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Clerk of the  
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
January 5, 2023 Session

**ANNIE J. JONES, BY AND THROUGH HER CONSERVATORSHIP,  
JOYCE SONS a/k/a CALISA JOYCE SONS v. LIFE CARE CENTERS OF  
AMERICA d/b/a LIFE CARE CENTER OF TULLAHOMA**

**Appeal from the Circuit Court for Coffee County  
No. 2020-CV-46643 William A. Lockhart, Judge**

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**No. M2022-00471-COA-R3-CV**

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This appeal arises from an incident in which the nude body of a resident at an assisted living facility was exposed on a video call via telephone when an employee of the healthcare facility engaged in a personal call while assisting the resident in the shower. The resident, by and through her conservator/daughter (“Plaintiff”), sued the owner and operator of the healthcare facility, Life Care Centers of America d/b/a Life Care Center of Tullahoma (“Defendant”), asserting a claim of “Negligence Pursuant to the Tennessee Medical Malpractice Act” and a generalized claim for invasion of privacy with allegations of “Gross Negligence, Willful, Wanton, Reckless, Malicious and/or Intentional Misconduct.” Relying on the undisputed fact that the resident was unaware and never informed that the incident occurred, Defendant moved for summary judgment due to the lack of a cognizable injury or recoverable damages. Plaintiff opposed the motion, contending that actual damages were not an essential element of her claims and, in the alternative, moved to amend the complaint to specifically assert a claim for invasion of privacy based on intrusion upon the resident’s seclusion and a claim for negligent supervision. The trial court summarily dismissed the complaint on the ground “that damages for invasion of privacy . . . cannot be proven as it would be impossible to suffer from personal humiliation, mental anguish or similar damages since [the resident] is unaware that the incident happened” and denied the motion to amend the complaint on the basis of futility. Plaintiff appealed. We have determined that the gravamen of the complaint states a claim for invasion of privacy based upon the distinct tort of intrusion upon seclusion. We have also determined that actual damages are not an essential element of a claim for invasion of privacy based on the distinct tort of intrusion upon seclusion. Thus, Defendant was not entitled to summary judgment. Moreover, granting leave to amend the complaint would not have been futile. Accordingly, we reverse the trial court’s decision to summarily dismiss the complaint, reverse the decision to deny the motion to amend the complaint, and remand with instruction to reinstate the complaint, grant the motion to amend the complaint, and for further proceedings consistent with this opinion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court  
Reversed and Remanded**

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the court, in which ANDY D. BENNETT and JEFFREY USMAN, JJ., joined.

Richard D. Piliponis, Benjamin J. Miller, Sarah L. Martin, Nashville, Tennessee, for the appellant Calisa Joyce Sons as Administrator Ad Litem for the Estate of Annie J. Jones.

Alan S. Bean, K. Nicole Poole, Franklin, Tennessee, for the appellee Life Care Centers of America, Inc. d/b/a Life Care Center of Tullahoma.

**OPINION**

**FACTS AND PROCEDURAL HISTORY**

Ms. Annie Jones, a resident of Life Care Center of Tullahoma since 2017, had impaired cognitive functioning and required assistance with activities of daily living. On February 12, 2019, a certified nursing aide (“CNA”) employed by the healthcare facility was assisting Ms. Jones in the shower room when she received a video call from her incarcerated boyfriend. The CNA propped her phone on a shelf to continue the call, while continuing to assist Ms. Jones in the shower. During the call, Ms. Jones’s nude body was partially visible, one staff member called Ms. Jones by her first name, while two other CNAs removed Ms. Jones’s briefs. However, Ms. Jones was unaware of the video incident, and it is undisputed that no one ever informed her of the incident.

Nevertheless, an employee of the Bedford County Sheriff’s Department, who was monitoring the inmate’s video call, saw the nude resident and notified Defendant shortly thereafter. Two members of Defendant’s staff later viewed the video and identified the nude resident as Ms. Jones and the CNA involved in the video call.<sup>1</sup> Acting on behalf of Defendant, a physician and social services representative interviewed Ms. Jones the day after the incident and concluded that she showed no signs of distress or knowledge that the event had occurred. It is also undisputed that Ms. Jones never mentioned the incident, nor did she make any indication that she was aware that the event occurred. Further, it is undisputed that Ms. Jones incurred no financial expenses as a result of the incident.

Defendant subsequently notified Calisa Joyce Sons, Ms. Jones’s daughter and conservator, of the incident by phone. Defendant also sent her a letter that included a report of the incident and Defendant’s response, which reads in pertinent part:

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<sup>1</sup> The video was destroyed, and there are no known duplicate recordings.

