No. 02-CV-3024

IN THE

SUPREME COURT OF THE STATE OF MARSHALL

October Term 2002

ROBERT ALAZORK,

Petitioner,

v.

HAUL N' RIDE, INC.,

Respondent.

On Writ of Certiorari to the
First District Court of Appeals
of the State of Marshall

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. Whether the use of GPS satellite technology by a vehicle rental company to gather personal information about its customers' location constitutes an invasion of privacy by intrusion upon seclusion.

II. Whether a statement, phrased as an opinion, that implies a false assertion of criminal activity or other wrongdoing, is protected opinion or fair comment.

III. Whether the use of GPS satellite technology by a vehicle rental company for nonemergency purposes constitutes an unfair deceptive business practice where the rental agreement limits the scope of GPS to emergency location services.

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certify that the following listed parties have an interest in the outcome of this case. These representations are made so that the Justices of this Court may evaluate any possible disqualification or necessary recusal.

ROBERT ALAZORK .....*Petitioner*

HAUL N' RIDE, INC. .....*Respondent*

_____

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ATTORNEYS FOR ROBERT ALAZORK
PETITIONER

(Signatures omitted in accordance with section 1020(6) of the Rules for the Twenty-First Annual John Marshall Law School Moot Court Competition in Information Technology and Privacy Law)

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TO THE HONORABLE SUPREME COURT OF THE STATE OF MARSHALL:

Petitioner, Robert Alazork, respectfully submits this brief in support of his request for reversal of the judgment of the court of appeals below.

OPINIONS BELOW

The opinion and order of the Potter 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 1-11.)

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions: Marshall Revised Code, 505 MRC 815/2; Marshall Revised Code, 735 MRC 15/30; Marshall Revised Code, 735 MRC 15/40.

STATEMENT OF THE CASE

I. SUMMARY OF THE FACTS

Prior to the fall of 2000, twenty-year-old Robert Alazork, a United States citizen of Zorkesian descent, was a student at Capitol College recognized for his academic excellence. (R. at 6.) Mr. Alazork served as a spokesperson for the Zorkesian-American Society of Marshall ("Society") and spent the summer of 2000 working with underprivileged children. (R. at 2-3.) When Mr. Alazork arrived at school at the beginning of the 2000 fall semester, he learned that his scholarship had been revoked and that he would have to pay the full tuition and room and board for the semester prior to starting classes. (R. at 6.) Unable to do so, Mr. Alazork was forced to quit college. (R. at 7.) On the second day of classes, September 10, *Capitol College Gazette*, read by nearly all 1500 students, ran a front-page story about his scholarship being revoked. (R. at 7.)

Mr. Alazork contacted his benefactor, Tom Babazork, who sponsored the award on behalf of the Society, about the revocation of his scholarship. (R. at 6.) Babazork informed him that a rental truck company, Haul n' Ride, had informed him that Mr. Alazork was suspected of terrorist activity, and had been spotted at an adult bookstore. (R. at 6.) Babazork told Mr. Alazork that the Society could not afford such publicity and thus was forced to revoke his scholarship. (R. at 6.)

Mr. Alazork, when moving back to school at the end of the summer, rented a truck from Haul n' Ride to move his belongings from his parents' home in Smallville, Marshall, to his off-campus apartment at Capitol College in Capitol City, West Ducoda, which was thirty miles away. (R. at 3.) Initially, Mr. Alazork called Haul n' Ride's national toll-free number to gather information on renting a truck for his move. (R. at 3.) Via the national number, he was

automatically connected to Haul n' Ride's Smallville location. (R. at 3.) Mr. Alazork spoke with Haul n' Ride's Smallville rental agency manager, John Streeter. (R. at 3.) Mr. Streeter explained that the company offered two types of rentals, "local" and "one-way." (R. at 3.) He told Mr. Alazork that local rentals involved the truck being returned to the same Haul n' Ride location that it was rented from, whereas one-way rentals allowed the truck to be returned to a different Haul n' Ride location. (R. at 3.) He further explained that one-way rentals were more expensive than local rentals as they necessitated the maintenance of national locations to which the trucks could be returned. (R. at 3.) Mr. Alazork, renting from the Smallville location to which he would eventually return the truck, reserved a truck for a "local" move. (R. at 3.)

Unknown to Mr. Alazork, Haul n' Ride had an anti-terrorism policy which stated that Zorkesian renters were suspicious and recommended that Zorkesian renters be scrutinized more than other customers. (R. at 4.) Because he was Zorkesian and thus automatically a suspected terrorist according to Haul n' Ride's policy, in order to rent a truck Mr. Alazork had to provide his name, current and past addresses, present and former telephone numbers, mobile and work phone, three financial references, and three personal references. (R. at 4.) Mr. Alazork complied with the requests, and listed his benefactor, Tom Babazork, as both a financial and personal reference. (R. at 4.) Mr. Alazork also informed Mr. Streeter that he would be using the truck to move back to his university for the fall semester. (R. at 4-5.)

On August 22, Mr. Alazork arrived at his apartment, approximately two blocks from the Capitol College campus. (R. at 5.) As he did not finish unloading the truck until 6 p.m., Mr. Alazork decided to park the truck overnight and return it to the Smallville Haul n' Ride early the next morning. (R. at 5.) Since he was prohibited by municipal rules from parking on the street

overnight, Mr. Alazork parked the truck in a convenience store mall parking lot across the street. (R. at 5.) The mall had a convenience store, a dry-cleaner, and an adult bookstore. (R. at 5.)

Also unknown to Mr. Alazork, his rental truck was equipped with global positioning system technology ("GPS"). (R. at 4.) GPS employs a network of satellites and ground stations that continuously transmit data over radio frequencies, along with devices that receive these transmissions and use them to calculate their own location via a method known as triangulation. (R. at 3.) It recorded the precise distance and route that each truck took, and enabled Haul n' Ride to determine the exact location of any of its GPS-equipped vehicles at any given time. (R. at 4-5.) The rental agreement stated that GPS might be used for emergency location services; however, no other mention of GPS was made in the rental agreement. (*See* Rental Agreement, Exhibit B.) The GPS device was located in the truck's engine compartment. (R. at 4.) On August 23, Mr. Streeter received a notice from the Haul n' Ride corporate office alerting him to a possible terrorist threat wherein a Haul n' Ride truck might be used to carry explosives into Capitol City. (R. at 5.) Mr. Streeter promptly used GPS to determine the location of all Haul n' Ride's trucks being currently rented. (R. at 5.) Accordingly, Mr. Streeter discovered that Mr. Alazork's truck was in Capitol City. (R. at 5.) He ran the GPS address through a reverse directory on the Internet and identified the address as that of an adult bookstore. (R. at 5.) Learning this, Mr. Streeter began contacting Mr. Alazork's references, and he first called Mr. Alazork's benefactor, Tom Babazork. (R. at 5.)

Mr. Streeter told Babazork that he had learned that Mr. Alazork had taken a Haul n' Ride truck out of Marshall and parked it at an adult bookstore. (R. at 5-6.) He told Babazork about the suspected terrorist activity, and said that he was worried that Mr. Alazork "might be involved or in trouble." (R. at 5-6.) Further, although Babazork made no attempt to verify the accuracy of

Mr. Streeter's statements, fearful of the Society being associated with terrorist activity, Babazork cancelled Mr. Alazork's scholarship. (R. at 6.)

After eventually gleaning this information from Babazork, Mr. Alazork contacted Haul n' Ride to try to determine what had happened that would lead Haul n' Ride to tell his benefactor that he was a suspected terrorist and adult-bookstore patron. (R. at 6.) When he spoke with Mr. Streeter, the manager informed him that because he took the truck across state lines, his credit card had been charged for the "one-way" rental at a rate of $1900, rather than the local rate of $324 he had been quoted at the time he rented the truck. (R. at 6.)

II. SUMMARY OF THE PROCEEDINGS

Mr. Alazork sued Haul n' Ride in Potter County Circuit Court, State of Marshall, alleging the following: (1) that Haul n' Ride intruded upon his seclusion by using global positioning technology in its rental vehicles; (2) that Mr. Streeter's comments were defamatory; and (3) that Haul n' Ride violated the Deceptive Business Practice Act. (R. at 7). Neither Alazork nor Haul n' Ride dispute the facts as they are reported in the record below. (R. at 2.) The Potter County Court granted summary judgment in favor of Haul n' Ride. (R. at 1.)

Mr. Alazork appealed the Potter County decision to the First District Court of Appeals of the State of Marshall. (R. at 1.) The court of appeals held that Mr. Alazork did not meet the elements of the State of Marshall's statute governing claims for intrusion upon seclusion. (R. at 7.) The court held that the use of GPS did not constitute an intrusion upon seclusion. (R. at 7.) According to the court, there was no evidence that the information collected was private. (R. at 7.) Finally, the court found that there was no indication that the use of GPS was highly offensive to a reasonable person. (R. at 7.)

The court also rejected Mr. Alazork's defamation claim, holding that Mr. Streeter's comments were either opinion or fair comment. (R. at 8.) Finally, the court rejected Mr. Alazork's Deceptive Business Practices Act claim. (R. at 9.) The court held that neither the failure to disclose the exorbitant out-of-state charge, nor the failure to disclose use of the GPS technology were material facts such that nondisclosure would constitute a violation of the Deceptive Business Practice Act. (R. at 9.) The court ultimately affirmed the Potter County Circuit Court's award of summary judgment. (R. at 10.) It is from this decision that Mr. Alazork appeals.

SUMMARY OF THE ARGUMENT

I.

Technology should not render privacy law obsolete. The advances in technology have increased dramatically over the past century, yet long-established privacy laws are flexible enough to keep up with technology's encroachment on personal privacy. GPS can save lives and generally be a benefit to society; however, in order for GPS to have a positive societal impact, average consumers must have faith that companies will not use GPS to pry into their private affairs. Therefore, the increase in technology demands an increase in privacy protection.

