SXSW

March 11, 2014

All About Hidden Camera
&
Investigative Reporting

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** The three lists of cases take a field of research involving photographing folks without their permission and divides them into subsets to which I affixed my own labels. Don't look for these labels in the cases. I use them to distinguish among three different types of unauthorized photography, not because different laws apply, but because the courts seem to focus on the facts somewhat differently. The three subsets are

1. Hidden Camera, meaning a photographer (usually a reporter or documentary filmmaker) films with a camera on his or her person that is not detectable to the unwitting subject being photographed.
2. Surveillance Camera, meaning a camera in a fixed position that records everything that happens within the camera's range without discrimination. These cameras can be visible or hidden from view.
3. Surreptitious Camera, meaning the photographer is at some distance and photographs the unwitting subject with a normal camera as used, for example, by news persons on ride-along shows.

***BORAT* RISK ANAYLSIS**

Several of the participants in the scenes listed below sued the producers of *Borat*. In fact ten law suits were filed by folks filmed during the production of *Borat*. Not all are listed on the chart. Use the attached chart to focus on the scenes we will discuss. Just for the fun of it, give a numerical ranking of your personal assessment of the risk of a law suit for each of the scenes listed. Use 10 for the lowest likelihood of a law suit and 1 for the highest likelihood of a law suit. Make notes as to how a potential lawsuit would play out.

The Release in the materials was the one used for the film. The film also had the following disclaimer at the end.

> *None of the real persons, companies, or organizations in the film are affiliated or associated with the film in any way. No real person or entity depicted or appearing in the film has sponsored or otherwise endorsed its contents. The same applies to the government and people of Kazakhstan, none of whom are involved in this film or have approved it in any way. Nothing in this film is intended to convey the actual beliefs, practices or behavior of anyone associated with Kazakhstan.*

Episode	Release	Paid	Risk Rank	Notes
1.Villagers in Glod, Romaina	Yes	Paid to be in Film		
2.Running Man on Street in NY	No	No		
3.Humor Coach	Yes	Paid for Services		
4.Driving Instructor	Yes	Paid for Services		
5.Frat Boys	Yes	$200 each		

6.Rodeo Audience	No	No		
7.Garage Sale	Yes	No		
8.Bed & Breakfast Owners	Yes	Paid for Services		
9.Etiquette Instructors Guests	Yes No	Paid for Services No		
10.Antique Store Owners	Yes	Yes for Damages		
11.Attendees at Mortgage Bankers Dinner	No	No		
12.Worshipper at Pentecostal Church	No	No		

BORAT RELEASE

This is an agreement between One America Productions, Inc (the "Producer") and the undersigned participant (the "Participant"). In exchange for the Producer's obligation to pay a participation fee in the amount of $_____ (receipt of which is acknowledged by the Participant) and the opportunity for the Participant to appear in a motion picture, the Participant agrees as follows:

1. The Participant agrees to be filmed and audiotaped by the Producer for a documentary-style film (the "Film"). It is understood that the Producer hopes to reach a young adult audience by using entertaining content and formats.

2. The Participant agrees that any rights that the Participant may have in the Film or the Participant's contribution to the Film are hereby assigned to the Producer, and that the Producer shall be exclusively entitled to use, or to assign or license to others the right to use, the Film and any recorded material that includes the Participant without restriction in any media throughout the universe in perpetuity and without liability to the Participant, and the Participant hereby grants any consents requited for those purposes. The Participant also agrees to allow the Producer, and any of its assignees or licensees, to use the Participant's contribution, photograph, film footage, and biographical material in connection not only with the Film, but also in any advertising, marketing, or publicity for the Film and in connection with any ancillary products associated with the Film.

3. The Participant understands that the Producer and its assignees or licensees are relying upon this consent agreement in spending time, money and effort on the Film and the Participant's participation in it, and that the consent agreement, for this and other reasons, shall be irrevocable.

4. The Participant specifically, but without limitation, waives, and agrees not to bring at any time in the future, any claims against the Producer, or against any if its assignees or licensees or anyone associated with the Film, that include assertions of (a) infringement of rights of publicity or misappropriation (such as any allegedly improper or unauthorized use of the Participant's name or likeness or image), (b), damages caused by "acts of God" (such as, but not limited to, injuries from natural disasters), (c) damages caused by acts of terrorism or war, (d) intrusion (such as any allegedly offensive behavior or questioning or any invasion of privacy), (e) false light (such as any allegedly false or misleading portrayal of the Participant), (f) infliction of emotional distress (whether allegedly intentional or negligent, (g) trespass (to property or person), (h) breach of any alleged contract (whether the alleged contract is verbal or in writing), (i) allegedly deceptive business or trade practices, (j)copyright or trademark infringement, (k) defamation (such as any allegedly false statements made on the Film) (l) violations of Sections 43(a) of the Lanham Act (such as allegedly false of misleading statements or suggestions about the Participant in relation to the Film or the Film in relation to the Participant), (m) prima facie tort (such as any alleged intentional harm to the Participant), (n) fraud (such as any alleged deception or surprise about the Film or this consent agreement), (o) breach of alleged moral rights, or (p) tortuous or wrongful interference with any contracts or business of the Participant.

5. This is the entire agreement between the Participant and the Producer or anyone else in relation to the Film, and the Participant acknowledges that in entering into it, the Participant is not relying upon any promises or statements made by anyone about the nature of the Film or the identity of any other Participants or persons involved in the Film.

6. Although the Participant agrees not to bring any claim in connection with the film or its production, if any claim nevertheless is made, the Participant agrees that any such claim must be brought before, and adjudicated by, only a competent court located in the State of New York and County of New York, under the laws of the State of New York.

Signature:_____ Date:_____

Address:_____

City, State, Zip:_____

Phone:_____ email:_____

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 9/3/08

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL PSENICSKA

Plaintiff,

v.

TWENTIETH CENTURY FOX FILM CORP., ONE AMERICA PRODUCTIONS, INC., TODD LEWIS SCHULMAN, and SACHA BARON COHEN,

Defendants.

07 Civ. 10972 (LAP)

CINDY STREIT, BEN K. MCKINNON, MICHAEL M. JARED, LYNN S. JARED, and SARAH MOSELEY,

Plaintiffs,

v.

TWENTIETH CENTURY FOX FILM CORP., ONE AMERICA PRODUCTION, INC., SPRINGLAND FILMS, TODD LEWIS SCHULMAN, MONICA LEVENSON, JULIE LYNN CHOUNARD, EVERYMAN PICTURES, DUNE ENTERTAINMENT, LLC,

Defendants.

08 Civ. 1571 (LAP)

KATHIE MARTIN,	:	08 Civ. 1828 (LAP)
Plaintiff,	:	MEMORANDUM AND ORDER
v.	:	
LARRY CHARLES, MONICA LEVINSON, JAY ROACH, TWENTIETH CENTURY FOX FILM CORP., ONE AMERICA PRODUCTIONS, INC., SPRINGLAND FILMS, DUNE ENTERTAINMENT, LLC, MTV NETWORKS d/b/a COMEDY CENTRAL, DAKOTA NORTH ENTERTAINMENT, INC., FOUR BY TWO PRODUCTIONS COMPANY, TODD SCHULMAN,	:	
Defendants.	:	

LORETTA A. PRESKA, U.S.D.J.

The above captioned actions all arise from the film BORAT -- Cultural Learnings of America for Make Benefit Glorious Nation of Kazakhstan ("Borat" or "the Movie"). In short, Plaintiffs all seek damages for the use of their images in the Movie, and Defendants have moved to dismiss each complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons discussed more fully below, I conclude that each Plaintiff has executed a valid agreement releasing the claims he or she now attempts to litigate, and, consequently, Defendants' motions are hereby GRANTED.

I. BACKGROUND

A. The Plaintiffs

Released in theaters in 2006, Borat tells the story of a fictional Kazakh television personality, Borat, sent to the United States to report on American culture. (See Hansen Decl.[1] (Psenicska) ¶ 4.) This Court has described the Movie before:

> [T]he movie employs as its chief medium a brand of humor that appeals to the most childish and vulgar in its viewers. At its core, however, Borat attempts an ironic commentary of "modern" American culture, contrasting the backwardness of its protagonist with the social ills [that] afflict supposedly sophisticated society. The movie challenges its viewers to confront, not only the bizarre and offensive Borat character himself, but the equally bizarre and offensive reactions he elicits from "average" Americans.

Lemerond v. Twentieth Century Fox Film Corp., 07 Civ. 4635, 2008 WL 918579, at *3 (S.D.N.Y. Mar. 31, 2008). Each Plaintiff in the above-captioned actions appeared in the Movie; the circumstances surrounding their appearances are described below.

[1] "Hansen Decl." refers to the Declaration of Joan Hansen in Support of Defendants' Motion to Dismiss the Complaint, sworn to on February 14, 2008, and filed in connection with the Psenicska action.

1. Michael Psenicska[2]

Among other things, Plaintiff Michael Psenicska ("Psenicska") has owned a driving school for 32 years, where he personally administers driving lessons. (See Complaint ¶ 12, Psenicska v. Twentieth Century Fox Film Corp., 07 Civ. 10972 (filed Dec. 3, 2007) (hereinafter "Psenicska Compl.").) In May 2005, he was contacted by Defendant Schulman,[3] who informed him that Defendant One America was producing a "documentary about the integration of foreign people into the American way of life." (Id. ¶ 13.) Psenicska was interested in participating in the Movie (id. ¶ 14) and agreed to meet the production crew in Washington, D.C. for filming on June 13, 2005 (see id. ¶ 15).

Before filming, Psenicska informed Schulman that he would need to leave by 5:00 p.m. to teach a driving class at 6:00 p.m.

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[2] The Psenicska parties have filed the following briefs in connection with Defendants' motion to dismiss Psenicska's Complaint: Defendants' Memorandum of Law in Support of Their Motion to Dismiss the Complaint dated February 15, 2008 ("Psenicska Defs.' Mem."); Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Complaint dated April 8, 2008 ("Psenicska Pl.'s Opp'n"); and Defendants' Reply Memorandum of Law in Further Support of Their Motion to Dismiss the Complaint dated April 29, 2008 ("Psenicska Defs.' Reply").

[3] In his Complaint, Psenicska refers to Defendant Todd Lewis Schulman as "Todd Lewis." (See, e.g., Psenicska Compl. ¶ 13.) For ease of reference, the Court shall refer to Defendant Schulman by his proper surname. See Decl. of Slade R. Metcalf in Supp. of Defs.' Mot. to Dismiss the Compl. ¶ 1 (sworn to Feb. 15, 2008) (noting Schulman incorrectly named as "Todd Lewis").

(See id.) On the day of filming, however, Schulman and the production crew arrived 90 minutes late (id. ¶ 16) with $500 in cash for Psenicska, as well as papers "needed by the producers for the documentary" (id. ¶ 17). According to his Complaint, Psenicska was unaware that he would be asked to sign something and, consequently, failed to bring his reading glasses. (Id.) Nevertheless, because he was rushed for time due to Schulman's late arrival, Psenicska signed the document, entitled the Standard Consent Agreement ("the Agreement"), without reading it, claiming to rely on previous conversations with Schulman. (See id.)

Psenicska was then shown to a driver-education car and instructed to follow a production van through a driving course. (See id. ¶ 19.) The ensuing events involved Defendant Cohen, as Borat ("Cohen/Borat"), driving irresponsibly and erratically while engaging in conversations with strangers and making derogatory and offensive remarks about sexual intercourse, Jews, women and African-Americans. (See id. ¶ 22.) Once taping ended, Psenicska approached a group of men he believed were producers of the Movie and accused them of setting him up, but elicited no response. (Id. ¶ 24.) Over the next several days, Psenicska attempted to contact Schulman to determine the intent of the film but again received no response (id. ¶ 24) and subsequently commenced his action on December 3, 2007.

2. Cindy Streit et al.[4]

Plaintiff Cindy Streit ("Streit") is the owner of an etiquette training business called ETS. (See First Amended Complaint ¶ 25, Streit v. Twentieth Century Fox Film Corp., 08 Civ. 1571 (filed Apr. 7, 2008) (hereinafter "Streit Compl.").) In October 2005, she was contacted by Schulman and asked to provide etiquette training to a Belarus dignitary and arrange a dinner party with guests to be filmed for an educational documentary made for Belarus television. (Id. ¶ 26.)

On October 24, 2005, Streit and Defendant Springland Films[5] negotiated and signed a written contract for Streit's services. (See id. ¶ 33; see also Hansen Decl. (Streit) Ex. C (ETS Contract).)[6] That same day, Schulman informed Streit that

[4] The Streit parties have filed the following briefs in connection with Defendants' motion to dismiss the Streit Plaintiffs' First Amended Complaint: Defendants' Memorandum of Law in Support of Their Motion to Dismiss the First Amended Complaint dated May 12, 2008 ("Streit Defs.' Mem."); Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss the First Amended Complaint ("Streit Pls.' Opp'n"); and Defendants' Reply Memorandum of Law in Further Support of Their Motion to Dismiss the First Amended Complaint dated July 7, 2008 ("Streit Defs.' Reply").

[5] Springland Films is a registered d/b/a of One America -- the producer of Borat. (See Hansen Reply Decl. (Streit) Ex. A (Certified Fictitious Name Statement).)

[6] "Hansen Decl. (Streit)" refers to the Declaration of Joan Hansen in Support of Defendants' Motion to Dismiss the First Amended Complaint, sworn to on May 9, 2008, and filed in

(continued on next page)

Cohen/Borat would not attend the etiquette training session but would attend the 6:00 p.m. dinner as previously arranged. (See Richards Decl.[7] Ex. B (Streit Declaration), ¶ 9 (hereinafter "Streit Decl.").) Plaintiffs Sarah Moseley, Ben McKinnon, Michael Jared and Lynn Jared (collectively with Streit, the "Streit Plaintiffs") were among the guests attending the dinner party. (Streit Compl. ¶ 32.) Schulman and the film crew arrived at 6:30 p.m.; Cohen/Borat arrived approximately one hour later. (See Streit Decl. ¶¶ 9-10.) Schulman did not present the Streit Plaintiffs with copies of the Agreement until immediately before Cohen's arrival. (See id. ¶ 11.)[8] Though Schulman allegedly

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(continued from previous page)

connection with the Streit action. After filming but before commencing her action, Streit, ETS and Springland Films signed an additional "Release of Liability" (see Hansen Decl. (Streit) Ex. E (Release of Liability)), whereby, in exchange for $4450, Streit agreed to release Springland Films and its related entities from any and all claims accruing to Streit or ETS against those entities (see Hansen Decl. (Streit) ¶ 7).

[7] "Richards Decl." refers to the Declaration of Adam Richards in Opposition to Defendants' Motion to Dismiss the First Amended Complaint, sworn to on June 13, 2008, and filed in connection with the Streit action.

[8] The consent agreements signed by Plaintiffs are identical in all material respects and, therefore, this Court will refer to the consent agreement executed by each Plaintiff as "the Agreement." The only differences appear to be (1) Springland Films was named in the agreements signed by the Streit Plaintiffs and Plaintiff Kathie Martin, while One America was named in the agreement signed by Psenicska (see Hansen Decl. (Psenicska) Ex. A (Standard Consent Agreement) pmbl.); and (2)

(continued on next page)

rushed them to review the Agreement, each of the Streit Plaintiffs signed and returned a copy. (Id.)

During the dinner, Cohen/Borat performed offensive acts and made sexist remarks before introducing the guests to an African-American woman who Cohen/Borat described as a prostitute. (See Streit Compl. ¶¶ 34, 36-38.) The Movie depicts that certain of the guests chose to leave at that point, whereupon Cohen/Borat made derogatory comments insinuating that the guests were racially intolerant. (Id. ¶¶ 42-44, 46.) After the Movie's release, the Streit Plaintiffs commenced this action in the U.S. District Court for the Northern District of Alabama, and it was subsequently transferred to this Court on February 15, 2008.

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the agreement signed by Martin included an additional term releasing claims "arising out of the Participant's viewing of any sexually-oriented materials or activities" (see Metcalf Decl. (Martin) Ex. B (Standard Consent Agreement) ¶ 4).

3. Kathie Martin[9]

Plaintiff Kathie Martin ("Martin") owns and operates the Etiquette Training School of Birmingham. (See First Amended Complaint ¶ 25, Martin v. Mazer, 08 Civ. 1828 (filed Apr. 11, 2008) (hereinafter "Martin Compl.").) In October 2005, Martin was contacted by Schulman to provide dining etiquette training to a foreign reporter whose travel experiences were being filmed by Springland Films for Belarus television. (Id. ¶¶ 28-30.) The etiquette class was scheduled to take place on October 23, 2005, at Martin's home. (Id. ¶ 32.)

While awaiting the film crew, Schulman learned that Martin's husband, who was present at the house, was somewhat familiar with another character created by Cohen in connection with his television show, "Da Ali G Show." (See id. ¶ 35.) According to the Martin Complaint, Schulman requested to reschedule the filming for the following day to avoid any chance Mr. Martin might recognize Cohen. (See id. ¶¶ 37-39.) At the rescheduled meeting, Martin was presented with $350 and the

[9] The Martin parties have filed the following briefs in connection with Defendants' motion to dismiss Martin's First Amended Complaint: Defendants' Memorandum of Law in Support of Their Motion to Dismiss the First Amended Complaint dated May 5, 2008 ("Martin Mem."); Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss the First Amended Complaint dated June 6, 2008 ("Martin Opp'n"); and Defendants' Memorandum of Law in Further Support of Their Motion to Dismiss the First Amended Complaint dated June 20, 2008 ("Martin Reply").

Agreement, described by Schulman as a "standard filming release form," which Martin signed and returned. (Id. ¶¶ 39-40.)

Over the course of the etiquette class, Cohen/Borat allegedly repeatedly offended Martin by making sexist and anti-Semitic remarks, as well as by producing naked photographs of Cohen/Borat's supposed son. (See id. ¶¶ 42-43, 45-46.) At the end of filming, the director apologized to Martin for the inappropriate photos, and Martin left the hotel. (Id. ¶ 48.) After hearing about Cohen's behavior, Mr. Martin identified the alleged foreign reporter as Cohen, and Martin made an unsuccessful attempt to contact Schulman. (See id. ¶ 50.) Thereafter, Martin commenced her action in this Court on February 22, 2008.

B. The Agreements[10]

As noted above, the Agreements signed by the various Plaintiffs herein are identical in all material respects. They set forth each Plaintiff's consent to appear in a "documentary-style . . . motion picture" (Agmt. pmbl.) intended "to reach a young adult audience by using entertaining content and formats" (id. ¶ 1). Each Agreement states that the relevant Plaintiff:

[10] For true copies of each Agreement, see Hansen Decl. (Psenicska) Ex. A; Metcalf Decl. (Martin) Ex. B; Hansen Decl. (Streit) Ex. D (Standard Consent Agreement).

> specifically, but without limitation, waives, and agrees not to bring at any time in the future, any claims against the Producer, or against any of its assignees or licensees or anyone associated with the Film, that include assertions of (a) infringement of rights or publicity or misappropriation (such as any allegedly improper or unauthorized use of the Participant's name or likeness or image), . . . (d) intrusion (such as any allegedly offensive behavior or questioning or any invasion of privacy), . . . (m) prima facie tort, . . . [and] (n) fraud (such as any alleged deception or surprise about the Film or this consent agreement).[11]

(Id. ¶ 4.) Furthermore, each Agreement includes a merger clause which notes, among other things, that "the Participant acknowledges that in entering into [the Agreement], the Participant is not relying upon any promises or statements made by anyone about the nature of the Film or the identity of any other Participants or persons involved in the Film." (Id. ¶ 5.)

II. DISCUSSION

On a motion to dismiss, the court must accept as true all material facts alleged in the complaint and draw all reasonable inferences in the plaintiff's favor. See Johnson v. Newburgh Enlarged Sch. Dist., 239 F.3d 246, 250 (2d Cir. 2001). Furthermore, on such a motion, courts may consider "any written instrument attached to [the complaint] as an exhibit or any

[11] As also noted above, the Agreement signed by Martin includes that Plaintiff waives "any claim arising out of the Participant's viewing of any sexually-oriented materials or activities." (See Metcalf Decl. (Martin) Ex. B, ¶ 4.)

statements or documents incorporated in it by reference . . . and documents that the plaintiffs either possessed or knew about and upon which they relied in bringing the suit." Rothman v. Gregor, 220 F.3d 81, 88-89 (2d Cir. 2000). So construed, to survive a motion to dismiss, a complaint must contain enough facts to suggest that the allegations are plausible. See Bell Atl. Corp. v. Twombly, --- U.S. ----, 127 S.Ct. 1955, 1965 (2007); see also Cannon v. Douglas Elliman, LLC, No. 06 Civ. 7092, 2007 WL 4358456, at *4 (S.D.N.Y. 2007).

A. The Agreement is not Ambiguous

Each Agreement at issue in these actions contains an explicit waiver clause that on its face prevents Plaintiffs from bringing the above-captioned actions. To avoid their waivers, Plaintiffs argue that the Agreement -- specifically, the term "documentary-style film" as it is used in Paragraph 4 of the Agreement -- is ambiguous and cannot be enforced at this stage of the litigation. (See Psenicska Pl.'s Opp'n 10-11; Streit Pls.' Opp'n 12; Martin Pl.'s Opp'n 11.) Further, Plaintiffs argue that the term "documentary-style film" does not describe Borat and, therefore, that they have not waived any right to bring claims against Defendants relating to Borat.

Under New York law,[12] issues of contract interpretation, including determining whether a contract term is ambiguous, are threshold questions of law to be determined by the court and suitable for disposition on a motion to dismiss. See Aon Financial Products, Inc. v. Societe Generale, 476 F.3d 90, 95 (2d Cir. 2007) (citing Krumme v. WestPoint Stevens Inc., 238 F.3d 133, 139 (2d Cir. 2000). A contract term is ambiguous as a matter of law if it is:

> capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.

Walk-In Med. Ctrs., Inc. v. Breuer Capital Corp., 818 F.2d 260, 263 (2d Cir. 1987) (quoting Eskimo Pie Corp. v. Whitelawn Dairies, Inc., 284 F. Supp. 987, 994 (S.D.N.Y. 1968)). Where there are alternative, reasonable interpretations of a contract term rendering it ambiguous, the issue should be submitted to the trier of fact and is not suitable for disposition on a motion to dismiss. See K. Bell & Assocs., Inc. v. Lloyd's Underwriters, 97 F.3d 632, 637 (2d Cir. 1996). A court should not find contract language ambiguous, however, on the basis of the interpretation urged by one party where that interpretation

[12] New York law governs construction of the Agreement pursuant to a choice of law provision, about which there is no dispute among the parties.

would strain the contract language beyond its reasonable and ordinary meaning. See Metro. Life Ins. Co. v. RJR Nabisco, Inc., 906 F.2d 884, 889 (2d Cir. 1990); see also E.Sayers v. Rochester Tel. Corp. Supplemental Mgmt. Pension Plan, 7 F.3d 1091, 1095 (2d Cir. 1993) (contracting parties may not create an ambiguity merely by urging conflicting interpretations of their agreement).

