

## WHO WATCHES THE WATCHDOGS?: THE STATUS OF NEWSGATHERING TORTS AGAINST THE MEDIA IN LIGHT OF THE *FOOD LION* REVERSAL

Investigative reporters . . . are the guard dogs of society, but the trouble with guard dogs is that they sometimes attack with equal fervor the midnight burglar and the midday mailman.<sup>1</sup>

### INTRODUCTION

The media have always been deemed informers of the public, a "Fourth Estate" obligated to protect and educate the masses with regard to the conduct of the officials who represent and affect them and the organizations created to facilitate such representation.<sup>2</sup> This power, however, is often misconstrued in the shrouded legal arena that newsgathering torts occupy. The informational capacity of the media often transcends its intended reportorial nature and instead is broadened into a creative, instigating power. The role of the media is to report the news, to inform. It is not intended to "make" or "create" the news.

The rise of intrusions during newsgathering, in conjunction with new technology, makes the media more invasive than ever before.<sup>3</sup> "Moreover, most commentators agree that the increase in media intrusions is the result of increasing competition for ratings and profits rather than an increasing desire to serve the public interest."<sup>4</sup> As the media have begun to blur the distinction between news reporting and news making, the privacy rights that remain unavoidably intertwined with the media's limited constitutional protection have begun to suffer.

Part I of this Comment will examine the lack of First Amendment protection for newsgathering and differentiate the often confused (or ignored) protection provided to publication. "[P]ress freedom is not

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1. MICHAEL J. ARLEN, *THE CAMERA AGE: ESSAYS ON TELEVISION* 172-73 (1981).

2. See Paul A. LeBel, *The Constitutional Interest in Getting the News: Toward a First Amendment Protection from Tort Liability for Surreptitious Newsgathering*, 4 WM. & MARY BILL RTS. J. 1145, 1153 (1996) (explaining how the media serve the important public function of "informing the public about the behavior of others, in affecting the conduct of public officials . . . and in deterring wrongful conduct by both public . . . and private [figures].").

3. Lyrisa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 179 (1998).

4. See *id.* (citing JAY BLACK ET AL., *DOING ETHICS IN JOURNALISM* 161 (3d ed. 1997)).

freedom from law but freedom to act independently. It consists of independence in publication judgments, not privilege to engage in conduct."<sup>5</sup> This Comment will establish the premise that no constitutional right to protection for surreptitious newsgathering exists, nor should there, through a review of the seminal cases dealing with the ever-increasing collisions between privacy rights and newsgathering. The freedom of the press is not absolute. The Supreme Court has repeatedly stated that the media's unabashed right to speak and publish does not provide the same veil with regard to gathering information.<sup>6</sup> In Part II, the Comment will discuss and analyze the *Food Lion* rulings at both the trial and appellate level. This portion will examine and deconstruct the reasoning of both courts. Part III of the Comment will review the current status of the most-widely used, although relatively unsuccessful, newsgathering torts that have developed and examine the reasons behind their frighteningly high failure rate. Lastly, Part IV will focus on the tort of intrusion, the most applicable of the privacy torts, and the need for its resurrection. It is the contention of this Comment that while tort law theoretically subjects intrusive journalists to liability for a variety of offenses, these torts inevitably sacrifice privacy interests when an accommodation must be made with gathering news.<sup>7</sup>

### I. THE GREAT DANE: NO PRIVILEGE, NO IMMUNITY

The constitutional issue at the heart of civil actions arising out of surreptitious newsgathering is what role the First Amendment raises when state law claims are brought against the media for newsgathering misconduct.<sup>8</sup> "Beyond question, the role of the media is important; acting as the 'eyes and ears' of the public, they can be a powerful and constructive force, contributing to remedial action in the conduct of public business."<sup>9</sup> Newsgathering is often difficult, expensive and time-consuming. Thus, "the organized media are often in a better position than the public to observe closely and document the events and

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5. Randall P. Bezanson, *Means and Ends and Food Lion: The Tension Between Exemption and Independence in Newsgathering by the Press*, 47 EMORY L.J. 895, 897 (1998).

6. See generally *Pell v. Procunier*, 417 U.S. 817 (1974) (refusing to remove a ban that prevented a journalist from conducting face-to-face interviews with inmates); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (holding that the First Amendment is not a reportorial defense in refusing to testify before a grand jury); *Zemel v. Rusk*, 381 U.S. 1 (1965) (holding that the First Amendment does not guarantee to the press a right of access to information that is not available to the public); *Associated Press v. United States*, 326 U.S. 1 (1945) (holding that the First Amendment does not invalidate every incidental burden on the press resulting from the enforcement of statutes).

7. See Lidsky, *supra* note 3, at 193.

8. See David A. Logan, *Masked Media: Judges, Juries and the Law of Surreptitious Newsgathering*, 83 IOWA L. REV. 161, 189 (1997).

9. *Houchins v. KQED, Inc.*, 438 U.S. 1, 8 (1978).

institutions. . . . [O]nly by vigorous newsgathering can the media play the [important] role contemplated by the Framers."<sup>10</sup>

Still, the First Amendment is not a provider but instead a protector. "[T]he First Amendment protects the right to *contribute to*, rather than *receive from*, the available pool of information."<sup>11</sup> Accepting this premise, newsgathering assumes no more an important status than that of any individual exercising their First Amendment rights.

The media's ability to publish is no more dependent on access to information than the ordinary person's right to speak. . . . [A]llowing the media to engage in tortious behavior imposes costs upon the public whose interests the media is claimed to serve[,] [f]orcing the public, ostensibly in its own interest, to subsidize newsgathering. . . .<sup>12</sup>

For almost three-quarters of a century, the media have argued that they should be entitled to immunity from state tort law. The argument was first addressed in *Associated Press v. National Labor Relations Board*,<sup>13</sup> which involved the firing of an employee of the Associated Press ("AP") who later filed a grievance through his union claiming that the AP was engaging in unfair labor practices against employees active in union organizing.<sup>14</sup> The AP argued that it could not tolerate bias or prejudice, which would stymie its mission to maintain objectivity, on the part of its writers.<sup>15</sup> Premising its defense on this mission, the AP suggested that the First Amendment thus precluded government interference in its employment decisions.<sup>16</sup> The Supreme Court disagreed:

The business of the Associated Press is not immune from regulation because it is an agency of the press. The 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. He must answer for libel. He may be punished for contempt of court. He is subject to the anti-trust laws. Like others he must pay equitable and nondiscriminatory taxes on his business.<sup>17</sup>

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10. Logan, *supra* note 8, at 170-71.

11. Mark Weidemaier, *Balancing, Press Immunity, and the Compatibility of Tort Law with the First Amendment*, 82 MINN. L. REV. 1695, 1716 (1998).

12. *Id.* at 1717.

13. 301 U.S. 103 (1937).

14. *Associated Press*, 301 U.S. at 123.

15. *Id.* at 116-17.

16. *Id.* at 115.

17. *Id.* at 132-33 (footnotes omitted).

After this initial decision, "the Supreme Court rejected press entreaties for absolute protection from generally applicable laws in a range of contexts, including antitrust and antidiscrimination laws."<sup>18</sup> More important to this discussion, the Court has considered these same arguments in the newsgathering context and expressly denied them.

### A. Supreme Court Decisions

#### 1. *Branzburg v. Hayes*

In *Branzburg v. Hayes*,<sup>19</sup> the Court initially addressed pre-publication conduct of the press.<sup>20</sup> In *Branzburg*, the Courier-Journal in Louisville, Kentucky ran a story written by Branzburg, a journalist, describing in detail his observations of two local residents synthesizing hashish from marijuana.<sup>21</sup> The sources claimed that the residents earned almost \$5,000 in three weeks from their activities.<sup>22</sup> The article additionally included a photograph of a pair of hands working above a laboratory table with a substance identified as hashish.<sup>23</sup> It further stated that the journalist had made a promise to the two hashish makers not to identify them.<sup>24</sup> After being subpoenaed by a grand jury, the journalist appeared but declined to identify the hashish makers, citing Kentucky's reporters' privilege status, the First Amendment, and the Kentucky Constitution.<sup>25</sup> The trial court's rejection of these contentions was affirmed in the Kentucky Court of Appeals.<sup>26</sup>

The Supreme Court then rejected the reporter's attempt to shield disclosure under a reporter's privilege based upon the fear that forcing revelation would cause future sources to refuse to provide newsworthy information "to the detriment of the free flow of information protected by the First Amendment."<sup>27</sup> The Court found no evidence that requiring disclosure would prevent or create a significant constriction on the

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18. Logan, *supra* note 8, at 171-72 (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 391 (1973); *Associated Press v. United States*, 326 U.S. 1, 7 (1945)) (footnotes omitted).

19. 408 U.S. 665 (1972).