Haul n' Ride invaded Mr. Alazork's privacy by intruding upon his seclusion when it utilized GPS to pry into his private affairs. Two separate intrusions are present. First, without proper authority, Haul n' Ride's use of GPS to electronically spy on Mr. Alazork constituted an unauthorized intrusion into Mr. Alazork's zone of sensory privacy. Second, an intrusion occurred when Haul n' Ride accessed data from GPS without permission for the purpose of disclosing private and embarrassing facts about Mr. Alazork to others. Technology has distorted the line between what is private and what is public, and Mr. Alazork was not required to have an expectation of complete privacy concerning the location of his rental truck, even though it was in public. Thus, Mr. Alazork reasonably expected that GPS would not be used to pry into his private affairs. Further, the unauthorized use of GPS to pry into Mr. Alazork's personal affairs would be highly offensive to a reasonable person. Therefore, Mr. Alazork has presented genuine issues of material fact with regards to the elements of intrusion upon seclusion, precluding summary judgment.

II.

Defamation law does not allow a speaker to damage a person's reputation without consequence merely because the speaker phrases his comment in the form of opinion. To that end, the First Amendment guarantee of free speech does not provide a per se exemption for statements of opinion. Rather, where a statement of opinion implies an assertion of objective fact, that statement will be actionable. Haul n' Ride defamed Mr. Alazork when its agent, Streeter, falsely accused Mr. Alazork of being a terrorist and a frequenter of adult bookstores. Although Streeter phrased his comment in the form of an opinion, his statements implied that Mr. Alazork was indeed a terrorist and a frequenter of adult bookstores. The First Amendment simply does not protect such malicious speech. Further, Haul n' Ride cannot hide behind the fair comment privilege. The fair comment privilege only applies to statements that are incapable of being proven true or false; therefore an accusation of criminal activity falls outside of the scope of the fair comment privilege. Further, a false accusation of criminal conduct cannot be considered a comment for the purpose of the fair comment privilege because such accusations have no redeeming social value. Therefore, neither the First Amendment guarantee of free speech nor the fair comment privilege shield Haul n' Ride from liability for Streeter's defamatory remark. Therefore, summary judgment on the defamation issue was improper.

III.

Further, the failure to fully disclose the various ways that GPS would be used against Mr. Alazork constituted an unfair deceptive business practice. The growth of GPS in rental vehicles has brought with it new and inventive ways to deceive unsuspecting consumers like Mr. Alazork. Mr. Alazork rented his vehicle with the assurance from Haul n' Ride that its rental vehicles would be equipped with GPS in case of an emergency only. Haul n' Ride capitalized on Mr.

Alazork's naivety by charging him an exorbitant fee for breaking a minor contractual provision and disclosing personal information recorded by GPS to the Society. Under Marshall's Deceptive Business Practices Act, the omission of a material fact in the conduct of any trade or business constitutes a deceptive unfair practice. Summary judgment was improper because the question of materiality is a question of fact that should, in all but the most extreme cases, be decided by the trier of fact. Various aspects of the transaction raise serious questions concerning materiality. Haul n' Ride's use of GPS was no more than a hidden charge in the rental agreement, and the failure to disclose its secret pecuniary interest in GPS was material. Haul n' Ride obscured the total amount of the fee and its method of discovery via GPS, thereby materially misrepresenting the actual fee charged to the customer. Haul n' Ride's failure to notify Mr. Alazork that information gathered via GPS would be disclosed the third persons also constitutes a material omission of fact.

ARGUMENT AND AUTHORITIES

I. HAUL N' RIDE'S UNAUTHORIZED USE OF GPS TO UNREASONABLY OBSERVE AND SCRUTINIZE MR. ALAZORK'S PRIVATE AFFAIRS CONSTITUTES AN INVASION OF PRIVACY BY INTRUSION UPON SECLUSION.

Concerned with the blossoming age of technology, Justices Samuel Warren and Louis Brandeis exclaimed in their famous law review article:

> The intensity and complexity of life . . . have rendered necessary some retreat from the world . . . so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon privacy, subjected [man] to mental pain and distress, far greater than could be inflicted by mere bodily injury.

Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 196 (1890). Although written in the nineteenth century, Justices Warren and Brandeis could have been referring to GPS when they warned future generations "numerous mechanical devices threaten to make good the prediction [that] 'what is whispered in the closet shall be proclaimed from the housetops.'" *Id*. at 195. There is no question GPS, when used properly, can be beneficial to society; however, in the absence of any meaningful state or federal legislation restricting its use, GPS threatens to allow meddlesome businesses, like Haul n' Ride, to intrude into the private affairs of the individual. *See* M.J. Zuckerman, *Wireless, with Strings Attached: A Cell Phone Can Make You Stand Out, to Rescuers and Marketers Alike*, USA Today, Feb. 7, 2002, at 1D.

The right to privacy has been described as "the rightful claim of the individual to determine the extent to which he wishes to share of himself with others." Adam Carlyle Breckenridge, *The Right to Privacy* 1 (1970). *Webster's* states information is private if it is "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public." *See United States Dep't of Justice v. Reporters Comm. for the Freedom of the Press*, 489 U.S. 749, 763-64 (1989) (quoting *Webster's Third New International Dictionary* 1804 (1976)). The Orwellian aspect of GPS provides businesses ubiquitous access to the individual and robs him of the ability to control the flow of private information concerning his location. Such control robs the individual of his dignity and violates his right to privacy.

The State of Marshall recognizes the common-law tort of intrusion upon seclusion as embodied in the Restatement (Second) of Torts § 652B (1977). The tort of intrusion upon seclusion is defined as an intentional intrusion, physical or otherwise, upon the solitude or seclusion of another person, or upon his private affairs or concerns. Restatement (Second) of

Torts § 652B (1977). One is subject to liability to another for invasion of privacy if the intrusion would be highly offensive to a reasonable person. *Id.* As the following sections will illustrate, the plaintiff must first show an unauthorized penetration of a zone of physical or sensory privacy surrounding him. *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 490 (Cal. 1998). An unwarranted examination of personal data also constitutes an intrusion. *Id.* Next, the plaintiff must have a reasonable expectation of privacy in the place, information, or conversation. *Id*. Last, the plaintiff must show that the intrusion is highly offensive to a reasonable person. *See* Restatement (Second) of Torts § 652B (1977).

This Court reviews de novo the decision of the court of appeals. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). All facts and inferences are taken in the light most favorable to the non-movant, Mr. Alazork, and summary judgment should only be given in the unlikely event that there are no genuine issues of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Therefore, if Mr. Alazork presents more than a scintilla of evidence concerning the material facts in dispute, then summary judgment is improper. *Id*. Further, the burden is on the movant, Haul n' Ride, to prove that there is an absence of evidence to support the non-movant's case. *Celotex*, 477 U.S. at 325. For the reasons set forth below, Mr. Alazork has presented several genuine issues of material fact. Therefore, the court of appeals' decision affirming the summary judgment in favor of Haul n' Ride should be reversed, and the case should be remanded for a trial on the merits.

A. The Use of GPS to Pry into the Personal Affairs of Mr. Alazork Constitutes an Intrusion upon Seclusion.

For an intrusion to be actionable, Mr. Alazork first must show that "the defendant penetrated some zone of physical or sensory privacy . . . or obtained unwanted access to data about the plaintiff." *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 490 (Cal. 1998). The

invasion of privacy can be accomplished by a physical intrusion into a place of seclusion, such as a physical invasion of the plaintiff's home. *See Med. Lab. Mgmt. v. Am. Broad. Co.*, 30 F. Supp. 2d 1182, 1187 (D. Ariz. 1998). Or an intrusion can occur via the use of one's senses, with or without the use of mechanical aids, to pry into the plaintiff's private affairs, such as when a person uses binoculars to peer into another's home. *Id*. Further, an intrusion can occur where the defendant engages in some form of investigation in order to learn private information about the plaintiff, such as when a person examines another's bank account without authorization. *Id*. In the present case, Mr. Alazork has presented genuine issues of material fact concerning whether Haul n' Ride committed a sensory intrusion into his zone of privacy when it employed GPS to engage in high-tech espionage. Further, Mr. Alazork has presented genuine issues of material fact concerning whether Haul n' Ride committed an actionable intrusion by obtaining unwanted access to information about Mr. Alazork.

1. The use of GPS constitutes a sensory invasion of Mr. Alazork's zone of privacy.

GPS is an example of a "mechanical device" that threatens to invade a person's privacy. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 195 (1890). The types of devices capable of secretly recording and transmitting personal information about a person have dramatically escalated in recent years. *See Shulman*, 955 P.2d at 473. GPS, used improperly, allows a person to exercise a great deal of control over another because of its omnipresence. The control exercised over the person robs him of his dignity and invades his privacy; consequently, the proliferation of GPS necessitates an increase in privacy protection.

As a general rule, the mere observation of a person's public activities is not an intrusion upon seclusion. *See Nader v. Gen. Motors Corp.*, 225 N.E.2d 765, 771 (N.Y. 1969). However, the general rule does not mean that everything occurring in public is fair game for inquiry. *Id*.

Rather, when the sensory observation of a person's activities in public is overzealous, then such an observation can be an actionable intrusion. *See id.* Here, Haul n' Ride's unreasonable use of GPS, which provided ever-present access to private information about Mr. Alazork, amounts to overzealous public observation and is thus actionable.

