

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
March 25, 2014 Session

**AUSTIN DAVIS, ET AL. v. COVENANT PRESBYTERIAN CHURCH, ET  
AL.**

**Appeal from the Circuit Court for Davidson County  
No. 13C2510 Carol Soloman, Judge**

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**No. M2013-02273-COA-R3-CV - Filed June 23, 2014**

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Plaintiffs sued four individual defendants and three religious institutions for invasion of privacy; malicious harassment; assault; intentional infliction of emotional distress; negligence; negligent hiring, training, supervision and retention; and civil conspiracy. The trial court dismissed all of plaintiffs' causes of action for failure to state a claim upon which relief can be granted. We affirm the dismissal of plaintiffs' claims against two of the religious institutions for failure to state a claim for vicarious liability. We also affirm the trial court's dismissal of plaintiffs' claims for invasion of privacy; malicious harassment; intentional infliction of emotional distress; negligence; negligent hiring, training, supervision and retention; and civil conspiracy. However, having liberally construed the complaint as we must at this stage of the pleading process, we find the complaint states a cause of action for assault against the individual defendants and one of the religious institutions. Therefore, we must reverse the trial court's dismissal of the plaintiffs' allegation of assault and affirm the court in all other respects.

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

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Duncan Cates Cave, Nashville, Tennessee, for the appellants, Austin Davis, et al.

Thomas M. Donnell, Jr., Autumn L. Gentry, and Kelly M. Telfeyan, Nashville, Tennessee, for the appellees, Covenant Presbyterian Church, et al.

## OPINION

### FACTUAL AND PROCEDURAL HISTORY

The Davis Family<sup>1</sup> (“Plaintiffs”), former members of Covenant Presbyterian Church of Nashville (“Covenant”), filed their original complaint against Covenant, Jim Bachmann, Joe Eades, John Avery, Worrick Robinson, Nashville Presbytery, and Presbyterian Church in America (“P.C.A.”) on June 19, 2013.<sup>2</sup> Covenant, Bachmann, Eades, Avery, and Robinson (collectively referred to as “Defendants”) moved to dismiss the complaint on July 24, 2013. Plaintiffs filed a motion to amend their complaint, which was granted by order entered August 1, 2013.

On August 7, 2013, Plaintiffs filed an amended complaint alleging that:

The defendants committed a continuous series of intentional acts, negligent acts or omissions, which damaged the plaintiffs in furtherance of an illicit act by defendants to fraudulently conceal from appropriate authorities unreported and unprosecuted child sexual abuse by confessed child molester, John Perry (a book author) who is associated with or was once closely associated with the defendants as a founder and former officer of Covenant, and same who donated money to Covenant.

...

From 2002-2012, the plaintiffs were closely associated with information and circumstances concerning vulnerable children residing at John Perry’s residence and the defendants[‘] fraudulent concealment of unlawful child sexual abuse by confessed child molester John Perry without plaintiffs actually possessing knowledge of child molestation by John Perry until 2012.

The complaint goes on to attempt to assert causes of action for invasion of privacy; malicious harassment; assault; intentional infliction of emotional distress; negligence; negligent hiring, training, supervision and retention; and civil conspiracy.

On August 22, 2013, Defendants filed a motion to dismiss Plaintiffs’ amended complaint, asserting that Plaintiffs’ amended complaint “consists of an assortment of vague,

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<sup>1</sup> The complaint lists Austin and Catherine Davis and their children as the plaintiffs in this matter.

<sup>2</sup> The complaint purports to sue the individual defendants (Bachmann, Eades, Avery, and Robinson) in their “individual capacit[ies]” and as “an agent, employee, independent contractor, officer, member” of Covenant, P.C.A., and Nashville Presbytery.

incoherent, rambling, and disjointed assertions and conclusory allegations that provide Defendants with no ability to decipher the factual basis for the causes of action Plaintiffs have asserted.” Specifically, Defendants argued the amended complaint should be dismissed for failure to provide a short and plain statement of the claims, failure to allege a cause of action within the applicable statutes of limitations period, failure to state a claim upon which relief can be granted, and failure to plead conspiracy with sufficient specificity. Nashville Presbytery and P.C.A. filed motions to dismiss on August 26, 2013 and September 6, 2013, respectively.