Here, the term "documentary-style film" is not ambiguous. Indeed, Psenicska offers a definition of that term that neither Defendants (see, e.g., Psenicska Defs.' Reply 6) nor the other Plaintiffs contest (See Streit Opp'n 9; Martin Opp'n 8). Quoting the New Oxford American Dictionary, he states that

> [t]he word "documentary," as an adjective, means "(of a movie, a television or radio program, or photography) using pictures or interviews with people involved in real events to provide a factual record or report . . .;" as a noun, the word means "a movie or a television or radio program that provides a factual record or report.

(Psenicska Opp'n 4 (quoting New Oxford American Dictionary (2d ed. 2005)).) Noting that "[t]he word '-style,' as a suffix forming adjectives and adverbs, means 'in a manner characteristic of'" (id. at 4-5 (quoting New Oxford American Dictionary, supra)), he concludes that "the phrase 'documentary-style film' means a work displaying the characteristics of a film that provides a factual record or report" (id. at 5; see also Streit Opp'n 9; Martin Opp'n 8). Whether that term is

"capable of more than one meaning when viewed objectively by a reasonably intelligent person," Walk-In Med. Ctrs., 818 F.2d at 263, is not presently at issue: there is only one meaning that the parties attribute to that term.

Instead, confusion appears to have resulted from the fact that, though its definition may not be ambiguous, the class of films defined as "documentary-style" is subject to some debate. There can be no reasonable debate, however, that Borat is a film "displaying the characteristics of a film that provides a factual record or report." The Movie comprises interviews with real people and depictions of real events that are intended to provide a "factual record or report" albeit of a fictional character's journey across America. To the contrary, Plaintiffs seem unwilling to recognize that the operative word in the phrase "documentary-style film" is "style" and not "documentary." (See, e.g., Streit Opp'n 8 (arguing that Borat is not a "documentary-style film" because it is a "fictional account of a staged journey across the United States by a fictional character, from a fictional country"); Psenicska Opp'n 5 (arguing that "[a] film made in the style of a documentary is based on facts that can be documented by reliable sources, and such a film does not contain fictional characters engaging in deliberately outré behavior to comedic effect").) The fact that Borat is a fictional character, however, does nothing to

diminish the fact that his fictional story is told in the style of a true one. Indeed, Borat owes such effectiveness as it may have to that very fact.[13]

For these reasons, I conclude that the Agreement is not ambiguous and may be enforced at this stage of the litigation.

B. Fraudulent Inducement Claims

Nevertheless, each Plaintiff seeks to avoid the waiver clause in the Agreement by arguing that he or she was fraudulently induced to enter the Agreement. Specifically, each Plaintiff argues that Schulman's representations about the nature of the film and the identities of Schulman, Cohen and Springland Films were false and were meant to induce him or her to appear in the film. (See Psenicska Compl. ¶¶ 38, 40; Streit Compl. ¶¶ 73-75; Martin Compl. ¶¶ 76-79.)

That line of argument is foreclosed to Plaintiffs here, however, because each waived his or her reliance on "any

[13] Nor does the fact that Borat employs humor disqualify it from the "documentary-style" genre, as Martin seems to suggest. (See Martin Opp'n 9 n.2, 10 (arguing that "the 'getting' of innocent people for satirical purposes has nothing whatsoever to do with the documentary genre to which Defendants claim the Borat Movie belongs.").) Humor is perfectly consistent with documentary. See An Inconvenient Truth (Lawrence Bender Prods. 2006) (employing humor at times to illustrate dangers of global warming); Bowling for Columbine (Alliance Atlantis Communications 2002) (relying on sardonic humor to ease an otherwise grave portrayal of gun violence in America).

promises or statements made by anyone about the nature of the Film or the identity of any other Participants or persons involved in the Film." See Agmt. ¶ 5; see also Danann Realty Corp. v. Harris, 5 N.Y.2d 217, 320, 184 N.Y.S.2d 599, 601 (1959). In Danann, the New York Court of Appeals held that the defense of fraud in the inducement is foreclosed to a party who disclaims, in the contract itself, reliance on fraudulent statements allegedly made to induce him to enter into the contract. See Danann 5 N.Y.2d at 323.[14] As this Court recently observed,

> specificity was the touchstone of the disclaimer in Danann: the purchaser in that case could not claim to have relied on the allegedly fraudulent representations when, in the contract, the purchaser stated that "the Purchaser hereby expressly acknowledges that no such representations have been made."

UBS AG, Stamford Branch v. Healthsouth Corp., No. 07 Civ. 8490 (LAP), 2008 WL 2337846, at *5 (S.D.N.Y. June 6, 2008) (quoting Danann, 5 N.Y.2d at 320, 184 N.Y.S.2d at 601).

Here, each Plaintiff argues that the Agreement's merger clause is too general to preclude his or her defense of fraud in the inducement. (See Psenicska Pl.'s Opp'n 15; Streit Pls.'

[14] To maintain a claim for fraud in the inducement, a party must show: (1) a material representation or omission of fact made by a defendant with knowledge of its falsity and intent to defraud, and (2) damages sustained as a result of a plaintiff's reasonable reliance on that representation. See Crigger v. Fahnestock and Co., Inc., 443 F.3d 230, 234 (2d Cir. 2006).

Opp'n 13; Martin Pl.'s Opp'n 12.) The relevant merger clause, however, states that Plaintiff has not relied "upon any promises or statements made by anyone about the nature of the Film or the identity of any other Participants or persons involved in the Film." (Agmt. ¶ 5 (emphasis added).) As in Danann, so too here: a Plaintiff may not claim to have relied on a statement upon which he or she has explicitly disclaimed reliance.

In the alternative, each Plaintiff argues that Defendants had a duty to disclose the nature of the film and the identities of those involved in the film. (See Psenicska Pl.'s Opp'n 13-14, Streit Pls.' Opp'n 15-16, Martin Pl.'s Opp'n 13.) Each Plaintiff invokes the duty to disclose that arises when a "party possesses superior knowledge, not readily available to the other, and knows that the other is acting on the basis of mistaken knowledge," Aaron Ferer & Sons, Ltd. v. Chase Manhattan Bank, N.A., 731 F.2d 112, 123 (2d Cir. 1984), and the principle that "an express disclaimer will not be given effect where the facts are peculiarly within the knowledge of the party invoking it," Banque Arabe Et Internationale D'Investissement v. Maryland Nat. Bank, 819 F. Supp. 1282, 1292 (S.D.N.Y. 1993). These Plaintiffs cannot avoid the consequences of their waivers, however, simply by restyling their allegations of

misrepresentation as allegations of omission.[15] (See Psenicska Compl. ¶ 29, Streit Compl. ¶¶ 73-75, Martin Compl. ¶¶ 76-77.) Such would empower these Plaintiffs to avoid the clear wording of their own contracts in a manner I must decline to condone under well-settled New York law. In light of the above disposition, I do not reach Defendants' additional arguments.

III. CONCLUSION

For the reasons stated above, the Agreements in each of the above-captioned actions is unambiguous and, based on the language of those Agreements, these Plaintiffs may not now maintain a defense of fraud in the inducement. The Agreements are thus enforceable, and the provisions contained therein waiving Plaintiffs' respective rights to bring any and all claims against Defendants with respect to Borat prevent the instant actions. Therefore, Defendants' motion to dismiss in Psenicska v. Twentieth Century Fox Corp., 07 Civ. 10972 [dkt. no. 9], Streit v. Twentieth Century Fox Corp., 08 Civ. 1571

[15] Of course, in a sense, every alleged misrepresentation involves an omission of the truth. Plaintiffs argue in the space provided by that ambiguity, asserting that Defendants "concealed the true nature of their film" (see Martin Compl. ¶ 69) and "misrepresent[ed] and conceal[ed] material facts" (Psenicska Compl. ¶ 35).

[dkt. no. 9] and Martin v. Mazel, 08 Civ. 1828 [dkt. no. 12] are all hereby GRANTED.

The Clerk of the Court shall mark each action closed and deny all pending motions as moot.

SO ORDERED:

Dated: September 3, 2008
New York, New York

Loretta A. Preska

LORETTA A. PRESKA, U.S.D.J.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/15/07			DEPT. WEC
HONORABLE JOSEPH S. BIDERMAN	JUDGE	K. SANDOVAL R. WHITE, CSL/CT. ASST.	DEPUTY CLERK ELECTRONIC RECORDING MONITOR
HONORABLE #5	JUDGE PRO TEM		
NONE	Deputy Sheriff	NONE	Reporter

2:30 pm	SC091723	Plaintiff Counsel	
	JOHN DOE I ET. AL. VS ONE AMERICA PRODUCTIONS, INC. ET AL.		NO APPEARANCES
		Defendant Counsel	

NATURE OF PROCEEDINGS:

RULING ON SUBMITTED MATTER;

Court rules on Special Motion to Strike taken under submission on February 14, 2007 as follows:

SPECIAL MOTION TO STRIKE

Evidentiary Objections

EVIDENTIARY OBJECTIONS BY DEFENDANTS

DECL OF STAUFFER

1. Para 3 - Sustained - hearsay
2. Para 4 - Sustained as to any reference to "producer" as hearsay
3. Para 5 - Sustained as to any reference to "producer" as hearsay

DECL OF HAMMETT

1. Para 3 - Overruled
2. Para 4 - Overruled
3. Para 5 - Overruled

DECL OF ROTUNDA

1. Para 14- Sustained as to foundation
2. Para 15- Sustained as to foundation

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NONE	Deputy Sheriff	NONE	Reporter

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NATURE OF PROCEEDINGS:

3. Para 16- Overruled
4. Para 17- Sustained as to hearsay regarding the substance of the telephone calls and as to foundation regarding level of consequences "inevitable"
5. Para 18 Overruled
6. Para 19 Sustained as speculation
7. Para 20 Overruled

Merits

As an initial matter, the Court notes that the only issue before it today is the narrow inquiry of whether this action constitutes what our Legislature has denominated as a "SLAPP" - a strategic lawsuit against public participation. The propriety of filming individuals, often in crude contexts and with a disarming disguise, with the specific intent of later embarrassing them on a national scale - even those individuals who, on occasion, exhibit less than admirable qualities - is not before the Court. Rather, the Court's role is constrained to an examination of the legal issues presented by the parties. The Court cannot and does not reach the topic of whether the Defendants' conduct is appropriate or conscionable; the only question is whether a legal claim survives in the manner it has been drafted in Plaintiffs' Complaint.

Under the two-step process of Section 425.16 of

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NATURE OF PROCEEDINGS:

the Code of Civil Procedure, the trial court first decides "whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity .... If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." Equilon Enterprises v. Consumer Cause, Inc. (2002) 29 Cal.4th 53, 67. "In bringing a section 425.16 motion to strike, the defendant has the initial burden to make a prima facie showing that the plaintiff's claims are subject to section 425.16. If the defendant makes that showing, the burden shifts to the plaintiff to establish a probability he or she will prevail on the claim at trial, i.e., to proffer a prima facie showing of facts supporting a judgment in the plaintiff's favor." Roberts v. Los Angeles County Bar Assoc. (2003) 105 Cal.App.4th 604, 613 (emphasis added). The Court must consider the pleadings and the evidence submitted by the parties; it cannot weigh the evidence but instead must simply determine whether the plaintiff's evidence would, if credited, be sufficient to meet the plaintiff's burden of proof. Ramona Unified Sch. Dist. v. Tsiknas (2005) 135 Cal.App. 4th 510, 519.

The parties dispute whether Plaintiffs' six causes of action are subject to Section 425.16. As the Court indicated at the lengthy hearing on this

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HONORABLE #5	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
NONE	Deputy Sheriff	NONE	Reporter
2:30 pm	SC091723 JOHN DOE I ET. AL. VS ONE AMERICA PRODUCTIONS, INC. ET AL.	Plaintiff Counsel NO APPEARANCES Defendant Counsel	

NATURE OF PROCEEDINGS:

motion, the Court concludes that Defendants have satisfied their initial burden under the anti-SLAPP statute.

Plaintiffs argue that this case is about misrepresentations, not conduct in furtherance of free speech rights. However, the last four causes of action stated in Plaintiffs' complaint indisputably arise from Defendants' communications (i.e., the movie). As to the first two causes of action (fraud and rescission), though couched in fraud, their gravamen, or principal thrust, goes to the exhibition of the movie. See, e.g., Complaint, paras. 16-18, 21, and 26; Martinez v. Metabolife Internat. Inc. (2003) 113 Cal.App.4th 181, 188 ("[I]t is the principal thrust or gravamen of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies..."). Indeed, at oral argument counsel effectively conceded, as he must, that this action would not exist at all if the movie were not playing in the United States.

Further, it is beyond reasonable dispute (and undisputed) that the topics addressed and skewered in the movie - racism, sexism, homophobia, xenophobia, anti- semitism, ethnocentrism, and other societal ills - are issues of public interest, and that the movie itself has sparked significant public awareness and debate about these topics. "The definition of 'public interest' within the meaning

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NATURE OF PROCEEDINGS:

of the anti-SLAPP statute has been "broadly construed." Damon v. Ocean Hills Journalism Club (2000) 85 Cal.App.4th 468, 479. Thus, a statement or activity has been held to be in the public interest when it involves a topic of widespread interest. Rivero v. American Fed. of State, County & Mun. Employees, AFL-CIO (2003) 105 Cal.App. 4th 913, 924. Likewise, "[m]ajor societal ills are issues of public interest." Lieberman v. KCOP Television, Inc. (2003) 110 Cal.App.4th 156, 164.

The movie is not about whether these specific plaintiffs held racist, sexist, or anti- Semitic views, but rather concerns the general topics of racism, sexism, homophobia, anti-Semitism, and ethnocentrism, which (as previously noted) are issues of public interest. See, M.G. v. Time Warner, Inc. (2001) 89 Cal.App.4th 623, 629 (courts are to look at the broad topic of an article or program in determining whether the act in furtherance of free speech was related to a public issue). In addition, several cases have held that the anti-SLAPP statute applies to private communications concerning public issues. E.g., Averill v. Superior Court (1996) 42 Cal.App.4th 1170, 1175; Ruiz v. Harbor View Community Assn. (2005) 134 Cal.App.4th 1456, 1470; Integrated Health Care Holdings v. Fitzgibbons (2006) 140 Cal.App.4th 515, 525, fn. 4.

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HONORABLE #5	JUDGE PRO TEM		
NONE	Deputy Sheriff	NONE	Reporter

2:30 pm	SC091723	Plaintiff Counsel	NO APPEARANCES
	JOHN DOE I ET. AL. VS ONE AMERICA PRODUCTIONS, INC. ET AL.	Defendant Counsel	

NATURE OF PROCEEDINGS:

In addition to the foregoing, the Court concludes that application of CCP 425.16 to the unusual fact pattern before the Court would further that statute's purpose of encouraging participation in matters of public significance.

Insofar as Defendants have satisfied their initial burden under CCP 425.16, the burden now shifts to Plaintiffs to establish a probability that they will prevail at trial by making a prima facie showing as to each cause of action. The Court concludes that Plaintiffs have failed to satisfy this burden as to any cause of action.

Plaintiffs' opposition brief fails to address several of the arguments raised by Defendants with regard to the fraud claim, such as the lack of actual, definite damages. Plaintiffs' evidence in this regard is virtually non-existent.

Plaintiffs have failed to show a basis for the equitable remedy of rescission. The Court could not possibly return Plaintiffs to anything remotely close to the status quo ante. Indeed, the rescission claim is, in effect, seeking a backdoor permanent injunction against displaying Plaintiffs' images, etc. on DVD, without satisfying the stringent requirements for that type of injunction.

Plaintiffs' opposition brief does not in any

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VS
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Plaintiff Counsel: NO APPEARANCES

Defendant Counsel:

NATURE OF PROCEEDINGS:

manner respond to Defendants' argument that they did not portray Plaintiffs in a false light. Motion, 15:8-19.

With regard to Plaintiffs' mis-titled claim for "statutory false light" (which is actually a claim based on the statutory right of publicity) and Plaintiffs' claim for common law misappropriation of likeness, Defendants simply have the more persuasive arguments, particularly with regard to those based on the First Amendment. Indeed, the Court cannot stress too highly the importance of the free speech rights at stake in this case. Movies are of significant public interest. "It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform." Joseph Burstyn, Inc. v. Wilson (1952) 343 U.S. 495, 501, 72 S.Ct. 777, 96 L.Ed. 1098 (fn. omitted). The fact that movies are made for private profit does not diminish the fact movies are "a form of expression whose liberty is safeguarded by the First Amendment." Id. at 501-502, 72 S.Ct. 777 (fn. omitted). See also, Guglielmi v. Spelling-Goldberg

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Productions (1979) 25 Cal.3d 860. This movie in particular, which is part fiction and part documentary, utilizes the reactions and statements of people such as Plaintiffs to subversively satirize the true targets of the movie: ethnocentrism, sexism, racism, and the like.

Plaintiffs' claim for "negligent infliction of emotional distress," which is really a claim for negligence, fails. Plaintiffs have failed to identify the duty which they contend Defendants owed them, and the manner in which Defendants breached said duty. Further, insofar as the movie is partly a work of fiction, the cause of action is arguably barred by Polydoros v. Twentieth Century Fox Film Corp. (1997) 67 Cal.App.4th 318, 326 ("Respondents are 'immune' from liability because they have a constitutional right to free expression, which they exercised when they made and released this film")

Motion is granted in full. Defendants are to serve and lodge a proposed order pursuant to CRC 3.1312. They are to concurrently serve and lodge a proposed revised judgment of dismissal as to the complaint in its entirety.

Any request for attorney's fees pursuant to CCP 425.16(c) may be made by separate motion supported by admissible evidence showing in detail the amount of reasonable time spent on the motion to strike and

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HONORABLE #5	JUDGE PRO TEM		
NONE	Deputy Sheriff	NONE	Reporter

2:30 pm	SC091723	Plaintiff Counsel	
	JOHN DOE I ET. AL. VS ONE AMERICA PRODUCTIONS, INC. ET AL.	Defendant Counsel	NO APPEARANCES

NATURE OF PROCEEDINGS:

the fees motion.

Clerk to give notice. Counsel for plaintiff to promptly notice remaining parties.

CLERK'S CERTIFICATE OF MAILING/
NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 2-15-07 upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

Date: February 15, 2007

John A. Clarke, Executive Officer/Clerk

By: _____
K. Sandoval

OLIVIER A. TAILLIEU, ESQ.
9595 WILSHIRE BOULEVARD

WALT SADLER, ESQ.
LEOPOLD, PETRICH & SMITH

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NONE	Deputy Sheriff	NONE	Reporter

2:30 pm	SC091723 JOHN DOE I ET. AL. VS ONE AMERICA PRODUCTIONS, INC. ET AL.	Plaintiff Counsel Defendant Counsel	NO APPEARANCES

NATURE OF PROCEEDINGS:

9TH FLOOR
BEVERLY HILLS, CA 90212

SUITE 3110
2049 CENTURY PARK EAST
LOS ANGELES, CA 90067

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Hidden Camera Cases with Analysis

	Case Name	Holding	Relevant Torts	Facts	Relationship	Content	Location	Entry	Other	Prevailed
1	*Food Lion v. Capital Cities/ABC*, 194 F.3d 505, 517 (4th Cir. 1999).	Because the reporters intended to act against the interests of plaintiff, they were liable in tort for breach of loyalty to their employer. Such disloyalty also exceeded the consent granted to enter plaintiff's premises and thus constituted trespass, but misrepresentations on the job applications did not alone vitiate such consent. No fraud Constitutional libel standards apply to damages claims for reputational injury from a publication. (at 523). –> Food Lion not entitled to compensation for loss of goodwill, reputational damage b/c would have to show actual malice.	fraud, breach of duty of loyalty, trespass	PrimeTime Live producers submitted job apps with false info to grocery chain, obtained employment, and used hidden cameras to film in non-public areas while investigating unsanitary meat-handling practices.	**Non-confidential:** Employ-er & employee	Taped employees general handling of meeting and discussion of meat dep't practices	Employee areas of super-market (employee break room, deli counter, meat cutting room, etc.)	Ruse - job appli-cation		Plaintiff
2	*Desnick v. ABC*, 44 F. 3d 1345 (7th Cir. 1995)	ABC investigators pretending to be patients in an ophthalmic clinic open to the public did not commit trespass b/c clinic was open to public, the office's activities weren't disrupted, and private details of people's lives weren't revealed. There was no interference w/possession of land (1352-1354). Desnick II, 233 F.3d 514 (7th cir 2000): Defamation claim - Desnick clinic conceded it was a public figure. ABC's investigation turned up evidence of tampering. The fact that its informant, a former employee of clinic, had lost a defamation suit against Desnick and ABC did not follow up may have been reckless but P never proved what following up would've revealed to establish causality between ABC's recklessness and injury to the clinic.	Trespass Appeal (Desnick II): defamation	ABC investigators taped doctor discussions with testers to expose the unnecessary cataract surgeries the clinic allegedly performed on Medicare recipients over 65.	**Confidential:** Dr-patient in clinic open to public	Eye clinic exam	opthalmic clinic-public	Ruse - ABC's agents posed as patients		Defendant

Hidden Camera Cases with Analysis

	Case Name	Holding	Relevant Torts	Facts	Relationship	Content	Location	Entry	Other	Prevailed
3	*Pitts Sales, Inc. v. King World Prods., Inc., 383 F. Supp. 2d 1354, 1363-64 (S.D. Fla. 2005).*	Interception under 18 USC 2520(wiretapping): co. had standing b/c it had a possessory interest in the communications where business practices were discussed. However, the undercover reporter was a party to the communication which is an exception to liability under 2511(1). Fraud: No claim b/c there was no reasonable reliance that employee would stay at job. Trespass: P argued for nominal damages for trespass b/c recording exceeded consent granted. Ct distinguished the case from *Medical Lab* whose claim was dismissed b/c it asked for publication damages. Unlike *Desnick*, D here went to non-public areas. Ct said this was issue of material fact that must be decided at trial.	interception and use in violation of anti-wiretapping statute, fraud, and trespass	Pitts Sales, a magazine sales company, unknowingly employed an associate producer who used hidden microphones and cameras to make recordings that were later used to produce a story about the harsh treatment and poor supervision of often-underage traveling magazine sales agents. The footage was broadcast on Inside Edition on feb 3, 2003.	**Non-Confidential:** Employer - employee	business - sales, cities traveled/traveling to, sales strategies	co. car, hotel con-ference room, check-in room, D's hotel room (private areas)	producer applied for sales position		Defendant: Interception and Fraud Trespass- no SJ for either party, issue to decide
4	*Broker's Choice of America v. NBC*, 2011 U.S. Dist. LEXIS 3003 (2011)	The court found for the defendants on all of the defamation claims. 42 USC 1983 provides a cause of action for the deprivation of rights by state actors. The State of Alabama and Ds were not join participants in creating the broadcast. There was no allegation that Ds acted at the command of the state or that the state had editorial control. Complaint dismissed with prejudice.	Defamation, 42 USC 1983	Undercover Dateline investigation of annuity salesmen. Videotaped insurance salesmen training seminar put on by P BCA. Dateline had volunteers pose as potential customers of agents an secretly tape sales pitches where agents did not disclose the risks associated with the annuities. Dateline worked with the Alabama Annuities Task Force. Ps alleged that the statements contained in the preview and during the show were defamatory.	**None:** fake insurance agents being trained by Plaintiff	Insurance sales tactics	Annuity University for insurance salesmen offered by Plaintiff	Dateline posed as insurance agents to attend training for agents		Defendant