In *Nader*, a well-known consumer advocate brought an action for invasion of privacy against General Motors ("GM") alleging GM authorized its agents to engage in activities that invaded his privacy. *Id*. at 767. Mr. Nader alleged GM agents followed him into a bank and got sufficiently close "to see the denominations of the bills he was withdrawing from his account." *Id*. at 771. The Court of Appeals of New York acknowledged the general rule that mere observation of the plaintiff in a public place does not constitute an actionable intrusion upon seclusion. *Id*. However, the court stated, "A person does not automatically make public everything he does merely by being in a public place." *Id*. To that end, the court found that the shadowing of Mr. Nader by GM's agents was more than mere observation. *Id*. The court held overzealous public surveillance is an actionable intrusion. *Id*. The unreasonable proximity to Mr. Nader constituted the overzealous act. *See also Pinkerton Nat'l Detective Agency v. Stevens*, 132 S.E.2d 119, 124 (Ga. Ct. App. 1963) (holding constant public surveillance constitutes an actionable intrusion); *Stessman v. Am. Black Hawk Broad. Co.*, 416 N.W.2d 685, 687 (Iowa 1987) (stating that public observation can amount to an invasion, particularly when plaintiff requests privacy). Consequently, Mr. Nader's intrusion claim was not insufficient as a matter of law merely because he was in a public location. *Nader*, 225 N.E.2d at 771.

As in the *Nader* case, Haul n' Ride's use of GPS constitutes an overzealous public observation of Mr. Alazork. In *Nader*, the court was concerned with the agent's unreasonable proximity to Mr. Nader. *See id*. GPS provided Haul n' Ride around-the-clock access to Mr.

Alazork's location. (R. at 4.) Mr. Alazork was helpless to defend against such monitoring. Haul n' Ride did not properly notify Mr. Alazork of the extent of the use of GPS as evidenced by the rental agreement's description of GPS for emergency location services. (*See* Rental Agreement, Exhibit B.) Mr. Alazork was unaware that the truck was equipped with GPS as the device was concealed in the truck's engine compartment. (R. at 4.) Therefore, Haul n' Ride could surreptitiously monitor Mr. Alazork's location at all times. Because Mr. Alazork could not escape from Haul n' Ride's constant monitoring, his situation is analogous to the GM agents' unreasonable proximity to Mr. Nader. Hence, GPS use, which provides Haul n' Ride with all encompassing access to Mr. Alazork, is the overzealous act that makes the public observation in this case an actionable intrusion. *See E.I. duPont deNemours & Co. v. Christopher*, 431 F.2d 1012, 1016 (5th Cir. 1970).

Christopher is a trade secret appropriation case, but the case has privacy implications that are applicable to the case at bar. *Id*. at 1013. The defendants in *Christopher* were photographers hired to take aerial photographs of construction occurring at a plant in Texas owned by duPont. *Id*. The plaintiff alleged the defendants wrongfully obtained photographs that revealed trade secrets owned by duPont and sold them to third parties. *Id*. at 1014. Under Texas law, liability for disclosure of trade secrets attaches if the trade secrets are obtained by "improper means." *Id*. The defendants argued that the photographs were not obtained by improper means because all of the activities occurred in public airspace and the trade secrets were exposed to public viewing via aircraft. *Id*. However, the Fifth Circuit found the photographers used improper means to discover the trade secrets. *Id* at 1016. The court noted it would be unreasonable to require duPont to build an "impenetrable fortress" to guard against such stealthy methods of observation. *Id* at 1016-17. The court stated, "[P]erhaps ordinary fences and roofs must be built to shut out

incursive eyes, but we need not require the discoverer of a trade secret to guard against the unanticipated, the undetectable, or the unpreventable methods of espionage now available." *Id*. at 1016.

Likewise, this Court should not require Mr. Alazork to guard against the undetectable high-tech espionage engaged in by Haul n' Ride. *See, e.g., Wolfson v. Lewis*, 924 F. Supp. 1413, 1434 (E.D. Pa. 1996) (holding the use of a shotgun microphone to decipher private conservations constitutes an intrusion upon seclusion). Mr. Alazork was only "guilty" of parking his truck in a shopping center parking lot that happened to house an adult bookstore. (R. at 5.) As a consequence of Haul n' Ride's high-tech espionage, Mr. Alazork lost his scholarship and consequently was forced to withdraw from the university. (R. at 6-7.) The interest in individual privacy is just as important as the interest in protecting trade secrets. Therefore, it would be no less unreasonable to require Mr. Alazork to build an "impenetrable fortress" to guard against the undetectable intrusion via GPS. *See Christopher*, 431 F.2d at 1016-17. In the present case, the general rule that public observation of the plaintiff is a non-actionable intrusion should give way because constant GPS surveillance is unreasonable, and Mr. Alazork was helpless to guard against such intrusive monitoring.

2. The use of GPS to improperly collect and examine private information about Mr. Alazork constitutes an actionable intrusion.

Not only did the use of GPS constitute a sensory invasion of Mr. Alazork's privacy, but Haul n' Ride's examination of private location information via GPS for improper purposes also constituted an intrusion upon his seclusion. Probing into the private affairs of Mr. Alazork robs him of the right to control the extent to which he wishes to divulge personal information about himself to others. *See* Project, *Government Information and the Rights of Citizens*, 73 Mich. L. Rev. 971, 1255 (1975) ("[T]he right of privacy is the right to control the flow of information

concerning the details of one's individuality."). In such a situation, the examination alone is sufficient to create a claim for intrusion upon seclusion. *See Alexander v. FBI*, 971 F. Supp. 603, 610 (D.D.C. 1997). Publication of the information gathered is not an essential element of an intrusion claim. Restatement (Second) of Torts § 652B cmt. b. (1977). Despite the fact that Haul n' Ride did disseminate the wrongfully gathered information, an intrusion upon seclusion occurred the moment Haul n' Ride utilized GPS to gather embarrassing private facts about Mr. Alazork. *See Alexander*, 971 F. Supp. at 610.

The United States District Court for the District of Columbia recently recognized that a request of FBI files for improper purposes is an intrusion upon seclusion. *Id*. The *Alexander* case arose from what has been popularly called "Filegate". *Id*. at 605. The plaintiffs, former Bush and Reagan administration employees and appointees, sued former First Lady Hillary Clinton and other White House personnel for intrusion upon seclusion. *Id.* The plaintiffs alleged that making improper requests for their Federal Bureau of Investigation ("FBI") files invaded their privacy. *Id*. The defendants argued that no intrusion occurred because the FBI files were largely matters of public record. *Id*. Although the files contained public information, the court found the plaintiffs nonetheless had a privacy interest because the files could also contain embarrassing private information about the plaintiffs. *Id*. at 609. The court found the complaint valid because it alleged that the sole purpose of the defendants' request was to "obtain embarrassing or damaging information on former employees . . . for partisan political purposes." *Id*. Therefore, where the collection of information, regardless of its public nature, is done merely for the purpose of exposing private and potentially embarrassing information about the plaintiff, an intrusion upon seclusion has occurred. *Id*.

Alexander is analogous to the present case because Haul n' Ride's motive for collecting information concerning Mr. Alazork's location was to disclose personal information about him. According to the rental contract, GPS was to be used only for emergency location services. (*See* Rental Agreement, Exhibit B.) Yet, upon learning the allegedly damning information about Mr. Alazork, Streeter did not call a supervisor or any law enforcement authority. (R. at 5.) Instead, he contacted Mr. Alazork's references. (R. at 5.) Streeter first called Mr. Babazork, the sponsor of Mr. Alazork's scholarship, and told him that Mr. Alazork was parked in an adult bookstore and might be involved in terrorist activity. (R. at 5-6.) Had this information been gathered for emergency location services, Streeter would have immediately contacted the proper authorities instead of Mr. Alazork's peers. The dissemination of this information to Mr. Alazork's references is evidence of Haul n' Ride's motive to embarrass Mr. Alazork. Haul n' Ride's motive is further evinced by its policy of targeting Zorkesians for heightened rental scrutiny. According to Haul n' Ride's policy, renters of Zorkesian descent were automatically suspect. (R. at 4.) As a Zorkesian, Mr. Alazork was, according to Haul n' Ride's policy, a suspected terrorist. (R. at 4.) As such, even after disclosing extensive personal information prior to renting, Mr. Alazork was monitored via GPS and information about his whereabouts was used to embarrass him. Because the collection of information via GPS was solely to make personal disclosures about Mr. Alazork, then according to *Alexander*, Mr. Alazork has stated a valid cause of action for intrusion upon seclusion. *See* 971 F. Supp. at 610. Therefore, there is a question of fact concerning whether the collection of private information about Mr. Alazork constituted an actionable intrusion upon seclusion. Next, for an intrusion to be actionable, the plaintiff must not consent to the alleged intrusion.

3. The mention of GPS in the rental agreement did not vest Haul n' Ride with the authority to pry into Mr. Alazork's private affairs.

Although Mr. Alazork signed a rental contract consenting to the possible use of GPS for emergency location services, Mr. Alazork did not consent to the use of GPS for any other purpose. (*See* Rental Agreement, Exhibit B.) Consequently, the GPS provision in the rental contract does not absolve Haul n' Ride from liability for intrusion upon seclusion.

For an intrusion to be actionable, the plaintiff must not consent to the challenged activity. *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 648 (Cal. 1994). Consent for one purpose is not consent for all purposes. *Ainsworth v. Century Supply Co.*, 693 N.E.2d 510, 514 (Ill. App. Ct. 1998). Whether a person voluntarily consents to particular conduct turns on whether the challenged conduct has been fully disclosed to the plaintiff. *Norman-Bloodshaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1270 (9th Cir. 1998). Here, the limited consent to allow the use of GPS for emergency location services did not vest Haul n' Ride with the authority to pry into the private affairs of Mr. Alazork. *See id*.

