UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LL NJ, INC, a Michigan corporation, and LIFESTYLE LIFT HOLDING COMPANY, INC., a Michigan corporation

Plaintiffs,

v

NBC - Subsidiary (WCAU-TV), L.P., a Delaware Limited Partnership, NBC STATIONS MANAGEMENT II, Inc, a Delaware corporation, NBC STATIONS MANAGEMENT, INC, a Delaware Corporation, NBC UNIVERSAL, INC., a Delaware corporation, LU ANN CAHN, JOHN DOE 1 and JOHN DOE 2, AND LOUIS P. BUCKY, M.D., Individuals.

Defendants

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Case No. 2:06-cv-14312
Hon: David M. Lawson

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS PURSUANT TO FED. R. CIV. PRO. 12 (b)(6)

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. STATEMENT OF QUESTIONS PRESENTED AND MOST CONTROLLING AUTHORITIES

A. Questions Presented

1. Whether the Plaintiffs have stated a claim for violation of the New Jersey Wiretapping and Electronic Surveillance Control Act?

   Plaintiffs Answer – Yes.
   Defendants Answer – No.

2. Whether Plaintiffs have stated a claim for Trespass to Land?

   Plaintiffs Answer – Yes.
   Defendants Answer – No.

3. Whether Plaintiffs have stated a claim for violation of the Lanham Act?

   Plaintiffs Answer – Yes.
   Defendants Answer – No.

4. Whether Plaintiffs have stated claim for Defamation?

   Plaintiffs Answer – Yes.
   Defendants Answer – No.

B. Most Controlling Authorities

1. Motion to Dismiss

   Fed. R. Civ. Pro. 12(b)(6)

   Ziegler v. IBP Hog Mkt., Inc., 249 F.3d 509 (6th Cir. 2001)

2. Wiretap Act Claims

   N.J.S.A. 2A:156A-1 *et seq.*

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

   Hornberger v. ABC, 351 N.J. Super. 577 (App. Div. 2002)

3. Trespass Claims

   N.J. Stat. § 2C:18-3(b)

   Restat 2nd of Torts, §892B

Medical Laboratory Management Consultants v. ABC, 30 F. Supp 2d 1182 (D. Ariz. 1998)

Shiffman v. Empire Blue Cross and Blue Shield & CBS, 256 A.D.2d 131 (NY Supreme Court, 1st Department, 1998)

4. Lanham Act Claims.

15 USC §1125

Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 433-34, 113 S.Ct. 1505, 1519, 123 L.Ed.2d 99 (1993)

Semco Inc. v. AmCast, Inc. 52 F3d 108, 114 (6th Cir 1995)

5. Defamation Claims.

42 Pa.C.S. § 8343

Gertz v. Welch, 418 U.S. 323; 94 S.Ct. 2997; 41 L. Ed. 2d 789 (1974)

Ireland v. Edwards, 230 Mich. App. 607; 584 N.W. 2d 636 (1998)

Milkovich v. Lorain Journal Co., 497 U.S. 1; 110 S. Ct. 2695; 111 L. Ed.2d 1 (1990)

Norton v. Glenn, 580 Pa. 212, 229 (Pa. 2004)

Rouch v Enquirer & News of Battle Creek (After Remand), 440 Mich. 238; 487 N.W.2d 205 (1992)

I. INTRODUCTION

This matter arises from a purported "news story" published by Defendant, NBC 10 regarding a medical procedure performed under the registered trade name Lifestyle Lift.™ Plaintiffs allege that the NBC "news" story contains numerous false and defamatory statements regarding the Plaintiffs, their affiliated doctors, the procedure, and that Defendants engaged in unlawful wiretapping under New Jersey law, trespassed, violated the Lanham Act, and were defamatory. The NBC Defendants have moved to dismiss Plaintiffs' claims pursuant to Fed. R. Civ. Pro. 12(b)(6). However, as discussed below, the Defendants' Motion should be denied.[1]

II. FACTUAL BACKGROUND

Lifestyle Lift Holding, Inc. ("LSL") owns the Trademark, Lifestyle Lift.™ (the "Mark") The Plaintiff, LL NJ, Inc. ("LLNJ") is licensed by LSL to use the Mark. In the late part of summer 2006, Defendants began an "investigation" into the Lifestyle Lift™ procedure (the "Procedure") which included surreptitiously recording a visit by two purported patients at LLNJ's location;[2] traveling to Michigan to film a procedure and interview Dr. David Kent; interviewing two alleged former patients of LSL; and conducting an interview of Dr. Bucky. Upon learning that Defendants had surreptitiously recorded events at LLNJ's location, Plaintiffs filed this action to prevent Defendants from violating Plaintiffs' and its patients' privacy rights. Following the broadcast, Plaintiffs amended their complaint to add defendants and a claim for defamation. Since the story first aired, Defendants have published the "story" on its affiliate's websites and on MSNBC. Each publication is false and defamatory has caused irreparable harm to Plaintiffs

[1] To the extent that the Pleadings are found to be deficient, Plaintiffs seek leave to file a Second Amended Complaint, pursuant to Fed. R. Civ. Pro. 15(a) to correct such deficiencies.