20. *Branzburg*, 408 U.S. at 679-82.

21. *Id.* at 667.

22. *Id.*

23. *Id.*

24. *Id.* at 667-68.

25. *Branzburg*, 408 U.S. at 668.

26. *Id.*

27. *Id.* at 680.

flow of news.<sup>28</sup> Stating that the public interest in “possible future news from sources” does not outweigh the public interest in investigating and prosecuting criminal activity reported by such sources,<sup>29</sup> the Court held that the media have no “constitutional right of special access to information not available to the public generally.”<sup>30</sup> Thus, the “First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability,” and the reporter was forced to testify.<sup>31</sup> The First Amendment “does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons.”<sup>32</sup>

The Court has consistently remained true to the tenet, recognized in *Branzburg*, that the media have no special right to gather the news.<sup>33</sup> Still, many argue that the *Branzburg* decision only addressed “the impact of governmental requirements on the press and not the impact of private parties through civil actions.”<sup>34</sup>

## 2. Cohen v. Cowles Media Co.

In *Cohen v. Cowles Media Co.*,<sup>35</sup> however, the Court directly addressed the issue of private party suits brought against the media.<sup>36</sup> Cohen was a public relations operative working for the Republican nominee in the 1982 Minnesota gubernatorial race.<sup>37</sup> Cohen gave court records concerning another party’s candidate for Lieutenant Governor to two reporters after receiving promises from the reporters that they would keep his name confidential.<sup>38</sup> Nonetheless, the editors later insisted that the source of the information was an essential aspect of the

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28. *Id.* at 693.

29. *Id.* at 695.

30. *Branzburg*, 408 U.S. at 684.

31. *Id.* at 682.

32. *Id.* at 691-92.

33. *See Snapp v. United States*, 444 U.S. 507 (1980) (holding that the CIA may prevent publication of plaintiff’s book detailing his experiences with the CIA without their consent based on an agreement previously signed by the employee); *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (holding that the media have no special right to access a county jail even in attempting to verify allegations of abuse); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (holding that an action for misappropriation based on a television station’s filming and broadcasting of plaintiff’s entire “human cannonball” act was not precluded by the First Amendment).

34. 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, 197 (1998).

35. 501 U.S. 663 (1991).

36. *Cohen*, 501 U.S. at 667-68.

37. *Id.* at 665.

38. *Id.*

story and subsequently published the story with Cohen prominently named as the source.<sup>39</sup> When Cohen was fired, he sued the newspapers for violating the confidentiality agreement and was originally awarded \$200,000 in compensatory damages and \$500,000 in punitive damages.<sup>40</sup> The Minnesota Supreme Court reversed.<sup>41</sup>

Citing authority preventing punishment for publication when a newspaper “lawfully obtains truthful information about a matter of public significance[,]” the newspaper attempted to wrap itself in this constitutionally protected doctrine.<sup>42</sup> The Court did not refute the newspaper’s assertion that the publication of the material warranted protection.<sup>43</sup> “Instead, the Court recognized that the newsgathering activity, and not the publication itself, was the focus of [Cohen’s] claim.”<sup>44</sup> Because the newspaper obtained the information only after making, and subsequently breaking, a promise of confidentiality, the controlling principle was that the press must comply with laws of general application even if their enforcement “ha[d] incidental effects on its ability to gather and report the news. . . . The press may not with impunity break and enter an office or dwelling to gather news.”<sup>45</sup> In finding that promissory estoppel was a law of general applicability, the Court held that “enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.”<sup>46</sup>

Significantly, the Court rejected the newspaper’s proposition that Cohen’s claim was a blatant attempt to circumvent the First Amendment protections imposed by *New York Times Co. v. Sullivan*<sup>47</sup> and its

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39. *Id.* at 666.

40. *Cohen v. Cowles Media Co.*, 445 N.W.2d 248, 262 (Minn. Ct. App. 1989) (affirming the compensatory damage award for breach of contract but setting aside the punitive damage award by stating that Cohen did not prove fraud and that the remaining claims did not involve conduct egregious enough to support a punitive damage award), *modified*, 457 N.W.2d 199 (Minn. 1990), *rev’d*, 501 U.S. 663 (1991).

41. *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 203-05 (Minn. 1990) (affirming the punitive damages questions but applying promissory estoppel rather than breach of contract in supporting the trial court’s awarding of compensatory damages, although it still reversed the compensatory award on First Amendment grounds).

42. *Cohen*, 501 U.S. at 668 (quoting *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979) (preventing the prosecution of a newspaper that correctly identified a juvenile homicide suspect)); *see also* *Florida Star v. B.J.F.*, 491 U.S. 524, 536 (1989) (holding that the First Amendment precludes civil liability for the publication of “lawfully obtained” information).

43. *Cohen*, 501 U.S. at 669.

44. Tracy Dreispul, *Circumventing Sullivan: An Argument Against Awarding Punitive Damages for Newsgathering Torts*, 103 DICK. L. REV. 59, 68 (1998) (citing *Cohen*, 501 U.S. at 669).

45. *Cohen*, 501 U.S. at 669.

46. *Id.* at 670.

47. 376 U.S. 254 (1964).

progeny.<sup>48</sup> Justice White, writing for the majority, distinguished the *Times* line of cases in that Cohen sought damages for his lost employment and earning capacity, not for publication damages relating to reputation or state of mind.<sup>49</sup> By failing to attribute to newsgathering the same constitutional protection afforded publication, the Court was able to displace the newspaper's First Amendment interests and establish civil liability for the media as "a cost of acquiring newsworthy material to be published at a profit."<sup>50</sup> Recognizing that the media have no special right to invade the rights and liberties of others, these cases make it apparent that the Supreme Court will refuse to instinctively insulate the media from newsgathering injuries, even if the resulting story is both newsworthy and truthful.

### B. Lower Court Decisions

#### 1. Dietemann v. Time, Inc.

In *Dietemann v. Time, Inc.*,<sup>51</sup> tort liability finally attached to undercover newsgathering.<sup>52</sup> Dietemann was a disabled veteran who practiced healing via the use of clay, minerals, and herbs.<sup>53</sup> Telling Dietemann that they had been sent there by a friend, two undercover reporters from *Life* magazine gained entry into the veteran's home where they believed that Dietemann was running a fraudulent medicinal healing practice.<sup>54</sup> One reporter used a small, hidden camera to photograph Dietemann while he diagnosed the falsified ailment of the other reporter, who transmitted the conversation to another *Life* employee from a small radio in her purse.<sup>55</sup> The additional *Life* magazine employee and two government officials recorded the conversation from a vehicle parked outside.<sup>56</sup> The police then arrested Dietemann for practicing medicine without a license and *Life* magazine ran the story, supported by photos taken with the undercover camera, in an exposé on medical quackery.<sup>57</sup> Dietemann pleaded no contest on the criminal charges but sued Time, Inc. (the owner of *Life*) for damages, without challenging

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48. Logan, *supra* note 8, at 174.

49. *Cohen*, 501 U.S. at 671.

50. *Id.* at 670.

51. 449 F.2d 245 (9th Cir. 1971).

52. *Dietemann*, 449 F.2d at 249-50.

53. *Id.* at 245.

54. *Id.* at 246.

55. *Id.*

56. *Id.*

57. *Dietemann*, 449 F.2d at 245-46.

the truthfulness of the story.<sup>58</sup> The trial court awarded Dietemann \$1,000 in general damages.<sup>59</sup>

In upholding the verdict, the Ninth Circuit first rejected Time, Inc.'s claim that the Constitution protected its newsgathering activities from civil liability.<sup>60</sup> In determining that the hidden devices used by the reporters were dispensable, the court stated:

Investigative reporting is an ancient art; its successful practice long antedates the invention of miniature cameras and electronic devices. The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime.<sup>61</sup>

Additionally, the court rejected the contention that the subsequent publication of the information, even if improperly acquired, constitutionally protected an attack on the preceding tort.<sup>62</sup> The Ninth Circuit squarely rejected this argument by holding that defamation law was not applicable "in determining liability for intrusive conduct antedating publication."<sup>63</sup> The court further stated that *Times* and its progeny "strongly indicate[] that there is no First Amendment interest in protecting [the] news media from [liability for its] calculated misdeeds."<sup>64</sup>

Lastly, the court determined that civil liability for newsgathering would not "chill" the press in their investigative reporting.<sup>65</sup> To the contrary, the court held that a granting of any sort of immunity would simply encourage media conduct that would "grossly offend[] ordinary men."<sup>66</sup>

## 2. *Desnick v. American Broadcasting Companies, Inc.*

As ostensibly as *Dietemann* seemed to prevent any sort of newsgathering privilege or immunity, the case of *Desnick v. American*

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58. *Id.* at 247.

59. *Id.*

60. *Id.* at 249.