Ainsworth involved an appropriation of name and likeness claim, and like intrusion upon seclusion, consent to the challenged conduct will defeat the plaintiff's claim. 693 N.E.2d at 513. In *Ainsworth*, a worker consented to being videotaped while installing ceramic tile for purposes of the creation of an instructional video. *Id*. at 511–12. The company making the video represented to the worker that the video would be distributed to customers of the company for instructional purposes only. *Id*. at 512. Later, parts of the instructional video were used to make a television commercial. *Id*. The defendants argued the consent to appear in the instructional video extended to the commercial use of the plaintiff's likeness. *Id*. at 514. However, the court disagreed. *Id*. The court stated the defendant's reasoning "amounts to an assertion that, by consenting to eat apples with dinner, one has also consented to eat oranges. The fact that both of

them are fruit does not make them indistinguishable." *Id*. Therefore, the consent for instructional purposes did not amount to consent for purposes of making the commercial. *Id*.

Likewise, Mr. Alazork's consent to allow Haul n' Ride to utilize GPS for emergency location purposes did not amount to consent to gather and disseminate private information about Mr. Alazork to third persons. The rental agreement specifically states rental cars may be equipped with GPS for "emergency location services." (*See* Rental Agreement, Exhibit B.) Even if the events leading up to the activation of the GPS by the Haul n' Ride employee did amount to an emergency, Mr. Alazork did not authorize Haul n' Ride to gather and disseminate private information to Mr. Babazork. *See Ainsworth*, 693 N.E.2d at 514.

In a similar case, the Ninth Circuit held full disclosure is a necessary element of consent. *Norman-Bloodshaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1270 (9th Cir. 1998). The plaintiffs in that case were new laboratory employees. *Id*. at 1264. They were required to take a federally mandated entrance examination that consisted of completion of detailed medical forms, a medical examination, and blood and urine testing. *Id*. However, the employer used the blood and urine samples to test for sensitive medical conditions including syphilis, sickle cell trait, and pregnancy. *Id*. The plaintiffs subsequently sued the employer for invasion of privacy. *Id*. The employer argued it fully informed the employees of the examination requirements, including the requirement of giving blood and urine samples. *Id*. at 1270. Further, the employer argued the completion of the medical history form, which asked detailed personal questions, placed the employees on notice that blood and urine samples would be used to test for venereal disease, sickle cell trait, and pregnancy. *Id*. However, the court held the blood testing was "qualitatively different" from providing answers to a questionnaire. *Id*. ("[Consenting] to a general medical examination does not abolish one's privacy right not to be tested for intimate, personal matters

involving one's health—nor does consenting to blood and urine samples, or filling out a questionnaire.").

Mr. Alazork authorized Haul n' Ride to use GPS for emergency location services only. (*See* Rental Agreement, Exhibit B.) The actual use of GPS by Haul n' Ride to spy on Mr. Alazork is likewise "qualitatively different." The rental contract describes the use of GPS as a service. (*See* Rental Agreement, Exhibit B.) *Black's Law Dictionary* defines service as "[t]he act of doing something useful for a person or company for a fee." *Black's Law Dictionary* 1373 (7th ed. 1999). The word service leads a renter to believe GPS would be put to use for the benefit of the renter. In reality, GPS was used against Mr. Alazork to pry into his private affairs. Therefore, a genuine issue of fact exists concerning whether the contractual provision absolves Haul n' Ride from liability for an unauthorized intrusion upon seclusion. Next, Mr. Alazork must show he had a reasonable expectation of privacy concerning his location.

B. Mr. Alazork Had a Reasonable Expectation That GPS Would Not Be Used to Pry into His Personal Affairs.

An intrusion upon seclusion is proven only if "the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation, or data source." *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 490 (Cal. 1998). The recent onslaught of sensory enhancement technology, like GPS, obscures the distinction between what is public and what is private. Because of advancements in technology, "privacy for purposes of the intrusion tort is not a binary, all-or-nothing characteristic." *Sanders v. Am. Broad. Cos.*, 978 P.2d 67, 72 (Cal. 1999). Therefore, that "the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law." *Id.* The antiquated common-law notion that a man's home is his castle should be updated if it is going to have any application in today's technological age. Therefore, this Court should recognize, in certain circumstances, a

person has an objectively reasonable expectation of privacy in information concerning his location, even in public.

Several Fourth Amendment cases illustrate the role sensory enhancement technology continues to play in defining society's expectation of privacy. *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001) ("It would be foolish to contend that the degree of privacy secured to citizens . . . has been entirely unaffected by the advance of technology. . . . The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy."). Like intrusion upon seclusion, a person's capacity to claim the protection of the Fourth Amendment depends on whether the person has a reasonable expectation of privacy. *Katz v. United States*, 384 U.S. 347, 353 (1967). In *Kyllo*, the Supreme Court expanded the realm of personal privacy by holding the use of a thermal imaging device to determine the amount of heat emanating from inside a home violated the Fourth Amendment's prohibition of unreasonable search and seizures. 533 U.S. at 34. Furthermore, in *Katz*, the Court found that placing a recording device on a public telephone booth violated the Fourth Amendment because the defendant had a reasonable expectation that his conversation would remain private, despite the fact that he was in public. *Katz*, 384 U.S. at 353.

While the Ninth Circuit has found the Fourth Amendment is not violated when officers place GPS on a car to track its location, its reasoning is flawed because it places too much emphasis on the public location of the car and not enough emphasis on the person. *See United States v. McIver*, 186 F.3d 1119 (9th Cir. 1999). The court held the defendant did not have a reasonable expectation in the undercarriage of his car. However, the court missed the point because "the Fourth Amendment protects people, not places." *Katz*, 384 U.S. at 352 (noting that whether a phone booth is a constitutionally protected area is irrelevant for purposes of the Fourth

Amendment). Rather, the proper focus should be on the individual's privacy rights in relation to the technology. Once this approach is taken, it becomes evident Mr. Alazork had a reasonable expectation that certain information concerning his location would remain private.

Mr. Alazork's situation is similar to the situation faced by the plaintiffs in *Shulman v. Group W Productions, Inc.,* 955 P.2d 469, 474 (Cal. 1998). In *Shulman*, vehicle accident victims sued a television producer for intrusion upon seclusion after the producer filmed various aspects of the victims' rescue. *Id*. A cameraman filmed the extrication from the car and the flight back to the hospital in a medical helicopter. *Id.* Only one of the accident victims was transported to the hospital via helicopter. *Id*. A flight crew nurse wore a microphone that recorded that plaintiff's conversations with the nurse and others in the helicopter. *Id*. The defendant argued the plaintiffs lacked a complete expectation of privacy because the accident occurred on a public thoroughfare. *Id.* at 490-93. Further, the defendant asserted the plaintiff in the helicopter lacked an expectation of privacy in the life-flight helicopter because many people were present and overheard the conversations between the nurse and the plaintiff. *Id.* The court agreed with the defendant's assertion that observation on a public roadway is not an actionable invasion of privacy. *Id.* As to the plaintiff whose conversation was recorded in the helicopter, the court nevertheless held that her expectation of privacy, although not absolute, was reasonable. *Id.* Even though various people were present and overheard her conversation, the plaintiff possessed a reasonable expectation that a recording microphone would not be used to document her conversations en route to the hospital. *Id*. *Shulman* focused on the use of the technology to define the expectation of privacy. Concerning the microphone, the court stated, "by placing a microphone on [the nurse's] person, amplifying what she said and heard, defendants may have listened in on conversations the parties could reasonably have expected to be private."

According to the court, the secret monitoring of the plaintiff's conversations with the microphone denied the plaintiff an important aspect of privacy: the right to control the flow of such information to third persons. *Id*. Therefore, despite lacking an expectation of complete privacy, the plaintiff's expectation of privacy was reasonable. *Id*.

Just as the *Shulman* plaintiff lacked an expectation of complete privacy concerning her conversation, Mr. Alazork lacked an expectation of complete privacy regarding his location. However, the lack of absolute privacy is not dispositive. *See, e.g., Sanders v. Am. Broad. Cos.*, 978 P.2d 67, 77 (Cal. 1999) (holding television reporter who gained employment at a company and secretly videotaped conversations with co-workers committed an intrusion upon seclusion despite the fact that other co-workers could overhear the conversation); *Stessman v. Am. Black Hawk Broad. Co.*, 416 N.W.2d 685, 687 (Iowa 1987) (stating plaintiff had a reasonable expectation of privacy in a crowded restaurant despite it being open to the public). While Mr. Alazork's truck was parked in a public location, he nevertheless had a reasonable expectation that his movements were not being electronically monitored via satellite. Once his travel routes were recorded, Mr. Alazork no longer had control of the flow of information concerning his whereabouts. Therefore, the inquiry does not end merely because Mr. Alazork's truck was in a public location; rather, the pertinent question is whether, despite being in public, he reasonably believed he had control over information concerning his location. *See* Richard C. Balough, *Global Positioning System and the Internet: A Combination with Privacy Risks*, 15 Chi. B. Ass'n Rec. 28, 32 (2001).

Even though Mr. Alazork lacked a complete expectation of privacy with respect to his location, the secret recording of Mr. Alazork's location via GPS deprived him of the ability to control the flow of information to others. As a result, Mr. Alazork lost his scholarship, suffered

humiliation, and experienced mental distress. Therefore, there is a genuine issue of fact concerning whether Mr. Alazork reasonably expected that Haul n' Ride would not utilize GPS to track his every move and disclose embarrassing, private information concerning his location to others. Last, the intrusion was highly offensive to a reasonable person.