Breach of privacy was reported to Adult Protective Services, area Ombudsman, and to TN Department of Health. These agencies conducted additional investigations. The facility began an investigation and gathered additional information from area law enforcement. The associate was charged with unlawful photographing in violation of privacy and facility terminated employment on 2-13-19. During the investigation, three witnesses were identified who failed to report knowledge of cell phone use in a patient area, which is prohibited by facility policy. Patient assessments and interviews were completed. Patient was seen by MD and Social Services and no acute changes of condition identified. Associate education related to cell phone policy, social media policy, abuse and neglect, and reporting requirements was completed.

On February 12, 2020, Ms. Sons, acting in her capacity as Ms. Jones's conservator, filed a complaint alleging "Negligence Pursuant to the Tennessee Medical Malpractice Act, Tenn. Code Ann. §29-26-115, et seq." and a generalized claim for invasion of privacy with allegations of "Gross Negligence, Willful, Wanton, Reckless, Malicious and/or Intentional Misconduct." After discovery, Defendant filed a motion for summary judgment, stating, "There is no genuine issue as to any material fact regarding the lack of any cognizable injury under Tennessee law or any resulting recoverable damages from the incident alleged." Plaintiff then filed a response in opposition to the motion for summary judgment, noting that Ms. Jones "has not claimed physical, mental, or emotional injury" but has instead claimed "injuries of loss of privacy and dignity." Plaintiff also filed a motion to amend her complaint to include claims of invasion of privacy based on intrusion upon seclusion and negligent supervision. Defendant filed a response in opposition to the motion to amend on the basis that Plaintiff could not show actual damages, contending that any proposed amendments would be futile without such proof.

In support of and as an exhibit to Defendant's motion and statement of undisputed material facts, Defendant offered the affidavit of Larry Tune, M.D., a professor of psychiatry and neurology, who has practiced and served as medical director in several long-term care facilities in Georgia. After reviewing Ms. Jones's records, Dr. Tune concluded, "More likely/probably than not, Ms. Jones did not suffer any physical, mental, or emotional injury as a result of the events surrounding the allegations in the Complaint, which would not otherwise have occurred." In her response to the motion for summary judgment, Plaintiff presented the affidavit of Jonathan Klein, M.D., a licensed physician in Virginia with training and knowledge in nursing home and hospital care. Based upon a review of Ms. Jones's records, Dr. Klein opined:

Annie Jones suffered a loss of privacy and dignity due to the inadequate care and treatment provided by Life Care Center of Tullahoma. . . . It is my opinion, that to a reasonable degree of medical certainty, the foregoing injuries were caused by the negligent and/or abusive care provided by Life

Care Center of Tullahoma. . . I believe to a reasonable degree of medical certainty that Life Care Center of Tullahoma deviated from the standard of care required of them in their treatment of Annie Jones. . . It is my opinion, to a reasonable degree of medical certainty that the foregoing deviations in the standard of care by Life Care Center of Tullahoma caused Annie Jones to needlessly suffer the injuries detailed above.

After a hearing on Defendant’s motion for summary judgment and Plaintiff’s motion to amend the complaint, the trial court granted Defendant’s motion for summary judgment, reasoning that “Plaintiff cannot prove the existence of any cognizable injury or damages from the incident” and that “the undisputed expert testimony by Dr. Tune affirmatively negate[s] the essential element of injury or loss.” The court also denied Plaintiff’s motion to amend the complaint, reasoning, “[E]ven if the court were to allow the requested amendment, a claim for invasion of privacy still requires actual damages.”

As expressed in the final order, the court also reasoned:

The undisputed facts in this case show that Ms. Jones is unaware that the incident occurred. The Plaintiffs concede that she has suffered no physical, mental or emotional injury. The remaining types of damages for invasion of privacy still cannot be proven as it would be impossible to suffer from personal humiliation, mental anguish or similar damages since Ms. Jones is unaware that the incident happened. Due to the negation of an essential element and further that the Plaintiff has not put forth evidence of actual loss or damages summary judgment is appropriate.

This appeal followed.<sup>2</sup>

## ISSUES

While the parties have articulated several issues, we restate the issues as: 1) whether the trial court erred in granting Defendant’s motion for summary judgment; 2) whether the trial court erred in denying Plaintiff’s motion to amend her complaint to include a claim for invasion of privacy by intrusion upon seclusion and negligent supervision, and 3) whether an invasion of privacy action survives the death of the individual whose privacy was invaded.

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<sup>2</sup> Ms. Jones died while this matter was pending in the trial court. By order entered on April 12, 2022, Calisa Joyce Sons, as administrator ad litem of Ms. Jones’s estate, was substituted as Plaintiff and pursues this appeal on behalf of her mother’s estate. This court has maintained the case name as styled in the trial court.

