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Food Lion and the Media's Liability for Newsgathering Torts: A Symposium Preview

Andrew B. Sims*

It is widely held that, with regard to the First Amendment,¹ “crimes and torts committed in news gathering are not protected.”² Nevertheless, much controversy has arisen

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1. U.S. CONST. amend. I. The First Amendment has been made applicable to the states by incorporation through the Fourteenth Amendment Due Process clause. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Whitney v. California*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925). Although the First Amendment only speaks to Congress and the federal government, and would have no application to the states or their subdivisions but for the Fourteenth Amendment, see *Barron v. Baltimore*, 32 U.S. 243 (1833), courts and commentators freely refer to the First Amendment and rarely to the Fourteenth Amendment in free speech/free press cases involving action by the states. A similar liberty will be taken by the author in this Symposium Preview.

It is generally accepted that state court enforcement of state common law or statutory tort laws would constitute the requisite state action to trigger the applicability of the First and Fourteenth Amendments. See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

2. *Galella v. Onassis*, 487 F.2d 986, 995 (2d Cir. 1973) (holding that defendant's tortious conduct was not immunized by First Amendment despite being committed during newsgathering process); see also *Branzburg v. Hayes*, 408 U.S. 665 (1972) (holding that the First Amendment does not afford a media defendant the right to conceal facts relevant to grand jury investigations of crimes or to

over the verdict in *Food Lion v. Capital Cities/ABC, Inc.*,³ in which a federal jury in North Carolina, on January 22, 1997, awarded \$5.5 million in punitive damages against the media defendant for fraud, trespass, and breach of loyalty. Such liability arose because media defendant American Broadcasting Company/Capital Cities (“ABC”) instructed its investigators not to disclose their media connections in order to gain employment in plaintiff’s supermarket, and to surreptitiously film alleged unsanitary meat-processing procedures.⁴ Part of this film was aired nationally on defendant’s *Prime-Time Live* program on November 5, 1992.⁵

Fortunately for ABC, the United States Supreme Court ruled last year, in *BMW of North America v. Gore*,⁶ that exces-

conceal criminal conduct of sources); *Dietemann v. Time, Inc.*, 449 F.2d 245, 249-50 (9th Cir. 1971) (holding media defendant liable for torts of invasion of privacy and intrusion in newsgathering process).

3. For previously reported decisions in this case, see *Food Lion v. Capital Cities/ABC*, 1997 U.S. Dist. LEXIS 6962 (M.D.N.C. May 9, 1997) (memorandum opinion) (giving rationale for decision excluding proof of publication damages following jury verdict finding defendants liable for fraud, trespass, and breach of duty of loyalty); 951 F. Supp. 1233 (M.D.N.C. 1996) (granting plaintiff’s motion for summary judgment on defendants’ affirmative defenses of unclean hands and *in pari delicto*); 951 F. Supp. 1224 (M.D.N.C. 1996) (denying defendants’ renewed motion to dismiss plaintiff’s claims of both breach of fiduciary duty and unfair and deceptive trade practices in violation of North Carolina’s Unfair Trade Practices Act, N.C. GEN. STAT. § 75-1.1 (1996)); 951 F. Supp. 1217 (M.D.N.C. 1996) (denying defendants’ motion for summary judgment on claims of fraud, trespass, negligent supervision, civil conspiracy, and respondeat superior for trespass); 887 F. Supp. 811 (M.D.N.C. 1995) (holding that state claims of fraud, trespass, and civil conspiracy did not warrant dismissal, that claims for violations of federal wiretapping statutes warranted dismissal, and claims for negligent supervision, respondeat superior liability, breach of fiduciary duty and constructive fraud, unfair and deceptive trade practices, warranted deferment; that ABC’s acts did not constitute pattern of racketeering as required to establish RICO violation; and that plaintiff could not recover damages for injuries to its reputation as result of broadcast).

4. For an excellent summary of the facts surrounding the *Food Lion* controversy and the jury verdict, see Amy Singer, *Food, Lies, and Videotape*, AM. LAW., Apr. 1997, at 56.

