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The Twenty-Ninth Annual John Marshall International Moot Court Competition in Information Technology and Privacy Law: Brief for Respondent, 28 J. Marshall J. Computer & Info. L. 151 (2010)

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BRIEF FOR RESPONDENT

NO. 2010-CV-0654

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

AARON MURPHY,
Petitioner,
v.
MARSHCODE CORP.,
a Marshall Corporation,
Respondent.

On Appeal from the
First District Court of Appeals for the State of Marshall

BRIEF FOR RESPONDENT

Kimberly Hodgman

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TO THE HONORABLE SUPREME COURT OF THE STATE OF MARSHALL:

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

OPINIONS BELOW

The Marbury County Circuit Court granted summary judgment in favor of Appellee, MarshCODE, in case number MCV-08-227. The First District Court of Appeals of the State of Marshall affirmed the circuit court's judgment in case number 2009-CV01-0416. The opinion of the court of appeals is contained in pages 3-13 of the record.

STATEMENT OF JURISDICTION

The statement of jurisdiction is omitted in compliance with Section 1020(2) of the Rules for the Twenty-Ninth Annual John Marshall Law School Moot Court Competition in Information Technology and Privacy Law.

CONSTITUTIONAL & RESTATEMENT PROVISIONS INVOLVED

The instant case requires application and interpretation of the First Amendment to the United States Constitution, which provides that "Congress shall make no law. . .abridging the freedom of speech." U.S. Const. amend. 1.

This case further requires the application and interpretation of the Restatement (Second) of Torts § 558, which defines the elements of a defamation claim:

> (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Restatement (Second) of Torts § 558 (1977).

Restatement (Second) of Torts § 652E provides a cause of action for false light invasion of privacy when an individual "gives publicity to a matter concerning another that places the other before the public in a false light" and:

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

STATEMENT OF THE CASE

I. Statement of the Facts

MarshCODE, Inc. (MarshCODE), a respected leader in the field of genetic research, has worked since 1997 to accumulate the largest DNA database in the country in an effort to "decode" the human genome, research genetic therapies, and promote public awareness of the human genome. (R. at 4). In order to facilitate these goals, MarshCODE created their research database using volunteer data subjects. (R. at 4). MarshCODE employed trained technicians to collect genetic samples, which, according to standard procedures, were kept in secure locations and assigned unique identifiers in order to protect data subjects' anonymity. (R. at 4). Further, each data subject signed a Participation Agreement that included terms of use and MarshCODE's privacy policy. (R. at 4).

After years of committing solely to scientific research, MarshCODE began to consider commercial options as well. (R. at 4). Thus in 2008, MarshCODE launched, "Your DNA, Your Health," enabling customers to discover genetic risks, and "Discover Your Roots," enabling customers to learn more about their ancestry. (R. at 4). Through the "Discover Your Roots" program customers could purchase "Build Your Family Tree." (R. at 4). This unique program allowed customers to compare their own DNA with MarshCODE's extensive database. (R. at 4). If a match was found, the customer could request that MarshCODE contact their potential family member. (R. at 4). The potential family member could then accept or decline contact. (R. at 5).

Upon entering the commercial market, MarshCODE remained true to protecting the donors who had contributed to their vast DNA database. First, MarshCODE undertook efforts to conceal donors' identity by creating a test database to develop the "Build Your Family Tree" program. (R. at 7). Second, MarshCODE designed the new programs to release participants' information through a secure, password protected website. (R. at 5). Third, on December 28, 2008, MarshCODE publicly announced its entry into the commercial market and updated its Participation Agreement online. (R. at 5). Under the revised Participation Agreement, donors who wished to have their data removed from MarshCODE's new programs simply needed to contact MarshCODE and their data would be removed within 72 hours. (R. at 5). Lastly, MarshCODE made an online announcement inviting all donors to participate in the new programs and sent individual notices to each donor

either through email or U.S. mail, depending on donors' preferences. (R. at 5). These notices should have reached every donor in compliance with MarshCODE's terms and conditions, which required participants to keep their contact information accurate and up to date. (R. at 14).

During September 2000, Aaron Murphy (Murphy) joined MarshCODE's efforts to further genetic research. (R. at 5). After giving a sample of his DNA to MarshCODE, Murphy moved out of Marshall without updating his address with MarshCODE. (R. at 4). In 2002, Murphy became a minister and began endorsing the conservative views of his church, regularly preaching against pre-marital sex and homosexuality. (R. at 5). Murphy commented extensively in the media, including television and radio, promoting his views. (R. at 5). His public commentary sparked the reaction of activist groups and received publicity during the 2008 general elections. (R. at 5).

In March 2009, Billie Who used the "Build Your Family Tree" program hoping to find her natural birth father. (R. at 5). To Billie Who's surprise, the program returned Murphy's profile as a purported DNA match. (R. at 6). As a gay member of the Marshall community, Billie Who was well aware of Murphy's views on pre-marital sex and homosexuality, and went public with the news. (R. at 6). While the news spread through the media and blogosphere, MarshCODE launched an internal investigation into the matter. (R. at 6). Murphy retained his position with the church and was asked to take a step back from preaching and public appearances until the controversy settled. (R. at 7). MarshCODE's investigation revealed that a program malfunction resulted in the unintentional release of randomized data from the test database created to protect donors during the production of the "Build Your Family Tree" program. (R. at 6, 7). MarshCODE publicly apologized for the mistake and assured customers that the necessary measures were being taken to remedy the situation. (R. at 7).

II. Summary of the Proceedings

The Circuit Court. During June 2009, Appellant initiated a suit against MarshCODE for "(1) defamation; (2) invasion of privacy by placing him before the public in a false light; (3) [and] breach of contract." (R. at 7). Appellant specifically accused MarshCODE of intentional misuse of his genetic data as a part of a greater plot to discredit him in the community and to distract the public from his ardent views regarding premarital sex and homosexuality. (R. at 6).

MarshCODE moved for summary judgment on all three counts, asserting that no genuine issue of material fact existed regarding any of Appellant's claims. (R. at 7). The circuit court granted MarshCODE's motion for summary judgment on all three counts. (R. at 7).

The Court of Appeals. Appellant appealed the circuit court's judgment to the First District Court of Appeals for the State of Marshall. (R. at 3). The First District Court of Appeals denied Appellant's assignment of error on all three counts. (R. at 13). Accordingly, on May 8, 2010, the Court of Appeals affirmed summary judgment on behalf of MarshCODE. (R. at 13).

The Court of Appeals found MarshCODE's arguments regarding Appellant's defamation claim convincing. (R. at 9). MarshCODE reasoned that (1) posting information to an internal network with no intent to communicate the information to third parties did not constitute a publication, (2) Appellant failed to prove negligence or the heightened standard of actual malice required due to Appellant's "pervasive and vocal involvement" in the community, and (3) Appellant failed to prove special damages with an economic or pecuniary value. (R. at 9). As to Appellant's false light claim, the court of appeals agreed with the circuit court's holding that "Murphy failed to establish the publicity element in his cause for action. . .noting that even if Murphy succeeded in proving. . .publicity, he would still fail in proving the remaining elements." (R. at 12). Finally, the appellate court affirmed summary judgment regarding Appellant's breach of contract claim on the basis that the "privacy policy included in the Study Participation Agreement is not contractual." (R. at 13).

On July 19, 2010 this Court granted Appellant leave to appeal the decision of the First District Court of Appeals affirming the Marbury County Circuit Court. (R. at 2).

SUMMARY OF THE ARGUMENT

The First District Court of Appeals properly affirmed summary judgment on behalf of MarshCODE because Appellant failed to raise a genuine issue of material fact on his defamation claim. First, MarshCODE's accidental disclosure of information, which implied that Appellant participated in premarital sex or had a homosexual child, was not defamatory because an average person would not lower his estimation or be deterred from associating with Appellant based on such a statement. Second, no publication was made because MarshCODE did not act with negligence and was unaware of the program malfunction that resulted in the release of the information. Third, given that MarshCODE did not act with negligence, Appellant, as a public figure, cannot establish that MarshCODE acted with the required actual malice. Lastly, Appellant did not sustain the special harm required to maintain a defamation claim because he was only asked to take a temporary step back from his duties within the church. For these reasons, the ap-

pellate court appropriately affirmed summary judgment for MarshCODE on Appellant's defamation claim.

Appellant likewise failed to raise a genuine issue of material fact on his false light invasion of privacy claim. First, the release of Appellant's name to a single person did not constitute publicity, as it did not lead to a substantial certainty that such information would become public knowledge. Second, Appellant's misidentification as Billy Who's birth father was not sufficiently extraordinary to be considered highly offensive to a reasonable person. Third, MarshCODE did not act with actual malice: no evidence exists that MarshCODE even knew of the falsity of the information prior to its accidental release. Therefore, the lower court appropriately granted summary judgment regarding Appellant's false light claim.

Appellant further failed to raise a genuine issue of material fact on his breach of contract claim. First, and most significantly, MarshCODE's privacy policy was not sufficiently definite to constitute a unilateral offer to contract. Even if the privacy policy amounted to a contract, Appellant did not perform his obligation when he moved from Marshall and failed to update his contact information. Lastly, MarshCODE did not breach its Study Participation Agreement because it reserved the right to revise its terms and conditions. Thus, the lower court properly granted summary judgment in favor of MarshCODE on Appellant's breach of contract claim.

