

INVASION OF PRIVACY INSTRUCTIONS

Introduction

Arizona first recognized a cause of action for invasion of privacy in 1945. *See Reed v. Real Detective Publishing Co., Inc.*, 63 Ariz. 294 (1945). In 1989 the Arizona Supreme Court explained the history of the Right of Privacy. *See Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335 (1989). The court in *Godbehere* discussed the development of the Right of Privacy from the exposition of the contours of the right in Justice Brandeis' law review article (Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)) to the development of four separate torts outlined by Dean Prosser (Prosser, *Privacy*, 48 Calif. L. Rev. 383 (1960). *Id.* at p.338. The court also noted that the American Law Institute adopted Prosser's four-part classification of privacy torts. *See Godbehere, supra.* citing RESTATEMENT (2D) OF TORTS § 652A-I (1977).

Arizona has adopted each of the four types of privacy torts identified in the Restatement. *See Reed, supra.* (adopting cause of action for misappropriation of name or likeness); *Hart v. Seven Resorts, Inc.*, 190 Ariz. 272 (App. 1997) (intrusion into private affairs); *Reed, supra.* (public disclosure of private facts); *Godbehere, supra.*, (placing plaintiff in a false light). Additionally, Arizona has recognized a remedy for the commercial exploitation of a person's name or likeness. *See In re Reynolds*, 235 Ariz. 80 (App. 2014) (adopting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995)). The cause of action for the commercial exploitation of a person's name or likeness is often referred to as the Right to Publicity. *Id.*

Privacy Instructions 1-3 are intended for use in claims alleging intrusion into the plaintiff's private affairs. Privacy Instructions 4-8 are intended for use in claims alleging public disclosure of private facts about the plaintiff. Privacy Instructions 9-11 are intended for use in claims alleging publications which place the plaintiff in a false light. Privacy Instruction 12 is intended for use in claims alleging a misappropriation of the plaintiff's name or likeness. All privacy claims would also include the instructions regarding causation and damages (instructions 13, 14, and 14A) and any applicable affirmative defenses (instructions 15 and 16).

INVASION OF PRIVACY 1

Invasion of Privacy by Intrusion Upon Seclusion — Elements

[Name of plaintiff] claims [name of defendant] [interfered with] [invaded] [his] [her] [privacy] [personal_records/information]. On this claim, [name of plaintiff] must prove:

1. [Name of defendant] intentionally [interfered with] [invaded] [name of plaintiff]'s privacy by [intruding in [name of plaintiff]'s private space][eavesdropping on [name of plaintiff]'s private affairs] [inspecting [name of plaintiff]'s private records];
2. The [interference] [invasion] would be highly offensive to a reasonable person;
3. The [interference] [invasion] was a cause of [name of plaintiff]'s [injuries] [damages] [losses]; and
4. [Name of plaintiff]'s [injuries] [damages] [losses].

If you find that any of these four requirements has not been proven, then your verdict must be for [name of defendant]. If you find that all four of these requirements have been proven, then [your verdict must be for [name of plaintiff]] [then you must consider [name of defendant]'s defense(s) of [insert any affirmative defense(s) that would be a complete defense to the plaintiff's claim]].

SOURCE: *Hart v. Seven Resorts, Inc.*, 190 Ariz. 272, 279 (App. 1997); *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.*, 306 F.3d 806, 812-13 (9th Cir. 2002); RESTATEMENT (SECOND) OF TORTS § 652B (1977).

COMMENT: The right of privacy does not protect people from minor annoyances, indignities or insults. To be actionable, the defendant's conduct must be highly offensive to a reasonable person. Evidence of the circumstances of the alleged intrusion are relevant to whether the conduct is highly offensive including the setting and manner in which the intrusion occurred, the defendant's motives and objectives, and the plaintiff's expectation of privacy. See *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.*, 306 F.3d 806, 819 (9th Cir. 2002); RESTATEMENT (SECOND) OF TORTS § 652B cmt. d (1977).

USE NOTES:

1. Invasion of Privacy Instruction No. 1 should be used with Privacy Instructions 2 and 3.
2. If the defendant has put no affirmative defense in issue, or there is insufficient evidence to support a defense, then use the first bracketed phrase in the second paragraph. If there is an affirmative defense at issue, then use the second bracketed phrase.
3. Mitigation of damages is not a complete defense. It should not be identified as an affirmative defense in the second paragraph of this instruction.