Hidden Camera Cases with Analysis

	Case Name	Holding	Relevant Torts	Facts	Relationship	Content	Location	Entry	Other	Prevailed
5	*Bowens v. Aftermath Ent't*, 254 F. Supp. 2d 629 (2003); *Bowens II* 364 F. Supp. 2d 641 (2005), Bowens III SC 140296 (2011)	Ps said Ds violated the act by intercepting, disclosing the contents, and using them to make dvd. -Ct said Ps stated a claim b/c they said only certain concert staff and city officials were permitted in the meeting room. There were questions of fact re Ds' assertions there were unnamed third parties in room. One party consent is a defense unless Ds intended to commit a tortious act or crime by eavesdropping. Ps said intent was to record to exploit their likeness and this was sufficient allegation of facts. -Ct said gives Ps leave to amend their complaint, and did not dismiss their claim. -Bowens II (federal): S.Ct granted D's motion for SJ due to issue preclusion; a state ct had decided the state law claims and granted SJ on all of them. -Bowens III (MI Supreme Ct): ct said no genuine issue of material fact of conversation being private b/c: backstage locale during hectic hrs with hundreds of ppl had backstage passes, parties had antagonistic relationship, unidentified ppl came and went, ps knew multiple camera crews were in vicinity, video evidence showed 1 person visibly filming in room.	18 USC 2510 Federal Wiretap Act; state court dealt with Michigan eavesdropping law	During rappers' Up in Smoke gangster tour, D tour managers used hidden cameras to tape interaction with Detroit city officials where they asked Ps not to broadcast an obscene video during their concert. Mayor's press secretary had requested private meeting. Meeting was at the concert arena, in a private room. Recordings were put on tour DVD as bonus tracks. Ds filed motion to dismiss, Ps filed motion for leave to amend First Amended Complaint.	None	discussing video footage to be aired, concert	Room in concert arena	Plaintiffs came to premises, Defendants agreed to private meeting		Defendant
6	*Fowler v. Capital Cities/ABC*, 2002 U.S. Dist. LEXIS 18484 (N.D.Tex. 2002)	D's statement on air that p had 6 malpractice suits involving breast implants or liposuction after he said in the hidden camera video that he had never had complications with breast surgery was not defamatory. Neither was D's statement that a patient got an infection through most of her body from liposuction when the dr had said she got the infection in her thigh and it was not serious. Ct addressed what was basically a false light claim. In TX, even if a broadcast's individual statements are true, the broadcast as a whole may still be defamatory... when published in such a way that they create a false an defamatory impression. P argued that his segment lumped him together with the workshop drs. who were undertrained, but the court disagreed because the dr was introduced with a description of his credentials and experience. There was also no suggestion that his credentials were worthless.	Defamation	20/20 did an investigation of physicians who receive weekend workshop training to hold themselves out as cosmetic surgeons when they are not trained or board certified in plastic surgery. ABC gave cameras to drs. attending the workshops. It also showed plaintiff dr. answering qs to fake prospective patients in an office consultation. It aired footage on a 20/20 episode called "Surgery Seminars" on Nov 3, 1999.	**Confidential:** Dr-patient	Discussion of past complication w/ surgeries doctor performed	Dr.'s offices	Ruse -		Defendant

Hidden Camera Cases with Analysis

	Case Name	Holding	Relevant Torts	Facts	Relationship	Content	Location	Entry	Other	Prevailed
7	*Candelaria v. Spurlock*, 2008 U.S. Dist. LEXIS 51595 (E.D.N.Y. 2008)	No common law right of privacy exists in NY, but section 51 provides a COA for anyone whose name, picture etc. is used for advertising or trade without consent. Newsworthiness and "incidental use" are exceptions under the statute. Ct said use of P's image bore a relationship to the movie's comments on obesity and directly related to the public's lack of information on the health effects of the food. Also, P had no reasonable expectation of privacy working at McD's meeting hundreds of members of the public. Also, use met incidental exception because P's image appeared for only a few seconds.	NY Civ Right Law Section 51	P sued because Spurlock allegedly used a hidden camera to film plaintiff for 3 or 4 seconds while working her shift at a McDonald's. D used the footage in *SuperSize Me* when D discussed the difficulty of obtaining nutritional info from McDonald's.	None	No conversation taped at McDonald's	Public/semi public McDonald's	No ruse		Defendant
8	*Russell v. ABC*, 1995 U.S. Dist. LEXIS 7528 (N.D. Ill. 1995)	Wiretap act: Dismissed because D was a party to the conversation. Inquiry is why communication was intercepted, not how it was ultimately used. Ds intended to expose sanitation problems in the fish industry, not commit a crime or tort. False Light: ct did not dismiss claim b/c show's voiceovers insinuated the fish wasn't fresh and that P was telling D to lie about its freshness. Intrusion: IL First App District doesn't recognize the tort. Also, not offensive prying to record a willing conversation at work. P was harmed, if at all, by publication, not the filming itself.	Wiretap act (2510), false light invasion of privacy, intrusion upon seclusion	ABC hired undercover journalism students to take on jobs at Potash, a grocery store that sells seafood. Ds recorded hidden conversations between reporter and employee, which aired on PrimeTime Live on Feb 3, 1994. P employee sued b/c she was taped telling clerk to tell customers the fish was today fresh and he later said even if the fish was sitting in back they would say it's fresh. Also ABC said they sold cooked fish when fish was too old to sell fresh. Ds moved to dismiss.	Non-Confidential: co-employees	business (selling fish)	Work-market	Ruse - job application		Defendant on some claims, ct kept Plaintiff's false light claim
9	*Russell II* (Russell v. ABC), 1997 U.S. Dist. LEXIS 14589 (N.D. Ill. 1997)	Court found that ABC was presenting its own subjective interpretation of P's statements and the portions of unaired footage don't indicate that the aired footage was inaccurate. Also, no malice proven in order for P to get punitive damages or false light damages. Ct said D's failure to investigate what P meant by "today fresh" was not reckless disregard because it was reasonable to interpret she meant the fish was delivered today (she claimed she meant that it's fresh as of today). Also no proof reporter knew or recklessly disregarded whether the segment conveyed the impression P was dishonest when he had said in a deposition that he did not consider her dishonest.	Invasion of privacy, defamation	"	"	"	"	"		Defendant

Hidden Camera Cases with Analysis

	Case Name	Holding	Relevant Torts	Facts	Relationship	Content	Location	Entry	Other	Prevailed
10	*Lucas v. Fox News Network*, 2000 U.S. Dist. LEXIS 22834 (N.D.G.A. 2000)	Invasion: one implicitly waives right tof privacy when she seeks the patronage of the public. Here, P called for public approval and patronage as a church ministry leader, and Ds reported on that public activity. Even the promise to keep matters confidential didn't allow reputational and state of mind damages. P consented to D's presence in her apartment - premises open to anyone expressing an interest and the communication was professional, not personal . Also GA has one-party consent rule. Wiretap claim failed b/c P didn't assert a criminal or tortious purpose. No publication damages allowed b/c any statements made didn't concern P; they were about her group. Negligence claim dismissed b/c no invasion and no duty owed to P. Consortium failed also. Ct dismissed all claims.	invasion of privacy, negligence, loss of consortium, wiretap act S 2520	Fox reporter went undercover to pose as considering becoming a student at GSU and went to bible studies of a campus church group at P's epartment where she was told the sessions were highly confidential. Footage was aired during *Fox Files* "Cults on Campus" on Jan 21, 1999. Info revealed about P was that she seeks public patronage and inquires into prospective members' sexual histories; her name was not revealed.	None	D was told conversation was confidential	P's home and bedroom	Open to interested public - D posed as interested student		Defendant
11	*LL NJ v. NBC*, 2008 U.S. Dist. LEXIS 34480 (E.D. Mich. 2008)	Trespass claim dismissed, SJ denied on both claims. Trespass: ct distinguished from Desnick b/c the reporters had to sign agreements. No NJ law on issue of whether fraud vitiates consent and there was no clear majority rule from other courts so ct abstained from deciding this issue. Trespass claim dismissed w/o prejudice. Defamation: LL was limited-purpose public figure, there was a controversy on their procedures based on the articles written about them prior to the show. Ct said jury could find actual malice based on D's assertion the LL reps said patients could party the same night as surgery when there was no evidence of that; including a patient's remark on the procedure that seemed false; the comments of another dr. they interviewed who said maybe a few of LL's physicians were certified, among other things. The case was to proceed to trial for the defamation claim.	Trespass, defamation	Undercover agents recorded conversation w/ P's reps at clinic regarding facelift procedure. NBC never aired the footage.	None: Sales reps to prospective patients	facelift procedure	Clinic	pretended to be prospective patients		SJ denied on defamation, case sent to trial

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12	*Copeland v. Hubbard Broadcasting, Inc.* 526 N.W.2d 402 (Minn. Ct. App. Jan. 24, 1995)	State Court of Appeals upheld the trespass claim because MN law recognizes trespass where entrant moves beyond possessor's permission. Consent was only given to a veterinary student so this withstood summary judgment. Remanded to district court.	Trespass	A veterinarian making a house call obtained permission to bring a student with him, but failed to inform the homeowners that the student was an employee of a television station. The student surreptitiously videotaped the doctor's treatment of the family cat in their home.	**Confidential:** Dr./vet student and patient	Treatment of Ps' cat	P's home	Ps consented		Plaintiff: trespass claim dismissed
13	*Ouderkirk v. P.E.T.A. Inc.*, 2007 U.S. Dist. LEXIS 29451 (E.D. Mich. 2007).	For Defendant on all counts. There was no intrusion into seclusion as they gave permission with no limitations on consent. Likeness was used in a matter of public concern and was protected by first amendment. None of the statements by defendants were literally false to allow for a false light claim. Lastly defendant's conduct was not so extreme as to warrent IIED.	intrusion into seclusion, appropriation of likeness, false light, IIED	PETA members lied to gain access to Chinchilla farm by stating they were prospective purchasers. Were given permission to bring cameras but only because under false pretenses. Had hidden camera in addition to visible hand held cameras. Published articles and clips on PETA website describing practices on farm and treatment of animals	**None:** potential buyer and seller	Treatment of Chinchillas on fam		deception - PETA personel lied to gain access to chinchilla farm pretending to be prospective purchasers		Defendant
14	*Dietemann v. Time, Inc.* 449 *F.2d 245* (9th Cir. 1971).	"clandestine photography of the plaintiff in his den and the recordation and transmission of his conversation without his consent resulting in his emotional distress warrants recovery for invasion of privacy in California" (at 248). "The *First Amendment* has never been construed to accord newsmen immunity from torts or crimes committed during newsgathering" (at 249). Publication is not a necessary element of the tort and the existence of a technical trespass is immaterial. (at 247). The court said that the den was a sphere from which the plaintiff could reasonably expect to exclude eavesdropping newsmen. (at 249). One who invites another into his home risks that the person invited may not be what he seems and may repeat the information he learns, but one does not take the risk that everything will be broadcast to the public. (249)	Invasion of privacy	*Life* undercover reporters went to P's house to seek his services as a healer. They secretly photographed plaintiff examining and diagnosing a reporter. They used a radio transmitter to transmit their conversation with plaintiff to a tape recorder outside in an automobile. They cooperated with the DA's office to obtain facts and pictures. He was later arrested for practicing medicine without a license. The reporters published an article on quack healing featuring the pictures taken.	**Non-Confidential:** Quasi-Dr- Patient (he wasn't a real doctor)	Lump in patient's breast	Den in home (home office) - private	Gained by ruse - Life employees said they had been sent there by a friend		Plaintiff

Hidden Camera Cases with Analysis

	Case Name	Holding	Relevant Torts	Facts	Relationship	Content	Location	Entry	Other	Prevailed
15	*Turnbull v. ABC*, 2004 US Dist Lexis 24351 (C.D. Cal. 2004).	632: Even though their conversations could have been overheard by other students during a casting workshop, the plaintiff actors had a reasonable expectation that the conversations were not recorded. The workshops were small and the reporter recorded some conversations which she was not a part of. court said defendants didn't prove conversations not confidential in the 632 claim. (at 31-35) Intrusion: contrasted w/Desnick which featured professional conversations in areas open to public and where no co-worker conversations were recorded. Here, workshop wasn't open to public, had to audition and pay fee; most convs. were personal, and reporter was not a party to some. SJ denied to Ds re intrusion.(fn 9 at 44) Trespass issue was triable b/c sign-up sheet for workshop said actors agreed to come to practice craft. Workshop teacher said he wouldn't have allowed taping.(at 52) 1708.8 SJ denied for Ds.	invasion of privacy, intrusion, 632, trespass, anti-paparazzi law 1708.8; IIED dismissed	Actors in a workshop were surreptitiously taped by ABC for a program on actors paying to meet casting directors. ABC producer posed as an actor attending the workshop. The program aired on Nov 8, 2002 on a 20/20 episode called "Pay to Play."	**None:** students and teacher in workshop	actors performing, conversations b/w actors, conversations b/w participants to which producer wasn't a party, instructions and feedback of casting directors	acting workshop in building	Producer paid a workshop fee and signed a sign-in sheet stating she wanted to practice her acting		Plaintiff
16	*Lieberman v. KCOP Television*, 110 Cal App 4th 156 (Cal. App. 2d 2003).	Doctor had reasonable expectation of privacy when he conducted appointments with television reporters posing as patients and who had brought third parties to the appointments. The Court said that the newsgathering activity was undertaken in furtherance of a broadcast regarding a public issue, and so the complaint fell within Code of Civ Procedure section 425.16 (SLAPP motion) and required P to prove a prima facie claim. Court said P had made a prima facie case and it was for jury to decide if the expectations were reasonable. 632 allows damages of either $5,000 or three times actual damages. Actual damages must relate directly to the recording, not the broadcast. at 167. Court said P's damages were not from the recording but may have been from public disclosure of his illegal activity. at 167.	sec. 632	KCOP employees had medical appointments with Dr. Lieberman . They brought companions who secretly recorded his private consultations on audio and videotape. The footage was featured in "Caught in the Act" on March 23, 2001 in a segment on KCOP's evening news, asserting that the Dr. prescribed Vicodin without proper medical exams. He sued under 632 and KCOP filed a SLAPP motion, which was denied.	**Confidential:** Dr-patient	medical consultation	Dr.'s office	Posed as patients and allowed in to see dr.		Plaintiff

	Case Name	Holding	Relevant Torts	Facts	Relationship	Content	Location	Entry	Other	Prevailed
17	*Sussman v. ABC*, 186 F. 3d 1200 (9th Cir. 1999).	Because Ds were not taping under color of law and were always a party to the conversation, Ps had to prove an illegal or tortious purpose for the recording to violated 2511. Ct said that an otherwise legal taping that is done to achieve a "further impropriety, such as blackmail," becomes a violation of the law. (at 1202). But even if ABC's means of taping were illegal because the act violated the employees' privacy, that does not make the taping illegal under the wiretap act, the court held. Ds "produced no probative evidence that ABC had an illegal or tortious purpose" when it made the tape. (at 1203).	federal wiretap section 2511 (District court included fraud)	Employees of a "psychic hotline" who were secretly recorded by an undercover reporter working for "Primetime Live" sued ABC for violation of the federal wiretapping statute, arguing that the taping was done for the illegal purposes of invading the employees' privacy.	**Non-confidential:** co-employees	conversations regarding psychic and company's business operations	Psychic offices	Gained by ruse of applying for job as psychic and telling co. she worked for their other office		Defendant
18	*Wilkins v. National Broadcasting Co.*, 71 Cal App. 4th 1066 (Cal. Ct. App. 1999).	No intrusion where meeting held in a restaurant, waiters frequently came to the table, reporters brought 2 guests, the pitch contained no secrets, and there was no discussion of p's private affairs. (1079). NBC's actions were not highly offensive for these reasons, the pHs had no objectively reasonable expectation of privacy. *Id.* S 632: communication was not confidential b/c its contents were not a secret, the sales executives continued their pitch while waiters came, and they did not implore their audience not to divulge the information presented. (1080). Fraud: nondisclosure fraud presupposes a relationship b/w the parties; no relationship here so facts were not material to disclosure b/c the execs were willing to pitch to anyone interested (1083). IIED: conduct was not extreme and outrageous Public disclosure: use of likeness, voices, occupations of the execs were of legit public concern b/c it was info about an enterprise that potentially affected unsuspecting callers to the 800 numbers getting billed without their knowledge (1086).	intrusion into seclusion/private affairs, unlawful recording of confidential communications (632), public disclosure of private facts, fraud, etc.	Undercover reporters posed as investors and surreptitiously videotaped company's sales pitch at a restaurant. Plaintiffs represented a co. selling 800 and 900 numbers to investors. On Oct 4, 1994 NBC aired the episode "Hardcore Hustle" on *Dateline NBC*.	**None:** producers met wit co executives while posing as investors	SimTel's business and how its 800 and 900-number products work	Restaurant - Public	Producers posed as investors to get meeting		Defendant

	Case Name	Holding	Relevant Torts	Facts	Relationship	Content	Location	Entry	Other	Prevailed
19	*Medical Laboratory Management Consultants v. American Broadcasting Co.*, 306 F. 3d 806 (9th cir. 2002)	The court found that the plaintiff did not have a reasonable expectation of privacy in the location or contents of the conversation where medical lab was partially open to the public and accessible to employees and where the plaintiff did not disclose any "intimate personal facts." 1) Intrusion: lab was semi-public place, P invited the strangers into the administrative offices and on a tour of the premises showing he had no objectively reasonable expectation of solitude. Info revealed was not personal, but was at best company confidential and privacy does not encompass any corporate interest. Owner could reasonably have expected that conversation wouldn't be divulged to the public, but AZ law permits any person present to record. Also, even assuming a CA standard, expectation is only reasonable to extent communication conveys info personal to declarant. (816). Offensiveness: intrusion was de minimis, not prying into private lives. Also offensiveness is mitigated by public interest in news gathered - this is a medical issue affecting millions of women, it's an issue of public concern. (819). 2) Trespass: MLMC sought damages from the publication of the show and didn't seek nominal damages. Ct said even if there was trespass no proven damages. Only 52 seconds of footage from the trespass was used featuring the owner talking about the lab, which didn't cause the harm (this was negligible). It was lab's failure to detect cervical cancer in reading pap smears. 3) Tortious interference with contractual relations and	Intrusion upon seclusion, trespass, tortious interference with contractual relations...	ABC producers posed as women's health clinic representatives interested in starting a pap smear laboratory in the state. The defendant secretly videotaped the plaintiff's discussion of the industry as a whole and the general practices of the lab. Lab was open to public but the admin offices where meeting took place was not and was for private conversations and confidential meetings. The footage was aired on *Primetime Live*'s "Rush to Read" on May 19, 1994.	None: Plaintiff was medical lab owner and Defendant posed as someone interested in starting a similar business	Business	Conference room in medical lab – semi-public	Ruse used-posed as cytotechnologist interested in the pap smear lab industry		Defendant
20	*Vera v. O'Keefe*, 2011 U.S. Dist. Lexis 54833 (S.D. Cal. May 23, 2011).	Court denied defendants' motion for judgment on pleadings. Court rejected Defendant Giles's contention that only the person who records the confidential communication can be punished. Cal Penal Code Section 31 provides liability for aiding and abetting a crime and plain language of statute doesn't limit liability to person who physically recorded. Ct also rejected Ds' argument that 632 is overbroad. Where Ds cited to the *Medical Laboratory* case, the ct said that the case was decided under Arizona law which doesn't recognize as broad a privacy interest as California does.	sec. 632	Undercover journalists posing as a pimp and a prostitute approached an ACORN employee at ACORN's offices for advice on their prostitution business. They even asked if the conversation would be confidential and Vera indicated it would be. Plaintiff employee sued under section 632.	None: journalists walked into office open to public	Prostitution business of Defendants and how Plaintiff could help them	Public or semi-public? ACORN offices	Journalists posed as people seeking ACORN's help		Plaintiff

Hidden Camera Cases with Analysis

	Case Name	Holding	Relevant Torts	Facts	Relationship	Content	Location	Entry	Other	Prevailed
21	*Sanders v. ABC*. 20 Cal 4th 907 (Cal. 1999).	In an office or other workplace to which the general public does not have unfettered access, employees may enjoy a limited, but legitimate, expectation that their conversations and other interactions will not be secretly videotaped by undercover reporters, even where conversations were not completely private from co-workers. Supreme Court said that even though plaintiff's interaction with the journalist may have been witnessed, and his conversation overheard by co-workers, plaintiff was still entitled to a limited right of privacy. Sup. Court reversed Court of Appeal's ruling that plaintiff could not have a reasonable expectation of privacy b/c his convs. could be overheard, and remanded for further proceedings. "We do not hold or imply that investigative journalists necessarily commit a tort by secretly recording events and conversations in offices, stores, or other workplaces. Whether a reasonable expectation of privacy is violated by such recording depends on the exact nature of the conduct and all the surrounding circumstances." (at 911). Tort still requires proving that invasion is highly offensive. There is a limited expectation of privacy. " The fact that the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable	Invasion of privacy by intrusion	Defendants secretly videotaped psychic telemarketers at work and misrepresented themselves in order to uncover a scam. Reporter videotaped two conversations with an employee, one of which was broadcast on ABC and showed him discussing personal aspirations and giving the reporter a psychic reading. Plaintiff sued for invasion of privacy and violation of S 632. Jury found for Ds on 632 and for Ps on intrusion, Ct of Appeals reversed intrusion jgmt. Supreme Ct said 632 finding didn't require disposing of intrusion claim.	**Non-Confidential:** Co-employees	Plaintiff Psychic's personal aspirations and psychic reading of the under-cover reporter	Office with cubicles; non-employees did not have access without specific permission	Gained by ruse - job application (but Plaintiff here is an employee, not the company)		Plaintiff

Summary of State Taping Laws

State	All Parties Must Consent?	Statute	Conditions
CA	Y	Cal Penal Code § 632(a)	Prohibits eavesdropping through electronic amplifying or recording device on a ***confidential communication***. "Confidential communication" includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto…
CT	N	Connecticut General Statutes 52-570d	**Note: online sources say CT is a two-party consent state, but the statute requiring two-party consent prohibits "oral private telephonic communication"* Can record only if use of recording instrument: (1) is preceded by consent of all parties to the communication and such prior consent either is obtained in writing or is part of, and obtained at the start of, the recording, or (2) is preceded by verbal notification which is recorded at the beginning and is part of the communication by the recording party, or (3) is accompanied by an automatic tone warning device which automatically produces a distinct signal that is repeated at intervals of approximately fifteen seconds during the communication while such instrument, device or equipment is in use.
FL	Y	F.S.A. §§ 934.03, 934.02	Prohibits recording or disclosing of the contents of any wire, oral or electronic communication without all party's consent BUT there needs to be a *reasonable expectation* of it not being intercepted. "Oral Communication" is defined as any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication. In addition, a person cannot intercept to commit a criminal act.
IL	Y	720 Ill. Complied Stat. Ann. 5/14-1,-2	Prohibits recording all or any part of ANY conversation without all parties' consent.
MA	Y	Mass. Ann. Laws ch. 272, § 99	Prohibits intercepting or disclosing ANY wire or oral communication without all party's consent; B. Definitions (4) The term "interception" means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication.