[2] LSL and its affiliated locations have a policy against recording on their premises. Signs are posted and visitors are required to acknowledge and agree to this policy. (See, Ex. A, Recording Policy).

and their affiliated doctors (see Docket No, 19, Ex. B**,** Aff. of Dr. David Kent). Defendants have been placed on notice that their statements in the October 10, 2006 broadcast were both false and defamatory. (See, Id, Ex. C, G, & H),[3] yet continue to "stand by their reporting." [4]

The Procedure is a facelift involving the superficial musculoaponeurotic system ("SMAS") performed under local anesthesia. (See Docket No, 19, Ex. B**,** Aff. of Dr. Kent). It is a generally accepted plastic surgery technique. *Id.* [5] The Procedure is performed, in one fashion or another, by nearly every plastic and facial plastic surgeon in the United States, *including* Dr. Bucky.[6] The Lifestyle Lift™ is LSL's trademarked name for this surgery.

III. ARGUMENT

PLAINTIFFS HAVE ADEQUATELY STATED A CLAIM AGAINST DEFENDANTS; THEREFORE, DEFENDANTS' MOTION SHOULD BE DENIED

A. STANDARD OF REVIEW

A motion to dismiss pursuant to Rule 12(b)(6) requires the Court to construe the complaint in the light most favorable to the plaintiff, *Bloch v. Ribar*, 156 F.3d 673, 677 (6th Cir. 1998), accept all the complaint's factual allegations as true, *Bloch*, 156 F.3d at 677, and determine whether "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Ziegler v. IBP Hog Mkt., Inc.*, 249 F.3d 509, 511-12 (6th Cir. 2001). The Court must liberally construe the complaint in favor of the party opposing the motion and

[3] A transcript attached as Ex. B. A video of it is attached as Ex. B to Defendants Motion.
[4] The statement was made during a broadcast on November 2, 2006 and posted on NBC 10's website.
[5] See, Ex.'s C-F.
[6] See Ex. G, ["Facelifts range in size from ***"mini"*** to "standard" depending on location and extent of skin laxity. The operation is done typically on an ***outpatient basis under local anesthesia with sedation***, or under general anesthesia."] Dr. Kent avers that the Lifestyle Lift™ is the name for a "Mini" facelift as marketed by LSL. (See, Docket 19, Ex.. B, ¶ 8, Aff. of Dr. Kent).

may dismiss the case only where no set of facts could be proved consistent with the allegations which would entitle the plaintiff to a recovery. *Mille v. Currie,*, 50 F.3d 373, 377 (6th Cir. 1995).

B. PLAINTIFFS HAVE STATED A VALID CLAIM AGAINST DEFENDANTS FOR VIOLATING THE NEW JERSEY WIRETAPPING AND ELECTRONIC SURVEILLANCE CONTROL ACT.

N.J.S.A. 2A:156A-1 *et seq*.,("Wiretap Act") provides that any person who intercepts oral communication is guilty of a crime of the third degree. See N.J.S.A. 2A:156A-3. It also provides a private cause of action against violators. (*White v. White*, 344 N.J. Super. 211 (2001)). An exception to the Act exists when:

> A person not acting under color of law to intercept a wire, electronic or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception ***unless such communication is intercepted or used for the purpose of committing*** any criminal or ***tortious*** act in violation of the Constitution or laws of the United States or of this State ***or for the purpose of committing any other injurious act***. N.J.S.A. 2A156A-4 (d) (Emphasis added).

Defendants reference the language of the statute which requires either (1) that the person intercepting the communication is a party to the communication, or (2) that one of the parties to the communication has given prior consent. These provisions are well-settled. See, *State v. Lane*, 279 N.J. Super. 209 (App. Div. 1995).

Plaintiffs allege that Defendants surreptitiously recorded oral communications between medical staff and patients. (Docket No, 13, ¶22). Defendants were not a party to these conversations and no party involved consented. Recognizing this question of fact, Defendants state, *ipse dixit*, that Defendants only recorded those conversations in which they themselves participated. Plaintiffs disagree. Assuming Plaintiffs' allegations of fact to be true, Defendants interceptions violate the Wiretap Act. Further, while conversations of patients and the medical staff may not have been the primary focus of interception, this makes no difference, particularly in this age of electronic development, voice isolation and other enhancements to the original

recording make obtaining private patient information readily available. Because Defendants were not parties to all of the communications they intercepted, and because they did not obtain statutorily mandated consent, they violated the Wiretap Act. The issue the, is whether the non-consenting employees and patients had a reasonable expectation of privacy.

