. *Id.* "Publicity," on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. *Id.* The difference is not one of the means of communication, which may be oral, written or by any other means. *Id.* It is one of a communication that reaches, or is sure to reach, the public. *Id.*

In accord with the *Restatement*, it is not an invasion of privacy to communicate a fact concerning the Plaintiff-Appellant's private life to a single person or even to a small group of persons. *Id.* 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. *Id.* So long as the nature of the publicity ensures that it would reach the public, there is publicity. *Vassiliades v. Garfinckel's Brooks Bros.*, 492 A.2d 580, 588 (D.C. App. 1985).

In this appeal, the pictures taken of Ramon were posted on the Web site drunkenhusband.com which was available to the public for viewing and downloading.[24] The site was quickly found by the press.[25] The *Daily Whitewater Reporter* published a story that included pictures

24. R. at 3.
25. *Id.*

found on the Web site.[26] Although the *Restatement* does not explicitly state that information posted on a Web site will meet the publicity element under this cause of action, case law has implied that whether or not the means of the publication is explicitly stated in the *Restatement* is not the determinative factor. *Vassiliades*, 492 A.2d at 588. The court in *Vassiliades* held that although only two witnesses were produced that viewed the publication, the "publicity" element was met because the nature of the publicity ensured that it would reach the public. *Id.* Moreover, the fact that Plaintiff-Appellant has only proved that two people have viewed the Web site is not dispositive. As in the instant case, in *Vassiliades* there were only two witnesses put forward to prove the "publicity" element. The court held that this did not defeat the claim. *Id.* at 588. Plaintiff-Appellant may argue that like a newspaper publication which meets the "publicity" element because it is sure to reach the public, information placed on the Internet is also likely to reach the public.

Defendant-Appellee may argue that the posting on the Internet, while a publication, is not publicity as the term is defined in the *Restatement*. The record evidence is that only two persons viewed the site itself. Defendant-Appellee may argue that this fact alone is not sufficient to fulfill the publicity requirement. Because of the nature of the Internet with millions of Web sites, many of which are never visited nor downloaded, mere posting on a non-publicized Web site did not constitute publicity.

Defendant-Appellee alternatively may simply concede the point that the pictures were posted on the site and that such posting does meet the definition of publicity under the *Restatement*. In doing so, Defendant-Appellee would argue that even though publicity occurred, Plaintiff-Appellant has not carried his burden of proof to meet the other requirements of the tort.

2. *The Pictures at Issue Concerned a Private Matter*

Next, Plaintiff-Appellant may argue that the pictures published on drunkenhusband.com were so private that the publication would be highly offensive to a reasonable person – or, as the court in *Y.G. & L.G* reasoned, would bring shame or humiliation to a person of ordinary sensibilities. *Y.G. & L.G.*, 795 S.W.2d at 498. The *Restatement*, as adopted by the State of Marshall only gives protection against unreasonable publicity of a kind highly offensive to the ordinary reasonable man. *Restatement (Second) of Torts* §652D. As is noted in the *Restatement* and numerous cases, complete privacy does not exist in this world, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he is a part. *Id.* The ordinary man does not

26. *Id.*

take offense at a report in a newspaper that he has returned from a visit, has gone camping in the woods, or has given a party at his house for his friends. *Id.* Even minor and moderate annoyance, as for example through public disclosure of the fact that the Plaintiff-Appellant has clumsily fallen downstairs and broken his ankle, is not sufficient to give him a cause of action under this rule. *Id.* It is only when the publicity given to him is such that a reasonable person would be justified in feeling seriously aggrieved by it that the cause of action arises. *Id.*

Defendant-Appellee Center may argue that there were no facts publicized on the Web site that were not otherwise open to the public eye and thus there were no private facts in this case. Since the information publicized was in the public view, there can be no invasion of privacy. An action for disclosure of private facts will not lie where the fact allegedly publicized is one that the plaintiff leaves open to the public eye. In *Dancy v. Fina Oil & Chem. Co.*, 3 F. Supp. 2d 737, 740 (E.D. Tex. 1997), the court held that where employees' absences were facts left open to the public eye, publishing a list of those absent did not cast any aspersions on the employees, but merely reported facts that could be gleaned by casual observation. *Id.* The images of Plaintiff-Appellant Ramon show him entering a drug and alcohol rehabilitation hospital. A person who viewed the publication of the photographs of his entering the Center will not learn any more information than a person who observed from the street. The Center is well known throughout the community, and the casual observer would know that Ramon could not be going there for a routine check-up or to have his blood pressure checked. They would instantly know that he is visiting the Center because he has either a drug or alcohol problem. Thus, the photographs showing him entering a specialized facility for drug and alcohol abuse were facts left open to the public eye, and were not private facts which would lead to an invasion of privacy claim.

As to the photographs during the session, Defendant-Appellee should argue that the evidence fails to show that it was the Plaintiff-Appellant in the pictures. In the clinical session photographs, no face was shown. While the body shape and clothing appeared to be that of Plaintiff-Appellant, Defendant-Appellee may argue that such conjecture is not sufficient for Appellant to meet his burden of proof demonstrating publication of a private fact.

Second, Defendant-Appellee may argue that Plaintiff-Appellant Ramon participated for three years in public activity in the State of Marshall[27] relating to the very activity shown in the photographs. As acting president for "Families for Families" he presided over its annual conven-

27. R. at 4.

tion which was open to the public.[28] This activity would make him a public figure which 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." William Prosser, & Keeton, On Torts, (5th ed. 1984). To be included in this category are those who have achieved some degree of reputation by appearing before the public. *Id.* It includes anyone who has arrived at a position where public attention is focused upon him as a person. *Id.* Plaintiff-Appellant has done all these things and is a public figure. Plaintiff-Appellant clearly has arrived at a position where public attention is focused on him in the area of alcoholism. He is the president of a group that collects large donations to help advocate a controversial subject, which is abstinence from drinking.[29] Any group that accepts public donations, especially very large donations is of public concern because the people that have donated money want to know what their money is being used for. Thus, as a public figure Plaintiff-Appellant has lost, at least to facts relating to alcoholism, his right to privacy. William Prosser, & Keeton, On Torts, (5th ed. 1984).

3. *The Publication of the Pictures at Issue Was Highly Offensive to a Reasonable Person.*

Whether the publication was highly offensive to a reasonable person is a factual question usually left for a jury to determine. *Doe v. Mills*, 536 N.W.2d 824, 829 (Mich. App. 1995).

The photographs allegedly depicted Plaintiff-Appellant participating in an alcohol treatment program at the Center. Plaintiff-Appellant may argue that the pictures need to be considered in the context in which they were published; that is, on a Web site that by its title "drunkenhusband.com," which denotes a negative connotation. Defendant-Appellee will argue that the pictures depict different situations and should be considered separately. For example, the expectation of privacy may be low, if non-existent, for the photograph of Plaintiff-Appellant taken from the street. There is no reasonable expectation of privacy when a person is on a public street. The question becomes closer for the photograph in the reception area. Plaintiff-Appellant may argue that once inside the building, his expectation of privacy has risen to a protectable level. Plaintiff-Appellant should cite the fact that the Center had a clear policy prohibiting the taking of pictures inside the facility. Defendant-Appellee may argue that the reception area of the Center should be considered a public place and that there is no reasonable expectation of privacy.

28. *Id.*

29. R. at 2.

Plaintiff-Appellant may argue that the remaining pictures taken during a clinical session invaded Ramon's privacy in that he had a reasonable expectation that his sessions in an alcohol treatment facility would remain private. Plaintiff-Appellant may argue that the publication of such a fact would be highly offensive to a reasonable person. Defendant-Appellee should argue that the pictures did not in fact depict Plaintiff-Appellant. The faces of those attending the treatment sessions were not visible. Again, while the body shape and clothing appeared to be that of Plaintiff-Appellant, Defendant-Appellee should argue that mere conjecture on what the pictures show is not sufficient to meet the burden of proof required to maintain an action for public disclosure of private facts.

In *Doe*, the Plaintiff-Appellants 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." *Doe*, 536 N.W.2d at 829. They alleged further that the publicity was highly offensive and was deliberately calculated to embarrass and humiliate them. *Id.* 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. *Id.* Plaintiff-Appellant will argue that when compared to the case at hand it is clear the "highly offensive" element is met. Similar to *Doe*, the Plaintiff-Appellant Ramon clearly intended to keep his alcohol problems private and confidential. He had told no one besides his wife of his problem. Moreover, as in *Doe*, the publication in the case at hand also was deliberately calculated to embarrass the Plaintiff-Appellant and his family.

Plaintiff-Appellant may also analogize between an abortion and checking into alcohol rehabilitation as both are confidential personal choices. Neither concerns the public, nor do they need public approval. 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. *Swickard v. Wayne County Med. Examr.*, 438 Mich 536, 560 (Mich. 1991). As illustrated by the courts in *Doe* and in *Swickard*, publication of these personal choices can be highly offensive, which can in turn lead to a successful invasion of privacy claim. *Id.*; *Doe*, 536 N.W.2d 824. The protection afforded to a Plaintiff-Appellant's interest in his privacy must be relative to the customs of the time and place, to the occupation of the Plaintiff-Appellant and to the habits of his neighbors and fellow citizens. *Pearson v. Dodd*, 133 U.S. App. D.C. 279, 281 (D.C. 1969).

Defendant-Appellee should argue that Plaintiff-Appellant's analogy to the emotionally charged issue of abortion rights is not proper in this instance. There is no stigma attached to a person who recognizes the

need for treatment for substance abuse. In addition, Plaintiff-Appellant's right to privacy is not absolute. He has injected himself into the debate concerning alcohol abuse through his participation as president in "Families for Families." Because of his role in that organization, he is a public figure when it comes to alcohol treatment.

4. *The Publication of the Pictures at Issue Was Not of Public Concern*

The last element is public concern or "newsworthiness." Plaintiff-Appellant must show that the photographs gave publicity to private matters in which the public had no legitimate concern. If the subject matter was of legitimate public concern, there was no invasion of privacy. *Wasser v. San Diego Union*, 191 Cal. App. 3d 1455 (Cal. App. 1987). The public disclosure tort is subject to a newsworthy privilege to protect the First Amendment freedom to report on matters of public concern. *Michaels v. Internet Ent. Group*, 1998 U.S. Dist. LEXIS 20786 19 (C.D. Cal. Sep. 10, 1998). This privilege is not without limit. *Id.* As the Court quoted in the *Michaels* opinion, "[w]here the publicity is so offensive as to constitute a morbid and sensational prying into private lives for its own sake, it serves no legitimate public interest and is not deserving of protection." *Id.* Plaintiff-Appellant has the burden of proof to demonstrate that the matters publicized are not newsworthy, or that the depth of the intrusion in private matters was "in great disproportion to their relevance" to matters of public concern. *Id.*

The issue of "newsworthiness" has never been answered in the State of Marshall, so Appellant must look to other jurisdictions for guidance. The clearest guidance comes from the California Supreme Court which adopted a three-part test for newsworthiness. *Shulman v. Group W Prod.*, 18 Cal. 4th 200 (Cal. 1998). In *Shulman*, newsworthiness is evaluated by balancing the depth of the intrusion against the relevance of the matters broadcast to matters of legitimate public concern. *Id.* The factors to consider include: (1) the social value of the facts published, (2) whether the Plaintiff-Appellant voluntarily became involved in public life, and (3) for private persons involuntarily caught up in events of public interest, whether a substantial relationship or nexus exists between the matters published and matters of legitimate public concern.

Plaintiff-Appellant may argue that there is slight social value, if any, in the pictures taken and published of him at the Center. As stated in *Michaels*, the social value of newsworthiness is not limited to news in the narrow sense of reports of current events. *Michaels*, 1998 U.S. Dist. LEXIS at *25. It extends to names, likenesses or facts giving information to the public for purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published. *Id.* at *26. Ramon may argue that this

broad definition as implied in many decisions including *Michaels* gives deference to the media and newspapers in distributing information, and not to protect publishing that is maliciously done by a private individual. *Id.* at *25. That being said, however, Plaintiff-Appellant may argue that the Web site is not considered part of the media. Moreover, he may argue that this broad definition does not apply to the case at hand because it was published maliciously, and for none of the purposes stated above, other than to embarrass and to destroy Ramon's wife's campaign. There is no social value in something that is merely to embarrass and harass a person. Furthermore, although some may have an interest in these facts, the reasonable person (which is the standard set out above) would not. This publication was of no public concern. Although Plaintiff-Appellant may have had a drinking problem, this problem had not harmed anyone which in turn would have made it a newsworthy issue, just as in the case of a car accident. Moreover, although his wife's congressional race was of public concern, Plaintiff-Appellant had done nothing to help with her campaign. He may point to the *Diaz* decision which states, "[w]here the publicity is so offensive as to constitute a morbid and sensational prying into private lives for its own sake, it serves no legitimate public interest and is not deserving of protection." *Diaz v. Oakland Tribune, Inc.*, 139 Cal. App.3d 118, 126 (Cal. App. 1983).

Plaintiff-Appellant also may address whether he was an involuntary public figure. An involuntary public figure is an individual who has not sought publicity or consented to it, but through his or her own conduct or otherwise have become a legitimate subject of public interest. *Restatement (Second) of Torts* § 652D. Ramon may argue that since he had no involvement with his wife's campaign and stayed out of the public eye, he did not fall under the definition. Furthermore, he may distinguish himself from the examples laid out in the *Restatement* of involuntary public figures, which includes those who commit a crime, victims of a crime, or those who were present when the crime was committed. *Id.* In these situations the public has an interest in the accident, or the crime and these people bear reasonable relation to that accident which the public has an interest in. These types of situations are not comparable to the case at hand.

Ramon may argue that even if he was an involuntary public figure, there was not a substantial relationship or nexus between the matters published and the matters of legitimate public concern. The only arguable matter of public concern was the election which involved his wife, but had nothing to do with him or his private affairs. The photos published nationwide over the Internet depicted Ramon in a private treatment center. His treatment was not associated with his wife's campaign. They did not show him along side his wife during the campaign, nor did they show him drinking at a campaign rally. At best, the photos only

illustrated that Ramon was a person with an alcohol problem, a private fact. Matters concerning a person's medical treatment or condition are generally considered private facts. *Doe*, 536 N.W.2d at 829. Plaintiff-Appellant may cite two cases where the plaintiff was found not to be newsworthy. In the first case, the defendant published the plaintiff's picture in connection with a general story concerning a local fair which was of public concern. *Daily Times Democrat v. Graham*, 276 Ala. 380 (Ala. 1964). Plaintiff had taken her children to the fair, and as they emerged from a "fun house," a jet of air blew her skirt above her waist and exposed her undergarments and legs. *Id.* The court held that this was not an item of legitimate public interest and that the publication of such a picture indecently exposing the plaintiff created a cause of action for the invasion of privacy. *Id.* The second case involved an employee of defendant who was injured on the job. *Lambert v. Dow Chem. Co.*, 215 So. 2d 673 (La. App. 1968). Pictures of his wound taken at the hospital were shown by the defendant company at its safety meetings. *Id.* The court determined that this was not a matter of general public interest and that such publication of the photograph was reasonably calculated to embarrass the plaintiff and constituted a cause of action for an invasion of privacy. *Id.* Thus, Plaintiff-Appellant should argue that publication of his photographs, which bore no relation to a matter of public concern, and which served no legitimate public interest but to pry into his private affairs causing embarrassment and humiliation, constituted an invasion of privacy.

Even if the court were to disagree with the above arguments and find that his medical condition of being an alcoholic was newsworthy, Plaintiff-Appellant may argue that while the ailment may have been a matter of public interest, his identity was not. In *Barber v. Time*, the plaintiff suffered from a physical ailment that was being treated at a public hospital. *Barber v. Time*, 348 Mo. 1199, 1203 (Mo. 1942). The defendants published this information and the plaintiff sued for invasion of privacy, under the theory of publication of private facts. The court held that while the plaintiff's ailment may have been a matter of some public interest, certainly the identity of the person who suffered this ailment was not. *Id.* at 1208. "Whatever the limits of the right to privacy may be, it seems clear that it must include the right to have information . . ." of treatment kept from publication which would state his name in connection therewith without such person's consent. *Id.* at 1208. "Likewise, whatever may be the right of the press . . . in public places, certainly any right of privacy ought to protect a person from publication of a picture taken without consent while ill . . ." and receiving treatment. *Id.* at 1208. Ramon suffered from alcoholism. Although this disease may be of public interest, his identity as found in the case above was not.

Defendant-Appellee may argue that even if Plaintiff-Appellant Ramon can prove all the elements of an invasion of privacy claim, his claim is still unfounded because he was a public figure. In accord with the *Restatement*, which the State of Marshall has adopted, "[o]ne who voluntarily places himself in the public eye, by engaging in public activities, or by assuming a prominent role in institutions or activities having general economic, cultural, social or similar public interest . . . cannot complain when he is given publicity that he has sought, even though it may be unfavorable to him." *Restatement (Second) of Torts* §652D. In such a case, the legitimate interest of the public in the individual may extend beyond those matters which are themselves made public, and to some reasonable extent, may include information as to matters that would otherwise be private. *Id.*

If found to be a public figure, Plaintiff-Appellant may argue that his status as a public figure was in the past, thus he is no longer a public figure based upon the record that he is a very private person that infrequently makes public appearances with his wife.[30] This claim is without merit. Once a person becomes a public figure, the person always remains a public figure. *Werner v. Times Mirror Co.*, 193 Cal. App. 2d 111 (Cal. App. 1961). Moreover, as noted by Prosser, there can be no doubt that a function of the press is that of education or reminding the public as to past history, and the recall of public figures. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 418. Thus, although Plaintiff-Appellant may to keep private and to himself, his status as a public figure remains a legitimate recall to the public mind to the end of his days. *Werner*, 193 Cal. App. 2d at 117-118.

Even if Ramon was not a voluntary public figure, Defendant-Appellee may argue that Plaintiff-Appellant Ramon was an involuntary public figure. As the *Restatement* illustrates, there are individuals who have neither sought publicity nor consented to it, but through their own conduct or otherwise have become a legitimate subject of public interest. *Restatement (Second) of Torts* § 652D. The Center should stress the facts in the record that support such a finding. First, Ramon on his own was the president of a group that advocates a controversial subject, abstinence from drinking.[31] Second, his wife, during her campaign ran on a platform advocating abstinence from drinking, putting the issue of abstinence into the public spotlight.[32] Last, his wife was a multi-millionaire who was well known in the State of Marshall, and who ran a very successful publishing business.[33] These facts combine to make Plaintiff-Ap-

30. R. at 4.
31. R. at 2.
32. R. at 3.
33. R. at 2.

pellant Ramon an involuntary public figure.

Involuntary public figures are regarded as properly subject to the public interest, and publishers are permitted to satisfy the curiosity of the public as to its heroes, leaders, villains, victims and those who are closely associated with them. *Virgil v. Time*, 527 F.2d 1122, 1129 (9th Cir. 1975). Plaintiff-Appellant Ramon was married to a multi-millionaire, who was running for a Congressional seat. The public definitely had an interest in her, just as they would have an interest in a millionaire running for the presidency. Moreover, the public also had a public interest in Ramon, her husband, because he was closely associated with her. As in the case of the voluntary public figure, the authorized publicity is not limited to the event that itself arouses the public interest, and to some reasonable extent includes publicity given to facts about the individual that would otherwise be purely private. *Id.* The election was without a doubt a matter of public concern. A focus in the campaign was on the Prohibition of alcohol. Furthermore, Ramon was the president of a controversial group that advocated this issue. Due to his wife's involvement in the congressional race, and the platform that she ran under, Defendant-Appellee should argue that this issue was of public concern due to the nexus between the information. Not only did the public have an interest due to Ramon's wife's campaign platform, it also had an interest because Ramon was a member and president of this local group which advocated the Prohibition of alcohol.

