No. 02-CV-3024

IN THE

Supreme Court of Marshall

OCTOBER TERM 2002

ROBERT ALAZORK,

Petitioner,

v.

HAUL N' RIDE, INC.,

Respondent,

On Writ of Certiorari to the
Court of Appeals
Of Marshall

BRIEF FOR RESPONDENT

Team Number: 24

Joe Heenan
Karen Royal
Casey Stevenson

Texas Tech University
School of Law
Lubbock, Texas 79409-0004
(806) 742-3784

Attorneys for Respondent

QUESTIONS PRESENTED

I. Whether the Court of Appeals correctly held that the use of global positioning system technology in rental vehicles was not an intrusion upon seclusion as a matter of law?

II. Whether the Court of Appeals correctly found that Haul n' Ride's statements regarding Alazork were opinion and/or fair comment?

III. Whether the Court of Appeals correctly held that Haul n' Ride did not violate the Deceptive Business Practices Act?

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TO THE SUPREME COURT OF MARSHALL:

Respondent, Haul n' Ride, Inc. ("Haul n' Ride"), Appellee in Cause No. 02-CV-3024 before the First District Court of Appeals for the State of Marshall (and Defendant before the trial court), respectfully submits this brief in response to the brief filed by the Petitioner, Robert Alazork ("Alazork"), Plaintiff-Appellant below, and requests this honorable Court affirm the judgment of the Court of Appeals.

OPINION BELOW

The Potter County Circuit Court granted summary judgment in favor of Haul n' Ride. The First District Court of Appeals of the State of Marshall affirmed the circuit court's order granting summary judgment as shown in the record.

STATUTORY AND RESTATEMENT PROVISIONS INVOLVED

The State of Marshall enacted an intrusion upon seclusion statute, section 735 MRC 15/40, that follows the Restatement (Second) of Torts section 652B. The State of Marshall also enacted a defamation statute, section 735 MRC 15/30, that follows the Restatement (Second) of Torts section 558. The relevant provisions of the Restatement (Second) of Torts sections 652B and 558 are provided in Appendices A and B, respectively. The State of Marshall enacted a Deceptive Business Practices statute, section 505 MRC 815/2, the relevant provisions of which are provided in Appendix C.

STATEMENT OF THE CASE

Statement of the Facts

Haul n' Ride, Inc. ("Haul n' Ride") provides nationwide rental truck services. (R. at 3.) Recently, Haul n' Ride has received negative publicity focusing on possible illicit uses of Haul n' Ride rental trucks. (R. at 4.) Specific reports suggest individuals used Haul n' Ride rental trucks to smuggle illegal immigrants, weapons, and explosives into the country. (*Id.*) Furthermore, Zorkesian terrorists possibly used Haul n' Ride's trucks in their terrorist activities. (*Id.*) Consequently, Haul n' Ride instituted an "anti-terrorism" policy, in which local dealers must request certain additional information from customers appearing suspicious. (*Id.*) Under the new policy, dealers must obtain the additional information from individuals seeking rentals of three or more days, out of state rentals, rentals to individuals

under twenty-five years-old, rentals to individuals appearing to be of Zorkesian descent, or individuals who otherwise appear to present a potential liability risk. (*See* R. at Exhibit A.)

In addition to the safeguards discussed above, Haul n' Ride equips most of its rental trucks with global positioning system ("GPS") technology. (R. at 3.) GPS technology uses a network of satellites and corresponding ground stations to transmit data. (*Id.*) A device in the rental truck's engine compartment receives the transmitted data and uses the data to determine the location of the vehicle. (R. at 3-4.) Because Haul n' Ride may access the rental truck locations from remote distances, Haul n' Ride is able to utilize the GPS collected data in various ways, including: emergency location services, navigation or travel information, and finding stolen rental vehicles. (R. at 4.) Furthermore, the GPS technology maintains a trip log which records the precise distance and route the rental truck traveled. (*Id.*) All customers renting Haul n' Ride vehicles sign standard rental agreements which include a notice that "[t]he truck may be equipped with global positioning satellite (GPS) and/or cellular phone technology for emergency location services." (*See* R. at Exhibit B.)

Robert Alazork ("Alazork") is a twenty year-old college student of Zorkesian descent attending Capitol College in Capitol City, West Ducoda. (R. at 2.) Although Alazork attends college out of state in West Ducoda, he established his residence in Smallville, Marshall. (*Id.*) In the summer of 2000, Alazork contacted Haul n' Ride's national toll-free telephone number to assist him in his move into an off-campus apartment at Capitol College. (R. at 3.) He was connected with a local Haul n' Ride rental agency in Smallville. (R. at 3.) Haul n' Ride manager, John Streeter, spoke with Alazork and described the two rental options that Haul n' Ride offers. (*Id.*) First, Alazork could purchase a "one-way" rental if the truck would be taken out of state and returned to a different Haul n' Ride location. (*Id.*)

This option requires a higher rental rate in order to cover the cost of maintaining a national network of Haul n' Ride locations and the increased insurance expenses associated with driving the trucks in multiple states. (*Id.*) The rental agreement further explained that a truck leaving the state incurs the one-way rental rate. (R. at Exhibit B.) The second and less expensive option, the "local" rental, may be purchased if the truck is used in town and is returned to the Smallville Haul n' Ride location. (R. at 3.) Although Alazork would be attending Capitol College, and therefore would be taking the rental truck into the neighboring state of West Ducoda, Alazork nevertheless reserved a rental truck for three days under the "local" rental option. (*Id.*)

Alazork provided the requested information in the rental agreement including his name, addresses, telephone numbers, and financial and personal references. (R. at 4.) Alazork listed Tom Babazork, the sponsor of an annual scholarship program instituted by the Zorkesian-American Society, as his personal and financial reference. (R. at 2, 4.) Mr. Babazork recently presented Alazork with an academic scholarship for the 2000-2001 academic year. (R. at 2). According to Alazork's rental agreement, Alazork would depart with the rental truck on August 20, 2000, and return the truck to the Smallville Haul n' Ride location on August 23, 2000. (R. at 5.)

Not only did Alazork violate the terms of the "local" rental agreement by driving the truck beyond Marshall state lines, Alazork failed to return the rental vehicle on August 23, 2000. (R. at 5, 6.) Meanwhile, on August 23, 2000, Mr. Streeter received a notice from the Haul n' Ride corporate office stating that the Federal Bureau of Investigation had alerted the company to terrorist threats potentially involving a rental truck destined for Capitol City. (R. at 5, R. at Exhibit C.) The notice from corporate headquarters requested that Mr. Streeter

immediately locate any trucks within a thirty (30) mile radius of Capitol City and report those trucks to Haul n' Ride security officials. (R. at Exhibit C.)

In an attempt to comply with the corporate request and avoid an emergency or crisis, Mr. Streeter immediately employed the GPS technology to locate all of his rental vehicles. (R. at 5.) Mr. Streeter learned that the truck Alazork rented was in Capitol City in the neighboring state of West Ducoda. (*Id.*) Using a reverse directory on the Internet and the GPS location data, Mr. Streeter learned that Alazork parked the truck in front of an adult bookstore. (*Id.*) Consequently, Mr. Streeter began contacting Alazork's references listed in the rental agreement, including Mr. Babazork. (*Id.*) Mr. Streeter also charged Alazork's credit card for the significantly higher "one-way" rental rate rather than the "local" rental rate, as per the rental agreement terms, because Alazork took the truck beyond Marshall state lines. (R. at 6.)

Upon contacting Mr. Babazork, Mr. Streeter informed him that Haul n' Ride had received a report of suspected terrorist activity, and that Alazork was currently in violation of his rental agreement for taking a truck out of state. (R. at 5.) As a result, Mr. Streeter was concerned that Alazork "might be involved or in trouble." (R. at 5-6.) Mr. Streeter also provided Mr. Babazork with the current location of the rental truck.

Mr. Babazork and Alazork's personal relationship may be reasonably characterized as more than mere acquaintances. In order to obtain the scholarship presented to him by Mr. Babazork and the Zorkesian-American Society, Alazork submitted an essay describing the importance of community involvement in American and Zorkesian societies. (R. at 2.) Mr. Babazork personally interviewed the final applicants, including Alazork, and after being presented with the scholarship, Alazork spoke to the Zorkesian-American Society on the

importance of excelling in school, serving the community, and honoring one's heritage. (*Id.*) Furthermore, Alazork subsequently attended a number of the Zorkesian-American Society meetings. (R. at 3.) However, despite having significant knowledge of Alazork's character, Babazork cancelled Alazork's scholarship after speaking with Mr. Streeter. (R. at 6.) Mr. Babazork made no attempt to verify the accuracy of Mr. Streeter's opinion that Alazork may be involved or in trouble. (*Id.*)

Statement of the Proceedings

Alazork sued Haul n' Ride in the Potter County Circuit Court seeking monetary damages, and he alleged causes of action in intrusion upon seclusion, defamation, and violations of the Deceptive Business Practices statute. (R. at 7, 8.) Neither party disputes the facts set forth in the record below. (R. at 2). Haul n' Ride moved for summary judgment, and the Potter County Circuit Court granted Haul n' Ride's motion for summary judgment on all three of Alazork's claims. (R. at 1-2.)

