MLRC Media Law Resource Center

COMMITTEE REPORT

MODEL BRIEF ON NEWSGATHERING CLAIMS

Prepared by the Newsgathering Committee
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INTRODUCTION TO THE MODEL BRIEF

This Model Brief sets forth arguments and legal authorities meant to form the basis for motions seeking dismissal (either addressing the face of pleaded claims, or, after completion of discovery, for summary judgment, of various claims based upon the conduct of newsgatherers in obtaining the information that results in publication or broadcast of news reports. Specifically, the Model Brief addresses frequently asserted claims of (1) intrusion upon seclusion, based upon photographs taken on public, or semi-public, property, (2) wiretap act violations, for surreptitious recording of conversations by a member of the news media, or the publication of information that is derived from unlawful wire intercepts lawfully obtained by a newsperson, and (3) misrepresentation, fraud, and trespass claims brought against reporters and news organizations by individuals who claim they were deceived by reporters who did not divulge that they were acting as such when they interviewed the plaintiff, recorded the conversation, or entered onto private property.

The Model Brief is intended only as a starting point for practitioners preparing pleadings that address the issues described above. Of course, an attorney defending a lawsuit presenting these claims must tailor the arguments, authorities, and facts to the particular circumstances of the case being defended. And, equally obviously, counsel must Shepardize/update the authorities in this Model Brief, as they are only valid and good law as of the date this Model Brief was published, in March 2008.

Credits

This Model Brief on Newsgathering Claims was prepared by the Newsgathering Committee of the Media Law Resource Center, under the chairmanship of Tom Julin and Steve Zansberg and was edited by Steve Zansberg. The major contributors/co-authors are Dean Ringel and Gail Johnston of Cahill, Gordon, & Reindel, L.L.P. (Intrusion); Kelli Sager, Andrew J. Thomas and John (Rory) Eastburg, of Davis Wright Tremaine, LLP (Misrepresentation); and Steve Zansberg of Levine Sullivan Koch & Schulz. L.L.P. (Wiretap). Special thanks to Jennifer Collins of Faegre & Benson, L.L.P., for assistance on the wiretap section. Additional editing and publication assistance was provided by Philip J. Heijmans and Eric Robinson of the Media Law Resource Center.

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I. INTRODUCTION

[*Begin brief with a statement of the source of law/rule that provides the basis for the motion — either Rule 12(b)(6) or Rule 56 — and a short recitation of the operative facts that gives rise to the plaintiff's claims.*][1]

For the reasons stated below, the plaintiff's claims for [intrusion upon solitude or seclusion; violation of the federal and state wiretap acts; misrepresentation/fraud] fail to state claims upon which relief can be granted <or> are subject to dismissal upon the Court's granting the defendants' motion for summary judgment on those claims. [*Note: if the latter, then the introduction should also set forth the "Statement of Undisputed Material Facts" upon which the motion is premised, including citations to the affidavits and deposition transcripts that establish those facts.*]

II. APPLICABLE LEGAL STANDARDS

[*Insert here your jurisdiction's case law setting forth the standards for granting a motion to dismiss or for summary judgment*]

III. SUMMARY OF ARGUMENT

[*Insert here a brief synopsis of the legal argument advanced in the motion.*]

IV. ARGUMENT

[*Select the portions of the brief that apply to the claims being challenged from the sections that follow. The remainder of the Model Brief is divided into three sections:*

Section One: Intrusion Upon Seclusion Claims

Section Two: Wiretap Act Violation Claims

Section Three: Misrepresentation & Fraud Claims]

[1] *[In this Model Trial Brief, instructions and commentary not to be included in a brief submitted to a court is in italics, and enclosed in brackets.]*

SECTION ONE: CLAIMS FOR INTRUSION UPON SECLUSION

1. THE PLAINTIFF'S CLAIMS FOR INTRUSION UPON SOLITUDE OR SECLUSION MUST BE DISMISSED

The plaintiff's claim(s) asserting that defendants violated his/her right of privacy by unlawfully intruding into his/her solitude or seclusion must be dismissed because the [pleaded allegations/undisputed facts] establish, as a matter of law, that the defendants' conduct did not violate the plaintiff's right of privacy, and the defendants' conduct is protected by the First Amendment to the Constitution of the United States, which bars the imposition of liability upon them in this case.

a) The First Amendment Protects the Media's Right to Gather News

Freedom of the press is a "fundamental principle of the American form of government," *New York Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964), and a "free and unrestrained press" is one of the touchstones of American jurisprudence. *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring). This principle is so central to American jurisprudence that it is embodied in the First Amendment to the U.S. Constitution: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

It is equally well established that the press freedoms guaranteed by the First Amendment extend not just to publication or broadcast, but to newsgathering activities as well. As the Supreme Court stated in *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972), "[w]e do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." Indeed, if news could not be gathered, the constitutional right to publish would be "impermissibly compromised" as the

right to newsgathering is a necessary "corollary of the right to publish." *Id*. at 667, 727-28 (Stewart, J., dissenting).

The Supreme Court has further recognized that it is "[b]eyond question, [that] 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." *Houchins v. KQED, Inc*., 438 U.S. 1, 8 (1978). Indeed, "terms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see." *Id*. at 17 (Stewart, J., concurring); *see also Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103-04 (1979) ("routine" reporting techniques are protected); *Estes v. Texas*, 381 U.S. 532, 539 (1965) (the press has been a "mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences"); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 147 (1967) (First Amendment protections extend to "all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.") (internal quotation marks and citations omitted).

(1) Protected Newsgathering Activity May Not Serve as the Basis for Tort Liability, Without Offending the First Amendment

This recognition of the importance of newsgathering activities has led the courts of this country, both federal and state, to reject efforts to premise tort liability on the media's newsgathering activities. For example, in *Nicholson v. McClatchy Newspapers*, 177 Cal. App. 3d 509, 223 Cal. Rptr. 58 (3d Dist. 1986), the court held that the use of ordinary newsgathering techniques does not give rise to a tort claim. "[T]he First Amendment protects the ordinary news-gathering techniques of reporters and those techniques cannot be stripped of their

constitutional shield by calling them tortious." *Id*. at 513, 223 Cal. Rptr. at 59. "[T]he news gathering component of the freedom of the press — the right to seek out information — is privileged at least to the extent it involves 'routine . . . reporting techniques' . . . [which] include asking persons questions, including those [persons] with confidential or restricted information." *Id*. at 519, 223 Cal. Rptr. at 64, quoting *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979).

Similarly, in *Desnick v. American Broadcasting Cos*., 44 F.3d 1345 (7th Cir. 1995), the Seventh Circuit held that even the most offensive reporting techniques were entitled to First Amendment protection. According to the court:

> 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 tort, and, we add, *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 . . . then the target has no legal remedy even if the investigatory tactics used by the network are surreptitious, confrontational, unscrupulous, and ungentlemanly.

Id. at 1355 (internal citations omitted) (emphasis added). This constitutionally driven recognition of the need to foster and protect newsgathering must inform any analysis of the tort claim asserted here.

b) The First Amendment Limits the Tort of Intrusion Upon Seclusion[2]

The tort of intrusion upon seclusion is a relatively recent tort, having first been separately articulated in a 1960 law review article by William Prosser.[3] It is not recognized in all

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[2] *[This section of the brief does not address claims brought under wiretapping statutes or state statutes that criminalize the viewing, videotaping of photographing a person without that person's knowledge or consent. They are addressed in Section Two of the model brief.]*

[3] William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 388-89 (1960). In this article Prosser identifies four privacy-related torts: intrusion upon seclusion or solitude, or into his private affairs, public disclosure of private facts, false light and appropriation of an individual's name or likeness. In a recent decision regarding the New Jersey

jurisdictions,[4] and even where such a claim is recognized, plaintiffs face a very high threshold. According to the Restatement (Second) of Torts, only "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." RESTATEMENT (SECOND) OF TORTS § 652B (1977). Thus, in order to establish a violation, plaintiff must prove (1) that he had an actual expectation of privacy, (2) that the expectation was objectively reasonable, and (3) that the intrusion into the private sphere was highly offensive to a reasonable person.[5] Plaintiff cannot meet this standard.

Recognizing the amorphous nature of the tort of privacy, courts nationwide have limited its boundaries in respect for countervailing First Amendment rights. As one court observed:

> [N]ot every kind of conduct that strays from social custom or implicates personal feelings gives rise to a common law cause of action for invasion of privacy. The various branches of the privacy tort refer generally to conduct that is "highly offensive to a reasonable person," thereby emphasizing the importance of the *objective context* of the alleged invasion, including: (1) the likelihood of serious

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Shield Law, a state appellate court rejected plaintiff's argument that his invasion of privacy claim had a constitutional foundation. *Kinsella v. Welch*, 362 N.J. Super. 143, 827 A.2d 325 (App. Div. 2003).

[4] New York and Virginia have rejected this tort. *See Howell v. New York Post Co.*, 81 N.Y.2d 115, 122-24, 612 N.E.2d 699, 596 N.Y.S.2d 350, *order aff'd in part*, 82 N.Y.2d 690, 619 N.E.2d 650, 601 N.Y.S.2d 572 (1993); *WJLA-TV v. Levin*, 264 Va. 140, 160 n.5 (2002).

[5] *[A few courts have required that there also be a physical intrusion. See Cox Commc'ns, Inc. v. Lowe, 173 Ga. App. 812, 328 S.E.2d 384 (1985). Most courts, however, only require the intrusion to be "physical or otherwise."]*

[On a separate note, after Princess Diana's death, efforts were made on both the federal and state level to restrict paparazzi. Although the federal litigation failed, California did pass anti-paparazzi legislation. CAL. CIV. CODE § 1708.8 (West 2005). The law prohibits physical invasions of privacy for the purpose of capturing images about a person engaging in "personal or familial activity" if done "in a manner that is offensive to a reasonable person." If plaintiff proves that the invasion of privacy was committed for a commercial purpose, then the defendant is subject to disgorgement to the plaintiff of any proceeds obtained as a result of the invasion although damages are available even in a non-commercial scenario. Id. at § 1708.8(d). "Commercial purpose" means "any act done with the expectation of a sale, financial gain, or other consideration. A visual image, sound recording, or other physical impression shall not be found to have been, or intended to have been captured for a commercial purpose unless it is intended to be, or was in fact, sold, published, or transmitted." Id. at § 1708.8(k). The law also allows for a claim under a "constructive invasion of privacy" targeted at privacy invasions and capturing images through the use of technical means that otherwise could not have been obtained without trespassing. Id. at § 1708.8(b). The law targets both the photographer and anyone who directs, induces or solicits the invasion of privacy. Id. at § 1708.8(e). See discussion infra of Turnbull v. American Broad. Cos., 32 Media L. Rep. (BNA) 2442 (C.D. Cal. 2004).]

> harm, particularly to the emotional sensibilities of the victim; and (2) the presence or absence of countervailing interests based on competing social norms which may render defendant's conduct inoffensive.

Hill v. *NCAA*, 7 Cal. 4th 1, 25, 865 P.2d 633, 648, 26 Cal. Rptr. 2d 834, 849 (1994).[6] *See also Jenkins* v. *Bolla*, 411 Pa. Super. 119, 600 A.2d 1293 (1992) (recognizing the need for balance between an individual's right to privacy and the dissemination of information pertaining to the public interest); *Cox Commc'ns, Inc*. v. *Lowe*, 173 Ga. App. 812, 813, 328 S.E.2d 384, 385 (1985) (noting that "[t]he right of privacy is not absolute, but is qualified by the rights of others.") (citations and internal quotation marks omitted); *cf. Culver* v. *Port Allegany Reporter Argus*, 409 Pa. Super. 401, 405, 598 A.2d 54, 56 (1991) ("The right of privacy competes with the freedom of the press as well as the interest of the public in the free dissemination of news and information, and these permanent public interests must be considered when placing the necessary limitations upon the right of privacy.") (citations and internal quotation marks omitted), *appeal denied*, 533 Pa. 600, 617 A.2d (1992); *Cape Publ'ns, Inc*. v. *Bridges*, 423 So. 2d 426 (Fla. Dist. Ct. App. 1982) (right of privacy with respect to photograph of plaintiff balanced against right to report a legitimate news story by the press); *cf. Gill* v. *Hearst Publ'g Co*., 40 Cal. 2d 224, 228, 253 P.2d 441, 443 (1953) (privacy rights "must be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press").

Courts have considered the newsgathering conduct not only by way of privilege, but also in assessing specific elements of the claim of intrusion. In *Medical Laboratory Management Consultants* v. *American Broadcasting Cos*., 30 F. Supp. 2d 1182 (D. Ariz. 1998), *aff'd*, 306

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[6] The intrusion tort, like the other branches of the privacy tort, is restricted to protect only persons of ordinary sensibilities, not the supersensitive. *See, e.g., Dempsey v. National Enquirer*, 702 F. Supp. 927, 931 (D. Me. 1988); *Robyn v. Phillips Petroleum Co.*, 774 F. Supp. 587, 592-93 (D. Colo. 1991); *Hill v. NCAA*, 7 Cal. 4th 1, 25, 865 P.2d 633, 648, 26 Cal. Rptr. 2d 834, 849 (1994); *Cape Publ'ns, Inc. v. Bridges*, 423 So. 2d 426, 427 (Fla. Dist. Ct. App. 1982*), cert. denied*, 464 U.S. 893 (1983).

F.3d 806 (9th Cir. 2002), for example, a reporter for ABC News' program *Primetime Live* posed as a cytotechnologist in order to gain access to a pap-smear clinic with hidden cameras for use in a television exposé. The owner sued on numerous grounds. The court rejected his intrusion claims, holding that the requisite offensiveness standard was not met because "the intrusion [was] by a member of the print and broadcast press in pursuit of news material. . . . [T]he constitutional protection of the press does reflect the strong societal interest in effective and complete reporting of events, an interest that may — as a matter of tort law — justify an intrusion that would otherwise be considered offensive. . . . [W]ithout some protection for seeking out the news, freedom of the press could be eviscerated." *Id*. at 1190 (citations and internal quotation marks omitted).

(1) Photographs Taken from, or of Activities in, an Area Visible to the Public Are Protected from Liability

The rights of the press to record and document events occurring in the public sphere — for example a public street, sidewalk, or park — have been recognized by courts throughout the nation. Indeed, the Restatement (Second) of Torts declares that for all but the most intimate and personal issues, there is no liability for intrusion when an individual is photographed in public:

> The defendant is subject to liability under the rule stated in this Section only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs. Thus there is no liability for the examination of a public record concerning the plaintiff, or of documents that the plaintiff is required to keep and make available for public inspection. Nor is there liability for observing him or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye.

§ 652B cmt. c.[7] In order to recover for an intrusion upon seclusion, "the plaintiffs must show that some aspect of their private affairs has been intruded upon," and, therefore, the tort "does

[7] The Restatement does note that "[e]ven in a public place, however, there may be some matters about the plaintiff, such as his underwear or lack of it, that are not exhibited to the public gaze; and there may still be invasion of

not apply to matters which occur in a public place or a place otherwise open to the public eye." *Fogel* v. *Forbes, Inc*., 500 F. Supp. 1081, 1087 (E.D. Pa. 1980).

Courts throughout the country have repeatedly applied this rule and have dismissed intrusion claims against the press for photography taken in a public place.

[*CHOOSE APPLICABLE CASES FROM THOSE DESCRIBED BELOW*.]

For example, in *Mark* v. *Seattle Times*, 96 Wash. 2d 473, 497, 635 P.2d 1081, 1094 (1981), the Washington Supreme Court stated that:

> It is clear also that the thing into which there is intrusion or prying must be, and be entitled to be, private. . . . On the public street, or in any other public place, the plaintiff has no legal right to be alone; and it is no invasion of his privacy to do no more than follow him about and watch him there. Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which anyone would be free to see.

Id. Similarly, in *Dempsey* v. *National Enquirer*, 702 F. Supp. 927 (D. Me. 1988), the court stated:

> [A] reporter's presence on a public thoroughfare and in a restaurant open to the public cannot constitute an intrusion upon the seclusion of another. Since taking a photograph of the plaintiff in a public place cannot constitute an invasion of privacy based on intrusion upon the seclusion of another . . . it is obvious that an *attempt* to take a photograph cannot create liability.

Id. at 931 (emphasis in original). In that case, the court rejected a claim for intrusion upon seclusion despite a reporter's insistent efforts to obtain an interview from the plaintiff by following him and repeatedly trying to take his picture in a restaurant.

In *Salazar* v. *Golden State Warriors*, No. C-99-4825, 2000 WL 246586 (N.D. Cal. Feb. 29, 2000), the district court granted a motion to dismiss a claim for invasion of privacy brought by an employee after he was videotaped by a private investigator allegedly snorting cocaine in a

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privacy when there is intrusion upon these matters." The case at bar, in contrast, has nothing to do with plaintiff's underwear. RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (1977).

car in a parking lot, receiving guests at his home and arriving and leaving his home. According to the court: "There is no actionable invasion of privacy when the plaintiff is photographed only while in public view." *Id*. at *2.

> To prove actionable intrusion, the plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff. There is no intrusion into a private place when the plaintiff has merely been observed, or even photographed or recorded, in a public place. The plaintiff must show he had an objectively reasonable expectation of privacy.

Id. (internal citations and quotations omitted). The court, rejecting the plaintiff's claim that the parking lot should be considered a private place because it was not "highly traveled but rather dark and isolated," stated:

> Plaintiff cites no authority that distinguishes a public from a private place based on the amount of traffic or light. These factors are not determinative in characterizing a place as public or private. Plaintiff was in public view while inside of a car parked in a parking lot. Plaintiff even admits that he turned on the interior light. The California Supreme Court has stated there is no invasion of privacy where plaintiff had no right of ownership or possession or actual control of the premises where the incident took place. Accordingly, this Court concludes that if the California Supreme Court were to decide the issue as a matter of first impression, it would hold that a parking lot would be considered a public place, as it is under the Fourth Amendment.

Id. at *2.[8] (internal citations and quotations omitted). The court further held that even if plaintiff had properly alleged intrusion into a private place, he had failed to demonstrate that defendant's actions would be highly offensive to a reasonable person. "A court determines offensiveness by considering the degree of intrusion, the context, conduct and circumstances surrounding the

[8] While holding that filming a rescue attempt at an accident scene was not an invasion of privacy, *Shulman* v. *Group W Prods., Inc*., 18 Cal. 4th 200, 955 P.2d 469, 74 Cal. Rptr. 3d 843 (1998), also found a triable issue as to whether there was an expectation of privacy inside the rescue helicopter serving as an ambulance. Ambulances, hospitals and nursing homes raise special privacy concerns not present here. *See also Mitchell v. Baltimore Sun Co.*, 164 Md. App. 497, 883 A.2d 1008 (Md. Ct. Spec. App. 2005) (citing *Shulman* and holding that genuine issues of material fact relating to consent and offensiveness element precluded summary judgment in case brought by former congressman who was interviewed by reporters in his nursing home room), *cert. denied*, 390 Md. 501, 889 A.2d 418 (2006).]

intrusion, as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded." *Salazar* at *3. The court concluded:

> In this case, plaintiff does not allege any facts that would constitute a highly offensive intrusion. The degree of defendant's intrusion was *de minimis*. The private investigator merely videotaped plaintiff from a distance in his car and in places where plaintiff was in public view. Plaintiff does not assert that the video had audio capabilities or that any communications were taped. Defendant's work-related reason for the surveillance is a legitimate motive. Videotaping plaintiff under these circumstances is not highly offensive to a reasonable person.

Id. at *4.

[*CALIFORNIA SPECIFIC: Although not at issue in* Salazar*, in 1998 California adopted an anti-paparazzi statute.* CAL. CIV. CODE *§ 1708.8 (West 2005). The law prohibits physical invasions of privacy for the purpose of capturing images about a person engaging in "personal or familial activity" if done "in a manner that is offensive to a reasonable person." Additionally, if the plaintiff can prove that the invasion of privacy was committed for a commercial purpose, then the defendant is subject to disgorgement of any proceeds obtained as a result of the invasion.* Id. *at § 1708.8. According to the statute, "commercial purpose" means "any act done with the expectation of a sale, financial gain, or other consideration. A visual image, sound recording, or other physical impression shall not be found to have been, or intended to have been captured for a commercial purpose unless it is intended to be, or was in fact, sold, published, or transmitted."* Id. *at § 1708.8(k).* See Nunez v. S. Melgar Investigations, Inc.*, 2004 WL 1926794 at *10 (Cal. Ct. App. 2d Dist Aug. 30, 2004) (not published) (reversing grant of summary judgment to defendants' even though no pictures were taken because investigator researching workers' compensation claim carried a camera and the "statute requires only that the violator have an intent to take a picture");* Rotar v. Kabai*, 2005 WL 469679 (Cal. Ct. App. 3d Dist. Mar. 1, 2005) (not published) (statute does not apply to videotaping of suspected elder abuse because plaintiffs were not engaging in a personal or*

familial activity). In Turnbull v. American Broadcasting Cos., 32 Media L. Rep. (BNA) 2442 (C.D. Cal. 2004), a case involving use of hidden video cameras by ABC's 20/20, the district court interpreted the statute's commercial purpose provision. Denying summary judgment to the defendants, the court rejected defendants' arguments that under First Amendment jurisprudence news broadcasts do not qualify as commercial. Drawing a distinction between "commercial speech" and the statute's definition of "commercial purpose," the court held that the "statute addresses the sale or broadcast of images or recordings obtained by invading plaintiff's privacy" and concluded that "[t]here is no First Amendment protection for images so obtained." Id. at 2460-61. The court likewise denied defendants' motion for summary judgment on plaintiffs' intrusion claims. Defendants prevailed at trial, however, as the jury returned a verdict in their favor.]

In *Fogel* v. *Forbes, Inc*., 500 F. Supp. 1081 (E.D. Pa. 1980), plaintiffs sued after a magazine published photographs of them standing in front of stacks of merchandise as part of an article about profiteering by Latin American travelers who purchase merchandise in the United States and sell it for huge profits in their homeland. The court rejected their claim in part because the photograph was taken in a municipal airport open to the general public and privacy torts do "not apply to matters which occur in a public place or a place otherwise open to the public eye." *Id*. at 1087.

In another case, reporters for the ABC News program *Primetime Live* secretly recorded police officers stopping three young African-American male "testers" driving an expensive car in New Jersey. *Hornberger* v. *American Broad. Cos.*, 351 N.J. Super. 577, 799 A.2d 566 **(**App. Div. 2002). The police officers alleged, *inter alia*, that defendants fraudulently procured the tape of the episode. The appellate court upheld the dismissal by summary judgment of the claims in

part because plaintiffs had no expectation of privacy while they were searching the car, holding that there is no intrusion where conduct videotaped occurred on public street.

In *Harrison* v. *Washington Post Co*., 391 A.2d 781 (D.C. 1978), a news broadcast showing film of plaintiff being escorted by police officers into a bank that had been robbed and reporting that plaintiff was later released was not an invasion of privacy where the contents of an accurate news broadcast were events of substantial public interest, and where the events took place in public view and were filmed by a cameraman standing on a public sidewalk.

[*But see Shulman* v. *Group W Prods., Inc*., 18 Cal. 4th 200, 242, 955 P.2d 469, 497, 74 Cal. Rptr. 3d 843, 871 (Cal. 1998) (holding that although media had a right to videotape at accident scene alongside a public highway, there was a triable issue as to whether plaintiffs had an expectation of privacy inside the rescue helicopter that served as an ambulance, noting that "the state may not intrude into the proper sphere of the news media to dictate what they should publish and broadcast, but neither may the media play tyrant to the people by unlawfully spying on them in the name of newsgathering")].

In *Hartman* v. *Meredith Corp*., 638 F. Supp. 1015 (D. Kan. 1986), the court held that bail bondsmen did not state a cause of action against a broadcaster for invasion of privacy by alleging that photographs taken of them in court on behalf of clients charged with gambling crimes appeared on television while an announcer was stating who was charged with crimes because the topic was a matter of public concern, the photographs had been taken in a public place, and the broadcast occurred as a result of plaintiffs' occupation as bail bondsmen.

In *Schifano* v. *Greene County Greyhound Park, Inc*., 624 So. 2d 178 (Ala. 1993), the defendant used, for publicity purposes, a photograph depicting plaintiffs attending defendant's park facilities and sitting in its public seating. Relying on the Restatement (Second) of Torts

§ 652B, the Kansas Supreme Court held that no wrongful intrusion into plaintiffs' privacy had occurred because the plaintiffs were photographed while engaged in activities in a public place. "Similarly, the photograph of the plaintiffs in the public seating they chose to occupy can not be interpreted as being 'highly offensive' to a reasonable person." *Id*. at 180.

In *Salupo* v. *Fox, Inc*., No. 82761, 2004 WL 64964 at *3 (Ohio Ct. App. Jan. 15, 2004), the president of a bankrupt company and his family were filmed as they prepared to move from their house. The court upheld dismissal of plaintiff's claim against the television networks, noting that moving is usually done in public and that plaintiff had not alleged that defendants had intruded into a private place or that they had invaded his private seclusion.

In *Neff* v. *Time, Inc*., 406 F. Supp. 858 (W.D. Pa. 1976), the court granted summary judgment in favor of a sports magazine in connection with an article about football fans that included a photograph of plaintiff at a football game with the zipper of his pants open. Plaintiff alleged that the unauthorized photograph invaded his right to privacy and subjected him to public ridicule. Notwithstanding the fact that the court found that the magazine "deliberately exhibited [plaintiff] in an embarrassing manner," it also found that the plaintiff was aware that photos were being taken, and the picture was taken in a public place where everyone present could see the plaintiff. *Id*. at 860-61. In dismissing plaintiff's claim for invasion of privacy, the court stated that "[a] factually accurate public disclosure is not tortious when connected with a newsworthy event even though offensive to ordinary sensibilities." *Id*. at 861. [*But see Daily Times Democrat* v. *Graham*, 276 Ala. 380, 383, 162 So. 2d 474, 478 (1964) holding that woman who was photographed after air jets at county fair's fun house blew her skirt above her waist could recover against newspaper that published the photo and stating that "[t]o hold that one who is involuntarily and instantaneously enmeshed in an embarrassing pose forfeits her right of privacy

merely because she happened at the moment to be part of a public scene would be illogical, wrong, and unjust."]

In *Lane* v. *MRA Holdings, LLC*, 242 F. Supp. 2d 1205 (M.D. Fla. 2002), a federal court rejected a plaintiff's claims resulting from the allegedly unauthorized production and publication of nude photographs taken of her on a public street in Florida. While in her car, plaintiff and a friend were approached by individuals with cameras who requested that plaintiff and her friend expose themselves in exchange for beaded necklaces. Both plaintiff and her friend consented. Before the pictures were taken the plaintiff's friend stated that she had been photographed in public before, with her picture subsequently appearing in a men's magazine. Plaintiff claimed that the cameraman indicated that he was making a film for his personal use, and would not show the video to anyone not present at that time, but video clips of the plaintiff were included in "Girls Gone Wild," a video that depicts young women exposing themselves in public places. The court held that plaintiff consented to defendants' photographing and rejected her argument that as a minor (at age 17), she was legally incapable of authorizing and consenting to defendants' publication. The court also found that plaintiff's consent was not limited only to the cameraman's viewing. A key factor was that the interactions between plaintiff and the cameraman took place on a public street, where pedestrians were nearby. Also, it was "unreasonable to expect that a total stranger would limit the viewing of a video with shots of young women publicly exposing themselves to only those persons present at the time of the filming." *Id*. at 1220. Finally, because her friend had stated that she had been photographed nude in public before and that her photograph subsequently appeared in a magazine, the court found that plaintiff should have been aware of the potential consequences of her action. [*But see Bosley* v. *Wildwett.com*, 310 F. Supp. 2d 914 (N.D. Ohio 2004) (granting preliminary injunction

against sale or distribution of photographs or videos of television news anchor participating in a wet t-shirt contest because of questions of whether the plaintiff explicitly consented to being filmed where tacit consent is insufficient as a matter of law), *stay granted by* 2004 WL 1093037 (6th Cir. Apr. 21, 2004), *appeal discontinued* (May 20, 2004).]

See also Deteresa v. *American Broad. Cos.*, 121 F.3d 460, 466 (9th Cir. 1997) (finding no actionable intrusion where plaintiff was videotaped in public view from a public place and no private or intimate details were broadcast, no audio portion was broadcast, and only five seconds of videotape were broadcast); *Jackson* v. *Playboy Enters., Inc.*, 574 F. Supp. 10 (S.D. Ohio 1983) (dismissing claim based on photographs taken of plaintiff on public sidewalk); *Livingston* v. *Kentucky Post*, 14 Media L. Rep. (BNA) 2076 (Ky. Cir. Ct. 1987) (photographing a fully clothed plaintiff stepping out of a portable toilet was not an intrusion on seclusion where the plaintiff was in a public place and his exit was in plain view); *Nelson* v. *Maine Times*, 373 A.2d 1221, 1225 (Me. 1977) (dismissing claim by a minor who had been photographed in public without parental consent; stating that "[a] person's facial appearance is exposed to the public eye"); *Wilkins* v. *National Broad. Co.*, 71 Cal. App. 4th 1066, 84 Cal. Rptr. 2d 329 (2d Dist. 1999) (secret videotaping of business lunch at outdoor café with salesmen for company that leased 800 and 900 number telephone lines and then sold them to investors was not so extreme and outrageous as to exceed all bounds of that usually tolerated in a civilized society, as required for salesmen to prevail on their claim for intrusion and intentional infliction of emotional distress); *Fiorillo* v. *Berkley Adm'rs*, No. CV010458400S, 2004 WL 1153678, 37 Conn. L. Rptr. 62 (Conn. Super. Ct. May 5, 2004) (unreported) (videotaping by private investigator of plaintiff in public areas and entering and exiting church building did not amount to intrusion into plaintiff's seclusion); *Creel* v. *I.C.E. & Assocs., Inc.*, 771 N.E.2d 1276 (Ind. Ct. App. 2002)

(affirming grant of summary judgment in favor of private investigator who had covertly videotaped plaintiff, who was seeking disability benefits, playing the piano during church services where the investigator confined his videotaping to areas of the church that were open to the public, there were no signs indicating that only church members or their invitees could attend the services or prohibiting videotaping within the church); *Mulligan* v. *United Parcel Serv., Inc*., No. 95-1922, 1995 WL 695097 at *2 (E.D. Pa. Nov. 16, 1995) (holding that "party has no claim for invasion of privacy because of surveillance where he or she is not in a private place or in seclusion," and that plaintiff had no expectation of privacy when he was repairing a walkway in front of his home); *Stanton* v. *Metro Corp*., 357 F. Supp. 2d 369, 384 n.16 (D. Mass. 2005) (noting in a footnote that "[t]he tort of intrusion imposes liability for intentional intrusion upon the seclusion of another in his private affairs, if the intrusion would be highly offensive to a reasonable person" and stating that where defendant had published a photograph of plaintiff that was taken outside of a high school prom, "[i]t is highly doubtful that the taking of the picture constituted an intrusion into plaintiff's private sphere, or an intrusion that was highly offensive to a reasonable person."), *reversed on other grounds*, 438 F.3d 119 (2006).[9]

The development of the Internet has added a new twist to the intrusion tort as journalists download photos from the internet, rather than taking them themselves. In *Four Navy Seals* v. *Associated Press*, 413 F. Supp. 2d 1136 (S.D. Cal. 2005), the court dismissed plaintiffs' claim that defendants had invaded their privacy by downloading photos of Navy SEALS that suggested

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[9] Similar principles have also been applied to bar claims for the tort of intentional infliction of emotional distress where the basis of the claim is a photograph of plaintiff in a public place. In an action for intentional infliction of emotional distress, an undercover narcotics police officer assigned to give testimony at a hearing was photographed by reporters as he neared the courthouse. *Ross v. Burns*, 612 F.2d 271 (6th Cir. 1980). These photos later appeared in a newspaper under the caption "Know Your Enemies." The Sixth Circuit reversed a judgment for the officer, holding that the reporters' conduct, which consisted of photographing an undercover officer in a public place and publishing those photos in connection with a news article "expressing strong views on a current political and philosophical controversy" cannot fall within the meaning of "extreme and outrageous conduct" and could not have stated a claim for intentional infliction of emotional distress. *Id.* at 274.

potential abuse of Iraqi prisoners. Holding that any intrusion by defendants was *de minimus*, the court stated, "[c]onducting an internet search and downloading photos from a photo storage and sharing website under the alleged circumstances of this case are acts that do not rise to the level of exceptional prying into another's private affairs as required for the offensiveness element of intrusion upon seclusion." *Id*. at 1147. Noting that "the motive to gather news can negate the offensiveness element" of the tort of intrusion into seclusion, the court stated that "[e]ven if Defendants' actions had been offensive, which they were not, the pursuit of such a potentially important story in the manner alleged did not constitute highly offensive conduct by [Defendants]." *Id*.

(a) Plaintiff Cannot Recover for Photographs Taken by a Photographer on Public Property

Just as the First Amendment protects the taking of photographs of persons in public and visible to anyone passing, it provides similar protections when the person being photographed is on private property but is still visible to a passerby who is on public property.

In the following cases, courts have upheld the rights of the media to photograph individuals on private property when the individual is visible from public property with the naked eye. For example, in *Solomon v. National Enquirer, Inc*., Civ. A. No. DKC 95-3327, 1996 WL 635384 (D. Md. June 21, 1996), the district court held that publishing a photograph of plaintiff taken through her second-floor bedroom window was not intrusion because she was in public view and took no steps to conceal herself from uninvited eyes.

In *Wehling v. Columbia Broadcasting System*, 721 F.2d 506 (5th Cir. 1983), the Fifth Circuit upheld the dismissal of plaintiffs' claim, finding that a broadcast showing plaintiffs' residence did not invade plaintiffs' privacy because the broadcast "provide[s] the public with nothing more than could have been seen from a public street." *Id*. at 509; *see also Schiller v.*

Mitchell, 357 Ill. App. 3d 435, 828 N.E.2d 323 (Ill. App. Ct. 2005) (dismissing claim against neighbors for videotaping homeowners' property because the areas photographed were not private); [*King v. Metcalf 56 Homes Ass'n*, 385 F. Supp. 2d 1137 (D. Kan. 2005) (dismissing on summary judgment claim that neighbors had intruded on plaintiff's seclusion and noting that the record did not suggest that plaintiff took photographs from a non-public vantage point or used some type of magnifying lens)]; *American Broad. Cos. v. Gill*, 6 S.W.3d 19, 28 (Tex. App. 1999) (photographing properties owned by plaintiffs' savings and loan association in connection with investigative report did not constitute invasion of privacy because broadcast showed nothing more than what the public could view from the street), *overruled in part on other grounds*, *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103 (Tex. 2000); *Mojica Escobar v. Roca*, 926 F. Supp. 30, 35 (D.P.R. 1996) (holding that it does not constitute actionable intrusion to photograph, from a public road, the house of the wife of a prominent politician; "[w]hen the invasion of privacy is necessary and unavoidable, and it constitutes the most adequate means for obtaining a lawful purpose, then there is no violation") (citation and internal quotation marks omitted); *Bisbee v. John C. Conover Agency, Inc.*, 186 N.J. Super., 335, 452 A.2d 689 (App. Div. 1982) (holding that publisher and real estate agent were not subject to intrusion claim for photographing plaintiff's home from the street); *Bloomquist v. Albee*, No. Civ. 03-276-P-S, 2005 WL 758456, at *5 (D. Me. Mar. 29, 2005) (denying plaintiff's intrusion claim and stating that "[t]he image of the exterior of one's house and your American flag whether you live there with your spouse, your kids, a dog, or a nudist colony, is not alone something that would be 'highly offensive to a reasonable person.'" (*citing Nelson v. Maine Times*, 373 A.2d 1221 (Me. 1977), *report and recommendation adopted by* 2005 WL 1058910 (D. Me. Apr. 22, 2005).

(b) Use of a Telephoto Lens Does Not Change the Analysis

A number of courts have also held that a defendant's use of modern photographic equipment makes no difference with respect to the First Amendment analysis applicable to claims of intrusion in connection with newsgathering. For example, in *Aisenson v. American Broadcasting Co*., 220 Cal. App. 3d 146, 153, 269 Cal. Rptr. 379, 382 (Cal. Ct. App. 2d Dist. 1990), the plaintiff alleged slander, false light and intrusion into seclusion in connection with televised reports of an opinion poll on the performance of local criminal law judges, which included a videotape of him as he walked from his home to his car in a manner which, appellant alleged, "[made] it appear as if [he] were a criminal or the subject of some ongoing criminal investigation."

With respect to the plaintiff's intrusion claim, the court stated that "'[w]hen the legitimate public interest in the published information is substantial, a much greater intrusion into an individual's private life will be sanctioned, especially if the individual willingly entered into the public sphere. Because of their public responsibilities, government officials and candidates for such office have almost always been considered the paradigm case of "public figures" who should be subjected to the most thorough scrutiny.'" *Id*. at 162, 269 Cal. Rptr. at 387-88 (*quoting Kapellas v. Kofman*, 1 Cal. 3d 20, 36-37, 459 P.2d 912, 81 Cal. Rptr. 360 (1969)). According to the court, there was no evidence to support a finding that ABC's method of newsgathering exceeded the public's interest in seeing a videotaped picture of an elected official. *Id*. at 388. The camera crew reportedly videotaped plaintiff from their car, which was parked across the street from his home. Even though plaintiff claimed that he could not be seen from the photographer's location unless an enhanced lens was being used, he did not claim that his car and the driveway where he was filmed were outside of public view or that his home address or his car license plate number were disclosed. *Id.* "In light of appellant's voluntary accession to a

position of public trust, the social interest in allowing videotaped depictions of him, and the fact that appellant was photographed only while in public view, we conclude that there was no invasion of appellant's privacy as a matter of law."[10] *Id*. at 163, 269 Cal. Rptr. at 388.

Although the *Aisenson* court cited the plaintiff's status as a public figure, other courts have specifically found that such status is not required to defeat intrusion claims based on observations made from public places. For example in *Sundheim v. Board of County Commissioners of Douglas County*, 904 P.2d 1337 (Colo. App. 1995), *aff'd*, 926 P. 2d 545 (Colo. 1996), the Colorado Court of Appeals held that the use of a camera with a telescopic lens to observe events on the plaintiff's commercial property from outside the property on a public road did not constitute an unlawful invasion of privacy. Because there is no invasion of privacy involved in observing that which is plainly visible to the public, the court held that a person's real property is not protected from observations lawfully made from outside its perimeter, even if those observations are made with a telescopic lens or binoculars. The court also stated that a "commercial establishment enjoys a diminished expectation of privacy in those areas which are open to the public." *Id*. at 1351.

Similarly in *Vega-Rodriguez v. Puerto Rico Telephone Co*., 110 F.3d 174 (1st Cir. 1997), the First Circuit, holding that lawful surveillance by the naked eye does not become unlawful when conducted by "openly displayed video cameras," dismissed employees' invasion of privacy

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[10] The court also rejected a false light claim because it "is in substance equivalent to a libel claim" and there was no basis for such a claim. *Aisenson v. American Broadcasting Co*., 220 Cal. App. 3d 146, 160, 269 Cal. Rptr. 379, 387 (Cal. Ct. App. 2d Dist. 1990).

> There is, moreover, no basis for concluding that the videotape of appellant placed him in a false light. Photographs are not actionable if they are fair and accurate depictions of the person and scene in question, even if they place the person in a less than flattering light, so long as the photographs do not surpass the limits of decency by being highly offensive to persons of ordinary sensibilities.

Id. at 161, 269 Cal. Rptr. at 387 (footnote omitted).

claims arising out of video surveillance of quasi-public telephone company's communications center. "[N]o legitimate expectation of privacy exists in objects exposed to plain view as long as the viewer's presence at the vantage point is lawful," the court ruled. *Id*. at 181. "And the mere fact that the observation is accomplished by a video camera rather than the naked eye, and recorded on film rather than in a supervisor's memory, does not transmogrify a constitutionally innocent act into a constitutionally forbidden one." *Id*.; *See also Salazar*, 2000 WL 246586, at *1, (dismissing claim even though private investigator "used high technology surveillance equipment, including night-vision infrared high-powered scoping devices" to videotape plaintiff).[11]

With regard to the relatively analogous question of the use of image-enhancing technology under Fourth Amendment search and seizure analysis, the U.S. Supreme Court in *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986) held that the Environmental Protection Agency had not conducted a search when EPA agents flew over the defendant's plant and took pictures with an image-enhancing camera. According to the Court, no warrant was needed because the surveillance was conducted by "a conventional, albeit precise, commercial camera commonly used in mapmaking." *Id*. at 238.

(2) Courts Have Granted First Amendment Protections to Newsgathering in Semi-Public Locations Such as Businesses and Public Institutions

Courts have also routinely upheld the media's right to gather the news in business locations, both private and governmental. Although not as accessible as public streets, because these locations have been opened to the public to at least some degree, courts have held them to be available for news photography, even in the face of asserted privacy rights.

[11] *[But see Wolfson v. Lewis, 924 F. Supp. 1413 (E.D. Pa. 1996), discussed in Section V, infra, where court stressed the defendants' use of "shotgun" microphones and telephoto lenses in granting preliminary injunction against reporters.]*

For example, in *Desnick v. American Broadcasting Cos*., 44 F.3d 1345 (7th Cir. 1995), an ophthalmic clinic and two ophthalmic surgeons appealed the dismissal of their suit alleging trespass, defamation, and other torts arising out of the production and broadcast of a program segment of *Primetime Live* critical of the clinic. Plaintiffs alleged that Dr. Desnick, who was not a party to the litigation, was told that *Primetime Live* wanted to do a segment on large-scale cataract practices but that the segment would not be about just one cataract practice, that it would not involve "ambush" interviews or "undercover" surveillance and that it would be "fair and balanced." Desnick therefore permitted an ABC crew to videotape the clinic's main premises, to film a cataract operation and to interview doctors, technicians, and patients, but he was not informed that individuals equipped with concealed cameras had been sent to other offices posing as patients requesting eye examinations. Unhappy with the broadcast, plaintiffs challenged both the report and the reporting techniques, alleging trespass, invasion of privacy, violations of electronic surveillance statutes and fraud by gaining access to the office by means of false promises.

Rejecting the trespass claims, the court stated that "[t]here was no invasion in the present case of any of the specific interests that the tort of trespass seeks to protect. The test patients entered offices that were open to anyone expressing a desire for ophthalmic services and videotaped physicians engaged in professional, not personal, communications with strangers (the testers themselves). The activities of the offices were not disrupted . . . ." *Id*. at 1352. The court noted:

> No embarrassingly intimate details of anybody's life were publicized in the present case. There 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. Had the testers been undercover FBI agents,

> there would have been no violation of the Fourth Amendment, because there would have been no invasion of a legally protected interest in property or privacy. *United States* v. *White*, 401 U.S. 745, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971); *Lewis* v. *United States*, 385 U.S. 206, 211, 87 S. Ct. 424, 427-28, 17 L. Ed. 2d 312 (1966); *Forster* v. *County of Santa Barbara*, 896 F.2d 1146, 1148-49 (9th Cir. 1990); *Northside Realty Associates, Inc*. v. *United States*, 605 F.2d 1348, 1355 (5th Cir. 1979). "Testers" who pose as prospective home buyers in order to gather evidence of housing discrimination are not trespassers even if they are private persons not acting under color of law. *Cf. id.* at 1355. The situation of the defendants' "testers" is analogous. 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.

Id. at 1353. (*See infra* Section III.)

The *Desnick* court similarly rejected plaintiffs' allegation of fraud noting that Illinois does not provide a remedy for fraudulent promises unless they are part of a "scheme" to defraud.[12] Rejecting plaintiffs' argument that a series of false promises constituted a scheme, the court granted summary judgment to defendants stating that "[t]he only scheme here was a scheme to expose publicly any bad practices that the investigative team discovered, and that is not a fraudulent scheme." *Id*. at 1355. [*But see Dietemann* v. *Time, Inc*., 449 F.2d 245 (9th Cir. 1971) (holding that "quack doctor" who was covertly filmed in his home/office without his consent had claim for invasion of privacy). Privacy protection is greatest in the "home" setting.]

In *Machleder* v. *Diaz*, 538 F. Supp. 1364, 1374 (S.D.N.Y. 1982), the court granted summary judgment to the media in an action for, *inter alia*, invasion of privacy and trespass brought by a company president against a television station and reporter after the reporter attempted to interview plaintiff outside of his company's building. The court found that the television station and reporter were not liable for intruding upon the company president's

[12] *[Note this is not the same in all states. See, e.g., Veilleux v. National Broad. Co., 206 F.3d 92, 120-21 (1st Cir. 2000).]*

seclusion because he was approached and filmed in a semipublic area. The court held that the reporter's questioning, although aggressive, occurred in one encounter with the company president and did not constitute unabated hounding.

In *Huskey* v. *Dalles Chronicle, Inc*., 13 Media L. Rep. (BNA) 1057 (D. Or. 1986), employees of two newspaper organizations were held not to have invaded upon an arrestee's privacy when they photographed him inside a county jail during the booking procedure. Because the photographs were taken in a public area, the court granted a motion for summary judgment to one of the newspapers and dismissed the claim against the other newspaper defendant. *See also Cox Communications, Inc*. v. *Lowe*, 173 Ga. App. 812, 813, 328 S.E.2d 384, 385-87 (1985), in which a prisoner, who was incidentally videotaped through a fence from a public parking lot while walking in a prison yard, could not recover against the television station for invasion of his privacy. [*But see Huskey* v. *National Broad. Co.*, 632 F. Supp. 1282 (N.D. Ill. 1986) (denying broadcasting company's motion to dismiss privacy claim by prisoner who was videotaped shirtless with his tattoos exposed in the prison's "exercise cage."]

In *Pierson* v. *News Group Publ'ns, Inc*., 549 F. Supp. 635 (S.D. Ga. 1982), journalists who photographed a soldier, with the Army's permission, during a training exercise, were held not to have intruded into the soldier's solitude and private affairs. Holding that a physical intrusion analogous to a trespass was an essential element of the tort of intrusion into seclusion, the court reasoned that the soldier was unable to allege any sort of physical intrusion because the training took place on a military reservation that was controlled by the soldier's superiors, and the location of the training, although restricted to the public generally, was not a place where the soldier could reasonably expect privacy as he could in his sleeping quarters or other peculiarly personal area.

In *Mark* v. *Seattle Times*, 96 Wash. 2d 473, 499, 635 P.2d 1081, 1095 (1981), the court dismissed a claim against a newspaper after its photographer had placed his camera against the window of the pharmacy that was not open for business and photographed the interior, including a pharmacist who had been indicted for Medicaid fraud. Even though there was a factual dispute over whether the cameraman was on public or private property, the court ruled that even if the property were private, the place from which the photograph was taken was open to the public and thus any passerby could have viewed the scene recorded by the camera. Moreover, the court noted that "a person accused of a crime loses some of his or her claims to privacy." *Id*. *See also Furman* v. *Sheppard*, 130 Md. App. 67, 76, 744 A.2d 583, 587 (2000) (surveillance film and photographs taken by a private investigator who allegedly trespassed on yacht club's property and observed the plaintiff "doing things that could be observed by non-trespassing members of the general public" did not violate the plaintiff's reasonable expectation of privacy).

In *Haynik* v. *Zimlich*, 30 Ohio Misc. 2d 16, 508 N.E.2d 195 (C.P. 1986), the court granted summary judgment in favor of the news media in an action for invasion of privacy brought by plaintiff who was photographed in a public hallway in the sheriff's department after being arrested because no liability exists for intrusion where the media "merely observes, films, or records a person in a public place, such as a courthouse or a police station." *Id*. at 22, 508 N.E.2d at 201.

In *Russell* v. *American Broadcasting Co.*, No. 94-C-5768, 1995 WL 330920 (N.D. Ill. May 31, 1995), a *Primetime Live* reporter obtained a job at a Chicago grocery store to uncover alleged sanitation problems in the commercial fish industry. The reporter wore a hidden camera and microphone to record conversations with co-workers that revealed allegedly questionable handling of fish that were being sold. According to the court, even if Illinois recognized the tort

of intrusion into seclusion, plaintiff would not recover. "[T]he core of this tort is the offensive prying into the private domain of another . . . . [P]laintiff alleges that defendants secretly recorded a conversation she willingly had with a co-worker at her place of business. This is hardly 'offensive prying into the private domain of another.'" *Id.* at *8. [*But see Sanders* v. *American Broad. Cos.*, 20 Cal. 4th 907, 911, 978 P.2d 67, 69, 85 Cal. Rptr. 2d 909, 911 (1999) (holding that employee whose conversation was surreptitiously videotaped could bring action for intrusion even if the conversation could have been overheard by co-workers although stating that "we do not hold or imply that investigative journalists necessarily commit a tort by secretly recording events and conversations in offices, stores or other workplaces. Whether a reasonable expectation of privacy is violated by such recording depends on the exact nature of the conduct and all the surrounding circumstances.")]

In *Stith* v. *Cosmos Broadcasting, Inc*., No. 96 CI 00309, 1996 WL 784513 (Ky. Cir. Ct. Sept. 3, 1996), plaintiff was shown on the television show *Inside Edition* on the subject of alleged abuse of horses by their trainers. Defendant obtained the footage by accessing the grounds of "The Celebration," a site where horse shows are held, by using hidden video equipment, and taping plaintiff explaining the use of chains on horses. Plaintiff claimed that he was defamed by the televised report, which inserted his remarks between the comments of a man indicted for felony abuse of horses. In rejecting his claim for invasion of privacy, the court held that plaintiff did not have a reasonable expectation of privacy at the event, as it was an event in which members of the public were in attendance. "Consequently, [defendants] did not intrude upon his privacy when they taped [him there]. . . ." *Id*. at *4.

(3) Courts Have Allowed Newsgathering When Consent, Either Actual or Implied, Has Been Found Even in Locales that Might Otherwise Be Thought of as Private

Courts have upheld the media's right to gather the news after finding that consent, either actual or implied, was given to the photographer, even in homes, hospitals and other locales that might otherwise be thought of as private.[13] For example, in *Rawls* v. *Conde Nast Publications, Inc*., 446 F.2d 313 (5th Cir. 1971), the Fifth Circuit affirmed a jury finding that no intrusion into privacy had occurred when a homeowner returned home to discover a magazine's employees in her home photographing a fashion layout. The magazine's employees had been admitted to the house by plaintiff's 14-year-old daughter, and the court found that the homeowner by her conduct gave actual or implied consent for the magazine's employees to remain in home and to continue to take photographs.

In *Bevis* v. *United States*, No. 91-1665, 1992 U.S. App. LEXIS 5627, at *8-11 (1st Cir. Jan. 15, 1992) (unpublished opinion), the First Circuit affirmed the trial court's granting of summary judgment dismissing an intrusion claim brought on behalf of a V.A. hospital patient photographed, without his permission, as he lay in bed. The court emphasized the fact that the photographer was accompanied by a hospital escort and abided by the escort's instructions that he not take any photos in which a patient would be identifiable. [*But see Stratton* v. *Krywko*, No. 248669, 248676, 2005 WL 27522 (Mich. Ct. App. Jan. 6, 2005) (reinstating claim for intrusion upon seclusion against television station, which had videotaped plaintiff being treated at hospital

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[13] *[In a 2006 case, the Superior Court of New Jersey reversed a trial court's grant of class certification to hospital patients who had their confidential medical procedures, treatment or information disclosed to or observed by individuals working on the television show Trauma: Life in the ER, holding that individual, not class, issues would predominate. Castro v. NYT Television, 384 N.J. Super. 601, 895 A.2d 1173 (N.J. Super. Ct. App. Div. 2006). According to the court: "[T]he determination of defendants' liability for this tort will necessarily turn on the particular circumstances of the videotaping of each individual plaintiff, including the nature of the area where the videotaping was conducted, the appearance of the plaintiff during the videotaping, what medical procedure, if any, was being performed, and whether the plaintiff objected to or welcomed the videotaping. Moreover, the amount of damages to be awarded to any plaintiff whose right to seclusion was unreasonably intruded upon would depend on evidence of those same individual circumstances." Id. at *4.]*

after she had refused to sign consent form, due to questions as to whether the method of intrusion was objectionable to the reasonable person), *appeal denied*, 474 Mich. 869, 703 N.W.2d 817 (Mich. 2005) (table) and *appeal denied sub nom*. *Stratton* v. *City of Flint*, 474 Mich. 872, 703 N.W.2d 817 (Mich. 2005).]

In *Cassidy* v. *American Broadcasting Cos.*, 60 Ill. App. 3d 831, 377 N.E.2d 126, 17 Ill. Dec. 936 (1st Dist. 1978), a news crew's filming of a police officer undercover at a massage parlor through a two-way mirror was not an intrusion into privacy since his status as a public official was tantamount to an implied consent to inform the public by all legitimate means regarding his activities in the discharge of his public duties.

In *Buckley* v. *W.E.N.H.-TV*, 5 Media L. Rep. (BNA) 1509 (D.N.H. 1979), a prisoner who was aware that a television interview was in progress and remained at a table where others who volunteered to be interviewed sat, and knowingly attempted to participate in the interviews did not have claim for intrusion upon privacy. Other factors influencing the court's decision were that the subject matter of the documentary was a matter of public interest and that a prisoner himself, "by virtue of his crime and subsequent trial, becomes a public figure in whose misadventures the community has a consuming interest." *Id*. at 1510.

In *Reeves* v. *Fox Television Network*, 983 F. Supp. 703 (N.D. Ohio 1997), a camera crew from the television show *COPS* accompanied police into plaintiff's house and videotaped his arrest. Plaintiff asserted claims for intrusion and trespass, but the court dismissed the claims on defendants' motion for summary judgment after finding that plaintiff had consented to entry by both the police and the camera crew. The court also dismissed the claims against Fox because no one from Fox was present at the scene and Fox's only role was the broadcast of the show.

In *Florida Publishing Co*. v. *Fletcher*, 340 So. 2d 914 (Fla. 1976), the court rejected a claim for trespass after finding implied consent for a news photographer to enter a home damaged by fire based upon the theory of implied consent by common custom, usage and practice.

[Nor can the plaintiff [*insert name of corporation*] state a claim for invasion of privacy, including the tort of intrusion. In *W.C.H. of Waverly, Mo., Inc*. v. *Meredith Corp*., 13 Media L. Rep. (BNA) 1648 (W.D. Mo. 1986), a corporation that operated an alcohol and drug abuse rehabilitation center whose employee was filmed by hidden cameras during an interview with a television news producer who purported to be a candidate for treatment at the hospital could not recover for intrusion upon seclusion. Noting that state courts had defined the right of privacy as one that protects the "ordinary sensibilities of an *individual*," the federal court declined to extend this privacy action to allow recovery by corporations. *Id.* at 1650 (citation omitted); *see also* RESTATEMENT (SECOND) OF TORTS § 652I cmt. c (1977) (invasion of privacy claims are only available to individuals, not corporations, partnerships, or other such entities); *S. Air Transp. v. American Broad. Cos.*, 670 F. Supp. 38, 42 (D.D.C. 1987))]

[PLAINTIFF'S CASES DO NOT PROVIDE A BASIS FOR RECOVERY HERE][14]

Plaintiffs rely primarily upon the following cases: *Galella* v. *Onassis*, 353 F. Supp. 196 (S.D.N.Y. 1972), *aff'd in part, rev'd in part*, 487 F.2d 986 (2d Cir. 1973); *Wolfson* v. *Lewis*, 924 F. Supp. 1413 (E.D. Pa. 1996); and *Food Lion, Inc*. v. *Capital Cities/ABC, Inc*., 194 F.3d 505 (4th Cir. 1999). However, each of these cases is clearly distinguishable, and therefore should not be relied upon by the Court in this case.

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[14] *[This section is included because these appear to be the cases that plaintiffs are most likely to rely upon; this section may be used in a reply in connection with any motion to dismiss.]*

Galella v. Onassis

Despite plaintiff's claims, *Galella* is actually a harassment case and not a newsgathering case. The victims of the stalking were Jacqueline Onassis, the widow of President John Kennedy, and their two children, John Jr. and Caroline, who were minors at the time. The defendant, Richard Galella, "fancie[d] himself as a 'paparazzo' (literally a kind of annoying insect. . .)." 487 F.2d at 991. According to the court, "[p]aparazzi make themselves as visible to the public and obnoxious to their photographic subjects as possible to aid in the advertisement and wide sale of their works." *Id*. at 992.

Galella was not covering a story nor involved in a news investigation. 353 F. Supp. at 216. Instead, he had engaged in a years-long pattern of abusive behavior toward Mrs. Onassis and the children, including jumping at them, touching Mrs. Onassis, bumping into her children, repeatedly going to, and into, the children's schools, frequently taking pictures of family members with flashbulbs from as close as two to three feet away, causing the children to fall off their bicycles or bang into glass doors, endangering Mrs. Onassis with the propeller of his power boat while she was swimming, and physically blocking the family's passage. 353 F. Supp. at 207-14. According to the district court, Galella's conduct amounted to "assault and battery." That is certainly not the case here.

Because the *Galella* facts were so unusual, courts have explicitly refused to rely on *Galella* when it could not be said (as it could in *Galella*) that "respondents' camera crew came into physical contact with [plaintiff] or endangered the safety of him or his family." *Aisenson* v. *American Broad. Cos*., 220 Cal. App. 3d 146, 162, 269 Cal. Rptr. 379, 388 (2d Dist. 1990).

Wolfson v. Lewis

The case of *Wolfson* v. *Lewis*, although nowhere near as outrageous *Galella*, also raises issues of stalking and child endangerment that are not present in the case at bar. The *Wolfson*

case arose out an investigative report by the tabloid television show *Inside Edition*. The investigation had been aimed at executive salary levels in the healthcare industry. Two investigative journalists from *Inside Edition* focused their story on two executives at U.S. Healthcare, Richard and Nancy Wolfson. The court found that the journalists attempted to obtain footage of the Wolfsons by staking out their house, following them to Florida, renting a boat to get close to the Wolfsons' house, surreptitiously following a car transporting the Wolfsons' child to school and recording the goings-on at the house through the use of "shotgun" mikes and telephoto lenses.

Although the court expressly recognized the press's constitutional right to "inform the public about the organizations that provide health insurance to millions of Americans," and that "T.V. journalists are protected by the First Amendment," 924 F. Supp. at 1416, it found the reporters' apparent stalking of the Wolfsons for photographs and the asserted following of their child to exceed the permitted boundary of conduct. No such allegations are made here.

Food Lion v. Capital Cities/ABC, Inc.

The *Food Lion* case was based on an undercover investigation by *Primetime Live* of sanitary conditions and food handling practices at the Food Lion supermarket chain. Two reporters obtained jobs at Food Lion and used a miniature video camera, hidden microphone, and a wireless radio transmitter to record their daily activities. According to ABC, the film footage, which included repackaging rotten meat, was crucial to the investigation and it would not have broadcast the story without it. Food Lion never challenged the truth of the broadcast. Instead, it sued ABC over the methods used to obtain the story, particularly the reporters' use of false resumes to gain employment and the reporters' alleged trespass onto Food Lion's private property.

The Fourth Circuit rejected all claims but an award of $2 against *Primetime Live* based on its assumption that the state courts in North and South Carolina would find that the reporters' conduct was sufficient to breach the duty of loyalty therefore triggering tort liability and that a breach of the duty of loyalty was also grounds for a trespass claim. 194 F.3d at 516, 518. The Supreme Court of North Carolina has since repudiated the *Food Lion* decisions even as to this sole basis for liability, stating that the federal trial court "incorrectly interpreted" state law when it held that the state courts would recognize a claim for breach of the duty of loyalty. *Dalton* v. *Camp*, 353 N.C. 647, 653, 548 S.E.2d 704, 709 (2001).]

c) Conclusion: Plaintiff's Intrusion Claim Fails as a Matter of Law

Based on the foregoing reasons, plaintiff's claims for intrusion upon solitude or seclusion must be dismissed.

SECTION TWO: WIRETAP ACT VIOLATION CLAIMS

1. DEFENDANT DID NOT VIOLATE THE WIRETAP ACT BECAUSE HE BOTH CONSENTED TO THE RECORDING AND LACKED A TORTIOUS OR CRIMINAL PURPOSE

The plaintiff's claim that the defendant violated the federal wiretap act[15] fails because the defendant was a party to the intercepted conversation, and (as the undisputed facts set forth above demonstrate), he lacked a "tortuous or criminal purpose" for making the recording.

a) Because the Defendant Was a Party to the Conversation, His Recording of the Conversation Does Not Violate the Federal Wiretap Act

The federal wiretap statute, 18 U.S.C. § 2510, *et seq.*, imposes criminal penalties on anyone who "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication." 18 U.S.C. § 2511(1)(a) (2006). The statute contains an exception for "one-party consent" of the recording. Under section 2511(2)(d), it is *legal* to intercept a communication if the person doing so is also a party to the communication or has the consent of one of the parties. 18 U.S.C. § 2511(2)(d). Consent need not be explicit; where the surrounding circumstances demonstrate that the party knowingly agreed to the surveillance, consent will be implied. *Williams v. Poulos*, 11 F.3d 271, 281 (1st Cir. 1993). The consent exception does not apply, however, if the communication "is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State." 18 U.S.C. §2511(2)(d).

Plaintiff first asserts that defendant's actions do not fall within the one-party consent exception (§ 2511(2)(d)) because defendant was not a party to the communication. However, a party who is present during a conversation but does not engage in the conversation is still

[15] *[NOTE: This Model Brief does not address claims brought under state wiretap statutes, some of which require two-party consent.]*

considered a party to the communication. *See Pitts Sales, Inc. v. King World Prods., Inc.*, 383 F. Supp. 2d 1354, 1361-62 (S.D. Fla. 2005) (dismissing a section 2511 claim after finding a television producer wearing a hidden camera to record conversations was a party to the communication even though he did not participate in the conversation). Because defendant was present during the conversation, defendant was a party to the conversation. *See id.*

Alternatively, plaintiff alleges that defendant, a party to the conversation, "intercepted the oral communication to commit the tort of invasion of privacy [and violation of the State's anti-eavesdropping act]." Am. Compl. ¶ _____ [*insert reference to appropriate section of Amended Complaint*]. That allegation is without merit, and is insufficient as a matter of law to limit the application of the one-party consent exception.

First, as discussed *supra*, plaintiff cannot prove his claim for invasion of privacy. Second, plaintiff cannot invoke the [*state*] eavesdropping statute as an exception to the federal wiretapping statute. *See Zhou v. Pittsburg State Univ.*, 252 F. Supp. 2d 1194, 1203 (D. Kan. 2003) (finding no violation of § 2511(2)(d) even though recording of telephone conversation may violate state wiretap law); *see also Glinsky v. City of Chicago*, No. 99 C 3063, 2002 WL 113884, at *2 (N.D. Ill. Jan. 29, 2002) ("Even if the *act* of recording the conversation were illegal under [state] law, this does not constitute a criminal or tortious purpose for its *use*."); *see also Buckingham v. Gailor*, No. 00-CV-1568, 2001 WL 34036325, at *5-6 (D. Md. Mar. 27, 2001) (holding that intention to violate the state wiretap statute or commit invasion of privacy under state law is not sufficient to constitute the tortious purpose required by § 2511(2)(d)); *Roberts v. Americable Int'l, Inc.*, 883 F. Supp. 499, 503 (E.D. Cal. 1995) (holding that alleged violation of state privacy law is not sufficient to establish tortious purpose under § 2511(2)(d)); *Payne v. Norwest Corp.*, 911 F. Supp. 1299, 1304 (D. Mont. 1995) (holding that plaintiff may

not rely on a violation of Montana's wiretapping law to establish violation of section 2511(2)(d)), *aff'd in part, rev'd in part*, 113 F.3d 1079 (9th Cir. 1997); *see, e.g.*, *Sussman v. American Broad. Cos.*, 186 F.3d 1200 (9th Cir. 1999) (holding that news media does not violate § 2511(2)(d) by surreptitiously recording conversations for purposes of preparing news report, even if the act of recording may constitute an invasion of privacy under state tort law).

Third, and most significantly, plaintiff's federal wiretap claim must fail because defendant lacks the requisite intent to commit a criminal or tortious act. Under section 2511, courts focus not upon whether the interception itself violated another law, but whether the purpose of the interception — its intended use — was criminal or tortious. *Payne*, 911 F. Supp. at 1304. The question is "whether, at the time the recording took place, [defendant] recorded the conversation *with the express intent of committing a tort*." *Medical Lab. Mgmt. Consultants v. American Broad. Cos.*, 30 F. Supp. 2d 1182, 1205 (D. Ariz. 1998); *aff'd*, 306 F.3d 806 (9th Cir. 2002); *see also In re DoubleClick, Inc.*, 154 F. Supp. 2d 497, 515 (S.D.N.Y. 2001) ("Section 2511(2)(d)'s legislative history and case law make clear that the 'criminal' or 'tortious' purpose requirement is to be construed narrowly, covering only acts accompanied by a specific contemporary intention to commit a crime or tort."); *cf. Russell v. American Broad. Cos.*, No. 94C5768, 1995 U.S. Dist. LEXIS 7528, at *10 (N.D. Ill. May 30, 1995) (explaining that "the critical question under section 2511(2)(d) is *why* the communication was intercepted, not *how* the recording was ultimately used").

The "tortious purpose" referenced in § 2511(2)(d) "must be a tortious purpose other than the mere intent to surreptitiously record an oral conversation." *Roberts*, 883 F. Supp. at 503 (finding no violation of section 2511 where recordings were made to protect the recorder and/or gather evidence of improper conduct); *see also Deteresa v. American Broad. Cos.*, 121 F.3d 460,

467 (9th Cir. 1997) (holding that there is no violation of § 2511 where news media representative records conversation to which he is a party for purposes of preparing a news report). The distinction between whether journalists "are ultimately liable for conduct found to be tortious [and] whether, at the time the recording took place, they recorded a conversation with the express intent of committing a tort . . . is significant, for without it the media could be held liable for undercover reporting under §2511 even when its sole intent was to gather news." *Vazquez-Santos v. El Mundo Broad. Corp.*, 283 F. Supp. 2d 561, 568 (D.P.R. 2003).

Plaintiff has failed to present any competent evidence that [*insert name*] recorded the conversation with plaintiff for the purpose of committing any crime or tort. Here, defendant is a journalist who recorded the conversation at issue for the purpose of newsgathering. [*cite to paragraph of Complaint or affidavit or deposition testimony*] Newsgathering, in and of itself, is neither tortious nor criminal. *See Sussman*, 186 F.3d at 1202-03 (noting that newsgathering is a lawful purpose for surreptitious taping); *cf. Desnick v. ABC., Inc.*, 44 F.3d 1345, 1354 (7th Cir. 1995) ("Telling the world the truth about a Medicare fraud is hardly what the framers of [section 2511] could have had in mind in forbidding a person to record his own conversations if he was trying to commit a[tortious or] 'injurious act.'"). By definition, then, the interception was not "for the purpose of committing any criminal or tortious act," and cannot serve as the basis for the imposition of liability under section 2511. *See Sussman*, 186 F.3d at 1202-03.

Moreover, section 2511 was not intended to be a "stumbling block in the path of journalists who record their own conversations." *Medical Lab. Mgmt. Consultants*, 30 F. Supp. 2d at 1205. This intent is evidenced by an important change in the statutory language. Before it was amended in 1986, section 2511(2)(d) exempted from liability one who recorded her own conversations "unless such communication is intercepted for the purpose of committing any

criminal or tortious act . . . *or for the purpose of committing any other injurious act*" (emphasis added). Notably, Congress excised the "other injurious act" language in 1986. The United States Senate explained that this amendment was necessary to protect journalists engaged in newsgathering:

> In numerous court cases the term "other injurious purposes" has been misconstrued. Most troubling of these cases have been attempts by parties to chill the exercise of First Amendment rights through the use of civil remedies under this chapter . . . . This interpretation of the statute places a stumbling block in the path of even the most scrupulous journalist. Many news stories have been brought to light by recording a conversation with the consent of only one of the parties involved — often the journalist himself. Many news stories are embarrassing to someone. The present wording of Section 2511(2)(d) not only provides such a person with a right to bring suit, but it also makes the actions of the journalist a potential criminal offense under Section 2511, even if the interception was made in the ordinary course of responsible newsgathering activities and not for the purpose of committing a criminal act or tort.

Boddie v. American Broad. Cos., 694 F. Supp. 1304, 1307-08 (N.D. Ohio 1988), citing S. Rep. 99-541, 99th Cong. 2d Sess. at 17 (1986), *aff'd*, 881 F.2d 267 (6th Cir. 1989).

The House of Representatives similarly condemned applying section 2511 to journalists engaged in newsgathering:

> The statute thus presents the journalist with a hard choice: to get the news may expose him or her to a criminal conviction and/or civil liability. . . . The Committee finds such a threat to be inconsistent with the guarantees of the First Amendment. . . . The amendment is intended to remove only the shadow of a finding that Section 2511 had been violated by interceptions made in the course of otherwise responsible newsgathering.

Id. at 1308, citing H.R. Rep. No. 99-647, 99th Cong. 2d Sess. at 40 (1986). The unambiguous purpose driving the amendment was summed up by the court in *Vazquez-Santos v. El Mundo Broad. Corp*. thusly: "Congress amended the statute to protect journalists engaged in responsible news-gathering that does not involve the commission of a crime or tort." 219 F. Supp. 2d 221, 228 (D. P.R. 2002).

In light of this clear legislative intent, courts have refused to allow section 2511 claims against media defendants who, without tortious or criminal purpose, intercept oral communications while engaged in newsgathering activities. *Medical Lab. Mgmt. Consultants*, 30 F. Supp. at 1205 (dismissing a section 2511 claim where journalist recorded conversations while investigating story regarding testing by laboratory); *see also Desnick*, 44 F.3d at 1353-54 (dismissing a section 2511 claim where the purpose of recordings was to investigate plaintiffs' medical treatment); *Berger v. Cable News Network, Inc.*, No. CV 94-46-BLG-JDS, 1996 WL 390528 at *3 (D. Mont. Feb. 26, 1996) (finding no liability under section 2511 where reporters made the recordings to produce a news story, not for the purpose of committing a crime or tortious act); *Russell*, 1995 U.S. Dist. LEXIS 7528, at *4 (finding no violation of section 2511 where purpose of recording conversation was to expose sanitation problems, not to commit a crime or tort); *Boddie*, 694 F. Supp. at 1309 (dismissing section 2511 claim where recording by reporter did not rise to a crime or tort).

This case is no different. Here, the purpose of [*insert name*]'s visit to plaintiff's [*office/home*] was to investigate plaintiff's [*specify*] practices, a subject of public concern. [*cites.*] Plaintiff even concedes in his Amended Complaint that defendant had no tortious or criminal purpose in conducting his investigation, and admits that defendant simply was engaged in newsgathering. [Am. Compl. ¶ _____] [*insert reference to appropriate section of Amended Complaint*]. Thus, plaintiff's own allegations demonstrate that [*insert name*]'s purpose was not to commit a crime or tort. *See Desnick*, 44 F.3d at 1353 (noting that plaintiff's own allegations state that defendants' purpose was to see whether the physicians would recommend cataract surgery on the testers); *Russell*, 1995 U.S. Dist. LEXIS 7528, at *10 (finding no violation of section 2511 where plaintiffs admitted in complaint that defendants' purpose in recording was to

expose sanitation problems). Moreover, plaintiff has presented no competent evidence that [*insert name*] recorded the conversation with plaintiff for the purpose of committing a crime or tort. *Deteresa*, 121 F.3d at 467.

Because defendant was a party to the communication and because there is neither an allegation nor any evidence that defendant intended to commit a tort or crime when he recorded the conversation with plaintiff (and because the evidence demonstrates that defendant's purpose in intercepting conversations was merely to investigate a newsworthy story), plaintiff's claim under 18 U.S.C. § 2510, *et seq*. must fail.

2. RECORDING ORAL COMMUNICATIONS IN A PUBLIC PLACE DOES NOT VIOLATE THE STATUTE

Federal and state wiretapping statutes protect only those communications in which the participants had a reasonable expectation of privacy. *See* 18 U.S.C. § 2510(2) (2006) (stating that the federal wiretap act protects only those oral communications "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation"); *see also Hornberger v. American Broad. Cos.*, 351 N.J. Super. 577, 574-75, 799 A.2d 566, 591-93 (2002). A party cannot claim a reasonable expectation of privacy with respect to "an object or activity which is open and visible to the public when the presence of members of the public may reasonably be anticipated." *State v. Augafa*, 92 Haw. 454, 467, 992 P.2d 723, 736 (Haw. Ct. App. 1999) (holding that the videotaping at issue was "of a public street with unlimited access and, therefore, Defendant's presence and/or transaction was 'in a public place subject to public viewing or hearing'"); *see also Kee v. City of Rowlett*, 247 F.3d 206, 211 (5th Cir. 2001) (concluding that the plaintiff had no reasonable expectation of privacy at an outdoor grave site during a funeral, and therefore finding no violation of the federal wiretap act); *Wilkins v. National Broad. Co.*, 71 Cal. App. 4th

1066, 1077-79, 84 Cal. Rptr. 2d 329, 336 (2d Dist. 1999) (holding that hidden camera recording of a conversation in an open patio area of a restaurant did not violate the California wiretapping statute).

Reasonable privacy expectations do not extend to what can readily be seen in a public place or to what can readily be heard by passersby in such a place. *Fordyce v. City of Seattle*, 840 F. Supp. 784, 793 (W.D. Wash. 1993), *aff'd in part, vacated in part, rev'd in part*, 55 F.3d 436 (9th Cir. 1995); *Brooks v. American Broad. Cos.*, 737 F. Supp. 431 (N.D. Ohio 1990), *aff'd in part, vacated in part*, 932 F.2d 495 (6th Cir. 1991). This is because "[o]n the public street, or in any public place, the plaintiff has no legal right to be alone; and it is no invasion of his privacy to do no more than follow him about and watch him there." *Mark v. Seattle Times*, 96 Wash. 2d 473, 496-97, 635 P.2d 1081, 1094 (1981) (citation omitted); *Hornberger v. American Broad. Cos.*, 351 N.J. Super. 577, 593, 779 A.2d 566, 623 (App. Div. 2002) (holding that "police officers on duty, searching a vehicle on a public street, cannot expect the same level of privacy as a private citizen in a private place"); *Kinsella v. Welch*, 362 N.J. Super. 143, 158-59, 827 A.2d 325, 334 (App. Div. 2003) (concluding that the plaintiff had no reasonable expectation of privacy in a hospital). Similarly, it is not an invasion of privacy to take a person's photograph in a public place, "since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public site which anyone would be free to see." *Id.*; *see also Fordyce*, 907 F. Supp. at 1447-48 (state wiretap statute does not prohibit audio and video recording of conversation held on a public street in voices audible to passersby using a videotape camera).

This line of reasoning has been extended to include audio recordings of conversations that are merely susceptible of being overheard by persons out of view. *Wilkins* at 1077-79, 84 Cal.

Rptr. 2d at 336; *Ex parte Graves*, 853 S.W.2d 701, 705-06 (Tex. App. 1993); *see also Agnew v. Dupler*, 553 Pa. 33, 41, 717 A.2d 519, 524 (1998) (interpreting similar state wiretap statute). Courts have concluded that even conversations that take place in the home but that may be heard by those outside are not protected by wiretap laws. *See, e.g.*, *United States v. Llanes*, 398 F.2d 880, 884 (2d Cir. 1968) (finding no reasonable expectation of privacy in a conversation conducted within home, but audible to those outside); *Commonwealth v. Louden*, 536 Pa. 180, 191, 638 A.2d 953, 959 (1994) (concluding that plaintiff had no reasonable expectation of privacy, even in the home, where conversation was audible through wall); *cf. Cinci v. State*, 642 So. 2d 572, 573 (Fla. Dist. Ct. App. 1994) (stating that it is not a violation of Florida's wiretapping statute to record conversation held outdoors in an apartment building courtyard).

In this case, where plaintiff stood in [*place*], a public place with unrestricted public access, he did not, as a matter of law, possess an objectively reasonable expectation of privacy concerning the matters recorded on videotape. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (1977); *see also* [*insert authority from your jurisdiction*]; *accord American Broad. Cos. v. Gill*, 6 S.W.3d 19, 28 (Tex. App. 1999), *overruled on other grounds by Turner v. KTRK Television, Inc.*, 38 S.W.3d 103 (Tex. 2000); *Roberts v. Houston Indep. Sch. Dist.*, 788 S.W.2d 107, 111 (Tex. App. 1990); *Fordyce v. City of Seattle*, 907 F. Supp. at 1447-48. Because plaintiff had no reasonable expectation of privacy in his conversation spoken and recorded in a public place, he has not stated a claim for violation of the federal wiretap act.

3. DEFENDANT DID NOT VIOLATE THE WIRETAP ACT BECAUSE HE DID NOT DISCLOSE PREVIOUSLY UNPUBLISHED INFORMATION, AND HE DID NOT KNOW OR HAVE REASON TO KNOW THAT THE CONVERSATIONS WERE ILLEGALLY INTERCEPTED

The federal wiretap statute, 18 U.S.C. § 2510, *et seq.*, proscribes the intentional disclosure of illegally intercepted information. Specifically, it provides criminal penalties where one:

> [I]ntentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; (or)
>
> [I]ntentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection.

18 U.S.C. §§ 2511(1)(c) and (d) (2006). For the reasons discussed below, defendant's conduct does not fall within the scope of the statute's prohibitions.

a) Defendant Did Not Disclose an Illegally Intercepted Communication

Section 2511(1)(c) prohibits "disclosure" of any illegally intercepted communication. Although the statute fails to define the term "disclose," its meaning in ordinary parlance is "to bring into view by uncovering," "to expose" or "to reveal to knowledge." BLACK'S LAW DICTIONARY 464 (6th ed. 1991). Consistent with this definition, courts have described disclosure as "as the act or an instance of opening up to view, knowledge, or comprehension." *Birdseye v. Driscoll*, 111 Pa. Commw. 214, 221-22, 534 A.2d 548, 552 (1987).

Courts uniformly hold that where the contents of a wiretap have already been revealed by another, subsequent publication of that communication is not a "disclosure" prohibited by the statute. For example, in *Birdseye*, the petitioners brought an action pursuant to the Pennsylvania Wiretapping and Electronic Surveillance Patrol Act. 111 Pa. Commw. at 221-222, 534 A.2d at 552. The plaintiffs sought to remove from office the district attorney and others because they had allegedly "disclosed" the contents of an illegal wiretap. *Id.* at 215-16, 534 A.2d at 549. The Pennsylvania court found that the contents of the wiretap had already been revealed in other court filings. Thus, the court held, there could not have been a disclosure within the meaning of the statute. *Id.* at 221-22, 534 A.2d at 552; *see also Lombardo v. Forbes*, 192 F. Supp. 2d 893, 899 (N.D. Ind. 2002) (holding that disclosure of the contents of a tape of intercepted telephone

conversations that was part of public record from a prior court proceeding was not a violation of §§ 2511(c) or (d)); *Coleman v. State*, 42 S.W.2d 1019, 1021 (Tex. Crim. App. 1931) (holding that a criminal defendant had not "disclosed" any acts for which he was on trial because "what he told the county attorney at the time the statement was made, amounted only to facts which were already known. . . ."); *cf. Pellerin v. Veterans Admin.*, 790 F.2d 1553, 1556 (11th Cir. 1986) (holding that under the federal Privacy Act, "a dissemination of information to a person or persons who were previously aware of the information is not a disclosure") (citations omitted); *Meuwissen v. Dep't of Interior*, 234 F.3d 9, 13 (Fed. Cir. 2000) ("a disclosure of information that is publicly known is not a disclosure under the [Whistleblower Protection Act of 1989].").

The federal wiretap statute's legislative history underscores the point that the act was designed to apply only to private or confidential communications, not to information already available to the public. In pertinent part, the legislative history states:

> Subparagraphs (c) and (d) prohibit, in turn, the disclosure or the use of the contents of any intercepted communication by any person knowing or having reason to know the information was obtained through an interception in violation of this subsection. *The disclosure of the contents of an intercepted communication that had already become "public information" or "common knowledge" would not be prohibited*.

S. Rep. No. 1097, 90th Cong. (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2181 (emphasis added).

In this case, the contents of the conversations were disclosed by [*insert name*], not by defendant. Defendant published the transcript [*or broadcast the tape*] only after extensive disclosure by others had already taken place. *See, e.g.*, [*cites*]. Thus, defendant cannot be said to have "disclosed" the contents of the intercepted communication within the meaning of the statute. Accordingly, plaintiff's claim for unlawful disclosure under the wiretap act must fail.

b) Defendant Did Not Know or Have Reason to Know that the Tape/Transcript Was Illegally Obtained

To prevail under 18 U.S.C. § 2511(1)(c) and (d) and the [*state*] analog, the plaintiff must also demonstrate that the defendant knew or had reason to know that the interception was illegal. *Forsyth v. Barr*, 19 F.3d 1527, 1538 (5th Cir. 1994). Although a defendant may be presumed to know the law, to establish liability under Title III, the plaintiff must show that the defendant was aware of factual circumstances that would violate the statute. *See Thompson v. Dulaney*, 970 F.2d 744, 749 (10th Cir. 1992); *see also Mayes v. LIN Television of Tex., Inc.*, No. 3:96-CV-0396-X, 1998 WL 665088, at *7 (N.D. Tex. Sept. 22, 1998); *cf. Weeks v. Union Camp Corp.*, No. 98-2814, 2000 U.S. App. LEXIS 12549, at *12 (4th Cir. June 7, 2000) ("plaintiff cannot overcome summary judgment merely by showing that it was reasonably foreseeable that the interception occurred illegally.") (internal quotation marks and citation omitted). It is not enough to show that a defendant merely knew he was using or disclosing information from an intercepted communication; it must also be shown that he knew, *inter alia*, that neither party to the intercepted conversation had consented to the conversation, or, if one party did consent, that the party's purpose was tortious or criminal. *See Thompson*, 970 F.2d at 749; *see, e.g.*, *Mayes*, 1998 WL 665088, at *2, *7 (dismissing §§ 2511(1)(c), (d) claims after finding that television station did not have sufficient knowledge of illegality of tape recording even though television's reporter heard allegations that the tape was illegally recorded).

In *Forsyth*, the Fifth Circuit described the quantum of proof necessary to establish liability under subsections (c) and (d) in similar terms:

> [A] plaintiff must demonstrate a greater degree of knowledge on the part of a defendant. The defendant must know 1) the information used or disclosed came from an intercepted communication, and 2) sufficient facts concerning the circumstances of the interception such that the defendant could, with presumed knowledge of the law, determine that the interception was prohibited in light of [the Act]. . . . [A] defendant must be shown to have been aware of the factual

> circumstances that would violate the statute. For example, it is not enough to show that a defendant merely knew he was using or disclosing information from an intercepted communication. It must also be shown that the defendant knew, *inter alia*, that neither party to the intercepted conversation had consented to the interception.

Forsyth, 19 F.3d at 1538 n.21.

The court's decision in *Ferrara v. Detroit Free Press*, illuminates the contours of this requirement. No. 97-CV-71136-DT, 1998 U.S. Dist. LEXIS 8635 (E.D. Mich. May 6, 1998), *aff'd*, No. 00-1243, 2002 U.S. App. LEXIS 24170 (6th Cir. Nov. 22, 2002). In *Ferrara*, the plaintiff was a judge involved in a child custody dispute with her ex-husband who tape-recorded certain of their telephone conversations in which she made racial slurs. At a hearing related to the child custody issue, at which a reporter from the *Free Press* was present, the ex-husband stated that he had tapes demonstrating that the judge was an unfit parent. Although these tapes were not used at the hearing, the ex-husband ultimately shared the tape recordings with a local newspaper reporter, who published their contents. *Id.* at *2. The court denied summary judgment as to the ex-husband, concluding that there was a genuine issue of fact as to whether the ex-husband recorded the conversations for the illegal purpose of blackmailing the judge or whether he instead intended to make an accurate record of their conversations for the purpose of defending himself in court. *Id.* at *5. Even though a reporter from the same paper had been at the hearing where the ex-husband stated that he had tapes showing the judge to be unfit, the court concluded that the ex-wife failed to present evidence sufficient for a rational jury to conclude that the newspaper defendants knew or had reason to know that the recordings were made in violation of the statute. *Id.* at *6-7. Thus, summary judgment was granted as to the newspaper and its reporter.

Here, [*set forth facts about how defendant came into possession of the wiretapped conversations*]. Defendant had no awareness that the conversation was obtained in an illegal

manner. Further, defendant had no reason to know that the interception was unlawful. He had no knowledge of the factual circumstances that would lead him to conclude that the statutes at issue here had been violated. Under these facts, where there is no evidence that defendant knew or had reason to know that the interception was illegal, defendant cannot be found to have violated either the federal or state statutes. *See Forsyth*, 19 F.3d at 1538; *Thompson*, 838 F. Supp. at 1546; *Mayes*, 1998 WL 665088, at *7.

4. IT IS UNCONSTITUTIONAL TO IMPOSE LIABILITY ON A DEFENDANT FOR DISCLOSING OR PUBLISHING TRUTHFUL, LAWFULLY OBTAINED INFORMATION ON A MATTER OF PUBLIC CONCERN

The federal and state wiretapping statutes prohibit intentional disclosure of the contents of wire, oral, or electronic communications which the disclosing party knows or has reason to know were obtained through unlawful interception. 18 U.S.C. § 2511(1)(c). However, the Constitution does not permit the government to punish publication of lawfully obtained information that is truthful and a matter of public significance, absent a need of the highest order and narrow tailoring. *Bartnicki v. Vopper*, 532 U.S. 514 (2001). Disclosure of such information is protected by the First Amendment. *Id.*

In *Bartnicki*, the head of a local citizen's group opposing the demands of a teacher's union received a tape of an illegally intercepted cellular telephone conversation between the union's chief negotiator and the union's president. *Id.* at 519. The conversation centered on the status of the negotiations, a matter of public concern. *Id.* at 525. The tape recipient provided a copy of the recording to a local radio station, which broadcast the contents. *Id.* at 519. Union officials sued the radio station and its commentator for invasion of privacy and breach of the federal and state wiretap statutes. The Supreme Court held that the First Amendment prohibited the imposition of liability upon the individual and the radio station for illegal disclosure of the

intercepted communications in violation of the federal and state wiretap laws where the defendants had not participated in the illegal interception, and the communications intercepted related to a matter of public concern. *Id.* at 534. Thus, *Bartnicki* makes clear that the Constitution proscribes the imposition of sanctions under the federal wiretap statute on individuals who lawfully obtain the contents of illegally intercepted communications and subsequently publish that information in news reports on matters of public interest and concern. *See also Boehner v. McDermott*, 484 F.3d 573, 579-580 (D.C. Cir. 2007) (en banc).

Here, the undisputed evidence demonstrates that defendants played no part in the interception of plaintiff's conversations. Defendant lawfully obtained the recording from [*insert name*] after the recording had been made. Moreover, here, as in *Bartnicki*, the matter reported on by defendant was one of public concern, and the information disclosed was truthful. Thus, defendant is on the same footing as the defendants in *Bartnicki*; in both cases, the defendants lawfully obtained intercepted communications relating to matters of public interest and concern. Accordingly, defendant cannot, consistent with the Constitution and consistent with controlling Supreme Court precedent, be punished for its publication of the intercepted communications.

5. THERE IS NO PRIVATE RIGHT OF ACTION FOR "AIDING AND ABETTING" OR "CONSPIRACY" UNDER THE FEDERAL WIRETAP ACT

Section 2520(a) provides that anyone "whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity . . . which engaged in that violation." 18 U.S.C. § 2520(a) (2006). This provision does not, however, create secondary liability against conspirators or assistants to those who actually violate the act. *See Doe v. GTE Corp.*, 347 F.3d 655, 658-59 (7th Cir. 2003); *see also In re Toys R Us, In.*, No. 00-CV-2746, 2001 WL 34517252, at *7 (N.D. Cal. Oct. 9, 2001) (holding that "§ 2520(a) does not provide a cause of action against aiders and

abetters"); *Sparshott v. Feld Entm't, Inc.*, 89 F. Supp. 2d 1, 3-4 (D.D.C. 2000) (noting that the federal wiretap statute does not expressly create a private cause of action for conspiracy); *cf. Peavy v. WFAA-TV, Inc.*, 221 F.3d 158, 168-69 (5th Cir. 2000) (dismissing civil claim for procurement under federal wiretap act because 1986 amendment to act explicitly deleted reference to procurement from § 2520); *DirecTV, Inc. v. Goehre*, No. 03-CV-1106, 2005 WL 2275940, at *3 (E.D. Wis. Sept. 19, 2005) ("The plain language of § 2520(a) authorizes relief only against those who 'intercepted, disclosed, or intentionally used' communications. There is no mention of granting a civil right of action against persons who endeavor to intercept or procure another person to intercept communications."); *Hurst v. Phillips*, No. 04-2591, 2005 WL 2436712 (W.D. Tenn. Sept. 30, 2005) (holding that there is no private right of action against a defendant who causes another to record a telephone conversation because § 2520 does not create civil liability for procurement); *DirecTV, Inc. v. Regall*, 327 F. Supp. 2d 986, 989-90 (E.D. Wis. Jul. 28, 2004) (holding that §2520(a) does not authorize a civil action against a person who "endeavors to intercept" or "procures another to intercept" a communication).

Congress has demonstrated its ability to create secondary liability under certain federal statutes. *See, e.g.*, Packers and Stockyards Act of 1921, 7 U.S.C. §§ 192 (f), (g) ("conspire, combine, agree or arrange with any other person to do, or aid or abet the doing of"); Agricultural Fair Practices Act of 1967, 7 U.S.C. § 2305(c) ("combination or conspiracy to violate"); RICO, 18 U.S.C. §1962(d) ("conspire to violate"); 1964(c) (civil cause of action); Immigration and Nationality Act, 8 U.S.C. § 1324 (a)(1)(A)(v) ("engages in any conspiracy" . . . or "aids or abets"); Civil Rights Act, 42 U.S.C. § 1985(3) ("two or more persons . . . conspire"); Courts generally construe such statutes narrowly, paying close attention to the precise text of the particular statute. *See, e.g., Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267-75

(1993), *superseded by statute*, Freedom of Access to Clinic Entrances, 18 U.S.C. § 248, *as recognized in N.Y. State Nat'l Org. for Women v. Terry*, 159 F.3d 86 (2d Cir. 1998); *Aetna Cas. Sur. Co. v. P & B Autobody*, 43 F.3d 1546, 1561 (1st Cir. 1994).

Where Congress has not explicitly created secondary liability, as in the federal wiretap act, courts are not free to imply such a cause of action. *See Central Bank v. First Interstate Bank*, 511 U.S. 164 (1994) (holding that there is no private cause of action under federal securities law against those who "aid and abet" securities fraud violators where Congress did not so specify, and stating that "when Congress wished to create such [secondary] liability, it had little trouble doing so"), *superseded by statute*, Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, *as recognized in SEC v. Fehn*, 97 F.3d 1276 (9th Cir. 1996); *see also Freeman v. DirecTV, Inc.*, No. 04-56500, 2006 WL 2255680, at *5 (9th Cir. Aug. 8, 2006) (holding that the Electronic Communications Privacy Act does not provide a private right of action against "aiders and abetters" or "conspirators" where the statute is devoid of any language suggesting secondary liability, and noting that where statutory sections "are clear about whom they are imposing liability and there are no unreasonable or impracticable results, [a court is] precluded from substituting [its] judgment of what would be good law for that of Congress's expressed will."); *In re Equity Funding Corp. of America Sec. Litig.*, 416 F. Supp. 161, 181 (C.D. Cal. 1976) ("[W]here a statute specifically limits those who may be held liable for the conduct described by the statute, the courts cannot extend liability . . . to those who do not fall within the categories of potential defendants described by the statute."); *Hayden v. Paul, Weiss, Rifkind, Wharton & Garrison*, 955 F. Supp. 248, 256 (S.D.N.Y. 1997) (holding that there is no implied civil cause of action for aiding and abetting a RICO violation); *Iowa ex rel. Turner v. First of Omaha Servs. Corp.*, 401 F. Supp. 439, 442 (S.D. Iowa 1975) (refusing to create a cause

of action for conspiracy to violate the National Bank Act where Act is devoid of any language regarding conspiracy).

In *Doe v. GTE Corp.*, the plaintiffs, college athletes, sued two corporations that provided Internet access and web hosting services to individuals who sold video tapes depicting the athletes undressed. 347 F.3d at 656. The tapes were recorded without the knowledge or consent of the athletes. *Id.* Plaintiffs, relying on §2511 and § 2520, contended that the web hosts were liable for aiding and abetting the video sellers. *Id.* at 657. The court concluded that the defendants were not liable for aiding and abetting the video sellers because "nothing in [§ 2511 or § 2520] condemns assistants, as opposed to those who directly perpetrate the act." *Id.* at 658. The court, holding that sections 2511 and 2520 do not create secondary liability, noted that "a statute that is this precise about who, other than the primary interceptor, can be liable, should not be read to create a penumbra of additional but unspecified liability." *Id.* at 659.

In this case, there is no evidence that defendant actually participated in the interception of plaintiff's communications. Defendant merely served as an intermediary to transmit the video and/or audio communications that were intercepted and disclosed by an [unidentified] third party. As in *GTE Corp.*, a third party provided the offensive material, not the defendant. Accordingly, under the authorities cites above, defendant cannot be held liable as an "aider and abettor" of a violation of the federal wiretapping statute.

SECTION THREE: MISREPRESENTATION, FRAUD, AND TRESPASS

1. CONCEALING A REPORTER'S IDENTITY OR PURPOSE DOES NOT CREATE LIABILITY FOR MISREPRESENTATION

The tort of misrepresentation is strictly limited by courts, and this is all the more true in the newsgathering context. The Restatement (Second) of Torts provides that "[o]ne who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation." RESTATEMENT (SECOND) OF TORTS § 525 (1977).[16] Thus, to be liable for misrepresentation, one must: (1) make a *material* misstatement of fact, opinion, or intention, (2) *intend* to induce reliance, (3) actually induce *justifiable* reliance, and (4) cause *pecuniary* loss. *See id.* Within the newsgathering context, the plaintiff's interest also must be weighed against the First Amendment interest in gathering and disseminating information. *La Luna Enters. v. CBS Corp.*, 74 F. Supp. 2d 384, 392 (S.D.N.Y. 1999) (*citing Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (Blackmun, J. dissenting)).

Courts routinely have found that the mere act of posing as an employee, customer, or potential investor does not, by itself, create liability for misrepresentation. *See, e.g.*, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 512 (4th Cir. 1999) (finding no misrepresentation liability where reporters posed as employees); *Pitts Sales, Inc. v. King World Prod'ns, Inc.*, 383 F. Supp. 2d 1354, 1364 (S.D. Fla. 2005) (same); *Homsy v. King World Entm't, Inc.*, 01-96-00708-CV, 1997 Tex. App. LEXIS 761 at *15 (Feb. 6, 1997) (no liability where reporters posed as potential investors). Likewise, where reporters have concealed the true purpose of their

[16] *[Because the elements and terminology of misrepresentation and fraud vary by jurisdiction, this brief will rely on the Restatement construction unless otherwise indicated. It also will refer generally to "misrepresentation" rather than "fraud," unless discussing a case that refers specifically to "fraud."]*

interview or have promised to be "fair" or "sympathetic" to sources, courts have refused to impose liability for misrepresentation. *See, e.g.*, *J.H. Desnick v. ABC*, 44 F.3d 1345, 1355 (7th Cir. 1995) (no liability for fraud where reporter promised to be "fair and balanced").

Like many cases before it, this case deals with an allegation that the defendants made false statements for the purpose of gathering information. In factually similar situations, courts across the nation have found that such allegations do not meet the strict standards required to impose misrepresentation liability.

a) The First Amendment Strictly Limits Misrepresentation Liability in Newsgathering Cases.

Just as defamation and invasion of privacy have been limited by the First Amendment, the common law tort of misrepresentation also has been circumscribed in cases — like this one — where the allegedly tortious activity was part of the newsgathering process.

The Seventh Circuit emphasized the importance of First Amendment interests in *Desnick*. In that case, ABC's *Primetime Live* aired an investigative report on a chain of clinics offering cataract surgery, finding evidence of large-scale malpractice and fraud. 44 F.3d at 1348-49. The clinics' owner alleged, among other things, that ABC had defrauded him into allowing access to the clinics and into sitting for an interview by claiming that the story would be "fair and balanced" and would not involve "ambush" interviews. *Id.* In fact, reporters went undercover by posing as patients, uncovering evidence of malpractice, unnecessary surgery, and alteration of patients' medical records. *Id.* The reporters then conducted an "ambush" interview, confronting the plaintiff at O'Hare airport with the evidence they had gathered. *Id.*

Writing for the court, Judge Posner noted that "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." *Id.* at 1355.

These "many safeguards" are not confined to defamation law. Rather, the press "is entitled to [First Amendment safeguards] *regardless of the name of the tort* . . . and, we add, *regardless of whether the tort suit is aimed at the content of the broadcast or the production of the broadcast*." *Id.* (emphasis added). Thus, the court concluded, there could be no liability for misrepresentation. *Id.*

The *La Luna* court followed similar reasoning. There, CBS News filmed the interior of the plaintiff's restaurant for a broadcast report about the influence of Russian organized crime in Miami. 74 F. Supp. 2d at 387. Plaintiffs alleged that CBS fraudulently had claimed that it was filming an innocuous report on Miami tourism. *Id.* The court acknowledged that "the media has no special privilege to invade the rights and liberties of others." *Id.* at 392 (internal quotations omitted). However, it held that "plaintiff's claim for fraud nevertheless must fail because it impermissibly threatens to punish the expression of [even] truthful information or opinion." *Id.* at 392 (S.D.N.Y. 1999) (*citing Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (Blackmun, J. dissenting)). The court explained that allowing fraud liability based on the alleged damage to the restaurant's reputation would open a back door to expanding defamation liability, a door that would allow a plaintiff to "succeed regardless of its defamation claim and the truth or falsity of the broadcast." *Id.* Thus, the *La Luna* court held that, even if the defendants made false statements, the First Amendment limited the types of harm that could form a basis for misrepresentation liability.[17]

[17] The First Amendment limitations on misrepresentation claims are even more stringent where prior restraints are involved. In *In re King World Productions, Inc.*, 898 F.2d 56 (6th Cir. 1990), the Sixth Circuit considered an *Inside Edition* investigation into medical malpractice. A doctor featured in the report sued, claiming that a producer for *Inside Edition* had fraudulently claimed to be a patient in order to investigate the suspected malpractice. *Id.* at 58. The court struck down a lower court injunction on the broadcast of footage from the office, finding that the injunction "[w]ithout a doubt" constituted a prior restraint. *Id.* at 59. It added, "[n]o matter how inappropriate the acquisition, or its correctness, the right to disseminate that information is what the Constitution intended to protect." *Id.* Thus, the Sixth Circuit confirmed, in the prior restraint context, that the First Amendment strictly limits the tort of misrepresentation.

Even where the facts have been found sufficient to support a finding of liability for misrepresentation, the courts have considered the First Amendment interests of the press in limiting the type and amount of damages that are recoverable in cases premised upon newsgathering. *E.g.*, *W.D.I.A. Corp. v. McGraw-Hill, Inc.*, 34 F. Supp. 2d 612 (S.D. Ohio 1998), *aff'd per curiam*, 202 F.3d 271 (6th Cir. 2000). *W.D.I.A.* dealt with a Business Week investigation into lax security procedures at credit bureaus. In the course of the investigation, Business Week obtained the credit records of politicians and others by claiming the information was going to be used for pre-employment screening. *Id.* at 617. Even though the court found that the elements of fraud were met, it relied on the social benefit of investigative reporting in refusing to award punitive damages. *Id.* at 628. It said that Business Week's "test of the credit reporting system does not support an award of punitive damage . . . because it served to inform Congress and the general public about a matter of vital public interest . . . ." *Id.* at 628. Ultimately, the plaintiffs were awarded less than $7,500 in compensatory damages and their request for $45 million in punitive damages was rejected. *Id.*

As each of these cases demonstrates, the tort of misrepresentation is limited by the First Amendment when the claim is based on newsgathering activity. Since this case deals with precisely this type of newsgathering, a similar analysis should strictly limit plaintiff's claim.

b) Courts Consistently Have Held that Claims Based on Alleged Omissions or Misstatements Concerning a Reporter's Identity or Purpose Do Not Satisfy the Elements of the Common Law Misrepresentation Tort.

(1) Misrepresentation Claims Must Fail Where They Are Based on the Alleged Concealment of a Reporter's Identity or Purpose Rather Than an Express Statement of Fact.

Courts have made clear that misrepresentation liability is precluded unless the plaintiff can demonstrate that the defendant made specific misstatements of material fact. *See, e.g.*, *Veilleux*

v. National Broadcasting Co., 206 F.3d 92, 101 (1st Cir. 2000). In newsgathering situations where the alleged "fraud" is the failure to disclose a reporter's profession or true purpose, courts have refused to find that this element has been met.[18]

Where the alleged misrepresentation by a media defendant is a mere omission of the reporter's status as a news gatherer, courts have found no duty to disclose and thus no liability. For example, in *Deteresa v. ABC*, 121 F.3d 460 (9th Cir. 1997), the Ninth Circuit carefully distinguished between liability for a recording itself and liability for failing to disclose the act of recording. *Id.* at 467-68. In that case, an ABC News reporter visited and spoke with the plaintiff, a flight attendant who had been on a flight with O.J. Simpson shortly after his wife was murdered. *Id.* at 462. The plaintiff claimed that, as she and the reporter spoke on her doorstep, the reporter surreptitiously recorded their conversation. She argued that the reporter "had a duty to disclose that he was taping her because federal and state law prohibits unauthorized taping of confidential communications." *Id.* at 467. The court rejected this argument, saying "[a]lthough inferentially, everyone has a duty to refrain from committing intentionally tortious conduct against another, it does not follow that one who intends to commit a tort owes a duty to disclose

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[18] *[Plaintiffs may attempt to rely on the California Supreme Court's opinion in Taus v. Loftus, 40 Cal. 4th 683, 151 P.3d 1185, 54 Cal. Rptr. 3d 775 (2007). That case involved a published study about a young woman who recalled a repressed memory of molestation. Id. at 689, 151 P.3d at 1188, 54 Cal. Rptr. 3d at 779. A defendant attempting to debunk the study allegedly obtained information from the woman's foster mother by claiming that she was working with the woman's psychiatrist. Id. at 736, 151 P.3d at 1220, 54 Cal. Rptr. 3d at 817. The court concluded that this allegation of fraud, if believed, could give rise to tort liability. Id. at 740, 151 P.3d at 1223, 54 Cal. Rptr. 3d at 820.*

Two things should be noted about the Loftus decision. First, while it discussed allegedly fraudulent behavior, it did not deal with the tort of misrepresentation. It dealt with the tort of intrusion into private matters, which has its own distinct elements and focuses on whether "the defendant intentionally intruded into a private . . . matter in a manner highly offensive to a reasonable person." Id. at 730, 151 P.3d at 1215, 54 Cal. Rptr. 3d at 811. Second, even within the intrusion context, the opinion was carefully limited. The holding depended on the premise that "intentionally misrepresenting oneself as an associate or colleague of a mental health professional who has a close personal relationship with the person about whom one is seeking information would be a particularly serious type of misrepresentation." Id. at 740, 151 P.3d at 1222, 54 Cal. Rptr. 3d at 820. It added that this was "significantly different from the more familiar practice of a news reporter or investigator in shading or withholding information regarding his or her motives when interviewing a potential news source." Id. Indeed, the Court pointed out that routine reporting techniques "could rarely, if ever, be deemed an actionable intrusion." Id. at 737, 151 P.3d at 1221, 54 Cal. Rptr. 3d at 818.]

that intention to his or her intended victim." *Id.* at 467 (quoting *LiMandri v. Judkins*, 52 Cal. App. 4th 326, 60 Cal. Rptr. 2d 539 (1997)). Thus, the court found that even if the recording itself is illegal, failing to disclose the recording does not amount to misrepresentation.[19]

(2) Misrepresentation Claims Premised on the Nature or "Slant" of a Future Report Must Fail Where the Alleged Statements at Issue Are Too Vague to Constitute an Actionable Material Misrepresentation.

Courts similarly have found that promises to present a "positive" or "balanced" report are simply too vague to constitute material misstatements of fact. In *Veilleux*, for example, the First Circuit found that vague promises to be "positive" are not sufficiently precise to give rise to misrepresentation liability. *Veilleux*, 206 F.3d at 101. In that case, NBC's *Dateline* program investigated the unsafe driving practices of truckers and their employers, finding evidence of truckers using drugs and going days without sleep. *Id.* at 103. One trucking company gave *Dateline* permission to accompany an employee on a cross-country delivery. *Id.* But to secure permission, plaintiff alleged that *Dateline* fraudulently promised that the story would present a "positive" view of the trucking industry. *Id.* at 102.

In rejecting the claim, the court decided that "Maine courts would not find actionable such a vague and, in this context, constitutionally suspect promise." *Id.* at 105. It noted that one of the truckers interviewed had admitted to taking drugs, and found that "it is hard to imagine that the parties expected positive coverage no matter how badly plaintiffs later behaved." *Id.* at 122. Citing *Desnick*, the court wrote that "*[t]he promise to provide positive coverage might, indeed, be viewed as more akin to 'puffing' or 'trade talk,' which . . . would not support recovery in fraud*." *Id.* (emphasis added). *See also* RESTATEMENT (SECOND) OF TORTS § 530 cmt. a (1977)

[19] *[But see Carter v. Superior Ct., 30 Media L. Rep. (BNA) 1193 (Cal. App. 2002) (unreported and non-citable case allowing a fraud claim where a reporter obtained a hospital patient's consent to record by falsely claiming the recording was for a hospital training film).]*

(stating that a misrepresentation as to intent is not actionable if it is "merely . . . one of those 'puffing' statements which are so frequent and so little regarded in negotiations for a business transaction as to make it unjustifiable for the recipient to rely upon them"). Finally, the court noted that if the tort were broad enough to cover such "puffing," it likely would be unconstitutionally vague, so that upholding it would violate the court's duty to avoid construing common law rules in ways that create serious constitutional problems. *Veilleux*, 206 F.3d at 122 (citing *Watters v. TSR, Inc.*, 904 F.2d 378, 383 (6th Cir. 1990), for the proposition that a state court must avoid applying its common law "in a way that would bring the constitutional problems to the fore").

Similarly, some courts have found that promises to be "fair" or "positive" are mere promises to do something in the future which, even if not kept, cannot be considered fraudulent. In *Morgan v. Celender*, 780 F. Supp. 307 (W.D. Pa. 1992), for example, a Pennsylvania newspaper ran an article about alleged sexual abuse against a child. The child's mother claimed that she spoke to the newspaper on the condition that her comments were "off the record," that the photograph of her and the child would be a silhouette, and that no names would be used. *Id.* at 309. When the photo appeared on page one of the newspaper, however, both were identifiable and the child was identified by name as "a victim of sexual abuse." *Id.* The court rejected a fraud claim based on the confidentiality promise, saying "[a] promise to do something in the future (such as keeping information confidential), which promise is not kept, is not fraud." *Id.* at 311. Following this logic, merely failing to keep a promise to a source is not sufficient to ground misrepresentation liability. [*But see* RESTATEMENT (SECOND) OF TORTS § 530 (1977) ("[a] representation of the maker's own intention to do or not to do a particular thing is fraudulent if he does not have that intention").]

(3) Courts Consistently Reject Misrepresentation Claims Against Reporters on the Ground That There Is No Intent to Defraud.

In addition to requiring specific misstatements of fact, the tort of misrepresentation requires proof that the defendant intended to induce reliance. RESTATEMENT (SECOND) OF TORTS § 531 (1977) ("[o]ne who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation"). When deceptive statements are not made in order to induce reliance by the plaintiff, no liability may attach.

In *Desnick*, for example, the court found that the type of deception at issue in the newsgathering context, aimed at exposing wrongdoing rather than simply deceiving a source for financial gain, does not qualify as a fraudulent scheme. It wrote that "[i]t would be different if the false promises were stations on the way to taking Desnick to the cleaners. . . . 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*." 44 F.3d at 1354-55 (emphasis added). Therefore, a misrepresentation that merely induces a person to speak with a reporter, or to provide access to information, is not an intent to defraud.

(4) Courts Consistently Reject Misrepresentation Claims Against Reporters on the Ground That There Has Been No Actual Reliance by the Plaintiffs.

The Restatement provides that a misrepresentation plaintiff can recover "if, but only if, (a) he relies on the misrepresentation in acting or refraining from action, and (b) his reliance is justifiable." RESTATEMENT (SECOND) OF TORTS § 537 (1977). Because the alleged misrepresentation in this case did not result in justifiable reliance, there can be no liability for misrepresentation.

In *Food Lion*, *supra*, the Fourth Circuit found no misrepresentation liability, even though the defendants assumed false identities and posed as employees, because Food Lion had not detrimentally relied on the alleged misstatements. 194 F.3d at 514. In that case, ABC reporters went undercover as Food Lion employees, using false identities and resumes to get hired, in order to report on the unsafe food-handling practices at Food Lion supermarkets. *Id.* at 510. ABC later broadcast a report that showed "employees repackaging and redating fish that had passed the expiration date, grinding expired beef with fresh beef, and applying barbeque sauce to chicken past its expiration date in order to mask the smell . . . ." *Id.* at 511. Rather than suing for defamation, which would have required it to prove that the allegations were false, Food Lion alleged that falsifying the reporters' identities and resumes amounted to actionable misrepresentation. *Id.* at 510.

The plaintiff in *Food Lion* claimed two types of injurious reliance — the costs of hiring and training the employees, and the wages it paid them. *Id.* at 512. The Fourth Circuit rejected both claims, saying the hiring and training costs would have existed with any new employee, and that the reporters had been paid because they performed their jobs at Food Lion and not "because of misrepresentations on their job applications." *Id.* at 513-14. Because the deceptive statements did not lead to injurious reliance, the court found, "[t]he fraud verdict must be reversed." *Id.* *See also Pitts Sales, Inc.*, 383 F. Supp. 2d at 1364 (citing *Food Lion* and holding that the plaintiff "cannot show that the costs it incurred in hiring and paying [a reporter] were proximately caused by its reasonable reliance on the misrepresentations [the reporter] made in getting hired by the company.").

Similarly, in *Ramirez v. Time, Inc.*, 12 Media L. Rep. (BNA) 2230 (N.Y. Sup. Ct. 1986), the plaintiff alleged that a reporter fraudulently claimed to have been an eyewitness to a murder

in order to induce the plaintiff to sit for an interview. But the court held that liability could not attach because, even if the allegations were true, "significantly absent from the complaint is any injury to plaintiff directly springing from the misrepresentation. *Other than meeting with [the reporter]*, plaintiff fails to allege that she did anything whatsoever in reliance upon his alleged misrepresentation." *Id.* at 2231 (emphasis added); *see also Wilkins v. National Broad. Co.*, 71 Cal. App. 4th 1066, 1081, 84 Cal. Rptr. 2d 329, 337-38 (1999) (refusing to find defendants liable for fraud because "[e]ven if [plaintiffs] had evidence of misrepresentations made by the producers of NBC Dateline, they are unable to prove they relied to their detriment on such misrepresentations.").

The analysis is the same where press organizations allegedly make fraudulent promises to be "fair" or "positive" as inducement for the plaintiff to agree to be interviewed. In *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 588 S.E.2d 20 (2003), for example, the court rejected a misrepresentation claim based on such promises. In that case, the plaintiff was involved in a 30-year divorce battle that eventually drew the interest of the press. *Id.* at 22, 588 S.E.2d at 23. The plaintiff alleged that a reporter had defrauded her into participating in an interview by promising that the article would be "sympathetic" to her. *Id.* at 31, 588 S.E.2d at 28-29. The court found that a plaintiff alleging fraud must show that she relied on the allegedly fraudulent statement. *Id.* Because, "[b]ased on plaintiff's own statements, she did not rely on any statements that might have been made by defendants," the court found that the essential element of actual reliance was not established. *Id.* at 32, 588 S.E.2d at 29.

Taken together, these cases make clear that merely showing that reporters concealed their identity or purpose is not enough. The plaintiff additionally must show that he or she actually relied on this representation to his or her detriment, and merely agreeing to an interview is not

sufficient to establish *detrimental* reliance. As in the cases cited above, the plaintiff in the case at bar has failed to prove detrimental reliance. The misrepresentation claim therefore must fail.

(5) Courts Consistently Reject Misrepresentation Claims Against Reporters on the Ground That Any Reliance by the Plaintiff Was Not Reasonable or Justifiable.

The Restatement makes it clear that reliance must be both actual and *justifiable*. RESTATEMENT (SECOND) OF TORTS § 537 (1977). In *Desnick*, *supra*, the Seventh Circuit held it is not reasonable for a source to rely on the representation of a reporter that a story will be "positive" or "balanced," even if such a representation is made. In *Desnick*, the court rejected a fraud claim based on an alleged promise that the story would be "fair and balanced" and would not involve "ambush" interviews. *Desnick*, 44 F.3d at 1355. Citing Illinois law, the court noted that "promissory fraud is actionable only if it either is particularly egregious or . . . it is embedded in a larger pattern of deceptions or enticements that reasonably induces reliance and against which the law ought to provide a remedy." *Id.* at 1354.[20] It continued: "Investigative journalists well known for ruthlessness promise to wear kid gloves. They break their promise, 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." *Id.* *See also Veilleux*, 206 F.3d at 122 (characterizing promises to be "positive" as puffery which could not induce justifiable reliance).

[20] *[Judge Posner noted, however, that Illinois had an unusually narrow definition of fraud that included promissory fraud only if it is part of a scheme to defraud. Desnick v. American Broad. Cos., 44 F.3d 1345 (7th Cir. 1995). Cf. Veilleux v. National Broadcasting Co., 206 F.3d 92, 120 (1st Cir. 2000) ("in appropriate circumstances, promises concerning future performance may be sufficiently akin to averments of fact as to be actionable under Maine misrepresentation law").]*

c) Because Any Pecuniary Loss Is Not Caused by the Defendants' Conduct, Liability Is Precluded.

Even if the plaintiff were able to prove that the defendant (a) intentionally (b) made a materially false statement, *and* (c) that the plaintiff reasonably relied on that statement to his or her detriment, the Restatement still requires that this reliance be the *proximate cause* of a *pecuniary* loss. RESTATEMENT (SECOND) OF TORTS § 546 (1977) ("[t]he maker of a fraudulent misrepresentation is subject to liability for pecuniary loss suffered by one who justifiably relies upon the truth of the matter misrepresented, if his reliance is a substantial factor in determining the course of conduct that results in his loss"). As shown below, harm caused by the report as a whole, harm caused by the plaintiff's own conduct, and purely reputational harm do not qualify under this test.

First, courts have made clear that any claimed harm must be directly attributable to the alleged misrepresentation — the plaintiff may not simply show a misrepresentation, and then show harm from the publication as a whole. The Seventh Circuit in *Desnick* assumed that, "had the defendants been honest, *Desnick* would have refused to admit the ABC crew" to his clinics. *Desnick*, 44 F.3d at 1355. Nevertheless, the court found that "none of the negative parts of the broadcast segment were supplied by the visit to the Chicago premises . . . and Desnick could not have prevented the ambush interview or the undercover surveillance." *Id.* Because of this, "[t]he so-called fraud was harmless" even if the broadcast as a whole was not. *Id.*

The First Circuit agreed in *Veilleux*, 206 F.3d at 92. The court found that, while promises to be "positive" were too vague to enforce, the alleged promise to exclude an advocacy group called Parents Against Tired Truckers (PATT) from the report was specific enough to be actionable. *Id.* at 105. But it noted that the plaintiff's "recovery is limited . . . to those damages specifically caused by the inclusion of PATT in the program; [plaintiff] may not recover

generally for harm flowing from the entirety of the broadcast." *Id.* at 124. It added that the plaintiff "must prove not only that defendants' representations as to PATT caused [him] to participate in the program, but that those representations — not just the program itself — caused his pecuniary loss." *Id.* at 125.

The district court made a similar ruling in *Food Lion v. Capital Cities/ABC*, 964 F. Supp. 956 (M.D.N.C. 1997), *aff'd on other grounds*, 194 F.3d 505 (4th Cir. 1999). In that case, the district court found that defendants had acted fraudulently in obtaining employment. However, it added that "Food Lion's lost profits and lost sales were not proximately caused by Defendants' tortious activities" because "it was the food handling practices themselves — not the method by which they were recorded or published — which caused the loss of consumer confidence." *Id.* at 962-63. Thus, the court found that fraud liability would be inappropriate because "[w]hile [business] 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." *Id.* at 963.[21]

Second, courts also have refused to grant relief on misrepresentation claims where the alleged harm is caused by the plaintiff's own behavior rather than the alleged misrepresentation. *Steele v. Isikoff*, 130 F. Supp. 2d 23 (D.D.C. 2000), was the result of a *Newsweek* investigation into charges of sexual misconduct leveled at President Clinton. The plaintiff, a friend of the accuser, gave an interview to *Newsweek* magazine which she claimed was off the record. *Id.* at 26. She later admitted that she lied during the interview to support her friend's story, but claimed that *Newsweek* was still liable for the harm the story caused to her because its reporter

[21] The Fourth Circuit went even further on appeal, finding that no fraud occurred. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 514 (4th Cir. 1999) (because reporters "were not paid their wages because of misrepresentations on their job applications," Food Lion "cannot assert wage payment to satisfy the injurious reliance element of fraud").

fraudulently had promised not to name her as a source. *Id.* at 34. The court disagreed. Citing *Food Lion*, the court found that "[p]ainful as the glaring spotlight may be, *Steele's harm is rooted in her own lie*, a deception by which she alone tied herself to a sordid news story that dominated all types of media." *Id.* at 35 (emphasis added). It added that "[w]hile Isikoff printed that fabrication and Steele's subsequent recantation, Steele herself proximately caused the harm." *Id.* In other words, even if the reporter defrauded the plaintiff by telling her she could remain anonymous, it was the plaintiff's lies, rather than the reporter's promise, that caused the harm.

Other cases have applied a similar analysis. *See Frome v. Renner*, 26 Media L. Rep. (BNA) 1956, 1958 (C.D. Cal. 1997) (finding that a news program was not the proximate cause of plaintiff's harm because it "merely served as a forum through which the public could learn about" the problems with his medical practice); *Cusack v. 60 Minutes*, 29 Media L. Rep. (BNA) 2067, 2074 (N.Y. Sup. 2001) (fraud and other claims failed "because the damages that plaintiffs claim to have suffered were not proximately, or even indirectly, caused by the actions that the CBS defendants are alleged to have taken" but rather "by [plaintiff's] fabrication of . . . documents"), *aff'd*, 299 A.D.2d 180 (2002).

Finally, an alleged harm that is purely reputational simply cannot support misrepresentation liability. In *Homsy*, a reporter allegedly posed as a potential investor in order to record a conversation with the plaintiff, the inventor of a controversial medical device. 1997 Tex. App. LEXIS 761 at *4. The device had been banned by the FDA, but the plaintiff was attempting to market it in other countries. *Id.* at *3. The plaintiff sought damages for mental anguish and "losses resulting from disclosure of confidential information . . . and from providing filmed footage of himself." *Id.* at *14. The court rejected these claims, saying plaintiff had not

"established any injury separate and apart from his libel claim. In both causes of action, the injury was damage to his reputation. Accordingly, appellant has not established a fraud injury independent of his libel injury." *Id.* at *15.

As these three types of cases show, the bar is high for plaintiffs alleging pecuniary loss stemming from alleged misrepresentation. First, plaintiffs must show that the alleged harm occurred as a direct result of the actual false statements, rather than as a result of the publication as a whole. Second, plaintiffs must show that it is the alleged misrepresentation that caused the harm rather than the plaintiff's own misdeeds, even if the misrepresentation made it possible for the plaintiff's misdeeds to become public. Finally, the plaintiff must show that the harm is pecuniary rather than simply reputational. Where, as here, the plaintiff cannot meet all of these requirements, the misrepresentation/fraud claim must fail.

2. PERMISSION TO ENTER PRIVATE PROPERTY, EVEN IF BASED ON FALSE REPRESENTATIONS, PRECLUDES LIABILITY FOR TRESPASS

The tort of trespass is a limited one. The Restatement notes that one is liable for trespass only if "he intentionally (a) enters land in the possession of the other, or causes a thing or a third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove." RESTATEMENT (SECOND) OF TORTS § 158 (1965). Like other common law torts, trespass law must be balanced against the First Amendment interests inherent in newsgathering activities. *See, e.g.*, *Allen v. Combined Commc'ns Corp.*, 7 Media L. Rep. (BNA) 2417, 2419 (Colo. Dist. 1981).

Moreover, as is the case with most torts, "[o]ne who effectively consents to conduct" that they later complain about cannot recover. RESTATEMENT (SECOND) OF TORTS § 892A (1979). If consent to enter onto land is given, it is not negated merely because it was granted based on a misrepresentation. *See, e.g.*, *Food Lion*, 194 F.3d at 517 ("'[c]onsent to an entry is often given

legal effect' even though it was obtained by misrepresentation or concealed intentions."), quoting *Desnick*, 44 F.3d at 1351. And even if the consent is negated, trespass liability still depends on whether the alleged trespasser violated the type of interest that trespass law is intended to protect. Otherwise, not even the lack of effective consent is sufficient to support liability for trespass. *Desnick*, 44 F. 3d at 1352.

a) The First Amendment Limits the Application of Trespass Law to Newsgathering Activities.

Although the mere fact that one is engaging in newsgathering does not provide blanket immunity to tort liability, *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-70 (1991), courts have recognized that the trespass tort must be modified when important First Amendment issues are involved.

For example, in *Allen v. Combined Communications Corp.*, the case considered a claim that an employee of a television station had trespassed by entering the plaintiff's livery stable in the course of the station's newsgathering activities. 7 Media L. Rep. at 2417. The court noted that "*[f]reedom of the press means freedom to gather news, write it, publish it, and circulate it. When one of these integral operations is interdicted, freedom of the press becomes a river without water*." *Id.* at 2419 (internal quotations omitted, emphasis added). It found that First Amendment interests must be balanced against trespass and other tort claims in newsgathering cases "by application of the traditional First Amendment balancing test, i.e., measuring the importance of the activity and degree of restraint against the governmental interest which tends to infringe on First Amendment rights." *Id.* at 2420 (internal quotations omitted, citation omitted). Finally, the court noted that "the interest is ordinarily weighted in favor of the First

Amendment." *Id.* (internal citations omitted). Following this reasoning, the court dismissed the plaintiff's trespass claim. *Id.* at 2420.[22]

Moreover, the Supreme Court has made clear that plaintiffs may not use trespass or other torts "to avoid the strict requirements for establishing a libel or defamation claim." *Cohen*, 501 U.S. at 671. Likewise, the Court in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), held that "public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice.'" *Id.* at 56. The court concluded that applying these strict requirements to torts beyond defamation "reflects our considered judgment that such a standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Id.*

Thus, even where trespass can be shown, it is impermissible under *Cohen*, *Allen*, and *Hustler* to claim damages for harm to the plaintiff's reputation allegedly brought about by the trespass. Such reputational damages are the province of defamation law. [*Cf. Veilleux v. National Broad. Co.*, 206 F.3d 92, 128 (1st Cir. 2000) (allowing a misrepresentation claim because "[u]nlike *Hustler* and *Food Lion*, this is not a case where [the plaintiff] could avoid the strict requirements of a defamation claim by seeking 'defamation-type' damages under an easier common law standard.").]

[22] In the prior restraint context, Justice Blackmun cited similar First Amendment interests in staying a preliminary injunction in *CBS Inc. v. Davis*, 510 U.S. 1315 (1994) (Blackmun, J., in chambers). In the lower court, a meat packing plant obtained an injunction against CBS's broadcast of a report on its meat-handling practices. The injunction was based on several claims, including trespass. *Id.* at 1316. Justice Blackmun stayed the injunction, saying that "[a]lthough a single Justice may stay a lower court order only under extraordinary circumstances, such circumstances are presented here." *Id.* at 1317. He continued that "[s]ubsequent civil or criminal proceedings, rather than prior restraints, ordinarily are the appropriate sanction for calculated defamation or other misdeeds in the First Amendment context." *Id.* Thus, at least in the prior restraint context, Blackmun agreed with the Allen court that the tort of trespass must be modified where it arises "in the First Amendment context."

These cases confirm that, like other common law torts, the contours of trespass law are altered when First Amendment interests are at stake. Because the case at bar involves an attempt to attach trespass liability to newsgathering activities, one of the "integral operations" involved in a free press, the tort must similarly be limited. *See Allen*, 7 Media L. Rep. at 2419.

b) Because Misrepresentation Alone Does Not Negate Consent, Liability for Trespass Is Inappropriate.

The *sine qua non* of a trespass claim is the lack of effective consent to enter real property. *See* RESTATEMENT (SECOND) OF TORTS § 892A (1979). If a plaintiff gives consent to entry onto the premises — even if that consent was based upon misrepresented information — some courts have held that no trespass liability can be found.

In *Desnick*, for example, the defendant journalists conceded that they had committed a trespass, and the court found that there can be no implied consent when express consent is procured by a misrepresentation. 44 F.3d at 1351. But as the Seventh Circuit explained:

> Yet some cases . . . deem consent effective even though it was procured by fraud. There must be something to this surprising result. Without it . . . [d]inner guests would be trespassers if they were false friends who never would have been invited had the host known their true character, and a consumer who in an effort to bargain down an automobile dealer falsely claimed to be able to buy the same car elsewhere . . . would be a trespasser in the dealer's showroom.

Id. at 1351.[23]

In *Food Lion*, the Fourth Circuit reversed the district court's finding that consent to enter could not be effective if based on a misrepresentation. *See Food Lion*, 887 F. Supp. at 820. Citing *Desnick*, the appellate court held that "[c]onsent to an entry is often given legal effect

[23] In addition to pointing to the absurd consequences of holding that fraud negates consent, the court pointed to similar analysis in the case of other torts. For example, it cited the Restatement's "example of a man who obtains consent to sexual intercourse by promising a woman $100, yet (unbeknownst to her, of course) he pays her with a counterfeit bill and intended to do so from the start. The man is not guilty of battery, even though unconsented-to sexual intercourse is a battery." *Desnick* at 1352 (citing Restatement (Second) of Torts § 892B, illustration 9, pp. 373-74 (1979)). Similarly, the court concluded, misrepresentation does not necessarily negate consent. *Id.* at 1352.

even though it was obtained by misrepresentation or concealed intentions." *Food Lion*, 194 F.3d at 517. It noted that any other holding would lead to the absurd consequence that "a restaurant critic could not conceal his identity when he ordered a meal, or a browser pretend to be interested in merchandise that he could not afford to buy." *Id.* (citing *Desnick*, 44 F.3d at 13). The court noted that *Desnick* might be at odds with the Restatement position, but nevertheless decided that "[w]e like *Desnick*'s thoughtful analysis." *Id.* In any case, the court concluded, "*we have not found any case suggesting that consent based on a resume misrepresentation turns a successful job applicant into a trespasser the moment she enters the employer's premises to begin work.*"[24] *Id.* at 518 (emphasis added).

Another court cautioned that, where the plaintiff alleges that consent to enter was fraudulently obtained, the proper claim, if any, is misrepresentation rather than trespass. *Baugh v. CBS, Inc.*, 828 F. Supp. 745 (N.D. Cal. 1993). In *Baugh*, plaintiff alleged that she allowed a CBS camera crew to follow police officers into her house because she was told that the crew was from the District Attorney's office and that the footage would not be broadcast. *Id.* at 756. The court found that California recognized trespass claims based on exceeding the scope of consent, but "[t]hose cases involve defendants whose intrusion on the land exceeds the scope of the consent given . . . ." *Id.* In this case, by contrast, "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." *Id.* at 756-57. The court continued that:

> No California cases indicate that the consent must be knowing or meaningful and the Court does not find any reason to add that requirement to the tort. In a case where consent was fraudulently induced, but consent was nonetheless given,

[24] *[Note that the Fourth Circuit in Food Lion did, however, find that liability could be based on the breach of the duty of loyalty owed to Food Lion as an employer. Food Lion, 194 F.3d at 522.]*

> plaintiff has no claim for trespass. Of course, a plaintiff in this predicament may still have a remedy based on fraud or intentional misrepresentation.

Id. at 757. Thus, the court found that trespass cannot be used as a back door to establish liability for alleged misrepresentation.[25]

[Plaintiffs may rely on authority that is ostensibly contrary to the position of *Food Lion*, *Desnick*, and *Baugh*, but on closer inspection it is not clear that there is a conflict. For example, the Restatement (Second) of Torts, § 892B(2) (1979), 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." But note that the section says that consent is not effective for the *unexpected* invasion or harm. This is no different than the position espoused in *Desnick*, which distinguished between cases in which fraud does and does not negate consent based on whether the fraud causes the *scope* of the consent to be exceeded — in other words, whether it leads to new, *unexpected* invasions or harms. *Special Force Ministries v. WCCO Television*, 584 N.W.2d 789 (Minn. Ct. App. 1998), which relies on the Restatement section above, can be harmonized for the same reason. In that case, trespass liability depended on the conclusion that the defendant "exceeded the scope of her consent by secretly videotaping . . . ." *Id.* at 792. Likewise, *Turnbull v. ABC*, 32 Media L. Rep. (BNA) 2442 (C.D. Cal. 2004), rejected *Baugh* and found that "if the scope of consent is exceeded, the privilege is lost and the tort is committed." *Id.* at 2455. But in that case, the ABC reporters signed an agreement which certified their purpose for attending the event was for acting lessons rather than reporting, so the court thought it was clear that they had exceeded the scope of consent. *Id.*]

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[25] *[Plaintiffs may rely on Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971), for the proposition that a business or homeowner "does not and should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording, or in our modern world, in full living color and hi-fi to the public at large." Id. at 249. Note, however, that this case dealt with invasion of privacy rather than trespass, and the court's emphasis was on use of hidden cameras rather than the entry itself.]*

As *Food Lion*, *Desnick*, and *Baugh* show, even consent based on misrepresentation is sufficient to bar a claim for trespassing if the defendant's activities did not exceed the scope of consent. Thus, just as a restaurant reviewer may conceal his or her identity without running the risk of trespassing liability, so the mere fact that a reporter concealed his or her identity does not, without more, lead to trespassing liability.

c) Even Where Consent Is Negated by an Alleged Misrepresentation, a Trespass Claim Must Fail Because Newsgathering Does Not Intrude on the Interests Trespass Law Is Intended to Protect.

Even if the Court finds that the defendant made fraudulent statements that negated plaintiff's consent to enter, trespass liability does not follow. This is because, as courts have noted, newsgathering activities are not the type of invasion against which the trespass tort was intended to protect.

In *Desnick*, the Seventh Circuit distinguished cases where fraudulently-obtained consent bars tort liability from those where it does not, explaining that "[i]t has to do with the interest that the torts in question . . . protect." *Id*. at 1352. In *Desnick*, the court found that the entrance did not invade any interest that trespass seeks to protect, since "[t]he test patients entered offices that were open to anyone expressing a desire for ophthalmic services and videotaped physicians engaged in professional, not personal, communications" and the business activities of the office were not disrupted. *Id.* Finally, the court distinguished *Miller v. National Broad. Co.*, 187 Cal. App. 3d 1463 (1986), and *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971), saying both involved either a home or a home-based business with different property interests. *Id*. at 1352-53. *Desnick* thus found that, even if consent were effectively negated, tort liability was still precluded because the newsgathering at issue did not invade an interest that the trespass law is intended to protect.

Nor is *Desnick* the only court to refuse to extend trespass beyond the interests it traditionally protected. As discussed above, the Fourth Circuit in *Food Lion* found that even fraudulently obtained consent bars trespass liability. But it also noted that the trespass claim was too broad, saying "if we turned successful resume fraud into trespass, we would not be protecting the interest underlying the tort of trespass — the ownership and peaceable possession of land." *Food Lion*, 194 F.3d at 518. Likewise, the court in *La Luna Enterprises* found that trespass was an inappropriate remedy for the newsgathering activities at issue. It held that the plaintiff "fails to allege that defendants interfered in any way with its use or possession of its property. Insofar as plaintiff's claim for damages for trespass relies, then, on alleged injury to its reputation from defendants' broadcast, it must fail for the same reasons as its fraud claim." *La Luna Enters.*, 74 F. Supp. 2d 384, 393.

The cases above show that, even where a court finds that consent is negated because it was based on misinformation, trespass liability is still appropriate only where the activity complained of invades the interest that the trespass tort is intended to protect — *i.e.*, the peaceable possession of real property. Because newsgathering activity generally does not infringe on those rights, trespass liability is barred.

V. CONCLUSION

Based on the foregoing reasons, plaintiff's claims should be dismissed.