Some places provide a stronger expectation of privacy than others. Courts have generally determined that conversations which take place in enclosed, indoor rooms are protected. *People v. Leslie*, 939 P.2d 443, 447-48 (10th Cir. 1996); *Hornberger v. ABC*, 351 N.J. Super. 577 (App. Div. 2002). For example, courts have held that people who hold conversations in telephone booths (*Katz v. United States*, 389 U.S. 347, 353 (1967)), bar restrooms (*Leslie, supra)*, their homes (*Dietman v. Time*, 449 F.2d 245, 249 (9th Cir. 1971)), and offices (*United States v. Duncan*, 598 F.2d 839, 849-53 (4th Cir. 1979), *cert. denied*, 444 U.S. 871 (1979); *U.S. v. McIntyre*, 582 F.2d 1221, 1223 (9th Cir. 1978)) have reasonable expectations of privacy. On the other hand, people in a car stopped on a busy highway with all doors open (*Hornberger*, supra), an animal trainer in the curtained-off area of a stage (*PETA v. Bobby Berosini, Ltd.*, 895 P. 2d 1269 (Nev. 1995)), individuals in the public area of a grocery store (*Food Lion, Inc. v. Capital Cities/ABC, Inc*., 194 F.3d 505 (4th Cir. 1999)), and prisoners who are told that their conversations are monitored (*Kee v. City of Rowlett*, 247 F.3d 206, 211 (5th Cir.), *cert. denied*, 534 U.S. 892 (2001)) do not have such an expectation. Admittedly, there is no bright line rule. However, the court in *Hornberger, supra* at 572, enumerated several factors to consider when analyzing expectations of privacy under the Wiretap Act, including:

> (1) the volume of the communication or conversation; (2) the proximity or potential of other individuals to overhear the conversation; (3) the potential for communications to be reported; (4) the affirmative actions taken by the speakers to shield their privacy; (5) the need for technological enhancements to hear the communications; and (6) the place or location of the oral communications as it relates to the subjective expectations of the individuals who are communicating.

In this case, the conversations that Defendants intercepted took place in private or semi-private areas of a doctor's office. Plaintiffs took extraordinary measures to ensure patient and employee privacy when they prominently posted their company policy *prohibiting recording devices* of any kind on the premise. Further, Plaintiffs required *all patients* and employees to sign a document acknowledging the policy. Thus, the parties to the conversations clearly had a reasonable expectation of privacy.

Finally, the Wiretap Act prohibits interception for the purpose of a, "criminal or tortious act in violation of the Constitution or laws of the United States or of this State or for the purpose of committing any other injurious act." While most states prevent interception for the purpose of "criminal or tortious acts," few include the language, "for the purpose of committing any other injurious act." In this case, the Defendants taped conversations of patients and employees that were made in furtherance of the commission of a tort, including trespass to real property, commercial disparagement, and defamation, and were undertaken in the commission of an injurious act towards the Plaintiffs, to wit, injuring Plaintiffs' credibility and the credibility of their affiliated doctors. At minimum, Defendants' intent is a question of fact. (See, e.g. *West v. Farm Bureau*, 402 Mich 67, 70; 259 N.W.2d 556 (1977) [intent is a question of fact.]). Thus, Plaintiffs have stated a valid claim for violation of the Wiretap Act against the NBC Defendants.

C. PLAINTIFFS HAVE STATED A VALID TRESPASS CLAIM AGAINST DEFENDANTS.

The property here is private property. Members of the public may not simply enter the premises. Rather, they are subject to invitation. Each person who enters the premises agrees to certain restrictions on their activities while on the property, including compliance with LSL's

recording policy, which is posted on signs on the premises and is required to be acknowledged in writing. (See, Ex. A). N.J. Stat. § 2C:18-3(b) provides as follows:

> Defiant trespasser. A person commits a petty disorderly persons offense if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given by:
>
> (1) Actual communication to the actor; or
>
> (2) Posting in a manner prescribed by law or reasonably likely to come to the attention of intruders; or
>
> (3) Fencing or other enclosure manifestly designed to exclude intruders.

Pursuant to N.J. Stat. § 2C:18-3(d), a defendant has the burden of establishing that:

> (2) The structure was at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the structure.[7]

It is generally recognized in New Jersey that property owners have the right to exclude persons from their premises, even when the property is open to the public generally and may impose reasonable restrictions on access to their property. See, e.g. *Uston v. Resorts International, Inc*., 89 N.J. 163; 445 A.2d. 370 (1982). These Defendants' actions were in violation of the lawful conditions imposed on the property and therefore, any implied consent was vitiated by Defendants' violation of the Plaintiffs' reasonable condition of access.

1. The Restatement of Torts Supports Plaintiffs' Position**.**

Restat 2nd of Torts, §892B states:

> (1) Except as stated in Subsection (2), consent to conduct of another is effective for all consequences of the conduct and for the invasion of any interests resulting from it.
>
> (2) If the person consenting to the conduct of another is induced to consent by a substantial mistake concerning the nature of the invasion of his interest or the extent of the harm to

[7] One of the conditions was an agreement not to make audio or video recordings on the premise. New Jersey has recognized that there is no "constitutional right" to videotape governmental proceedings, let alone matters on private property. See, *Tarus v. Pine Hill*, 381 N.J. Super. 412; 886 A.2d 1056 (2005); cert. granted at 186 N.J. 255, 893 A.2d 722 (2006).