INVASION OF PRIVACY 2
Intentional Intrusion — Defined

[*Name of defendant*]'s invasion of [*name of plaintiff*]'s privacy is intentional if:

1. [*Name of defendant*] interfered with [*name of plaintiff*]'s [privacy][private affairs or concerns] on purpose, or
2. It was substantially certain that [*name of defendant*]'s conduct would [invade [*name of plaintiff*]'s privacy] [interfere with [*name of plaintiff*]'s private affairs or concerns].

SOURCE: RESTATEMENT (SECOND) OF TORTS §§ 8A, 652B (1977).

INVASION OF PRIVACY 3

Highly Offensive to a Reasonable Person — Defined

An [invasion of privacy] [interference with a person’s private affairs] is “highly offensive” if a reasonable person in the same or similar circumstances as the plaintiff would feel seriously upset or embarrassed by the [invasion] [interference].

SOURCE: RESTATEMENT (SECOND) OF TORTS § 652B cmt. d (1977); R. SACK, LIBEL, SLANDER & RELATED PROBLEMS § 12:4.6 (4th ed. 2014).

COMMENT: The Restatement makes clear that liability for intrusion is based on an intentional interference with the plaintiff’s interest in privacy. However, the liability imposed by the rule requires that the interference with the plaintiff’s seclusion be substantial—i.e. of a kind that would be highly offensive to the ordinary reasonable man and to which the reasonable man would strongly object. *See* RESTATEMENT (SECOND) OF TORTS § 652B cmt. d.

In *Fernandez v. United Acceptance Corp.*, 125 Ariz. 459 (App. 1980), the court addressed whether a collection agent’s conduct was sufficiently egregious to be considered an invasion of privacy. The court noted that the standard was whether the action would cause extreme mental anguish to “a person of ordinary sensibilities.” *Id.* at 461 (quoting *Rugg v. McCarty*, 476 P.2d 753 (Colo. 1970)). *See also Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.*, 306 F.3d 806, 819 (9th Cir. 2002) (surreptitious videotaping of medical lab was not sufficiently offensive to state a claim for intrusion upon seclusion).

INVASION OF PRIVACY 4

Invasion of Privacy by Public Disclosure of Private Facts — Elements

[*Name of plaintiff*] claims [*name of defendant*] invaded his/her privacy by publicly disclosing [private information about] [private images/photos of] [*name of plaintiff*]. On this claim [*name of plaintiff*] must prove:

1. [*Name of defendant*] publicly disclosed [private information about] [private images/photos of] [*name of plaintiff*];
2. The public disclosure of the[private information] [private images/photos] about the [*name of plaintiff*] would be highly offensive to a reasonable person;
3. At the time of the disclosure of the [information] [images/photos], [*name of defendant*] knew or should have known that the [information] [images/photos] were private;
4. The disclosure of the [information] [images/photos] was a cause of [*name of plaintiff*]'s [injuries] [damages] [losses]; and
5. [*Name of plaintiff*]'s [injuries] [damages] [losses].

If you find that any of these five requirements has not been proven, then your verdict must be for [*name of defendant*]. If you find that all five of these requirements have been proven, then [your verdict must be for [*name of plaintiff*] [then you must consider [*name of defendant*]'s defense(s) of [*insert any affirmative defense(s) that would be a complete defense to the plaintiff's claim*].

SOURCE: *Reed v. Real Detective Publ'g Co., Inc.*, 63 Ariz. 294, 305-06 (1945); RESTATEMENT (SECOND) OF TORTS § 652D (1977).

COMMENT: To be actionable a disclosure must be of a previously private matter that had not been publicly disclosed. This excludes information that is part of a public record, or information that the plaintiff has made available to the public. *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977). The protection of privacy interests generally applies only to private matters. *Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 343 (1989) citing RESTATEMENT (SECOND) OF TORTS § 652A cmt. b and *Reed v. Real Detective Publ'g, supra*.

USE NOTES:

1. Invasion of Privacy Instruction 4 should be used with Invasion of Privacy instructions 5 – 8.
2. If the defendant has put no affirmative defense in issue, or there is insufficient evidence to support a defense, then use the first bracketed phrase in the second paragraph. If there is an affirmative defense at issue, then use the second bracketed phrase.
3. Mitigation of damages is not a complete defense. It should not be identified as an affirmative defense in the second paragraph of this instruction.