ARGUMENT AND AUTHORITIES

The Marbury County Circuit Court resolved this case when it granted summary judgment for MarshCODE on all three of Appellant's claims. Marshall Rule of Civil Procedure 56(c) requires judgment as a matter of law for the moving party when the evidence fails to demonstrate a genuine issue of material fact. Marshall R. Civ. P. 56(c). A genuine issue of material fact does not exist unless a reasonable jury could find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Thus, summary judgment is appropriate when a party fails to raise a fact issue for an element of a cause of action for which that party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (interpreting similar language of Federal Rules of Civil Procedure 56(c)). Hence, a primary purpose of summary judgment "is to isolate and dispose of factually unsupported claims." *Id.* at 323-34.

An appellate court reviews a grant of summary judgment using a *de novo* standard. *IESI AR Corp. v. Nw. Ark. Reg'l Solid Waste Mgmt. Dist.*, 433 F.3d 600, 603 (8th Cir. 2006). The reviewing court determines whether a genuine issue of material fact exists by viewing the evidence most favorably to the nonmoving party. *Id.* The appealing party must

raise at least a fact issue for all essential elements of his claims. *Celotex Corp*., 477 U.S. at 322. A "complete failure of proof concerning an essential element" will deem all other facts immaterial. *Id.*

I. NO GENUINE ISSUE OF MATERIAL FACT EXISTS REGARDING APPELLANT'S DEFAMATION CLAIM.

Appellant first alleges that MarshCODE defamed him by accidentally releasing his name to a single individual, Billie Who (R. at 9). Thus, Appellant's first issue on appeal is whether the court erred in granting summary judgment for MarshCODE with respect to his defamation claim. (R. at 2). Because Appellant is unable to show a genuine issue of material fact regarding the elements of his defamation claim, the First District Court of Appeals for the state of Marshall properly affirmed the circuit court's grant of summary judgment in MarshCODE's favor.

The state of Marshall has adopted the Restatement (Second) of Torts § 558, under which a defendant may be liable for defamation if the plaintiff can prove the following: 1) a false and defamatory statement; 2) an unprivileged publication to a third party; 3) fault amounting at least to negligence on the part of the publisher; and 4) either actionability of the statement or the existence of special harm caused by the publication. *Id.* Simply stated, a claim for defamation "redresses damage to reputation." *State v. Carpenter*, 171 P.3d 41, 53 (Alaska 2007). While a person's reputation is inherently valuable and may be harmed by untruthful publications, the protection of reputation comes at the cost of the constitutionally protected right of free speech. *New York Times Co. v. Sullivan*, 376 U.S. 254, 301 (1964). Thus, protecting a person's reputation and enforcing defamation claims must be balanced against the right of free speech. *See id.* at 301.

Although the parties have stipulated to the falsity of the information released to Billie Who, Appellant's defamation claim nonetheless fails because he cannot satisfy the remaining elements required by Section 558 of the Restatement (Second) of Torts. MarshCODE's accidental identification of Appellant as Billie Who's birth parent was not defamatory, the inadvertent release of such information on a private, password protected website did not constitute a publication, Appellant is a public figure who failed to prove MarshCODE acted with actual malice, and the disruptions Appellant sustained do not constitute special damages. Because Appellant fails to prove each element of his defamation claim, this Court should affirm summary judgment on behalf of MarshCODE.

A. *MarshCODE's Disclosure of Appellant as Billie Who's Birth Parent Is Not Defamatory.*

Appellant's defamation claim must fail because MarshCODE's accidental disclosure of Appellant's identity as Billie Who's natural birth father is not defamatory. In a defamation claim, the court must first determine if the challenged statement is capable of bearing a defamatory meaning. Restatement (Second) of Torts § 614 (1977). A statement is defamatory if it goes so far as "to harm the reputation of [a] person [or] lower him in the estimation of the community," or "[deter] third person[s] from associating or dealing with." Restatement (Second) Torts §559 (1977); *see Gilbert v. WNIR 100 FM*, 756 N.E.2d 1263, 1277 (Ohio. App. Ct. 2001) (broadcast stating that plaintiffs were murderers was defamatory and impaired their reputations); *see also Brown v. Farkas*, 511 N.E.2d 1143, 1147 (Ill. App. Ct. 1986) (accusation that teacher molested a child was defamatory because it tarnished her reputation and deterred third person from associating with her); Restatement (Second) of Torts § 559 (1977). The court reviews the challenged statement from the perspective of the average reader judging the statement in the context in which it was made. Restatement (Second) of Torts § 566 cmt. e (1977).

While both parties have stipulated to the falsity of the statement (R. at 8), falsity alone does not satisfy a claim for defamation. *New York Times*, 376 U.S. at 271-72. The Supreme Court distinguished false statements from defamatory statements and noted that an "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *Id.* at 271-72.

Furthermore, modern courts recognize statements that are considered defamatory evolve with societal norms. *See Murphy v. Millennium Radio Grp.*, No. 08-1743, 2010 WL 1372408, at *7 (D. N.J. Mar. 31, 2010); (holding imputation of homosexuality cannot be defamatory in today's society); *Albright v. Morton*, 321 F. Supp. 2d 130, 136 (D. Mass 2004) ((finding that a statement wrongfully identifying someone as homosexual is not defamatory *per se*).

For example, the *Murphy* court held that the imputation of homosexuality is not capable of a defamatory meaning. *Murphy*, 2010 WL 1372408 at *7. The plaintiff in *Murphy* brought a defamation claim against a radio company for implying that the plaintiff was a homosexual and someone not to be trusted. *Id.* at *6-7. While the *Murphy* court noted that courts have historically treated the imputation of homosexuality as capable of a defamatory meaning, the court determined that the same result in *Murphy* would be incompatible with today's Fourteenth Amendment Equal Protection guarantees. *Id.* at *6-7. Thus, the court refused to hold the imputation of homosexuality as defamatory as it

would "legitimize discrimination against gays and lesbians by concluding that referring to someone as homosexual tends so to harm the reputation of that person as to lower him in the estimation of the community. . ." *Id.* at *7.

Moreover, in 1954, a court treated the insinuation that a Caucasian woman was an African-American as defamatory *per se*. *Natchez Times Publ'g Co. v. Dunigan*, 72 So.2d 681, 684 (Miss. 1954). The Mississippi Supreme Court found that a woman, who was referred to as a "Negro" in a newspaper, could recover on her defamation claim without showing special harm since the statement that she was African-American was so offensive that she need not show pecuniary damages. *Id.* This case shows how society's views on defamatory statements change over time because it is doubtful that courts today would conclude that the status of being an African-American is so offensive that a statement to that effect would degrade a plaintiff in society. Similarly, stating that someone had premarital sex or a homosexual child is not defamatory to the reasonable person given modern societal norms.

At issue in this case is the misidentification of Appellant as Billie Who's birth parent. (R. at 6). While Billie Who is a homosexual, stating that Appellant is Billie Who's birth parent is not defamatory. *Murphy*, 2010 WL 1372408 at *7. Furthermore, insinuating that Appellant had premarital sex or had a child while unmarried is not defamatory given current societal norms. *Id.*; *Albright*, 321 F. Supp. 2d at 136. Although Appellant presents evidence that members of his church condemn homosexuality and premarital sex (R. at 6), a reasonable person would not think less of or avoid associating with a single parent or the parent of a homosexual child.

If this Court were to recognize the status of being a single parent or the parent of a homosexual child as defamatory, this Court would effectively condemn parents of over a quarter of all children living in the United States. According to a 2007 report issued by the United States Census Bureau, there are approximately 13.7 million single parents in the United States and those same parents are responsible for raising 21.8 million children. Timothy S. Grall, U.S. Census Bureau, *Custodial Mothers and Fathers and Their Child Support: 2007* 1 (2009), http://www.census.gov/prod/2009pubs/p60-237.pdf. Those children make up approximately twenty-six percent of all children under the age of twenty-one in the United States today. *Id.* Moreover, such a conclusion would conflict with Fourteenth Amendment Equal Protection guarantees that prohibit discrimination against homosexuals. Since no Marshall citizen could reasonably believe that stating a person is a single parent or has a homosexual child is defamatory, no genuine issue of material fact exists as to whether MarshCODE's statement was defamatory; thus. Thus, this Court should affirm summary judgment.

B. *MarshCODE's Inadvertent Release of Appellant's Identity to Billie Who did not Constitute a Publication.*

Appellant has also failed to establish that MarshCODE published the alleged defamatory statement to a third party. The second element of a defamation claim requires that the defendant publish an unprivileged statement concerning the plaintiff to a third party. Restatement (Second) of Torts § 558(b) (1977). To constitute a publication, a plaintiff must establish that the defendant communicated to a third person a defamatory statement orally, in writing, or by conduct. *Accubanc Mortg. Corp. v. Drummonds*, 938 S.W.2d 135, 147 (Tex. App. 1996). "Any act by which the defamatory matter is communicated to a third party constitutes publication." *Gilbert*, 756 N.E.2d at 1276. However, the "accidental communication of a matter defamatory of another to a third person is not a publication if there was no negligence." *Morrow v. II Morrow, Inc.*, 911 P.2d 964, 967 (Or. App. Ct. 1996); Restatement (Second) of Torts § 577 cmt. o (1977).

Courts following the Restatement (Second) of Torts, like Marshall courts, consider a statement negligently made if the defendant's actions created an unreasonable risk that the defamatory statement would be communicated to a third party. *Campbell v. Salazsar*, 960 S.W.2d 719, 726 (Tex. App. 1994). Thus, to establish that an accidental communication constitutes a publication, a plaintiff must prove that the defendant either intended or could reasonably anticipate that a third party would overhear the statement. *Morrow*, 911 P.2d at 967-68.

