No. 6D23-2449

IN THE DISTRICT COURT OF APPEAL

FOR THE SIXTH DISTRICT OF FLORIDA

JOHN DOE

Plaintiff-Appellant

v.

THOMAS S. MONAGHAN, AND

AVE MARIA SCHOOL OF LAW, INC.

Defendants-Appellees

On Appeal from Circuit Court for the Twentieth Judicial Circuit of Florida -

Collier County

No. 21-CA-2765

APPELLANT'S INITIAL BRIEF (AMENDED)

John Doe, pro se

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I. Jurisdiction

Florida Rule of Appellate Procedure 9.030(b)(1)(A) is the basis of this Court's jurisdiction because this is an appeal from an order granting final summary judgment. *Final Judgment*, *ROA, 357.*[1] *See also Transcript of Hearing on MSJ*, *ROA II, 1053:4-9* (showing the circuit court instructing AMSL's counsel "to prepare a detailed order … to withstand appellate scrutiny because I presume this will go up to the sixth DCA").

II. Statement of the Facts and of the Case

Doe began classes at AMSL in May 2020. *Plaintiff's Deposition, ROA, 183 (bottom left; line 3).* At or before that time, Doe was given the Student Handbook. *Id. (top right; lines 5-10)*. The student handbook purports to prohibit the storage of firearms in vehicles on campus. *AMSL Student Handbook, ROA, 228*. It also promises that "AMSL respects the privacy of AMSL community members." *Id.* Doe relied on this promise in accepting AMSL's offer of admission, in believing or perceiving his private business would remain private, and in uncritically accepting and using the free computer AMSL gave him. *Plaintiff's Deposition, ROA, 184 (top left; lines 17-25)*. Doe's attendance improved AMSL's average LSAT. *Compare id. at 183*

[1] ROA means the 372-page PDF. ROA II means the 1057-page PDF. All page cites are based on the PDF reader, not on any internal pagination.

(bottom left; lines 20-23) with AMSL 509 Disclosure, ROA, 230. In October 2020, Doe and his family became rent-paying tenants at the on-campus apartment building at 1065 Commons Circle. *Plaintiff's Deposition, ROA, 166 (top left; lines 18-19).* At that time, AMSL further guaranteed that Doe "may reasonably expect … personal privacy." *AMSL Housing Handbook, ROA, 233*. Doe was also informed that "Housing units are not supplied with either wired or wireless internet access. This must be contracted individually […]" *Id.* at 234. Doe used his cellphone for internet and purchased private internet service from Xfinity. *Phone and Internet Bills, ROA, 236*. "AMSL provided Doe with a Surface Go laptop upon enrollment." *AMSL's Answers to Interrogatories, ROA, 302-03 (#9).* At that time, AMSL staff instructed Doe to connect his cell phone to the laptop. *Rengifo Email, ROA, 318.* In February 2022, Doe generated a System Information Report – which shows the computer was running "Apple Mobile Device Service," "Background Intelligent Transfer Service," "Routing and Remote Access," "Parental Controls," "Xbox Live Game Save," "Game DVR and Broadcast," and at least fourteen (14) system drivers or loaded modules related to the YourPhone application on the laptop, including "Screen Mirroring." *System Information Report, ROA, 320.*

AMSL uses a Texas business called Rubix Systematics to manage its IT services. *Rubix Systematics, ROA, 322.* Rubix Systematics advertises its ability to create "availability in the access of information" through "ethical offensive threat assessments and exploits." *Id.*

The apartment in which Doe and his family were residing used to be the campus of Ave Maria University ("AMU") from 2004-07. *AMSL's Admissions, ROA, 284 (#22).* In 2004, when Ave Maria's move to Florida was first manifesting, Monaghan described his vision at a conference on business ethics:

> We'll own all the commercial real estate. That means we will be able to control what goes on there. You won't be able to buy a *Playboy* or *Hustler* magazine in Ave Maria Town. We're going to control the cable television that comes in the area. There is not going to be any pornographic television in Ave Maria Town. If you want to buy the pill or condoms or contraceptives, you won't be able to get that in Ave Maria Town.

Riley Article, ROA, 272; accord Leonard Biography, ROA 286-87.

Collier County permit records show that, in August of 2003, a storage room in each of the apartment buildings on the-then property of AMU was converted into a "data room" or "room for data and telecommunications." *Permit Records, ROA, 290 and 292* ("Make sure those changes have been revised on the prints."). The blueprints filed with Collier County are amended blueprints from the previous owner of the property. *Blueprints, ROA, 294*

("F.K.A. Greenfield Commons"). The original prints show the power, phone, and cable lines, carried in risers, running underground out to the point of service. *Blueprints*, *ROA, 295 (bottom half of page)*. The amendments, however, show that the "underground tenant risers [were] cut off and capped flush with slab, all to be abandoned." *Id.* at 296. Instead, "existing tenant risers [were] picked up in first floor ceiling." *Id.* AMSL admits that the data rooms exist on the second floor and that they are still operational. *AMSL's Admissions, ROA, 282 (##13 and 14).* The blueprints tell us that the data room has telephone, data, and cable TV equipment, and that it is connected to other buildings on campus. *Blueprints, ROA, 295 (top half of page).* When this evidence was first presented in circuit court, the court asked Doe: "And did you depose anyone to find out whether this, in fact, is true?" *Transcript of Hearing on MSJ, ROA II, 1047:1-2.* The circuit court's order dismissed this evidence as it was "from over one decade ago…" *Final Order*, *ROA, 360 (¶10).*

In connection to the data room, all the apartments in the building are equipped with a Series 140 Structured Media Enclosure. *AMSL's Answers to Interrogatories, ROA, 302, (#7)*; *see also Storage Area Network Photo, ROA, 307.* These devices are designed for "running cable" and to "accommodate the distribution of voice, data, video, audio, security, and

IT/AV control applications." *Leviton Product Description, ROA, 309.* One can also "combine two or more enclosures for larger installations..." *Id.* To this day, AMU openly censors the internet and promulgates notice of the same. *AMU Student Handbook, ROA, 312.*

