

INVASION OF PRIVACY INSTRUCTIONS

Introduction

The Restatement of Torts includes four separate torts in the classification of the Right to Privacy: (1) intrusion on the plaintiff's seclusion or private affairs, (2) public disclosure of private facts, (3) publicly placing the plaintiff in a false light, and (4) appropriation of the plaintiff's name or likeness. *See Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 338 (1989) *citing* RESTATEMENT (2D) OF TORTS § 652 (1977). Arizona has recognized causes of action for three of the four privacy torts: intrusion into private affairs, *see Hart v. Seven Resorts, Inc.*, 190 Ariz. 272, 279 (App. 1997), public disclosure of private facts, *see Reed v. Real Detective Publ'g Co., Inc.*, 63 Ariz. 294, 305-06 (1945), and false light invasion of privacy, *see Godbehere*, 162 Ariz. at 340-41. However, no Arizona appellate case has yet addressed whether Arizona will adopt a tort remedy for misappropriation. *But see Lemon v. Harlem Globetrotters Int'l, Inc.*, 437 F. Supp. 2d 1089, 1100 (2006) (concluding that Arizona would recognize a tort remedy for misappropriation claims). Accordingly, the RAJI Committee has drafted recommended instructions for Intrusion claims, Public Disclosure of Private Fact claims, and False Light claims along with related defenses.

Privacy Instructions 1-3 are intended for use in claims alleging intrusion on the plaintiff's seclusion or 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. All privacy claims would also include the causation and damages instructions (13-14) and any applicable affirmative defenses.

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, 947 P.2d 846, 853 (App. 1997); *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.*, 306 F.3d 806, 812-13 (9th Cir. 2002); RESTATEMENT (2D) 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 (2D) 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 OF TORTS § 652B (1977); RESTATEMENT (SECOND) OF TORTS § 8A (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 (1977); RESTATEMENT (SECOND) OF TORTS § 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 (1977); RESTATEMENT (SECOND) OF TORTS § 652G.

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.

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**

No instruction has been drafted for Invasion of Privacy by appropriation of plaintiff's name or likeness because there is no Arizona appellate case recognizing this cause of action.

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 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.”

² To 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 (1977) § 652F cmt. b; RESTATEMENT (SECOND) OF TORTS (1977) § 583.

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