61. *Id.* (footnotes omitted).

62. *Dietemann*, 449 F.2d at 249-50.

63. *Id.* at 250.

64. *Id.*

65. *Id.*

66. *Id.*

*Broadcasting Companies, Inc.*<sup>67</sup> is the strongest and most frequently cited support for such a privilege or immunity. The opinion of the Seventh Circuit, authored by Judge Posner, who has been described as “no pro-press patsy,”<sup>68</sup> focused on both tort analysis and First Amendment application, both of which are important here.<sup>69</sup>

The Desnick Eye Center (“Eye Center”) was a chain of clinics that performed cataract operations.<sup>70</sup> An ABC News producer had contacted Dr. Desnick, the clinic’s owner, requesting permission to interview some of the clinic’s workers for a story that ABC was working on concerning major providers of cataract surgery.<sup>71</sup> The producer assured Desnick that the segment would cover numerous eye clinics, that neither “ambush” interviews nor undercover surveillance would be used, and that the report would be “fair and balanced.”<sup>72</sup>

Based upon these reassurances, Desnick allowed an ABC film crew into his main office in Chicago to film a cataract operation and to interview personnel.<sup>73</sup> However, the producer also secretly dispatched seven reporters, equipped with hidden cameras, to Desnick clinics in other states in order to pose as patients.<sup>74</sup> The eventual story, run on ABC’s *PrimeTime Live*, was highly critical of Desnick’s clinics and implied that the clinics targeted older patients in an attempt to recommend, perform, and then charge the clients for what were deemed unnecessary procedures.<sup>75</sup>

The Eye Center and two of the interviewed employees named in the broadcast sued ABC for defamation and claimed that the newsgathering methods of the seven undercover reporters constituted trespass and invasion of privacy.<sup>76</sup> Additionally, the company alleged that ABC committed fraud by gaining access to the Chicago office through false promises.<sup>77</sup> The district judge dismissed the complaint and the Court of Appeals for the Seventh Circuit affirmed with regard to ABC’s newsgathering activities.<sup>78</sup>

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67. 44 F.3d 1345 (7th Cir. 1995).

68. Stuart Taylor, *Bad Food, Bad Taste, Bad Verdict; Huge Punitive Damages Against ABC in Food Lion Case Are Unwarranted*, *Fulton County Daily Rep.*, Feb. 7, 1997, available in LEXIS, News Library, Fulton File.

69. See *Desnick*, 44 F.3d at 1345-55.

70. *Id.* at 1347.

71. *Id.*

72. *Id.* at 1348.

73. *Id.*

74. *Desnick*, 44 F.3d at 1348.

75. *Id.*

76. *Id.* at 1347.

77. *Id.* at 1348.

78. *Id.* at 1355.

Judge Posner recognized that there is no "journalists' privilege to trespass," and that, normally, consent procured by misrepresentation is invalid.<sup>79</sup> Still, Judge Posner determined that the "specific interests that the tort of trespass seeks to protect" can provide situations in which consent may be deemed effective despite any fraud.<sup>80</sup> Because ABC's undercover reporters had only entered office areas accessible to any patient, there was no "disruption" of the normal business, violation of any doctor-patient privilege, nor revelation of details regarding anyone's privacy.<sup>81</sup> As such, ABC was not guilty of trespass because there had been no "interference with the ownership or possession of land."<sup>82</sup>

Judge Posner disposed of Desnick's privacy claims because "no intimate personal facts" about any of the plaintiffs were revealed.<sup>83</sup> On the fraud claims, the court decided that the false promises that enabled the ABC reporters to gain access to obtain the videotape did not rise to the state-required level of "particularly egregious" in stating:

[Investigative journalists] break their promise[s], as any person of normal sophistication would expect. If that is "fraud," it is the kind against which potential victims can easily arm themselves by maintaining a minimum of skepticism about journalistic goals and methods. . . . It would be different, [here], if the false promises were stations on the way to taking Desnick to the cleaners.<sup>84</sup> An elaborate artifice of fraud is the central meaning of a scheme to defraud through false promises. The only scheme here was a scheme to expose publicly any bad practices that the investigative team discovered, and that is not a fraudulent scheme.<sup>85</sup>

Although Judge Posner dismissed all of Desnick's newsgathering claims on non-constitutional grounds, he still elaborated on possible First Amendment considerations.<sup>86</sup> The opinion stated that the media were entitled to all the necessary safeguards promulgated in the Su-

79. *Desnick*, 44 F.3d at 1351 (citing *Prahl v. Brosamle*, 295 N.W.2d 768, 780-81 (Wis. Ct. App. 1980); *LeMistral, Inc. v. Columbia Broad. Sys.*, 402 N.Y.S.2d 815 (N.Y. App. Div. 1978)).

80. *Desnick*, 44 F.3d at 1352.

81. *Id.* at 1352-53.

82. *Id.* at 1353.

83. *Id.*

84. See Logan, *supra* note 8, at 180-81 n.125 (stating that "[c]ontrary to Judge Posner's view, ABC's carefully planned infiltration could well be characterized as 'stations on the way to taking Desnick to the cleaners.' See BLACK'S LAW DICTIONARY 660 (6th ed. 1990) (defining 'fraud' as 'an intentional perversion of the truth for the purpose of inducing another in reliance upon it to part with some valuable thing . . . or to surrender a legal right')").

85. *Desnick*, 44 F.3d at 1354-55.

86. *Id.* at 1355.

preme Court's defamation jurisprudence in order to "protect a vigorous market in ideas and opinions," regardless of whether the tort is aimed at the content of the broadcast or its production.<sup>87</sup> Absent defamation or a violation of an established right, Judge Posner noted that a disgruntled plaintiff would have no recourse, even though the reports are "often shrill, one-sided, and offensive . . . [and the investigative tactics] used by the network are surreptitious, confrontational, unscrupulous, and ungentlemanly."<sup>88</sup>

## II. *FOOD LION, INC. V. CAPITAL CITIES/ABC, INC.*<sup>89</sup>

The *Food Lion* case arose after the November 5, 1992 airing of a *PrimeTime Live* broadcast that was sharply critical of Food Lion's labor and food handling practices.<sup>90</sup> The broadcast, which was hosted by Diane Sawyer, prominently featured excerpts taken by hidden cameras and garnered during an extensive undercover operation planned and executed by ABC executives.<sup>91</sup> The broadcast, finished in April and early May, was not aired by ABC until the struggling *PrimeTime Live* could aggressively advertise the piece and show it during "sweeps week," almost seven months later.<sup>92</sup> Following the broadcast, Food Lion was forced to close more than eighty-five stores and lay off more than one thousand employees as both its retail sales and stock value plummeted.<sup>93</sup>

In late 1991, Lynne Litt and Susan Barnett, both of whom were ABC employees, were independently informed by the United Food and Commercial Workers Union ("UFCW") and the Government Accountability Project ("GAP"), respectively, that Food Lion would serve as a good target for investigation.<sup>94</sup> The UFCW had unsuccessfully been trying "to organize Food Lion employees for more than a decade," acknowledging that it would either unionize Food Lion or put it out of business.<sup>95</sup>

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87. *Id.*

88. *Id.*

89. 887 F. Supp. 811 (M.D.N.C. 1995).

90. *Food Lion*, 887 F. Supp. at 816.

91. *Id.*

92. See Bezanson, *supra* note 5, at 903-04. Such a delay can only suggest that the piece was not researched for any pressing news purpose, but instead, as a majority of "investigative" pieces now appear to be, for ratings and sensationalism. *Id.*

93. *Food Lion*, 887 F. Supp. at 816; Logan, *supra* note 8, at 181 (citing Amy Singer, *Food, Lies and Videotape*, AM. LAW., Apr. 1997, at 56, 59).

94. *Food Lion*, 887 F. Supp. at 814.

95. *Id.*

"In early 1992, Litt and Barnett submitted, [again] independently, proposals for a [*PrimeTime Live*] story on Food Lion."<sup>96</sup> "The . . . proposals were approved by ABC management, and it was determined that . . . hidden camera work would be necessary to develop the story."<sup>97</sup> The reporters, with the help of the UFCW, assembled false names and backgrounds, false references and employment histories, false reasons for wanting to work in a Food Lion store, and also obtained minimal training.<sup>98</sup>

Based upon the false information in her employment application, in addition to her false statements made during the interview, Litt was eventually hired in a Food Lion meat department in Hickory, North Carolina and began working on May 4, 1992.<sup>99</sup> She worked for eleven days at two different stores.<sup>100</sup> While employed, Litt was an "unsatisfactory employee," working slowly and appearing to have no experience in meat wrapping.<sup>101</sup> Through either "neglect or hidden motive, [Litt] failed to perform her cleaning responsibilities adequately."<sup>102</sup> While employed, Litt concealed and covertly "used a video recorder, camera, tape recording device, and/or other video and audio recording devices."<sup>103</sup> Litt's only goal during her employment was to gain evidence for use in the *PrimeTime Live* story, and she never intended to faithfully perform her duties as a Food Lion employee.<sup>104</sup>

Barnett was hired on April 14, 1992, based upon her interview two weeks earlier during which she made "false statements consistent with the false background" that she provided in her application.<sup>105</sup> Barnett, working in Myrtle Beach, South Carolina, was trained and put on the payroll.<sup>106</sup> She worked for eight days before complaining of personal problems and being given time off.<sup>107</sup> She never returned to work at Food Lion.<sup>108</sup> During her employment at Food Lion, Barnett, "while on Food Lion's premises, and without [their] knowledge or permission[,] concealed and used various video and audio recording equipment."<sup>109</sup> Barnett never had any intention to faithfully perform her du-

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96. *Id.*

97. *Id.*

98. *Id.* at 814-15.