In April of 2006, AMSL faculty (in an 11-3 resolution) published in the Wall Street Journal their grievance that Monaghan and the then CEO of AMSL had "initiated a widespread system of electronic discovery" that sought to "monitor the e-mail, internet, and other computer-related activity of the faculty without suspicion of wrongdoing or other good cause." *AMSL Faculty Resolution, ROA, 264.* The Professors also claimed that "[g]raduates who have spoken out about Law School matters have reported that the Dean has called their employers in a threatening manner." *Id*. A lawsuit was filed in 2007, ("*Michigan case*"), and Monaghan's notes and correspondence from this period were obtained by virtue of an order of the Michigan supreme court. *Safranek v. Monaghan*, 765 N.W.2d 885 (2009) (Weaver, J., *concurring*) ("I write separately to provide important background information concerning the defendant's repeated attempts to avoid producing his personal notes."). The notes show that Monaghan instructed the CEO of AMSL to create a 'strategy' to deal with the 'opposition.'" *Michigan Case*, *ROA, 61.* The CEO "began having his staff watching these faculty and

reporting on their minute activities, and he reported on matters he believed could be used against them to Monaghan." *Id.* "When Monaghan saw something he liked, he would make comments such as, 'More fodder!'" *Id*.

Doe first suspected that AMSL was clandestinely monitoring his personal devices in the Spring of 2021. *Plaintiff's Deposition, ROA, 155 (top right; lines 12-20)*. Doe posed a question in Professor Gillen's class, which a few other students made comments on before Gillen chimed in, saying, "interesting, but I don't know about transgender people." *Id.* This was odd, because "the question posed had nothing to do with transgender people or how they would feel about this or that. It was completely unrelated." *Id. (bottom right; lines 11-14).* Around that same time, in another Zoom lecture, Professor Miller, "[r]eferring to the Creation of Adam fresco by Michelangelo that [Doe] had hanging behind [him]" stated, 'I bet that has special meaning to you.'" *Id.* at 156 *(top left; line 1).*

In the Summer 2021, in another Zoom lecture, all doubts were cast out when Professor Tracey stated that "the law school can see the screens like a DVR playback of what's being done on the personal devices of the students." *Id.* at 154 *(top left; lines 14-19)*. In the context of that admission, Professor Tracey also opined that a person cannot help who they are attracted to. *Id.*

In its Spring 2013 edition, the Memphis Law Review published an article written by AMSL Professor Tracey titled: *The Demise of Equal Access and a Return to the Early-American Understanding of Student Rights. Tracey Article, ROA, 314.* The article was funded by AMSL. *Id*. Professor Tracey argued that the law's "deference to university administrators […] is far more consistent with the historical understanding of the university student relationship" than if the law were to interfere because university administrators have "the paternalistic duty to shape the values of students […] a responsibility for virtually all the facets of students' lives […] from libido to laundry." *Id.* at 315. Professor Tracey explains that "this paternalism extended over students an intimate supervision […] designed to regulate the minute details of daily life […] confine young men within an observable space for definite periods of time. So long as students could find food, lodging and work within the institution, few would have to leave its precincts and escape surveillance." *Id.* at 316. Professor Tracey argued that the courts should not hear students' claims against colleges and universities because 250 years ago "students lived under the strict control of university administrators and faculty, and students certainly had no right to second-guess the educational choices of administrators." *Id*.

In the Fall of 2021, before raising his concerns with the administration and ultimately filing suit, Doe continued to face “pervasive harassment” to the point of being “constructively expelled.” *Plaintiff’s Deposition, ROA, 157 (bottom left; lines 14-16)*. For example, Doe recalls Professor Govern, during his recorded lectures, stating, "[d]on't ever assume you are alone on the internet” and “[w]hat you do on your own time is none of my business, but don't ask me for an ethics recommendation letter.” *Id.* at 154 *(bottom left; lines 1-3)*. These types of comments continued, and on October 22, 2021, Doe wrote and sent a letter to AMSL. *Plaintiff’s Inquiry, ROA, 331-32.* In that letter, Doe (1) demanded to know “whether AMSL is monitoring me or my family in our dwelling or on our personal phones/computers, and (2) informed AMSL that its policy of prohibiting the storage of firearms in vehicles on campus is contrary to Florida law. *Id.* On October 26, 2021, Professor Govern publicly humiliated Doe in retaliation for asking these questions. *Plaintiff’s Deposition, ROA, 154 (top right; lines 9-10).*

On October 30, 2021, having heard no response to his inquiry, Doe followed up directly with the CEO of AMSL: John Czarnetzky. *Plaintiff’s Follow-up, ROA, 334 (middle).* Doe expressed therein his expectation that the concerns raised in his inquiry be timely responded to, informed the CEO of the retaliation by Professor Govern, and demanded that AMSL “preserve

the record of [Professor Govern's] Oct. 26 Professional Responsibility class as well as any other records supporting the claims made [in the inquiry]." *Id.* Emails from that day show a senior administrator saying:

> "I have not yet reached out to counsel. Do you want me to respond to [Doe] now to advise him that we are reviewing his comments with counsel? I can also assure him that we do not have cameras in on campus housing units. I have no idea what has occurred with Professor Govern.

October 30th Emails, ROA, 337. Dean Milliron responded, "I can ask [the Chief Information Officer] for the video and review it when I get a chance." *Id.* CEO Czarnetzky then instructed Dean Milliron to "find out as best you can what the heck he's talking about regarding Prof. Govern." *Id.* On November 1, 2021, CEO Czarnetzky and Dean Milliron showed up at Doe's apartment, unannounced and flanked by armed security, and the CEO told Doe that he would be asked to leave if he did not surrender his right to store a firearm in his vehicle and stop asking questions about AMSL's data-gathering policies. *October 30th Emails, ROA, 336 (top); cf. Plaintiff's Deposition, ROA, 153 (top left; lines 3-6).*

Days later, Professor Mikochik said to his class that, "the recordings were all deleted after four days." *Plaintiff's Deposition, ROA, 154 (top right; lines 10-12).* Doe filed this lawsuit on November 26, 2021. *Docket, ROA, 3*. Around that time, Professor DeVito shared with his class that "when his wife

wasn't around from time to time he'd like to watch a video on his phone." *Plaintiff's Deposition, ROA, 154 (bottom left; lines 7-10).* When Doe returned to classes in the Spring of 2022, Professor Bonner looked directly at Doe and, in front of the whole class, asked him, "Are you the poorest student at Ave Maria School of Law?" *Id. (bottom right; lines 11-15).*

