IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CLARENCE PERKINS, et al.	)	
	)	**No. 3-03-0578**
	)	**JUDGE NIXON**
Plaintiffs,	)	**MAGISTRATE BROWN**
	)	**JURY DEMAND**
	)	
vs.	)	
	)	
PRINCIPAL MEDIA GROUP et al.	)	
	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MEDIA DEFENDANTS' MOTION TO DISMISS

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I. PLAINTIFFS HAVE COGNIZABLE RIGHT OF PRIVACY CLAIMS

The Media Defendants' brief fundamentally misconstrues the Plaintiffs' privacy claims. Plaintiffs do not seek recovery for invasion in the right of privacy of Misty Perkins Norman. Plaintiffs sue for a violation of *their* right of privacy based upon numerous well reasoned cases that recognize a right of "family privacy" (sometimes referred to as "survivor privacy') and peace of mind in the images and memory of a relatives' deceased loved one, particularly in the case of graphic images of a relative's dead body:

> What the cases point to is a zone of privacy in which a spouse, a parent, a child, a brother or a sister preserves the memory of the deceased loved one. To violate that memory is to invade the personality of the survivor. The intrusion of the media would constitute invasion of an aspect of human personality essential to being human, the survivor's memory of the beloved dead.

Favish v. Office of Independent Counsel, 217 F.3d 1168, 1713 (9th Cir. 2000).

A) Family's Expectation of Privacy

Plaintiffs had a reasonable expectation of privacy to be free from intrusions and may sue for violation of their "family" privacy under an intrusion upon seclusion theory for several actionable intrusions in this case. Because the hotel room and death scene were taped off and sequestered crime scene areas where the public was not allowed, and because the public and news media are not allowed to view body handling or autopsy areas, the filming of these images constituted an intrusion into a place where the surviving family members had a reasonable expectation of privacy. Plaintiffs had a legitimate privacy interest to believe their deceased loved one would not be identified (at 13:27 to 13:45 of the tape), photographed and exposed to prying eyes, let alone the entire world, by broadcasting the video images in this case[1]. Plaintiffs'

[1] **Exhibit 1** includes 36 captured still images from the videotape of the subject episode. Due to the graphic nature and content of the photographs, they are being filed under seal.

privacy rights to be free from intrusions also includes the right to be free from intrusions: on the pictures of their deceased loved one; on the body of their deceased love one and on the Plaintiffs' memory of the decedent and peace of mind associated therewith.

Established case law supports a right of privacy in "survivors" or the "family" to recover for invasive intrusions of this type where graphic death scene or autopsy images are published to the public. Kentucky law presumptively governs this case on this issue and is well established on the right of survivors to sue for such invasions of privacy. Tennessee law generally recognizes "family privacy"; and Tennessee law would likely recognize the privacy claims of the surviving family members when disturbing graphic death scene or autopsy photos, that were taken in a place not open to the public, are published. Plaintiffs had a reasonable expectation of privacy to be free from public disclosure of private facts and may sue for violation of their right to privacy. The public had no right to see or film Misty Norman when she was lying dead in a taped off and sequestered crime scene area where the public was not allowed. (**Ex. 1.01-.05, 1.07, 1.09, 1.23, 1.26 and 1.35).** The public had no right to see or film Ms. Norman when she was lying in the morgue and was physically examined by Dr. Levy during the autopsy. **(Ex. 1.06, 1.08, 1.11-.14, 1.16, 1.18, 1.19, 1.21, 1.22, 1.25, 1.27-.34 and 1.36)**. Her images, and any pictures therefrom, were *private* to the family. The images, and any pictures taken at the hotel room, are also *private* to her family. The filming and broadcasting of these graphic and disturbing images is an unlawful publication of private facts.

B) "<u>The Most Tender Affections Of The Human Heart Cluster About The Body Of One's Dead Child.</u>" *<u>Douglas v. Stokes</u>*, <u>149 S.W.850 (KY 1912).</u>

The Kentucky Supreme Court has twice recognized a right of family privacy where there is an intrusive publication of a graphic photograph of a deceased child. *Sellers v. Henry,* 329

S.W.2d 214 (Ky.1959); *Douglas v. Stokes*, 149 Ky. 506, 149 S.W.849 (1912). In *Douglas* the Kentucky Supreme Court (before 1976 called the Court of Appeals) considered a case in which twin boys were connected at the sternum died after birth and then died. The parents hired a photographer to make 12 pictures of the twins. The photographer made an extra picture and obtained a copyright of the picture from the United States Copyright Office. Plaintiffs filed suit to recover damages for the photographer's use of the negative claiming that it had been done against their consent and that by the exposure of the photographs they had been humiliated and their feelings and sensibilities had been wounded. *Douglas v. Stokes*, 149 Ky. 506, 507, 149 S.W. 849, 850 (1912). The court reasoned:

> The corpse of the children was in the custody of the parents. The photographer had no authority to make the photographs, except by their authority, and when he exceeded his authority he invaded their right. We do not see that this case can be distinguished from those involving the like use of the photograph of a living person, and this has been held actionable. The most tender affections of the human heart cluster about the body of one's dead child. A man may recover for any injury or indignity done the body, and it would be a reproach to the law if physical injuries might be recovered for, and not those incorporeal injuries which would cause much greater suffering and humiliation. If the defendant had wrongfully taken possession of the nude body of the plaintiff's dead children and exposed it to public view in an effort to make money out of it, it would not be doubted that an injury had been done them to recover for which an action might be maintained. When he wrongfully used the photograph of it, a like wrong was done; the injury differing from that supposed in degree, but not in kind. No question of copyright, under the statutes of the United States, is involved.
> Judgment affirmed.

Douglas v. Stokes, 149 Ky. 506, 507, 149 S.W. 849, 850 (1912).

In a subsequent Kentucky Supreme Court decision, *Brents v. Morgan,* 221 Ky. App. 967, 299 S.W. 967, 971 (1927) the Kentucky Supreme Court explained the basis for the holding in *Douglas*: "There is no property right in a dead body, and the opinion in the case of *Douglas v. Stokes, supra*, *could have been put on no ground other than the unwarranted invasion of the*

*right of privacy***.**" (emphasis supplied).

C) <u>The Media Defendants Misstate Kentucky Law</u>

The Media Defendants' brief at p. 23 ignores that the Kentucky Supreme Court stated in *Brents v. Morgan* that *Douglas* was based upon "an unwarranted invasion of the right of privacy." The Media Defendants' brief wrongly states *Douglas* "does not apply here." The Media Defendants brief further misleads at p. 23 by stating that: "As noted in *Mineer* [*Mineer v. Williams,* 82 F. Supp. 2d 702 (E.D. Ky. 2000)] *Douglas* involves 'breach of confidential relationship' *id*." *Mineer* actually "noted":

> It is true that *Douglas v. Stokes,* 149 Ky. 506, 149 S.W. 849, 849- 50 (1912), and *Sellers v. Henry,* 329 S.W.2d 214, 216 (Ky.1959), permitted recovery for publishing photographs of the bodies of plaintiffs' deceased children. These cases, however, are examples of the exception to the general rule. They also involve the breach of a confidential relationship, a factor that is missing here.

Mineer v. Williams, 82 F. Supp. 2d 702, 706 (E.D. Ky. 2000).

The Media Defendants' misstatements as to the state of Kentucky law becomes even more glaring when one examines the *Sellers v. Henry,* 329 S.W.2d 214, 216 (Ky. 1959) case cited in the above passage from *Mineer* (and part of the p. 706 "*id*" citation in Media Defendants' brief at p, 23). In *Sellers v. Henry,* 329 S.W.2d 214, 216 (Ky. 1959) the *parents* of a deceased "young daughter" brought an action for invasion of *their* privacy against a police officer who in the course of his official duties took photographs of the plaintiffs' deceased daughter at the scene of an accident. *Id*. at 215. The photos showed the girl "in a mutilated condition." *Id*. The officer then "published" the photos by showing them to others, although to precisely whom was unclear from the record. *Id*. The face was not recognizable. *Id*. The trial court granted summary judgment on the basis that the photographs related to an occurrence of "general and public interest." *Id*. The Kentucky Supreme Court, however, reversed and found that the parents'

privacy claim should not have been dismissed as there were genuine issues of material facts as to whether the photographs were of "public interest":

> It is true that an individual's right of privacy must in some instances yield to certain paramount rights of the public. 77 C.J.S. Right of Privacy § 3, p. 401. It has been held by this Court that a regular newspaper account of an occurrence of public and general interest does not constitute an actionable invasion of the right of privacy. *Jones v. Herald Post Co.*, 230 Ky. 227, 18 S.W.2d 972 . . .
>
> We think the question of whether the publication in the instant case was in the public interest, such as to excuse an invasion of privacy, must depend upon the nature and purpose of the publication. It is stated in the appellants' *brief* that the defendant exhibited the picture to the deceased girl's classmates in giving a safety lecture at the school she had attended. Since this does not appear in the record, the lower court could not have used it as a basis for a determination that the publication was in the public interest.
>
> While the question of whether the publication of such a photograph as is here involved is in the public interest is one of law, it is a type of legal question the answer to which is peculiarly dependent upon factual details.
>
> Since the complaint and the defendant's affidavit, which are all the trial court had before it, did not establish the lack of a genuine issue as to any material fact, but on the contrary, left completely unanswered what seem to us to be the vitally material facts, the trial court erred in granting summary judgment. If upon further proceedings the material facts are brought out, and it then develops that there is no genuine issue about those facts, it is possible that the case then could be disposed of upon a motion for summary judgment.
>
> *Sellers v. Henry,* 329 S.W.2d 214, 216 (Ky.1959).

The Media Defendants' failure to cite *Sellers v. Henry,* 329 S.W.2d 214, 216 (Ky.1959) in their exhaustive brief is inexplicable. The Kentucky Supreme Court directly upheld the right of parents to bring an invasion of privacy claim for the publication of graphic photographic images of a deceased child. The Media Defendants were certainly aware of the *Douglas* and *Sellers* cases, having directly cited to a passage in *Mineer* at page 23 of their brief that explained, "It is true that *Douglas v. Stokes,* 149 Ky. 506, 149 S.W. 849, 849-50 (1912), and *Sellers v. Henry,* 329 S.W.2d 214, 216 (Ky.1959), permitted recovery for publishing photographs of the

bodies of plaintiffs' deceased children." The Media Defendants instead tout a "well established limitation" that "the right [to privacy] "lapses with death." The Media Defendants are confused, obfuscatory, or worse. It is not the privacy of Misty Perkins Norman that is at issue; the issue in this case is invasion of the privacy rights of Ms. Norman's parents and sister – who are very much alive.

The Media Defendants also overlook that the Sixth Circuit has recently affirmed the applicability of *Douglas v. Stokes*, in its "special circumstances," in *Bowling v. The Missionary Servants of the Most Holy Trinity*, 972 F.2d 346, 1992 WL 181427 (6th Cir. 1992). In this case, a father sought to recover damages for invasion of his privacy by the unauthorized publication of his minor child's photograph in an advertisement for a charity. In considering the father's invasion of privacy claim, the Sixth Circuit confirmed the validity of *Douglas* in "special circumstances" involving photographs of a deceased child:

> The District Court pointed out the *Douglas* decision was based upon the special circumstances involved in that case and that the court emphasized the fact that "the most tender affections of the human heart cluster around the body of one's dead child." By contrast, Brandon Bowling is very much alive and can seek recovery in his own right. We note the Kentucky courts have not expanded the relational right of privacy to cover circumstances like those in this case, and we agree with the District Court's determination that there is no reason to conclude that they would do so in light of the favorable view taken by those courts of the Restatement.

Bowling v. The Missionary Servants of the Most Holy Trinity, 972 F.2d 346, 1992 WL 181427 at * 3 (6th Cir. 1992).