The trial court held a hearing on the motions to dismiss on September 19, 2013 and stated:

I need meat. I need the facts, I need the specifics, I need the date, I need the place, I need the who and the where and what happened. I don’t have any of that. . . .

So unless you have something further to show me, I’m going to grant their motion to dismiss. . . .

The statute of limitations is definitely a question, but we can’t even get that far, because you don’t have enough specificity pursuant to Rule 8 to state a claim of action.

On September 26, 2013, the trial court entered an order granting the motions to dismiss, holding that the Plaintiffs’ amended complaint “fails to state a claim upon which relief may be granted pursuant to Tenn. R. Civ. P. 12.02(6).” Plaintiffs appeal.

#### STANDARD OF REVIEW

Tennessee Rule of Civil Procedure 12.02(6) permits dismissal of a lawsuit for failure to state a claim upon which relief can be granted. A Tenn. R. Civ. P. 12.02(6) motion to dismiss challenges the legal sufficiency of the complaint, not the strength of the plaintiff’s proof or evidence. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011). The motion admits the truth of all averments contained in the complaint but asserts that such facts do not constitute a cause of action. *Id.* In considering a motion to dismiss, courts must liberally construe the complaint, “presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences.” *Id.* (quoting *Tigg v. Pirelli Tire Corp.*, 232 S.W.3d 28, 31-32 (Tenn. 2007)). The scope of review following the grant or denial of a motion to dismiss involves a question of law, which we review de novo, without any presumption of correctness. *Lind v. Beaman Dodge, Inc.*, 356 S.W.3d 889, 894 (Tenn. 2011).

## ANALYSIS

Tennessee Rule of Civil Procedure 8.01 states that a pleading setting forth a claim for relief “shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks.” Rule 8.05 further states: “Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required.” If a pleading fails to comply with Tenn. R. Civ. P. 8.01, the pleading is subject to dismissal by a grant of a Tenn. R. Civ. P. 12.02(6) motion to dismiss for failure to state a claim upon which relief can be granted.

“To be sufficient and survive a motion to dismiss, a complaint must not be entirely devoid of factual allegations.” *Webb*, 346 S.W.3d 427. The complaint must state “the facts upon which a claim for relief is founded,” *Smith v. Lincoln Brass Works, Inc.*, 712 S.W.2d 470, 471 (Tenn. 1986) (quoting *W & O Constr. Co. v. City of Smithville*, 557 S.W.2d 920, 922 (Tenn. 1977)), and must “raise the pleader’s right to relief beyond the speculative level.” *Abshure v. Methodist Healthcare-Memphis Hosps.*, 325 S.W.3d 98, 104 (Tenn. 2010). As our Supreme Court has explained: “While a complaint in a tort action need not contain in minute detail the facts that give rise to the claim, *it must contain direct allegations on every material point* necessary to sustain a recovery on any legal theory . . . .” *Leach v. Taylor*, 124 S.W.3d 87, 92 (Tenn. 2004) (quoting *Donaldson v. Donaldson*, 557 S.W.2d 60, 61 (Tenn. 1977)) (alterations in original). Moreover, “allegations of pure legal conclusions will not sustain a complaint” and should not be accepted by the courts as true. *Id.* (quoting *White v. Revco Disc. Drug Ctrs., Inc.*, 33 S.W.3d 713, 718 (Tenn. 2000)); *see also Webb*, 346 S.W.3d at 427. Dismissal pursuant to Tenn. R. Civ. P. 12.02(6) is warranted when the complaint is “totally lacking in clarity and specificity.” *421 Corp. v. Metro. Gov’t of Nashville & Davidson Cnty.*, 36 S.W.3d 469, 479 (Tenn. Ct. App. 2000).