For example, the *Morrow* court dismissed a libel action on summary judgment because the plaintiff could not establish that a defamatory statement that was accidentally communicated without negligence constituted a publication. *Id.* at 968. There, the plaintiff brought a defamation claim against his former employer for an allegedly defamatory memorandum regarding the plaintiff's work performance. *Id.* at 965-66. The plaintiff discovered the memorandum saved on the "O" drive of the employer's database after an anonymous voicemail informed the plaintiff that the disparaging report was located on the database. *Id.* at 965. The supervisor, however, provided in his affidavit that he had created the file, saved it to his personal computer, printed two copies of the document per his superior's request, and then deleted the file. *Id*. Hence, the supervisor was unaware that the employer's database saved all created documents to a common, shared "O" drive. *Id.* Even though the employer created, maintained, and allowed access to the shared "O" drive to all employees, the court found that the employer did not have the requisite intent necessary to constitute a publication, nor could the employer reasonably anticipate that its shared "O" drive would communicate a defamatory statement. *Id.*

In the instant case, Appellant did not present any evidence that MarshCODE intended to publish Appellant's identity to Billie Who or could have reasonably anticipated such information would be disclosed through the maintenance of the "Build Your Family Tree" program. According to *Morrow*, the creation of a database that is accessible to multiple people does not establish the intent required to elevate an accidental communication to the level of a publication. *Id*. In this case, MarshCODE created a randomized test database in an attempt to prevent anyone from discerning the identity of DNA donors, even the programmers, unless certified by the donor. (R. at 7). Furthermore, MarshCODE's actions were far from negligent since it did not know about the technical malfunction and did not intend to disclose Appellant's identity to Billie Who. (R. at 6, 7). Thus, Appellant failed to prove that MarshCODE made a publication and cannot sustain his defamation claim. Accordingly, this Court should affirm the lower courts grant of summary judgment on behalf of MarshCODE.

C. *Appellant is a Public Figure and Failed to Prove the Requisite Degree of Fault Necessary to Succeed in a Defamation Claim.*

Appellant's defamation claim fails because, as a public figure, he failed to show that MarshCODE acted with actual malice when it inadvertently released Appellant's information to Billie Who. The third element of a defamation claim requires a plaintiff to prove that the defendant acted with the requisite degree of harm regarding the act of publication. Restatement (Second) of Torts § 588 (1977). The Supreme Court distinguishes between public and private figures, requiring public figures to prove the defendant acted with an elevated degree of fault, actual malice, to succeed on a defamation claim. *New York Times*, 376 U.S. at 279-80.

The Supreme Court classifies defendants who have achieved evasive fame, notoriety or commanded public interest as "all purpose" public figures and require a showing of actual malice in a defamation claim. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 154-55 (1975). The rationale behind the heightened standard is two-fold. *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 164 (1979). First, since a public figure enjoys greater access to the media and may resort to "self-help," he or she is less vulnerable to a defamatory statement. *Id.* "The first remedy for any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974). Second, the Supreme Court recognizes a "normative consideration that public figures are less deserving of protection" since they have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood." *Wolston*, 443 U.S. at 164.

An "all purpose" public figure has "assumed a role of special prominence in the affairs of society" or occupied a position of "persuasive power and influence." *Id.* at 165. To determine if a plaintiff is an "all purpose" public figure the court considers: "(1) statistical survey data concerning the plaintiff's name recognition; (2) previous media coverage of the plaintiff; (3) evidence that others alter or revaluate their conduct or ideas in light of plaintiff's actions; and (4) any other relevant evidence." *Wilson v. Daily Gazette Co.*, 588 S.E.2d 197, 205 (W. Va. 2003). Given the prominence of an "all purpose" public figure, he or she must prove that the defendant acted with actual malice to succeed on a defamation claim. *Gertz*, 418 U.S. at 324.

A private figure, on the other hand, does not have access to media outlets to correct erroneous statements or protect his reputation. *Id.* at 344. A private figure enjoys a greater scope of protection from erroneous speech and must only prove that the defendant negligently published the defamatory statement. *Wolston*, 443 U.S. at 164. "A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." *Id.* at 167. Thus, a defendant must show more than mere news-worthiness to justify the application of the actual-malice standard, and showing that the plaintiff "engaged the attention of the public in an attempt to influence the resolution of issues involved" may transform a private figure to a public figure. *Cf. id.* at 168. Accordingly, an individual who has not engaged the media to influence an outcome is likely a private figure who must prove that the defendant acted negligently to succeed on his defamation claim.

In addition, the Supreme Court recognizes a class of public figures who do not meet the traditional requirements of an "all purpose" public or a private figure. *Id.* at 345-51. Within this group of individuals are "limited purpose" public figures and involuntary public figures. *Id.* A "limited purpose" public figure is someone who has thrust himself into the middle of a public issue. *Id.* at 380. If an individual is deemed a "limited purpose" public figure, the heightened actual-malice standard applies for a defamation claim. *Id.* at 351. Courts treat "limited purpose" public figures as "public figures for a limited range of issues surrounding a particular public controversy." *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998). The court will consider a plaintiff a "limited purpose" public figure if he satisfies the three-prong test set forth in *Suriano*:

> (1) the plaintiff voluntarily engaged in significant efforts to influence a public debate-or voluntarily assumed a position that would propel him to the forefront of a public debate-on a matter of public concern;
>
> (2) the public debate or controversy and the plaintiff's involvement in it existed prior to the publication of the allegedly libelous statement; and

> (3) the plaintiff had reasonable access to channels of communication that would permit him to make an effective response to the defamatory statement in question.
>
> *Wilson*, 588 S.E.2d at 206 (citing *Suriano v. Gaughan*, 480 S.E.2d 548, 557-58 (W. Va. 1996) as the proper test for "limited purpose" public figures).

Furthermore, a person seeking to influence a public debate will qualify as a "limited purpose" public figure, and courts have long considered the debate on homosexuality an issue of public concern. *See e.g.*, *Savage v. Gee*, 716 F. Supp. 2d 709, 716 (S.D. Ohio 2010) ("Book concerning homosexual rights certainly raises issues of public concern"); *Nichols v. Univ. of S. Miss.*, 669 F. Supp. 2d 684, 698 (S.D. Miss. 2009) ("[h]omosexuality. . .could generally be considered [a matter] of public concern as [it has] been the center of intense public debate").

For example, the Supreme Court in *Gertz* discussed the prerequisite notoriety necessary for the Court to consider an individual a "limited purpose" public figure. *Gertz*, 418 U.S. at 380. In *Gertz*, a published magazine article labeled a criminal prosecutor a "Communist-fronter," "Marxist," and part of a "Communist campaign against the police." *Id*. at 326. The Court determined that the attorney was not a "limited purpose" or "all purpose" public figure because he had not injected himself into the "vortex of this public issue" nor engaged "the public's attention in attempt to influence its outcome." *Id.* at 352. The Court held that the constitutional privilege against liability for injury was not available when a plaintiff was a private individual. The Court, however, recognized that the class of public figures was not limited to publicly elected officials. *Id.* at 380. This class also included individuals who had thrust themselves into the public eye. *Id.* Thus, an individual may elevate himself to public figure status by making statements to the public and being present in the public eye.

Further, the *Wilson* court applied the *Suriano* three-prong test for "limited purpose" public figures. *Wilson*, 588 S.E.2d at 207. There, a high school athlete brought a defamation claim against the local newspaper for reporting that he had inappropriately exposed himself after a sporting event. *Id.* at 201. The court found that the athlete had not interjected himself into a discussion of sportsmanship under the *Suriano* test since he had not directed any letters to the editor nor commented on sportsmanship during a press conference prior to the publication of the defamatory remarks. *Id.* at 207. Thus, the court did not deem the athlete a "limited purpose" public figure and he did not have to prove actual malice.

While the plaintiffs in *Wilson* or *Gertz* were not considered public figures in the defamation context, courts have considered a variety of other individuals to be public figures, including religious leaders. Multi-

ple courts have treated ministers and other religious leaders as public figures based on their involvement in the community and commentary on politics. *See e.g.*, *Price v. Stossel*, 620 F.3d 992, 1005 (9th Cir. 2010) (evangelic minister classified as a public figure in a defamation suit); *Thompson v. Emmis Television Broad.*, 894 So.2d 480, 485 (La. Ct. App. 2005) (minister "made himself a public figure through his political activism and position in his community. . .").

For example, in *Thompson*, a minister brought a defamation action against a television station for a broadcast linking the minister to an embezzlement scandal at his church. *Id*. at 482-86. The trial court considered him a public figure, dismissing his claim. *Id.* at 483. On appeal, the court discussed how the minister's activities within the community created public figure status. *Id.* at 485. Specifically, the court considered his prominent role in his local "civic and religious community," "his political activism," and the media coverage of his activities in classifying him as a public figure. *Id.* Thus, the court upheld the trial court's dismissal of the minister's defamation claim since he could not prove that the defendant acted with actual malice when it broadcast the scandal. *Id.* at 486-87. Accordingly, courts consider religious leaders to be public figures when they are involved in civic and religious activities, are politically active, and are subject to media attention.