D) <u>Other Circuits Recognize Right of Privacy Claims</u>

Other Federal Appellate Circuits have consistently held that family members have a right of privacy that encompasses post-mortem photographs and other highly personal records. In *Accuracy in Media v. National Park Service*, 194 F.3d 120, 123 (D.C. Cir. 1999), *cert. denied*,

529 U.S. 1111 (2000), and *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1113 (9th Cir. 2000) the courts held that the spouse, parents and children of the deceased (White House Counsel Vincent Foster) had a privacy interest to protect against the release of photographs of Foster's body at the death scene and the autopsy. For example, in *New York Times Co. v. National Aeronautics and Space Administration*, 782 F. Supp. 628, 631-32 (D.D.C. 1991), the court held that the privacy rights of the family members of the Challenger astronauts outweighed public interest in hearing audio tapes of the crew's last words, and thus prohibited release of these tapes under the FOIA. Four years later the D.C. Circuit blocked the disclosure of autopsy photographs of President John F. Kennedy and held that their disclosure implicates the privacy rights of both the decedent and his family. *Katz v. National Archives and Records Administration,* 68 F.3d 1438 (D.C. Cir. 1995) (holding the autopsy photographs of former President John F. Kennedy could not be released to the public because they had been given to the Kennedy estate, and were thus not government records subject to disclosure, but also noting that even if the photographs were government records, they would remain exempt from disclosure under a FOIA exception for medical records. "The x-rays and [autopsy] photographs are medical records," the court held, "which are usually considered private. See, e.g., 5 U.S.C. § 552(b)(6) (exempting 'medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy' from disclosure under the FOIA.") *Id*. at 1441*); Badhwar v. U.S. Dep't of Air Force,* 829 F.2d 182, 185-86 (D.C. Cir. 1987) (concluding under the FOIA standard that release of autopsy photographs of deceased pilots would "shock the sensibilities of surviving kin" and was a "clearly unwarranted invasion of personal privacy" of the families); *Stone v. F.B.I.,* 727 F.Supp. 662 (D.D.C. 1990), *aff'd*, 1990 WL 134431 (D.C. Cir. 1990) (withholding of the names of FBI and local law enforcement agents that participated in the

investigation of the assassination of Senator Robert F. Kennedy); *see also*, *Hale v. U.S. Dep't of Justice*, 973 F.2d 894, 902 (10th Cir. 1992), *vacated on other grounds*, 509 U.S. 918 (1993) (holding that Exemption 7(C) prevented the disclosure of photographs of a deceased victim as no public interest could be discerned that would outweigh the personal privacy interest of a victim's family).

The analysis in *Favish v. Office of Independent Counsel*, 217 F.3d 1168 (9th Cir. 2000) is especially germane to this case. The Ninth Circuit considered a request under the Freedom of Information Act to obtain death scene photographs of White House Counsel Vincent Foster (who committed suicide during the Clinton administration). His body was found dead in the Fort Marcy Park and his death was investigated by the National Park Service and the F.B.I. The Ninth Circuit Court of Appeals held that under the personal privacy exemption of the Freedom of Information Act personal privacy extended to the memory of the deceased held by those tied closely to the deceased by blood or love ("a spouse, a parent, a child, a brother or a sister"), and therefore the reasonable expectation of their family privacy caused by the release of records would be balanced against the public purpose to be served by disclosure. *Id*. at 1173. The court relied on previous case law that recognized (in *Katz)* that release of such a photograph of President Kennedy would invade the privacy of the Kennedy family and (in *New York Times v. NASA*) that release of the tape of the last conversations of the astronauts of the Challenger would invade the privacy of their families. The Ninth Circuit held that the 10 photographs taken shortly after Mr. Foster's body was discovered depicting the corpse lying in Fort Marcy Park could constitute a severe and unnecessary invasion of the family's privacy. Disclosure was precluded by 5 U.S.C. § 552(b)(7)(c) which permits government agencies to deny the release of investigatory materials if disclosure could "reasonably be expected to constitute an unwarranted

invasion of personal privacy." The case was remanded to the district court to make this determination by balancing the Foster family's privacy interest against the public benefit.[2]

The plaintiff in *Favish*, a lawyer, also participated as counsel in the *Accuracy in Media* case and sought in that case to obtain photographs of Foster's body at the death scene and the autopsy. The D.C. Circuit held that the spouse, parents and children of the deceased had a privacy interest against the release of the photographs of his body. *Accuracy in Media v. National Park Service*, 194 F.3d 120, 123 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1111 (2000).

E) <u>State Court Jurisdictions Recognize Right of Privacy Claims</u>

State courts have also recognized a right of family privacy to protect against the intrusive publication of scene-of-death images and autopsy photos. In *Earnhardt v. Volusia County*, 2001 WL 992068 *5, Fla. Cir. Ct., July 10, 2001, (No. 2001-20773-CICI), which concerned the death of NASCAR driver Dale Earnhardt, the court determined that:

> The release of autopsy photographs to any members of the public could result in immediate widespread dissemination of these disturbing images, including posting them on the word wide web. *Id*. at *5.

[2]In the subsequent history of the Ninth Circuit's panel decision, on remand the district court ordered the disclosure of 5 death scene photographs and the withholding of 5 remaining death scene photographs on the grounds that the Ninth Circuit had "defined the zone of privacy protection as those photographs that are 'graphic, explicit and extremely upsetting.' See the decision at page 1174." *Favish v. Office of Independent Counsel,* 2001 WL 770410 at * 1 (C.D. Cal., Jan. 11. 2001), *aff'd*, *Favish v. Office of Independent Counsel,* 37 Fed. Appx. 863, 2002 WL 1263948 (June 6, 2002), *cert. granted,* 123 S,Ct. 1928 (May 5, 2003). The Ninth Circuit then affirmed the district court but ordered that one additional photo be withheld. *Favish v. Office of Independent Counsel,* 37 Fed. Appx. 863, 2002 WL 1263948 (9th Cir., June 6, 2002). The Office of Independent Counsel filed a *certiorari* petition and the Supreme Court granted the OIC's petition that argued *no* death scene photographs should be produced. The issue before the Supreme Court is: "Whether the Office of Independent Counsel properly withheld, under Exemption 7(C), photographs relating to the death of former Deputy White House Counsel Vincent Foster." *Office of Independent Counsel v. Favish,* 2002 WL 32101044 (U.S. Dec 20, 2002;http://search.access.gpo.gov/supreme-court/SearchRight.asp?ct=Supreme-Court-Dockets&q1=02-954&x=23&y=21.

The court took judicial notice of the many websites already specializing in the publication of photographs that are "without question gruesome, grizzly, and highly disturbing to a person of ordinary and normal sensibilities." *Id.* at *2. The *Earnhardt* trial court further determined that:

> The publication of a person's autopsy photographs constitutes a unique, serious and extraordinarily intrusive invasion of the personal privacy of that person's surviving family members, particularly their children, parents and spouse. The wide viewing of such personal and painful photographs by people all over the world who are strangers to the family will cause serious pain, anxiety, worry, and discomfort to the family members. The availability of such photographs on the web makes the dissemination of the photographs very easy for anyone with access to a computer modem. That knowledge alone can cause continuous pain and anxiety to the family and prolong their suffering. The Court specifically finds that examination of these autopsy photographs by any means would be indecent, outrageous, and an intolerable invasion, and would cause deep and serious emotional pain, embarrassment, humiliation and sadness to Dale Earnhardt's surviving family members. *Id.* at *3.

Earnhardt also specifically stated that the generalized public interest in the medical examiner's office and the conduct of autopsies is a "thinly veiled excuse to gain access to the court for either purposes of arguing the constitutionality of the statute or for making profit at the expense of the Earnhardt family." The court considered these arguments strained and "entirely too tenuous for realistic discussion." *Id.* at *3. *Earnhardt* found that in the absence of some question raised as to the performance by the medical examiner of his public duties, the private interest of the Earnhardt family in that keeping the autopsy photographs out of the public view was controlling.

In *Bazemore v. Savannah Hospital*, 171 Ga. 257, 155 S.E. 194 (1930) the Georgia Supreme Court held that the parents of a deceased child could bring an action for invasion of privacy against a hospital, a photographer and a newspaper where a photographer took an unauthorized picture of a malformed child. The court found that it was a violation of the *parents*' privacy to publish the photograph. The Court specifically addressed the issue of whether the right of privacy should survive the death of the child, and stated: "In this case the child was dead when

the unauthorized acts were committed and the right of action could not be in the child, but in the parents." *Id*. at 197. Likewise, in *Cox Broadcasting Corp. v. Cohn*, 214 S.E.2d 530 (Ga. 1973), *rev'd on other grounds*, *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 492 (1975) the Georgia Supreme Court upheld a survivor's (father's) relational privacy right for invasion of privacy and intrusion caused by the publication of the identity of his raped daughter during a television broadcast. The case, although reversed on the grounds that the identity of the rape victim was already a matter of public record, stands as authority for a relational or survivor's right of privacy.

The Supreme Court of Washington in *Reid v. Pierce County*, 961 P.2d 333 (1998) considered the federal jurisprudence and held under the common law that relatives of deceased individuals could maintain an action for invasion of privacy against a county based upon allegations that county employees had appropriated and shown photographs of decedents' corpses. The photos were taken by the medical examiner's office. The Court noted that it was clear that had the county employees physically mutilated or otherwise physically interfered with the corpses of the plaintiffs' relatives then liability would certainly exist. *Reid* at 339-340.

The Washington Supreme Court specifically considered those cases that had considered family right to privacy in connection with postmortem photographs and relied upon *Katz, Badwar* and *New York Times v. NASA*. The Court also relied on a the Kentucky decision in *Douglas v. Stokes, supra*, The Washington Supreme Court stated:

> We agree with the plaintiffs' interpretation of the common law rights of privacy and recognize that the cases relied upon by plaintiffs are more consistent with our own jurisprudence on this issue. *Reid v. Pierce County*, 961 P.2d 333, 341 (1998).

The Washington Supreme Court also relied upon a Florida case, *Loft v. Fuller*, 408 So. 2d 619 (Fl. App. 1991). In that case the Florida Court of Appeals stated:

> There are cases which support the view that under certain circumstances the deceased's relatives may recover for the invasion of their own privacy interests even though they were not personally the focus of the publicity in question. For example, see *Douglas v. Stokes*, 149 Ky. 506, 149 S.W. 849 (Ky.App.1912); *Bazemore v. Savannah Hosp.*, 171 Ga. 257, 155 S.E. 194 (1930); *Fitzsimmons v. Olinger Mortuary Ass'n*, 91 Colo. 544, 17 P.2d 535 (1932); *Varnish v. Best Medium Publishing Co.*, 405 F.2d 608 (2d Cir. 1968), *cert. denied* 394 U.S. 987, 89 S.Ct. 1465, 22 L.Ed.2d 762 (1969); *Cox Broadcasting Corp. v. Cohn*, 231 Ga. 60, 200 S.E.2d 127 (Ga.1973), *reversed on other grounds*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). The rationale behind these decisions is that the relatives of the deceased have their own privacy interest in protecting their rights in the character and memory of the deceased as well as the right to recover for their own humiliation and wounded feelings caused by the publication. Some of these actions were also predicated on quasi-contractual grounds or on grounds similar to those which might constitute a cause of action for intentional infliction of emotional distress under Florida law.
>
> We are wary of a blanket rule barring all relatives of a deceased from bringing a common law invasion of privacy action simply because the relatives were not directly involved in the publicity. However, in our view such relatives must shoulder a heavy burden in establishing a cause of action. When there are unusual circumstances, such as those that were involved in most of the cases which have recognized claims by the relatives, it may be that a defendant's conduct towards a decedent will be found to be sufficiently egregious to give rise to an independent cause of action in favor of members of decedent's immediate family.

Loft v. Fuller, 408 So. 2d 619 (Fl. App. 1991).[3]

The Washington Supreme Court therefore held:

> We hold that the immediate relatives of the decedent have a protectable privacy interest in the autopsy records of the decedent. That protectable privacy interest is grounded in maintaining the dignity of the deceased. We also hold that the trial court erred in granting the county's 12(b)(6) and summary judgment motions on this issue.

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[3]In a recent Eleventh Circuit Opinion, *Tyne v. Time Warner Entertainment Co., L.P.,* 336 F.3d 1286 (11th Cir. [Florida law] 2003) the Eleventh Circuit Court recognized Florida cases in which relational right of privacy gave surviving family members a right to recover damages for invasion of a family's personal privacy rights caused by humiliation and wounded feelings associated with the disclosure of pictures of a deceased body. 336 F.3d 1286, 1292 (11th Cir. 2003).

Reid v. Pierce County, 961 P.2d 333, 342 (1998).