## STANDARD OF REVIEW

This court reviews a trial court's decision on a motion for summary judgment de novo without a presumption of correctness. *Rye v. Women's Care Ctr. of Memphis, M PLLC*, 477 S.W.3d 235, 250 (Tenn. 2015). Accordingly, this court must make a fresh determination of whether the requirements of Tennessee Rule of Civil Procedure 56 have been satisfied. *Id.*; *Hunter v. Brown*, 955 S.W.2d 49, 50 (Tenn. 1997). In so doing, we consider the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002).

Summary judgment should be granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Tenn. R. Civ. P. 56.04. When the party moving for summary judgment does not bear the burden of proof at trial, it “may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence at the summary judgment stage is insufficient to establish the nonmoving party's claim or defense.” *Rye*, 477 S.W.3d at 264.

When a motion for summary judgment is made and supported as provided in Tennessee Rule of Civil Procedure 56, the nonmoving party may not rest on the allegations or denials in its pleadings. *Id.* at 265. Instead, the nonmoving party must respond with specific facts showing there is a genuine issue for trial. *Id.* A fact is material “if it must be decided in order to resolve the substantive claim or defense at which the motion is directed.” *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993). A “genuine issue” exists if “a reasonable jury could legitimately resolve that fact in favor of one side or the other.” *Id.*

“[T]he determination of whether to allow an amendment to the pleadings is left to the sound discretion of the trial court.” *George v. Bldg. Materials Corp. of Am.*, 44 S.W.3d 481, 486 (Tenn. 2001). This court reviews discretionary decisions under the “abuse of discretion” standard of review. *See Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010). The abuse of discretion standard does not permit reviewing courts to substitute their discretion for the trial court. *Id.* Nevertheless, the abuse of discretion standard of review does not immunize a lower court's decision from meaningful appellate scrutiny:

Discretionary decisions must take the applicable law and the relevant facts into account. An abuse of discretion occurs when a court strays beyond the applicable legal standards or when it fails to properly consider the factors customarily used to guide the particular discretionary decision. A court abuses its discretion when it causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence.

*Id.* (citations omitted). Discretionary decisions require “a conscientious judgment, consistent with the facts, that takes into account the applicable law.” *White v. Beeks*, 469 S.W.3d 517, 527 (Tenn. 2015) (citing *Lee Med., Inc.*, 312 S.W.3d at 524).

Thus, in reviewing the trial court’s decision to deny Plaintiff’s motion to amend, we will determine, where applicable, whether there is a factual basis for the decision in the record, whether the court properly identified and applied the correct legal principles, and whether the decision is within the range of acceptable alternative dispositions. *See Lee Med., Inc.*, 312 S.W.3d at 524.

## ANALYSIS

### I. SUMMARY JUDGMENT

We begin our analysis with the trial court’s decision to grant Defendant’s motion for summary judgment. In its motion, Defendant asserted:

There is no genuine issue as to any material fact regarding **the lack of any cognizable injury under Tennessee law or any resulting recoverable damages from the incident alleged in the Amended Complaint, and Defendant is entitled to judgment as a matter of law.** Defendant is therefore entitled to judgment as a matter of law.

The motion was supported by a memorandum of law in which Defendant further asserted:

The Complaint alleges that “on or about February 14, 2019, two employees gave [Ms. Jones] a shower while simultaneously conducting a video chat with one of the employees’ boyfriend,” and that [Ms. Jones] was visible in the video while she was being showered. Plaintiff’s Complaint alleges that Defendant and its employees were negligent pursuant to Tenn. Code Ann. § 29-26-115, et seq., and that such negligence was a proximate cause of the violations to Ms. Jones’ privacy and dignity.

Defendant has deposed Ms. Jones’ daughter/conservator, Joyce Sons. Ms. Sons’ testimony establishes that Ms. Jones did not suffer any physical, mental, emotional, or any other category of cognizable injury under Tennessee law as result of the incident. . . .

In its order granting summary judgment, the trial court reasoned:

Before the Court is Life Care Center LLC’s Motion for Summary Judgment filed on December 15, 2021. Life Care Center asserts that Summary

Judgment is appropriate because the Plaintiff cannot prove the existence of any cognizable injury or damages from the incident. Further they argue that the undisputed expert testimony by Dr. Tune affirmatively negate[s] the essential element of injury or loss. The court agrees. The statement of facts asserted by the Defense based upon Dr. Tune[']s affidavit [is] undisputed. **A plaintiff must be able to prove an actual injury or loss. The Plaintiff in this case concedes that they have “not claimed physical, mental or emotional injury.”** (Response of Plaintiff P. 9.) Instead they argue that they should be allowed to amend their complaint to include the tort of invasion of privacy which does not require proof of a physical, mental or emotional injury.