On February 8, 2022, Doe served AMSL with Requests for Production, which included "The recordings of all classes, lectures, and meetings in which Doe was present." *Docket, ROA, 3*. On March 10, 2022, the day production was due, AMSL moved for an enlargement of time to respond, stating: "Many, if not all, of the Requests are objectionable ... and AMSL intends to file appropriate objections." *Id*. On March 24, 2022, AMSL served its response – raising the following objections: privilege, relevance, over-broad, meant-to-harass-and-annoy, requires-expert, and undue-cost-and-effort. *Id*. at 4. On March 27, 2022, Doe filed a Motion to Compel. *Id.* However, Doe could not get the matter before the judge. As a pro se litigant, Doe was unable to schedule a hearing on his motion through JACS – the online scheduling system used by attorneys to schedule hearings – so he had to get a hearing scheduled by emailing the Judicial Assistant. Calls and emails went unanswered, and the weeks turned into months without a response. As it turns out, the court told the parties at their final meeting: "I

don't have a judicial assistant." *Transcript from the hearing on MSJ, ROA II, 1055, line 8.*

On June 22, 2022, after Doe told AMSL he would not sit for a deposition until he viewed the recordings, AMSL filed a Motion to Compel Doe's deposition. *Docket, ROA, 6*. On August 8, 2022, the court below issued an Order granting the motion but requiring AMSL to produce, before taking Doe's deposition, all recordings of Professor Gillen' s Moral Foundations of the Law classes that took place in the Spring 2021 semester." *Order on Defendant's Motion to Compel, ROA, 15.* On August 5, 2022, Defendant produced thirteen (13) video files. *ROA, 345.* Of the thirteen (13) video files produced, only six (6) were actual class recordings. The other seven (7) were random recordings of Professor Gillen. Doe pointed out that the recording from the class that took place on April 21, 2021, was missing, and in response to this, on August 23, 2022, AMSL filed a Notice of Compliance with an Affidavit of its Chief Information Officer, Monica Rengifo – wherein Rengifo stated that the recording of the April 21, 2021 class "has been identified as deleted" to "free up storage space" on Zoom. *ROA, 20-21 (¶¶ 9 and 13).* Importantly, Rengifo only looked on Zoom; as for the Google drive or local drives, she said she spoke with her supervisor who "stated he had nothing on the local drives from Professor Gillen's class as all of the

classes that semester were saved on Zoom, except for the one class he found on the Google Drive dated January 27, 2021." *Id. at ¶ 8*. On August 26, 2022, Doe filed a Motion for Sanctions for Spoliation. *Docket, ROA, 8*. On October 28, 2022, having finally heard Doe's February 8 Motion to Compel, the court below Ordered AMSL to produce the recordings of the Tracey, Govern, Bonner, and DeVito lectures. *Order on Plaintiff's Motion to Compel, ROA, 29.* Although AMSL produced recordings going as far back as Summer 2020*, ROA, 347*, the relevant recordings were all missing. On November 8, 2022, Doe Amended his Motion for Sanctions, explaining that 0 (zero) recordings were produced from Tracey's Constitutional Law class; Govern' s Professional Responsibility class recordings was short by eleven (11) classes – including that of October 26, 2021 for which request to preserve had been made on October 30, 2021; DeVito's classes had three (3) missing recordings; and Mr. Bonner's class from January 19 does not start until 30 minutes into the class while the professor is in the middle of a sentence. *ROA, 9*. Further facts will be provided below as needed.

III. Summary of the Argument

In Part A of the Argument Section, Doe argues that summary judgment was improper because there is a genuine issue of material fact about whether AMSL intercepted and monitored Doe's data and communications.

Firstly, this issue is genuine because a finding that AMSL did intercept and monitor Doe's data and communications could be adequately supported by the following record evidence:

- An admission of Tracey that the law school could view DVR-like playbacks of sessions on students' personal devices.
- AMSL's instructing Doe to connect his phone to a free computer that it gave him upon enrollment.
- The System Information Report from the free computer, showing the free computer performing processes consistent with the Tracey admission.
- The blueprints, showing AMU cutting the individual power, cable, and phone lines, capping the old point-of-service runs with concrete, and rerouting them into the data room.
- Mr. Monaghan's contemporaneous public announcement that he would control the cable television available in Ave Maria.
- The AMSL faculty's resolution, decrying their own administration's monitoring of their data and communications, and informing the public that graduates who have spoken out about Law School matters have reported that the Dean has called their employers in a threatening manner.

- Monaghan's personal notes showing his intent to collect fodder to gain leverage on AMSL community members that were opposing him.
- The students' rights law review article of Professor Tracey.
- The statements of other Professors evidencing that AMSL had found out something about Doe that it could have never found out had it not intercepted and monitored his data and communications.

The circuit court errored on the genuineness issue by rejecting the Blueprints, Monaghan's ethics speech, Monaghan's personal notes evidencing intent, and the faculty resolution, on the grounds that they are from over a decade ago, and by not considering the Tracey admission, the Govern harassment and retaliation, and the other probative and relevant statements of Gillen, Bonner and DeVito, on the grounds that Doe was not mentioned by name in those statements. This failure to fairly meet Doe's evidence constituted improper weighing, passing on the credibility of witnesses, and failing to view the evidence in the light most favorable to Doe.

Secondly, summary judgment was improper because the genuine dispute over whether AMSL intercepted and monitored Doe's data and communications is material under the substantive law for each count. The circuit court errored in resting its dismissal of the intrusion count on its finding that there was no publication.

Doe next argues, in Part B, that AMSL's spoliation of evidence precluded summary judgment in its favor and that Doe is entitled to a presumption or an adverse inference regarding that evidence (e.g., the Tracey admission, the Govern harassment and retaliation, and the other probative statements of Gillen, Bonner and DeVito).