The First District Court of Appeals affirmed the circuit court's grant of summary judgment in favor of Haul n' Ride. The Court of Appeals determined that Alazork failed to establish an issue of material fact regarding intrusion upon seclusion in holding that the act of using GPS technology was neither objectionable nor offensive which caused any anguish or suffering. (R. at 7.) Also, Haul n' Ride's summary judgment was proper as to defamation, because Haul n' Ride's statements were properly classified as opinions or fair comments. (R. at 8.) Finally, the Court of Appeals held that Haul n' Ride was not bound by the rental agreement to notify Alazork of the use of GPS technology to track the truck's location, therefore, summary judgment on the deceptive business practices issue was also proper. (R. at 10.)

SUMMARY OF ARGUMENT

I.

On de novo review, this Court should affirm the decision of the First District Court of Appeals which affirmed the grant of summary judgment in favor of Haul n' Ride on Alazork's claims for intrusion upon seclusion, defamation, and deceptive business practices. A summary judgment is proper when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Therefore, when a reasonable jury could not return a verdict for the nonmoving party, summary judgment is proper. Applying the law of intrusion to the undisputed facts of this case, Haul n' Ride did not commit an intrusion upon Alazork's seclusion. Only when a defendant believes he lacks permission to commit the intrusive act, does an intrusion occur. However, Alazork granted Haul n' Ride permission to use GPS technology by signing the rental agreement which contained a provision allowing for such use. Alazork's consent to the use of GPS technology negates any inference that Haul n' Ride lacked the required permission to use the GPS technology, and no intrusion occurred.

Furthermore, a claim for intrusion upon seclusion cannot survive unless the intrusive act may be considered offensive or objectionable to a reasonable person. After considering the context, conduct, and circumstances giving rise to Alazork's claim, as well as the motives and objectives behind Haul n' Ride's use of the GPS technology, this Court must determine that any degree of intrusiveness was insubstantial. In order to assert an expectation of privacy, Alazork must have conducted himself in a manner consistent with an actual expectation of privacy. Alazork drove a commercial vehicle and parked it in a public venue which diminished any expectation of privacy Alazork may have possessed. Additionally,

any degree of intrusion was slight because GPS technology involves the non-invasive use of satellites to pinpoint the location of Haul n' Ride's trucks which do not interfere with the purposes for which Alazork rented the truck. Alazork's own conduct evidences no expectation of privacy, and the degree of intrusiveness of GPS technology is slight. Consequently, a reasonable person cannot find Haul n' Ride's use of GPS technology offensive or objectionable.

Finally, Haul n' Ride's use of GPS technology did not cause the injury claimed by Alazork. The damages alleged by Alazork resulted from Mr. Babazork's reinterpretation and misuse of the information he received from Haul n' Ride, not the use of GPS technology. Because Alazork's claim for intrusion upon seclusion fails in all of its essential elements, a reasonable jury could render only one conclusion. Thus, summary judgment in favor of Haul n' Ride was properly granted.

II.

Haul n' Ride cannot be subject to defamation liability based upon its comments to Mr. Babazork because the law provides the affirmative defense of opinion or fair comment. Although opinions are protected speech, false statements of fact are not afforded similar protection. The statements made by Haul n' Ride, however, are statements of opinion. The common usage and meaning of the language used by Haul n' Ride are so loosely defined that the expression may be subject to various interpretations, a clear indication of opinion. Furthermore, the statements are incapable of being objectively verified as true or false because the statement that Alazork "might be involved or in trouble" lacks any precision as to its meaning, yet another indication of opinion. Finally, the immediate context of Haul n' Ride's expression as well as the broader social context of the statement indicate that the

statements are opinion. The immediate context of the statement indicates that Haul n' Ride disclosed the underlying facts upon which it founded its opinion that Alazork "might be involved or in trouble." When the underlying facts upon which an individual bases his opinion are fully disclosed, the expression enjoys the protected status of opinion. Finally, the broader social context reveals that Haul n' Ride was simply upholding its duty to society by staying vigilant in combating terrorism. After receiving notice of possible terrorist activities, Haul n' Ride promptly and vigilantly acted in order to thwart possible death and destruction.

Finally, Haul n' Ride's statements also fall squarely within the affirmative defense of fair comment. The fair comment privilege extends to statements of opinion on matters of public concern so long as the critic's opinion was his own, and he did not make the comment for purposes of causing harm to the object of the comment. Undoubtedly, the public concern for terrorism has grown recently, however, the impact of terrorism on America was no less critical in years past. Because Haul n' Ride's comments fit within the fair comment defense, Alazork shouldered the burden of establishing that Haul n' Ride's statements were made for the sole purpose of defaming him. The record indicates, however, that Haul n' Ride had received notice from the Federal Bureau of Investigation that their trucks might be involved in terrorist activities. Because Alazork failed to establish that Haul n' Ride made the statements for the sole purpose of defaming him, and the statements could otherwise be characterized as protected opinion, the Circuit Court's grant of summary judgment if favor of Haul n' Ride was proper as to Alazork's defamation claim.

III.

Alazork's final claim against Haul n' Ride alleged violations of the Marshall Deceptive Business Practices statute. This statute prohibits the omission or concealment of

material facts. However, the use of GPS technology was not essential to the transaction between Haul n' Ride and Alazork. In renting the truck to move back to college, Alazork failed to inquire into the availability of GPS technology in Haul n' Ride rental trucks. Furthermore, after signing the rental agreement, Alazork showed no further interest in the agreement provision that informed him of the availability of GPS technology. The fact that Haul n' Ride disclosed the use of GPS technology in the rental agreement defeats any claim of omission or concealment; however, should this Court hold that the information was not fully disclosed, the omission or concealment cannot be considered a material fact since the information was not essential to the underlying transaction.

Moreover, Haul n' Ride fully disclosed the price difference and circumstances which distinguish local rental from one-way rental plans. Had Alazork simply read the terms of the agreement to which he was bound, he would have learned that he would be subject to the one-way rental rate. However, despite being told of the rental arrangements and having available the rental agreement terms, Alazork chose the local rental plan. After being found in violation of the rental terms, Alazork now attempts to avoid the increased rental rate by alleging an omission or concealment by Haul n' Ride. However, after applying the law to the undisputed facts, a reasonable jury could render but one conclusion in favor of Haul n' Ride; therefore, the Circuit Court properly granted summary judgment in favor Haul n' Ride.

Haul n' Ride recognizes that Alazork's situation is lamentable. However, any loss suffered by Alazork resulted from Mr. Babazork's independent actions, and not as a result of Haul n' Ride's statements or use of GPS technology. Haul n' Ride should not be punished for its attempt to strike a blow against terrorism. Consequently, the Circuit Court properly granted summary judgment for Haul n' Ride on all three of Alazork's claims.

ARGUMENT

The Marshall Supreme Court should affirm the First District Court of Appeals which affirmed the Potter County Circuit Court's grant of summary judgment in favor of Haul n' Ride. The Court of Appeals and the Circuit Court properly held Haul n' Ride not liable for the statutory claims of intrusion upon seclusion, defamation, and deceptive business practices. Under Marshall Rule 56, summary judgment is appropriate when no genuine issue of material fact exists, and the movant is entitled to judgment as a matter of law. Marshall R. Civ. P. 56(c). Rule 56 mandates summary judgment when the party carrying the burden of proof at trial fails to make a showing sufficient to establish the existence of an essential element. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Additionally, "[a] party is entitled to summary judgment 'if, under the governing law, there can be but one reasonable conclusion as to the verdict.'" *Church v. Gen. Motors Corp.*, 33 F.3d 805, 807 (7th Cir. 1994) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). Because the various commercial and private uses clearly benefit society, the Court of Appeals properly affirmed the Circuit Court's grant of summary judgment in favor of Haul n' Ride.

GPS technology employs approximately twenty-four satellites that send out radio signals to a receiver in order to establish location. Aaron Reneger, *Satellite Tracking and the Right to Privacy*, 53 Hastings L.J. 549, 550 (2002). GPS technology serves many vital functions within today's society. In fact, former President Clinton ordered that the selective availability of GPS be discontinued in order to make GPS more responsive to civil and commercial users worldwide. Office of Science and Technology, *President Clinton: Improving the Civilian Global Positioning System (GPS)* (September14, 2002), *at* http://www.ostp.gov/html/0053_4.html. For example, uses of GPS include air, road, rail, and

marine navigation, precision agriculture and mining, oil exploration, environmental research and management, telecommunications, electronic data transfer, construction, recreation and emergency response. *Id*.

Furthermore, some school districts may use GPS to track public busing systems. *See* Kevin Duffy, *Satellites Watch as School Buses Travel the Roads; County Installs Tracking System*, Atlanta Journal and Constitution, Aug. 29, 2002, at 3JI. In Clayton County, Georgia, fifty new buses were equipped with GPS so a frustrated parent calling the school system may receive a precise answer to her question, "Where's my child's bus?" *Id*. The school system is apparently attempting to avoid incidents such as the one that occurred last January in Pennsylvania when an armed man took thirteen children hostage on a 160 mile trip along the eastern seaboard. *Id*. Frantic parents worried about their children's location as helicopters searched for the hijacked bus. *Id*. Also, several years ago in Clayton County, a child suffered a seizure on the bus, and the driver was not able to determine whether it would be quicker to return the child home or to continue to the school for assistance. With the use of GPS technology, both buses in the above situations could have been immediately located and assistance rendered.