99. *Food Lion*, 887 F. Supp. at 816.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Food Lion*, 887 F. Supp. at 816.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Food Lion*, 887 F. Supp. at 816.

ties as a Food Lion employee but only intended to obtain information for the *PrimeTime Live* broadcast.<sup>110</sup> Food Lion would have never hired Barnett had it known her true intentions.<sup>111</sup>

Litt and Barnett retrieved more than fifty hours of hidden camera footage at their respective Food Lion stores which *PrimeTime Live* reviewed for its eventual broadcast.<sup>112</sup> In its November 5th broadcast, *PrimeTime Live* aired five to six minutes of this footage to support the allegations and statements made by several former Food Lion employees and Diane Sawyer, *PrimeTime Live*'s anchor.<sup>113</sup> Without the footage, *PrimeTime Live* would not have aired the story.<sup>114</sup> "More viewers watched the Food Lion episode of [the show] than any previous [*PrimeTime Live*] program."<sup>115</sup> Immediately after the broadcast, Food Lion's retail sales dropped and its publicly traded securities decreased in value.<sup>116</sup>

#### A. *The Trial Court Decision—Born with Bite*

Soon thereafter, Food Lion filed a civil action against ABC seeking damages that arose as a result of "lost sales, profits, business opportunities and goodwill, a decrease in the value of its securities, and an increase in the cost of obtaining funds."<sup>117</sup> Included in the forty-seven page complaint were claims specifically alleging:

- (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 General Statute § 75-1.1; and (5) violations of the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. § 161 et seq..<sup>118</sup>

Of the fourteen claims, all attacked ABC's newsgathering techniques; none attacked the accuracy of the broadcast.<sup>119</sup>

After ABC filed a motion to dismiss the charges, Judge Tilley ordered that the claims of violations of RICO and federal wiretapping

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110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Food Lion*, 887 F. Supp. at 816.

115. *Id.*

116. *Id.*

117. *Id.* at 823 n.3.

118. *Id.* at 812.

119. *See Food Lion*, 887 F. Supp. at 812.

statutes be dismissed.<sup>120</sup> In allowing the remaining claims to stand, however, Judge Tilley essentially recognized that the First Amendment did not immunize ABC from tort liability for its newsgathering practices.<sup>121</sup> ABC's initial contention that Food Lion, as a public figure plaintiff, had to prove falsity and actual damages in order to succeed, was rejected.<sup>122</sup> Judge Tilley instead relied on *Cohen v. Cowles Media*<sup>123</sup> in applying laws like trespass and fraud that do not "target or single out the press."<sup>124</sup> Judge Tilley noted that "the First Amendment does not protect the press when it violates generally applicable criminal or civil laws in the name of newsgathering."<sup>125</sup>

In at least as equal a blow as the allowance of Food Lion's remaining claims, Judge Tilley hamstrung Food Lion in holding that the company could only recover the damages resulting from the remaining claims but not any "publication damages for injury to its reputation as a result of the *PrimeTime Live* broadcast."<sup>126</sup> Again relying on *Cohen*, Judge Tilley determined that the First Amendment posed no impediment to damages for the breach of laws of general applicability.<sup>127</sup> Judge Tilley qualified the statement, however, by stating that while the First Amendment did not bar Food Lion's collection of damages for ABC's alleged wrongful and illegal acts, *Hustler v. Falwell*<sup>128</sup> prevented the recovery of possibly billions of dollars in publication damages.<sup>129</sup> The court refused to allow Food Lion to circumvent the First Amendment's required proof of falsity and actual malice, as required by *Hustler*, in any attempt to secure defamation-type damages.<sup>130</sup>

As trial approached, both parties entered motions for summary judgment.<sup>131</sup> Food Lion sought judgment on the trespass claim and the respondeat superior claim of trespass.<sup>132</sup> ABC, in turn, sought sum-

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120. *Id.* at 824.

121. *See id.*

122. *Id.* at 823-24. ABC relied on *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), for the contention that because Food Lion did not attack the content of the broadcast, as evidenced by its failure to try to prove falsehood and actual malice, the *Hustler* decision mandated that all Food Lion's claims be dismissed. *See Food Lion*, 887 F. Supp. at 823-24.

123. 501 U.S. 663 (1990); *see also supra* text accompanying notes 35-50.

124. *Food Lion*, 887 F. Supp. at 822 (quoting *Cohen*, 501 U.S. at 670).

125. *Id.*

126. *Id.* at 823.

127. *Id.* at 822.

128. 485 U.S. 46 (1988).

129. *Id.*

130. *Food Lion*, 887 F. Supp. at 823.

131. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 951 F. Supp. 1217, 1218 (M.D.N.C. 1996) (hereinafter "*Capital Cities*"), *aff'd in part and rev'd in part*, 194 F.3d 505 (4th Cir. 1999).

132. *Capital Cities*, 951 F. Supp. at 1218.

mary judgment on Food Lion's claims of fraud, trespass, negligent supervision, and civil conspiracy.<sup>133</sup>

In examining the fraud claim, Judge Tilley determined that granting summary judgment on the fraud claim in favor of ABC would only serve to attach the message that "perspective [sic] at-will employees could lie with impunity in order to obtain a position."<sup>134</sup> In their motion, ABC claimed that because Food Lion could show no damages that were proximately caused by the misrepresentations made by Litt and Barnett they could not then recover.<sup>135</sup> Judge Tilley separated Food Lion's damage claims into two categories: (1) those involving losses and expenditures associated with the events leading up to and the eventual broadcast of *PrimeTime Live's* story ("publication damages")<sup>136</sup> and (2) those associated with the hiring, training, and employment of Litt and Barnett and the costs associated with replacing them after each quit.<sup>137</sup> Judge Tilley refused to examine the first type of damages because the motion pending their exclusion was still before the court but did deny ABC's motion for summary judgment based on the ramifications of ignoring the second type.<sup>138</sup> Judge Tilley stated that the facts that Litt and Barnett "misrepresented themselves and their backgrounds, accepted jobs with Food Lion when they were actually employed by ABC, and had goals in those positions far different from those normally associated with the jobs," were completely different from the facts in cases that ABC relied upon as analogous. Those cases dealt with employers who attempted to avoid damages arising from an employee termination by asserting that a subsequently discovered résumé fraud would have resulted in the termination regardless.<sup>139</sup> In those cases, the judge noted, deterrence principles embodied in the relevant statutes would have been frustrated had the employer been able to escape damage liability based on subsequently acquired evidence.<sup>140</sup> Noting that this case presented no such concerns, Judge Tilley stated that "if the employer has somehow been damaged by the plaintiff's misrepresentations or misconduct on the job, it may seek its own damages where appropriate."<sup>141</sup> In an ominous forecast, Judge Tilley

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133. *Id.*

134. *Id.* at 1220.

135. *Id.* at 1219. Note that the *Capital Cities* opinion refers to Lynne Litt as Lynne Dale because she had married.

136. Such damages were excluded from any possible recovery. See *supra* text accompanying notes 124-30.

137. *Capital Cities*, 951 F. Supp. at 1219.

138. *Id.* at 1219-20.

139. *Id.* ABC relied in part on *Russell v. Microdyne Corp.*, 65 F.3d 1229 (4th Cir. 1995) and *Mardell v. Harleysville Life Ins. Co.*, 65 F.3d 1072 (3d Cir. 1995) (other citations omitted).

140. *Capital Cities*, 951 F. Supp. at 1220.