INVASION OF PRIVACY 5
Public Disclosure — Defined

A disclosure is “public” if it is communicated to the general public or to a large number of persons or if it is communicated in a way that it is substantially certain to become a matter of public knowledge.

SOURCE: *Hart v. Seven Resorts, Inc.*, 190 Ariz. 272, 280 (App. 1997); *Advanced Cardiac Specialists v. Tri-City Cardiology Consultants, P.C.*, 222 Ariz. 383, 387 n.7 (App. 2009); RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977).

COMMENT: The court in *Hart v Seven Resorts, Inc.*, explained that to be actionable the disclosure of the private facts about the plaintiff must be to more than a small group of people.

Publicity means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of communication which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public. . . . It is not an invasion of the right of privacy . . . to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons. On the other hand, any publication in a newspaper or magazine, even of small circulation, . . . or statement made in an address to a large audience, is sufficient.

Hart, 190 Ariz. at 280.

INVASION OF PRIVACY 6

About the Plaintiff — Defined

A public disclosure is about [*name of plaintiff*] if the people who [see] [hear] [read] the disclosure would reasonably understand that it refers to [*name of plaintiff*].

SOURCE: *Reynolds v. Reynolds*, 231 Ariz. 313, 318 (App. 2013) (false light claim dismissed because article could not be read to be about plaintiffs); RESTATEMENT (SECOND) OF TORTS § 652D (1977); R. SLACK, LIBEL, SLANDER & RELATED PROBLEMS § 12:4.3 (4th ed. 2014) (“The question is whether the plaintiff would reasonably be understood by recipients of the offending communication to be the person to whom it relates.”).

INVASION OF PRIVACY 7

Private Facts — Defined

Information is private if it relates to [*name of plaintiff*]'s private life and if it is not already known in the community. Information is not private if it is in a public record or is otherwise publicly available.

SOURCE: RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977); R. SLACK, LIBEL, SLANDER & RELATED PROBLEMS § 12:4.4 (4th ed. 2014).

COMMENT: In *Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335 (1989), the court explained that privacy torts are limited to disclosures about the private life of the plaintiff. In discussing the standard applied in a false light claim, the court said:

A number of jurisdictions take the position that because false light is a form of invasion of privacy, it must relate only to the private affairs of the plaintiff and cannot involve matters of public interest. . . . We hold that there can be no false light invasion of privacy action for matters involving official acts or duties of public officers. Consequently, we adopt the following legal standard: a plaintiff cannot sue for false light invasion of privacy if he or she is a public official *and* the publication relates to performance of his or her public life or duties.

Id. at. 343; *see also* *Judicial Watch, Inc. v. City of Phoenix*, 228 Ariz. 292, 399-400 (App. 2011) (public's interest in access to mayor's security log weighed against privacy interest of public figure).

INVASION OF PRIVACY 8
Public Disclosure of Private Facts —
Highly Offensive to a Reasonable Person — Defined

Public disclosure of private facts is “highly offensive” if a reasonable person in the same or similar circumstances as the plaintiff would feel seriously upset or embarrassed by the disclosure.

SOURCE: RESTATEMENT (SECOND) OF TORTS § 652D cmt. c (1977); R. SLACK, LIBEL, SLANDER & RELATED PROBLEMS § 12:4.6 (4th ed. 2014).

COMMENT: The Restatement makes clear that liability for invasion of public disclosure of private facts is limited to situations where the disclosure is “highly offensive.” As explained in the comments to the rule:

The rule stated in this Section [652D] gives protection only against unreasonable publicity, of a kind highly offensive to the ordinary reasonable man. The protection afforded to the plaintiff’s interest in his privacy must be relative to the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens. . . . It is only when the publicity given to him is such that a reasonable person would feel justified in feeling seriously aggrieved by it, that the cause of action arises.

RESTATEMENT (SECOND) OF TORTS § 652D cmt. c (1977).