> be expected from it and the mistake is known to the other or is **induced by the other's misrepresentation, the consent is not effected** for the unexpected invasion or harm. (emphasis provided.)

As explained in Comment d, *Mistake known to the actor*, "If the actor is aware that the consent is given under a substantial mistake… the actor is not entitled to rely on the consent given. Similarly, as explained in Comment h, when consent is obtained through misrepresentation, "the other may have a cause of action for the misrepresentation itself… but he may also treat the consent as invalid and maintain any tort action open to him in the absence of consent."

2. Caselaw on Trespass Claims from Sister Circuits Supports Plaintiffs' Position.

While Defendants suggest that *Desnick v. ABC*, 44 F.3d 1345 (7th Cir. 1995), is the seminal case regarding reporter trespass and imply that the law on the matter is clear, that position is mistaken. Rather the courts vary widely in their treatment of these issues and their decisions are fact specific.

In *Desnick*, the court held that defendant ABC did not trespass when entering plaintiffs' clinic with hidden cameras while posing as potential patients. There, the defendants were producing a program on Medicare fraud, including allegations that plaintiffs were performing unnecessary surgeries on them. The court held that plaintiffs' defamation claim should have survived and that plaintiffs may have a claim for breach of contract. It then analyzed the trespass claim. Noting that, "the lines [between misrepresentations vitiating consent and those that do not] are not bright – they are not even inevitable (*Id.* at 1352)." The Court then opined:

> To enter upon another's land without consent is trespass. The force of the rule has, it is true, been diluted somewhat by concepts of privilege and of implied consent. But there is no journalists' privilege to trespass. And there can be no implied consent in any nonfictitious sense of the terms when express consent is procured by misrepresentation or a misleading omission. *Id.* at 1351, (internal citations omitted.)

While holding that the defendants did not trespass when they went into the clinic, the court did so only after noting several key facts, including that no embarrassingly intimate details of anybody's life were publicized, no violation of physician/patient privilege occurred, that there was no eavesdropping on a private conversation, and that the only conversations that were recorded those with defendants. *Id.* at 1352-3.

Desnick has been criticized and/or distinguished in other cases. For example, in *Medical Laboratory Management Consultants v. ABC*, 30 F. Supp 2d 1182 (D. Ariz. 1998), the court held that defendant trespassed on plaintiffs' property when a reporter posed as an entrepreneur eager to learn about the industry and as someone capable of bringing the plaintiffs business. There, the reporter was investigating error rates in PAP smear testing. The plaintiffs led defendants to a conference room and gave a tour of the facilities. He never discussed confidentiality with defendants. *Id*. at 1186. When plaintiffs found out about the secret recordings, they filed suit. In ruling on whether plaintiffs' trespass claim survived summary judgment, the court, citing Restat 2nd of Torts, §892B, held:

> If the plaintiff is induced to consent [to defendant's presence of plaintiff's private property] by a substantial mistake concerning the nature of the invasion of his interests or the extent of harm to be expected from it and the mistake is known to the other or is induced by the other's misrepresentation, the consent is not effective. … Thus, the question is whether Defendants' failure to inform [plaintiff] of the real purpose of their presence at Medical Lab vitiates the consent given by [plaintiff]. *Id*. at 1201-1202, (internal citations omitted.)

After noting the defendants' reliance on *Desnick*, the court stated, "the Seventh Circuit's formula for determining whether a plaintiff's interest in ownership or possession of land has been cannot easily be embraced… [t]he Seventh Circuit's analysis does not withstand close scrutiny." *Id*. at 1202. After pointing out other shortcomings of the *Desnick* holding, the court noted, "[i]t is unclear whether the outcome in *Desnick* would have been the same if the videotaping had

taken place in a semi-private office, as in the instant case, rather than a public eye clinic." *Id*. at 1203, n. 22.

In *Shiffman v. Empire Blue Cross and Blue Shield & CBS*, 256 A.D.2d 131 (NY Supreme Court, 1st Department, 1998), the court held that defendants trespassed on plaintiff's private medical office when the reporter posed as a potential patient. In doing so, it noted, "defendants' affirmative defenses based on consent and implied consent to enter the premises were legally insufficient since consent obtained by misrepresentation or fraud is invalid." *Id*. at 131. (internal citations omitted.) Several other cases discuss trespass by undercover reporters and the effect of misrepresentation on consent. For example, the court in *Food Lion Inc v. Capital Cities/ABC, Inc*, 194 F.3d 505 (4th Cir. 1999), held that defendant reporters who obtained jobs with a Food Lion grocery store exceeded the scope of that permission by using hidden cameras on the job. The court held that since Food Lion had not consented to defendants' presence for the purpose of recording footage, their presence in the nonpublic areas constituted trespass.