F) Tennessee Law on Right of Privacy

The Tennessee Supreme Court has not directly considered whether parents may bring an invasion of privacy claim for invasion of family privacy associated with the publication of photographic images of a deceased relative. Tennessee courts, however, have recognized the principle of "family privacy." *Rust v. Rust,* 864 S.W.2d 52, 54 (Tenn. Ct. App., 1993) ("The Tennessee Supreme Court in [*Hawk v. Hawk,* 855 S.W.2d 573, 579 (1993)] has held in that a parent's right to raise his or her child is a fundamental liberty interest and that a parent's 'childrearing autonomy' stems from a family's privacy rights." In *Evans v. Steelman*, 970 S.W.2d 431, 434-435 (Tenn. 1998) the court stated: "We acknowledge that the parent-child relationship implicates a right of privacy guaranteed by the Tennessee Constitution. *Hawk v. Hawk,* 855 S.W.2d 573 (Tenn.1993). Moreover, the parent-child relationship may give rise to a liberty interest. *Nale v. Robertson,* 871 S.W.2d 674 (Tenn.1994)." The Tennessee Courts have also recognized that "[a]bsent an expressed desire of deceased, the surviving spouse and, if no surviving spouse, the next of kin, has the right of custody and burial of the remains of the deceased." *Estes v. Woodlawn Memorial Park, Inc.,* 780 S.W.2d 759, 762 (Tenn. Ct. App. 1989). Indeed the surviving relatives have the sole legal authority over the disposition of a deceased relative's remains (subject to the State's power to order an autopsy). *Foley v. St. Thomas Hosp.,* 906 S.W.2d 448, 453 (Tenn. 1995) ("Plaintiff, as a surviving spouse, had the sole legal authority over the disposition of her husband's remains. *See* Tenn. Code Ann. § 68-4-111. To adopt a rule which would require plaintiff, and others similarly situated, to preserve, or cremate, her husband's remains, would violate the law's sensitive deference to the family's right to control the

disposition of a loved one's remains and could violate the surviving spouse's freedom of religion.")[4].

[4]The Media Defendants misleadingly assert at p. 28 of their brief that the Plaintiffs "have no legitimate expectation of privacy in their daughter's body" because in *State v. Kelly*, 697 S.W. 2d 355 (Tenn. Crim. App. 1985) the court "held that the brother of a shooting victim had no legitimate expectation of privacy in his brother's dead body and had no standing to challenge an autopsy that was ordered as part of a criminal investigation." What the Media Defendants fail to point out is *Kelly* was a *criminal* prosecution and Fourth Amendment search and seizure case where the "brother of the shooting victim" *murdered* his brother, and after being convicted of the first-degree murder of his brother appealed his conviction by challenging the admissibility of the autopsy of his murdered brother. The murdered brother raised a Fourth Amendment search and seizure issue– the case had nothing to do with the survivor or family privacy. The court stated:

> By his first issue, the defendant insists that the results of the autopsy should have been suppressed because it violated his right against unreasonable searches and seizures under the Fourth Amendment to the United States Constitution. He relies on irregularities in the statutory procedure of recommending the autopsy, as well as the fact that he was not notified of the autopsy as next of kin.
> Further, the defendant has shown no legitimate expectation of privacy for him in the body of the deceased upon which the officers intruded. He has cited no case or statute which legally confers upon him any right to the possession of his brother's body. He has shown no standing to challenge the "search" or "seizure" of the victim's body. If the defendant expected that he could prevent the state from examining the body of one who has recently died by violence, his expectation was neither reasonable nor legitimate. We note that he makes no claim that the autopsy was unreliable. This issue is meritless. *Id.* at 357.

Clearly a murderer cannot not assert a Fourth Amendment "right of privacy" to prevent the State from conducting an autopsy on the body he murdered. The happenstance sibling relationship in the peculiar fact pattern in *Kelly* has no relevance to the issue of whether a claim for survivor or family privacy exists on the facts present in this case.

The Media Defendants compound their fatuous analysis by stating that *Kelly* was cited with approval in *Collins v. Crabbe*, 172 F.3d 872, 1999 WL 55279 (6th Cir. 1999). The Media Defendants assert that *Collins* cited *Kelly* with approval stating "(*Kelly* court 'has, in fact, affirmatively held that under Tennessee law, no reasonable expectation of privacy exists' in body of next of kin." Media Defendants brief at p. 29. In *Collins,* however, once again the issue was whether public officials (carrying out their official duties to conduct an autopsy) somehow violated the *Fourth Amendment*. As the Court explained, "Thus, the complaint alleged, the autopsy amounted to 'a warrantless seizure of the Plaintiff's private property in violation of the Fourth and Fourteenth Amendments of the United States Constitution.'" *Id* at *1. Moreover, The Sixth Circuit assumed there *was* "a constitutionally protected property interest in the body of a deceased next-of-kin" under Tennessee law, but that such a right was not clearly established, therefore the defendants were entitled to qualified immunity. The Court then went on to reject a *Fourth Amendment* (search and seizure) claim and quoted *Kelly* in the context of "no privacy" with respect to the Fourth Amendment claim:

> This court has twice, in somewhat analogous circumstances, held that under the law of states other than Tennessee, a plaintiff had a constitutionally protected property interest in the body of a deceased next-of- kin. *See Whaley v. County of Tuscola,* 58 F.3d 1111, 1115-16 (6th Cir.1995); *Brotherton v. Cleveland,* 923 F.2d 477, 480 (6th Cir.1990) . . .
> Assuming *arguendo* that Tennessee has created the same sort of property right as this court concluded had been created by Michigan and Ohio, we think it plain that the right was not "clearly established" so as to defeat qualified immunity for the defendants here.
> *With respect to the plaintiff's Fourth Amendment claim*, we note that we are aware of no decision

Tennessee recognizes the tort of invasion of privacy as set forth in the RESTATEMENT (SECOND) OF TORTS § 652A under theories of intrusion upon seclusion, public disclosure of private facts and false light privacy claims. *See e.g., Major v. Charter Lakeside Hosp.,* 1990 WL 125538 (Tenn. Ct. App. 1990) (intrusion and private facts); *Langford v. Vanderbilt Univ.,* 199 Tenn. 389, 287 S.W. 32 (1956) (publication of private facts); *West v. Media General Convergence, Inc*. 53 S.W3d 640 (Tenn. 2001) (false light); *Martin v. Senators*, Inc., 418 S.W.2d 660 (Tenn. 1967) (invasion and private facts); *Givens v. Mullikin,* 75 S.W.3d 383 (Tenn. 2002) (intrusion). Tennessee has also held that the right of publicity survives death. *State ex. rel. Elvis Presley Int'l Mem. Foundation v. Crowell,* 733 S.W.2d 89 (Tenn Ct. App. 1997). Based upon the strong recognition of family and parental privacy interests in Tennessee, Plaintiffs aver that the Tennessee Supreme Court would recognize a family or survivor right to privacy in this case based upon an intrusion and an impermissible publication of private facts.

The recognition of a family right of privacy on the facts of this case is consistent with the United States Supreme Court's opinion in *Whalen v. Roe*, 429 U.S. 589 (1997) where the Court recognized an individual's constitutional and protected right to informational privacy, described as the individual's privacy interest in avoiding disclosure of personal matters. *Id.* at 599-600.

> from any court to the effect that a Fourth Amendment right exists in the deceased body of one's next-of-kin. The Tennessee Court of Criminal Appeals has, in fact, affirmatively held that, under Tennessee law, no reasonable expectation of privacy exists. *See State v. Kelly,* 697 S.W.2d 355, 357 (Tenn.Ct.Crim.App.1985). We agree, and conclude that because the plaintiff has failed to show that the defendants violated a Fourth Amendment right, she has failed to satisfy an essential element of her section 1983 claim. *See Charles v. Baesler,* 910 F.2d 1349, 1352 (6th Cir. 1990). (emphasis supplied). *Id.* at *3.

Both *Kelly* and *Collins* involved the novel (or actually "meritless") argument that there was an unlawful search and seizure violative of the Fourth Amendment when public officials took possession of a body for a lawful autopsy. Not surprisingly, the Sixth Circuit found "no decision from any court" that supported this supposed right. These cases, however have absolutely nothing to do with whether a right of privacy based upon intrusion and private facts theories exists in family members to recover for emotional distress where a Media Defendant films and broadcasts graphic and disturbing images of a relative's body in a morgue and at a sequestered death scene.

Although *Whalen* rejected the privacy arguments made by patients and doctors about the New York statute requiring entry of a patient name, address and doctors in a centralized computer database, the Court did so on two grounds: a) that the state had taken security precautions to ensure that the database information would not be unintentionally disclosed or made publicly available; and b) the state had shown an important interest in tracking the use of certain legal, yet dangerous drugs. *Id*. at 600-02.

G) Death and Morgue Scenes Were Private Until Broadcast

The Media Defendants contend (at pp. 25-26 of their brief) that the Plaintiffs' private facts claims fail because "all of the facts" "about Mrs. Norman's death, her injuries and her past history already were in the public domain." Plaintiffs Complaint pleads the private facts claim by stating: "Plaintiffs further aver that the Defendants narrated, explained, filmed or broadcast private injuries sustained by Misty Perkins Norman." Complaint ¶ 37 (first sentence). The defendants conspicuously omit any references to the graphic videotape or film images from the death scene and morgue that were never public until the Media Defendants broadcast the *True Stories From the Morgue* episode. The defendants' argument is without merit as to the film and video images.

H) Privacy Claims Do Not Require Physical Presence

The Media Defendants next contend that the privacy claims must fail because the plaintiffs were not present when the intrusion occurred. (Brief, p. 26). Again the Media Defendants misstate the applicable law by declaring "See also Restatement (Second) of Torts § 652B cmt. B (intrusion claim requires 'intrusion into a place in which the plaintiff has secluded himself')." In *fact* RESTATEMENT (SECOND) OF TORTS § 652B comment (b) makes clear that there is *not* any such requirement:

> The invasion *may be by physical intrusion* into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff's room in a hotel or insists over the plaintiff's objection in entering his home**.** *It may also be by the use of the defendant's senses,* with or without mechanical aids, *to oversee* or overhear the *plaintiff's private affairs,* as by looking into his upstairs windows with binoculars or tapping his telephone wires. *It may be by some other form of investigation or examination into his private concerns, as by opening his private and personal mail*, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents. The intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of the photograph or information outlined[5]. (emphasis supplied).

None of the family or survivor privacy cases involving death scene images or autopsy photographs have ever imposed a "presence requirement" doubtless because it makes no sense. It is the intrusion into someone's memory and peace of mind by the *publishing of the photographic* images that give rise to liability. *Earnhardt v. Volusia County*, 2001 WL 992068 *3, Fla. Cir. Ct., July 10, 2001, (No. 2001-20773-CICI); *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1713 (9th Cir. 2000) *cert. granted*, 123 S.Ct. 1928 (MEM), 155 L.Ed.2d 847 (May 5, 2003). *Cf. Williams v. City of Minneola,* 575 So. 2d 683, 690 (Fla. Ct. App. 1981) ("We hold that a cause of action in tort for reckless infliction of emotional distress can lie for outrageous conduct involving pictures of the dead body of a plaintiff's spouse, child, sibling or parent, even though the plaintiff was not present at the display of the pictures and the allegedly tortious conduct did not physically impact the plaintiff, whether or not the emotional distress in turn caused physical harm to the plaintiff.").

II. THE FIRST AMENDMENT DOES NOT BAR PLAINTIFFS' CLAIMS

The Media Defendants assert that the First Amendment permitted them to videotape, film and broadcast on television graphic death scene and autopsy images of the deceased body of

[5]The case citations in the RESTATEMENT (SECOND) OF TORTS § 652B annotate intrusion cases in which

Misty Perkins Norman. The Media defendants' attempt to use the protective cloak of the First Amendment to the United States Constitution is an obscene subterfuge. The Broadcast was not news and not newsworthy. It was sensational exploitation.

A) <u>The Death Scene Was Not Public</u>

The First Amendment affords no protection to the Media Defendants because there was *no* legitimate public concern or newsworthiness in the graphic death scene photographs and autopsy room images of Ms. Norman's dead body taken at a sequestered death scene investigation and at the Davidson County morgue. Morgues are not open to the public but are areas of "private repose." *See State v. Condon*, 15 Ohio App. 3d 629, 641, 789 N.E. 2d 696, 705, (Ohio Ct. App. 2003) ("Here, however, the corpses were not in a place open to public inspection. A morgue is not a lending library or a museum. It is a place of private repose, not of public display."). National standards for morgues and medical examiners *require* that the public be excluded from morgues and autopsy rooms. *See* National Ass'n of Medical Examiners, *Accreditation Checklist* (2003) at pages 1, 2, 4 and 10 (attached hereto as **Exhibit 2**). No case has ever held that pictures of a human corpse in a morgue or at autopsy concern to a matter that is "newsworthy" or of "public concern."