INVASION OF PRIVACY 9A
Invasion of Privacy by Publicly Placing
Plaintiff in a False Light — Elements
(Where Actual Malice Is Required)

[*Name of plaintiff*] claims [*name of defendant*] invaded [his] [her] privacy by placing [him] [her] before the public in a false light. On this claim [*name of plaintiff*] must prove:

1. [*Name of defendant*] made, said, or wrote a public statement about [*name of plaintiff*];
2. [*Name of defendant*]'s [statement] [conduct] created a false impression about [*name of plaintiff*].
3. The impression created about [*name of plaintiff*] would be highly offensive to a reasonable person;
4. [*Name of defendant*]'s [statement] [conduct] was a cause of [*name of plaintiff*]'s [injuries] [damages] [losses]; and
5. [*Name of plaintiff*] had [injuries] [damages] [losses].

In addition, in order for you to find for [*Name of plaintiff*] on this claim, you must find by clear and convincing evidence that at the time the statement was made, said, or written [*name of defendant*] either:

- 6a. knew that [his] [her] [statement] [conduct] would create a false impression about [*name of plaintiff*] or
- 6b. acted recklessly about whether [his] [her] [statement] [conduct] would create a false impression about [*name of plaintiff*].

If you find that any of these six requirements has not been proven, then your verdict must be for [*name of defendant*]. If you find that all six of these requirements have been proven, then [your verdict must be for [*name of plaintiff*]] [then you must consider [*name of defendant*]'s defense(s) of [*insert any affirmative defense(s) that would be a complete defense to the plaintiff's claim*]].

SOURCE: *Godbehere v. Phoenix Newspapers*, 162 Ariz. 335 (1989); *Desert Palm Surgical Group, P.L.C. v. Petta*, 236 Ariz. 568 (App. 2015); RESTATEMENT (SECOND) OF TORTS §§ 652E, 652G (1977).

COMMENT: A public figure may not bring a false light invasion of privacy claim based on a statement related to the performance of his or her public life or duties. *Godbehere*, 162 Ariz. at 343. However, a public figure may bring an action if the publication presents the public figure's private life in a false light. *Id.*

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INVASION OF PRIVACY 9A
Invasion of Privacy by Publicly Placing
Plaintiff in a False Light — Elements
(Where Actual Malice Is Required)

Continued

USE NOTES:

1. Invasion of Privacy Instruction 9A should be used with Privacy Instructions 10 and 11.
2. This instruction is intended for use where proof of actual malice is required. The ‘actual malice’ standard is required in cases where (i) the plaintiff is a public figure or public official, (ii) the statement involves a matter of public concern, or (iii) defendant asserts a defense for which there is a qualified privilege. *Rosenblatt v. Baer*, 383 U.S. 75 (1966), and *Godbehere, supra*, (public officials); *Gertz v. Welch*, 418 U.S. 323 (1974) and *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476 (1986) (public figures); *Advanced Cardiac Specialists v. Tri-City Cardiology*, 222 Ariz. 383 (App. 2009) (qualified immunity).
3. Element 6, the “actual malice” element, must be proved when the plaintiff is a public figure, but the statement giving rise to the plaintiff’s false light claim relates to the plaintiff’s private affairs. *Godbehere*, 162 Ariz. at 343. If the plaintiff is not a public figure, then the negligence standard in Instruction 9B should be used. *See Advanced Cardiac Specialists*, 222 Ariz. at 388.
4. If the defendant has put no affirmative defense in issue, or there is insufficient evidence to support a defense, then use the first bracketed phrase in the third paragraph. If there is an affirmative defense at issue, then use the second bracketed phrase.
5. Mitigation of damages is not a complete defense. It should not be identified as an affirmative defense in the third paragraph of this instruction.

INVASION OF PRIVACY 9B
Invasion of Privacy by Publicly Placing
Plaintiff in a False Light — Elements
(Negligence Standard)

[*Name of plaintiff*] claims [*name of defendant*] invaded [his or her] privacy by placing [him or her] before the public in a false light. On this claim [*name of plaintiff*] must prove:

1. [*Name of defendant*] made, said, or wrote a public statement about [*name of plaintiff*];
2. [*Name of defendant*]'s statement created a false impression about [*name of plaintiff*];
3. The impression created about [*name of plaintiff*] would be highly offensive to a reasonable person;
4. [*Name of defendant*] failed to use reasonable care in determining that the statement would create a false impression about [*name of plaintiff*];
5. [*Name of defendant*]'s statement was a cause of [*name of plaintiff*]'s [injuries] [damages] [losses]; and
6. [*Name of plaintiff*] had [injuries] [damages] [losses];

If you find that all six requirements have been proven, [then your verdict must be for [*name of plaintiff*]] [then you must consider [*name of defendant*]'s affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to the plaintiff's claim*]]. If you find that any of these six requirements has not been proven, then your verdict must be for [*name of defendant*].