In this case, Defendants' presence in Plaintiffs' offices constitute trespass and are distinguishable from *Desnick*. The offices in that case were public clinics, *Medical Laboratory Management, supra* at 1203, fn 22; whereas, Plaintiffs' offices in the instant case are private/semi-private. Individuals wishing Plaintiffs' services are invited to the premises, interviewed, evaluated, and are assured the strictest confidence regarding their medical treatment. This is hardly a "public-eye clinic." For these reasons, the facts presented in the instant case more closely resemble those of *Medical Laboratory Management Consultants* and *Shiffman, supra*. As in *Food Lion, supra*, the Defendants' surreptitious tapings took place in non-public areas of Plaintiffs' property, without Plaintiffs' consent, and in violation of its policies regarding entry onto the property. Further, the recordings violated the patients' and the Plaintiffs' rights to

privacy and the right to control access to their property. Lastly, Defendants eavesdropped on private conversations, without consent. Thus, Plaintiffs state a valid trespass claim against Defendants.

3. Defendants' Trespass Caused Damage.

While the court in *Medical Laboratory* held that plaintiffs' claim should be dismissed because they failed to show any damage resulting from defendants' trespass, the same is not true here. Assuming, *arguendo*, that Plaintiffs cannot prove actual damages, their claim still survives. In *Nappe v. Anschelewitz*, 97 N.J.Super. 37, 477 A.2d 1224 (1984), the court held that a plaintiff must only prove *nominal damages* for a trespass claim to survive. The court in *Nappe* explained, "the general rule is that whenever there is… an invasion of a legal right, the law ordinarily infers that damage ensued and, in the absence of actual damages, the law vindicates the right by awarding nominal damages." *Id.* at 45-6, citing *Spiegel v. Evergreen Cemetary Co.*, 117 N.J.L. 90, 93-4 (Sup.Ct. 1926). Similarly, in this case, Plaintiffs are entitled to receive, at the very least, nominal damages and injunctive relief against the use of the footage obtained by Defendants. Hence, Plaintiffs have stated a valid trespass claim the Motion should be denied.

D. PLAINTIFFS HAVE STATED A VALID LANHAM ACT CLAIM

There are multiple acts of false or misleading representations of facts alleged implicating multiple Defendants under the Lanham Act. It is not disputed that Dr. Bucky is in direct competition with Plaintiffs (see, Ex. G, Dr. Bucky's website) or that Dr. Bucky's statements constitute commercial speech, and are thus actionable under the Lanham Act. *Semco Inc. v. AmCast, Inc*. 52 F3d 108, 114 (6th Cir 1995); see also, *Fuente Cigar, Ltd v. Opus One*, 985 F. Supp. 1448, 1454-6 (MD FL. 1997). Thus, the Lanham Act claims cannot be dismissed at this

stage as to Dr. Bucky. The question of dismissing the Lanham Act Count as to the NBC Defendants is admittedly a closer issue but one that is fact intensive. There are two chief issues:

1) the legal issue of interpreting "commercial advertising or promotion" governed by §43 (a)(1)(B) of the Lanham Act (15 USC §1125).

2) the factual issue of whether the accused acts constitute "commercial advertising or promotion."[8]

Examination of the specific facts is critical. Defendants aired a segment which they characterize as "news," but which is more honestly characterized as entertainment. The commercial nature of "television ratings" and advertising dollars for entertainment moves this away from the more important concern of restricting political speech. Instead the court must balance the public interest in being entertained with protecting the public from false and misleading commercial speech. At least three acts are complained of:

1) NBC 10's broadcast of its "investigative report" which conveyed a misleading impression regarding Plaintiffs' advertising and contained false statements regarding its services;

2) NBC 10's advertising pieces ("teasers") which falsely conveyed a negative impression of Plaintiffs' services for the specific purpose of attracting viewers; and

3) NBC 10's website, which allows Defendants to utilize Plaintiffs' trademarks to increase site traffic, and thus its advertising revenue.

At a minimum, the NBC Defendants published advertising spots utilizing the Mark. NBC was trading upon the fame of the Mark for the commercial purposes – which is directly related to its sale of advertising space. Thus, NBC's commercial use of the Mark is subject to the Lanham Act.

A. Commercial Advertising or Promotion

The NBC Defendants would improperly limit the Lanham Act count to "false advertising." However, the Lanham Act is not so limited, and is designed to protect consumers from

[8] Determination of Constitutional facts is appropriate for jury. *Winstead v. Sweeney*, 205 Mich. App. 664, 675, 517 NW2d 874 (1994).

commercial misrepresentations regarding goods or services. Here, Plaintiffs invoke the Lanham Act to protect consumers from NBC's misrepresentations. The issue before the Court is not whether they were misrepresentations; the issue is whether the misrepresentations are governed by the Lanham Act. The Lanham Act applies to misrepresentations of "goods, services or commercial activities" made in "commercial advertising or promotion." (15 USC §1115 (a)(1)(B)). Not surprisingly, the NBC Defendants cite a district court case which interprets the statute narrowly – *Gordon and Breach Science Publishers S.A. v. American Institute of Physics*, 859 F.Supp 1521, 1533 (SD NY 1994). What the NBC Defendants fail to mention is that the court in *Gordon* and *Breach* cited only a portion of the legislative history from the House of Representatives, and that that portion conflicts with the legislative history from the Senate which interpreted §43(a) much more expansively. In *Semco*, the Sixth Circuit accepted the Senate's interpretation of the Lanham Act, noting the broader intention to protect consumers any time there is a misrepresentation relating to goods and services, excluding only political speech.

