

# Food Lion v. Capital Cities / ABC

194 F. 3d 505

United States Court of Appeals for the Fourth Circuit

October 20, 1999

5 FOOD LION, INCORPORATED, Plaintiff-Appellee, v. CAPITAL CITIES/ABC, INC.; Lynne Litt, a/k/a  
Lynne Neufes; ABC Holding Company; American Broadcasting Companies, Incorporated; Richard N. Kaplan;  
Ira Rosen; Susan Barnett, Defendants-Appellants, Advance Publications, Incorporated; Associated Press; The  
10 Association of American Publishers; CBS Broadcasting, Incorporated; Cable News Network, Incorporated;  
Gannett Company, Incorporated; The Hearst Corporation; King World Productions, Incorporated; McClatchy  
Newspapers, Incorporated; The National Association of Broadcasters; National Broadcasting Company,  
Incorporated; The Newspaper Association of America; National Public Radio, Incorporated; The New York  
Times Company; The Radio-Television News Directors Association; The Reporters Committee for Freedom of  
the Press; Investigative Reporters; Editors, Incorporated; National Grocers Association; International Mass  
15 Retail Association; William E. Lee; John Demott; Robert Ellis Smith; Mike Rosen; Accuracy In Media; Media  
Research Center; Atlantic Legal Foundation; Southeastern Legal Foundation, Amici Curiae. Food Lion,  
Incorporated, Plaintiff-Appellant, v. Capital Cities/ABC, Inc.; Lynne Litt, a/k/a Lynne Neufes; ABC Holding  
Company; American Broadcasting Companies, Incorporated; Richard N. Kaplan; Ira Rosen; Susan Barnett,  
20 Defendants-Appellees, Advance Publications, Incorporated; Associated Press; The Association of American  
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Incorporated; The National Association of Broadcasters; National Broadcasting Company, Incorporated; The  
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Radio-Television News Directors Association; The Reporters Committee for Freedom of the Press; National  
25 Grocers Association; International Mass Retail Association; William E. Lee; John Demott; Robert Ellis Smith;  
Mike Rosen; Accuracy in Media; Media Research Center; Atlantic Legal Foundation; Southeastern Legal  
Foundation, Amici Curiae. Nos. 97-2492, 97-2564.. Argued: June 4, 1998. Decided: October 20, 1999.  
ARGUED: Bruce J. Ennis, Jr., Jenner & Block, Washington, D.C., for Appellants. Richard L. Wyatt, Jr., Akin,  
Gump, Strauss, Hauer & Feld, L.L.P., Washington, D.C., for Appellee. Before NIEMEYER, MICHAEL, and  
30 MOTZ, Circuit Judges. Affirmed in part and reversed in part by published opinion. Judge NIEMEYER wrote a  
separate opinion, concurring in part and dissenting in part.

## **MICHAEL, Circuit Judge.**

Two ABC television reporters, after using false resumes to get jobs at Food  
Lion, Inc. supermarkets, secretly videotaped what appeared to be unwholesome  
35 food handling practices. Some of the video footage was used by ABC in a  
*PrimeTime Live* broadcast that was sharply critical of Food Lion. The grocery  
chain sued Capital Cities/ABC, Inc., American Broadcasting Companies, Inc.,  
Richard Kaplan and Ira Rosen, producers of *PrimeTime Live*, and Lynne Dale  
and Susan Barnett, two reporters for the program (collectively, “ABC” or the  
40 “ABC defendants”). Food Lion did not sue for defamation, but focused on how  
ABC gathered its information through claims for fraud, breach of duty of loyalty,  
trespass, and unfair trade practices. Food Lion won at trial, and judgment for  
compensatory damages of \$1,402 was entered on the various claims. Following a  
substantial (over \$5 million) remittitur, the judgment provided for \$315,000 in  
45 punitive damages. The ABC defendants appeal the district court’s denial of their  
motion for judgment as a matter of law, and Food Lion appeals the court’s ruling  
that prevented it from proving publication damages. Having considered the case,  
we (1) reverse the judgment that the ABC defendants committed fraud and unfair

trade practices, (2) affirm the judgment that Dale and Barnett breached their duty of loyalty and committed a trespass, and (3) affirm, on First Amendment grounds, the district court's refusal to allow Food Lion to prove publication damages.

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I.

10 In early 1992 producers of ABC's *PrimeTime Live* program received a report alleging that Food Lion stores were engaging in unsanitary meat-handling practices. The allegations were that Food Lion employees ground out-of-date beef together with new beef, bleached rank meat to remove its odor, and re-dated (and offered for sale) products not sold before their printed expiration date. The producers recognized that these allegations presented the potential for a powerful news story, and they decided to conduct an undercover investigation of Food Lion. ABC reporters Lynne Dale (Lynne Litt at the time) and Susan Barnett concluded that they would have a better chance of investigating the allegations if they could become Food Lion employees. With the approval of their superiors, they proceeded to apply for jobs with the grocery chain, submitting applications with false identities and references and fictitious local addresses. Notably, the applications failed to mention the reporters' concurrent employment with ABC and otherwise misrepresented their educational and employment experiences. 15 Based on these applications, a South Carolina Food Lion store hired Barnett as a deli clerk in April 1992, and a North Carolina Food Lion store hired Dale as a meat wrapper trainee in May 1992. 20

Barnett worked for Food Lion for two weeks, and Dale for only one week. As they went about their assigned tasks for Food Lion, Dale and Barnett used tiny cameras ("lipstick" cameras, for example) and microphones concealed on their bodies to secretly record Food Lion employees treating, wrapping and labeling meat, cleaning machinery, and discussing the practices of the meat department. They gathered footage from the meat cutting room, the deli counter, the employee break room, and a manager's office. All told, in their three collective weeks as Food Lion employees, Dale and Barnett recorded approximately 45 hours of concealed camera footage. 25 30

Some of the videotape was eventually used in a November 5, 1992, broadcast of *PrimeTime Live*. ABC contends the footage confirmed many of the allegations initially leveled against Food Lion. The broadcast included, for example, videotape that appeared to show Food Lion employees 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 and sell it as fresh in the gourmet food section. The program included statements by former Food Lion employees alleging even more serious mishandling of meat at Food Lion stores across several states. The truth of the *PrimeTime Live* broadcast was not an issue in the litigation we now describe. 35 40

Food Lion sued ABC and the *PrimeTime Live* producers and reporters. Food Lion's suit focused not on the broadcast, as a defamation suit would, but on the methods ABC used to obtain the video footage. The grocery chain asserted claims of fraud, breach of the duty of loyalty, trespass, and unfair trade practices, seeking millions in compensatory damages. Specifically, Food Lion sought to 45

recover (1) administrative costs and wages paid in connection with the employment of Dale and Barnett and (2) broadcast (publication) damages for matters such as loss of good will, lost sales and profits, and diminished stock value. Punitive damages were also requested by Food Lion.~

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## II.

### A.

We must first consider whether the ABC defendants can be held liable for fraud, breach of the duty of loyalty, and trespass as a matter of North Carolina and South Carolina law and whether the North Carolina UTPA applies.~

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#### 1.

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

15

As indicated, under North and South Carolina law a plaintiff claiming fraud must show injury proximately caused by its reasonable reliance on a misrepresentation.~

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In this case, therefore, Food Lion had to show (1) that it hired Dale and Barnett (and incurred the administrative costs incident to their employment) because it believed they would work longer than a week or two and (2) that in forming this belief it reasonably relied on misrepresentations made by Dale and Barnett.

25

On their job applications Dale and Barnett did misrepresent matters such as their backgrounds, experience, and other employment. They did not, however, make any representations about how long they would work, and Food Lion did not ask for any. To the contrary, the applications signed by Dale and Barnett expressly provided that either side—company or employee—could terminate the employment at any time.~

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The fraud verdict must be reversed.

#### 2.

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

35

The jury found that Dale and Barnett breached their duty of loyalty to Food Lion, and nominal damages of \$1.00 were awarded.

As a matter of agency law, an employee owes a duty of loyalty to her employer.

5        Because Dale and Barnett did not compete with Food Lion, misappropriate  
any of its profits or opportunities, or breach its confidences, ABC argues that the  
reporters did not engage in any disloyal conduct that is tortious under existing  
law. Indeed, the district court acknowledged that it was the first court to hold that  
10        the conduct in question “would be recognized by the Supreme Courts of North  
Carolina and South Carolina” as tortiously violating the duty of loyalty. We  
believe the district court was correct to conclude that those courts would decide  
today that the reporters’ conduct was sufficient to breach the duty of loyalty and  
trigger tort liability.

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

30        Our holding on this point is not a sweeping one. An employee does not  
commit a tort simply by holding two jobs or by performing a second job  
inadequately. For example, a second employer has no tort action for breach of the  
duty of loyalty when its employee fails to devote adequate attention or effort to  
her second (night shift) job because she is tired. That is because the inadequate  
performance is simply an incident of trying to work two jobs. There is no intent  
35        to act adversely to the second employer for the benefit of the first. Because Dale  
and Barnett had the requisite intent to act against the interests of their second  
employer, Food Lion, for the benefit of their main employer, ABC, they were  
liable in tort for their disloyalty.

### 3.

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

5 In North and South Carolina, as elsewhere, it is a trespass to enter upon another's land without consent. Accordingly, consent is a defense to a claim of trespass. Even consent gained by misrepresentation is sometimes sufficient. See *Desnick v. American Broad. Cos.*, 44 F.3d 1345, 1351-52 (7th Cir.1995) (Posner, C.J.). The consent to enter is canceled out, however, "if a wrongful act is done in excess of and in abuse of authorized entry."

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

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

*Id.*

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

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

*Id.* at 1353 (citation omitted).

45 The jury found that the reporters committed trespass by breaching their duty of loyalty to Food Lion "as a result of pursuing [their] investigation for ABC."

We affirm the finding of trespass on this ground because the breach of duty of loyalty – triggered by the filming in non-public areas, which was adverse to Food Lion – was a wrongful act in excess of Dale and Barnett’s authority to enter Food Lion’s premises as employees.~

5 The Court of Appeals of North Carolina has indicated that secretly installing a video camera in someone’s private home can be a wrongful act in excess of consent given to enter.~

It is consistent with that principle to hold that consent to enter is vitiated by a wrongful act that exceeds and abuses the privilege of entry.

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

#### 4.

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

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

Although the UTPA’s language is quite broad, “the Act is not intended to apply to all wrongs in a business setting.”^ The Act’s primary purpose is to protect the consuming public.~

35 The district court found an UTPA violation because ABC is a business that engaged in deception. However, the deception—the misrepresentations in Dale’s application—did not harm the consuming public. Presumably, ABC intended to benefit the consuming public by letting it know about Food Lion’s food handling practices. Moreover, ABC was not competing with Food Lion, and it did not have any actual or potential business relationship with the grocery chain. The  
40 UTPA, therefore, cannot be used here because there is no competitive or business relationship that can be policed for the benefit of the consuming public.~

#### B.

ABC argues that even if state tort law covers some of Dale and Barnett’s conduct, the district court erred in refusing to subject Food Lion’s claims to any

level of First Amendment scrutiny. ABC makes this argument because Dale and Barnett were engaged in newsgathering for *PrimeTime Live*. It is true that there are “First Amendment interests in newsgathering.” In re Shain, 978 F.2d 850, 855 (4th Cir.1992) (Wilkinson J., concurring). See also *Branzburg v. Hayes*, 408  
5 U.S. 665, 681 (1972) (“without some protection for seeking out the news, freedom of the press could be eviscerated.”). However, the Supreme Court has said in no uncertain terms that “generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.” *Cohen v. Cowles Media Co.*,  
10 501 U.S. 663, 669 (1991); see also *Desnick*, 44 F.3d at 1355 (“the media have no general immunity from tort or contract liability”).

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

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

### C.

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

III.

5 In its cross-appeal Food Lion argues that the district court erred in refusing to  
allow it to use its non-reputational tort claims (breach of duty of loyalty, trespass,  
etc.) to recover compensatory damages for ABC’s broadcast of the *PrimeTime*  
10 *Live* program that targeted Food Lion. The publication damages Food Lion  
sought (or alleged) were for items relating to its reputation, such as loss of good  
will and lost sales. The district court determined that the publication damages  
claimed by Food Lion “were the direct result of diminished consumer confidence  
in the store” and that “it was[Food Lion’s] food handling practices themselves—  
not the method by which they were recorded or published—which caused the  
loss of consumer confidence.”

Food Lion attempted to avoid the First Amendment limitations on defamation  
claims by seeking publication damages under non-reputational tort claims, while  
holding to the normal state law proof standards for these torts. This is precluded  
15 by *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

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

In sum, Food Lion could not bypass the *New York Times* standard if it wanted  
30 publication damages.

IV.

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

40 AFFIRMED IN PART AND REVERSED IN PART.

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

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