5. *Additional Policy Considerations*

Plaintiff-Appellant Ramon further may argue that, as a matter of public policy, facts that illustrate medical treatment should be kept private, and publication of those facts without consent or waiver is an invasion of privacy. He should stress that one of the major objectives of society is rehabilitation. *Melvin v. Reid*, 112 Cal. App. 285, 292 (Cal. App. 1931). Under these theories of sociology it is our objective to lift up and sustain the unfortunate rather than to tear them down. *Id.* Where a person has rehabilitated by their own efforts, as in the case at hand, society should permit them to continue in the path of rectitude rather than throw them back into a life of shame or crime. *Id.* If the publication of these photos is allowed, it may severely call into question the mores of our society, and the basis of the privacy torts. If this court allows photos that were taken in private and presumably confidential settings to be published nationwide, it will deter people from seeking treatment for their problems. If people do not receive treatment, for problems such as alcoholism, because they fear that the community will find out, this will lead to numerous other problems our society for years has been trying to deter, such as more drinking and driving accidents, more hospitalizations, and more familial problems.

Defendant-Appellee may argue that the correct policy to follow is one where alcoholism is not considered a stigma, but a disease to be treated as any other diseases. For the public to know that even persons in high public places have family members who suffer from, and seek treatment for alcoholism would encourage, not discourage, persons to seek treatment. Moreover, as a policy, candidates and their families are subject to intense public scrutiny when their public positions run counter to their private actions. This is especially important in this case since Plaintiff-Appellant himself publicly espoused the evils of alcoholism while hiding his own alcoholism from the public.

B. Vicarious Liability as a Threshold Issue

Plaintiff-Appellant Ramon should also address the issue of whether Lee D. Gordon's posting of the pictures made the Defendant-Appellee Center liable for Gordon's actions. The State of Marshall statute states that it is "one who gives publicity to a matter" is liable. If Gordon was not an agent of the Center, then there is a question whether this threshold issue is met.

Under the theory of respondeat superior or vicarious liability, an employer can be held liable for the torts of his employee if: (1) the tortious conduct of the employee is within the scope of employment, (2) the employee acted within the scope of apparent authority, or (3) the employer authorized or ratified the employee's tortious acts. *Restatement (Second) of Agency* §§ 215, 218, 219 (1958).

In general, an employee's conduct is within the scope of employment if it is of a type the employee is hired to perform, it occurs within the authorized limits of time and space, and is motivated, at least in part, by a desire to serve the employer. *Id.* § 219. Courts use primarily two approaches when determining whether vicarious liability applies. The critical element in the first approach is the employee's motivation. The other factors are important, but not essential to finding the employer vicariously liable. *Rodriguez v. Sarabyn*, 129 F.3d 760 (5th Cir. 1997). Under the second methodology, courts use a totality of circumstances approach. Liability is imposed if the employee's tortious conduct is closely related in time, place, and causation to the employee's normal duties. The motivation of the employee is relevant, but not determinative. *Samuels v. S. Baptist Hosp.*, 594 So. 2d 571 (La. App. 1992).

A separate theory of vicarious liability derives from the authorization of the employee's tortious conduct by an employer. Unlike the scope of employment theory of vicarious liability, the employer must have actual knowledge of the tortious act. To succeed on a claim of employer authorization, a Plaintiff must prove that the employer knew about the act ahead of time and either specifically authorized it or failed to take

adequate measures to prevent the act from occurring. *Plains Resources, Inc. v. Gable*, 682 P.2d 653 (Kan. 1984).

Plaintiff-Appellant Ramon may argue that Gordon acted within the scope of his employment when he obtained the photographs from another patient. Gordon was employed as a nurse's aide,[34] Gordon had contact with patients and patient records, and such contact was a normal part of Gordon's daily routine. Ramon can argue that courts are very lenient when assessing whether conduct is of a type and within the course of employment. *See e.g.*, *Burns v. Mayer*, 175 F. Supp. 2d 1259, 1266-67 (D. Nev. 2001) (finding a hotel vicariously liable for sexual harassment when several male cooks flicked grease on a female employee, hit her on the buttocks with a bag of French fries, and made lewd gestures with sausages). The court in *Burns* found that the conduct that occurred during normal work hours "fell within the scope of the tasks assigned to the employees." *Id.* at 1267. In addition, Ramon can assert that Gordon's motivation for attempting to discredit Betty was motivated, at least in part, by an attempt to keep the Center in the business of alcohol treatment. Gordon's fear that he would be unemployed if Betty succeeded in reinstituting Prohibition stemmed for his belief that the Center would close.[35] In *Plains Resources*, the court held that an employer could be held liable for an employee's sabotage of an oil well if the employee thought the act furthered his employer's business. *Plains Resources*, 682 P.2d at 660-661. In addition, that court, along with others, found that liability for an employee's tortious acts can be imputed to the employer if the acts could be "fairly foreseen from the nature of the employment and the duties relating to it." *Id.* Ramon can argue that Gordon had access to personal confidential information as a part of his normal duties; Gordon expressed a dislike for Betty and her family; Gordon felt threatened by Betty and her policies; Gordon thought that someone "must do something to derail Betty's campaign;" Gordon was a known photographer and Web site developer; and the Center knew or should have known of these facts.[36] Ramon can assert that the Center should have foreseen that Gordon would take some action. As in *Doe v. Community Health Plan*, 268 A.D.2d 183 (N.Y. App. Div. 2000), Ramon can argue that the Center had a particular duty to protect patient confidences under a statute.[37] In *Doe*, the court held that a breach of patient confidentiality by an employee makes the medical provider directly responsible. *Id.* at 187 (stating that "to hold otherwise would render meaningless the imposition of such a duty on a medical corporation").

34. R. at 5.

35. R. at 5.

36. *Id.*

37. *Medical Privacy Act*, 750 Marshall Stat. 58/7.16; R. at 6.

Defendant-Appellee may rebut Plaintiff-Appellant by arguing that it is not liable for the posting of the photographs because Gordon acted entirely outside the scope of his employment *Restatement (Second) of Agency* § 228. Defendant-Appellee Center will contend that the posting of the photographs on a private Web site was not the type or kind of act consistent or incidental with Gordon's position as a nurse's aide.[38] The Center also will argue that even if Gordon received the photographs during his normal working hours, Gordon created and maintained his Web site outside the normal time and space of his employment.[39] In any case, Defendant-Appellee will argue that Gordon's motivation for posting the photographs was entirely personal and in no way beneficial to the Center. The Center will show that Gordon had personal animosity towards Betty and that Gordon feared he would lose his job if Betty successfully reinstituted Prohibition.[40] The Center may cite a variety of cases holding that an employer is not vicariously liable for the disclosure of confidential information by an employee outside the scope of employment. In *Anderson v. Toeppe*, 688 N.E.2d 538 (Ohio App. 1996), a hotel clerk who was the past president of Mothers Against Drunk Driving ("MADD") wrote a letter to the employer of three hotel guests informing the guests' employer that the employees were highly intoxicated when they drove up to the hotel entrance. The court held that even though the clerk obtained confidential information during the course of her employment, the hotel had no liability for acts that didn't promote the employer's business. *Id.* at 437. In *Foster v. Hillcrest Baptist Med. Ctr.*, 2004 Tex. App. LEXIS 1448 (Feb. 11, 2004), a radiology employee removed medical records concerning a patient who had been treated at the hospital after an assault. The employee took the medical file home to show to the person accused of the assault. The court held that the employee's conduct was outside the scope of her general authority and the removal of the records did not "accomplish an object for which she was hired." *Id.* at 11.

Further, Defendant-Appellee Center may argue that it never authorized any photographs of Plaintiff-Appellant Ramon.[41] In fact, the Center specifically had a written patient privacy policy that barred the release of any medical records without written authorization of the patient.[42] The Center will also argue that it had a prominently posted sign that prohibited the taking of photographs inside the Center.[43] In addition, the Center will argue that it neither authorized nor ratified

38. R. at 5.
39. *Id*
40. *Id.*
41. *Id.*
42. R. at 4.
43. *Id.*

Gordon's conduct. In fact, the Center terminated Gordon as soon as the pictures were posted on the Web site.[44] In *Harrington v. Chi. Sun-Times*, 150 Ill. App. 3d 797, 804 (Ill. App. 1986), the court held a newspaper publisher was not vicariously liable for the shooting death of a third-party by one of the newspapers delivery truck drivers. The court found that, even if some supervisors knew that drivers carried guns, the newspaper had a policy strictly prohibiting them. *Id.* The court held that an employers "toleration of such a practice . . . does not create agency." *Id.*

C. Did the Court of Appeals Err in Finding that a State Medical Privacy Statute Fell Under an Exemption under HIPAA to Prevent the Disclosure of Medical Information Pursuant to a Proper Subpoena?

The First District Court of Appeals of the State of Marshall affirmed the trial court's quashing of the Plaintiff-Appellant's subpoena of the identity and medical records of a third party who was treated in the Defendant-Appellee's alcohol abuse treatment center.[45] In so doing, the Court of Appeals held that the standard for disclosure of this information was controlled by the State of Marshall's *Medical Privacy Act*, 210 Marshall Stat. 85/6.17, which only permits disclosure of such information under circumstances inapplicable to the present action, rather than the standards set forth in the *Health Insurance Portability and Accountability Act of 1996*, Pub. L. No. 104-191, §§ 261-264, 110 Stat. 1936 (Aug. 21, 1996), which would permit the disclosure of the third party information sought in the present action "in response to an order of the court." 45 C.F.R. § 164.512(e)(1)(i). The Court of Appeals concluded that this was correct based on the preemption scheme contained in HIPAA, which dictates that HIPAA will only preempt state medical privacy laws which are "contrary" to HIPAA and not "more stringent" than HIPAA itself. Opinion p. 11 citing HIPAA § 264, 42 U.S.C. § 1320 d-2 note. The Court of Appeals concluded that the Marshall *Medical Privacy Act* was "more stringent" than HIPAA because "HIPAA would allow for the disclosure of [the third party's] identity and medical information pursuant to a subpoena" while the Marshall statute "does not provide for such disclosure."[46]

The Defendant-Appellee may argue that the Court of Appeals did not err in affirming the trial court's quashing of the Plaintiff-Appellant's subpoena of the third party's information from the Defendant-Appellee's alcohol treatment center, citing a Northern District of Illinois opinion decided in February 2004. In *Natl. Abortion Fedn. v. Ashcroft*, 2004 U.S.

44. R. at 5.
45. R. at 13.
46. R. at 12.

Dist. LEXIS 1701 (N.D. Ill., Feb. 6, 2004), a case involving a constitutional challenge to the *Partial Birth Abortion Act of 2003*, 18 U.S.C. § 1531, Chief Judge Charles Kocoras quashed the government's subpoena of the redacted third party medical records of certain individuals who received abortions from an expert witness who was set to testify in the case. The value of these records to the government was in the possibility of finding "impeachment material." *Id.* at *3. In considering the applicability of HIPAA and the medical privacy law of the forum state, Illinois, Judge Kocoras noted that "HIPAA's preemption over state medical privacy laws is not absolute, as HIPAA and its subsequent regulations do not preempt state law if the state law is 'contrary' to HIPAA and 'relates to the privacy of individually identifiable health information' such as patient medical records." *Id.* at **7-8. Using this as a framework of the interplay of state and federal law contained in HIPAA, Judge Kocoras concluded that Illinois medical privacy laws were not "contrary" to HIPAA and were "more stringent" than HIPAA's disclosure requirements because Illinois law would not have permitted disclosures of the sought information while HIPAA would have. *Id.* at *12. Thus, the Illinois medical privacy law was not preempted by HIPAA. Consequently, the Illinois medical privacy laws provided the standard for disclosure of the information, not HIPAA.

The Defendant-Appellee may argue that the present case provides an even stronger case for application of Marshall's *Medical Privacy Act* rather than HIPAA. As in *Natl. Abortion Fedn.*, the state law at issue here is clearly not "contrary" to HIPAA and is "more stringent" in its standard for disclosure of medical information than HIPAA. A state law is contrary to HIPAA and its regulations if a "covered entity would find it impossible to comply with both State and federal requirements." 45 C.F.R. § 160.202. Marshall's *Medical Privacy Act* is clearly "contrary" to HIPAA because HIPAA would permit covered entities to disclose medical information under circumstances that would be precluded under Marshall's *Medical Privacy Act*. In other words, a covered entity could not comply with both a court order under HIPAA to disclose medical information and Marshall's requirement that such information only be disclosed to certain enumerated parties.

A state medical privacy law is "more stringent" than HIPAA if the state law "prohibits or restricts a use or disclosure in circumstances under which such use or disclosure would be permitted" under HIPAA. 45 C.F.R. § 160.202. HIPAA would permit the disclosure of the information sought in this case if released "in response to an order of the court." *See* 45 C.F.R. § 164.512(e)(1)(i). Marshall's *Medical Privacy Act* clearly would not permit disclosure. *See* 210 Marshall Stat. 85/6.17. Thus, under the reasoning of *Natl. Abortion Fedn.* and the plain language of

HIPAA, Marshall's *Medical Privacy Act* is a "more stringent" law and, consequently, not preempted by HIPAA.

Other cases are in accord, as well. *Natl. Abortion Fedn.* was taken up on appeal and affirmed by the Seventh Circuit Court of Appeals in *Northwestern Meml. Hosp. v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004). Judge Posner, writing for the majority, noted that, while "HIPAA regulations do not impose [state medical privacy law standards] on suits to enforce federal law," Illinois was "free to enforce its more stringent [medical privacy law] in suits in state court to enforce state law and . . . in suits in federal court . . . in which state law supplies the rule of decision." *Id.* at 925. The present case is in accord with Judge Posner's view as this is a suit to enforce state law in a state court where the law of the State of Marshall supplies the rule of decision. See also *Law v. Zuckerman*, 307 F. Supp. 2d 705 (S.D. Md. 2004) (holding in a federal case in which jurisdiction was based on diversity of citizenship that HIPAA preempted Maryland Confidentiality of Records Act because HIPAA was "more stringent" than the state law). Consequently, Defendant-Appellee may argue that the holding of the First District Court of Appeals for the State of Marshall affirming the trial court's quashing of Plaintiff-Appellant's subpoena of third party medical information from Defendant-Appellee's alcohol abuse treatment center was not in error.

On the other hand, Plaintiff-Appellant may argue that the State of Marshall statute is over-broad in that it prohibits providing relevant and material information about a defendant. If medical information is what the statute is designed to protect, Plaintiff-Appellant should be entitled to at least the name of the patient especially in an instance where there is no other way to obtain his or her identity.

Plaintiff-Appellant also may argue that the Marshall statute is not "more stringent" as the term is defined. It is possible for the covered entity to comply with both the state and federal requirements simply by providing that the medial information be turned over pursuant to a protective order.

D. Procedural Issues Involving Issuing of a Subpoena

An issue that may be raised, but is not required or expected to be raised, is whether the Court abused its discretion by failing to issue the subpoena in some form. This is not the case where the information is sought about a third party's medical records but rather the information is sought to determine the identity of an alleged tortfeasor and defendant.

In Illinois, under S. Ct. R. 224, a person is entitled to file a case solely limited to identifying parties and entities "who may be responsible in damages." Certainly the request for the name of John Doe would fall

under this rule. Thus, Plaintiff-Appellant could argue that even if HIPAA applies to the medical records requested, the Court abused its discretion by not limiting the subpoena to require the Center to identify by name the patient who took the pictures.

Conversely, Defendant-Appellee may argue that Plaintiff-Appellant's request was overly broad. If Plaintiff-Appellant wanted the name of John Doe, he could have either filed a separate lawsuit using S. Ct. R. 224 or he could have limited the subpoena to obtain the identity of the patient without the request for medical information.

Further, Defendant-Appellee will argue that the Marshall statute does not grant an exception to the rule to allow for discovery of the name of a potential defendant. If the legislature wanted such an exception, it could easily have included one in the statute.

BRIEF FOR THE PETITIONER

No. 04-CV-0306

IN THE
SUPREME COURT OF MARSHALL
October Term 2004

RAMON JACQUES,
Petitioner,
v.
GRAND OUT PATIENT CENTER,
Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS
OF MARSHALL

BRIEF FOR PETITIONER

Ryan Dry
Angela Hamilton
Jason Newman
Attorneys for Petitioner

QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT THE PUBLIC DISCLOSURE BY A REHABILITATION CENTER OF THE PRIVATE FACT OF A PATIENT'S TREATMENT CONSTITUTES AN INVASION OF PRIVACY BY THE PUBLICATION OF PRIVATE FACTS.

II. WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT A STATE MEDICAL PRIVACY STATUTE PREEMPTS HIPAA AND PREVENTS THE LIMITED DISCLOSURE OF JOHN DOE'S MEDICAL INFORMATION PURSUANT TO A SUBPOENA AND WELL-CRAFTED PROTECTIVE ORDER.

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TO THE HONORABLE SUPREME COURT OF THE STATE OF MARSHALL:

Appellant, Ramon Jacques, respectfully submits this brief in support of his request for affirmance in part and reversal in part of the judgment of the court of appeals below.

OPINIONS BELOW

The opinion and order of the Whitewater County Circuit Court is unreported. The opinion and order of the First District Court of Appeals of the State of Marshall is also unreported and is set out in the record. (R. at 1–13.)

STATEMENT OF JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional provision to the determination of this action is: U.S. Const. art. VI, cl. 2. (*See* Appendix A.)

The following statutory provisions are relevant to the determination of this action: 42 U.S.C. § 1320d-7 (2002); Marshall Revised Code § 562(B); 210 Marshall Stat. 85/6.17. (*See* Appendix B.) Likewise, the following federal regulation is relevant to the determination of this action: 45 C.F.R. § 164.512 (2002). (*See* Appendix C.)

STATEMENT OF THE CASE

I. SUMMARY OF THE FACTS

Ramon Jacques privately struggled with alcoholism for years. (R. at 4.) In the winter of 2001, Mr. Jacques made the difficult decision to seek treatment and checked into the Grand Out Patient Center ("the Center"), a rehabilitation hospital for alcohol and drug abusers. (R. at 3.) Known as a very private person, Mr. Jacques entered treatment with the understanding that his medical records would not be released and that no pictures would be taken of him during treatment. (R. at 4.) The Center's policy posted at the entrance, clearly visible to Mr. Jacques and other patients, stated that "[t]he use of cell phones and the taking of any pictures are strictly prohibited inside this facility." (R. at 5.)

Unknown to Mr. Jacques, another Center patient had plans to disregard this policy. Sometime during the months of February and March

2001, that patient, John Doe, took a number of digital photographs of Mr. Jacques in treatment. (R. at 5.) These photographs eventually became well-known throughout Whitewater County due to their publication on the Internet by Center employee Lee D. Gordon. (R. at 3, 5.)

Gordon worked at the Center as a nurse's aide for three years, despite the fact that he had been charged with burglary ten years before and pled guilty to unlawful trespass after breaking into the campaign headquarters of the Crocker Party. (R. at 5–6.) Even though the Center warned applicants that it would carefully screen the answers of potential employees, the Center failed to catch Gordon's deception regarding his prior criminal behavior. (R. at 6.) As his supervisor knew and Mr. Jacques would soon learn, Gordon had a personal vendetta against Mr. Jacques' wife. (R. at 5.)