Summary of State Taping Laws

MD	Y	Md. Code Ann. § 10-402; Md. Crim. Law § 3-901	Even with consent, cannot record for the purpose of committing a **tortuous or criminal act**. § 10-402(c)(3). It is a felony to intercept a wire, oral or electronic communication unless all parties to the communication have consented. State courts have interpreted the law to protect communications only when the parties have a reasonable expectation of privacy. If a person is in a private apartment and is speaking so loudly that residents of an adjoining apartment can hear without any sound enhancing device, recording without the speaker's consent does not violate the wiretapping law. Md. Code Ann. § 10-402. Md. Crim. Law § 3-901 prohibits visual surveillance of an individual in a private place without that person's consent. "Private place" is defined as a dressing room or rest room in a retail store.
MI	Y	Mich. Comp. Laws §§ 750.539c,d	Prohibits using a device to eavesdrop in a **private conversation** without all parties' consent. Mich. Comp. Laws § 750.539c. Eavesdropping includes recording. Mich. Comp. Laws. § 750.539a. Law has been interpreted to apply only to situations in which a third party has intercepted a communication. *Sullivan v. Gray*, 324 N.W.2d 58 (Mich. Ct. App. 1982). It is a felony to observe, record, transmit, photograph, or eavesdrop on a person in a private place without the person's consent. Mich. Comp. Laws. § 750.539d. A "private place" is a place where one may reasonably expect to be safe from intrusion or surveillance, but does not include a place where the public or substantial group of the public has access. Mich. Comp. Laws § 750.539a.
MT	Y	Mont. Code ann. § 45-8-213(c)	Prohibits recording "a conversation" without knowledge of all parties. Exceptions to this rule include the recording of: elected or appointed officials and public employees, when recording occurs in the performance of public duty; a person speaking at a public meetings'; a health care facility or a government agency that deals with health care if the recording is of a health care emergency telephone communication made to the facility or agency; and persons given warning of the transcription. If one party gives warning, then either party may record.

Summary of State Taping Laws

NH	Y	N.H. Rev. Stat. Ann. §§ 570-A: 2-I, 644:9	It is a felony to intercept ANY telecommunication or oral communication without the consent of all parties. It is a misdemeanor if one party records or another records with the permission of only one party. It is a violation of privacy to install or use any device for the purpose of observing, photographing, or recording in a private place or outside a private place where images/sounds are not ordinarily audible, visible, or comprehensible. "Private place" is defined as a place where one may reasonably expect to be safe from surveillance. N.H. Rev. Stat. Ann. § 644:9.
NV	N	Nev. Rev. Stat. Ann. § 200.650	**Note: online sources referred to NV as being a two-party consent state, but the actual statute requiring two-party consent is specific to wire communications (Nev. Rev. Stat. Ann. § 707.900).* Telephonic—2 party consent Listening device – 1 party consent. Prohibits surreptitiously listening to, monitoring or recording, or attempting to listen to, monitor or record, by means of any mechanical, electronic or other listening device, any private conversation unless 1 party consents.
PA	Y	18 Pa.C.S.A. § 5703, 5702.	Prohibits interception of any wire, electronic or oral communication without all parties' consent BUT need ***reasonable expectation***. 18 Pa.C.S.A. § 5703. "Oral communication" is defined as any oral communication uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation. The term does not include any electronic communication. 18 Pa.C.S.A. § 5702.
WA	Y	Wash. Rev. Code § 9.73.030	Prohibits recording of any ***private conversation*** without all party's consent. The state Supreme Court has identified three factors bearing on the reasonable expectation sand intent of the parties: (1) duration and subject matter of the conversation, (2) location of conversation and presence or potential presence of a third party, and (3) role of the non-consenting party and his or her relationship to the consenting party. *Lewis v. State Dept. of Licensing*, 139 P.3d 1078 (Wash. 2006).
DC	N	D.C. Code Ann. § 23-542	Prohibits intercepting **ANY** wire or oral communication unless 1 party consents; even with consent cannot record to commit a criminal or tortuous act.

FRED L. LIEBERMAN, Plaintiff and Respondent, v. KCOP TELEVISION, INC., Defendant and Appellant.

B161477

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR

110 Cal. App. 4th 156; 1 Cal. Rptr. 3d 536; 2003 Cal. App. LEXIS 1007; 31 Media L. Rep. 1933; 2003 Daily Journal DAR 7424

July 3, 2003, Filed

SUBSEQUENT HISTORY: [***1]
Review denied by *Lieberman v. KCOP TV, Inc., 2003 Cal. LEXIS 7451 (Cal., Oct. 1, 2003)*

PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Los Angeles County, No. BC274310. Edward A. Ferns, Judge.

DISPOSITION: Affirmed.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A licensed physician sued a local television station for violation of *Pen. Code, § 632,* seeking statutory damages for improper recordings pursuant to *Pen. Code, § 632.7,* and actual damages for lost income and emotional distress. The station had aired secretly recorded excerpts of consultations between the physician and station employees who sought his medical treatment on its evening television news program as part of a featured segment on physicians who prescribe controlled substances without proper medical examinations. The television station filed a SLAPP motion under *Code Civ. Proc., § 425.16.* The superior court denied the special motion to strike, finding that the recorded transaction was a "confidential communication" within the context of *Pen. Code, § 632.* (Superior Court of Los Angeles County, No. BC274310, Edward A. Ferns, Judge.)

The Court of Appeal affirmed. The court emphasized at the outset that the physician asserted only a violation of *Pen. Code, § 632,* and not claims for defamation or invasion of privacy resulting from the broadcast. The court held that the issuance of prescriptions for controlled substances other than for a legitimate medical purpose was an issue of great public interest. Because the surreptitious recordings were in aid of and incorporated into a broadcast in connection with that public issue, the physician's complaint fell within the scope of *Code Civ. Proc., § 425.16.* Having found that the television station made a threshold showing that the physician's cause of action arose out of an act done in furtherance of the television station's exercise of its free speech rights, the court turned to the issue of whether the physician had demonstrated a probability of prevailing on his claim. The court noted that to recover statutory damages under the authority of *Pen. Code, § 637.2, subd. (a)(1),* the physician was not required to prove actual damages resulting from the secret act of recording. Any damages he suffered from the broadcast of the recordings were not, however, "actual damages" under *Pen. Code, § 637.2, subd. (a)(1).* The court held that the physician presented a prima facie case of a violation of *Pen. Code, § 632,* by demonstrating that he expected his communications with the television employees to be private and [*157] that he did not expect them to be recorded. The court declined to create an affirmative defense to *§ 632,* which would

allow secret recording if justified by the legitimate motive of gathering the news. Because appellant had presented a prima facie case demonstrating violation of *§ 632*, and the right to recover statutory damages, the superior court did not err in denying the SLAPP motion. (Opinion by Hastings, J., with Epstein, Acting P. J., and Curry, J., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1) Pleading § 93?Motions and Objections--Motion to Strike Pleading as a Whole--Anti-SLAPP--Standard of Review.--On appeal from an order granting or denying a SLAPP motion pursuant to *Code Civ. Proc., § 425.16*, the appellate court engages in a two-step process, determining first, whether the defendant made a threshold showing that the challenged cause of action was one arising out of acts done in furtherance of the defendant's exercise of a right to petition or free speech under the *United States* or *California Constitution* in connection with a public issue, as defined in the statute, and second, whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Code Civ. Proc., § 425.16, subd. (b)(1), (2).*) The appellate court independently determines whether a cause of action is based upon activity protected under the statute, and if so, whether the plaintiff has established a reasonable probability of prevailing. In doing so, the court considers the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based. (*Code Civ. Proc., § 425.16, subd. (b)(2).*)

[5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 963.]

(2) Pleading § 93--Motions and Objections--Motion to Strike Pleading as a Whole--Anti-SLAPP--Protected Acts.--*Code Civ. Proc., § 425.16, subd. (e)*, includes four separate categories of acts which qualify for SLAPP protection. The first two categories pertain to statements made in connection with proceedings "before" or "in connection with" an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law. The third category identifies matters of public interest addressed in circumstances traditionally protected by the right to freedom of speech; i.e., statements made in a place open to the public or a public forum in connection with an issue of public interest. Category four provides a catch-all for any other conduct in furtherance of the exercise of the [*158] constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

[5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, §§ 960-971.]

(3) Searches and Seizures § 11.4--Constitutional and Statutory Provisions--Generally--Existence of Reasonable Expectation of Privacy--Electronic Surveillance--Confidential Communication.--A violation of *Pen. Code, § 632*, is committed the moment a confidential communication is secretly recorded regardless of whether it is subsequently disclosed.

(4) Pleading § 93--Motions and Objections--Motion to Strike Pleading as a Whole--Anti-SLAPP--News Reporting.--Reporting the news is speech subject to the protections of the *First Amendment* and subject to a motion brought under *Code Civ. Proc., § 425.16*, if the report concerns a public issue or an issue of public interest.

[5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, §§ 960-971.]

(5) Drugs and Narcotics § 5--Offenses--Improper Issuance by Physician or Pharmacist.--The issuance of prescriptions for controlled substances other than for a legitimate medical purpose is a crime, and may be punishable as a felony. (*Health & Saf. Code, § 11153.*) The unlawful dispensing of controlled substances is an issue of great public interest.

[2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 293.]

(6) Constitutional Law § 55--*First Amendment* and Other Fundamental Rights--Scope and Nature--Freedom of Speech and Expression--Television News: Pleading § 93--Motions and Objections--Motion to Strike Pleading as a Whole--Anti-SLAPP.--The broadcast of excerpts of secretly recorded medical consultations as part of a news segment on physicians who prescribe controlled substances without proper medical examinations was an act in furtherance of a television station's exercise of a constitutional right to free speech in connection with a public issue, as defined in *Code Civ. Proc., § 425.16.*

[5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, §§ 960-971.]

(7) Pleading § 93--Motions and Objections--Motion to Strike Pleading as a Whole--Anti-SLAPP.--It is not the defendant's burden in bringing a SLAPP motion to establish that the challenged cause of action is constitutionally protected as a matter of law. Once the defendant shows **[*159]** that the cause of action arose from acts done in furtherance of an exercise of free speech, it becomes the plaintiff's burden to establish that the acts are not protected by the *First Amendment.*

[5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, §§ 960-971.]

(8) Constitutional Law § 57--*First Amendment* and Other Fundamental Rights--Scope and Nature--Freedom of the Press--Newsgathering.--Unlawful newsgathering activity does not enjoy constitutional protection to the same extent as news reporting activity. The right to speak and publish does not carry with it the unrestrained right to gather information. While reporters are not privileged to commit crimes and independent torts in gathering the news, and the press has no special constitutional right of access to information, newsgathering is not without its *First Amendment* protections.

(9) Pleading § 93--Motions and Objections--Motion to Strike Pleading as a Whole--Anti-SLAPP--Conduct.--*Code Civ. Proc., § 425.16, subd. (a),* mandates that the statute be construed broadly, and the statute's reach is not restricted to speech, but expressly applies to conduct. (*Code Civ. Proc., § 425.16, subd. (e)(4).*) Further, that conduct is not limited to the exercise of its right of free speech, but to all conduct in furtherance of the exercise of the right of free speech in connection with a public issue.

[5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, §§ 960-971.]

(10) Searches and Seizures § 11.4--Constitutional and Statutory Provisions--Generally--Existence of Reasonable Expectation of Privacy--Electronic Surveillance: Pleading § 93--Motions and Objections--Motion to Strike Pleading as a Whole--Anti-SLAPP--Public Issue.--Because surreptitious recordings of medical consultations were made in aid of and were incorporated into a television broadcast about the public issue of the unlawful dispensing of controlled substances, the complaint of the recorded physician who sued for damages to his reputation and career resulting from the broadcast fell within the scope of *Code Civ. Proc., § 425.16.*

[5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, §§ 960-971.]

(11) Searches and Seizures § 11.4--Constitutional and Statutory Provisions--Generally--Existence of Reasonable Expectation of Privacy--Electronic Surveillance--Confidential Communication--Criminal Punishment.--*Pen. Code, § 637.2, subd. (a),* would not provide for alternative statutory damages of up to $ 5,000 if the Legislature intended the victim of the secret recording to recover only **[*160]** "actual damages." Thus, to recover statutory damages for violation of *Pen. Code, § 632,* a party is not required to prove actual damages resulting from the recording. He may nonetheless recover up to $ 5,000 for each incident.

(12) Searches and Seizures § 11.4--Constitutional and Statutory Provisions--Generally--Existence of Reasonable Expectation of Privacy--Electronic Surveillance--Confidential Communication--Criminal Punishment.--*Pen. Code, § 632,* does not prohibit the disclosure of information gathered in violation of its terms. Damages which resulted from the television broadcast of secretly recorded excerpts of medical consultations, where information about the consultations was otherwise available, were not the actual damages contemplated within *Pen. Code, § 637.2.* Damages which resulted from the public disclosure that a physician was involved in an illegal activity and not from the surreptitious recording of his medical consultations were not recoverable as "actual damages" under *§ 637.2.*

[5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 581.]

(13) Searches and Seizures § 11.4--Constitutional and Statutory Provisions--Generally--Existence of Reasonable Expectation of Privacy--Electronic Surveillance--Confidential Communication.--*Pen. Code, § 632,* protects only confidential communications, and a communication is not confidential when the parties may reasonably expect other persons to overhear it. A communication is confidential where a party to the conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded

(14) Searches and Seizures § 11--Constitutional and Statutory Provisions--Generally--Existence of Reasonable Expectation of Privacy--Presence of Others.--The concept of privacy is relative. Whether a person's expectation of privacy is reasonable may depend on the identity of the person who has been able to observe or hear the subject interaction. The presence of others does not necessarily make an expectation of privacy objectively unreasonable, but presents a question of fact for the jury to resolve.

COUNSEL: Davis, Wright & Tremaine, Jean-Paul Jassy and Gary L. Bostwick for Defendant and Appellant.

Zev S. Brooks for Plaintiff and Respondent.

JUDGES: HASTINGS, J.; Epstein, Acting P. J., and Curry, J., concurred.

OPINION BY: HASTINGS [*161]

OPINION

[538] HASTINGS, J.**--Fred Lieberman sued KCOP Television, Inc. (KCOP), for violation of *Penal Code section 632* and seeks damages he contends resulted from two secret recordings made in connection with an investigation by KCOP. KCOP broadcast a news report using excerpts from the secret recordings and identifying Lieberman as a doctor who improperly prescribed controlled substances. Lieberman contends that the broadcast ruined his reputation and his professional career. He seeks statutory damages for the improper recordings pursuant to *Penal Code section 637.2* and actual damages for lost income and emotional distress. [***2] [1]

1 All further references will be to the Penal Code unless otherwise stated.

The trial court denied a SLAPP motion brought by KCOP to strike Lieberman's complaint, concluding that Lieberman had presented sufficient evidence to demonstrate a violation of *section 632*. KCOP appeals denial of the motion, an appealable order. (*Code Civ. Proc., § 425.16, subd. (j)*.) We agree with the trial court that sufficient evidence was presented to establish a prima facie claim for statutory damages pursuant to *section 632.7* and that the motion was properly denied. But we caution that statutory damages recoverable resulting from the surreptitious recordings are not tantamount to damages resulting from the KCOP broadcast.

BACKGROUND

A violation of *section 632* is committed by anyone who "intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, [**539] whether the [***3] communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio."

On May 21, 2002, Lieberman, filed a verified complaint alleging that appellant KCOP violated *section 632* in two separate incidents. It alleges that Lieberman was a licensed physician at the time of the incidents, and on each occasion, an agent or employee of KCOP made an appointment to be seen by Lieberman at his medical clinic for treatment of a medical condition. One, Jessica Uribe, was seen on May 23, 2001, and the other, John Halecky, was seen sometime prior to that date. On each occasion, the employee was accompanied from the waiting room of the clinic into Lieberman's private office by a companion who was not introduced to Lieberman. The door was shut behind them, leaving Halecky and his companion on the one occasion, and Uribe and her companion on the other, [*162] alone with Lieberman. Lieberman's office was equipped as an examining room in which he routinely conducted medical examinations. Although Lieberman had never recorded patient examinations there, and did not expect examinations to be recorded by the patient, the [***4] two companions secretly recorded his private consultation with Uribe and Halecky on both audiotape and videotape, without Lieberman's knowledge or consent.

The complaint also alleges that portions of the secret tapes were broadcast on KCOP's evening television news program on May 23, 2001, during a segment entitled, "Caught in the Act," in which it was asserted that Lieberman prescribed Vicodin, a controlled substance, without proper medical examinations, and in which Lieberman was labeled a "drug dealer" and "candy doctor." It is further alleged that *as a result of the broadcast*, Lieberman was ostracized from his "on call" association and later forced to resign from it, depriving him of nearly 500 HMO patients. In addition, many pharmacies refused to fill any of his prescriptions, and his reputation was so permanently tainted by the broadcast

that he lost the ability to earn income as a consultant or an expert in litigation. Also, because of the broadcast, Lieberman' s malpractice insurer notified him that it did not intend to renew his policy, St. Vincent Medical Center denied his application for reappointment to its medical staff, and the California Medical Board launched [***5] an investigation, culminating in a police raid of Lieberman's clinic in full view of his patients sitting in the waiting room.

Lieberman allowed his medical license to expire on November 1, 2001, because, it is alleged, *the events following the broadcast* caused him so much stress that he could no longer earn a living as a physician, and he was forced to close his practice.

The allegations of the complaint are set forth in a single count, entitled "Violation of *Penal Code Section 632.*" The complaint seeks damages in the statutory amount set out in *section 637.2*, see *post*, at page 166 et seq., as well as actual damages alleged to be lost income and emotional distress.

On July 15, 2002, KCOP filed a special motion to strike the complaint, or a "SLAPP motion," pursuant to *Code of Civil Procedure section 425.16.* [2]The motion asserted that *section 632* should not be applicable because Lieberman had no expectation of privacy with the extra person involved in each of the consultations. Additionally, [**540] citing freedom of the press under the *First Amendment*, it argued that *section 632* should not apply to its newsgathering [*163] activities. It also urged that [***6] damages resulting from the broadcast must be afforded *First Amendment* protection and that Lieberman could not demonstrate that the damages alleged were caused by KCOP.

> 2 The statute targets actions known as "strategic lawsuits against public participation" or by the acronym "SLAPP." (*Navellier v. Sletten (2002) 29 Cal.4th 82, 85 [124 Cal. Rptr. 2d 530, 52 P.3d 703].*) *Code of Civil Procedure section 425.16* has therefore become known as the anti-SLAPP statute, and motions made pursuant to the statute as, "SLAPP motions."

Lieberman opposed the motion with a declaration which supported the substance of the allegations of the complaint. Additionally, he stated that Uribe's companion appeared to be familiar with her and Halecky's companion appeared to be acquainted with him, and he assumed each was the "significant other" of either Ms. Uribe or Mr. Halecky. With regard to each incident he stated: "all parties in the office were present with the knowledge and desire of Ms. Uribe [Mr. Halecky], [***7] and no person who was not present in the office could overhear any of the discussions that took place therein."

The trial court denied the special motion to strike on August 7, 2002, finding that the recorded transaction was a "confidential communication" within the context of *section 632*, despite the presence of the third-party companions. KCOP filed a timely notice of appeal.

DISCUSSION

At the outset we emphasize that Lieberman has asserted only one cause of action in his complaint: violation of *Penal Code section 632.* He has not alleged claims for defamation or invasion of privacy resulting from the broadcast.

*Code of Civil Procedure section 425.16, subdivision (b)(1)*provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

[***8] (1) On appeal from an order granting or denying a motion pursuant to *section 425.16*, the appellate court engages in a two-step process, determining first, whether the defendant made a threshold showing that the challenged cause of action is one arising out of acts done in furtherance of the defendant's exercise of a right to petition or free speech under the *United States* or *California Constitution* in connection with a public issue, as defined in the statute; and second, whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Equilon Enterprises v. Consumer Cause, Inc. (2002) 29 Cal.4th 53, 67 [124 Cal. Rptr. 2d 507, 52 P.3d 685]*; *§ 425.16, subd. (b)(1), (2).*) We independently determine whether a cause of action is based upon activity protected under the statute, and if so, whether the plaintiff has [*164] established a reasonable probability of prevailing. (*Governor Gray Davis Com. v. American Taxpayers Alliance (2002) 102 Cal.App.4th 449, 456 [125 Cal. Rptr. 2d 534].*) In doing so, we

consider "'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is [***9] based.'" (*§ 425.16, subd. (b)(2)*; *Equilon Enterprises v. Consumer Cause, Inc., supra, 29 Cal.4th at p. 67.*)

We turn to the first question of whether Lieberman's complaint qualifies for treatment under *section 425.16.*

(2) *Subdivision (e)* of that section includes four separate categories of acts which qualify for treatment under the section. The first two categories pertain to statements made in connection with proceedings [**541] "before" or "in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." The third category identifies matters of "public interest" addressed in circumstances traditionally protected by the right to freedom of speech; i.e., statements "made in a place open to the public or a public forum in connection with an issue of public interest." Category four provides a catch-all for "any other *conduct* in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Italics added.) The facts here trigger the last two [***10] categories.

We are not here faced with a "pure" *section 632* claim, i.e., one which alleges only a surreptitious recording and no subsequent disclosure or use of the recording. (3) A *section 632* violation is committed the moment a confidential communication is secretly recorded regardless of whether it is subsequently disclosed. (*Friddle v. Epstein (1993) 16 Cal.App.4th 1649, 1660-1661 [21 Cal. Rptr. 2d 85].*) Rather, we have two surreptitious recordings which were used in connection with an investigative report by the media. The investigation resulted in the broadcast of "Caught in the Act."

(4) Reporting the news is speech subject to the protections of the *First Amendment* and subject to a motion brought under *section 425.16*, if the report concerns a public issue or an issue of public interest. (*Braun v. Chronicle Publishing Co. (1997) 52 Cal.App.4th 1036, 1047, fn. 5 [61 Cal. Rptr. 2d 58]*; *§ 425.16, subd. (e).*) Major societal ills are issues of public interest. (*M.G. v. Time Warner, Inc. (2001) 89 Cal.App.4th 623, 629 [107 Cal. Rptr. 2d 504].*) News reports concerning current criminal activity [***11] serve important public interests. (*Briscoe v. Reader's Digest Association, Inc. (1971) 4 Cal.3d 529, 536 [93 Cal. Rptr. 866, 483 P.2d 34].*)

(5) The issuance of prescriptions for controlled substances other than for a legitimate medical purpose is a crime, and may be punishable as a felony. [*165] (*Health & Saf. Code, § 11153.*) [3] "Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances." (*United States v. Mendenhall (1980) 446 U.S. 544, 561 [64 L. Ed. 2d 497, 100 S. Ct. 1870]* (conc. opn. of Powell, J.).) We have no doubt that the unlawful dispensing of controlled substances is an issue of great public interest.

> 3 See *Health and Safety Code sections 11210* and *11154.* It is also cause for discipline. (See *Bus. & Prof. Code, §§ 2242, 2238.*) Respondent's medical license was revoked, effective August 2, 2002, after failing to contest a California Medical Board accusation alleging the unlawful prescribing of controlled substances.

[***12] (6) We conclude that the broadcast was an act in furtherance of the appellant's exercise of a constitutional right to free speech in connection with a public issue, as defined in *section 425.16.* (See *Equilon Enterprises v. Consumer Cause, Inc., supra, 29 Cal.4th at p. 67*; *Code Civ. Proc., § 425.16, subds. (b)(1), (2) & (e)(4).*)

Quoting *Nicholson v. McClatchy Newspapers (1986) 177 Cal. App. 3d 509 [223 Cal. Rptr. 58]*, Lieberman contends that the secret *recording* was not an act in furtherance of appellant's right of free speech. He argues that although "the *First Amendment* protects the ordinary news-gathering techniques of reporters," it does not protect illegal conduct, and the press is not "immune from liability for crimes and torts committed in news gathering activities." [**542] (*Id. at pp. 513, 518.*)

To say that lawful newsgathering is an act in furtherance of one's right to free speech, but unlawful newsgathering is not an act in furtherance of one's right to free speech, begs the question. [***13] (7) It is not the defendant's burden in bringing a SLAPP motion to establish that the challenged cause of action is constitutionally protected as a matter of law. (*Navellier v. Sletten, supra, 29 Cal.4th at pp. 94-95*; *Fox Searchlight Pictures, Inc. v. Paladino (2001) 89*

Cal.App.4th 294, 305 [106 Cal. Rptr. 2d 906].) Once the defendant shows that the cause of action arose from acts done in furtherance of an exercise of free speech, it becomes the plaintiff's burden to establish that the acts are *not* protected by the *First Amendment*. (*Navellier v. Sletten, supra, 29 Cal.4th at p. 94.*)

(8) We agree that unlawful news*gathering* activity does not enjoy constitutional protection to the same extent as news *reporting* activity. (See *Shulman v. Group W Productions, Inc. (1998) 18 Cal.4th 200, 241-242 [74 Cal. Rptr. 2d 843, 955 P.2d 469]* (*Shulman*).) "The right to speak and publish does not carry with it the unrestrained right to gather information." (*Zemel v. Rusk (1965) 381 U.S. 1, 17 [14 L. Ed. 2d 179, 85 S. Ct. 1271].*) "While reporters are not privileged [***14] to commit crimes and independent torts in [*166] gathering the news, and the press has no special constitutional right of access to information, 'news gathering is not without its *First Amendment* protections.' [Citation.]" (*Nicholson v. McClatchy Newspapers, supra, 177 Cal. App. 3d at p. 519*, quoting *Branzburg v. Hayes (1972) 408 U.S. 665, 707 [33 L. Ed. 2d 626, 92 S. Ct. 2646].*)

Neither the parties nor we have found authority considering the question whether newsgathering is conduct *in furtherance* of the news media's exercise of its right of free speech. **(9)** *Section 425.16, subdivision (a)*, mandates, however, that the statute be construed broadly, and the statute's reach is not restricted to speech, but expressly applies to *conduct*. (*§ 425.16, subd. (e)(4).*) Further, that conduct is not limited to the exercise of its right of free speech, but to all conduct *in furtherance* of the exercise of the right of free speech in connection with a public issue. (*Id.*)

Furtherance means *helping* to advance, *assisting*. (See Oxford English Dict. Online (2d ed. 1989).) Reporting the news is free speech. (*Braun v. Chronicle Publishing Co., supra, 52 Cal.App.4th at p. 1047, fn. 5* [***15] .) Reporting the news usually requires the assistance of newsgathering, which therefore can be construed as undertaken *in furtherance* of the news media's right to free speech. **(10)** Because the surreptitious recordings here were in aid of and were incorporated into a broadcast in connection of a public issue, we conclude that Lieberman's complaint fell within the scope of *section 425.16*.

We next must determine whether or not Lieberman met his burden of providing evidence giving rise to a prima facie claim.

Appellant contends that Lieberman may not recover damages for a violation of *Penal Code section 632* because he failed to present admissible evidence that his *injuries* were caused by the secret recording, as compared to the broadcast. Our review of the complaint and Lieberman's declaration submitted in opposition to the motion reveals no allegation of damages caused by the secret recordings themselves. Rather, the allegations relate to damages flowing from the broadcast.

[**543] At this point we turn to the language of subdivision *(a) of section 637.2*. It provides: "Any person who has been *injured* by a violation of this chapter may bring an action against the [***16] person who committed the violation for the greater of the following amount: [¶] (1) Five thousand dollars ($ 5,000). [¶] (2) Three times the amount of *actual damages*, if any, sustained by the plaintiff." (Italics added.)

Appellant argues that the terms "injured" and "actual damages" within this statute should be viewed as synonymous. We disagree. As previously noted, [*167] an actionable violation of *section 632* occurs the moment the surreptitious recording is made, whether it is disclosed or not. (*Friddle v. Epstein, supra, 16 Cal.App.4th at 1660-1661.*) **(11)** *Subdivision (a) of section 637.2* would not provide for alternative statutory damages of up to $ 5,000 if the Legislature intended the victim of the secret recording to recover only "actual damages." Thus, to recover statutory damages for violation of *section 632*, Lieberman was not required to prove actual damages resulting from the recording. He may recover up to $ 5,000 for each incident. (*Ribas v. Clark (1985) 38 Cal.3d 355, 365 [212 Cal. Rptr. 143, 696 P.2d 637]*; *Pen. Code, § 637.2.*) But this does not resolve the question of the damages alleged as a result of the [***17] broadcast.

(12) *Penal Code section 632* does not prohibit the disclosure of information gathered in violation of its terms. [4] Given the factual background of this case, we conclude that damages resulting from the *publication* of information otherwise available, but also referenced within the recordings, are not the "actual damages" contemplated within *section 637.2*. (See *Kimmel v. Goland (1990) 51 Cal.3d 202, 209-210 [271 Cal. Rptr. 191, 793 P.2d 524]*; *Ludwig v. Superior Court (1995) 37 Cal.App.4th 8, 19, fn. 12 [43 Cal. Rptr. 2d 350]*; see also, *Ribas v. Clark, supra, 38 Cal.3d at p. 364.*) The "actual

damages" referenced must relate directly to the surreptitious recording. For example, Lieberman may have suffered emotional distress or outrage upon discovering that he had been surreptitiously recorded and upon seeing the recording used on the broadcast. A victim of a surreptitious recording may incur legal expenses in attempting to recover the recording. But the damages that Lieberman may have incurred when the KCOP broadcast disclosed that Lieberman was involved in illegal activity did not result [***18] from the surreptitious recordings. They resulted from public disclosure that Lieberman may be involved in the improper dispensing of controlled substances. To the extent Lieberman contends the broadcast improper, he may have traditional civil remedies. But no such claims are asserted in this action.

> 4 By contrast, the federal wiretap law prohibits disclosure of unlawfully recorded material. (See *18 U.S.C. § 2511.*) The United States Supreme Court has held that disclosure of truthful information of public concern may not be prohibited if obtained in a lawful manner, even if obtained from a source that has obtained it unlawfully. (*Bartnicki v. Vopper (2001) 532 U.S. 514, 528, 534-535 [149 L. Ed. 2d 787, 121 S. Ct. 1753].*) But the Court left open the "the question 'whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well.' [Citation.]" (*Id. at pp. 528-529,* fn. omitted.)

[***19] Next, appellant contends that *section 632* was not violated because Lieberman had no reasonable expectation of privacy when the recordings were [*168] made. (13) *Penal Code section 632* protects only *confidential* communications, and a communication is not confidential when the parties may reasonably expect other persons to [**544] overhear it. (See *Sanders v. American Broadcasting Companies (1999) 20 Cal.4th 907, 924-925 [85 Cal. Rptr. 2d 909, 978 P.2d 67]* (*Sanders*).) A communication is confidential where a party to the conversation has an objectively reasonable expectation that the conversation is not being overheard *or* recorded. (*Flanagan v. Flanagan (2002) 27 Cal.4th 766, 768, 774-775 [117 Cal. Rptr. 2d 574, 41 P.3d 575].*) Appellant argues that Lieberman had no reasonable expectation of privacy during the secret recording in light of the presence of the companions, who could obviously overhear Lieberman's conversation with the reporters posing as patients.

The statute defines "confidential communication" as including "any communication carried on in circumstances as may reasonably indicate [***20] that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded." (*Pen. Code, § 632, subd. (c).*)

Appellant does not challenge Lieberman's showing that he intended the recorded conversation to be confined to the patient and his or her companion, but reasons that since the companion remained silent on each occasion, he or she was not a "party" to the communication.

A "party" to something may be a person who participates in it, or it may be a person who is simply concerned with it. (Webster's Third New Internat. Dict. (1993) p. 1648; Oxford English Dict. Online (2d ed. 1989).) "Overhear" connotes listening without a speaker's knowledge or intent that his speech be heard, as in eavesdropping, which is "to listen secretly to what is said in private." (Webster's, *supra*, pp. 717, 1608.) It follows that one who listens with the speaker's knowledge and intent is involved or [***21] interested in a conversation, not an eavesdropper.

We must give effect to the plain meaning of the words of a statute. Resort to extrinsic aids to construe a statute is proper only where its words have no clear, plain meaning. (*Burden v. Snowden (1992) 2 Cal.4th 556, 562 [7 Cal. Rptr. 2d 531, 828 P.2d 672].*) Appellant refers to the meaning of "party" used in legal proceedings, as set forth in Black's Law Dictionary, but words must be given their ordinary and commonly understood meaning, unless they have a technical meaning and it clearly appears that the Legislature used them in a technical sense. (See *Honegger v. Reclamation Dist. No. 1619 (1961) 190 Cal. App. 2d 684, 691 [12 Cal. Rptr. 76].*) We reject appellant's [*169] forced definitions. A party to a conversation need not speak, and *overhear* is not synonymous with *hear*.

(14) The concept of privacy is relative. (*Sanders,*

supra, 20 Cal.4th at p. 916.) Whether a person's expectation of privacy is reasonable may depend on the identity of the person who has been able to observe or hear the subject interaction. (*Id. at p. 923* [***22] ; *Shulman, supra, 18 Cal.4th at pp. 233-235.*) The presence of others does not necessarily make an expectation of privacy objectively unreasonable, but presents a question of fact for the jury to resolve. (Cf. *Shulman, supra, 18 Cal.4th at pp. 233-235* [as element of California intrusion tort].)

Lieberman's evidence demonstrates that he expected his communications to be private and did not expect them to be recorded. [**545] We conclude that he has satisfied his burden under *section 425.16* to present a prima facie case. But we do not resolve issues of credibility in connection with a SLAPP motion. (*Seelig v. Infinity Broadcasting Corp. (2002) 97 Cal.App.4th 798, 809 [119 Cal. Rptr. 2d 108].*) It is for the jury to decide whether under the circumstance presented Lieberman could have *reasonably* expected that the communications were private. (See *Sanders, supra, 20 Cal.4th at p. 926*; see also *Coulter v. Bank of America (1994) 28 Cal.App.4th 923, 929 [33 Cal. Rptr. 2d 766].*)

Appellant contends that *Penal Code section 632* conflicts with the freedoms of speech and press guaranteed [***23] by the *First Amendment.* It quotes from *Sanders, supra, 20 Cal.4th at pages 922-923*, and urges us to create an affirmative defense for *section 632*, allowing secret recording if "'justified by the legitimate motive of gathering the news.' [Citation.]" *Sanders* does not compel such a result. There, the California Supreme Court expressly declined to reach any constitutional issue, stating: "As for possible *First Amendment* defenses, any discussion must await a later case, as no constitutional issue was decided by the lower courts or presented for our review here." (*Sanders, supra, 20 Cal.4th at p. 923.*)

Further, the Court was not discussing *Penal Code section 632.* The quote relates to a discussion of the common law tort of intrusion, and in particular, the element of that tort requiring the method of intrusion to be highly offensive to a reasonable person, which may be negated by a legitimate newsgathering motive. (See *Sanders, supra, 20 Cal.4th at pp. 914, 922-923.*)

The issue was discussed earlier by the Supreme Court, however, which acknowledged that the media enjoy a degree of favorable treatment under the common law intrusion [***24] tort not applicable to a violation of *section 632.* (*Shulman, supra, 18 Cal.4th at p. 239.*) The Court concluded that the "*First* [*170] *Amendment* does not immunize the press from liability for torts or crimes committed in an effort to gather news." (*Shulman, supra, 18 Cal.4th at pp. 236, 239.*)

On the other hand, the Court recognized that both the common law intrusion tort and *section 632* "might, under some circumstances, impose an 'impermissible burden' on newsgathering [citation]; [and that] such a burden might be found in a law that, as applied to the press, would result in 'a significant constriction of the flow of news to the public' and thus 'eviscerate[]' the freedom of the press. [Citation.]" (*Shulman, supra, 18 Cal.4th at p. 239.*)

The court refused to enunciate a bright-line rule, finding that "[n]o basis exists ... for concluding that either *section 632* or the intrusion tort places such a burden on the press, either in general or under the circumstances of this case. The conduct of journalism does not depend, as a general matter, on the use of secret devices to record private conversations." [***25] (*Shulman, supra,* 18 Cal.4th at p. 239.)

Appellant has not shown that the California Constitution or the United States Constitution requires the creation of a broad affirmative defense based solely upon a legitimate newsgathering motive, and we decline appellant's invitation to do so.

Because appellant has presented a prima facie case demonstrating violation of *Penal Code section 632* and the right to recover statutory damages, the trial court did not err in denying the SLAPP motion.

[546] DISPOSITION**

The judgment is affirmed. Each side shall bear its own costs on appeal.

Epstein, Acting P. J., and Curry, J., concurred.

Respondent's petition for review by the Supreme Court was denied October 1, 2003. Kennard, J., was of the opinion that the petition should be granted.

FOOD LION, INCORPORATED, Plaintiff-Appellee, v. CAPITAL CITIES/ABC, INC.; LYNNE LITT, a/k/a Lynne Neufes; ABC HOLDING COMPANY; AMERICAN BROADCASTING COMPANIES, INCORPORATED; RICHARD N. KAPLAN; IRA ROSEN; SUSAN BARNETT, Defendants-Appellants, ADVANCE PUBLICATIONS, INCORPORATED; ASSOCIATED PRESS; THE ASSOCIATION OF AMERICAN PUBLISHERS; CBS BROADCASTING, INCORPORATED; CABLE NEWS NETWORK, INCORPORATED; GANNETT COMPANY, INCORPORATED; THE HEARST CORPORATION; KING WORLD PRODUCTIONS, INCORPORATED; MCCLATCHY NEWSPAPERS, INCORPORATED; THE NATIONAL ASSOCIATION OF BROADCASTERS; NATIONAL BROADCASTING COMPANY, INCORPORATED; THE NEWSPAPER ASSOCIATION OF AMERICA; NATIONAL PUBLIC RADIO, INCORPORATED; THE NEW YORK TIMES COMPANY; THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; INVESTIGATIVE REPORTERS; EDITORS, INCORPORATED; NATIONAL GROCERS ASSOCIATION; INTERNATIONAL MASS RETAIL ASSOCIATION; WILLIAM E. LEE; JOHN DEMOTT; ROBERT ELLIS SMITH; MIKE ROSEN; ACCURACY IN MEDIA; MEDIA RESEARCH CENTER; ATLANTIC LEGAL FOUNDATION; SOUTHEASTERN LEGAL FOUNDATION, Amici Curiae. FOOD LION, INCORPORATED, Plaintiff-Appellant, v. CAPITAL CITIES/ABC, INC.; LYNNE LITT, a/k/a Lynne Neufes; ABC HOLDING COMPANY; AMERICAN BROADCASTING COMPANIES, INCORPORATED; RICHARD N. KAPLAN; IRA ROSEN; SUSAN BARNETT, Defendants-Appellees, ADVANCE PUBLICATIONS, INCORPORATED; ASSOCIATED PRESS; THE ASSOCIATION OF AMERICAN PUBLISHERS; CBS BROADCASTING, INCORPORATED; CABLE NEWS NETWORK, INCORPORATED; GANNETT COMPANY, INCORPORATED; THE HEARST CORPORATION; KING WORLD PRODUCTIONS, INCORPORATED; MCCLATCHY NEWSPAPERS, INCORPORATED; THE NATIONAL ASSOCIATION OF BROADCASTERS; NATIONAL BROADCASTING COMPANY, INCORPORATED; THE NEWSPAPER ASSOCIATION OF AMERICA; NATIONAL PUBLIC RADIO, INCORPORATED; THE NEW YORK TIMES COMPANY; THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; NATIONAL GROCERS ASSOCIATION; INTERNATIONAL MASS RETAIL ASSOCIATION; WILLIAM E. LEE; JOHN DEMOTT; ROBERT ELLIS SMITH; MIKE ROSEN; ACCURACY IN MEDIA; MEDIA RESEARCH CENTER; ATLANTIC LEGAL FOUNDATION; SOUTHEASTERN LEGAL FOUNDATION, Amici Curiae.

No. 97-2492, No. 97-2564

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

194 F.3d 505, *; 1999 U.S. App. LEXIS 26373, **;
139 Lab. Cas. (CCH) P58,758; 15 I.E.R. Cas. (BNA) 1065

194 F.3d 505; 1999 U.S. App. LEXIS 26373; 139 Lab. Cas. (CCH) P58,758; 15 I.E.R. Cas. (BNA) 1065; 27 Media L. Rep. 2409

June 4, 1998, Argued
October 20, 1999, Decided

PRIOR HISTORY: [**1] Appeals from the United States District Court for the Middle District of North Carolina, at Winston-Salem. N. Carlton Tilley, Jr., Chief District Judge. (CA-92-592-6).

DISPOSITION: AFFIRMED IN PART AND REVERSED IN PART.

COUNSEL: ARGUED: Bruce J. Ennis, Jr., JENNER & BLOCK, Washington, D.C., for Appellants.

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ON BRIEF: Paul M. Smith, Mark D. Schneider, Deanne E. Maynard, Michelle B. Goodman, Christopher A. Bracey, JENNER & BLOCK, Washington, D.C.; William H. Jeffress, Jr., Randall J. Turk, MILLER, CASSIDY, LARROCA & LEWIN, Washington, D.C.; Alan N. Braverman, Nathan Siegel, ABC, INCORPORATED, New York, New York; Kathleen M. Sullivan, STANFORD LAW SCHOOL, Stanford, California; Hugh Stevens, EVERETT, GASKINS, HANCOCK & STEVENS, Raleigh, North Carolina, for Appellants.

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JUDGES: Before NIEMEYER, MICHAEL, and MOTZ, Circuit Judges. Judge Michael wrote the opinion, in which Judge Motz joined. Judge Niemeyer wrote a separate opinion, concurring in part and dissenting in part.

OPINION BY: MICHAEL

OPINION

[*510] OPINION

MICHAEL, Circuit Judge:

Two ABC television reporters, after using false resumes to get jobs at Food Lion, Inc. supermarkets, secretly videotaped [**3] what appeared to be unwholesome food handling practices. Some of the video footage was used by ABC in a *PrimeTime Live* broadcast that was sharply critical of Food Lion. The grocery chain sued Capital Cities/ABC, Inc., American Broadcasting Companies, Inc., Richard Kaplan and Ira Rosen, producers of *PrimeTime Live*, and Lynne Dale and Susan Barnett, two reporters for the program (collectively, "ABC" or the "ABC defendants"). Food Lion did not sue for defamation, but focused on how ABC gathered its

information through claims for fraud, breach of duty of loyalty, trespass, and unfair trade practices. Food Lion won at trial, and judgment for compensatory damages of $ 1,402 was entered on the various claims. Following a substantial (over $ 5 million) remittitur, the judgment provided for $ 315,000 in punitive damages. The ABC defendants appeal the district court's denial of their motion for judgment as a matter of law, and Food Lion appeals the court's ruling that prevented it from proving publication damages. Having considered the case, we (1) reverse the judgment that the ABC defendants committed fraud and unfair trade practices, (2) affirm the judgment that Dale and Barnett breached [**4] their duty of loyalty and committed a trespass, and (3) affirm, on *First Amendment* grounds, the district court's refusal to allow Food Lion to prove publication damages.

I.

In early 1992 producers of ABC's *PrimeTime Live* program received a report alleging that Food Lion stores were engaging in unsanitary meat-handling practices. The allegations were that Food Lion employees ground out-of-date beef together with new beef, bleached rank meat to remove its odor, and re-dated (and offered for sale) products not sold before their printed expiration date. The producers recognized that these allegations presented the potential for a powerful news story, and they decided to conduct an undercover investigation of Food Lion. ABC reporters Lynne Dale (Lynne Litt at the time) and Susan Barnett concluded that they would have a better chance of investigating the allegations if they could become Food Lion employees. With the approval of their superiors, they proceeded to apply for jobs with the grocery chain, submitting applications with false identities and references and fictitious local addresses. Notably, the applications failed to mention the reporters' concurrent employment with ABC [**5] and otherwise misrepresented their educational and employment experiences. Based on these applications, a South Carolina Food Lion store hired Barnett as a deli clerk in April 1992, and a North Carolina Food Lion store hired Dale as a meat wrapper trainee in May 1992.

Barnett worked for Food Lion for two weeks, and Dale for only one week. As they went about their assigned tasks for Food Lion, Dale and Barnett used tiny cameras ("lipstick" cameras, for example) and microphones concealed on their bodies to secretly record Food Lion employees treating, wrapping and labeling meat, cleaning machinery, and discussing the practices of the meat department. They gathered footage from the meat cutting room, the deli counter, the employee break [*511] room, and a manager's office. All told, in their three collective weeks as Food Lion employees, Dale and Barnett recorded approximately 45 hours of concealed camera footage.

Some of the videotape was eventually used in a November 5, 1992, broadcast of *PrimeTime Live*. ABC contends the footage confirmed many of the allegations initially leveled against Food Lion. The broadcast included, for example, videotape that appeared to show Food Lion employees [**6] repackaging and redating fish that had passed the expiration date, grinding expired beef with fresh beef, and applying barbecue sauce to chicken past its expiration date in order to mask the smell and sell it as fresh in the gourmet food section. The program included statements by former Food Lion employees alleging even more serious mishandling of meat at Food Lion stores across several states. The truth of the *PrimeTime Live* broadcast was not an issue in the litigation we now describe.

Food Lion sued ABC and the *PrimeTime Live* producers and reporters. Food Lion's suit focused not on the broadcast, as a defamation suit would, but on the methods ABC used to obtain the video footage. The grocery chain asserted claims of fraud, breach of the duty of loyalty, trespass, and unfair trade practices, seeking millions in compensatory damages. Specifically, Food Lion sought to recover (1) administrative costs and wages paid in connection with the employment of Dale and Barnett and (2) broadcast (publication) damages for matters such as loss of good will, lost sales and profits, and diminished stock value. Punitive damages were also requested by Food Lion.

The district court, in a [**7] remarkably efficient effort, tried the case with a jury in three phases. At the liability phase, the jury found all of the ABC defendants liable to Food Lion for fraud and two of them, Dale and Barnett, additionally liable for breach of the duty of loyalty and trespass. Based on the jury's fraud verdict and its special interrogatory findings that the ABC defendants had engaged in deceptive acts, the district court determined that the ABC defendants had violated the North Carolina Unfair and Deceptive Trade Practices Act (UTPA). Prior to the compensatory damages phase, the district court ruled that damages allegedly incurred by

Food Lion as a result of ABC's broadcast of *PrimeTime Live* -- "lost profits, lost sales, diminished stock value or anything of that nature" -- could not be recovered because these damages were not proximately caused by the acts (fraud, trespass, etc.) attributed to the ABC defendants in this case. *See Food Lion, Inc. v. Capital Cities/ABC, Inc., 964 F. Supp. 956, 958 (M.D.N.C. 1997)* (setting forth rationale for ruling at trial). Operating within this constraint, the jury in the second phase awarded Food Lion $ 1,400 in compensatory damages [**8] on its fraud claim, $ 1.00 each on its duty of loyalty and trespass claims, and $ 1,500 on its UTPA claim. (The court required Food Lion to make an election between the fraud and UTPA damages, and the grocery chain elected to take the $ 1,400 in fraud damages.) At the final stage the jury lowered the boom and awarded $ 5,545,750 in punitive damages on the fraud claim against ABC and its two producers, Kaplan and Rosen. The jury refused to award punitive damages against the reporters, Dale and Barnett. In post-trial proceedings the district court ruled that the punitive damages award was excessive, and Food Lion accepted a remittitur to a total of $ 315,000.

After trial the ABC defendants moved for judgment as a matter of law on all claims, the motion was denied, and the defendants now appeal. Food Lion cross-appeals, contesting the district court's ruling that the damages the grocery chain sought as a result of the *PrimeTime Live* broadcast were not recoverable in this action. We now turn to the legal issues.

II.

A.

We must first consider whether the ABC defendants can be held liable for [*512] fraud, breach of the duty of loyalty, and trespass as a matter of North Carolina and South [**9] Carolina law and whether the North Carolina UTPA applies. As a federal court sitting in diversity, we are obliged to interpret and apply the substantive law of each state. *See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938)*. This process is more complicated here because neither state's highest court has applied its law to circumstances exactly like those presented in this case. Thus, we must offer our best judgment about what we believe those courts would do if faced with Food Lion's claims today. *See Hatfield v. Palles, 537 F.2d 1245, 1248 (4th Cir. 1976)* (noting that when "there have been no decisions by the South Carolina Supreme Court . . . [a] federal court must . . . endeavor to decide the issue in the way it believes the South Carolina Supreme Court would decide it."). In conducting our analysis, we may of course consider all of the authority that the state high courts would, and we should give appropriate weight to the opinions of their intermediate appellate courts. *Commissioner v. Estate of Bosch, 387 U.S. 456, 465, 18 L. Ed. 2d 886, 87 S. Ct. 1776 (1967)* (noting that when there is no decision [**10] by a state's highest court, federal court must apply what it "finds to be the state law after giving 'proper regard' to relevant rulings of other courts of the State."); *Sanderson v. Rice, 777 F.2d 902, 905 (4th Cir. 1985)* (noting that "an opinion of an intermediate appellate court is persuasive in situations where the highest state court has not spoken"). Finally, we review *de novo* the district court's determinations on these questions of state law. *Salve Regina College v. Russell, 499 U.S. 225, 231, 113 L. Ed. 2d 190, 111 S. Ct. 1217 (1991)*.

1.

Food Lion, proceeding under the proof limitations on damages, sought $ 2,432.35 in compensatory damages on its fraud claim and the jury awarded $ 1,400. According to ABC, the district court erred in upholding the verdict on this claim because Food Lion did not prove injury caused by reasonable reliance on the misrepresentations made by Dale and Barnett on their job applications. We agree.

To prove fraud under North Carolina law, the plaintiff must establish that the defendant (1) made a false representation of material fact, (2) knew it was false (or made it with reckless disregard of its truth or falsity), [**11] and (3) intended that the plaintiff rely upon it. In addition, (4) the plaintiff must be injured by reasonably relying on the false representation. *See Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E.2d 494, 500 (N.C. 1974)*; *Britt v. Britt, 320 N.C. 573, 359 S.E.2d 467, 471 (N.C. 1987), criticized on other grounds, Myers & Chapman, Inc. v. Thomas G. Evans, Inc., 323 N.C. 559, 374 S.E.2d 385, 391-92 (N.C. 1988)*. The elements of fraud in South Carolina are essentially the same. *See Florentine Corp., Inc. v. PEDA I, Inc., 287 S.C. 382, 339 S.E.2d 112, 113-114 (S.C. 1985)*. It is undisputed that Dale and Barnett knowingly made misrepresentations with the aim that Food Lion rely on them. Thus, only the fourth element of fraud, injurious reliance, is at issue. Food Lion claimed two categories of injury resulting

from the lies on the job applications: the costs associated with hiring and training new employees (administrative costs) and the wages it paid to Dale and Barnett.

The main component of Food Lion's claim for fraud damages relates to administrative costs resulting from its employment of Dale and Barnett. These are [**12] routine costs associated with any new employee, including the costs of screening applications, interviewing, completing forms, and entering data into the payroll system. Also included are estimated costs attributable to trainees for lower productivity and customer dissatisfaction. Food Lion offered testimony that these costs totaled $ 1,944.62. It is undisputed that the jobs held by Dale and Barnett, meat wrapper trainee and deli clerk, were ones with high turnover. Still, Food Lion [*513] claims that because of the reporters' misrepresentations on their employment applications, it was forced to "incur these [administrative] costs for two more employees," Appellee's Opening Br. at 15, because the reporters quit their jobs after one or two weeks.

As indicated, under North and South Carolina law a plaintiff claiming fraud must show injury proximately caused by its reasonable reliance on a misrepresentation. *See Britt, 359 S.E.2d at 471* (requiring that plaintiff be "injured by reasonably relying on the false representation."); *Florentine Corp., 339 S.E.2d at 114* (same). In this case, therefore, Food Lion had to show (1) that it hired Dale and Barnett (and [**13] incurred the administrative costs incident to their employment) because it believed they would work longer than a week or two and (2) that in forming this belief it reasonably relied on misrepresentations made by Dale and Barnett.

On their job applications Dale and Barnett did misrepresent matters such as their backgrounds, experience, and other employment. They did not, however, make any representations about how long they would work, and Food Lion did not ask for any. To the contrary, the applications signed by Dale and Barnett expressly provided that either side -- company or employee -- could terminate the employment at any time. Each application contained the same provision, written in no uncertain terms: "I also understand and agree that if employed, employment is for an indefinite period of time, and that I have the right to terminate my employment at any time for any reason, as does the Company." Food Lion also understood what this meant. As one of its payroll managers acknowledged on cross-examination, "when Food Lion hires a new deli clerk or a new meat clerk. . . it assumes the risk that that person might stay only a few days." Dale and Barnett were, in short, at-will employees.

[**14] Because Dale and Barnett did not make any express representations about how long they would work, Food Lion is left to contend that misrepresentations in the employment applications led it to believe the two would work for some extended period. There is a fundamental problem with that contention, however. North and South Carolina are at-will employment states, and under the at-will doctrine it is unreasonable for either the employer or the employee to rely on any assumptions about the duration of employment. At-will employment means that (absent an express agreement) employers are free to discharge employees at any time for any reason, and employees are free to quit. *See Kurtzman v. Applied Analytical Indus., Inc., 347 N.C. 329, 493 S.E.2d 420, 422 (N.C. 1997)* ("in the absence of a contractual agreement between an employer and an employee establishing a definite term of employment, the relationship is presumed to be terminable at the will of either party without regard to the quality of performance of either party"); *Small v. Springs Indus., Inc., 300 S.C. 481, 388 S.E.2d 808, 810 (S.C. 1990)* ("An individual working for an employer under a contract [**15] of employment for an indefinite period can be terminated at will. At-will employment is generally terminable by either party at any time, for any reason or for no reason at all.") (citations omitted).

Food Lion's claim for administrative costs attributable to Dale and Barnett is simply inconsistent with the at-will employment doctrine. Under that doctrine Food Lion could not reasonably rely on the sort of misrepresentations (about background, experience, etc.) made by the reporters to conclude that they would work for any extended period. As a result, Food Lion did not show that the administrative costs were an injury caused by reasonable reliance on the misrepresentations.

Food Lion also sought to recover the full amount ($ 487.73) of the wages it paid to Dale and Barnett, arguing that it [*514] was fraudulently induced to pay the wages because of the misrepresentations on the reporters' employment applications. The last (proximate cause) element of fraud is again the only one at issue: Food Lion had to show that it paid the wages in reasonable reliance on the misrepresentations.

Food Lion relies on the jury's findings on a separate claim, the finding that Dale and Barnett breached their [**16] duty of loyalty to Food Lion, to argue that it proved fraud damages for the wages it paid. Specifically, Food Lion says that "it is apparent[from the disloyalty verdict] that the jury found Food Lion did not receive adequate services for the wages it paid Dale and Barnett." Appellee's Opening Br. at 14. However, proof of the breach of duty of loyalty, for which the jury awarded nominal damages of $ 1.00, does not equal proof of fraud damages for inadequate services. That is because it is possible to perform the assigned tasks of a job adequately and still breach the duty of loyalty. For fraud damages Food Lion still had to prove reliance on the misrepresentations.

The question is what was the proximate cause of the issuance of paychecks to Dale and Barnett. Was it the resume misrepresentations or was it something else? It was something else. Dale and Barnett were paid because they showed up for work and performed their assigned tasks as Food Lion employees. Their performance was at a level suitable to their status as new, entry-level employees. Indeed, shortly before Dale quit, her supervisor said she would "make a good meat wrapper." And, when Barnett quit, her supervisor recommended [**17] that she be rehired if she sought reemployment with Food Lion in the future. In sum, Dale and Barnett were not paid their wages because of misrepresentations on their job applications. Food Lion therefore cannot assert wage payment to satisfy the injurious reliance element of fraud. [1] The fraud verdict must be reversed. [2]

> 1 Food Lion cannot rely on *Daniel Boone Complex, Inc. v. Furst, 43 N.C. App. 95, 258 S.E.2d 379 (N.C. Ct. App. 1979)*, to recover administrative costs and wages as fraud damages in this case. Food Lion argues that under *Daniel Boone* it can recover damages if it simply proves that it was fraudulently induced to hire Dale and Barnett. That is an oversimplification. In *Daniel Boone* the plaintiff-borrower was induced to enter into a loan agreement based on misrepresentations about the identity of the lenders. The Court of Appeals of North Carolina said the borrower had a choice of remedies:
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> > Ordinarily, a party who has been fraudulently induced to enter into a contract or sale has a choice of remedies. He may repudiate the contract, and tendering back what he has received under it, may recover what he had parted with or its value; or he may affirm the contract, keeping whatever property or advantage he has derived under it, and may recover in an action for deceit the damages caused by the fraud.
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> *258 S.E.2d at 387* (citation omitted). Thus, *Daniel Boone* says that a party fraudulently induced to enter a contract in North Carolina has two options. He may sue for money damages, keeping whatever benefits he received under the fraudulent contract. Or, he may repudiate the contract, tender back what he received under it, and seek the value of what he parted with. The latter *Daniel Boone* remedy cannot apply in this case. We are dealing with employment contracts, and it is impossible for Food Lion to tender back what it received under those contracts. In other words, Dale wrapped meat and Barnett worked at the deli counter. Food Lion kept those services, and there is no way to tender them back. Because Food Lion cannot satisfy the "tender back" element of *Daniel Boone's* repudiation remedy, it is left with a basic fraud claim for money damages, which, as we have said, fails for lack of proof of injurious reliance.
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> 2 Our colleague, in partial dissent, argues that the administrative costs attributable to Dale and Barnett should be recoverable as fraud damages. To reach that result, the dissent would fundamentally alter the at-will employment doctrine by qualifying an employee's right to quit at any time. According to the dissent, Dale and Barnett induced Food Lion to hire them and spend money to train them by *impliedly* representing (as at-will job applicants) that (1) they "intended to work indefinitely, until [there was] a change in circumstances" and that (2) there was "a possibility that they would become long-term employees." *Post, 1999 U.S. App. LEXIS 26373*, *53. But these implied representations that the dissent would impute are in essence representations about the potential duration of employment, and here they would translate into

an obligation to work longer than a week or two. Such an obligation is inconsistent with, and cannot be enforced under, the at-will employment doctrine. Thus, when Food Lion, as an at-will employer, incurred the administrative expenses, it took the full risk that Dale and Barnett might do what any at-will employee was free to do (and what many at Food Lion did) -- quit within a very short time.

Nor can fraud damages be supported by the breach of duty of loyalty we confirm in the next subpart. The dissent argues that because Dale and Barnett (by silence) misrepresented their loyalty, Food Lion was willing to spend the money to train them on the chance they might become long-term employees. *See post, 1999 U.S. App. LEXIS 26373 *57.* Missing out on that "chance" is too speculative to form a basis for damages. Even if Food Lion had spent the money on new hires who were loyal, there is no evidence that the hypothetical new hires would have stayed any longer than Dale and Barnett in these high turnover jobs. Indeed, Food Lion conceded at trial that it could not prove actual damages resulting from the breach of duty of loyalty.

[**19] [*515] 2.

ABC argues that Dale and Barnett cannot be held liable for a breach of duty of loyalty to Food Lion under existing tort law in North and South Carolina. It is undisputed that both reporters, on behalf of ABC, wore hidden cameras to make a video and audio record of what they saw and heard while they were employed by Food Lion. Specifically, they sought to document, for ABC's *PrimeTime Live* program, Food Lion employees engaging in unsanitary practices, treating products to hide spoilage, and repackaging and redating out-of-date products. The jury found that Dale and Barnett breached their duty of loyalty to Food Lion, and nominal damages of $ 1.00 were awarded. [3]

3 As we have already mentioned, Food Lion acknowledged at trial that it could not quantify actual damages on this claim. The jury was therefore instructed that it could award only nominal damages.

As a matter of agency law, an employee owes a duty of loyalty to her employer. In South Carolina it is "implicit in any contract for employment [**20] that the employee shall remain faithful to the employer's interest throughout the term of employment." *Berry v. Goodyear Tire and Rubber Co., 270 S.C. 489, 242 S.E.2d 551, 552 (S.C. 1978).* In North Carolina "the law implies a promise on the part of every employee to serve [her] employer faithfully." *McKnight v. Simpson's Beauty Supply, Inc., 86 N.C. App. 451, 358 S.E.2d 107, 109 (N.C. Ct. App. 1987).* The courts of North and South Carolina have not set out a specific test for determining when the duty of loyalty is breached. Disloyalty has been described in fairly broad terms, however. Employees are disloyal when their acts are "inconsistent with promoting the best interest of their employer at a time when they were on its payroll," *Lowndes Prods., Inc. v. Brower, 259 S.C. 322, 191 S.E.2d 761, 767 (S.C. 1972),* and an employee who "deliberately acquires an interest adverse to his employer . . . is disloyal," *Long v. Vertical Techs., Inc., 113 N.C. App. 598, 439 S.E.2d 797, 802 (N.C. Ct. App. 1994).*

ABC is correct to remind us that employee disloyalty issues are usually dealt with in the context of the employment contract: [**21] unfaithful employees are simply discharged, disciplined, or reprimanded. Up to now, disloyal conduct by an employee has been considered tortious in North and South Carolina in three circumstances. First, the tort of breach of duty of loyalty applies when an employee competes directly with her employer, either on her own or as an agent of a rival company. *See 439 S.E.2d at 801-02* (duty breached when employee used current employer's resources during business hours to develop rival company); *Lowndes Prods., 191 S.E.2d at 767* (duty breached [*516] when employees conspired to take trade secrets and hire away other workers for the benefit of rival company they were forming). Second, the tort applies when the employee misappropriates her employer's profits, property, or business opportunities. *See Sara Lee Corp. v. Carter, 129 N.C. App. 464, 500 S.E.2d 732, 736-37 (N.C. Ct. App. 1998)* (duty breached when employee bought parts for employer at above market prices from company partly owned by employee); *Construction Techniques, Inc. v. Dominske, 928 F.2d 632, 636-39 (4th Cir. 1991)* (applying South Carolina law) (employee's ownership interest in one of [**22] his employer's suppliers was inherently adverse to interests of employer; duty of loyalty was not breached only because employee disclosed this interest to employer). Third, the tort applies when the employee breaches her employer's confidences. *See Lowndes Prods., 191 S.E.2d at 767* (duty breached

when employees used employer's trade secrets after forming competing business).

Because Dale and Barnett did not compete with Food Lion, misappropriate any of its profits or opportunities, or breach its confidences, ABC argues that the reporters did not engage in any disloyal conduct that is tortious under existing law. Indeed, the district court acknowledged that it was the first court to hold that the conduct in question "would be recognized by the Supreme Courts of North Carolina and South Carolina" as tortiously violating the duty of loyalty. *Food Lion, Inc. v. Capital Cities/ABC, Inc., 964 F. Supp. 956, 959 n.2 (M.D.N.C. 1997)*. We believe the district court was correct to conclude that those courts would decide today that the reporters' conduct was sufficient to breach the duty of loyalty and trigger tort liability.

What Dale and Barnett did verges [**23] on the kind of employee activity that has already been determined to be tortious. The interests of the employer (ABC) to whom Dale and Barnett gave complete loyalty were adverse to the interests of Food Lion, the employer to whom they were unfaithful. ABC and Food Lion were not business competitors but they were adverse in a fundamental way. ABC's interest was to expose Food Lion to the public as a food chain that engaged in unsanitary and deceptive practices. Dale and Barnett served ABC's interest, at the expense of Food Lion, by engaging in the taping for ABC while they were on Food Lion's payroll. In doing this, Dale and Barnett did not serve Food Lion faithfully, and their interest (which was the same as ABC's) was diametrically opposed to Food Lion's. In these circumstances, we believe that the highest courts of North and South Carolina would hold that the reporters-- in promoting the interests of one master, ABC, to the detriment of a second, Food Lion -- committed the tort of disloyalty against Food Lion.

Our holding on this point is not a sweeping one. An employee does not commit a tort simply by holding two jobs or by performing a second job inadequately. For example, a second [**24] employer has no tort action for breach of the duty of loyalty when its employee fails to devote adequate attention or effort to her second (night shift) job because she is tired. That is because the inadequate performance is simply an incident of trying to work two jobs. There is no intent to act adversely to the second employer for the benefit of the first. *Cf. Long, 439 S.E.2d at 802* (finding disloyalty when employee "deliberately" acquired an interest adverse to his employer). Because Dale and Barnett had the requisite intent to act against the interests of their second employer, Food Lion, for the benefit of their main employer, ABC, they were liable in tort for their disloyalty.

We hold that, insofar as North and South Carolina law is concerned, the district court did not err in refusing to set aside the jury's verdict that Dale and Barnett breached their duty of loyalty to Food Lion.

3.

ABC argues that it was error to allow the jury to hold Dale and Barnett liable for trespass on either of the independent grounds (1) that Food Lion's consent to their presence as employees was void because it was based on misrepresentations or (2) that Food Lion's consent [**25] was vitiated [*517] when Dale and Barnett breached the duty of loyalty. The jury found Dale and Barnett liable on both of these grounds and awarded Food Lion $ 1.00 in nominal damages, which is all that was sought in the circumstances.

In North and South Carolina, as elsewhere, it is a trespass to enter upon another's land without consent. *See, e.g., Smith v. VonCannon, 283 N.C. 656, 197 S.E.2d 524, 528 (N.C. 1973); Snow v. City of Columbia, 305 S.C. 544, 409 S.E.2d 797, 802 (S.C. Ct. App. 1991)*. Accordingly, consent is a defense to a claim of trespass. *See, e.g., Miller v. Brooks, 123 N.C. App. 20, 472 S.E.2d 350, 355 (N.C. Ct. App. 1996), review denied, 345 N.C. 344, 483 S.E.2d 172 (N.C. 1997)*. Even consent gained by misrepresentation is sometimes sufficient. *See Desnick v. American Broad. Cos., 44 F.3d 1345, 1351-52 (7th Cir. 1995)* (Posner, C.J.). The consent to enter is canceled out, however, "if a wrongful act is done in excess of and in abuse of authorized entry." *Miller, 472 S.E.2d at 355* (citing *Blackwood v. Cates, 297 N.C. 163, 254 S.E.2d 7, 9 (N.C. 1979)*). [**26] *Cf. Ravan v. Greenville County, 315 S.C. 447, 434 S.E.2d 296, 306 (S.C. Ct. App. 1993)* (noting that the law of trespass protects the "peaceable possession" of property).

We turn first to whether Dale and Barnett's consent to be in nonpublic areas of Food Lion property was void from the outset because of the resume misrepresentations. "Consent to an entry is often given legal effect" even though it was obtained by misrepresentation or concealed intentions. *Desnick, 44 F.3d at 1351*. Without this result,

> a restaurant critic could not conceal his identity when he ordered a meal, or a browser pretend to be interested in merchandise that he could not afford to buy. Dinner guests would be trespassers if they were false friends who never would have been invited had the host known their true character, and a consumer who in an effort to bargain down an automobile dealer falsely claimed to be able to buy the same car elsewhere at a lower price would be a trespasser in a dealer's showroom.

Id.

Of course, many cases on the spectrum become much harder than these examples, and the courts of North and South Carolina have not considered the validity **[**27]** of a consent to enter land obtained by misrepresentation. Further, the various jurisdictions and authorities in this country are not of one mind in dealing with the issue. *Compare Restatement (Second) of Torts, § 892B(2)* (1965) ("if the person consenting to the conduct of another . . . is induced [to consent] by the other's misrepresentation, the consent is not effective for the unexpected invasion or harm") and *Shiffman v. Empire Blue Cross and Blue Shield, 256 A.D.2d 131, 681 N.Y.S.2d 511, 512 (App. Div. 1998)* (reporter who gained entry to medical office by posing as potential patient using false identification and insurance cards could not assert consent as defense to trespass claim "since consent obtained by misrepresentation or fraud is invalid"), *with Desnick, 44 F.3d at 1351-53* (ABC agents with concealed cameras who obtained consent to enter an ophthalmic clinic by pretending to be patients were not trespassers because, among other things, they "entered offices open to anyone"); *Baugh v. CBS, Inc., 828 F. Supp. 745, 757 (N.D. Cal. 1993)* ("where consent was fraudulently induced, but consent was nonetheless given, plaintiff has no claim **[**28]** for trespass"); and *Martin v. Fidelity & Cas. Co. of New York, 421 So. 2d 109, 111 (Ala. 1982)* (consent to enter is valid "even though consent may have been given under a mistake of facts, or procured by fraud") (citation omitted).

We like *Desnick*'s thoughtful analysis about when a consent to enter that is based on misrepresentation may be given effect. In *Desnick* ABC sent persons posing as patients needing eye care to the plaintiffs' eye clinics, and the test patients secretly recorded their examinations. **[*518]** Some of the recordings were used in a *PrimeTime Live* segment that alleged intentional misdiagnosis and unnecessary cataract surgery. *Desnick* held that although the test patients misrepresented their purpose, their consent to enter was still valid because they did not invade "any of the specific interests[relating to peaceable possession of land] the tort of trespass seeks to protect:" the test patients entered offices "open to anyone expressing a desire for ophthalmic services" and videotaped doctors engaged in professional discussions with strangers, the testers; the testers did not disrupt the offices or invade anyone's private space; and the **[**29]** testers did not reveal the "intimate details of anybody's life." *44 F.3d at 1352-53. Desnick* supported its conclusion with the following comparison:

> "Testers" who pose as prospective home buyers in order to gather evidence of housing discrimination are not trespassers even if they are private persons not acting under color of law. The situation of [ABC's] "testers" is analogous. Like testers seeking evidence of violation of anti-discrimination laws, [ABC's] test patients gained entry into the plaintiffs' premises by misrepresenting their purposes (more precisely by a misleading omission to disclose those purposes). But the entry was not invasive in the sense of infringing the kind of interest of the plaintiffs that the law of trespass protects; it was not an interference with the ownership or possession of land.

Id. at 1353 (citation omitted). [4]

> 4 *Desnick* noted in a separate discussion that the test patients were not sent in to commit a tort or some other injurious act. *44 F.3d at 1353.*

[30]** We return to the jury's first trespass finding in this case, which rested on a narrow ground. The jury found that Dale and Barnett were trespassers because they entered Food Lion's premises as employees with consent given because of the misrepresentations in their job applications. Although the consent cases as a class are inconsistent, we have not found any case suggesting that consent based on a resume misrepresentation turns a successful job applicant into a trespasser the moment she

enters the employer's premises to begin work. Moreover, if we turned successful resume fraud into trespass, we would not be protecting the interest underlying the tort of trespass -the ownership and peaceable possession of land. *See Desnick, 44 F.3d at 1352*; *see generally Matthews v. Forrest, 235 N.C. 281, 69 S.E.2d 553, 555 (N.C. 1952)*; *Ravan, 434 S.E.2d at 306.* Accordingly, we cannot say that North and South Carolina's highest courts would hold that misrepresentation on a job application alone nullifies the consent given to an employee to enter the employer's property, thereby turning the employee into a trespasser. The jury's finding of trespass [**31] therefore cannot be sustained on the grounds of resume misrepresentation.

There is a problem, however, with what Dale and Barnett did after they entered Food Lion's property. The jury also found that the reporters committed trespass by breaching their duty of loyalty to Food Lion "as a result of pursuing [their] investigation for ABC." We affirm the finding of trespass on this ground because the breach of duty of loyalty -- triggered by the filming in non-public areas, which was adverse to Food Lion -- was a wrongful act in excess of Dale and Barnett's authority to enter Food Lion's premises as employees. *See generally Blackwood, 254 S.E.2d at 9* (finding liability for trespass when activity on property exceeded scope of consent to enter).

The Court of Appeals of North Carolina has indicated that secretly installing a video camera in someone's private home can be a wrongful act in excess of consent given to enter. In the trespass case of *Miller v. Brooks* the (defendant) wife, who claimed she had consent to enter her estranged husband's (the plaintiff's) house, had a private detective place a video camera [*519] in the ceiling of her husband's bedroom. The court noted [**32] that "even an authorized entry can be trespass if a wrongful act is done in excess of and in abuse of authorized entry." *Miller, 472 S.E.2d at 355.* The court went on to hold that "even if [the wife] had permission to enter the house and to authorize others to do so," it was a jury question "whether defendants' entries exceeded the scope of any permission given." *Id.* We recognize that *Miller* involved a private home, not a grocery store, and that it involved some physical alteration to the plaintiff's property (installation of a camera). Still, we believe the general principle is applicable here, at least in the case of Dale, who worked in a Food Lion store in North Carolina. Although Food Lion consented to Dale's entry to do her job, she exceeded that consent when she videotaped in nonpublic areas of the store and worked against the interests of her second employer, Food Lion, in doing so.

We do not have a case comparable to *Miller* from South Carolina. Nevertheless, the South Carolina courts make clear that the law of trespass protects the peaceable enjoyment of property. *See Ravan, 434 S.E.2d at 306.* It is consistent with that principle [**33] to hold that consent to enter is vitiated by a wrongful act that exceeds and abuses the privilege of entry.

Here, both Dale and Barnett became employees of Food Lion with the certain consequence that they would breach their implied promises to serve Food Lion faithfully. They went into areas of the stores that were not open to the public and secretly videotaped, an act that was directly adverse to the interests of their second employer, Food Lion. Thus, they breached the duty of loyalty, thereby committing a wrongful act in abuse of their authority to be on Food Lion's property.

In sum, we are convinced that the highest courts of North and South Carolina would hold that Dale and Barnett committed trespass because Food Lion's consent for them to be on its property was nullified when they tortiously breached their duty of loyalty to Food Lion. Accordingly, as far as North and South Carolina law is concerned, the jury's trespass verdict should be sustained.

4.

Dale worked in a Food Lion store in North Carolina. Based on the jury's finding of fraud and a special interrogatory, the district court determined that ABC and Dale were liable under the North Carolina UTPA, *N.C. Gen. Stat.* [**34] *§ 75-1.1.* Because Food Lion elected to take damages on the fraud claim, the district court awarded no damages on the UTPA claim. ABC argues that the Act does not apply to the circumstances of this case, and we agree.

North Carolina's UTPA prohibits "unfair methods of competition" and "unfair or deceptive acts or practices" that are "in or affecting commerce." *N.C. Gen. Stat. § 75-1.1(a).* "Commerce" is defined to include "all business activities, however denominated." *N.C. Gen. Stat. § 75-1.1(b).* Food Lion contends that Dale's misrepresentations on her job application were "deceptive acts" "in or affecting commerce" because they were made to further the production of *PrimeTime Live*, a business

activity.

Although the UTPA's language is quite broad, "the Act is not intended to apply to all wrongs in a business setting." *HAJMM Co. v. House of Raeford Farms, Inc., 328 N.C. 578, 403 S.E.2d 483, 492 (N.C. 1991).* The Act's primary purpose is to protect the consuming public. *See Skinner v. E.F. Hutton & Co., Inc., 314 N.C. 267, 333 S.E.2d 236, 241 (N.C. 1985).* It gives a private cause of action to consumers aggrieved by unfair or deceptive business [**35] practices. *See Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397, 400 (N.C. 1981).* In addition, businesses are sometimes allowed to assert UTPA claims against other businesses because "unfair trade practices involving only businesses" [*520] can "affect the consumer as well." *United Labs., Inc. v. Kuykendall, 322 N.C. 643, 370 S.E.2d 375, 389 (N.C. 1988).* But one business is permitted to assert an UTPA claim against another business only when the businesses are competitors (or potential competitors) or are engaged in commercial dealings with each other. *See, e.g., Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 331 S.E.2d 677 (N.C. 1985)* (UTPA applies when temporary personnel agency falsely claims to have conducted background checks of workers it sends to companies); *Harrington Mfg. Co. v. Powell Mfg. Co., 38 N.C. App. 393, 248 S.E.2d 739 (N.C. Ct. App. 1979)* (UTPA applies when manufacturer passes off its competitor's goods as those of its own); *Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, 760-61 (N.C. Ct. App. 1986)* (UTPA covers acts intended to deceive suppliers into [**36] extending credit). In any event, the fundamental purpose of the UTPA is to protect the consumer, and courts invariably look to that purpose in deciding whether the Act applies. *See Lindner v. Durham Hosiery Mills, Inc., 761 F.2d 162, 165-67 (4th Cir. 1985).*

The district court found an UTPA violation because ABC is a business that engaged in deception. However, the deception -- the misrepresentations in Dale's application -- did not harm the consuming public. Presumably, ABC intended to benefit the consuming public by letting it know about Food Lion's food handling practices. Moreover, ABC was not competing with Food Lion, and it did not have any actual or potential business relationship with the grocery chain. The UTPA, therefore, cannot be used here because there is no competitive or business relationship that can be policed for the benefit of the consuming public. The North Carolina statute has not been applied to a circumstance like this, and we believe the Supreme Court of North Carolina would hold that it should not be. We therefore reverse the district court's judgment that the ABC defendants, including Dale, were liable under the North Carolina UTPA.

B.

[**37] ABC argues that even if state tort law covers some of Dale and Barnett's conduct, the district court erred in refusing to subject Food Lion's claims to any level of *First Amendment* scrutiny. ABC makes this argument because Dale and Barnett were engaged in newsgathering for *PrimeTime Live.* It is true that there are "*First Amendment* interests in newsgathering." *In re Shain, 978 F.2d 850, 855 (4th Cir. 1992)* (Wilkinson J., concurring). *See also Branzburg v. Hayes, 408 U.S. 665, 681, 33 L. Ed. 2d 626, 92 S. Ct. 2646 (1972)* ("without some protection for seeking out the news, freedom of the press could be eviscerated."). However, the Supreme Court has said in no uncertain terms that "generally applicable laws do not offend the *First Amendment* simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Cohen v. Cowles Media Co., 501 U.S. 663, 669, 115 L. Ed. 2d 586, 111 S. Ct. 2513 (1991); see also Desnick, 44 F.3d at 1355* ("the media have no general immunity from tort or contract liability").

In *Cowles,* Cohen, who was associated with a candidate for [**38] governor of Minnesota, gave damaging information about a candidate for another office to two reporters on their promise that his (Cohen's) identity would not be disclosed. Because editors at the reporters' newspapers concluded that the source was an essential part of the story, it was published with Cohen named as the origin. Cohen was fired from his job as a result, and he sued the newspapers for breaking the promise. The question in the Supreme Court was whether the *First Amendment* barred Cohen from recovering damages under state promissory estoppel law. The newspapers argued that absent "a need to further a state interest of the highest order," the *First Amendment* protected them from liability [*521] for publishing truthful information, lawfully obtained, about a matter of public concern. *501 U.S. at 668-69* (quoting *Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103, 61 L. Ed. 2d 399, 99 S. Ct. 2667 (1979)).* The Supreme Court disagreed, holding that the press "has no special immunity from the application of general laws" and that

the enforcement of general laws against the press "is not subject to stricter scrutiny than would be applied to enforcement against other persons [**39] or organizations." *501 U.S. at 670* (quoting *Associated Press v. NLRB, 301 U.S. 103, 132, 81 L. Ed. 953, 57 S. Ct. 650 (1937)).*

The key inquiry in *Cowles* was whether the law of promissory estoppel was a generally applicable law. The Court began its analysis with some examples of generally applicable laws that must be obeyed by the press, such as those relating to copyright, labor, antitrust, and tax. *501 U.S. at 669.* More relevant to us, "the press may not with impunity break and enter an office or dwelling to gather news." *Id.* In analyzing the doctrine of promissory estoppel, the Court determined that it was a law of general applicability because it "does not target or single out the press," but instead applies "to the daily transactions of all the citizens of Minnesota." *Id. at 670.* The Court concluded that "the *First Amendment* does not confer on the press a constitutional right to disregard promises that would otherwise be enforced under state law." *Id. at 672.* The Court thus refused to apply any heightened scrutiny to the enforcement of Minnesota's promissory estoppel law against the newspapers.

The torts Dale and Barnett committed, breach of the [**40] duty of loyalty and trespass, fit neatly into the *Cowles* framework. Neither tort targets or singles out the press. Each applies to the daily transactions of the citizens of North and South Carolina. If, for example, an employee of a competing grocery chain hired on with Food Lion and videotaped damaging information in Food Lion's non-public areas for later disclosure to the public, these tort laws would apply with the same force as they do against Dale and Barnett here. Nor do we believe that applying these laws against the media will have more than an "incidental effect" on newsgathering. *See Cowles, 501 U.S. at 669, 671-72.* We are convinced that the media can do its important job effectively without resort to the commission of run-of-the-mill torts. [5]

> 5 Indeed, the ABC News Policy Manual states that "news gathering of whatever sort does not include any license to violate the law."

ABC argues that *Cowles* is not to be applied automatically to every "generally applicable law" because [**41] the Supreme Court has since said that "the enforcement of [such a] law may or may not be subject to heightened scrutiny under the *First Amendment.*" *Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 640, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994)* (contrasting *Barnes v. Glen Theatre, Inc., 501 U.S. 560, 115 L. Ed. 2d 504, 111 S. Ct. 2456 (1991)*, and *Cowles*). In *Glen Theatre* nude dancing establishments and their dancers challenged a generally applicable law prohibiting public nudity. Because the general ban on public nudity covered nude dancing, which was expressive conduct, the Supreme Court applied heightened scrutiny. *Glen Theatre, 501 U.S. at 566.* In *Cowles* a generally applicable law (promissory estoppel) was invoked against newspapers who broke their promises to a source that they would keep his name confidential in exchange for information leading to a news story. There, the Court refused to apply heightened scrutiny, concluding that application of the doctrine of promissory estoppel had "no more than [an] incidental" effect on the press's ability to gather or report news. *Cowles, 501 U.S. at 671-72.* [**42] There is arguable tension between the approaches [*522] in the two cases. The cases are consistent, however, if we view the challenged conduct in *Cowles* to be the breach of promise and not some form of expression. In *Glen Theatre*, on the other hand, an activity directly covered by the law, nude dancing, necessarily involved expression, and heightened scrutiny was applied. Here, as in *Cowles*, heightened scrutiny does not apply because the tort laws (breach of duty of loyalty and trespass) do not single out the press or have more than an incidental effect upon its work.

C.

For the foregoing reasons, we affirm the judgment that Dale and Barnett breached their duty of loyalty to Food Lion and committed trespass. We likewise affirm the damages award against them for these torts in the amount of $ 2.00. We have already indicated that the fraud claim against all of the ABC defendants must be reversed. Because Food Lion was awarded punitive damages only on its fraud claim, the judgment awarding punitive damages cannot stand.

III.

In its cross-appeal Food Lion argues that the district court erred in refusing to allow it to use its non-reputational tort claims (breach of duty of loyalty, [**43] trespass, etc.) to recover compensatory damages for ABC's broadcast of the *PrimeTime Live* program that targeted Food Lion. The publication damages Food Lion sought (or alleged) were for items relating to its

reputation, such as loss of good will and lost sales. The district court determined that the publication damages claimed by Food Lion "were the direct result of diminished consumer confidence in the store" and that "it was [Food Lion's] food handling practices themselves -- not the method by which they were recorded or published -- which caused the loss of consumer confidence." *Food Lion, Inc. v. Capital Cities/ABC, Inc., 964 F. Supp. 956, 963 (M.D.N.C. 1997)*. The court therefore concluded that the publication damages were not proximately caused by the non-reputational torts committed by ABC's employees. We do not reach the matter of proximate cause because an overriding (and settled) *First Amendment* principle precludes the award of publication damages in this case, as ABC has argued to the district court and to us. Food Lion attempted to avoid the *First Amendment* limitations on defamation claims by seeking publication damages under non-reputational tort [**44] claims, while holding to the normal state law proof standards for these torts. This is precluded by *Hustler Magazine v. Falwell, 485 U.S. 46, 99 L. Ed. 2d 41, 108 S. Ct. 876 (1988)*.

Food Lion acknowledges that it did not sue for defamation because its "ability to bring an action for defamation . . . required proof that ABC acted with actual malice." Appellee's Opening Br. at 44. Food Lion thus understood that if it sued ABC for defamation it would have to prove that the *PrimeTime Live* broadcast contained a false statement of fact that was made with "actual malice," that is, with knowledge that it was false or with reckless disregard as to whether it was true or false. *See New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964)*. It is clear that Food Lion was not prepared to offer proof meeting the *New York Times* standard under any claim that it might assert. What Food Lion sought to do, then, was to recover defamation-type damages under non-reputational tort claims, without satisfying the stricter (*First Amendment*) standards of a defamation claim. We believe that such an end-run around *First Amendment* strictures [**45] is foreclosed by *Hustler*.

In *Hustler* a popular liquor advertisement prompted the magazine to run a parody of the ad, labeled as such, that featured the Reverend Jerry Falwell "discussing" an incestuous sexual act he had undertaken while drunk in disgusting circumstances. Falwell sued the magazine and its publisher, Larry Flynt, seeking [*523] damages for libel and intentional infliction of emotional distress. At trial the jury held against Falwell on the libel claim, specifically finding that the ad parody could not reasonably be understood as describing actual facts about Falwell or actual events in which he participated. The jury, however, found for Falwell on the emotional distress claim and awarded compensatory and punitive damages.

It was clear that Falwell, in asserting the claim for intentional infliction of emotional distress, sought "damages for emotional harm *caused by the publication* of an ad parody offensive to him." *Hustler, 485 U.S. at 50* (emphasis added). In the Supreme Court the question was whether Falwell had to satisfy the heightened *First Amendment* proof standard set forth in *New York Times*. After concluding that the ad parody was protected [**46] expression, the Court, in an opinion by Chief Justice Rehnquist, held that the constitutional libel standard applied to Falwell's emotional distress claim:

> We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true.

Hustler, 485 U.S. at 56.

Hustler confirms that when a public figure plaintiff uses a law to seek damages resulting from speech covered by the *First Amendment*, the plaintiff must satisfy the proof standard of *New York Times*. Here, Food Lion was not prepared to meet this standard for publication damages under any of the claims it asserted. Unless there is some way to distinguish *Hustler* (we think there is not, *see* below), Food Lion cannot sustain its request for publication damages from the ABC broadcast.

Food Lion argues that *Cowles, supra*, and not *Hustler* governs [**47] its claim for publication damages. According to Food Lion, *Cowles* allowed the plaintiff to recover -- without satisfying the constitutional prerequisites to a defamation action -- economic losses for publishing the plaintiff's identity in violation of a

legal duty arising from generally applicable law. Food Lion says that its claim for damages is like the plaintiff's in *Cowles*, and not like Falwell's in *Hustler*. This argument fails because the Court in *Cowles* distinguished the damages sought there from those in *Hustler* in a way that also distinguishes Food Lion's case from *Cowles*:

> Cohen is not seeking damages for injury to his reputation or his state of mind. He sought damages . . . for breach of a promise that caused him to lose his job and lowered his earning capacity. Thus, this is not a case like *Hustler* . . . where we held that the constitutional libel standards apply to a claim alleging that the publication of a parody was a state-law tort of intentional infliction of emotional distress.

Cowles, 501 U.S. at 671. Food Lion, in seeking compensation for matters such as loss of good will and lost sales, is claiming reputational [**48] damages from publication, which the *Cowles* Court distinguished by placing them in the same category as the emotional distress damages sought by Falwell in *Hustler* . In other words, according to *Cowles*, "constitutional libel standards" apply to damage claims for reputational injury from a publication such as the one here.

Food Lion also argues that because ABC obtained the videotapes through unlawful acts, that is, the torts of breach of duty of loyalty and trespass, it (Food Lion) is entitled to publication damages without meeting the *New York Times* standard. The Supreme Court has never suggested that it would dispense with the *Times* standard in this situation, and we believe *Hustler* indicates that the Court would not. In *Hustler* the magazine's conduct would [*524] have been sufficient to constitute an unlawful act, the intentional infliction of emotional distress, if state law standards of proof had applied. Indeed, the Court said, "generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude." *Hustler, 485 U.S. at 53*. Notwithstanding the nature of the underlying act, the Court [**49] held that satisfying *New York Times* was a prerequisite to the recovery of publication damages. That result was "necessary," the Court concluded, in order "to give adequate 'breathing space' to the freedoms protected by the *First Amendment*." *Id. at 56*.

In sum, Food Lion could not bypass the *New York Times* standard if it wanted publication damages. The district court therefore reached the correct result when it disallowed these damages, although we affirm on a different ground.

IV.

To recap, we *reverse* the judgment to the extent it provides that the ABC defendants committed fraud and awards compensatory damages of $ 1,400 and punitive damages of $ 315,000 on that claim; we *affirm* the judgment to the extent it provides that Dale and Barnett breached their duty of loyalty to Food Lion and committed a trespass and awards total damages of $ 2.00 on those claims; we *reverse* the judgment to the extent it provides that the ABC defendants violated the North Carolina UTPA; and we *affirm* the district court's ruling that Food Lion was not entitled to prove publication damages on its claims.

AFFIRMED IN PART AND REVERSED IN PART

CONCUR BY: NIEMEYER (In [**50] Part)

DISSENT BY: NIEMEYER (In Part)

DISSENT

NIEMEYER, Circuit Judge, concurring in part and dissenting in part:

Because I believe that ample evidence supports the jury's verdict finding that the ABC defendants acted fraudulently, I dissent from Part II.A.1. of the majority opinion. I am pleased to join the remainder.

I

The transactional facts are not disputed. In order to obtain an inside story, ABC's *PrimeTime Live* devised a plan by which ABC's employees would falsely represent themselves to Food Lion to obtain jobs in its stores and then would secretly film the activities of Food Lion's employees, including themselves, using miniature "spy cam" equipment.

In applying for jobs at Food Lion stores, ABC reporters Lynne Dale and Susan Barnett misrepresented themselves, their experience, and their references, even

though they certified that their applications were complete and truthful. More fundamentally, they misrepresented themselves as bona fide applicants for employment. They were already employees of ABC and knew that within a week or two they would no longer be working for Food Lion. After Food Lion gave them jobs at stores in North Carolina and South Carolina, Dale and Barnett [**51] roamed the stores to obtain film footage for *PrimeTime Live*. While some of the film footage so obtained was damaging to Food Lion, these reporters contributed to the damage. For example, when Barnett saw food that she suspected to be out of date, she sold it to her camera crew rather than throw it away. Similarly, she attempted to sell such food to a customer. When these reporters obtained their film footage -- after two weeks for Barnett and one week for Dale -- they quit their jobs at Food Lion and provided the videotapes to ABC's *PrimeTime Live* for broadcast on national television.

The jury returned a verdict against the ABC defendants based on fraud and awarded Food Lion $ 1,400 in compensatory damages and over $ 5.5 million in punitive damages. The district court remitted the $ 5.5 million punitive damage award to $ 315,000. I would affirm this judgment.

[*525] II

The elements of a fraud claim under North Carolina law are "(1) [a] false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Myers & Chapman, Inc. v. Thomas G. Evans, Inc., 323 N.C. 559, 374 S.E.2d 385, 391 (N.C. 1988)* [**52] (emphasis omitted) (quoting *Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E.2d 494, 500 (N.C. 1974)*). The requirements under South Carolina law are similar. *See Florentine Corp. v. PEDA I, Inc., 287 S.C. 382, 339 S.E.2d 112, 113-14 (S.C. 1985)*.

In reversing the jury's fraud verdict, the majority agrees with the ABC defendants that Food Lion failed to prove the injury element of its fraud claim because the expenses it incurred in training at-will employees could not be claimed as damages. The majority explains, "North and South Carolina are at-will employment states, and under the at-will doctrine it is unreasonable for either the employer or the employee to rely on any assumptions about the duration of employment." *Ante, 1999 U.S. App. LEXIS 26373*, *14.

I respectfully disagree, and my disagreement focuses on (1) the difference in hiring a person who intends to work indefinitely and a person who intends to work one or two weeks and fails to disclose that intent, and (2) the ABC employees' misrepresentation of loyalty inherent in their application for a job. I will discuss these in order.

A

The majority concludes that there is no difference in Food Lion's unwitting employment [**53] of ABC reporters who intend to leave within one or two weeks and employment of applicants who have no specific intent about the duration of their employment because both types of the employment are "at will." This, however, overlooks the difference between a bona fide at-will employee and an undercover news reporter who knows from the beginning that she will stay only two weeks. With the former, normal risks allow for the possibility that Food Lion can obtain long-term, experienced, faithful service from which it can recover its training expenses; with the latter there is no such possibility.

Applicants for employment, even at-will employment, present themselves representing by implication: (1) that they want to become employees; (2) that they intend to work indefinitely, until a change in circumstances leads them or their employer to terminate the arrangement; (3) that there is a possibility that they would become long-term employees; and (4) that they will be loyal employees as long as they work, prepared to work at the promotion of their employer's business. ABC's undercover reporters presented themselves to Food Lion, representing all of these matters falsely. They did not, during [**54] the application process, disclose that they did not intend to become employees at all. Indeed, they were already employed by ABC, and their application for employment with Food Lion was only a sham to get them into locations within Food Lion where they otherwise would not be permitted. Moreover, the ABC employees had no intention of allowing the normal risks of at-will employment to govern their term; they knew from the beginning that they were to be at Food Lion only long enough to obtain damaging information.

In training new employees and investing in their future, Food Lion has a right to assume that the normal risks attend the relationship and that some of those employees will eventually become experienced and loyal employees who will provide a return on the costs of

training them. The fact that Food Lion would not make such an investment in an applicant if the applicant stated that she was an ABC employee only seeking inside information and that she would leave after two weeks defines the injury sustained by Food Lion. Indeed, [*526] far less injury is required by law. Where a plaintiff presents evidence that the defendant's fraudulent misrepresentation induced the plaintiff to deal [**55] "with a party with whom it did not wish to deal," "sufficient injury" has been shown "to meet the requisite damage element of fraud" and the plaintiff is "entitled to recover any damages shown to result therefrom." *Daniel Boone Complex, Inc. v. Furst, 43 N.C. App. 95, 258 S.E.2d 379, 386-87 (N.C. Ct. App. 1979)*. Not only was Food Lion induced to hire persons it would not otherwise have hired, it was induced to spend money on persons whose potential for employment was nil, contrary to the potential of a bona fide applicant for at-will employment.

B

Similarly and perhaps more importantly, Dale and Barnett's implied representations that they would be loyal Food Lion employees injured Food Lion. Both North Carolina and South Carolina law provide that implicit in any contract for employment is the duty of the employee to "remain faithful to the employer's interest throughout the term of employment." *Berry v. Goodyear Tire & Rubber Co., 270 S.C. 489, 242 S.E.2d 551, 552 (S.C. 1978)*; *see also McKnight v. Simpson's Beauty Supply, Inc. 86 N.C. App. 451, 358 S.E.2d 107, 109 (N.C. Ct. App. 1987)* ("The law implies a promise on the part of every [**56] employee to serve his employer faithfully"). And when an employee acts adversely to the interest of his employer, he is disloyal and his discharge is justified. *Berry, 242 S.E.2d at 552*.

In this case, Dale and Barnett never intended to work as loyal employees for Food Lion and to promote the business of Food Lion. On the contrary, they applied to Food Lion with the secret intent to obtain sensational and damaging evidence to publish against Food Lion. And in furtherance of that purpose they even failed to do what they were hired to do. As one snippet from their videotape shows, instead of cleaning a meat grinder that a loyal employee would have undertaken to clean, even if the task were not specifically assigned to the employee, the ABC employee photographed the dirty meat grinder and offered it as an example of poor food-handling practices. Moreover, in seeking to "uncover" practices, the ABC employees baited fellow employees to say and do things that they knew would undermine Food Lion's standing food-handling practices. Indeed, a portion of the majority opinion, which I have joined, concludes that these employees breached their duties of loyalty to Food Lion and, [**57] in doing so, caused Food Lion damage. I believe that this very breach and injury, when intended from the very beginning, also supports Food Lion's fraud claim.

III

In short, the ABC employees misrepresented their potential for staying at Food Lion and they misrepresented their loyalty. Food Lion had less of a chance -- indeed, no chance -- of developing experienced, long-term, and loyal employees because the likelihood of that possibility was misrepresented. If these ABC employees had disclosed their true identities and intentions accurately, Food Lion would never have hired them and incurred expenses to train them on the chance that they would stay because the employees had already determined there was no such chance.

In my judgment, the jury had ample evidence to reach the conclusion that the ABC defendants committed common law fraud, and I would affirm its verdict.

Surveillance Camera Cases with Analysis

	Case Name	Holding	Relevant Torts	Facts	Relationship	Content	Location	Entry	Other	Prevailed
1	*Acosta, et. al. v.Scott Labor Inc., et. al.*, 377 F. Supp. 2d 647 (N.D. Ill. 2005).	Claim by counter-plaintiff employer dismissed for failure to allege sufficient facts to state the privacy element of the claim. Nothing that was alleged suggesting that the facts discovered were private.	intrusion into seclusion	Employee installed hidden cameras in office and videotapped without consent. Later showed tape on local news and as evidence of racial discrimination and violations of employment acts.	**Non-confidential:** employer/ employee	images of employer handling of employees	Workplace			Defendant
2	*Carter, et. al. v. County of Los Angeles, et. al.*, 2011 U.S. Dist. LEXIS 17554 (C.D. Cal. Feb. 22, 2011). —&— *Richards v. County of Los Angeles. et. al.*, 2001 U.S. Dist. LEXIS 30847 (C.D. Cal. March 1, 2011).	Because surveillance was covert, non-discriminating and in an area that employees were expected to engage in non-work behavior, video surveillance was unreasonable and violated *Fourth Amendment* Rights.		Government employees were caught on hidden camera while on the job. The location was a semi-private room. They were not put on notice of the possibility of video taping	**Non-confidential:** employer/ employee	various grooming, cleansing, changing act, and more activities usually reserved for private areas	Semi-private room at workplace			Plaintiff
3	*People v. Nazary*, 191 Cal. App 4th 727 (2010).	It was not objectively reasonable for defendant employee to expect the confrontation with his employer regarding embezzlement from a gas station cash register to be confidential where he knew there were video cameras installed in and around the gas station, knew he was under suspicion for embezzlement, and saw a camera in his office on a previous occasion.		Gas station owners noticed a discrepancy in cash receipts from a machine when the manager counted and recorded the receipts. They installed a hidden camera to monitor the employee.	**Non-confidential:** employer/ employee	An argument regarding employee's embezzellment	semi-public			Plaintiff
4	*Hernandez v. Hillside, Inc.*, 47 Cal. 4th 272 (2009).	Lower court erred in allowing privacy claim to go to trial. There was no triable issue as to whether the intrusion was highly offensive and sufficiently serious. Actual surveilance was very limted in scope and the defendants were motivated by strong countervailing circumstances	Invasion of privacy, IIED, NIED	Employer installed hidden camera and motion sensors in Plaintiff's office after learning that someone was entering the premise and viewing internet porn after hours.	**Non-confidential:** employer/ employee	very little was recorded aside from empty desks and defendant setting up the equipment.	semi-public office.			Defendant

Surreptitious Camera Cases with Analysis

	Case Name	Holding	Relevant Torts	Facts	Relationship	Content	Location	Entry	Other	Prevailed
1	*Shulman v. Group W. Productions* 18 Cal 4th 200 (1997).	Supreme Ct held that summary jgmt for Ds was appropriate for the publication claim, but not the intrusion claim. Public disclosure: accident was newsworthy, as was the nurse's work so showing the accident victim being extricated. Intrusion: Court found that the cameraman's presence at and filming of the scene of the accident was not an intrusion of plaintiff's seclusion b/c it was an interstate highway, property over which plaintiffs had no ownership (232). Court said Ps might recover for intrusion for the vidcotaping inside the helicopter of conversations with the nurse and other medical rescuers and the audiotaping of the conversations with the nurse and rescuers at the scene using microphone to amplify what was said (as opposed to mere presence at accident scene and hearing conversation w/ unaided ears). Whether expectations of keeping conversations with rescuers private is question for jury(232-234).	Tortious intrusion Public disclosure of private facts	Camera not hidden by nurse for helicopter rescue co. wore a microphone while treating two car accident victims; mic wasn't obvious (at 238). She permitted a TV photographer to accompany her and photograph the Shulmans at the scene and in the helicopter. The recorderd conversations were broadcast on TV. Conversations b/w the nurse and victim were not audible to general public without the recording device, but could've been overheard by other rescuers.	**Confidential:** Nurse-patient	Discussed car accident, victim's confusion and pain	highway and helicopter	Medical rescue at accident scene		Defendant: on public disclosure, Plaintiff: on intrusion
2	*Geragos v. Borer*, 2010 Cal. App. Unpub. LEXIS 165 (Cal. App. 2d. Dist. Jan. 11, 2010).	Because the injunction stopped the sale of the video, media outlets heard of the tape's existence but had not seen it, and no proof of damage to the reputation of the Attorneys, Court lower damages award.	Invasion of privacy, Public disclosure of private facts, Common law misappropriation of name and likeness, Use of name and likeness in violation of Cal. Civ. Code § 3344, Violation of the const. right of privacy, Recording of confidential info, Unfair business practices, Negligence	Travel agent and airline owner planted hidden cameras in private jet booked by Geragos (attorney) in order to transport Micheal Jackson to Santa Barbara for arrest.	**None**	Confidential conversations between an attorney and his client.	Semi-private - private airplane	No deception	(Defendant was also convicted of criminal charges)	Plaintiff

Surreptitious Camera Cases with Analysis

3	*Hornberger v. ABC, Inc. 799 A.2d 566* (N.J. Super. Ct. App. Div. 2002).	Police officers who were secretly videotaped while they were searching a car did not have a claim under New Jersey's wiretapping law. The officers had no reasonable expectation of privacy in a conversation that occurred in a car on the shoulder of a busy highway. Also, police officers have a diminished expectation of privacy because they hold a position of trust. 1) Defamation and false light: Ct said statements by professor watching tape not defamatory b/c it was true that search of car was illegal. Statement of no permission to search car was true. Omission of other footage/info wouldn't have softened impact of search being illegal. Statement of Police Chief saying "it's profiling" appeared to refer to the general practice, not the specific incident taped. 2) NJ wiretap law: No reasonable expectation of privacy on hwy, police have more restricted privacy expectation 3) fraud: no false statement in the show to permit recovery	Defamation, False light invasion of privacy, Fraud, and Violation of the New Jersey wiretapping law	New Jersey Superior Court Appellate Division upheld a lower court's dismissal of a lawsuit by three police officers caught on hidden camera during a traffic stop. Aired on Prime Time Live's "Driving While Black" in November 27, 1996.	**None:** testers who drove filmed police officers	Search of car and comments pertaining thereto	Road	No ruse - officers pulled over Defendants	Defendant
4	*DeTeresa v. American Broadcasting Co.*, 121 F.3d 460 (9th cir. 1997)	632: communication was not confidential b/c defendant revealed he was a producer, the plaintiff spoke with the defendant at her doorstep, and she did not request that the producer not share the information with anyone else. Invasion of privacy: no offensive invasion occurred. P was videotaped in a public place and any invasion was de minis. ABC did not broadcast her name or address and the clip was only five seconds long. Wrt the audiotape, ABC did not gain entry through deception and P spoke voluntarily to a known reporter. Also no audio was ever broadcast. 2511: Producer was a party to the communication so P needed to prove he recorded her to commit a criminal or tortious act. No evidence of criminal intent. Fraud: no relationship permitting her to claim producer should've disclosed recording.	632, Physical intrusion on solitude or private affairs, Federal eavesdropping 2511 and 2520, Fraud, Unfair business practices	ABC producer went to the doorstep of plaintiff flight attendant trying to convince her to appear on television to discuss the flight OJ Simpson took with her. P revealed information about the flight to the producer. The producer secretly recorded the conversation while a crew videotaped their interaction from across the street. ABC broadcast a five second clip of the videotape on "Day One" and did not broadcast the audiotape.	**None:** Plaintiff was flight attendant and Defendant said he was a Producer	Where OJ Simpson sat and what he did on the flight she worked on	Plaintiff's doorstep	No deception	Defendant

5	*PETA v. Bobby Berosini, Ltd.* 895 P.2d 1269 (Nev. 1995)	1) Defamation: Because the videotape showing P beating orangutans on 9 different occasions was not altered to portray something different from what P actually did, there was no "false" statement. Wrt to Ds' statements that Berosini abused his orangutans, the court said these were evaluative comments based on facts that were entitled to constitutional free speech protection. Saying he beats the orangs with steel rods - whether rod is steel or wood, not defamatory, and P didn't prove he used wood. 2) Intrusion: P wasn't concerned about ppl backstage seeing him disciplining the orangs. Not offensive b/c filming didn't cause a commotion and occurred where other ppl had a right to be and could see. 3) Appropriation: P sought pecuniary gain made by PETA through using his name for publicity and fundraising; ct said this tort is more for ordinary people, not celebrities and he did not plead right of publicity.	Defamation, Invasion of privacy	A Las Vegas animal trainer was secretly videotaped while physically abusing orangutans backstage at a show. The footage was later broadcast on "Entertainment Tonight." P sued for defamation for the taping and for claiming he regularly abused orangutans. P sued for intrusion and appropriation privacy torts as well b/c PETA supposedly used his name an likeness for publicity.	**None**: dancer in different show at casino filmed	Backstage beating of orangutans in sight of others	Backstage at show in casino	No ruse - dancer at Stardust hotel filmed	Defendant

The New York Times

May 28, 2006

No Free Samples for Documentaries: Seeking Film Clips With the Fair-Use Doctrine

By ELAINE DUTKA

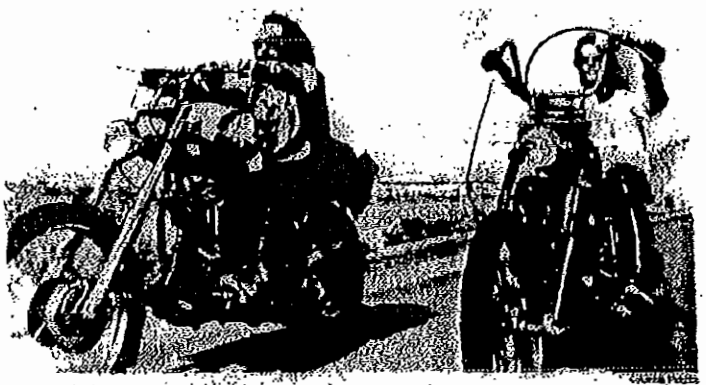
THE film producer Alicia Sams viewed "Wanderlust," a documentary about American road movies, as a way of introducing a new generation to Bonnie and Clyde, Thelma and Louise, and other giants of the genre. Films like "Five Easy Pieces," "Easy Rider" and "The Grapes of Wrath," she was convinced, offered a window into the American character.

The 90-minute documentary, to be broadcast Monday night on the Independent Film Channel, was also a window into the frustrations of making a clip-intensive film dependent on copyright clearance, which has become hugely expensive in the past decade. Initial quotations for the necessary sequences came to more than $450,000, which would have raised by half the cost of the IFC film, directed by the Oscar-nominated team of Shari Springer Berman and Robert Pulcini ("American Splendor").

"Paramount wanted $20,000 for 119 seconds of 'Paper Moon,' " Ms. Sams said. "The studios are so afraid of exploitation that they set boundaries no one will cross. Even after the prices were cut, we were $150,000 in the hole."

Unwilling to pay those fees, IFC's general manager, Evan Shapiro, helped Ms. Sams pursue another, more aggressive, tack, which may point the way for documentarians who want to tap movie iconography without paying studio prices. Its strategy involved some negotiating hardball, backed up by a willingness to fall back on the tricky legal doctrine known as fair use.

Mr. Shapiro called in a Los Angeles entertainment lawyer, Michael C. Donaldson, who drilled him on copyright law. Under the 165-year-old fair-use doctrine, Mr. Shapiro was told, filmmakers, news gatherers,



In "Wanderlust," from left, Darrell Hopper and Peter Fonda in "Easy Rider."

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critics and educators can access material at no cost if they add something to it (like a voice-over), don't undermine its value or use more than needed to make a point. Free speech trumps private property when a project is in the public interest, a term broadly defined.

"Fair use is the lubricant that allows creativity and copyright law to coexist," said Mr. Donaldson, a former president of the International Documentary Association.

Though many public-affairs programmers employ the fair-use concept, cable outlets — the major producers and distributors of documentaries — have been reluctant to do so, as budgets for documentaries are low and litigation expensive. And it's hard to get insurance for "errors and omissions," the media version of malpractice, unless everything is licensed.

Mr. Shapiro had vowed never to embark on another clip-heavy film after Xan Cassavetes's "Z Channel: A Magnificent Obsession," a costly 2004 profile of a cable network that used scenes from movies like "Salvador" and "400 Blows." Rights had to be purchased separately for home video and film festivals, and renewed periodically. But "Wanderlust," set in motion by a predecessor, was a chance to set a precedent.

"We're taking on the fight not only with 'Wanderlust' but also with the upcoming "This Film Is Not Yet Rated,' " said Mr. Shapiro, referring to a clip-dependent critique of the film ratings system set for release in theaters later this year. "That was made, from the start, under the fair-use doctrine, as all of our documentaries will be from now on."

Mr. Donaldson began contacting the studios at the Berlin film festival in February, initiating talks that dragged on for months. Accept $1,000 a title, he said, or IFC will move ahead anyway. Though Paramount held firm, 13 of the 18 copyright holders accepted the offer, including Sony Pictures Entertainment, MGM, Universal Studios, Miramax Films and Warner Brothers Entertainment, whose price was cut from $149,850 to $8,000. In the end the clips cost IFC less than $50,000. The holdouts advised IFC to rely on the fair-use argument, which, after viewing the film, they said they might legally challenge. (Mr. Shapiro is ramping up his insurance and putting away money in case that happens.)

Copyright law is not being used to stonewall filmmakers but to protect corporate assets, argues a licensing executive from one of those studios, who was granted anonymity because of his company's press relations policy.

Because of the proliferation of clip-generated programming, movie clips are in great demand. The executive said his department had no problem when broadcasters use unlicensed sequences to mark the death of an actor, and it has a lower rate for "nonprofits." But "Wanderlust" is a commercial product that will, undoubtedly, have a shelf life.

"Fair use is a defense sometimes used, after the fact, to justify the appropriation of footage without asking," the executive said. "The producers could have used shorter clips, or even still photographs. If someone can't afford a Mercedes, that doesn't mean he can't drive."

One copyright holder, James Velaise, the president of Pretty Pictures, ultimately agreed to license a clip from François Truffaut's "Breathless" for $1,000, a fraction of his usual asking price. Still, he said he took issue with IFC's take-it-or-leave-it approach and the introduction of fair use. Using the argument to save "a few thousand bucks" is "thoroughly dishonest," he wrote in e-mail messages sent to Mr. Donaldson's firm. It's tantamount, he said, to stealing. "I was simply blackmailed," Mr. Velaise said from his Paris office. "And why pay anything if that lawyer is so sure of the law?"

No such confusion with Kirby Dick's "This Film Is Not Yet Rated." While "Wanderlust" employed a hybrid approach, fair use was the only option because of the volume of clips and the provocative subject matter. Licensing 135 excerpts at an average of $10,000 each would have doubled his budget, Mr. Dick said. And projects that ruffle the feathers of the media establishment, he suggested, face insurmountable challenges. Some licensing agreements prohibit negative portrayal of copyright holders, he observed. And others preclude the use of the clip in films rated NC-17, which no one 17 or under can attend. He would be sued for breach of contract on both counts, he said, because his documentary takes aim at the studios and carries the NC-17 tag.

The enemy is not the copyright holders but ignorance of available options, other filmmakers and their advocates maintain. To address the problem, IFC is formulating its own fair-use guide, and last November, Pat Aufderheide and Peter Jaszi, communications professors at American University, coordinated a statement of fair-use practices drawn up by a coalition of filmmaking groups. Ms. Aufderheide has since met with the History Channel, Court TV and the Corporation for Public Broadcasting, among others, teaching them the value of fair use, economic as well as creative.

"IFC is positioning themselves as hard-charging rebels," she said. "But by lowering their clearance costs, they're actually canny businessmen."

Because fair-use boundaries are seldom clear, lawyers are needed to interpret each case, said Prof. Lawrence Lessig of Stanford Law School. Earlier this month he announced the formation of a co-op of lawyers based at Stanford that will donate services to fair-use filmmakers.

"Shapiro is fighting the good fight," Professor Lessig said. "But the danger of drawing a line in the sand is that others will try to erase it."

VARIETY

CLAPPING FOR CLIPS

Insurance for 'fair use' fare

By DAVE McNARY

Inspired partly by "This Film Is Not Yet Rated," a veteran showbiz insurer has started offering coverage for documakers, aimed at allowing free use of film clips.

Initiative by Media/Professional Insurance is designed to explicitly allow documentarians to retain coverage if they rely on the "fair use" doctrine, which holds that copyrighted material may be used without compensation if it's for purposes of criticism, comment, news reporting, teaching, scholarship or research.

Goal is to enable docus to contain clips without forcing filmmakers to pay hefty licensing or release fees. In the case of "This Film Is Not Yet Rated," filmmaker Kirby Dick included 134 clips without paying fees, which would have probably run in the $10,000-$15,000 range for each clip.

Kirby Dick's use of film clips to make his points in "This Film Is Not Yet Rated" has intrigued others and helped spawn an insurance policy.

The clips in "Rated" were employed to portray the inconsistencies within the MPAA ratings system, often running side by side to depict violent scenes that were deemed acceptable and sexual scenes that were not. Pic, released

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Insurer unveils 'fair use' coverage

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by IFC, grossed $306,000 domestically.

"Documentary films are an important source of education, commentary and criticism," said Leib Dodell, proxy of Kansas City-based Media/Professional Insurance. "Rigidly requiring licenses or releases in all cases does not give filmmakers the flexibility to take advantage of 'fair use' in appropriate situations. This initiative makes 'fair use' work in the real world of independent filmmakers."

Media/Professional, the nation's largest provider of media liability insurance, developed the new coverage in partnership with the Stanford Law School Fair Use Project and several local intellectual property attorneys including Michael Donaldson, general counsel for Film Independent and the Intl. Documentary Assn. The additional coverage would probably range from several hundred to several thousand dollars, execs said Thursday at a media briefing.

Donaldson said at the event that there are two key questions for filmmakers wanting to employ "fair use": Is the material needed to tell the story, and did the filmmaker use only what was needed. He also admitted he was somewhat surprised that no studios threatened to sue over Dick's employing "fair use" for the clips on "Not Yet Rated."

"I fully expected one of those effort-beating letters from an attorney for a studio, but we never got one," Donaldson said. "I was also quite confident that we would not be sued because Kirby took a very conservative approach on how the clips were used."

Heightened profile for docs

For his part, Dick said he's received many inquiries from fellow filmmakers about his use of the clips and noted that the overall profile of docus has broadened significantly. "Documentary filmmakers are moving into the cultural debate now that the news media isn't fulfilling its role," he added.

IFC general manager Evan Shapiro said the initiative is particularly welcome since it comes at a time when getting clearances for use of copyrighted material has become much more difficult amid the explosion in digital platforms. "Trying to understand who's the content owner is increasingly muddy," he added.

Part of the initiative includes the availability of half a dozen Stanford Law School attorneys on a pro bono basis to filmmakers who comply with the Center for Social Media's guidelines, published in 2005.

"This initiative will let filmmakers stand up for their 'fair use' rights where they were unable to do so before," said Anthony Falzone, exec. director of Stanford's Fair Use Project. "Copyright holders will no longer be able to rely on fear and intimidation. Everyone will be on a level playing field."

IDA proxy Diane Estelle Vicardi made an announcement about the Media/Professional policy Wednesday night at a reception for documentarians at the Academy of Motion Picture Arts & Sciences, leading to a standing ovation by attendees.