5. *PrimeTime Live* (ABC television broadcast, Nov. 5, 1992).

6. 116 S. Ct. 1589 (1996) (holding that an award of \$2 million in punitive damages for a distributor’s fraudulent failure to disclose the repainting of a new BMW automobile was “grossly excessive” and violated 14th Amendment due process guarantee).

sive punitive damages violate the Fourteenth Amendment Due Process Clause. In so holding, the Court posited a guidepost, in the form of a three-prong test, to determine whether a punitive damage award is unconstitutionally excessive under the Fourteenth Amendment.⁷ The test requires courts to consider: (1) the degree of reprehensibility of the defendant's conduct;⁸ (2) the ratio of the punitive damage award to the compensatory damage award;⁹ and (3) the difference between the punitive damage award and the civil or criminal sanctions that could be imposed for comparable conduct.¹⁰ On appeal,¹¹ the Fourth Circuit is likely to overturn the punitive damage award against ABC in *Food Lion* and remand the decision for retrial,¹² because the award is vulnerable under two, if not three, of the *BMW* guideposts.¹³

Whether or not the media defendant's conduct was "reprehensible"—the first of the *BMW* guideposts or indicia¹⁴—is debatable,¹⁵ but the issue might well be resolved in ABC's

7. *Id.* at 1598.

8. *Id.* at 1599.

9. *Id.* at 1601.

10. *Id.* at 1603.

11. *Capital Cities/ABC, Inc. v. Food Lion*, No. 96-2320 (4th Cir. argued May 9, 1997).

12. The Fourth Circuit could grant a remittitur of its own volition, offering Food Lion the option of accepting a specific reduction of its punitive damage award in lieu of a new trial. *Cf. Martin v. Fleissner GmbH*, 741 F.2d 61, 65 (4th Cir. 1984) (holding that an appellate remittitur might be granted as to an award of actual damages where the amount assessed "is 'so shockingly excessive as manifestly to show that the jury was actuated by caprice, passion or prejudice'") (quoting *Hicks v. Herring*, 144 S.E.2d 151, 154 (S.C. 1965)); see generally Eric Schnapper, *Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts*, 1989 WISC. L. REV. 237 (1989); Irene D. Sann, *Remittiturs (and Additurs) in the Federal Courts: An Evaluation with Suggested Alternatives*, 38 CASE W. RES. L. REV. 157, 197 n.113 (1987).

13. See Marcia Coyle, *BMW Punies Ruling May Upend Food Lion Verdict*, NAT'L L.J., Feb. 3, 1997, at A9; Stuart Taylor, Jr., *Smashing Undercover Journalism*, LEGAL TIMES, Feb. 17, 1997, at 23.

14. *BMW*, 116 S. Ct. at 1599.

15. The jury may have found the defendants' behavior to have been "reprehensible" because of submitted evidence that the ABC reporters might have

favor if consideration of its newsgathering function and purpose, along with the First Amendment interests inherent therein, are taken into account. The second indicium—the “disproportionality” of the punitive damage award¹⁶—is staggering. The ratio of punitive to compensatory damages in *Food Lion* is nearly 4,000:1,¹⁷ compared to a ratio of only 500:1, deemed unconstitutionally disproportionate in *BMW*.¹⁸ The third indicium—the “excessiveness” of the damages—is evaluated by measuring the difference between the punitive damage award and the civil or criminal sanctions that could be imposed for comparable misconduct.¹⁹ There is no North Carolina criminal statute leveling a fine of \$5.5 million for fraud in an employment application,²⁰ nor have there been comparable recoveries for compensatory damages in civil cases.²¹ Violation of North Carolina’s Unfair Trade Practices Act (“UTPA”),²² with which the *Food*

“staged” various incidents for the purpose of making Food Lion’s working conditions look unsanitary, including, *inter alia*, failing to throw away rotten food, failing to clean a meat saw, and even “sabotaging” a hot water heater needed for equipment cleaning. See *Food Lion*, 1997 U.S. Dist. LEXIS 6962, at *19-21. Notably, however, Judge Tilley ruled that none of the alleged “staged incidents” could, under North Carolina or South Carolina law, be deemed to be the proximate cause of the \$5.5 billion “publication damages” that Food Lion alleged. *Id.* at *21-31; see generally *Food Lion, Fraud and Free Speech*, FULTON COUNTY DAILY REP., Feb. 17, 1997 (Counsel Connect Round Table).