In the present case, Appellant's prominent role in the community elevated him to the status of a "limited purpose" public figure; thus, he must prove that MarshCODE acted with actual malice or in reckless disregard of the truth. *Gertz*, 418 U.S. at 351. According to *Gertz*, Appellant is a "limited purpose" public figure since he has thrust himself into society as a prominent minister, made statements on premarital sex and homosexuality, and received media attention for his positions. (R. at 5). Appellant's actions also satisfy the *Suriano* test for "limited purpose" public figures. *Suriano*, 480 S.E.2d at 557-58. The first element is satisfied because Appellant voluntarily engaged in significant public debate on the topics of pre-marital sex and homosexuality. *Id.*; (R. at 5). Under *Nichols* and *Savage*, homosexuality is an issue of public concern. *Savage*, 2010 WL 2301174 at *6-7; *Nichols*, 669 F. Supp. 2d at 698. Appellant has spoken out against premarital sex and homosexuality in schools, commented extensively on radio and television programs, and sparked opposition from other activist groups. (R. at 5). The second element of the *Suriano* test is satisfied because Appellant's public role in the debate on pre-marital sex and homosexuality existed prior to the inadvertent disclosure of Appellant's identity to Billie Who. *Suriano*, 480 S.E.2d at 557-58; (R. at 5). The third and final element of the *Suriano* test is met because Appellant had "reasonable access to channels of communication" and made an "effective response to the [alleged] defamatory statement in question." *Id.* Appellant publicly denied that Billie Who

was his child and had ample access to the press: the paparazzi followed Appellant providing him the "self-help" opportunity to correct any misstatements in the press. *Gertz*, 418 U.S. at 344; (R. at 6). For these reasons, Appellant is a "limited purpose" public figure and must show that MarshCODE acted with the heightened actual malice standard regarding his defamation claim.

Appellant has failed to show that MarshCODE acted maliciously. The record only reflects that MarshCODE inadvertently released Appellant's identity through its "Build Your Family Tree" program. (R. at 9). MarshCODE's actions were not malicious and were not made with a reckless disregard for the truth. Thus, the circuit court properly awarded summary judgment since Appellant failed to prove that MarshCODE acted with actual malice.

D. *Appellant Did Not Sustain the Special Harm Required to Maintain His Defamation Claim.*

As with the other elements of his defamation claim, Appellant also failed to prove the requisite degree of harm required to maintain his defamation claim. The final element of a defamation claim requires the plaintiff to sustain the degree of special harm: only if the statement was considered so defamatory is harm presumed. Restatement (Second) of Torts §558 (1977). Courts following the Restatement (Second) of Torts require a different showing of harm depending on the nature of the defamatory statement and the degree of fault of the defendant. *See Kolegas v. Heftel Broad. Corp.*, 607 N.E.2d 201, 206 (Ill. 1992); Restatement (Second) of Torts §558 cmt. b (1977). These jurisdictions classify defamatory statements into two categories: defamatory *per se* and defamatory *per quod*. *Kolegas*, 607 N.E.2d at 206. If a plaintiff proves that the statement at issue is defamatory *per se*, the plaintiff does not need to show special harm to succeed on his defamation claim. *Hoffman-Pugh v. Ramsey*, 193 F. Supp. 2d 1295, 1299 (D. Ga. 2002). Conversely, when the challenged statement is defamatory *per quod*, the plaintiff must meet the higher burden of showing special harm as a result of the defamatory publication. *Id.*

The Seventh Circuit has recognized that statements are defamatory *per se* when the words impute: (1) the commission of a crime; (2) infection with a loathsome disease; (3) an inability to perform or a want of integrity in the discharge of duties of office or employment; or (4) lack of ability in that person's profession. *Republic Tobacco Co. v. N. Atl. Trading Co., Inc.*, 381 F.3d 717, 726 (7th Cir. 2004). Additionally, some courts recognize the imputation of sexual misconduct as defamatory *per se*. *Bryson v. News Am. Publ'n, Inc.*, 672 N.E.2d 1207, 1215 (Ill. 1996) (referring to plaintiff as "slut" in a magazine article was defamatory *per se*);

Marshall v. Mahaffey, 974 S.W.2d 942, 947-49 (Tex. App. 1998) (calling professional golfer's wife a slut was slanderous *per se*). However, even if a statement falls into one of these defamatory *per se* categories, the court will not consider it defamatory *per se* if it is susceptible to an innocent construction. *Kolegas*, 607 N.E.2d at 206.

A defamatory *per se* statement is susceptible only to derogatory interpretation and is so harmful to a plaintiff's reputation that injury is presumed. *Id.* at 206. On the other hand, defamatory *per quod* statements are susceptible to an innocent construction. *Id*. Thus, if a statement requires reference to other extrinsic facts to be defamatory, it is not defamatory *per se*. *Dusabek v. Martz*, 249 P. 145, 146 (Okla. 1926).

A plaintiff must show that he sustained special harm in the form of specific pecuniary damages if his defamation claim is based on a defamatory *per quod* publication. *See Tacket v. Delco Remy Div. Gen. Motor Corp.*, 937 F.2d 1201, 1204-06 (7th Cir. 1991) (plaintiff's defamation claim based on a defamatory bathroom sign failed since he did not sustain economic damages); Restatement (Second) of Torts §757 cmt. b (1977) (defining special harm for all defamatory publications). These damages must be proven with particularity. *Bruck v. Cincotta*, 371 N.E.2d 874, 879-80 (Ill. App. Ct. 1977). General damages, which will not suffice, include damages to reputation, injury for feelings, mental anguish, embarrassment, and mental suffering. *Chonich v. Wayne County Cmty. Coll.*, 973 F.2d 1271, 1277 (6th Cir. 1992).

In the instant case, Appellant has failed to raise a genuine issue of material fact that he sustained the requisite degree of harm. Although MarshCODE's inadvertent disclosure of Appellant as Billie Who's natural birth father was not defamatory, even if this Court found the challenged statement defamatory, it was only defamatory *per quod*. The statement is susceptible to an innocent meaning and therefore cannot be defamatory *per se*. *Kolegas*, 607 N.E.2d at 206. Thus, Appellant must prove special harm. *Tacket*, 937 F.2d at 1204-06. Appellant has failed to show special harm because he did not sustain pecuniary or economic damages. *Id.*; Restatement (Second) of Torts §757 cmt. b (1977). Appellant claims injury to his reputation within the community and within his church, which are not sufficient. (R. at 6, 8); *Chonich*, 973 F.2d at 1277. The record merely reflects that Appellant took a step back in his duties with the church, which did not result in any monetary harm.

Further, it is inappropriate to apply the standard mentioned in Section 569 of the Restatement (Second) of Torts, as Appellant argued at the circuit court level, since the challenged communication does not meet the definition of libel. Restatement (Second) of Torts §568 (1997). The Restatement distinguishes between libel and slander and considers the dissemination of the statement, the deliberateness of the statement, and the persistence of the statement in categorizing it as a libel. Restate-

ment (Second) of Torts §568 (1997). Since the "Build Your Family Tree" program accidentally disclosed the statement to only one person, Billie Who, and the challenged statement was immediately removed from the database, the statement is not libelous under Restatement (Second) of Torts §569. (R. at 6, 7); *See* Restatement (Second) of Torts §568 (1997); Restatement (Second) of Torts §569 (1997).

Appellant has failed to establish his claim for defamation because stating that someone is a single parent or the parent of a homosexual is not defamatory, MarshCODE's accidental, non-negligent release of the information was not a publication, MarshCODE did not act with actual malice, and Appellant did not sustain pecuniary damages. Given current societal norms, stating that an individual participated in premarital sex or has a homosexual child is not defamatory to the reasonable person. Further, no publication was made since MarshCODE was unaware of the website malfunction and did not act with negligence. Moreover, Appellant is a public figure and cannot show that MarshCODE acted with the heightened standard of actual malice. Lastly, Appellant cannot prove that he suffered the special harm required to sustain a defamation claim since the record only references general damages. Accordingly, this Court should affirm summary judgment on behalf of MarshCODE regarding Appellant's defamation claim.

II. NO GENUINE ISSUE OF MATERIAL FACT EXISTS REGARDING APPELLANT'S CLAIM OF FALSE LIGHT INVASION OF PRIVACY.

Appellant alleges that MarshCODE invaded his privacy and placed him in a false light by accidentally releasing his name to Billie Who (R. at 10), thus Appellant's second issue on appeal is whether the court erred in granting summary judgment for MarshCODE with respect to Appellant's false light invasion of privacy claim. (R. at 2). Since Appellant is unable to show a genuine issue of material fact with respect to the elements of his false light invasion of privacy claim, the circuit court appropriately awarded MarshCODE's motion for summary judgment.

In the state of Marshall, which has adopted the Restatement (Second) of Torts § 652E, a defendant may be liable for a claim of false light invasion of privacy if: 1) the defendant gives publicity to a matter that places plaintiff in a false light, 2) the false light in which plaintiff was placed would be highly offensive to a reasonable person, and 3) the defendant had knowledge or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed. Restatement (Second) of Torts § 652E (1977). Although similar to a claim for defamation, which protects a person's interest in a good reputation, a false light claim protects and redresses an individual's

peace of mind. *Welling v. Weinfeld*, 866 N.E.2d 1051, 1055 (Ohio 2007) (citing *Denver Publ'g Co. v. Bueno*, 54 P.3d 893, 901-02 (Colo. 2002)); Restatement (Second) of Torts § 652E cmt. b (1977).

While both parties have stipulated that Appellant's information on the "Build Your Family Tree" website was false, the remaining elements of Appellant's false light invasion of privacy claim have not been satisfied. MarshCODE's release of Appellant's name to a single individual, Billie Who, did not constitute "publicity," the release of such information would not be considered highly offensive to a reasonable person, and MarshCODE's accidental release of the information did not amount to knowledge or reckless disregard. Due to the fatal flaws in Appellant's claim, this Court should affirm summary judgment on behalf of MarshCODE.