In Tennessee, although no statute or regulation addresses autopsy photographs made by the medical examiners, the uniform policy and practice of county coroners and medical examiner is to *not* treat photos as public records and they are not disclosed to the public. *See Frequently Asked Questions of the Hamilton County [Chattanooga, Tennessee] Medical Examiner,* http://www.hamiltontn.gov/faq.htm (**Exhibit 3**) ("Photographs, x-rays, and histology sections/microscopic slides are necessary parts to any medicolegal investigation but are not

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family members' privacy was invaded by publication of a relative's information. *See e.g, Cox Broadcasting Corp.*

public documents.□There are many special circumstances about the availability of this type of evidence; inquire within about your particular case."). Likewise, in the conduct of death scene investigations, "At serious crime scenes, no one except the officers assigned to investigate the scene is permitted inside the secured area." *Barrett v. Outlet Broadcasting, Inc.,* 22 F.Supp.2d 726, 742 (S.D. Ohio 1997) (citing Columbus, Ohio police policy directive). National guidelines for death scenes investigations also mandate that crime scenes are not open to the public." United States Dep't of Justice, DEATH INVESTIGATION: A GUIDE FOR THE SCENE INVESTIGATOR (1999) at pp. 16, 23 ("establish physical boundaries" to scene; "remove all nonessential personnel from the scene"). (**Exhibit 4**).

In this case, Opryland Hotel's private security employees expressly excluded the media from entering the hotel and kept the public from the Norman's room and the crime scene area and did not authorize use or broadcasting of the videotape or film taken by the film crew, who entered the premises under false pretenses. (Affidavit of Randy Thurman, **Exhibit 5**).

The RESTATEMENT (SECOND) OF TORTS § 652D specifically states that matters are *not* of public concern if they involve "a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern." RESTATEMENT (SECOND) OF TORTS § 652D, *comment h*, at 391 (1977). *No* case or court has ever held that a media defendant can film or broadcast pictures of a dead body from a sequestered death scene, a morgue or autopsy as a protected "First Amendment" act of "newsgathering" or "publication." To the contrary, courts routinely deny access to autopsy and death scene pictures of even public figures such as President John F. Kennedy[6], NASCAR driver

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v. Cohn, 420 U.S. 469 (1973), *conformed to*, 234 Ga. 67, 214 S.E.2d 530.

[6]*See Katz v. National Archives and Records Administration,* 68 F.3d 1438 (D.C. Cir. 1995).

Dale Earnhardt[7], and White House counsel Vincent Foster.[8]

The Media Defendants' First Amendment argument to dismiss the Plaintiffs' Complaint fails because the public and news media have no concern, indeed no right whatsoever, to intrude upon, film or broadcast on television or the Internet photographic images from a sequestered police death scene investigation or a medical examiner's autopsy.

B) <u>Supreme Court Decisions Do Not Protect Defendants' Actions</u>

The United Supreme Court cases relied upon by the Media Defendants are only marginally instructive to this case, because they do not address the scope of what is "newsworthy" or of "public significance" and expressly refuse to define any "rule" to resolve cases in which rights of privacy or civil liabilities "clash" with the First Amendment. The Supreme Court has "eschewed" such rulemaking, choosing instead to evaluate each case on its own particular facts. In the Supreme Court's most recent privacy-First Amendment case, for example, *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (where a newspaper lawfully obtained illegal wiretap tapes of cell phone conversations) the Court explained this essentially *ad hoc* approach:

> Our refusal to construe the issue presented more *broadly is consistent with this Court's repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment***.** Rather,"[o]ur cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily....We continue to believe that the sensitivity and significance of the interests presented in clashes between [the] First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the

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[7]In *Earnhardt v. Volusia County*, 2001 WL 992068 *5, (Fla. Cir. Ct., July 10, 2001) (No. 2001-20773-CICI) It is important to note that the ORLANDO SENTINEL never intended to print the photos from Dale Earnhardt's autopsy and wanted to view them as a part on a broader series on NASCAR safety. *See* Association of Press Managing Editors. THE ORLANDO SENTINEL stated that "We have never sought to publish the autopsy photographs; we have never once sought to copy the photographs." Associated Press Managing Editors, *FOI Stump Speech.* (December 12, 2002) at http://www.apme.com/FOI/FOIspeech_text.shtml. (**Exhibit 6**).

[8]*Accuracy in Media, Inc. v. National Park Service*, 194 F. 3d 120, 123 (D.C. Cir. 1999*), cert. denied*, 529 U.S. 1111 (2000); *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1713 (9th Cir. 2000) *cert. granted*, 123 S.Ct. 1928 (MEM), 155 L.Ed.2d 847 (May 5, 2003).

> instant case." Accordingly, we consider whether, given the facts of these cases, the interests served by § 2511(1)(c) can justify its restrictions on speech. (emphasis supplied).

Bartnicki v. Vopper, 532 U.S. 514, 529 (2001).

Despite the Supreme Court's "repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment" the Media Defendants open their brief and their discussion of the First Amendment issue by asserting the existence of a "fundamental constitutional rule" that "fully immunizes" their conduct. Media Defendants' brief at p. 2. The movants' brief then proceeds (at p. 10) to distort the United States Supreme Court's jurisprudence. In discussing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) the Media Defendants state:

> The Court *was called upon to decide* whether "the publication of truthful information withheld by law from the public domain is . . . . privileged [by the First Amendment."Id. at 840. The Court concluded that the First Amendment *did protect* the publication of such information, noting that the newspaper "had provided accurate factual information about a legislatively authorized inquiry . . .and in so doing clearly served those interests in public scrutiny and discussion of public affairs which the First Amendment was adopted to protect." Id. at 839.
>
> The Court reaffirmed this *rule* in *Smith v. Daily Mail Publ'g*, 443 U.S. 97 (1979). (emphasis supplied).

Media Defendants' Brief at pp. 10-11.

The quoted argument by the Media Defendants would reasonably lead a reader to believe that in *Landmark* the Supreme Court was "called upon to decide whether the publication of truthful information withheld by law from the public domain is privileged by First Amendment" and that the *Landmark case* announced a "rule" that the "First Amendment did protect the publication of such information." Plaintiffs refer the Court to what the Supreme Court *actually* said in *Landmark Communications, Inc. v. Virginia* to demonstrate the scope of the Media

Defendants' distortion:

> At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records." 420 U.S., at 496, 95 S.Ct., at 1047. The broader question--whether the publication of truthful information withheld by law from the public domain is similarly privileged--*was not reached and indeed was explicitly reserved in Cox. Id. at 497 n.27, 95 S.Ct., at 1047 n.27. We need not address all the implications of that question here, but only whether in the circumstances of this case Landmark's publication is protected by the First Amendment*. (emphasis supplied).

A proper (and fair) reading of *Landmark* is that the Court *limited* its decision to the "circumstances of [the] case" which involved the special situation of reporting on "governmental affairs, the operation of courts and the judicial conduct of judges" and did "not address all the implications" of the "question" raised by publication of truthful information from matters withheld from the public domain.[9]

Again in *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) the Supreme Court expressed its caution in analyzing the competing interests of privacy rights and the First Amendment. In *Florida Star* a newspaper reporter went to a "press room" that was "open to the public" at the Sheriff's Department that "did not restrict access to the room or to the reports available there" and saw a rape victim's name on a police report. *Id*. at 524. The Florida Star newspaper published the rape victim's name in violation of a Florida law that prohibited the publication of a

[9]The Media Defendants also mischaracterize the Supreme Court's holding in *Smith v. Daily Mail Pub. Co.,* 443 U.S. 97 (1979) by stating that at page 103 the Court held that where " 'a *newspaper* lawfully obtains truthful information about truthful information of public significance' *it may not be punished* 'absent a need to further a state interest of the highest order." Media Defendants' brief at p. 11. (emphasis supplied). In *fact*, however, the Court said at page 103: "*None of these opinions directly controls this case***;** however, all *suggest* strongly that if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." 443 U.S. 97, 103. (emphasis supplied). The Court stated at page 102: "state action to punish the publication of truthful information *seldom* can satisfy constitutional standards." *Smith v. Daily Mail Pub. Co.,* 443 U.S. 97, 102 (1979). (emphasis supplied). The Court went on to state at page 104: "If the information is lawfully obtained, as it was here, the state may not punish its publication except when necessary to *further an interest more substantial than is present here*." (emphasis supplied).

rape victim's name. The rape victim then sued the newspaper for negligence *per se* for violating the Florida statute. The Supreme Court held that imposing damages on the newspaper violated the First Amendment but expressly cautioned that no broad rule or principle should be inferred from the Court's holding:

> *Nor need we accept appellant's invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment***.** Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily. See, *e.g., Near v. Minnesota ex rel. Olson,* 283 U.S. 697, 716, 51 S.Ct. 625, 75 L.Ed. 1357 (1931) (hypothesizing "publication of the sailing dates of transports or the number and location of troops");see also *Garrison v. Louisiana,* 379 U.S. 64, 72, n. 8, 74, 85 S. Ct. 209, 215, n. 8,216, 13 L.Ed.2d 125 (1964) *(endorsing absolute defense of truth "where discussion of public affairs is concerned," but leaving unsettled the constitutional implications of truthfulness "in the discrete area of purely private libels"*); *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 838, 98 S.Ct. 1535, 1541, 56 L.Ed.2d 1 (1978); *Time, Inc.v. Hill,* 385 U.S. 374, 383, n. 7, 87 S.Ct. 534, 539-40, n. 7, 17 L.Ed.2d 456 (1967). Indeed, in *Cox Broadcasting, we pointedly refused to answer even the less sweeping question "whether truthful publications may ever be subjected to civil or criminal liability" for invading "an area of privacy" defined by the State***.** 420 U.S., at 491, 95 S.Ct., at 1044. Respecting the fact that press freedom and privacy rights are both "plainly rooted in the traditions and significant concerns of our society," we instead focused on the less sweeping issue "whether the State may impose sanctions on the accurate publication of the name of a rape victim *obtained from public records*--more specifically, from judicial records which are maintained in connection with a public prosecution *and which themselves are open to public inspection***."** *Ibid. We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.*
>
> In our view, this case is appropriately analyzed with reference to such a limited First Amendment principle. It is the one, in fact, which we articulated in *Daily Mail* in our synthesis of prior cases involving attempts to punish truthful publication: "[I]f a newspaper lawfully obtains truthful information *about a matter of public significanc**e*** then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." 443 U.S., at 103, 99 S.Ct.

The Florida Star v. B.J.F., 491 U.S. 524, 532-533 (1989).

The United States Supreme Court cases simply do not address what is a "matter of public significance" or what is "newsworthy" such that publication of private facts will justify civil liability. *See Shulman v. Group W Productions, Inc.*, 18 Cal.4th 200, 218, 955 P.2d 469,480-481, 74Cal.Rptr.2d 843, 854-855 (Cal. 1998) (United States Supreme Court decisions provide "little general guidance as to what is, and what is not newsworthy" and "do not enunciate a general test of newsworthiness or provide a broad theoretical basis for the discovery of such a general constitutional standard.").

C) <u>Private Tragedy Is Not Newsworthy and Its Exploitation Is Not Protected By the First Amendment</u>

Before any First Amendment privilege is implicated in a case involving a media defendant there must be a reasonable newsworthiness or matter of public concern associated with the newsgathering, broadcast or publication. *See Virgil v. Time, Inc.*, 527 F.2d 1122, 1128 (9th Cir.1975), *cert. denied*, 425 U.S. 998 (1976) ("[w]e conclude that unless it be privileged as newsworthy . . . the *publicizing of private facts is not protected by the First Amendment*."); *Gilbert v. Medical Economics Co.,* 665 F.2d 305, 308 (10th Cir.1981) ("*Thus, dissemination of non-newsworthy private facts is not protected by the First Amendment*." *Veilleux v. National Broadcasting Co.,* 8 F.Supp.2d 23, 40 n. 8 (D.Me.1998) ("To the extent Defendants argue that the First Amendment imposes additional restraints on Plaintiffs' offensive publicity claim, the Court notes that "unless it be privileged as newsworthy . . . *the publicizing of private facts is not protected by the First Amendment*."). (Emphasis supplied.)

The protection afforded Media Defendants who invade personal privacy or inflict emotional distress does not extend to matters that are not newsworthy such as graphic close up images of a nude corpse taken in place not open to the public[10].

