Professor Gelin, LWRA I, Fall 2012
Assignment for Week 1, August 15

Important Announcements:

-Our first class will begin at 6:00 p.m. and end at 10:00 p.m. Plan accordingly. (Our regular class time period is from 6:15 p.m. to 9:30 p.m.)
-I strongly suggest printing out this assignment and its attachments: two handouts and three cases.
-We are going to "hit the ground running" in this class. Leave yourself plenty of time to complete this assignment. Be prepared for class: don't get left behind.

For First Half of Class:

Read:
-"An Introduction to Legal Writing." (Attached.)
-"Briefing a Case." (Attached.)
-Food Lion, Miller & Broughton cases. (All attached.)
-Neumann Chapters 1, 5, 14, 15, 16 (§§ 16.1 - 16.3 only).
-Sloan, Excerpt from Chapter 5, pp. 93-99 (§§A1 - A4).

Prepare:
-Case briefs for Food Lion, Miller and Broughton. Bring hard copies of these briefs to class.
-Neumann Chapter 5, Exercise, pp. 29-31.
-Hill, Exercises 4 and 11.

Assignment Due:
-None.

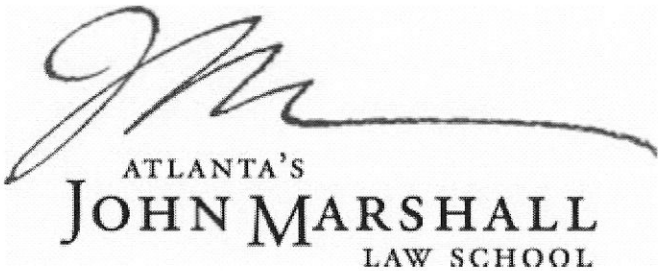
For Second Half of Class:

Read:
-Neumann Chapters 2 - 4.
-ALWD Introduction and Rules 1 - 6. Familiarize yourselves with Appendices 3 - 5.

Prepare:
-Neumann Chapter 2, Exercise I, p. 14.
-Neumann Chapter 4, Exercise I, p. 26.

Assignment Due:
-State the precise rule for "consent," and how that consent can be vitiated according to Food Lion. Your assignment should be in Courier New, 14 point font, double spaced with one inch margins. Include your name and date of submission in the upper left hand corner. This assignment should not exceed one page.

An Introduction to Legal Writing



AN INTRODUCTION TO LEGAL WRITING

SOME BASICS

Legal writing is not like any other writing. Though the substance of a legal argument may be creative, legal writing is not at all like the "creative writing" you may have some familiarity with from your undergraduate studies. Similarly, legal writing is not like writing a research paper you might have written in a history class, although legal writing certainly involves a good deal of research. Legal writing is also different than writing prose or poetry, although legal writers do follow a very strict structure just as a poet would when writing a haiku or sonnet.

Two types of legal writing will be the focus in LWRA I and II--objective writing and persuasive writing. Attorneys use objective writing (also called predictive writing) for a myriad of reasons. Such uses include analyzing whether a client has a cause of action, whether a particular course of conduct is appropriate or legal, and whether a particular law applies to a particular situation, to name just a few. All attorneys engage in objective writing when they are advising their clients. Objective writing most commonly appears in interoffice memoranda and client letters. This type of writing will be the focus of LWRA I in the Fall semester.

Attorneys use persuasive writing to persuade others (opposing counsel or the court, for instance) that their legal analysis is correct and should be adopted. To effectively persuade, you must understand the law and how it applies to your client's situation. In other words, you must complete the objective analysis before you can

write persuasively. Persuasive writing most commonly appears in legal briefs (also called legal memoranda) filed with the court and in correspondence with opposing counsel. This type of writing will be the focus of LWRA II in the Spring semester.

Regardless of whether you are writing objectively or persuasively, you will be expected to follow strictly the requisite legal writing structure. Although the structure has numerous acronyms (you may have heard of IRAC), the one that we will use is CREAC.

DO NOT FIGHT THE CREAC STRUCTURE

Attorneys think and write logically. CREAC is a logical structure. Courts expect an attorney's writing to follow a particular structure. CREAC is the structure courts expect. So, instead of fighting the CREAC structure or lamenting the fact that you may find it constraining initially, get comfortable with CREAC now because it is the structure that you will use for nearly all legal writing that you perform from this point forward, both in law school and in your career as a lawyer. Also get comfortable with the fact that you will be doing a lot of writing from this point forward.

As the acronym CREAC suggests, there are five parts that you, the legal writer, must complete to thoroughly present the written analysis of a legal issue:

C Conclusion

R Rule of law

E Explanation of the rule

A Application of the rule to your facts

C Conclusion

Each part of the CREAC structure is discussed below.

THE PARTS OF CREAC

CONCLUSION

Beginning with the conclusion may seem odd to you, but it is expected in legal writing. In other words, you begin by telling the reader what conclusion you will prove with the remaining parts of the CREAC structure. Naturally, before you can draw the conclusion, you must have isolated the legal issue.[1] In LWRA I and II, you will have isolated the legal issue, performed your legal research, identified the

applicable rule, and applied that rule to the facts of your case before you reach the conclusion that will kick off the written form of your legal analysis.

RULE

The "rule" is a general legal principle. A rule is not fact specific to one case; rather, it applies to all cases of a particular type, regardless of the facts. The applicable legal rule may be found in a statute. It may be found in a single case. It may be found in a series of cases and then "synthesized" by the legal writer. Moreover, rules take many forms. Some are simple and straight-forward. Others have many elements or "factors." Others have exceptions. Other rules take different forms or combine forms. You will be learning more about those concepts in various classes, including your LWRA class. For now, you need to understand that identifying and correctly expressing the rule--regardless of where it is found or the form it takes--is imperative to accurately completing your analysis.

EXPLANATION OF THE RULE

After you correctly present your rule, you must explain it. Said another way, you must prove to the reader that the rule you have presented is the appropriate rule to apply to your legal issue and that you have interpreted that rule accurately. The rule explanation identifies the legal authority from which you accessed or formulated the rule. It generally includes the facts of a case or cases, the holding(s), and the court's reasoning. It may also include dicta (if you do not know what that word means, then look it up now in a law dictionary and start training yourself to do that each time you come across a word that is unfamiliar to you) and/or public policy supporting the rule.

The type of authority you will use when explaining the applicable rule will be the subject of much discussion in your LWRA classes. Moreover, the depth of your rule explanation may vary, depending on the complexity of the legal issue you are addressing. For now, you should understand that merely presenting an accurate rule of law is not sufficient to prove to the legal reader that the rule should be adopted to resolve the legal issue. Rather, you must explain that rule using information from the legal research you performed before you started the writing process.

APPLICATION OF THE RULE

After you have explained your rule to the reader, you will apply the rule to the facts of your case. In this part of the CREAC formula, you will explain to the reader how your client's facts are similar or dissimilar to the facts of the cases discussed in your rule explanation and you will explain the reasoning for reaching the conclusion that you presented at the beginning of the analysis. Additionally, if there are counter-arguments to the conclusion that you have drawn, your rule application section must address that counter-analysis as well.

You may not introduce new legal authority in your application section. If you find that you cannot completely present your explanation of how the rule applies to the facts of your case without including authority that you did not present in the rule explanation section, then your rule explanation section was incomplete.

New law students have a tendency to be "conclusory" (drawing conclusions without adequately using the facts of the case to support them) in their rule application section. Unfortunately, that tendency often translates into poor use of facts on final examinations as well. You should keep in mind that the outcome of cases is dependent on their facts. Thus, your ability to use the facts of your case in the application section (or in a final examination) to support your prediction or desired result is essential.

CONCLUSION

When you are finished thoroughly applying the rule to the facts of your case, then you will restate your conclusion. Sometimes there may be a bit of summarizing that accompanies your conclusion; other times there will not be. Again, how developed the conclusion is depends on a number of considerations. At this juncture, you should understand that the conclusion at the beginning of your CREAC and at the end of it must be consistent.

TO SUM UP

This document is intended to merely introduce you, in a very broad sense, to the types of legal writing assignments you will encounter in the LWRA classroom and the CREAC structure you will use to complete those writing assignments. Naturally, your LWRA professor will get into greater depth on the topics covered in this document in the weeks to come. However, as you finish reading this document, you should commit yourself to the CREAC structure and make sure that you are very familiar with its parts.

[1] Identifying the legal issue first is one of the key differences between IRAC and CREAC. The other key difference is that, in CREAC, you must explain your rule (hence the "E" in CREAC), but with IRAC you do not. You may be expected to use the IRAC structure when taking a final exam, which you can discuss with your professors as exams approach, but the CREAC structure will be used in your LWRA classes.

Briefing a Case

ATLANTA'S
JOHN MARSHALL
LAW SCHOOL

BRIEFING A CASE

Even before attending law school, you may have heard that attorneys write "briefs." However, there are two types of briefs that you will write in law school and you should not confuse the two. The first type of brief is a "case brief." A student writes case briefs primarily to prepare for law school classes. For instance, if your professor assigns you four cases to read for your Contracts class, you should prepare four separate case briefs. A case brief usually is one to two pages in length and follows a very specific organizational structure.

The other type of "brief" that law students write is an appellate brief. An appellate brief is rather lengthy (usually about twenty-five to thirty pages in length), very stylized, and highly complex. Its purpose is to argue your client's legal position to an appellate court. You will be writing such a brief in the Spring semester in LWRA II. However, the focus of this document is writing a case brief—a skill that you should master as quickly as possible.

THE PURPOSE

You may be asking yourself, "if I read the case, why do I need to write a case brief"? That's a fair question. However, as you should have discovered by now, simply reading a case is not enough preparation for the law school classroom. Rather, you must know the case, understand it, figure out how the case fits into the scheme of other cases you are examining, and how it will apply in different factual scenarios. So, in a nutshell, the reasons you should write a case brief are to:

1. continually improve your critical reading skills;
2. internalize the substance of the case and improve your comprehension of it;
3. create a document that will assist you when called upon in class and when creating your class outlines; and
4. improve the likelihood that you will retain what you learn.

THE ORGANIZATIONAL STRUCTURE

Complete case briefs have at least seven sections—case citation, facts, procedural history, issue, rule, holding, and reasoning. A well prepared law student may choose to add an additional section that reflects the thoughts that were generated through post-critical reading exercises, paramount of which is the answer to the question: how does this information fit with prior reading I have done for this class? Below, each of the seven primary sections of a case brief is described in detail.

CASE CITATION

You will learn more about case citation as you advance in your Legal Writing classes. Case citation is a very technical part of legal writing and it will take a lot of practice for you to master. For now, you need to identify the name of the case (who is opposing whom) and then record how to locate the case in a particular case reporter. For instance, in a case brief for the Miller case you will read shortly, you would complete the case citation section as: Miller v. Brooks, 472 S.E.2d 350 (N.C. App. 1996).[1]

FACTS

This section of a case brief answers the question: what happened that led the parties to the court in the first place? At a minimum, in the "facts" section of your case brief, you should describe the nature of the case and summarize the relevant allegations, evidence, and arguments presented by the litigants.

PROCEDURAL HISTORY

This section of a case brief answers the question: how did this case get to this particular court? Usually, the cases you will be reading are appellate court cases. That means the case has been decided already by a lower court and the losing party has appealed that decision to a higher court. At a minimum, in the "procedural history section," you should include the party who is appealing and what happened in the lower court that the losing party in the court below is taking issue with.

ISSUE

This section of a case brief answers the question: what legal question(s) does this case raise? Again, before you came to law school, you may have heard someone say "you'll do a lot of issue-spotting in law school." That is true, but it is not as easy as you think. Spotting the issue and precisely stating it are essential law school skills and you should use case briefing to help you get better and better at it.

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[1] The "472" in the citation refers to the volume number of the reporter in which the case appears. The "S.E. 2d" is the abbreviation for the reporter in which the case appears – The Southeastern Reporter Second Series. The "350" refers to the page number in the Southeastern Reporter on which the Miller case begins. The "N.C. App." in the citation is the abbreviation for the court deciding the case; the North Carolina Court of Appeals. The "1996" in the citation indicates the year the opinion was issued.

For purposes of illustration, consider the following scenario:

> Mr. Smith and Ms. Jones, who had not met each other before, were sitting on a park bench at Piedmont Park. Mr. Smith's dog, Fido, was tied to the bench beside Mr. Smith. Mr. Smith told Ms. Jones that Fido was "as gentle as could be" before he walked away from the bench (leaving Fido behind, but still tied to the bench) to get a drink of water at a fountain about 30 yards away. While Mr. Smith was getting a drink of water, a young man walked in front of the bench and noticed Fido. When the young man leaned down to pet Fido, the dog growled and gnashed his teeth at the young man while Ms. Jones looked on. Just as the young man walked away from the bench, Mr. Smith turned around from the water fountain to return to the bench. Ms. Jones did not tell Mr. Smith what happened while he was gone and, about 15 minutes later when Mr. Smith untied Fido to walk him back to Mr. Smith's car, Ms. Jones reached out to pet Fido. When she did, Fido bit her. Mr. Smith was shocked. Ms. Jones sued Mr. Smith as seeking damages for the injuries she incurred.

Given the scenario, you might state the issue in your case brief as "whether a victim of a dog bite can recover damages from the dog's owner when the victim had reason to believe the dog could be aggressive."

RULE

This part of the case brief answers the question: what legal rule did the court apply to the facts of the case to come to its conclusion? The court should give a clear statement of the rule or rules that control the issue. The rule is not specific to the facts of the case. Rather, it is a general legal principle that applies to all cases of a particular type, regardless of the facts. For instance, a legal rule that a court might use to resolve the dog bite case described above could be "the victim in a dog bite case cannot recover damages from the dog's owner unless the dog's owner has superior knowledge of the dog's propensity to bite than the plaintiff has."

HOLDING

This part of the case brief answers the question: who won? The holding may be narrow or quite broad. Often, but not always, the holding will follow words in the case like "we hold that . . . ." Also, the holding should include the disposition of the case. In other words, was the ruling of the lower court affirmed? Reversed? Remanded? For example, a court's holding in the dog bite case might be "the court held that the dog owner was not liable to the victim and, therefore, the decision of the lower court was reversed."

REASONING

This part of the case brief answers the question: why did the court reach its holding? Another way of thinking about how to complete this section of a case brief is to describe how and why the court fits the particular facts of the case into the rule or law. Sometimes the court uses policy to illuminate its reasoning. So, you should include in this section what principle of equity or justice the court is trying to advance.

Turning to the dog bite case again, you might complete the "reasoning" section of the case brief by explaining that the court denied recovery to Ms. Jones because she personally observed Fido growl and gnash his teeth at the stranger who approached Fido while Mr. Smith was away from the bench getting water. Moreover, because Mr. Smith did not know that Fido had reacted so aggressively to the stranger and because Mr. Smith truly was shocked when Fido bit Ms. Jones, the court concluded that Ms. Jones had superior knowledge of Fido's propensity to bite than Mr. Smith did. The court noted that it would be unfair to punish the dog's owner when the victim attempted to pet the dog after personally observing the dog's reaction to another stranger.

ADDITIONAL THOUGHTS

The seven sections of a case brief described above represent the minimum of what you write to prepare for classes. As previously mentioned, some students will write down the thoughts or questions that come to mind as they complete their post-critical reading exercises. Moreover, courts are not always unanimous in their decisions. As a result, some cases present two or more opinions. The first opinion presented (the "majority" opinion) is the official decision of the court. The second opinion is either a "concurring" opinion or a "dissenting" opinion. If you are unfamiliar with those terms, look them up (and get in the habit of doing that). In any event, you should not simply cast aside the concurring and/or dissenting opinions. Instead, you should examine them closely and then decide whether to include information about them in your case brief. Often, the concurring and/or dissenting opinions explain counter-arguments that assist you in analyzing the case from a different perspective.

As you complete case briefs for the cases in this orientation packet, keep in mind that no one is expecting perfection at this juncture. However, we do expect good-faith efforts. Come prepared to orientation. If you do not, you will begin your law school career behind the proverbial "eight ball."