B. The Commercial Promotion

There is no real dispute that the statements at issue are misrepresentations regarding Plaintiffs' services or advertising. The factual issue is whether Defendants' acts comprise "commercial advertising or promotion."

1) "Investigative Report"

Under *Semco*, the misrepresentations are actionable. Plaintiffs maintain that the commercial nature and intent was to boost ratings and sell advertising. The "news" was merely a pretext to trade off the Mark, which the NBC Defendants had earlier traded upon in promoting the Procedure under the guise of "news." It is clear that the NBC Defendants were involved in commercial

promotion. Declaring the broadcast to be "commercial promotion" does not rob it of its constitutional protection, it merely provides a remedy if the broadcast is misleading.

2) Promos or Teasers

The advertisements for the report contained misleading statements and constitute discrete violations of the Lanham Act. The NBC Defendants aired at least two spots to increase the viewership of the entire broadcast, not just the report. Advertisements of constitutionally protected works can be unprotected commercial speech. See e.g. *Keimer v. Buena Vista Books, Inc.*, 75 Cal. App 4th 1220, 1229-31, 89 Cal Rptr 781, 787-8 (2000) (Book is protected expression, but book cover constitutes commercial speech). Even if the Court is to find that the report falls outside the scope of the Lanham Act, the advertisements for the report are separate acts which do fall within the Lanham Act. As discussed in *Keimer*, labeling such statements as commercial speech does not strip the statements of all free speech protection, it merely limits those protections. 89 Cal Rptr2d at 788. False commercial speech is entitled to no protection *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 433-34, (1993) (Blackmun, J., concurring). The advertisements, or promos or teasers, contained misrepresentations regarding Plaintiffs' services or advertising, thus constitute independent grounds for the Lanham Act count.

3) Web Page

The NBC Defendants continue to publish the story by posting a video and transcript on its website. This site bears at least 10 paid advertisements and a self-promotional banner including highlights from upcoming programming. (See, Ex. B). While this may have informational purposes, there is clearly a commercial purpose to the site, and falls within the "commercial promotion" governed by the Lanham Act. In addition to repeating the misrepresentations regarding Plaintiffs' services, publication of the transcript of the report results in an unfair use of

Plaintiffs' Mark that exceed an informative "news" use of the trademarks. The dozens of references to the Mark in the transcript will elevate that web page in most search engine results for "Lifestyle Lift" and thus generate more "hits" for the website by people searching for "Lifestyle Lift.

Plaintiffs have stated a valid claim under the Lanham Act and therefore dismissal of Plaintiffs' claims pursuant to Fed. R. Civ. Pro. 12(b)(6) should be denied.

E. PLAINTIFFS HAVE STATED A VALID DEFAMATION CLAIM.

Plaintiffs have asserted a valid defamation claim, alleging that certain statements made in the course of the broadcast and in its subsequent publications were both false and defamatory.[9] Defendants argue that the statements at issue are "protected opinion" and therefore are not defamatory. However, the statements at issue are facts and there is no separate constitutional privilege for "opinion" nor is one required "to ensure the freedom of expression guaranteed by the First Amendment." *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 19-20 (1990); See also, *Braig v. Field Communications,* 310 Pa. Super. 569 (Pa. Super. Ct. 1983); *Restat 2d of Torts*, § 566. ("A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion).

1. Fact v. Opinion

A fact is "something that can be shown to be true, to exist, or to have happened." Encarta, World English Dictionary, North American Edition, © & (P) 1998-2003 Microsoft Corporation. Put another way, a fact is "An actual or alleged event or circumstance, as distinguished from its

[9] Defendants assert that the Plaintiffs must allege each defamatory statement with particularity. That statement is inaccurate as such statements may be alleged *generally*. See, e.g., *Suarez Corp. v. CBS, Inc.*, 23 F.3d 408, 5 (Table) (6th Cir. 1994); [Defamation may be alleged generally].

legal effect, consequence or interpretation." Black's Law Dictionary, Eighth Edition, West Publishing Co, St. Paul, Minnesota, 2004, Pg. 628. On the other-hand, an Opinion is "the view somebody takes about a certain issue, especially when it is based solely on personal judgment." Encarta, supra. An opinion is "A person's thought belief, or inference." Black's Law Dictionary, supra, at Pg. 1126.