C. Surreptitious Utilization of GPS is Highly Offensive to a Reasonable Person.

The Restatement (Second) of Torts requires an intrusion to be highly offensive to a reasonable person. Restatement (Second) of Torts § 652B (1977). Whether conduct will be highly offensive to a reasonable person is "largely a matter of social conventions and expectations." J. Thomas McCarthy, *The Rights of Publicity and Privacy*, § 5.10(A)(2) (1993). Courts take into account several factors to determine if conduct is highly offensive to a reasonable person, including: "the degree of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded." *People for the Ethical Treatment of Animals v. Berosini*, 895 P.2d 1269, 1282 (Nev. 1995). Mr. Alazork placed a tremendous amount of trust in Haul n' Ride when he allowed it to use GPS for emergency location services. Haul n' Ride betrayed this trust by wrongfully prying into Mr. Alazork's private affairs. The circumstances as a whole indicate that the intrusion would be highly offensive to a reasonable person.

Evidence of an improper motive indicates that an intrusion would be highly offensive to a reasonable person. *See id.* By exceeding the scope of the rental agreement and using the information collected from GPS for non-emergency purposes, Haul n' Ride showed that its motives were improper. In *Shulman*, the court noted that collection of information for "socially unprotected reasons" makes an intrusion highly offensive to a reasonable person. *Shulman v.*

Group W Productions, Inc., 955 P.2d 469, 493-94 (Cal. 1998). Humiliation, embarrassment, and harassment are examples of socially unprotected motivations. *See Alexander*, 971 F. Supp. at 610 (holding collection and examination of FBI files for purpose of causing shame, outrage, or public humiliation is an intrusion upon seclusion). Here, Haul n' Ride's intent was solely to embarrass and harass Mr. Alazork. Evidence of Haul n' Ride's motive lies in its racially discriminatory treatment of Zorkesians. Zorkesians were required to comply with more demanding rental requirements than persons of non-Zorkesian descent. (R. at 4.) Haul n' Ride also disclosed to the Society that Mr. Alazork was parked at an adult bookstore. (R. at 6.) This information bore no relation to the alleged terrorist attack. This disclosure evinces Haul n' Ride's wrongful intent. Upon learning of the alleged terrorist attack, Streeter, a Haul n' Ride manager, did not immediately contact the authorities; rather, he initially contacted Mr. Alazork's peers at the Society. Haul n' Ride's conduct alone raises a question of fact concerning whether the intrusion would have been highly offensive to a reasonable person.

Not only does Haul n' Ride's conduct raise a question of fact, but the mere use of GPS to engage in high-tech espionage raises an additional fact question concerning the highly offensive element. Using sensory enhancement technology to collect information is sufficient to raise a fact question concerning the offensiveness element. *Wolfson v. Lewis*, 924 F. Supp. 1413, 1434 (E.D. Pa. 1996). For example, the use of a shotgun microphone to record the plaintiff's conversations could be highly offensive to a reasonable person. *Id*. A shotgun microphone allowed the defendants in *Wolfson* to eavesdrop on the plaintiffs' conversations from far away. *Id.* at 1424. The shotgun microphone made the plaintiffs virtual prisoners in their home; thus, the court found the use of the device presented a genuine issue of fact concerning the offensiveness element. *Id*. at 1434. Similarly, in *Shulman*, the California Supreme Court stated the mere use

of the microphone by a nurse to record private conversations with a patient could be highly offensive to a reasonable person. *Shulman v. Group W Prods.*, 955 P.2d 469, 494 (1998). Like a microphone, GPS is a powerful sensory enhancement device that provided Haul n' Ride with constant access to Mr. Alazork's location. Standing alone, Haul n' Ride's use of GPS to collect private location information about Mr. Alazork is sufficient to raise a question of fact concerning the highly offensive element.

Finally, in addition to Haul n' Ride's conduct and use of GPS, Haul n' Ride's betrayal of customer trust also raises a factual issue concerning the offensiveness element. A trust relationship between the intruder and the victim can make an intrusion highly offensive to a reasonable person. For example, in *Norman-Bloodshaw,* the newly hired employees placed a great deal of trust in their employer when they consented to blood testing. *Norman-Bloodshaw v. Lawerence Berkeley Lab.*, 135 F.3d 1260, 1270 (9th Cir. 1998). However, the employer's breach of that trust, by testing for syphilis, sickle cell trait and pregnancy without authorization, constituted a significant invasion of privacy. *See id*. Because the employees trusted the employer with their blood samples, the court found the violation of that trust by improper testing constituted a significant invasion of privacy. *Id*. Implicit in the court's holding is that a relationship of trust between the parties is evidence that the intrusion would have been highly offensive to a reasonable person. *See id.* Like the employees in *Norman-Bloodshaw*, Mr. Alazork trusted Haul n' Ride to use GPS for his benefit in case of an emergency. Using information gathered by GPS to subject Mr. Alazork to ridicule in the eyes of his peers represents a major breach of the trust Mr. Alazork placed in Haul n' Ride; therefore, the intrusion would have been highly offensive to a reasonable person.

The gravaman of a claim for intrusion upon seclusion is the injury to the feelings of the plaintiff and the mental distress caused thereby. *Reed v. Real Detective Publ'g Co.*, 162 P.2d 133, 139 (Ariz. 1945). If the plaintiff establishes the elements of an intrusion, substantial damages for mental damages may be recovered. *Id*. Mr. Alazork was damaged emotionally because of Haul n' Ride's intrusion into his private affairs. The exact amount of the damage award is a question within the province of the trier of fact. *Meyer v. Ricklick*, 409 P.2d 280, 281-82 (Ariz. 1965). Therefore, the court of appeals also erred when it disposed of the case on the issue of damages. For the above stated reasons, Mr. Alazork has presented genuine issues of material fact concerning the tort of intrusion upon seclusion, and this Court should reverse the court of appeals and remand to the trial court for a trial on the merits.

II. DEFAMATION LAW PROVIDES NO PROTECTION FROM LIABILITY FOR STATEMENTS, COUCHED IN THE FORM OF OPINION, THAT WRONGFULLY IMPLY SPECIFIC CRIMINAL ACTIVITY OR OTHER WRONGFUL CONDUCT.

The distinction between fact and opinion in defamation law was designed to accommodate "between protection of valuable interests in reputation and the provision of sufficient breathing space for critical and sometimes caustic free expression." 1 Robert A. Smolla, *Law of Defamation* § 6:1 (2d ed. 2002). However, there is no distinction between opinion and fact under the First Amendment's protection of free speech. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990). In *Gertz v. Robert Welch, Inc.*, Justice Powell, in judicial dictum, stated, "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on conscience of judges and juries but on competition of other ideas." 418 U.S. 323, 339-40 (1974). This statement became "the opening salvo in all arguments for protection from defamation actions on the ground of opinion." *Cianci*

v. New Times Publ'g Co., 639 F.2d 54, 61 (2d Cir. 1980). However, clarifying its position in *Gertz*, the Supreme Court in *Milkovich* held no per se protection of opinion exists under the First Amendment. 497 U.S. at 17. The Court stated, "Thus we do not think . . . *Gertz* was intended to create a wholesale defamation exemption from anything that might be labeled 'opinion.'" *Id*. According to the Court, such a wholesale exemption would "ignore the fact that expressions of 'opinion' may often imply an assertion of objective fact." *Id*. Opinion privilege would be too strong if it protected the speaker from liability merely because he qualified his statement as an opinion. *Id*. at 18. Therefore, where an assertion, no matter how it is phrased, is provable as false, then such statements are actionable. *Id*. at 19. In *Milkovich*, the Court held an author's opinion that a high school wrestling coach committed perjury at a hearing was actionable because the opinion reasonably implied that the coach had in fact committed perjury. *Id*. Applying *Milkovich* to the present case, the dispositive question is whether a reasonable factfinder could imply from Streeter's statements an assertion that Mr. Alazork was a terrorist or a frequenter of adult bookstores. Streeter's accusation of criminal activity diminished Mr. Alazork's reputation in the community, causing him to lose his academic scholarship. Without a scholarship, Mr. Alazork was forced to withdraw from the university. (R. at 7.) Defamation law mandates such vitriolic speech not be protected simply because it was phrased in the form of an opinion.

A. No Constitutional Protection Is Afforded to Statements of Opinion That Imply False Accusations of Criminal Activity.

A charge of criminal behavior necessarily involves a statement of opinion unless made by an observer of the crime. *Cianci v. New Times Publ'g Co.*, 639 F.2d 54, 64 (2d Cir. 1980). Allowing a speaker to escape liability for accusations of criminal activity merely by couching his accusation in the form of an opinion would allow a person to damage another's reputation

without recourse, thereby undermining the very purpose of defamation law. *Id*. Hence, opinions that can reasonably be understood as accusations of specific criminal activity or other wrongful conduct are defamatory, regardless of how the statement is phrased. *Id*.

The present case is factually similar to *Cianci*. In *Cianci*, an article in "New Times" magazine implicated Vincent "Buddy" Cianci, Mayor of Providence, Rhode Island, as the perpetrator of a rape of a woman at gunpoint. *Id*. at 56. The headline read in bold type "BUDDY WE HARDLY KNEW YA." *Id*. The article went on to describe the alleged rape, stating Mayor Cianci had failed three lie detector tests, while the victim had passed a lie detector test. *Id*. The article stated Mayor Cianci bought his way out of a possible felony conviction with a $3000 settlement with the alleged victim. *Id*. at 58. The article also commented that the victim had capitalized on her experience. *Id*. The Second Circuit found the statements could reasonably be understood as a false statement of fact, namely that Mayor Cianci had in fact raped the alleged victim at gunpoint. *Id*. at 60. Discussing the distinction between fact and opinion, the court noted that specific accusations of criminal activity, even in the form of opinion, are not constitutionally protected. *Id*. at 63. The Court stated "It would be destructive of the law of libel if a writer could escape liability for accusations of defamatory conduct simply by using, explicitly or implicitly, the words, 'I think.'" *Id*. at 64. Therefore, the court held that a jury could find that the false accusations of criminal activity by the magazine were defamatory. *Id*.