Other applications of GPS technology include tracking individuals on probation. Zachary R. Dowdy, *Using Higher Tech to Monitor Offenders*, Newsday (N.Y.), Aug. 28, 2002, at A39. Now, high-tech bracelets allow probation officers to keep tighter reins on high-risk individuals such as sex offenders. *Id*. GPS allows for real-time tracking of the probationers to see exactly where they are going, including places they are not allowed to be, such as schools. *Id*. Also, parents may be able to track the movements of their children with GPS bracelets. Christine Jackman, *Bracelet to Track Kids by Satellite*, Sunday Mail (QLD),

Aug. 25, 2002, at 3. The bracelets may be set to sound an alarm when a child wanders beyond certain boundaries. *Id*. When a child in missing, kidnapped, or injured, a parent can simply logon to an internet site that displays the location of their child. *Id*.

GPS technology will become an integral part of society within the next few years. In fact, in 2000, the market for GPS applications was expected to double by 2003, increasing from $8 billion to over $16 billion. Office of Science and Technology, *supra*. Society recognizes the instant benefits of GPS technology, rather than considering it a threat to its individual liberties. Despite such general acceptance, Alazork claims Haul n' Ride committed an intrusion upon seclusion, defamation, and deceptive business practices. However, the Circuit Court properly granted summary judgment in favor of Haul n' Ride.

I. No intrusion upon seclusion arises from the use of GPS technology to track the location of rental trucks because Alazork established none of the elements of intrusion upon seclusion.

The Court of Appeals affirmed the Circuit Court's grant of summary judgment for Haul n' Ride on Alazork's intrusion upon seclusion claim. The claim is based on the Marshall statute which follows the Restatement Second provision and requires proof of the following four elements:

1) an unauthorized intrusion or prying into the plaintiff's seclusion;

2) the intrusion must be offensive or objectionable to a reasonable person;

3) the matter on which the intrusion occurs must be private, and

4) the intrusion causes anguish and suffering.

Marshall Revised Code § 735 MRC 15/40.

Examining the four elements of intrusion under the undisputed facts shows that the use of the GPS technology in its rental trucks does not intrude upon seclusion.

A. The use of GPS technology in rental vehicles does not amount to an intrusion when the actor believes he received the necessary legal or personal permission to commit an otherwise intrusive act.

One of the most fundamental freedoms on which our country has grounded its roots is a person's right to privacy, or to be let alone. Like all great and fundamental freedoms, however, the right to privacy is not absolute. In pursuing a claim for an invasion of privacy, one must proceed within the confines of the appropriate statute. Under the Marshall intrusion upon seclusion statute which mirrors the corresponding Restatement provision, Alazork must first establish that Haul n' Ride committed an "intrusion." *See* RESTATEMENT (SECOND) OF TORTS § 652B. However, because Haul n' Ride believed it obtained the proper permission from Alazork to use the GPS technology, no "intrusion" occurred.

An intrusion, for invasion of privacy purposes, occurs when an actor "believes, or is substantially certain, that he lacks the necessary legal or personal permission to commit the intrusive act." *Fletcher v. Price Chopper Foods of Trumann, Inc.*, 220 F.3d 871, 876 (8th Cir. 2000) (citing *O'Donnell v. United States*, 891 F.2d 1079, 1083 (3rd Cir. 1989)). For example, the Eighth Circuit Court of Appeals in *Fletcher* held that the defendant intruded. *Fletcher*, 220 F.3d at 876. In *Fletcher*, when the plaintiff developed a work-related injury, her manager requested that she fill out a worker's compensation form. *Id*. at 873-74. However, she did not seek worker compensation benefits. *Id*. at 874. The manager then used the worker compensation form to obtain the plaintiff's injury information from her doctor. *Id*. In finding that an intrusion occurred, the court of appeals recognized that the grocery store manager used a worker's compensation form to deviously obtain information about the plaintiff's injury, although the plaintiff never sought worker's compensation benefits. *See Id*. at 876.

The present facts bear no resemblance to those presented before the court in *Fletcher* because Haul n' Ride obtained the necessary legal or personal permission to use the GPS technology. Haul n' Ride and Alazork entered into a rental agreement that set forth various terms, including the dates the rental truck would depart from the Haul n' Ride office and when Alazork would return the truck. (R. at 5.) Among the eleven express terms listed in the agreement was a statement acknowledging that the truck may be equipped with GPS technology. The agreement further stated that Haul n' Ride may use the GPS technology to locate the vehicle in emergency situations such as mechanical malfunctions, accident, or theft. (*See* R. at 4, R. at Exhibit B). Alazork expressly agreed to all terms and conditions listed within the rental contract when he entered into the agreement and signed it. *Id*.

When a person provides legal or personal permission to commit an intrusive act, no intrusion occurs. *See Fletcher*, 220 F.3d at 876. Essentially, Alazork's legal commitment under the terms of the rental contract amounted to "permission" or "consent" to Haul n' Ride's use of the GPS technology. At least one state has inferred that consent to search negates any possible intrusion. *See Wal-Mart Stores, Inc. v. Lee*, 74 S.W.3d 634 (Ark. 2002). The Arkansas Supreme Court in *Lee* addressed a situation in which an employee agreed to a search for stolen property by his employer. *See Lee*, 74 S.W.3d at 645. Although no dispute existed that the employee consented to a search, disagreement as to the scope of the search prevented the court from ruling in favor the defendant employer. *Id*. at 647.

However, no similar dispute as to the scope of the search exists between Haul n' Ride and Alazork in the present case. Because Alazork signed the agreement, he expressly agreed to all rental terms and conditions including the use of GPS technology to locate the vehicle in "emergency" situations. The common meaning and understanding of the term "emergency"

may be stated as "a situation, often dangerous, which arises suddenly and calls for prompt action." New Webster's Dictionary and Thesaurus of the English Language (School, Home & Office ed. 1995). Emergency situations include obtaining location information of a rental truck in order to thwart potential terrorist activities.

Because Alazork voluntarily solicited the services of Haul n' Ride and entered into a rental agreement, he consented to the use of GPS technology to locate the rental truck in any emergency situation. Emergency situations often occur under the most remote and unforeseeable circumstances. Obviously, GPS technology provides location information when mechanical failure occurs or when a traffic accident arises. However, GPS technology can also assist law enforcement in finding children abducted by kidnappers. Simply because the emergency situation involved in the present case did not involve foreseeable circumstances such as a car accident or vehicle malfunction does not lessen its status as an "emergency." Because Haul n' Ride obtained the necessary legal and personal permission to use the GPS technology in its rental vehicle, no intrusion occurred.

B. Haul n' Ride's use of GPS technology in rental vehicles cannot be considered offensive or objectionable after giving consideration to factors indicating offensive or objectionable conduct.

Even assuming Haul n' Ride's use of GPS technology amounted to an intrusion, the alleged intrusion did not rise to a level that would be offensive or objectionable to a reasonable person. Under the Marshall intrusion upon seclusion statute, the defendant's activity must amount to conduct that would be offensive to a reasonable person.

When the undisputed material facts demonstrate no reasonable expectation of privacy or an insubstantial impact on a person's privacy interest, the question of invasion may be determined as a matter of law. *Deteresa v. Am. Broad. Companies, Inc.*, 121 F.3d 460, 465

(9th Cir. 1997) (citation omitted). Courts address certain factors in determining the "offensiveness" of a person's conduct, such as:

1) the degree of the intrusion;

2) the context, conduct, and circumstances surrounding the intrusion;

3) the intruder's motives and objectives;

4) the setting into which the intruder intrudes; and

5) the expectations of those whose privacy is invaded.

Deteresa, 121 F.3d at 465.

An important theme arising in the discussion of these factors in the *Deteresa* opinion focused upon the fact that the alleged intrusion occurred in public view. *Id*. at 466.

1. The degree of any intrusion is minimal when considered within the context, conduct, and circumstances.

During the infamous O.J. Simpson murder controversy, American Broadcasting Companies ("ABC") approached Deteresa for a television interview regarding her knowledge of Mr. Simpson. *Id*. at 462. She declined the interview but later learned that her initial encounter with ABC had been recorded. *Id*. at 463. ABC later broadcast a short clip of the videotape. *Id*. In finding that no substantial intrusion of Deteresa's privacy occurred, the Court of Appeals emphasized that Deteresa was videotaped in public view by a camera person in a public place. *Id*. at 466. The camera person operated the video recording device from across the street, and because the camera crew did not encroach on her property, any intrusion upon Deteresa's privacy was de minimis. *Id*.

Similarly, any intrusion upon Alazork's privacy was also insubstantial. First, Alazork was not operating his own personal vehicle; rather, he rented a commercial vehicle from Haul n' Ride. The United States Supreme Court has held that an individual's expectation of

privacy in commercial property is less than the expectation of privacy in an individual's home. *Minnesota v. Carter*, 525 U.S. 83, 90 (1998). Therefore, Alazork's privacy expectations should be less than if he had been operating his own personal vehicle. Second, Alazork had notice of the potential use of GPS technology under the terms of the rental agreement. Finally, and perhaps most importantly, Alazork drove the vehicle to his college and parked it in a convenience store parking lot. (R. at 5.) Alazork made absolutely no attempt to conceal his identity or otherwise protect his privacy. In fact, he parked in a public venue which was open to and accessible by any passerby. Such undisputed facts negate any impact on Alazork's privacy expectations.