Doe then argues, in Part C, that the circuit court's failure to consider the record before ruling, and its use of the JACS system (which only allows attorneys to schedule hearings), violated Doe's fundamental rights to due process and access to the courts.

Finally, in Part D, Doe argues that Mr. Thomas Monaghan is a properly named defendant because AMSL is his alter ego.

IV. Argument

A trial court's order granting a motion for summary judgment is reviewed de novo. *Bensen v. Privilege Underwriters Reciprocal Exch.*, 6D23-464, 2023 WL 3668085, at *2 (Fla. 6th DCA May 26, 2023) (citing *Brevard Cty. v. Waters Mark Dev. Enters., LC*, 350 So. 3d 395, 399 (Fla. 5th DCA 2022)). "[S]ummary judgment is appropriate where there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.*

"In determining whether a genuine dispute of material fact exists, the court must view the evidence and draw all factual inferences therefrom in a light most favorable to the non-moving party and must resolve any reasonable doubts in that party's favor." *Waters Mark Dev.,* 350 So. 3d at 398. "Summary judgment should only be granted where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Id*. at 398-99 (internal quotations omitted).

A. Summary judgment was improper because there is a genuine issue of material fact regarding whether AMSL intercepted and monitored Doe's data and communications in violation of his substantive rights and the public policy of the state of Florida.

"Summary judgment is not a substitute for the trial of disputed fact issues. As the United States Supreme Court itself has emphasized, the summary judgment rule must be implemented 'with due regard . . . for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury.'" *Olsen v. First Team Ford*, 359 So. 3d 873 (Fla. 5th DCA 2023) (quoting *In re Amendments to Fla. Rule of Civil Proc. 1.510*, 309 So. 3d 192, 194 (Fla. 2020)).

1. The dispute over whether AMSL intercepted and monitored Doe's data and communications is genuine because it would not be unreasonable for a jury to find that it did.

"[A]n issue of fact is 'genuine' only if a reasonable jury could return a verdict for the nonmoving party.'" *Waters Mark*, 350 So. 3d at 398

(quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). According to the Florida Supreme Court, "those applying new rule 1.510 must recognize the fundamental similarity between the summary judgment standard and the directed verdict standard." *In re: Amendments to Fla. Rule of Civil Proc. 1.510.*, 317 So. 3d 72, 75 (Fla. 2021) (citing *Liberty Lobby*, 477 U.S. at 251). "The evidentiary question a trial judge faces in a directed verdict motion is not *should* a jury consider an issue to reach a particular verdict, but rather, *could* a jury reach a particular verdict on that issue." *United Servs. Auto. Ass'n v. Rey*, 313 So. 3d 698, 702 (Fla. 2d DCA 2020), *cited with approval in Lancheros v. Burke*, 48 Fla. L. Weekly D 992 (Fla. 6th DCA 2023). "In analyzing a motion for summary judgment, the trial court and the appellate court are not permitted to weigh the evidence nor may they determine the credibility of the witnesses." *Lin v. Demings*, 219 So. 3d 124, 125 (Fla. 5th DCA 2017) (citing *Jones v. Stoutenburgh*, 91 So. 2d 299, 302 (Fla. 1956)).

For example, viewing evidence in the light most favorable to the nonmovant is inconsistent with ignoring the nonmovant's evidence on grounds that only effect weight - as opposed to relevance and admissibility. *Lin*, 219 So. 3d 124. Lin was a Sheriff's Deputy who brought an age

discrimination suit against the Sheriff under the Florida Civil Rights Act. In reversing a grant of summary judgment, the Fifth Circuit noted:

> The trial court improperly weighed the evidence during certain points of its analysis, including when it dismissed as "too tenuous" Lin's allegations that his replacement in the marine unit was in turn replaced by a substantially younger deputy. Furthermore, the trial court's use of the stray comment doctrine to label and disregard statements that Lin alleged evidenced discriminatory intent constituted weighing the evidence and was inappropriate at the summary judgment stage.

Lin, 219 So. at 126 n.3.

Here, the court below improperly weighed the evidence and kept a question from the jury that is adequately based in fact. *Lin,* 219 So. 3d 124. The order on appeal stresses “much of the evidence attached to Plaintiff's Response and Counter Motion for Partial Summary Judgment is from over one decade ago…” The lower court’s disregarding evidence on these grounds is equivalent to saying it’s “too tenuous” – which was held to be an improper weighing in *Lin*. Moreover, the discounting of Doe’s testimony—particularly the testimony that the central fact in issue was admitted to him by Professor Tracey, within six months of service of process—was just as improper as it was for the trial court in *Lin* to use the stray comment doctrine label and disregard statements that Lin alleged evidenced discriminatory intent. Finally, the court’s question after hearing about the blueprints—"And did you depose anyone to find out whether this, in fact, is true?”—betrays its

weighing of the evidence, its drawing of an inference against Doe where the evidence was sufficient to create a question, thus invading the province of the jury and denying Doe his right to his day in court.

2. The dispute over whether AMSL intercepted and monitored Doe's data and communications is material because it makes a difference under the substantive law of each count.

"A fact is 'material' if the fact could affect the outcome of the lawsuit under the governing law." *Waters Mark,* 350 So. 3d at 398 (quoting *Liberty Lobby,* 477 U.S. at 248). "The substantive evidentiary burden of proof that the respective parties must meet at trial is the only touchstone that accurately measures whether a genuine issue of material fact exists to be tried.'" *Olsen*, 359 So. 3d 873 (internal citations omitted).

i. <u>Intrusion upon Seclusion</u>

"Intrusion upon seclusion is defined as where a person intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable person." *Jackman v. Cebrink-Swartz*, 334 So. 3d 653 (Fla. 2d DCA 2021). "Notably, this form of invasion of privacy does not depend on any publicity given to the person whose interest is invaded or to his affairs." *Id.* at 656.