CASE BRIEF – Template

Case Citation:

Facts:

Procedural History:

Issue:

Rule:

Holding:

Reasoning:

Miscellaneous information:

Food Lion

benefits to Art Stanley is affirmed in No. 98–2731.

No. 98–2731—*AFFIRMED*

No. 99–1057—*DISMISSED*

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 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 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, Defendants–Appellees,

Advance Publications, Incorporated; Associated Press; The 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; National 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.

United States Court of Appeals,
Fourth Circuit.

Argued: June 4, 1998.

Decided: Oct. 20, 1999.

Grocery store chain which had been subject of undercover investigation of its food handling practices by television network news program sued network, its corporate parent, and network employees. After jury returned verdict for chain on its claims for fraud, breach of duty of loyalty, and trespass, the United States District

Court for the Middle District of North Carolina, N. Carlton Tilley, Jr., J., 964 F.Supp. 956, held that chain could not recover "publication" damages, and entered judgment for chain. After their motion for judgments as a matter of law and for new trial was denied, 984 F.Supp. 923, defendants appealed, and chain cross-appealed. The Court of Appeals, Michael, Circuit Judge, held that: (1) alleged acts of fraud by undercover reporters who obtained jobs with chain did not proximately cause damages; (2) reporters breached duty of loyalty owed to chain under North Carolina and South Carolina law by using hidden cameras; (3) breach of duty of loyalty vitiated reporters' consent to enter chain's stores, so that they could be held liable for trespass; (4) misrepresentations could not support claim under North Carolina Unfair and Deceptive Trade Practices Act (UTPA); (5) First Amendment did not bar recovery for fraud and breach of duty of loyalty; but (6) chain could not recover for damages resulting from broadcast of news program.

Affirmed in part and reversed in part.

Niemeyer, Circuit Judge, concurred in part and dissented in part and filed opinion.

1. Federal Courts ⇨373

Federal court sitting in diversity is obliged to interpret and apply state substantive law.

2. Federal Courts ⇨383, 391

In conducting its analysis of applicable state substantive law, federal court sitting in diversity may consider all of the authority that the state high courts would, and should give appropriate weight to the opinions of their intermediate appellate courts.

3. Federal Courts ⇨776

In diversity action, Court of Appeals reviews de novo district court's determinations on questions of state substantive law.

4. Fraud ⇨3

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

5. Fraud ⇨23, 25

Administrative costs incurred by grocery store chain in connection with its hiring of employees who were in fact undercover reporters for network television news program did not result from reasonable reliance on misrepresentations by reporters, who concealed their employment with network when they submitted job applications as part of investigation of chain's food handling practices, and thus could not support recovery under North Carolina and South Carolina law on fraud claims asserted against network; reporters made no express representations about how long they would work, and any belief by chain that reporters would work for extended period was unreasonable, since their employment was at will.

6. Master and Servant ⇨20

North Carolina and South Carolina follow doctrine of employment at will.

7. Master and Servant ⇨8(1)

Under employment at will doctrine, it is unreasonable for either the employer or the employee to rely on any assumptions about the duration of employment.

8. Master and Servant ⇨20, 30(1.5)

At will employment means that, absent an express agreement, employers are free to discharge employees at any time for any reason, and employees are free to quit.

9. Fraud ⇨25

Wages paid by grocery store chain to employees who were in fact undercover reporters for network television news pro-

gram were attributable not to misrepresentations of reporters, who concealed their employment with network when they submitted job applications as part of investigation of chain's food handling practices, but by reporters' performance of tasks for which they were hired, so that payment of wages did not result in damages proximately caused by misrepresentations, and could not support recovery under North Carolina and South Carolina law on fraud claims asserted against network.

10. Master and Servant ⇐50

It is possible for an employee to perform the assigned tasks of a job adequately and still breach the duty of loyalty.

11. Fraud ⇐32

Under North Carolina law, a party who has been fraudulently induced to enter a contract has two options: he may sue for money damages, keeping whatever benefits he received under the fraudulent contract, or he may repudiate the contract, tender back what he received under it, and seek the value of what he parted with.

12. Master and Servant ⇐50

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

13. Master and Servant ⇐50

Under South Carolina law, it is implicit in any contract for employment that the employee shall remain faithful to the employer's interest throughout the term of employment.

14. Master and Servant ⇐50

North Carolina law implies a promise on the part of every employee to serve her employer faithfully.

15. Master and Servant ⇐50

Employee breaches duty of loyalty owed to employer under South Carolina law when his or her acts are inconsistent with promoting the best interest of employer at a time when employee on its payroll.

16. Master and Servant ⇐50

Under North Carolina law, an employee who deliberately acquires an interest adverse to his employer breaches duty of loyalty.

17. Master and Servant ⇐50

Under North Carolina and South Carolina law, as predicted by Court of Appeals, reporters for network television news program, who obtained jobs with grocery store chain as part of undercover investigation of chain's food handling practices, breached duty of loyalty owed to chain by virtue of their employment by wearing hidden cameras to make video and audio record of what they saw and heard while employed by chain; interests of network, to whom reporters gave complete loyalty, were adverse to those of chain.

18. Master and Servant ⇐50

Under North Carolina and South Carolina law, as predicted by Court of Appeals, employee does not commit tort of breach of duty of loyalty simply by holding two jobs, or by performing a second job inadequately.

19. Master and Servant ⇐50

Under North Carolina and South Carolina law, as predicted by Court of Appeals, a second employer has no tort action for breach of duty of loyalty when its employee fails to devote adequate attention or effort to her second job because she is tired; inadequate performance is simply an incident of trying to work two jobs, and there is no intent to act adversely to the second employer for the benefit of the first.

20. Trespass ⇐10

Under North Carolina and South Carolina law, it is a trespass to enter upon another's land without consent.

21. Trespass ⇐25

Under North Carolina and South Carolina law, consent is a defense to a claim of trespass.

22. Trespass ⇐25

Under North Carolina and South Carolina law, consent to enter is canceled out, and does not serve as defense to claim of trespass, if a wrongful act is done in excess of and in abuse of authorized entry.

23. Trespass ⇐25

Under North Carolina and South Carolina law, consent to an entry is often given legal effect, as will allow consent to provide defense to claim of trespass, even though it was obtained by misrepresentation or concealed intentions.

24. Trespass ⇐25

Under North Carolina and South Carolina law, as predicted by Court of Appeals, misrepresentations by reporters for network television news program in concealing their employment with network when they obtained jobs with grocery store chain as part of undercover investigation of chain's food handling practices did not vitiate chain's grant of consent to reporters to enter store premises after they were hired by chain.

25. Trespass ⇐10

Interest underlying the tort of trespass is the ownership and peaceable possession of land.

26. Trespass ⇐25

Under North Carolina and South Carolina law, as predicted by Court of Appeals, reporters for network television news program, who had concealed their employment with network to obtain jobs with grocery store chain as part of undercover investigation of chain's food handling practices, committed wrongful act in excess of their authority as chain employees to enter store premises, so that their entry of premises constituted a trespass, when they breached duty of loyalty owed to chain as its employees by wearing hidden cameras to make video and audio record of what they saw and heard while employed by chain.

27. Consumer Protection ⇐4

Although language of North Carolina Unfair and Deceptive Trade Practices Act (UTPA) is quite broad, UTPA is not intended to apply to all wrongs in a business setting. N.C.G.S. § 75–1.1.

28. Consumer Protection ⇐3

Primary purpose of North Carolina Unfair and Deceptive Trade Practices Act (UTPA) is to protect the consuming public. N.C.G.S. § 75–1.1.

29. Consumer Protection ⇐36.1

North Carolina Unfair and Deceptive Trade Practices Act (UTPA) gives a private cause of action to consumers aggrieved by unfair or deceptive business practices. N.C.G.S. § 75–1.1.

30. Trade Regulation ⇐864

One business is permitted to assert a claim against another business under North Carolina Unfair and Deceptive Trade Practices Act (UTPA) only when the businesses are competitors or potential competitors, or are engaged in commercial dealings with each other. N.C.G.S. § 75–1.1.

31. Consumer Protection ⇐3

Fundamental purpose of North Carolina Unfair and Deceptive Trade Practices Act (UTPA) is to protect the consumer, and courts invariably look to that purpose in deciding whether UTPA applies to given factual situation. N.C.G.S. § 75–1.1.

32. Trade Regulation ⇐864

As predicted by Court of Appeals, misrepresentations by reporter for television network news program, who concealed her employment with network when she obtained position with grocery store chain as part of undercover investigation of chain's food handling practices, were not deceptive acts in or affecting commerce, and thus could not support claim by chain against network under North Carolina Unfair and Deceptive Trade Practices Act (UTPA). N.C.G.S. § 75–1.1.

33. Constitutional Law ⇐90.1(8)

There are protected First Amendment interests in newsgathering. U.S.C.A. Const.Amend. 1.

34. Constitutional Law ⇐90.1(8)

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. U.S.C.A. Const. Amend. 1.

35. Constitutional Law ⇐90.1(9)
Fraud ⇐36
Master and Servant ⇐50

Tort claims of fraud and breach of duty of loyalty which were asserted by grocery store chain under North Carolina and South Carolina law against television network after reporters for network news program concealed their employment with network, and obtained positions with chain as part of undercover investigation of chain's food handling practices, were based on state laws of general applicability, so that recovery against network on claims did not violate First Amendment's guarantee of freedom of the press. U.S.C.A. Const.Amend. 1.

36. Constitutional Law ⇐90.1(9)
Master and Servant ⇐50
Trespass ⇐23

Under First Amendment's free speech and free press guarantees, *New York Times* actual malice standard applied to grocery store chain's claims against television network for breach of duty of loyalty and trespass which sought compensatory damages in connection with broadcast of news program regarding chain's food handling practices, which utilized footage obtained by reporters who obtained jobs with chain after concealing their employment with network; chain could not avoid First Amendment limitations on defamation claims by seeking publication damages under non-reputational tort claims. U.S.C.A. Const.Amend. 1.

37. Constitutional Law ⇐90.1(1)

Public figure plaintiff who uses theory of law to seek damages resulting from speech covered by First Amendment must satisfy *New York Times* actual malice standard, even when theory of recovery is other than defamation. U.S.C.A. Const. Amend. 1.

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Before NIEMEYER, MICHAEL, and 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.

OPINION

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 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 "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 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.

I.

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. 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.

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.

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.

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 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.

The district court, in a remarkably efficient effort, tried the case with a jury in three phases. At the liability phase, the jury found all of the ABC defendants liable to Food Lion for fraud and two of them, Dale and Barnett, additionally liable for breach of the duty of loyalty and trespass. Based on the jury's fraud verdict and its special interrogatory findings that the ABC defendants had engaged in deceptive acts, the district court determined that the ABC defendants had violated the North Carolina Unfair and Deceptive Trade Practices Act (UTPA). Prior to the compensatory damages phase, the district court ruled that damages allegedly incurred by Food Lion as a result of ABC's broadcast of *PrimeTime Live*—"lost profits, lost sales, diminished stock value or anything of that nature"—could not be recovered because these damages were not proximately caused by the acts (fraud, trespass, etc.) attributed to the ABC defendants in this case. *See Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 964 F.Supp. 956, 958 (M.D.N.C.1997) (setting forth rationale for ruling at trial). Operating within this constraint, the jury in the second phase awarded Food Lion $1,400 in compensatory damages on its fraud claim, $1.00 each on its duty of loyalty and trespass claims, and $1,500 on its UTPA claim. (The court required Food Lion to make an election between the fraud and UTPA damages, and the grocery chain elected to take the $1,400 in fraud damages.) At the final stage the jury lowered the boom and awarded $5,545,750 in punitive damages on the fraud claim against ABC and its two producers, Kaplan and Rosen. The jury refused to award punitive damages against the reporters, Dale and Barnett. In post-trial proceedings the district court ruled that the punitive damages award was excessive, and Food Lion accepted a remittitur to a total of $315,000.

After trial the ABC defendants moved for judgment as a matter of law on all claims, the motion was denied, and the defendants now appeal. Food Lion cross-appeals, contesting the district court's ruling that the damages the grocery chain sought as a result of the *PrimeTime Live* broadcast were not recoverable in this action. We now turn to the legal issues.

II.

A.

[1–3] 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. As a federal court sitting in diversity, we are obliged to interpret and apply the substantive law of each state. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). This process is more complicated here because neither state's highest court has applied its law to circumstances exactly like those presented in this case. Thus, we must offer our best judgment about what we believe those courts would do if faced with Food Lion's claims today. *See Hatfield v. Palles*, 537 F.2d 1245, 1248 (4th Cir.1976) (noting that when "[t]here have been no decisions by the South Carolina Supreme Court ... [a] federal court must ... endeavor to decide the issue in the way it believes the South Carolina Supreme Court would decide it."). In conducting our analysis, we may of course consider all of the authority that the state high courts would, and we should give appropriate weight to the opinions of their intermediate appellate courts. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967) (noting that when there is no decision by a state's highest court, federal court must apply what it "find[s] to be the state law after giving 'proper regard' to relevant rulings of other courts of the State."); *Sanderson v. Rice*, 777 F.2d 902, 905 (4th Cir.1985) (noting that "[a]n opinion of an intermediate appellate court is persuasive in situations where the highest state court has not spoken"). Finally, we review *de novo* the district court's determinations on these questions of state law. *Salve Regina College v. Russell*, 499 U.S. 225, 231, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991).

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.

[4] To prove fraud under North Carolina law, the plaintiff must establish that the defendant (1) made a false representation of material fact, (2) knew it was false (or made it with reckless disregard of its truth or falsity), and (3) intended that the plaintiff rely upon it. In addition, (4) the plaintiff must be injured by reasonably relying on the false representation. *See Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E.2d 494, 500 (N.C.1974); *Britt v. Britt*, 320 N.C. 573, 359 S.E.2d 467, 471 (N.C. 1987), *criticized on other grounds, Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385, 391–92 (N.C.1988). The elements of fraud in South Carolina are essentially the same. *See Florentine Corp., Inc. v. PEDA I, Inc.*, 287 S.C. 382, 339 S.E.2d 112, 113–114 (S.C. 1985). It is undisputed that Dale and Barnett knowingly made misrepresentations with the aim that Food Lion rely on them. Thus, only the fourth element of fraud, injurious reliance, is at issue. Food Lion claimed two categories of injury resulting from the lies on the job applications: the costs associated with hiring and training new employees (administrative costs) and the wages it paid to Dale and Barnett.

[5] The main component of Food Lion's claim for fraud damages relates to administrative costs resulting from its employment of Dale and Barnett. These are routine costs associated with any new employee, including the costs of screening applications, interviewing, completing forms, and entering data into the payroll system. Also included are estimated costs attributable to trainees for lower productivity and customer dissatisfaction. Food Lion offered testimony that these costs totaled $1,944.62. It is undisputed that the jobs held by Dale and Barnett, meat wrapper trainee and deli clerk, were ones with high turnover. Still, Food Lion

claims that because of the reporters' misrepresentations on their employment applications, it was forced to "incur these [administrative] costs for two more employees," Appellee's Opening Br. at 15, because the reporters quit their jobs after one or two weeks.

As indicated, under North and South Carolina law a plaintiff claiming fraud must show injury proximately caused by its reasonable reliance on a misrepresentation. *See Britt*, 359 S.E.2d at 471 (requiring that plaintiff be "injured by reasonably relying on the false representation."); *Florentine Corp.*, 339 S.E.2d at 114 (same). 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.

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. Each application contained the same provision, written in no uncertain terms: "I also understand and agree that if employed, employment is for an indefinite period of time, and that I have the right to terminate my employment at any time for any reason, as does the Company." Food Lion also understood what this meant. As one of its payroll managers acknowledged on cross-examination, "when Food Lion hires a new deli clerk or a new meat clerk . . . it assume[s] the risk that that person might stay only a few days." Dale and Barnett were, in short, at-will employees.

[6–8] Because Dale and Barnett did not make any express representations about how long they would work, Food Lion is left to contend that misrepresentations in the employment applications led it to believe the two would work for some extended period. There is a fundamental problem with that contention, however. North and South Carolina are at-will employment states, and under the at-will doctrine it is unreasonable for either the employer or the employee to rely on any assumptions about the duration of employment. At-will employment means that (absent an express agreement) employers are free to discharge employees at any time for any reason, and employees are free to quit. *See Kurtzman v. Applied Analytical Indus., Inc.*, 347 N.C. 329, 493 S.E.2d 420, 422 (N.C.1997) ("in the absence of a contractual agreement between an employer and an employee establishing a definite term of employment, the relationship is presumed to be terminable at the will of either party without regard to the quality of performance of either party"); *Small v. Springs Indus., Inc.*, 300 S.C. 481, 388 S.E.2d 808, 810 (S.C.1990) ("An individual working for an employer under a contract of employment for an indefinite period can be terminated at will. At-will employment is generally terminable by either party at any time, for any reason or for no reason at all.") (citations omitted).

Food Lion's claim for administrative costs attributable to Dale and Barnett is simply inconsistent with the at-will employment doctrine. Under that doctrine Food Lion could not reasonably rely on the sort of misrepresentations (about background, experience, etc.) made by the reporters to conclude that they would work for any extended period. As a result, Food Lion did not show that the administrative costs were an injury caused by reasonable reliance on the misrepresentations.

[9] Food Lion also sought to recover the full amount ($487.73) of the wages it paid to Dale and Barnett, arguing that it

was fraudulently induced to pay the wages because of the misrepresentations on the reporters' employment applications. The last (proximate cause) element of fraud is again the only one at issue: Food Lion had to show that it paid the wages in reasonable reliance on the misrepresentations.

[10] Food Lion relies on the jury's findings on a separate claim, the finding that Dale and Barnett breached their duty of loyalty to Food Lion, to argue that it proved fraud damages for the wages it paid. Specifically, Food Lion says that "it is apparent[from the disloyalty verdict] that the jury found Food Lion did not receive adequate services for the wages it paid Dale and Barnett." Appellee's Opening Br. at 14. However, proof of the breach of duty of loyalty, for which the jury awarded nominal damages of $1.00, does not equal proof of fraud damages for inadequate services. That is because it is possible to perform the assigned tasks of a job adequately and still breach the duty of loyalty. For fraud damages Food Lion still had to prove reliance on the misrepresentations.

[11] The question is what was the proximate cause of the issuance of paychecks to Dale and Barnett. Was it the resume misrepresentations or was it something else? It was something else. Dale and Barnett were paid because they showed up for work and performed their assigned tasks as Food Lion employees. Their performance was at a level suitable to their status as new, entry-level employees. Indeed, shortly before Dale quit, her supervisor said she would "make a good meat wrapper." And, when Barnett quit, her supervisor recommended that she be rehired if she sought reemployment with Food Lion in the future. In sum, Dale and Barnett were not paid their wages because of misrepresentations on their job applications. Food Lion therefore cannot assert wage payment to satisfy the injurious reliance element of fraud.[1] The fraud verdict must be reversed.[2]

1. Food Lion cannot rely on *Daniel Boone Complex, Inc. v. Furst*, 43 N.C.App. 95, 258 S.E.2d 379 (N.C.Ct.App.1979), to recover administrative costs and wages as fraud damages in this case. Food Lion argues that under *Daniel Boone* it can recover damages if it simply proves that it was fraudulently induced to hire Dale and Barnett. That is an oversimplification. In *Daniel Boone* the plaintiff-borrower was induced to enter into a loan agreement based on misrepresentations about the identity of the lenders. The Court of Appeals of North Carolina said the borrower had a choice of remedies:

> Ordinarily, a party who has been fraudulently induced to enter into a contract or sale has a choice of remedies. He may repudiate the contract, and tendering back what he has received under it, may recover what he had parted with or its value; or he may affirm the contract, keeping whatever property or advantage he has derived under it, and may recover in an action for deceit the damages caused by the fraud.

Id. at 387 (citation omitted). Thus, *Daniel Boone* says that a party fraudulently induced to enter a contract in North Carolina has two options. He may sue for money damages, keeping whatever benefits he received under the fraudulent contract. Or, he may repudiate the contract, tender back what he received under it, and seek the value of what he parted with. The latter *Daniel Boone* remedy cannot apply in this case. We are dealing with employment contracts, and it is impossible for Food Lion to tender back what it received under those contracts. In other words, Dale wrapped meat and Barnett worked at the deli counter. Food Lion kept those services, and there is no way to tender them back. Because Food Lion cannot satisfy the "tender back" element of *Daniel Boone's* repudiation remedy, it is left with a basic fraud claim for money damages, which, as we have said, fails for lack of proof of injurious reliance.

2. Our colleague, in partial dissent, argues that the administrative costs attributable to Dale and Barnett should be recoverable as fraud damages. To reach that result, the dissent would fundamentally alter the at-will employment doctrine by qualifying an employee's right to quit at any time. According to the dissent, Dale and Barnett induced Food Lion to hire them and spend money to train them by *impliedly* representing (as at-will job applicants) that (1) they "intend[ed] to work indefinitely, until [there was] a change in circumstances" and that (2) there was "a possibility that they would become long-term employees." *Post* at 30. But these implied representations that the dissent would impute are in essence representations about the potential

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. The jury found that Dale and Barnett breached their duty of loyalty to Food Lion, and nominal damages of $1.00 were awarded.[3]

[12–16] As a matter of agency law, an employee owes a duty of loyalty to her employer. In South Carolina it is "implicit in any contract for employment that the employee shall remain faithful to the employer's interest throughout the term of employment." *Berry v. Goodyear Tire and Rubber Co.*, 270 S.C. 489, 242 S.E.2d 551, 552 (S.C.1978). In North Carolina "the law implies a promise on the part of every employee to serve [her] employer faithfully." *McKnight v. Simpson's Beauty Supply, Inc.*, 86 N.C.App. 451, 358 S.E.2d 107, 109 (N.C.Ct.App.1987). The courts of North and South Carolina have not set out a specific test for determining when the duty of loyalty is breached. Disloyalty has been described in fairly broad terms, however. Employees are disloyal when their acts are "inconsistent with promoting the best interest of their employer at a time when they were on its payroll," *Lowndes Prods., Inc. v. Brower*, 259 S.C. 322, 191 S.E.2d 761, 767 (S.C.1972), and an employee who "deliberately acquires an interest adverse to his employer ... is disloyal," *Long v. Vertical Techs., Inc.*, 113 N.C.App. 598, 439 S.E.2d 797, 802 (N.C.Ct. App.1994).

ABC is correct to remind us that employee disloyalty issues are usually dealt with in the context of the employment contract: unfaithful employees are simply discharged, disciplined, or reprimanded. Up to now, disloyal conduct by an employee has been considered tortious in North and South Carolina in three circumstances. First, the tort of breach of duty of loyalty applies when an employee competes directly with her employer, either on her own or as an agent of a rival company. *See id.* at 801–02 (duty breached when employee used current employer's resources during business hours to develop rival company); *Lowndes Prods.*, 191 S.E.2d at 767 (duty breached when employees conspired to take trade secrets and hire away other workers for the benefit of rival company they were forming). Second, the tort applies when the employee misappropriates her employer's profits, property, or business opportunities. *See Sara Lee Corp. v. Carter*, 129 N.C.App. 464, 500 S.E.2d 732, 736–37 (N.C.Ct.App.1998) (duty breached

duration of employment, and here they would translate into an obligation to work longer than a week or two. Such an obligation is inconsistent with, and cannot be enforced under, the at-will employment doctrine. Thus, when Food Lion, as an at-will employer, incurred the administrative expenses, it took the full risk that Dale and Barnett might do what any at-will employee was free to do (and what many at Food Lion did)—quit within a very short time.

Nor can fraud damages be supported by the breach of duty of loyalty we confirm in the next subpart. The dissent argues that because Dale and Barnett (by silence) misrepresented their loyalty, Food Lion was willing to spend the money to train them on the chance they might become long-term employees. *See post* at 32. Missing out on that "chance" is too speculative to form a basis for damages. Even if Food Lion had spent the money on new hires who were loyal, there is no evidence that the hypothetical new hires would have stayed any longer than Dale and Barnett in these high turnover jobs. Indeed, Food Lion conceded at trial that it could not prove actual damages resulting from the breach of duty of loyalty.

3. As we have already mentioned, Food Lion acknowledged at trial that it could not quantify actual damages on this claim. The jury was therefore instructed that it could award only nominal damages.

when employee bought parts for employer at above market prices from company partly owned by employee); *Construction Techniques, Inc. v. Dominske*, 928 F.2d 632, 636–39 (4th Cir.1991) (applying South Carolina law) (employee's ownership interest in one of his employer's suppliers was inherently adverse to interests of employer; duty of loyalty was not breached only because employee disclosed this interest to employer). Third, the tort applies when the employee breaches her employer's confidences. *See Lowndes Prods.*, 191 S.E.2d at 767 (duty breached when employees used employer's trade secrets after forming competing business).

[17] 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 the conduct in question "would be recognized by the Supreme Courts of North Carolina and South Carolina" as tortiously violating the duty of loyalty. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 964 F.Supp. 956, 959 n. 2 (M.D.N.C. 1997). 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.

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. 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 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.

[18, 19] 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 to act adversely to the second employer for the benefit of the first. *Cf. Long*, 439 S.E.2d at 802 (finding disloyalty when employee "deliberately" acquired an interest adverse to his employer). 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.

We hold that, insofar as North and South Carolina law is concerned, the district court did not err in refusing to set aside the jury's verdict that Dale and Barnett breached their duty of loyalty to Food Lion.

3.

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 vitiat-

ed when Dale and Barnett breached the duty of loyalty. The jury found Dale and Barnett liable on both of these grounds and awarded Food Lion $1.00 in nominal damages, which is all that was sought in the circumstances.

[20–22] In North and South Carolina, as elsewhere, it is a trespass to enter upon another's land without consent. *See, e.g., Smith v. VonCannon,* 283 N.C. 656, 197 S.E.2d 524, 528 (N.C.1973); *Snow v. City of Columbia,* 305 S.C. 544, 409 S.E.2d 797, 802 (S.C.Ct.App.1991). Accordingly, consent is a defense to a claim of trespass. *See, e.g., Miller v. Brooks,* 123 N.C.App. 20, 472 S.E.2d 350, 355 (N.C.Ct.App.1996), *review denied,* 345 N.C. 344, 483 S.E.2d 172 (N.C.1997). 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." *Miller,* 472 S.E.2d at 355 (citing *Blackwood v. Cates,* 297 N.C. 163, 254 S.E.2d 7, 9 (N.C.1979)). *Cf. Ravan v. Greenville County,* 315 S.C. 447, 434 S.E.2d 296, 306 (S.C.Ct.App.1993) (noting that the law of trespass protects the "peaceable possession" of property).

[23] 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,

> 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.

Of course, many cases on the spectrum become much harder than these examples, and the courts of North and South Carolina have not considered the validity of a consent to enter land obtained by misrepresentation. Further, the various jurisdictions and authorities in this country are not of one mind in dealing with the issue. *Compare Restatement (Second) of Torts,* § 892B(2) (1965) ("[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") and *Shiffman v. Empire Blue Cross and Blue Shield,* 256 A.D.2d 131, 681 N.Y.S.2d 511, 512 (App.Div.1998) (reporter who gained entry to medical office by posing as potential patient using false identification and insurance cards could not assert consent as defense to trespass claim "since consent obtained by misrepresentation or fraud is invalid"), *with Desnick,* 44 F.3d at 1351–53 (ABC agents with concealed cameras who obtained consent to enter an ophthalmic clinic by pretending to be patients were not trespassers because, among other things, they "entered offices open to anyone"); *Baugh v. CBS, Inc.,* 828 F.Supp. 745, 757 (N.D.Cal.1993) ("where consent was fraudulently induced, but consent was nonetheless given, plaintiff has no claim for trespass"); and *Martin v. Fidelity & Cas. Co. of New York,* 421 So.2d 109, 111 (Ala.1982) (consent to enter is valid "even though consent may have been given under a mistake of facts, or procured by fraud") (citation omitted).

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:

> "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).[4]

[24, 25] We return to the jury's first trespass finding in this case, which rested on a narrow ground. The jury found that Dale and Barnett were trespassers because they entered Food Lion's premises as employees with consent given because of the misrepresentations in their job applications. Although the consent cases as a class are inconsistent, 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. Moreover, 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. *See Desnick*, 44 F.3d at 1352; *see generally Matthews v. Forrest*, 235 N.C. 281, 69 S.E.2d 553, 555 (N.C.1952); *Ravan*, 434 S.E.2d at 306. Accordingly, we cannot say that North and South Carolina's highest courts would hold that misrepresentation on a job application alone nullifies the consent given to an employee to enter the employer's property, thereby turning the employee into a trespasser. The jury's finding of trespass therefore cannot be sustained on the grounds of resume misrepresentation.

[26] There is a problem, however, with what Dale and Barnett did after they entered Food Lion's property. The jury also 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. *See generally Blackwood*, 254 S.E.2d at 9 (finding liability for trespass when activity on property exceeded scope of consent to enter).

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. In the trespass case of *Miller v. Brooks* the (defendant) wife, who claimed she had consent to enter her estranged husband's (the plaintiff's) house, had a private detective place a video cam-

4. *Desnick* noted in a separate discussion that the test patients were not sent in to commit a tort or some other injurious act. 44 F.3d at 1353.

era in the ceiling of her husband's bedroom. The court noted that "[e]ven an authorized entry can be trespass if a wrongful act is done in excess of and in abuse of authorized entry." *Miller*, 472 S.E.2d at 355. The court went on to hold that "[e]ven if [the wife] had permission to enter the house and to authorize others to do so," it was a jury question "whether defendants' entries exceeded the scope of any permission given." *Id.* We recognize that *Miller* involved a private home, not a grocery store, and that it involved some physical alteration to the plaintiff's property (installation of a camera). Still, we believe the general principle is applicable here, at least in the case of Dale, who worked in a Food Lion store in North Carolina. Although Food Lion consented to Dale's entry to do her job, she exceeded that consent when she videotaped in nonpublic areas of the store and worked against the interests of her second employer, Food Lion, in doing so.

We do not have a case comparable to *Miller* from South Carolina. Nevertheless, the South Carolina courts make clear that the law of trespass protects the peaceable enjoyment of property. *See Ravan*, 434 S.E.2d at 306. 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.

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 committing a wrongful act in abuse of their authority to be on Food Lion's property.

In sum, we are convinced that the highest courts of North and South Carolina would hold that Dale and Barnett committed trespass because Food Lion's consent for them to be on its property was nullified when they tortiously breached their duty of loyalty to Food Lion. Accordingly, as far as North and South Carolina law is concerned, the jury's trespass verdict should be sustained.

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 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.

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 *PrimeTime Live*, a business activity.

[27–31] Although the UTPA's language is quite broad, "the Act is not intended to apply to all wrongs in a business setting." *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 403 S.E.2d 483, 492 (N.C.1991). The Act's primary purpose is to protect the consuming public. *See Skinner v. E.F. Hutton & Co., Inc.*, 314 N.C. 267, 333 S.E.2d 236, 241 (N.C. 1985). It gives a private cause of action to consumers aggrieved by unfair or deceptive business practices. *See Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397, 400 (N.C.1981). In addition, businesses are sometimes allowed to assert UTPA claims against other businesses because "unfair trade practices involving only businesses"

can "affect the consumer as well." *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 370 S.E.2d 375, 389 (N.C.1988). But one business is permitted to assert an UTPA claim against another business only when the businesses are competitors (or potential competitors) or are engaged in commercial dealings with each other. *See, e.g., Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 331 S.E.2d 677 (N.C.1985) (UTPA applies when temporary personnel agency falsely claims to have conducted background checks of workers it sends to companies); *Harrington Mfg. Co. v. Powell Mfg. Co.*, 38 N.C.App. 393, 248 S.E.2d 739 (N.C.Ct.App.1979) (UTPA applies when manufacturer passes off its competitor's goods as those of its own); *Concrete Serv. Corp. v. Investors Group, Inc.*, 79 N.C.App. 678, 340 S.E.2d 755, 760–61 (N.C.Ct.App.1986) (UTPA covers acts intended to deceive suppliers into extending credit). In any event, the fundamental purpose of the UTPA is to protect the consumer, and courts invariably look to that purpose in deciding whether the Act applies. *See Lindner v. Durham Hosiery Mills, Inc.*, 761 F.2d 162, 165–67 (4th Cir. 1985).

[32] 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 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. The North Carolina statute has not been applied to a circumstance like this, and we believe the Supreme Court of North Carolina would hold that it should not be. We therefore reverse the district court's judgment that the ABC defendants, including Dale, were liable under the North Carolina UTPA.

B.

[33, 34] 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 U.S. 665, 681, 92 S.Ct. 2646, 33 L.Ed.2d 626 (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.*, 501 U.S. 663, 669, 111 S.Ct. 2513, 115 L.Ed.2d 586 (1991); *see also Desnick*, 44 F.3d at 1355 ("the media have no general immunity from tort or contract liability").

In *Cowles*, Cohen, who was associated with a candidate for governor of Minnesota, gave damaging information about a candidate for another office to two reporters on their promise that his (Cohen's) identity would not be disclosed. Because editors at the reporters' newspapers concluded that the source was an essential part of the story, it was published with Cohen named as the origin. Cohen was fired from his job as a result, and he sued the newspapers for breaking the promise. The question in the Supreme Court was whether the First Amendment barred Cohen from recovering damages under state promissory estoppel law. The newspapers argued that absent "a need to further a state interest of the highest order," the First Amendment protected them from lia-

bility for publishing truthful information, lawfully obtained, about a matter of public concern. *Id.* at 668–69, 111 S.Ct. 2513 (quoting *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979)). The Supreme Court disagreed, holding that the press "has no special immunity from the application of general laws" and that the enforcement of general laws against the press "is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations." *Id.* at 670, 111 S.Ct. 2513 (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132, 57 S.Ct. 650, 81 L.Ed. 953 (1937)).

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 to copyright, labor, antitrust, and tax. *Id.* at 669, 111 S.Ct. 2513. 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 Minnesota." *Id.* at 670, 111 S.Ct. 2513. 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, 111 S.Ct. 2513. The Court thus refused to apply any heightened scrutiny to the enforcement of Minnesota's promissory estoppel law against the newspapers.

[35] 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 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, 111 S.Ct. 2513. We are convinced that the media can do its important job effectively without resort to the commission of run-of-the-mill torts.[5]

ABC argues that *Cowles* is not to be applied automatically to every "generally applicable law" because the Supreme Court has since said that "the enforcement of [such a] law may or may not be subject to heightened scrutiny under the First Amendment." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 640, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (contrasting *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), and *Cowles*). In *Glen Theatre* nude dancing establishments and their dancers challenged a generally applicable law prohibiting public nudity. Because the general ban on public nudity covered nude dancing, which was expressive conduct, the Supreme Court applied heightened scrutiny. *Glen Theatre*, 501 U.S. at 566, 111 S.Ct. 2456. In *Cowles* a generally applicable law (promissory estoppel) was invoked against newspapers who broke their promises to a source that they would keep his name confidential in exchange for information leading to a news story. There, the Court refused to apply heightened scrutiny, concluding that application of the doctrine of promissory estoppel had "no more than [an] incidental" effect on the press's ability to gather or report news. *Cowles*, 501 U.S. at 671–72, 111 S.Ct. 2513. There is arguable tension between the ap-

5. Indeed, the ABC News Policy Manual states that "news gathering of whatever sort does not include any license to violate the law."

proaches in the two cases. The cases are consistent, however, if we view the challenged conduct in *Cowles* to be the breach of promise and not some form of expression. In *Glen Theatre*, on the other hand, an activity directly covered by the law, nude dancing, necessarily involved expression, and heightened scrutiny was applied. Here, as in *Cowles*, heightened scrutiny does not apply because the tort laws (breach of duty of loyalty and trespass) do not single out the press or have more than an incidental effect upon its work.

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 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.

[36] 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 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, Inc. v. Capital Cities/ABC, Inc.*, 964 F.Supp. 956, 963 (M.D.N.C.1997). The court therefore concluded that the publication damages were not proximately caused by the non-reputational torts committed by ABC's employees. We do not reach the matter of proximate cause because an overriding (and settled) First Amendment principle precludes the award of publication damages in this case, as ABC has argued to the district court and to us. 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 by *Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (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 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, 84 S.Ct. 710, 11 L.Ed.2d 686 (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 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 *Hustler* a popular liquor advertisement prompted the magazine to run a parody of the ad, labeled as such, that featured the Reverend Jerry Falwell "discussing" an incestuous sexual act he had undertaken while drunk in disgusting circumstances. Falwell sued the magazine and its publisher, Larry Flynt, seeking

damages for libel and intentional infliction of emotional distress. At trial the jury held against Falwell on the libel claim, specifically finding that the ad parody could not reasonably be understood as describing actual facts about Falwell or actual events in which he participated. The jury, however, found for Falwell on the emotional distress claim and awarded compensatory and punitive damages.

It was clear that Falwell, in asserting the claim for intentional infliction of emotional distress, sought "damages for emotional harm *caused by the publication* of an ad parody offensive to him." *Hustler*, 485 U.S. at 50, 108 S.Ct. 876 (emphasis added). In the Supreme Court the question was whether Falwell had to satisfy the heightened First Amendment proof standard set forth in *New York Times*. After concluding that the ad parody was protected expression, the Court, in an opinion by Chief Justice Rehnquist, held that the constitutional libel standard applied to Falwell's emotional distress claim:

> We conclude 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," *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true.

Hustler, 485 U.S. at 56, 108 S.Ct. 876.

[37] *Hustler* confirms that when a public figure plaintiff uses a law to seek damages resulting from speech covered by the First Amendment, the plaintiff must satisfy the proof standard of *New York Times*. Here, Food Lion was not prepared to meet this standard for publication damages under any of the claims it asserted. Unless there is some way to distinguish *Hustler* (we think there is not, *see* below), Food Lion cannot sustain its request for publication damages from the ABC broadcast.

Food Lion argues that *Cowles*, *supra*, and not *Hustler* governs its claim for publication damages. According to Food Lion, *Cowles* allowed the plaintiff to recover—without satisfying the constitutional prerequisites to a defamation action—economic losses for publishing the plaintiff's identity in violation of a legal duty arising from generally applicable law. Food Lion says that its claim for damages is like the plaintiff's in *Cowles*, and not like Falwell's in *Hustler*. This argument fails because the Court in *Cowles* distinguished the damages sought there from those in *Hustler* in a way that also distinguishes Food Lion's case from *Cowles:*

> Cohen is not seeking damages for injury to his reputation or his state of mind. He sought damages . . . for breach of a promise that caused him to lose his job and lowered his earning capacity. Thus, this is not a case like *Hustler* . . . where we held that the constitutional libel standards apply to a claim alleging that the publication of a parody was a state-law tort of intentional infliction of emotional distress.

Cowles, 501 U.S. at 671, 111 S.Ct. 2513. Food Lion, in seeking compensation for matters such as loss of good will and lost sales, is claiming reputational damages from publication, which the *Cowles* Court distinguished by placing them in the same category as the emotional distress damages sought by Falwell in *Hustler*. In other words, according to *Cowles*, "constitutional libel standards" apply to damage claims for reputational injury from a publication such as the one here.

Food Lion also argues that because ABC obtained the videotapes through unlawful acts, that is, the torts of breach of duty of loyalty and trespass, it (Food Lion) is entitled to publication damages without meeting the *New York Times* standard. The Supreme Court has never suggested that it would dispense with the *Times* standard in this situation, and we believe *Hustler* indicates that the Court would not. In *Hustler* the magazine's conduct would

have been sufficient to constitute an unlawful act, the intentional infliction of emotional distress, if state law standards of proof had applied. Indeed, the Court said, "[g]enerally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude." *Hustler*, 485 U.S. at 53, 108 S.Ct. 876. Notwithstanding the nature of the underlying act, the Court held that satisfying *New York Times* was a prerequisite to the recovery of publication damages. That result was "necessary," the Court concluded, in order "to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Id.* at 56, 108 S.Ct. 876.

In sum, Food Lion could not bypass the *New York Times* standard if it wanted publication damages. The district court therefore reached the correct result when it disallowed these damages, although we affirm on a different ground.

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 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.

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 opinion. I am pleased to join the remainder.

I

The transactional facts are not disputed. In order to obtain an inside story, ABC's *PrimeTime Live* devised a plan by which ABC's employees would falsely represent themselves to Food Lion to obtain jobs in its stores and then would secretly film the activities of Food Lion's employees, including themselves, using miniature "spy cam" equipment.

In applying for jobs at Food Lion stores, ABC reporters Lynne Dale and Susan Barnett misrepresented themselves, their experience, and their references, even though they certified that their applications were complete and truthful. More fundamentally, they misrepresented themselves as bona fide applicants for employment. They were already employees of ABC and knew that within a week or two they would no longer be working for Food Lion. After Food Lion gave them jobs at stores in North Carolina and South Carolina, Dale and Barnett roamed the stores to obtain film footage for *PrimeTime Live.* While some of the film footage so obtained was damaging to Food Lion, these reporters contributed to the damage. For example, when Barnett saw food that she suspected to be out of date, she sold it to her camera crew rather than throw it away. Similarly, she attempted to sell such food to a customer. When these reporters obtained their film footage—after two weeks for Barnett and one week for Dale—they quit their jobs at Food Lion and provided the videotapes to ABC's *PrimeTime Live* for broadcast on national television.

The jury returned a verdict against the ABC defendants based on fraud and awarded Food Lion $1,400 in compensatory damages and over $5.5 million in punitive damages. The district court remitted the $5.5 million punitive damage award to $315,000. I would affirm this judgment.

II

The elements of a fraud claim under North Carolina law are "(1) [a][f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385, 391 (N.C.1988) (emphasis omitted) (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E.2d 494, 500 (N.C.1974)). The requirements under South Carolina law are similar. *See Florentine Corp. v. PEDA I, Inc.*, 287 S.C. 382, 339 S.E.2d 112, 113–14 (S.C.1985).

In reversing the jury's fraud verdict, the majority agrees with the ABC defendants that Food Lion failed to prove the injury element of its fraud claim because the expenses it incurred in training at-will employees could not be claimed as damages. The majority explains, "North and South Carolina are at-will employment states, and under the at-will doctrine it is unreasonable for either the employer or the employee to rely on any assumptions about the duration of employment." *Ante*, at 513.

I respectfully disagree, and my disagreement focuses on (1) the difference in hiring a person who intends to work indefinitely and a person who intends to work one or two weeks and fails to disclose that intent, and (2) the ABC employees' misrepresentation of loyalty inherent in their application for a job. I will discuss these in order.

A

The majority concludes that there is no difference in Food Lion's unwitting employment of ABC reporters who intend to leave within one or two weeks and employment of applicants who have no specific intent about the duration of their employment because both types of the employment are "at will." This, however, overlooks the difference between a bona fide at-will employee and an undercover news reporter who knows from the beginning that she will stay only two weeks. With the former, normal risks allow for the possibility that Food Lion can obtain long-term, experienced, faithful service from which it can recover its training expenses; with the latter there is no such possibility.

Applicants for employment, even at-will employment, present themselves representing by implication: (1) that they want to become employees; (2) that they intend to work indefinitely, until a change in circumstances leads them or their employer to terminate the arrangement; (3) that there is a possibility that they would become long-term employees; and (4) that they will be loyal employees as long as they work, prepared to work at the promotion of their employer's business. ABC's undercover reporters presented themselves to Food Lion, representing all of these matters falsely. They did not, during the application process, disclose that they did not intend to become employees at all. Indeed, they were already employed by ABC, and their application for employment with Food Lion was only a sham to get them into locations within Food Lion where they otherwise would not be permitted. Moreover, the ABC employees had no intention of allowing the normal risks of at-will employment to govern their term; they knew from the beginning that they were to be at Food Lion only long enough to obtain damaging information.

In training new employees and investing in their future, Food Lion has a right to assume that the normal risks attend the relationship and that some of those employees will eventually become experienced and loyal employees who will provide a return on the costs of training them. The fact that Food Lion would not make such an investment in an applicant if the applicant stated that she was an ABC employee only seeking inside information and that she would leave after two weeks defines the injury sustained by Food Lion. Indeed,

far less injury is required by law. Where a plaintiff presents evidence that the defendant's fraudulent misrepresentation induced the plaintiff to deal "with a party with whom it did not wish to deal," "sufficient injury" has been shown "to meet the requisite damage element of fraud" and the plaintiff is "entitled to recover any damages shown to result therefrom." *Daniel Boone Complex, Inc. v. Furst,* 43 N.C.App. 95, 258 S.E.2d 379, 386–87 (N.C.Ct.App.1979). Not only was Food Lion induced to hire persons it would not otherwise have hired, it was induced to spend money on persons whose potential for employment was nil, contrary to the potential of a bona fide applicant for at-will employment.

B

Similarly and perhaps more importantly, Dale and Barnett's implied representations that they would be loyal Food Lion employees injured Food Lion. Both North Carolina and South Carolina law provide that implicit in any contract for employment is the duty of the employee to "remain faithful to the employer's interest throughout the term of employment." *Berry v. Goodyear Tire & Rubber Co.,* 270 S.C. 489, 242 S.E.2d 551, 552 (S.C.1978); *see also McKnight v. Simpson's Beauty Supply, Inc.* 86 N.C.App. 451, 358 S.E.2d 107, 109 (N.C.Ct.App.1987) ("[T]he law implies a promise on the part of every employee to serve his employer faithfully"). And when an employee acts adversely to the interest of his employer, he is disloyal and his discharge is justified. *Berry,* 242 S.E.2d at 552.

In this case, Dale and Barnett never intended to work as loyal employees for Food Lion and to promote the business of Food Lion. On the contrary, they applied to Food Lion with the secret intent to obtain sensational and damaging evidence to publish against Food Lion. And in furtherance of that purpose they even failed to do what they were hired to do. As one snippet from their videotape shows, instead of cleaning a meat grinder that a loyal employee would have undertaken to clean, even if the task were not specifically assigned to the employee, the ABC employee photographed the dirty meat grinder and offered it as an example of poor food-handling practices. Moreover, in seeking to "uncover" practices, the ABC employees baited fellow employees to say and do things that they knew would undermine Food Lion's standing food-handling practices. Indeed, a portion of the majority opinion, which I have joined, concludes that these employees breached their duties of loyalty to Food Lion and, in doing so, caused Food Lion damage. I believe that this very breach and injury, when intended from the very beginning, also supports Food Lion's fraud claim.

III

In short, the ABC employees misrepresented their potential for staying at Food Lion and they misrepresented their loyalty. Food Lion had less of a chance—indeed, no chance—of developing experienced, long-term, and loyal employees because the likelihood of that possibility was misrepresented. If these ABC employees had disclosed their true identities and intentions accurately, Food Lion would never have hired them and incurred expenses to train them on the chance that they would stay because the employees had already determined there was no such chance.

In my judgment, the jury had ample evidence to reach the conclusion that the ABC defendants committed common law fraud, and I would affirm its verdict.

Miller

Terry Stuart MILLER, Plaintiff,

v.

Gregory F. BROOKS, Michael Craig Hite, Brooks Investigations, Inc., Annette K. Miller and Pierino "Pat" Massaroni, Defendants.

No. COA95-407.

Court of Appeals of North Carolina.

July 2, 1996.