Additionally, GPS technology causes little or no intrusion. In fact, GPS technology involves no physical intrusion; instead, it utilizes a system of satellites to pinpoint location within one hundred feet. *See* Aaron Reneger, *Satellite Tracking and the Right to Privacy*, 53 Hastings L.J. 549, 550 (2002). While GPS technology was originally developed by the United States military to navigate submarines and guide missiles, many current commercial applications of the technology exist. *Id*. Now, GPS receivers can be embedded in cellular telephones, watches, and laptop computers. *Id*.; *see also* Richard C. Balough, *Global Positioning System and the Internet: A Combination with Privacy Risks*, 15 OCT CBA Rec. 28, 29 (2001). Because the use of GPS technology is rapidly becoming a widely accepted commercial application, and no physical intrusion arises from its use, the degree intrusion upon Alazork's privacy expectations is minimal.

2. Haul n' Ride possessed legitimate motives and objectives, and Alazork's privacy expectations were diminished.

Haul n' Ride's motives and objectives in performing the intrusive acts must also be examined. In other words, this Court should consider the purpose of the intrusion and

whether the "thing" being intruded upon is entitled to privacy. *I.C.U. Investigations, Inc. v. Jones*, 780 So. 2d 685, 689 (Ala. 2000). Furthermore, the overall context of the alleged intrusion should be examined including the circumstances under which the alleged intrusion occurred. *Bauer v. Ford Motor Credit Co.*, 149 F. Supp. 2d 1106, 1110-11 (D. Minn. 2001). In *I.C.U. Investigations*, Jones suffered from a work-related injury and sought workers' compensation benefits. *I.C.U. Investigations*, 780 So. 2d at 687. Jones's employer hired an investigative company to watch Jones's daily activities. *Id*. While parked on the shoulder of one of two roads near Jones's mobile home, investigators videotaped Jones urinating in his front yard on several occasions. *Id*. Jones filed suit alleging invasion of privacy. *Id*. at 688.

The Alabama Supreme Court noted that because the extent of Jones's injuries presented an issue in his workers' compensation claims, he should have expected a reasonable investigation regarding his physical capacity. *Id*. at 689. Concluding that the purpose of the investigation was legitimate, the court turned to the issue of whether the investigation was objectionable or offensive. *Id*. Because Jones was watched and taped in his front yard, exposed to public view, the investigators intrusion was not wrongful. *Id*. The front yard was located such that Jones could be viewed from either of two public roads, and the investigators never entered or taped activities occurring within the home. A reasonable person could not find the intrusion objectionable or offensive. *See Id*.

Similarly, Haul n' Ride possessed legitimate purposes and motives for collecting the location information of their truck. Virtually every aspect of American society has changed in light of recent events. Foreign entities and extremist American factions catapulted the issue of terrorist activities into forefront of American media by their acts. After tragic bombings at home and abroad, Americans have become much more aware of the havoc that

may be reaped on our great nation. Because Haul n' Ride was informed that its trucks might be used by those seeking such death and destruction, Haul n' Ride was familiar with the potential for future terrorist activities even before the rest of the country became keenly aware of the actuality on September 11, 2001. In its attempt to combat such activities, Haul n' Ride contacted Mr. Streeter after receiving notice from the Federal Bureau of Investigation of potential terrorist activities in the region. Mr. Streeter's use of GPS technology, under the circumstances, to locate its rental trucks must be considered legitimate. Furthermore, Alazork's actions of parking the vehicle in full public view diminished his privacy expectations just as Mr. Jones's expectations of privacy were diminished in *I.C.U. Investigations*.[1] Consequently, any intrusion by Haul n' Ride cannot be considered wrongful, offensive, or objectionable.

3. The location in which Haul n' Ride placed the GPS receiver further negates the intrusiveness of GPS technology.

Finally, the setting into which Haul n' Ride intruded provides additional grounds that Haul n' Ride's acts were not offensive or objectionable. Haul n' Ride places the GPS receivers inside the trucks' engine compartments. Such placement neither invades any part of the vehicle which Alazork could use for private matters, nor does the receiver interfere with Alazork's ability to use the vehicle for moving purposes. Thus, taking into account the various factors indicating offensive or objectionable conduct, Haul n' Ride's use of the GPS technology did not rise to the level of intrusion that a reasonable person would find offensive.

C. Alazork's conduct evidenced no expectation of privacy.

The legitimate expectation of privacy represents the touchstone of privacy law in America. *See e.g.*, *Fletcher*, 220 F.3d at 877; *see also Katz v. United States*, 389 U.S. 347,

[1] Alazork's diminished expectation of privacy is further discussed in Section I(c), *infra*.

360 (1967) (holding that the touchstone of Fourth Amendment analysis is whether an individual maintains a "constitutionally protected reasonable expectation of privacy."). A plaintiff asserting such a claim "must have conducted himself or herself in a manner consistent with an actual expectation of privacy." *Id*. (quoting *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 648 (Cal. 1994)). In other words, a person's behavior may give rise to an inference that he retains no privacy expectations in some aspects of his affairs. *Id*. Even Samuel D. Warren and Louis Brandeis acknowledged this principle in their famous article which founded the common law's recognition of an individual's right to privacy. *See* Samuel D. Warren, and Louis Brandeis, *The Right to Privacy*, 4 Harv. L Rev. 193 (1890). Warren and Brandeis avowed that "the individual is entitled to decide whether that which is his shall be given to the public. . . . The right is lost only when the author himself communicates his production to the public,—in other words, publishes it." *Id*. at 199-200. Some of the most often litigated privacy expectation issues arise in the criminal context because the United States Constitution provides stringent protections for individuals against unreasonable searches and seizures. *See* U.S. Const. amend. IV. Due to these heightened privacy protections, principles set forth in criminal cases are helpful in examining Alazork's expectation of privacy.

1. Privacy expectations are lessened when in public places.

The 9th Circuit Court of Appeals has limited a person's privacy expectations when he is in public places. *United States v. McIver*, 186 F.3d 1119 (9th Cir. 1999). In *McIver*, law enforcement officers, suspecting McIver of cultivating marijuana plants in a national park, placed video and still cameras in areas of the park where the plants were growing. *See Id*. at 1122. After the defendant's vehicles were photographed in the area, officers placed a

magnetized tracking device (similar in principle to GPS technology) on the undercarriage of McIver's vehicle. *Id*. at 1123. McIver was later indicted for possession of marijuana with intent to deliver. *Id*. at 1124.

On appeal, McIver asserted that the use of an unmanned camera constituted an unreasonable search. *Id*. at 1125. However, the court of appeals rejected this contention, recognizing that "nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them." *Id*. (citations omitted). Observation of the marijuana site with unmanned cameras did not violate the constitution simply because the more cost-effective "mechanical eye" was utilized by law enforcement. *Id*.; *see also Hudspeth v. Arkansas*, No. CR 01-1222, 2002 WL 1339891, at *4 (Ark. June 20, 2002) (holding that use of photographic equipment does not violate the Fourth Amendment as long as the information obtained could have been lawfully observed by a law enforcement officer.) Similarly, GPS technology reveals no more than what could be observed by the naked eye.

Instead of spending significant amounts of time and money in hiring an individual to physically locate and view the placement of Alazork's rental truck, Haul n' Ride employed a more cost-effective and efficient means of gathering the same information. The undisputed facts establish that Alazork parked the truck in a parking lot, open to the view of any passerby, thereby defeating any expectation of privacy Alazork may have in his location information. Such reasoning falls within the holding of the Ninth Circuit in *McIver*. *See McIver*, 186 F.3d at 1125-26 (holding that "[i]llegal activities conducted on government land open to the public which may be viewed by any passing visitor or law enforcement officer are not protected by the Fourth Amendment because there can be no reasonable expectation

of privacy under such circumstances."). Of course, the court did recognize that even in public places, some expectation of privacy may exist in some circumstances such as in hotel rooms, a cabin, or an enclosed tent. *Id*. at 1126. However, just as McIver made no attempt to conceal his activities from public view, Alazork made no attempt to conceal the location of the rental truck. Thus, no reasonable expectation of privacy existed.

2. Use of GPS technology does not require a search warrant under the heightened protection of criminal cases.

Recently, a Washington state court addressed the use of GPS technology and privacy expectation issues. *See Washington v. Jackson*, 46 P.3d 257 (Wash. Ct. App. 2002). In *Jackson*, law enforcement officers sought and received a warrant to attach a GPS device on a murder suspect's vehicle in an attempt to find the victim's body. *See Id*. at 261. Using the information collected from the GPS, investigators located the victim's body and other incriminating evidence used to convict the defendant. *Id*. at 261-62. On appeal, the Washington appellate court held that probable cause for the arrest warrants securing the use of the GPS was ultimately unnecessary. *Id*. at 269. A fundamental pillar of privacy law states that "what is voluntarily exposed to the general public and observable without the use of enhancement devices from an unprotected area is not considered part of a person's private affairs." *Id*. (citations omitted). Applying this fundamental law, the court held that monitoring the defendant's public travels with a GPS device may be "reasonably viewed as merely sense augmenting, revealing open-view information of what might easily be seen from a lawful vantage point without such aids." *Id*. (citations omitted). Similarly, because the information was collected with GPS technology, Alazork can assert no expectation of privacy in his location information as the same information could have easily and lawfully been obtained with the naked eye in open-view.