However, even if the court were to allow the requested amendment, a claim for invasion of privacy still requires actual damages. *West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 648 (Tenn. 2001). **A plaintiff must specifically prove damages allegedly suffered from the invasion of their privacy.** *Id.* The damages in invasion of privacy are not limited to out of pocket loss and damages can occur without evidence assigning an actual dollar value to an injury. *Myers v Pickering Firm*, 959 S.W.2d 152, 164 (Tenn. Ct. App. 1997). The types of damages contemplated are for example impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. *Id.*

The undisputed facts in this case show that Ms. Jones is unaware that the incident occurred. **The Plaintiffs concede that she has suffered no physical, mental or emotional injury. The remaining types of damages for invasion of privacy still cannot be proven as it would be impossible to suffer from personal humiliation, mental anguish or similar damages since Ms. Jones is unaware that the incident happened. Due to the negation of an essential element and further that the Plaintiff has not put forth evidence of actual loss or damages summary judgment is appropriate.**

(Emphasis added).

Plaintiff contends that this was error because the intrusion on Ms. Jones's privacy, on her privacy and dignity, does not require proof of actual damages.

## A. The Gravamen of the Complaint

To discern whether summary judgment was appropriate, we must first determine the gravamen of the complaint,<sup>3</sup> which is a question of law that we review pursuant to the de novo standard of review. *See Howard v. Kindred Nursing Ctrs. Ltd. P'ship*, No. W2005-02360-COA-R3-CV, 2006 WL 2136466, at \*4 (Tenn. Ct. App. Aug. 2, 2006) (“The determination of the gravamen of the complaint is a question of law.”). “In determining the real purpose or the gravamen of the action the Court must look to the basis for which damages are sought.” *Swauger v. Haury & Smith Contractors, Inc.*, 512 S.W.2d 261, 263 (Tenn. 1974) (quoting *Bland v. Smith*, 277 S.W.2d 377, 379 (Tenn. 1965)). As the Tennessee Supreme Court more recently explained, in determining the gravamen of a complaint, a court “must first consider the legal basis of the claim and then consider the type of injuries for which damages are sought. This analysis is necessarily fact-intensive and requires a careful examination of the allegations of the complaint as to each claim for the types of injuries asserted and damages sought.” *Benz-Elliott v. Barrett Enters., LP*, 456 S.W.3d 140, 151 (Tenn. 2015) (citation omitted); *see also Anderson v. Lauderdale Cnty.*, No. W2022-00332-COA-R3-CV, 2023 WL 2138382, at \*3 (Tenn. Ct. App. Feb. 21, 2023) (“[W]e look to the allegations in the complaint to determine the gravamen of the claims including the legal basis of the claims and the types of injuries alleged.”). Moreover, the “examination of a plaintiff’s complaint should consider substance, not surface[.]” *Fry v. Napoleon Cmty. Schs.*, 580 U.S. 154, 156 (2017).

In the First Amended Complaint, which is the operative complaint at issue on appeal, Plaintiff asserted, in pertinent part:

8. Defendant represented itself to plaintiff and her family as being capable of providing high quality, compassionate long-term care.
9. Defendant failed to implement a system to ensure that plaintiff was properly monitored and protected from acts of abuse and neglect.
10. Upon information and belief, on or about February 14, 2019, **two employees gave plaintiff a shower while simultaneously conducting a video chat with one of the employees’ boyfriend.**
11. **Plaintiff was visible in the video while she was being showered.**

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<sup>3</sup> Gravamen is “[t]he substantial point or essence of a claim, grievance, or complaint.” *Gravamen*, *Black’s Law Dictionary* (11<sup>th</sup> ed. 2019).



12. **Videoting plaintiff while being showered violated her privacy and dignity.**

13. Defendant owed a duty to its residents, including plaintiff, to render care, services and treatment as a reasonably prudent and similarly situated facility would render, including but not limited to, rendering care and services in a safe and beneficial manner.

14. Defendant owed a duty to assist its residents, including plaintiff, in attaining and maintaining the highest level of physical, mental and psychosocial well-being.

15. Defendant failed to meet that standard of care and violated its duty of care in its treatment of plaintiff through mistreatment, abuse and neglect. **Specifically, it allowed her to be videoed and seen by the boyfriend of an employee while being showered.**

16. A reasonably prudent facility, operating under the same or similar conditions, would not have permitted the forgoing to occur. **Each of the foregoing acts of negligence on the part of defendant was a proximate cause of the violations to plaintiff's privacy and dignity.**

22. Such conduct was undertaken by defendant without regard to the health and safety consequences to those residents, such as plaintiff, entrusted to its care. Moreover, such conduct evinces such little regard for its duties of care, good faith, and fidelity owed to plaintiff as to raise a reasonable belief that the acts and omissions set forth above are the result of conscious indifference to plaintiff's rights and welfare.