141. *Id.* (quoting *Massey v. Trump's Castle Hotel and Casino*, 828 F. Supp. 314, 323

concluded by stating that any determination of damages would have to be determined by the jury.<sup>142</sup>

With regard to Food Lion's request for summary judgment on the trespass claim, Judge Tilley determined that the misrepresentation and excession of the scope of consent negated any expressed consent.<sup>143</sup> In establishing that the misrepresentation made by Litt and Barnett violated consent, Judge Tilley relied upon the Restatement (Second) of Torts § 892(b) paragraph (2), which states:

If the person consenting to the conduct of another is induced to consent by a substantial mistake concerning the nature of the invasion of his interest or the extent of the harm to be expected from it and the mistake is known to the other or is induced by the other's misrepresentation, the consent is not effective for the unexpected invasion or harm.<sup>144</sup>

Additionally, Judge Tilley dismissed ABC's attempt to rely on *Desnick v. American Broadcasting Companies, Inc.*,<sup>145</sup> a case that also involved hidden cameras, misrepresentations, and a *PrimeTime Live* broadcast, to prove that consent remained effective even if deemed to be procured by fraud.<sup>146</sup> Judge Tilley recognized the fatal flaw in ABC's analogy in that it rested on the "contention that [Litt] and Barnett were Food Lion employees and that Food Lion consented to [the] presence of employees in the areas where [Litt] and Barnett were allowed to go."<sup>147</sup> Instead, unlike in *Desnick*, Litt and Barnett were ABC employees who hoped to be admitted into areas of the store not available to the public in order to "steal" the private images of those areas.<sup>148</sup> Finally, Judge Tilley concluded that this entry by misrepresentation resulted in ABC's obtainment of what they otherwise would not have had, a story.<sup>149</sup>

Judge Tilley additionally stated that even if consent was properly given and not negated, the authorized entry constituted a trespass when ABC committed the wrongful acts in excess of and in abuse of their authorized entry.<sup>150</sup> Analogizing to *Copeland v. Hubbard Broadcasting*,

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(D.N.J. 1993)).

142. *Capital Cities*, 951 F. Supp. at 1220.

143. *Id.* at 1220-24.

144. RESTATEMENT (SECOND) OF TORTS § 892(b) (1979).

145. 44 F.3d 1345 (7th Cir. 1995); see also *supra* notes 67-88.

146. *Capital Cities*, 951 F. Supp. at 1222.

147. *Id.*

148. *Id.*

149. *Id.* at 1223.

150. *Id.* (relying in part on *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971), discussed *supra* notes 51-66).

*Inc.*,<sup>151</sup> Judge Tilley noted that other jurisdictions recognize that trespass is a remedy when broadcasters use secret cameras for newsgathering.<sup>152</sup> "Newsgathering does not create a license to trespass or to intrude by electronic means into the precincts of another's home or office."<sup>153</sup>

In the initial phase of the trial, the liability phase, only the fraud, trespass, breach of fiduciary duty,<sup>154</sup> and claim under the North Carolina Unfair Trade Practices Act<sup>155</sup> ("UTPA") survived.<sup>156</sup> After being instructed to assume that the broadcast was true (a broadcast the jury was not able to view), the jury returned verdicts for Food Lion on the fraud, trespass, and breach of loyalty claims.<sup>157</sup>

Because Judge Tilley had precluded the awarding of publication damages, the compensatory damage phase involved only one witness, who tallied up the company's costs of hiring the reporters, including training and net pay, to be \$2,432.35.<sup>158</sup> After one hour of deliberation, the jury returned a \$1,402 award for compensatory damages: \$1,400 for the breach of loyalty claims and one dollar for each fraud and trespass claim.<sup>159</sup>

Food Lion premised its punitive damage argument on the fact that ABC's undercover investigation was only part of a pattern of deception, motivated by profit, that relied upon hidden cameras in a blatant attempt to boost ratings with little concern for journalistic ethics.<sup>160</sup> Introducing evidence of ABC's net worth, the large salaries of the executives in charge of the investigation, and the raises they received after the success of the broadcast, Food Lion asked for punitive damages between \$52.5 million and \$1.9 billion.<sup>161</sup>

ABC's primary argument against punitives was that Food Lion failed to offer any proof of "consciousness of wrongdoing."<sup>162</sup> They

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151. 526 N.W.2d 402 (Minn. Ct. App. 1995).

152. *Capital Cities*, 951 F. Supp. at 1223.

153. *Copeland*, 526 N.W.2d at 405.

154. Food Lion alleged that Litt and Barnett failed to perform their duties because they were there on behalf of, and had allegiance to, ABC. Food Lion also alleged that the two reporters staged some of the scenes that later appeared in the *PrimeTime Live* broadcast. *Capital Cities*, 951 F. Supp. at 1229-30.

155. N.C. GEN. STAT. § 75-1.1 (1994) (providing remedies for unfair or deceptive acts or practices that affect commerce). Because this claim was unique to this case, as opposed to more commonly applicable common law torts, it is not discussed in detail in this Comment.

156. *Capital Cities*, 951 F. Supp. at 1224-25.

157. *Singer*, *supra* note 93, at 62-63.

158. *Logan*, *supra* note 8, at 187.

159. *Singer*, *supra* note 93, at 63.

160. *Logan*, *supra* note 8, at 187.

161. *Id.* at 188 (citing Peter S. Canellos, *ABC Ordered to Pay \$5.5 Million to Food Lion*, BOSTON GLOBE, Jan. 23, 1997, at A1).

162. *Logan*, *supra* note 8, at 188.

additionally argued that any punitive award would severely hamper the "essential" role played by investigative reporters.<sup>163</sup> In support, at least theoretically,<sup>164</sup> ABC presented Diane Sawyer as a witness.<sup>165</sup>

After a week of intense deliberations the jury compromised at \$5.5 million dollars.<sup>166</sup> Judge Tilley disagreed with the amount and granted ABC's post-trial remittitur motion and reduced the award to \$315,000.<sup>167</sup>

### *B. The Fourth Circuit's Decision—A Neutering Botched*

In their briefs to the Fourth Circuit, the ABC defendants appealed the denial of their motion for judgment as a matter of law, and Food Lion appealed the district court's preclusion of publication damages.<sup>168</sup> In a 2-1 decision, the Fourth Circuit affirmed the trespass and breach of loyalty claims but reversed the fraud claim and its attached punitive damage award.<sup>169</sup> The court additionally, on First Amendment grounds, affirmed the district court's refusal to allow Food Lion to prove publication damages.<sup>170</sup>

#### *1. Duty of Loyalty*

In affirming the lower court's breach of loyalty judgment, the Fourth Circuit determined that Litt and Barnett had been disloyal because their acts were "inconsistent with promoting the best interest[s] of their employer at a time when they were on its payroll."<sup>171</sup> While the conduct of the employees did not fall into one of the three limited

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163. *Id.* (quotation marks added).

164. This tactic appeared to backfire as press reports indicated that "the most memorable part of her testimony was her answer to the single question: 'What's your salary?' She shrugged and answered, 'More than seven million dollars.'" Logan, *supra* note 8, at 188 (citing Scott Andron, *Lawyers Focus on ABC's Profits*, GREENSBORO NEWS & REC. (N.C.), Jan 8, 1997, at B6).

165. Logan, *supra* note 8, at 188.

166. The compromise was quickly reached after a juror who initially demanded a \$1 billion award dropped to \$8 million. Apparently moved by this compromising effort, another juror demanding no award offered to compromise at the agreed to \$5.5 million. *Id.* (citing Justin Catanoso, *From 0 to \$1 Billion: Food Lion/ABC Jury Started Very Far Apart*, GREENSBORO NEWS AND REC. (N.C.), Jan. 23, 1997, at A1).

167. Logan, *supra* note 8, at 188.

168. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 510 (4th Cir. 1999).

169. *Food Lion*, 194 F.3d at 510. With regard to the UTPA claim, the court concluded that the statute was inapplicable because of the lack of competition or business relationship between Food Lion and ABC that could be policed for the benefit of the consuming public, the major concern of the statute. *Id.* at 520.

170. *Id.*

171. *Id.* at 515 (quoting *Lowndes Prods., Inc. v. Brower*, 191 S.E.2d 761, 767 (S.C. 1972)).

categories previously created to find a breach of loyalty,<sup>172</sup> the Fourth Circuit determined, as the trial court had, that the conduct in question would be recognized as tortiously violating the duty.<sup>173</sup> The court decided that the interests of ABC, to whom Litt and Barnett gave complete loyalty, were adverse to Food Lion's interests.<sup>174</sup> While not direct competitors, the fact that ABC's interest was to expose Food Lion made them adverse in a fundamental way.<sup>175</sup> Because Litt and Barnett had the requisite intent to act against the interest of their second employer (Food Lion) for the benefit of their main employer (ABC), they were liable for the one dollar of damages awarded for their breach of loyalty.<sup>176</sup>

## 2. *Trespass*

ABC argued on appeal that it was error to allow the jury to hold either Litt or Barnett liable for trespass on either of the independent grounds that: (1) Food Lion's consent was negated by their misrepresentations; or (2) Food Lion's consent terminated when Litt and Barnett breached their duty of loyalty.<sup>177</sup>

With regard to the misrepresentations, the court noted the polar approaches adopted and recognized by the district court in both the Restatement of Torts and cases like *Desnick*.<sup>178</sup> Adopting the *Desnick* analysis, the court decided that Food Lion's consent to enter could still be given effect even when based on the misrepresentations.<sup>179</sup> In adopting *Desnick's* premise, the Fourth Circuit held that turning successful resumé fraud into trespass would fail to protect the underlying interest of trespass—the ownership and peaceable possession of land.<sup>180</sup> As such, misrepresentation was not allowed to support the trespass verdict.<sup>181</sup>

The Fourth Circuit did, however, find that the filming of the non-public areas, which entailed a breach of loyalty, constituted a wrongful

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172. The categories included: (1) direct competition; (2) misappropriation of employer's profits, opportunity, or property; and (3) breach of employer's confidence. *Food Lion*, 194 F.3d at 515-16.

173. *Id.*, *aff'g on other grounds*, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 964 F. Supp. 956, 959 n.2 (M.D.N.C. 1997).

174. *Food Lion*, 194 F.3d at 516.

175. *Id.*

176. *Id.*

177. *Id.* at 516-17.

178. *See id.* at 517.

179. *Food Lion*, 194 F.3d at 518.

180. *Id.*

181. *Id.*

act capable of vitiating consent.<sup>182</sup> Although Food Lion consented to the entry of the "reporters" to do their job, the reporters exceeded that consent when they videotaped in non-public areas.<sup>183</sup> Thus, the breach of loyalty exceeded the consent to peaceably enjoy the property.<sup>184</sup> As such, the court sustained Food Lion's two-dollar verdict.<sup>185</sup>

### 3. *Fraud*

In reversing the district court's finding of fraud, the Fourth Circuit agreed with ABC in that "Food Lion did not prove injury caused by reasonable reliance on the misrepresentations made by [Litt] and Barnett on their job applications."<sup>186</sup> Food Lion's claims rested mainly on damages caused by the administrative costs incurred in hiring and training the "employees."<sup>187</sup> The court noted that neither applicant had made any representations concerning the length of employment.<sup>188</sup> More specifically, the application created an at-will employment contract enabling both parties to terminate employment for any reason, at any time.<sup>189</sup>

Since Litt and Barnett had made no express representations about the length of their employment, Food Lion was left to prove that the applications' misrepresentations caused it to believe that the applicants intended to work for an extended period of time.<sup>190</sup> The fact that the contracts, as well as the states in which they were formed, were at-will made it inherently unreasonable and inconsistent with the doctrine in general for an employer or employee to rely on any assumptions concerning employment duration.<sup>191</sup> As a result, the Fourth Circuit concluded that no administrative costs could have been caused by or incurred by reasonable reliance on the misrepresentations.<sup>192</sup>

Additionally, Food Lion sought recovery of all wages paid to the employees, arguing that it was fraudulently induced to pay because of the misrepresentations made.<sup>193</sup> Food Lion's claim then still relied on its proving reasonable reliance.<sup>194</sup> The court refused to accept Food

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182. *Id.*

183. *Id.* at 519.

184. *Food Lion*, 194 F.3d. at 519.

185. *Id.*

186. *Id.* at 512.

187. *Id.*

188. *Id.* at 513.

189. *Food Lion*, 194 F.3d at 513.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 513-14.

194. *Food Lion*, 194 F.3d at 514.

Lion's position that the mere finding of a breach of loyalty automatically established that Food Lion did not receive adequate services for the wages it paid.<sup>195</sup> Instead, the court determined that it was possible to adequately perform the assigned tasks of a job while still breaching loyalty.<sup>196</sup> "[Litt] and Barnett were paid because they showed up for work and performed their assigned tasks as [entry-level] employees."<sup>197</sup> In conclusion, the Fourth Circuit held that Litt and Barnett "were not paid their wages because of [any] misrepresentations on their . . . applications."<sup>198</sup> In deciding such, the court reversed the \$1,400 award, thus undercutting the basis for the punitive damage award, and subsequently eliminated that \$315,000 award.<sup>199</sup>

The 2-1 decision that resulted in Food Lion's "verdict" for two dollars was lauded by First Amendment supporters as a victory of constitutional proportions.<sup>200</sup> The refusal to recognize liability—at least any liability with a cognizable effect—seemed, however, to ignore the simple fact that the story resulted in the dismantling of several Food Lion stores and the loss of hundreds of jobs across the Southeast, all based on what the court concluded to be illegal and inappropriate conduct.<sup>201</sup> The court concluded that, notwithstanding the nature of the underlying act, a plaintiff must satisfy the high-barred elements of actual malice and falsity in order to recover substantial and stinging publication damages.<sup>202</sup> That result, the court felt, was necessary "to give adequate 'breathing space' to the freedoms protected by the First Amendment."<sup>203</sup> The court did, however, remain "convinced that the media can do its important job effectively without resort to the commission of run-of-the-mill torts."<sup>204</sup>

In his dissent, Judge Niemeyer disagreed with the majority's reliance on the at-will doctrine and instead focused on: "(1) the difference

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195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Food Lion*, 194 F.3d at 524.

200. See Associated Press, *Free-Press Advocates Applaud Reversal of Jury Verdict in Food Lion Case* (Oct. 21, 1999) available in <<http://www.freedomforum.org/press/1999/10/21foodlion.asp>>.

201. See *Food Lion*, 194 F.3d at 524.

202. *Id.* at 523-24.

203. *Id.* at 524 (quoting *Hustler v. Falwell*, 485 U.S. 46, 56 (1988)).

204. *Food Lion*, 194 F.3d at 521. Even with this statement, ABC News President David Westin considered the verdict a "victory for the American tradition of investigative journalism." Lisa de Moraes, *With Appeals Court Ruling, ABC Won't Pay Food Lion's Share*, WASH. POST, Oct. 21, 1999, The TV Column, at C7 (quoting ABC News President David Westin). Noting that Food Lion spent millions on "'legal fees and public relations offensives,' . . . the decision shows 'that the First Amendment continues to protect investigative journalists from attempts to intimidate them through threats of outlandish damage claims.'" *Id.*

in hiring a person who intends to work indefinitely and a person who intends to work one or two weeks and fails to disclose that intent, and (2) the . . . misrepresentation[s] of loyalty inherent in [the] application[s].”<sup>205</sup>

In examining the at-will reliance by the majority, Judge Niemeyer recognized the inherent difference between an actual at-will employee and an undercover news reporter: with the former, normal risks still allow for the possibility of securing long-term employment; with the latter, such a possibility is nonexistent.<sup>206</sup> The ABC employees had no intentions of providing Food Lion a chance to overcome the inherent risks in the at-will doctrine.<sup>207</sup> Litt and Barnett knew from the start that they would remain employed only long enough to secure the damaging footage they needed.<sup>208</sup> Determining that Food Lion was thus “induced to hire persons it would not otherwise have hired, it was induced to spend money on persons whose potential for employment was nil, contrary to the potential of a bona fide applicant for at-will employment.”<sup>209</sup>

Additionally, Judge Niemeyer determined that Litt’s and Barnett’s implied representations as to their loyalty towards the company in an employment capacity injured Food Lion and thus supported the company’s fraud claim.<sup>210</sup> Here, the reporters never intended to be loyal to Food Lion or promote its business.<sup>211</sup> Instead, they applied “with the secret intent to obtain sensational and damaging evidence to publish against Food Lion. . . . [T]hey even failed to do what they were hired to do.”<sup>212</sup> Niemeyer noted that the majority-recognized damages caused by the breach of loyalty, when such a breach is intended from the beginning, also supports a Food Lion fraud claim.<sup>213</sup>

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205. *Food Lion*, 194 F.3d at 525.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at 526 (citing *Daniel Boone Complex, Inc. v. Furst*, 258 S.E.2d 379, 386 (N.C. Ct. App. 1979) (holding that evidence which showed that the defendant’s fraudulent misrepresentations induced the plaintiff to deal “with a party with whom it did not wish to deal” created sufficient injury to meet the requisite elements of fraud)).

210. *Food Lion*, 194 F.3d at 526.

211. *Id.*

212. *Id.* As the video showed, instead of cleaning a meat grinder as a loyal employee would have, even if not an assigned task, the ABC employee merely photographed the dirty machinery for “proof” of the company’s unsafe food-handling practices and further baited fellow employees to do and say things they knew were contrary to Food Lion’s food-handling policy. *Id.*

213. *Id.*

### III. THE NEED FOR A NEW BREED

Any law designed to protect individual privacy must feed to squawking chicks in an attempt to satiate both First Amendment values and the reasonable expectations of privacy of individuals in today's more open society. Without the worms to go around, neither constitutional law nor tort law has been able to develop or establish definitive or mutually acceptable guidelines to determine when intrusive newsgathering infiltrates the shroud of privacy.