We must apply these principles to the amended complaint submitted by the Plaintiffs to determine whether the complaint should be dismissed pursuant to Tenn. R. Civ. P. 12.02(6). We note that the complaint is twenty-five pages long and is far from being “simple, concise, and direct” as Tenn. R. Civ. P. 8.05 directs. Nevertheless, we will examine the Plaintiffs’ assertions to determine whether a claim exists and will address each cause of action in turn.<sup>3</sup>

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<sup>3</sup> Each of the Defendants argue that the Plaintiffs’ causes of action should be barred by the applicable statutes of limitations periods. The trial court, however, chose to dismiss the case for failure to state a claim upon which relief can be granted. We decline to address the statute of limitations issue because the trial court failed to reach that issue in its final order.

### *Vicarious Liability*

Plaintiffs allege seven causes of action (invasion of privacy; malicious harassment; assault; intentional infliction of emotional distress; negligence; negligent hiring, training, supervision and retention; and civil conspiracy) against three religious institutions and four individuals whom they allege are employed or otherwise affiliated with those institutions. The Plaintiffs apparently base their claims against the Nashville Presbytery and P.C.A. on a theory of vicarious liability resulting from a principal-agent relationship. The Nashville Presbytery and P.C.A. contend the Plaintiffs' amended complaint fails to allege facts to support the legal conclusion that Covenant and the individually-named defendants were in an agency relationship with Nashville Presbytery and/or P.C.A.

As a threshold matter, we must consider whether the Nashville Presbytery and P.C.A. may be held vicariously liable for the alleged tortious and negligent conduct of Covenant and the individually named defendants. At its core, an agency relationship is one in which "one person acts for or represents another." *White v. Revco Disc. Drug Ctrs.*, 33 S.W.3d 713, 723 (Tenn. 2000) (quoting *Kerney v. Aetna Cas. & Sur. Co.*, 648 S.W.2d 247, 253 (Tenn. Ct. App. 1982)). When an agency relationship exists, the principal "authorizes the agent to act for the principal's benefit but at the same time retains the right to control the agent's conduct." *Mathes v. DRD Knoxville Med. Clinic*, No. E2010-01809-COA-R3-CV, 2011 WL 1402879, at \*7 (Tenn. Ct. App. Apr. 13, 2011) (quoting *Hussman Refrigeration, Inc., v. S. Pittsburgh Assocs.*, 697 S.W.2d 588, 592 (Tenn. Ct. App. 1985)).

The basis for the alleged liability of the Nashville Presbytery and P.C.A. is found in the following paragraphs in Plaintiffs' amended complaint:

6. Defendant Nashville Presbytery, Presbyterian Church in America (P.C.A.) (Hereafter "Nashville Presbytery") is an unincorporated organized body of churches and existing under the laws of the State of Tennessee; same possessing actual and/or apparent authority over Defendant, Covenant; same maintaining a principal place of business in Davidson County, Tennessee; same at all times alleged in this complaint being vicariously liable for acts committed by Defendant, Covenant, its agents, its independent contractors, its employees, its officers, its members, and its volunteers.

7. Defendant Presbyterian Church in America (A Corporation) (hereafter "P.C.A.") is a non-profit corporation organized and existing under the laws of the State of Georgia; same maintaining a principal place of business in the State of Georgia; same being a parent corporation of defendant, Covenant and defendant, Nashville Presbytery or same possessing actual and/or apparent

authority of defendant, Covenant and defendant, Nashville Presbytery; same at all times alleged in this complaint being vicariously liable for acts committed by defendant, Nashville Presbytery, Covenant, their agents, their independent contractors, their employees, their officers, their members, and their volunteers.

The Plaintiffs have not alleged that the Nashville Presbytery or P.C.A. authorized any of the individually-named defendants or Covenant to act on their behalf, nor does the complaint allege that the Nashville Presbytery or P.C.A. controlled Covenant or the individually-named defendants. The amended complaint does not allege facts showing that the Nashville Presbytery or P.C.A. directed or authorized the allegedly tortious conduct; instead, the amended complaint uses the terms “vicariously liable” and “actual and/or apparent authority,” which are merely legal conclusions that are not required to be taken as true. *See Leach*, 124 S.W.3d at 92. Accordingly, we hold that Plaintiffs have not stated a claim upon which relief can be granted against the Nashville Presbytery or P.C.A. *See Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383, 399-400 (Tenn. 2002); *Stein v. Sparks*, No. 1:08-CV-142, 2008 WL 4356964, at \*2 (E.D. Tenn. 2008).