Husband sued estranged wife and private detectives she had hired, seeking declaratory judgment and compensatory and punitive damages for invasion of privacy, intentional infliction of emotional distress, trespass and damage to real property. The Superior Court, Guilford County, W. Steven Allen, J., granted summary judgment to all defendants. Appeal was taken. The Court of Appeals, Lewis, J., held that: (1) tort of intrusion upon privacy was actionable in state; (2) material issues of fact, precluding summary judgment, existed as to whether wife and detectives intruded upon privacy of husband by placing video camera in bedroom and going through his mail; (3) material issues of fact, precluding summary judgment, existed as to whether intentional infliction of emotion distress had been inflicted upon husband; (4) material issues of fact, precluding summary judgment, existed as to whether there had been damage to real property in connection with trespass claim; and (5) material issues of fact, precluding summary judgment, existed as to whether husband could recover punitive damages.

Reversed and remanded.

1. Torts ⇐8.5(6)

North Carolina recognizes, as invasion of privacy tort, unauthorized appropriation of plaintiff's photographic likeness for defendant's advantage as part of an advertisement or commercial enterprise.

2. Torts ⇐8.5(5.1)

North Carolina does not recognize, as invasion of privacy tort, disclosure of private facts, or placement of plaintiff in false light before public.

3. Torts ⇐8.5(2)

Intrusion tort, one example of actionable invasion of privacy, consists of intrusion, physically or otherwise, upon solitude or seclusion of another or his private affairs or concerns, if intrusion would be highly offensive to reasonable person. Restatement (Second) of Torts § 652 comment.

4. Judgment ⇐185.3(21)

Material issues of fact, precluding summary judgment, existed as to whether estranged wife and private detectives she had hired were liable for invasion of privacy, involving intrusion into home; there was evidence that detectives had entered bedroom of marital home in which husband was living alone, and surreptitiously installed video camera which recorded husband undressing, showering and going to bed, and wife had intercepted his mail, discarding some of it.

5. Husband and Wife ⇐205(2)

Existence of marital relationship did not preclude husband from asserting claim against estranged wife for intrusion on his privacy, when wife hired detectives to install video camera in bedroom of marital residence and went through husband's mail, discarding some items; husband's expectation of privacy from wife was not lessened due to their married state, as there was evidence they had agreed to live separately, and in any event wife would not have authority to order strangers to enter house for purpose of invading husband's privacy.

6. Trespass ⇐12, 20(1)

To prove trespass plaintiff must show that defendant intentionally, and without authorization entered real property actually or constructively possessed by him at time of entry.

7. Trespass ⇐13

Even an authorized entry can be trespass if wrongful act is done in excess of and in abuse of authorized entry.

8. Judgment ⇐181(15.1)

Material issues of fact, precluding summary judgment, existed as to whether estranged wife had authority to enter marital home in which husband was living alone, or whether her incursions onto property were trespass; husband claimed he had forbidden her to enter premises, and even if she could enter there was fact issue whether authorization covered surreptitious placement of video camera in bedroom and sorting of his mail.

9. Husband and Wife ⇐205(2)

Existence of marital relationship does not automatically preclude trespass suit by one partner against other. G.S. § 52–5.

10. Trespass ⇐23

Entrance onto premises with bona fide belief of entitlement to enter is no defense to claim of trespass. Restatement (Second) of Torts § 164.

11. Trespass ⇐23

Liability for trespass cannot be escaped by claim that alleged trespassers relied on advice of counsel in mistakenly concluding that they were entitled to enter property. Restatement (Second) of Torts § 164 comment.

12. Tenancy in Common ⇐3

Tenancy in common is created by conveyance inter vivos or testamentary gift to two or more persons or when two or more persons acquire property through intestate succession.

13. Husband and Wife ⇐14.2(2)

Estranged wife could not defeat claim by husband that she had committed trespass by entering marital home following alleged agreement that she would live elsewhere, on grounds that they were tenants in common; land on which house had been built was purchased entirely with husband's money, and her signature on deed of trust on house did not of itself create relationship.

14. Damages ⇐50.10

Plaintiff who asserts claim for intentional infliction of emotional distress must prove that defendant engaged in extreme and outrageous conduct, which was intended to cause and did cause severe emotional distress to another.

15. Damages ⇐50.10

Intent to cause harm element of intentional infliction of emotional distress tort may be proven by showing that defendant acted with reckless indifference to likelihood that his or her acts would cause severe emotional distress.

16. Damages ⇐50.10

To establish existence of "severe emotional distress," as required for intentional infliction of emotional distress tort, plaintiff must prove that he has suffered severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.

See publication Words and Phrases for other judicial constructions and definitions.

17. Judgment ⇐185.3(21)

Material issues of fact, precluding summary judgment, existed as to whether estranged wife had intentionally inflicted emotional distress upon husband by having private detectives install video camera in his bedroom; wife had told detectives that husband had fearful temperament, and husband testified that he was scared to death and had difficulty sleeping after discovering camera, and there was evidence he had gone into hiding after event and rode around with loaded shotgun under seat.

18. Judgment ⇐185.3(1)

Material issues of fact, precluding summary judgment, existed as to whether husband living in marital home had suffered damages to property compensable as element of trespass claim; husband had testified that detectives entering premises at direction of estranged wife for purpose of surreptitiously installing video camera in bedroom had altered wiring and drilled holes in ceiling of bedroom, requiring repair work by electrician.

19. Damages ⇐89(1), 91(1)

Plaintiff who proves that defendant acted willfully, intentionally, maliciously and recklessly can recover punitive damages on

claim for intentional infliction of emotional distress.

20. Damages ⇐89(1), 91(1)

Plaintiff may seek punitive damages based on tort of intrusion upon privacy, provided plaintiff can establish proof of aggravated conduct.

21. Damages ⇐91(1)

While reliance on advice of counsel is factor that may be considered by jury in assessing reasonableness of defendant's conduct in regard to punitive damages, it is not a complete defense.

22. Judgment ⇐185.3(1)

Material issues of fact, precluding summary judgment. existed as to whether husband could recover punitive damages from his estranged wife and private detectives, after they placed video camera in bedroom and took pictures of him undressing, showering and going to bed; there was evidence they knew husband was paranoid, detectives had altered wiring of house although they were not licensed electricians, camera had been placed in bedroom rather than less private area of house, and they had gone back into house after discovering camera had been removed.

Appeal by plaintiff from order entered 21 December 1994 by Judge W. Steven Allen in Guilford County Superior Court. Heard in the Court of Appeals 24 January 1996.

Gabriel Berry & Weston, L.L.P. by M. Douglas Berry, Greensboro, for plaintiff-appellant.

Yates, McLamb & Weyher, L.L.P. by Andrew A. Vanore and Beth Y. Smoot, Raleigh, for defendants-appellees Gregory F. Brooks, Michael Craig Hite, Brooks Investigations, Inc., and Pierino "Pat" Massaroni.

Dotson & Kirkman by John W. Kirkman, Jr., Greensboro, for defendant-appellee Annette K. Miller.

LEWIS, Judge.

Plaintiff appeals an order granting summary judgment to all defendants on all of his claims.

Evidence presented at the summary judgment hearing tends to show the following: In December 1986, plaintiff Terry Miller purchased a lot at 2400 Buck Lane. On 14 February 1987 he married defendant Annette K. Miller. The couple built a house on the Buck Lane lot and lived in it, but the property remained titled solely in plaintiff's name. On 1 August 1990, defendant Annette Miller moved out of the house and into an apartment. On 29 January 1991, the Millers entered into a separation agreement which provided that plaintiff Terry Miller had sole possession of the Buck Lane house. In February 1992, the couple attempted a reconciliation during which defendant Miller moved back into the Buck Lane residence. This reconciliation attempt failed and she moved out after a few days. Plaintiff has testified in his affidavit and in a previous criminal trial that the couple agreed that he would have exclusive possession and control of the Buck Lane house and that defendant Miller would not return unless she was invited or he was present. She returned her key.

In February 1993, defendant Annette Miller made arrangements with defendant Gregory Brooks, a private investigator with defendant Brooks Investigations, Inc., for a surveillance camera to be placed in the Buck Lane residence. Brooks hired defendants Massaroni and Hite to assist. On 5 February 1993, Brooks contacted a locksmith who met defendants Miller, Brooks, and Massaroni at the house and made a key to the house. On or about 16 or 17 February 1993, when plaintiff was not home, defendants Massaroni and Brooks entered the Buck Lane house, altered the wiring, and installed a hidden videotape camera in the bedroom ceiling.

On 17 February 1993, plaintiff returned home and discovered a pile of dust or dirt on the floor indicating that someone had been in his house. He engaged a private detective who helped him locate and remove the camera and videotape. They watched the videotape which showed pictures of plaintiff in his bedroom, getting undressed, taking a show-

er, and going to bed. The tape also showed defendants Brooks and Hite in plaintiff's bedroom. After discovering the camera, plaintiff became fearful for his life, moved out of his house temporarily, and carried a loaded shotgun in his car. He suspected he was being investigated by federal officials and went into hiding. Later, defendants Miller, Massaroni, and Hite went to the house to change the videotape and discovered that the camera and tape had been removed.

In mid-February 1993, defendant Miller, representing herself as a resident, asked the local post office to hold the mail for 2400 Buck Lane. Afterwards, she regularly picked up plaintiff's mail at the post office, sorted through and discarded portions of it, and placed the remainder in plaintiff's mailbox. Defendant Massaroni picked up the mail for her once. Postal employees discovered that defendant Miller was not living at the Buck Lane house and contacted plaintiff.

Upon concluding that the defendants were involved, plaintiff filed this action on 27 July 1993 seeking a declaratory judgment and compensatory and punitive damages for invasion of privacy, intentional infliction of emotional distress, trespass, and damage to real property. On 7 April 1994, plaintiff amended his complaint adding defendant Massaroni and asserting additional claims for invasion of privacy. Defendants answered and moved to dismiss under N.C.R. Civ. P. 12(b)(6). Judge Allen heard defendants' motions to dismiss as motions for summary judgment and, on 21 December 1994, granted summary judgment to all defendants on all of plaintiff's claims.

Plaintiff has assigned error to the grant of summary judgment on his claims for invasion of privacy, trespass, damage to real property, intentional infliction of emotional distress, and a declaratory judgment. Since plaintiff has not presented argument on the dismissal of his declaratory judgment claim, this issue is abandoned on appeal. Rules App.Proc., Rule 28(a).

Plaintiff alleges that defendants invaded his privacy by their intentional and highly offensive intrusion upon his seclusion, solitude, or private affairs. In his first and eighth causes of action, plaintiff asserts that defendants violated his privacy by breaking into his home, installing a hidden video camera in his bedroom, and taking pictures of him while in his bedroom. He asserts that they performed these acts wilfully, intentionally, maliciously, and in reckless disregard and indifference to his privacy rights. In his seventh cause of action, plaintiff asserts that defendants Miller, Massaroni, and Brooks Investigations, Inc., through its agent Massaroni, wilfully, intentionally, and maliciously invaded his privacy by intercepting and opening his mail without authorization.

This appeal requires us to decide whether North Carolina recognizes the tort of invasion of privacy by intrusion into the seclusion, solitude, or private affairs of another ("intrusion tort").

In *Renwick v. News and Observer Publishing Co.; Renwick v. Greensboro Daily News*, 310 N.C. 312, 312 S.E.2d 405, *cert. denied*, 469 U.S. 858, 105 S.Ct. 187, 83 L.Ed.2d 121 (1984), then Mr. Justice Mitchell, writing for the majority, stated:

> The tort of invasion of privacy is now recognized, in one or more of its forms, in a majority of jurisdictions.... It is generally recognized that:
>
> > The right of privacy, as an independent and distinctive legal concept has two main aspects: (1) the general law of privacy, which affords a tort action for damages resulting from an unlawful invasion of privacy, and (2) the constitutional right of privacy which protects personal privacy against unlawful governmental invasion.
> >
> > The general law of the right of privacy, as a matter of tort law, is mainly left to the law of the states....

Id. at 321, 312 S.E.2d at 411.

In *Renwick*, the majority listed four types of privacy torts recognized in American jurisdictions. These are: (1) appropriation of a plaintiff's name or likeness for a defendant's advantage; (2) intrusion upon a plaintiff's seclusion, solitude, or private affairs; (3) public disclosure of embarrassing private facts about a plaintiff; and (4) publicity that places a plaintiff in a false light in the public eye. *Id.* at 322, 312 S.E.2d at 411 (citing W.

Prosser, Handbook of the Law of Torts § 117 (4th Ed.1971)).

[1, 2] Our Supreme Court has held that a right of privacy exists in North Carolina and has recognized the first type of privacy tort, i.e., invasion of privacy by the unauthorized appropriation of a plaintiff's photographic likeness for a defendant's advantage as part of an advertisement or commercial enterprise. *Id.* (discussing *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938)). However, the Court has refused to recognize the third type, invasion of privacy by disclosure of private facts, *see Hall v. Post*, 323 N.C. 259, 372 S.E.2d 711 (1988), or the fourth type, invasion of privacy by placing a plaintiff in a false light before the public. *See Renwick*, 310 N.C. at 322, 326, 312 S.E.2d at 411, 413.

[3] In *Smith v. Jack Eckerd Corp.*, 101 N.C.App. 566, 400 S.E.2d 99 (1991), we defined the intrusion tort as follows:

> "[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."

Smith, 101 N.C.App. at 568, 400 S.E.2d at 100 (quoting Restatement (Second) of Torts § 652B). However, in *Smith*, the intrusion complained of was not so highly offensive to a reasonable person as to constitute an invasion of privacy. *See Smith*, 101 N.C.App. at 569, 400 S.E.2d at 100.

[4] The level of offensiveness here is infinitely higher than that complained of in *Smith*. Here, plaintiff's forecast of the evidence shows that defendants invaded his home, indeed, his bedroom, and placed a hidden video camera in his room which recorded pictures of him undressing, showering, and going to bed. Plaintiff's evidence also shows that defendant Annette Miller intercepted, sorted through, and threw away some of his mail and that defendant Massaroni picked up plaintiff's mail for her on one occasion. Acts of physically invading a person's home and opening his personal mail are wrongs protected by this tort. *See* Restatement (Second) of Torts § 652B, Comment b. (1977); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 117, at 854–56 (5th ed.1984). Plaintiff had every reasonable expectation of privacy in his mail and in his home and bedroom. A jury could conclude that these invasions would be highly offensive to a reasonable person.

Unlike the privacy torts based on public disclosure of private facts and false light publicity, the intrusion tort does not implicate the First Amendment concerns addressed in *Renwick* and *Hall*. *See generally Renwick*, 310 N.C. at 323–26, 312 S.E.2d at 412–14; *Hall*, 323 N.C. at 265–69, 372 S.E.2d at 714–17. Recognition of this tort also does not duplicate other tort claims. An offensive physical contact is not required for the intrusion tort as it is for battery. *Cf. McCracken v. Sloan*, 40 N.C.App. 214, 216, 252 S.E.2d 250, 252 (1979)(stating battery elements). Severe emotional distress is not an element of this tort as it is for intentional and negligent infliction of emotional distress. *Cf. Waddle v. Sparks*, 331 N.C. 73, 82–84, 414 S.E.2d 22, 27–28 (1992)(stating that both emotional distress torts require severe emotional distress). The intrusion tort also does not duplicate trespass since trespass requires proof of an unauthorized entry on land possessed by another and this tort does not. *Cf. Matthews v. Forrest*, 235 N.C. 281, 283, 69 S.E.2d 553, 555 (1952)(stating elements of trespass). Thus, we conclude that the intrusion tort is actionable in this State.

[5] We reject defendants' assertion that the marital relationship between plaintiff and defendant Annette Miller precludes plaintiff from asserting an intrusion claim. The couple agreed, in a written separation agreement, that plaintiff would have sole possession of the Buck Lane premises. Granted, the couple's attempted reconciliation may have voided this agreement. *See* N.C. Gen. Stat. § 52–102 (1991); *Schultz v. Schultz*, 107 N.C.App. 366, 368–73, 420 S.E.2d 186, 188–90 (1992), *disc. review denied*, 333 N.C. 347, 426 S.E.2d 710 (1993). However, even if the separation agreement were nullified by the attempted reconciliation, there is evidence that, at the time of the intrusions, plaintiff and defendant Miller were living separately

and had agreed that only plaintiff would live in the marital residence. The evidence raises a genuine issue of material fact as to whether plaintiff had authorized her to enter his house without his permission. Furthermore, there is no evidence that plaintiff authorized his wife or anyone else to install a video camera in his bedroom or to intercept and open his mail.

Although a person's reasonable expectation of privacy might, in some cases, be less for married persons than for single persons, such is not the case here where the spouses were estranged and living separately. Further, the marital relationship has no bearing on the acts of defendants Brooks, Hite, Brooks Investigations, and Massaroni. Plaintiff's marriage to defendant Miller did nothing to reduce his expectations that his personal privacy would not be invaded by perfect strangers. The acts of installing the hidden video camera and the interception of plaintiff's mail as alleged and forecasted are sufficient to sustain plaintiff's claims for invasion of privacy by intrusion on his seclusion, solitude, or private affairs. Plaintiff has offered sufficient proof of these acts, many of which are admitted in defendants' depositions, to survive summary judgment.

Plaintiff also asserts that the trial court erred by granting summary judgment to defendants on his trespass claim. We agree.

[6, 7] To prove trespass, a plaintiff must show that the defendants intentionally, *York Industrial Center v. Michigan Mut. Liability Co.*, 271 N.C. 158, 163, 155 S.E.2d 501, 506 (1967), and without authorization entered real property actually or constructively possessed by him at the time of the entry. *Matthews*, 235 N.C. at 283, 69 S.E.2d at 555. Even an authorized entry can be trespass if a wrongful act is done in excess of and in abuse of authorized entry. *Blackwood v. Cates*, 297 N.C. 163, 167, 254 S.E.2d 7, 9 (1979).

There is abundant record evidence showing that defendants, on more than one occasion, intentionally entered the Buck Lane house and premises and that plaintiff had possession at that time. The key issue in dispute is whether these entries were authorized.

[8] Defendants assert that, as plaintiff's wife, defendant Miller was authorized to enter the house and could give others the right. Defendants further dispute plaintiff's testimony that he directed defendant Miller not to enter the house in his absence and without his permission. We conclude that there is a genuine issue of material fact on this issue. Even if she had permission to enter the house and to authorize others to do so, there is also evidence to create a genuine issue of material fact as to whether defendants' entries exceeded the scope of any permission given.

[9] We further conclude that plaintiff's marriage to defendant Annette Miller does not automatically preclude his action for trespass. N.C. Gen.Stat. section 52–5 (1991) provides that a husband and wife may sue each other for damages sustained to their person or property as if they were unmarried. Here, the record evidence tends to show that the real property was titled solely in Terry Miller's name and that only he lived at the Buck Lane house. As discussed above, we recognize that the separation agreement executed by the couple may have been invalidated by their attempted reconciliation. *See Schultz*, 107 N.C.App. at 368–73, 420 S.E.2d at 188–90. Even so, there is a dispute of fact as to whether, after the reconciliation attempt failed, plaintiff instructed defendant Miller not to enter the premises without his consent.

[10, 11] "The essence of a trespass to realty is the disturbance of possession." *Matthews*, 235 N.C. at 283, 69 S.E.2d at 555. If plaintiff had the right of possession at the time of the entries and if defendant Miller had no such right, any entries made by her without plaintiff's consent, or by the other defendants, constitute trespass. This is true even if defendants entered the premises with a bona fide belief that they were entitled to enter the property since such a belief is no defense to trespass. *See Industrial Center*, 271 N.C. at 163, 155 S.E.2d at 506 (citing, *inter alia*, Restatement of Torts (Second) § 164). Similarly, defendants cannot escape liability by asserting that they relied on the advice of counsel in mistakenly concluding

that they were entitled to enter plaintiff's property. *See* Restatement (Second) of Torts § 164, Comment a. (1965).

Citing *Jones v. McBee*, 222 N.C. 152, 153, 22 S.E.2d 226, 227 (1942), defendants contend that plaintiff and defendant Miller are tenants in common so that plaintiff cannot maintain an action for trespass against her. As evidence of this assertion, defendants point to plaintiff's testimony, given in a previous criminal proceeding, that, after the marriage, both plaintiff and defendant Miller, signed a deed of trust enabling them to build a house on the Buck Lane lot.

[12–14] A tenancy in common is created by a conveyance inter vivos or testamentary gift to two or more persons or when two or more persons acquire the property through intestate succession. *See* 2 Robert E. Lee, *North Carolina Family Law* § 123, at 85 (4th ed.1980). None of these occurred in this case. Citing *Ward v. Ward*, 57 N.C.App. 343, 346, 291 S.E.2d 333, 335–36 (1982), defendants assert that a tenancy in common is created when a husband and wife purchase property and both pay or agree to pay part of the purchase price. *Ward* is not helpful to the defendants, however, because it deals with the purchase of personal property. Furthermore, evidence shows that the land on which the Millers built the Buck Road house was purchased by plaintiff prior to the marriage and that title to the property remained solely in plaintiff's name. We conclude that defendant Miller's signature on a deed of trust on the house does not, in itself, create a tenancy in common. Any equitable distribution or inheritance rights she acquired by her marriage to plaintiff do not establish that she was a tenant in common or that she otherwise had a right to possession at the time of the alleged trespasses. The trial court erred in granting summary judgment for defendants on plaintiff's trespass claim.

[15, 16] Plaintiff further asserts that the court erred by granting summary judgment to defendants on his claim for intentional infliction of emotional distress. A plaintiff who asserts a claim for intentional infliction of emotional distress must prove that the defendant engaged in "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another." *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981). The second element may also be proven by a showing that the defendant acted with "reckless indifference to the likelihood" that his or her acts "will cause severe emotional distress." *Id.* To prove the third element, a plaintiff must prove that he has suffered a "*severe and disabling* emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Waddle v. Sparks*, 331 N.C. 73, 83, 414 S.E.2d 22, 27 (1992) (quoting *Johnson v. Ruark Obstetrics & Gynecology Assoc.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990)).

[17] Here, plaintiff has forecast sufficient evidence of these elements to survive summary judgment. A jury could reasonably find that the conduct of defendants in breaking into plaintiff's house and installing a hidden video camera was "extreme and outrageous conduct." On the issue of intent, the record suggests that defendant Miller knew, and told the other defendants, prior to installation of the camera, that plaintiff had a proclivity to be fearful, i.e., she knew and told them that he "slept with a loaded shotgun next to him." Even if defendants did not intend specifically to cause him emotional distress, knowing these circumstances, the record raises a genuine issue of fact as to whether they acted with reckless indifference to the likelihood that installation of the camera, once discovered, would cause him emotional distress. Defendant Miller's initial denial of her involvement, involvement which she later admitted in her deposition, also tends to show reckless indifference to the likelihood that plaintiff would continue to suffer emotional distress. She testified that after he questioned her about the camera and she denied any involvement, he became "real paranoid," and "fearful for his life," and that "it was my fault that he had gone through the week that he had gone through."

Plaintiff has also forecast sufficient evidence of severe and disabling emotional distress to survive summary judgment. He tes-

tified that he was scared and worried and had difficulty sleeping after discovering the camera. Immediately after finding the camera in his bedroom, he stayed in a hotel room for two nights. Defendant Miller testified that, after he discovered the camera and before he confirmed her involvement, plaintiff was "real paranoid." She further testified that he told her that he had to go into hiding and that she was aware that he "was riding around town with a loaded shotgun underneath his seat." Although the record does not show that he sought medical attention for his symptoms, we conclude that a jury could reasonably conclude that the symptoms he suffered show a "*severe and disabling* emotional or mental condition" of a type "which may be generally recognized and diagnosed" by trained professionals and that the distress was "*so severe that no reasonable man could be expected to endure it.*" *See Waddle*, 331 N.C. at 83–84, 414 S.E.2d at 27–28.

[18] Plaintiff also asserts that the trial court erred by granting summary judgment on his "claim" for damages to real property. Plaintiff has not offered any cases, nor have we found any, that confer an independent claim for damages to real property. Thus, we treat this, not as a separate claim, but as a prayer for damages incident to plaintiff's trespass claim. Plaintiff has testified that defendants damaged his house by altering the wiring and drilling holes in the ceiling and that he paid expenses for repairs and to hire an electrician. We conclude that plaintiff has forecast sufficient proof to survive summary judgment on his prayer for damages to his real property.

[19, 20] Plaintiff further contends that the trial court erred by granting summary judgment on his prayer for punitive damages based on his allegation that defendants acted willfully, intentionally, maliciously, and recklessly. A plaintiff who proves such aggravated conduct can recover punitive damages on a claim for intentional infliction of emotional distress, *Holloway v. Wachovia Bank and Trust Co.*, 339 N.C. 338, 348, 452 S.E.2d 233, 239 (1994), and on a claim for trespass. *Maintenance Equipment Co. v. Godley Builders*, 107 N.C.App. 343, 351, 420 S.E.2d 199, 203 (1992), *disc. review denied*, 333 N.C. 345, 426 S.E.2d 707 (1993). In accord with many other states, we hold that plaintiff may also seek punitive damages based on the intrusion tort upon proof of aggravated conduct. *E.g., Estate of Berthiaume v. Pratt, M.D.*, 365 A.2d 792, 795 (Me.1976); *LeCrone v. Ohio Bell Telephone Co.*, 120 Ohio App. 129, 201 N.E.2d 533, 536 (1963).

[21] Defendants assert that summary judgment was proper on the prayer for punitive damages because they relied on the advice of counsel in ascertaining that Annette Miller had a right to enter the house. We hold that reliance on the advice of counsel is a factor that may be considered by a jury in assessing the reasonableness of a defendant's conduct in regard to punitive damages, but it is not a complete defense. *Cf. Flippo v. Hayes*, 98 N.C.App. 115, 119, 389 S.E.2d 613 (stating that reliance on advice of counsel is a factor to be considered in assessing the reasonableness of a defendant's conduct in a malicious prosecution action, but is not a complete defense), *aff'd per curiam*, 327 N.C. 490, 397 S.E.2d 512 (1990); *see also* 22 Am. Jur.2d *Damages* § 779 (1988).

[22] Plaintiff's evidence of aggravated conduct includes the following: (1) that defendants knew plaintiff had paranoid tendencies making him particularly susceptible to their intrusions; (2) that defendants Brooks and Massaroni altered the wiring of his house although neither of them were licensed electricians; (3) that defendants placed the camera in the bedroom rather than in a less private area of the house; (4) that they went back into the house even after they discovered that the camera had been removed. Given this evidence, summary judgment was not proper on plaintiff's prayer for punitive damages.

Reversed and remanded.

ARNOLD, C.J., and WALKER, J., concur.

Broughton

meet the requirements of the Huntersville Subdivision Ordinance.

[9] In the 18 February 2002 meeting, the Town Board concluded Riverdale did not comply with the consistency and conformity requirements of the Huntersville Subdivision Ordinance. Section 6.200.1 requires consistency of the proposed subdivision with the most recently adopted public plans and policies for the area. Public plans and policies are final planning documents on file in the offices of the Town of Huntersville. In its findings of fact, the Town Council determined that there were no adopted public plans or policies within 1.2 miles of the Riverdale subdivision. Although the lot sizes were much smaller and the proposed density was higher than in the surrounding areas, without adopted public plans and policies for these areas, denial of the subdivision for lack of consistency was not based on competent, material and substantial evidence.

[10] Petitioner further asserts that it met the requirements for conformity. Section 6.200.2 of the Subdivision Ordinance, requires that "[i]n areas with established development, new subdivisions should be planned to protect and enhance the stability, environment, health and character of neighboring areas." The findings of fact determined that Riverdale, with lot sizes much smaller than the 10,000 square foot lots in the Beatties Ford Road area, did not conform with the established area. However, most of the discussion in the town board meetings centered on conformity with Cashion Woods, not Beatties Ford Road. Cashion Woods, a subdivision in the preliminary stages of development, does not meet the requirement for conformity with "established development." The only specific discussion of lot sizes in the Beatties Ford Road area was during the 22 January 2002 meeting of the Town Board when Frank Jacobus, representing Brewster, noted that of the homes located on Beatties Ford Road nearest to Riverdale, six or seven were mobile homes on older, larger lots, with square footage between 800 and 1,400 square feet. Although relevant, this evidence alone is not adequate to support a conclusion that Riverdale does not conform to the surrounding areas. The findings further found that the Riverdale subdivision "overpopulates and violates the historical and rural character of the Beatties Ford Road area." There is no evidence contained in the record to support this conclusion.

Brewster presented competent, material and substantial evidence that they met the requirements of the Zoning and Subdivision Ordinances; thus, they established a prima facie case of entitlement to approval. Because the Town Board did not present substantial evidence contra, the Town Board's decision to deny the subdivision sketch plan was not supported by competent, material and substantial evidence, *See Clark v. City of Asheboro,* 136 N.C.App. 114, 524 S.E.2d 46 (1999), *Woodhouse v. Bd. of Comm'rs of Town of Nags Head,* 299 N.C. 211, 261 S.E.2d 882 (1980), and was arbitrary and capricious. The decision of the Superior Court must be reversed, and this matter remanded for entry of an order requiring the town to approve petitioner's application.

Reversed.

Judges McCULLOUGH and LEVINSON concur.

Celeste G. BROUGHTON, Plaintiff,

v.

McCLATCHY NEWSPAPERS, INC.; The News and Observer Publishing Co.; et al., Defendants.

No. COA02–1034.

Court of Appeals of North Carolina.

Nov. 4, 2003.

Ex-wife brought action against newspaper, alleging libel per se, invasion of privacy, fraud and misrepresentation, slander of title, and obstruction of justice in regards to a newspaper article on her divorce. The Supe-

rior Court, Wake County, Howard E. Manning, Jr., J., granted newspaper summary judgment. Ex-wife appealed. The Court of Appeals, Steelman, J., held that: (1) trial court was entitled to deny motion to strike newspaper's late answer; (2) newspaper did not commit libel per se; (3) newspaper did not invade ex-wife's privacy; (4) newspaper did not slander title to ex-wife's property; (5) ex-wife did not rely upon newspaper's alleged statements so as to support fraud claim; (6) reporter did not trespass on property; and (7) newspaper did not obstruct justice in regards to other litigation initiated by ex-wife.

Affirmed.

1. Statutes ⇐223.4

When a more generally applicable statute conflicts with a more specific, special statute, the special statute is viewed as an exception to the provisions of the general statute.

2. Judgment ⇐92, 162(2)

Default judgments are disfavored in the law, and therefore, any doubts should be resolved in favor of allowing the case to proceed on the merits.

3. Judgment ⇐107

When an answer is filed before default judgment is entered, the clerk is no longer authorized to enter default against defendants.

4. Appeal and Error ⇐960(3)
Pleading ⇐353

A motion to strike an answer is addressed to the sound discretion of the trial court, and its ruling will not be disturbed absent an abuse of discretion.

5. Pleading ⇐352

Trial court was entitled to deny motion to strike newspaper's late answer, which was filed several days after filing deadline, where newspaper mistakenly believed it had 30 days to respond to more definite statement under procedural rule governing amended pleadings, when in actuality newspaper had only 20 days to file answer after being served with more definite statement in defamation action under rule specifically governing more definite statements. Rules Civ.Proc., Rules 12(a)(1), par. b, 15, West's N.C.G.S.A. § 1A–1.

6. Judgment ⇐92

It is preferable for matters to be resolved on their merits rather than upon a procedural defect.

7. Libel and Slander ⇐123(2)

Whether a publication is deemed libelous per se is a question of law to be decided by the court.

8. Libel and Slander ⇐33

Defamatory words, to be libelous per se, must be susceptible of but one meaning and of such nature that the court can presume as a matter of law that they tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided.

9. Libel and Slander ⇐6(1)

Libel per se is a publication which, when considered alone without explanatory circumstances: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace.

10. Judgment ⇐181(33)
Libel and Slander ⇐123(2)

Regardless of whether a libel case is resolved upon a motion for summary judgment or by a jury trial, the trial court is required to make a threshold determination of whether the statement is libelous on its face.

11. Libel and Slander ⇐6(1)

In order to be libelous on its face, the statements must be subject to only one interpretation, which must be defamatory.