For example, publicity is not an element of an intrusion claim and setting up equipment to surveil and record activities of another individual on a consistent basis constitutes an intrusion upon seclusion. *Jackman*, 334 So. 3d 653. In *Jackman*, the Second District found that the trial court abused its discretion in not granting a temporary preliminary injunction to prevent the neighbor appellees from continuing to point a video camera to see over the fence into the Jackman's back yard. *Id.* "[The neighbor appellees] argued that the Jackmans had not established a substantial likelihood of success on the merits because they had not proven that the recordings from the camera were ever published to anyone. *Id.* at 656. The Jackmans contended that that element was not required for an intrusion upon seclusion claim." *Id.* In deciding for the Jackmans, the court recognized "a material difference between occasionally viewing the activities within a neighbor's backyard that are observable without peering over a privacy fence and erecting a camera to see over a privacy fence to thereafter surveil and record those activities on a consistent basis." *Id.* at 656-57 (citing *Goosen v. Walker*, 714 So. 2d 1149 (Fla. 4th DCA 1998).

For example, pre-installing software on a computer that is to be subsequently leased or sold to another is actionable as an intrusion upon seclusion where the software enables the party who pre-installed it to extract

personal information of the subsequent user of the device. *Peterson v. Aaron's, Inc.*, 108 F.Supp.3d 1352, 1355 (N.D. Ga. 2015) (applying Georgia common law). In *Peterson*, a popular computer lessor's alleged practice of leasing computers which, without the lessees' knowledge, contained software that allowed the lessor to access the lessee's private information, was held to be an improper and unreasonable intrusion upon seclusion. *Id; see also Sneed v. Sei/Aaron's, Inc.*, 2013 U.S. Dist. LEXIS 177266, at *2 (N.D. Ga. 2013) (alleging that the pre-installed software allowed the company "to take photographs with the leased computers' cameras, capture keystrokes, [and] take screen shots").

Here, AMSL intruded on Doe's seclusion by setting up equipment to consistently intercept and monitor Doe's data and communications. *Jackman*, 334 So. 3d 653. Like how the camera in *Jackman* was positioned to surveil and record over the neighbor's fence on a consistent basis, a reasonable person could find that AMSL's data rooms in the residence halls were used to consistently intercept and monitor Doe's communications and private activities based on all the evidence in the record that Doe has identified.[2] Moreover, like the order in *Jackman*, the order on appeal seems to rest its dismissal of the Intrusion claim on the fact that "Plaintiff conceded

[2] See supra, pp. 13-14.

that these comments [in the videos] did not name him individually or indicate to his classmates that the comments were about him." *Final Order*, *ROA, 360 (¶10).* This fact, even if true, does not support the summary judgment on this count because "this form of invasion of privacy does not depend on any publicity given to the person whose interest is invaded or to his affairs." *Jackman*, 334 So.3d at 656. In any event, Doe maintained that a reasonable person could find that the comments were directed or in reference to him:

> THE COURT: But did they ever -- did they ever mention you by name?
>
> MR. DOE: I was not mentioned by name, Your Honor.
>
> THE COURT: How do you know that they were referring to you in their comments?
>
> MR. DOE: I -- it would be -- it would be different for each one, Your Honor. For example, Professor Gillen -- I was speaking, and I was – we were discussing an issue; and, at the end of the discussion, which I started, he turned back and said, "Well, I don't know about transgender people." And so it's, like, circumstantial, obviously; but, given the unique facts, I would say it's a – a reasonable person or ordinary person could – could find that that was directed toward me and that was an indication that they were aware and they were monitoring what I was doing.

Transcript from Hearing on MSJ, ROA II, 1044-45. Even if the professors' statements could not be used to establish publication, application of *Jackman* indicates that the circuit court erred in resting dismissal of the Intrusion count on that fact.

AMSL intruded on Doe's seclusion by giving him a computer that had software pre-installed which enabled Defendants to obtain access to Doe's personal cell phone and knowledge of Doe's private activities. *Aaron's,* 108 F.Supp.3d at 1355. The screen-shot capability discussed in the Arron's cases is the earlier and less expensive version of AMSL's DVR session replay that, according to Professor Tracey, AMSL uses. This admission is corroborated by the System Information Report's showing the computer running DVR playback, Xbox Live game save, and at least fourteen (14) system drivers or loaded modules related to the YourPhone application on the laptop, including screen mirroring. Also, probative here is AMSL personnel instructing Doe to connect his cell phone to this computer in May 2020. Like in *Aaron's*, we have a defendant placing a premium on the availability in the access of information through "ethical" offensive threat assessments and exploits. This Court should concur with Georgia that this technology cannot be said, as a matter of law, to not be highly offensive.

This Court must reverse the summary dismissal of the Intrusion count because publication is not a required element of Intrusion, and the dispute about the use of this technology is material under the substantive law.

ii. Interception of Communications, under Chapter 934

Under Florida law, "any person who […] intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, oral, or electronic communication […] shall be punished…" § 934.03(1), Fla. Stat. "The clear intent of the Legislature in enacting section 934.03 was to make it illegal for a person to intercept wire, oral, or electronic communications." *O'Brien v. O'Brien*, 899 So. 2d 1133, 1135 (Fla. 5th DCA 2005). *O'Brien* is most powerful for its dicta that Florida follows federal courts' interpretation of their federal statutory counterparts, specifically with respect to the requirement that the interception be contemporaneous with transmission of the communication.

The *O'Brien* court's contemporaneous-acquisition rule, smuggled into Florida law in dicta, turned on the definition of "wire communication" in the federal law:

> The fact that the definition of "wire communication" provides for electronic storage while the definition of "electronic communication" does not, suggests to the federal courts that Congress intended "intercept" to include retrieval from storage of wire communications, but exclude retrieval from storage of electronic communications.

O'Brien, 899 So. 2d at 1136. However, this difference in the definitions of wire and electronic communications is not present in Chapter 934 – which would explain why the O'Brien court "found no precedent rendered by the

Florida courts that considers this distinction…" *Id*. at 1135. It is critical to note here that Congress preempted the field of the interception of wire communications under its power to regulate interstate communications. *State v. McGillicuddy*, 342 So.2d 567, 568 (Fla. 2d DCA 1977). However, the states are also permitted to regulate wiretaps to the extent that their standards are at least as strict (protecting privacy) as those set forth in the federal act. *Id.* It follows from this that Chapter 934 must be interpreted on its own terms, and that those terms should be construed in a manner that does not render the statute superfluous relative to federal privacy protections.