Having concluded that the trial court properly dismissed the complaint against Nashville Presbytery and P.C.A., we will consider the following causes of action as they relate to Covenant and the individually-named Defendants.

#### *False Light Invasion of Privacy*

Our Supreme Court has expressly recognized the tort of false light invasion of privacy as set forth in Section 652E of the Restatement (Second) of Torts, which defines this tort as:

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.

RESTATEMENT (SECOND) OF TORTS § 652E (1977); *West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 643-44, 648 (Tenn. 2001). In *Secured Financial Solutions, LLC v. Winer*, No. M2009-00885-COA-R3-CV, 2010 WL 334644, at \*4 (Tenn. Ct. App. Jan. 28, 2010), this Court discussed the meaning of “publicity” as used in the context of a claim for false

light invasion of privacy and quoted with approval the following principles:

“Publicity,” . . . means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public.

Thus it is not an invasion of privacy, within the rule stated in this Section, to communicate a fact concerning the plaintiff’s private life to a single person or even to a small group of persons.

RESTATEMENT (SECOND) OF TORTS § 652D cmt. a.

In reviewing Plaintiff’s amended complaint, the only allegations conceivably related to a claim for false light invasion of privacy are the following:

32. At all times relevant and material hereto and in furtherance of the defendants’ fraudulent concealment of unlawful child sexual abuse by confessed child molester John Perry, the defendants caused third-party family members of the plaintiffs to disinherit plaintiffs *because of false information concerning plaintiffs being disseminated to third-party family members of plaintiffs* by defendants.

33. At all times relevant and material hereto and in furtherance of the defendants’ fraudulent concealment of unlawful child sexual abuse by confessed child molester John Perry, the defendants interfere with personal relationship of plaintiffs *by conveying false information concerning the plaintiffs’ mental health to individuals that have personal relationships with plaintiffs* in order to demonize, discredit, damage, and harm plaintiffs.

(Emphasis added).

To summarize, Plaintiffs allege that the Defendants conveyed some unidentified “false information” to “third-party family members” and to “individuals that have personal relationships with plaintiffs.” Plaintiffs did not describe the content of the “false information” allegedly disseminated by defendants, nor did they allege that the “false information” was made public by the Defendants. Construing the Plaintiffs’ allegations liberally and presuming the truth of the allegations, it is apparent that Plaintiffs have failed

to establish an essential element of the cause of action for false light invasion of privacy and “can prove no set of facts in support of the claim” that would entitle them to relief. *Crews v. Buckman Labs. Int’l, Inc.*, 78 S.W.3d 852, 857 (Tenn. 2002). As stated above, “[i]t is not an invasion of privacy to communicate a fact concerning the plaintiff’s private life to a single person or even to a small group of persons.” *Secured Fin. Solutions*, 2010 WL 334644, at \*4. Therefore, we affirm the trial court’s dismissal of the claim for false light invasion of privacy because the allegations are not sufficient to meet the “publicity” requirement for this cause of action.

#### *Malicious Harassment*

To establish a claim for malicious harassment under Tenn. Code Ann. § 4-21-701, the plaintiff must demonstrate that the perpetrator intentionally intimidated the plaintiff from freely exercising a constitutional right and that the harassment was motivated by the victim’s race, color, religion, ancestry, or national origin. *Levy v. Franks*, 159 S.W.3d 66, 80 (Tenn. Ct. App. 2004).

We have reviewed the section of Plaintiffs’ amended complaint that is devoted to the purported allegations of malicious harassment and have found no factual assertion that the Defendants harassed Plaintiffs on the basis of their race, color, ancestry, religion, or national origin. To the contrary, Plaintiffs allege that they were harassed because they were “pry to information concerning the defendants’ fraudulent concealment of the unlawful sexual abuse.” We affirm the dismissal of Plaintiffs’ cause of action for malicious harassment where Plaintiffs do not assert a claim based on race, color, ancestry, religion, or national origin.