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SOURCE: *Advanced Cardiac Specialists, v. Tri-City Cardiology Consultants*, 222 Ariz. 383 (App. 2009); *Godbehere v. Phoenix Newspapers*, 162 Ariz. 335, 342-43, n.6 (1989); RESTATEMENT (SECOND) OF TORTS §§ 652E cmt. d, 652G (1977).

COMMENT: Neither the U.S. Supreme Court nor the Arizona Supreme Court has expressly addressed whether a private plaintiff bringing a false light invasion of privacy claim must prove the actual malice element that *Godbehere* held public figures must prove when bringing false light claims based on statements made about their private affairs. *See Godbehere*, 162 Ariz. at 342-43 n.6. However, in *Advanced Cardiac Specialists v. Tri-City Cardiology Consultants*, 222 Ariz. 383 (App. 2009), the court held that a negligence standard should be applied in privacy cases in which there is no allegation that the plaintiff is a public figure or that the case involves a matter of public concern. *Id.* at 388. The negligence standard is used in defamation cases which do not involve public figures. *See Dube v. Likins*, 216 Ariz. 406 (App. 2007); *Peagler v. Phoenix Newspapers, Inc.*, 114 Ariz. 309 (1977).

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INVASION OF PRIVACY 9B
Invasion of Privacy by Publicly Placing
Plaintiff in a False Light — Elements
(Negligence Standard)

Continued

If you find that any of these six requirements has not been proven, then your verdict must be for [name of defendant]. If you find that all six of these requirements have been proven, then [your verdict must be for [name of plaintiff] [then you must consider [name of defendant]'s defense(s) of [insert any affirmative defense(s) that would be a complete defense to the plaintiff's claim]

USE NOTES:

1. Invasion of Privacy Instruction 9B should be used with Invasion of Privacy Instructions 10 and 11.
2. This instruction is intended for use when the plaintiff is neither a public figure nor a public official and no qualified privilege has been asserted.
3. If the defendant has put no affirmative defense in issue, or there is insufficient evidence to support a defense, then use the first bracketed phrase in the second paragraph. If there is an affirmative defense at issue, then use the second bracketed phrase.
4. Mitigation of damages is not a complete defense. It should not be identified as an affirmative defense in the concluding paragraphs of this instruction.

INVASION OF PRIVACY 10

Public Disclosure — Defined

A statement is “public” if it is communicated to the general public or to a large number of persons or if it is communicated in a way that it is substantially certain to become a matter of public knowledge.

SOURCE: *Hart v. Seven Resorts, Inc.*, 190 Ariz. 272, 280 (App. 1997); RESTATEMENT (SECOND) OF TORTS § 652E cmt. a (1977).

COMMENT: The court in *Hart v Seven Resorts, Inc.* explained that to be actionable the statement about the plaintiff must be to more than a small group of people. “Publicity means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of communication which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public. . . . It is not an invasion of the right of privacy . . . to communicate a fact concerning the plaintiff’s private life to a single person or even to a small group of persons. On the other hand, any publication in a newspaper or magazine, even of small circulation, . . . or statement made in an address to a large audience, is sufficient.” *Hart*, 190 Ariz. at 280.

INVASION OF PRIVACY 11

Publicly Placing Plaintiff in a False Light — Highly Offensive to a Reasonable Person — Defined

A statement which creates a false impression about a person is “highly offensive” if a reasonable person in the same or similar circumstances would feel seriously upset or embarrassed by the statement.

SOURCE: RESTATEMENT (SECOND) OF TORTS § 652E cmt. c. (1977).

COMMENT: The comment to the Restatement rule provides: “The rule stated in this Section applies only when the publicity given to the plaintiff has placed him in a false light before the public, of a kind that would be highly offensive to a reasonable person. In other words, it applies only when the defendant knows that the plaintiff, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity. . . . It is only when there is such a major misrepresentation of [the plaintiff’s] character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position, that there is a cause of action for invasion of privacy.” *See* RESTATEMENT (SECOND) OF TORTS § 652E cmt. c.