2. The alleged defamatory statements are statements of fact, not opinion.

In an attempt to obtain dismissal of this action, Defendants argue that Dr. Bucky's statements are opinions. That is simply untrue. Rather, the statements by Dr. Bucky are facts, provable as false. The Supreme Court has "consistently viewed the determination of truth or falsity in defamation cases as a purely factual question which should generally be left to the jury." *Ireland v. Edwards*, 230 Mich. App. 607, 621; 584 N.W. 2d 636 (1998). It is also "for a jury to decide what insinuation or implication can reasonably be drawn from the broadcasts." *Sobeck v. Northeastern TV*, 2005 Pa. Dist. & Cnty. Dec. Lexis 408 (Pa. C.P. 2005). It is initially for the trial court to determine whether a challenged communication is *capable* of a defamatory meaning. *Green v. Mizner*, 692 A.2d 169, 172 (Pa. Super. 1997). When making this determination, the court must look at the communication as a whole, not merely at specific words or phrases. *Id; see also, Baker v. Lafayette College,* 532 A.2d 399, 402 (1987). If there is any interpretation which could be construed as defamatory, the question must be sent to the jury. *Gordon v. Lancaster Ost. Hosp. Ass.*, 489 A.2d 1364, 1374 (1985).

"A person's interest in his or her reputation has been placed in the same category with life, liberty and property." *Norton v. Glenn*, 580 Pa. 212, 229 (Pa. 2004) Thus, "the constitutional interest in providing for the free flow of information was not so absolute that it granted 'a license to the media to use information recklessly and/or maliciously to destroy the reputation of a

citizen.' Rather, a balance must be struck between these two constitutional rights." *Id.*, (citations omitted). Thus, in the area of the law where defamation actions and free expression rights intersect, the courts cannot focus myopically on the preservation of free expression. *Norton*, supra at 225.

a. The statement that the Lifestyle Lift™ "is a procedure that was basically discarded in the 1970's because it only gives temporary results."

This statement contains two distinct statements of fact. First, is that the Lifestyle Lift is a "procedure that was basically discarded in the 1970's." Second, is that the procedure "only gives temporary results." These statements can be proven true or false. Either the procedure was disregarded in the 1970's by plastic surgeons or it was not.[10] If it can be proven that plastic surgeons have not disregarded this procedure, then the statements are false. As noted in the Aff. of Dr. Kent and literature (See, Ex.'s C-F), as well as on Dr. Bucky's own website, (See, Ex. G) the procedure is a generally accepted medical technique, presently employed by plastic surgeons. Likewise, the statement that the procedure only gives temporary results can likewise be proven false. The statements are of fact and are actionable.

b. That the Lifestyle Lift™ "might work fine for about 5% of patients."

This statement is one of fact, not opinion. First, it implies knowledge of undisclosed facts, including knowledge of the patients, their medical history, and their results. Second, it implies knowledge of the Procedure, a procedure which Dr. Bucky suggests is "out-dated," "not real," "discarded," and only gives "temporary results." Lastly, this statement suggests that for 95% of Lifestyles' patients, (not people in general) the surgery would not work and implies that for 95% of Lifestyle's patients, unnecessary and inappropriate surgery was performed. This statement is one of fact and is defamatory.

[10] Plaintiffs' assert that the procedure was not developed until the 1990's.

c. That "if this operation was real and truly worked than *far more qualified physicians* would all be doing that."

This statement is a statement of fact, which makes three separate factual assertions. First, it asserts the operation is not "real." Second, it asserts that the operation does not work. Lastly it asserts that "far more qualified physicians" do not perform the procedure.

Defendants assert that the surgery is not real. However, as noted in Ex. C-F, the surgery is well recognized in the literature and is a surgery that Dr. Bucky performs. Dr. Kent avers that the procedure a generally accepted plastic surgery procedure. (See, Docket 19, Ex. B, Aff. of Dr. Kent, ¶ 8 and 9(b)).

The second statement, that the surgery does not work, is a statement of fact. This statement is not made in reference to a particular patient, but rather as an unqualified reference to the Procedure. Thus, it is asserted that at all times and in all circumstances, the surgery does not work. This statement is false, as the procedure is one generally accepted in the literature, is performed by numerous plastic surgeons throughout the United States (including Dr. Bucky), and has a success rate far more favorable than that reported in the literature. (See, Docket 19, Ex. B, Aff. of Dr. Kent, ¶ 8 and 9).

The final statement that "far more qualified surgeons" would be performing the surgery is also a statement of fact, or at minimum, is a statement of opinion which implies the knowledge of undisclosed defamatory facts. To this end, the statement presumes that Dr. Bucky knows the qualifications of each surgeon who performs the procedure, has evaluated their qualifications, weighed their qualifications against physicians who do not perform the surgery, and that he has determined that there are more qualified physicians do not perform the surgery because the procedure is not real and does not work. These statements may be proven false. For example, these statements may be measured by comparing the qualification of the physicians who perform

the surgery against those who do not and then the overall statement can be tested by determining whether these "more qualified surgeons do not perform the surgery because it is not real and does not work or for some other reason. Thus, this statement is one of fact.