D. The use of GPS technology did not cause Alazork's anguish or suffering.

Generally, establishing causation requires sufficient facts that a defendant's conduct substantially caused the injury claimed by the plaintiff. *Tompkins v. Cyr*, 202 F.3d 770, 782 (5th Cir. 2000). Alazork's alleged damages resulted from Mr. Streeter's statements to Mr. Babazork, and not from the use of GPS technology. The record indicates that Alazork lost his scholarship due to Mr. Babazork's conversation with Mr. Streeter. (R. at 6.) Because Alazork failed to establish that the damages he suffered resulted from the use of GPS technology, Marshall Rule 56 mandates that Haul n' Ride receive judgment as a matter of law.

Applying the law relating to intrusion upon seclusion to the evidence, Haul n' Ride committed no intrusion upon the private affairs of Alazork. Furthermore, no aspect of the alleged intrusion can be classified as offensive or objectionable to a reasonable person. Applying the law to the undisputed facts, the only reasonable conclusion is that Haul n' Ride committed no intrusion upon Alazork's seclusion. Thus, the Potter County Circuit Court properly granted Haul n' Ride's motion for summary judgment on this claim.

II. Haul n' Ride's statements were properly characterized as opinion or fair comment which provide an affirmative defense to defamation claims.

Alazork's second claim alleges that Haul n' Ride defamed him by their statements to Mr. Babzork. However, because the law affords an affirmative defense of opinion or fair comment, the First District Court of Appeals properly held that Haul n' Ride's statements regarding Alazork were not subject to defamation liability. Specifically, Haul n' Ride's statements to Mr. Babazork amounted to expressions that Mr. Streeter was concerned that Alazork "might be involved or in trouble," referred to Haul n' Rides' notice of possible terrorist activities, and indicated that Alazork was parked at an adult bookstore. Because Mr.

Streeter's statements fall within the definition of protected opinion and fair comment, the Potter County Circuit Court appropriately rendered summary judgment in favor of Haul n' Ride.

A. Haul n' Ride's referral to possible terrorist threats and statement that Alazork "might be involved or in trouble" are expressions of opinion not subject to defamation liability.

The exception of opinion in defamation law is largely rooted in the United States Supreme Court decision in *Gertz v. Welch, Inc.*, 418 U.S. 323 (1974). In *Gertz*, the Supreme Court unambiguously stated that "[u]nder the First Amendment there is no such thing as a false idea." *Id*. at 339. Conversely, however, "there is no constitutional value in false statements of fact." *Id*. at 340. Consequently, Courts across the nation have struggled with the often confusing distinction between fact and opinion.

The Restatement (Second) of Torts section 566 describes the application of defamation law and opinions as the following:

> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable ***only*** if it implies the allegation of ***undisclosed defamatory facts*** as the basis for the opinion.
> RESTATEMENT (SECOND) OF TORTS § 566 (1976) (emphasis added).

Building on the Restatement rule, two types opinions exist, pure opinions and mixed opinion. RESTATEMENT (SECOND) OF TORTS § 566 cmt. b (1976). A pure opinion exists when the defendant states the facts on which his opinion is based. *Id*. An opinion based upon disclosed or assumed non-defamatory facts is insufficient to establish liability for defamation. RESTATEMENT (SECOND) OF TORTS § 566 cmt. c (1976). On the other hand, a mixed opinion is an opinion apparently based on facts not stated or assumed to exist. RESTATEMENT (SECOND) OF TORTS § 566 cmt. b (1976). Consequently, a mixed opinion gives rise to an inference that undisclosed facts form the basis of the defendant's opinion. *Id*.

When the inference of undisclosed facts arises, liability for defamation may exist. RESTATEMENT (SECOND) OF TORTS § 566 cmt. c (1976).

Focusing on the Supreme Court's statements in *Gertz*, several Courts of Appeals have further developed and explained the distinction between statements of fact and opinion, and the liability attached to each. Recognizing that *Gertz* left many questions unanswered as to the distinction between fact and opinion statements, the District of Columbia Court of Appeals examined various approaches to clarify the distinction. *See Ollman v. Evans*, 750 F.2d 970, 977 (D.C. Cir. 1984). Adopting a totality of the circumstances approach, the court addressed four factors in determining whether an opinion may be reasonably characterized as making factual assertions. *Id*. at 979. The four factors utilized by the court of appeals may be summarized as follows:

1) the common usage or meaning of the specific language;

2) the statements verifiability as being objectively true or false;

3) the full context of the statement; and

4) the broader context or setting in which the statement appears.

Ollman, 750 F.2d at 979.

1. The common usage and meaning of the language used indicates that the statements are opinion.

As an example of the first factor, the common usage and meaning of the words, the court used the classic example of an accusation of a crime. *Id*. at 980. Obviously, such a statement may be "laden with factual content," however, statements that are "loosely definable" or "variously interpretable" cannot support an action for defamation. *Id*. In the present case, the context of Mr. Streeter's words closely resemble the "loosely definable" or "variously interpretable" comment. The common usage of the words Mr. Streeter used,

"might be involved or in trouble," cannot be interpreted as a direct accusation of a crime. Rather, the terms "might be involved or in trouble" may be interpreted in many different contexts.

When situations arise such that the plain meaning of the words may be interpreted differently, some states invoke the common law "innocent construction" rule. For example, in Illinois, if a statement may be innocently interpreted, it should be so interpreted. *Mittleman v. Witous*, 552 N.E.2d 973, 979 (Ill. 1990). Consequently, every innocent inference should be made in favor of Haul n' Ride.

2. Haul n' Ride's statements are incapable of being objectively verified as true or false, thus indicating an opinion.

Secondly, the court of appeals in *Ollman* held that the court should consider the verifiability of the statement. *Ollman*, 750 F.2d at 981. "[A] reader cannot rationally view an unverifiable statement as conveying actual facts." *Id*. Mr. Streeter's statement that Alazork "might be involved or in trouble" cannot be objectively verified as true or false. When the uttered statement connotes varying interpretations, the lack of precision makes the statement incapable of being proven true or false. *See McCabe v. Rattiner*, 814 F.2d 839, 842 (1st Cir. 1987) (stating that the term "scam" may mean different things to different people, consequently the assertion that "X is a scam" is incapable of being proven true or false.). "[T]he trier of fact may improperly tend to render a decision based upon the approval or disapproval of the contents of the statement, its author, or its subject." *Id*. Therefore, the Circuit Court correctly rendered summary judgment because unverifiable statements of opinion should be made as a matter of law. *See Id*. This lack of verifiability of the statement must also be considered in light of the third factor, the context in which the statement occurs.

3. The immediate context of the expression suggests that the statement is an opinion.

The degree of factual content arising from a statement of opinion depends upon the context of the statement taken as a whole. *See Ollman*, 750 F.2d at 982. For example, in *McCabe*, *supra*, the plaintiff operated time share condominiums. *McCabe*, 814 F.2d at 840. After an encounter with one of the plaintiff's salespersons, the defendant published an article that labeled the plaintiff's operation a "scam." *Id*. Addressing the statement in context, the court noted that the defendant "extensively and accurately described his encounter with the resort salespeople, thereby disclosing the basis for his assertion that it was a scam." *Id*. at 843. As previously stated, a pure opinion based upon disclosed facts cannot satisfy an action for defamation. RESTATEMENT (SECOND) OF TORTS § 566 cmt. c (1976).

Similarly, Mr. Streeter extensively and accurately disclosed the underlying facts upon which he based his opinion that Alazork "may be involved or in trouble." Mr. Streeter unambiguously informed Mr. Babazork that he had received a report of suspected terrorist activity. Mr. Babazork was also informed that Alazork violated the rental agreement by taking the truck out of the state. Because these underlying non-defamatory facts were disclosed to Mr. Babazork, Mr. Streeter's opinion that Alazork "might be involved or in trouble" amounts to protected opinion no matter how derogatory the opinion may have been. *See* RESTATEMENT (SECOND) OF TORTS § 566 cmt. c (1976) ("A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, *no matter how unjustified and unreasonable the opinion may be or how derogatory it is*.") (emphasis added). Thus, just as the term "scam" in *McCabe* could not reasonably be considered defamation, Mr. Streeter's statement to Mr. Babazork, considered in the context of the disclosed facts, cannot be sufficient to uphold an action in defamation.

4. The broader social context of the statement supports a holding that the statement is an opinion.

Finally, when determining whether a statement should be characterized as opinion or fact, courts must consider the broader social context into which the statement fits. *Ollman*, 750 F.2d at 983. Clearly, the social context and setting in which the statement was made has broad implications. Haul n' Ride was aware of the broad implications and took proactive measures to address them. Recently, Americans generally have become aware of the same implications because of terrorist activity. America and other free nations have fallen under attack at the hands of terrorist organizations, both domestically and abroad. In order to secure our own safety, freedom, and values, Americans must join together in combating these acts. While soldiers are literally fighting to uphold the pillars of America's foundation, each and every citizen soldier must stay ever vigilant and aware in order to prevent terrorist acts against the innocent. Mr. Streeter was simply upholding his duty.