INVASION OF PRIVACY 12

Invasion of Privacy by Appropriation of Plaintiff's Name or Likeness — Elements

[*Name of plaintiff*] claims [*name of defendant*] used his/her [name][photo][likeness] without his/her consent. On this claim, [*name of plaintiff*] must prove:

1. [*Name of defendant*] used [*name of plaintiff*]'s [name][photo][likeness];
2. [*Name of plaintiff*] did not consent to [*name of defendant*]'s use of [*name of plaintiff*]'s [name][photo][likeness];
3. [*Name of defendant*]'s use of [*name of plaintiff*]'s [name][photo][likeness] was a cause of [injury][damage] to [*name of plaintiff*]; and
4. [*Name of plaintiff*]'s [injuries][damages][losses].

If you find that any of these four requirements has not been proven, then your verdict must be for [*name of defendant*]. If you find that all four of these requirements have been proven, then your verdict must be for [*name of plaintiff*].

SOURCE: *Reed v Real Detective Publ'g Co., Inc.*, 63 Ariz. 294 (1945); *In re Estate of Reynolds*, 235 Ariz. 80 (App. 2014); *Canas v. Bay Entertainment, LLC*, 252 Ariz. 117 (App. 2021).

USE NOTE: Invasion of Privacy No. 12 should be used with Privacy instructions 13 and 14A.

COMMENT: Arizona recognizes a cause of action for personal harms caused by a misappropriation of a person's name or likeness. *See Reed, supra*. Arizona also recognizes a cause of action for the commercial appropriation of a person's name or likeness. *See Reynold, supra*. The elements of these two causes of action are the same. However, there are distinct measures of damages for the two types of misappropriation claims. The recoverable damages are explained in Privacy Instruction 14A

INVASION OF PRIVACY 13

Causation

Before you can find [*name of defendant*] liable for [invasion of] [interference with] [*name of plaintiff*]'s privacy, you must find that [*name of defendant*]'s [conduct] [statement about [*name of plaintiff*]] was a cause of [*name of plaintiff*]'s [injuries] [damages] [losses]. [Conduct] [A statement] causes damages if it helps produce the damage, and if the damage would not have happened without the [conduct] [statement].

SOURCE: RAJI (Civil) 7th Fault Instruction 2.

INVASION OF PRIVACY 14

Damages

If you find that [Name of Defendant] has [invaded [Name of Plaintiff]'s privacy] [interfered with [Name of Plaintiff]'s privacy] [publicly disclosed private [information about] [images of] [Name of Plaintiff]] [placed [Name of Plaintiff] in a false light], you must then decide the full amount of damages that will reasonably and fairly compensate [Name of Plaintiff] for each of the following elements of damages proved by the evidence to have been caused by [Name of Defendant]'s conduct:

1. Emotional distress, humiliation, inconvenience, and anxiety already experienced and reasonably probable to be experienced in the future.
2. Financial losses already experienced and reasonably probable to be experienced in the future.
3. Impairment/Injury to reputation and standing in the community already experienced and reasonably probable to be experienced in the future.

SOURCE: *Reed v. Real Detective Publishing Co., Inc.*, 63 Ariz. 294 (1945) (plaintiff may recover damages for mental pain and annoyance resulting from unauthorized publication of photograph of the plaintiff); *Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335 (1989) (plaintiff may recover damages for emotional suffering caused by false light invasion of privacy); RESTATEMENT (SECOND) OF TORTS § 652H (1977).

COMMENT: It is unclear whether a plaintiff in an invasion of privacy case may recover damages for injury to his or her reputation. Comment a to Restatement § 652H indicates that damages may be recoverable for reputational injuries.

A cause of action for invasion of privacy entitles the plaintiff to recover damages for the harm to the particular element of his privacy that is invaded. Thus one who suffers an intrusion upon his solitude or seclusion under § 652B may recover damages for the deprivation of his seclusion. One whose name, likeness or identity is appropriated under § 652C may recover for the loss of the exclusive use of the value so appropriated. One to whose private life publicity is given under § 652D may recover for the harm resulting to his reputation for the publicity. One who is publicly placed in a false light under § 652E may recover damages for the harm to his reputation from the position in which he is placed.