A very instructive case (*not* cited by the Media Defendants) is *Green v. Chicago Tribune Company,* 286 Ill. App. 3d 1, 675 N.E. 2d 249 (Ill. Ct. App. 1996). In *Green* a newspaper reporter and photographer for the Chicago Tribune entered a hospital room and photographed the dead body of young male killed in a gangland shooting. Like the Media Defendants, in this case, the Chicago Tribune argued that the subject of gangland shootings was newsworthy, of public concern and protected by the First Amendment. *Id.* at 10 and 255. The Court rejected the Chicago Tribune's claims with an analysis that although lengthy, bears careful consideration in this case:

> The Tribune argues the subject of the January 1 article was the death toll from guns and gang warfare, which, like the subject of drug use, is of legitimate public concern. In our view, however, the relevant inquiry is whether *the photograph of plaintiff's dead son and her statements to him* [*emphasis in original*] are of legitimate public concern.
>
> The Tribune contends the publication of the photograph of plaintiff's son lying dead in the hospital, and plaintiff's statements to him, satisfied the public's curiosity of a newsworthy event and therefore no liability should follow. However, "[t]he extent of the authority to make public private facts is not * * *

[10]Defendants cite a 1956 decision of the Iowa Supreme Court in *Bremmer v. Journal-Tribune Publishing Company*, 247 Iowa 817, 76 N.W.2d 762 (Iowa 1956). In *Bremmer* a newspaper published a photograph of an eight-year old boy whose body was discovered in a field near Sioux City. The body was described as mutilated and decomposed. *Id.* at 819. The Defendants omit significant facts from this case including the court's finding that "it is not pleaded or contended that the body was unclothed or that any of its organs or private parts were shown in the picture." The decomposed body of Jimmy Bremmer 'was exposed to public view and more particularly, to the view of the parents." Therefore, what the Media Defendants were seeing was already public. The morgue and death-scene at Opryland were not open to the public and the photographs in this case are of the unclothed, naked body of Misty Perkins Norman. *Bremmer* distinguished cases involving the showing of a nude corpses as examples of "an extreme case" involving the "pictures of a nude and deformed body." *Id.* at 827. The court stated such cases were not on point. *Id. Bremmer* further stated there was "no suggestion of indecent exposure." *Id.* at 766. The opinion also contains a vigorous dissent in which the Judge stated that he could not agree with the application of a rule that pictures of news interest, "no matter how morbid and repulsive they may be, and how much they may needlessly hurt anyone concerned, are privileged and that the publishers are therefore governed only by their own conscience and sense of decency in determining whether or not such pictures are printed." *Id.* at 829.

> unlimited. * * * In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. *The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern."* *Restatement (Second) of Torts Sec. 652D, comment h, at 391 (1977).* (emphasis supplied).
>
> A jury could find that a reasonable member of the public has no concern with the statements a grieving mother makes to her dead son, *or with what he looked like lying dead in the hospital,* even though he died as the result of a gang shooting. (emphasis supplied).
>
> In sum, we hold plaintiff's amended complaint states a cause of action for public disclosure of private facts with respect to the January 1, 1993, Tribune publication.
>
> . . . . . .
>
> We hold plaintiff stated a cause of action for intentional infliction of emotional distress caused by the Tribune when it barred her from seeing her dead son on December 31 while it photographed him, *and when it published the January 1 article featuring her statements to her son and the photograph of him lying dead.* (emphasis for this last sentence supplied).

Green v. Chicago Tribune Company, 286 Ill. App. 3d 1, 10-14, 675 N.E. 2d 249, 255-58 (Ill. Ct. App. 1996)[11].

D) <u>The First Amendment Does Not Protect Lurid Voyeurism</u>

The Media Defendants crossed the line to lurid voyeurism and morbid curiosity by exposing in intimate photographic detail Misty Perkins Norman's nude deceased body and mortal injuries, these images captured at places that were not open to public view (and were in facts areas where the public was not allowed).[12] *See* **Exhibit 1**. The *True Stories From the*

[11] *See also Bichler v. Union Bank & Trust Co.,* 745 F.2d 1006, 1012 (6th Cir. 1984) (First Amendment privilege to report on matter of public interest does not extend to material "not reasonably necessary to the development of the privileged subject matter of the publication.").

[12] *Cinel v. Connick,* 15 F.3d 1338 (1994) is cited by the Media Defendants at p. 16 of their brief. The case is clearly distinguishable. In *Cinel* a videotape of a Catholic priest's homosexual acts (which were then illegal under

Morgue pictures are lurid, morbid, close-up, bloody, gruesome, sensational, emotional, ghoulish[13] and violate all norms of decent respect for the dead:

> [one] cannot deny the powerful sense of invasion bound to be aroused in close survivors by wanton publication of gruesome details of death by violence. One has only to think of Lindbergh's rage at the photographer who pried open the coffin of his kidnapped son to photograph the remains and peddle the resulting photos. While law enforcement sometimes necessitates the display of such ghoulish materials, there seems nothing unnatural in saying that the interest asserted against it by spouse, parents and children of the deceased is one of privacy--even though the holders of the interest are distinct from the individual portrayed.

Accuracy in Media, Inc. v. National Park Service, 194 F. 3d 120, 123 (D.C. Cir. 1999*), cert. denied*, 529 U.S. 1111 (2000)(recognizing invasion of family/survivor privacy by the release of photos of the death scene and autopsy of Deputy White House counsel, Vincent W. Foster, Jr.).

In *Barrett v. Outlet Broadcasting, Inc.,* 22 F. Supp. 2d 276 (S.D. Ohio 1997) a television news reporter and cameraman accompanied police to the house of a suicide victim and took pictures of the dead body. A Detective told another officer, "These guys are with me tonight" in order to permit the reporter and cameraman to pass under the police tape. *Id.* at 732. The images were broadcast on television and the children of the victim brought a § 1983 claim (with pendent state law claims) against the city and television station. The Court found the Media Defendants were state actors. As here, the media defendants asserted the First Amendment

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Louisiana law) that was *obtained by subpoena* was held to be newsworthy because the court found it "related to Appellant's guilt or innocence of criminal conduct. Also, the material implicated the public's concern with the performance of its elected DA, especially because the DA's decision cannot be reviewed by a court. *See State v. Perez,* 464 So.2d 737, 744 (La.1985) (explaining that the district attorney is given absolute discretion in the institution of criminal charges). Finally, the materials concerned Appellant's activities while an ordained Catholic priest and the Church's response to those activities." *Id.* at 1346. The Media Defendants also misrepresent *Cape Publications, Inc. v. Bridges,* 423 So. 2d 426 (Fla. Ct. App. 1982) at page 17 of their brief by stating that a "nude picture was relevant to a story of public interest." In *fact* the opinion reveals that the photo was taken outside, *in a public place* as the woman was being escorted to a police car, with court stating that "The photograph revealed little more than could be seen had appellee been wearing a bikini and somewhat less than some bathing suits seen on the beaches. *Id.* at 427. Nowhere in the opinion is the word "nude" used.

[13]"Ghoul": "From an Arab verb root meaning 'to seize.' An evil spirit supposed (in Mohammedan) countries to rob graves and prey on human corpses." VI THE OXFORD ENGLISH DICTIONARY (2d. ed.), p. 495 (1998). *See* **Ex. 1.**.

protected the newsgathering and broadcasting of the death scene image of the victim's deceased body. The court, in a lengthy analysis, upheld the Plaintiffs' section 1983 and state law claims and rejected any First Amendment privilege:

> The Media Defendants argue that even if their behavior was extreme and outrageous, that they cannot be liable because their actions are privileged under the First Amendment. The Media Defendants argue that they are privileged to broadcast truthful stories "of legitimate concern to the public." *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 492, 95S.Ct. 1029, 43 L.Ed.2d 328 (1975). Plaintiffs argue that Ms. Smith's suicide in her own home is not newsworthy material, and that the public does not have a legitimate interest in her suicide. Although the Court does not agree that the story covered by Mr. Hayes was completely unnewsworthy, the degree of "newsworthiness" of suicides is exemplified in Outlet Broadcasting's own policy regarding the reporting of suicides. That policy provides: "We do not report suicides unless they are part of an unusual story and are cleared by the News Director as, for example, in the case of a public figure who commits suicide." (Plaintiffs' Ex. 7).
>
> The defendants in *Miller* also argued that their conduct was protected under the First Amendment. The California court agreed that a civil action against a news organization for invasion of privacy implicated the First Amendment. *See* 232 Cal.Rptr. at 684 (citing *New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686(1964)). The court further found that news-gathering fell within the protective ambit of the First Amendment. *See Miller,* 232 Cal.Rptr. at 684. The court held, however, that the media did not enjoy an absolute privilege in this area, but was entitled to limited protection. *See id.* The Court found that this limited privilege did not protect the defendants' conduct in *Miller:*
>
> > "[T]he First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office."
>
> We conclude, in the case before us, that the obligation not to make unauthorized entry into the private premises of individuals like the Millers does not place an impermissible burden on newsgatherers, nor is it likely to have a chilling effect on the exercise of First Amendment rights. To hold otherwise might have extraordinarily chilling implications for all of us; instead of a zone of privacy protecting our secluded moments, a climate of fear might surround us instead. Others besides the media have rights, and those rights prevail when they are considered in the context of the events at the Miller home....
> *Miller,* 232 Cal.Rptr. at 685 (citing *Dietemann v. Time, Inc.,* 449 F.2d 245, 249 (9th Cir.1971)) (footnotes omitted). The Court agrees with the analysis of the *Miller* court. In this Court's Memorandum and Order of March 13, 1996, the Court similarly held: *To be sure, the media has a right to cover events relating to*

> *the commission and investigation of a crime--matters which "are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government." However, the right to obtain and broadcast newsworthy persons and places is not an unfettered right. It is constrained by the fundamental protections afforded all citizens by the Constitution and applicable case law*. (emphasis supplied).
> (Mem. and Order at 27) (citations omitted).
>
> In that Memorandum and Order, this Court made a distinction between the broadcast of scenes open to view by the public and the broadcast and misrepresentation of scenes within the sanctity of a residence. The Court continues to find this distinction relevant. In *Howell v. New York Post Co.,* 81 N.Y.2d 115, 596 N.Y.S.2d 350, 612 N.E.2d 699, 700 (1993), a photographer trespassed onto the grounds of a psychiatric hospital and photographed the plaintiff walking outside the hospital. The court held that the publication was qualifiedly privileged. *See id.* at 125, 596 N.Y.S.2d 350, 612 N.E.2d 699. In *Howell,* the court noted that Courts have recognized that newsgathering methods may be tortious and, to the extent that a journalist engaged in such atrocious, indecent and utterly despicable conduct as to meet the rigorous requirements of an intentional infliction of emotional distress claim, recovery may be available. The conduct alleged here, however--a trespass [onto the hospital's] grounds--does not remotely approach the required standard. That plaintiff was photographed outdoors and from a distance diminishes her claims even further. *Id.* at 126, 596 N.Y.S.2d 350, 612 N.E.2d 699 (citations omitted). *In contrast, Ms. Smith was filmed inside her bedroom at close range, allegedly without the knowledge or permission of her family. In addition, Ms. Smith was not shown walking on the grounds of a psychiatric hospital, but lying dead with a gunshot wound in her chest. The Court finds that the Media Defendants were not privileged by the First Amendment to enter Ms. Smith's home without permission, or to film and broadcast Mr. Smith's corpse or the interior of her home.* (emphasis supplied).

Barrett v. Outlet Broadcasting, Inc., 22 F.Supp. 2d 726, 747-748 (S.D. Ohio 1997) (emphasis supplied).

The reasoning in *Barrett v. Outlet Broadcasting* is fully applicable here. Misty Perkins Norman was filmed "lying dead" "at close range" with "a wound" in her head "without the knowledge or permission of her family." *See* **Exhibit 1.** The crime scene and morgue were not "open to view by the public." Although *Barrett* involved a news crew at a residence, courts have applied the same analysis where a media defendant intrudes upon a place where there is an "objectively reasonable expectation of privacy."

The Media Defendants fail to cite *Shulman v. Group W Productions, Inc.*, 18 Cal.4th 200, 955 P.2d 469, 74 Cal.Rptr.2d 843 (Cal. 1998). In *Shulman,* two plaintiffs, a mother and son, sued a television producer for videotaping and broadcasting a documentary program showing the plaintiffs' rescue from an automobile accident and their transportation to the hospital in a medical helicopter. The California Supreme Court held that the media defendants could be sued for invasion of privacy (intrusion upon seclusion). The California Supreme Court also held that a First Amendment privilege did not apply because the defendants videotaped a seriously injured plaintiff's medical condition and conversation in a medical helicopter (even though there was permission by the helicopter crew for the new team to film and the even though broadcast facts were true) should a jury determine that the segment was an offensive intrusion. The Court found that the plaintiff had an "objectively reasonable expectation of privacy" in the medical helicopter:

> First, a triable issue exists as to whether both plaintiffs had an objectively reasonable expectation of privacy in the interior of the rescue helicopter, which served as an ambulance. Although the attendance of reporters and photographers at the scene of an accident is to be expected, we are aware of no law or custom permitting the press to ride in ambulances or enter hospital rooms during treatment without the patient's consent. (See *Noble v. Sears, Roebuck & Co., supra,* 33 Cal.App.3d at p. 660,109 Cal.Rptr. 269 [accepting, subject to proof at trial, intrusion plaintiff's theory she had "an exclusive right of occupancy of her hospital room" as against investigator]. *Miller, supra,* 187 Cal.App.3d at pp. 1489- 1490, 232 Cal.Rptr. 668 [Rejecting intrusion defendant's claim that plaintiff consented to media's entry into home by calling paramedics: "One seeking emergency care does not thereby 'open the door' for persons without any clearly identifiable and justifiable official reason who may wish to enter the premises where the medical aid is being administered."].) Other than the two patients and Cooke, only three people were present in the helicopter, all Mercy Airstaff. As the Court of Appeal observed, "[i]t is neither the custom nor the habit of our society that any member of the public at large or its media representatives may hitch a ride in an ambulance and ogle as paramedics care for an injured stranger." (See also *Green v. Chicago Tribune Co., supra,* 221 Ill.Dec. 342, 675 N.E.2d at p. 252 [hospital room not public place]; *Barber v. Time, Inc., supra,* 159 S.W.2d at p. 295 ["Certainly, if there is any right of privacy at all, it should include the right to

obtain medical treatment at home or in a hospital ... without personal publicity."].)