While Mr. Jacques was in treatment, his wife, Betty, was seeking election to an open congressional seat on the Crocker Party ticket, the same party whose campaign headquarters Gordon broke into. (R. at 2.) Mrs. Jacques was popular in Whitewater County and easily won the primary election in March 2002. (R. at 2–3.) Running on a platform of family values and the reinstitution of Prohibition, Mrs. Jacques was leading in the polls to win the fall election. (R. at 3.) Gordon wanted to derail her successful campaign to secure the need for alcohol and drug rehabilitation, thus ensuring business for the Center and a job for himself. (R. at 5.) He made his agenda known to his coworkers, who in turn informed Gordon's supervisor. (R. at 5.) Only after he carried out his plan to derail Mrs. Jacques' campaign did the Center fire Gordon. (R. at 5.)

In July of 2002, after the primary but before the fall election, both Mrs. Jacques and the *Daily Whitewater Reporter* discovered the photographs Gordon posted of Mr. Jacques on the Internet at http://www.drunkenhusband.com. (R. at 3.) Gordon's Website showed Mr. Jacques in treatment, along with a caption declaring "Betty's husband, Ramon, is pictured here entering the Grand Out Patient Center, a well known facility for treating alcoholics." (R. at App. 1). The *Daily Whitewater Reporter* put the story on the front page and the fact of Mr. Jacques' treatment spread throughout Whitewater County. (R. at 3.) Mrs. Jacques, previously a shoe-in for the congressional seat, lost the fall election by a wide margin because of the widespread publication of the photos by Gordon. (R. at 3.)

Not only was Mr. Jacques devastated by the Center's breach of confidence, he became distraught over the revelation and required medical treatment for severe depression. (R. at 3.) Mr. Jacques had spent his life avoiding the public eye. Though he served as president of "Families for Families," Mr. Jacques stayed out of Mrs. Jacques' campaign literature and never appeared in a campaign advertisement. (R. at 4.)

As a part of normal admission procedures, the Center required each patient, including Ramon Jacques and the unnamed John Doe, to sign a medical release form before being admitted to treatment. (R. at 4.) Each patient also received a copy of the Center's policy regarding patient privacy. (R. at 4.) That policy stated in part that "all medical records shall remain strictly confidential." (R. at 5.) Patients entering the Center were also notified that they were not to use cell phones or take pictures inside the facility. (R. at 5.) Both Gordon and John Doe disregarded these policies when they acted together to publish photographs of Mr. Jacques in treatment. (R. at 5.)

II. Summary of the Proceedings

This action was originally brought in the Whitewater County Circuit Court in the State of Marshall. (R. at 1.) Ramon Jacques filed suit in December 2002, naming one count for invasion of privacy by public disclosure of private facts. (R. at 6.) The complaint named both the Center and John Doe as defendants. (R. at 6.) Mr. Jacques also issued a subpoena to the Center requesting information that would lead to the identity of John Doe, the patient who took the photographs of Mr. Jacques. (R. at 6.)

The Center moved for summary judgment on the invasion of privacy claim as well as to quash the subpoena. The Whitewater County Circuit Court filed separate orders granting summary judgment in favor of the Center and granting the request to quash the subpoena. (R. at 1.) Upon Mr. Jacques' motion, John Doe was voluntarily dismissed from the suit with leave to reinstate. (R. at 6.)

The First District Court of Appeals for the State of Marshall reversed the order granting summary judgment but upheld the order to quash the subpoena. (R. at 7.) On August 1, 2004, this Court granted Mr. Jacques leave to appeal the decision of the court of appeals. (R. at 14.) The issues under consideration are whether the Center violated Mr. Jacque's privacy by publishing photographs of him in treatment on the Internet, and whether Marshall state law prevents Mr. Jacques from discovering the identity of John Doe. (R. at 14.)

SUMMARY OF THE ARGUMENT

I.

The Marshall Court of Appeals for the First District correctly held that genuine issues of material fact exist as to whether the Center, through the actions of employee Lee Gordon, invaded Mr. Jacques' privacy through the publication of highly embarrassing private facts. Overwhelming public policy dictates that the decision to seek treatment for

alcoholism remain confidential. Mr. Jacques expected the Center to respect this policy. It did not. Instead, the Center allowed an employee to broadcast the private fact of treatment to the world over the Internet.

The publication of private facts tort requires the determination of numerous fact issues that courts uniformly agree are the province of the jury. Whether Gordon acted within the scope of employment when he broadcast the photographs in an attempt to ensure the Center had steady business is a fact issue for the jury. Whether the publication of Mr. Jacques' treatment would be highly offensive to a reasonable person is a fact issue for the jury. Whether the identity of a treatment center patient is newsworthy and of legitimate public concern is unquestionably a fact issue for the jury.

Absolving a rehabilitation center from liability for publicly disclosing a patient's private facts is in direct contravention of strong public policy. A decision that, as a matter of law, the publication of these photographs is of legitimate public concern is antithetical to numerous federal and state laws protecting the identity of those who seek treatment.

II.

The court of appeals erred when it held that HIPAA requires the application of the Marshall Medical Privacy Act. As federal law, HIPAA preempts state law that stands as an obstacle to the policies of Congress evidenced through the regulations of the Department of Health and Human Services. While HIPAA does allow state law that is both "contrary to" and "more stringent than" HIPAA to escape preemption, the Marshall Medical Privacy Act is not "contrary to" HIPAA regulations. Only those state laws that address an equivalent HIPAA standard are allowed to supplant the federal law.

HIPAA allows the Center to disclose John Doe's identity pursuant to a subpoena or court order. Marshall state law contains no such exception. To construe the Marshall statute's silence regarding this exception, an exception that exists in virtually every state and federal privacy law, would be in direct contravention of clear public policy as evidenced through the HIPAA regulations. Savings clauses are to be construed narrowly when their broad application would interrupt a comprehensive federal regulatory scheme. By allowing the disclosure of John Doe's identity under HIPAA through the use of a well-crafted protective order, this Court can give effect to the clear intent of Congress to balance the need for patient privacy with the need for the pursuit of truth that lies at the heart of the litigation process.

ARGUMENT AND AUTHORITIES

At the heart of this matter lies the juxtaposition of two separate privacy laws. One, the state law private facts tort, exists to protect the right of individuals "to be let alone." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 196 (1890). The other, the Health Insurance Portability and Accountability Act ("HIPAA"), exists to give individuals the right to control the release of personal information regarding "the ailments that afflict us, or the therapy that cures us." Jennifer Guthrie, *Time Is Running Out—The Burdens and Challenges of HIPAA Compliance: A Look at Preemption Analysis, The "Minimum Necessary" Standard, and the Notice of Privacy Practices*, 12 Annals Health L. 143, 143 (2003). These two privacy laws converged when the Center betrayed Ramon Jacques' trust by allowing the release of highly private and embarrassing health information.

Appellee argues that the very right of privacy Ramon Jacques attempts to protect with this suit is the same right of privacy that protects the identity of another patient, the John Doe who took the photographs of Mr. Jacques in treatment. While Mr. Jacques uses the state tort law defensively to protect his privacy right to confidential treatment, the Center attempts to use HIPAA and the Marshall Medical Privacy Act offensively to quash the subpoena that would allow discovery to take place and the search for truth to begin.

A decision for Mr. Jacques is not a significant blow to John Doe's privacy, because his identity can still be protected by a well-crafted protective order, an option that Mr. Jacques fully supports. By rejecting Appellee's argument, this Court can send a clear signal that privacy law should not be perverted to shield a treatment center that betrays the confidence of a patient and, in the face of strong public policy to the contrary, broadcasts to the world one man's highly private decision to seek treatment. *See Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001) (recognizing that Americans have a reasonable expectation of privacy in their medical records).

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE PUBLICATION OF PICTURES OF RAMON JACQUES UNDERGOING TREATMENT FOR ALCOHOL ABUSE IS NOT NEWSWORTHY AND THAT THE PUBLICATION CONSTITUTES THE PUBLIC DISCLOSURE OF A PRIVATE FACT.

In their landmark law review article, Justices Samuel Warren and Louis Brandeis warned that technological advances and their accompanying invasions of privacy have the capacity to subject man to "mental pain and distress, far greater than could be inflicted by mere bodily injury." Warren and Brandeis, *supra*, at 196. It was the communication of

private facts to the world that Justices Warren and Brandeis feared, and there is perhaps no fact more private than a citizen's confidential medical information. *Id.*

Now that the Internet has taken its place alongside television, radio and newspaper as the most common sources of information in modern society, individuals, and not just the media, are able to reach large audiences. While in the past, the overwhelming majority of privacy suits involved media defendants, the parameters of the invasion of privacy tort must change to encompass the situation where nonmedia defendants operating without any professional standards release medical information over the Internet.[1] This is so because, as there are now over 1.4 billion Internet participants worldwide, the widespread publication of secret and potentially embarrassing information can be accomplished by anyone with a home computer. Dorothy Glancy, *At the Intersection of Visible and Invisible Worlds: United States Privacy Law and the Internet*, 16 Santa Clara Computer & High Tech L.J. 357, 382 (2000).

Patient records revealing the most intimate details of our lives are the quintessential type of information in need of protection by privacy law. The United States Supreme Court recognized this when it extended constitutional protection to personal health information. *Whalen v. Roe*, 429 U.S. 589, 605 (1977). For similar reasons, both state and federal lawmakers wrapped a tight cocoon of privacy around medical records, specifically those relating to the treatment for drug and alcohol addiction. *See* 42 U.S.C. § 290dd-2 (2000); 42 C.F.R. §§ 2.11, 2.63–.64 (2002). Protecting patient privacy is critical because, as explained by the First Circuit, "[w]ithout guarantees of confidentiality, many individuals with alcohol problems would be reluctant to participate fully in alcoholism programs." *Whyte v. Conn. Mut. Life Ins. Co.*, 818 F.2d 1005, 1010 (1st Cir. 1987); *see also Chandler v. Cook County, Ill.*, 277 F.3d 969, 981 (7th Cir. 2002); *U.S.s v. Smith*, 789 F.2d 196, 205–06 (3d Cir. 1986).

This Court reviews de novo the decision of the court of appeals. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is appropriate where no genuine issues of material fact exist so that the movant is entitled to judgment as a matter of law. All facts and inferences are taken in the light most favorable to the nonmovant, Mr. Jacques, and summary judgment should only be granted in the unlikely event that there are no genuine issues of material fact. Marshall R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Therefore, if Mr. Jacques presents more than a scintilla of evidence concerning material facts that are in dispute, then summary judgment is improper. *An-*

1. The overwhelming majority of cases involving publication of private facts involve a media defendant. *See, e.g., Cox Broad. Corp v. Cohn*, 420 U.S. 469, 472 (1975); *Virgil v. Time, Inc.*, 527 F.2d 1122, 1129 (9th Cir. 1975).

derson, 477 U.S. at 250. Further, the burden is on the movant, Grand Out Patient Center, to prove that there is an absence of evidence to support the nonmovant's case. *Celotex*, 477 U.S. at 325. For the reasons set forth below, Mr. Jacques has presented numerous genuine issues of material fact. Therefore, the court of appeal's decision reversing the trial court's grant of summary judgment should be affirmed, and the case should be remanded for a trial on the merits.

A. The Center Publicized The Private Fact of Mr. Jacques' Treatment Through the Actions of its Employee, Lee Gordon

The Center is liable for Gordon's actions because (1) he was acting within the scope of his employment and (2) the Center was negligent in its hiring and subsequent retention of Gordon. Although Gordon gave publicity to the photographs, the Center is the named defendant in Mr. Jacques' suit. Thus, in order to establish liability on the part of the Center and survive summary judgment, this Court must, as a threshold matter, determine whether the principles of respondeat superior or negligent hiring and supervision apply. *See Corcoran v. S.W. Bell Tel. Co.*, 572 S.W.2d 212, 215 (Mo. Ct. App. 1978) (finding that an actionable publication does not take place when the disclosure is the result of an unlawful act of someone other than the defendant).

Respondeat superior is the traditional basis for imputing liability for a tort committed by an employee to an employer without fault on the employer's part. *Rosenthal & Co. v. Commodity Futures Trading Commn.*, 802 F.2d 963, 966 (7th Cir. 1986). Even if this Court holds that Gordon was acting outside the course and scope of his employment, the Center is still liable due to its negligent hiring and subsequent retention of Gordon. *Tindall v. Enderle*, 320 N.E.2d 764, 767 (Ind. Ct. App. 1974). Courts uniformly agree that whether Gordon was acting within the scope of employment under the doctrine of respondeat superior is a question of fact for the jury. *See Prince v. St. Francis–St. George Hosp., Inc.*, 484 N.E. 2d 265, 269 (Ohio Ct. App. 1985) (finding that under doctrine of respondeat superior, a physician's employer could be liable for the invasion of a patient's right of privacy which occurred when the physician allegedly published private information about the patient's alcoholism); *see also St. Paul Fire & Marine Ins. Co. v. Downs*, 617 N.E.2d 338, 391–2 (Ill. App. Ct. 1993).

1. *Gordon was acting within the course and scope of his employment because he posted the photographs to benefit the Center.*

A prima facie case in a respondeat superior action to recover from the employer for the intentional tort of an employee requires proof: (1) of the underlying tort committed by the employee; (2) that the tortfeasor

was a bona fide employee of the defendant; and (3) that the tortfeasor was acting within the "scope of employment" when the tort was committed. *See* Lauren Krohn, *Cause of Action Against Employer to Recover Under Doctrine of Respondeat Superior for Intentional Torts Committed by Employee*, 17 Causes of Action 647 (2004). Because Mr. Jacques stated sufficient facts to sustain a cause of action for invasion of privacy, and because it is undisputed that Mr. Gordon was an employee of the Center, it is the third element, "scope of employment," that is the only element at issue here.

Courts apply several factors to decide whether an employee acts within the scope of employment, including: (1) the extent to which the employee-tortfeasor was motivated by a desire to serve the employer in engaging in the tortious conduct; (2) whether the tortious conduct was committed during the time the employee was on duty; (3) whether the tortious conduct was committed while the employee was on the employer's premises or on premises where the employee's duties would naturally cause the employee to go; and (4) the extent to which the impetus for the tortious conduct was causally related to the tortfeasor's employment. *See generally* Restatement (Second) of Agency § 229 (1958).[2] The employee–tortfeasor's subjective motivation to serve the employer is the critical element in finding that the employee was acting within the scope of his or her employment when the tort was committed. *See, e.g., Stoot v. D & D Catering Serv. Inc.*, 807 F.2d 1197, 1200 (5th Cir. 1987).

It is undisputed that Gordon was motivated to post the photographs, in part, by a desire to benefit the Center. (R. at 5.) To find an employer liable under respondeat superior, the prospective benefit to the employer need not be great in order to show that the employee-tortfeasor was motivated by a desire to serve the employer. *See Fogg v. Lott*, 444 So. 2d 177, 179 (La. Ct. App. 1983) (finding a benefit to the employer where a bouncer violently ejected a patron for the violation of the establishment dress code and the ejection enhanced the bar's image); *see also Lancaster v Norfolk & W. Ry. Co.*, 773 F.2d 807, 820 (7th Cir. 1985). By making sure Prohibition did not derail the Center's business, Gordon acted to benefit the Center. (R. at 5.)

Appellee argued below that Gordon's publication of private medical information was not connected with his employment. (R. at 7.) Yet in this matter, genuine issues of material fact exist as to when the photographs were posted on the Internet. The record is silent as to whether

2. *See also Stoot v. D & D Catering Serv., Inc.*, 807 F.2d 1197 (5th Cir. 1987); *Gonpere Corp. v. Rebull,* 440 So. 2d 1307 (Fla Ct. App. 1983); *Rubin v. Yellow Cab Co.*, 507 N.E.2d 114 (Ill. App. Ct. 1987); *Burch v. A & G Assocs., Inc.*, 333 N.W.2d 140 (Mich. Ct. App. 1983); *Taylor v. Drs. Hosp.*, 486 N.E.2d 1249 (Ohio Ct. App. 1985); *Condict v. Condict*, 664 P. 2d 131 (Wyo. 1983).

Gordon posted the pictures on the Internet while he was "on the clock." Under the summary judgment standard of review, this Court should resolve all inferences and fact issues in favor of Mr. Jacques and assume that Gordon posted the pictures while at work. *See Anderson,* 477 U.S. at 250.

Furthermore, where an intentional tort is committed by an employee, liability attaches to the employer if it was foreseeable that the tort could be committed. *See Doe v. Samaritan Counseling Ctr.*, 791 P.2d 344, 348 (Alaska 1990). Section 245 of the Restatement (Second) of Agency provides that a master is subject to liability for the intended tortious harm caused by an employee, even though the act was unauthorized, if the act was not unexpectable in view of the employee's duties. *See* Restatement (Second) Agency § 245 (1958). In this instance, Gordon's supervisor knew that Gordon had access to confidential medical information and was bent on derailing Mrs. Jacques' campaign. (R. at 5.) At the very least, this raises a genuine issue of material fact as to whether it was foreseeable that an employee who had been charged with burglary might use confidential information to further his well-known vendetta against the former spouse of a patient. (R. at 5, 10.)

2. *The Center is liable for the tortious publication of the fact of treatment due to its own negligent hiring and supervision of Gordon.*

Even if this Court finds that Gordon was acting outside the course and scope of his employment, the Center is still liable due to its negligent hiring and supervision of Gordon. The Center had a clear duty to protect patient privacy, as evidenced by its own policy regarding the confidentiality of patient records. (R. at 4.) Yet the Center hired Gordon without properly investigating his background and then failed to properly supervise him after being notified of his personal vendetta with the Jacques. (R. at 5.)

a. The Center was negligent in its background check and hiring of Gordon.

The Center breached its duty to ensure Mr. Jacques' privacy by not performing a thorough background check of Gordon. While generally, the Center recognized the importance of careful background checks for potential employees, in this instance it failed to follow its own policy. (R. at 6.)

An employer breaches its duty when it fails to conduct a proper background check prior to hiring. *See Broderick v. King's Way Assembly of God Church*, 808 P.2d 1211, 1221 (Alaska 1991) (holding that a question of fact existed with respect to negligent hiring where a church hired

an employee without an interview or background check); *see also J. v. Victory Tabernacle Baptist Church*, 372 S.E.2d 391, 394 (Va. 1988); *McLean v. Kirby Co. Div. of Scott Fetzer Co.*, 490 N.W. 2d 229, 238 (N.D. 1992). In this matter, Gordon had previously been charged with burglary for his part in breaking into the campaign headquarters of a political party. (R. at 5.) The story was highly publicized and a background check would have no doubt revealed Gordon's past. (R. at 5.) The Center, however, conducted no such background investigation of Gordon prior to hiring him. (R. at 5.) It is axiomatic that a treatment center must hire employees that will respect patient privacy. Because the Center failed to properly conduct an investigation into Gordon's past, the Center should be found liable for Gordon's actions.

At the very least, whether the Center breached its duty to properly hire and supervise employees trusted with patient privacy presents an issue of fact for the jury. A Washington court was faced with this same issue in *Carlsen v. Wackenhut Corp.*, 868 P.2d 882, 883 (Wash. Ct. App. 1994). In *Carlsen*, a young woman sued a corporation after one of its employees attempted to rape her. *Id.* The court upheld the denial of summary judgment because the employee had a criminal record and a trier of fact could find that the corporation was liable for not performing a thorough background investigation on its employees. *Id.* at 887–88. As in *Carlsen*, summary judgment was properly denied in the present case as well.

b. The Center negligently supervised and retained Gordon after receiving notice of his improprieties.