A. *MarshCODE Did Not "Publicize" Anything by Releasing Appellant's Name to a Single Individual.*

Appellant's claim for false light invasion of privacy must fail because MarshCODE's release of information to a single person, Billie Who, does not meet the definition of publicity as required by the Restatement (Second) of Torts. Publicity requires that a matter be made public "by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." *Hunter v. The Buckle, Inc.*, 488 F. Supp. 2d 1157, 1179 (D. Kan. 2007) (citing Restatement (Second) of Torts § 652D cmt. a (1977)). Thus, "it is not an invasion of the right of privacy. . .to communicate a fact concerning the plaintiff's private life to a single person or even a small group of persons." *Id.* Rather, publicity requires something more: it requires publication in a newspaper, magazine, circulation, broadcast, or address to a large audience. *Id.* It should be noted that the publicity element required for false light invasion of privacy is the same as that required for a claim of publication of private facts. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 554 n.3 (Minn. 2003); *see* Restatement (Second) of Torts § 652E cmt. a (1977). Thus, courts have almost universally adopted the definition of publicity found in Restatement § 652D, Comment *a*. *Moore v. Big Picture Co.*, 828 F.2d 270, 273 (5th Cir. 1987).

Communication to a single person or even a small group of people does not constitute publicity. *See Polin v. Dun & Bradstreet, Inc.*, 768 F.2d 1204, 1206 (10th Cir. 1985) (distributing plaintiff's credit report to seventeen subscribers did not meet element of publicity); *Jones v. United States Child Support Recovery*, 961 F. Supp. 1518, 1521 (D. Utah 1997) (delivering Wanted poster to plaintiff's employer and close relatives was insufficient to meet element of publicity); *Grigorenko v. Pauls*, 297 F.

Supp. 2d 446, 448-49 (D. Conn. 2003) (disclosing allegations of plagiarism to nine persons at Yale and three persons outside of Yale community "[fell] well short of publicizing the allegations"); *Handler v. Arends*, No. 0527732S, 1995 WL 107328, at *9 (Conn. Super. Mar. 1, 1995) (communicating to ten department members did not constitute publicity); *Wells v. Thomas*, 569 F. Supp. 426, 437 (E.D. Pa. 1983) (sharing information at a staff meeting or upon an individual's request did not constitute publicity).

For example, the *Bodah* court rejected an employer's submission of a list of employees and their social security numbers to sixteen terminal managers across six states as constituting publicity. *Bodah,* 663 N.W.2d at 556. Further, the court held that allegations that the information was still being shared or communicated were merely speculative, since the employer had redacted the information. *Id.* at 558 (discussing *Beverly v. Reinhert*, 606 N.E.2d 621 (Ill. App.Ct. 1992), which held that the mere possibility that unknown third parties might receive or eavesdrop on otherwise private or confidential communications does not qualify as disclosure to the public).

Additionally, the *Moore* court held that false statements made about the plaintiff to several individuals during a meeting did not qualify as publicity. *Moore*, 828 F.2d at 274. Not only did the court hold that a few people did not constitute the "public at large," but the plaintiff could not prove that the defendant was responsible for publicizing the statements. *Id.* As the *Moore* court explained, "the mere fact that some interested parties may have heard rumors . . . is, without more, insufficient to meet the level of publicity required for a false light claim." *Id.*; *Curry v. Blanchester*, No. CA2009-08-010, 2010 WL 2807948, at *12 (Ohio App. Ct. July 19, 2010) ((stating defendant's comment to one person coupled with evidence that rumor was spread by another party did not constitute publicity); *Wells*, 569 F. Supp. at 437 ((holding information shared with employees at a staff meeting, even if eventually spread to others across the organization, did not constitute publicity, "but a mere spreading of the word by interested persons in the same way rumors are spread").

Rather, publicity requires a communication to the public at large that is substantially certain to become one of public knowledge. *Steinbuch v. Cutler*, 463 F. Supp. 2d 1, 3 (D.D.C. 2006). As illustrated in the Restatement, the posting of a statement in a store window where it can be read by passers-by constitutes publicity. *Bodah*, 663 N.W.2d at 554; *Brents v. Morgan*, 299 S.W. 967, 968 (Ky. Ct. App. 1927) ((finding display of a five-by-eight foot sign stating plaintiff's outstanding account balance in show window of auto shop constituted publicity); Restatement (Second) of Torts § 652D cmt. a, illus. 2 (1977).

Hence, publicity requires a public communication. *Bodah*, 663 N.W.2d at 554. For example, the *Lovgren* court held that a defendant

running a false advertisement in the newspaper for the sale of plaintiff's land constituted publicity. *Lovgren v. Citizens First Nat'l Bank of Princeton*, 534 N.E.2d 987, 990 (Ill. 1989). In addition, the Missouri Supreme Court held that a loud declaration of a plaintiff's indebtedness made in a public restaurant with numerous patrons satisfied the element of publicity. *Biederman's of Springfield, Inc. v. Wright*, 322 S.W.2d 892, 898 (Mo. 1959).

In the instant case, Appellant's claim for false light invasion of privacy cannot succeed because MarshCODE's release of Appellant's name to a single person did not lead to a substantial certainty that such information would become public knowledge. In keeping with *Bodah* and *Moore*, the release of Appellant's name to a sole individual, Billie Who (R. at 6), did not constitute publicity. *Bodah*, 663 N.W.2d at 556; *Moore*, 828 F.2d at 274. Moreover, after Appellant's name was accidentally released to Billie Who, it was she who went public with the news, not MarshCODE. (R. at 6). Thus, in accordance with *Moore*, Appellant is unable to show that MarshCODE publicized the information; rather, Billie Who released the information and she is not a party to this appeal. (R. at 2). *Moore*, 828 F.2d at 274. Furthermore, several courts have held that rumors, created in this case through the blogosphere and news media (R. at 6), do not rise to the level of publicity. *Id.*; *Curry*, 2010 WL 2807948 at *12; *Wells*, 569 F. Supp. at 437.

In contrast to the public communications made in *Lovgren* and *Biederman's*, the release of Appellant's information in this case was made through the "Build Your Family Tree" program, a password-protected service available only to paying customers. (R. at 4, 5); *Lovgren*, 534 N.E.2d at 990; *Biederman's*, 322 S.W.2d at 898. It was far from publicly displayed for all to see or loudly proclaimed in a public area. Lastly, MarshCODE removed the information and publicly apologized to Appellant for the mistake, which in accordance with *Bodah*, suggests that any allegations of publicity after that time amount to nothing more than speculation. *Bodah,* 663 N.W.2d at 558. For these reasons, Appellant is unable to show that MarshCODE's release of his name was substantially certain to become a matter of public knowledge and, therefore, his claim for false light invasion of privacy cannot withstand a motion for summary judgment.

B. *Appellant's Misidentification as Billie Who's Birth Parent Is Not Highly Offensive to a Reasonable Person.*

As with the element of publicity, Appellant has failed to prove that MarshCODE's accidental release of his name placed him in a false light that was highly offensive to a reasonable person; thus, Appellant's claim for false light invasion of privacy must fail. In order to prevail on a claim

for false light invasion of privacy, the plaintiff must prove that the false light in which he was portrayed created such a major misrepresentation of character, history, activities, or beliefs that a reasonable man would be justified in feeling seriously offended and aggrieved by the publicity. Restatement (Second) of Torts § 652E cmt. c (1977). The requirement has been criticized as "an area fraught with ambiguity and subjectivity" that "necessarily involves a subjective component." *Welling*, 866 N.E.2d at 1056 (citing *Denver Publ'g Co. v. Bueno*, 54 P.3d 893, 903-04 (Colo. 2002)). Thus, courts have narrowly construed the highly offensive element of false light in order to "avoid a head on collision with First Amendment rights." *Machleder v. Diaz*, 801 F.2d 46, 58 (2d Cir. 1986). Accordingly, some courts have measured allegations under false light invasion of privacy claims by an ordinary, reasonable person standard, rather than a reasonable person in plaintiff's position. *Kitt v. Capital Concerts, Inc.*, 742 A.2d 856, 860 (D.C. 1999); *Machleder*, 801 F.2d at 49 (using "ordinary person" standard); *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1138 (7th Cir. 1985) (determining whether a "reasonable jury could have found a false-light tort"); *Wolf v. Regardie*, 553 A.2d 1213, 1219 (D.C. 1989) (using "ordinary, reasonable person" standard for a privacy claim).

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

For example, the allegedly false statement attributed to the leader of a conservative, pro-life ethics organization in an article discussing his relentless attempts for television appearances, that if a school shooting occurred, he would say "So what? We're doing important things here," did not place him in a highly offensive false light. *Klayman v. Segal*, 783 A.2d 607, 619 (D.C. 2001). The court held as a matter of law that such statements, when read in context by a reasonable person, were not defamatory but instead conveyed the message that a school tragedy should not interfere with an employee's scheduling of public appearances. *Id.* at 618. The *Klayman* court explained its narrow construction of the highly

offensive standard by stating that a plaintiff cannot "avoid the strictures of the burdens of proof associated with defamation by resorting to a claim of false light invasion." *Id.* at 619.