Shulman v. Group W Productions, Inc., 18 Cal.4th 200,232-233 955 P.2d 469, 490-491, 74 Cal.Rptr.2d 843, 864-865 (Cal. 1998).

The Court continued:

> On this summary judgment record, we believe a jury could reasonably regard entering and riding in an ambulance -- whether on the ground or in the air -- with two seriously injured patients to be an egregious intrusion on a place of expected seclusion. Again, the patients, at least in this case, were hardly in a position to keep careful watch on who was riding with them, or to inquire as to everyone's business and consent or object to their presence. A jury could reasonably believe that fundamental respect for human dignity requires the patients' anxious journey be taken only with those whose care is solely for them and out of sight of the prying eyes (or cameras) of others.

Shulman v. Group W Productions, Inc., 18 Cal.4th 200237, 955 P.2d 469, 494, 74 Cal.Rptr.2d 843, 868 (Cal. 1998).

Shulman's First Amendment analysis, rejecting a blanket claim of privilege, also bears quotation:

> It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil and criminal laws of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed." (*Branzburg v. Hayes, supra,* 408 U.S. at pp. 682-683, 92 S.Ct. at pp. 2657- 2658.) California's intrusion tort and section 632 are both laws of general applicability. They apply to all private investigative activity, whatever its purpose and whoever the investigator, and impose no greater restrictions on the media than on anyone else. (If anything, the media enjoy some degree of *favorable* treatment under the California intrusion tort, as a reporter's motive to discover socially important information may reduce the offensiveness of the intrusion.) These laws serve the undisputedly substantial public interest in allowing each person to maintain an area of physical and sensory privacy in which to live. Thus, defendants enjoyed no constitutional privilege, merely by virtue of their status as members of the news media, to eavesdrop in violation of section 632 or otherwise to intrude tortuously on private places, conversations or information. . . . . .
>
> As should be apparent from the above discussion, the constitutional protection accorded newsgathering, if any, is far narrower than the protection surrounding the publication of truthful material; consequently, the fact that a reporter may be

seeking "newsworthy" material does not in itself privilege the investigatory activity. The reason for the difference is simple: the intrusion tort, unlike that for publication of private facts, does not subject the press to liability for the contents of its publications. Newsworthiness, as we stated earlier, is a complete bar to liability for publication of private facts and is evaluated with a high degree of deference to editorial judgment. The same deference is not due, however, when the issue is not the media's right to publish or broadcast what they choose, but their right to intrude into secluded areas or conversations in pursuit of publishable material. At most, the Constitution may preclude tort liability that would "place an impermissible burden on newsgatherers" (*Miller, supra,* 187 Cal.App.3d at p. 1493, 232 Cal.Rptr. 668) by depriving them of their " 'indispensable tools' " (*Dietemann, supra,* 449 F.2d at p. 249).

Defendants urge a rule more protective of press investigative activity. Specifically, they seek a holding that "when intrusion claims are brought in the context of newsgathering conduct, that conduct be deemed protected so long as (1) the information being gathered is about a matter of legitimate concern to the public and (2) the underlying conduct is lawful (i.e., was undertaken without fraud, trespass, etc.)."

Neither tort law nor constitutional precedent and policy supports such a broad privilege. *Miller, Dietemann,* and *Wolfson v. Lewis, supra,* 924 F.Supp. 1413, were all cases in which the reporters and photographers were acting in pursuit of newsworthy material, but were held to have tortuously intruded on the plaintiffs' privacy because their conduct was highly offensive to a reasonable person, not because they had committed any independent crime or tort. [FN19] (See also *Baugh v. CBS, Inc.* (1993) 828 F.Supp. 745, 757 [intrusion tort does not require existence of technical trespass]; *KOVR-TV, Inc. v. Superior Court* (1995) 31 Cal.App.4th 1023, 1030-1032, 37 Cal.Rptr.2d 431 [no newsgathering defense toclaim of intentional infliction of emotional harm for television reporter'stelling small children their neighbors had been killed while filming their shocked reaction, even if reporter hoped the children's reaction would be " 'newsworthy,' e.g., suitable to redeem a promise of 'film at eleven' "]; Rest.2d Torts, § 652B, illus. 1, p.379 ["A, a woman, is sick in a hospital room with a rare disease that arouses public curiosity. B, a newspaper reporter, calls her on the telephone and asks for an interview, but she refuses to see him. B then goes to the hospital, enters A's room and over her objection takes her photograph. B has invaded A's privacy."].)

FN19. In *Miller* the camera crew's entry into the Miller home was also deemed a trespass (*Miller, supra,* 187 Cal.App.3d at p. 1480, 232 Cal.Rptr. 668), but the court's discussion of the intrusion tort does not depend on this fact. (*Id.* at pp.

In *Dietemann, supra,* reporters for Life Magazine gained consensual access to the home office of a quack doctor, where they secretly photographed him and recorded his remarks as he purportedly diagnosed a medical condition of one of

> the reporters.(449 F.2d at p. 246.) The federal court, applying California law, concluded the facts showed an invasion of privacy. (*Id.* at pp. 247-249.) Presumably because a peaceable entry by consent does not constitute trespass under California law (see 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 607, p. 706), no question of liability for trespass arose in *Dietemann.*
>
> In *Wolfson* v. *Lewis, supra,* 924 F.Supp. 1413, television reporters doing a story on the high salaries paid to executives of health care companies physically pursued a family that included three such executives in an effort to get "ambush" interviews with them, and attempted to intercept with a directional microphone conversations they had at a family home. The federal district court granted preliminary injunctive relief against such behavior, finding the plaintiffs likely to prevail on their claim the reporters' harassment and spying was a highly offensive intrusion into their privacy. (*Id.* at pp. 1432-1434.) The court expressly stated its finding of a tortious intrusion was not based on any alleged trespass. (*Id.* at p. 1434.) Nor was the court's finding of a tortious intrusion logically dependent on violation of state anti-eavesdropping statutes, although two such statutes we recited in support of the privacy element of the intrusion tort (in the same manner as we have cited section 632). (924 F. Supp. at p. 1434.) As to constitutional policy, we repeat that the threat of infringement on the liberties of the press from intrusion liability is minor compared with the threat from liability for publication of private facts. Indeed, the distinction led one influential commentator to assert flatly that "[i]ntrusion does not raise first amendment difficulties since its perpetration does not involve speech or other expression." (Nimmer, *supra,* 56 Cal.L.Rev.at p. 957.) Such a broad statement is probably not warranted; a liability rule, for example, that punished as intrusive a reporter's merely asking questions about matters an organization or person did not choose to publicize would likely be deemed an impermissible restriction on press freedom. But no constitutional precedent or principle of which we are aware gives a reporter general license to intrude in an objectively offensive manner into private places, conversations or matters merely because the reporter thinks he or she may thereby find something that will warrant publication or broadcast.

Shulman v. Group W Productions, Inc., 18 Cal.4th 200, 955 P.2d 469, 74 Cal.Rptr.2d 843 (Cal. 1998).

Thus a "tortious invasion of privacy" into "private places" that is found "highly offensive to a reasonable person" subjects a media defendant to liability notwithstanding the First Amendment. The graphic and disturbing images in this case are therefore actionable because they are of no legitimate public concern and even if the images were deemed newsworthy a tortious intrusion and publication of private facts occurred.

The Media Defendants allege a First Amendment right to broadcast this information based on *Bartnicki v. Vopper*, 532 U.S. 514 (2001). However, in *Quigley v. Rosenthal*, 327 F.3d 1044 (10th Cir. 2003) the court held that *Bartnicki* left open the question of whether the interest in protecting the privacy of communications is strong enough to justify the application of the federal wire tap act to disclosures of "purely private concern." *Id.* at 1067. The Tenth Circuit held that if faced with this issue the Supreme Court would conclude that the interest in privacy is sufficient to allow the federal wire tap act to be applied to situations if the intercepted telephone conversations concerned purely private matters and thus no First Amendment protection applied. *Id. Quigley* also found that the defendants knew that private telephone conversations were continuing to be recorded, in contrast to the situation in *Bartnicki*, where the media defendant found out about the interception issue only after it had occurred and in fact never learned the identify of the person that made the interception.

Similarly, in *Peavy v. WFFA-TV, Inc.*, 221 F.3d 158 (5th Cir. 2000) a television station was found to have no First Amendment right to publish privately recorded conversations. The television station acted in a conspiracy to violate the wire tap act. Because the station reporter wrongfully procured the interception of the wire communications, the First Amendment provided no protection.

E) <u>Plaintiffs Allege A Cognizable Claim</u>

The Plaintiffs' Complaint raises and pleads claims not barred by the first amendment. The Media Defendants acted in conspiracy with the Medical Examiner Defendants to *physically* manipulate the deceased dead body of Misty Norman for the cameras - a violation of the law prohibiting abuse of a corpse. *See State v. Condon*, 15 Ohio App. 3d 629, 641, 789 N.E.2d 696, 705, 722 (Ohio Ct. App. 2003) ("It is conceivable, however, that even a photojournalist could be

found guilty of abusing a corpse--even one found in a public place--under R.C. 2927.01 if he or she manipulated the body for the purpose of heightening the visual effect of a photograph. Here, however, the corpses were not in a place open to public inspection."). The Media Defendants entered the *private* premises of the Opryland Hotel under a misrepresentation of their status as being "with" of the Medical Examiners' office. *See State v. Condon*, 15 Ohio App. 3d 629, 789 N.E. 2d 696, 722 (Ohio Ct. App. 2003) (photographer entered morgue under false pretenses). The death scene and hotel room were a sequestered crime scene, not open to the public or media, and Opryland Hotel security personnel explicitly excluded the news media and the public from theses areas. Likewise, the morgue was not open to the public and was a "place of *private* repose" where the family had a legitimate expectation of privacy that their daughter's body would not be manipulated, filmed and displayed in a sideshow fashion. The Media Defendants also obtained permission from Dr. Levy under false or deceptive pretenses by promising that any broadcasting would be done with permission from the family members. *See* THE TENNESSEEAN, *Morgue Show Postponed After Complaints, Threat* (June 24, 2003) ("Levy has said it was the responsibility of the London-based film crew to get permission from the family members to use the footage. Principal Films has said that permission was not necessary unless access to a private residence was required.)(**Exhibit 7**). Dr. Levy testified by deposition in *Gower v. Levy, et al.* (No. 02C-2826)(Third Cir. Ct., Davidson County, Tennessee, 2003) that he discussed permissions with Principal and Principal indicated to him they were being obtained. (Levy Deposition, pp. 154-55)(**Exhibit 8**).

III. THE PLAINTIFFS HAVE VIABLE STATUTORY MISAPPROPRIATION CLAIMS

The Media Defendants argue (at pages 29-31 of their brief) that Tennessee's commercial misappropriation statute, T.C.A. § 47-25-1105 does not apply because the use of Ms. Norman's

images were not for advertising or fund raising. Ms. Norman's images were used on a program, *True Stories From the Morgue*, that had commercial advertisements. The facts may reveal that the Media Defendants "pitched" this program (believed to be the *first* episode) to advertisers to sell program ads.

The defendants' fair use argument hinges on whether the images were newsworthy or of public concern. Plaintiffs submit they were not newsworthy for the reasons discussed above and that the issue of newsworthiness is a *fact* question. *See Virgil v. Time, Inc.* 527 F.2d 1122, 1 Media L. Rep. 1835, 9th Cir.(Cal.), Dec 05, 1975; *Sellers v. Henry,* 329 S.W.2d 214, 216 (Ky.1959); *Times-Mirror Co. v. Superior Court*, 198 Cal.App.3d 1420, 244 Cal.Rptr. 556, (Cal. Ct. App.1988); *Anonsen v. Donahue*, 857 S.W.2d 700 (Tex. Ct. App. 1993); Note, *Newsworthiness Defense to Public Disclosure Tort,* 85 KENTUCKY LAW JOURNAL 147, 162 (1997).