The Center further breached its duty to ensure Mr. Jacques' privacy by not taking the proper precautions with Gordon after being notified of his grudge against Mrs. Jacques. In addition to negligent hiring, a breach of duty may be shown by evidence that the employer retained an employee that it knew was unsuited for a particular position. *See Carney v. Roberts Inv. Co.*, 837 S.W.2d 206, 208–9 (Tex. App. 1992) (finding a trucking company in breach of its duty since the company negligently hired and retained a driver the company knew was unsuited for his position by virtue of his poor eyesight and his previous recent firing due to too many accidents); *see also Cutter v. Farmington*, 498 A.2d 316, 320 (N.H. 1985); *Harvey Freeman & Sons, Inc. v. Stanley*, 375 S.E.2d 261 (Ga. 1988), *aff'd in part and rev'd in part on other grounds*, 378 S.E. 2d 857 (Ga. 1989). Knowledge of an employee's unfitness for a particular job can be either actual or constructive. *Hunter v. Allis-Chalmers Corp. Engine Div.*, 797 F.2d 1417, 1422 (7th Cir. 1986).

Here, the employer had actual notice. Gordon's coworkers notified his supervisor that Gordon wished to disrupt and harm Mrs. Jacques'

campaign. (R. at 5.) After receiving this information, the Center failed to warn Gordon or closely monitor the situation. (R. at 5.) Instead, it allowed Gordon to continue working in close proximity with Mrs. Jacques' husband. (R. at 5.) As explained by the Kansas Supreme Court in *Plains Resources, Inc. v. Gable*, 682 P.2d 653, 665–7 (Kan. 1984), employers have a duty to supervise their employees closely once put on notice of the potential for wrongdoing. The court in *Plains* held that a drilling company breached its duty to hire and retain safe employees after it was placed on notice that an employee intended to sabotage an oil well and did nothing to prevent the employee's conduct. *Id.* Similar facts are before this Court today. The Center knew of Gordon's intentions and did nothing to deter him from acting on them. (R. at 5.) As in *Plains*, this Court should find that the Center breached a clear duty to properly hire and supervise an employee trusted with patient privacy and hold it accountable for the acts of Gordon.

B. The Center Violated The Publicity Given To Private Facts Tort By Publishing The Confidential Private Fact Of Mr. Jacques' Treatment.

The State of Marshall's statute for invasion of privacy, publicity given to private facts, follows the Restatement (Second) of Torts. (R. at 7.) The applicable section states:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his/her 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.

Marshall Revised Code § 562(B).

To state a cause of action, the plaintiff must plead and prove that: (1) publicity was given to facts; (2) the facts were private, and not public; (3) the matter made public was highly offensive to a reasonable person; and (4) the matter was not of legitimate concern to the public. *See Harris v. Easton Publg. Co.*, 483 A.2d 1377, 1384 (Pa. Super. Ct. 1984); *see also Miller v. Motorola, Inc.*, 560 N.E.2d 900, 978 (Ill. App. Ct. 1990); W. Prosser, *Torts* 856 (5th ed. 1984). Because Mr. Jacques pled sufficient facts to survive summary judgment on the respondeat superior and negligent hiring issues, the actions of Gordon are imputed to the Center.

1. *The Center publicized Mr. Jacques' treatment by posting both pictures and a caption on the Internet clearly identifying Mr. Jacques at the Center.*

In order to sustain a public disclosure of private facts action, the plaintiff need only present evidence of an actual disclosure to the general

public, or one which is likely to reach the general public. *See Tureen v. Equifax*, 571 F.2d 411, 419 (8th Cir. 1978). Publicity is given to a private fact when the defendant initiates a process whereby information is eventually disclosed to a large number of persons. *See Beaumont v. Brown*, 257 N.W.2d 522, 530 (Mich. 1977), *overruled in part on other grounds by Bradley v. Saranac Community Sch. Bd. of Educ.*, 565 N.W.2d 650, 658 (Mich. 1997); *see also Ozer v. Borquez*, 940 P.2d 371, 377 n.7 (Colo. 1997). Courts define "publicity" to mean that "the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." *Hillman v. Columbia County*, 474 N.W.2d 913, (Wis. Ct. App. 1991) (citing Restatement (Second) of Torts § 652D cmt. a (1977)).

a. Both the Center's initial publication on the Internet and the subsequent downstream publication in the *Daily Whitewater Reporter* satisfy the publicity element.

The Restatement explains that "publicity" occurs when the communication is sure to reach the public. Restatement (Second) of Torts § 652D cmt. a (1977). The Center's publication of photographs depicting Mr. Jacques in treatment satisfies this standard. *See Harris v. Easton Publg. Co.*, 483 A.2d at 1385. The Center publicized Mr. Jacques' decision to seek treatment for his affliction when it posted six photographs on the Internet of him in treatment, along with a caption identifying both him and the Center by name. (R. at 5.) Downstream publication occurred when the fact was later picked up by the local paper, and became known widely enough to derail Betty Jacques' once-successful campaign. (R. at 5.)

Also known as "transitory publication," downstream publication satisfies the publicity prong of the private facts tort. *See Beaumont v. Brown*, 257 N.W.2d 522, 530–31 (Mich. 1977); *see also Ozer v. Borquez*, 940 P.2d 371, 377 n.7 (Colo. 1997) ("We note that public disclosure may occur where the defendant merely initiates the process whereby the information is eventually disclosed to a large number of persons."). In *Beaumont*, private and derogatory facts were disclosed by the plaintiff's former employer to the plaintiff's Army reserve unit. *Id.* at 522–24. The letter was then introduced into a public hearing that became a matter of public record. *Id.* at 528. Relying on a Fifth Circuit case and a Missouri Supreme Court opinion in which downstream publicity to the general public satisfied the publicity element, the court refused to "attempt to numerically measure the persons to whom the letter was publicized . . . ." *Id.* at 529; *see also Santiesteban v. Goodyear Tire & Rubber Co.*, 306 F.2d 9, 11 (5th Cir. 1962); *Biederman's of Springfield, Inc. v. Wright*, 322 S.W.2d 892 (Mo. 1959). The court in *Beaumont* recognized that placing the private fact into the public domain, whether directly or indirectly,

satisfies the publicity element of the private facts tort because otherwise it would be too difficult to prove that the general public viewed the private fact. *Beaumont*, 257 N.W.2d at 531 ("To begin with 'communication to the general public' is somewhat ambiguous, because a communication rarely, if ever, reaches everyone.").

Facts supporting downstream publication alone are sufficient to survive summary judgment under the publicity element of a publication of private facts cause of action. *See id.* Yet in this matter, there is a second reason that the Center's publication on the Internet of photographs of a patient in treatment satisfies the publicity element. The mere act of placing a private fact in a widely disseminated form of media like the Internet constitutes the publication of a private fact. *See, e.g., Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 557 (Minn. 2003) (noting that publication on the Internet would satisfy the publicity element of a private facts tort).

The Restatement (Second) of Torts is clear that "any publication in a newspaper or a magazine, even of small circulation" satisfies the publicity element of the private facts tort. *See* Restatement (Second) of Torts § 652 D cmt. a. Posting private facts on the Internet is simply another way to reach the public, as were magazines and newspapers in 1977 when the Restatement was drafted. *See Michaels v. Internet Entmt. Group*, 5 F. Supp. 2d 823, 840 (C.D. Cal. 1998) (explaining that the distribution of private facts on the Internet would constitute public disclosure); *see also State ex rel. Humphrey v. Phillip Morris Inc.*, 606 N.W.2d 676, 691 (Minn. Ct. App. 2000) (explaining that documents released on the Internet are in the public domain); *see also* Glancy, *supra*, at 371.

It is undisputed in this matter that widespread publicity occurred when the Center initiated a process whereby the general public ultimately learned the private fact. Appellee would have this Court believe that the publicity element of the private facts tort is not satisfied where a significant portion of Whitewater County learned of the private and embarrassing fact of Mr. Jacques' treatment for alcoholism. Taken to its logical extreme, under Appellee's view, a plaintiff under the private facts tort would not only have to prove the defendant placed a private fact in a newspaper or the Internet, but that the general public actually read the paper or viewed the site. This would require plaintiffs to identify and prove up a sufficient number of viewers to reach some quantifiable number sufficient to make up "the general public." This has never been the standard under the Restatement, which only requires the placement of the fact in the newspaper, or in this case on the Internet, and not proof that a sufficiently large number of readers actually saw the public communication. *See Williams v. KMCO Broad. Div.—Meredith Corp.*, 472 S.W.2d 1, 3 (Mo. Ct. App. 1971). At the very least, there exists an issue

of fact as to whether the disclosure of Mr. Jacques' treatment satisfied the publicity element. *See Celotex v. Catrett,* 477 U.S. 317, 322 (1986).

b. The caption and the totality of the photographs on the Internet satisfy the publicity element because Mr. Jacques was actually identified from the website.

The record is clear that the publication of photographs depicting Mr. Jacques in treatment along with the subsequent media attention single-handedly derailed his wife's campaign. (R. at 5.) Yet incredibly, Appellee claims that the images on the website do not clearly show Ramon Jacques undergoing treatment. (R. at 7.) Appellee is wrong. It is undisputed in the record that an employee of the Center published photographs of Ramon Jacques attending alcohol treatment. (R. at 5.) Accompanying the photographs is the statement "Betty's husband, Ramon, is pictured here entering the Grand Out Patient Center, a well known facility for treating alcoholics." (R. at App. 1.) While that statement alone is sufficient to support a cause of action for publication of private facts, the pictures and the statement combined leave no room to argue that Ramon Jacques' treatment for alcoholism was not readily discernable from the website.

Disregarding, however, the clear caption accompanying the photographs identifying Mr. Jacques, the photographs alone sufficiently identify Mr. Jacques as a person seeking treatment at the Center, "which is well-known in Betty's congressional district as being a rehabilitation hospital for alcohol and drug abusers." (R. at 3.) Like the First Court of Appeals below and other state courts, this Court should find that the totality of the pictures published on the Internet satisfies the publicity element. It does not matter, as Appellee argues, that Mr. Jacques' face is not crystal clear in the pictures. What matters is that the public actually did identify him from the publication. (R. at 3.)

This matter is similar to *Harris v. Easton Publg. Co.*, 483 A.2d at 1377. In *Harris*, a newspaper ran a column that detailed private facts about a welfare applicant supplied by the Department of Public Welfare. *Id.* at 1381. Numerous readers were able to identify the applicant from the column, even though she was not named and attempts were made to disguise her identity. *Id.* Like Appellee, the newspaper in *Harris* argued that there could be no publication of private facts because the applicant was not readily identifiable from the article. *Id.* at 1385. However, in rejecting this argument, the court noted the indisputable fact that the applicant was recognized from the column and therefore the publicity element was met. *Id.*

The facts in this matter bode in favor of publicity even more so than those in *Harris*. Even though the record states there is no evidence that

anyone other than Betty or the *Daily Whitewater Reporter* visited the Website hosting the pictures of Mr. Jacques in treatment, there is certainly ample evidence to create a fact issue as to whether the general public did in fact identify Mr. Jacques from the photos. (R. at 3.) After publication on the Internet, media coverage of the Website revealing Mr. Jacques' substance abuse problem spread. (R. at 3.) The totality of the six photographs,[3] along with the caption, made it substantially certain that the public *would* recognize Mr. Jacques. The fact that Mrs. Jacques lost the election makes it clear that the public actually *did* recognize Mr. Jacques.

2. *Mr. Jacques' treatment for alcohol abuse is a private fact.*

A decision to seek treatment for alcoholism is a private fact that was closely held by Mr. Jacques and one that public policy strongly favors keeping private. In order to prevail on a private fact claim, the plaintiff must prove that the facts disclosed are private; the disclosure of facts that are already public will not support a claim for invasion of privacy. *See Harris*, 483 A.2d at 1384. Mr. Jacques in no way made the private fact of his treatment for alcohol abuse a public matter. The Center represented to Mr. Jacques that his medical records would be kept strictly confidential, and was likely bound by federal law to do so. (R. at 4.), *see* 42 U.S.C. § 290dd-2 (2000); 42 C.F.R. §§ 2.11, 2.63–.64 (2002). Mr. Jacques was a very private person. (R. at 4). Moreover, Mr. Jacques did not authorize the taking of any pictures of him while he was in the Center. (R. at 5.)

The argument that group therapy somehow takes this case out of the private facts arena is untenable. The First Court of Appeals held that a person has a reasonable expectation of privacy while undergoing a therapy session, even though the session is a group session. (R. at 8.) While it is true that there is no liability for giving further exposure to that which the plaintiff leaves open to the public eye, therapy in a small group does not equal public disclosure. Appellee would have this Court believe that because other members of the group knew Mr. Jacques was in treatment, the fact of treatment was no longer private.

The issue is not whether the small group inside the Center knew that Mr. Jacques was undergoing treatment for alcoholism; rather, as the Ninth Circuit pointed out, the question is whether the information

3. The record states that six photographs were published on the Website. (R. at 7.) The First Court of Appeals made its determination that publication had been given to private facts because four of the six photographs show Mr. Jacques in treatment. The reproduction of the Website found in Appendix 1, however, shows only two of the four photographs. Because a dispute between the Appendix and record should be resolved in favor of Appellant under summary judgment standards, Appellant relies on the number found in the record.

disclosed was public or private—whether it was generally known in the *community* and, if not, whether the disclosure by the Center can be said to have been made to the *public at large*. *See Virgil,* 527 F.2d at 1127. In this case, the Center notified each patient that all medical records shall remain strictly confidential. (R. at 4.) These patients had a duty to keep the private fact of treatment private, and therefore, these facts were not "generally known in the community." *Id.* Therefore, at least a question of fact exists as to whether the facts disclosed were private.

3. *A treatment center's communication to the public that a patient is undergoing treatment is highly offensive to a reasonable person.*

The third prong of the private facts tort requires a showing that the disclosure of the private fact would be highly offensive to a reasonable person. In making this determination, the customs of the plaintiff and the surrounding community are material. *Harris*, 483 A.2d at 1384. An act which constitutes a tortious invasion of privacy is one committed in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities. *Id.*

This Court should look to statutes and other law in determining whether a fact issue exists as to the issue of offensiveness. In *Harris*, the court held that the disclosure of a welfare applicant's identity to the public would be highly offensive to a reasonable person based on state law and "commonsense analysis." *Id.* at 1386. Because a section of the Pennsylvania Public Welfare Code protected the identity of welfare applicants, the court found that welfare applicants have a legitimate basis for believing that the personal or confidential information revealed through the application process will not subsequently appear in their local newspaper for all to read. *Id.*

Even more so than the identity of a welfare applicant, public policy mandates that the identity of those who seek help for chemical dependency be kept confidential. *Whyte*, 818 F.2d at 1010. Federal law exists requiring all treatment centers to maintain patient privacy. 42 U.S.C. § 290dd-2 (2000); 42 C.F.R. §§ 2.11, 2.63–.64 (2002). The customs of the community and common sense, as evidenced by federal and state law, direct that the highly private decision to seek out treatment for chemical dependency remain protected by a judicial and legislative zone of privacy. *See* Guthrie, *supra*, at 143 (arguing that personal information regarding the ailments that afflict us, or the therapy that cures us, deserves a special kind of shield).

Mr. Jacques pled sufficient facts to survive summary judgment on this element. The record states that after the invasion of Mr. Jacques' privacy, he became distraught and was hospitalized for severe depression. (R. at 3.) Viewing this record in the light most favorable to Mr.

Jacques, genuine issues of material fact exist as to whether the publication would be highly offensive to a reasonable person. *See Swarthout v. Mut. Serv. Life Ins. Co.*, 632 N.W.2d 741, 745 (Minn. Ct. App. 2001) (explaining that whether the publication of plaintiff's medical information would be highly offensive presents a fact issue precluding summary judgment).

4. *Mr. Jacques' treatment was not a matter of legitimate public concern.*

The newsworthiness defense in a public disclosure of private facts claim is generally accepted as part of the plaintiff's burden of proof, and therefore is not truly a defense. *See, e.g., Diaz v. Oakland Trib., Inc.*, 188 Cal. Rptr. 762 (Cal. Ct. App. 1983) (explaining that once the plaintiff has established a prima facie case that the publicity was not newsworthy, the defendant can meet it with a showing that the information was newsworthy); *see also* 43 Am. Jur. 2d POF § 8, at 449 (2004).[4] Though the plaintiff bears the burden of this element in a private facts case, legal scholars note that the misapplication of this "defense" has led to a steady decrease in the effectiveness of the private facts tort. *See* George B. Trubow, *Protecting Informational Privacy in the Information Society*, 10 N. Ill. U. L. Rev. 521, 532 (1990) ("In applying the tort, the courts have reduced its usefulness by interpreting 'public concern' in broad terms; and 'newsworthiness,' which often is little more than curiosity, seems to meet the test."). While the newsworthiness defense may exist to provide "breathing room" for the media, this Court should not join those courts that have effectively eviscerated this important cause of action, but instead should hold that the release of highly private medical information by a treatment center is not newsworthy as a matter of law. *See Virgil*, 527 F.2d at 1129.

a. Genuine issues of material fact exist as to Mr. Jacques' status as a public, nonpublic or involuntary public figure.

Courts apply the newsworthiness defense differently depending on whether the plaintiff is a voluntary public figure, an involuntary public figure, or a nonpublic figure. *See Crump v. Beckley Newsps., Inc.*, 320 S.E. 2d 70, 83 (W. Va. Ct. App. 1984); *see also* Adam Chrzan, *No-Fault Publicity: Trying to Slam the Door Shut on Privacy—The Battle Between*

4. A small minority of jurisdictions, however, view the newsworthiness defense as well as whether something is a matter of legitimate concern as qualified privilege defenses. *See, e.g., Crump v. Beckley Newsps., Inc.*, 320 S.E.2d 70, 83 (W. Va. Ct. App. 1984). Whether this Court views newsworthiness as part of the plaintiff's burden or as an affirmative defense, genuine issues of material fact still preclude summary judgment on this element.

the Media and the Nonpublic Persons It Thrusts into the Public Eye, 27 Nova L. Rev. 341, 346–47 (2002). To determine whether a party is a public figure, this Court's inquiry "focuses on the person to whom the publicity relates and asks whether the individual either by assuming a role of special prominence in the affairs of society or by thrusting himself to the forefront of a particular public controversy . . . has become a public figure." *Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980); *see also Time, Inc. v. Firestone*, 424 U.S. 448 (1976). In *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458, 460 (N.J. Super. 1967), the court defined "public figure" 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."

Mr. Jacques is certainly not a public figure as a matter of law. Mr. Jacques was a very private person. (R. at 4.) He eschewed the public eye, avoided participation in his wife's campaign, and successfully kept his alcoholism hidden from the public. (R. at 4.) Appellee argues that Mr. Jacques' position as president of "Families for Families" caused him to achieve the status of a public figure. By presiding over this group for three years, it can hardly be said that this private man assumed a role of special prominence in the affairs of society or thrust himself to the forefront of a particular public controversy. *See Campbell,* 614 F.2d at 397. Nor does the fact that Mr. Jacques was formerly married to a public figure automatically make him a public figure as a matter of law. *See Condit v. Natl. Enquirer, Inc.*, 248 F. Supp. 2d 945, 947 (E.D. Cal. 2002) (rejecting defendant's summary judgment claim that the wife of former United States Congressman Gary Condit was a public figure).

b. Even if this Court finds Mr. Jacques to be a public figure, the publication of private facts tort shields sensitive medical information from morbid and sensational prying.