16. See *BMW*, 116 S. Ct. at 1601.

17. Compensatory damages in *Food Lion* were \$1,402 and punitive damages were \$2 million. See Singer, *supra* note 4, at 56.

18. *BMW*, 116 S. Ct. at 1602-03.

19. *Id.* at 1603.

20. Cf. N.C. GEN. STAT. §14-100 (1996) (making it illegal to obtain property by false pretenses and “punished by no less than 4 months nor more than 10 years, and fined, in the discretion of the court”).

21. Cf. 31 U.S.C.A. § 3729 (West Supp. 1996) (permitting the United States government to sue a federal employee, who obtained his or her employment by way of fraud on an employment application, for recovery of a forfeiture of between \$5,000 and \$10,000; and also treble damages, with “damages” possibly based on restitution of salary paid); see, e.g., *United States v. Johnston*, 138 F. Supp. 525 (W.D. Okla. 1956) (federal government claim for damages under the predecessor False Claims Statute, 31 U.S.C.A. § 231 (West Supp. 1996)).

22. N.C. GEN. STAT. §§ 75-1.1 to -16.2 (1996).

Lion defendants are charged,²³ would only provide for an automatic trebling of the actual damage award.²⁴

If it is likely that the Fourth Circuit will reverse or reduce Food Lion's punitive damage award, *Food Lion* nevertheless raises the controversial issue of whether the media should be entitled to some First Amendment immunity, at least as to excessive punitive damage awards, if not as to liability for some newsgathering torts.²⁵ While ABC would be gratified to see its *Food Lion* punitive damages reduced under the *BMW* principles,²⁶ what the media giant would undoubtedly much prefer is judicial recognition of a First Amendment privilege to engage in minor, non-criminal newsgathering torts either without legal liability, or at least without the assessment of any punitive damages if the tort-generated speech is truthful, of public concern, and is not legally contested as being otherwise in defamation actions.²⁷

Media defendants like ABC, who want explicit recognition of such a First Amendment immunity, argue that tort

23. As of May 1997, the district court had not yet determined whether the acts of the defendants had violated the UTPA. See *Food Lion*, 1997 U.S. Dist. LEXIS 6962, at *28-29. This determination must be made by the court as a matter of law. *Hardy v. Toler*, 218 S.E.2d 342, 346 (N.C.), cert. granted, 214 S.E.2d 431 (N.C.), modified, 218 S.E.2d 342 (N.C. 1975).

24. N.C. GEN. STAT. § 75-16; see *Peterson v. Bozzano*, 183 B.R. 735 (Bankr. M.D.N.C. 1995).

25. See generally Robert M. O'Neil, *Tainted Sources: First Amendment Rights and Journalistic Wrongs*, 4 WM. & MARY BILL RTS. J. 1005 (1996); Sandra S. Baron et al., *Tortious Interference: The Limits of Common Law Liability for Newsgathering*, 4 WM. & MARY BILL RTS. J. 1027 (1996); Jane E. Kirtley, *Vanity and Vexation: Shifting the Focus to Media Conduct*, 4 WM. & MARY BILL RTS. J. 1069 (1996); John J. Walsh et al., *Media Misbehavior and the Wages of Sin: The Constitutionality of Consequential Damages for Publication of Ill-Gotten Information*, 4 WM. & MARY BILL RTS. J. 1111 (1996); Paul A. Lebel, *The Constitutional Interest in Getting the News: Toward a First Amendment Protection from Tort Liability for Surreptitious Newsgathering*, 4 WM. & MARY BILL RTS. J. 1145 (1996).

26. See Memorandum in Support of Defendants' Motion for New Trial or Remittitur of Punitive Damage Award, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, No. 92-00592 (M.D.N.C. 1997).

27. See Memorandum in Support of Defendants' Motion for Judgment as a Matter of Constitutional Law on Punitive Damages, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, No. 95-00513 (M.D.N.C. 1997).

actions and large damage awards, such as those in *Food Lion*, chill the media's ability to engage in investigative reporting necessary to bring important problems to the public's attention.²⁸ The media thus claim a special "watchdog" function in society which they feel has been vindicated by their history, and of which the First Amendment should take cognizance.²⁹ If they accept these arguments, courts might want to expressly acknowledge the constraints of the First Amendment on state tort law in a more forceful and unambiguous manner than would be achieved by merely leaving the media defendants to their *BMW* due process defense.

BMW is, after all, merely a due process rule of general applicability,³⁰ theoretically predicated on a low-tier, rational basis standard of review.³¹ While First Amendment concerns might no doubt be factored into the first *BMW* indicium of "reprehensibility," query whether there should not be some separate and independent First Amendment immunity principles recognized in this area. Media defendants would point out that most of their tort-generated speech is entitled to high-tier First Amendment protection, requiring "compelling" government reasons for directly burdening the liberty, with the law "narrowly drawn" to achieve those ends.³² The minor newsgathering torts asserted to be necessary to generate this speech should arguably be protected against excessive damage awards by something more than low-tier, "rational basis" due process.

Moreover, *BMW* says nothing about the problem of excessive compensatory damage awards for newsgathering torts. Indeed, *Food Lion* does not present this issue on appeal

28. *Id.* at 13-14.

29. *Id.* at 10-12.

30. *BMW*, 116 S. Ct. at 1592-93 (citing U.S. CONST. amend. XIV).

31. Under this standard, the government is required to show that the law is rationally-related to a valid or legitimate purpose. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-54 (1938).

32. See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989).

because, at the trial level, Judge Tilley had rejected the plaintiff's attempt to have the damages from publication considered by the jury as proximately caused by the newsgathering torts,³³ and because the jury's ultimate award of compensatory damages for the torts proper was a modest one.³⁴ It is nevertheless noteworthy that a higher award of compensatory damages would in turn have reduced the "disproportionality" of the punitive damage award under *BMW's* second indicium.³⁵

Should the Fourth Circuit go beyond *BMW* and reconsider whether the media enjoys a First Amendment privilege, or immunity from liability, for newsgathering torts, it might be useful to consider the following issues:

33. *Food Lion*, 887 F. Supp. at 822-24. Including the damages from publication in the measurement of the damages for the predicate newsgathering torts, on a theory of proximate causation, receives some support in state common law decisions. See, e.g., *Dietemann v. Time Inc.*, 449 F.2d 245, 250 (9th Cir. 1971); *Belluomo v. Kake TV & Radio, Inc.*, 596 P.2d 832, 842 (Kan. App. 1979); *Prahl v. Brosamle*, 295 N.W.2d 768, 781-82 (Wis. 1980). But see *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. 1969), cert. denied, 395 U.S. 947 (1969); *Costlow v. Cusimano*, 34 A.D.2d 196 (N.Y. App. Div. 1970); see generally James F. King & Frederick T. Muto, *Compensatory Damages for Newsgathering Torts: Towards a Workable Standard*, 14 U.C. DAVIS L. REV. 919 (1981); Rex S. Heinke, *Added Damages for Publication Should not be Available in Intrusion-Trespass Cases without Independent Justification*, 5 COMM. LAW. 1, 6 (1983).

Food Lion had argued that such reputational damages should be recoverable whether or not the publication was truthful. 887 F. Supp. at 822. However, Judge Tilley accepted ABC's argument, predicated on the Supreme Court's ruling in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), "that a public figure cannot use a law of general applicability to recover reputation damages without establishing the strict requirements of a defamation claim." 887 F. Supp. at 821. *Food Lion* did not sue ABC for defamation, apparently asserting that the statute of limitations had run before it had gathered sufficient evidence to prove actual malice as required by *New York Times v. Sullivan*, 376 U.S. 254 (1964). See Singer, *supra* note 4, at 58. Outside of court, however, *Food Lion* continues to contest the truthfulness of the *PrimeTime Live* broadcast, and asserts that it unsuccessfully attempted to add a libel claim to its lawsuit in 1995. *Id.* at 65. ABC, in response, has challenged *Food Lion* to lift the "confidential" designation of *Food Lion's* internal documents that ABC obtained on discovery, and which it believes support the substantial truthfulness of its broadcast. *Id.*

34. See *supra* note 17 and accompanying text.

35. See *supra* notes 17-18 and accompanying text.

(1) Which newsgathering torts would properly be included within, and which would be excluded from, such a First Amendment privilege/immunity, and which would not;

(2) Whether the First Amendment privilege should extend to a complete immunity from civil liability for commission of these newsgathering torts, or whether immunity should be limited to excessive liability for the newsgathering torts, and if the latter, whether to excessive damages in any form—punitive, compensatory, or a combination thereof—or to punitive damages only;

(3) On what “conditions” might such an immunity, from either liability or excessive damages, be predicated;

(4) If the court chose to limit First Amendment protection to a ban on excessive punitive damages for newsgathering torts, but under a standard more rigorous than the *BMW* due process rule, what factors might it weigh in assessing whether a specific punitive damage award is unconstitutionally excessive in light of the First Amendment?

Prominent in any discussion of a First Amendment immunity for newsgathering torts would be a comparison to First Amendment law limiting the recovery of civil tort damages for defamation³⁶ in cases brought by public figures and public officials, or by others where the alleged defamations related to matters of public concern, under the doctrine of *New York Times v. Sullivan*³⁷ and its progeny.³⁸ Indeed, this comparison might be made at more than one level. For example, the newsgathering torts might be generally compared to these constitutionalized categories of defamation to assess whether recognition of any First Amendment immu-

36. See, e.g., Baron, *supra* note 25, at 1062; Lebel, *supra* note 25, at 1148-49.

37. 376 U.S. 254 (1964).

38. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); see also *infra* note 40 and accompanying text (describing the *Gertz* and *Greenmoss* decisions).

nity for the media for the newsgathering torts might serve First Amendment interests of comparable significance.

The issue of constitutionalized defamation would also arise because of the more specific concern that media targets like Food Lion are bringing newsgathering tort actions to circumvent the significant constitutional bulwarks erected by the Supreme Court in defamation cases.³⁹ Food Lion did not sue ABC for defamation, apparently asserting that the statute of limitations had run before it had gathered sufficient evidence to meet the proof of “actual malice” requirement of *Sullivan*.⁴⁰ The suspicion that Food Lion was trying to circumvent the *Sullivan* requirements led Judge Tilley to reject the plaintiff’s argument that the measurement of damages for the newsgathering torts should include its reputational damages from ABC’s broadcast regardless of the truth or falsity thereof⁴¹—a decision which no doubt significantly reduced ABC’s compensatory damages.⁴²

39. See *supra* note 33 (discussing *Sullivan* and its progeny).

40. See *supra* note 33 and accompanying text. In order to establish liability for defamation under the rule of *Sullivan* and its progeny, public officials and public figures must not only prove “actual malice”—defined as “knowledge of the falsity or reckless disregard of the truth,” *Sullivan*, 376 U.S. at 279-80, but also must do so with clear and convincing clarity. *Id.* at 285-86.

Non-*Sullivan* plaintiffs alleged to have been defamed as to matters of public concern bear the same burden of proof as to “actual malice” in order to recover presumed or punitive damages, but may otherwise recover provable special or general damages under state law standards which do not award injury without fault. *Gertz*, 418 U.S. at 347-50, as clarified by *Greenmoss*, 472 U.S. at 757-61.