Plaintiffs' Complaint at ¶ 42 specifically avers a misappropriation of the right of publicity (in addition to the specific statutory claim under T.C.A. § 47-25-1101 *et. seq*. pleaded at ¶ 44). The *Kentucky* commercial appropriation statute provides:

> § 391.170 Commercial rights to use of names and likenesses of public figures
>
> (1) The general assembly recognizes that a person has property rights in his name and likeness which are entitled to protection from commercial exploitation. The general assembly further recognizes that although the traditional right of privacy terminates upon death of the person asserting it, the right of publicity, which is a right of protection from appropriation of some element of an individual's personality for commercial exploitation, does not terminate upon death.
> (2) The name or likeness of a person who is a public figure shall not be used for commercial profit for a period of fifty (50) years from the date of his death without the written consent of the executor or administrator of his estate.

Clearly under KY. REV. STAT. § 391.170 the Plaintiffs have actionable claims under ¶ 42 of Plaintiff's Complaint. For example, in *Melton v. Board of Commissioners of Hamilton County*

Ohio, 267 F.Supp. 859 (May 7, 2003), the Court found that the plaintiff stated a right of publicity claim where photographs of a deceased body were appropriated by a photographer from a morgue:

> It is not difficult in light of *Brotherton* to find that families have a right not to be embarrassed or humiliated by the outrageous display or exposure to public view of the remains of a loved one. That is not to say that the official photography of decedent at the death scene or in an autopsy report would provide the basis for such a claim as long as such official photos remain in the files of the coroner and they were not released to the public. *Id*. at 865.

IV. THE PLAINTIFFS HAVE VALID CLAIMS FOR ABUSE OF A CORPSE

The Plaintiffs' Amended Complaint at ¶ 22 avers that: "Her body was *touched*, *manipulated* and displayed for Principal's cameras accompanied by Shane Hessey's narration of Misty Perkins Norman's wounds and injuries." (emphasis supplied). At ¶ 37 Plaintiffs state, "The intentional acts of the Defendants, *permitting a private film crew* from London, England, to enter these private, secure and protected areas and to film, *manipulate* and *display* carry a theory of intentional invasion on seclusion." (emphasis supplied). Paragraph 37 also alleges the Media Defendants "acted in *conspiracy*, combination, or joint venture with the Medical Examiner Defendants." (emphasis supplied). Once again the Media Defendants misrepresent (this time at p. 34) by stating " there is no allegation that the Media defendants even touched Mrs. Norman's body. "

In *State v. Condon*, 15 Ohio App. 3d 629, 641, 789 N.E. 2d 696, 705, 722 (Ohio Ct. App. 2003), *appeal denied,* 795 N.E. 2d 684 (Ohio 2003) a photographer (Condon) was found to have no First Amendment right to photograph corpses at a morgue and was convicted of abuse of a corpse under the Ohio abuse of corpse statute.[14] The court noted that although photo journalists

[14] OHIO REV. CODE ANN. § 2921.01 provides:

may take pictures of the dead on the battlefield, here the corpses were in a place not open to public inspection:

> Here, however, the corpses were not in a place open to public inspection. A morgue is not a lending library or a museum. It is a place of private repose, not a public display. The public expects that those in charge to ensure that the bodies of their loved ones are not unnecessarily disturbed or gratuitously handled or examined. Condon did not merely document photographically what the public was free to see, but instead entered the morgue without permission and took pictures of what the public was not allowed to see. *Id*. at 641.

The Court further stated:

> Community mores concerning the proper treatment of the corpse are not, in our view, esoteric or otherwise difficult to discern. Irrespective of one's religious views, and even if one is an atheist or an agnostic, it is almost universally understood that the bodies of the dead are to be treated with the utmost respect and in a manner that will not inflict anymore emotional pain upon the wounded hearts of friends a mourners. *Id*. at 642.

The Media Defendants unfairly interpret *Condon* to *only* apply if there is a lack of authorization by the coroner's office to take the photographs. Again, the case *actually* states a number of evidentiary factors that led to the conclusion of abuse of a corpse including: photographing an autopsy, treating the corpse as a mere model, manipulation of the bodies for photos, lights used to photograph the bodies and lack of permission from the families to take the photographs:

> The statute clearly proscribes a *broad range of conduct* provided that it is so

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2927.01 Offenses against human corpse

(A) No person, except as authorized by law, shall treat a human corpse in a way that the person knows would outrage reasonable family sensibilities.

(B) No person, except as authorized by law, shall treat a human corpse in a way that would outrage reasonable community sensibilities.

(C) Whoever violates division (A) of this section is guilty of abuse of a corpse, a misdemeanor of the second degree. Whoever violates division (B) of this section is guilty of gross abuse of a corpse, a felony of the fifth degree.

> inappropriate and insensitive as to outrage community standards. The statute does not require that the corpse be physically abused. *Treating the corpse as a mere object, as a model to be manipulated or exploited for its shock value, can suffice under certain circumstances*. Here, Condon, having never received official permission for his own project, and having lost his one legitimate reason for being in the morgue after the autopsy-training video was cancelled, nonetheless continued to visit the morgue after October 2000 and to take pictures of the corpses for his own gratuitous purposes. *He exposed the eight corpses to the harsh glare of the lights and camera without any apparent regard for their sanctity. One, a young boy, was photographed while the body was apparently undergoing an autopsy. Others he objectified by placing upon their bodies props to enhance whatever artistic message he wished to convey. We hold that such unauthorized and disrespectful treatment of the bodies was a sufficient affront to dignity for the jury to determine that there had been abuse of a corpse. Id.* at 649.
>
> While note that while the lack of family authorization is not an element of abuse of a corpse, arguably, *permission from the family, if it existed, would have exonerated Condon*, at least in the juror's minds, as his conduct may not have been perceived as either outrageous if done with the family's approval. *Id.* at 711. (emphasis supplied).

The Tennessee abuse of corpse statute provides for liability if a person "physically mistreats a corpse in a manner offensive to the sensibilities of an ordinary person." T.C.A. § 39-17-312(a). The videotape clearly shows: Mrs. Norman's bra being lifted; her blouse being pulled up and her hand and arm being propped ; and a shoe being physically placed on her stomach. *See* photographs (**Exhibit 1**). Under *State v. Condon*, 15 Ohio App. 3d 629, 641 789 N.E. 2d 696, 705, 722 (Ohio Ct. App. 2003) the court stated, "It is conceivable, however, that even a photojournalist could be found guilty of abusing a corpse--even one found in a public place--under R.C. 2927.01 if he or she manipulated the body for the purpose of heightening the visual effect of a photograph." Although the Media Defendants assert that they did not do any touching, that is a *fact* question and the Complaint states that they participated in the touching and manipulation, filmed these events in a conspiracy. Principal's suggestion that there is no allegation that the *Discovery* defendants were present overlooks the pleaded facts that the Media

Defendants (including Discovery) acted in a conspiracy and permitted these acts to occur. The Media Defendants also argue, without any citation of authority, that somehow supposed permission would provide immunity for an abuse of a corpse. Plaintiffs are unaware of any authority that "permissive abuse of a corpse " (or for that matter "permissive murder") would preclude criminal or civil liability.

V. PLAINTIFFS HAVE CLAIMS FOR EMOTIONAL DISTRESS AND OUTRAGE

Defendants assert at p. 41 that these claims fail because the "plaintiff must show 'that the alleged outrageous conduct consisted of acts or words *directed and specially communicated to the injured party*.' *Gann v. Key*, 758 S.W. 538 (Tenn. Ct. App. 1988) (emphasis added)." [In the defendants' brief]. Again the Media Defendants play fast and loose. In *Gann* the court *actually* said:

> It is seen from the foregoing that damages may be recovered for serious emotional distress *intentionally* or recklessly inflicted by *outrageous* conduct which exceeds in degree willful and wanton misconduct. In each of the authorities cited above, the alleged outrageous conduct consisted of acts or words directly and specially communicated to the injured party. *In the present case the acts or words did not occur in the physical presence of plaintiffs nor were they specially directed toward plaintiffs as by mail. Nevertheless, it is reasonable to concede that the use of public communication, such as the news media, would not immunize one who intentionally or recklessly inflicts serious emotional distress by acts or words which constitute outrageous conduct.*

Gann v. Key, 758 S.W. 538, 546 (Tenn. Ct. App. 1988) (emphasis added).

Defendants then further distort fact and law at p. 42 by *lifting* part of the above-cited passage completely out of context and asserting that in *Gann* "[t]he court affirmed summary judgment in part because 'the acts or words did not occur in the physical presence of plaintiffs nor were they specially directed towards plaintiffs[.]'" This statement and summary by Defendants is *absolutely untrue*. The reason the court in *Gann* granted summary judgment was *not* that the press release was widely disseminated (the court having *expressly* held that the use

of mass media would *not* immunize outrageous conduct) but that, on the facts, the officers stated they acted "in good faith" and the "*evidence* [was] not sufficient to support plaintiffs' allegation of intent." *Id*. at 549. (emphasis supplied). That *Gann* held that the "directed at" requirement was met by the mass media press release was noted in a later Tennessee case:

> In addition, in *Gann v. Key,* this court noted that in all the cases it reviewed the alleged misconduct consisted of acts or words "directly and specially communicated to the injured party." 758 S .W.2d at 546 . Acknowledging that in the case before it the acts or words did not occur in the presence of the plaintiffs and were not specially directed toward them, as by mail, the court held "it is reasonable to concede that the use of public communication, such as the news media [as opposed to private communication as by mail], would not immunize one who intentionally or recklessly inflicts serious emotional distress by acts or words which constitute outrageous conduct." *Id*. Thus, the court affirmed the existence of the "directed at" requirement but found it was met in the circumstances of that case.

John Doe 1 v. Roman Catholic Diocese of Nashville, 2003 WL 22171558 at * 10 (Tenn. Ct. App. 2003).

The Media Defendants further transgress in their discussion of *John Doe 1 v. Roman Catholic Diocese of Nashville*, 2003 WL 22171558 (Tenn. Ct. App. 2003). The Tennessee Court of Appeals explained in that case that the requirement in cases for extreme or outrageous conduct that the conduct "must be directed to the plaintiff or occur in the presence of the plaintiff " could be satisfied by a mass media publication *Id* at *10 (citing *Gann)* and explained that "third persons" or "bystanders," such as close family members, could, under certain circumstances of outrageous conduct, recover. The court stated:

> Comment l to the RESTATEMENT, § 46 provides clarification as to the second circumstance in which a defendant can be liable, sometimes called a bystander claim.
> l. Conduct directed at a third person. Where the extreme and outrageous conduct is directed at a third person, as where, for example, a husband is murdered in the presence of his wife, the actor may know that it is substantially certain, or at least highly probable, that it will cause severe emotional distress to the plaintiff. In such cases the rule of this Section applies. . .
> Furthermore, the decided cases in which recovery has been allowed have been those in

> which the plaintiffs have been near relatives, or at least close associates, of the person attacked. The language of the cases is not, however, limited to such plaintiffs, and there appears to be no essential reason why a stranger who is asked for a match on the street should not recover when the man who asks for it is shot down before his eyes, at least where his emotional distress results in bodily harm.

The court also quoted the "Caveat" to this section:

> "The Institute expresses no opinion as to whether there may not be other circumstances under which the actor may be subject to liability for the intentional or reckless infliction of emotional distress."

John Doe 1 v. Roman Catholic Diocese of Nashville, 2003 WL 22171558 at * 8 (Tenn. Ct. App. 2003).

Plaintiffs submit that this is precisely the special circumstance type of case envisioned by the court in *John Doe 1 v. Roman Catholic Diocese of Nashville*, 2003 WL 22171558 (Tenn. Ct. App. 2003), in *comment l* and in the *Caveat* to RESTATEMENT (SECOND) OF TORTS § 46. On similar facts courts have upheld claims for intentional infliction of emotional distress and outrageous conduct. *See Green v. Chicago Tribune Company*, 286 Ill. App. 3d 1, 675 N.E.2d 249 (Ill. Ct. App. 1996); *Barrett v. Outlet Broadcasting, Inc.*, 22 F.Supp 2d 726 (S.D. Ohio 1997); and *Willaims v. City of Minneola*, 575 So. 2d 683, 690 (Fla. Ct. App. 1981)(each case upholding claims of outrageous conduct).