The recent publicity negatively implicating Haul n' Ride rental trucks in illegal activities has forced the company to be on "high alert." After the Federal Bureau of Investigation alerted Haul n' Ride to possible terrorist activities potentially involving the use one of its rental trucks, the company immediately contacted its rental managers in an attempt to impede disaster. Mr. Streeter fulfilled his duty in tracking down all of the rental trucks in his command, and when Alazork's truck fit the description of the Federal Bureau of Investigation's lead, Mr. Streeter contacted Alazork's references. Hypothetically, should the Federal Bureau of Investigation's tip proved true, and Alazork was involved, Mr. Streeter would be hailed as a hero for preventing imminent death and destruction. Fortunately, Alazork was not involved and the Federal Bureau of Investigation's tip proved unfounded. Rather than being rewarded for prompt action and vigilant awareness, Haul n' Ride faces a

lawsuit for upholding its duty to America.

In speaking with Mr. Babazork, Mr. Streeter did not state, implicitly or explicitly, that Alazork was a terrorist. By holding that Mr. Streeter's statements somehow implied derogatory or defamatory facts concerning Alazork's character, this Court would be encouraging self-censorship of the citizens of Marshall. This self-censorship impedes America's objectives in its war on terrorism. Consequently, taking into consideration both the immediate context of the statement made and the overall social context of the situation, Mr. Streeter's statement cannot be characterized as anything other than non-actionable pure opinion.

B. Additionally, Haul n' Ride is not subject to defamation liability because fair comment is an affirmative defense.

Early common law did not distinguish between fact and opinion when imposing liability for defamation. *Bentley v. Bunton*, No. 00-0139, 2001 WL 1946127 at *12 (Tex. 2002). However, courts incorporated the affirmative defense of fair comment to "afford legal immunity for the honest expression of opinion on matters of legitimate public interest." *Id*. (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 13 (1990)). This form of privileged communication extended to expressions of opinion on matters of public concern if the critic's opinion was his own and he did not make the comment for purposes of causing harm to the object of the comment. *See* RESTATEMENT (SECOND) OF TORTS § 566 cmt. a (1976); *see also Milkovich*, 497 U.S. at 13-14. Furthermore, the fair comment privilege extended only to opinions of the "pure" type as discussed above. *Milkovich*, 497 U.S. at 13-14. In sum, the fair comment privilege "afforded legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact." *Id*. at 13. The fair comment privilege strikes the balance between the need

for public debate and the need to redress injury to citizens "wrought by invidious or irresponsible speech." *Id*. at 14. While the Supreme Court's opinion in *Gertz* has largely made the fair comment principle inapplicable, some states still apply the fair comment privilege in one form or another. *See Scheidler v. Nat'l Org. for Women, Inc.*, 739 F. Supp. 1210, 1215 (N.D. Ill. 1990). In such cases, the plaintiff assumes the burden of proving that the defendant published the statements solely for the purpose of defaming him and not for the purpose of informing the public. *Id*.

Taking into account the burden Alazork carried to overcome the fair comment privilege, the Court of Appeals correctly upheld the Circuit Court's grant of summary judgment in favor of Haul n' Ride. As stated above, the grave impact terrorist attacks have had upon the United States has been felt by all American citizens. As has been the case for many years, reporting and investigating possible terrorist activities continues to remain at the forefront of public debate. While the duty to report and investigate terrorist activities has become more critical in light of recent events, it was no less important in years past. Consequently, Alazork carried the burden of proving that Mr. Streeter published the statement that Alazork "might be involved or in trouble" for the sole purpose of defaming his good name.

However, the record on appeal clearly establishes that Mr. Streeter had no intent to defame Alazork. Haul n' Ride's security director received a report of possible terrorist activities from the Federal Bureau of Investigation. When the security director passed this information on to the local Haul n' Ride rental agencies, he directed the managers to locate all of their trucks immediately. Acting pursuant to this notice, Mr. Streeter located Alazork's rental truck which fit the description and raised Mr. Streeter's suspicions. Mr. Streeter's

statements to Mr. Babazork cannot be characterized as an attempt to defame Alazork because Mr. Streeter intended to prevent terrorist activity. Therefore, the Potter County Circuit Court appropriately granted summary judgment in favor of Haul n' Ride because Mr. Streeter's comments fell within the bounds of the fair comment privilege.

C. Haul n' Ride's statement that Alazork parked in front of an adult bookstore is true, and therefore, not subject to liability for defamation.

Alazork failed to sufficiently meet the falsity element of a defamation action regarding Mr. Streeter's statement that Alazork parked the vehicle at an adult bookstore. To prove defamation, Alazork must have established that Haul n' Ride made a false and defamatory statement. It is not enough that the alleged statement is defamatory, rather the statement must also be false or carry a false implication. *Schoff v. York County*, 761 A.2d 869, 871 (Me. 2000); *see also Fitzgerald v. Tucker*, 737 So. 2d 706, 716 (La. 1999). No liability exists for a true statement unless the statement is incomplete. *Schoff*, 761, A.2d at 871; *see also Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995) ("In suits brought by private individuals, truth is an affirmative defense to slander."). In fact, the United States Supreme Court has noted that "in defamation actions, where the protected interest is personal reputation, the prevailing view is that truth is a defense." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 489 (1975). For example, in *Schoff*, a local newspaper published a story stating that Schoff went to the jail to deliver sneakers to her son, and jail officials found hacksaw blades concealed within the insoles. *Schoff*, 761 A.2d at 870. Schoff filed a defamation action alleging that the statements implied that she attempted to break her son out of jail. *Id*. at 871. The court held that no material facts were omitted and the statements did not carry with them a false implication, thus recognizing the general rule

that true statements do not carry defamation liability. *Id*. at 872. Only when omitted statements would "dispel the defamatory sting" does a true statement of fact give rise to a claim for defamation. *Id*.

Despite the fact that parking in front of an adult bookstore is considered by some defamatory to Alazork's character, the fact is nevertheless true. Mr. Streeter informed Mr. Babazork of the true fact without implying any further factual connotations. No matter how unappealing this fact may be no defamatory liability exists. Because the affirmative defenses of opinion and fair comment apply, the Circuit Court properly granted summary judgment in favor of Haul n' Ride.

III. No violation of the Deceptive Business Practices Act exists because Haul n' Ride committed no deceptive act or practice with an intent that Alazork rely upon Haul n' Ride's acts or omissions.

Alazork's final claim against Haul n' Ride asserts a violation of the Marshall Deceptive Business Practices Act. However, the use of GPS technology was not a material fact, and Haul n' Ride fully disclosed the various rental rates; thus, the Circuit Court properly granted summary judgment in favor of Haul n' Ride. The Marshall 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 the 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 representations.
> Marshall Revised Code § 505 MRC 815/2.

Establishing a violation under the Deceptive Business Practices Act requires proof of 1) a deceptive act or practice concerning a material fact, 2) a defendant's intent that the plaintiff rely upon the deceptive act or practice, and 3) the deceptive act occurring in the course of

conduct involving trade or commerce. *See Bober v. Glaxo Wellcome PLC*, 246 F.3d 934, 938 (7th Cir. 2001); *see also Celex Group, Inc. v. Executive Gallery, Inc.*, 877 F. Supp. 1114, 1128 (N.D. Ill. 1995); *Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 593 (Ill. 1997). Although the Deceptive Business Practices Act should be construed liberally, courts should not use the statute to "transform nondeceptive and nonfraudulent omissions into actionable affirmations." *Mackinac v. Arcadia Nat'l Life Insurance Co.*, 648 N.E.2d 237, 240 (Ill. App. Ct. 1995) (citations omitted).

A. Disclosure of GPS technology was not essential to the rental truck transaction, and Haul n' Ride fully disclosed the price differences between one-way and local rentals.

1. Haul n' Ride had no duty to disclose the use of GPS technology because it was not essential to renting.

The Deceptive Business Practices Act prohibits the "misrepresentation or the concealment, suppression or omission of any material fact" in trade or commerce. Marshall Revised Code § 505 MRC 815/2. A material fact consists of information in which "a buyer would have acted differently knowing the information, or . . . concerns the type of information upon which a buyer would be expected to rely in making a decision whether to purchase." *Cozzi Iron & Metal, Inc. v. U.S. Office Equipment, Inc.*, 250 F.3d 570, 576 (7th Cir. 2001); *see also Connick*, 675 N.E.2d at 595. Stated another way, the fact "must be essential to the transaction between the parties." *Cozzi*, 250 F.3d at 576 (quoting *Ryan v. Wersi Elec. GmbH & Co.*, 59 F.3d 52, 54 (7th Cir. 1995)).

In *Ryan*, the plaintiff alleged that the defendant fraudulently induced him to purchase stock in one of the defendant's subsidiary companies. *Ryan*, 59 F.3d at 53. The district court granted summary judgment against the plaintiff because he failed to establish that the alleged misrepresentations were material. *Id*. According to the plaintiff, the defendant promised to

grant him exclusive distributorship rights upon the purchase of the stock. *Id*. at 54. However, none of the plaintiff's agreements contained such a promise. *Id*. The Seventh Circuit held that if the plaintiff had considered exclusive distributorship an essential element of the transaction, he would have insisted upon the inclusion of such a provision in the agreement. *Id*.

The Seventh Circuit contrasted the *Ryan* decision with the facts set forth in *Cozzi*. *Cozzi* involved a lease agreement for photocopier equipment. *Cozzi Iron & Metal, Inc.*, 250 F.3d at 573. The plaintiff alleged that the defendant informed him that, although the leases required monthly payments for a minimum number of copies, he would only be accountable for the actual number of copies made. *Id*. Contrasting the alleged misrepresentation with *Ryan*, the court of appeals stated, "Most importantly, the provision in [*Ryan*] was collateral to the purchase of the company's stock. Here by contrast, the alleged misrepresentations go to the very heart of the contract—the amount that Cozzi was required to pay U.S. Office for use of the photocopiers." *Id*. at 576 (internal citations omitted).

Under the guidance of the Seventh Circuit decisions, the use of GPS technology cannot be considered an essential element in the transaction between Haul n' Ride and Alazork. The record indicates that Alazork needed a rental truck in order to move back to college for the fall semester. (R. at 3.) Nothing in the record indicates that Alazork considered the use of GPS technology in the rental trucks as essential to his decision to rent the vehicle because he never inquired into the use of GPS technology in the trucks. Just as the exclusive distributorship rights involved in *Ryan* proved immaterial, any of Haul n' Ride's omissions regarding the potential uses of GPS technology are also immaterial.

However, assuming the use of GPS technology rises to the level of a material fact,

this Court should find that no omission occurred. In *Bober v. Glaxo Wellcome*, buyers of the pharmaceutical drugs Zantac 75 and Zantac 150 filed an action against the drug manufacturer alleging that the manufacturer provided false and misleading information on the substitutability of the two drugs. 246 F.3d at 936. The drug manufacturer provided both a hotline telephone number as well as an internet website to provide information on the drugs. *Id*. at 937. In holding that the manufacturer committed no violation of the deceptive business practices statute, the court stated "that examining the statements at issue, together and in the context of the other information available to Zantac users, eliminates any possibility of deception with regard to substitutability." *Id*. at 940. Similarly, Haul n' Ride noted in its rental agreement that its rental trucks may be equipped with GPS technology, and Haul n' Ride may use this technology for emergency location services. Although the term emergency may be broad, no question arises that the circumstances of the present case involved an emergency circumstance.

2. Haul n' Ride fully disclosed the price differences between local and one-way rentals.

Failing to disclose information can be deceptive under a consumer unfair trade practices act only if, under the circumstances, a duty to disclose the information exists. *Kenney v. Healey Ford-Lincoln-Mercury, Inc.*, 730 A.2d 115, 117 (Conn. App. Ct. 1999). Various circumstances of a transaction may give rise to a duty to disclose material information. *See Mackinac*, 648 N.E.2d at 240. For example, such a duty arises in fiduciary relationships such as an agency relationship. *Id*. Other times, a duty to speak occurs when one party specifically inquires as to a material matter involved in the transaction. *See Brandywine Volkswagen, Ltd. v. Delaware*, 312 A.2d 632, 633 (Del. 1973) (When a buyer specifically asked a used car salesman about a car's mileage, a duty arose to disclose the

facts relevant to the buyer's inquiry); *see also Mitchell v. Skubiak*, 618 N.E.2d 1013, 1018 (Ill. App. Ct. 1993) (Addressing a buyer's discovery of defects after purchasing a home the court stated, "Upon plaintiff's inquiring about the source of [cracks found the in master bedroom wall and ceiling], a duty to speak arose on behalf of the defendants."). However, Alazork raises no argument that a fiduciary duty exists between himself and Haul n' Ride, and Alazork failed to inquire as to any specifics of the local or one-way rental arrangements.

In determining whether a seller has a duty to disclose, an additional factor to consider is whether an omission could be discoverable through the buyer's exercise of ordinary prudence. *See Randels v. Best Real Estate, Inc.*, 612 N.E.2d 984, 988 (Ill. App. Ct. 1993). In *Randels*, the seller sold a residence without disclosing to the buyer that a city ordinance required the owner of the residence to connect the property's waste water system to the municipal sewer system. *See Id*. at 986. The appellate court stated:

> the key question is *whether a defendant's misrepresentations or omissions were discoverable through the exercise of ordinary prudence by the plaintiff*, and a finding of liability is made when the defendant misrepresents or omits facts of which he possesses almost exclusive knowledge of the truth or falsity or which is not readily ascertainable by the plaintiff.
> *Id*. at 988 (emphasis added).

Because the city ordinance was a matter of public knowledge, the seller committed no violation of the Consumer Fraud Act. *Id*. Additionally, the court noted that the buyers made few, if any, inquiries about the property. *Id*. at 989. Had the buyers made a simple review of the ordinances prior to purchasing the home, they would have been placed on notice of the hookup requirements. *Id*. at 988-89.

Although the present circumstances involved no city ordinance or other applicable law, the same principle applies. Alazork learned of the two types of rentals available, one-way and local when he contacted Haul n' Ride. Mr. Streeter told Alazork that one-way rental

rates were higher "because of the cost of maintaining a national network of Haul n' Ride locations and because *the company's insurance expenses were higher for rentals in which a truck was driven in more than one state.*" (R. at 3)(emphasis added). Although Mr. Streeter stated that one-way rentals involved taking the truck out of state and returning it to a different Haul n' Ride location, the rental agreement entered into by Alazork expressly stated, "The truck leaving the State of Marshall will be charged the one-way rental fee." (R. at Exhibit B). The rental agreement unequivocally states that, under Alazork's circumstances, Alazork would be subject to the one-way rental fee. Thus, Haul n' Ride made full disclosure of the rental arrangements to Alazork. Like the buyers in *Randels*, Alazork would have been placed on notice if he had simply read the binding terms of the contract. Furthermore, like the buyers in *Randels*, Alazork made no inquiry about his particular circumstances. Rather, Alazork chose not to inquire in an attempt to avoid the increased one-way rental charges. Having been caught in violation of the clear terms of the contract, Alazork now attempts to shift the blame to Haul n' Ride.

B. No evidence exists that Haul n' Ride had the requisite intent under the Deceptive Business Practices Act because Haul n' Ride had no exclusive knowledge or notice that further disclosure of the contract terms was necessary.

In order to establish a claim under the Deceptive Business Practices Act, Alazork must establish intent on the part of Haul n' Ride. *See* Marshall Revised Code § 505 MRC 815/2. Intent may be established by circumstantial evidence. *Celex Group, Inc.*, 877 F. Supp. at 1131. In order to establish intent, a defendant must be placed on notice that it may be committing a deceptive act.

For example, in *Celex*, the plaintiff and defendant entered into a relationship by which the parties would buy and sell each other's products. *Celex Group, Inc.*, 877 F. Supp.

at 1119. On several occasions, the defendant purchased advertising space in the plaintiff's magazine issued on various airline flights. *Id*. The plaintiff claimed that the defendant granted exclusive marketing rights to sell the defendant's products in its magazines. *Id*. at 1120. However, the defendant did not disclose to plaintiff that it had entered into an agreement with another in-flight magazine. *Id*. at 1127. On its erroneous belief that it retained exclusive rights, the plaintiff placed orders for defendant's products totaling approximately $700,000. *See Id*. Addressing the element of intent in the plaintiff's deceptive business practices claim, the court found circumstantial evidence that the defendant was well aware of the plaintiff's reliance on airline advertising to promote its products. *Id*. at 1131. Because of "notice," a reasonable factfinder could infer that the defendant concealed its agreement with another in-flight magazine because such disclosure would undermine the ongoing negotiations with the plaintiff concerning the $700,000 in products. *Id*.

Notice to a defendant of his deceptive act was also used to establish the element intent in *Totz v. Continental Du Page Acura*, 602 N.E.2d 1374 (Ill. App. Ct. 1992). In *Totz*, the plaintiff purchased a used automobile from the defendant. *Totz*, 602 N.E.2d at 1377. The defendant referred to the vehicle as "the cream of the crop" and even placed a sticker on the windshield stating that the car had undergone a 26-point inspection. *Id*. at 1376. However, the defendant failed to notify the plaintiff that the vehicle sustained extensive damage in the past. *Id*. at 1377. In finding the element of intent, the court held that ample evidence existed that some of defendant's employees knew of the damage the vehicle had previously sustained. *Id*. at 1382. The evidence established that the vehicle underwent an inspection by the defendant's mechanic, and the defendant placed a sticker on the vehicle acknowledging that an inspection occurred. *Id*. Based on this circumstantial evidence, the defendant had

constructive notice that the car sustained prior damages. *Id*. Because an individual is presumed to have intended the consequences of his actions, it may be inferred that the defendant's failure to disclose such information to the plaintiff amounted to a deliberate attempt to induce the plaintiff into purchasing the car. *See Id*.