While tort law does a relatively good job of punishing the most serious newsgathering abuses, the area seems to "promise[] remedies for a broad range of newsgathering behaviors that invade both property and dignitary interests."<sup>214</sup> Tort law's promise, however, has yet to metamorphose into any sort of substantial, remedial reality. This result, however, is largely because these torts "fail to make the fine distinctions necessary to accommodate both individual privacy and the right to gather news, and, inevitably, it is privacy that suffers."<sup>215</sup>

#### *A. Trespass*

Trespass seems relatively effective at protecting property interests that are violated in the newsgathering process. It protects an individual's home and private establishments from physical intrusions. Still, trespass is too rigid to recognize the interests and injuries that arise in intrusive newsgathering.<sup>216</sup> First, trespass is designed to protect property, especially private property.<sup>217</sup> Any subsequent protection of privacy is merely incidental. Additionally, trespass does nothing to eliminate the rampant hounding of the media in public arenas.<sup>218</sup> More significantly, as evidenced by *Food Lion's* reversal, trespass does little to protect an individual from surreptitious surveillance.<sup>219</sup> While ultimately successful, to the tune of two dollars, a trespass claim stands little chance of ever imposing a serious impediment to undercover intrusion, even in nonpublic places.<sup>220</sup>

#### *B. Intentional Infliction of Emotional Distress*

This tort takes a major stride forward toward, ultimately, truly

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214. Lidsky, *supra* note 3, at 193.

215. *Id.*

216. *See id.* at 194-95.

217. *Id.* at 194.

218. *Id.* at 194-95.

219. Lidsky, *supra* note 3, at 195.

220. *See Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 524 (4th Cir. 1999).

compensable damages because it specifically allows for recovery based on an infliction to an individual's dignity. In order to make out such a case, an individual must establish that the intruder intentionally or recklessly caused severe emotional distress by acting in an extreme or outrageous way.<sup>221</sup> A major hurdle with the tort is the requirement that an individual prove the defendant's conduct to be so outrageous as to be beyond "all possible bounds of decency."<sup>222</sup> Sadly, in today's society, even stalking type behavior has become the norm, making it extremely difficult to prove that the newsgathering technique was intolerable.<sup>223</sup> An additional hurdle is proving that the distress was "severe," requiring a level where "no reasonable man could be expected to endure it."<sup>224</sup> Naturally, this requirement is difficult to surmount.<sup>225</sup> Additionally, it appears that *Hustler v. Falwell*<sup>226</sup> may impose proof of a defendant's knowledge that the material published was false or outrageous.<sup>227</sup>

### C. Public Disclosure of Private Facts

Unlike the torts of trespass and intentional infliction of emotional distress, public disclosure is specifically designed to remedy an invasion of privacy.<sup>228</sup> However, "the tort addresses the defendant's dissemination of private information rather than [any] misconduct in obtaining the information."<sup>229</sup> Additionally, like its intentional infliction of emotional distress counterpart, the tort requires the disclosure, in

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221. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

222. *Id.* at § 46 cmt. d.

223. In light of society's increasing intolerance for such behavior, government officials are attempting to respond. In California, the legislature has enacted an anti-paparazzi statute that makes it a tort for any reporter or news organization to trespass on the premises of third parties to get pictures or recordings of "personal or familial activity" or to use visual or auditory enhancing devices to obtain recordings of such activities under circumstances that give the subject a reasonable expectation of privacy. Violators are liable for up to three times the amount of compensatory damages, and also for punitive damages and loss of profits. Perhaps more importantly, the statute additionally attempts to reach the media who employ paparazzi by creating liability for those who cause a violation of the statute, "regardless of whether there is an employer-employee relationship." CAL. CIV. CODE § 1708.8 (West Supp. 2000).

224. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j. (1965).

225. Lidsky, *supra* note 3, at 196 (citing *In re Medical Lab. Management Consultants*, 931 F. Supp. 1487, 1494 (D. Ariz. 1996); *Berger v. CNN*, 24 Media L. Rep. (BNA) 1757, 1762 (D. Mont. 1996); *Pemberton v. Bethlehem Steel Corp.*, 502 A.2d 1101, 1115 (Md. Ct. Spec. App. 1986). *But see* *Muratore v. M/S Scotia Prince*, 656 F. Supp. 471, 480-83 (D. Me. 1987), *aff'd in part and rev'd in part on other grounds*, 845 F.2d 347 (1st Cir. 1988)).

226. 485 U.S. 46, 56 (1988).

227. *See* *Hustler*, 485 U.S. at 56. This burden of proof would rest only on plaintiffs who are public figures or public officials. *Id.*

228. Lidsky, *supra* note 3, at 198.

229. *Id.* (citing Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 978 (1989)).

addition to being information that is not "of legitimate public concern," to be of a nature that is "highly offensive to a reasonable person."<sup>230</sup> As such, the tort provides little hope for a public company like Food Lion or another similarly situated plaintiff whose business or operations affect the public and thus would naturally be of public concern.<sup>231</sup> Lastly, the Supreme Court's most recent addition of constitutional hurdles makes the tort's obstacle essentially insurmountable.<sup>232</sup> These hurdles, as Justice White noted in his dissent, essentially obliterate any chance a plaintiff has of succeeding under this tort.<sup>233</sup>

#### IV. INTRUSION

Intrusion has been described by many as "the last effective weapon in [the] fight for privacy."<sup>234</sup> Created "to fill in the gaps left by trespass, nuisance, the intentional infliction of mental distress, and whatever remedies there may be for the invasion of constitutional rights," intrusion has still largely failed to provide a bite equal to its initial bark.<sup>235</sup> The tort is currently interpreted so narrowly by the courts that it toothlessly stands guard at the gate of protection.<sup>236</sup> From a distance, the tort seems "ideally suited to deal with the problem of intrusive newsgathering."<sup>237</sup> Designed specifically to redress invasions of privacy, intrusion is defined broadly enough to encompass many types of newsgathering behaviors while overcoming any First Amendment obstacles that render other torts ineffective because the focus of intrusion is on newsgathering, not publication.<sup>238</sup>

Under the Restatement's definition, which is widely adopted, liability could be imposed for any action that "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, . . . [provided that] the intrusion would be

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230. RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (1965).

231. The courts' unwillingness to second guess the media with regard to what qualifies as newsworthy, and thus does not qualify as actionable under tort, allows the media, essentially, to create their "own definition of news." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 117 (5th ed. 1984).

232. See *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (holding that the publishing of truthful information that is lawfully obtained prohibits punishment unless narrowly tailored to a state interest of the highest order).

233. *Florida Star*, 491 U.S. at 550-51 (White, J., dissenting).

234. Harry S. Raleigh, Jr., Case Comment, *Invasion of Privacy—Unreasonable Intrusion—A Weapon Against Intrusions Upon Our Shrinking Right of Privacy*, 47 NOTRE DAME L. REV. 1067, 1077 (1972).

235. Lidsky, *supra* note 3, at 205 (quoting William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 392 (1960)).

236. Lidsky, *supra* note 3, at 203.

237. *Id.*

238. *Id.* at 204.

highly offensive to a reasonable person.”<sup>239</sup> Significantly, publication is not required.<sup>240</sup> Because the tort is defined broadly, it appears capable of reaching and establishing liability created by the varying newsgathering techniques employed by today’s ever-increasingly intrusive media. In fact, case law suggests that surreptitious surveillance of the type used in *Food Lion* that is aimed at an individual’s private affairs or targeted at obtaining admission into the private areas of one’s business or home creates intrusion liability.<sup>241</sup> Additionally, constant, hounding surveillance that endangers an individual’s safety or involves the use of high-tech eavesdropping devices also appears to constitute intrusion.<sup>242</sup> Still, courts have not recognized, nor should they, an individual’s absolute right to privacy; therefore, intrusion still establishes the requirement that any actionable interference be “highly offensive to a reasonable person.”<sup>243</sup>

Even though intrusion seems most properly armed toward combating intrusive newsgathering, the tort still seems to suffer from a number of doctrinal flaws that hamstring its intended effect.<sup>244</sup> Perhaps the most significant flaw is the courts’ mechanistic limitation of intrusion’s use to non-public places.<sup>245</sup> This approach ignores the specific intent of intrusion’s development, as a trespass gap filler, and prevents the tort from protecting privacy unattached to a property interest.<sup>246</sup> As such, the tort’s “public places” limitation “categorically means that persons forego privacy rights in all public places and therefore have no recourse against constant and obtrusive surveillance.”<sup>247</sup> This limitation thus merges trespass and intrusion, seeming to make an intrusion claim, which was designed to support *non*-proprietary interests, equivalent and redundant to a trespass claim.<sup>248</sup>

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239. RESTATEMENT (SECOND) OF TORTS § 652B (1965).