Other courts are in accord with *Cianci*. In *Catalano v. Pechous*, 419 N.E.2d 350, 359 (Ill. 1980), the Illinois Supreme Court held "[a]ccusations of criminal activity, even if in the form of opinion, are not constitutionally protected." *See also Silsdorf v. Levine*, 449 N.E.2d 716, 721 (N.Y. 1983) (holding statements in open letter concerning mayor of Village Beach, New York, were actionable, as a reasonable inference could be made that the mayor was involved in

criminal behavior). In *Catalano*, the city clerk of the city of Berwyn, Illinois, concerned over the city council's award of a contract for garbage collections, uttered, "[T]wo hundred forty pieces of silver changed hands—thirty for each alderman." 419 N.E.2d at 353. The city clerk went on to opine that something was "smelly" about the contract besides the garbage, and that if it was ever discovered how the contract was approved, there would be empty chairs on the city council. *Id*. The court held the allusion to Judas' betrayal of Christ was intended to implicate the council members in specific acts of wrongdoing in the contract. *Id*. at 355-56. Therefore, the court found the allusion defamatory. Additionally, the constitutional protection of rhetorical hyperbole does not protect Streeter's statements to Mr. Babazork. *See Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 15 (1970) (holding defendant's statement that the plaintiff was "blackmailing" the city was constitutionally protected free speech because no one would have considered the defendant's statement to be an actual charge of criminal blackmail). The case at bar is distinguishable because Streeter was not hurling epithets or hyperbole when he implicated Mr. Alazork. His statements were intended to imply Mr. Alazork was in fact a terrorist and a frequenter of adult bookstores; therefore the statements are actionable. *Cianci*, 639 F.2d at 64.

Streeter's comments were designed to strike a blow to Mr. Alazork's reputation. Streeter contacted Mr. Babazork after Mr. Alazork failed to return the rental truck on the due date specified in the rental agreement. (R. at 5.) Streeter informed Mr. Babazork that Haul n' Ride received a report of possible terrorist activity in Capital City. (R. at 5.) Streeter told Mr. Babazork that because he had taken the rental truck out of Marshall and into Capital City, he thought Mr. Alazork might be involved in the reported terrorist plot. (R. at 5.) Streeter also informed Mr. Babazork that the truck was located at an adult bookstore. (R. at 6.) Based on these statements, a reasonable finder of fact could imply an assertion from Streeter's statements

that Mr. Alazork was a terrorist or a frequenter of adult bookstores. In fact, the Society believed the statements to be an accusation of specific wrongful conduct, as evidenced by its canceling of Mr. Alazork's scholarship. (R. at 6.) These statements damaged Mr. Alazork's reputation, eliminated his scholarship, and ended his college career. The constitution does not protect such pejorative speech; therefore, the court of appeals erred when it held the statements were mere opinions.

B. The Fair Comment Privilege Does Not Protect False Accusations of Criminal Activity.

The court of appeals also erred when it held that Streeter's statements were protected by the fair comment privilege. The fair comment privilege sprung from the early common-law rule that statements of opinion, even if incapable of being disproven, were actionable if the statement tended to be injurious to reputation. *See* Restatement (Second) of Torts § 566 cmt. a (1977). To protect against this harsh rule, courts began to recognize that "valuable discourse might be furthered by intuitive, evaluative statements that could not be proved either true or false by the rigorous deductive reasoning of the judicial process." *See* 1 Robert A. Smolla, *Law of Defamation*, § 6:3 (2d ed. 2002). Under the fair comment privilege, legal immunity is afforded for honest expressions of opinion on matters of public concern, where the statement is based on true or privileged facts, regardless of whether the statement was expressly stated or implied from an expression of opinion. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 14 (1990). However, the fair comment privilege has no application to an assertion of criminal activity, despite the fact that the assertion was worded as an opinion. *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 66 (2d Cir. 1980). Because Streeter comments were nothing more than a false accusation of criminal activity, the defendant cannot claim the protection of the fair comment defense.

First, the fair comment privilege is inapplicable to the case at bar because it only applies to statements that are incapable of being proven true or false. *See Milkovich,* 497 U.S. at 14 (1990). According to the codification of the fair comment privilege found in the Restatement (Second) of Torts § 566 (1977), an opinion was not actionable if the speaker disclosed the background facts, however unreasonable, forming the basis for his opinion. Today, opinions can support a defamation action only when the opinion conveys false representations of facts. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990). Thus, the disclosure of factual background may indicate whether a statement constituted a direct charge of criminal activity or a constitutionally protected statement incapable of objective verifiability. *Cianci,* 639 F.2d at 66. However, the mere disclosure of such facts does not insulate the speaker from liability for opinions that imply specific criminal activity because such a statement is capable of being verified. *Id*.; *see also* W. Page Keeton, *Defamation and Freedom of the Press*, 54 Tex. L. Rev. 1221, 1254 (1976) ("any charge of specific misconduct . . . should be treated as a statement of fact regardless of whether the publisher conveys his deductive opinion alone or with the information to support it."). Because the fair comment privilege is only applicable if the statement is incapable of verifiability, Streeter's false accusation of criminal activity, a verifiable statement, cannot be protected. *Cianci*, 639 F.2d at 66.

Second, the fair comment privilege is inapplicable to the case at bar because Streeter's accusation that Mr. Alazork was a terrorist cannot be considered a comment. Under the fair comment privilege, to be a comment, the statement had to relate to a matter of public concern. *Id*. The policy prompting the development of the fair comment privilege was to balance the need for public discourse against the need to redress injury for defamatory speech. *Id*. A false accusation of specific criminal activity is not worthy of the protection afforded to vigorous

public discourse under the fair comment privilege because false accusations of criminal activity have no social utility. *Id*. Therefore, such expressions do not fall within the scope of the fair comment privilege. *Id*. (holding accusation of criminal activity is antithetical to the usual sort of evaluative judgment with which the fair comment privilege has traditionally been concerned). Further, the fair comment privilege does not extend to expressions made with malice, which means ill will or spite. *See id.* Here, Streeter immediately phoned Mr. Babazork, informing him that Mr. Alazork might be engaged in a terrorist plot. (R. at 5.) A person acting without malice would have phoned the authorities first. Therefore, Streeter's knee-jerk call to Mr. Babazork raises a question of fact concerning malice, precluding summary judgment.

False accusations of criminal activity are never protected opinion or fair comment. Because Streeter's comments alleged Mr. Alazork was a terrorist, they were not protected opinion or fair comment, and were thus defamatory. Therefore, the court of appeals erred when it held otherwise. Last, Haul n' Ride's unauthorized use of GPS constituted an unfair deceptive business practice.

III. HAUL N' RIDE'S SECRET USE OF GPS TO FINE UNSUSPECTING RENTERS AN UNCONSCIONABLE FEE FOR TRAVELING BEYOND THE MARSHALL STATE LINE CONSTITUTES AN UNFAIR AND DECEPTIVE PRACTICE.

All fifty states have adopted statutes designed to give private consumers a statutory cause of action against unscrupulous businesses that engage in deceptive or unfair business practices. Dee Pridgen, *Consumer Protection and the Law*, § 3:2 (2001). The ability of citizens to pursue a private cause of action helps states regulate business activity in the state. *Id*. Deceptive trade practice statutes provide consumers with a statutory cause of action that is not as difficult to pursue as similar state common-law causes of action. *See, e.g., Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980) ("[a] primary purpose of the enactment of the [statute] was to provide

consumers a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in a common-law fraud or breach of warranty suit."). Therefore, these statutes lessen the unequal bargaining power of the consumer by giving the consumer an advantage in court. *See Kugler v. Romain*, 279 A.2d 640, 648 (N.J. 1971). Deceptive Trade Practices statutes employ sweeping language to enjoin a number of harmful business practices in whatever context the practice might arise. *See Schnall v. Hertz Corp.*, 93 Cal. Rptr. 2d 439, 446 (Ct. App. 2000). And when a scheme violates "the fundamental rules of honesty and fair dealing, a court . . . is not impotent to frustrate its consummation because the scheme is an original one." *Am. Philatelic Soc'y v. Clairbourne*, 46 P.2d 135, 140 (Cal. 1935).

The use of GPS in rental cars to assess costly fines on unsuspecting customers is an emerging scheme in the vehicle rental industry. *See* Jane Engle, *Car Rental Companies May Be Watching You; Lawsuits Claiming Invasion of Privacy Say Renters Are Tracked with GPS Devices*, Orlando Sentinel, Aug. 18, 2002, at L5. For example, several persons in Arizona have filed lawsuits seeking to prevent rental companies from tracking customers in order to assess fees for going out of state. *See id*. Recently, the Consumer Protection Commissioner of Connecticut ordered a rental car company to cease and desist its practice of using GPS to assess exorbitant fines for going over a designated speed limit. Press Release, State of Connecticut Department of Consumer Protection, Consumer Protection Orders ACME Rental to Stop Charging Consumers for Speeding and to Return Fees to Customers (Feb. 20, 2002), *available at* http://www.state.ct.us/dcp/Press%20Releases/ACME.2.htm (last visited Sept. 13, 2002). According to the commissioner's order, the rental company must clearly and conspicuously disclose the use of GPS for the purpose of tracking the rented vehicle's speed, disclose the fee to be assessed for going over the set speed limit, and set a fee that is reasonably related to the

expected damage to the vehicle. *Id*. Haul n' Ride employed the same type of scheme when it fined Mr. Alazork for traveling beyond the borders of the state of Marshall.