Even if this Court determines that Mr. Jacques is a public figure as a matter of law, Appellee still must show that the exposure of Mr. Jacques' treatment was of legitimate concern to the public. *See Diaz*, 188 Cal. Rptr. at 773 (finding that even though a college student body president was a public figure for some purposes, the disclosure of private facts must also be newsworthy). Newsworthiness is determined by (1) the social value of the facts disclosed, (2) the depth of the intrusion into the private affairs of the plaintiff, and (3) the extent to which the plaintiff voluntarily acceded to a position of public notoriety. *See Briscoe v. Reader's Dig. Assn.*, 483 P.2d 34, 45 (Cal. 1971). A disclosure lacks social value when it fails to add to the knowledge citizens use when they make vital choices in the community. *See Cent. Natl. Bank v. U.S. Dept. of Treasury*, 912 F.2d 897, 900 (5th Cir. 1980).

While newsworthiness is generally interpreted broadly, it is not without limit. *See Michaels*, 5 F. Supp. at 839. Even though the facts in this matter present a jury question as to whether Mr. Jacques is a public figure, should this court categorize him as such, the newsworthiness defense does not make all facets of his life public. Even people who voluntarily enter the public sphere retain a privacy interest in the most intimate details of their private lives. *See Michaels*, 5 F. Supp. 2d at 840 (quoting *Virgil* and the Restatement); *See also Diaz*, 188 Cal. Rptr. at 773. Whether this Court categorizes Mr. Jacques as a public or nonpublic figure, publication of treatment for alcoholism is counter to well-established public policy and fails to add to the knowledge citizens use when they make vital choices in the community. The publication of these photos is a morbid sensational prying into Mr. Jacques' life and at the very least presents a question of fact for the jury as to whether persons of ordinary sensibility would find such treatment newsworthy.

The newsworthiness test is an extension of the First Amendment and exists to give the press space in which to exercise editorial judgment. *Virgil*, 527 F.2d at 1129. Yet in this matter, the claim is against a treatment center charged with the duty to keep strictly confidential the records of patients seeking treatment for alcohol abuse. This is not a case of a newspaper deciding that Mr. Jacques' treatment was a matter of legitimate public concern. While a newspaper ultimately led to the widespread dissemination of this embarrassing fact, it is the Center's decision that Mr. Jacques' treatment was a newsworthy event that is in issue. There is no argument that public policy requires strong First Amendment protection for the media. Yet that policy argument weakens when a treatment center takes it upon itself to decide what is newsworthy, and then attempts to cloak itself in the First Amendment to avoid liability. *See, e.g.*, *Ozer v. Borquez*, 940 P.2d 371, 378–79 (Colo. 1997) (explaining that the newsworthiness test exists to provide the "breathing space" needed by the press); *see also U.S. v. Sanusi*, 813 F. Supp. 149, 161 (E.D.N.Y. 1993) ("The First Amendment is a shield, not a sword. Even a reporter must accept limits on how far upon another person's privacy he or she may intrude . . . ."). No editorial judgment was involved in this matter. This is a case of an employee of a treatment center publishing highly private and embarrassing facts about a patient while on a self-serving vendetta to preserve his job. (R. at 5.)

Appellee's reliance on *Bartnicki v. Vopper*, 532 U.S. 514 (2001), for the proposition that the Center can't be held liable for publishing these photographs is misplaced. The United States Supreme Court in *Bartnicki* held that a federal statute cannot punish the publication of truthful information where the media publishes information that was originally obtained illegally. *Id.* at 534. In *Bartnicki*, state action punished a media defendant for disclosing information obtained illegally by a third

party. *Id.* Here, state law provides a remedy to a patient seeking to protect his right to privacy from a nonmedia rehabilitation center. While the source of the information was at issue in *Bartnicki*, in a state law private facts cause of action, it simply does not matter who originally obtained the information. *See Virgil*, 527 F.2d at 1126 ("It is not the manner in which information has been obtained that determines whether it is public or private."). The focus here is not on John Doe, the party that originally took the photographs of Mr. Jacques. The focus is on Gordon and the Center, the parties that exposed the photographs to the general public.

This Court should not allow the Center to hide behind the newsworthiness defense. As acknowledged by the court in *Virgil*, the publication of all private facts about even public figures should not be privileged because "[m]ost persons are connected with some activity, vocational or avocational, as to which the public can be said as a matter of law to have a legitimate interest or curiosity." 527 F.2d at 1131; *see also Crump*, 320 S.E.2d at 83–84. Allowing all facets of a public figure's life to be a matter of legitimate public interest would be the exception that swallows this tort. *See Virgil*, 527 F.2d at 1131. ("To hold as a matter of law that private facts as to such persons are also within the area of legitimate public interest could indirectly expose everyone's private life to public view.").

In the face of strong public policy, courts uniformly agree that there is no legitimate public interest in the disclosure of private medical information. *See* David A. Elder, *Privacy Torts* § 3:17 (2004). In *Barber v. Time, Inc.*, 159 S.W.2d 291, 298 (Mo. 1942), the Missouri Supreme Court held that a person's medical treatment is a private matter. In determining whether the fact of treatment presented a jury issue, the court in *Barber* stated, "[C]ertainly if there is any right of privacy at all, it should include the right to obtain medical treatment at home or in a hospital for an individual personal condition without personal publicity." *Id.* at 295. The court held that although plaintiff's medical condition may have been a matter of public interest because it was unusual, her identity was a private matter protected by the right of privacy. *Id.*; *see also Y.G. v. Jewish Hosp. of St. Louis*, 795 S.W.2d 488, 499 (Mo. Ct. App. 1990); *Hawkins by Hawkins v. Multimedia, Inc.*, 344 S.E.2d 145, 146 (S.C. 1986) (explaining that the identity of the teenage father of an illegitimate child was not a matter of public interest and that whether a fact is a matter of public interest is a question of fact for the jury); *Logan v. District of Columbia*, 447 F. Supp. 1328, 1336 (D.D.C. 1978) (concluding that there is no legitimate public interest in plaintiff's status as a participant in a drug treatment program).

Public policy overrides the First Amendment right of the press to publish the identity of public figures in certain instances. *Briscoe*, 483

P.2d at 537 n.10. For example, publication of the identity of suspected juvenile offenders or victims is prohibited in many jurisdictions. *Id.* As the court in *Briscoe* explained, the First Amendment does not give to the press the unmitigated right to publish the identities of certain public figures. *Id.* Even more so, the First Amendment should not give a treatment center employee the right to publish private medical information he determines is newsworthy.

Whether this matter is newsworthy should be decided by a jury of Mr. Jacques' peers. This Court should follow the majority of courts that view newsworthiness as a question of fact. Because of the strong public policy implicated by the Center's disclosure of medical information, and because Mr. Jacques' status as a public figure is in issue, this Court should allow a jury to resolve these fact issues. *See Anderson*, 477 U.S. at 255.

II. THE COURT OF APPEALS ERRED IN FINDING THAT A STATE MEDICAL PRIVACY STATUTE PREEMPTS FEDERAL LAW INTENDED TO CREATE A UNIFORM NATIONAL STANDARD REGULATING PATIENT MEDICAL INFORMATION.

At the outset of this section, it should be noted that Appellant does not wish to expose John Doe's identity to the world, as Appellee suggests. Appellant recognizes that John Doe has a similar interest in protecting his confidential decision to seek treatment. By acting in conjunction with Lee Gordon to invade Mr. Jacques' privacy, however, John Doe violated both the policy of the Center and possibly violated established state tort law. Appellant does not wish for this Court to strip John Doe of his privacy and announce his identity to the general public. Rather, this suit can proceed under the guise of a pseudonym,[5] and by following the stringent HIPAA regulations that require notice or the safeguard of a protective order, only the Appellant and the trial court need know John Doe's identity. HIPAA strikes a balance between John Doe's right to privacy in his medical information and the pursuit of truth that lies at the heart of the litigation process. *See Natl. Abortion Fedn. v. Ashcroft*, No. 03-C-8695 2004 WL 555701, at *2 (S.D.N.Y. Mar. 19, 2004). It is this balance that Mr. Jacques advocates and that this Court should apply.

Just as the publication of private facts tort exists to protect the privacy interests of individuals in every facet of life, HIPAA exists to provide the same zone of privacy around patient health information. HIPAA, and its implementing rules and regulations promulgated by the Department of Health and Human Services, exist in part to address

5. State and federal courts typically allow pseudonymity in cases that raise a substantive right-to-privacy issue. *See* Carol M. Rice, *Meet John Doe: It Is Time for Federal Civil Procedure to Recognize John Doe Parties*, 57 U. Pitt. L. Rev. 883, 912 (1996).

growing public concerns that advances in electronic technology will result in a "substantial erosion of the privacy surrounding individually identifiable health information." 65 Fed. Reg. 82,462, 82,462 (Dec. 28, 2000). Through carefully crafted exceptions, however, Congress recognized that this right to privacy is not absolute, and must yield to certain competitive interests, such as those that exist in the litigation process.

Prior to HIPAA, a "patchwork system" of state privacy laws did not afford comprehensive privacy protection. *See* Rebecca H. Bishop, *The Final Patient Privacy Regulations Under the Health Insurance Portability and Accountability Act—Promoting Patient Privacy or Public Confusion?*, 37 Ga. L. Rev. 723, 728 (2003). Congress' solution to this dilemma was bold and simple—create a uniform nationwide privacy standard for health care information. To do this, Congress determined that HIPAA would preempt most state privacy law, leaving a narrow exception for state law that provides more stringent privacy protection on equivalent HIPAA standards.

This Court reviews de novo the trial court's decision to quash the subpoena allowing discovery in this matter.[6] Moreover, this Court reviews de novo the lower court's federal preemption decision. *See Harris v. Harvard Pilgrim Health Care, Inc.*, 208 F.3d 274, 281 (1st Cir. 2000). Because the lower courts erroneously held that the Marshall Medical Privacy Act preempts federal law, the lower courts' decisions should be overruled and a subpoena should issue allowing discovery to continue in this matter.

A. HIPPA Regulations Allowing The Disclosure Of John Doe's Identity Pursuant To A Subpoena Preempt Marshall State Law Because The State Law Has No Equivalent "Requirement, Standard, Or Implementation Specification."

Federal preemption originates in the Supremacy Clause of the Constitution and vests Congress with the power to preempt state law. U.S. Const. art. VI, cl. 2; *see also FMC Corp. v. Holliday*, 498 U.S. 52, 56 (1990). A federal statute may preempt state law in two distinct ways. Congress may specifically preempt certain types of state regulation by an express preemption clause in a federal statute. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). In the absence of an express preemption clause, or where the scope of such clause is unclear, Congress' intent to

6. While generally, an appellate court applies an abuse of discretion standard when reviewing a trial court's decision to quash a subpoena, when a trial court's discretionary decision is based on a specific construction of law, the review is de novo and the abuse of discretion standard has no application. *See, e.g., State v. Today's Bookstore, Inc.*, 621 N.E.2d 1283, 1291–1292 (Ohio Ct. App. 1993); *Akron-Canton Waste Oil, Inc. v. Safety-Kleen Oil Serv., Inc.*, 611 N.E.2d 955, 962–63 (Ohio Ct. App. 1992).

preempt may be inferred from the structure and purpose of the statute. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). Savings, or antipreemption clauses are to be construed narrowly when broad interpretation would upset a careful regulatory scheme established by federal law. *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 870 (2000).

In this matter, HIPAA preempts Marshall state law. HIPAA allows the disclosure of John Doe's identity subject to certain privacy safeguards. *See* 45 C.F.R. § 164.512(e)(1)(ii) (2002). Marshall state law, however, contains no equivalent provision for the release of medical information in these circumstances. By using state law to quash Mr. Jacques' subpoena, the lower courts' have disregarded the express intent of Congress to provide a uniform regulatory system governing patient health information.

1. *HIPPA's general express preemption clause calls for the preemption of the Marshall Medical Privacy Act because the state statute stands as an obstacle to the purposes of Congress.*

The express intent of Congress is contained in HIPAA's preemption clause requiring the preemption of state law that is contrary to HIPAA or stands as an obstacle to the purposes of Congress. *See Cipollone v. Liggett*, 505 U.S. 504, 517 (1982). HIPAA sets forth a general rule, based on the principles of conflict preemption, which establishes that any federal regulation resulting from the implementation of HIPPA preempts any contrary state law. *See* 42 U.S.C. § 1320d – 7(a)(1). "Contrary" is defined as a situation where: (1) a covered entity would find it impossible to comply with both the state and federal requirements, or (2) when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. 45 C.F.R. § 160.202 (2002); *see also Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (explaining that state and federal laws are in conflict where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."). Under this general rule of express preemption, the Marshall state law must yield to HIPAA.

HIPAA regulations authorize the Center to disclose private health information in judicial proceedings pursuant to a subpoena. 45 C.F.R. § 164.512(e)(1)(ii) (2002). Disclosure pursuant to this standard requires the party seeking disclosure to make a good faith effort to either notify the patient or secure a qualified protective order. 45 C.F.R. § 164.512 (e)(1)(v) (2002). There is no equivalent requirement under Marshall's Medical Privacy Act, which generally prohibits the disclosure of the identity of a patient subject to several exceptions. 210 Marshall Stat. 85/ 6.17. Patient information under the state act can be disclosed in a narrow range of circumstances, including to the patient, persons authorized

by the patient, those parties directly responsible for patient care, or by the hospital for defense arising out of care. *Id.*

The United States Supreme Court addressed the interplay between an express preemption clause and an antipreemption "savings" clause in a similar federal statute in *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996). In *Barnett*, the Court decided that the general rule of express preemption found in the McCarran-Ferguson Act controlled over the Act's anti-preemption rule. *Id.* at 43. The federal statute at issue in *Barnett* permitted national banks to sell insurance in small towns. *Id.* A state statute, however, prohibited banks from selling most types of insurance. *Id.*

The Court in *Barnett* explained that where a federal statute contains an express preemption provision, followed by an antipreemption savings clause, a court should begin by asking whether, in the absence of the savings clause, the federal statute preempts the state statute. *Id.* at 30. The Court in *Barnett* held that the federal statute preempted the state statute because the state law stood as an obstacle to the accomplishment of the full purposes of Congress. *Id.* at 31. In this matter, as in *Barnett*, the lower court specifically held that HIPPA's general rule of express preemption controls over the state law and that the subpoena should issue. (R. at 11.)

Here, by making no equivalent exception for the disclosure of medical information pursuant to a subpoena or court order, the state statute stands as an obstacle to the purposes of Congress in enacting HIPAA. The purpose statement of HIPAA explicitly mentions the intent to simplify and reduce the cost of healthcare administration. *See* Pub. L. No. 104-191, 110 Stat. 1936, 1936 (1996). The state statute stands as an obstacle to the intent of Congress to streamline healthcare with a uniform, nationwide standard of privacy law subject to carefully carved out exceptions based on public policy. Bishop, *supra*, at 743–44 (pointing out that a state law that is serving any need related to a state health issue, even if it hinders national health goals, could, arguably, escape preemption by the uniform HIPAA standards). For instance, had John Doe raped a female patient at the Center, rather than exposed another patient's identity, there would be no way under the state statute to discover John Doe's identity. Congress and the Department of Health and Human Services realized, in enacting HIPPA and the subsequent implementing regulations, that there are times when patient privacy must yield to other interests, such as the pursuit of justice.[7]

7. *See* 65 Fed. Reg. 82,462, 82,674 (Dec. 28, 2000) ("Thus, we have tried to balance the need for the information with the individual's privacy. We believe the approach described above provides individuals with the opportunity to object to disclosures and provides a mechanism through which their privacy interests are taken into account.").

2. *The antipreemption savings clause calling for the application of state law that is both contrary to and more stringent than equivalent HIPPA standards does not apply because Marshall state law contains no equivalent exception for judicial process.*

Analysis of preemption under HIPAA does not end, however, with the general rule of express preemption. Congress carved out a narrow category of state law to survive the general rule of preemption. 45 C.F.R. § 160.203(b) (2002). Subsection (b) provides that such a regulation "shall not supercede a contrary provision of State law, if the provision of State law imposes requirements, standards, or implementation specifications that are more stringent than the implementation specifications imposed under the regulation." 45 C.F.R. § 160.203(b) (2002). A standard is "more stringent" if it "provides greater privacy protection for the individual who is the subject of the individually identifiable health information" than the standard in the regulation. *See* 42 U.S.C. § 1320d-7(a)(2)(B) (implemented by 45 C.F.R. § 160.202(6)). Under this antipreemption savings clause, only equivalent state law "requirements, standards, or implementation specifications" that are more stringent than those found in HIPAA trump federal law. 45 C.F.R. § 160.203(b) (2002). Where there is no equivalent state law standard, as in this matter, HIPAA preempts state law. *See* 42 U.S.C. § 1320d-7(a)(1) (implemented by 45 C.F.R. § 160.203).

Only those state provisions that are both "contrary to" and "more stringent than" the federal counterparts found in HIPAA supplant HIPAA. 64 Fed. Reg. 59,918-01, 59,922 (Nov. 3, 1999). The court of appeals relies on faulty logic to determine that Marshall state law supplants HIPAA regulations allowing the Center to disclose the identity of the John Doe that took Mr. Jacques' pictures. (R. at 12–13.) The Marshall Medical Privacy Act does not contain an exception for judicial process, and therefore is not the kind of equivalent requirement, standard or implementation specification that is more stringent or contrary to the HIPAA standard. *See* 210 Marshall Stat. 85/6.17.

Only by narrowly construing this antipreemption provision can HIPAA ever provide a nationwide uniform system of privacy protection. *See Geier*, 529 U.S. at 870 (explaining that antipreemption provisions are to be construed narrowly). Here, the Marshall Medical Privacy Act is silent as to the disclosure of a patient's identity pursuant to a valid subpoena. *See* 210 Marshall Stat. 85/6.17. The Court mistakes the statute's silence as an affirmative statement that no disclosure should occur, even in response to a valid subpoena. HIPAA regulations establish the baseline procedure for the privacy of patient records. Only those state standards which require greater protection trump the HIPAA standard. In

this matter, however, the state act does not provide greater protection for the disclosure of information pursuant to a subpoena. Here, the state act does not provide such a standard or requirement at all. Therefore, HIPAA controls. *See* 45 C.F.R. § 160.202–.203 (2002). As scholars have noted, "HIPAA expressly has preemptive effect upon state law where it conflicts with state law *or where there is a void within a state law provision concerning its subject matters.*" Tamela J. White & Charlotte A. Hoffman, *The Privacy Standards Under the Health Insurance Portability And Accountability Act: A Practical Guide to Promote Order and Avoid Potential Chaos*, 106 W. Va. L. Rev. 709, 716 (2004) (emphasis added).

To quash Mr. Jacques' subpoena is a direct violation of the Supremacy Clause. Only where a state law standard is "contrary" to a HIPAA standard does the state law control. This state law is not contrary to a standard; it is simply silent as to the use of medical information in litigation. Congress intended through HIPAA to protect patient privacy in litigation by demanding that such information be redacted where possible, or used only pursuant to a protective order. It was not the intent of Congress, however, to engraft state law that completely bars the use of such information in litigation into the uniform federal standards HIPAA strives to create. *See Natl. Abortion Fedn.*, 2004 WL 555701 at *2 (recognizing the important public policy implicated by the search for truth at the heart of the litigation process).