Rather, false portrayals rising to the level of highly offensive have been reserved for "considerably more insulting" instances. *Machleder*, 801 F.2d at 58. *See, e.g.*, *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 247-48 (1974) (false portrayal of family living in abject poverty exposed them to pity and ridicule); *Braun v. Flynt*, 726 F.2d 245, 247, 253 (5th Cir. 1984) (printing photo of female entertainer's amusement park novelty act in "hardcore men's magazine" was highly offensive); *Parnigoni v. St. Columba's Nursery Sch.*, 681 F. Supp. 2d 1, 19-20 (D.D.C. 2010) (statements implying plaintiff was a threat to children because of her relationship with an alleged sex offender were highly offensive); *Benz v. Wash. Newspaper Pub. Co.*, No. 05-760, 2006 WL 2844896, *6 (D.D.C. Sept. 29, 2006) (articles implying plaintiff was in a sexual relationship with "porn king" were highly offensive).

In the instant case, Appellant's claim for false light invasion of privacy fails because being misidentified as Billie Who's birth father, although unfavorable, did not rise to the egregious level required to be highly offensive to a reasonable person. Appellant erroneously relies on the standard of a reasonable person in his situation (R. at 11) which, according to the *Machleder* court's narrow construction of the highly offensive standard and the courts that have used an "ordinary reasonable person" standard, is incorrect. *Machleder*, 801 F.2d at 58; *Kitt*, 742 A.2d at 860; *Douglass*, 769 F.2d at 1138; *Wolf*, 553 A.2d at 1219. Thus, an ordinary, reasonable person misidentified as a child's natural parent would not liken any resulting offensiveness to say, being portrayed as living in abject poverty, being placed in a lewd magazine, being portrayed as a threat to children, or allegations of being romantically involved with a "porn king." *Cantrell*, 419 U.S. at 247-48; *Braun*, 726 F.2d at 247, 253; *Parnigoni*, 681 F. Supp. 2d at 19-20; *Benz*, 2006 WL 2844896 at *6. As in *Klayman*, just because the false light in which plaintiff was placed is contrary to his character or position in society, it does not automatically follow that the false light is highly offensive to a reasonable person. 783 A.2d at 619. We urge this court to maintain the narrow construction set forth in *Klayman* and *Machleder* and affirm the lower courts' grant of summary judgment on behalf of MarshCODE.

C. *MarshCODE Experienced Nothing More Than a Program Malfunction and Thus, Did Not Act with the Requisite Malice or Reckless Disregard as to the Falsity of the Information.*

Appellant has not only failed to establish the elements of publicity and highly offensive false light, but has also failed to show that

MarshCODE acted in reckless disregard as to the falsity of the information released to Billie Who. In order to satisfy the final element of a false light claim, a plaintiff must prove that the defendant had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed. Restatement (Second) of Torts § 652E (1977).

1. *Even if private individuals are entitled to a lower standard of proof for false light claims, Appellant is a "limited purpose" public figure because he thrust himself into the public eye regarding his religious views.*

The Supreme Court has held that "constitutional guarantees require" a public official to prove that a statement was made with actual malice, "that is, with knowledge that it was false or with reckless disregard of whether it was false or not," to succeed in defamation claims. *New York Times*, 376 U.S. at 279-80. Not long thereafter, the Court applied the actual malice standard to false light invasion of privacy claims. *Time, Inc. v. Hill*, 385 U.S. 374, 390 (1967); *see Wood v. Hustler*, 736 F.2d 1084, 1090 (5th Cir. 1984). While the Court established a "public-private figure dichotomy" in *Gertz*, which provided a heightened sense of protection for public figures while lowering the standard of care for private individuals in defamation actions, the Restatement currently uses the actual malice standard and does not address whether negligence is sufficient for a false light claim against a private individual. *Wood*, 736 F.2d at 1090; *Gertz*, 418 U.S. at 347; Restatement (Second) of Torts § 652E cmt. d (1977). Accordingly, some courts have simply held that negligence is insufficient to support a claim for false light invasion of privacy. *Zeran v. Diamond Broad., Inc.*, 203 F.3d 714, 719 (10th Cir. 2000); *Rush v. Philadelphia Newspapers, Inc.*, 732 A.2d 648, 654 (Pa. Super. Ct. 1999).

While the actual malice standard likely applies to both public and private individuals, if the distinction must be made, it hinges on whether a person has thrust himself into the public light. Designation as a public figure can rest on either: 1) pervasive fame or notoriety, or 2) voluntarily injecting oneself into a particular public controversy. *Gertz*, 418 U.S. at 351. Courts look for evidence of whether individuals have "thrust themselves into the forefront of particular public controversies" in determining public figure status. *Reader's Digest Assn. v. Sup. Ct.*, 37 Cal.3d 244, 254-55 (Cal. 1984) (church and its founder considered public figures based on "attempts to thrust their case. . .into the public eye"). *See also Curtis Publ'g Co.*, 388 U.S. at 155 (athletic director of major university and retired Army officer commanded sufficient continuing public interest to be considered public figures); *Anderson v. Low Rent Housing Comm'n of Muscatine*, 304 N.W.2d 239, 246 (Iowa 1981) (secretary considered a

public figure by inviting attention and influencing controversy surrounding issues in the city government).

Private individuals, on the other hand, are either 1) not in the public eye, or 2) if they are in the public eye, they did not voluntarily attract such attention. *See, e.g.*, *Wood*, 736 F.2d at 1092 (wife whose nude photographs stolen and published in men's magazine considered a private individual); *Braun*, 726 F.2d at 250 (female entertainer who had limited public exposure through her novelty act considered a private individual); *Colbert v. World Publ'g Co.*, 747 P.2d 286, 288 (Okla. 1987) (Arizona resident whose picture was erroneously printed in Oklahoma newspaper considered a private individual).

In the instant case, Appellant is a "limited purpose" public figure because he has thrust himself into the public light by vigorously promoting his religious views in the media. Thus, even if this Court chooses to recognize the *Gertz* distinction and apply a lower standard of negligence to private individuals, Appellant is not a private individual. To the contrary, Appellant regularly preached against pre-marital sex and homosexuality, spoke out against sex-education and gay marriage, commented extensively on radio and television broadcasts regarding these issues, and received press coverage during the 2008 general elections. (R. at 5). Appellant is a "limited purpose" public figure because he has thrust himself into the midst of a controversy surrounding pre-marital sex and homosexuality. *Reader's Digest Assn.*, 37 Cal.3d at 254-55; *Curtis Publ'g Co.*, 388 U.S. at 155; *Anderson*, 304 N.W.2d at 246.

Unlike the private individuals in *Wood*, *Braun*, and *Colbert* who did little or nothing to attract attention, Appellant enjoyed the media spotlight by commenting extensively on his views on pre-marital sex and homosexuality – to the point of sparking fierce opposition from activist groups. (R. at 5); *Wood*, 736 F.2d at 1092; *Braun*, 726 F.2d at 250; *Colbert*, 747 P.2d at 288. For these reasons, Appellant is a "limited purpose" public figure. Thus, regardless of any ambiguity in the Restatement or distinctions drawn in *Gertz*, Appellant must meet the higher standard of actual malice in order to succeed in his claim for false light invasion of privacy.

2. MarshCODE mistakenly released Appellant's information, and thus did not act with actual malice.

Appellant must prove that MarshCODE acted with knowledge or acted in reckless disregard as to the falsity of the publicized matter and the false light in which he would be placed. Restatement (Second) of Torts § 652E (1977). This "actual malice" test requires a subjective inquiry: whether the defendant acted with a high degree of awareness of probable falsity. *Howard v. Antilla*, 294 F.3d 244, 252 (1st Cir. 2002). It requires

sufficient evidence "that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

For example, sufficient evidence existed to find knowing or reckless publishing of falsehoods when a journalist published a statement that he had interviewed a woman upon visiting her home when, in fact, she was not present at anytime during his visit. *Cantrell*, 419 U.S. at 252-53. To the contrary, evidence showing that a radio news analyst could have been "more diligent in their research" but did not "entertain serious doubts" as to whether a secret service agent was a homosexual did not rise to the level of reckless disregard. *Buendorf v. Nat'l Pub. Radio, Inc.*, 822 F. Supp. 6, 12 (D.D.C. 1993).

Appellant cannot prove that MarshCODE acted with actual malice because MarshCODE tested the database prior to launching the "Build Your Family Tree" program and did not doubt the accuracy of the information posted. Under *Howard*, MarshCODE would have to have acted with a high degree of awareness of probable falsity and entertained serious doubts as to the truth of its publication. *Howard,* 294 F.3d at 252. No evidence of either a degree of awareness or entertainment of doubt exists in the record; to the contrary, MarshCODE launched an investigation into the matter and issued a public apology to Appellant. (R. at 7). In fact, MarshCODE concealed participants' identities by creating a test database prior to releasing "Build Your Family Tree," which speaks to their concern and diligence. (R. at 7). Regardless, as *Buendorf* shows, mere evidence that MarshCODE could have been more diligent in creating the "Build Your Family Tree" program does not constitute actual malice. *Buendorf,* 822 F. Supp. at 12. Because Appellant cannot show that MarshCODE had knowledge as to the falsity of the information released to Billie Who or acted in reckless disregard as to the falsity of such information, Appellant's claim for false light invasion of privacy must fail. Accordingly, we ask this Court to affirm summary judgment on behalf of MarshCODE.