23. As a direct and proximate result of the grossly negligent, willful, wanton, reckless, malicious and/or intentional misconduct of defendant, **plaintiff's privacy and dignity were violated.**

(Emphasis added).

In defining the general principle of invasion of privacy, the Restatement (Second) of Torts provides: "One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other." Restatement (Second) of Torts § 652A (1977). The Restatement then outlines four distinct means by which a person's right of

privacy can be violated, the first of which, as listed below, is at issue here, and the fourth of which was at issue in *West*, 53 S.W.3d at 648, the authority upon which the trial court relied in granting Defendant's motion for summary judgment.

The right of privacy is invaded by

(a) **unreasonable intrusion upon the seclusion of another, as stated in § 652B;** or

(b) appropriation of the other's name or likeness, as stated in § 652C;  
or

(c) unreasonable publicity given to the other's private life, as stated in § 652D; or

(d) **publicity that unreasonably places the other in a false light before the public, as stated in § 652E.**

*Id.* (emphasis added). Significantly, and as explained in William L. Prosser, *Law of Torts* § 117 (4<sup>th</sup> ed. 1971), “**the law of privacy comprises four distinct interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common** except that each represents an interference with the right of the plaintiff ‘to be let alone.’” *West*, 53 S.W.3d at 642 (quoting Prosser, *Law of Torts* § 117, at 804). And one of the four categories is “intrusion upon the seclusion of another.” *Id.* (emphasis added).

Tennessee adopted the common law invasion of privacy tort of intrusion upon seclusion in *Roberts v. Essex Microtel Assocs., II, L.P.*, 46 S.W.3d 205 (Tenn. Ct. App. 2000). As the Restatement provides:

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.

Comment:

A. The form of invasion of privacy covered by this Section does not depend upon any publicity given to the person whose interest is invaded or to his affairs. It consists solely of an intentional interference with his interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of a kind that would be highly offensive to a reasonable man.

B. The invasion may be by physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff's room in a hotel or insists over the plaintiff's objection in entering his home. It may also be by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wires. It may be by some other form of investigation or examination into his private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents. The intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of the photograph or information outlined.

C. The defendant is subject to liability under the rule stated in this Section only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs. Thus, there is no liability for the examination of a public record concerning the plaintiff, or of documents that the plaintiff is required to keep and make available for public inspection. Nor is there liability for observing him or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye. Even in a public place, however, there may be some matters about the plaintiff, such as his underwear or lack of it, that are not exhibited to the public gaze; and there may still be invasion of privacy when there is intrusion upon these matters.

D. There is likewise no liability unless the interference with the plaintiff's seclusion is a substantial one, of a kind that would be highly offensive to the ordinary reasonable man, as the result of conduct to which the reasonable man would strongly object. Thus, there is no liability for knocking at the plaintiff's door, or calling him to the telephone on one occasion or even two or three, to demand payment of a debt. It is only when the telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff, that becomes a substantial burden to his existence, that his privacy is invaded.

*Id.* at 210–11 (quoting Restatement (Second) of Torts § 652 B (1977)).

Even a cursory review of the complaint clearly reveals that Plaintiff states a claim for invasion of privacy that is based on the intrusion upon Ms. Jones's right of seclusion. Thus, the gravamen of the complaint is a claim for intrusion upon Ms. Jones's seclusion. Accordingly, we must determine whether a claim for intrusion upon seclusion requires

proof of actual damages and this exercise requires an examination of the *West* decision, which the trial court relied upon in summarily dismissing the complaint.

### B. The *West* Court's Focus on False Light

In *West*, the Tennessee Supreme Court accepted certification of the following question from the United States District Court for the Eastern District of Tennessee: “Do the courts of Tennessee recognize the tort of **false light** invasion of privacy, and if so, what are the parameters and elements of that tort?” *West*, 53 S.W.3d at 641 (emphasis added). The Court answered the question in the affirmative and further stated:

We conclude that Tennessee recognizes the tort of false light invasion of privacy and that Section 652E of the Restatement (Second) of Torts (1977), as modified by our discussion below, is an accurate statement of the elements of this tort in Tennessee. We further conclude that the parameters of the doctrine are illustrated by the Comments to Sections 652A and 652E–I, and by this Court’s decision in *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412 (Tenn. 1978), as it applies to the First Amendment standard for private plaintiffs and the pleading of damages.