Again, the decision of the United States Supreme Court in *Barnett* guides this issue. In *Barnett*, federal banking law allowed national banks to sell insurance while state law prevented such sale. *Barnett*, 517 U.S. at 43. Under the express preemption clause, the federal statute controlled because the state law stood as an obstacle to the purpose of Congress. *Id.* at 31. The federal law in *Barnett* also contained an antipreemption clause. Under the savings provision, state law would not be preempted unless the federal law specifically related to the business of insurance. *Id.* at 38. In finding that the antipreemption provision did not apply, the Court explained that the decision rested upon the federal law's language and purpose, taken together. *Id.*

In this matter, the purpose and language of HIPPA dictate that the antipreemption clause does not control. HIPPA exists to provide uniform nationwide standards. The antipreemption clause requires an equivalent state standard that is both contrary to and more stringent than federal law before it controls. Here, there is no equivalent state standard that can be analyzed as contrary to a federal standard.

This case is similar to the one before the district court in *U.S. ex rel. Stewart v. La. Clinic*, No. Civ. A. 99-1767 2002 WL 31819130 (E.D. La. Dec. 12, 2002). In *Stewart*, the court held that HIPAA preempts state law protecting patient medical information from disclosure, so that the production of nonparty patient medical records in False Claims Act liti-

gation can be compelled under limitations imposed by a protective order. *Id.* at *3–*4. The defendant medical clinic in *Stewart*, like Appellee in this matter, argued that production of nonparty patient records was barred by Louisiana's medical information disclosure law. *Id.* at *3. Noting that the only way an exception to HIPAA's general preemption of state law would occur would be if the state law at issue was both contrary to and more stringent than HIPAA, the court found that this was not the case. *Id.* at *5. Rather, although the Louisiana statute required notice and a contradictory hearing before disclosure, it did not address "the form, substance, or the need for express legal permission from an individual," as required by HIPAA's regulations to qualify for the exception. *Id.* at *6. Because the state law did not contain a standard equivalent to a HIPAA standard, the court found that HIPAA controlled. *See id.*

Appellee points out that it was the intent of Congress to give states the right to provide greater protection to medical information under HIPAA. While this is true to some extent, Congress also intended to provide a uniform national standard. While HIPAA does allow federal privacy protection to be supplemented by more stringent state laws, there must be a point at which HIPAA controls. A state statute that reads "No patient medical information shall be disclosed for any reason whatsoever," would certainly be more stringent than HIPAA. Congress chose to preempt such a statute because it stands as an obstacle to the objectives of Congress to balance privacy with the need for disclosure in certain instances. Such a statute should not be allowed to supersede federal law because it does not allow for the disclosure of medical information in specific circumstances that state and federal public policy mandate. By requiring the state statute to be both "contrary to" and "more stringent than" before it controls, HIPAA allows state law that specifically provides greater protection to control, not state laws with blanket prohibitions for the disclosure of all information.

This case presents a unique issue of first impression. No court, state or federal, has answered the question of whether a state law without an equivalent HIPAA standard preempts HIPAA through its silence. The First Court of Appeals erroneously relied on *Natl. Abortion Fedn. v. Ashcroft* No. 04-C-55 in holding that the Marshall privacy statute preempted HIPAA. (R. at 12); 2004 WL 292079 (N.D. Ill. Feb. 6, 2004).[8]

8. That case has since been reversed on the preemption issue by the Seventh Circuit. *See Northwestern Meml. Hosp. v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004). It should be noted that another case filed in a New York district court held exactly the opposite of the Illinois District Court. *See Natl. Abortion Fedn.*, 2004 WL 555701. As noted by a recent opinion letter from the Kansas Office of the Attorney General, "unfortunately, what few court decisions exist are not particularly consistent in their analyses or application of the HIPAA preemption provision." Kan. Atty. Gen. Op. No. 04-21, 2004 WL 1523039, *9 (July 7, 2004).

The *Ashcroft* decision from the Illinois federal district court dealt with an issue wholly distinct from the one before this court. In *Ashcroft*, the government was attempting to enforce a subpoena requesting the medical records of patients who received partial birth abortions. *Natl. Abortion Fedn. v. Ashcroft*, 04-C-55 2004 WL 292079 (N.D. Ill. Feb. 6, 2004). The hospital moved to quash the subpoena and asserted the medical records were privileged from disclosure under HIPAA as well as Illinois and federal statutory and common law. *Id.* The hospital argued the Illinois statutory law should not govern in a federal case. *Id.* The government argued the Supremacy Clause and Federal Rule of Evidence 501 dictate that Illinois's strict privacy laws should be trumped by federal common law, which does not recognize a physician-patient privilege. *Id.* The issue in *Ashcroft* was merely a question of whether federal or state law applied to a federal issue.

The *Ashcroft* court held that HIPAA engrafts state law procedure into a federal case. The Seventh Circuit disagreed and reversed in *Northwestern Meml. Hosp. v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004). The Seventh Circuit held that HIPAA does not require the application of more stringent state law in federal suits. *Id.* While the *Ashcroft* decisions resolve the issue of whether HIPAA requires the application of state procedural law in a federal case, they do not answer the question of whether state law preempts HIPAA where there is no equivalent state law standard and the state statute stands as an obstacle to the purposes of Congress.

B. This Court Should Apply HIPAA Because Strong Public Policy Weighs In Favor Of A Uniform National Standard With Important Confidentiality Exceptions For Judicial Process.

This Court can legally resolve the preemption issue in favor of HIPAA because Marshall state law contains no equivalent subpoena exception. As a matter of public policy, this Court should apply HIPAA and follow the majority of state and federal privacy laws that allow the limited disclosure of protected information to assist in litigation.[9] *See Bar-*

9. For examples of state statutes allowing a health care provider to disclose confidential patient information without consent pursuant to a subpoena or court order, see: Ariz. Rev. Stat. Ann. § 12-2294 (West 2002); Ark. Code Ann. § 20-46-104 (Michie Supp. 2004); Cal. Civ. Code § 56.10 (West 2002); Colo. Rev. Stat. § 27-10-120.5 (2002); Fla. Stat. Ann. § 455.667 (West 2002); Ky. Rev. Stat. Ann. § 210.235 (Michie 2002); Me. Rev. Stat. Ann. tit. 22 § 1711-C (West 2002); Md. Code Ann., Health–Gen. I § 4-305 (2002); Miss. Code Ann. § 83-41-355 (2002); Mo. Rev. Stat. § 630.005 (2002); Neb. Rev. Stat. § 44-7210 (2002); N.Y. Public Health Law § 18 (McKinney 2002); 71 Pa. Cons. Stat. § 1690.108 (2000); Tex. Health & Safety Code Ann. § 241.513 (Vernon Supp. 2004); S.D. Codified Laws § 58-41-74 (Michie 2002); Utah Code Ann. § 63-2-202 (2002); Va. Code Ann. § 32.1-127.1:03 (Michie Supp.

nett, 517 U.S. at 38 (explaining that the purpose of the federal act must be taken into account when determining whether an antipreemption clause should control in a given matter). By allowing disclosure pursuant to HIPAA, this Court would not be disclosing John Doe's identity to the world, but would be in line with public policy typified by these state and federal privacy laws.[10] HIPAA's provisions require either notice to the patient or a protective order before a patient's identity is disclosed to a tribunal. In this matter, John Doe's identity could be disclosed pursuant to a protective order so that justice may be served and no more of John Doe's privacy is violated than necessary.

This Court should follow the example of those courts that have allowed the limited release of patient medical information since HIPAA was enacted. In *A Helping Hand, L.L.C. v. Balt. County, Md.*, 295 F. Supp. 2d 585, 592 (D. Md. 2003), the court held that HIPAA regulations permit discovery of protected health information so long as a court order or agreement of the parties prohibits disclosure of the information outside the litigation and requires the return of the information once the proceedings are concluded. In *Helping Hand*, the operator of a drug and alcohol treatment program alleged violations by governmental agencies of the Americans with Disabilities Act. *Id.* at 588. Despite the fact that confidentiality concerns were high because the patients were recovering drug addicts, the court allowed limited discovery of the medical records. *Id.* at 592; *see also Hutton v. City of Martinez*, 219 F.R.D. 164 (N.D. Cal. 2003) (finding that HIPAA privacy regulations do not preclude production of a defendant's medical records in response to a subpoena).

This Court could remand this case to the trial court with instructions to issue the subpoena subject to the same type of protective order found in *Helping Hand*. John Doe's identity need not be known outside of the litigation, and all information, including medical records, could be ordered returned once the proceedings are concluded.

2003); W. Va. Code § 27-3-1(a) (2002); Wash. Rev. Code Ann. § 70.02.050 (West 2002); Wis. Stat. § 146.82(2)(a) (2002).

The following federal statutes allow disclosure of patient medical information pursuant to a subpoena or court order without patient consent: 42 U.S.C. § 290dd-2 (1994) ("Public Health Act"); 20 U.S.C. § 1232g(b)(2)(2000) ("Family Educational Rights and Privacy Act of 1974").

10. Federal courts have long recognized that the right to privacy in medical information is not absolute. In *Doe v. S.E. Pa. Transp. Auth.*, 72 F.3d 1133, 1138 (3d Cir. 1995), the Third Circuit recognized a constitutional right to privacy in a patient's prescription records. The court in *Doe* explained that this right must be balanced against the government's interests in obtaining the information. *See id.*; *see also Whalen v. Roe*, 429 U.S. 589, 602 (1977) (applying balancing test); *Patients of Dr. Barbara Solomon v. Bd. of Physician Quality Assurance*, 85 F. Supp. 2d 545, 548 (D. Md. 1999) (predicting that the Fourth Circuit would apply a balancing test to medical record disclosure).

The greatest criticism of HIPAA preemption is that it presents a considerable burden to covered entities forced to comply with a patchwork of state and federal requirements. *See* Guthrie, *supra*, at 156. Though HIPAA was designed to provide uniformity to medical information privacy, many agree that "the promised stability of the proliferating 'federal floor' doctrine is becoming a policy nightmare more likely to result in consumer confusion than consumer protection." Christopher C. Gallagher, *Health Information Privacy: The Federal Floor's State Elevator* (visited Sept. 7, 2004) <http:/www.gcglaw.com/resources/healthcare/healthprivacy.html>.

While at the same time respecting patient privacy, allowing HIPAA to control would give certainty to Marshall health care providers dealing with the confusing patchwork created by the HIPAA antipreemption provision. *See* Gallagher, *supra* at 4. ("This resulting mosaic of privacy protection directives will likely create an imbalance not intended by Congress or the states. Companies have to act now, and hope they guess right."). Scholars note that covered entities untrained in legal analysis should spend their time and resources on patient care, not ensuring compliance with multiple standards. Guthrie, *supra*, at 147. The fact that the lower court misinterprets the HIPAA subpoena exception as requiring both notice and a protective order further underscores how confusing HIPAA can be to covered entities.[11] To ensure simplicity and uniformity, the Department of Health and Human Services made sure that only where state law conflicts with an equivalent federal regulation does state law control, thus easing the burden on providers.

The subpoena is necessary in this matter because it would allow Mr. Jacques to protect his privacy rights by revealing just enough of John Doe's personal information to decide what role Doe played in the invasion of Mr. Jacques' privacy. There are numerous facts about John Doe and the Center that, at this point, stand as a roadblock to the pursuit of justice. For one, it is possible that John Doe consented to the use of his medical information in these proceedings by signing a medical release. The record is clear that all patients entering the Center sign such a release. (R. at 4) ("As part of the normal procedure for being admitted for treatment, each patient must sign a medical release form."). While the record also states that the Center has a policy that all medical records will remain strictly confidential and will not be released without the express written permission of the patient, the medical release signed could certainly be the express written permission required by the policy. (R. at

11. The lower court misreads HIPAA's subpoena exception to require both notice and a protective order. The regulation clearly states that this is a disjunctive requirement; either notice *or* a protective order must accompany disclosure. *See* 45 C.F.R. § 164.512(e)(1)(ii) (2002); (R. at 11).

4.) This release could possibly allow the Center to disclose John Doe's identity pursuant to a subpoena or court order.[12] The contents of that release, as well as whether John Doe actually signed it, are necessary before it can be determined whether John Doe consented to the release of information.

CONCLUSION

Mr. Jacques privately checked into the Grand Out Patient Center hoping to receive treatment for his affliction. Instead of confidential treatment, Mr. Jacques had his private and embarrassing decision to seek treatment broadcast throughout the community where he lives and works.

Summary judgment is inappropriate in this matter because the jury is the proper body to determine whether the public has a legitimate interest in learning the identity of patient in a rehabilitation center. Moreover, because Congress intended a uniform national system regulating the privacy of patient medical information subject to important exceptions for the pursuit of justice, this Court should allow HIPAA to control the limited release of John Doe's identity in this matter so that justice may be done. Accordingly, the court of appeals decision reversing the trial court's grant of summary judgment should be affirmed and the decision to quash Mr. Jacques' subpoena should be reversed.

Respectfully submitted,

_____

Counsel for Respondent

12. For examples of cases dealing with the scope of medical releases in general, *see Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *Hicks v. Talbott Recovery Sys., Inc.*, 196 F.3d 1226, 1241–42 (11th Cir. 1999).

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APPENDIX A:
CONSTITUTIONAL PROVISION
U.S. CONST. amend. XIV
Due Process Clause

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law. . .

APPENDIX B:
MARSHALL REVISED CODE (WEST 2002)
SECTION 735 MRC 25-302

A tribunal of the State may exercise personal jurisdiction over a person (or the personal representative of a deceased individual who would be subject to jurisdiction under this section if not deceased) who acts directly or by an agent, as to a cause of action or other matter arising from such person: (1) Transacting any business in this State . . .

APPENDIX C:
RESTATEMENT (SECOND) OF TORTS (1977)
SECTION 652B

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of privacy, if the intrusion would be highly offensive to a reasonable person.

APPENDIX D:
RESTATEMENT (SECOND) OF TORTS (1977)
SECTION 652E

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

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

BRIEF FOR THE RESPONDENT

No. 04-CV-0306

IN THE
SUPREME COURT OF MARSHALL
October Term 2004

RAMON JACQUES,
Petitioner,
v.
GRAND OUT PATIENT CENTER,
Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS
OF MARSHALL

BRIEF FOR PETITIONER

Ashley S. Kamphaus
Michelle M. Prince
Jon Paul Carroll
Attorneys for Respondent

QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS ERRED IN HOLDING PHOTOGRAPHS DEPICTING A PROMINENT POLITICAL CANDIDATE'S SPOUSE UNDERGOING ALCOHOL ABUSE TREATMENT CONSTITUTE THE PUBLIC DISCLOSURE OF PRIVATE FACTS?

II. WHETHER THE COURT OF APPEALS CORRECTLY HELD A STATE MEDICAL PRIVACY STATUTE THAT IS CONTRARY TO HIPAA AND PROVIDES GREATER PROTECTION FOR INDIVIDUALLY IDENTIFIABLE HEALTH INFORMATION FALLS WITHIN HIPAA'S PREEMPTION EXCEPTION?

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The Whitewater County Circuit Court held the Marshall Medical Privacy Act was more stringent than HIPAA and granted the Center's motion to quash Appellant's subpoena. The court then granted Appellant's motion to voluntarily dismiss John Doe as a defendant with leave to reinstate in the future. In a separate order, the court granted the Center's motion for summary judgment and dismissed Appellant's complaint. The opinion and order of the Whitewater Circuit Court is unreported.

The First District Court of Appeals of the State of Marshall affirmed the trial court's order quashing the subpoena, but reversed the court's grant of summary judgment in favor of the Center, finding a genuine issue of material fact exists regarding Appellant's claim. The opinion and order of the First District Court of Appeals is also unreported and is set forth in the Record. (R. at 2-7.)

STANDARD OF REVIEW

The First District Court of Appeals of the State of Marshall erred as a matter of law in reversing summary judgment in favor of the Center, but was correct in its determination the Marshall Medical Privacy Act is not preempted by HIPAA. The Supreme Court of the State of Marshall reviews de novo an appellate court's decision to deny summary judgment and the evidence is considered in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255 (1986). The Center, as the moving party, bears the initial burden of showing no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to Appellant, who must show specific facts demonstrating a genuine issue "require[s] a jury or judge to resolve the parties' differing versions of the truth at trial." *Anderson*, 477 U.S. at 249. As the non-moving party, Appellant cannot merely rely upon his allegations and denials alone to carry his burden of demonstrating the existence a genuine issue of material fact. *Celotex*, 477 U.S. at 322. Summary judgment is appropriate when the factual record shows "there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Anderson*, 477 U.S. at 247 ; See also Marshall R. Civ. P. 56(c) (2004). The appellate court's conclusion the Marshall Medical Privacy Act is not preempted by HIPAA is an interpretation of state or federal law that is also reviewable de novo by this Court. *Hawes v. Golden*, 2004 Ohio App. LEXIS 4520, at *7 (Ohio Ct. App. Sept. 22, 2004).

STATEMENT OF THE CASE

I. SUMMARY OF THE FACTS

Ramon Jacques ("Appellant") was married to Betty Jacques, a political candidate who launched her political career after publishing hints for family life, home cooking and interior design. (R. at 2.) Betty's first campaign for public office won her a nomination on the Crocker Party ticket for an open Congressional seat in March 2002. (R. at 2.) She eventually won the primary election on a platform based on strengthening family values, advocating abstinence from alcohol and the reinstitution of Prohibition. (R. at 3.) While Betty and Appellant portrayed themselves as a happily married couple for purposes of Betty's campaign, in reality the two had experienced personal problems and had been separated since 2001. (R. at 3.) Betty's public personality and Appellant's willingness to go along with the charade allowed their secret to remain hidden from the public.

Appellant initially sought treatment from the Grand Out Patient Center ("Appellee" or "Center"), a drug and alcohol abuse treatment facility in February 2001 after his separation from Betty. (R. at 4.) The normal admission procedure at the Center was to require each patient to sign a medical release form and a form acknowledging receipt of the Center's policy regarding patient privacy. (R. at 4.) Patients are provided with both a copy of the release form and the policy statement which states, "all medical records shall remain strictly confidential and will not be released to any party without the express written permission of the patient." (R. at 4.) Appellant remembers receiving the statement of the Center's privacy policy. Furthermore, a "clearly visible" sign at the entrance to the Center states, "The use of cell phones and the taking of any pictures are strictly prohibited inside this facility." (R. at App. 3.) At some point in February or March of 2001 an unidentified patient of the Center allegedly took a number of digital photographs of Appellant that came into the possession of Lee D. Gordon, an employee of the Center who, unbeknownst to the Center, had misrepresented his criminal background on his employment application. (R. at 5.) The photographs were later posted to a website registered to Gordon located at http://www.drunkenhusband.com. When the Center learned the website hosting the photos was registered to Gordon, it conducted a further investigation into Gordon's background, which revealed a seven-year-old conviction for trespassing. The Center promptly terminated Gordon's employment. (R. at 5.)

In July 2002, Betty discovered the website and the pictures which purported to display photographs of Appellant both inside and outside the Center. (R. at 3.) The Daily Whitewater Reporter, a local newspaper, published a story on its own website and reproduced the pictures from

the website on its online front page. (R. at App. 2.) There is no evidence in the trial record that anyone other than Betty or the Daily Whitewater Reporter visited the website registered to Gordon.

Appellant "became distraught" and was hospitalized briefly for depression after the election, but this was not new for him, as he had hidden his previous bouts with depression and alcoholism from the public. (R. at 3.) Although Appellant had not appeared in his wife's campaign advertisements, he portrayed himself as part of a happily married couple for purposes of furthering Betty's campaign. For three years, Appellant had also served as President of "Families for Families," a public interest organization advocating abstinence from alcohol and was receiving constant financial support from Betty's campaign. (R. at 4.) Appellant resigned his position as President after the pictures appeared on the website. (R. at 4.)