However, the court in *Godbehere* distinguished between the damages recoverable in defamation and privacy claims.

Although both defamation and false light invasion of privacy involve publication, the nature of the interests protected by each action differs substantially. A defamation action compensates damage to reputation or good name caused by the publication of false information. . . . Privacy, on the other hand, does not protect reputation but protects mental and emotional interests. . . . Under this theory, a plaintiff may recover even in the absence of reputational damage, as long as the publicity is unreasonably offensive and attributes false characteristics.

Godbehere, 162 Ariz. at 341.

Invasion of Privacy No. 14A

Damages

If you find that [name of defendant] used [name of plaintiff]'s name/likeness/identity without [name of plaintiff]'s consent, you must then decide the full amount of damages that will reasonably and fairly compensate [name of plaintiff] for each of the following elements of damages proved by the evidence to have been caused by [name of defendant]'s conduct:

1. The greater of:
 - a. any economic loss suffered by [name of plaintiff] as a result of [name of defendant]'s use of [name of plaintiff]'s name/likeness/identity; or
 - b. any unjust economic gain obtained by [name of defendant] from the use of [name of plaintiff]'s name/likeness/identity;
2. Any reduction in the commercial value of [name of plaintiff]'s name/likeness/identity as a result of [name of defendant]'s use of [name of plaintiff]'s name/likeness/identity;
3. The cost of corrective measures taken by [name of plaintiff] to restore his/her reputation or good will;
4. Any emotional distress, humiliation, inconvenience, and anxiety already experienced by [name of plaintiff]; and
5. Any emotional distress, humiliation, inconvenience, and anxiety reasonably probable to be experienced by [name of plaintiff] in the future.

SOURCE: *Reed v Real Detective Publ'g Co., Inc.*, 63 Ariz. 294 (1945); *Estate of Reynolds*, 235 Ariz. 80 (App. 2014); *Canas v. Bay Entertainment, LLC*, 252 Ariz. 117 (App. 2021).

USE NOTE 1: Arizona recognizes causes of action for both personal harms and commercial harms caused by an appropriation of a person's name or likeness. *See Reed, supra*. 63 Ariz. at 305-06 (recognizing a cause of action for emotional damages caused by the appropriation of a person's name or likeness) and *Reynolds, supra*, 235 Ariz. at 82-83 (recognizing a cause of action for commercial exploitation of a person's name or likeness). The RAJI Committee has included both types of remedies in Privacy Instruction 14A. Categories 1a and 1b set forth the measure of direct damages for commercial appropriation claims. Categories 2 and 3 set forth the indirect or consequential damages for commercial appropriation claims. Categories 4 and 5 set forth the measure of damages for personal harms. The court should instruct only on the categories of damages which are supported by the evidence in the case.

USE NOTE 2 (Categories 1a and 1b): The court in *Reynolds* adopted § 46 of the RESTATEMENT (THIRD) OF UNFAIR COMPETITION (1995). Section 46 indicates that the damages recoverable in commercial misappropriation claims are set forth in § 49 which states:

One who is liable for an appropriation of the commercial value of another's identity under the rule stated in § 46 is liable for the pecuniary loss to the other caused by the appropriation or for the actor's own pecuniary gain resulting from the appropriation, whichever is greater.

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Invasion of Privacy No. 14A Damages

Continued

Comment d to § 49 of the RESTATEMENT (THIRD) OF UNFAIR COMPETITION states:

Monetary relief [in appropriation cases] may be awarded for the pecuniary loss to the plaintiff or the pecuniary gain to the defendant resulting from the unauthorized use of the plaintiff's identity. As in other areas of unfair competition, the plaintiff is permitted to establish either or both measures of relief, but may recover only the greater of the two amounts.

Categories 1a and 1b are intended to capture the measure of damages described in § 49. While the court in *Reynolds* adopted § 46, the court did not determine the scope of damages recoverable in commercial misappropriation cases. Because there is no Arizona case which has addressed the measure of damages in commercial misappropriation cases, it will be for the court to determine whether a plaintiff may present evidence of both the losses suffered by the plaintiff and the gains achieved by the defendant or whether the plaintiff must elect the remedy prior to trial.