Even setting that aside, the data and communications intercepted by AMSL's data rooms would qualify as "wire communication" and thus the contemporaneous acquisition rule would not apply to that method of interception. As for the laptop AMSL gave to Doe, summary judgment was improperly rendered because AMSL's harvesting data from the free laptop falls squarely within the prohibition on technology that "copies the communication as it is transmitted and routes the copy to a storage file in the computer." *O'Brien*, 899 So. 2d at 1137. This court should follow O'Brien and hold that AMSL's conduct falls within the prohibitions of § 934.03, Florida Statutes.

iii. Breach of Contract

"The three elements for an action for a breach of contract are: (1) the existence of a contract, (2) a breach of the contract, and (3) damages resulting from the breach." *JF & LN, LLC v. Royal Oldsmobile-GMC Trucks Co.*, 292 So.3d 500, 508 (Fla. 2d DCA 2020). "The question of whether or not the parties' negotiations produced a binding agreement is a question of intent, which in turn is a question of fact." *Smith v. Royal Auto. Grp.*, 675 So. 2d 144, 152 (Fla. 5th DCA 1996).

iv. Fraud

"Where the promise to perform a material matter in the future is made without any intention of performing or made with the positive intention not to perform a cause of action for fraud may proceed to a jury." *Perry v. Cosgrove*, 464 So. 2d 664, 666 (Fla. 2d DCA 1985) (citing *Home Seekers' Realty Co. v. Menear*, 102 Fla. 7 (1931)). "In fraud cases, summary judgment is rarely proper…" *Wadlington v. Cont'l Med. Servs.*, 907 So. 2d 631, 633 (Fla. 4th DCA 2005). "[W]hether evidence was sufficient proof of an intention 'to deceive and mislead the plaintiffs' is for the jury to consider and decide." *Id.* (quoting *Iasigi v. Brown*, 58 U.S. 183, 196 (1854)).

v. Trespass

The second restatement's rules on continuing trespass have been given approval in Florida. *See Anchorage Yacht Haven, Inc. v. Robertson*, 264 So. 2d 57, 61 (Fla. 4th DCA 1972) (adopting § 160); *see also Warehouse 1050 Corp. v. Fla. Sol Corp.*, 2015 Fla. Cir. LEXIS 45940, *3 (Fla. 11th Cir. Ct. January 14, 2015) (adopting § 161 and holding that a "jury could reasonably find that the placement of Comcast's cable utility line on Plaintiffs property, for the purpose of supplying a neighboring building with cable, without Plaintiffs knowledge or consent constitutes trespass for failure to remove"). Section 161 of the second restatement of torts provides:

> (1) A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor has tortiously placed there, whether or not the actor has the ability to remove it.
> (2) A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor's predecessor in legal interest therein has tortiously placed there, if the actor, having acquired his legal interest in the thing with knowledge of such tortious conduct or having thereafter learned of it, fails to remove the thing.

Restatement 2d of Torts, § 161. Here, a jury could find that the Storage Area Network was tortiously placed in Doe's apartment by AMSL, or by AMU with

AMSL's knowledge of the fact. Such a finding would be adequately supported by the record evidence.[3]

Wherefore, the order on appeal must be vacated and this case must be remanded to the circuit court to proceed to trial.

B. Summary judgment against Doe was erroneous because AMSL spoiled evidence on purpose, or in a manner that was negligent and fatally prejudiced the case.

In cases involving intentional spoliation, courts more often strike pleadings or enter default judgments." *Golden Yachts, Inc. v. Hall*, 920 So. 2d 777, 780 (Fla. 4th DCA 2006) (citing *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342, 346-7 (Fla. 2005)). *See also* Rule 1.380(e)(2)(C), Florida Rules of Civil Procedure. Short of this disposition, but where the court has nonetheless determined that the party had a duty to preserve the evidence, courts will shift the burden of proof by furnishing a presumption. *Adamson v. R.J. Reynolds Tobacco Co.*, 325 So. 3d 887, 895 (Fla. 4th DCA 2021), *discussing* Fla. Std. Jury Instr. (Civ.) 301.11(b) ("The court has determined that … you should find that [Doe] established his [claim] unless [AMSL] proves otherwise by the greater weight of the evidence.").

"Even in the absence of a legal duty, though, the spoliation of evidence results in an adverse inference against the party that discarded or destroyed

[3] See supra, pp. 13-14.

the evidence." *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 391 (Fla. 2015); *cf.* Fla. Std. Jury Instr. (Civ.) 301.11(a) ("If you find that [AMSL lost material evidence] … then you may, but are not required to, infer that this evidence would have been unfavorable to [AMSL]."). *See* Charles W. Ehrhardt, *Florida Evidence* § 301.1 (2001 ed.) ("Whether the inferred fact is found to exist will be decided by the trier of fact."); *See also* § 90.302, Fla. Stat. (2023).

Here, AMSL provided no evidence explaining its failure to fully comply with the October 28, 2022, order.[4] With respect to the preceding order, compelling production of the Gillen recordings, AMSL filed the affidavit of one of its employees - Monica Rengifo. Rengifo stated that the recording of the April 21, 2021, class "has been identified as deleted" to "free up

[4] Chart showing missing items:

Recordings Ordered	Missing Recordings	AMSL's Explanation
Gillen - Spring 2021	April 21, 2021	Rengifo affidavit, claiming that the video was deleted to free up storage space on Zoom
Tracey – Summer 2021	All	**NONE**
Govern – Fall 2021	11 classes, including 10/26/21	**NONE**
DeVito – Fall 2021	3 classes missing.	**NONE**
Bonner – Spring 2022	Portion of January 19 class recording missing.	**NONE**

storage space" on Zoom. Even if this were a credible excuse, the Zoom storage is a red herring because evidence shows that AMSL routinely kept the recordings on Google Drive. *ROA, 347* (showing the recordings produced by AMSL as mp4 files stored on Google Drive); *see also ROA, 349-52* (showing recordings of lectures that Doe received when he missed class as links to Google Drive).