II. SUMMARY OF THE PROCEEDINGS

Appellant filed suit against Appellee and the "John Doe" who took the photographs, for invasion of privacy through the public disclosure of private facts. In order to determine the identity of John Doe and assess his "mental state," (R. at 6.) Appellant issued a subpoena to the Center requesting disclosure of John Doe's identity and medical records. At trial, the Center moved to quash the subpoena, which was granted in an order by the Whitewater County Circuit Court. The Center then filed a Motion for Summary Judgment, which was also granted in a separate order by the trial court. On appeal, the First District Court of Appeals of the State of Marshall affirmed the trial court's order quashing the subpoena, but reversed the trial court's grant of summary judgment in favor of the Center. Appellant now appeals the appellate court's decision affirming the trial court's quashing of Appellant's subpoena and the Center cross-appeals the appellate court's reversal of the trial court's grant of summary judgment.

SUMMARY OF THE ARGUMENT

I.

Appellant brought this suit alleging a violation of his privacy and seeking to compel disclosure of medical records in possession of the Center. First, no genuine issue of material facts exists as to whether posting the photographs of Appellant on the Internet constitutes a public disclosure of a private fact. Furthermore, the Center cannot be held vicariously liable for the tortious actions of a rogue employee acting outside the scope of his employment. Second, the Marshall Medical Pri-

vacy Act is a contrary provision of state law that is more stringent than and therefore not preempted by, HIPAA.

Posting to the Internet photographs indicating Appellant's presence at a drug treatment facility does not violate Appellant's privacy because Appellant's treatment is a public, rather than private fact. Two of the photographs show Appellant entering the Center and standing in the waiting room, where Appellant has no reasonable expectation of privacy. These photographs effectively disclosed to the public that Appellant was receiving treatment from the clinic. The other pictures merely reaffirm this fact and therefore do not disclose any additional private facts. Nevertheless, even if this Court finds Appellant's treatment is a private fact, the public has a legitimate interest in this information due to Appellant's status as a public figure. By representing himself as the spouse of a prominent political candidate, whose platform is based on strengthening family values and by acceding to a position as President of an organization that advocates abstinence from drinking alcohol, Appellant became a public figure. The general public has a legitimate interest in Appellant's substance abuse treatment, which is relevant to his status as a public figure.

Even if Appellant's treatment is not of legitimate public concern, his claim nevertheless fails because there was insufficient publication of the photographs. The Record indicates only Betty and the Daily Whitewater Newspaper actually visited the website on which the photographs were originally published, which is insufficient to constitute communication to the "public at large." This Court should accordingly hold there is no genuine issue of material fact concerning Appellant's tort claim and reinstate summary judgment for the Center.

II.

The First District Court of Appeals properly granted the Center's motion to quash Appellant's subpoena. The Marshall Medical Privacy Act, 210 Marshall Stat. 85/6.17 (2004), neither requires nor allows disclosure of John Doe's identity or medical records in this case, whereas HIPAA makes allowances for such disclosure. The general rule is that HIPAA, a federal law, would preempt a directly contrary state law. The Marshall statute falls within an exception to this general rule of preemption because in addition to being contrary to HIPAA, it contains more stringent requirements for the disclosure of individually identifiable medical information. The Marshall statute is therefore the controlling law of this case and prevents disclosure of John Doe's identity and mental state. Accordingly, this Court should affirm the trial court and the Court of Appeals' granting of the Center's motion to quash Appellant's subpoena.

I. THE COURT OF APPEALS ERRED IN HOLDING A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER POSTING ONLINE PHOTOGRAPHS OF A PUBLIC FIGURE'S TREATMENT FOR ALCOHOL ABUSE CONSTITUTES THE PUBLIC DISCLOSURE OF PRIVATE FACTS.

The First District Court of Appeals erred in reversing the lower court's grant of summary judgment in favor of the Center because there is no genuine issue of material fact regarding Appellant's tort claim and the Center is therefore entitled to judgment as a matter of law. This Court should hold the First District Court of Appeals incorrectly reversed the trial court's order dismissing Appellant's complaint and reinstate summary judgment in favor of the Center.

Marshall Revised Code § 562(B) (2004), which mirrors § 652D of the Restatement (Second) of Torts (1977), states:

> 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

Marshall Revised Code § 562(B) (2004).

This statute sets forth a four-part test for determining whether an actionable public disclosure of private facts has taken place. *Id.* First, there must be publication made to the public at large. Second, the publicity must concern a private, as opposed to a public, matter. *Id.* Third, the court must find that disclosure of those facts would be offensive to a reasonable person. *Id.* Finally, the matter must not be something in which the public has a legitimate interest or concern. *Id.* The undisputed facts indicate Appellant has failed to raise a genuine issue of material fact as to all of these issues. Furthermore, the facts demonstrate there was no publication of the photographs to the public at large, the public has a legitimate concern in Appellant's treatment and the Center cannot be held vicariously liable for the unforeseeable actions of a rogue employee acting outside the scope of his employment. Accordingly, the Center is entitled to summary judgment on Appellant's claim for public disclosure of private facts.

A. *Appellant's status as a public figure renders his treatment a matter of legitimate public concern, the publication of which outweighs any intrusion into Appellant's privacy.*

Sensitive to the potential encroachment on the freedoms of speech and the press, our courts have recognized a broad privilege cloaking the truthful publication of all newsworthy matters. *See, e.g., Time, Inc. v. Hill*, 385 U.S. 374 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254

(1964); *Bartnicki v. Vopper*, 532 U.S. 514 (2001); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975). The photographs posted on Gordon's website are newsworthy because Appellant has acceded to a position of public notoriety, both voluntarily and involuntarily and there is high social value in the information depicted therein. Accordingly, the facts revealed by the photographs are of legitimate public concern, the disclosure of which cannot form the basis for an actionable invasion of privacy.

In determining whether a fact is newsworthy, courts must consider the First Amendment interests of free speech and press and the privacy rights of the individual. In conducting this analysis, courts have adopted a balancing test weighing the public's interest in the matter against the depth of intrusion caused to the subject of the information. *Michaels v. Internet Entmt. Group*, 1998 U.S. Dist. LEXIS 20786, at *24-25 (D. Cal. Sept. 14, 1998). "The factors to be considered include (1) the social value of the facts published; (2) whether the plaintiff voluntarily became involved in public life; and (3) for private persons involuntarily caught up in events of public interest, whether a substantial relationship or nexus exists between the matters published and matters of legitimate public concern." *Id.* at *24-25 (*citing Shulman v. Group W Productions, Inc.*, 955 P.2d 469, 482-83 (Cal. 1998)). Appellant is a public figure by virtue of his marriage to a prominent political candidate and his position with Families for Families. Accordingly, the public has a legitimate interest in information concerning Appellant's mental and emotional health that is directly related to his public roles.

1. Appellant became a public figure by representing himself as the supportive spouse of a political candidate and by accepting a public role in an association with a widely recognized public interest.

Appellant's voluntary representation as the supporting spouse of a political candidate running on a platform based on the reinstitution of Prohibition and family values and his position with Families for Families, affords him the status of a public figure and a legitimate subject of news. A voluntary public figure places himself in the public eye by engaging in public activities or by assuming a prominent role in institutions or activities having a public interest. *See generally Cohen v. Marx*, 211 P. 2d 320 (Cal. Ct. App. 1949) (holding a boxer to be a public figure); *Ruth v. Educ. Films, Inc.*, 184 N.Y.S. 948 (N.Y. 1920) (holding a baseball player to be a public figure); *Chaplin v. Natl. Broad. Co.*, 15 F.R.D. 134 (S.D.N.Y. 1953) (holding an actor to be a public figure). By accepting the position of President with "Families for Families," a public interest group with financial and political ties to his wife, Appellant thereby voluntarily interjected himself into the public's eye and became a voluntary public figure. *See Gertz v. Robert Welch*, Inc., 418 U.S. 323, 345 (1974); Restatement (Second) of Torts § 652D, cmt. e. (1977) (describing a voluntary

public figure as "[o]ne who voluntarily places himself in the public eye, by engaging in public activities, or by assuming a prominent role in institutions or activities having general economic, cultural, social or similar public interest").

Even if Appellant did not sufficiently interject himself into the public's eye, his marriage to Betty, a prominent political candidate, renders him an involuntary public figure. Involuntary public figures are individuals who are a legitimate subject of public interest despite the fact they have neither sought publicity nor consented to it. *See generally Elmhurst v. Pearson*, 153 F.2d 467 (D.C.C. 1946) (holding a man tried for sedition is an involuntary public figure); *Sidis v. F-R Pub. Corp.*, 113 F.2d 806 (2d Cir. 1940) (holding a child prodigy is an involuntary public figure and an article on his life story is not an invasion of privacy); Restatement (Second) of Torts § 652D, cmt. f (1977). Appellant purposefully hid the fact of his separation from the public's eye, while at the same time outwardly maintaining his role as the supporting spouse of a political candidate whose platform was based on family values.

In *Haynes v. Alfred A. Knoff, Inc.*, 8 F.3d 1222 (7th Cir. 1993), a couple sued a book publisher for a historical novel that exposed allegedly embarrassing and private facts about their lives. *Id.* at 1231. The court stated, while the couple did not aspire to be "representative figure[s] in the great black migration from the South to the North," the fact they were a part of that historical event made the private facts published about them a matter of legitimate public concern. *Id.* at 1232 The court stated:

> People who do not desire the limelight and do not deliberately choose a way of life or course of conduct calculated to thrust them into it nevertheless have no legal right to extinguish it if the experiences that have befallen them are newsworthy, even if they would prefer that those experiences be kept private.

Id. at 1232.

Appellant, by actively promoting the image of a happily married spouse, made the facts surrounding his relationship with Betty a legitimate subject of public interest. Courts have consistently indicated the public must be afforded the opportunity of learning about any facet of a candidate's life that may relate to his fitness for office. *See Garrison v. La.*, 379 U.S. 64, 77 (1964). Generally courts are reluctant to impede the free flow of any truthful information that may be relevant to a candidate's qualifications for office, which may often include information concerning relatives. In *Kapellas v. Kofman*, 459 P.2d 912 (Cal. 1969), a candidate for town council filed suit against a newspaper for publishing allegedly private facts relating to the bad behavior of her children. In rejecting the plaintiff's claim, the court held the facts published about her children were permissible, recognizing those who seek public posi-

tions realize that in so doing they subject themselves and those closely related to them to a "searching beam of public interest and attention." *Id.* at 923. Appellant, by virtue of relationship to Betty, has become subject to the "searching beam of public interest and attention." He purposefully expressed and maintained this image in an effort to obtain support for his wife's political candidacy. (R. at 3.)

2. The public has a legitimate interest in Appellant's substance abuse treatment because it is highly relevant to his position as President of Families for Families and to his wife's platform for candidacy.

Appellant, by virtue of his status as a public figure, has been forced into the limelight and the relationship between his alcohol abuse treatment, his wife's campaign and his position with Families for Families constitutes subject matter in which the public has a legitimate concern. In determining the scope of the newsworthiness privilege, courts have considered whether there is a "logical nexus" between the events or activities that brought the individual within the public's eye and the particular facts disclosed. *Shulman v. Group W Prod.*, 955 P.2d at 484-85; *See also Ross v. Midwest Commun., Inc.*, 870 F.2d 271 (5th Cir. 1989); *Campbell v. Seabury Press*, 614 F.2d 395 (5th Cir. 1980). In *Riley v. Harr*, 292 F.3d 282 (1st Cir. 2002), the First Circuit Court of Appeals noted, "the First Amendment protects the publication of private facts that are newsworthy, that is, of legitimate public concern to the public. Even if the private fact is not itself newsworthy, its publication is still protected if it has substantial relevance to, or any substantial nexus with a newsworthy topic." *Id.* at 298 (citations and internal quotation marks omitted).

There is a substantial nexus between Appellant's substance abuse problem and both his position with Families for Families and status as supporting spouse to Betty. Alcoholism and family values, the two core tenants of Betty's political platform, are implicated by Appellant's condition, thereby making it a matter of legitimate public concern. The public has a valid interest in facts that are contrary to Appellant's position as President of Families for Families and relevant to the accuracy of Betty's public persona as a champion of family values. Furthermore, the social value of disclosing Appellant's substance abuse treatment to the public far outweighs any depth of intrusion upon Appellant's privacy caused by such disclosure. *See* William L. Prosser, *Privacy*, 48 Calif. L. Rev. 383, 411 (1960) ("the privilege of giving publicity to news and other matters of public interest arises out of the desire and the right of the public to know what is going on in the world and the freedom of the press and other agencies of information to tell them"). In the instant case, the right of the public to know a political candidate and her spouse are hiding facts that contradict the platform on which she has based her campaign, or

that a leader of a public interest group lives in a way is contrary to the purpose of the organization, outweighs the individual's right to keep such information private.

Finally, the fact that the photographs were posted to the Internet in no way detracts the legitimacy of the public's interest in Appellant's treatment because "[t]he test of permissible use is not the currency of the publication of which the picture appears but whether it is illustrative of a matter of legitimate public interest." *Bosley v. WildWetT.com*, 310 F. Supp. 2d 914, 924 (N.D. Ohio 2004) (recognizing, "one could extend this analysis to conclude that information relating to a legitimate public interest on an internet webpage is protected communication"). Posting to the Internet information concerning Appellant's treatment did not rise to the level of a "morbid and sensational prying into [Appellant's] private [life] for its own sake." *Virgil v. Time, Inc.*, 527 F.2d 1122, 1129 (9th Cir.1975). The public's legitimate interest in facts of Appellant that have a direct relationship to his status as a public figure thereby defeats Appellant's attempt to hold the Center liable for the disclosure of those facts.

B. THERE WAS NO "PUBLICITY" OF APPELLANT'S ALCOHOL ABUSE TREATMENT BECAUSE AN INSUFFICIENT NUMBER OF PEOPLE VIEWED THE PHOTOGRAPHS ON GORDON'S WEBSITE.

Posting the photographs to the Internet did not constitute "publicity" of the matter to the public at large. There is no evidence to suggest the photographs of Appellant were ever communicated to the "public at large" until after being reproduced on the Daily Whitewater Newspaper's personal website. The fact that Betty and the Daily Whitewater Newspaper visited Gordon's website and saw the photographs is insufficient to constitute "publicity" of Appellant's alcohol abuse treatment to the public at large. This Court should accordingly dismiss Appellant's claim.

The fact that the pictures were posted to an Internet website is insufficient to constitute publication to the "public at large," which is required to satisfy the "publicity" element of Appellant's tort claim. There is no evidence in the record that the information depicted in the photographs ever reached the general public. "Publicity," for purposes of Appellant's tort claim, "means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."[1] Restatement (Second) of Torts § 652D, cmt. a. (1977) (emphasis added). The Court of Appeals recognized there is no evidence in

1. "Publicity" in this context is much broader than the "publication" element for defamation, which is satisfied by merely communicating defamatory information to a third person.

the record that anyone other than Betty or the Daily Whitewater Newspaper viewed the pictures at http://www.drunkenhusband.com. The fact that Betty saw the pictures does not constitute disclosure of a private fact because her husband's problems with alcohol abuse were well known to her before their separation. (R. at 4.) (indicating Appellant had "suffered from alcoholism and had been treated several times"). The newspaper is therefore the only entity which viewed the photographs on Gordon's website and "it is not an invasion of privacy to communicate a fact concerning the [complainant's] private life to a single person or even a small group of persons." Restatement (Second) of Torts § 652D cmt. a. (1977); *See also Yoder v. Ingersoll-Rand Co.*, 1998 U.S. App. LEXIS 31993, at *7-8 (6th Cir. Dec. 22, 1998) (per curiam) (accidental disclosure of plaintiff's AIDS condition to three co-workers, including plaintiff's mother, was not enough to constitute disclosure to the "public at large").

C. THE PHOTOGRAPHS THAT IDENTIFY APPELLANT DO NOT REVEAL PRIVATE FACTS.

The Court of Appeals was correct in recognizing that two of the photographs (the "public-fact" pictures) attached to Appellant's complaint are not actionable because they depict areas in which Appellant does not have a reasonable expectation of privacy. (R. at 8.) The appellate court erred, however, in concluding the remaining pictures (the "private-fact" pictures), which appear to depict an internal clinical session, are actionable when considered in conjunction with the first two photographs. (R. at 8-9.) The private-fact pictures are not sufficient, in and of themselves, to allege a private fact about Appellant because the faces depicted in the pictures "are not . . . picture perfect," and "no individual's face can be clearly identified" therein. (R. at 8.) This conclusion is supported by the fact that resort to the public-fact photographs is required in order to provide a context for the private-fact photographs.

Courts have recognized, "'[t]here is no liability when the defendant merely gives further publicity to information about [a] plaintiff which is already public or when the further publicity relates to matters which the plaintiff leaves open to the public eye.'" *Daly v. Viacom, Inc.*, 238 F. Supp.2d 1118, 1124 (N.D. Ca. 2002) (*quoting Sipple v. Chronical Publg. Co.*, 201 Cal. Rptr. 665, 669 (Cal. Ct. App. 1984)); *see also Howell v. N.Y. Post Co.*, 612 N.E.2d 699, 704 (N.Y. 1993) ("no cause of action . . .for publication of truthful but embarrassing facts"). In this case, the public-fact pictures show Appellant entering and standing in the waiting room of the treatment facility. (R. at 7-8.) The private-fact photographs, although taken inside the treatment facility, do not disclose any additional private facts of Appellant to the public at large. Rather, they merely reinforce the inference of the public-fact photographs, namely, that Appel-

lant entered the substance abuse treatment facility. In *Daly*, the plaintiff sued Viacom alleging public disclosure of private facts after Viacom's camera crew followed plaintiff into a nightclub bathroom and filmed her kissing another person, which Viacom later used to promote its television program entitled "Bands on the Run." 238 F. Supp. 2d at 1123-24. Viacom argued it merely gave further publicity to a fact that was already public, because plaintiff had kissed the same man on a sidewalk outside of the dance club earlier in the evening. *Id.* at 1124. The court stated that although plaintiff had a reasonable expectation of privacy in the bathroom, she could change what had previously become a public fact, into a private fact "merely by virtue of the location in which [the] activity occur[ed]." *Id.* Likewise, Appellant entered the front door of the treatment facility and stood in the waiting room, where he had no reasonable expectation of privacy. These facts were made public by two of the photographs. The private-fact photographs merely give further publicity to a public matter and are therefore not actionable.

D. THE CENTER IS NOT VICARIOUSLY LIABLE FOR GORDON'S ACTIONS BECAUSE THEY WERE OUTSIDE OF THE SCOPE OF HIS EMPLOYMENT.

Courts have consistently refused to extend liability to employers for the intentional torts of their employees without a satisfactory showing by the plaintiff that the conduct of the employee was within the scope of employment. Appellant therefore bears the burden of proving Gordon's alleged acts were within the scope of his employment with the Center. Appellant has failed to meet this burden.