#### *Assault*

In *Hughes v. Metropolitan Government of Nashville and Davidson County*, 340 S.W.3d 352, 371 (Tenn. 2011), our Supreme Court described assault as the intentional creation of “an apprehension of harm in the plaintiff.” In setting forth this definition, the Court drew upon the definition of assault in our criminal statutes which states that a person who commits assault is one who: “(1) [i]ntentionally, knowingly or recklessly causes bodily injury to another; (2) [i]ntentionally or knowingly causes another to reasonably fear imminent bodily injury; or (3) [i]ntentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.” *Hughes*, 340 S.W.3d at 370 (quoting Tenn. Code Ann. § 39-13-101(a)).

In subsection 50 of the amended complaint, Plaintiffs assert that the Defendants created a fear of bodily harm to Plaintiffs by:



- a. aggressively attacking and invading the personal space of the plaintiffs;
- b. threatening the plaintiffs;
- c. physically separating the plaintiffs against their free-will;
- d. following and hounding the plaintiffs;
- g. sending a death threat to plaintiffs when plaintiffs reported the unlawful child sexual abuse of a confessed child molester John Perry

51. At all times relevant and material hereto, the defendants' conduct placed plaintiffs in reasonable fear of bodily harm.

Construing the complaint liberally and presuming all factual allegations to be true (i.e. that the Defendants attacked, threatened, sent death threats to, followed, and hounded the Plaintiffs causing them to fear bodily harm), it is not apparent from the face of the amended complaint that Plaintiffs could "prove no set of facts in support of the claim that would entitle them to relief." *Crews*, 78 S.W.3d at 857; *see also Webb*, 346 S.W.3d at 43. We are not evaluating the likelihood of Plaintiffs' success on the merits at this stage of the proceedings; we are simply holding that the allegations in the amended complaint, taken as true as required by Rule 12.02(6), establish that the Defendants created "an apprehension of harm" in the Plaintiffs.<sup>4</sup> Dismissal is, therefore, not appropriate.<sup>5</sup>

#### *Intentional Infliction of Emotional Distress*

A claim for intentional infliction of emotional distress requires a showing that "the

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<sup>4</sup> Plaintiffs also appear to meet the definition of assault found in the Tennessee Pattern Jury Instructions, which provide the following definition of assault for use in a civil jury trial:

[A]ssault consists of two elements:

1. An intentional attempt or the unmistakable appearance of an intentional attempt to do harm to, or to frighten, another person; and
2. The present ability or the unmistakable appearance of the present ability to do that harm or to cause that fright.

T.P.I.—CIVIL 8.01 (2013 ed.).

<sup>5</sup> Defendants assert that Plaintiffs' failure to specify which defendant committed the alleged assault requires dismissal pursuant to Tenn. R. Civ. P. 12.02(6). We note that the allegations refer to all "defendants," and Defendants have pointed to no authority requiring more specificity. Defendants desiring more information in such circumstances have the option of filing a motion for a more definite statement pursuant to Tenn. R. Civ. P. 12.05.

defendant's conduct was (1) intentional or reckless, (2) so outrageous that it is not tolerated by civilized society, and (3) resulted in serious mental injury to the plaintiff.” *Brown v. Mapco Express, Inc.*, 393 S.W.3d 696, 703 (Tenn. Ct. App. 2012) (quoting *Rogers v. Louisville Land Co.*, 367 S.W.3d 196, 205 (Tenn. 2012)). Our Supreme Court has noted that “no perfect legal standard exists for determining whether particular conduct is so intolerable as to be tortious” but has adopted the “high threshold” of the Restatement (Second) of Torts:

“The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by ‘malice,’ or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous.’”