Importantly, Rengifo only looked on Zoom; as for the Google drive or local drives, she said she spoke with her supervisor who "stated he had nothing on the local drives from Professor Gillen's class as all of the classes that semester were saved on Zoom, except for the one class he found on the Google Drive dated January 27, 2021. This, however, is hearsay and therefore inadmissible under § 90.802, Fla. Stat. - as AMSL and counsel well know. Because of Doe's pending motions for sanctions, the court's final order implies the court's acceptance of this showing of "excuse" for not complying with its orders. This was erroneous because the evidence indicates that the recordings were routinely kept on Google Drive and there is no reliable evidence that AMSL looked there to determine if the circuit court's order could be complied with.

As for the second order, which compelled production of four (4) additional classes almost nine (9) months after Doe moved to compel the

same, the bad faith becomes undeniable. Please recall that it was Professor Govern's harassment that drove Doe to inquire with AMSL about its policies on October 22, 2021. On October 26, 2021, Professor Govern publicly humiliated Doe in retaliation for asking these questions. A request to preserve the recording of that lecture was received by the CEO of AMSL on October 30, 2021. Internal communications show senior administrators discussing the matter, with Czarnetzky asking Milliron to "find out as best you can what the heck he's talking about regarding Prof. Govern," and Milliron saying: "I can ask Monica for the video and review it when I get a chance." However, as it turns out, AMSL asks us to believe that it undertook a "diligent and reasonable inquiry to determine whether the recording of this particular class existed on October 30, 2021 but was unable to make such a determination." *ROA, 280-81 (#8)*. This defies logic; Milliron would know whether there was a recording of the lecture because she indicated to her boss that she would review it. In these circumstances, the only unacceptable answer was "we don't know" – which is what AMSL said.

Based on the foregoing, AMSL clearly lost this evidence in bad faith, or at least, negligently. Doe asks for a reversal of the circuit court's order - with instructions on remand to: (1) enter a default judgment with a finding of

contempt of court, (2) proceed to trial with a presumption instruction; or (3) proceed to trial with an adverse inference instruction.

C. Doe's fundamental rights require reversal because not being able to schedule a hearing through JACS, and the court's ruling before considering the record, denied Doe access to the courts and procedural due process.

At the hearing on AMSL's Motion for Final Summary Judgment, the court below informed the parties that it had "missed the title" of Doe's Response and Counter Motion for Partial Summary Judgment, and that it had, therefore, not reviewed the record with respect to the evidence standing against the motion which it was about to grant. *Transcript from hearing on MSJ, ROA II, 1020, line 1.* In fact, after Doe pled for a stay on the judgment until review of his motion in opposition, the court stated:

> Okay. I'll review it. But why don't you include in the ruling and the order that they're going to submit, Mr. Bender, that based on that ruling, that it moots those issues raised in Mr. Doe's motion for partial summary judgment; and, as such, that it will not be set for a hearing. But I want you to know that I'm going to read it this afternoon.

Id. at 1054-55. The court went on to announce to the parties that "I don't have a judicial assistant." This latter comment was news. Doe had been calling and emailing the old JA for months to try to schedule critical hearings, as he was not able to schedule hearings in JACS like represented parties. Denying Doe the ability to schedule a hearing in JACS like a represented

party, and not reading Doe's response to AMSL's motion for summary judgment before ruling on the same, constitutes a denial of access to the courts and a denial of procedural due process.

D. Mr. Monaghan is personally liable for the tortious and criminal conduct of AMSL.

1. Facts specific to Piercing

After "netting about $1 billion from the 1998 sale of Domino's to Bain Capital," *Hansen Article, ROA, 251,* "all of Defendant Monaghan's accumulated wealth, excluding the family home, [was] bequeathed to Ave Maria Foundation…["AMF"]." *Michigan Case, ROA, 256.* Upon dissolution, all of AMSL's assets were to pass to AMF by operation of law. *AMSL Original Articles of Incorporation, ROA, 259.* That term could only be amended with Monaghan's approval. *Id.* at 260. "AMF funds AMSL approximately quarterly, on an as-needed basis." *Michigan Case, ROA, 75*. "If Monaghan were to die or opt to stop the funding, the school could only survive for a matter of months." *Id.* (citing deposition of Kate O'Beirne, former Board-of-Directors ("BOD") member at AMSL). "Monaghan repeatedly wielded the threat of cutting AMSL off throughout the years to induce BOD members to vote with him." *Michigan Case, ROA, 50* (citing deposition of former BOD member, Charles Rice). Monaghan "disclosed to the AMSL BOD that AMU [Ave Maria University] is his priority, and he will not continue to fund AMSL in Florida if

doing so threatens AMU." *Id.* at 43. "AMSL's BOD does not have its own budget, and in fact it does not set AMSL's budget." *Id*. at 50 (citing Dobranski). "Rather, AMF does, and it sends the budgets to the AMSL BOD for approval only once they are completed." *Id.* The CEO of AMSL is contracted by AMF and Monaghan and reports directly to Monaghan. *See id.* at 54. "Under the terms of the contract, Monaghan determined [the CEO's] pay increases. Monaghan met with [the CEO] at private quarterly meetings to evaluate him and set his future pay." *Id.* at 67. "There was no governing Board of AMSL … the BOD was 'at best' an advisory panel to Defendant Monaghan, who ran AMSL 'as a sole proprietorship.'" *Id.* at 75 (quoting Rice); *accord id.* ("De facto, we operated as a sole proprietorship.") (quoting former acting Secretary to the BOD, Joseph Falvey).

Steve Safranek, a founding faculty member of AMSL, alleged that he was wrongfully terminated because "he refused to acquiesce in violation of laws governing the independence of the corporate form, fiduciary duties, taxation of employees, and laws forbidding obstruction of justice and or destruction of evidence of criminal activity." *Id.* at 60. Specifically, Safranek was a leader of a 2006 Faculty Resolution – wherein AMSL faculty, by a margin of 11-3, alleged that AMSL was impermissibly controlled by the "independent interests of Mr. Monaghan" and that the administration had

"initiated a widespread system of electronic discovery" that sought to "monitor the e-mail, internet, and other computer-related activity of the faculty without suspicion of wrongdoing or other good cause." *Faculty Resolution, ROA, 264.*

"These eleven 'dissidents' constituted a majority of the AMSL teaching staff [and] included *every* tenured professor at AMSL." *Michigan Case, ROA, 40.* Monaghan's notes from this period show that he instructed the CEO of AMSL to create a strategy to deal with the opposition. *Id.* at 61. The CEO "began having his staff watching these faculty and reporting on their minute activities, and he reported on matters he believed could be used against them to Monaghan." *Id*. "When Monaghan saw something he liked, he would make comments such as, 'More fodder!'" *Id*. Shortly after Joseph Falvey negotiated a severance with AMSL, and four other whistle-blowing colleagues had either resigned or been terminated, Monaghan wrote in his personal notes: "JF Done 5 down 6 to go…" *Id.* at 49, 76. By Summer 2009, only two (2) of the eleven (11) "dissidents" remained at AMSL, and both had life tenure before the faculty resolution. *Id.* at 63.

"Tom Monaghan runs an academic dictatorship." *Dillon Article, ROA, 270* (quoting Matt Bowman, a 2003 graduate and AMSL alumni board member). "The only reason" the law school moved to Florida was to "shore

up" Mr. Monaghan's land-development investment there – the personal profits from which were "expected to exceed $100 million." *Hansen Article, ROA, 252* (quoting first Chris McGowan, AMSL alumnus, and then Nicholas Healy, former president of Ave Maria University). Before moving AMSL to Florida, Monaghan told the BOD that "AMSL will not be made a discretionary beneficiary" of the land-development project there. *Michigan Case, ROA, 43.* The AMSL BOD was denied the opportunity to review the legal agreements that would control AMSL's rights in Florida on the grounds that they were too lengthy and complicated. *Id.* at 75 (citing Rice). Jason Negri, former president of the law school's alumni association, "criticized Mr. Monaghan's insistence on operating the school like a private business and what he said was the board's failure to stand up to him." *Hansen Article, ROA, 252.* David Krause, an AMSL 2003 graduate, lamented the control exercised over AMSL "by one man's desires." *Riley Article, ROA, 272.* "It has become clear that Tom Monaghan regards Ave Maria … as his personal domain which he can effectively treat however he wants," *Hansen Article, ROA, 252* (quoting Edward Peters, a former professor of at Ave Maria College).

During the transition from Michigan to Florida, an AMU employee—Katherine Ernsting—noticed inconsistencies in the school's financial aid records. *Miller Article, ROA, 274..* "She warned her colleagues: 'I think that

could be fraud,' and one [Jay McNally] complained to the U.S. Department of Education, which opened an investigation." *Id.*

> 'They were pulling a lot of shenanigans,' says now-retired DOE investigator Joseph Hajek. 'The whole show was run by the one person, Tom Monaghan. Whatever he said went.' […] Ernsting says Ave Maria officials 'thought they could just play dumb and ignore the whole thing.' But she worked hard to gather documents and submitted the key ones to prosecutors. In May 2004, the DOE ordered Ave Maria to pay back $259,000 in financial aid and fines, but Ernsting's cooperation and hustle kept prosecutors happy and staved off criminal charges. Yet she was fired, so several weeks later she filed a whistleblower lawsuit. In a deposition, Monaghan claimed, 'What [Ernsting] reported was slanted and erroneous and maybe even malicious.'

Id. at 275. A jury disagreed. In May 2011, only after the jury found against them, Defendants settled for over $418,000. *Id.* at 277.

2. Legal argument for Piercing

"Piercing the corporate veil requires the plaintiff to establish both that the corporation is a mere instrumentality or alter ego of the defendant and that the defendant engaged in improper conduct in the formation or use of the corporation." *Abdo v. Abdo*, 263 So.3d 141, 149 (Fla. 2d DCA 2018) (citing *Bellairs v. Mohrmann*, 716 So.2d 320 (Fla. 2d DCA 1998)).

"To show that a corporation is the mere instrumentality or alter ego of another person, the plaintiff must plead and ultimately prove that the shareholder dominated and controlled the corporation to such an extent that the corporation's independent existence, was in fact nonexistent and the

shareholders were in fact alter egos of the corporation.'" *Abdo*, 263 So.3d at 149.

For example, failure to observe corporate formalities negates the protection of the corporate form. *Futch v. Head*, 511 So. 2d 314 (Fla. 1st DCA 1987). In *Futch*, the District Court affirmed the circuit court's holding Futch personally liable on a claim for breach of an oral contract. *Id.* The salient facts were "(1) Futch merged her corporation's liabilities and assets with her own personal funds; (2) she failed to distinguish between her individual and corporate capacities in connection with the Melroe property; (3) she paid one of her companies a $ 130,000 commission when she sold her five-acre share of the Melroe property." *Id.* "These factors," the court wrote, "evince an extremely loose observation of corporate formalities suggesting Futch did not consider herself as distinct from her corporations…" *Id.*

Here, Monaghan merged corporate assets and liabilities with his own personal funds when, according to his attorneys in the Michigan case, he deposited his entire $1 billion dollar fortune into AMF. Structuring AMF's subsidiaries so that Monaghan and AMF would retain absolute control over them constitutes a failure to separate the corporation's independent existence – as does Monaghan telling the AMSL BOD that AMU is his priority

and that he will not continue to fund AMSL in Florida if doing so threatens AMU, as does Monaghan's threatening to cut AMSL off in his effort to coerce the BOD to vote with him. If believed, this evidence allows the veil to be pierced, because it indicates that Monaghan did not consider himself as distinct from his corporations.

V. Conclusion

Wherefore, Doe requests reversal of summary judgment, an award of costs to appeal, and instructions on remand to: (1) enter a default judgment with a finding of contempt of court, proceeding to a trial on damages with an appropriate instruction; (2) proceed to trial on the merits with a presumption instruction; (3) proceed to trial on the merits with an adverse inference instruction; or (4) proceed to trial on the merits.

Respectfully submitted, this 13th day of July 2023. /s/ John Doe

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered by electronic mail to Marshall Bender and Courtney Bullock at marshall.bender@dentons.com and courtney.bullock@dentons.com, respectively, this 13th day of July 2023.

/s/ JOHN DOE

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with all Florida Rules of Appellate Procedure and all Administrative Orders of the Sixth District Court of Appeal.

/s/ JOHN DOE