Conversely, when evidence of a defendant's exclusive knowledge of particular facts, or notice, does not appear in the record, the element of intent fails. In *Mackinac*, *supra*, the plaintiff purchased an automobile from defendant, and as part of the transaction, the plaintiff bought a credit life and disability insurance policy. *Mackinac*, 648 N.E.2d at 238. However, the defendant failed to give the plaintiff a copy of her policy at the time of purchase. *Id*. Later, the plaintiff submitted a claim under the policy after being deemed disabled due to diabetes retinopathy, a diabetes-related eye disorder. *Id*. at 239. The insurance provider denied the claim based on an exclusion for claims arising from a condition diagnosed prior to the commencement of the policy. *Id*. The plaintiff filed suit alleging the defendant failed to inform her of the policy's "good health" requirement at the time of contracting. *Id*. Rejecting the plaintiff's claims, the court of appeals held that the defendant's failure to disclose the information was not calculated to induce the plaintiff's reliance. *Id*. at 240. Not only did the defendant not have knowledge of the defendant's diabetic condition, the defendant had no reason to suspect the condition restriction in the policy would be of any consequence to the plaintiff. *Id*. The court stated, "Without such knowledge, defendants could not have affirmatively intended that plaintiff rely upon their alleged failure [sic] disclose the exclusion." *Id*. Based upon the above cases, the element requiring intent that a plaintiff rely upon a deceptive act requires a showing that the defendant possessed exclusive knowledge, or was placed on notice that disclosure of such information was necessary.

The record clearly indicates Haul n' Ride possessed no such knowledge or notice. Alazork contacted Haul n' Ride seeking to rent a truck to move back to college. However, Alazork made no statements as to the location of the college that he attended. Mr. Streeter proceeded to disclose the rental fees which included a one-way or local rental fee. Mr. Streeter described both fees and explained that the increased cost of the one-way rental fee is due in part to the fact that "the company's insurance expenses were much higher for rentals in which a truck was driven in more than one state." (R. at 3.) He also told Alazork that local rentals involve the truck's use "in town." (R. at 3.) Mr. Streeter also presented Alazork with the rental agreement which stated, "The truck leaving the State of Marshall will be charged the one-way rental fee." (R. at Exhibit B.) Mr. Streeter had no notice of Alazork's circumstances which would require further disclosure or discussion of the rental arrangements. In fact, after Mr. Streeter disclosed information regarding the one-way rental fee and the fact that a truck leaving the State of Marshall fits within the one-way rental, Alazork was left with the decision as to what arrangement to purchase. Alazork, clearly intending to avoid the increased cost, chose the local rental arrangement. After violating the terms of the agreement, an individual attempting to surreptitiously avoid such costs should not be able to later assert the seller's omission.

Furthermore, Mr. Streeter had no notice that further disclosure of the GPS technology was necessary under the circumstances. The rental agreement plainly stated that "[t]he truck may be equipped with global positioning satellite (GPS) and/or cellular phone technology for emergency location services." (R. at Exhibit B). Alazork neither inquired as to the availability or uses of the GPS technology in the trucks, nor did Alazork request further explanation after entering into the rental agreement. Absent Haul n' Ride's knowledge that

Alazork needed additional information regarding rental fees or the GPS technology, Alazork cannot maintain that Haul n' Ride omitted material facts with an intent that Alazork rely upon the omission.

C. Haul n' Ride committed no deceptive act or practice under the Federal Trade Commission guidelines.

When addressing a claim under a deceptive business practices act, courts should give deference to the considerations and interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act. *Robinson v. Toyota Motor Credit Corp.*, No. 90242, 2002 WL 1038728 at *8 (Ill. May 23, 2002). The Federal Trade Commission considers certain factors in determining unfairness, including: 1) whether the practice offends public policy; 2) whether the practice is immoral, unethical, oppressive, or unscrupulous; and 3) whether it causes substantial injury to consumers. *Id*. (citing *Fed. Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972)). Examination of the Federal Trade Commission factors reveals no deceptive act or practice.

1. Haul n' Ride's use of GPS technology and price differences do not violate public policy because neither injure the public or make competition unfair.

In order to find that a defendant's conduct is unfair or deceptive, a court need not find satisfaction of all three criteria. *Id*. at *8 (citations omitted). "A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three." *Id*. However, Alazork failed to establish any evidence that the use of GPS technology or the price differences between local and one-way rentals violate public policy.

A violation of public policy involves an injury to the public, and it is in the public interest to prevent the use of unfair methods of competition. *See Spiegel, Inc. v. Fed. Trade Comm'n*, 540 F.2d 287, 295 (7th Cir. 1976) (citations omitted). Not only has Alazork failed

to establish that Haul n' Ride's use of GPS technology violates public policy, the use of GPS technology proves to be a significant benefit to society.

Among the many benefits of GPS technology are uses of GPS in navigation, precision agriculture and mining, mineral exploration and environmental research, telecommunications, electronic data transfer, construction, recreation, and emergency response. *See* Office of Science and Technology, *supra*. As previously indicated, school districts have advantageously used GPS technology in their buses. Emergency medical services are able to better serve their communities with increased response time provided by the use of GPS technology. Finally, in the future, parents will be able to better monitor their children's location through the use of GPS bracelets.

The facts of this case provide an excellent example of the benefits that GPS contributes to society. Hypothetically, should the Federal Bureau of Investigation's tip to Haul n' Ride proved true and Alazork had, in fact, rented the truck with the intention of committing a terrorist act, countless lives could have been saved. The use of GPS technology allowed Haul n' Ride to immediately locate the vehicle without disclosing Alazork's personal information. Law enforcement could dispatch personnel to Alazork's location, possibly preventing extensive human casualties and property damage. Rather than be considered a threat to individual privacy, GPS technology should be welcomed as a valuable asset to combat terror and assist individuals in their daily lives.

Turning to the practice of charging a heightened fee for vehicles traveling beyond state lines, a valid reason for such a practice exists, and this reason was directly communicated to Alazork. When a seller charges unconscionable fees in return for little or no service, he violates public policy. *See Illinois v. Hedrich*, 438 N.E.2d 924, 929 (Ill. App.

Ct. 1982) (A significant fee was charged to mobile home owners wishing to sell their homes if the home was not moved from the park after the sale.) Rental agencies provide needed services for individuals who wish to move residences, businesses, or other personal and commercial property. However, without national networks such services would be essentially limited to local services, thus causing significant inconvenience for many individuals and businesses wishing to move property longer distances. Mr. Streeter explained that the cost of maintaining Haul n' Ride's national network required an increased fee for those traveling across state lines. Furthermore, the increased cost does not depend solely on returning vehicles to remote locations, rather Haul n' Ride's insurance expenses increase when consumers travel across state lines. Rather than absorb the added costs, Haul n' Ride appropriately shares this expense with customers traveling across state lines.

2. Haul n' Ride's conduct is not deceptive because it is not immoral, unethical, oppressive, or unscrupulous conduct and does not cause substantial injury.

The final factors for this Court to consider in determining the unfairness or deceptiveness of Haul n' Ride's business practices involves consideration of whether the practice is immoral, unethical, oppressive, or unscrupulous and whether the practice causes substantial injury to consumers. Both the use of GPS technology and the price differential between one-way and local rentals by Haul n' Ride can be analogized to the facts in *Robinson*, *supra*, where the defendant's conduct did not violate a state claim under a statute strikingly similar to Marshall's Deceptive Business Practices Act.

In *Robinson*, the plaintiffs leased automobiles from the defendant. 2002 WL 1038728 at *1. The plaintiffs' claims under the statute alleged that the defendant's default penalties under the leases constituted an unfair business practice because the lease required both an

excess mileage penalty and payment for excess wear and tear. *Id*. at *9. The Illinois Supreme Court disagreed, holding that there existed a "total absence of the type of oppressiveness and lack of meaningful choice necessary to establish unfairness," because the plaintiffs could have leased a vehicle elsewhere. *Id*. Furthermore, the penalty provisions were clearly set forth in the lease. *Id*. Consequently, the defendant's conduct was neither unfair nor deceptive.

Similarly, Haul n' Ride's conduct fails to amount to oppressive behavior or cause substantial injury to consumers. The increased rates for traveling beyond Marshall state lines are not anymore unfair than the penalty provisions in the *Robinson* leases. Haul n' Ride disclosed the difference between local and one-way rentals, both orally and in the provisions in the rental contract. Furthermore, the rental agreement provided for use of the GPS technology in emergency situations. The record fails to indicate that Alazork was coerced into signing the rental contract or that he lacked reasonable alternatives in the marketplace. Consequently, under the Federal Trade Commission guidelines, Haul n' Ride committed no deceptive or unfair practice in violation of the Marshall Deceptive Business Practices statute.

CONCLUSION

For the reasons set for above, Haul n' Ride respectfully requests that this Court affirm the decision of the First District Court of Appeals in favor of Respondent, Haul n' Ride.

Respectfully submitted,

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Counsel for Respondent

APPENDIX TABLE OF CONTENTS

APPEDIX A:

RESTATEMENT (SECOND) OF TORTS (1976)

SECTION 652B

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

APPEDIX B:

RESTATEMENT (SECOND) OF TORTS (1976)

SECTION 558

To create liability for defamation there must be:

(a) a false and defamatory statement concerning another;

(b) an unprivileged publication to a third party;

(c) fault amounting to at least negligence on the part of the publisher; and

(d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

APPEDIX C:

MARSHALL REVISED CODE (WEST 2002)

SECTION 505 MRC 815/2

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 the 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 representations.