*Id.* As noted, the court’s focus in *West* was on false light and how it is distinguished from the similar tort of defamation, neither of which apply in Ms. Jones’s case. *See id.* at 645. In defining false light, the court relies on the definition offered by the Restatement:

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

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

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

*Id.* at 644–45 (quoting Restatement (Second) of Torts § 652E (1977)).

As the court stated in *West*, “Consistent with defamation, we emphasize that plaintiffs seeking to recover *on false light claims* must specifically plead and prove damages allegedly suffered from the invasion of their privacy.” *West*, 53 S.W.3d at 648 (emphasis added). Although the trial court relies on this basis in denying Plaintiff’s motion to amend, *West* makes it clear that this requirement “to plead and prove damages” applies specifically to a false light claim. *Id.*

Here, there was no claim for publicity placing Ms. Jones in a false light. Therefore, false light is not the type of invasion of privacy at issue. Instead, the complaint reveals that the gravamen of Plaintiff's claim is for invasion of privacy by means of intrusion upon seclusion. Accordingly, we focus our attention on the separate and distinct form of invasion of privacy, that of intrusion upon seclusion.

### C. Intrusion upon Seclusion

Restatement (Second) of Torts § 652B defines intrusion upon seclusion as follows: "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."

As detailed in the Restatement, the tort of intrusion upon seclusion is more private and intimate than its three counterparts:

The form of invasion of privacy covered by this Section does not depend upon any publicity given to the person whose interest is invaded or to his affairs. It consists solely of an intentional interference with his interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of a kind that would be highly offensive to a reasonable man.

Restatement (Second) of Torts § 652B cmt. a (1977). Unlike the other three forms of invasion of privacy, this form does not require publication of any information, nor does it require any other participants beyond the victim and her tortfeasor. *Id.* It specifies that the intrusion is of a nature that would "be highly offensive to a reasonable man." *Id.* Clearly aligning with the undisputed facts of this case, by including Ms. Jones's nude body in her videocall, a reasonable person may conclude that the CNA's actions intruded upon Ms. Jones's privacy in a way that would be highly offensive to her dignity.

As explained in Dobbs's *Law of Remedies*:

In general, dignitary torts are those in which the law seeks to protect the plaintiff's intangible interests in personality. For example, interests in mental tranquility and interests in privacy are dignitary interests. Physical harm and economic harm may be involved in dignitary tort cases, but the essence of a dignitary claim is the highly personal and intangible interest involved.

Dan B. Dobbs, *Law of Remedies* § 7.3(1) (2nd ed., vol. 2 1993).

Dobbs adds, generally:

Except for an occasional injunction in some kinds of privacy invasion, the remedies in dignitary tort cases are money remedies for damages. . . .

Damages in dignitary tort cases include nominal damages, but are mainly distinguished by the practice of permitting presumed or general damages in substantial, more-than-nominal amounts without proof of any pecuniary or other harm. . . .

The common law dignitary torts—a technical assault without physical harm, for example—are comparable to libel and slander in that they have traditionally supported damages for intangible injuries **even when little or no economic or physical harm is done. The tort is said to be damage in itself, or as more commonly put, the plaintiff can recover “general” or “presumed” damages in substantial or more-than-nominal amounts.**

Dan B. Dobbs, *Law of Remedies* § 7.3(1–2) (2nd ed., vol. 2 1993) (footnotes omitted) (emphasis added).

It has long been held that intrusion into a person’s privacy allows for the award of damages. See *De May v. Roberts*, 9 N.W. 146 (Mich. 1881); *Hamberger v. Eastman*, 206 A.2d 239 (N.H. 1964). Our Supreme Court has reasoned that “an unreasonable intrusion upon the seclusion of another is actionable in this state and that the scope of this tort is parallel to that contained in section 652B of the *Restatement (Second) of Torts.*” *Givens v. Mullikin ex rel. Est. of McElwaney*, 75 S.W.3d 383, 411 (Tenn. 2002), *superseded by statute*, Tenn. Code Ann. § 29-26-121(f) (“Written notice of claim; statute of limitations”) (citing *Roberts*, 46 S.W.3d at 211). Specifically, the *Givens* court held that “a plaintiff may recover damages in Tennessee for an unreasonable intrusion into his or her private affairs.” *Id.* Furthermore, Tennessee courts have adopted the Restatement’s definition and parameters as it applies to the invasion of privacy tort of intrusion upon seclusion.<sup>4</sup>

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<sup>4</sup> The *Givens* court defined the following elements for intrusion upon seclusion. However, in *Givens*, the facts were specific to an invasion of privacy through discovery.