240. *Id.* at § 652B cmts. a, b.

241. See *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971); *supra* notes 51-65 and accompanying text; *In re King World Prods., Inc.*, 898 F.2d 56 (6th Cir. 1980).

242. See *Galella v. Onassis*, 487 F.2d 986, 998 (2d Cir. 1973) (allowing an injunction against a hounding photographer); see also *Wolfson v. Lewis*, 924 F. Supp. 1413, 1435 (E.D. Pa. 1996) (enjoining defendants who attempted to film and record plaintiff’s conversations with the use of boom microphones and telephoto lenses).

243. RESTATEMENT (SECOND) OF TORTS § 652B (1965).

244. See Lidsky, *supra* note 3, at 207 (citing Susan Grogan Faller, *Summary Judgment Without Discovery*, in LIBEL DEFENSE RESOURCE CENTER 1997 REPORT ON SUMMARY JUDGMENT (1997)). Lidsky points out that, in fact, most intrusive cases never even seem to be able to get past the summary judgment phase. In a ten-year study, the Libel Defense Resource Center found that defendants prevailed on almost ninety percent of summary judgment motions. Lidsky, *supra* note 3, at 207.

245. Lidsky, *supra* note 3, at 208-09.

246. *Id.* at 209.

247. *Id.*

248. *Id.* at 209-10.

Secondly, as courts wrestle to accommodate First Amendment values and privacy concerns, they have blurred the line between the tort of intrusion and that of public disclosure of private facts through the creation of some sort of "newsworthiness" privilege.<sup>249</sup> In doing so, courts dump the problems of the now useless public disclosure tort into intrusion.<sup>250</sup> In attempting to adopt some sort of newsgathering privilege, courts remove any limitation on "what the press can publish, and when applied in the intrusion context, impose[] almost no limitations on how [the press] obtain information to publish."<sup>251</sup>

Lastly, courts seem seriously impeded in allowing plaintiffs to recover for any sort of dignitary injuries.<sup>252</sup> Instead, courts are much more "at home" in allowing claims like trespass, which are property based.<sup>253</sup> In addition to harboring an apparent "hostility to dignitary torts, courts also seem to prefer allowing plaintiffs to recover based on narrow theories rather than broad ones," thus preventing any necessary examination of broad social policy questions.<sup>254</sup> This would explain the *Food Lion* court's narrow interpretation of trespass and fraud and the complete absence of an intrusion claim.<sup>255</sup> Cumulatively, the doctrinal flaws in the intrusion tort seem to undercut the intended use of the tort and undermine any attempted recovery for privacy invasions.<sup>256</sup>

As easy as it is to outline the apparent failures and misunderstandings of intrusion, it is equally as difficult to remedy the situation. Since most intrusions, like that in *Food Lion*, occur in public places, any sort of rights-based remedy, as offered in trespass (the right to prohibit entrance upon one's property), provides "too blunt an instrument to be applied more broadly to the problem of intrusive newsgathering."<sup>257</sup> Any ideal solution must somehow manage to incorporate the attractiveness of a rights-based approach with a degree of flexibility that allows aggressive coverage while prohibiting the hounding, harassing, surreptitious surveillance often used today.<sup>258</sup>

Concededly, intrusion currently fails to address any of these concerns; however, intrusion still remains the best promise of a remedy "because it is tailored to redress privacy invasions, but is still ambi-

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249. *Id.* at 210.

250. Lidsky, *supra* note 3, at 210.

251. *Id.* at 211.

252. *Id.*

253. *Id.*

254. *Id.*

255. Lidsky, *supra* note 3, at 211.

256. *Id.* at 212.

257. *Id.* at 234.

258. *Id.* at 235.

tious enough to encompass [a wide] variety of media intrusions.”<sup>259</sup> So, intrusion, or more appropriately, the courts interpretation of it, must first begin to acknowledge that an individual has a right to be free from invasion of privacy in public places.<sup>260</sup> Even if considered narrowly, as it probably should be,<sup>261</sup> the tort would still allow for recovery when news reporters like Litt and Barnett exceed the “reasonable bounds of newsgathering” when their surreptitious and intrusive newsgathering and fraudulent misrepresentations outweigh “the *de minimis* public importance” of the story<sup>262</sup> and the news organization fails to ever take a responsible approach to the story.<sup>263</sup> The *Galella v. Onassis* court found that “even in a public setting intrusive newsgathering can be so extreme as to deprive a plaintiff of any semblance of privacy.”<sup>264</sup>

The second step to achieving reform is for the courts to acknowledge the increase in ability and means by which to intrude.<sup>265</sup> Nowadays, with the infinite adaptation of technology, intrusion is much broader than historic eyewitness observation.<sup>266</sup> The use of secret cameras and boom microphones is more intrusive than simple observation because: (1) the subject of a photo is forever at the mercy of the holder of the photograph and (2) a photograph “creates the potential that the subject’s actions [or image] will be exposed to a completely different audience” than the subject intended, violating the subject’s expectation of anonymity and the autonomy of selecting his audience.<sup>267</sup> Thus, courts could examine the filming or recording with a set of factors to determine if the intrusive tactics were actionable. Such factors should include (1) whether the use of technology (e.g., a boom mike) has allowed a newsgatherer to surpass normal “sensory capacities”; (2) whether the subject was aware that he or she “was being observed or filmed”; (3) whether the subject was “acting in a private capacity or professional capacity”; and (4) “the exact location of the alleged intrusion.”<sup>268</sup>

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259. *Id.* at 235-36.

260. Lidsky, *supra* note 3, at 236.

261. *Id.* (citing Andrew J. McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 995 (1995)).

262. Lidsky, *supra* note 3, at 236 (quoting *Galella v. Onassis*, 487 F.2d 986, 994 (2d Cir. 1973) (examining the practical effects of a photographer’s conduct on the lives of the Onassis children in holding that his photography “insinuate[d] himself into the very fabric of Mrs. Onassis’ life.”)).

263. It seems that the entire Food Lion episode may have been avoided if ABC had simply been more responsible in its approach rather than ignoring responsible journalism in its attempt to garner ratings.

264. Lidsky, *supra* note 3, at 236.

265. *Id.* at 237.

266. *Id.*

267. *Id.*

268. *Id.*

The third, and perhaps most crucial and difficult, reform must entail a refusal of courts to apply a newsworthiness privilege in intrusion cases.<sup>269</sup> Courts must ensure that intrusion is not based on publication, but instead is premised and based on newsgathering techniques.<sup>270</sup> A failure to do so again blurs intrusion with public disclosure of private facts.<sup>271</sup> The inappropriateness of this blurring is evidenced by the Restatement's express exclusion of publication as a factor of intrusion.<sup>272</sup>

### CONCLUSION

Even as the media expresses a collective sigh of relief over the Fourth Circuit's reversal in *Food Lion*, it is clear that the bleak chapter initiated by the decision has not yet, as this Comment has, reached its conclusion. In a recent Freedom Forum<sup>273</sup> poll, nearly seventy-five percent of Americans said that broadcasters should not be allowed to use hidden cameras, and fifty-three percent said that the press was generally allowed too much freedom.<sup>274</sup> This sentiment is reflected in popular media as well. On the same day the Freedom Forum poll was published the Harvard Crimson wrote a feature stating that "[t]actics that skirt or violate the law will buy no friends among a public already quick to identify bias in reporters and dismiss their reports."<sup>275</sup> The feature went on to note that "[t]he press occupies too important a position in the democratic process to be complacent toward this ambient distrust."<sup>276</sup>

The adoption of a newsworthiness privilege imposes an insurmountable burden to any intrusion recovery. Still, if the intrusion tort is to shield plaintiffs from "prying, spying, and lying by the media, courts must interpret [intrusion] more expansively."<sup>277</sup> Only through an acknowledgment by courts that citizens are entitled to some privacy, even in public places, and a subsequent modernization of intrusion can courts make the fine distinctions necessary between legitimate newsgathering and illegal invasions of privacy.<sup>278</sup> Only through making such

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269. Lidsky, *supra* note 3, at 238.

270. *Id.*

271. *See id.* at 210.

272. *See* Restatement (Second) of Torts § 652B (1965).

273. Freedom Forum is an organization interested in protecting and publicizing First Amendment rights.

274. Tony Mauro, *Damages Cut to \$2 From \$5.5 M in Food Lion Case*, USA TODAY, Oct. 25, 1999, at 6A.

275. *One for the Media*, HARV. CRIMSON, Oct. 25, 1999, available in <<http://www.thecrimson.com/archives>>.

276. *Id.*

277. Lidsky, *supra* note 3, at 248.

278. *Id.* at 248-49.

distinctions can courts protect both the burgeoning societal interest in increasing privacy protection and the economic realities and necessities of the media.

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