Both *Sullivan*- and *Gertz*-type plaintiffs bear the burden of proof by a preponderance of the evidence on the issue of falsity. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986). “Substantial truth” is a defense. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516-17 (1991).

41. *Food Lion*, 887 F. Supp. at 822-24; see *supra* note 33 and accompanying text.

42. See *supra* note 17 and accompanying text. The ABC/*PrimeTime Live* broadcast apparently did have a devastating impact on Food Lion’s reputation: “Its stock lost almost half of its value in the year following the broadcast. At least 88 stores were closed. More than 1,000 employees were laid off.” Singer, *supra* note 4, at 58.

On December 20, 1996, following a jury verdict finding the defendants liable for fraud, trespass, and breach of the duty of loyalty, Judge Tilley informed the parties that proof of damages resulting from “lost profits, lost sales, diminished

Such “anti-circumvention” analysis could be taken a significant step further and argued as the basis for a general theory of First Amendment immunity from liability for minor newsgathering torts. Perhaps the most significant statement of this position is that of the eminent Judge Richard A. Posner, writing for the Seventh Circuit in *J.H. Desnick, M.D. Eye Service v. ABC*,⁴³ a case also involving ABC and *PrimeTime Live*:

Today’s ‘tabloid’ style investigative television reportage . . . 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 (for the media have no general immunity from tort or contract liability), then the target has no legal remedy even if the investigatory tactics used by the network are surreptitious, confrontational, unscrupulous, and ungentlemanly.⁴⁴

stock value or anything of that nature” would not be permitted. See *Food Lion*, 1997 U.S. Dist. LEXIS 6962, at *5 n.2. Judge Tilley gave his rationale for this ruling in a memorandum opinion filed May 9, 1997. *Id.* His theory was that, under the applicable laws of North Carolina and South Carolina, such “publication damages” could not be viewed as directly attributable to, and therefore proximately caused by, the defendants’ torts. *Id.* Judge Tilley avoided the question of whether such recovery might be barred by the First Amendment.

43. 44 F.3d 1345 (7th Cir. 1995).

44. *Id.* at 1355 (citations omitted). Judge Posner’s quoted remarks regarding the First Amendment are arguably dicta in *Desnick*, because the Seventh Circuit had previously concluded therein that the media defendants had not committed the alleged common law torts of trespass, privacy invasion and fraud, nor had they violated the relevant federal or state statutes limiting electronic surveillance by having individuals with hidden cameras pose as patients requesting eye examinations at defendant’s ophthalmic centers specializing in cataract surgery. *Id.* at 1351-55.

Critical to the holding in *Desnick* that no newsgathering torts had been committed was Judge Posner’s conclusion that the media’s inducement of the

It is hoped that this Symposium panel, *Accountability of the Media in Investigations*, will give us valuable insights into these constitutional and other legal issues that will confront the Fourth Circuit in the *Food Lion* appeal, as well as other judges and federal and state legislators in the years to come.

target's consent through fraud or misrepresentation might not always negate that consent. *Id.* at 1351. Notably, Judge Tilley, in denying ABC's motion for summary judgment in *Food Lion*, thought *Desnick* to be distinguishable, in this regard, on its facts. Unlike the eye examination offices in *Desnick*, to which anyone expressing a desire for ophthalmic services had access, Food Lion had allowed the *PrimeTime Live* reporters access to areas to which only its employees had access. These reporters, Tilley concluded, were really ABC employees, and a reasonable jury might find that their presence at Food Lion was purely incidental to their jobs with *PrimeTime Live*. *Food Lion*, 951 F. Supp. at 1222-24.

The approach of Judge Posner and the Seventh Circuit in *Desnick*, in effect reading the common law torts "small" by reinterpreting ancient forms of action so as to free the media from liability for non-criminal newsgathering torts, might provide an additional option for the Fourth Circuit in considering the *Food Lion* appeal.