12. Libel and Slander ⇐6(1)

Statements in newspaper article regarding ex-wife's divorce proceedings, which commented on ex-wife's $4.2 million-dollar lawsuit against ex-husband, their marriage and subsequent divorce, her attempts to obtain

money for her children's educations, affidavits filed in lawsuits between the parties, and how wife began to act pro se because she could no longer afford to hire attorneys, were not susceptible to only one defamatory meaning as a matter of law, and therefore, the article was not libelous per se.

13. Torts ⇐8.5(2, 5.1, 6)

There are four types of invasion of privacy actions: (1) appropriation, for the defendant's advantage, of the plaintiff's name or likeness; (2) intrusion upon the plaintiff's seclusion or solitude or into his private affairs; (3) public disclosure of embarrassing private facts about the plaintiff; and (4) publicity which places the plaintiff in a false light in the public eye.

14. Torts ⇐8.5(5.1)

North Carolina does not recognize a cause of action for the invasion of privacy by disclosure of private facts.

15. Torts ⇐8.5(5.1)

North Carolina does not recognize a cause of action for false light in the public eye invasion of privacy.

16. Torts ⇐8.5(2)

Generally, there must be a physical or sensory intrusion or an unauthorized prying into confidential personal records to support a claim for invasion of privacy by intrusion.

17. Telecommunications ⇐494.1

Torts ⇐8.5(2)

Intrusion as an invasion of privacy is a tort that does not depend upon any publicity given a plaintiff or his affairs but generally consists of an intentional physical or sensory interference with, or prying into, a person's solitude or seclusion or his private affairs; specific examples of intrusion include physically invading a person's home or other private place, eavesdropping by wiretapping or microphones, peering through windows, persistent telephoning, unauthorized prying into a bank account, and opening personal mail of another.

18. Torts ⇐8.5(2)

The conduct required to support a claim for invasion of privacy by intrusion must be so egregious as to be highly offensive to a reasonable person.

19. Torts ⇐8.5(2)

There can be no invasion of privacy claim, on intrusion theory, based upon the use of public records as to which plaintiff had no expectation of privacy.

20. Torts ⇐8.5(4)

Ex-wife, whose divorce was the subject of newspaper article, did not have her privacy invaded by intrusion, where newspaper article was based on public records, and there was no evidence of physical or sensory intrusion into ex-wife's confidential personal records.

21. Libel and Slander ⇐130

The elements of slander of title are: (1) the uttering of slanderous words in regard to the title of someone's property; (2) the falsity of the words; (3) malice; and (4) special damages.

22. Libel and Slander ⇐134

Newspaper did not slander the title of property mentioned in newspaper article, which stated that property was held in trust, where title was in fact held in trust for the children of the subject of the article.

23. Fraud ⇐3

To establish a claim for fraud, plaintiff must show that: (1) defendants made a representation of a material past or existing fact; (2) the representation was false; (3) defendants knew the representation was false or made it recklessly without regard to its truth or falsity; (4) the representation was made with the intention that it would be relied upon; (5) plaintiff did rely on it and that her reliance was reasonable; and (6) plaintiff suffered damages because of her reliance.

24. Fraud ⇐20

Ex-wife, who was the subject of newspaper article regarding her divorce, did not rely on alleged fraudulent statements made by newspaper that article would be sympathetic to her interests, which article commented on ex-wife's $4.2 million-dollar lawsuit against ex-husband, their marriage and subsequent divorce, her attempts to obtain money for

her children's educations, affidavits filed in lawsuits between the parties, and how wife began to act pro se because she could no longer afford to hire attorneys, and thus, ex-wife was not entitled to bring fraud action against newspaper, where ex-wife stated in her deposition that she had learned over the years that people at the newspaper lied glibly.

25. Trespass ⇐10

The elements of trespass to real property are: (1) possession of the property by the plaintiff when the alleged trespass was committed; (2) an unauthorized entry by the defendant; and (3) damage to the plaintiff from the trespass.

26. Trespass ⇐25

Newspaper reporter, who wrote an article regarding ex-wife's divorce, did not trespass on ex-wife's property; evidence indicated that reporter engaged in social conversation with ex-wife and that wife did not ask reporter to leave property.

27. Obstructing Justice ⇐1

Obstruction of justice is a common law offense in North Carolina; it is an offense to do any act which prevents, obstructs, impedes or hinders public or legal justice.

28. Obstructing Justice ⇐6, 16

Newspaper, which published article regarding ex-wife's divorce, did not obstruct justice in regards to other litigation that wife was involved with; ex-wife presented no evidence that her litigation was in some way judicially prevented, obstructed, impeded, or hindered by the acts of the newspaper.

29. Appeal and Error ⇐837(1)
Trial ⇐388(2)

A trial judge is not required to make finding of fact and conclusions of law in determining a motion for summary judgment, and if he does make some, they are disregarded on appeal.

30. Appeal and Error ⇐979(1)

The trial court's decision on a motion requesting a new trial based on insufficiency of the evidence is not reviewable on appeal absent manifest abuse of discretion. Rules Civ.Proc., Rule 59(a)(7), West's N.C.G.S.A. § 1A–1.

Appeal by plaintiff from orders entered 23 October 1997 by Judge Orlando F. Hudson, Jr.; 21 October 1998 by Judge Robert Farmer; 18 December 1998 by Judge B. Craig Ellis; 20 April 1999 by Judge E. Lynn Johnson; 11 August 1999 by Judge Howard E. Manning, Jr.; 8 June 2001 by Judge Howard E. Manning, Jr.; and 3 July 2001 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 18 August 2003.

Celeste G. Broughton, pro se.

Everett Gaskins Hancock & Stevens, LLP, by Hugh Stevens and C. Amanda Martin, Raleigh, for defendants-appellees.

STEELMAN, Judge.

This appeal arises from a lawsuit initiated by plaintiff, Celeste G. Broughton, against defendants, McClatchy Newspaper, Inc., The News and Observer Publishing Company, Frank A. Daniels, Jr., individually and as president of the News and Observer Publishing Company and as publisher of the News and Observer (N & O), Anders Gyllenhaal, individually and as editor of the N & O, and Sarah Avery, individually and as a staff writer for the N & O. This action was dismissed by Judge Howard E. Manning, Jr. For the reasons discussed herein, we affirm.

Plaintiff and Robert Broughton were married on 5 December 1964. The Broughtons separated on 25 November 1968. Since that time, they have been involved in litigation. In 1995, defendant Sarah Avery (Avery) became interested in the Broughtons' protracted litigation. Avery researched court files and conducted interviews for an article to be published in the N & O. On 3 December 1995, the article was published in the N & O. It was titled "Lawsuit in Superior Court Latest Volley in Broughtons' War," and included references to the Broughtons' marriage, plaintiff's financial status, and ongoing and past litigation. On 2 December 1996, plaintiff filed a complaint alleging libel *per se*, invasion of privacy, fraud and misrepresenta-

tion, slander of title, and obstruction of justice.

On 4 February 1997 defendants filed a motion for a more definite statement, a motion to strike portions of plaintiff's complaint, and a provisional answer. The trial court granted both of defendants' motions on 21 April 1997 and directed plaintiff to file and serve an "amended complaint" on or before 19 May 1997. On 12 May 1997, plaintiff obtained an *ex parte* order granting an extension of time to serve her "amended complaint" until 3 June 1997. Plaintiff filed a document designated as an "amended complaint" on 3 June 1997. Defendants filed an answer to the amended complaint on 3 July 1997. On 7 July 1997, plaintiff moved to strike defendants' answer and for entry of default. Both of these motions were denied by Judge Orlando F. Hudson, Jr. on 23 October 1997.

Following contentious discovery, all parties moved for summary judgment. Judge Howard E. Manning, Jr. denied plaintiff's motion for summary judgment on 11 August 1999. He granted defendants' motion for summary judgment on 8 June 2001 in an order that set forth, in detail, the rationale of the court's ruling.

On 18 June 2001, plaintiff filed a motion under Rules 52 and 59(a)(7) requesting that the trial court reconsider its 8 June 2001 decision. The motion alleged that the trial court's order, which granted defendants' motion for summary judgment, contained errors of law and fact. On 3 July 2001, Judge Manning denied the motions under Rules 52 and 59(a)(7). Plaintiff's motion for reconsideration was allowed, but the trial court declined to change its decision. Plaintiff appeals all of these orders, but does not discuss the 21 October 1998 order by Judge Robert Farmer, the 18 December 1998 order by Judge B. Craig Ellis, or the 20 April 1999 order by Judge E. Lynn Johnson in her brief. Assignments of error as to these orders are deemed abandoned and are not addressed further. *See* N.C. R.App. P. 28(b)(6). Plaintiff sets forth four assignments of error.

In her first assignment of error, plaintiff argues that the trial court erred by denying her motion to strike defendants' answer and motion for entry of default. She contends that because defendants' answer was not filed in a timely manner, the trial court was required to enter default. We disagree.

Plaintiff filed her complaint on 2 December 1996. Defendants moved for a more definite statement on 4 February 1997. The trial court's 5 May 1997 order granted defendants' motion and directed that plaintiff serve an "amended complaint" upon defendants. "If the court grants a motion for a more definite statement, the responsive pleading shall be served within 20 days after service of the more definite statement." N.C.R. Civ. P. 12(a)(1)(b). Plaintiff served her amended complaint by mail on 3 June 1997. Defendants, therefore, had until 26 June 1997 to file a response. *See* N.C.R. Civ. P. 6(e). Defendants did not file an answer to the amended complaint until 3 July 1997.

Plaintiff presented an affidavit and a proposed order entering default to the Clerk of Superior Court of Wake County on 2 July 1997. The clerk did not enter default against defendants. Defendants filed an answer to the amended complaint on 3 July 1997. Plaintiff moved to strike the answer and for entry of default on 7 July 1997. Defendants responded to plaintiff's motions, contending that under Rule 15(a), they were allowed 30 days to answer an "amended pleading."

[1] Rule 15(a) provides that "[a] party shall plead in response to an amended pleading within 30 days after service of the amended pleading, unless the court otherwise orders." N.C.R. Civ. P. 15(a). However, Rule 15 applies to amended and supplemental pleadings in general. Rule 12(a)(1)(b) specifically applies to responses to a more definite statement. N.C.R. Civ. P. 12(a)(1)(b). When a more generally applicable statute conflicts with a more specific, special statute, the "special statute is viewed as an exception to the provisions of the general statute[.]" *Domestic Electric Service, Inc. v. City of Rocky Mount,* 20 N.C.App. 347, 350, 201 S.E.2d 508, 510, *aff'd,* 285 N.C. 135, 203 S.E.2d 838 (1974). Accordingly, we conclude that the specific requirements of

Rule 12(a)(1)(b) control where in conflict with the general requirements of Rule 15(a).

Plaintiff moved to strike defendants' answer pursuant to Rule 55, which provides:

> When a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by these rules or by statute and that fact is made to appear by affidavit, motion of attorney for the plaintiff, or otherwise, the clerk *shall* enter his default.

N.C.R. Civ. P. 55(a) (Emphasis added).

[2] Default judgments are disfavored in the law, and therefore any doubts should be resolved in favor of allowing the case to proceed on the merits. *North Carolina Nat'l Bank v. McKee*, 63 N.C.App. 58, 303 S.E.2d 842 (1983). In *Peebles v. Moore*, 302 N.C. 351, 275 S.E.2d 833 (1981), the defendant filed an untimely answer. After the answer was filed, the clerk entered a default against the defendant. The trial court refused to set aside the entry of default. Our Supreme Court reversed, holding that once an answer has been filed, default may not be entered, even though the answer was late. The court further stated that:

> We believe that the better reasoned and more equitable result may be reached by adhering to the principle that a default should not be entered, even though technical default is clear, if justice may be served otherwise.... Without considering the questions of just cause, excusable neglect or waiver, we conclude that justice will be served by vacating the entry of default and permitting the parties to litigate the joined issues.

Id. at 356, 275 S.E.2d at 836.

[3] In the instant case, unlike *Peebles*, there was never an entry of default. Clearly, defendants' answer was not timely filed. However, when an answer is filed before default is entered, the clerk is no longer authorized to enter default against defendants. *See Peebles, supra; Fieldcrest Cannon Employees Credit Union v. Mabes*, 116 N.C.App. 351, 447 S.E.2d 510 (1994).

[4, 5] A motion to strike an answer is addressed to the sound discretion of the trial court and its ruling will not be disturbed absent an abuse of discretion. *Byrd v. Mortenson*, 308 N.C. 536, 302 S.E.2d 809 (1983). Defendants had previously filed a provisional answer to plaintiff's complaint on 4 February 1997. It is clear from the record that defendants believed that since plaintiff filed an "amended complaint," they had 30 days to file a response. Defendants did, in fact, file an answer, albeit late by several days. Further, there was no showing that plaintiff was prejudiced by the late answer. The denial of plaintiff's motion to strike was not an abuse of discretion.

[6] It is preferable for matters to be resolved on their merits rather than upon a procedural defect. *Hardison v. Williams*, 21 N.C.App. 670, 205 S.E.2d 551 (1974). The interests of justice in this case were served by the trial court's denial of plaintiff's motion to strike. *See Peebles, supra.* This assignment of error is without merit.

In plaintiff's second and third assignments of error, she argues that the trial court erred in denying her motion for summary judgment and granting defendants' motion for summary judgment concerning her claims for libel *per se*, invasion of privacy, slander of title, fraud and misrepresentation, trespass and obstruction of justice. We disagree.

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen.Stat. § 1A–1, Rule 56(c) (2001). The moving party bears the burden of demonstrating the lack of triable issues of fact. *Koontz v. City of Winston–Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). Once the movant satisfies its burden of proof, the burden then shifts to the nonmovant to present specific facts showing triable issues of material fact. *Lowe v. Bradford*, 305 N.C. 366, 369–70, 289 S.E.2d 363, 366 (1982). On appeal from summary judgment, "we review the record in the light most favorable to the non-moving party." *Bradley v. Hidden Valley Transp., Inc.*, 148 N.C.App. 163, 165, 557 S.E.2d 610, 612 (2001), *aff'd*, 355

N.C. 485, 562 S.E.2d 422 (2002) (citing *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975)).

Where a plaintiff cannot prove an essential element of her claim, summary judgment is proper. *Martin Marietta Corp. v. Wake Stone Corp.*, 111 N.C.App. 269, 432 S.E.2d 428 (1993), *rev. denied*, 335 N.C. 770, 442 S.E.2d 517 (1994). Summary judgment can be appropriate in libel cases. *See Taylor v. Greensboro News Co.*, 57 N.C.App. 426, 435, 291 S.E.2d 852, 857 (1982), *appeal dismissed*, 307 N.C. 459, 298 S.E.2d 385 (1983).

[7, 8] Whether a publication is deemed libelous *per se* is a question of law to be decided by the court. *Ellis v. Northern Star Co.*, 326 N.C. 219, 224, 388 S.E.2d 127, 130, *reh'g denied*, 326 N.C. 488, 392 S.E.2d 89 (1990). "[D]efamatory words to be libelous *per se* must be susceptible of but one meaning and of such nature that the court can presume as a matter of law that they tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided." *Flake v. Greensboro News Co.*, 212 N.C. 780, 786, 195 S.E. 55, 60 (1938).

[9] Plaintiff alleged in her complaint that the actions by defendants constituted libel *per se*. There are no allegations of any other type of libel. Libel *per se* is "a publication which, when considered alone without explanatory circumstances: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace." *Phillips v. Winston–Salem/Forsyth County Bd. of Educ.*, 117 N.C.App. 274, 277, 450 S.E.2d 753, 756 (1994), *disc. rev. denied*, 340 N.C. 115, 456 S.E.2d 318 (1995). The first three types of libel *per se* are not applicable to this case.

Paragraph 17 of plaintiff's complaint reads as follows:

> Such publications (Exhibits A, B and C)-each separately and also taken as a whole-were intended to convey and did convey to the community at large the impression that plaintiff was mean-spirited, greedy, and buffoonishly litigious, and that no one-especially lawyers and judges-should take her legal allegations or other activities seriously. By such publication, defendants meant and intended to mean:

Plaintiff then enumerated in seventy-eight separately numbered sub-paragraphs what she interpreted defendants meant and intended to mean in the newspaper articles. The articles complained of were: (1) the original story which ran on 3 December 1995 (Exhibit A); (2) three letters to the editor which discussed the original story; and (3) an article dated 10 December 1996 reporting that plaintiff had sued defendants in the instant action.

The original story (Exhibit A) was titled, "Lawsuit in Superior Court latest volley in Broughtons' war." The fourth paragraph states: "Convinced that her husband would use his power and influence to ruin her, [plaintiff] took to the courts to fight for what she said was rightfully due her and her children-a just division of the property he controlled during their marriage. She is still fighting." The article then states that plaintiff is known by her first name only at the Wake County Courthouse because she has been a party to at least "two dozen lawsuits, complaints and criminal actions involving her lawyers, her ex-husband's lawyers, state and federal judges, district attorneys, The News and Observer and the Internal Revenue Service." The article comments on plaintiff's $4.2 million-dollar lawsuit against Robert Broughton, their marriage and subsequent divorce, plaintiff's attempts to obtain money for her children's educations from Robert Broughton, affidavits filed in lawsuits between the parties, how plaintiff began to act *pro se* because she could no longer afford to hire attorneys, and Robert Broughton's estrangement from his children.

Plaintiff has misconstrued the article and read into it interpretations that are simply not there. Her complaint refers to what defendants "meant and intended to mean" in the article. This is not the test for libel *per se*. In *Renwick v. News & Observer Pub. Co.*, 310 N.C. 312, 318, 312 S.E.2d 405, 409, *reh'g denied*, 310 N.C. 749, 315 S.E.2d 704, *cert. denied*, 469 U.S. 858, 105 S.Ct. 187, 83

L.Ed.2d 121 (1984), our Supreme Court stated:

> The principle of common sense requires that courts shall understand them as other people would. The question always is how would ordinary men naturally understand the publication.... The fact that supersensitive persons with morbid imaginations may be able, by reading between the lines of an article, to discover some defamatory meaning therein is not sufficient to make them libelous.
>
> In determining whether the article is libelous *per se* the article alone must be construed, stripped of all insinuations, innuendo, colloquium and explanatory circumstances. The article must be defamatory on its face "within the four corners thereof."

(Quoting *Flake v. Greensboro News Co.*, 212 N.C. at 786–87, 195 S.E. at 60). Here, plaintiff complains only of insinuations and innuendos by alleging what defendants intended to mean.

[10–12] In opposition to defendants' motion for summary judgment, plaintiff submitted the affidavits of three persons, together with her own affidavit, that stated how they perceived the article made plaintiff appear. Regardless of whether a libel case is resolved upon a motion for summary judgment or by a jury trial, the trial court is required to make a threshold determination of whether the statement is libelous on its face. *Renwick v. News & Observer Pub. Co.*, 310 N.C. 312, 312 S.E.2d 405 (1984); *Robinson v. Nationwide Ins. Co.*, 273 N.C. 391, 159 S.E.2d 896 (1968); *Flake v. News Co.*, 212 N.C. 780, 195 S.E. 55 (1938). In order to be libelous on its face, the statements must be subject to only one interpretation, which must be defamatory. *Martin Marietta Corp. v. Wake Stone Corp.*, 111 N.C.App. 269, 432 S.E.2d 428 (1993). The statements complained of by plaintiff are not susceptible of only one defamatory meaning as a matter of law. The trial court correctly determined that "as a matter of law, the article is not libelous per se." Consequently, we hold that the trial court did not err, but properly granted defendant's summary judgment motion and properly denied plaintiff's summary judgment motion on the libel *per se* issue.

[13] In addition to her claim for libel, plaintiff asserts a claim for invasion of privacy. There are four types of invasion of privacy actions: "(1) appropriation, for the defendant's advantage, of the plaintiff's name or likeness; (2) intrusion upon the plaintiff's seclusion or solitude or into his private affairs; (3) public disclosure of embarrassing private facts about the plaintiff; and (4) publicity which places the plaintiff in a false light in the public eye." *Renwick*, 310 at 322, 312 S.E.2d at 411.

[14, 15] Plaintiff has not alleged a claim for appropriation of her name or likeness. North Carolina does not recognize a cause of action for the invasion of privacy by disclosure of private facts. *Burgess v. Busby*, 142 N.C.App. 393, 544 S.E.2d 4, *reh'g denied*, 355 N.C. 224, 559 S.E.2d 554 (2001) (citing *Hall v. Post*, 323 N.C. 259, 372 S.E.2d 711 (1988), *rev'd on other grounds*, 323 N.C. 259, 372 S.E.2d 711 (1988)). Neither does North Carolina recognize a cause of action for false light in the public eye invasion of privacy. *Renwick, supra.* Thus, the only possible invasion of privacy claim that can be brought by plaintiff is one for intrusion.

[16–18] Generally, there must be a physical or sensory intrusion or an unauthorized prying into confidential personal records to support a claim for invasion of privacy by intrusion. *Burgess v. Busby, supra; See also Toomer v. Garrett*, 155 N.C.App. 462, 574 S.E.2d 76 (2002), *rev. denied, appeal dismissed*, 357 N.C. 66, 579 S.E.2d 576 (2003).

> We have held that " 'intrusion' as an invasion of privacy is [a tort that] ... does not depend upon any publicity given a plaintiff or his affairs but generally consists of an intentional physical or sensory interference with, or prying into, a person's solitude or seclusion or his private affairs." *Hall v. Post*, 85 N.C.App. 610, 615, 355 S.E.2d 819, 823 (1987). Specific examples of intrusion include "physically invading a person's home or other private place, eavesdropping by wiretapping or microphones, peering through windows, persistent telephoning,

> unauthorized prying into a bank account, and opening personal mail of another."

Burgess, 142 N.C.App. at 405–06, 544 S.E.2d at 11 (citing *Hall v. Post*, 85 N.C.App. 610, 615, 355 S.E.2d 819, 823 (1987), *reversed on other grounds*, 323 N.C. 259, 372 S.E.2d 711 (1988)). The conduct required to support this claim must be so egregious as to be "highly offensive to a reasonable person." *Smith v. Jack Eckerd Corp.*, 101 N.C.App. 566, 568, 400 S.E.2d 99, 100 (1991).

The allegations in paragraph 17 of plaintiff's complaint pertaining to intrusion of privacy are as follows:

> 17. (40) False and defamatory allegation about the most private and personal matters of plaintiff's family's life is acceptable for publication, even over her explicit protest, although plaintiff is not a public figure and the defendants and their said publications clearly convey that the matters published were deliberately contrived to be tedious, unnewsworthy trivia and grossly invade plaintiff's and her sons' privacy.
>
> 35. Plaintiff repeatedly asked Avery not to publish any article about the plaintiff or the case, as *any* article would be an unwarranted invasion of her family's privacy and also would inevitably jeopardize the outcome of the case Wake County 88 CVS 6157.
>
> 58. Since the matters written about were private, plaintiff is not a public figure, the public is not interested in those matters, the account of the matters was incomplete and accordingly inaccurate (if not outright falsehoods), the publication unlawfully invaded plaintiff's privacy.
>
> 63. Even if all the individual statements in subject article were true, the article would yet be libelous, slanderous of title, invasive of privacy and obstruct just resolution of the referred "lawsuit in superior court", since article omits relevant information about the plaintiff and other matters it purports to accurately report. [Sic].

[19, 20] In this case, defendants investigated *public* records and conducted interviews of persons to acquire information for the article. There can be no invasion of privacy claim based upon the use of public records as to which plaintiff had no expectation of privacy. *Burgess*, 142 N.C.App. at 406, 544 S.E.2d at 11. There was no evidence of physical or sensory intrusion or of prying into confidential personal records. The conduct of defendants in the gathering of information for its articles does not rise to a level that would support a claim for invasion of privacy by intrusion. Accordingly, we hold that the trial court properly denied plaintiff's summary judgment motion and granted defendants' motion for summary judgment as to the claim for invasion of privacy.

[21] Plaintiff also contends that defendants committed slander of title. The elements of slander of title are: (1) the uttering of slanderous words in regard to the title of someone's property; (2) the falsity of the words; (3) malice; and (4) special damages. *Mecimore v. Cothren*, 109 N.C.App. 650, 655–656, 428 S.E.2d 470, 473, *rev. denied*, 334 N.C. 621, 435 S.E.2d 336 (1993) (citing *Allen v. Duvall*, 63 N.C.App. 342, 345, 304 S.E.2d 789, 791 (1983), *rev'd on other grounds*, 311 N.C. 245, 316 S.E.2d 267 (1984)).

The article of 3 December 1995 contains the following statements concerning plaintiff's residence:

> The house sits on a hill, looking down through a forest of tall oaks at the grand old-money homes to the left and right....
>
> Celeste Broughton long ago put the house on the hill in a trust for her children, saying in court papers that it would be the only nest-egg they would ever have. And while the three acres span some of the most desirable real estate in Raleigh-easily worth several times the $400,000 tax value-the 3,500 square foot house shows signs of age. A gray mildew climbs the six columns that establish its grand front.
>
> Still, she refuses to sell the house and subdivide the land. It's the principle of the matter. Why, she demands, should she sacrifice the only home her children have ever known because they are owed what she considers a legal and binding debt?

[22] The materials presented to the trial court upon the summary judgment hearing

reveal that the title to the property is in fact held in trust for plaintiff's children. This statement was not false. The evidence further showed that the remaining allegations pertaining to plaintiff's real property were not false. In addition, plaintiff has not shown any damages. In the absence of an essential element of the cause of action, summary judgment is proper. *Lavelle v. Schultz,* 120 N.C.App. 857, 859–60, 463 S.E.2d 567, 569 (1995), *disc. rev. denied,* 342 N.C. 656, 467 S.E.2d 715 (1996). We therefore hold that the trial court correctly granted summary judgment in favor of defendants and denied plaintiff's motion for summary judgment on this claim.

[23] Plaintiff further contends that defendants committed fraud and misrepresentation by telling her that the article would be "sympathetic" to her interests. To establish a claim for fraud, plaintiff must show that: (1) defendants made a representation of a material past or existing fact; (2) the representation was false; (3) defendants knew the representation was false or made it recklessly without regard to its truth or falsity; (4) the representation was made with the intention that it would be relied upon; (5) plaintiff did rely on it and that her reliance was reasonable; and (6) plaintiff suffered damages because of her reliance. *Blanchfield v. Soden,* 95 N.C.App. 191, 194, 381 S.E.2d 863, 864, *rev. denied,* 325 N.C. 704, 388 S.E.2d 448 (1989).

[24] In plaintiff's deposition, however, she stated that:

> I've made it a policy all-for the last many, many years to never talk to anyone who works with *The News and Observer,* to avoid them socially, have nothing to do with them, to not even go near them in the grocery store.... I've learned that people-especially people who work for *The News and Observer*-lie glibly.

Based on plaintiff's own statements, she did not rely on any statements that might have been made by defendants. Because an essential element is missing from plaintiff's claim, summary judgment was proper. *Lavelle v. Schultz,* 120 N.C.App. 857, 859–60, 463 S.E.2d 567, 569 (1995), *disc. rev. denied,* 342 N.C. 656, 467 S.E.2d 715 (1996). The trial court properly denied plaintiff's motion and granted defendants' motion for summary judgment as to this claim.

[25] Plaintiff contends that defendant Avery trespassed on her property when she came to plaintiff's residence unannounced. The elements of trespass to real property are: (1) possession of the property by the plaintiff when the alleged trespass was committed; (2) an unauthorized entry by the defendant; and (3) damage to the plaintiff from the trespass. *Kuykendall v. Turner,* 61 N.C.App. 638, 642, 301 S.E.2d 715, 718 (1983).

[26] Plaintiff alleged that defendant Avery trespassed when the following happened:

> 36. A day or so after that conversation, Avery appeared unannounced at plaintiff's residence and stated that she had come solely for a "social visit". Plaintiff had never seen the woman before in her life.
>
> 37. Plaintiff feared the N & O's often demonstrated proclivity and reputation for vindictively destroying people and, consequently, plaintiff did not want to appear rude by refusing to "socially" visit with Avery.
>
> 38. As a result of that fear, plaintiff talked for some time "socially" with Avery on plaintiff's front porch.
>
> 39. After having made the fraudulent misrepresentation that she was "socially" visiting, Avery later, in her article of December 3, 1995, rewarded plaintiff's hospitality by cruelly invading plaintiff's privacy, including writing viciously unflattering description of plaintiff's residence and alleging the property has a high market value. [sic].

Plaintiff has not shown or alleged that Avery's entry onto her land was unauthorized. To the contrary, the evidence was that plaintiff engaged in "social" conversation with Avery and did not ask her to leave the property. Thus, the trial court properly granted summary judgment for defendants and denied summary judgment for plaintiff on the trespass claim.

Plaintiff next contends that the trial court erred in dismissing her claim for obstruction of justice. For example, paragraph 70 of the amended complaint states that "[p]laintiff has suffered obstruction of a just resolution of pending court actions, Case number 88 CVS 6157 (Wake County)."

[27, 28] "Obstruction of justice is a common law offense in North Carolina." *Burgess*, 142 N.C.App. at 408, 544 S.E.2d at 12. "[I]t is an offense to do any act which prevents, obstructs, impedes or hinders public or legal justice." *Id.* at 408–09, 544 S.E.2d at 12–13. However, plaintiff presented no evidence that her case, 88 CVS 6157, was in some way judicially prevented, obstructed, impeded or hindered by the acts of defendants. There is no evidence as to the disposition of that action or any showing that the newspaper articles adversely impacted that case.

As to each of plaintiff's claims, the trial court properly granted summary judgment in favor of defendants and properly denied plaintiff's motion for summary judgment. These assignments of error are without merit.

In her fourth and final assignment of error, plaintiff argues that the trial court erred in denying her motions under Rules 52 and 59(a)(7), filed following the trial court's granting of defendants' motion for summary judgment. We disagree.

[29] Rule 52 provides that a party may move for the trial court to amend its findings, make additional findings or amend its judgment. N.C.R. Civ. P. 52. However, these provisions are not applicable to an order granting summary judgment.

> A trial judge is not required to make finding of fact and conclusions of law in determining a motion for summary judgment, and if he does make some, they are disregarded on appeal. [Sic]. Rule 52(a)(2) does not apply to the decision on a summary judgment motion because, if findings of fact are necessary to resolve an issue, summary judgment is improper.

Mosley v. National Finance Co., 36 N.C.App. 109, 111, 243 S.E.2d 145, 147 (1978) (citations omitted). In this case, the trial court did not enter findings of fact and conclusions of law, but rather carefully and in detail stated the legal basis for each of its rulings.

[30] Rule 59(a)(7) provides that a party may request a new trial based upon "[i]nsufficiency of the evidence to justify the verdict or that the verdict is contrary to law." N.C.R. Civ. P. 59(a)(7). The trial court's decision on a Rule 59 motion is not reviewable on appeal absent manifest abuse of discretion. *Thomas v. Dixson*, 88 N.C.App. 337, 363 S.E.2d 209 (1988). Plaintiff has not shown an abuse of discretion. As discussed above, the trial court did not err in denying plaintiff's motion for summary judgment or granting defendants' motion for summary judgment. This assignment of error is without merit.

AFFIRMED.

Chief Judge EAGLES and Judge TYSON concur.

Caswell Lee SUMMERLIN, Jr., Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY COMPANY, Defendant.

No. COA02–1679.

Court of Appeals of North Carolina.

Nov. 4, 2003.

Owner of property through which railroad had right-of-way filed suit to obtain private grade crossing over railroad tracks. The Superior Court, Beaufort County, William C. Griffin, Jr., J., granted railroad's motion for summary judgment. Property owner appealed. The Court of Appeals, Tyson, J., held that railroad was not required to construct, finance, or allow private grade