Appellant has failed to establish a claim for false light invasion of privacy because he is unable to prove the elements of publicity, false light that is highly offensive to a reasonable person, and knowledge or reckless disregard as to the falsity of the publicized matter and false light in which Appellant would be placed. MarshCODE's release of Appellant's name to a single person did not constitute publicity because it did not lead to a substantial certainty that the information would become public knowledge. Further, Appellant's misidentification as Billy Who's birth father did not rise to the egregious level required to be considered highly offensive to a reasonable person. Lastly, Appellant cannot prove that MarshCODE acted with actual malice because no evidence exists that MarshCODE knew of the falsity of the information prior to its acci-

dental release. For these reasons, the lower court appropriately granted summary judgment on behalf of MarshCODE.

III. NO GENUINE ISSUE OF MATERIAL FACT EXISTS REGARDING APPELLANT'S BREACH OF CONTRACT CLAIM.

Appellant alleges that MarshCODE breached the Study Participation Agreement when his name and contact information were released to Billie Who (R. at 12). Thus, Appellant's third issue on appeal is whether the lower court erred in granting summary judgment for MarshCODE with respect to Appellant's breach of contract claim. (R. at 2). Since Appellant is unable to show a genuine issue of material fact for three elements of his breach of contract claim, the circuit court appropriately granted MarshCODE's motion for summary judgment.

Marshall common law only recognizes a cause of action for breach of contract when: 1) a contract existed; 2) the plaintiff performed its conditions; 3) the defendant breached; and 4) the breach resulted in damages. *Kopley Group V. v. Sheridan Edgewater Props., Ltd.*, 876 N.E.2d 218, 226 (Ill. App. Ct. 2007); (R. at 12). The undisputed facts show that Appellant is unable to meet his burden to survive summary judgment because he failed to establish three of the elements necessary to establish a breach of contract claim. As a threshold matter, a contract was never formed because the privacy policy was not sufficiently definite to form a unilateral contract. Thus, Appellant's breach of contract claim automatically fails. Even if a contract was created, Appellant's claim fails for the following reasons: 1) Appellant failed to perform by not keeping his information updated and accurate; and 2) MarshCODE did not breach the contract because it retained the right to revise the Terms and Conditions. Murphy cannot raise a genuine issue of material fact in order to overcome summary judgment; therefore, this Court should affirm the decisions of the circuit court and the court of appeals.

A. *The Privacy Policy in the Study Participation Agreement Is Not a Unilateral Contract.*

Appellant's breach of contract claim automatically fails because MarshCODE's privacy policy contained in the Study Participation Agreement does not constitute a unilateral contract. "Included in the formation of a valid contract are offer and acceptance, consideration, and definite and certain terms." *Carlton at the Lake, Inc. v. Barber*, 928 N.E.2d 1266, 1270 (Ill. App. Ct. 2010). Hence, an offer is essential to contract formation, and the offeror's statements must be sufficiently definite to constitute an offer. *Day v. Amax, Inc.*, 701 F.2d 1258, 1263 (8th Cir. 1983); *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 740

(Minn. 2000); *Stewart v. Chevron Chem. Co.*, 762 P.2d 1143, 1154 (Wash. 1988) (finding a company's policy statements were binding as a contract only when the statements were of specific treatment in specific situations). Conversely, a company's general policy statements do not meet the contractual requirements for a unilateral offer to contract. *Pratt v. Heartview Found.*, 512 N.W.2d 675, 677-78 (N.D. 1994) (finding language in an employer's policy manual lacked the necessary specificity to constitute a unilateral offer); *Aon Risk Servs. v. Meadors*, 267 S.W.3d 603, 607 (Ark. Ct. App. 2007) (distinguishing between offers and statements of policy); *Bjorn v. Associated Reg'l & Univ. Pathologists, Inc.*, 567 N.E.2d 417, 420 (Ill. App. Ct. 1990) (stating that without clear, promissory language or description of specific procedures, policy language does not create an enforceable employment contract right). Appellant failed to prove the existence of a unilateral contract because the privacy policy is not sufficiently definite and it reserves discretion for MarshCODE to revise the terms and conditions.

1. The privacy policy is not sufficiently definite to constitute a unilateral offer necessary to form a contract.

The privacy policy in the Study Participation Agreement is not sufficiently definite to create a unilateral contract because it is nothing more than MarshCODE's general privacy policy with respect to a participant's genetic information. General descriptions of a company's framework are not unilateral contract offers. *Martens*, 616 N.W.2d at 735. Therefore, to establish a unilateral contract, a plaintiff must show that the terms of a company's policies are sufficiently definite to create an offer. *Id*.

In *Martens*, a brochure referred to company's "dual ladder" system under which pay grades and benefits were the same for administrative employees and technical employees on the same level of the ladder. *Id.* at 742-43. The brochure also contained statements that the purpose of the dual ladder system was to provide opportunities. *Id.* at 743. The court stated that it was clear that these brochures were intended to be generic so that they "would be relevant to the thousands of technical employees they might affect." *Id.* Because the brochures were generic, the court held there was no intent by the company to contract for a specific right or benefit. *Id.* Further, the brochures reserved the prerogative for management to make individual decisions about management promotions; there was no mention of "the specifics of how an individual employee's pay, benefits, or promotion is to be determined-and therefore nowhere do we find criteria to determine when rights to such benefits have been breached, or what standard to apply to enforce them." *Id.* at 744. Thus, the brochures amounted to the company's policy of equivalence of opportunity and were too vague to constitute a unilateral offer. *Id.*

In contrast, courts have found unilateral contracts to be created only when the terms of a policy are definite. In *Aon Risk Servs., Inc. v. Meadors*, a parent company sent a memorandum to its subsidiaries which promoted interdependency among the various subsidiary entities. 267 S.W.3d at 607. The memorandum stated that "a financial rewards system has now been put in place," and listed certain companies who would give "bonus pool monies" based on the stated percentage of interdependence revenue generated from new sales. *Id.* It further explained how the bonus pool system would operate and listed six specific conditions that must be met to receive the benefit. *Id.* The specificity provided in the memorandum was so particular that it even detailed how bonus pool monies would be allocated within the company. *Id.* The court found that the memorandum constituted a unilateral contract because it was more than a policy statement. *Id.* Rather, the memorandum was specific and provided details about the bonus system, including specific percentages to be paid to the bonus pool by each company and the precise means by which those bonus funds would be distributed to the staff. *Id.* at 610.

Similarly, the court in *Nebraska Beef* found statements to be sufficiently definite to constitute an offer for a unilateral contract when a letter stated the exact terms of a loan agreement. *Neb. Beef Ltd. v. Wells Fargo Bus. Credit, Inc.*, 470 F.3d 1249, 1251 (8th Cir. 2006). The company established a line of credit with a bank, and there was a specific process identified to withdraw funds in excess of that line of credit, which was referred to as an overadvancement. *Id.* at 1250. The terms were memorialized in a written agreement. *Id.* Each overadvancement taken by the company resulted in a formal written amendment to the original agreement. *Id.* The company and bank began negotiations for the fourth overadvancement, and the bank sent the company a letter that outlined the terms of the withdrawal: after the specified date, the fees would be $2,000 per day for each increment of $150,000 in overadvancement. *Id.* The court found these terms to be sufficiently definite to constitute a unilateral contract offer. *Id.* at 1251.

In the instant case, Appellant's breach of contract claim fails because MarshCODE's privacy policy amounted to nothing more than a general statement of company policy. In accordance with the *Martens* court's treatment of the brochures, MarshCODE's privacy policy in the Study Participation Agreement provides the general framework for the company's privacy policy, and does not contain the requisite specificity to constitute a contract. *Martens*, 616 N.W.2d at 735; (R. at 14). For example, the privacy policy explains: "MarshCODE uses the same encryption as banks and other financial companies." (R. at 14). MarshCODE's privacy policy also explains that when information is used, "MarshCODE will only refer to [the] unique identifier" given to every donor. (R. at 14). This language is similar to that in *Martens* because it only makes gen-

eral, nonspecific statements about MarshCODE's policies. Additionally, like the brochures in *Martens*, the privacy policy was a generic statement intended to apply to all individuals who donated their genetic material to MarshCODE; it was not a unilateral offer unique to Murphy. *Martens*, 616 N.W.2d at 735.

Unlike *Nebraska Beef* and *Meadors*, MarshCODE's privacy policy does not contain any specific information on how the information is protected. *Nebraska Beef*, 470 F.3d at 1251; *Meadors*, 267 S.W.3d at 607. Rather, it only claims that the encryption process is similar to that used in banks and other financial companies. (R. at 14). Thus, Appellant has failed to prove the existence of a contract since MarshCODE's privacy policy lacks the required specificity of an offer.

2. The privacy policy vested discretion in MarshCODE to disclose content to various organizations for multiple purposes.

The MarshCODE privacy policy, which already lacked sufficient definiteness to constitute an offer, also vested discretion in MarshCODE, making the Study Participation Agreement too indefinite to constitute an offer. Thus, MarshCODE is not bound by a contractual obligation. A reservation of discretion in determining the meaning of language within a policy can preclude a binding offer. *Grenier v. Air Express Int'l Corp.*, 132 F. Supp. 2d 1198, 1201 (D. Minn. 2001) (holding that a policy providing one party reservation to determine what businesses qualified for an incentive did not constitute a binding unilateral offer); *see also Amax, Inc.*, 701 F.2d at 1263 (stating that offers need to be sufficiently definite to form a binding contract); Samuel Williston & Richard A. Lord, *Williston on Contracts* § 4:21 (4th ed., West 2010) ("[A] reservation in either party of a future unbridled right to determine the nature of the performance . . . has often caused a promise to be too indefinite for enforcement.").