Because a plaintiff cannot seek damages for intrusion into seclusion when he or she is required to make the allegedly private information available for public inspection, a plaintiff must allege and prove the following essential elements: (1) that the information sought by the opposing party was not properly discoverable or was otherwise subject to some form of privilege; (2) that the opposing party knew that the information was not discoverable or was subject to privilege, but nevertheless proceeded to obtain that

There is little to no existing Tennessee case law that explores the award of damages for the specific tort of intrusion upon seclusion, beyond establishing that the tort is recognized and recovery is allowed. *Givens*, 75 S.W.3d at 411. While cases in this jurisdiction offer various examples of behavior falling short of intrusion upon seclusion or otherwise negating an essential element, these do not reach the award of damages. *See, e.g., Roberts*, 46 S.W.3d at 213 (a hotel clerk copying and sharing with police a guest's willingly offered, government-issued identification was not an intrusion upon guest's private affairs); *Harris v. Horton*, 341 S.W.3d 264, 272 (Tenn. Ct. App. 2009) (photos taken on a public highway were not an intrusion upon seclusion), overruled on other grounds by *Rogers v. Louisville Land Co.*, 367 S.W.3d 196 (Tenn. 2012); *Fitzgerald v. Hickman Cnty. Gov't*, No. M2017-00565-COA-R3-CV, 2018 WL 1634111, at \*11 (Tenn. Ct. App. Apr. 4, 2018) (discoverable information negates an element of the *Givens* factors for intrusion upon seclusion).

However, as we expand our research, persuasive authorities offer additional guidance as it relates to the award of damages for intrusion upon seclusion. A Texas Court of Appeals explained in its finding:

The basis of a cause of action for invasion of privacy is that the defendant has violated the plaintiff's rights to be left alone. **This intrusion itself is actionable, and the plaintiff can receive at least nominal damages for that actionable intrusion without demonstrating physical detriment. The appellants' improper intrusion of an area where the appellee had manifested an expectation of privacy alone raised her right to recover.**

*K-Mart Corp. Store No. 7441 v. Trotti*, 677 S.W.2d 632, 638 (Tex. App. 1984), writ refused NRE sub nom. *Trotti v. K-Mart Corp. No. 7441*, 686 S.W.2d 593 (Tex. 1985) (citations omitted) (emphasis added). A United States District Court found that “[r]epeated and continuous calls in an attempt to collect a debt give rise to a claim for intrusion upon seclusion” and “may support a claim for punitive damages.” *Varnado v. Midland Funding LLC*, 43 F. Supp. 3d 985, 992–94 (N.D. Cal. 2014). In *Neal v. United States*, 599 F. Supp. 3d 270 (D. Md. 2022), the United States District Court in Maryland explained:

Neal's second claim is for intrusion upon seclusion, which falls within the broader category of torts for invasion of privacy. As such, it is an intentional tort. And, “[w]hile it is necessary to prove actual damages to obtain a recovery in negligence actions, the same rule does not apply to intentional

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information; (3) that the obtaining of such information would be highly offensive to a reasonable person; and (4) that injury was suffered from the invasion of privacy.

*Givens*, 75 S.W.3d at 412.

torts. For example, a plaintiff who proves a prima facie case for an intentional tort, but fails to prove damages, will always be allowed to obtain at least a nominal recovery.”

*Neal*, 599 F. Supp. 3d at 299. Finally, and more generally, the United States Supreme Court has reasoned, “Because ‘every violation [of a right] imports damage,’ nominal damages can redress [the plaintiff’s] injury even if he cannot or chooses not to quantify that harm in economic terms.” *Uzuegbunam v. Preczewski*, — U.S. —, S. Ct. 792, 802 (2021) (alteration in original) (citation omitted).

The present case is a rare one in which Ms. Jones was unaware of the intrusion on her private affairs and, as such, provides no evidence of mental or emotional ramifications. Additionally, it is undisputed that she suffered no actual or economic damages. Even so, we would consider it a detriment to public policy to condone intrusions upon the seclusion of the most vulnerable—those unable to comprehend that the intrusion is occurring—without the possibility of redress or consequence. Further, the above authorities reveal the long-held position that the intrusion itself is the injury, that a claim for intrusion upon seclusion does not require actual damages to survive a motion for summary judgment, and that Ms. Jones is afforded the opportunity to “recover damages for the deprivation of [her] seclusion.” Restatement (Second) of Torts § 652H cmt. a. (1977). The Restatement treats such damages for the privacy harm of deprivation of seclusion as distinct from damages for emotional distress and personal humiliation. *See id.* at § 652H cmts. a & b.

For the foregoing reasons, we have determined that the gravamen of the complaint is a claim for intrusion upon Ms. Jones’s seclusion, which does not require a showing of actual damages as an essential element.

