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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2023-2024

SC-2023-0132

Regional Prime Television and Tommy Dwayne Hubbard

v.

**Jennifer South, individually and as administratrix
of the Estate of Jules Pierre Gillette, deceased**

**Appeal from Calhoun Circuit Court
(CV-20-900377)**

WISE, Justice.

Regional Prime Television ("Regional Prime") and Tommy Dwayne Hubbard appeal from a judgment entered in favor of Jennifer South, individually and as administratrix of the estate of Jules Pierre Gillette, deceased.

Facts and Procedural History

South and Gillette were married until Gillette's death on August 19, 2014, at the age of 49. They had one daughter together ("the daughter"), who was three and one-half years old at the time of Gillette's death. The couple had lived together in a former school building in Jacksonville ("the school building"); they were living in the school building at the time of the daughter's birth, and South and the daughter moved out of the school building weeks after Gillette's death.

This case involves an episode of a show titled Ghostly Encounters that was filmed in the school building. Ghostly Encounters was distributed on Regional Prime's channel, which was available on Roku streaming platform. Regional Prime is owned by Hubbard, and Hubbard is the sole employee of Regional Prime. Hubbard testified that he started Regional Prime as a community service "because we lived in what they call a media depressed area of Alabama and nobody was able to be -- to get news or entertainment." Hubbard produced various shows that appeared on Regional Prime's channel. When asked about the different types of shows on the channel, Hubbard replied:

"Oh, we got silly things. One is kind of a comedy. And we got one that's kind of drama. But it's all amateur stuff, you know,

same as this. We tried for a year and a half to do local news and tried to make it like a news presentation. But at the end of the day it gets to be a lot of work for no reward because, you know, I fund all this myself, and you know, the advertisers that I have, 92 percent of them are as a courtesy and the 7, 8 percent of them that pays some sort of remuneration doesn't even cover a 10th of the cost of running the platform."

He further testified that Regional Prime offered different categories of shows, including documentaries in which he would interview various people. When asked if he would fact-check the information provided by the people he interviewed, he replied:

"No, because you -- nobody does that. You don't go back and just fact-check everything unless you're putting it out as factual. If I'm putting this out -- say when we were doing the news, yeah, we did as much of that as we could. But if I'm just sitting there interviewing John Smith and he tells me he's a graduate of this and he done that, I'm not going to fact-check that. I'm going to take him for his word just like everybody else does. Because it didn't benefit me one way or the other nor is it detrimental to me one way or the other whether what he said is, you know, true or not. That's what it makes him look like, not me. You know, all I do is casually interview these people, you know, as a community service."

He testified that if he knew beforehand that someone was telling him a lie, he would not publish it and that he probably would not go through with the interview. Hubbard went on to state:

"And if by some chance -- this has never happened, but if by some chance I had interviewed somebody and found out 100 percent factually that what I had just interviewed was totally

erroneous then I would either not release it or take it down. But, you know, having found out factually not just cause someone said so."

One of the shows on Regional Prime's channel is Ghostly Encounters. Hubbard testified that he had known Jessica King, a purported psychic medium who is referred to in the show as "Clairvoyant Jess," for 15 to 20 years. He testified that King had told him she would like to do a show on the channel, that he had told her he would come and follow her around one day, and that they would see if they could make a show of it. Hubbard testified that they had made six episodes of the show in three years.

This case arises from episode three of Ghostly Encounters ("the episode"), which has a 2019 copyright date. Hubbard testified that he filmed, edited, directed, produced, and distributed the episode.¹ With regard to the episode, Hubbard testified that King had telephoned him and told him about the school building in Jacksonville. He testified that

¹The credits at the end of the episode listed Hubbard and his wife, Susanne Hubbard, as the video-camera operators. Hubbard testified: "I think if you'll watch all of our shows, not just that one, you'll see the exact same credits because it's a one-man show. My wife occasionally helps me run a second or third camera, you know."

King had told him that a paranormal group had gotten in touch with her and was asking for help in evaluating what was going on there, that "they're going to allow us to film," and that she thought it would be a good episode. Hubbard testified that King asked him if he wanted to come along and that he said he would. Hubbard testified that he, King, and Kiara Woods, another purported psychic medium, went to the school building and that there were actually three or four paranormal groups at the school building. He testified that, about half an hour after they arrived, Michael West showed up at the school building, identified himself as the owner of the building,² and gave everyone a speech about being careful because there were nails, debris, and broken glass in the building; that West had keys to the building; that West unlocked the front door of the building and welcomed everyone inside; and that the groups then went in various directions. Hubbard testified that West chatted

²South and the estate did not present evidence regarding the ownership of the school building during their case-in-chief. In responding to Regional Prime and Hubbard's motion for a judgment as a matter of law, plaintiffs' counsel asked the trial court to take judicial notice that the estate owned the school building, and defense counsel objected. After some discussion regarding inferences that could be drawn from the evidence, the trial court ultimately stated: "You know, I guess I'll leave it up to the jury to decide how they're going to deal with that if it becomes an issue."

with King and that, based on that chat, West led them to different parts of the building. He also testified that West had keys to the rear doors of the school building and to some interconnecting doors in the building.

With regard to the episode, Hubbard testified:

"And all I did was show up because [King] told me to show up and I showed up there. I followed her around. I tried to do some little engagement like you would as a host, and the show -- I mean, it's her show. I mean, I put it out simply because I could."

In the episode, Hubbard, King, and Woods toured the school building. During the episode, King talked about things that she purportedly heard, sensations she purportedly experienced, and feelings she purportedly had while in the building. Woods talked about the energy of various rooms, colors she sensed in various rooms, and feelings she experienced. At the beginning of the episode, King stated that, after she had originally received information regarding the building from a woman, a man "came," or appeared, to her at her house. She stated that she then talked to the woman who had originally contacted her, that she gave that woman the description of the man who had "come" to her, and that that woman told her she had a photograph of that man. King stated that Woods had also gotten the premonition or feeling that the school

building had been turned into a home. When Hubbard said West had said something about turning the school building into a home, King said that the premonition or feeling related to an earlier time; that, right after the school had closed, the person who had purchased the school building had planned to use part of the building as a home and part of the building as a business; and that King thought that that person had actually died there. Woods stated that she planned to walk around the school building and read the energy and the colors of the rooms. Hubbard asked if they were at the school building for investigatory purposes and not a cleansing, and King stated that they were not there for a cleansing. King stated that she was going to walk around the school building and that she wanted to see how the other paranormal groups worked. Hubbard stated that there were two paranormal groups at the school building. At one point, King stated that they were going to walk around and see what they "got" from different rooms and to get a person named Melissa from the group called "Backwoods Paranormal" to verify some of the things that had already been confirmed for Melissa. King stated that she was going to get Melissa to see if she could walk with the Ghostly Encounters group.

The camera then showed a room that appeared to be a gymnasium. Various items, which included stacks of what appeared to be seat cushions, were strewn about the room. In the next scene, King talked to another woman and asked about some of the items piled in the room.³ The woman said that someone had said that a man whom she referred to only as "he" had used some of the items for puppets and that "he" had also had a music room. King said that she had noticed the walls, and the other woman said that "he" had tried to make the room soundproof. King said that she had also been getting a feeling about the room being soundproof and that she also kept "hearing" something about trying to keep something out. King asked the woman if she knew anything about paranoia and said that she felt that there was a lot of paranoia. The woman replied: "Oh, yeah, I think he was, he was very" She then stated that "[h]is wife left him because he was " and then gestured to her head. King also said that she was picking up on a lot of vomiting. The other woman said that "he" had had a massive heart attack, that "he" had drunk himself to death, and that it had been weeks before

³Nothing in the episode indicates whether that woman was actually Melissa from Backwoods Paranormal.

anyone found "him" after "he" had died there. King said that that made sense, that she kept getting a feeling that she was not steady on her feet and that she was going to vomit, and that drunk would match feeling. The woman said that, in the basement, there were beds like doctor beds piled up and that "they" had said that, many years ago, back in the 1800s or 1900s, sick children would be taken in there and would die. King stated that she was also getting an elevated fever or that something was hitting her at the same time, that she did not know where that was coming from, and that it would rise all of a sudden and she would get really hot. The two then talked about things they did to be spiritually safe.

Subsequently, King talked to West, who was identified as the present owner of the school building. West stated that he and his partner had purchased the school building, that they thought it would be the perfect place for a haunted house, and that weird things started happening after they began working in the school building. King told West that, as soon as she had been provided with the address for the school building, a man with a handlebar moustache immediately "came" to her. West replied that that was "Pierre." King stated that the man

had not told her his name and that he was creepy and stared at her a lot. West told King that Pierre used to build and design puppets, and King replied that she "got" that from the man. West told her that, for the most part, everything was as Pierre left it but that they had started doing some cleanup and redesigning. West told King that it had been an experience. King said that she wanted to warn West that it would continue to be an experience as he continued to work on the school building. West said that he thought that it had gotten worse, and King stated that it was going to escalate. While talking, King told West that there was a lot of energy in the building and that she "got so much sickness" in the building. West told her that, when the building was still a school, any children who got sick or came down with a bad disease would be quarantined in the basement. King stated that the other woman had just told her that. King told West that she had picked up on dizziness and vomiting, that she was disoriented, and that she had a rise in temperature. King stated that the other woman had said that Pierre had a drinking problem. King said that she kept "hearing" mentally unstable. West said that Pierre did have a drinking problem. West also stated that, during the cleanup process, they had found letters that Pierre's wife had written to another

man and that, in the letters, Pierre's wife described herself and said that the reason she was leaving him was because he was physically abusive. King responded that she had told the man who had appeared to her at her house that he could only stay if he kept his hands off of her and that, if he touched her, he was gone. West went on to state that Pierre had been physically abusive to his wife. He then clarified that that was according to the letters and that he had not known Pierre. King then stated that she could say for sure that Pierre was physically abusive to his wife; that, the way he "came" to her, he was very demeaning as far as his stature and how he approached her; and that that was based on his spirit.

During the episode, West told King about an old rocking horse in the school building. King stated that it would rock on its own, and West agreed that it would. King said that that was what she had "just heard." West also said that, if you walked into a room, the rocking horse would turn and face you. West stated that no one had keys to the school building except him and his partner; that the building was completely secure; that nobody could come in from the outside; and when he came into the school building one day, the rocking horse had moved to the

opposite side of the building. At some point, West showed King the rocking horse. King said that the rocking horse had to go, that there was a certain way they would have to get rid of it, that she would have to think about how to get rid of it to make sure it was done safely, that there was "something" with the rocking horse; and that "something" was really bad. West took King to another area of the school building near a staircase and told King that he had smelled a bad sulfur smell in the area and that it had felt like somebody was looking at him while he was down there. King said that it felt like there were eyes on you. She also said that the sulfur smell signified the presence of a demonic entity, that the energy shift in another area was a portal, that there was a free-flowing gate of energy from "them" coming in and out, and that the portal could be closed or blocked off.

The group went downstairs to another area of the school building. As they approached a room, Woods bent over and made a noise. West said that that was the room where the children had been kept. At one point, Woods stated that she might throw up. West said that the beds could be seen to the right. King said sickness was trapped in the room, and Woods stated that the energy of the room was black and that the

hallway was muddy green and brown. King stated that that meant that the root of the issues in the school building was down there. Woods and King pointed to a corner. Woods started to walk away and said that she was nauseous. King called her back. King told Woods not to run away from "him"; to keep "him" over there; that if Woods walked away, that meant "he" was winning; and that they were not going to give "him" that. West asked if someone was in the corner, and King said "yeah." King asked Woods if she had seen a light form in that corner, and Woods agreed that she had. King then told Hubbard that a light had flashed in the corner for a brief second and that it was weird. West said that no one had ever been able to tell them what the rooms down there were for and that those rooms were not classrooms. Woods said that harm had happened in those rooms. King said that there were things that were not right that had happened to children in that room. Woods said that she felt something about the school and that it had happened like a cover-up. King then stated: "There was some twisted s--t. I mean that's all I can tell you." King told Woods that she had been told that children who were sick had been brought down to the basement and left to die. King also said that the black energy and the sickness they were feeling made sense.

At some point, King looked around, said "Quit touching me!," and brushed her arm even though no one was around her. King then stated: "I got my a-- grabbed upstairs, and now something is poking me." As King was talking to West and walking away, she said: "Stop touching me."

In another scene, West took the group into another room, which he said was the cafeteria, and also pointed out the kitchen. King exclaimed and said that this was where "they" got sick, and Woods made noises of agreement. King said that "it" was in the food, and Woods again agreed. King said that it was on purpose and that "they made them sick."

In the next scene, West said that the room they were in was "their" bedroom after "they" got married and that that was where "they" lived. King commented about a cartoon painting of Jesus on the wall. West told her that the school building had been a church before Pierre bought it. He stated that Pierre did not want to redecorate it, so he had left it the way it was. Woods commented that it felt like she had been hit in the ribs. Hubbard then asked West if he knew what years Pierre had lived in the school building. West stated that he did not know the exact dates, that the school building had been empty for about six years, and that he

wanted to say that Pierre and his wife had lived there for three years. King then stated that that was the room "he" would beat "her" in because she and Woods had been punched in the ribs as soon as they came in. King asked Woods if she remembered telephoning her and telling her that she kept getting a shot to the ribs, and Woods said "yeah" and nodded in agreement. King said that she did not know what that was and that she guessed that that was the energy emanating from where "he" used to abuse "her." Woods gestured to a closet area and stated: "She was locked in there too." West told them that the windows to the closet area had been covered with plywood but he had taken it off. King stated that "she" got put in there.

In a subsequent scene, West brought out a pair of old shorts and asked if King had any ideas. King replied: "Some weird S&M s--t, I don't know." Hubbard then stated that they were lederhosen, and he said that they were either German or from Germany. West stated that he had found them in a closet underneath a bunch of things. Hubbard said: "Well, if he was French, with a name like Pierre--." West then interjected and said that "he" was a lot bigger than that. King then said, "little boys," and Woods stated that they were for little boys. West then showed the

inside of the waistband, which said "lederhosen." King pointed out that that was what Hubbard had said, and Woods and King said that lederhosen were German. West said that he had found them, but he was not really sure what they were. Woods said something about a costume. King said that she knew, made a comment about a costume, and then made a face and a noise. King repeatedly stated that the lederhosen were for a little boy and said that that was what she was "hearing."

West then took the group to another room and said that the piano in the room was the oldest piano in the school building. King asked if there was another piano in the building, and West said that there was a piano in every room and that Pierre had fixed and tuned pianos. Someone made a comment about the pied piper, and Woods stated: "[I]t's like the pied piper ... play the music for children." Woods then made a face at the camera and said it was a little sick and twisted. King then stated: "The music, the puppets, and that makes sense for, you know, also being a little drawn to something he shouldn't have been." King then made a comment about "him" putting "his" hands on women, that that was just wrong, and that somebody should have tased "him."

In the next room, King gestured to a wooden frame and stated that that was "his" bed up there, and the room was "his" first bedroom before "his" wife moved in, that that was where "his" bed had been, and that the bed had been taken down. West told them that the mattress and/or box springs from the bed was in another room. He also told them that there had been a box around the top where a person could not see it and that they had removed the box. King made a comment about not wanting something being done to be seen and that it tied into the paranoia she was "getting." She then said that the paranoia was from touching little boys' "no-no squares." West then pulled out two puppets and showed them to King. He said that one of the puppets was one of Pierre's completed puppets. At some point, Woods stated that she felt that "he" had used the puppets as bait; that "he" had everything sealed off; and that, when "they" got out of line, "he" poisoned "them" and killed "them." She said it was sick, but that that was the full picture. King said that she knew. Hubbard then asked if Woods actually got the feeling "he" had killed, and Woods replied, "through poison, yeah, through the food." King said that she thought the poison in the food was when the school was open. She said that she thought the first part of Woods's statement was

right but that the latter part was when the school was open. Subsequently, King asked West if he knew where "he" had died, and West said that he did not.

The group went into another room, and West said that that was where Pierre had played drums and played in a band. The comment was made: "He had a band of something." West stated that that room was soundproofed. The camera panned around the room and showed items that appeared to be pieces of foam against a wall and some sort of material on the ceiling.

West then took the group into another room. West said that that room had been full of personal belongings and that that was where the letters had been found. Woods picked up a strip of film negatives from the floor, and West stated that there were a lot of undeveloped photographs. Woods held up the strip to the light and said that she could see a person, two people with a lantern, what looked like a ball, a woman in a dress, and another person taking a picture. She picked up another strip, and she said that it looked like the same people. She also picked up some other film strips and stated that one of them had pictures on it but that she could not make them out. King then came back into the

shot, held up a photograph, said that that was the man that had "come" to her and asked Hubbard to get a closeup. The photograph showed a man sitting at a table. At trial, South testified that the man in the photograph was Gillette. Hubbard said that the man looked French, and King said that he looked "like an a--hole."

The group went into another room, and West said that they had found two hospital beds in the room. Woods said that she was feeling pain in her lower left abdomen. King said that there were some interesting things in the room, that she just did not know what "he" was doing, and that it was just strange. West said that there was a little bit of everything and that none of it made sense. West also told the group that there were a lot of drawings, including a lot of drawings of weird things. Woods held up some of the drawings, which included a drawing of a little boy sitting in chair, a drawing of a dog, and a drawing of two little girls. A sketchpad and a drawing of a house were also shown. At one point, King commented that there were a lot of children that "he" seemed to be drawn to drawing. West said that he did not know if they were "his" personal drawings. Hubbard pointed out that somebody had

signed the drawings and that it appeared to say something like "Jennifer Frank Farmer."

Later, West directed King to a bathroom and stated that there was the wreath off of a grave inside. Inside the bathroom was what appeared to be a funeral wreath on a stand. King said that somebody could not breathe in there, that there was something about breathing in there, and that that was the only room where she had felt like she was being suffocated or something. She also stated that someone was touching her again and that it reminded her of "the a-- grabbing" earlier. King asked Woods if she heard a ringing, and Woods said that she did.

Out in a hallway, there were lockers and a set of double doors with a chain and a padlock. West used a key to unlock the padlock. At some point, King looked behind her and said: "Stop." West opened the door to the outside and King stated that she was getting a weird feeling. West closed the doors and then chained and locked them again.

The group then went into a room off the hallway, and West told them that that was the room where the rocking horse originally had been located. King commented about Bible verses that were written on the chalkboard. She asked West if "he" had left it all there from when it was

a church, and West stated that he did not really know. King stated that that was just strange. Hubbard then asked King what she thought about a chiropractor's table being in the room. King responded, "Again, boys' no-no squares," and said that there was something off with that. She stated that there were pool tables in one room, that "he" had his bed on stilts in another room, that there was something going on, and that it was weird. As he was plugging in the table, West said that everybody had said that it was a chiropractor's table, but that he was not sure. King said that she had never seen a chiropractor's table like that. King then stated: "Have you ever been to a chiropractor that does that? Seriously, look at it, Tom."

In the next scene, they were in a girls' bathroom. King stated that that was where "they" actually felt safe.

Toward the end of the episode, King and Woods were standing outside the building. Hubbard stated that it appeared that the man who had lived there was French and creepy. Hubbard commented about the bed on stilts. He also said: "Okay, I get being a puppeteer ... because the Muppets guy was famous for being a puppeteer." However, he stated that that seemed a little more of a creepy factor than it was anything else and

then commented on the drawings of the children and some of the film negatives they had seen. King asked Hubbard if he had seen something creepy on those, and Hubbard said that they could not really define what was on them by holding them up to the light, that there were things on the negatives, and that it would be interesting to have them developed. He commented about the photograph that King had found, and King responded that it looked just like the man who had "come" to her and that it was exactly what she had described to the woman who had originally contacted her. Hubbard then said that they were outside because the air was fresh and it had been very hot and stuffy inside the school building. King then said that the energy in the school building was extremely heavy and that there were places where the energy felt like walls. Hubbard then commented on the chiropractor's table and the hospital beds, and Woods pointed out the rocking horse. King stated that the rocking horse would turn and follow you and that that would be uncomfortable. Hubbard stated that there were a lot of interesting things in the school building that could not be explained and that it was very fortunate that West had walked around with them to give them insight and perspective on what King had already surmised. King stated that it

was nice to have validation of what she and Woods had "gotten" and that she was making sure they got some information about what they had "gotten." Hubbard then asked King about her initial general take on the paranormal aspect of the school building. King stated that she had told West that it was going to escalate because "they" were not happy about the fact that West was about to start doing renovations. Hubbard commented about disturbing "their" home, and King said that "they" were feeling very disturbed, that "they" were not happy about it, that "they" wanted it to stay exactly like it was, and that "they" did not like anybody in the school building. Hubbard then asked Woods her opinion, and she stated that the school building was yucky, disturbing, and full of low vibration. Woods stated that there was a lot of muddy brown, muddy green, and black colors, and she agreed that that was negative. Woods stated that there was low vibration in the school building and that that was why it was so thick and so hot and stuffy in the building. Hubbard stated that some things were pretty creepy. He also stated that the soundproofing in multiple rooms was the thing that really made him go "there was some s--t going on here." Hubbard stated that he could understand having one music room where you wanted to record but noted

that there were a lot of rooms with soundproofing. King said that she had "gotten" that "he" was trying to keep the sound in and that "he" did not want the sound of what was being done in there to get outside. King also stated that "he" had a lot of paranoia and that she thought that the paranoia was because of the things "he" had done in the building. King said that, if a person was touching little boys' "no-no squares," it was not a good thing. Hubbard then said: "So we have a paranormal pedo." King agreed and said that Hubbard had been looking for something with an extra interesting twist, and here they were. Hubbard said that it was true that something interesting and new popped up in every show. After a little more talking, Hubbard wrapped up the episode.

When asked at trial if the episode had been put out as factual news or if it had been put out as entertainment, Hubbard replied: "It was put out there for those people who believe that to have -- to be entertained by that location and those people." When asked if Ghostly Encounters was presented as fiction, Hubbard responded:

"Well, yeah. I mean, how can it be anything but? I mean, did you -- go to their website and read the description of the show. I mean, it's a lark I call it. I mean, it's just fun. It's innocent humor intended anyway. It might not end up being that way. But it's innocent entertainment to make people happy. And I understand that it don't make everybody happy, and I just

wish that they would call me on the telephone and tell me if it doesn't."

Hubbard testified that there was a Ghostly Encounters section on Regional Prime's website that included a "splash screen" and a hyperlink to the channel on the Roku streaming platform. However, he stated that the show could not be watched through the hyperlink. Hubbard also admitted that the website did not include any disclaimers stating that the show was only for entertainment, stating that it should not be taken at face value, or stating that the information had not been verified.

"[PLAINTIFFS' COUNSEL:] So to the average person watching Ghostly Encounters, Episode Number 3 where you called Pierre a paranormal pedo, where psychic Jess says he looks like an a--hole, where the speaker that you keep referring to as Michael says that Jennifer was beat by her husband, there's nothing to tell viewers of that that none of that is true, is there?"

"[HUBBARD:] There's no disclaimers, no."

"[PLAINTIFFS' COUNSEL:] And you put that out there and you put it out into the world and you don't do anything to lessen the impact of how people may perceive it; is that right?"

"[HUBBARD:] I explained that earlier during my examination."

"[PLAINTIFFS' COUNSEL:] Right. But now my question is, is that right?"

"[HUBBARD:] That is correct."

"[PLAINTIFFS' COUNSEL:] So you just put it out there and it's out there and people can decide whether they believe it or not?

"[HUBBARD:] Yes."

South testified that Gillette had been an artist and that he had been well-known, outgoing, and well-liked. She testified that Gillette had owned a company that made elaborate, life-size puppets; that some of the puppets he had made were used as therapy puppets; and that some of the puppets he had made were used in children's programming. She further testified that Gillette had also painted Victorian houses, one of which was known as "The Painted Lady" in Anniston and had been featured on the front page of a local newspaper. She also testified that Gillette had acted in plays and had won some awards for acting in different plays. South further testified that Gillette was a musician and wrote books.

South testified that Gillette had previously been married when he had been around 19 to 20 years old, that he and his first wife had been married about 5 or 6 years, that that was in a different state, and that he and his first wife had had a daughter together. South agreed that, although the episode referred to Pierre's wife, it did not mention her by name. However, she testified that the episode referred to the wife who

had lived in the school building and that she was Gillette's only wife who had lived in the school building. South further testified that the episode could not have been talking about Gillette's first wife, that his first marriage had been about 30 years ago, and that Gillette did not live in the school building 30 years ago.

South testified that she had learned of the episode when her sister-in-law from Florida telephoned her and told her about the episode. South testified that she had subsequently watched the episode. South testified that most of the information in the episode was false. South denied that Gillette had had a drinking problem and testified that he had never had any issue with alcohol abuse. She also testified that Gillette had not been "weird" and that he had not had a mental illness. She further testified that Gillette had never physically abused her and that she had never written a letter to another man stating that Gillette had physically abused her. Finally, she testified that Gillette had not abused little boys. During plaintiffs' counsel's examination of South, the following occurred:

"[PLAINTIFFS' COUNSEL:] And you heard me ask him yesterday how do you think Ms. South or Jennifer feels about this what you call entertainment. Now is your opportunity. Tell the jury how you feel about this broadcast.

"[SOUTH:] I hate it. I hate that it's out there. I've never been hit in my life, maybe spanked as a child, I don't remember, but I've never been hit in my life by my husband who loves me -- hit me, talking about locking me in a closet -- I'm claustrophobic. There is no way I would let anybody lock me in a closet.

"[PLAINTIFFS' COUNSEL:] And the entirety of this video, is anything in this broadcast true?

"[SOUTH:] No. He said it was our bedroom. It was our bedroom. That is true.

"[PLAINTIFFS' COUNSEL:] It was your bedroom?

"[SOUTH:] Yes, that was our bedroom.

"[PLAINTIFFS' COUNSEL:] And you did live there?

"[SOUTH:] Yes, we did live there.

"[PLAINTIFFS' COUNSEL:] Other than the fact that it was your bedroom in this clip that we're looking at now and other than the fact that you, [Gillette], and [the daughter] lived there, was there anything else in that entire broadcast true?

"[SOUTH:] No, not that I can think of. I don't think so.

"[PLAINTIFFS' COUNSEL:] So is it your testimony that Tommy Hubbard and Regional Prime Television [have] used [Gillette's] name and image --

"[SOUTH:] Yes.

"[PLAINTIFFS' COUNSEL:] -- to produce a show and none of the statements, other than the fact that you did live

there and that is your bedroom, none of the other statements were true?

"[SOUTH:] Correct.

"[PLAINTIFFS' COUNSEL:] Is that your testimony today?

"[SOUTH:] Yes, it is.

"[PLAINTIFFS' COUNSEL:] Oh, and that you were married?

"[SOUTH:] Yes, we were married.

"[PLAINTIFFS' COUNSEL:] And there's another portion of the video in evidence, and the jury is going to get to see it because opposing counsel has indicated she's going to play it, but the video indicates that [Gillette] actually -- you've testified that [Gillette] died at the hospital, but that's not what Mr. Hubbard says. Did [Gillette] die in that school?

"[SOUTH:] No, he did not die in the school. He died in the hospital.

"[PLAINTIFFS' COUNSEL:] Did [Gillette] even have a heart attack -- was his heart attack, did it occur at the school?

"[SOUTH:] No, it did not. It occurred at work.

"[PLAINTIFFS' COUNSEL:] So nothing about [Gillette's] death that appears in this video is true?

"[SOUTH:] No."

South testified that, when she saw the episode, she was very upset and angry and that it still made her very angry at the time of trial. She

further testified that the allegations that Gillette had molested little boys made her sick and that the allegations still made her sick at the time of trial. South further testified that she was almost in constant fear that the daughter would either see the episode or hear about the allegations included in the episode. Finally, South testified that she had lost sleep over the episode.

On July 24, 2020, South, individually and as the representative of Gillette's estate, sued Regional Prime, Hubbard, Roku, Inc., Amazon.com Services, LLC, and various fictitiously named defendants in the Calhoun Circuit Court.⁴ She subsequently filed an amended complaint. In the amended complaint, South and the estate alleged a violation of the Alabama Right of Publicity Act, § 6-5-770 et seq., Ala. Code 1975. The amended complaint also included a defamation claim by South, a tort-of-outrage claim by South and the estate, a trespass claim by the estate, and invasion-of-privacy claims by South.⁵

⁴South never substituted any named parties for the fictitiously named defendants.

⁵Roku and Amazon filed motions to dismiss the plaintiffs' claims against them, which the trial court granted.

Regional Prime and Hubbard filed an answer to the amended complaint. They later filed a motion to dismiss the amended complaint pursuant to Rule 12(b)(6), Ala. R. Civ. P., which the trial court denied. On September 21, 2022, Regional Prime and Hubbard filed a motion for leave to submit motions for a judgment on the pleadings, which the trial court denied.

The case was tried by a jury on the following claims against Regional Prime and Hubbard ("the defendants"): the estate's violation-of-the-right-of-publicity claim and South's claims of defamation, the tort-of-outrage, and invasion of privacy. The jury returned a verdict in favor of the estate as to its right-of-publicity claim and awarded the estate \$500,000 in compensatory damages and \$1,000,000 in punitive damages. The jury also returned a verdict in favor of South and awarded her \$500,000 in compensatory damages and \$1,000,000 in punitive damages. The trial court subsequently entered a judgment on the jury's verdicts.

The defendants filed a "Defendants' Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for a New Trial," which was denied by operation of law. This appeal followed.

Standard of Review

""The standard of review applicable to a motion for directed verdict or judgment notwithstanding the verdict [now referred to as a preverdict and a postverdict motion for a judgment as a matter of law] is identical to the standard used by the trial court in granting or denying the motions initially. Thus, when reviewing the trial court's ruling on either motion, we determine whether there was sufficient evidence to produce a conflict warranting jury consideration. And, like the trial court, we must view any evidence most favorably to the nonmovant.'"

"Glenlakes Realty Co. v. Norwood, 721 So. 2d 174, 177 (Ala. 1998) (quoting Bussey v. John Deere Co., 531 So. 2d 860, 863 (Ala. 1988)).'

"Parker v. Williams, 977 So. 2d 476, 480 (Ala. 2007)."

Springhill Hosps., Inc. v. Critopoulos, 87 So. 3d 1178, 1180-81 (Ala. 2011).

""[T]his Court uses the same standard the trial court used initially in granting or denying a JML [judgment as a matter of law]. Palm Harbor Homes, Inc. v. Crawford, 689 So. 2d 3 (Ala.1997). Regarding questions of fact, the ultimate question is whether the nonmovant has presented sufficient evidence to allow the case or the issue to be submitted to the jury for a factual resolution. Carter v. Henderson, 598 So. 2d 1350 (Ala.1992). For actions filed after June 11, 1987,

the nonmovant must present 'substantial evidence' in order to withstand a motion for a JML. See § 12-21-12, Ala. Code 1975; West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989). A reviewing court must determine whether the party who bears the burden of proof has produced substantial evidence creating a factual dispute requiring resolution by the jury. Carter, 598 So. 2d at 1353. In reviewing a ruling on a motion for a JML, this Court views the evidence in the light most favorable to the nonmovant and entertains such reasonable inferences as the jury would have been free to draw. Motion Industries, Inc. v. Pate, 678 So. 2d 724 (Ala. 1996). Regarding a question of law, however, this Court indulges no presumption of correctness as to the trial court's ruling. Ricwil, Inc. v. S.L. Pappas & Co., 599 So. 2d 1126 (Ala. 1992).

"Furthermore, a jury verdict is presumed to be correct, and that presumption is strengthened by the trial court's denial of a motion for a new trial. Cobb v. MacMillan Bloedel, Inc., 604 So. 2d 344 (Ala. 1992). In reviewing a jury verdict, an appellate court must consider the evidence in the light most favorable to the prevailing party, and it will set aside the verdict only if it is plainly and palpably wrong. Id."

"Delchamps, Inc. v. Bryant, 738 So. 2d 824, 830-31 (Ala. 1999)."

"I.C.U. Investigations, Inc. v. Jones, 780 So. 2d 685, 688 (Ala. 2000)."

Butler v. Town of Argo, 871 So. 2d 1, 11-12 (Ala. 2003).

Discussion

I.

The defendants argue that they were entitled to a judgment as a matter of law as to the estate's claim that they violated the Alabama Right of Publicity Act, § 6-5-770 et seq., Ala. Code 1975.⁶

Section 6-5-772, Ala. Code 1975, provides:

"(a) Except as otherwise provided in this article [i.e., the Alabama Right of Publicity Act], any person or entity who uses or causes the use of the indicia of identity of a person, on or in products, goods, merchandise, or services entered into commerce in this state, or for purposes of advertising or selling, or soliciting purchases of, products, goods, merchandise, or services, or for purposes of fund-raising or solicitation of donations, or for false endorsement, without consent shall be liable under this article to that person, or to a holder of that person's rights.

⁶The defendants also reference South's claim arising from the Alabama Right of Publicity Act. The jury did not return a verdict in favor of South as to that claim. Accordingly, the defendants' argument in this regard is moot.

"(b) Liability may be found under this section without regard as to whether the use is for profit or not for profit."

Section § 6-5-771, Ala. Code 1975, provides:

"For the purposes of this article, the following terms shall have the following meanings unless the context clearly indicates otherwise:

"(1) Indicia of identity. Include those attributes of a person that serve to identify that person to an ordinary, reasonable viewer or listener, including, but not limited to, name, signature, photograph, image, likeness, voice, or a substantially similar imitation of one or more of those attributes.

(2) Person. A natural person or a deceased natural person who at any time resided in this state or died while in this state or whose estate is, or was, probated in any county in this state.

(3) Right of publicity. There is a right of publicity in any indicia of identity, both singular and plural, of every person, whether or not famous, which right endures for the life of the person and for 55 years after his or her death, whether or not the person commercially exploits the right during his or her lifetime. The right is freely transferable and descendible, in whole or in part, and shall be considered property of the estate of the decedent unless otherwise transferred."

Section § 6-5-773, Ala. Code 1975, provides, in pertinent part:

"(a) Nothing in this article will allow for an abridgement of free speech rights under the First Amendment of the United

States Constitution and Section 4 of the Constitution of Alabama of 1901.

"(b) It is a fair use and not a violation of Section 6-5-772 if the use of the indicia of identity ... is part of an artistic or expressive work, such as a television program ... or any advertising or promotion of the same, unless the claimant proves, subject to subsection (a), that the use in an artistic work is such a replica as to constitute a copy of the person's indicia of identity for the purposes of trade."

(Emphasis added.)

In this case, the defendants used Gillette's middle name and photograph in the episode. Evidence was presented that Ghostly Encounters was a television show that was available on Regional Prime's channel on the Roku streaming platform. Thus, pursuant to § 6-5-773(b), the use of Gillette's indicia of identity was a fair use and not a violation of § 6-5-772 unless the estate proved that the use of Gillette's indicia of identity was such a replica "as to constitute a copy of [his] indicia of identity for the purposes of trade."

The Alabama Comment to § 6-5-773 provides: "The phrase 'for the purposes of trade' in subsection (b) is based on the definition set out in the Restatement (Third) of Unfair Competition § 47 (1995) and comment c. thereto."

The Restatement (Third) of Unfair Competition § 47 (Am. L. Inst.

1995) provides:

"The name, likeness, and other indicia of a person's identity are used 'for purposes of trade' under the rule stated in § 46 [addressing, in general, the right of publicity] if they are used in advertising the user's goods or services, or are placed on merchandise marketed by the user, or are used in connection with services rendered by the user. However, use 'for purposes of trade' does not ordinarily include the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses."

Comment c. to § 47 provides:

"c. Use in news, entertainment, and creative works. The right of publicity as recognized by statute and common law is fundamentally constrained by the public and constitutional interest in freedom of expression. The use of a person's identity primarily for the purpose of communicating information or expressing ideas is not generally actionable as a violation of the person's right of publicity. The scope of the activities embraced within this limitation on the right of publicity has been broadly construed. Thus, the use of a person's name or likeness in news reporting, whether in newspapers, magazines, or broadcast news, does not infringe the right of publicity. The interest in freedom of expression also extends to use in entertainment and other creative works, including both fiction and nonfiction. The use of a celebrity's name or photograph as part of an article published in a fan magazine or in a feature story broadcast on an entertainment program, for example, will not infringe the celebrity's right of publicity. Similarly, the right of publicity is not infringed by the dissemination of an unauthorized print or broadcast biography. Use of another's identity in a novel, play, or motion picture is also not ordinarily an infringement.

The fact that the publisher or other user seeks or is successful in obtaining a commercial advantage from an otherwise permitted use of another's identity does not render the appropriation actionable. However, if the name or likeness is used solely to attract attention to a work that is not related to the identified person, the user may be subject to liability for a use of the other's identity in advertising. See Comment a. Similarly, if a photograph of the plaintiff is included in the defendant's publication merely for the purpose of appropriating the plaintiff's commercial value as a model rather than as part of a news or other communicative use, the defendant may be subject to liability for a merchandising use of the plaintiff's identity. See Comment b.

"Some cases indicate that the right to use another's identity in news reports and similar works may be forfeited if the work contains substantial falsifications. Such cases, however, are more appropriately regarded as actions for defamation or for invasion of privacy by placing the plaintiff in a false light rather than for infringement of the right of publicity. When the imposition of liability turns on the truth or falsity of the defendant's statements, the defendant is also entitled to the constitutional safeguards that have been incorporated into the law of defamation and false light privacy."

In this case, the evidence was undisputed that Gillette's name and photograph were not used in any of the advertisements that aired during the episode. Additionally, the estate did not present any evidence indicating that Gillette's name and photograph had been used to advertise Hubbard's or Regional Prime's goods or services, that Gillette's name and photograph had been placed on any merchandise marketed by

Hubbard or Regional Prime, or that Gillette's name and photograph had been used in connection with any services rendered by Hubbard or Regional Prime. See Restatement (Third) of Unfair Competition § 47. Hubbard also testified that he did not solicit any of the advertisers by using Gillette's name, that he did not make any financial profit from Gillette's middle name and photograph being used in the episode, and that he did not receive any monetary benefit from the episode. Based on the foregoing, the estate did not present substantial evidence demonstrating that the use of Gillette's indicia of identity in the episode was "for the purposes of trade." § 6-5-773(b). Accordingly, the trial court erred when it denied the defendants' motion for judgment as a matter of law as to the estate's claim for alleging a violation of the Alabama Right of Publicity Act.

II.

Next, the defendants argue that the trial court should have granted their motion for judgment as a matter of law as to South's invasion-of-privacy claims.

"This Court has defined the tort of invasion of privacy as the "intentional wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities."

Rosen v. Montgomery Surgical Ctr., 825 So. 2d 735, 737 (Ala. 2001) (quoting Carter v. Innisfree Hotel, Inc., 661 So. 2d 1174, 1178 (Ala. 1995)). The tort of invasion of privacy consists of four limited and distinct wrongs:

""(1) intruding into the plaintiff's physical solitude or seclusion; (2) giving publicity to private information about the plaintiff that violates ordinary decency; (3) putting the plaintiff in a false, but not necessarily defamatory, position in the public eye; or (4) appropriating some element of the plaintiff's personality for a commercial use.""

"[S.B. v. Saint James School, 959 So. 2d [72,] 90 [(Ala. 2006)] (quoting Johnston v. Fuller, 706 So. 2d 700, 701 (Ala. 1997)). Each of these categories has distinct elements, and each category ""establishes a separate privacy interest that may be invaded."" Regions Bank v. Plott, 897 So. 2d 239, 243 (Ala. 2004) (quoting Doe v. High-Tech Inst., Inc., 972 P.2d 1060, 1065 (Colo. App. 1998))."

Flickinger v. King, [Ms. SC-2022-0721, Apr. 21, 2023] ___ So. 3d ___, ___ (Ala. 2023).

In this case, the trial court instructed the jury on the following grounds for invasion of privacy -- the intrusion upon South's physical solitude or seclusion; publicity of information about South that violated ordinary decency; and putting South in a false, but not necessarily defamatory, position in the public eye.

A.

Initially, the defendants argue that the trial court erroneously denied their motion for a judgment as a matter of law as to South's invasion-of-privacy claims based on wrongful intrusion and unwarranted publicity.

1.

Initially, the defendants argue that "South's invasion of privacy claims are subject to the First Amendment's guarantee of free speech." Defendants' brief, p. 22.

"In Phillips v. Smalley Maintenance Services, Inc., 435 So. 2d 705 (Ala.1983), this Court adopted the Restatement (Second) of Torts definition of the wrongful-intrusion branch of the invasion-of-privacy tort:

"'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.'

"Restatement (Second) of Torts § 652B (1977). Comment c to § 652B states in part: '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.' The wrongful intrusion may be by physical intrusion into a place where the plaintiff has secluded himself, by discovering the plaintiff's private affairs through wiretapping or eavesdropping, or by some investigation into the plaintiff's private concerns, such as opening private mail

or examining a private bank account. Restatement (Second) of Torts § 652B cmt. b; see Vernars v. Young, 539 F.2d 966 (3d Cir. 1976) (holding that invasion of privacy occurred when mail addressed to plaintiff was opened by defendant without plaintiff's consent); see generally, W. Page Keeton, et al., Prosser and Keeton on the Law of Torts, § 117, at 854-55 (5th ed. 1984); 62 Am. Jur. 2d Privacy §§ 51-57 (1990). Further, if the means of gathering the information are excessively objectionable and improper, a wrongful intrusion may occur. See Hogin v. Cottingham, 533 So. 2d 525 (Ala. 1988) (wrongful intrusion occurs when there has been abrupt, offensive, and objectionable prying into information that is entitled to be private)."

Johnston v. Fuller, 706 So. 2d 700, 702 (Ala. 1997) (emphasis added).

"In regard to a claimed invasion of privacy based on a defendant's giving publicity to private information, this Court has adopted the language and reasoning of Restatement (Second) of Torts § 652D (1977). Johnston[v. Fuller], 706 So. 2d [700,] 703 [(Ala. 1997)]. Section 652D states:

"One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

"(a) would be highly offensive to a reasonable person, and

"(b) is not of legitimate concern to the public."

"Ex parte Birmingham News, Inc., 778 So. 2d 814, 818 (Ala. 2000).

"....

"It is axiomatic, however, that a claim of invasion of privacy based on a defendant's giving publicity to private information about the plaintiff can succeed only if the plaintiff can prove that the publicized information was actually private at the time it was publicized. See Abernathy v. Thornton, 263 Ala. 496, 498, 83 So. 2d 235, 237 (1955) ("There can be no privacy in that which is already public." (quoting Charles Hepburn, Cases on the Law of Torts, p. 504 (1954))); Falona v. Hustler Magazine, Inc., 799 F.2d 1000, 1006 (5th Cir. 1986) (stating 'the obvious' that 'the tortious disclosure of private facts "applies only to private facts"' (quoting Falona v. Hustler Magazine, Inc., 607 F. Supp. 1341, 1359 (N.D. Texas 1985))); Grimsley v. Guccione, 703 F. Supp. 903, 910 (M.D. Ala. 1988) ('[A] defendant who merely gives further publicity about a plaintiff concerning information already made public cannot be held liable' for an invasion of privacy based on giving publicity to private information.)."

Facebook, Inc. v. K.G.S., 294 So. 3d 122, 145-46 (Ala. 2019)

In Doe v. Roe, 638 So. 2d 826 (Ala. 1994), the plaintiff, John Roe, as the next friend for his minor adoptive children, filed a complaint against Jane Doe for injunctive relief, seeking to prohibit the distribution of a book Doe had written about the murder of the children's natural mother by their natural father. The natural father had murdered the natural mother in 1984, dismembered the natural mother's body, and buried the body underneath a fishpond in the backyard of the family's home. The

body was discovered approximately three year later, and the event received a great deal of publicity. After the natural father was arrested for the murder, the children were in the custody of relatives for more than a year. Subsequently, Roe and his wife, who lived in another state, adopted the children. About a month before the natural father's trial, the children moved into the Roes' home. The natural father was convicted and received a life sentence. Doe wrote a novel about the murder. Although she contacted various commercial publishers, none were interested in publishing the book. Doe ultimately had 1,000 copies of the book printed so that she could distribute the book herself. Roe filed a complaint seeking an injunction to prevent distribution of the book. The trial court initially entered a temporary restraining order in which it found "that the minor children were 'likely to suffer an unlawful invasion of their privacy and mental solitude with resulting irreparable mental and emotional injuries' if the novel was distributed." 638 So. 2d at 827. After a hearing, the trial court entered a preliminary injunction. The trial court ultimately entered an order permanently enjoining the distribution of the book. Doe filed a motion to set aside the order, but that motion was denied by operation of law. Doe appealed to this Court.

The question in Doe was whether the injunction violated Article 1, § 4, of the Constitution of Alabama. In addressing that issue, this Court addressed Roe's invasion-of-privacy claims based upon wrongful intrusion and unwarranted publicity as follows:

"This Court has recognized that the tort of invasion of privacy occurs when one intrudes upon a plaintiff's physical solitude or seclusion or wrongfully intrudes into private activities in a manner that would outrage, or cause mental suffering, shame, or humiliation to, a person of ordinary sensibilities. Johnson[v. Corporate Special Servs., Inc.], 602 So. 2d 385, 387[(Ala. 1992)]. However, in McCaig v. Talladega Publishing Co., 544 So. 2d 875, 879 (Ala. 1989), this Court stated that the right to privacy does not prohibit the broadcast of a matter that is of legitimate public concern. Thus, like most courts, faced with the competing interests of the right to privacy and the right to freedom of speech, this Court has held that the right to freedom of speech transcends the right to privacy so long as the speech pertains to a matter of public concern. Smith v. Doss, 251 Ala. 250, 37 So. 2d 118 (1948); see Peter Felcher and Edward Rubin, Privacy, Publicity, and the Portrayal of Real People by the Media, 88 Yale Law J. 1577 (1979).

"In Smith v. Doss, the plaintiffs, the daughters of a man who had been missing, sued the defendant for damages, alleging the tort of invasion of privacy. The plaintiffs claimed that the defendant, a radio station owner, had invaded their right to privacy by broadcasting the events of the disappearance of their father. This Court summarized the right of privacy as

""the right of a person to be free from unwarranted publicity" or "the unwarranted appropriation or exploitation of one's personality,

the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities."

"251 Ala. at 252-53, 37 So. 2d at 120 (quoting a legal encyclopedia).

"After summarizing the right of privacy, the Court said that "[f]requently, the public has an interest in an individual which transcends his right to be left alone" and "since the whole is greater than its component parts, privacy rights must often yield to public interest." Smith v. Doss, 251 Ala. at 253, 37 So. 2d at 120. The Court held that the defendant had not violated the plaintiffs' right to privacy because he had only broadcast events of public concern that were already a part of the public record.

"Further, in Campbell v. Seabury Press, 614 F.2d 395 (5th Cir. 1980), the plaintiff, a former sister-in-law of the defendant, sued the defendant author and his publisher for publishing in his autobiography facts relating to the plaintiff's marriage to the defendant's brother, who was a famous civil rights leader. Citing Smith v. Doss for the proposition that the privilege to publish or broadcast news or other matters of public concern applies to the invasion of privacy tort, the 5th Circuit held that the publication of the defendant's book did not intrude upon the plaintiff's privacy. It stated that because the marriage, as it impacted on the defendant author, was a matter of legitimate public interest (this was not disputed by the plaintiff), the author and publisher did not tortiously invade the plaintiff's privacy by including facts relating to the plaintiff's home life and her marriage with the author's brother.

"Unlike the plaintiff in Campbell, Roe argues that the events summarized in Doe's novel are not of legitimate public concern. We disagree. Society's interest in the events surrounding this murder was recognized long before Doe wrote her novel. Like the events surrounding the disappearance and reappearance of the plaintiffs' father in Smith v. Doss, the events of this murder were also outlined in the media and detailed in the trial transcript, which is a matter of public record. Thus, we hold that the events are a matter of public interest, and as such can be published without improperly intruding into the children's seclusion and without intruding into the children's private activities in a manner that will outrage a person of ordinary decencies."

638 So. 2d at 827-28.

In their brief to this Court, the defendants assert:

"Ghostly Encounters is a television program that investigated and documented alleged paranormal activity associated with an abandoned building and a deceased artist in the Jacksonville area. This is precisely the kind of program about events in which society has an interest that the First Amendment seeks to protect."

Defendants' brief, p. 23. The episode of Ghostly Encounters at issue in this case did not focus on an event or events in which society had an interest before the airing of the episode or that were a matter of public record. The show included allegations that South's husband had had a drinking problem, had been paranoid, had sexually abused little boys in the school building in which their family had lived, had been physically abusive to South, and had locked South in a closet in their bedroom. No

evidence was presented indicating that any such allegations had ever been made before the episode aired. Additionally, the allegations regarding Gillette's drinking problem came from an unknown female who appeared in the episode; from King, who asserted that that fact explained some of the feelings she purported to experience in one of the rooms in the school building; and from West, who stated that Gillette had a drinking problem. The allegations regarding Gillette's abuse of South came from West, who asserted that he had found letters Gillette's wife had written to another man regarding the abuse, and from the purported feelings and impressions of the two purported psychic mediums. Finally, the allegations that Gillette had sexually abused little boys also came from the two purported psychic mediums. Additionally, Hubbard's testimony that the show was "a lark" and that it was meant solely for entertainment value undercut the defendants' assertion that the episode included matters that were of legitimate public concern. In light of the facts of this case, the defendants' assertion that the episode actually involved matters of legitimate public concern is not well taken.

2.

Next, the defendants assert that South did not present substantial evidence to support her wrongful-intrusion claim because she allegedly did not present any evidence "indicating that Hubbard intentionally trespassed into a private space or violated her seclusion." Defendants' brief, p. 22. During the trial, Hubbard testified that he believed that West owned the abandoned school building. In the episode, West stated that he and his partner had purchased the building. West was also shown unlocking a padlock on one of the doors inside the building. The defendants go on to argue:

"South failed to allege or point to any evidence that Hubbard entered her home, searched her private papers, wiretapped her phone, eavesdropped on her conversations, obtained her private records concerning her affairs, or that Hubbard's conduct in gathering information was abrupt, offensive, and objectionable."

Defendants' brief, p. 25. In this case, many of the allegations came from the two purported psychic mediums who appeared in the episode. King and Woods both asserted that the bedroom of Gillette and South was where Gillette had beaten South and that Gillette had locked South in the bedroom closet. Also, as noted previously, the allegation that Gillette had sexually abused little boys was based solely on the purported impressions of the two purported psychic mediums. Additionally,

Hubbard testified that he did not do anything to verify the truth of any of those allegations. Viewing the facts in a light most favorable to South, South presented substantial evidence from which the jury could have reasonably concluded that the defendants' conduct in gathering the "information" that was presented in the episode was offensive and objectionable. Accordingly, the defendants' argument in this regard is without merit.

B.

The defendants also argue that South did not present substantial evidence to support her false-light claim.

"Regarding the elements of a false-light claim, this Court has held:

""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.""

"Butler v. Town of Argo, 871 So. 2d [1,] 12 [(Ala. 2003)] (quoting Schifano v. Greene County Greyhound Park, Inc., 624 So. 2d 178, 180 (Ala.1993), quoting in turn Restatement (Second) of Torts § 652E (1977)).

"'A false-light claim does not require that the information made public be private,' but it does require that 'the information ... be false.' 871 So. 2d at 12. See Restatement (Second) of Torts § 652E, cmt. a. (1977). Thus, falsity is the sine qua non of a false-light claim. Moreover, unlike defamation, truth is not an affirmative defense to a false-light claim; rather, 'falsity' is an element of the plaintiff's claim, on which the plaintiff bears the burden of proof. [Nathan E.] Ray, Let There be False Light[: Resisting the Growing Trend Against an Important Tort], 84 Minn. L. Rev. [713,] 736 [(2000)] ('false light plaintiffs therefore bear [a] heavier burden [than defamation plaintiffs] because they must make an affirmative showing of falsity rather than leaving it to defendants to justify the offensive statement')."

Regions Bank v. Plott, 897 So. 2d 239, 244 (Ala. 2004) (first emphasis added).

1.

With regard to South's false-light claim, the defendants assert that "South offered no evidence that Hubbard has any knowledge of the truth or falsity of the information provided in the episode Ghostly Encounters. Hubbard's testimony that he had no knowledge of the truth or falsity of the statements went uncontroverted." Defendants' brief, p. 25. In support of this argument, the defendants cite Schifano v. Greene County

Greyhound Park, Inc., 624 So. 2d 178, 180 (Ala. 1993), for the proposition that, to establish a false-light claim, a plaintiff must show that "'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.'" (Quoting Restatement (Second) of Torts § 652E.) Although the defendants assert that South did not present any evidence to establish that he intentionally published false information about South, their opening brief does not address the issue whether South presented evidence to establish that he "'acted in reckless disregard as to the falsity of the publicized matter and the false light in which [South] would be placed.'" Schifano, 624 So. 2d at 180. At most, in their reply brief, the defendants assert:

"The crux of [South's] argument centers on Hubbard and Regional Prime's lack of due diligence in verifying facts. Yet, in the realm of entertainment, particularly when dealing with fictional portrayals, such rigorous verification may not always be a requisite. The testimony that the statements were made 'in a reckless manner' lacks context on how such determinations are made for entertainment productions and to term this approach 'reckless' without understanding entertainment industry standards is overly simplistic."

Defendants' reply brief, p. 18. However, "arguments made for the first time in a reply brief are 'waived, and will not be considered by this Court.'

Perkins v. Dean, 570 So. 2d 1217, 1220 (Ala. 1990)." Wiggins v. Mobile Greyhound Park, LLP, 294 So. 3d 709, 729 (Ala. 2019). Moreover, the defendants did not cite any authority in their reply brief to support their argument in this regard. Accordingly, that argument also did not comply with Rule 28(a)(10), Ala. R. App. P. For these reasons, the defendants are not entitled to relief on this basis.

2.

The defendants also argue:

"South merely alleged that Hubbard's brief display of a photograph, presumably depicting a younger Gillette, along with an opinion of Clairvoyant Jess that 'he looks like an a--hole' is sufficient to meet their burden of proof. However, South herself testified that the photograph of Gillette was an average photograph of Gillette -- nothing offensive about the photograph at all and that 'the photograph was fine.' ... The mere photograph of 'Gillette' cannot be interpreted as 'highly offensive' as it depicts an individual in a normal setting and activity."

Defendants' brief, p. 26. However, contrary to the defendants' argument in this regard, South's false-light invasion-of-privacy claim was not based on the photograph of Gillette or King's statement that Gillette "looks like an a--hole." Rather, as the trial court instructed the jury, South alleged that "the false information was that she was abused by her deceased husband and he kept her captive and placed her in a false light, an

abused spouse in the eyes of the public." Therefore, the defendants' argument in this regard is without merit.

III.

The defendants also argue that South did not present substantial evidence to support her tort-of-outrage claim.

A.

"For a plaintiff to recover under the tort of outrage, she must demonstrate that the defendant's conduct (1) was intentional or reckless; (2) was extreme and outrageous; and (3) caused emotional distress so severe that no reasonable person could be expected to endure it. Green Tree Acceptance, Inc. v. Standridge, 565 So. 2d 38, 44 (Ala. 1990). The conduct complained of must 'be so extreme in degree as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized society.' Id.

"This Court has previously recognized the tort of outrage in three circumstances:

"The tort of outrage is an extremely limited cause of action. It is so limited that this Court has recognized it in regard to only three kinds of conduct: (1) wrongful conduct in the family-burial context, Whitt v. Hulsey, 519 So. 2d 901 (Ala. 1987); (2) barbaric methods employed to coerce an insurance settlement, National Sec. Fire & Cas. Co. v. Bowen, 447 So. 2d 133 (Ala. 1983); and (3) egregious sexual harassment, Busby v. Truswal Sys. Corp., 551 So. 2d 322 (Ala. 1989). See also Michael L. Roberts and Gregory S. Cusimano, Alabama Tort Law, § 23.0 (2d ed. 1996).'

"Potts v. Hayes, 771 So. 2d 462, 465 (Ala. 2000). However, as Wilson notes in her brief, this Court has not held that the tort of outrage can exist in only those three circumstances:

"That is not to say, however, that the tort of outrage is viable in only the three circumstances noted in Potts. Recently, this Court affirmed a judgment on a tort-of-outrage claim asserted against a family physician who, when asked by a teenage boy's mother to counsel the boy concerning his stress over his parents' divorce, instead began exchanging addictive prescription drugs for homosexual sex for a number of years, resulting in the boy's drug addiction. See O'Rear v. B.H., 69 So. 3d 106 (Ala. 2011). It is clear, however, that the tort of outrage is viable only when the conduct is "'so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society.'" Horne v. TGM Assocs., L.P., 56 So. 3d 615, 631 (Ala. 2010) (quoting [American Road Service Co. v.] Inmon, 394 So. 2d [361, 365 (Ala. 1980)])."

"Little v. Robinson, 72 So. 3d 1168, 1172-73 (Ala. 2011) (emphasis added)."

Wilson v. University of Alabama Health Servs. Found., P.C., 266 So. 3d 674, 676-77 (Ala. 2017).

"It should also be noted that this tort does not recognize recovery for 'mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.' Comment, Restatement [(Second) of Torts § 46, supra, at 73 [(Am. L. Inst. 1948)]. The principle applies only to unprivileged, intentional or reckless conduct of an extreme and outrageous nature, and only that which causes severe emotional distress.

The rule itself provides that the trial court determine in the first instance whether recovery is indicated, cf. Rule 12(b)(6), [Ala. R. Civ. P.]. And in those jurisdictions which have recognized the cause of action, appellate review frequently has upheld the denial of recovery. See Annot., 46 A.L.R.3d 772; Annot., 86 A.L.R.3d 454. For as the Massachusetts Supreme Judicial Court stated in George v. Jordan Marsh Company, 359 Mass. 244, 268 N.E.2d 915, 46 A.L.R.3d 762, 767 (1971):

"Fact finding tribunals, whether judges, juries or auditors, are considered qualified and competent to decide whether there is any emotional distress resulting from a recognized common law tort, and, if there is, to include compensation therefor in any damages awarded the victim. They would seem to be equally qualified and competent to decide the same issues when the claim is based on intentional acts allegedly causing emotional distress without a recognized common law tort. When some of these same objections were made to recovery for prenatal injuries, we said: "The advancement of medical science should take care of most of these arguments. The element of speculation is not present to any greater extent than in the usual tort claim where medical evidence is offered and the issue of causation must be weighed with great care. * * * The opportunity for fraudulent claims can be faced by the courts as in other types of cases. * * *"

"We therefore join with our sister states of Maryland, Massachusetts, Missouri, Tennessee, West Virginia, Georgia, Washington, Florida, California and New York in appreciating that willful wrongs, or those made so recklessly as to equate willfulness, authorize recovery in damages for the mental suffering caused thereby, and we now recognize that one who by extreme and outrageous conduct intentionally or

recklessly causes severe emotional distress to another is subject to liability for such emotional distress and for bodily harm resulting from the distress. The emotional distress ... must be so severe that no reasonable person could be expected to endure it. Any recovery must be reasonable and justified under the circumstances, liability ensuing only when the conduct is extreme. Comment, Restatement, supra, at 78. By extreme we refer to conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society. Comment (d), Restatement, supra at 72. See also Prosser, Law of Torts (4th ed.) at 56-60 and [John W.]Wade [Tort Liability for Abusive and Insulting Language, 4 Vand. L. Rev. 63 (1950)], for instances which clearly fall within the principle."

American Rd. Serv. Co. v. Inmon, 394 So. 2d 361, 364-65 (Ala. 1980).

The episode included allegations that Gillette had a drinking problem, suffered from paranoia, abused little boys in the home he shared with South, physically abused South, and imprisoned South in a closet in their bedroom. Many of those allegations were based on the feelings and impressions of the two purported psychic mediums who appeared in the episode. Some of the statements were made by an unknown woman who appeared in the episode, while others were made by West, who was the purported owner of the building. At trial, Hubbard testified that he did not have any knowledge as to the truth or falsity of the statements

included in the episode. During plaintiffs' counsel's examination of Hubbard, the following occurred:

"[PLAINTIFFS' COUNSEL:] You're not you are now aware surely that everything you say about [Gillette] in the episode that has to do with alcohol use, beating [South], being a child molester, and all those things that all that is not true?

"[HUBBARD:] It hasn't been disproved nor has it been proved. So, I mean, one person says yes. Perhaps another person says no I mean, it's just -- I mean, I don't get where you're going here.

"....

"[PLAINTIFFS' COUNSEL:] You just don't give a rip if they are or not. You just don't care. Just tell the jury. If you don't care if it's true or not, just tell them you don't care and I'll move on to the next question.

"[HUBBARD:] It is not my position to care, you know, because --

"[PLAINTIFFS' COUNSEL:] It's not -- no, sir. No, sir I don't want to get the judge involved here if I don't have to. And I'm going to ask you to stick to yes or no. You've got a lawyer who's going to try to dig you out of this hole.

"[HUBBARD:] All right. Answer your question -- I mean, ask your question.

"[PLAINTIFFS' COUNSEL:] Yes, sir. You understand that it is shameful for [South] to know that there's stuff out there that you are 100 percent responsible for that says she was beaten by her husband?

"[HUBBARD:] Yes, I understand that the way you just worded it, yes.

"[PLAINTIFFS' COUNSEL:] When you think about it that way, you understand that her honor and reputation may be affected by all the lies that you put in your production?

"[HUBBARD:] That was a question?

"[PLAINTIFFS' COUNSEL:] Yeah. You understand that her honor and reputation can be affected by all the lies that you put in this production that you're 100 percent responsible for?

"[HUBBARD:] Well, I'm going to say no because I object to the word 'lies.'

"[PLAINTIFFS' COUNSEL:] Your production says that [Gillette] molested boys in the home that she lived -- where she lived with [Gillette], right?

"[HUBBARD:] The production made that statement, yes.

"[PLAINTIFFS' COUNSEL:] Yes, sir. And it made the statement that there were multiple soundproof rooms to keep people from hearing little boys get molested?

"[HUBBARD:] No, that was not what it said. Replay it, please.

"(Plays video.)

"[PLAINTIFFS' COUNSEL:] You understand how that can be humiliating to [South]?

"[HUBBARD:] Yes. The clip that we just watched is what you're referring to, correct?

"[PLAINTIFFS' COUNSEL:] Sir?

"[HUBBARD:] The clip that we just watched is what you were referring to?

"[PLAINTIFFS' COUNSEL:] Yes, sir.

"[HUBBARD:] Yes.

"[PLAINTIFFS' COUNSEL:] And the whole episode, all of it that's already in evidence, yes, sir. You understand that that can humiliate her?

"[HUBBARD:] I understand, yes.

"[PLAINTIFFS' COUNSEL:] And you don't care?

[HUBBARD:] No. I mean, it's not -- it's yes and no. I mean, it's not --

"[PLAINTIFFS' COUNSEL:] No, sir. No, sir. You've already given me the answer again."

Subsequently, the following occurred:

"[PLAINTIFFS' COUNSEL:] You intentionally published this stuff that is false about [Gillette], didn't you?

"[HUBBARD:] I intentionally published this episode.

"[PLAINTIFFS' COUNSEL:] Okay. All right. You didn't have any regard about it being true or not when you published it, did you?

"[HUBBARD:] No.

"[PLAINTIFFS' COUNSEL:] And you knew that when this aired it would place [Gillette] and [South] in a false light, didn't you?

"[HUBBARD:] No, I did not.

"[PLAINTIFFS' COUNSEL:] What you put in there you understand could be highly offensive to a reasonable person?

"[HUBBARD:] I do not.

"[PLAINTIFFS' COUNSEL:] You don't see that?

"[HUBBARD:] No.

"[PLAINTIFFS' COUNSEL:] But you see how people could be offended by this.

"[HUBBARD:] Yes, people can be offended by anything.

"[PLAINTIFFS' COUNSEL:] You have you knew that this could cause her -- you knew that this could cause [South] and the girls -- [South's] and [Gillette's] daughters -- emotional distress when you put this out there for public consumption, didn't you?

"[HUBBARD:] I mean, you're asking the same question a different way. I said no.

"[PLAINTIFFS' COUNSEL:] Okay. You didn't know that. And you believe that what you did here is just totally decent and totally appropriate?

"[HUBBARD:] Yes.

"[PLAINTIFFS' COUNSEL:] You're not ashamed of it one bit?

"[HUBBARD:] No.

"[PLAINTIFFS' COUNSEL:] Just look at the jury and tell them you're not ashamed of it. I invite you to. Would you like to?

"[HUBBARD:] No."

Hubbard also testified that he did not do anything to attempt to verify the allegations that Gillette had abused South or the allegations that Gillette had sexually abused boys. During defense counsel's cross-examination of Hubbard, the following occurred:

"[DEFENSE COUNSEL:] ... And so -- I believe there was a lot of mention about the statements of you being responsible for and I believe we talked about statements about drinking and physically abusive. You watched the video?

"[HUBBARD:] Yes.

"[DEFENSE COUNSEL:] Who was making these comments?

"[HUBBARD:] Well, I mean, largely it was Michael West. If you'll notice every time something new was brought up about this gentleman known as Pierre or Pierre's wife or anything to do with the people who lived there before, it all come from him and then inferences being built upon what it was that he originally said.

"[DEFENSE COUNSEL:] And did you have any reason at that point to think that he was not being honest with you?

"[HUBBARD:] No, I thought he knew the history of the people who owned it. I thought he knew the history of the facility itself. I mean, I had no reason to doubt that. I mean I just drove from Roanoke, Alabama to where I was at the time up here just to film this silly little ghost hunting show."

Hubbard described Ghostly Encounters as a lark and testified that it was intended as innocent fun. However, he also testified that nothing on Regional Prime's website included any disclaimers stating that the show was only for entertainment, stating that it should not be taken at face value, or stating that the information had not been verified.

"[PLAINTIFFS' COUNSEL:] So to the average person watching Ghostly Encounters, Episode Number 3 where you called [Gillette] a paranormal pedo, where psychic Jess says he looks like an a--hole, where the speaker that you keep referring to as Michael says that [South] was beat by her husband, there's nothing to tell viewers of that that none of that is true, is there?"

"[HUBBARD:] There's no disclaimers, no."

"[PLAINTIFFS' COUNSEL:] And you put that out there and you put it out into the world and you don't do anything to lessen the impact of how people may perceive it; is that right?"

"[HUBBARD:] I explained that earlier during my examination."

"[PLAINTIFFS' COUNSEL:] Right. But now my question is, is that right?"

"[HUBBARD:] That is correct."

"[PLAINTIFFS' COUNSEL:] So you just put it out there and it's out there and people can decide whether they believe it or not?"

"[HUBBARD:] Yes."

On cross-examination by his counsel, Hubbard testified that neither South nor anyone from her family had contacted him regarding the episode. He further testified:

"Had Ms. South contacted me and said the same things as what this gentleman had said, you know, it upsets me, I'm actually still alive and that stuff in there was not true, had that happened I would have went click and that show would have no longer been on there anymore, if she had come and said to me look, you know, I'm the person on this video. And then I would have been right on the phone to [King] going, you know, what the hell have you got me -- you know, why did you drag me out to this place, you know, because I don't -- I don't care about hurting people's feelings, but I don't -- I'm not going to pander to whims and idiosyncrasies of everybody or I would never do anything because there's always somebody that's not going to like something you're doing."

However, evidence was also presented indicating that, even at the time of trial, Hubbard still had not removed the episode and that the episode was still available on Regional Prime's channel on the Roku streaming platform.

Based on the foregoing testimony, South presented substantial evidence from which the jury could have reasonably concluded that the

defendants had engaged in at least reckless conduct and that such conduct was "so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." American Rd. Serv. Co., 394 So. 2d at 365.

B.

The defendants also argue:

South ... failed to produce sufficient evidence that she had suffered 'severe emotional distress' as a result of Hubbard's actions. South merely testified that she had been upset, angry, and hurt by the statements. ... This evidence, alone, is simply insufficient, and a verdict in South's favor is entirely against the great weight of [the] evidence presented by South."

Defendants' brief, p. 33. During the trial, the following occurred:

"[PLAINTIFFS' COUNSEL:] And what were your thoughts when you saw that portion of the broadcast that said [Gillette] was mentally ill, had a drinking problem, was abusive to you, and that you were writing letters to another man telling him that [Gillette] was physically abusive? What was your feeling when you saw that?

"[SOUTH:] I was very angry, very upset that that could even be put out there about somebody, just right out lies.

"[PLAINTIFFS' COUNSEL:] What are your feelings sitting here today about those statements that were made?

"[SOUTH:] It still makes me mad, very angry, hurtful and the fact that other people can see that about him.

"[PLAINTIFFS' COUNSEL:] Does it cause you any type of -- you said angry and upset?"

"[SOUTH:] Uh-huh (indicating yes).

"[PLAINTIFFS' COUNSEL:] And I want to explore that more. How else do you feel about it?"

"[SOUTH:] A huge fear is that our daughter ... will see that. And even though it's not true, the fact that that's out there, you know, she's -- she loved her daddy.

"[PLAINTIFFS' COUNSEL:] And it's still out there, right?"

"[SOUTH:] Yes, yeah. I worry about that."

South also testified as follows:

"[PLAINTIFFS' COUNSEL:] What is your concern, if any, about your daughter ... seeing stuff like that being said about your deceased husband?"

"[SOUTH:] I think at the moment at her age she may not understand a lot of what they're saying, but as she gets older she'll understand what they're saying. But just to even put that thought in her mind as much as I were to tell her -- she's a very smart little girl and just to -- for her to even have that thought in the back of her mind would just be horrible about him."

She further testified that her daughter was three and one-half years old when Gillette died, that her daughter loved her father very much, and that her daughter would be hurt and angry to hear someone say that about her father.

Subsequently, the following occurred:

"[PLAINTIFFS' COUNSEL:] When you found out about this broadcast, did it cause you any type of emotional distress?

"[SOUTH:] Oh, sure.

"[PLAINTIFFS' COUNSEL:] Would you tell the jury about that?

"[SOUTH:] I was just -- you know, it's hard to lose a spouse and, you know, time goes by and you still love them and you don't want people to talk bad about them. I was just very hurt and concerned and angry and, you know, very worried for [the daughter]. Even his [other daughter] just you know, just what that does for that to be out there about somebody.

"[PLAINTIFFS' COUNSEL:] Do you still feel those types of feelings?

"[SOUTH:] I do.

"[PLAINTIFFS' COUNSEL:] Sitting here today?

"[SOUTH:] Yes."

South testified that she understood King's comments about touching little boys "no-no squares" to mean that Gillette was molesting little boys. When asked about how it made her feel when she heard King saying that in the episode, South testified that it made her feel sick and that it still made her feel sick at the time of trial. She further testified that she was afraid that her daughter will find out or learn about this one day and that

she was "[j]ust afraid for her to see such a thing and just very mad." When asked if that was a fleeting fear or something she thinks about constantly, South replied: "It's been constant for the most part. I've had a couple of people mention seeing the video, and I worry about it getting to my daughter." Subsequently, defense counsel asked about the rating on the episode. South testified that she did not believe that the episode was rated at all. When asked if it would surprise her if the episode was rated R, she said it should be based on the language used and what they were describing. Subsequently, the following occurred:

"[DEFENSE COUNSEL:] And so do you have a fear today that your daughter may be getting on the internet and watching rated R videos without your knowledge?

"[SOUTH:] I do not, but I know that a lot of children her age are allowed to watch whatever they want to watch, and she goes to school with other children and she goes to church with other children who I'm sure they pull up scary stuff all the time for fun, so I have no -- I would not be surprised if any of them saw that and were to tell her about that.

"[DEFENSE COUNSEL:] But you don't allow her to do that?

"[SOUTH:] Personally, no, I would not allow her to watch that."

Defense counsel subsequently asked if South believed that her daughter's memory of Gillette would continue as is and not be tainted by the

opinions or speculation of others, and South replied: "I believe her memory will continue as it is, but I will say if she is exposed to this video or somebody telling her about her father supposedly being that, she would never forget it." Subsequently, the following occurred:

"[DEFENSE COUNSEL:] Okay. All right. And now other than your -- you being angry or hurt about it or upset, overwhelmed, has this affected you emotionally in any other way or just hurt, upset, and overwhelmed?

"[SOUTH:] I think there's a lot of ways.

"[DEFENSE COUNSEL:] Okay. Now, your life today, you own your own business?

"[SOUTH:] I do.

"[DEFENSE COUNSEL:] And you're pretty good at it, successful business?

"[SOUTH:] Yes, ma'am.

"....

"[DEFENSE COUNSEL:] And so you're living a pretty productive life?

"[SOUTH:] Yes, we work hard.

"[DEFENSE COUNSEL:] And life's continued as normal, correct?

"[SOUTH:] Pretty much, yes, it does.

"[DEFENSE COUNSEL:] You're not losing any sleep about this at night?

"[SOUTH:] Oh no, I have lost sleep about this, yes, ma'am.

"[DEFENSE COUNSEL:] Oh, now you have lost some sleep about it now?

"[SOUTH:] No, I have the whole time, not just now.

"[DEFENSE COUNSEL:] Okay. You didn't testify about it earlier.

"[SOUTH:] You didn't ask me.

"[DEFENSE COUNSEL:] I think I just did. So I'll add that to the hurt, concern, you lost a lot of sleep and you're angry and sick. Does that pretty much sum up what this has done?

"[SOUTH:] You're making it sound like it's just me.

"[DEFENSE COUNSEL:] Are those --

"[SOUTH:] -- It is -- that is part of what I feel. Also I'm in fear for my daughter ... and what will happen, how she'll how this will affect her. She does not know about this as of now, but I -- probably once the case is over it will be out there so, you know, because once it's down I think it -- I don't know that it's -- I mean, it will still be out there and accessible."

Based on the foregoing testimony, South presented substantial evidence from which a jury could have reasonably concluded that she had suffered severe emotional distress sufficient to support her tort-of-outrage claim.

For the above-stated reasons, the trial court did not err when it denied the defendants' motion for judgment as a matter of law as to South's tort-of-outrage claim.⁷

IV.

Finally, the defendants argue that South failed to produce substantial evidence to support her defamation claim.⁸

"[R]egarding the elements of a cause of action for defamation, this Court has stated:

""To establish a prima facie case of defamation, the plaintiff must show [1] that the

⁷On appeal, the defendants also argue that the estate's tort-of-outrage claim should be dismissed. The jury did not return a verdict in favor of the estate as to the tort-of-outrage claim. Accordingly, the defendants' argument in this regard is moot.

⁸In the first amended complaint, South's defamation claim alleged that that, at several points during the episode, statements were made that "falsely imputed [her] chastity to her then husband Gillette"; that the defendants "allude, suggest and state that [she] was in communications with another man while she was married to Gillette"; and that such statements were actionable pursuant to § 6-5-181." The defendants argue that § 6-5-181, Ala. Code 1975, cannot be a basis for South's defamation claim because this Court held that that statute is unconstitutional in Butler v. Town of Argo, 871 So. 2d 1 (Ala. 2003). However, at trial, the trial court instructed the jury that South's defamation claim was based on South's allegation that "the defendants falsely stated that she was abused by her husband, that he abused little boys, that he was an alcoholic ... and it defamed her because none of those statements were true." Thus, the defendants are not entitled to any relief in regard to this argument.

defendant was at least negligent, [2] in publishing [3] a false and defamatory statement to another [4] concerning the plaintiff, [5] which is either actionable without having to prove special harm (actionable per se) or actionable upon allegations and proof of special harm (actionable per quod)."

"Delta Health Grp., Inc. v. Stafford, 887 So. 2d 887, 895 (Ala. 2004) (quoting Nelson v. Lapeyrouse Grain Corp., 534 So. 2d 1085, 1091 (Ala. 1988)). 'One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true.' Restatement (Second) of Torts § 581A (1977). Stated otherwise, '[t]ruth is a "complete and absolute defense" to defamation.' Federal Credit, Inc. v. Fuller, 72 So. 3d 5, 10 (Ala. 2011) (quoting Battles v. Ford Motor Credit Co., 597 So. 2d 688, 692 (Ala. 1992))."

Birmingham Broad. (WVTM-TV) LLC v. Hill, 303 So. 3d 1148, 1158 (Ala. 2020).

""[T]o constitute slander actionable per se, there must be an imputation of an indictable offense involving infamy or moral turpitude...

""This distinction, however, does not deny the right to maintain an action for slander founded on oral malicious defamation subjecting the plaintiff to disgrace, ridicule, odium, or contempt, though it falls short of imputing the commission of such crime or misdemeanor. In such case the law pronounces the words actionable per quod only, and the plaintiff must allege and prove special damages as an element of the cause of action."

"Ceravolo v. Brown, 364 So. 2d 1155, 1157 (Ala. 1978) (quoting Marion v. Davis, 217 Ala. 16, 18, 114 So. 357, 358-59 (1927))."

Delta Health Grp., Inc. v. Stafford, 887 So. 2d 887, 896-97 (Ala. 2004).

"Even when the statement is not actionable per se ... a plaintiff may maintain "'an action for slander [per quod] founded on oral malicious defamation subjecting the plaintiff to disgrace, ridicule, odium, or contempt'" if that plaintiff alleges and proves "'special damages.'" Butler v. Town of Argo, 871 So. 2d [1,] 17 (Ala. 2023) (quoting Ceravolo v. Brown, 364 So. 2d 1155, 1157 (Ala. 1978), quoting in turn Marion v. Davis, 217 Ala. 16, 18, 114 So. 357, 359 (1927)). "Special damages are the material harms that are the intended result or natural consequence of the slanderous statement, and the general rule is that they are limited to 'material loss capable of being measured in money.'" Butler, 871 So. 2d at 18 (quoting Shook v. St. Bede Sch., 74 F. Supp. 2d 1172, 1180 (M.D. Ala. 1999)) (internal citations omitted)."

Casey v. McConnell, 975 So. 2d 384, 390 (Ala. Civ. App. 2007).

In this case, none of the statements included in the episode imputed to South the commission "'of an indictable offense involving infamy or moral turpitude.'" Delta Health Grp., 887 So. 2d at 896. Thus, the statements did not constitute defamation per se. Additionally, South did not present any evidence that she had suffered special damages as a result of the defamatory statements. Thus, South failed to prove damages to support a claim of defamation per quod. Accordingly, the trial court erred when it did not grant the defendants' motion for judgment as a matter of law as to South's defamation claim.

Moreover, the verdict form stated, in pertinent part:

"If after a full and fair consideration of the evidence, you find for the Plaintiff Jennifer South on any or all of her claims for Invasion of Privacy, Defamation or Outrage, then you should use the following verdict form:

"We the Jury find in favor of the Plaintiff and against the defendant and assess Plaintiff's damages as follows:

"Compensatory \$ 500,000

"Punitive \$ 1,000,000 "

This Court has previously held:

"In the present case, the jury returned a general verdict, without indicating which of the various claims it based its verdict upon. This Court cannot presume that the verdict was based solely upon the "good" counts, i.e., the claims that are supported by the evidence. The jury could have based its verdict, awarding compensatory and punitive damages, solely upon the "bad" counts, i.e., the claims that are not supported by the evidence. For this reason, we have no alternative but to order a new trial.'

"Cook's Pest Control, Inc. v. Rebar, 28 So. 3d 716, 729 (Ala. 2009).

"As in Rebar, the jury in this case returned a general verdict without indicating which of Spence's various claims it was returning the verdict upon. We have determined that the malicious-prosecution and defamation claims were improperly submitted to the jury. Therefore, we have in this appeal a 'good-count/bad-count' situation. Dolgencorp submitted a motion for a [judgment as a matter of law] specifically directed to the various claims; that motion was denied. We cannot assume that the verdict was based only on

those of Spence's claims that were properly submitted to the jury. Accordingly, the judgment based on the jury verdict for Spence must be reversed; we remand this case for a new trial on Spence's claims that were properly submitted to the jury, i.e., negligent training, invasion of privacy, false imprisonment, and assault and battery. See e.g., Rebar, supra; Alfa Life Ins. Corp. v. Jackson, 906 So. 2d 143, 146 (Ala. 2005); and Waddell & Reed, Inc. v. United Inv'rs Life Ins. Co., 875 So. 2d 1143, 1165-66 (Ala. 2003)."

Dolgencorp, LLC v. Spence, 224 So. 3d 173, 187-88 (Ala. 2016).

Similarly, in this case, the jury returned a general verdict as to South's claims against the defendants. As in Dolgencorp and Cooks Pest Control, Inc. v. Rebar, 28 So. 3d 716 (Ala. 2009), the defendants moved for a judgment as a matter of law as to each of South's claims against them, which the trial court denied. Because we cannot assume that the verdict was based only on South's claims that were properly submitted to the jury, we must reverse the trial court's judgment in favor of South and remand the case for a new trial as to South's invasion-of-privacy and tort-of-outrage claims.

Conclusion

Based on the foregoing, we reverse the trial court's judgment based on the jury's verdicts. As to the estate's right-of-publicity claim, we render a judgment in favor of Hubbard and Regional Prime. As to South's

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claims, we render a judgment in favor of Hubbard and Regional Prime on South's defamation claim, and we remand the case for a new trial as to South's invasion-of-privacy and tort-of-outrage claims.

REVERSED; JUDGMENT RENDERED IN PART; AND
REMANDED FOR A NEW TRIAL.

Parker, C.J., and Stewart, J., concur.

Sellers, J., concurs in the result.

Cook, J., concurs in the result, with opinion.

COOK, Justice (concurring in the result).

I concur in the result. As to Section II.A.1 in the main opinion, I write separately to explain why I believe that even the alleged fictitious nature of episode three of Ghostly Encounters does not mean that it is protected by the First Amendment to the United States Constitution. As to Section II.A.2., I write to address the argument of Tommy Dwayne Hubbard and Regional Prime Television ("Regional Prime") that they did not intentionally intrude upon Jennifer South's solitude or seclusion.

Section II.A.1

I agree with the main opinion that episode three of Ghostly Encounters does not involve matters of legitimate public interest and, thus, is not protected from an invasion-of-privacy claim by the First Amendment. The evidence provided by South and recounted thoroughly in the main opinion supports this conclusion. However, this Court has also recognized that the content of fictitious works can be protected by the First Amendment. Given that one of the primary contentions by Hubbard and Regional Prime below was that episode three was intended to be fictitious in nature, I felt it was necessary to discuss this issue.

"The First Amendment to the United States Constitution requires

that we recognize a privilege in regard to the invasion of privacy, where the alleged invasion concerns publicity." J.C. v. WALA-TV, Inc., 675 So. 2d 360, 362 (Ala. 1996) (citing Campbell v. Seabury Press, 614 F.2d 395, 396 (5th Cir. 1980)). As discussed in the main opinion, one such privilege is "the privilege to publish ... matters of legitimate public interest." J.C., 675 So. 2d at 362. When a publication does not contain a legitimate public concern but instead is a "fictitious work, using the names or attributes of real people, [that is] clearly presented as fiction, this Court, like other courts, must extend to it the constitutionally guaranteed freedom of speech." Doe v. Roe, 638 So. 2d 826, 829 (Ala. 1994) (emphasis added).

Despite Hubbard's repeated claims that the content of episode three of Ghostly Encounters was "fictitious," the evidence presented during the jury trial below showed that it was not "presented as fiction." Doe, 638 So. 2d at 829. There were allegations presented in the show that arose from the alleged reading of South's letters and from Michael West's "knowledge" about South's deceased husband -- the former owner of the abandoned school building. Under these circumstances, I do not believe that the allegations presented in that episode were "clearly presented" as fiction, and, therefore, they are not protected by the First Amendment as

being fictitious in nature.

Section II.A.2

On appeal, Hubbard and Regional Prime argue that South failed to present any evidence showing that Hubbard intentionally "invaded her privacy by intruding into her physical solitude or seclusion" in support of her wrongful-intrusion claim. Hubbard and Regional Prime's brief at 25.⁹ Hubbard and Regional Prime contend that South failed to "present any evidence that Hubbard acted intentionally." Hubbard and Regional Prime's brief at 24. Instead, they note that they provided "uncontroverted

⁹As the main opinion notes, the tort of invasion of privacy consists of "four limited and distinct wrongs." ____ So. 3d at ____ (emphasis added; citations omitted). Those "four limited and distinct wrongs" are as follows:

""(1) intruding into the plaintiff's physical solitude or seclusion; (2) giving publicity to private information about the plaintiff that violates ordinary decency; (3) putting the plaintiff in a false, but not necessarily defamatory, position in the public eye; or (4) appropriating some element of the plaintiff's personality for commercial use.""

Flickinger v. King, [Ms. SC-2022-0721, Apr. 21, 2023] ____ So. 3d ____, ____ (Ala. 2023) (quoting S.B. v. Saint James Sch., 959 So. 2d 72, 90 (Ala. 2006), quoting in turn Johnston v. Fuller, 706 So. 2d 700, 701 (Ala. 1997)). South's wrongful-intrusion claim is the first "wrong" listed above.

testimony [that] [Hubbard] believed the building he entered was owned by Michael West, who was clearly depicted in the episode itself unlocking doors in the building with a set of keys." They further note that the letters alleged to have been written by South were found by West in the building now owned by West.

There is no doubt that a defendant's intent is a requisite element of a wrongful-intrusion claim. See Johnston v. Fuller, 706 So. 2d 700, 702 (Ala. 1997) ("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." (quoting Restatement (Second) of Torts § 652B (Am. L. Inst. 1977) (emphasis added))).

I have been unable to locate any Alabama caselaw addressing whether the level of intent needed to satisfy this element is simple intent -- i.e., the intent to do an act -- or specific intent -- i.e., the intent to bring about the wrong. I note, however, that various courts outside Alabama have addressed the issue and have applied a specific-intent standard set

forth in § 8A of the Restatement (Second) of Torts.¹⁰

The main opinion does not expressly mention a conclusion on the intent element, and I do not read the main opinion as reaching a conclusion on the intent element.¹¹ Given our decision to remand this

¹⁰Specifically, those courts have explained that the word "intent" is used throughout § 8 of the Restatement (Second) of Torts to denote that "the actor desires to cause consequences of his act, or ... he believes that the consequences are substantially certain to result from it," and have emphasized that "the intrusion, as well as the action, must be intentional." O'Donnell v. United States, 891 F.2d 1079, 1083 (3d Cir. 1989) (emphasis added). See also Mauri v. Smith, 324 Or. 476, 484, 929 P.2d 307, 311 (1996) (explaining that "an actor commits an intentional intrusion if the actor either desires to cause an unauthorized intrusion or believes that an unauthorized intrusion is substantially certain to result from committing the invasive act in question"), and 62A Am. Jur. 2d Privacy § 32 (2018) (explaining that "[i]nvasion of privacy is an intentional tort, which requires clear, specific intent") (footnote omitted).

¹¹The main opinion correctly recounts that the information "assert[ed]" in the "episode" by the two purported psychic mediums was highly offensive. ____ So. 3d at _____. However, this conclusion goes to a different claim -- the second invasion-of-privacy "wrong" listed in note 9, supra which concerns "giving publicity to private information about the plaintiff that violates ordinary decency" -- rather than wrongful intrusion. Moreover, proving that the information asserted was offensive does not equate to finding that "'the means of gathering the information [was] excessively objectionable and improper.'" ____ So. 3d at ____ (quoting Johnston, 706 So. 2d at 702) (explaining an element of "wrongful intrusion") (emphasis modified). This distinction is especially strong when the cited assertions are statements made by third persons (the purported psychic mediums) rather than the defendant. Further, as noted above, there still remains the question of Hubbard's intent.

action for a new trial, I see no reason to decide whether that element was, or was not, satisfied in the present case, especially given the lack of authority in Alabama on the type of intent necessary to support a wrongful-intrusion claim.

Nevertheless, I make this observation in the hopes that future litigants will address this element in an appropriate future case. I also make this observation in the hopes that the parties to this action will carefully consider these issues upon remand before again proceeding to trial on this particular claim.