In order for consumers to reap the substantial benefits GPS has to offer, rental companies must be trusted to use the technology for the benefit of the consumer. Using GPS to assess unconscionable and hidden fines for minor breaches of a rental agreement threatens the continued viability of GPS. While Marshall's legislature has yet to address the problem with any meaningful legislation limiting rental companies' use of GPS, this Court can curb this growing problem via the Marshall Deceptive Business Practices Act.

Marshall's Deceptive Business Practices Act provides:

> Unfair deceptive acts or practices, including but not limited to the use or employment of any deception fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, in the conduct of any trade or commerce are hereby declared unlawful if, in fact, a reasonable person could be misled, deceived or damaged by said misrepresentations.

Marshall Revised Code, 505 MRC 815/2. Under Marshall's Deceptive Business Practice Act, an omission or misrepresentation of fact is actionable only if the fact was material to the transaction such that a reasonable person could be misled, deceived, or damaged by its omission or misrepresentation. In affirming summary judgment in favor of Haul n' Ride, the court of appeals found the failure to inform Mr. Alazork was not an unfair deceptive business practice because the use of GPS in the rental truck was not material. (R. at 9-10.) However, Marshall's Deceptive Business Practices Act does not provide a definition for materiality. As the following sections illustrate, a fact is material if an average or reasonable consumer would consider the fact important in making its decision, and where there is an objective standard, the determination should be left to the jury except in rare cases. *Green v. H & R Block*, 735 A.2d 1039, 1059 (Md.

1999). In the present case, the rental agreement failed to disclose Haul n' Ride's pecuniary interest in GPS. Mr. Alazork was not warned of the exorbitant fee for crossing the state line, nor was he warned that embarrassing information about his location would be disclosed to third persons. All of these facts are material because they would be important to an average consumers in their rental decision; therefore, summary judgment in favor of Haul n' Ride on Mr. Alazork's Deceptive Business Practices claim was improper.

A. Whether a Fact Is Material Requires a Delicate Assessment of the Importance of that Fact to an Average Consumer and Should Be Decided by the Trier of Fact.

The court of appeals erred when it ruled on the materiality of the use of GPS as a matter of law because the question of materiality, unless the fact is obviously not important to a consumer, is within the province of the jury to determine. *Id*. A fact is material if the average consumer would find the information important in determining its course of action, and whether an omission of fact is material under this standard should be a question for the jury. *Id.* For example, the Court of Appeals of Maryland stated "whether an omission would be important to a significant number of unsophisticated consumers is a question of fact for the jury." *Id*. Further, the question should be taken from the fact finder and decided as a matter of law only if the "factors do not allow for a reasonable inference of materiality or immateriality." *Id*. Therefore, the threshold to establish a fact question concerning materiality is minimal under the objective standard. *See id*.

The issue of materiality arises in a number of other areas of law and will be helpful in this Court's determination of materiality under Marshall's Deceptive Business Practices statute. According to the Restatement (Second) of Torts § 538 (1977), which governs the fraudulent misrepresentation tort, a fact is material if "a reasonable man would attach importance to its

existence or nonexistence in determining his choice of action in the transaction in question." In explaining the reasonable man standard, the Restatement provides:

> As in all cases in which the conduct of the reasonable man is the standard, the question of whether a reasonable man would have regarded the fact misrepresented to be important in determining his course of action is a matter for the judgment of the jury subject to control of the court. The court may withdraw the case from the jury if the fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.

Restatement (Second) of Torts § 538 cmt. e. (1977). The Restatement (Second) of Contracts takes an objective approach when determining whether a contractual misrepresentation is material. Restatement (Second) of Contracts § 162 (1981) ("[a] misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent."). The determination of whether the defendant acted with reasonable care ordinarily precludes summary judgment in negligence cases. *See* 10 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2729 (1973). Further, the Federal Trade Commission, which governs deceptive and unfair trade practices affecting interstate commerce, utilizes an objective approach to materiality. *See, e.g.*, *Am. Home Prods. v. FTC*, 98 F.T.C. 136, 368 (1981), *aff'd* 695 F.2d 681 (3d Cir. 1982) (holding a claim is material if it is likely to affect consumer behavior).

In *Basic, Inc. v. Levinson*, the United States Supreme Court was asked to provide a definition of materiality under Section 10b of the Securities and Exchange Act of 1934 and the Securities and Exchange Commission's ("SEC") Rule 10b-5 promulgated thereunder. *See* 485 U.S. 224, 227 (1988). The relevant portion of Rule 10b-5 states "[I]t shall be unlawful for any person . . . [t]o make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statement made . . . not misleading . . . in connection with the sale or purchase of any security." 17 C.F.R. 240.10b-5 (1987). According to the Court, a fact is

material if there is a substantial likelihood that a reasonable investor would find the disclosure of the omitted fact important in the total mix of all of the information available. *Basic*, 485 U.S. at 232. The Supreme Court applied the same definition in determining materiality under SEC Rule 14a-9 as defined by 17 C.F.R. 240.14a-9 (1975). *See TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 445 (1976) ("The question of materiality, it is universally agreed, is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor.").

The Supreme Court's analysis of whether summary judgment is appropriate where a question of materiality exists is particularly helpful to the case at bar. *Id.* at 450. According to the Court, the underlying facts, which are often undisputed, are only the starting point for the determination of materiality. *Id*. Rather, a determination of materiality entails a "delicate assessment" of the inferences a reasonable investor would draw from the underlying facts and the importance of the inferences to a reasonable investor. *Id*. Therefore, the determination of materiality is for the trier of fact, and this decision should only be decided as a matter of law if "it is so obviously important to an investor, that reasonable minds cannot differ on the question of materiality." *Id*. (quoting *Johns Hopkins University v. Hutton*, 422 F.2d 1124, 1129 (4th Cir. 1970)).

This court should adopt the objective test of materiality. The objective standard furthers the goal of deceptive business practices statutes to provide relief to the average consumer from unscrupulous business practices, but provides enough flexibility for businesses to operate. *See Basic, Inc. v. Levinson*, 485 U.S. 224, 231 (1988). The objective standard insures not every trivial omission of fact in a transaction will be a violation of the statute, but it allows the finder of fact to determine the importance of a particular fact to an average consumer. *Id*. Next, the objective approach is consistent with the great weight of authority that has dealt with the issue of

materiality. Further, Marshall's Deceptive Business Practices Act seems to mandate that an objective standard be observed. The statute instructs that a practice is not unlawful unless "a reasonable person could be misled, deceived or damaged by said misrepresentation." Marshall Revised Code, 505 MRC 815/2.

Applying the objective standard of materiality to the present case, summary judgment is improper unless it is so obvious that the average consumer would find the failure to disclose the various ways GPS would be employed unimportant. *See Green v. H & R Block*, 735 A.2d 1039, 1059 (Md. 1999). As the following sections illustrate, it is not obvious that the disclosure of all of the various ways GPS would be used against the renter would be unimportant to the average consumer. Therefore, the court should remand the case for a trial on the merits.

B. Haul n' Ride's Failure to Disclose Its Secret Pecuniary Interest in GPS Constitutes a Material Omission.

Haul n' Ride's failure to disclose its pecuniary interest in GPS is material. *See Green*, 735 A.2d at 1058. In *Green*, customers of H & R Block, a tax preparation service company, filed a class action lawsuit alleging a violation of the Maryland's Consumer Protection Act. *Id*. at 1043. Maryland's Consumer Protection Act is similar to Marshall's Deceptive Business Practices Act. *See id*. at 1058. The business practice in dispute involved H & R Block's rapid refund program. *Id*. at 1043. As part of the rapid refund program, H & R Block acted as a loan facilitator of a Refund Anticipation Loan ("RAL") between its customers and a third party bank. *Id*. at 1044. The cost of the RAL is described as a "finance charge" in the loan materials. *Id*. at 1045. The annual percentage rate corresponding to the finance charge ranged from 25% to 500% depending on the amount of the refund and the amount of finance charge to a particular customer. *Id*. at 1044. However, the RAL material did not disclose the methods in which H & R Block stood to benefit from the RAL program. *Id*. at 1045. First, H & R Block received a

"license fee" from the third party bank for each loan customer referred by H & R Block to the bank. *Id.* Second, H & R Block secretly arranged to purchase about one half of all of the RAL's from the bank. *Id*. Third, H & R Block received 15% of the check-cashing fee for each RAL check cashed at Sears, Roebuck, & Company ("Sears"). *Id*. H & R Block has many locations inside Sears and encouraged its customers to cash the RAL checks at Sears. *Id*. The plaintiffs' claims turned on whether H & R Block's failure to disclose the numerous ways it benefited under the RAL was a material fact. *Id*. The circuit court granted summary judgment in favor of H & R Block. *Id*. at 1058. On writ of certiorari, the Court of Appeals reversed holding that a genuine issue of fact concerning the materiality of H & R Block's failure to disclose its interest in the RAL prohibited summary judgment in favor of the bank. *Id*. at 1058. According to the court, a reasonable inference could be drawn that an average consumer may consider "important the knowledge that the 'finance' cost of the loan is in inflated by virtue of the various ways H & R Block stands to benefit." *Id*. at 1059.