In determining whether an employee's action is within the scope of his employment, courts have considered, inter alia, whether the action furthers a business interest of the employer, whether it arises from the circumstances of employment and whether the action was foreseeable. *See eg. Tichenor v. Roman Catholic Church*, 32 F.3d 953 (5th Cir. 1994); *Jones v. Baisch*, 40 F.3d 252 (8th Cir. 1994). An employee acts within the scope of his employment where his actions are of kind for which the employee was hired to perform, the acts occurred substantially within the authorized time and space limits and the acts were actuated, at least in part, by a purpose to serve the master. *Jones*, 40 F.3d at 254. Gordon was not employed by the Center for the purpose of improperly disclosing confidential information of the Center's patients and was not acting for a purpose to serve the Center when he posted the photographs of Appellant to his website.

1. *Gordon's actions were not reasonably foreseeable to the Center.*

The Center cannot be held vicariously liable for Gordon's misconduct because his posting of the photographs to the Internet was an unforeseeable deviation from the duties and authority delegated to him by the Center. For an employer to be held vicariously liable for an employee's actions, such actions must have been reasonably foreseeable to the employer. To support his claim that Gordon's actions were foreseeable, Appellant must prove the Center had actual knowledge Gordon would do something to harm Appellant. *See eg. Preisler v. Hospitality Intl., Inc.*, 106 F.3d 391 (4th Cir. 1997). In Preisler, the Fourth Circuit Court of Appeals refused to extend vicarious liability to a hotel for the tortious acts of its employees. *Id.* The court dismissed plaintiff's complaint because plaintiff offered no evidence the hotel had any actual knowledge of the alleged illicit acts of its employees.cite The court refused to accept "a bald allegation that the defendants knew or should have known or would have discovered by reasonable inspection of the relevant premises that such Peeping Tom holes existed in room 142 of the hotel." *Id.* Likewise, Appellant has provided insufficient evidence to suggest the Center could have reasonably foreseen Gordon would violate the Center's policy regarding the taking of pictures. Based on Gordon's application, the Center had no reason to suspect Gordon would violate its internal policies regarding photographs. While the record indicates Gordon "told a coworker that someone must do something to derail Betty's campaign," (R. at 5.) this was insufficient to put the Center on notice that Gordon might violate its internal policies. One ambiguous political comment of an otherwise dedicated three year employee hardly suffices to make it reasonably foreseeable to the Center that Gordon would engage in such misconduct. Furthermore, there is no evidence in the record to suggest Appellant had been anything other than a dutiful employee of the treatment facility for three years. Vague comments to coworkers were insufficient to put the Center on notice that Gordon would attempt to violate the facility's policy regarding photographs.

2. *Gordon's actions were in direct violation of the Center's policy regarding the taking of pictures within the facility.*

The Center is not liable for acts committed by Gordon in direct violation of its internal policies. By posting photographs of an internal patient meeting, Gordon violated the Center's privacy policy which states, in relevant part, "THE TAKING OF ANY PICTURES IS STRICTLY PROHIBITED INSIDE THIS FACILITY." (R. at App. 3.) Gordon's actions in posting the photographs of Appellant to his website were not of a kind he was employed to perform. Rather, they were in direct conflict with the Center's printed policy regarding the taking of pictures.

The Center's philosophy on patient privacy is clearly defined and well known to all of its employees. That policy directly prohibits the taking of photographs within the facility. The instant case is similar to *Jones v. Baisch*, *supra*, in which the Eighth Circuit Court of Appeals refused to extend liability to a doctor's office when two of its nurses publicly disclosed that one of the doctor's patients had herpes. In determining the issue of the office's liability, the court considered the fact that the nurses' employee handbooks specifically forbade the disclosure of patient medical records. *Id.* at 254 It also considered the fact that the doctor reprimanded the nurses when he learned of the disclosures. *Id.* Because this evidence showed the nurses knew they were not authorized to reveal the patient's medical records, the court held the defendants were entitled to summary judgment as a matter of law on the respondeat-superior claim. *Id.* Similarly, the record in our case indicates Gordon's actions were of a kind expressly prohibited by the Center in its written guidelines regarding patient privacy (R. at 4.) The Center has a written privacy policy and required all patients, including Appellant, to sign a form acknowledging the receipt of the policy. Additionally, there is a sign posted at the Center's entrance expressly prohibiting the taking of pictures within the facility. (R. at App. 3.) Therefore, Gordon was on notice his actions were in direct opposition to the policies of the Center and unauthorized.

3. *Gordon's actions were motivated by his personal desire and did not further any business interest of the Center.*

The Center is not liable for Gordon's independent and self-motivated actions because Gordon was motivated by a purpose to serve himself when he posted the photographs to his website. His actions in no way facilitated or promoted the Center's business. The record indicates Gordon's primary motivation in posting the photographs was a personal animus towards Betty and her position on family values and alcohol. (R. at 5.) Additionally, there is no indication in the record that Gordon acquired the photographs by virtue of his employment with the Center or committed the alleged tortious acts within the work place.

Decisions in which courts have found employees were actuated by a purpose to serve the master involve fact patterns which are very different from the instant case. For instance, in *Mason v. Kenyon Zero Storage*, 856 P.2d 410 (Wash. Ct. App. 1993), the court found genuine issues of material fact existed as to whether a supervisor was acting within his scope of employment when he drove a forklift truck into the back of another employee. The court noted the evidence did not indicate that the supervisor's actions were occasioned solely by ill will, because the evidence could sustain the reasonable inference that his acts took place in a familiar disciplinary context, used to further the work of the employer.

Id. at 415. Noting the supervisor's daily duties included the disciplining of other employees, the court held a genuine issue of material fact did exist. *Id.* In contrast, in the case at hand, the record is clear Gordon neither "liked Betty nor her position on family values, drugs and alcohol," and feared that he might lose his job if Betty won the election (R. at 5). His actions were motivated by ill-will and selfishness, which in no way furthered the Center's business interest in helping people overcome alcohol and drug dependencies. As such, no rational relationship exists between Gordon's actions and a desire to serve the Center's business interests. Neither were Gordon's actions motivated by a "dual-purpose" to serve both the Center's and his own interests. *See Gregor v. Kleiser*, 443 N.E.2d 1162 (Ill. App. Ct. 1982) (finding a dual purpose may have existed when a bouncer, hired by homeowner for private party, struck a guest). No reasonable inference can be drawn from the facts that Gordon was acting with any other intention but to further his own personal interests.

II. THE STATE OF MARSHALL'S MEDICAL PRIVACY ACT IS NOT PREEMPTED BY HIPAA BECAUSE IT FALLS UNDER THE PREEMPTION EXCEPTION TO HIPAA'S REGULATIONS.

Initially, if this court reverses the Court of Appeals and reaffirms the trial court's grant of summary judgment to the Center, this court need not address the question of whether the subpoena should be quashed because there would be no pending case from which a subpoena could issue. However, even if the case is permitted to continue, this court should affirm the Court of Appeals' and the trial court's orders granting the Center's request to quash the subpoena.

Appellant should be prevented from seeking not only the names of patients at the Center but also their medical records for the sole purpose of attempting to discern who took the pictures that were posted to Gordon's website. The Court of Appeals correctly held the Center was precluded from complying with the subpoena because the Marshall Medical Privacy Act prohibits such disclosure. 210 Marshall Stat. 85/6.17 (2004). Interpretations of state or federal law are questions of law which are reviewed by this Court de novo. *Hawes v. Golden*, 2004 Ohio App. LEXIS 4520, at *7 (Ohio Ct. App. Sept. 22, 2004). In this case, the precise question of law is whether the Marshall Medical Privacy Act or HIPAA controls the release of the records sought by Appellant's subpoena.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA), was enacted by Congress in an attempt "to protect the security and privacy of individually identifiable health information." *Law v. Zuckerman*, 307 F. Supp. 2d. 705, 710 (D. Md. 2004). The general rule regarding HIPAA's effect on state law states that the provisions, standards and requirements of HIPAA "shall supercede any contrary provi-

sion of State law." 42 U.S.C.S. § 1320d-7(a)(1) (2004). HIPAA's preemption power, however, is not absolute. HIPAA does not preempt a state law that is contrary to HIPAA and "relates to the privacy of individually identifiable health information." 42 U.S.C.S. § 1320d-7(a)(2)(B) (2004); *see also Natl. Abortion Fedn. v. Ashcroft*, 2004 U.S. Dist. LEXIS 1701, at *7-8 (N.D. Ill. Feb. 6, 2004), *aff'd* 362 F.3d 923 (7th Cir. 2004). HIPAA dictates when a medical provider, such as the Center, is permitted to disclose medical records. Pursuant 45 C.F.R. § 164.512(e)(1), a covered entity may disclose protected health information in judicial and administrative proceedings in two circumstances:

> (i) In response to an order of the court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or
>
> (ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal[.] (Emphasis added.).

45 C.F.R. § 164.512(e)(1) (2004).

Only 45 C.F.R. § 164.512(e)(1)(ii) is applicable in this case because the subpoena in this case was issued by Appellant, rather than a court. A trial or deposition subpoena, such as Appellant's, is appropriately treated differently from an order of the Court and requires that the Appellant make assurances to the health care provider that Appellant has not provided the Center.[2]

A. THE MARSHALL MEDICAL PRIVACY ACT IS CONTRARY TO HIPAA BECAUSE IT IS IMPOSSIBLE FOR THE CENTER TO COMPLY WITH BOTH STATUTES.

HIPAA, by its own terms, does not exclusively dominate the field of protecting individual privacy interests in health information. HIPAA's preemption provision states:

> A standard, requirement or implementation specification adopted under this subchapter that is contrary to a provision of State law preempts the provision of state law. This general rule applies, except if one or more of the following conditions is met: . . ..(b) The provisions of State law relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementations specification adopted under subpart E of part 164 of this subchapter.

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2. HIPAA states, "When medical information is to be released in response to a subpoena or discovery request, the health care provider must receive satisfactory assurance that: (1) there have been good faith attempts to notify the subject of the protected health information in writing of the request and that the subject has been given the opportunity to object; or (2) reasonable efforts have been made by the requesting party to obtain a qualified protective order." 45 C.F.R. § 164.512(e)(1)(ii)(A) and (B) (2004).

45 C.F.R. § 160.202 (2004) (emphasis added). The first part of the preemption analysis to determine whether Marshall's statute is preempted by HIPAA hinges on whether the statute is "contrary" to the federal law. A state law is "contrary" to HIPAA if (1) a covered entity would find it impossible to comply with both the State and federal requirements or (2) the provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of [HIPAA], as applicable. *Id.* The Marshall statute reflects a different and more restrictive policy regarding medical information than that contained in HIPAA. Under Marshall's Medical Privacy Act, medical information cannot be disclosed unless it falls under the exceptions provided in the statute. The statute's relevant provision states:

> No member of a hospital's or other medical facility's staff and no agent or employee of a hospital or other medical facility shall disclose the identity of the patient nor the nature or details of services provided to a patient, except that the information may be disclosed to the patient, persons authorized by the patient, the party making treatment decisions (if the patient is incapable of making decisions regarding the health services provided), those parties directly involved with providing treatment to the patient or processing the payment for the treatment, those parties responsible for peer review, utilization review or quality assurance, risk management, or defense of the hospital or other medical facility arising out of the care and those parties required to be notified under the Abused and Negligent Child Reporting Act.

210 Marshall Stat. 85/6.17 (2004).

There is no provision under the Marshall statute that would allow for disclosure of the identity and medical information of John Doe in this case despite the fact that his identity may be "useful" and "possibly required" in order for Appellant to pursue a case. (R. at 12.) On the other hand, HIPAA, if procedurally complied with, would allow for the disclosure of John Doe's protected health information in this case. (R. at 12.) The Marshall statute is therefore "contrary" to HIPAA because it is impossible for the Center to comply with both statutes. HIPAA affords select state laws an exception to the general rule of preemption in order to maintain the status quo in states, like Marshall, in which more stringent privacy regulations exist. *See Natl. Abortion Fedn. v. Ashcroft*, 2004 U.S. Dist. LEXIS 4530, at *16, (S.D.N.Y. Mar. 19, 2004). The Marshall Medical Privacy Act will therefore avoid preemption under HIPAA if its disclosure requirements are "more stringent" than HIPAA.

B. THE MARSHALL MEDICAL PRIVACY ACT IS MORE STRINGENT THAN HIPAA BECAUSE IT DOES NOT ALLOW THE DISCLOSURE OF JOHN DOE'S IDENTITY AND MEDICAL RECORDS WITHOUT HIS CONSENT.

Not only is 210 Marshall Stat. 85/6.17 (2004) contrary to HIPAA, but its disclosure requirements are also more stringent than HIPAA's provisions because the Marshall statute prohibits disclosure of John Doe's information in this case, while HIPAA would permit it. Under HIPAA, regulations "shall not supercede a contrary provision of State law, if State law imposes requirements, standards, or implementation specifications that are more stringent than the requirements, standards, or implementation specifications imposed under the regulation." 42 U.S.C.S. § 1320d-2 (2004). A standard is "more stringent" if it "provides greater privacy protection for the individual who is the subject of the individually identifiable health information" than the standard in the regulation. 45 C.F.R § 160.202(6)(2004). For example, if state law provides that the written consent of the individual is necessary before individually identifiable health information may be disclosed for payment purposes, it governs, because it precludes disclosure unless consent is obtained, while the HIPAA privacy rule permits disclosure without consent or authorization for such purposes.[3]

Very few courts have addressed the issue of whether their respective state laws regarding the privacy of medical records are more stringent than those regulations contained in HIPAA. One of the first published discussions came from an appellate court in Florida, which found that HIPAA's procedural requirements were more stringent than those imposed by its own law. *See Lemieux v. Tandem Health Care of Fla., Inc.*, 862 So. 2d 745, (Fla. Cir. Ct. 2003). More importantly, however, the court found that the substantive provisions of the same Florida statute were more stringent than those of HIPAA.cite The substantive portion of the Florida statute governing litigation uses prohibited disclosure of protected health care information except to entities falling within four statutory exceptions, while HIPAA allowed disclosure of protected health care information to any third party as long as "satisfactory assurances" were provided. *Id.* at 748 . The substantive provisions in the Marshall statute, like those specifically enumerated in the Florida statute, restrict the disclosure for specific uses only and makes no mention of any assurance that could be sufficient to allow disclosure outside the listed instances.

3. *See also Campos v. Payne*, 766 N.Y.S.2d 535 (N.Y. Civ. Ct. 2003) (trial court refused to issue a subpoena *duces tecum* to health care entities seeking production of patient's health care records because New York state law requires that the subpoena state that records sought shall not be provided unless the subpoena is accompanied by the written authorization of the patient).

In *Natl. Abortion Fedn. v. Ashcroft*, 2004 U.S. Dist. LEXIS 1701 (N.D. Ill. Feb. 6, 2004), *aff'd*, 362 F.3d 923 (7th Cir. 2004), the federal government served a subpoena on Northwestern Memorial Hospital requiring the hospital to produce medical records in its possession with respect to patients for whom a named physician had performed late-term abortions in the previous two years. The goal of the litigation was to challenge the constitutionality of the Partial Birth Abortion Ban of 2003. The subpoena was accompanied by a federal court order authorizing the hospital, a non-party witness to the litigation, to disclose to the government the medical records sought with all patient identifying information redacted. In moving to quash the subpoena, the hospital argued that Illinois state law precluded it from disclosing the records, even with identifying information redacted. The court agreed and noted that disclosure of the subpoenaed records was permitted under HIPAA, which allows disclosure "in the course of any judicial or administrative proceeding . . . in response to an order of the court," but was forbidden by Illinois law. Accordingly Illinois state law, just like Marshall's state law, "prohibits or restricts a use or disclosure in circumstances under which such use or disclosure otherwise would be permitted" under HIPAA, thus satisfying the definition of "more stringent" set forth in the regulations. 45 C.F.R. § 164.512(e)(1)(i) (2004); 45 C.F.R. § 160.202 (2004).

Because Marshall's privacy statute does not contain a provision for disclosure of protected health information pursuant an attorney-issued subpoena, the statute does not provide for disclosure of John Doe's identity or medical records. The lack of any provision for disclosure in response to an attorney-issued subpoena makes clear that the Marshall Medical Privacy Act neither requires nor allows Appellant to disclose John Doe's identity or medical information to Appellee. Regardless of the fact that disclosure of the requested information might be "useful and possibly required for plaintiff to pursue a case against John Doe," (R. at 12.) there is no provision that authorizes Appellee to produce the information to Appellant. The appellate court properly found that the Marshall Statute "does not provide for such disclosure," and upheld the trial court's decision to quash Appellant's subpoena. (R. at 12.)

Finally, Marshall's statute is more stringent than HIPAA because it requires a patient's authorization before their identity or nature of treatment can be disclosed without exception, while HIPAA permits the disclosure of such information without express consent of the patient or pursuant to a court order. *U.S. v. Sutherland*, 143 F. Supp. 2d. 609, 612 (W.D. Va. 2001). Indeed, the "key component in analyzing HIPAA's permissive disclosure requirement is the ability of the patient to withhold permission and to effectively block disclosure." *Law*, 307 F. Supp. 2d at 711. Under this analysis and the analysis of the courts that have consid-

ered the preemption exception issue, Marshall's statute is more stringent and therefore not preempted by, HIPAA.

C. Even if Marshall's Act is preempted by HIPAA, Appellant's subpoena must still be quashed because it seeks disclosure of the very information HIPAA was designed to protect.

Both the Marshall Medical Privacy Act and HIPAA have a strong public policy of protecting health information and medical records, which would be abrogated if Appellant was allowed to force disclosure of John Doe's information. The Hippocratic Oath, written in the fourth or fifth century B.C., embodies the ethical obligation of confidentiality in the medical profession:

> Whatever, in connection with my professional practice, or not in connection with it, I see or hear in the life of men, which ought not to be spoken abroad, I will not divulge, as reckoning that all such should be kept secret.

Under HIPAA, Congress recognized a privacy interest in addition to this centuries-old physician-patient privilege by seeking to protect the security and privacy of individually identifiable health information. 45 C.F.R. § 164.501 (2004). It is equally clear by the restrictions Congress placed on the disclosure of patient medical records that there is a "strong federal policy in favor of protecting the privacy of patient medical records." Law, 307 F. Supp. 2d at 711; *see also Northwestern Med. Hospital v. Ashcroft*, 362 F.3d 923, 929 (7th Cir. 2004) (recognizing that, if the hospital "cannot shield its abortion patients' records from disclosure in judicial proceedings . . . [it] will lose the confidence of its patients and persons with sensitive medical conditions may be inclined to turn elsewhere for medical treatment"). Congress did not enact HIPAA to serve as a conduit through which a plaintiff could force disclosure of protected health information under the guise of assessing a potential defendant's "identity" and "mental state" for purposes of litigation (R. at 6.) As the appellate court recognized, "[w]hile John Doe's identity may be useful and possible required for plaintiff to pursue a case against John Doe, the [Marshall statute] does not provide for such disclosure." (R. at 12.)

Marshall's Medical Privacy Act not only follows in the footsteps of the policy behind the creation of HIPAA but also supports the Congressional intent in creating HIPAA as a floor of medical record privacy law that encourages states to enact "more stringent" laws to protect patients. In other words, because Marshall's statute is contrary to and more stringent than HIPAA, it indeed codified the policy behind HIPAA and is therefore the controlling law to be applied in the case at hand. Marshall's statute does not permit the disclosure Appellant seeks in his subpoena without John Doe's consent and therefore the Court should affirm the

decisions of trial court and Court of Appeals and grant the Center's motion to quash because there is no evidence that John Doe authorized the release of his identity and medical records.

CONCLUSION

For the reasons set forth above, this Court should affirm the Court of Appeals' quashing of Appellant's subpoena and dismiss Appellant's complaint, reinstating summary judgment in favor of the Center.