Defendant's arguments concerning negligent infliction of emotional distress (at brief pp. 46-48) are misguided because although the Plaintiffs were not present when the intrusive filmings occurred, they were present at the time of the broadcasting. The requirement for "an awareness of the event" is therefore satisfied in this case as the Plaintiffs felt, saw and heard the harrowing broadcast at the time Defendants "published" *True Tales from the Morgue* on The Learning Channel. In addition, damages for emotional distress are recoverable for outrageous conduct or intentional infliction of emotional distress. *See Baugh v. CBS, Inc.*, 828 F.Supp. 745,

758 (N.D. Cal. 1993)(dismissing negligence claim, but upholding claims for outrageous conduct and intentional infliction of emotional distress). *See also Williams v. City of Minneola*, 575 So. 2d 683 (Fla. Ct. App. 1991)(to the same effect).

VI. PLAINTIFFS HAVE COGNIZABLE SECTION 1983 CLAIMS.

The Media Defendants are state actors because they acted with government officials (the Medical Examiner defendants) at the death scene and autopsy. *See e.g., Barrett v. Outlet Broadcasting, Inc.,* 22 F.Supp. 2d 276 (S.D. Ohio 1997). Defendants continue their errant legal analysis in discussing the Plaintiffs' 42 U.S.C. § 1983 claims by focusing on violations against Ms. Norman and ignoring the section 1983 case law applicable to the deprivations of *surviving* family members' privacy and civil rights. Defendants, for example, argue at p. 37 that plaintiffs cannot "assert any privacy interest on their daughter's behalf, since any such interest *she may had had ended with her untimely death*." (emphasis supplied*)*. Defendants then, at p. 38, repeat their fallacious assertion that *State v. Kelly*, 697 S.W. 2d 355 (Tenn. Crim. App. 1985) (the case in which a murderer was found to have no Fourth Amendment right to prevent state officials from conducting an autopsy on his murdered brother)[15] somehow establishes that plaintiffs "have no constitutional right in Mrs. Norman's remains."

The law, however, is simply not as presented by the Media Defendants. In *Collins v. Crabbe*, 172 F.3d 872, 1999 WL 55279 at * 3 (6th Cir. 1999) the Sixth Circuit assumed that Tennessee, like Michigan and Ohio *would* recognize a constitutionally protected interest in the body of a deceased next of kin:

> This court has twice, in somewhat analogous circumstances, held that under the law of states other than Tennessee, a plaintiff had a constitutionally protected property interest in the body of a deceased next-of- kin. *See Whaley v. County of Tuscola,* 58 F.3d 1111,

[15] *See* discussion *supra* at p. 13 (in footnote 2).

> 1115-16 (6th Cir.1995); *Brotherton v. Cleveland,* 923 F.2d 477, 480 (6th Cir.1990) . . . Assuming *arguendo* that Tennessee has created the same sort of property right as this court concluded had been created by Michigan and Ohio, we think it plain that the right was not "clearly established" so as to defeat qualified immunity for the [municipal defendants] here.[16]

Cases *within* the Sixth Circuit have also upheld viability of section 1983 claims where a deceased relative's body is photographed in an outrageous manner as alleged in the Plaintiffs' Complaint. In *Melton v. Board of Commissioners of Hamilton County Ohio,* 267 F.Supp.2d 859 (S.D. Ohio, 2003), the court held that a decedent's surviving siblings had a constitutionally protected interest in their deceased relative's body for the purposes of a § 1983 claim against a county and a private photographer who alleged that the photographer's taking of pictures of the decedent's body while he was in the morgue denied them due process even if the photographer did not mutilate the corpses and merely took photographs. The Court held that the siblings' property interest in the decedent's corpse included the right not to have the corpse photographed for commercial purposes without their permission. The Court also found that under Ohio law the decedent's surviving siblings sufficiently alleged that they had a constitutionally protected privacy right to be free from a photographer's unwarranted intrusion by taking pictures of the decedent's body without the family's permission, and therefore were denied privacy without due process. The Court also found a Section 1983 claim under a "shocks the conscience" analysis. *Id.* at 862. At page 864, the court noted that the plaintiff's complaint stated that their *own* privacy was invaded when the defendants gained access to the decedent's body, looked at his

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[16] It is well-settled that, though private parties (such as the Media Defendants in this case) who conspire with a state official to violate constitutional rights can be liable under §1983, such parties cannot defend on the basis of qualified immunity. A "party who is not a public official may be liable pursuant to 42 U.S.C. § 1983 and yet not be entitled to qualified immunity because, if not a public official , the reason for affording qualified immunity does not exist." *Vector Research, Inc. v. Howard & Howard Attorneys P.C.,* 76 F.3d 692, 698 (6th Cir.1996). *See also Wyatt v. Cole,* 504 U.S. 158, 168-69 (1992).

photographs and touched and photographed his body. The Court distinguished *Young v. That Was the Week that Was*, 423 F.Supp. 265, 266 (6th Cir. 1970) as being inapplicable since that case involved an allegation of invasion of privacy as to the decedent. *Id.* at 864.

Melton further relied on the Sixth Circuit opinion in *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991) for supporting a section 1983 claim by recognizing a substantive interest of constitutional protection in a decedent's body. *Brotherton* specifically held that a spouse "had a legitimate claim of entitlement" in the body of her husband, such that her rights to the body were protected by the Due Process Clause of the Fourteenth Amendment. *Melton* found that the plaintiffs had a cognizable action for invasion of privacy based upon the wrongful intrusion into one's private activities:

> The plaintiffs have a legitimate claim of entitlement to their brother's body. The Court could find that defendant Condon's alleged conduct constitutes a wrongful intrusion into the family's privacy in such a matter as to cause mental suffering to a person of ordinary sensibilities." *Id.* at 864.

In *Chesher v. Neyer*, 215 F.R.D. 544 (S.D. Ohio 2003), the court held that family members of decedents could maintain a class action under FED. R. CIV. P. 23 where they alleged that morgue employees either permitted or participated in posing, disrupting or photographing the remains of their relatives and illegally released crime scene photographs and autopsy photographs to the public. The court stated that at least 9 of the bodies were photographed with props and in 4 cases the wrongful conduct involved release of autopsy or death scene photos. *Id.* at 547. The court determined that the claims of deliberate indifference to the rights of the families under *Brotherton v. Cleveland,* 923 F.2d 477 (6th Cir. 1991) and the claim as to whether there was a conspiracy in a matter that "shocks the conscious" were common substantive due process claims under 42 U.S.C. § 1983. *Id.* at 548. The court rejected the defendants' contention

that families whose deceased family members were the subject of posed photography did not have claims common to families suing for the release of death, scene of death or autopsy photographs. The Court found that commonality existed because the county morgue security policy, or lack thereof, created access for Defendant Condon (the photographer) to the bodies, records and official autopsy and scene of death photographs. *Id.* The court explained that the two classes of families, those that were posed, and those that were exposed to Condon, stated claims because of the same security practices that resulted in exposure of the bodies to the course and conduct of Condon and Tobias (the coroner). *Id.*

Similarly, in *Barrett v. Outlet Broadcasting, Inc.,* 22 F.Supp. 2d 726 (S.D. Ohio 1997) the court permitted a section 1983 claim under a substantive due process theory against Media Defendants for violation of the right of privacy for disturbing a corpse. ("This Court finds that the shocks the conscience test is applicable to Defendants' conduct, and that Defendants' alleged disturbance of Ms. Smith's body and bedroom in order to portray her in a false light is sufficiently demeaning to shock the conscience of the court."). *Id.* at 744.[17]

VII. KENTUCKY LAW APPLIES TO THE PRIVACY AND MISAPPROPRIATION CLAIMS

Plaintiffs' Amended Complaint (at ¶ 36) pleads that Kentucky law should apply to the privacy and misappropriation claims based upon Tennessee's "most significant relationship" to the issue to be decided test given the clear provision in the RESTATEMENT (SECOND) OF CONFLICTS § 153 that in a right of privacy cases arising from a broadcasted matter, the law where the plaintiff resides controls. For example, in *Ruffin v. Steinbeck*, 267 F.3d 457 (6th Cir.

[17] *See also Ayeni v. Mottola*, 35 F.3d 680 (2nd Cir. 1994) (section 1983 claim upheld where Secret Service agent brought CBS news film crew into home); *Beger v. Hanlon [Cable News Network]*, 129 F.3d 505 (9th Cir. 1997) (Section 1983 claim upheld where federal agents brought CNN news film crew onto ranch); *Scheetz v. The Morning Call, Inc.*, 747 F. Supp. 1515 (E.D. Pa. 1990)(newspaper reporter conspired with state actor for purposes of § 1983 to publish private facts).

2001), ABC aired a 4-hour mini-series depicting the life of the musical group the Temptations. Plaintiffs filed suit in Michigan asserting publicity, privacy, defamation and infliction of emotional distress claims. The Sixth Circuit held that despite the presumption that Michigan law would apply to a case filed in the forum, because the mini-series was a nationwide broadcast the only state with an interest in the defamation claim was the law of the plaintiffs' domicile. *Id*. at 463. *See also Wells v. Liddy*, 186 F.3d 505 (4th Cir. 1999) (Maryland would apply the law of the plaintiff's domicile in cases of multi-state broadcast defamation).

Any "conflicts" analysis here is likely "false" or moot since although Kentucky has directly addressed the right of privacy claims of surviving family members on similar facts, there is no reason to suppose that the Tennessee Supreme Court would rule otherwise.

VIII. PLAINTIFFS HAVE A VIABLE DECEPTIVE TRADE PRACTICES ACTS CLAIM

Plaintiffs allege that the Media Defendant's misappropriation of Misty Norman's images for commercial purposes by invading the Plaintiffs' privacy interests is an unfair or deceptive act or practice "affecting the conduct of any trade or commerce" and under T.C.A. § 47-18-102(3) constitutes an unlawful trade practice. Where a business misappropriates property or identity, a cause of action exists under state consumer protection statutes. *See Felsher v. University of Evansville*, 755 N.E.2d 589, 598 (Ind. 2001)(university sued professor for misappropriating names for e-mail and website addresses; court stated "an appropriate remedy for the misappropriation of a corporation name or likeness is found under the state unfair competition law and trademark statutes, as well as common law torts"). *See also Petty v. Chrysler Corp*. 2003 WL 22240548 (Ill. Ct App. 2003).

IX. CONVERSION

Defendants committed conversion by misappropriating the deceased human body of Misty Perkins Norman and her images at death for their own gains and benefit. The videotape and photographic images are *property* subject to conversion. For example, in *Enyart v. City of Los Angeles*, 76 Cal. App.4th 499, 90 Cal.Rptr.2d 502 (Cal. Ct. App. 1999), the court upheld a cause of action for conversion of photographs taken at the scene of Robert F. Kennedy's assassination. The conversion claim in that case was brought by the photographer. Because in this case Plaintiffs' had an exclusive constitutionally protected right in the body and images of the decedent, there is tangible property and an action for conversion may lie.

XI. CONCLUSION

Under a Rule 12(b)(6) motion, the plaintiff's allegations must be accepted as true, and the plaintiff's claims must not be dismissed "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *French v. First Union Securities, Inc.*, 209 F.Supp.2d 818, 823 (Tenn. 2002), quoting from *Windsor v. The Tennesseean*, 719 F.2d 155, 158 (6th Cir. 1983).

In *Woodlawn Memorial Park, Inc.*, 780 S.W.2d 759 (Tenn. Ct. App. 1989), the Court observed that "No matter in whom the right of burial rests, it is in the nature of a *sacred trust* for the benefit of all who may, from family ties or friendship, have an interest in the remains." *See* also *Memphis State Line RR v. Forrest Hills Cemetery*, 116 Tenn. 400, 419, 94 S.W.2d 73, 74 (1906)(human remains are sacred). The Media Defendants wrongfully intruded into the privacy of the Plaintiffs and published private facts by obtaining and publishing graphic and disturbing death scene and autopsy images. Neither law nor social policy can support a rule that allows public broadcast of deceased human bodies at a morgue without family consent. Such a rule

would demean the respect for the deceased and would likely provoke public outcry against any coroner or medical examiner that allowed such an intrusion. The claims in the Amended Complaint are viable and Plaintiffs should be allowed to cure any technical or deficient factual allegation by filing an Amended Complaint after all Defendants have answered and appeared in this action.[18]

Respectfully submitted,

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[18] For example, after the lawsuit was filed facts came to light that entry at Opryland occurred under circumstances of misrepresentation. In addition, after the suit was filed Dr. Levy stated that it was his understanding that Principal was obtaining permissions. Accordingly, Plaintiffs should be granted leave to amend to add these specific allegations as related to authorization and lawfulness *vel non* and any other additional factual or legal averments