*Bain v. Wells*, 936 S.W.2d 618, 622-23 (Tenn. 1997) (quoting RESTATEMENT (SECOND) OF TORTS § 46, cmt. d (1965)). Thus, liability for intentional infliction of emotional distress “does not extend to mere insults, indignities, threats, annoyances, petty oppression or other trivialities.” *Id.* at 622 (quoting *Medlin v. Allied Inv. Co.*, 398 S.W.2d 270, 274 (1966)).

Plaintiffs included the following general information regarding their allegation of intentional infliction of emotional distress:

At all times relevant and material hereto, and in furtherance of the fraudulent concealment of the unlawful sexual abuse by confessed child molester, John Perry, the defendants, engaged in intentional or reckless conduct against the plaintiffs as follows:

- a. aggressively attacking and invading the personal space of the plaintiffs;
- b. threatening the plaintiffs;
- c. physically separating the plaintiffs against their free will;
- d. following and hounding the plaintiffs;
- e. blocking movement of the plaintiffs;
- f. by using the police as instruments to invade, harass, and/or threaten the plaintiffs at their private home for unfounded or false reasons;

- g. by blocking the plaintiffs from attending a public service in church on property not owned by the defendants;
- h. by following, verbally accosting, and publicly ridiculing the plaintiffs by the public dissemination of false information concerning the plaintiffs;
- i. By making threats to plaintiffs as to include threats to have plaintiffs arrested and thrown in jail;

In our view, the allegations asserted do not rise to the level of such outrageous and extreme conduct as to go beyond all bounds of decency and to be regarded as “utterly intolerable in a civilized community.” The allegations are more akin to “insults, indignities, threats, [and] annoyances.” Accordingly, we affirm the trial court’s dismissal of the Plaintiffs’ claim for intentional infliction of emotional distress.

### *Negligence*

To assert a successful negligence claim, a plaintiff must establish each of the following elements: “(1) a duty of care owed by the defendant to the plaintiff; (2) conduct by the defendant falling below the applicable standard of care that amounts to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate, or legal, causation.” *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 89 (Tenn. 2000).

Plaintiffs assert that the Defendants’ conduct “fell below the applicable standard of care” when the Defendants promoted a “hostile environment,” failed to refrain from, *inter alia*, “attacking,” “threatening,” “harassing,” “physically separating,” “following,” “blocking movement,” and “verbally accosting” the Plaintiffs. Each of the allegations sound in intentional tort rather than negligence. Therefore, the trial court properly dismissed Plaintiffs’ negligence claim for failure to state a claim upon which relief can be granted.

### *Negligent Hiring, Supervision and Retention*

A plaintiff may recover for negligent hiring, supervision, or retention if “he establishes, in addition to the elements of a negligence claim, that the employer had knowledge of the employee’s unfitness for the job.” *Doe v. Catholic Bishop for Diocese of Memphis*, 306 S.W.3d 712, 717 (Tenn. Ct. App. 2008). The plaintiff must show that the employer knew, or by the exercise of reasonable care might have ascertained, that the employee or independent contractor was not qualified to perform the work for which he was hired. *Marshalls of Nashville, Tenn., Inc. v. Harding Mall Assoc., Ltd.*, 799 S.W.2d 239, 243 (Tenn. Ct. App. 1990).

Even if we assume that Covenant’s employees were somehow unfit, the Plaintiffs

have failed to allege facts to support a theory that Covenant knew or should have known that their employees were unfit for their positions. Accordingly, we find no error in the trial court's dismissal of the Plaintiffs' claim for negligent hiring, training, supervision and retention.