Haul n' Ride's embrace of GPS to penalize renters is an undisclosed pecuniary interest much like H & R Block's secret interest in the RAL Program. Haul n' Ride's rental agreement is silent as to the use of GPS in assessing fees. (*See* Rental Agreement, Exhibit B.) Rather, the rental agreement lulls the customer into a sense of security concerning the use of GPS. The loan agreement affirmatively states "[t]he truck may be equipped with global positioning satellite (GPS) and/or cellular phone technology for emergency location services." (*See* Rental Agreement, Exhibit B.) Two aspects of this contractual provision suggest an omission of fact concerning the use of GPS to assess a fee. The word "may" suggests an ambivalence concerning GPS. The record is unclear concerning how many Haul n' Ride vehicles are actually equipped with GPS; however, the word "may" does not provide the consumer with sufficient notice that

GPS would be placed in the vehicle. Further, Haul n' Ride placed the GPS device in the truck's engine compartment so that the consumer would not know if the truck was equipped with GPS. (R. at 4.) Next, the rental agreement confines the use of GPS to "emergency location services." However, assessing a fee for a minor contractual infraction can hardly be considered a service to the average customer. Because the rental agreement did not provide the average consumer with notice of the secret benefit Haul n' Ride stood to gain via GPS, there is an omission of fact in the rental agreement. *See Green*, 735 A.2d at 1059 ("the evidence permits a fact finder to conclude that the characterization of the cost of the loan as a 'finance charge' without further disclosure misleads consumers who would consider it an important factor in determining whether to pursue the loan through H & R Block."). Therefore, the omission is material because an average consumer may reasonably want to know the various ways Haul n' Ride stood to benefit under the rental agreement. *Id*. Next, Haul n' Ride's misrepresentation concerning the minimum fee imposed is material.

C. Haul n' Ride's Failure to Disclose the Total Fee Imposed for Taking the Rental Vehicle Across the Marshall State Line Constitutes a Material Misrepresentation.

The average consumer would consider the total fee imposed for violation of the rental agreement important in deciding whether to take the vehicle across the state line. *See MacMillan, Inc.*, 96 F.T.C. 208, 303-04 (1980). In *MacMillan*, LaSalle Extension University failed to disclose to its students the number of lesson assignments to be submitted in a course. *Id*. Students needed to know this information because their tuition obligation was calculated on the number of lesson assignments to be submitted. *Id.* Therefore, the failure to disclose this information was material because the average student would consider the total tuition obligation important in deciding whether to take the course. *Id*.

Here, the rental agreement stated the renter would be charged a fee for taking the vehicle out of state, and the minimum fee was $100. (*See* Rental Agreement, Exhibit B.) Yet, Mr. Alazork was charged a fee in excess of $1500. (R. at 6.) Like *MacMillan*, a full disclosure concerning the fee is necessary in determining a renter's obligation for taking the vehicle across the state line. Had an average consumer known the fee, it is reasonable to assume that he or she would not have ventured past the borders of the state.

The fact that the fee was avoidable should not prevent Mr. Alazork from pursuing his deceptive business practices claim. The present case is analogous to the facts in *Schnall v. Hertz Corp.*, 93 Cal. Rptr. 2d 439, 444 (Ct. App. 2000). In that case, customers of Hertz brought a cause of action alleging the fuel service charge imposed under Hertz's rental agreement violated California's unfair competition law, which is analogous to Marshall's Deceptive Business Practices Act. *Id*. Under the rental agreement, the renter could choose to return the vehicle with a full tank of gas and avoid the fuel service charge imposed by Hertz, or the renter could allow Hertz to refuel the vehicle at the applicable rate specified in the rental agreement. *Id*. However, the rate specified in the rental agreement was not at all clear to the consumer. The rental agreement used confusing formulas and needlessly complex language relating to the application of the rates under the rental agreement. *Id*. at 454. Hertz argued that the service charge was avoidable because the renter could bring the vehicle back with a full tank of gas. *Id*. However, the court disagreed. *Id*. According to the court, "[t]he failure . . . to make it clear . . . that an avoidable charge . . . is considerably higher than the retail rate for an item or service . . . would doubtless encourage . . . customers to incur a fuel service charge they could and would otherwise avoid." Therefore, the plaintiffs' stated a claim under the unfair competition law for concealing the fuel service charge. *Id*.

The fuel service charge in *Hertz* is similar to the fee imposed by Haul n' Ride. The customer could avoid the fee by simply not traveling beyond the borders of the state; however, the rental agreement does not provide the consumer with sufficient notice that the applicable fee will not bear any similarity to Haul n' Ride's actual cost incurred when the vehicle goes beyond the borders of the state. The rental agreement stated a minimum fee, but it did not provide any definition of the method at which Haul n' Ride calculated the fee or the total fee imposed. (*See* Rental Agreement, Exhibit B.) The failure to describe the method by which Haul n' Ride will assess a fee coupled with the confusing language concerning the use of GPS for "emergency location services", has a tendency to mislead the consumer both as to the total fee and the method of assessing the fee. In the present case, the fee imposed by Haul n' Ride exceeded $1500, yet Mr. Alazork only traveled thirty miles past Marshall's border. (R. at 5.) Had Mr. Alazork known of the total amount of the fee, or at the very least, the method of assessing the fee via GPS, he would not have taken the rental truck beyond the Marshall state line. Because an average consumer would consider this information important, the misrepresentation concerning the minimum fee is material. Last, the failure to warn Mr. Alazork that his private location information would be disclosed to third persons was a material omission.

D. Haul n' Ride's Failure to Disclose that Private Information Recorded by GPS Would Be Revealed to Third Persons Constitutes a Material Omission.

GPS poses a significant risk to an individual's right to privacy. *See* Richard C. Balough, *Global Positioning System and the Internet: A Combination with Privacy Risks*, 15 Chi. B. Ass'n Rec. 28, 32 (2001). Because GPS provided Haul n' Ride with a wealth of information concerning Mr. Alazork's location, Haul n' Ride had enveloping and instant access to sensitive and private information concerning Mr. Alazork's location. However, Haul n' Ride divulged this private information to Mr. Alazork's peers thereby inflicting emotional and pecuniary

damage. Because an average consumer would want to know that location information gathered via GPS would be disclosed to third persons, the failure to disclose this information constituted a material omission in the rental agreement. *Dwyer v. Am. Express Co*., 652 N.E.2d 1351 (Ill. App. Ct. 1995).

In *Dwyer*, American Express cardholders sued American Express alleging the practice of releasing personal information to other merchants constituted a violation of the Illinois Consumer Fraud Act. *Id* at 1356. American Express, as part of a joint marketing agreement and sales program, compiled information about its cardholders spending habits and then categorized and ranked the cardholders into six tiers based on their spending habits. *Id*. at 1353. Then American Express rented this information to third party merchants. *Id*. In analyzing the materiality requirement under the Illinois Consumer Protection Act, the court stated, "it is highly possible that some customers would have refrained from using the American Express Card if they had known that defendants were analyzing their spending habits." *Id*. at 1357. Therefore, the plaintiffs sufficiently alleged the undisclosed practice was material. *Id*. Similarly, the undisclosed practice of divulging personal information about Mr. Alazork is material. Haul n' Ride contacted Mr. Babazork and told him that Mr. Alazork might be involved in terrorist activity and also that he was parked at an adult bookstore. (R. at 5.) It is reasonable that an average consumer would not rent from Haul n' Ride had the person known that private information would be disclosed to third persons. *See Dywer*, 652 N.E.2d at 1357. Therefore, the failure to inform the customer about the invasive use of GPS is material. For the above reasons, Mr. Alazork has presented genuine issues of material fact concerning his deceptive business practices claim.

CONCLUSION

George Orwell was right. In *1984*'s fictitious state, Oceania, the "Thought Police" utilized powerful technology to monitor everyone's thoughts and actions, and the scrutiny was inescapable. George Orwell, *1984*, at 6, 7 (1949). Orwell wrote, "You had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard and, except in darkness, every movement scrutinized." *Id*. Today's technology is even more powerful than perhaps Orwell would expect, yet Mr. Alazork should not have to sit idly by while businesses like Haul n' Ride use technology, like GPS, to take advantage of him.

First, Mr. Alazork has affirmatively established genuine issues of fact on all of the elements of his intrusion upon seclusion claim. Haul n' Ride intruded upon Mr. Alazork's seclusion when it utilized GPS, powerful sensory enhancement technology, to pry into his private affairs. The information gathered via GPS was highly personal, and Haul n' Ride should not be allowed to rely on outdated case law that does not take into account the vast impact technology has had on privacy law. *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001) ("It would be foolish to contend that the degree of privacy secured to citizens . . . has been entirely unaffected by the advance of technology.") Therefore, despite being in a public location, Haul n' Ride's use of GPS constituted a significant invasion of his privacy.

Second, Streeter's statements accusing Mr. Alazork of being a terrorist and a frequenter of adult bookstores was neither a protected opinion nor fair comment. Outright charges of illegal conduct, if false, are defamatory, even if the speaker phrases his comment in the form of opinion. *See Cianci v. New Times Publ'g Co.*, 639 F.2d 54, 64 (9th Cir. 1980). Any other rule would allow Streeter to inflict serious damage on Mr. Alazork's reputation without recourse.

Last, Mr. Alazork, an average consumer, was deceived by Haul n' Ride's material omission of fact concerning the various ways it intended to use GPS against Mr. Alazork. The use of GPS to trick renters out of their hard earned money and disclose private information about them is a new scheme in the rental industry; however, it is exactly this type of scheme Marshall's Deceptive Business Practices Act is intended to prevent. For deceptive trade practices statutes are "intentionally framed in . . . broad, sweeping language . . . to enable judicial tribunals to deal with the innumerable 'new schemes which the fertility of man's invention would contrive.'" *Schnall v. Hertz Co.*, 93 Cal. Rptr. 2d 439, 446 (Ct. App. 2000). Materiality is a question of fact under Marshall's Deceptive Business Practices Act and it was wrong for the court of appeals to rule on the issue as a matter of law. The use of GPS raises questions of fact concerning materiality because it is obvious that reasonable consumers would find the use of GPS for nonemergency purposes important in their rental decision. Therefore, summary judgment was improper on the deceptive business practices claim.

For the reasons set forth above, the decision of the First District Court of Appeals should be reversed and the case remanded to the Potter County Circuit Court for a trial on the merits.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Brief for Petitioner was mailed by first class certified mail, return receipt requested, to all counsel of record on this 16th day of September, 2002.

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