To demonstrate that summary judgment is appropriate, Defendant was required to either affirmatively negate an essential element of Plaintiff’s claim or demonstrate that her evidence at the summary judgment stage is insufficient to establish her claim of intrusion upon Ms. Jones’s seclusion. *See Rye*, 477 S.W.3d at 264. Because actual damages are not an essential element of a claim for intrusion upon seclusion, Defendant did not negate an essential element of the claim. Thus, Defendant was not entitled to summary judgment as a matter of law. Accordingly, the judgment of the trial court is reversed, and we remand with instructions to reinstate the complaint and for further proceedings consistent with this opinion.

## II. MOTION TO AMEND THE COMPLAINT

In addition to filing a response in opposition to Defendant’s motion for summary judgment, Plaintiff filed a motion to amend the complaint to more specifically assert a claim for intrusion upon seclusion and a claim for negligent supervision. The court denied Plaintiff’s motion to amend the complaint, reasoning, “[E]ven if the court were to allow



the requested amendment, a claim for invasion of privacy still requires actual damages.” Plaintiff contends this was error.

We have determined that Plaintiff’s claim of invasion of privacy based on intrusion upon seclusion survives Defendant’s motion for summary judgment. For the reasons stated above, we also conclude that granting Plaintiff leave to amend the complaint to state, with more specificity, her claim of intrusion upon seclusion, as well as a claim for negligent supervision, would not be futile. For these reasons, we reverse the decision denying the motion to amend the complaint and remand with instructions for the trial court to grant Plaintiff leave to amend the complaint.

### III. SURVIVAL OF THE ACTION AFTER DEATH OF THE PERSON AFFECTED

During our research following oral arguments, a statement in the *West* decision caused this court to consider whether an action for invasion of privacy survives the death of the individual whose privacy was invaded. As a consequence, we asked the parties to brief this issue,<sup>5</sup> which they did by filing supplemental briefs.

In the *West* decision, our Supreme Court adopted the Restatement as it applies to the right of privacy. In doing so, the Court stated:

[T]his Court adopts Section 652I of the Restatement (Second) of Torts (1977) which recognizes that the right to privacy is a personal right. As such, the right cannot attach to corporations or other business entities, may not be assigned to another, nor may it be asserted by a member of the individual’s family, even if brought after the death of the individual.

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<sup>5</sup> Because the issue was not raised by the parties, the court entered an order directing the parties to brief this issue. The order reads:

This matter was argued before the Court on January 5, 2023. Following argument and during its review of the issues raised by the parties, the Court came upon an issue that was not raised by either party. The issue is “whether an action for the invasion of privacy can be maintained after the death of the individual whose privacy was invaded.” See *West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 648 (Tenn. 2001) (citing Section 652I of the *Restatement (Second) of Torts* cmt. a–c (1977) (“[W]hich recognizes that the right to privacy is a personal right. As such, the right . . . may not be assigned to another, nor may it be asserted by a member of the individual’s family, even if brought after the death of the individual.”)).

Because the parties have not briefed this issue, and acting pursuant to the reasoning in *State v. Bristol*, 654 S.W.3d 917, 928 (Tenn. 2022), the parties are afforded the opportunity to be heard on this issue.

*West*, 53 S.W.3d at 648 (citing Restatement (Second) of Torts § 652I cmt. a–c (1977)).

The Restatement goes on to describe the right to privacy as having a “personal character” specific to the person affected by the action. As the Restatement explains, “Except for the appropriation of one’s name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded.” Restatement (Second) of Torts § 652I (1977). Then, in the comments, the Restatement provides, “**In the absence of statute**, the action for the invasion of privacy cannot be maintained after the death of the individual whose privacy is invaded.” Restatement (Second) of Torts § 652I cmt. b (1977) (emphasis added).

Significantly, however, Tennessee Code Annotated § 20-5-102 provides: “No civil action commenced, whether founded on wrongs or contracts, **except actions for wrongs affecting the character of the plaintiff**, shall abate by the death of either party, but may be revived.” Thus, with the presence of Tennessee Code Annotated § 20-5-102, Tennessee does not have an “absence of statute” on the subject of the survivability of the cause of action.

Here, Plaintiff’s claims and Defendant’s actions are not of a slanderous or defamatory nature that affect the character of Ms. Jones. Accordingly, Plaintiff’s claims survive the death of Ms. Jones pursuant to Tennessee Code Annotated § 20-5-102.

#### IN CONCLUSION

For the foregoing reasons, we reverse the trial court’s decision to grant Defendant’s motion for summary judgment as well as the decision to deny the motion to amend the complaint, and this matter is remanded to the trial court for proceedings consistent with this opinion. Costs of appeal are assessed against Defendant.

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FRANK G. CLEMENT JR., P.J., M.S.