### *Civil Conspiracy*

Civil conspiracy is defined as “a combination of two or more persons who, each having the intent and knowledge of the other's intent, accomplish by concert an unlawful purpose, or accomplish a lawful purpose by unlawful means, which results in damage to the plaintiff.” *Trau-Med of Am. v. Allstate Ins. Co.*, 71 S.W.3d 691, 703 (Tenn. 2002). A civil conspiracy “requires an underlying predicate tort allegedly committed pursuant to the conspiracy.” *Watson's Carpet & Floor Coverings, Inc. v. McCormick*, 247 S.W.3d 169, 186 (Tenn. Ct. App. 2007); *see also Levy*, 159 S.W.3d at 82 (“there is no liability under a theory of civil conspiracy unless there is underlying wrongful conduct”). Moreover, “[c]onspiracy claims must be pled with some degree of specificity” and “[c]onclusory allegations . . . unsupported by material facts will not be sufficient to state such a claim.” *Kincaid v. SouthTrust Bank*, 221 S.W.3d 32, 38 (Tenn. Ct. App. 2006). “Conspiracy, standing alone, is not actionable where the underlying tort is not actionable.” *Lane v. Becker*, 334 S.W.3d 756, 763 (Tenn. Ct. App. 2010) (citing *Watson's Carpet*, 247 S.W.3d at 179-80).

The Plaintiffs' amended complaint devotes the following paragraph to their allegation of civil conspiracy:

87. The actions or omissions complained of above are a result of common design between all of the defendants to accomplish, by concerted action, an unlawful purpose of concealing the molestations of a child and potentially other children by confessed child molester John Perry, by diverting the congregation[']s and public's attention away from John Perry and the defendants by intentionally and negligently injuring the plaintiffs as set forth above in furtherance of the defendants' conspiracy with the result being injuries to the plaintiffs as described in the preceding paragraphs.

Plaintiffs assert that the underlying wrongful conduct at the center of the alleged conspiracy consisted of the Defendants committing “an unlawful purpose of concealing molestations of a child and potentially other children.” From our reading, it appears the Plaintiffs allege “fraudulent concealment” as the “underlying predicate tort” allegedly committed by Defendants. Thus, we must consider whether a claim for fraudulent concealment is present from the facts alleged.

To establish fraudulent concealment, a plaintiff must allege and prove the following:

(1) that the defendant affirmatively concealed the plaintiff's injury or the identity of the wrongdoer or failed to disclose material facts regarding the injury or the wrongdoer despite a duty to do so; (2) that the plaintiff could not have discovered the injury or the identity of the wrongdoer despite reasonable care and diligence; (3) that the defendant knew that the plaintiff had been injured and the identity of the wrongdoer; and (4) that the defendant concealed material information from the plaintiff by "withholding information or making use of some device to mislead' the plaintiff in order to exclude suspicion or prevent inquiry."

*Redwing v. Catholic Bishop for the Diocese of Memphis*, 363 S.W.3d 436, 462-63 (Tenn. 2012) (quoting *Shadrick v. Coker*, 963 S.W.2d 726, 735 (Tenn. 1998)) (internal citations omitted). Thus, a cause of action for fraudulent concealment applies only when the defendant engages in conduct intended to conceal the plaintiff's injury from the plaintiff, or when the defendant engages in conduct intended to conceal the identity of the person or persons who caused the plaintiff's injury from the plaintiff.

Here, Plaintiffs do not allege that they were abused. Rather, the amended complaint mentions an unidentified "child and perhaps other children" that were allegedly abused by someone who was "closely associated with" the Defendants. Plaintiffs cannot rely upon a theory of fraudulent concealment to support their allegation of civil conspiracy because they have not alleged that the Defendants have concealed *Plaintiffs'* injury. Accordingly, having failed to establish an essential element of a cause of action for conspiracy, the Plaintiffs' allegation cannot survive a motion to dismiss for failure to state a claim upon which relief can be granted.

#### CONCLUSION

We affirm the trial court's dismissal of all of Plaintiffs' claims against the Nashville Presbytery and P.C.A. Likewise, we affirm the trial court's dismissal of Plaintiffs' claims against the individually-named defendants and Covenant for invasion of privacy; malicious harassment; intentional infliction of emotional distress; negligence; negligent hiring, training, supervision and retention; and civil conspiracy under Tenn. R. Civ. P. 12.06(2).

However, we reverse the trial court's dismissal of Plaintiffs' claim for assault and remand the case for further proceedings consistent with this opinion. Costs of appeal are assessed against Covenant Presbyterian Church, Jim Bachmann, Joe Eades, John Avery, Worrick Robinson, and the Plaintiffs equally, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE