
Undercover Reporters, Tort Law, and the First Amendment: *Food Lion v. ABC* and the Future of Surreptitious Newsgathering

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I. INTRODUCTION

The resolution of many legal disputes requires the court to balance two or more competing social values or interests. For example, one major purpose of the rules of criminal law and criminal procedure is to balance society's interest in order with society's interest in liberty. As another example, the confidential communications doctrine in evidence law is designed to balance society's interest in truthful, reliable trial evidence with society's interest in encouraging open communication in certain relationships such as the attorney-client relationship, the physician-patient relationship and the marital relationship.

Food Lion, Inc. v. Capital Cities/ABC, Inc., decided by the U.S. Court of Appeals for the Fourth Circuit in October 1999¹, requires such a balancing of competing social interests. This case² arose when, after hearing allegations of unsanitary food-handling practices at the Food Lion supermarket chain, ABC News decided to "go undercover" to document whether or not the allegations were true. Two ABC reporters obtained jobs at Food Lion by concealing their ABC employment and their newsgathering purpose, and submitting job applications that misrepresented their educational and work experience. While employed at Food Lion, the reporters wore hidden cameras and microphones and made video and audiotapes of other Food

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For his helpful comments on the issues addressed in this article, we would like to thank attorney Michael G. Berkman of Glenview, Illinois. We would also like to thank Professor LeAne Rutherford of the University of Minnesota Duluth and Professor Ellen Rubert of the College of Lake County, Illinois, for their helpful comments on earlier drafts of this article.

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Lion employees engaging in such practices as repackaging old food for sale with new freshness dates. After the video footage was shown in a 1992 Prime Time Live episode, Food Lion's sales and stock price dropped substantially.

In response, Food Lion sued ABC³ in a North Carolina federal court alleging not that the story was false⁴, but rather that ABC had committed a variety of torts through its use of surreptitious newsgathering techniques. The jury found that ABC committed fraud, trespass and breach of loyalty, and awarded Food Lion minimal compensatory damages of \$1,400 for fraud, \$1 for trespass and \$1 for breach of loyalty. In the trial's final phase, the jury awarded remarkably large punitive damages of \$5.5 million based solely on the finding of fraud. The trial judge reduced the punitive damages to \$315,000. On appeal by both sides, the U.S. Court of Appeals reversed the fraud claim and affirmed the trespass and breach of loyalty claims, leaving ABC liable to Food Lion for a total of \$2.⁵ Neither side has appealed the case to the U.S. Supreme Court.

The competing social interests presented by the Food Lion case are numerous and include at least the following. First, the public has an interest in ensuring that business corporations and other social actors avoid behavior that injures the public health and welfare. For example, the public has an interest in food purveyors abiding by sanitary food-handling practices and being truthful about the freshness and quality of their food.⁶ In this regard, the public has an interest in discovering social actors who are engaged in socially harmful behavior so such behavior can be stopped.⁷

Second, business corporations and other property owners have an interest in controlling access to their property.⁸ Third, employers have an interest in hiring employees who honestly state their qualifications when applying for a job, so as to maximize the likelihood of hiring qualified applicants.⁹ Additionally, employers have an interest in hiring employees who seek, while at work, to carry out the employer's business and do not engage in conduct adverse to that business.¹⁰ Fourth, journalists have an interest in honest newsgathering and reporting so as to maximize their credibility.¹¹

This paper explores how some of these interests interact in the Food Lion case. The central issue appears to be this¹²: Is it (or should it be) legally permissible for a reporter who has a tip that an organization is engaged in wrongdoing (that is, conduct that is illegal or unethical or both), to seek and obtain a job with that organization, not for the primary purpose of serving the organization's interests, but for the primary purpose of secretly investigating, from inside the organization, whether the organization is in fact doing wrong, and then publicly exposing any wrong thereby discovered, where the reporter conceals his identity and his newsgathering purpose when applying for the job? If it *is* legally permissible, at least in some cases, then *when* is it permissible? In other words, are there conditions where the law should

protect journalists who lie about their identity to get a story, and if so, what are those conditions?

That central issue contains numerous sub-issues. For example, when are journalists the appropriate people to uncover wrongdoing? How candid must journalists be about who they are? Can society adequately protect public health and welfare without undercover journalism? If undercover journalism is necessary, how far should a journalist be able to go in investigating alleged wrongdoing?¹³

II. FACTUAL BACKGROUND OF THE FOOD LION CASE

A. The Founding of the Food Lion Grocery Chain and its Labor Law Problems

In 1957, three men with experience in the grocery business opened a supermarket called “Food Town” in Salisbury, North Carolina. The firm grew slowly in its first decade. In 1967, Food Town began a low-price, high-volume strategy that substantially increased the firm’s revenues and profits. Food Town then expanded into other southern states. In 1974, the second-largest Belgian supermarket chain, Etablissements Delhaize Freres et Cie “Le Lion” SA (“Delhaize”), purchased a majority of Food Town’s shares. In 1982, after opening stores in Virginia and planning to open stores in Tennessee, Food Town changed its name to “Food Lion” to avoid confusion with Virginia and Tennessee supermarkets that had also been operating under the name “Food Town.” By 1990, Food Lion was the fastest growing and one of the most profitable supermarket chains in the United States.¹⁴ In North Carolina, many people continue to view Food Lion as a local institution even though Delhaize has owned it since 1974.¹⁵

During the 1980s, several former employees sued Food Lion¹⁶ seeking compensation for unpaid overtime, pursuant to the Fair Labor Standards Act (“FLSA”).¹⁷ These employees showed that Food Lion had an elaborate “Effective Scheduling [S]ystem”¹⁸ in which it set the number of hours each hourly employee was authorized to work each week. Employees were required to complete the duties assigned to them within the authorized time. The plaintiffs found that they could not complete their duties in compliance with Food Lion standards in the time allowed by the scheduling system. In one such lawsuit that appears typical of these “unpaid overtime compensation” suits against Food Lion, the U.S. Court of Appeals for the Fourth Circuit found that:

[The employees’] inability to meet these standards within the hours scheduled came up against Food Lion policies both minimizing the number of overtime hours store management could authorize hourly employees to work and prohibiting hourly employees from working “off the clock”—i.e., unscheduled and unreported overtime

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work. Obviously, employees could be fired for work that did not meet Food Lion standards; they could also be fired for working off the clock. Tew and Lyle were aware of the policy against off-the-clock work, but worked off the clock anyway in order to complete their assigned duties in accordance with Food Lion standards. For Tew and Lyle, the possibility of dismissal for substandard work was greater, they thought, than that for getting caught working off the clock.¹⁹

For an employee to recover compensation for unpaid overtime under the FLSA, the employee must prove that he worked overtime hours without compensation, the amount of such work, and that the employer knew of such work.²⁰ In several cases, the Food Lion employees proved that they worked overtime without compensation. Some of these employees were unable to prove Food Lion's knowledge of their overtime work and so lost their cases.²¹ Other employees did prove Food Lion's knowledge, and recovered from Food Lion.²²

The United Food & Commercial Workers International Union ("UFCW") began a campaign to organize Food Lion employees about 1980.²³ The UFCW publicly acknowledged that its goal was to unionize Food Lion or put it out of business.²⁴ In August 1990, the UFCW called for a boycott of Food Lion's stores to protest Food Lion's opposition to the union.²⁵ During its unionization campaign, the UFCW spurred several administrative or legislative investigations by various governmental authorities by alleging violations of law by Food Lion.²⁶ For example, in September 1991, the UFCW filed a complaint with the U.S. Department of Labor accusing Food Lion of tacitly encouraging employees to work "off the clock" without pay.²⁷

In October 1991 the Labor Department began an investigation of Food Lion and in August 1993 the Department announced a settlement with the company. According to the Department, it inspected 85 Food Lion stores and received reports from 150 others, showing extensive violations of overtime and child labor rules. The Department found that the overtime violations derived from Food Lion's "Effective Scheduling" system. Regarding the child labor rules, the Department accused Food Lion of over 1,400 child labor violations, primarily involving 16- and 17-year old employees who operated dangerous equipment, such as motor-driven cardboard compactors or meat-slicing machines. A few violations involved minors working too many hours or too late. Under the settlement, Food Lion agreed to pay \$13.2 million in back wages to nearly 40,000 former and current Food Lion employees, and \$3 million in penalties. Food Lion's agreement with the Labor Department was the biggest settlement against a private employer for wage violations in U.S. history. Food Lion did not admit any wrongdoing, and continued to maintain its innocence.²⁸

B. *Prime Time Live's* Hidden Camera Investigation of Food Lion and Food Lion's Lawsuit Against ABC

Prime Time Live (“PTL”) is an ABC network news show that first aired in August 1989. PTL is not a “straight news” program, but rather an “investigative news” show, featuring sensational stories designed to attract large audiences. The content of PTL broadcasts are subject to the control of Capital Cities/ABC, Inc.²⁹ One of PTL’s key techniques is the use of hidden cameras and microphones, which sometimes require the use of misrepresentations and deception so as to position recording equipment and to entice persons into actions or statements that can be recorded.³⁰ In addition to PTL, ABC also produces other programs in which it has broadcast stories based on undercover operations involving hidden cameras.³¹

ABC has procedures and policies to facilitate undercover work. ABC’s News Policy Manual states that “[i]n the course of investigative work, reporters should not disguise their identity or pose as someone with another occupation without prior approval of ABC News Management.”³² This manual further states that “news gathering of whatever sort does not include any license to violate the law.”³³

In December 1991, people working on behalf of UFCW told ABC field producer Lynne Dale (then known as Lynne Neuffer Litt³⁴) that Food Lion might be a good subject for investigation.³⁵ Dale’s sources informed her that the U.S. Department of Labor was investigating the UFCW’s complaint about Food Lion employees working “off the clock,” and alleged that Food Lion was firing its employees before they could reach the five-year anniversary that would allow them to participate in Food Lion’s lucrative profit-sharing plan. Former Food Lion employees told her they had been subjected to “Gestapo-like” tactics during investigations of food theft, and locked inside interrogation rooms for hours until they confessed.³⁶

At about the same time that UFCW supporters were talking to Dale about Food Lion, the Government Accountability Project (“GAP”) was talking to ABC associate producer Susan Barnett about Food Lion. GAP was closely aligned with the UFCW and the information that GAP supplied to Barnett came from the UFCW.³⁷ GAP informed Barnett about the same labor issues that Dale had learned of, and also about unsanitary food-handling practices at Food Lion stores and warehouses.³⁸ “The allegations were that Food Lion employees ground out-of-date beef together with new beef, bleached rank meat to remove its odor, re-dated (and offered for sale) products not sold before their printed expiration date,”³⁹ and retrieved discarded food from dumpsters and offered it for sale.⁴⁰

In March 1992, Dale and Barnett independently submitted written proposals for a Food Lion story to *Prime Time Live* senior staff. Dale’s proposal focused on labor issues, while Barnett’s proposal focused on unsanitary food practices.⁴¹ ABC management approved the proposals and determined that undercover or hidden camera

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work would be needed to develop the story.⁴² Because most of the alleged Food Lion misconduct occurred only in non-public areas of the stores, Dale and Barnett decided it would be necessary to pose as Food Lion employees to document whether the allegations were true.⁴³ They planned to hide small video cameras and audio equipment on their persons, and use these devices to record the actions and statements of other Food Lion employees.⁴⁴ Because Food Lion would not knowingly hire ABC reporters whose purpose was to investigate Food Lion's practices, Dale and Barnett, with the UFCW's help, created false identities and backgrounds, complete with supporting documentation.⁴⁵ ABC's upper management and legal department reviewed and approved all of the above activities.⁴⁶

In April 1992, Dale submitted various job applications to Food Lion using the name Lynne Neuffer or Lynne Neufes. She applied to be a "meat wrapper" or "meat clerk." Her applications contained a false address, false employment history, false references, and false reasons for seeking employment, and did not disclose her employment with ABC.⁴⁷ She was offered a job and began work on May 4, 1992. She worked at two different Food Lion stores in North Carolina. She quit on May 15, 1992, stating (falsely) that her grandfather had died and that she was moving to Pennsylvania to care for her grandmother.⁴⁸ She had worked at Food Lion for twelve days.⁴⁹ In April 1992, Barnett applied to work for Food Lion as a "deli clerk." Like Dale's, Barnett's application contained a false address, false employment history, false references, and false reasons for seeking employment, and did not disclose Barnett's employment with ABC.⁵⁰ Barnett was offered a job and began work on April 14, 1992 at a Food Lion store in South Carolina. Barnett worked for eight days and then complained (falsely) of personal problems. She was given time off but never returned.⁵¹

As they did their assigned tasks for Food Lion, Dale and Barnett secretly recorded other Food Lion employees treating, wrapping and labeling meat, cleaning machinery, and discussing the practices of the meat department. They obtained footage of the meat-cutting room, the deli counter, the employee break room, and a manager's office. In their (approximately) three collective weeks as Food Lion employees, Dale and Barnett recorded about 45 hours of hidden camera footage.⁵² As we will discuss later, whether Dale and Barnett did good work in their roles as Food Lion employees is not entirely clear.⁵³

In August or September 1992, Food Lion management discovered that *PTL* planned to air a story about their company.⁵⁴ In early September, Food Lion lawyers met with ABC executives to try to stop ABC from airing the story. The meeting was unproductive. Food Lion pressed ABC for information about the story, but ABC would not supply it. Meanwhile, ABC tried to persuade Food Lion to agree to an on-camera interview with Food Lion CEO Tom Smith. Food Lion representatives said

they would consent to this only if the interview was aired live. ABC declined this proposal.⁵⁵

On September 18, 1992, Food Lion sued ABC and Lynne Dale in North Carolina state court.⁵⁶ Based mainly on Dale's having obtained her job through deception and (in Food Lion's view) having performed it inadequately, the complaint alleged fraud, negligent misrepresentation, breach of fiduciary duty, and violation of North Carolina's Unfair and Deceptive Trade Practices Act ("UTPA").⁵⁷ Food Lion asked the court to restrain ABC from broadcasting any tapes that Dale had made while working at Food Lion. Food Lion also sought expedited discovery.⁵⁸ North Carolina Superior Court Judge Judson DeRamus, Jr. granted Food Lion's request for expedited discovery, ordering ABC to make Dale available for deposition within five days and to turn over to Food Lion materials related to the *PTL* story.⁵⁹ On September 21, 1992, ABC removed the case to the U.S. District Court for the Middle District of North Carolina, on diversity grounds.⁶⁰ ABC moved to vacate the state court order allowing expedited discovery, and on September 28, 1992, Magistrate Sharp vacated that order.⁶¹

Magistrate Sharp noted that Food Lion's complaint had asked the court to restrain ABC from airing any video or audio tapes gathered by Dale while she was posing as a Food Lion employee.⁶² Further, the Magistrate found that Food Lion's request for expedited discovery to secure materials gathered by ABC in apparent preparation for a future *PTL* program violated the First Amendment. Food Lion, he said, was "not now before the court directly seeking an order of prior restraint with respect to broadcast of the materials in question." Even so, Food Lion's request for immediate production of the materials before their expected broadcast was "obviously in aid of a frivolous [anticipated] application for a prior restraint [and] suffers the constitutional deficiencies of [an] application for an injunction."⁶³ With respect to Food Lion's claim that ABC secured the material in question by unlawful means, the Magistrate ruled that Food Lion would have a full opportunity to show it had a right to damages. But "[n]o matter how inappropriate the acquisition, or its correctness, the right to disseminate that information is what the Constitution intended to protect."⁶⁴

C. The November 5, 1992 Prime Time Live Broadcast and Food Lion's Response

On the evening of November 5, 1992, *PTL* broadcast its Food Lion story, anchored by Diane Sawyer. The Food Lion report was the program's lead story and ran for about twenty-five minutes. The story included five or six minutes of video and audio tape made by Dale and Barnett during their Food Lion employment.⁶⁵ The *PTL* broadcast included videotape appearing to show Food Lion employees repackaging and redating fish that had passed its expiration date ("expired" product), mixing

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expired beef with fresh beef, and applying barbecue sauce to expired chicken.⁶⁶ The broadcast included interviews with former and current Food Lion employees, who alleged that Food Lion had engaged in such practices as pulling meat out of a dumpster and selling it, treating fish and pork with Clorox bleach to get the smell out and then selling them, mixing rotten pork with other pork and selling it as fresh sausage, and cutting off the edge of a block of cheese that had been nibbled by rats so that the rest of the block could be sold.⁶⁷

The *PTL* story essentially asserted that Food Lion managers were under so much pressure to make their departments profitable that they encouraged workers to repackage old meat and fish rather than throw it out, and that Food Lion workers were under so much pressure to meet company production standards that they worked overtime “off the clock” to avoid getting fired for failing to meet these standards.⁶⁸ During the broadcast, *PTL* told viewers that *PTL* producers had posed as applicants in twenty different Food Lion stores and that two *PTL* producers had been hired and worked in three different stores.⁶⁹ *PTL* also told viewers that Food Lion had sent *PTL* a statement asserting that Food Lion meets all cleanliness and food handling laws in the states where they do business. Additionally, *PTL* told viewers that Food Lion said *PTL*’s sources were angry employees supplied by a union trying to destroy the nonunion company.⁷⁰ More viewers watched the Food Lion episode of *PTL* than any prior *PTL* episode.⁷¹

In response to Food Lion’s assertion that *PTL*’s sources were aligned with the UFCW, *PTL* played videotapes of interviews with several former Food Lion employees. One former employee said she “could care less whether the union ever goes in Food Lion.”⁷² Another former employee said, “I’d hate to have to pay union dues.”⁷³ Food Lion immediately denied the story’s accuracy. In a live interview after the *PTL* broadcast, Food Lion’s chairman and president, Tom Smith, told television station WTVD in Durham, North Carolina that ABC had fabricated the story.⁷⁴ “It was sensational TV,” Smith said. “But it was pretty obvious that a lot of this was staged. The camera was always in the stores with the disgruntled employees.”⁷⁵ Despite Food Lion’s assertions that the *PTL* story was false, Food Lion chose not to sue for defamation. This was because, according to a company spokesperson, the burden for proving libel was too heavy.⁷⁶ According to legal journalist Amy Singer writing in *The American Lawyer* magazine, “By taking advantage of tort law that gives no special protections to journalists, Food Lion bypassed the pesky hurdles of litigating a libel case and thrust itself into position to attack the credibility of the reporters responsible for the story—all the while having no legal obligation to refute the substance of their charges.”⁷⁷

Immediately after the broadcast, Food Lion’s retail sales dropped as did the value of its publicly traded securities.⁷⁸ The day after the broadcast, the price of Food

Lion's Class A stock fell from \$9.25 per share to \$8.25 per share (about an 11% drop) and the price of its Class B stock fell from \$10.00 per share to \$8.625 per share (about a 14% drop).⁷⁹ In 1993, Food Lion's profits fell from \$178 million to \$3.9 million (about a 98% drop)⁸⁰ and it closed eighty-eight stores.⁸¹ The week following the broadcast, the head of sanitation for North Carolina's Department of Environment, Health and Natural Resources announced that health inspectors in North Carolina and possibly South Carolina would treat the *PTL* story as a complaint and increase inspections of Food Lion.⁸²

D. The Continuation of Food Lion's Litigation Against ABC

After the broadcast, the litigation continued in the North Carolina federal court. In April 1993, after five months of discovery, Food Lion filed an amended complaint, adding several claims to its original claims of fraud, breach of fiduciary duty and unfair trade practices.⁸³ Food Lion now alleged: (1) state tort law violations of intentional misrepresentation, deceit, fraud, negligent supervision, trespass, breach of fiduciary duty, and respondeat superior; (2) civil conspiracy; (3) violations of federal wiretapping laws; (4) unfair and deceptive trade practices in violation of North Carolina's Unfair and Deceptive Trade Practices Act; and (5) violations of the federal Racketeer Influenced and Corrupt Organizations Act (RICO). ABC moved to dismiss all claims for failure to state a cause of action.⁸⁴ Magistrate Sharp recommended that the court allow Food Lion's state law claims of fraud, trespass, and civil conspiracy to proceed; that the court dismiss Food Lion's wiretapping and RICO claims; and that as to Food Lion's claims of negligent supervision, respondeat superior, breach of fiduciary duty, and unfair and deceptive trade practices, the court defer ruling on ABC's motion to dismiss until trial or summary judgment adjudication. In a March 1995 ruling, Judge N. Carlton Tilley, Jr. adopted the Magistrate's recommendations.⁸⁵ Though Food Lion had claimed since the night of the *PTL* broadcast that *PTL*'s story was false, Food Lion did not sue for defamation in its initial pleadings. Instead, Food Lion claimed that *PTL*'s newsgathering methods were unlawful. But in September 1995, Food Lion asked the court for permission to amend its complaint to add a libel claim. In support of the libel claim, Food Lion argued that information in hidden camera footage that ABC had failed to provide to Food Lion in discovery ("out-takes") until January 1994 showed that the *PTL* broadcast was false.⁸⁶ Food Lion argued that it might have considered filing a libel claim against ABC earlier, if ABC had provided the complete tapes earlier.⁸⁷ But Magistrate Sharp disallowed a libel claim, ruling that "[t]here simply is no relation whatsoever between the out takes and any possible libel action Food Lion may have contemplated over two years ago."⁸⁸

III. THE TRIAL

The case was tried to a jury beginning on December 9, 1996 in Greensboro, North Carolina federal court.⁸⁹ The trial proceeded in three phases: liability, compensatory damages, and punitive damages.⁹⁰

A. The Liability Phase

Before trial, Judge Tilley ruled that the content of the broadcast was not at issue. Thus, Food Lion could not discuss the UFCW's role in suggesting the story to ABC or helping Dale and Barnett get their Food Lion jobs. Nor could ABC discuss food-sanitation or labor questions that led *PTL* to go undercover. Since ABC conceded that Dale and Barnett had lied on their Food Lion job applications, the trial's liability phase focused largely on whether Dale and Barnett had trespassed on Food Lion's property and on how adequately they had performed their Food Lion jobs.⁹¹

For reasons not entirely clear, ABC moved to exclude the *PTL* broadcast from trial. The court granted this motion, so the jury never saw the broadcast.⁹² Though Judge Tilley barred the jurors from watching the *PTL* broadcast, he allowed Food Lion's counsel to show the jury several hours of out-takes from Dale and Barnett's videotapes.⁹³ These were admitted with regard to Food Lion's claim that Dale and Barnett had breached their duty of loyalty as Food Lion employees.⁹⁴ The out-takes included Food Lion employees cleaning their work areas, throwing away old food, and telling Barnett to throw away old food.⁹⁵ In one out-take, Barnett muttered a swear word, apparently in disappointment, after another Food Lion worker told her to throw out a tray of old poultry. In another out-take, Dale muttered a swear word when a deli worker decided to clean a meat-cutting machine. Dale and Barnett testified that they swore because the recording equipment on their bodies was heavy and uncomfortable.⁹⁶

Despite Magistrate Sharp's April 1996 ruling disallowing a libel claim, and Judge Tilley's ruling immediately before trial that the content of the *PTL* broadcast was not at issue, Food Lion attempted at trial to suggest that the broadcast was false. For example, in his opening statement, Food Lion attorney Andrew Copenhaver asserted that Dale and Barnett were "trying to stage events" at Food Lion for the hidden cameras.⁹⁷ Food Lion's breach of loyalty claim raised the issue of the quality of Barnett's and Dale's work in their Food Lion jobs. Regarding Barnett's work, journalist Amy Singer found that:

[When Barnett quit her Food Lion job] [h]er supervisor noted that [she] had performed her duties adequately and recommended that she be rehired should she ever apply again to the company.⁹⁸

Regarding Dale's work, Singer found that:

Dale found meat wrapping more of a challenge. Despite the crash course, she demonstrated woeful wrapping skills and failed to identify several cuts of meat correctly during her job interview. But since her false reference had given her a favorable recommendation, the supervisor assumed she was just rusty. He hired her as a meat wrapper at \$5 an hour, the typical pay for a trainee, not a seasoned worker.

....Dale worked in two stores in May. Her duties included wrapping meat, keeping the retail meat counters clean, and helping rotate products in the meat counter. It was hard work. Dale expressed her frustration during a lunch break rendezvous with hidden camera experts Hill and Bell on her first day. "I'm really bad at this job," she said with the tape rolling. "I don't know what the f*** I'm doing." Dale quit after eight days, saying that her grandfather had died and she was moving to Pennsylvania to care for her grandmother. Because she quit without giving notice, it was noted in her record that she should not be rehired.⁹⁹

Judge Tilley's reported opinions in the litigation do not appear to address the quality of Barnett's work. But as to Dale, Judge Tilley found that:

While employed at Food Lion, [Dale] was an unsatisfactory employee. She worked slowly and did not appear to have experience in meat wrapping. Through neglect or hidden motive, she failed to perform her cleaning responsibilities adequately.¹⁰⁰

ABC claimed that Food Lion managers had been satisfied with both Dale's and Barnett's work. According to ABC,

[Dale's] supervisor never considered firing her, and told her shortly before she quit that she would "make a good meat wrapper." After Barnett quit, her supervisor formally recommended that she be rehired if she again sought employment.¹⁰¹

With respect to Dale's and Barnett's intent, Judge Tilley found that neither Dale nor Barnett intended to faithfully perform the duties for which they were hired by Food Lion.¹⁰²

At the close of the liability phase of the trial, the jury found all of the ABC defendants liable to Food Lion for fraud. Additionally, the jury found Dale and Barnett liable for trespass and breach of loyalty. Based on the jury's fraud verdict and its findings that the ABC defendants had engaged in deception, Judge Tilley determined that they had violated the North Carolina Unfair and Deceptive Trade Practices Act (UTPA).¹⁰³

B. The Compensatory Damages Phase

On December 20, 1996, at the start of the compensatory damages phase, Judge

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Tilley ruled that damages allegedly sustained by Food Lion as a result of ABC's broadcast of Prime Time 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 torts (fraud, trespass, and breach of loyalty) that Food Lion claimed ABC had committed.¹⁰⁴ Judge Tilley reasoned that:

Food Lion made no defamation claim and, therefore, did not challenge the truthfulness of the broadcast. Recognizing that the broadcast must be assumed to be true for purposes of ascertaining compensatory damages can lead to only one conclusion: Food Lion's lost profits and lost sales were not proximately caused by Defendants' tortious activities. Food Lion's lost sales and profits were the direct result of diminished consumer confidence in the store. While these losses occurred after the Prime Time Live broadcast, the broadcast merely provided a forum for the public to learn of activities which had taken place in Food Lion stores. Stated another way, tortious activities may have enabled access to store areas in which the public was not allowed and the consequent opportunity to film people, equipment and events from a perspective not available to the ordinary shopper, but it was the food handling practices themselves—not the method by which they were recorded or published—which caused the loss of consumer confidence. Those practices were not the probable consequence of Defendants' fraud and trespass and it cannot be argued under the evidence in this case that the filming of those practices by the Prime Time Live producers set any of those activities in motion. If it can be argued that Defendants should have foreseen the ultimate consequences, the acts of Food Lion employees interrupted any causal connection between Defendants' fraud and trespass so as to render that tortious activity remote from the ultimate loss of profits and sales.¹⁰⁵

In observing that "Food Lion made no defamation claim"¹⁰⁶, Judge Tilley noted that Food Lion *had* argued that Dale and Barnett, while working at Food Lion, "staged" certain incidents for the *PTL* broadcast.¹⁰⁷ According to Food Lion, "staging" means "causing something to happen that otherwise would not have happened." But the judge found in essence that Dale and Barnett had not staged incidents.¹⁰⁸

Since Judge Tilley barred Food Lion from introducing evidence of monetary losses flowing from the *PTL* broadcast, Food Lion presented only one witness as to compensatory damages, who testified that Food Lion's total costs from hiring Dale and Barnett were \$2,432.35. This included Dale's wages (\$270.83), Barnett's wages (\$216.90) and the administrative costs of hiring, processing and training them (\$1944.62).¹⁰⁹

The jury awarded Food Lion \$1,400 in compensatory damages on its fraud claim, \$1 each on its duty of loyalty and trespass claims, and \$1,500 on its UTPA claim.¹¹⁰ In post-trial proceedings, Judge Tilley required Food Lion to elect between compensatory and punitive damages under the fraud claim and treble damages under the UTPA claim.¹¹¹ Food Lion elected to take damages under the fraud claim.¹¹²

C. The Punitive Damages Phase

In the punitive damages phase, the jury “lowered the boom”¹¹³ and awarded \$5,545,750 in punitive damages on the fraud claim against ABC and producers Kaplan and Rosen. The jury refused to award punitive damages against the reporters, Dale and Barnett.¹¹⁴ (In post-trial proceedings, discussed in section III.D below, Judge Tilley reduced the punitive damages to \$315,000).

D. The Post-Trial Period

After the trial—despite the fact that the truth of the *PTL* broadcast was not at issue in the trial¹¹⁵—Food Lion continued to claim in public statements that the *PTL* broadcast was false. For example, four days after the trial, Food Lion lawyer Richard Wyatt sent a letter to ABC lawyers and several news organizations asserting that Magistrate Sharp’s ruling disallowing a libel claim was based on a “technicality.” And in a post-trial ABC Nightline broadcast on February 12, 1997, Food Lion’s Communications Director Chris Ahearn stated, “portions of the broadcast that aired in 1992 ... we know to be false.”¹¹⁶

ABC filed three post-trial motions.¹¹⁷ The first motion was for judgment as a matter of law on Food Lion’s claims of fraud, trespass and breach of fiduciary duty. The second motion sought a new trial or a remittitur of the punitive damage award. The third motion was for judgment as a matter of constitutional law on punitive damages. Judge Tilley ruled on these motions in August 1997.¹¹⁸

Judge Tilley denied ABC’s motion for judgment as a matter of law on Food Lion’s claims of fraud, trespass and breach of fiduciary duty. Judge Tilley held that ABC’s arguments in support of this motion had generally been disposed of before trial.¹¹⁹ Addressing ABC’s motion seeking a new trial or a remittitur of the punitive damage award, Judge Tilley examined North Carolina law, South Carolina law and federal law regarding limits on the amount of punitive damages. Judge Tilley found that all of the North Carolina factors and most of the South Carolina factors were included in the three factors set forth in the U.S. Supreme Court’s decision in *BMW v. Gore*¹²⁰ for determining whether a punitive damage award is excessive.¹²¹ Applying the *BMW* factors, along with two South Carolina factors not included in the *BMW* decision (defendant’s ability to pay and the likelihood that the punitive damage award will deter defendant and others from similar conduct), the court ruled that the punitive damage award was excessive. Therefore, the court denied ABC’s motion for a new trial on the condition that Food Lion remit all but \$315,000 of the punitive damage award.¹²²

ABC’s third and final post-trial motion argued that the First Amendment barred punitive damages as a matter of law in this case because such an award would chill newsgathering.¹²³ Judge Tilley denied this motion, ruling that legal protection was

indeed necessary for the proper operation of the press, but that if the press engaged in illegal conduct with a consciousness of wrongdoing, punitive damages were appropriate to punish and deter such conduct.¹²⁴

IV. PRESS REACTION TO THE PUNITIVE DAMAGE VERDICT

When the punitive damage award was announced in January 1997, press reaction was swift. It was also divergent. Opinions varied regarding such issues as whether reporters should ever use hidden cameras to get a story; whether reporters should ever use other kinds of deception to get a story; what degree of deception might be appropriate for a reporter; and (apparently) even whether or not using a hidden camera *is* deceptive. Some press commentary generally defended ABC's use of undercover newsgathering techniques in the Food Lion case.¹²⁵ Other press commentary criticized ABC's use of such techniques and was generally critical of hidden cameras or any kind of undercover reporting.¹²⁶ Still other press commentary took a middle ground of some sort.¹²⁷

A. Press Reaction Supporting ABC's Conduct in the Food Lion Case

Press commentators supporting ABC advanced several arguments. First, they argued that undercover reporters' exposure of wrongdoing has been beneficial and even essential for social welfare. Several commentators observed that undercover journalism has historically been a valuable journalistic tool, citing New York World reporter Nellie Bly's undercover exposure of an abusive mental asylum in the late 1800s and Upton Sinclair's undercover exposure of abusive working conditions and unsanitary practices in the Chicago stockyards in the early 1900s, described in his novel *The Jungle*.¹²⁸ Paul McMasters, a former president of the Society of Professional Journalists, noted that ABC journalists themselves had used hidden cameras to uncover abuse of children in day care centers, abuse of patients in a veterans hospital, and racial discrimination by landlords and real estate agents.¹²⁹ McMasters noted that other journalists had used hidden cameras to uncover poor security at airports and hospitals.¹³⁰ John Seigenthaler and David L. Hudson Jr., both from the First Amendment Center, noted that undercover journalists had exposed police corruption, white collar crime, and environmental pollution.¹³¹ The Buffalo News noted that it had won a Pulitzer Prize for undercover reporting of deficiencies in the welfare bureaucracy.¹³² Chicago Tribune Columnist Clarence Page noted that he had been part of a Tribune undercover investigation of the 1972 Presidential primaries that disclosed voter fraud and led to several convictions as well as a Pulitzer Prize.¹³³

Second, some commentators argued that undercover reporting is sometimes the only way to get a story, because wrongdoers often hide their misconduct. For example, Paul McMasters noted that "[s]ystematic wrongdoing in our society seldom

occurs in the public where everyone can see it. Law enforcement and other government officials can't always see it..."¹³⁴ Other commentators argued that undercover reporting is sometimes necessary to effectively illustrate a story.¹³⁵

Third, commentators observed that government regulators themselves have used undercover "testers" to expose racial discrimination in housing and employment.¹³⁶

B. Press Reaction Critical of ABC's Conduct in the Food Lion Case

Press commentators critical of ABC advanced several counter-arguments. Several commentators argued that undercover reporting is not a necessary part of newsgathering. For example, A.M. Rosenthal, a former Executive Editor of *The New York Times*, rejected the claim that undercover reporting is "the only way to get the story."¹³⁷ In response to that claim, he argued that the most important investigative stories were not achieved by reporters "masquerading" as someone else. Rather, these stories were achieved by reporters who had "the courage to keep digging" until they had enough information to print the story, or had "the even greater courage to tell themselves and their editors that it couldn't be proved." He observed that certain stories or pictures might theoretically be important enough to justify undercover reporting: Presidential corruption, the massacre of minorities, "the official but secret story of the conduct and loss of a war" (presumably a reference to the Pentagon Papers), and photographs of war crime victims or death camp corpses. But each of these stories or pictures, said Rosenthal, was obtained by reporters and photographers who did not hide their identities as journalists.¹³⁸ He noted further that he had not encountered any story so valuable as to require the press to "dirty itself" to report it.¹³⁹

A second argument made against ABC's conduct is that undercover reporting "demeans journalism by insisting on the right of reporters to do in professional life something they would never willingly allow done to themselves or to their news operations."¹⁴⁰ This argument observes that news offices contain "treasuries of information" that might interest the public, such as names of whistleblowers and national security details.¹⁴¹ A third argument critical of ABC is that lying is inconsistent with an enterprise that professes to be seeking and telling the truth. If a news organization's newsgathering practices include lying to get information, such practices damage that organization's reputation for truth and accuracy.¹⁴² "[N]ews organizations should not be untruthful in their search for the truth," wrote Paul Starobin, a Contributing Editor of the *Columbia Journalism Review*.¹⁴³ A fourth argument critical of ABC is that undercover reporting is motivated by sensationalistic goals, designed merely or mainly to entertain, and that this damages press credibility.¹⁴⁴ A fifth argument critical of ABC is that the misrepresentation and, on occasion, trespassing involved in undercover reporting offend the public, which in turn

damages press credibility.¹⁴⁵

V. UNDERCOVER REPORTING AND JOURNALISTS' CODES OF ETHICS

For American journalists, the main codes of ethics are the American Society of Newspaper Editors ("ASNE") "Statement of Principles," the Society of Professional Journalists ("SPJ") "Code of Ethics," and the Radio-Television News Directors Association ("RTNDA") "Code of Ethics and Professional Conduct." Though two of these ethics codes discuss undercover reporting, none of the reported cases in the Food Lion litigation mentioned these ethics codes.¹⁴⁶

A. The American Society of Newspaper Editors' Statement of Principles

The ASNE was founded in 1922 and its membership consists of editors of daily newspapers in the United States and Canada. ASNE's first ethics code was adopted in 1922 as the "Canons of Journalism." That document was revised and renamed the "Statement of Principles" in 1975.¹⁴⁷ The Statement of Principles consists of a preamble and six "articles," entitled "Responsibility," "Freedom of the Press," "Independence," "Truth and Accuracy," "Impartiality," and "Fair Play." Each article is a single paragraph containing a set of rules with rationales. The Statement of Principles does not specifically address undercover reporting.

B. The Society of Professional Journalists' Code of Ethics

The SPJ was founded in 1909 as Sigma Delta Chi and renamed in 1988.¹⁴⁸ SPJ's membership consists of journalists, former journalists, journalism teachers and journalism students.¹⁴⁹ SPJ's first ethics code was borrowed from the ASNE in 1926. In 1973, Sigma Delta Chi wrote its own code, which was revised in 1984 and 1987.¹⁵⁰ SPJ's current "Code of Ethics" was adopted in 1996.¹⁵¹ It consists of a preamble and four general rules captioned "Seek Truth and Report It," "Minimize Harm," "Act Independently," and "Be Accountable." Each general rule is followed by a list of specific rules.

SPJ's 1987 ethics code¹⁵², which was in effect when *PTL* investigated Food Lion and broadcast its Food Lion report, does not specifically address undercover reporting. But SPJ's current ethics code does address this subject. The general rule captioned "Seek Truth and Report It" provides that "[j]ournalists should be honest, fair and courageous in gathering, reporting and interpreting information."¹⁵³ One of the specific rules that follows provides that:

"Journalists should ... [a]void undercover or other surreptitious methods of gathering information except when traditional open methods will not yield information vital to the public. Use of such methods should be explained as part of the story."¹⁵⁴

This rule appears to create a rebuttable presumption against “undercover or other surreptitious” newsgathering. The presumption can be overcome if two conditions exist:

- 1) The information being sought is “vital to the public.”
- 2) “[T]raditional open methods will not yield” this important information.

The rule also advises the news organization to explain such methods as part of the story. Such explanation does not appear to be an express condition of using such methods, though it might be interpreted as an implied third condition. Applying the first factor appears simpler than applying the second. Determining whether information is “vital to the public” would seem to involve similar (if not the same) considerations as determining whether information involves “a matter of public concern.” Courts have made the latter determination for years, such as in cases involving the scope of a public employee’s right to self-expression under the First Amendment.¹⁵⁵ Applying the second factor appears more difficult, since it is unclear how a news organization could determine whether “traditional open methods” of reporting would yield the same information sought by an undercover press investigation.

As we noted above, the SPJ ethics code in effect when *PTL* did its Food Lion story did not directly address undercover reporting. Would SPJ’s current ethics code—which does address undercover reporting—sanction *PTL*’s undercover conduct in the Food Lion case? The first factor appears to be satisfied, since the information *PTL* sought—whether Food Lion stores were selling unsafe food to the public—clearly seems “vital to the public.” As for the second factor, it is unclear whether “traditional open methods” would have yielded the information sought by *PTL*.¹⁵⁶ As we noted in section IV, journalists disagreed strongly about that question. Finally, *PTL*’s Food Lion broadcast did explain that *PTL* had used undercover methods to obtain the story.¹⁵⁷

C. The Radio-Television News Directors Association’s Code of Ethics and Professional Conduct

The RTNDA was founded in 1946.¹⁵⁸ It describes itself as “the world’s largest professional organization devoted exclusively to electronic journalism.”¹⁵⁹ RTNDA’s membership consists of news executives from electronic media, teachers and students. RTNDA’s first ethics code was adopted at the organization’s founding convention.¹⁶⁰ This code has been revised several times. RTNDA’s current Code of Ethics and Professional Conduct was adopted in 2000. It consists of a preamble and six general rules captioned “Public Trust,” “Truth,” “Fairness,” “Integrity,” “Independence,” and

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“Accountability.” Each general rule is followed by a list of specific rules.¹⁶¹

RTNDA’s 1987 ethics code¹⁶², which was in effect when *PTL* investigated Food Lion and broadcast its Food Lion report, does not specifically address undercover reporting. But RTNDA’s current ethics code does address this subject. The general rule captioned “Integrity” provides that “[p]rofessional electronic journalists should present the news with integrity and decency, avoiding real or perceived conflicts of interest, and respect the dignity and intelligence of the audience as well as the subjects of news.”¹⁶³ One of the specific rules provides that:

“Professional electronic journalists should [u]se surreptitious newsgathering techniques, including hidden cameras or microphones, only if there is no other way to obtain stories of significant public importance and only if the technique is explained to the audience.”¹⁶⁴

This rule is very similar to SPJ’s rule concerning undercover reporting. RTNDA’s rule on this topic, like SPJ’s, appears to create a rebuttable presumption against “surreptitious” newsgathering, “including hidden cameras or microphones.” The presumption can be overcome if three conditions exist:

- (1) The story has “significant public importance.” This provision appears equivalent to SPJ’s provision that the information sought be “vital to the public.”
- (2) “[T]here is no other way to obtain” the story. This provision appears equivalent to SPJ’s provision that “traditional open methods will not yield” the important information.
- (3) “The [surreptitious] technique is explained to the audience.” This provision is equivalent to SPJ’s provision that “use of such methods should be explained as part of the story.”

The main difference between the SPJ and RTNDA ethics rules on undercover reporting appears to be that the RTNDA rule expressly refers to hidden cameras and microphones.

As we noted above, the RTNDA ethics code in effect when *PTL* did its Food Lion story did not directly address undercover reporting. But RTNDA’s current ethics code does. Given the close similarity between the current SPJ and RTNDA ethics codes regarding undercover reporting, it appears that if the SPJ code would sanction *PTL*’s undercover methods in the Food Lion case, so would the RTNDA code.

VI. THE APPEAL

Both sides appealed the District Court’s judgment to the U.S. Court of Appeals for the Fourth Circuit. ABC appealed the District Court’s ruling denying its post-trial motion for judgment as a matter of law. Food Lion appealed the District Court’s ruling

preventing Food Lion from recovering damages resulting from the *PTL* broadcast.¹⁶⁵ The Fourth Circuit heard oral arguments in June 1998 and issued its decision in October 1999.¹⁶⁶

A. ABC's Arguments on Appeal

1. Fraud

ABC argued that the District Court erred in upholding the jury's fraud verdict because Food Lion did not prove injury caused by reasonable reliance on the misrepresentations made by Dale and Barnett on their job applications. The Fourth Circuit agreed and reversed the fraud verdict¹⁶⁷ and the associated compensatory damage award of \$1,400 and punitive damage award of \$315,000.¹⁶⁸ Judge Niemeyer dissented, arguing Food Lion had proved that ABC committed fraud.¹⁶⁹

To prove fraud under both North Carolina and South Carolina law, a plaintiff must prove that (1) defendant made a false representation of material fact, (2) defendant knew it was false or made it with reckless disregard of its truth or falsity, (3) defendant intended that plaintiff rely on it, and (4) plaintiff was injured by reasonably relying on the false representation.¹⁷⁰

Because it was undisputed that Dale and Barnett knowingly made false representations with intent that Food Lion rely on them, only the fourth element of fraud, injurious reliance, was in question.¹⁷¹ Food Lion claimed two injuries resulting from relying on the job application misrepresentations: (1) the administrative costs incurred in hiring and training Dale and Barnett, and (2) the wages it paid to Dale and Barnett.¹⁷²

a. Administrative Costs of Hiring and Training Dale and Barnett

The main component of Food Lion's claim for fraud damages was Food Lion's administrative costs resulting from its employment of Dale and Barnett.¹⁷³ At trial, Food Lion offered evidence that these costs totaled \$1,944.62.¹⁷⁴ Food Lion argued that Dale and Barnett's job application misrepresentations fraudulently caused Food Lion to incur these costs. "No matter how much money Food Lion spent on hiring and training in 1992, ... Food Lion incurred costs *at the margin* to hire and train Dale and Barnett because of the fraud, and had to incur these costs for two more employees [i.e., Dale and Barnett] than it would have if it had not been fraudulently induced to hire them." (Emphasis in original).¹⁷⁵

The Fourth Circuit noted that the jobs held by Dale and Barnett were characterized by high turnover.¹⁷⁶ The court ruled that for Food Lion's fraud claim to be valid, "Food Lion had to show (1) that it hired Dale and Barnett (and incurred the administrative costs incident to their employment) because it believed they would

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work longer than a week or two and (2) that in forming this belief it reasonably relied on misrepresentations made by Dale and Barnett.”¹⁷⁷

The Fourth Circuit found that Food Lion could not show this. The court reasoned that although Dale and Barnett misrepresented matters “such as their backgrounds, experience, and other employment,”¹⁷⁸ they made no representations about how long they would work, nor did Food Lion ask them how long they would work. In fact, each application expressly stated that both parties to the relationship (Food Lion and employee) had the right to terminate the employment at any time and for any reason. Dale and Barnett were thus employees-at-will.¹⁷⁹ Therefore, said the Fourth Circuit, “Food Lion did not show that the administrative costs were an injury caused by reasonable reliance on the misrepresentations.”¹⁸⁰

Judge Niemeyer, dissenting only on the issue of whether ABC committed fraud, argued that the job application misrepresentations caused Food Lion “to hire persons [Dale and Barnett] it would not otherwise have hired [and] to spend money on persons [Dale and Barnett] whose potential for employment was nil, contrary to the potential of a bona-fide applicant for at-will employment.”¹⁸¹

b. Wages Paid to Dale and Barnett

At trial, Food Lion had sought to recover the \$487.73 in wages it paid Dale and Barnett, asserting that Dale’s and Barnett’s misrepresentations on their job applications fraudulently caused Food Lion to pay these wages.¹⁸² Food Lion argued that the jury’s finding that Dale and Barnett breached their duty of loyalty to Food Lion proved the requisite injury. Specifically, Food Lion argued that the jury’s finding of disloyalty meant the jury had found that Food Lion received inadequate services for the wages it paid Dale and Barnett.¹⁸³

The Fourth Circuit ruled that Food Lion’s proof of a breach of loyalty, “for which the jury awarded nominal damages of \$1.00,”¹⁸⁴ did not equal proof of fraud damages for inadequate services. This was true because “it is possible to perform the assigned tasks of a job adequately and still breach the duty of loyalty.”¹⁸⁵ According to the Fourth Circuit, Food Lion paid Dale and Barnett “because they showed up for work and performed their assigned tasks as Food Lion employees.”¹⁸⁶ In support of its finding that Dale and Barnett performed adequately, the Fourth Circuit noted that shortly before Dale quit, Dale’s supervisor said she would “make a good meat wrapper” and that when Barnett quit, Barnett’s supervisor recommended that she be rehired if she later sought reemployment with Food Lion.¹⁸⁷ Since Dale and Barnett’s misrepresentations did not cause Food Lion to pay them wages, those payments did not satisfy the injurious reliance element of fraud.¹⁸⁸

2. Breach of Loyalty

ABC argued that the District Court erred in upholding the jury's breach of loyalty verdict because under existing North and South Carolina tort law, Dale and Barnett had not breached their duty of loyalty to Food Lion.¹⁸⁹ The Fourth Circuit disagreed and upheld the breach of loyalty verdict and the associated nominal damages of \$1.00.¹⁹⁰

According to the Fourth Circuit, existing North and South Carolina tort law considered employee disloyalty to be tortious in three instances: (1) when an employee competes directly with her employer, either on her own or as an agent of a rival company; (2) when an employee misappropriates her employer's profits, property, or business opportunities; and (3) when the employee breaches the employer's confidences.¹⁹¹ ABC argued that Dale and Barnett did not compete with Food Lion, misappropriate its profits, property or business opportunities, or breach its confidences; therefore, ABC asserted that Dale and Barnett did not breach their loyalty to Food Lion under existing North and South Carolina law.¹⁹²

ABC argued that Dale and Barnett were equivalent to employees who simply held a second job:

The fact that an employee holds a second job should not convert inadequate job performance into tortious misconduct. That rule would allow employers to bring a tort claim against an employee who is also an officer of a charity for soliciting charitable contributions during working hours, or against an employee who holds a second job as a night watchman and fails to devote full time and attention to her job because she is tired. Such conduct may be grounds to fire employees, but there is no reason why it should give rise to the kind of tort claim for nominal damages pursued here.¹⁹³

Food Lion responded that rather than being like employees who simply held a second job, Dale and Barnett "sought to infiltrate Food Lion at the behest of another business, and thus were more akin to spies planted to conduct industrial espionage."¹⁹⁴

The District Court had acknowledged that it was the first to hold explicitly that Dale's and Barnett's conduct would be considered a breach of loyalty by the North and South Carolina Supreme Courts.¹⁹⁵ According to the Fourth Circuit, the District Court correctly concluded that the North Carolina and South Carolina courts "would decide today that the reporters' conduct was sufficient to breach the duty of loyalty."¹⁹⁶ The Fourth Circuit reasoned that:

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

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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.¹⁹⁷

According to the Fourth Circuit, its holding on this point was “not a sweeping one.”¹⁹⁸ An employee, said the court, does not commit a tort simply by holding two jobs or by doing a second job inadequately. For example, a second employer has no breach of loyalty claim when its employee devotes insufficient attention or effort to the second job because the employee is tired from working two jobs. “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.”¹⁹⁹ But here, “[b]ecause 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.”²⁰⁰

3. *Trespassing*

The jury found Dale and Barnett liable for trespassing on two independent grounds: (1) that Food Lion's consent to their presence was nullified because it was based on their job application misrepresentations, and (2) that Food Lion's consent was nullified when Dale and Barnett breached their duty of loyalty. The jury awarded Food Lion \$1.00 in nominal damages on the trespassing claim. ABC argued that the District Court erred in upholding the jury's trespass verdict.²⁰¹

The Fourth Circuit ruled that the jury's first ground (job application misrepresentation) did not support a finding of trespass²⁰², but that the jury's second ground (breach of loyalty) did support a finding of trespass.²⁰³ Thus, the Fourth Circuit upheld the trespass verdict and the associated nominal damages.²⁰⁴

a. *The Jury's Finding that Dale and Barnett's Job Application Misrepresentations Nullified Food Lion's Consent to their Presence*

Addressing the jury's first ground for finding that Dale and Barnett trespassed—that Food Lion's consent to Dale and Barnett's presence in “non-public areas of Food Lion property was void from the outset because of the resume misrepresentations”²⁰⁵—the Fourth Circuit observed that in North and South Carolina, as elsewhere, entering another's land without consent is a trespass. As a result, consent is a defense to a trespass claim. Even consent achieved by misrepresentation is sometimes a defense to a trespass claim. But consent to enter is canceled if the party entering does “a wrongful act ... in excess of and in abuse of authorized entry.”²⁰⁶ The

Fourth Circuit then observed that the North and South Carolina courts had not considered the validity of consent to enter land obtained by misrepresentation. Further, noted the court, various American jurisdictions disagree about this issue.

One view, observed the Fourth Circuit, is that where a defendant makes a misrepresentation that induces plaintiff to consent to defendant's entry on plaintiff's property, the consent is ineffective and there is a trespass. This view is expressed in Restatement (Second) of Torts §892B ("Consent Under Mistake, Misrepresentation or Duress"), subsection (2).²⁰⁷ The Fourth Circuit noted that *Shiffman v. Empire Blue Cross and Blue Shield*²⁰⁸ conforms to this "misrepresentation negates consent" view.²⁰⁹

Another view, observed the Fourth Circuit, is that where a defendant makes a misrepresentation that induces plaintiff to consent to defendant's entry on plaintiff's property, the consent is effective and there is no trespass. The court noted that *Baugh v. CBS, Inc.*²¹⁰ and *Martin v. Fidelity & Casualty Co. of New York*²¹¹ conform to this "misrepresentation does not negate consent" view.²¹²

The Fourth Circuit then cited with approval *Desnick v. American Broadcasting Companies, Inc.*²¹³ In *Desnick*, an eye clinic and two eye surgeons employed by the clinic sued the ABC television network, a *PTL* producer, and Sam Donaldson, in federal court, for various torts arising out of a *PTL* broadcast that was critical of the eye clinic.²¹⁴ The complaint alleged that in March 1993, a *PTL* producer telephoned Dr. Desnick (owner of the eye clinic) and said that *PTL* wanted to do a story on large cataract practices. The complaint alleged further that the producer told Desnick that the story would not involve undercover surveillance or "ambush" interviews, and would be "fair and balanced." Reassured, Desnick then allowed an ABC crew to videotape the eye clinic's main office in Chicago, to film a cataract operation, and to interview clinic physicians, technicians and patients. Without Desnick's knowledge, the *PTL* producer had sent seven persons equipped with hidden cameras to Desnick eye clinic offices in Wisconsin and Indiana. These seven persons posed as patients and requested eye exams. The "test patients" videotaped the plaintiff eye surgeons conducting the eye exams.

In June 1993, *PTL* broadcast the eye clinic story. The story alleged that the eye clinic "may ... be ... doing unnecessary cataract surgery for the money."²¹⁵ The story included an on-camera interview with an optometrist, formerly employed by the clinic, who said a "glare machine" used by the clinic to diagnose cataracts was "rigged" to persuade patients with healthy eyes that they needed cataract surgery. The story also included an "ambush" interview in which Donaldson confronted Desnick at Chicago's O'Hare Airport and asked Desnick if it was true that Desnick had altered patient records "to show less vision than your patients actually have" and had "changed the glare machine so we have a different reading."²¹⁶

The District Court dismissed the suit for failure to state a claim and plaintiffs

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appealed.²¹⁷ Regarding the trespass claim, the Seventh Circuit focused on the interests that this tort is designed to protect—ownership and possession of land—and found that plaintiffs had not stated a claim for trespass.²¹⁸

The Seventh Circuit observed that entry on another's land without consent is a trespass. This rule, said the court, has been weakened somewhat by doctrines of privilege and implied consent. "But there is no journalists' privilege to trespass."²¹⁹ Further, there can be no genuine implied consent when express consent is obtained by a misrepresentation or misleading omission. "The Desnick Eye Center would not have agreed to the entry of the test patients into its offices had it known they wanted eye examinations only in order to gather material for a television expose of the Center and that they were going to make secret videotapes of the examinations."²²⁰

But the Seventh Circuit noted that in some cases²²¹, courts rule that consent nullifies a trespass claim even though the consent was procured by fraud. For example, the Seventh Circuit observed that there is no trespass where a restaurant critic conceals his identity when ordering a meal, or a browser pretends to be interested in goods that he cannot afford to buy, or a false friend accepts a dinner invitation, or a car buyer, in trying to negotiate a lower price with a car dealer, falsely tells the dealer that the buyer can buy the same car elsewhere at a lower price. "The fact is that consent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him for perfectly understandable and generally ethical or at least lawful reasons to revoke his consent."²²² This "surprising result" can be explained by the fact that the tort of trespass protects the interest in ownership and possession of property. Where an entrant uses fraud to persuade a property owner to consent to the entry, and the court rules that the consent nullified a trespass claim, the court is simply recognizing that the entrant did not invade the property owner's interest in ownership and possession of property.

To be sure, noted the Seventh Circuit, in some cases where an entrant uses fraud to persuade a property owner to consent to the entry, the consent does *not* nullify the trespass claim. This is true, for example, where a "busybody" with simple curiosity about the interior of a home gains entry by purporting to be a meter-reader, or where a competitor gains entry to a business firm's premises posing as a customer but in fact intending to steal the firm's trade secrets. "How [can we] distinguish ... the restaurant critic from the meter-reader impersonator? The answer can have nothing to do with fraud; there is fraud in [both] cases. It has to do with the interest that [the tort of trespass protects:] ... the inviolability of the person's property."²²³

According to the Seventh Circuit, ABC committed no trespass in the Desnick case because "[t]here was no invasion ... of any of the specific interests that the tort of trespass seeks to protect." The court noted that the test patients entered offices that were open to anyone who expressed a desire for ophthalmic services; the test patients

videotaped physicians engaged in professional, not personal, communications with strangers (the testers themselves); and the test patients did not disrupt the activities of the offices nor invade anyone's private space. Further, ABC did not publicize any "embarrassingly intimate details of anybody's life."²²⁴

Moreover,

[t]here was no eavesdropping on a private conversation; the testers recorded their own conversations with the Desnick Eye Center's physicians. There was no violation of the doctor-patient privilege. There was no theft, or intent to steal, trade secrets; no disruption of decorum, of peace and quiet; no noisy or distracting demonstrations.... Like testers seeking evidence of violation of anti-discrimination laws, the defendants' 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.²²⁵

In a broad defense of investigative TV reporting, the Seventh Circuit wrote in its concluding paragraph in *Desnick* that:

One further point about the claims concerning the making of the program segment, as distinct from the content of the segment itself, needs to be made. The Supreme Court in the name of the First Amendment has hedged about defamation suits, even when not brought by public figures, with many safeguards designed to protect a vigorous market in ideas and opinions. Today's "tabloid" style investigative television reportage, conducted by networks desperate for viewers in an increasingly competitive television market ... constitutes—although it is often shrill, one-sided, and offensive, and sometimes defamatory—an important part of that market. It is entitled to all the safeguards with which the Supreme Court has surrounded liability for defamation. And it is entitled to them regardless of the name of the tort²²⁶, and ... regardless of whether the tort suit is aimed at the content of the broadcast or the production of the broadcast. If the broadcast itself does not contain actionable defamation, and no established rights are invaded in the process of creating it (for the media have no general immunity from tort or contract liability²²⁷), then the target has no legal remedy even if the investigatory tactics used by the network are surreptitious, confrontational, unscrupulous, and ungentlemanly.²²⁸

Stating that "[w]e like Desnick's thoughtful analysis about when a consent to enter that is based on misrepresentation may be given effect,"²²⁹ the Fourth Circuit ruled that the Food Lion jury's trespass verdict could not be sustained on the ground of resume misrepresentation:

[I]f we turned successful resume fraud into trespass, we would not be protecting the

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interest underlying the tort of trespass—the ownership and peaceable possession of land.... 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.²³⁰

b. The Jury’s Finding that Dale and Barnett’s Breach of Loyalty Nullified Food Lion’s Consent to their Presence

Next, the Fourth Circuit addressed the jury’s second ground for finding that Dale and Barnett trespassed—that Dale and Barnett’s breach of loyalty nullified Food Lion’s consent to their presence. In North Carolina, noted the Fourth Circuit, the courts had ruled in *Miller v. Brooks*²³¹ that an authorized entry can be trespass if a wrongful act is done in excess and abuse of authorized entry.²³² The Fourth Circuit noted that while *Miller* involved a private home and involved some physical alteration of plaintiff’s property (installation of a camera), the general rule applied in the Food Lion case, at least regarding Dale, who worked in a North Carolina Food Lion store: though Food Lion consented to Dale’s entry to do her job, she exceeded this consent by videotaping in nonpublic areas of the store, against Food Lion’s interests.²³³

The Fourth Circuit observed that South Carolina, where Barnett worked for Food Lion, did not have a case comparable to *Miller v. Brooks*. But, said the court, under South Carolina caselaw, the law of trespass protects the peaceable enjoyment of property, and it is consistent with that rule to hold that consent to enter is nullified by a wrongful act that exceeds and abuses the consent to enter.²³⁴

When Dale and Barnett secretly videotaped areas of the stores not open to the public, said the Fourth Circuit, they committed an act directly adverse to Food Lion, breached their duty of loyalty, and committed a wrongful act in abuse of their authority to be on Food Lion’s property. Thus, the jury correctly found that Dale and Barnett’s breach of loyalty nullified Food Lion’s consent to their presence. Therefore, the Fourth Circuit upheld the jury’s trespass verdict.²³⁵

4. The North Carolina Unfair and Deceptive Trade Practices Act (UTPA)

North Carolina’s UTPA makes it unlawful to engage in “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.”²³⁶ The statute defines “commerce” to include “all business activities, however denominated” except for professional services rendered by a member of a learned profession.²³⁷ ABC argued that the UTPA did not apply here. Food Lion contended that the UTPA did apply here; specifically, Food Lion argued that Dale’s misrepresentations on her job applications were “deceptive acts” “in or affecting commerce” because they were made to further the production of *PTL*, a business activity.²³⁸

The Fourth Circuit ruled that the UTPA did not apply. Citing North Carolina case law, the court stated that the UTPA is not intended to apply to all wrongs in a business setting. Rather, the Act's primary purpose is to protect the consuming public. The Act confers a private cause of action on consumers aggrieved by unfair or deceptive business practices. Businesses are sometimes allowed to assert UTPA claims against other businesses since unfair trade practices involving only businesses can affect consumers. But a business may bring a UTPA claim against another business only when the businesses are either competitors, potential competitors, or engaged in commercial dealings with each other.²³⁹ In any event, said the court, the UTPA's fundamental purpose is consumer protection and courts always look to that purpose in deciding whether the Act applies.²⁴⁰

The Fourth Circuit noted that the District Court had found a UTPA violation because ABC is a business that engaged in deception. But, said the Fourth Circuit, that deception (Dale's job application misrepresentations) did not harm consumers. Instead, ABC presumably intended to benefit consumers by informing them of Food Lion's food handling misconduct. Further, ABC neither competed with Food Lion nor had any actual or potential business relationship with Food Lion. As a result, said the court, the North Carolina Supreme Court would hold that the UTPA would not apply here. Therefore, the Fourth Circuit reversed the District Court's judgment that ABC was liable under the UTPA.²⁴¹

5. The First Amendment

ABC argued that even if the District Court correctly ruled that state tort law covered Dale's and Barnett's conduct, the District Court erred in refusing to subject Food Lion's claims to any level of First Amendment scrutiny.²⁴²

The Fourth Circuit agreed with ABC that newsgathering implicates First Amendment interests. But the Fourth Circuit observed that in *Cohen v. Cowles Media Company*,²⁴³ the Supreme Court ruled 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."²⁴⁴ The Fourth Circuit observed further that "the media have no general immunity from tort or contract liability," quoting *Desnick v. American Broadcasting Companies*.²⁴⁵

a. Cohen v. Cowles Media Company

Cohen arose out of events preceding the 1982 Minnesota gubernatorial election.²⁴⁶ Shortly before the election, a Republican party activist (Flakne) discovered court records showing that the Democratic candidate for lieutenant governor had been arrested for two minor crimes about ten years earlier.²⁴⁷ Flakne then met with several other Republican activists including Cohen. The group believed that publication of

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these court records by the press would damage the Democratic party's chances of winning the governorship. The group decided that Cohen should release the court records because of his good rapport with the local media, and that he should retain anonymity in releasing the records.

Cohen gave the records to two newspaper reporters after the reporters promised not to disclose that Cohen was their source. Later, editors at each newspaper concluded that Cohen's name was an essential part of the story, so each newspaper published the story and named Cohen as the source. As a result, Cohen lost his job, and sued the two newspapers in a Minnesota state court for breaking the reporters' promise of confidentiality. Cohen alleged breach of contract and misrepresentation, and sought compensatory and punitive damages.²⁴⁸

The U.S. Supreme Court framed the issue as "whether the First Amendment prohibits a plaintiff from recovering damages, under state promissory estoppel law, for a newspaper's breach of a promise of confidentiality given to the plaintiff in exchange for information."²⁴⁹ The court held 5-4 that the First Amendment did not impose such a bar, and reversed the Minnesota Supreme Court.

First, said the U.S. Supreme Court, the application of state rules of law in state courts in a way that allegedly restricts First Amendment rights constitutes state action. Therefore, Cohen's promissory estoppel claim involved state action, implicating the First Amendment. Second, said the U.S. Supreme Court, two alternative lines of cases involving press freedom exist.

The first line of cases holds that if the press lawfully acquires truthful information about a matter of public importance, then the First Amendment bars the government from punishing publication of that information unless such punishment is needed "to further a state interest of the highest order."²⁵⁰ The second line of cases holds that a generally applicable law does not violate the First Amendment if its enforcement against the press has merely incidental effects on the press' ability to gather and report news.²⁵¹

The U.S. Supreme Court concluded that the *Cohen* dispute was controlled by the second line of cases. "As the cases relied on by [the *Star Tribune* and the *Pioneer Press*] recognize, the truthful information sought to be published must have been lawfully acquired. The press may not with impunity break and enter an office or dwelling to gather news."²⁵² It is "beyond dispute," said the Court, that "[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others."²⁵³

The U.S. Supreme Court reasoned that state promissory estoppel law is a law of general applicability that does not target the press; that holding the newspapers liable here for breach of promise would not punish them for publishing lawfully obtained truthful information because compensatory damages are not punishment; and that it

was not even clear that the newspapers had obtained Cohen's name lawfully (at least for purposes of publishing it) because the newspapers obtained his name only by making a promise which they did not perform. The First Amendment, said the court, does not give the press a constitutional right to disregard promises that would otherwise be enforced under state law. Since the second line of cases controlled, the First Amendment did not bar Cohen's lawsuit. The court remanded the case to the Minnesota Supreme Court for reconsideration of Cohen's promissory estoppel claim under state law.²⁵⁴

b. The Fourth Circuit's application of Cohen v. Cowles Media Company to the Food Lion dispute

The Fourth Circuit ruled that the torts which Dale and Barnett committed, breach of loyalty and trespass, "fit neatly into the *Cowles* framework."²⁵⁵ In other words, the common law rules recognizing these torts were rules of general applicability that did not target the press. Applying these torts to the media would have only an incidental effect on newsgathering.²⁵⁶ "We are convinced," said the Fourth Circuit, "that the media can do its important job effectively without resort to the commission of run-of-the-mill torts."²⁵⁷ The Fourth Circuit observed that the ABC News Policy Manual itself said that "news gathering of whatever sort does not include any license to violate the law."²⁵⁸

6. The Fourth Circuit's Conclusion Regarding ABC's Appeal

The Fourth Circuit affirmed the District Court's judgment that Dale and Barnett breached their duty of loyalty to Food Lion and trespassed against Food Lion. Consequently, the Fourth Circuit affirmed the \$2.00 in nominal damages that the jury had awarded against Dale and Barnett for these torts.

The Fourth Circuit reversed the fraud claim against all the ABC defendants. Since the District Court had awarded Food Lion punitive damages on its fraud claim alone, the Fourth Circuit reversed the punitive damage award.

B. Food Lion's Arguments in its Cross-Appeal

In its cross-appeal Food Lion argued that the District Court erred in refusing to allow it to use its non-reputational tort claims (fraud, trespass and breach of loyalty) to recover compensatory damages allegedly caused by *PTL*'s November 1992 Food Lion broadcast. As we noted in section II, Food Lion had claimed in the District Court that the broadcast harmed its reputation which in turn caused it to lose sales, profits and stock value.²⁵⁹ But the District Court ruled that these losses were not proximately caused by the non-reputational torts committed by ABC employees.²⁶⁰

The Fourth Circuit declined to rule on the proximate cause issue because it

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found that an overriding First Amendment principle barred the court from awarding damages to Food Lion based on the *PTL* broadcast.²⁶¹ Food Lion acknowledged that it did not sue ABC for defamation because, under *New York Times v. Sullivan*²⁶², winning such a suit required proof that the *PTL* broadcast contained a false statement of fact made with “actual malice.” Thus, Food Lion would have to prove ABC made the statement with knowledge that it was false or with reckless disregard as to whether it was true or false.²⁶³ But, said the Fourth Circuit, “Food Lion was not prepared to offer proof meeting the *New York Times* standard under *any* claim that it might assert.” (Emphasis in original.)²⁶⁴ Unable to satisfy the *New York Times* requirement, Food Lion “sought to ... recover defamation-type damages under non-reputational tort claims, without satisfying the stricter (First Amendment) standards of a defamation claim.”²⁶⁵ According to the Fourth Circuit, such an “end-run” around the First Amendment was barred by *Hustler Magazine v. Falwell*.²⁶⁶

In Food Lion’s cross-appeal, the Fourth Circuit interpreted *Hustler* to “confirm 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*.”²⁶⁷ Since Food Lion could not satisfy that standard, Food Lion could not recover publication damages from the *PTL* broadcast.²⁶⁸

The Fourth Circuit rejected Food Lion’s argument that *Cowles* rather than *Hustler* governed Food Lion’s claim for publication damages. Food Lion argued that *Cowles* allowed a plaintiff to recover—without meeting the constitutional requirements of a defamation action—economic losses for a newspaper’s publication of plaintiff’s identity in violation of a legal duty arising from a generally applicable law.²⁶⁹ Food Lion asserted that its claim for damages against ABC was like Cohen’s claim against Cowles Media Company, and not like Falwell’s claim against Hustler Magazine.²⁷⁰ But, said the Fourth Circuit, this argument fails because “according to *Cowles*, ‘constitutional libel standards’ apply to damage claims for reputational injury from a publication such as [*PTL*’s Food Lion program].”²⁷¹

The Fourth Circuit also rejected Food Lion’s argument that because ABC obtained the videotapes through unlawful acts (the torts of trespass and breach of loyalty), Food Lion was 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 have been sufficient to constitute an unlawful act, the intentional infliction of emotional distress, if state law standards of proof had applied. Notwithstanding the nature of the underlying act, the Court 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 56.²⁷²

Since Food Lion had to meet the *New York Times* standard to recover publication damages, and did not do so, the Fourth Circuit ruled that the District Court had correctly disallowed these damages (though the District Court based its ruling on proximate cause rather than First Amendment grounds).²⁷³

C. Summary of the Fourth Circuit’s Ruling in the Food Lion Case

The Fourth Circuit:

1. Reversed the District Court’s judgment that the ABC defendants committed fraud, and therefore reversed the District Court’s award to Food Lion of \$1,400 in compensatory damages and \$315,000 in punitive damages based on the fraud claim;
2. Affirmed the District Court’s judgment that Dale and Barnett trespassed on Food Lion’s property and breached their duty of loyalty to Food Lion, and affirmed the District Court’s award to Food Lion of \$2.00 in nominal damages based on those claims;
3. Reversed the District Court’s judgment that the ABC defendants violated the North Carolina UTPA; and
4. Affirmed the District Court’s ruling that Food Lion was not entitled to prove publication damages on its claims.²⁷⁴

VII. TOWARD BALANCING THE INTERESTS IN UNDERCOVER JOURNALISM CASES

The *Food Lion* case raises fundamental issues about the proper role of the press and the operation of tort law and the First Amendment. The U.S. Court of Appeals for the Fourth Circuit is the first federal appeals court to decide whether a news organization is liable in tort if its journalists lie on their job applications to obtain jobs at a company they wish to investigate.

After trial in this landmark case, the jury ruled that ABC had committed fraud, trespass and breach of loyalty when its reporters lied to obtain jobs at Food Lion grocery stores. The jury awarded small actual damages but awarded over \$5.5 million in punitive damages, which the judge remitted to \$315,000. Press response to the jury’s punitive award was swift and divergent, with press commentators expressing passionate views on such issues as whether reporters should ever use hidden cameras to get a story, whether reporters should ever use other kinds of deception to get a story, and even whether or not using a hidden camera *is* deceptive.

The Fourth Circuit’s decision, handed down almost two years after trial, reversed the jury’s finding of fraud and jettisoned all punitive damages, but upheld the

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jury's finding of trespass (with its corresponding verdict of \$1.00 in nominal damages) and breach of loyalty (with *its* corresponding verdict of \$1.00 in nominal damages). Regarding the fraud claim, the Fourth Circuit reasoned that Food Lion could not show that the damages it sought (its administrative costs of hiring) were caused by the reporters' misrepresentations, because the reporters did not lie about how long they would work at Food Lion.

The Fourth Circuit also held that the District Court had erred in refusing to subject Food Lion's claims to any level of First Amendment scrutiny. Referring to *Cohen v. Cowles Media Company*, the Fourth Circuit noted that news organizations are not exempt from common law rules of general applicability (including trespass and breach of loyalty). But when reputational damages are sought, the Fourth Circuit said the *New York Times v. Sullivan* standard applies and that *Hustler Magazine v. Falwell* prohibits an "end-run" around the First Amendment.

The *Food Lion* case was not appealed to the Supreme Court, so the Fourth Circuit's answers to the questions raised by the case are binding only in the Fourth Circuit and, of course, only on the facts of the case. What about an undercover news story about something less serious than the safety of the food supply? What if undercover reporters do substantial harm to persons or property? And will another court analyze fraud, trespass, consent and breach of loyalty in the same way as the Fourth Circuit did here?

In deciding whether the press should be subjected to tort liability for undercover newsgathering, courts might well consider a number of factors. First are the factors identified in journalists' ethics codes. The ethics codes of two professional journalist organizations take almost identical positions on the use of undercover newsgathering: that there is a rebuttable presumption against such newsgathering which can be overcome if three conditions exist—first, the story has significant public importance; second, there is no other way to obtain the story; and third, the surreptitious technique is explained to the audience.

We think several additional factors might also be considered, such as the following:²⁷⁵

1. What is the nature and severity of the wrongdoing?
2. Does the wrongdoing involve someone in a position of trust abusing a vulnerable individual who cannot readily protect him or herself (such as a child, a mentally or physically disabled person, an elderly person, or a prisoner)?
3. What are the purposes and goals of the person or organization being investigated/infiltrated? Are the purposes and goals primarily law-abiding or primarily criminal?
4. Did the undercover reporter enter a place not ordinarily open to the public?

(Did the undercover reporter invade a private space?)

5. If the organization's purposes and goals are primarily law-abiding, did the undercover reporter disrupt the organization's law-abiding activities?
6. Is the press the best societal agent to investigate the problem? For example, could the government investigate the problem just as well or better?²⁷⁶

One can imagine a set of possible scenarios in which the press was considering an undercover investigation. The scenarios fall on a continuum. At one end of the continuum, going undercover would probably not be justified, based on a consideration of the factors listed above, while at the other end, going undercover would arguably be justified.

For example, imagine two scenarios. In scenario one, a reliable source informs a reporter that a worker at a nuclear power plant is stealing crackers from the plant cafeteria and taking them home.²⁷⁷ In scenario two, a reliable source informs a reporter that a worker at a nuclear power plant is stealing plutonium from the plant and selling it to a terrorist organization. In the first scenario, the alleged wrongdoing is minor and probably does not justify undercover reporting. In the second scenario, the alleged wrongdoing is severe and would more likely justify undercover reporting. Yet in the second scenario, other factors might counsel against going undercover. For example, a reporter with little or no nuclear training, posing as an experienced nuclear worker, could readily disrupt the operations of a nuclear power plant and do serious harm.

What about the Food Lion case? Let's begin by considering the SPJ and RTNDA ethics codes. The first consideration is whether the story has significant public importance. It seems clear that a grocery store chain alleged to be selling out-of-date food to the public is a story with significant public importance.

The second SPJ/RTNDA ethics code consideration is whether there is another way to get the story. At least one commentator, relying on the views of a professor of food biology, thought there was no other way:

But was going undercover the best way to get the story? Probably. "You can't just go in and buy some food samples," says Kathryn Boor, professor of food microbiology in the department of food science at Cornell University. "Observation of practice is absolutely essential."

It's possible, of course, to test for the presence of specific bacteria like salmonella or E. coli in a food product. But because so many harmful organisms can infect food, a comprehensive search would not be limited to just a few categories. And even if a specific bacteria is isolated, testing cannot ascertain how it got there. Nor, says Boor, can testing determine the age of a piece of meat. "Observation in many ways is more effective," she says.²⁷⁸

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The third SPJ/RTNDA ethics code consideration is whether the surreptitious technique is explained to the audience. *PTL*'s Food Lion story did explain to the audience that *PTL* reporters had gotten hired by two Food Lion stores and that is how *PTL* obtained its hidden camera footage.²⁷⁹

Now let's consider the additional factors that we identified above. Regarding factor one (the nature and severity of the alleged or suspected wrongdoing), the alleged wrongdoing was the sale of out-of-date food to an unsuspecting public. Assuming that old food could cause sickness or even death to consumers, this is severe wrongdoing. Factor two (someone in a position of trust abusing a vulnerable individual, such as a child, disabled person, elderly person, or prisoner) is not involved here. Regarding factor three (purposes of the organization being investigated), Food Lion's purposes are primarily law-abiding. For example, ABC admitted that most of Food Lion's food was fresh. Food Lion is not an organization, such as the Ku Klux Klan, with a criminal purpose. Regarding factor four (whether an undercover reporter invaded a private space), Dale and Barnett entered areas of Food Lion stores not ordinarily open to the public. And one could argue that Dale and Barnett invaded the private space of the other Food Lion employees with whom they worked. However, there was no entry into anyone's private home; rather, one might regard an area of a food store not open to the public as quasi-private.²⁸⁰

Regarding factor five (disruption or other harm), Dale and Barnett were undertrained in food handling. Yet there was no clear evidence of disruption or other harm here. Judge Tilley found that Dale was an unsatisfactory employee at Food Lion and that neither Dale nor Barnett intended to faithfully perform the duties for which they were hired by Food Lion. But ABC claimed that Food Lion managers were pleased with both Dale and Barnett's work.

Finally, is the press the best societal agent to investigate the problem? Could the government investigate the problem just as well or better? Food Lion argued that problems with sanitation in food stores should be left to government inspectors. Yet government inspections at Food Lion stores were apparently rare²⁸¹, and *PTL*'s Food Lion broadcast indicates that government inspectors failed to discover some unsanitary practices there.

Investigative reporting has a long history in American journalism. Yet the law is clear, and properly so, that the press has no right to become a lawbreaker in the pursuit of news. The courts, informed by the First Amendment, by traditional common law principles including well-settled notions of fair play and property rights, and by ethical considerations developed by journalists themselves, must strike the appropriate balance between the rights of the press and the rights of those whom the press seeks to investigate.

Notes

1. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999). Prior decisions in the case are reported at 20 Media L. Rep. 2263 (M.D.N.C., Sep 28, 1992); 887 F.Supp. 811 (M.D.N.C., Mar 21, 1995); 165 F.R.D. 454 (M.D.N.C., Apr 19, 1996); 946 F.Supp. 420, (M.D.N.C., Aug 16, 1996); 24 Media L. Rep. 2431 (M.D.N.C., Sep 6, 1996); 951 F.Supp. 1211 (M.D.N.C., Nov 8, 1996); 951 F.Supp. 1217 (M.D.N.C., Nov 27, 1996); 951 F.Supp. 1224 (M.D.N.C., Nov 27, 1996); 951 F.Supp. 1233 (M.D.N.C., Nov 27, 1996); 964 F.Supp. 956 (M.D.N.C., May 9, 1997); 116 F.3d 472 (4th Cir., Jun 19, 1997); 1997 U.S. Dist. LEXIS 11344 (M.D.N.C., July 9, 1997); and 984 F.Supp. 923 (M.D.N.C., Aug 29, 1997).

Law review commentary on the Food Lion case includes David A. Logan, *Masked Media: Judges, Juries, and the Law of Surreptitious Newsgathering*, 83 IOWA L. REV. 161 (1997); Charles C. Scheim, *Trash Tort or Trash TV?: Food Lion, Inc. v. ABC, Inc., and Tort Liability of the Media for Newsgathering*, 72 ST. JOHN'S L. REV. 185 (1998); Clay Calvert, *The Voyeurism Value in First Amendment Jurisprudence*, 17 CARDOZO ARTS & ENT. L.J. 273 (1999); Cris Carmody, *Applying a "Persona Test" for Newsgathering Privilege to Food Lion v. Capital Cities/ABC*, 93 NW. U. L. REV. 1287 (1999); C. Thomas Dienes, *Protecting Investigative Journalism*, 67 GEO. WASH. L. REV. 1139 (1999); Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 GEO. WASH. L. REV. 1097 (1999); William E. Lee, *The Unusual Suspects: Journalists as Thieves*, 8 WM. & MARY BILL RTS. J. 53 (1999); John H. Fuson, *Protecting the Press from Privacy*, 148 U. PA. L. REV. 629 (1999); Jennifer L. Marmon, *Intrusion and the Media: An Old Tort Learns New Tricks*, 34 IND. L. REV. 155 (2000); Brad Snyder, *Protecting the Media from Excessive Damages: The Nineteenth-Century Origins of Remittitur and its Modern Application in Food Lion*, 24 VT. L. REV. 299 (2000); Diane Leenheer Zimmerman, *I Spy: The Newsgatherer Under Cover*, 33 U. RICH. L. REV. 1185 (2000); Erwin Chemerinsky, *Protect The Press: A First Amendment Standard for Safeguarding Aggressive Newsgathering*, 33 U. RICH. L. REV. 1143 (2000); Michael W. Richards, *Tort Vision for the New Millennium: Strengthening News Industry Standards as a Defense Tool in Lawsuits over Newsgathering Techniques*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 501 (2000); Merrit Jones, *First Amendment Protection for Newsgathering: Applying the Actual Malice Standard to Recovery of Damages for Intrusion*, 27 HASTINGS CONST. L.Q. 539 (2000); Richard A. Epstein, *Privacy, Publication, and The First Amendment: The Dangers of First Amendment Exceptionalism*, 52 STAN. L. REV. 1003 (2000); Susan M. Gilles, *Food Lion as Reform or Revolution: "Publication Damages" and First Amendment Scrutiny*, 23 U. ARK. LITTLE ROCK L. REV. 37 (2000); Enrique J. Gimenez, *Who Watches the Watchdogs?: The Status of Newsgathering Torts Against the Media in Light of the Food Lion Reversal*, 52 ALA. L. REV. 675 (2001).

2. The facts of the Food Lion case stated in this article are taken from the reported decisions in the case and other sources we cite in the article. Among the most useful such sources are two programs that ABC aired shortly after the jury's verdict. On the evening of Feb. 12, 1997, about seven weeks after the jury found ABC liable to Food Lion and three weeks after the jury awarded \$5.5 million in punitive damages to Food Lion, ABC News broadcast two programs devoted to the

Food Lion litigation and the issues raised in that case. The first was a “Special Edition” of Prime Time Live (“PTL”) called “Hidden Cameras, Hard Choices” and the second was a Nightline Viewpoint program called “Hidden Cameras and Hard Choices.”

In the Viewpoint series, which began about 1982, ABC News provides a forum to discuss its conduct with its critics. According to anchor Ted Koppel, in the Viewpoint series “we assist our critics in putting ourselves on the griddle.” The Viewpoint program about the Food Lion case was the 30th Viewpoint that ABC had broadcast. *See ABC News Nightline, Viewpoint: Hidden Cameras and Hard Choices* (ABC television broadcast, Feb. 12, 1997), transcript at 2.

ABC offers videotapes and transcripts of these two Feb. 12, 1997 programs to the public for sale. Due to the Food Lion litigation, ABC has not offered to sell either videotapes or transcripts of the Nov. 5, 1992 PTL segment on Food Lion (the broadcast that led to the litigation).

3. Food Lion brought claims against Capital Cities/ABC, Inc., as well as several ABC reporters and producers. For simplicity, we will often refer to the defendants simply as ABC.
4. About three and one-half years after Food Lion filed suit against ABC, Food Lion filed a pre-trial motion seeking to add a libel claim. But the court rejected the claim, ruling in essence that it had no factual basis. We discuss the libel claim further in section II.
5. *See* Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 511, 524 (4th Cir. 1999). We discuss all of Food Lion’s claims in detail in section II.
6. The law seeks to protect this interest with pure food statutes and the law of product liability.
7. The law seeks to protect this interest with the free speech and press clauses of the First Amendment.
8. The law seeks to protect this interest with tort and criminal rules prohibiting trespass.
9. The law seeks to protect this interest with tort and criminal rules prohibiting fraud.
10. The law seeks to protect this interest with agency concepts such as fiduciary duty and tort rules prohibiting breach of loyalty.
11. This is an interest that journalistic codes of ethics seek to protect. For American journalists, the main codes of ethics are the American Society of Newspaper Editors “Statement of Principles,” the Society of Professional Journalists “Code of Ethics,” and the Radio-Television News Directors Association “Code of Ethics and Professional Conduct.” We discuss these codes further in Section V.
12. We apologize to the reader for the length of our issue statement.
13. One commentator on the Food Lion case put the question this way:
“Let’s assume the story is very important, it’s a story of abuse of patients, serious public health. What sorts of things would ... be improper to do to get that story? Would [it be appropriate] to break into the premises at night? Would [it be] appropriate to jimmy the locks on the documents? Would [it be] appropriate to place a bug in the office of the president to get the story[?]”
The quote is from David Logan, a Professor of Law at Wake Forest University in North Carolina, who participated as an audience member in ABC News’ Viewpoint program about the Food Lion case. *ABC News Nightline, Viewpoint: Hidden Cameras and Hard Choices* (ABC television broadcast, Feb. 12, 1997), transcript at 11. Professor Logan published a law review article about the Food Lion case in 1997. *See* n. 1, *supra*.
14. 15 INTERNATIONAL DIRECTORY OF COMPANY HISTORIES 176-178 (1996).

15. “[I]n North Carolina, where Food Lion is sometimes the only supermarket in town, people tend to see it as a local rather than a global institution, one by which neighbors and friends are employed, one where they regularly shop for food and supplies.” Jonathan Yardley, *The Food Lion Jurors’ Reverberating Roar*, WASH. POST., Jan. 27, 1997, at C2.
16. *Davis v. Food Lion, Inc.*, 792 F.2d 1274 (4th Cir. 1986); *Pforr v. Food Lion, Inc.*, 851 F.2d 106 (4th Cir. 1988); *Lyle v. Food Lion, Inc.*, 954 F.2d 984 (4th Cir. 1992).
17. FLSA Section 7(a)(1), 29 U.S.C. § 207(a)(2) provides that:
[N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.
FLSA Section 16(b), 29 U.S.C. § 216(b) provides that:
Any employer who violates the provisions of ... section 207 ... shall be liable to the employee or employees affected in the amount of ... their unpaid overtime compensation ... and in an additional equal amount as liquidated damages.
18. *Tew v. Food Lion, Inc.*, 756 F.Supp. 238, 239 (E.D.N.C. 1991).
19. *Lyle v. Food Lion, Inc.*, 954 F.2d 984, 986 (4th Cir. 1992).
20. *See Tew v. Food Lion, Inc.*, 756 F.Supp. 238, 241 (E.D.N.C. 1991) (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946)).
21. *Davis v. Food Lion, Inc.*, 792 F.2d 1274 (4th Cir. 1986).
22. *See Lyle v. Food Lion, Inc.*, 954 F.2d 984, 985 (4th Cir. 1992).
23. “[By] December of 1991 ... [t]he UFCW had been trying unsuccessfully to organize Food Lion employees for more than a decade.” *Food Lion v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811, 814 (M.D.N.C. 1995).
24. *Id.*
25. *Longman v. Food Lion, Inc.*, 197 F.3d 675, 687 (4th Cir. 1999) (Murnaghan, J., dissenting).
26. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F.Supp. 811, 814 (M.D.N.C. 1995).
27. *Longman*, 197 F.3d at 678.
28. *See id.* at 680; Linda Brown Douglas, *Food Lion to Pay in Wage Case*, THE NEWS & OBSERVER (Raleigh, North Carolina), Aug. 4, 1993, at A1.
29. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F.Supp. 811, 813 (M.D.N.C. 1995). The Walt Disney Company acquired Capital Cities/ABC in early 1996. *Disney Closes Acquisition, Signals Interest in Another*, WALL ST. J., Feb. 12, 1996, at B3.
30. *Food Lion, Inc.*, 887 F. Supp.at 813. According to *PTL* anchor Sam Donaldson, journalists’ use of hidden cameras is inherently deceptive: “The use of a hidden camera carries with it some level of deception. First, because it is hidden. And second, because often, to get into position, we have to go places we couldn’t go openly if it were known we were from Prime Time.” *ABC News Prime Time Live, Special Edition: Hidden Cameras, Hard Choices* (ABC television broadcast, Feb. 12, 1997), transcript at 2.
In *PTL*’s first hidden camera story, two ABC News producers went undercover in a board and care home in Texas. They posed as mentally ill patients. The producers took pictures of what

anchor Sam Donaldson described as “shocking abuse.” *Id.* at 3.

Over the years, *PTL* has also used hidden cameras to document such stories as baggage handlers going through passengers’ luggage in the cargo hold of a plane, *id.* at 2; a televangelist pretending to heal people but actually tricking them, *id.*; dishonest car repairmen, *id.*; dishonest home repairmen, *id.*; veterans hospital staff neglecting patients, *id.*; members of Congress taking Caribbean vacations at taxpayers’ and lobbyists’ expense, *id.* at 3; day care center workers striking children, *id.* at 4; racial discrimination in the rental housing market, *id.* at 5; unsanitary kitchen practices in fast food restaurants, *id.*; and workers’ compensation claimants who appear to be healthy, *id.*

31. *Food Lion, Inc.*, 887 F.Supp. at 813.
32. *Id.* at 814.
33. *Id.*
34. Amy Singer, *Food, Lies and Videotape*, 57 AM. LAWYER 56, 58 (1997).
35. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F.Supp. 811, 814 (M.D.N.C. 1995).
36. Singer, *supra* note 34, at 58.
37. *Food Lion, Inc.*, 887 F. Supp.at 814.
38. Singer, *supra* note 34, at 58.
39. *Food Lion, Inc.*, 194 F.3d at 510.
40. Opening Brief for Appellants/Cross-Appellees Capital Cities/ABC, Inc. et al. at 3-4, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (No. 97-2492, 97-2564).
41. Singer, *supra* note 34, at 58.
42. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F.Supp. 811, 814 (M.D.N.C. 1995).
43. Opening Brief for Appellants/Cross-Appellees Capital Cities/ABC, Inc. et al. at 4, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (No. 97-2492, 97-2564).
44. *Food Lion, Inc.*, 887 F.Supp. at 814. One key reason for using hidden cameras is to obtain proof of wrongdoing that is difficult for the wrongdoer to refute. For example, in one case *PTL* reporters obtained jobs in a mental hospital and used hidden cameras to record staff members physically abusing patients. These reporters then informed the hospital’s ombudsman about the abuse, but the accused employees denied the accusations. According to *PTL* anchor Diane Sawyer, the ombudsman said to the *PTL* reporters involved (thinking they were hospital employees) “it’s your word against [the accused employees’] word.” But, noted Sawyer, *PTL* could prove the abuse because “we had the camera.” *ABC News Nightline, Viewpoint: Hidden Cameras and Hard Choices*, (ABC television broadcast, Feb. 12, 1997), transcript at 7, 8.
45. For example, UFCW in-house lawyer Nicholas Clark suggested that Dale seek employment as a meat wrapper, and arranged for her to go to a unionized food store where she would be shown and could practice the functions of a meat wrapper; Clark arranged for managers at unionized stores to write false letters of reference for Dale and Barnett; and Clark gave Dale and Barnett local addresses to claim as residences. People with no connection to ABC, journalism or unions also participated in deception in pursuit of the Food Lion story; for example, Dale’s dentist gave her a false letter of reference stating that she had been employed as his receptionist. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F.Supp. 811, 814-815 (M.D.N.C. 1995). In addition to Dale and Barnett’s job applications at Food Lion, ABC made “numerous other attempts to infiltrate Food Lion.” *Id.* at 815.

46. *Food Lion, Inc.*, 887 F.Supp. at 814-815. (M.D.N.C. 1995).
47. *Id.* at 815. Regarding why she wanted the Food Lion job, Dale wrote on her application, “I really miss working in a grocery store, and I love meat wrapping. I have heard that Food Lion is a great company. I would like to make a career with the company.” Singer, *supra* note 34, at 59.
48. *Food Lion, Inc.*, 887 F.Supp. at 815-816; *Food Lion*, 194 F.3d at 510.
49. *Food Lion, Inc.*, 951 F.Supp. at 1218.
50. *Food Lion, Inc.*, 887 F.Supp. at 816. Regarding why she wanted the Food Lion job, Barnett wrote on her application, “I am in the process of moving from Chicago to Myrtle Beach. I enjoy working with food and would like to work for Food Lion. I also enjoy working with people.” Singer, *supra* note 34, at 59.
51. *Food Lion, Inc.*, 887 F.Supp. at 816.
52. The actual number of total hours of hidden camera footage appears to be in some doubt. The District Court stated that “*PTL* reviewed more than 50 hours of hidden camera footage taken at the Food Lion stores by *PTL* agents,” 887 F.Supp. at 816, while the Court of Appeals stated that “Dale and Barnett recorded approximately 45 hours of concealed camera footage.” 194 F.3d at 511.
53. We discuss this issue in Section III.
54. One sign of this was when Diane Sawyer was seen walking through a Food Lion store near the ones where Dale had worked. A cameraman was walking backwards in front of her, filming with a camera hidden in his baseball cap. “The presence of a celebrity in a grocery store in the middle of nowhere was noteworthy....” Singer, *supra* note 34, at 59.
55. *Id.*
56. *Id.*
57. *Id.*; Opening and Answering Brief of Appellee/Cross-Appellant Food Lion at 2, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (No. 97-2492 and No. 97-2564). The North Carolina UTPA, N.C. Gen.Stat. § 75-1.1, provides:
 - (a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
 - (b) For purposes of this section, “commerce” includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.
 - (c) Nothing in this section shall apply to acts done by the publisher, owner, agent, or employee of a newspaper, periodical or radio or television station, or other advertising medium in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement and when the newspaper, periodical or radio or television station, or other advertising medium did not have a direct financial interest in the sale or distribution of the advertised product or service.
 - (d) Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim.
58. Singer, *supra* note 34, at 59.
59. *Food Lion, Inc.*, 20 Media L.Rep. at 2263.
60. U.S. Magistrate P. Trevor Sharp presided over the discovery process. U.S. District Judge N. Carlton Tilley, Jr. presided over the remaining aspects of the litigation, including the trial.

61. *Food Lion, Inc.*, 20 Media L.Rep. at 2263-2264.
62. *Id.* at 2264.
63. *Id.*, (quoting *Goldblum v. NBC*, 584 F.2d 904, 907 (9th Cir. 1979)).
64. *Food Lion, Inc.*, 20 Media L.Rep. at 2263, 2264 (M.D.N.C. 1992), (quoting *In re King World Productions, Inc.*, 898 F.2d 56, 59 (6th Cir. 1990)).
65. *Food Lion, Inc.* 887 F. Supp. at 816.
66. *Food Lion, Inc.*, 194 F.3d at 511.
67. *Longman*, 197 F.3d at 680.
68. Scott Andron, *Food Lion versus ABC*, QUILL, March 1997, at 15, 16. QUILL is a trade magazine published by the Society of Professional Journalists.
In the *PTL* broadcast, anchor Diane Sawyer summarized:
“Over and over again, we were told that for workers, Food Lion is a kind of pressure cooker. The employees all said the company pays good salaries and has excellent benefits, including profit sharing. But there’s a flip side, a time management policy called Effective Scheduling, which critics charge forces a lot of workers to finish the work on their own time.... Many employees told us that [the] pace [required by the Effective Scheduling system] is pounding. And since very little overtime is permitted, at the end of the day good workers were faced with an impossible choice: leave work unfinished, jeopardizing their jobs, or stay and finish, giving extra hours to the company without pay. It’s called working off the clock, and it’s illegal.”
Longman, 197 F.3d at 680.
69. *ABC News Prime Time Live, Special Edition: Hidden Cameras, Hard Choices* (ABC television broadcast, Feb. 12, 1997), transcript at 6.
70. *Id.* at 7.
71. *Food Lion, Inc.*, 887 F. Supp. at 816.
72. *ABC News Prime Time Live, Special Edition: Hidden Cameras, Hard Choices* (ABC television broadcast, Feb. 12, 1997), transcript at 7.
73. *Id.*
74. Kyle Marshall, *ABC Says Food Lion Recycles, Doctors Meat*, THE NEWS & OBSERVER (Raleigh, North Carolina), Nov. 6, 1992, at A1.
75. *Id.*
76. Scott Andron, *Food Lion Versus ABC*, QUILL, March 1997, at 16, 19. In September 1995, Food Lion did attempt to add a libel claim, but the Magistrate disallowed it. We discuss this later in this section and in section III.
77. Singer, *supra* note 34, at 59.
78. *Food Lion, Inc.*, 887 F. Supp. at 816.
79. *Longman*, 197 F.3d at 677, 680-681.
80. *ABC News Nightline, Viewpoint: Hidden Cameras and Hard Choices* (ABC television broadcast, Feb. 12, 1997). This statistic appeared on the broadcast but is not included in the transcript that ABC made available for sale to the public. The statistic was shown at the commercial break referred to on page 10 of the transcript.
81. *Id.*, transcript at 10. This figure was provided by Food Lion’s Communications Director, Chris Ahearn.

82. *State says it will increase inspections of Food Lions*, THE NEWS & OBSERVER (Raleigh, North Carolina), Nov. 11, 1992, at C10.
83. Food Lion also added producers Susan Barnett, Ira Rosen, and Richard Kaplan as defendants. Singer, *supra* note 34, at 60.
84. *Food Lion, Inc.*, 887 F.Supp. at 812.
85. *Id.* at 813.
86. *Food Lion, Inc.*, 165 F.R.D. at 457.
87. *Id.* at 457. During discovery in 1992 and 1993, ABC provided videotape footage to Food Lion from its hidden camera investigation. But ABC edited out all footage shot outside Food Lion stores, on the ground that this omitted footage was not relevant to Food Lion's lawsuit. ABC failed to notify Food Lion of the omitted footage until January 1994, when ABC provided the complete footage to Food Lion.

In September 1995, Food Lion moved for sanctions against ABC, contending that ABC's provision of the incomplete footage violated the federal discovery rules. As a sanction for ABC's discovery violation, Food Lion asked the court to waive the January 1994 deadline for requesting leave to amend its complaint. *Id.* at 454-457.
88. *Id.* In its motion for sanctions, Food Lion argued "that the original tapes may have been altered by ABC in ways not even now determined." The Magistrate responded that he had "carefully reviewed the reports of experts on this point ... and conclude[d] that Food Lion's 'evidence' of tampering is not remotely persuasive." *Id.* at 456.

The Magistrate found that ABC's editing of the tapes provided to Food Lion without disclosing this to Food Lion "was not a tactical attempt to hide or cover up damaging information." *Id.* at 458. But the Magistrate ruled that ABC's editing was a violation of federal discovery rules. *Id.* at 457. As a sanction for ABC's violation, the Magistrate allowed Food Lion to re-depose, at ABC's expense, any ABC employee regarding information on the out takes. *Id.*
89. *See Food Lion, Inc.*, 984 F.Supp. at 927.
90. *Food Lion, Inc.*, 194 F.3d at 511.
91. Singer, *supra* note 34, at 61.
92. Opening and Answering Brief of Appellee/Cross-Appellant Food Lion at 3 n.1, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (No. 97-2492 and No. 97-2564). During voir dire, the court dismissed prospective jurors who remembered the broadcast clearly from 1992. Scott Andron, *Food Lion versus ABC*, QUILL, March 1997, at 20.
93. Scott Andron, *Food Lion versus ABC*, QUILL, March 1997 at 19; Russ Baker, *In Greensboro: Damning Undercover Tactics as Fraud*, COLUMBIA JOURNALISM REVIEW, March/April 1997 at 31.
94. Baker, *supra* note 93, at 31.
95. Andron, *supra* note 93, at 19.
96. Baker, *supra* note 93, at 31 (According to Baker, Dale's and Barnett's story that they swore because the recording equipment felt uncomfortable "sounded like baloney to just about everyone in the courtroom. Reporters at the trial wondered why ABC didn't just own up and note that it's normal to be frustrated when reporters fail to visually document something they believe—from other evidence—to be true").
97. Singer, *supra* note 34, at 61.

98. *Id.* at 59.
99. *Id.*
100. Food Lion, Inc., v. Capital Cities/ABC, Inc., 887 F.Supp. 811, 816 (M.D.N.C. 1995).
101. Opening Brief for Appellants/Cross-Appellees Capital Cities/ABC, Inc. et al. at 5 n. 6, Food Lion v. Capital Cities/ABC, 194 F.3d 505 (4th Cir. 1999) (No. 97-2492 and No. 97-2564).
102. Food Lion, 887 F.Supp. at 816.
103. Food Lion, 194 F.3d at 511.
104. *See id.*; Food Lion, Inc. v. Capital Cities/ABC, Inc. 964 F.Supp. 956, 958 (M.D.N.C.1997).
105. Food Lion, 964 F.Supp. at 962-963.
106. *Id.* at 962.
107. *Id.* at 962 n. 4.
108. *Id.* at 963-966.
109. Singer, *supra* note 34, at 63; Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 512-514 (4th Cir. 1999).
110. Food Lion, 194 F.3d at 511.
111. Food Lion, Inc. v. Capital Cities/ABC, Inc., No. 6:92CV00592, 1997 U.S. Dist. LEXIS 11344, at *16-*17 (M.D.N.C., July 9, 1997) (In July 1997, Judge Tilley ruled that “the actions which comprise the UTPA violation are also part of the same actions which comprise the jury’s finding of fraud. Pursuant to [North Carolina] case law, [citations], Plaintiff must choose between treble damages under the UTPA and compensatory and punitive damages under the fraud claim. Plaintiff will have 10 days from the entry of this Opinion to file a motion stating its election”).
112. Food Lion, 194 F.3d at 511.
113. *Id.*
114. Singer, *supra* note 34, at 64 (The jury’s punitive damage award figure (\$5,545,750) is about 3,955 times the jury’s compensatory damage award figure (\$1,402 after Food Lion elected fraud damages rather than UTPA damages).
The jury’s deliberations about punitive damages were contentious. The jurors initially expressed widely divergent views on the amount to award. Juror Lois Marie Bozman wanted to award \$1 billion. Juror Debra Falls wanted to award \$1.00. Jurors Tony Kinton and Stephen Craven wanted to award nothing. The debate became personal, with jurors insulting each other. On Friday, the fifth day of deliberations as to punitive damages, the jury told Judge Tilley they were deadlocked. The Judge persuaded them to return after the Martin Luther King, Jr., holiday weekend. On their return, they were able to reach a verdict, when juror Kinton (who initially favored an award of zero) suggested a compromise of \$5.5 million. The jury’s final punitive award was \$4 million against Capital Cities/ABC, Inc., \$1.5 million against ABC Holding Co., \$35,000 against Richard Kaplan, \$10,750 against Ira Rosen, and \$0 against Lynne Dale and Susan Barnett).
115. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 511 (4th Cir. 1999) (“The truth of the Prime Time Live broadcast was not an issue in [this] litigation”); Court’s Instructions—Punitive Damages at 7, Food Lion, Inc. v. Capital Cities/ABC, Inc., Civil Action No. 6:92CV00592 (M.D.N.C. Jan. 22, 1997) (Judge Tilley’s jury instructions included the following: “For purposes of your deliberations, the broadcast must be assumed to be true...”).
116. *ABC News Nightline, Viewpoint: Hidden Cameras and Hard Choices* (ABC television broadcast,

- Feb. 12, 1997), transcript at 3-4.
117. *See* Food Lion, Inc. v. Capital Cities/ABC, Inc., 984 F.Supp. 923, 929-931 (M.D.N.C. 1997) (Defendant Capital Cities/ABC also filed a post-trial motion, requesting judgment as a matter of law on all claims. The ground for this motion was that Capital Cities was found liable for fraud based on the actions of one of their attorneys, Jonathan Barzilay. Judge Tilley denied this motion on the ground that Capital Cities had not properly made the argument during trial).
118. *Id.* at 923.
119. *Id.* at 927-929.
120. BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996).
121. *Id.* at 574-575. (The BMW “indici[a] of a punitive damage award’s excessiveness” include: (1) the degree of reprehensibility of the defendant’s conduct, (2) the ratio of the punitive damage award to the actual harm inflicted on the plaintiff and (3) the relation between the punitive damage award and the civil or criminal penalties that could be imposed for comparable misconduct).
122. Food Lion, Inc. v. Capital Cities/ABC, Inc. 984 F.Supp. 923, 940 (Specifically, the court required Food Lion to remit all punitive damages above \$250,000 for ABC, above \$50,000 for Capital Cities, above \$7,500 for Richard Kaplan and above \$7,500 for Ira Rosen).
123. *Id.* at 931.
124. *Id.* at 932.
125. For example, The Atlanta Constitution, The Buffalo News, The Chicago Sun-Times, The Detroit News, and USA Today all published editorials supporting ABC’s undercover investigation of Food Lion. Columnists Clarence Page and Carl Rowan published columns supporting ABC. Journalists Stuart Taylor Jr., John Seigenthaler, David L. Hudson Jr. and Paul McMasters also wrote pieces supporting ABC.
- See Jurors Cast Another Veil Over Truth*, ATLANTA CONSTITUTION, Jan. 24, 1997, at A16; *Jury’s Award in Food Lion Case Makes World Safer for Unscrupulous Businesses*, BUFF. NEWS, Jan. 24, 1997, at B2; *Grocery Store Verdict Sacks Free Speech*, CHI. SUN-TIMES, Jan. 23, 1997, at 27; *Rotten Verdict*, DETROIT NEWS, Jan. 25, 1997, at C6; *Food Lion Collects The \$, But Public Pays The Price*, USA TODAY, Jan. 23, 1997, at 14A; Clarence Page, *RIP: Undercover Journalism*, CHI. TRIB., Jan. 29, 1997, at 17; Carl Rowan, *Deceit at Times Necessary To Expose Bad*, HOUS. CHRON., Jan. 29, 1997, at 24; Stuart Taylor Jr., *Smashing Undercover Journalism*, LEGAL TIMES, Feb. 17, 1997, at 23; John Seigenthaler and David L. Hudson Jr., *Going Undercover—The Public’s Need To Know Should Be More Important*, QUILL, March 1997, at 17; Paul McMasters, *It Didn’t Have To Come To This—Both Food Lion And ABC Could Have Taken Different Approaches*, QUILL, March 1997, at 18.
126. For example, see *Ends, Means and Food Lion*, CHI. TRIB., Jan. 30, 1997, at 18; A.M. Rosenthal, *On My Mind: Reporters With Masks*, N.Y. TIMES, Dec. 27, 1996, at A39; Paul Starobin, *Why Those Hidden Cameras Hurt Journalism*, N.Y. TIMES, Jan. 28, 1997, at A21; Jonathan Yardley, *The Food Lion Jurors’ Reverberating Roar*, WASH. POST, Jan. 27, 1997, at C2.
127. The middle ground included supporting hidden cameras but criticizing undercover reporting, or criticizing some aspect of ABC’s conduct in the Food Lion case but also criticizing the punitive damage verdict. For example, see *Journalistic Tactics on Trial*, CHRISTIAN SCIENCE MONITOR, Jan. 31, 1997, at 20; *Food Lion Roars*, CLEVELAND PLAIN DEALER, Jan. 28, 1997, at 8B; *The Hidden-Camera Verdict*, DES MOINES REGISTER, Jan. 27, 1997, at 5; *Public, Media Both Must*

- Preserve Ideas Marketplace*, HOUS. CHRON., Feb. 3, 1997, at 18; *Food Lion vs. ABC—A Narrow Case And Unjust Verdict*, MINNEAPOLIS STAR-TRIB., Jan. 29, 1997, at 12A; *High Stakes—ABC News May Have Dissembled To Get A Story, But Is \$5.5 Million Fair Punishment?*, NEWSDAY, Jan. 25, 1997, at A20; *Hidden Cameras Shouldn't Have To Go*, ROCKY MOUNTAIN NEWS (Denver, Colo.), Jan. 24, 1997, at 48A; *Chilling the First Amendment*, ST. LOUIS POST-DISPATCH, Jan. 25, 1997, at 34; *Muckraking Limits—Jury Sends \$5.5 Million Message In ABC Case*, SAN DIEGO UNION-TRIB., Jan. 24, 1997, at B6; *Suspect News Gathering is Not Good Journalism*, THE SEATTLE TIMES, Jan. 24, 1997, at B4; Steve Geimann, *It's Fair to Ask Whether the Ends Justify the Means—Abuse of TV Images Erodes Public Confidence*, QUILL, March 1997, at 43.
128. Seigenthaler and Hudson Jr., *supra* note 125 at 17 (“[Sinclair’s] findings ... upset the nation, outraged President Teddy Roosevelt, and led to the Congressional passage of the Food and Drug Act of 1906”).
129. McMasters, *supra* note 125, at 19.
130. *Id.*
131. Seigenthaler and Hudson Jr., *supra* note 125 at 17.
132. *Jury’s Award in Food Lion Case Makes World Safer for Unscrupulous Businesses*, *supra* note 125 at B2.
133. Page, *supra* note 125, at 17.
134. McMasters, *supra* note 125, at 19.
135. *Jury’s Award in Food Lion Case Makes World Safer for Unscrupulous Businesses*, *supra* note 132, at B2 (“Going undercover is often the only way for journalists to illustrate unsavory practices ... that companies hide and often deny unless citizens get a first-hand account”); Page, *supra* note 125, at 17 (“Undercover reporting was never meant to replace other ... forms of investigative journalism. But it tells some stories better than any other form”).
136. Page, *supra* note 125, at 17 (“Newspapers helped pioneer the sending of black and white “testers” to pose as house shoppers and expose racial bias in the residential real estate industry. You could call such practices lying, fraud, misrepresentation and trespassing, if you wanted to be lawyerly about it. Yet, testing also has become a respected and routine practice for federal regulators”); Taylor, *supra* note 125, at 23 (“Deception [is] routinely employed ... by civil rights testers....”).
137. Rosenthal, *supra* note 126, at A39.
138. Starobin, *supra* note 126, at A21 (Paul Starobin argued that Nellie Bly’s undercover approach was not necessary to get her story and that “[t]he greatest muckrakers shunned such ruses. Ida Tarbell brought down John D. Rockefeller’s Standard Oil monopoly by the tireless bird-dogging of court records and other documents—a righteous tradition later upheld by I. F. Stone and honored these days by the crusaders who are following the money to expose the fund-raising practices of Newt Gingrich and Bill Clinton. And Fortune magazine didn’t need to go undercover for its 1993 report on the exploitation of child labor in garment-industry sweatshops in New York City and Los Angeles”).
139. Rosenthal, *supra* note 126, at A39. Rosenthal, however, expressed the hope that the fraud and trespass verdicts against ABC would be overturned on appeal. “I don’t think a contradiction lurks there [because] [n]ews decisions belong in the newsroom, not the courtroom.” The newsroom is “the only place [news decisions] can be made day to day and stay within the First Amendment.” *Id.*

140. “If another newspaper, magazine or TV team sent its employees into our homes or offices undercover or planted cameras or mikes in them, we would leap into ecstasies of rage.” *Id.*
141. *Id.*
142. *Ends, Means and Food Lion*, CHI. TRIB., Jan. 30, 1997, at 18. “It was that realization, more than anything else, that motivated the Tribune and most other major newspapers two decades ago to swear off so-called ‘undercover’ reporting that involved intentional deception or misrepresentation.” *Id.*
143. Starobin, *supra* note 126, at A21.
144. Washington Post Columnist Jonathan Yardley called ABC’s Food Lion story “cheap entertainment masquerading as investigative reporting” and “trash TV.” Jonathan Yardley, *The Food Lion Jurors’ Reverberating Roar*, WASH. POST, Jan. 27, 1997, at C2.
145. Jonathan Yardley argued that “the issue of [ABC’s] illegal actions ... was, in fact, the essence of the [Food Lion case against ABC]” and that “[a]s the jurors in [that case] said, there’s a right way to cover the news and a wrong way.” *Id.*
146. But the trial court observed that ABC’s News Policy Manual states that “[i]n the course of investigative work, reporters should not disguise their identity or pose as someone with another occupation without prior approval of ABC News Management” and that “news gathering of whatever sort does not include any license to violate the law.” *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F.Supp. 811, 814 (M.D.N.C. 1995).
147. CODES OF PROFESSIONAL RESPONSIBILITY 169-170 (Rena A. Gorlin ed., 3d ed. 1994).
148. *Id.* at 173.
149. *Id.*
150. SPJ website, http://www.spj.org/ethics_code.asp (last visited Feb. 13, 2002).
151. *Id.*
152. *See* CODES OF PROFESSIONAL RESPONSIBILITY 175 (Rena A. Gorlin ed., 3d ed. 1994).
153. SPJ website, http://www.spj.org/ethics_code.asp (last visited Feb. 13, 2002).
154. *Id.*
155. *See, e.g.*, *Pickering v. Board of Education*, 391 U.S. 563 (1968).
156. *PTL* anchor Diane Sawyer observed that “We had talked to some of our sources at the beginning of our investigation. But we didn’t feel that sources alone were sufficient for a story of this seriousness.” *ABC News Prime Time Live, Special Edition: Hidden Cameras, Hard Choices* (ABC television broadcast, Feb. 12, 1997), transcript at 6.
157. Diane Sawyer stated that “We told [viewers in the Nov. 5, 1992 *PTL* Food Lion broadcast] that PrimeTime producers posed as applicants for work in over 20 different stores. Two of our producers were hired and worked in three different stores. And that’s how we obtained the hidden camera footage.” *Id.*
158. RTNDA website, <http://www.rtna.org/about/rtna.html> (last visited Feb. 13, 2002).
159. *Id.*
160. University of Missouri Journalism School website, <http://web.missouri.edu/~jourvs/rtna.html> (last visited Feb. 13, 2002).
161. RTNDA website, <http://www.rtna.org/ethics/coe.html> (last visited Feb. 13, 2002).
162. University of Missouri Journalism School website, <http://web.missouri.edu/~jourvs/rtna.html#1987> (last visited Feb. 13, 2002).

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163. RTNDA website, <http://www.rtna.org/ethics/coe.html> (last visited Feb. 13, 2002).
164. *Id.*
165. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 511 (4th Cir. 1999).
166. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999).
167. *Id.* at 512-514.
168. *Id.* at 524.
169. *Id.* Judge Niemeyer concurred with the court of appeals majority on all issues other than whether ABC committed fraud.
170. *Id.* at 512.
171. *Id.*
172. *Id.*
173. These were “routine costs associated with any new employee, including the costs of screening applications, interviewing, completing forms, ... entering data into the payroll system [and] estimated costs attributable to trainees for lower productivity and customer dissatisfaction.” *Id.*
174. *Id.*
175. Opening and Answering Brief of Appellee/Cross-Appellant Food Lion at 15, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (No. 97-2492 and No. 97-2564).
176. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 512 (4th Cir. 1999).
177. *Id.* at 513.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.* at 526.
182. *Id.* at 513-514.
183. *Id.* at 514.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at 515.
190. *Id.* at 515-516, 524.
191. *Id.* at 515-516.
192. *Id.* at 516.
193. Opening Brief for Appellants/Cross-Appellees Capital Cities/ABC, Inc. et al. at 20, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (No. 97-2492, 97-2564).
194. Opening and Answering Brief of Appellee/Cross-Appellant Food Lion at 12, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (No. 97-2492 and No. 97-2564).
195. *See Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 516 (4th Cir. 1999), citing *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 964 F.Supp. 956 at 959 n.2 (M.D.N.C. 1997).
196. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 516 (4th Cir. 1999).
197. *Id.*
198. *Id.*

199. *Id.*
200. *Id.*
201. *Id.* at 516-517.
202. *Id.* at 518.
203. *Id.* at 519.
204. *Id.*
205. *Id.* at 517.
206. *Id.*, (quoting *Miller v. Brooks*, 472 S.E.2d 350 (N.C.App. 1996)).
207. *Id.* Section 892B, subsection (2) provides that “[i]f 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.”
208. 681 N.Y.S.2d 511 (App.Div.1998).
209. In *Shiffman*, a CBS television reporter gained entry to a physician’s (Dr. Shiffman) private medical office by posing as a patient using a false identity and false insurance card. The physician sued CBS and Blue Cross for trespassing, and the defendants argued that the physician had consented to the reporter’s presence. The New York Appellate Division ruled that the consent defense failed because “consent obtained by misrepresentation or fraud is invalid.” *Id.* at 512. The court’s opinion does not explain what the reporter was investigating or what Blue Cross’s role in the investigation was.

For the proposition that “consent obtained by misrepresentation or fraud is invalid”, the court cited Restatement (Second) Torts § 330, comment g, and a New York case. Section 330 (“Licensee Defined”), provides that “[a] licensee is a person who is privileged to enter or remain on land only by virtue of the possessor’s consent.” Comment g provides that “[o]ne who obtains the consent of the owner, either by way of invitation or permission, by a conscious misrepresentation of any fact upon which he knows that the consent is conditioned, as the identity of the entrant or the purpose of the entry, is not a licensee.”

The court also ruled that New York and Federal free speech guarantees conferred no privilege to trespass, and that Dr. Shiffman could not recover punitive damages because there was no evidence that the trespass was motivated by malice. *Id.*

210. 828 F.Supp. 745 (N.D.Cal. 1993).
211. 421 So.2d 109 (Ala. 1982).
212. In *Baugh*, a CBS television news crew, with a video camera, accompanied a District Attorney’s victim assistance team when the team visited a crime victim’s (Ms. Baugh) home. The crime victim told the cameraman she agreed to him filming the visit “as long as I was not going to be on anyone’s television.” The cameraman replied, “Okay.” The videotape of the visit was included in a CBS news program called “Street Stories” that was broadcast in April 1992. Ms. Baugh sued CBS in a California federal court for trespassing and various other torts, and CBS argued that she had consented to the entry. The court ruled that the consent defense was valid and dismissed plaintiff’s trespass claim.

The court rejected plaintiff’s argument that CBS exceeded the scope of her consent. The court said:

In general, California does recognize a trespass claim where the defendant exceeds the scope of the consent. Those cases involve defendants whose intrusion on the land

exceeds the scope of the consent given, however. In this case, the camera crew acted within the scope of Baugh's consent while they were on the premises. If they exceeded the scope of Baugh's consent, they did so by broadcasting the videotape, an act which occurred after they left Baugh's property and which cannot support a trespass claim. See *Mangini v. Aerojet-General Corp.*, 230 Cal.App.3d 1125, 1141, 281 Cal.Rptr. 827 (1991) ("A trespass may occur if the party, entering land pursuant to a limited consent, i.e., limited as to purpose or place, proceeds to exceed those limits by divergent conduct on the land of another.")

Id. at 756-757. The court also rejected plaintiff's argument that her consent was fraudulently induced and therefore invalid. The court stated that "[n]o California cases indicate that the consent must be knowing or meaningful.... In a case where consent was fraudulently induced, but consent was nonetheless given, plaintiff has no claim for trespass." *Id.* at 757. The court noted that where plaintiff's consent was induced by fraud, plaintiff may have a fraud claim. Ms. Baugh had included fraud in her claims against CBS, and the court allowed that claim to proceed. *Id.* at 757-758.

In *Martin*, a hurricane damaged a homeowner's (Ms. Martin) home. The home was insured, and the insurance company hired a contractor to repair the home. The contractor did repairs, but the homeowner claimed that they were inadequate to remedy the problem. The homeowner sued her insurer on various theories, including trespass. The Alabama Supreme Court ruled that a trespass occurs only if defendant intrudes on plaintiff's possession without plaintiff's consent. Further, such consent negates a trespass even if plaintiff gave consent under a mistake of facts, or because of defendant's fraud. But consent does not negate a trespass if defendant entered under a license for some particular purpose and went beyond that purpose. The court ruled that in *Martin's* case, the allegations of her complaint were insufficient to establish trespass, because she consented "to the entry on her property for purposes of repairing her house." The fact that she did not consent to the particular contractor hired by her insurer did not establish a trespass. *Id.* at 110, 111.

213. 44 F.3d 1345 (7th Cir. 1995).

214. The Seventh Circuit noted that Plaintiffs' claims fell into two classes. The first class arose from the content of the *PTL* broadcast and had only one claim (defamation). The second class arose from the means by which ABC had obtained the information used in the broadcast and had four claims: that defendants trespassed when the test patients entered the eye clinic's offices; that defendants invaded the privacy of the eye clinic and its physicians; that defendants violated federal and state statutes regulating electronic surveillance; and that defendants committed fraud by gaining access to the Chicago office by means of a false promise that they would present a "fair and balanced" picture of the eye clinic's operations and would not use "ambush" interviews or undercover surveillance. *Id.* at 1349-1351.

215. *Id.* at 1348.

216. *Id.* at 1348-1349.

217. The Seventh Circuit noted that the record on appeal was limited to the complaint and an accurate transcript of the *PTL* eye-clinic story. *Id.* at 1347.

218. *Id.* at 1351-1353.

219. *Id.* at 1351.

220. *Id.*
221. The court cites *Martin v. Fidelity & Casualty Company*, *supra* note 211, as an example.
222. *Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345, 1351 (7th Cir. 1995).
223. *Id.* at 1352.
224. *Id.* at 1352-1353.
225. *Id.*
226. *Id.* at 1355 (*citing* *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988)).
227. *Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345, 1355 (7th Cir. 1995) (*citing* *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) and *Le Mistral, Inc. v. Columbia Broadcasting System*, 61 A.D.2d 491, 402 N.Y.S.2d 815 (1978)).
228. *Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345, 1355 (7th Cir. 1995).
229. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 517 (4th Cir. 1999).
230. *Id.* at 518.
231. 123 N.C.App.20, 472 S.E.2d 350 (N.C.App.1996).
232. *Miller* involved an estranged married couple. The wife, who claimed she had consent to enter her husband's house, had a private detective install a video camera in her husband's bedroom. In the husband's suit for trespass, the North Carolina Court of Appeals ruled that even if the wife had the husband's consent to enter the house, it was a jury question whether the wife's and detective's entries exceeded the scope of consent. *Id.* at 355.
233. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 519 (4th Cir. 1999).
234. *Id.*
235. *Id.*
236. N.C. Gen.Stat. § 75-1.1(a).
237. N.C. Gen.Stat. § 75-1.1(b).
238. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 519 (4th Cir. 1999).
239. *Id.* at 519-520.
240. *Id.* at 520.
241. *Id.*
242. *Id.*
243. 501 U.S. 663 (1991).
244. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 520 (4th Cir. 1999) (*quoting* *Cohen v. Cowles Media Company*, 501 U.S. 663, 669 (1991)).
245. 44 F.3d 1345, 1355 (7th Cir. 1995). In *Desnick*, the seventh circuit cited *Cohen v. Cowles Media Company* for this proposition. *See* 501 U.S. 663, 669-670 (1991).
246. *Cohen v. Cowles Media Company*, 501 U.S. 663, 665 (1991).
247. The records also showed that the first charge (unlawful assembly) was later dismissed and that the second charge (petty theft) resulted in a conviction that was later vacated.
248. The newspapers argued that the First Amendment barred Cohen's lawsuit. The trial court ruled that there was no state action and so rejected that argument. The jury found that the newspapers had breached their confidentiality contracts with Cohen and made misrepresentations to Cohen. Consequently the jury awarded him \$200,000 in compensatory damages for breach of contract, and \$500,000 in punitive damages based on misrepresentation.
- The Minnesota Court of Appeals affirmed the compensatory damage award but reversed the

punitive damage award, ruling that there was no misrepresentation since the reporters had intended to perform their promises of confidentiality.

The Minnesota Supreme Court reversed the compensatory damage award. First, the court ruled that a source and a reporter do not ordinarily believe that a promise of confidentiality is a legally binding contract; rather, both parties understand that such a promise is given as a moral commitment. Thus the reporters' promises of confidentiality to Cohen were not contracts. Second, the court addressed whether Cohen might have a promissory estoppel claim. The court found problematic promissory estoppel's requirement that injustice can be avoided only by enforcing the promise. Resolving that issue here, said the court, necessarily implicated the First Amendment, because in deciding whether it would be unjust not to enforce the promise, the court would have to weigh the same considerations that are weighed for whether the First Amendment has been violated, and this would require the court to balance the newspapers' First Amendment right to publish against Cohen's interest in enforcing the promise of confidentiality. The court concluded that awarding damages for breach of the promise of confidentiality to Cohen would chill public debate and violate the newspapers' First Amendment rights.

For a detailed description of the factual background of the *Cohen* case, see Daniel A. Levin and Ellen Blumberg Rubert, *Promises of Confidentiality to News Sources after Cohen vs. Cowles Media Company: A Survey of Newspaper Editors*, 24 GOLDEN GATE UNIVERSITY LAW REVIEW 423 (1994).

249. *Cohen v. Cowles Media Company*, 501 U.S. 663, 665 (1991).

250. *Id.* at 669 (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979)). After stating this rule, the court identified three decisions as being in this first line of cases: *Smith v. Daily Mail Publishing Co.*, *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) and *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). The court described these as cases that held insufficient the asserted government interest in preventing publication of truthful, lawfully acquired information.

In *Smith*, a West Virginia statute made it a crime for a newspaper to publish, without juvenile court approval, the name of any youth charged as a juvenile offender. Two local newspapers obtained the name of a juvenile homicide defendant by listening to the police band radio frequency and interviewing eyewitnesses. The newspapers published the juvenile's name without juvenile court approval, and were indicted for violating the statute. The U.S. Supreme Court held the statute unconstitutional, ruling that the First Amendment barred the government from punishing a newspaper for truthful publication of an alleged juvenile offender's name, lawfully acquired, because press freedom outweighed the state's interest in protecting the anonymity of juvenile defendants. The court suggested that since the statute applied only to newspapers, it was underinclusive. Further, the court noted that many states had found ways to achieve anonymity of juvenile defendants without imposing criminal penalties on the press (such as cooperation between juvenile courts and newspaper editors), suggesting that the statutory purposes could be achieved with means other than criminal liability that were less restrictive of press freedom.

In *Florida Star*, a Florida statute made it a crime for any instrument of mass communication to publish or broadcast the name of a sexual offense victim. A local newspaper obtained the name of a rape victim by reading a publicly available police report. The newspaper published the rape victim's name, and she sued the newspaper in a state court, alleging that the newspaper had

negligently violated the statute. The U.S. Supreme Court, relying on *Smith*, ruled that the First Amendment barred the imposition of damages on the newspaper. The court stated that since the statute applied only to instruments of mass communication, it was underinclusive. Further, the court suggested that the statutory purposes could be achieved with means other than civil liability that were less restrictive of press freedom.

In *Landmark Communications*, a Virginia statute made it a crime to divulge information regarding proceedings before a state judicial review commission that was authorized to hear complaints about state judges' disability or misconduct. A local newspaper published an article that reported on a pending inquiry by the commission and identified the judge whose conduct was being investigated. The newspaper was convicted of violating the statute. The U.S. Supreme Court held the statute unconstitutional, ruling that the First Amendment barred the government from punishing third persons who were strangers to confidential commission proceedings for divulging truthful information regarding such proceedings, because freedom of speech outweighed the state's interest in protecting the reputation of judges or the institutional reputation of courts.

251. *Cohen v. Cowles Media Company*, 501 U.S. 663, 669 (1991). After stating this rule, the court identified eight decisions as being in this second line of cases: *Branzburg v. Hayes*, 408 U.S. 665 (1972) (holding that the First Amendment does not relieve a reporter of the citizen's obligation to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (holding that the First Amendment does not immunize the press from the application of the copyright laws); *Associated Press v. NLRB*, 301 U.S. 103 (1937) (holding that the First Amendment does not immunize the press from the application of the National Labor Relations Act); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946) (holding that the First Amendment does not immunize the press from the application of the Fair Labor Standards Act); *Associated Press v. U.S.*, 326 U.S. 1 (1945) and *Citizen Publishing Co. v. U.S.*, 394 U.S. 131 (1969) (holding that the First Amendment does not immunize the press from the application of the antitrust laws); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (holding that a city ordinance imposing a license tax on people distributing religious material door-to-door violated the First Amendment, but stating in dictum that the press is not "free from all financial burdens of government") and *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) (holding that a use tax on the cost of paper and ink products used in producing publications violated the First Amendment, but stating in dictum that the government can subject newspapers to generally applicable economic regulations).
252. *Cohen v. Cowles Media Company*, 501 U.S. 663, 669 (1991).
253. *Id.* at 670 (citing *Associated Press v. NLRB*, 301 U.S. 103, 132-133 (1937)).
254. On remand, the Minnesota Supreme Court unanimously ruled that the jury's compensatory damage award was sustainable on a promissory estoppel theory and affirmed that award. *Cohen v. Cowles Media Company*, 479 N.W.2d 387 (1992).
255. *Food Lion, Inc.*, 194 F.3d 505, 521 (4th Cir. 1999).
256. *Id.*
257. *Id.*
258. *Id.* at 521 n. 5.
259. *Id.* at 511, 522.

260. “Food Lion’s lost profits and lost sales were not proximately caused by Defendants’ tortious activities. Food Lion’s lost sales and profits were the direct result of diminished consumer confidence in the store.” *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 964 F.Supp. 956, 962-963 (M.D.N.C. 1997).
261. *Food Lion, Inc.*, 194 F.3d 505, 522 (4th Cir. 1999).
262. 376 U.S. 254 (1964).
263. “The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” *Id.* at 279-280.
264. *Food Lion, Inc.*, 194 F.3d 505, 522 (4th Cir. 1999).
265. *Id.*
266. 485 U.S. 46 (1988). The *Hustler* case arose out of a parody that *Hustler Magazine* published involving minister and conservative activist Jerry Falwell. *Campari Liqueur* had published a series of ads in which celebrities were interviewed about their “first time.” The text of the ads made it clear that the celebrity was discussing his or her first experience sampling *Campari*, rather than his or her first experience having sex. Thus the ads played on the sexual double-entendre of the phrase “first time.”
- The November 1983 issue of *Hustler Magazine* included a parody of a *Campari* ad, directed at Falwell. The parody contained Falwell’s name and photograph and was entitled “Jerry Falwell talks about his first time.” The parody included what purported to be an interview with Falwell in which he stated that his “first time” was during a drunken incestuous rendezvous with his mother in an outhouse. In small print at the bottom of the page, the ad contained the disclaimer, “ad parody—not to be taken seriously”, and the magazine’s table of contents listed the ad as “Fiction; Ad and Personality Parody.”
- When the November issue went on sale, Falwell filed a federal diversity action against the magazine and its publisher, Larry Flynt, seeking damages for libel, invasion of privacy and intentional infliction of emotional distress. At the close of the evidence, the District Court dismissed the invasion of privacy claim. On the libel claim, the jury found against Falwell, finding specifically that a reasonable person would not believe the parody described actual facts about Falwell. But on the intentional infliction of emotional distress claim, the jury ruled in Falwell’s favor and awarded him \$100,000 in compensatory and \$100,000 in punitive damages. The Fourth Circuit affirmed.
- The U.S. Supreme Court reversed, holding that where a public figure or public official sues for intentional infliction of emotional distress based on a publication such as the *Hustler* parody of Falwell, the plaintiff must show that the publication contains a false statement of fact made with “actual malice.” Since Falwell was a public figure and the jury found that a reasonable person would not believe the parody described actual facts about Falwell, Falwell failed to prove that the parody contained a false statement of fact. Therefore, he could not recover for intentional infliction of emotional distress. 485 U.S. at 56-57.
267. *Food Lion, Inc.*, 194 F.3d 505, 523 (4th Cir. 1999).
268. *Id.*
269. *Id.*

270. *Id.*
271. *Id.* “[*Cohen v. Cowles*] is not a case like *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), 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* at 671.
272. *Food Lion, Inc.*, 194 F.3d 505, 523-524 (4th Cir. 1999).
273. *Id.* at 524.
274. *Id.*
275. Additional factors might come into play in deciding whether to launch an undercover investigation, such as whether the source is reliable, whether the undercover reporter could influence the story by his or her presence in the organization, and whether the reporter could do harm by posing as someone he or she is not.
276. “60 Minutes” producer Don Hewitt suggested that investigative journalism is needed because government regulators sometimes fail to discover, or even care about, wrongdoing. “[W]e [at 60 Minutes] discovered that blood and urine labs in Chicago were offering kickbacks to Medicaid clinics that sent their lab work to them. Nobody gave a damn. The government couldn’t have cared less. We went in there with the Chicago Better Government Association, showed what was going on and the government closed them down. The government should have closed them down before we got there.” *ABC News Nightline, Viewpoint: Hidden Cameras and Hard Choices* (ABC television broadcast, Feb. 12, 1997), transcript at 7.
277. The scenario is not completely farfetched. In *Banks v. Industrial Claim Appeals Office*, 794 P.2d 1062 (Colo. App. 1990), an employee at a nuclear weapons plant in Colorado filed a workers’ compensation claim after she was injured in a fight between herself and another employee whom she had accused of stealing crackers from the plant cafeteria.
278. Singer, *supra* note 34, at 65.
279. Diane Sawyer noted that “We told you back in 1992, that Prime Time producers posed as applicants for work in over 20 different stores. Two of our producers were hired and worked in three different stores. And that’s how we obtained the hidden camera footage.” *ABC News Prime Time Live, Special Edition: Hidden Cameras, Hard Choices* (ABC television broadcast, Feb. 12, 1997), transcript at 6.
280. The U.S. Supreme Court has ruled that under the U.S. Constitution, corporations have lesser privacy rights than individuals. “While they may and should have protection from unlawful demands made in the name of public investigation, ... corporations can claim no equality with individuals in the enjoyment of a right to privacy.... They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favours from government often carry with them an enhanced measure of regulation.... [L]aw-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.” *U.S. v. Morton Salt Co.*, 338 U.S. 632 at 652 (1950).
281. Evidence of this is contained in the following exchange between moderator Ted Koppel and Food Lion’s Communications Director Chris Ahearn during ABC’s “Viewpoint” broadcast about the Food Lion story:
- Chris Ahearn: ... [E]very single day there is an investigator and inspector in at least

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one of our stores. We are in 14 states. We have about 1,200 stores and there are inspectors from health departments, from agriculture departments every single day in one or more of our stores....

Ted Koppel: So, any given store might expect to see an inspector once every two and a half years?

Chris Ahearn: Well, we also have our own internal auditors, as well.

ABC News Viewpoint: Hidden Cameras and Hard Choices (ABC television broadcast, Feb. 12, 1997), transcript at 10.