COMMENT: Consequential Damages (Categories 2 and 3). While the *Reynolds* case indicates that damages for commercial harms are recoverable in appropriation cases, there is no Arizona case which discusses the types of damages recoverable for such commercial harms. Section 49 of the RESTATEMENT (THIRD) OF UNFAIR COMPETITION sets forth the commercial damages recoverable in appropriation claims. In addition to the direct damages stated in categories 1a and 1b, comment d to § 49 indicates that other consequential damages may be recovered including: the reduction in the commercial value of the plaintiff's name/likeness/identity as a result of the defendant's use of the plaintiff's name/likeness/identity, and the cost of corrective measures taken by the plaintiff to restore his/her reputation or good will. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 cmt. d. The indirect damages identified in comment d are included in categories 2 and 3 of the instruction. Because there is no Arizona case which has addressed what elements of damages are recoverable in commercial misappropriation cases, it will be for the court to determine which of the elements of damages are recoverable.

INVASION OF PRIVACY 15

Affirmative Defenses — Qualified Privilege

[Name of defendant] claims that [he] [she] is not liable for invading [name of plaintiff]'s privacy because [describe nature of defendant's claim of privilege].¹ [Repeat description of claimed privilege] is protected from liability unless it was done with malice. [Name of plaintiff] claims that [name of defendant]'s conduct is not protected from liability because [name of defendant] acted with malice.

On the claim of malice, [name of plaintiff] must prove by clear and convincing² evidence:

1. [Name of defendant] knew that [his] [her] statement was untrue or had serious doubts about the truth of the statement and
2. [Name of defendant] was motivated by an improper purpose.

If you find that malice has been proven, then your verdict must be for [name of plaintiff]. If you find that malice has not been proven, then your verdict must be for [name of defendant].

SOURCE: *Green Acres Trust v. London*, 141 Ariz. 609 (1984) citing RESTATEMENT (SECOND) OF TORTS, Ch. 25, topic 3, “Occasions Making a Publication Conditionally Privileged”; *Advanced Cardiac Specialists v. Tri-City Cardiology*, 222 Ariz. 383 (App. 2009); RESTATEMENT (SECOND) OF TORTS § 652G (1977).

COMMENTS: Whether conduct is privileged is a question of law. *See Green Acres*, 141 Ariz. at 616, 688 P.2d at 624. Whether the defendant abused the privilege by acting with malice is a question of fact to be determined by the jury. *Id.*

USE NOTES:

¹Arizona recognizes a number of qualified or conditional privileges. *See Green Acres, supra*; *see also Advanced Cardiac, supra* (qualified privilege to report improper conduct to medical board); *Burns v. Davis*, 196 Ariz. 155 (App. 1999) (qualified privilege to provide information at zoning board hearing); and *Ramsey v. Yavapai Family Advocacy Center*, 225 Ariz. 132 (App. 2010) (qualified privilege to report suspected child abuse). Appropriate language to describe the applicable privileged conduct should be used in the instruction. For example, the first sentence might read: “Defendant claims that he is not liable for invading plaintiff’s privacy because he was reporting suspected child abuse.”

²To establish that a qualified privilege has been abused, the plaintiff must show malice by clear and convincing evidence. *See Advanced Cardiac*, 222 Ariz. at 387.

INVASION OF PRIVACY 16

Affirmative Defenses — Consent

[*Name of defendant*] contends that [he] [she] is not liable for invading [*name of plaintiff*]'s privacy because [*name of plaintiff*] consented to [*describe the alleged invasion of privacy*]. On this defense, [*name of defendant*] must prove:

1. [*Name of plaintiff*], by words or conduct, led [*name of defendant*] to reasonably believe that [*name of plaintiff*] agreed to [*describe defendant's conduct*] and
2. [*Name of defendant*] acted in a manner and for a purpose [which [*name of plaintiff*] had agreed to] [which [*name of defendant*] reasonably believed that [*name of plaintiff*] agreed to].¹

if you find that [*name of plaintiff*] consented to [*describe the alleged invasion of privacy*], then your verdict must be for [*name of defendant*]. If you find that [*name of plaintiff*] did not consent to [*describe the alleged invasion of privacy*], then your verdict must be for [*name of plaintiff*].

SOURCE: RESTATEMENT (SECOND) OF TORTS §§ 583, 652F cmt. b (1977).

USE NOTE: ¹ Choose the bracketed language that fits the facts of the case.