In the instant case, Appellant's breach of contract claim must fail because the privacy policy vested discretion in MarshCODE, thus being too indefinite to constitute a valid offer and form a contract. MarshCODE's privacy policy vested discretion in MarshCODE to preserve and disclose content to various entities for multiple reasons. (R. at 15). The privacy policy stated that the donor acknowledged and agreed that:

> . . . MarshCODE is free to preserve and disclose content to non-profit or commercial partner organizations conducting scientific research, law enforcement agencies, or others if required to do so by law or in the good faith belief that such preservation or disclosure is reasonably necessary to: (a) comply with legal process or obligations that MarshCODE may owe pursuant to ethical and other professional rules, laws, and regulations; (b) enforce the Terms of Service; (c) respond to claims that any

> content violates the rights of third-parties; or (d) protect the rights, property, or personal safety of MarshCODE, its users, its clients, and the public.

(R. at 15). Because the policy language reserves discretion for MarshCODE to disclose donors' content, it cannot be sufficiently definite to constitute a unilateral offer to contract. *See Grenier*, 132 F. Supp. 2d at 1201. The privacy policy reserves discretion to MarshCODE to preserve and disclose content to non-profit or commercial partner organizations performing scientific research or law enforcement agencies. (R. at 15). It further allows MarshCODE to disclose content to others if required by law or in the good faith belief that such disclosure is necessary to comply with legal processes, enforce the Terms of Service, respond to third-party claims, or to protect MarshCODE. (R. at 15).

Because the privacy policy is merely a general statement of the company's internal policy and because the terms of the policy are not sufficiently definite, it does not constitute a unilateral offer to contract. Consequently, Appellant is unable to prove that a contract existed, thus summary judgment was appropriately granted on Appellant's breach of contract claim.

B. *Appellant Failed to Perform His Obligations Pursuant to the Study Participation Agreement by Not Updating His Contact Information.*

Assuming *arguendo* Appellant were able to prove the existence of a contract, his breach of contract claim still fails because he cannot raise a genuine issue of material fact regarding his own performance of the contract conditions. In order to recover for a breach of contract, a plaintiff must prove that he performed his contractual obligations. *Kopley Grp. V*, 876 N.E.2d at 226. This is in accordance with the well-settled rule, "founded in absolute justice, that a party to a contract cannot prevent performance by another and derive any benefit. . .from his own failure to perform a necessary condition." *Talbot v. Nibert*, 206 P.2d 131, 138 (Kan. 1949).

A plaintiff's failure to comply with the terms of a contract will result in the plaintiff losing his right to bring a claim for breach of contract. *Buckman v. Hill Military Acad.*, 223 P.2d 172, 174 (Or. 1950). For example, in *Buckman*, the plaintiff transferred a piece of property to the defendant, and the defendant submitted the promissory note and mortgage covering the property. *Id.* at 173. The mortgage stated that if the defendant platted the land into smaller lots and a lot was sold, plaintiff would release that platted land from the lien with the payment of $300 on the principal and all the interest due on the note. *Id.* The defendant subsequently deeded the property to a company in a trust, which was agreed to by both parties in writing. *Id.* However, when the trust sold a piece of

the platted property and paid the plaintiff $300 to release the land, the plaintiff refused to release it, claiming that more money was owed on the principal. *Id.* at 174. The court found that the plaintiff's refusal amounted to a breach of contract, and therefore plaintiff could not recover the remaining balance on the loan. *Id.*

Only when a plaintiff performs his contractual obligations can he or she recover for breach of contract. *Republic Corp. v. Procedyne Corp.*, 401 F. Supp. 1061, 1069 (S.D.N.Y. 1975); *Lieberman Props., Inc. v. Braunstein*, 134 A.D.2d 55, 59 (N.Y. App. Div. 1987); *Price v. Appalachian Res. Co.*, 496 S.W.2d 136, 139 (Tex. App. Ct. 1973). In *Republic Corp.*, the contract required the performance of three successive acts: 1) Procedyne Corporation would deliver the control consoles; 2) Republic Corporation would attach the consoles to the thermoformers; and 3) Procedyne Corporation would ensure that the consoles worked properly. *Republic Corp*., 401 F. Supp. at 1069. Because the terms required successive performance, Procedyne could not be liable for a breach of contract unless Republic Corporation proved that it performed its contractual obligation to attach the control consoles. *Id.* Republic Corporation's failure to properly attach the control consoles amounted to negligence and barred recovery for its breach of contract claim. *Id.* at 1070. Thus, a plaintiff's failure to perform his contractual obligations prohibits his claim for breach of contract.

In the instant case, Appellant's claim must fail because he did not maintain accurate contact information with MarshCODE. The Legal Notice in the Study Participation Agreement unambiguously states that it is Appellant's responsibility to contact MarshCODE and update his contact information so that it is accurate and complete. (R. at 14). While Appellant provided his contact information when he supplied his genetic and phenotypic information, he failed to fulfill his remaining performance obligation. (R. at 5-6). Appellant's contact information changed, and he was contractually obligated to contact MarshCODE and provide his updated contact information. (R. at 5, 14). By failing to do so, he did not perform his obligation under the Agreement and forfeited his right to bring a breach of contract claim. *Buckman*, 223 P.2d at 174. Consistent with *Braunstein*, Appellant was required, but failed, to perform his obligation under the Study Participation Agreement in order to maintain his breach of contract claim. *Braunstein*, 134 A.D.2d 55. Upon revising the Terms and Conditions, MarshCODE attempted to notify all donors of the changes and sent the updated terms to Appellant. (R. at 6). However, because Appellant failed to keep his contact information current with MarshCODE, he did not receive the updated information. (R. at 6). Appellant is unable to prove that he performed under the contract, thus summary judgment is appropriate on this element of his breach of contract claim.

C. *MarshCODE Did Not Breach the Study Participation Agreement Since It Maintained the Right to Revise the Terms and Conditions of Use.*

Appellant is unable to raise a genuine issue of material fact regarding MarshCODE's breach of the Study Participation Agreement; thus, Appellant's breach of contract claim must fail. In order to recover for a breach of contract in the state of Marshall, a plaintiff must prove that the defendant breached the contract. *Kopley Grp. V*, 876 N.E.2d at 226; (R. at 12). MarshCODE did not breach the Study Participation Agreement for two reasons: 1) the agreement contained a provision that allowed MarshCODE to revise the Terms and Condition of Use, and 2) the 2009 Participation Agreement and Terms of Use gave each participant the opportunity to delete their MarshCODE account. (R. at 12, 19).

When a party reserves the right to unilaterally amend a contract, amending the contract does not amount to a breach. *Austrian, M.D. v. United Health Grp., Inc.*, No. X06CV054010357S, 2007 WL 2363301, at *14 (Conn. Super. July 17, 2007). In *Austrian, M.D.*, doctors had contracted with a health insurance company to provide services to patients. *Id.* at *1. In asserting a breach of contract claim, the doctors argued that the health insurance company breached its contract, which provided for the insurance company to respect and support the physician patient relationship and allow for physicians to make independent treatment decisions. *Id.* at *14. The insurance company, however, reserved the unilateral right to amend the contract. *Id.* If an amendment created a "material adverse change" that was deemed unacceptable by the doctors, the doctors had the right to terminate the contract. *Id.* Therefore, amending the contract fell within the insurance company's prerogative, and the insurance company did not breach the contract. *Id.*

In the instant case, MarshCODE did not breach the contract because it reserved the right to unilaterally amend the Terms and Conditions. Like the contract provision at issue in *Austrian, M.D.*, MarshCODE reserved the right to "revise these Terms and Conditions of Use at any time by updating the relevant this [sic] posting on MarschCODE's website and by sending out relevant notices to you, using your preferred method of communication, via e-mail or via U.S. mail . . ." (R. at 14); *see Austrian*, 2007 WL 2363301 at *14. Murphy does not dispute that he was required to update his contact information with MarshCODE to receive notice of changes to the policy. When MarshCODE changed its policy, it published the relevant revised portions on its website and mailed the 2009 Participation Agreement and Terms of Use to Murphy via e-mail and U.S. mail. (R. at 5-6). Further, the revised agreement allowed for Murphy to delete his account with MarshCODE if he chose. (R. at 5). The 2009 Participation Agreement and Terms of Use allowed any donor

to "correct, update, modify or delete [his] account by making the change via [his] account page, or by sending a request to our Customer Support . . . ." (R. at 19). Because the original Study Participation Agreement allowed MarshCODE to revise the Terms and Conditions and because the 2009 Study Participation Agreement allowed a participant to delete his account, MarshCODE did not breach the agreement. Murphy is unable to prove that MarshCODE breached the Study Participation Agreement, and summary judgment is appropriate on this element of the breach of contract claim.

Appellant has failed to establish his breach of contract claim because he is unable to prove the elements of contract formation, performance by Appellant, and a breach by MarshCODE. MarshCODE's privacy policy was not sufficiently definite to constitute a unilateral offer to contract. Further, Appellant failed to perform his obligations by not updating his contact information. Finally, MarshCODE did not breach its Study Participation Agreement because it reserved the right to revise its terms and conditions. For these reasons, the lower court properly granted summary judgment in favor of MarshCODE.

CONCLUSION

This Court should affirm the decision of the First District Court of Appeals in all respects. Specifically, this Court should find that Appellant failed to raise a genuine issue of material fact on his claims that the release of information defamed him, that he was subject to false light invasion of privacy, or that MarshCODE breached a contract.

Respectfully submitted,

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Attorneys for Appellee