Likewise, the statement by a patient, published by Defendants, that "[t]hey take your skin and roll it up and stick it behind your ear, which they tell you will be gone is two months" is a statement of fact. Either Plaintiffs say and do those things or they do not. Thus, it is a statement of fact and is defamatory.

d. That the Plaintiffs performed surgery without the informed consent of the patients.

In the "story" Defendants assert that on two occasions LSL's affiliated doctors performed surgery without the patient's informed consent. (See, Docket 19, Ex. A, pg. 5). These statements are factual in nature. Either the women were presented and executed informed consent forms or they were not.[11] Performing surgery without a patient's informed consent is a battery, *Stalsitz v. Allentown Hospital,* 2002 Pa. Super. 416 (Pa. Super. Ct. 2002), and a violation of law. See, 40 P.S. § 1303.504. The statement is also one of fact, is defamatory and thus, is actionable.

e. Implying that Lifesyle's doctors are guilty of malpractice.

The "story" also suggests that Plaintiffs' committed malpractice. Dr. Bucky states, "In my ten years of practice, I've never seen keloid scars or sutures coming through." This statement is one of fact, not opinion. Either Dr. Bucky has or has not seen a keloid scar or sutures coming though following a mini-face lift or he has not.[12] It is also a statement, by its direct implication, which has a defamatory meaning – that is that the doctor committed medical malpractice. Under Pennsylvania law, to establish a claim of medical malpractice, a person asserting such a claim against a physician must "establish a duty owed by the physician to the patient, a *breach of that*

[11] Defendants have been provided signed consents; yet they continue to publish this story.
[12] The patients were advised of theses risks. (See e.g., Docket No. 19, Ex. F, Pg. 2).

duty by the physician, that the breach was the proximate cause of the harm suffered, and the *damages suffered were a direct result of the harm*." *Toogood v. Owen J. Rogal, D.D.S., P.C.* 824 A.2d 1140, 1145 (Pa. 2003). Because the negligence of a physician encompasses "matters not within the ordinary knowledge and experience of laypersons, a medical malpractice plaintiff must present expert testimony to establish the applicable standard of care, the deviation from that standard, causation and the extent of the injury." *Id.* Yet, despite implying that Lifestyle's doctor committed malpractice, no doctor has stated that any Lifestyle doctor *breached the standard of care*. Nor did any Dr. Bucky examine a patient or her medical records and come to the conclusion that a LSL surgeon committed malpractice. Implying that a doctor is guilty of malpractice is defamatory. See, e.g. *Peckham v. University of Pa.*, 199 Pa. Dist & County, Dec. Lexis 1974 (Pa. C.P. 1999) and may be proven true or false.

3. Plaintiffs have alleged a viable claim for Defamation

The Supreme Court has "consistently viewed the determination of truth or falsity in defamation cases as a purely factual question which should generally be left to the jury." *Ireland*, supra at 621; see also, *Kryeski v. Schott Glass Tech.*, 626 A.2d 595 (Pa. Super. 1993). *Baker v. Lafayette College*, 516 Pa. 291, 532 A.2d 399 (1987). The meaning of a statement which is alleged to be defamatory is that meaning, which, under the circumstances, a reasonable person who hears or sees the statement, reasonably understands the meaning intended. *Ellis v. Whitehead*, 95 Mich App 105 (1983); *Baker v. Lafayette College*, 516 Pa. 291, 532 A.2d 399 (1987). A communication is considered defamatory if it tends to harm the reputation of another so as to lower her in the estimation of the community or to deter third persons from associating or dealing with her. *MacElree v. Philadelphia Newspapers, Inc.*, 674 A.2d 1050 (1996); *Ireland*, supra at 614. [A] communication which ascribes to another conduct, character or a condition that

would adversely affect his fitness for the proper conduct of his business, trade, or profession**,** is defamatory per se… . *Bochetto v. Gibson,* 2006 Phila. Ct. Com. Pl. Lexis 310 (Phila. Com. P. 2006). If the Court has any doubt that the communication is defamatory, then the issue must be given to the jury. *Gordon v. Lancaster Osteopathic Hosp. Ass'n*, 340 Pa. Super. 253, 261 (1985).

A cause of action for defamation by implication also exists, but only if the plaintiff proves that the defamatory *implications* are materially false**,** and (2) that such a cause of action might succeed even without a direct showing of any actual literally false statements. *Hawkins v. Mercy Health Center,* 230 Mich. App. 315, 330; 583 N.W.2d 725 (1998); See also, *Dunlap v. Philadelphia Newspapers, Inc.*, 301 Pa. Super. 475, 493 (1982). Implying that a doctor is guilty of malpractice, performs unwarranted surgery, which is not real and for which the surgeon is not qualified and without informed consent, are defamatory, as such statements tend to harm the doctor's reputation and lower his or her professional esteem and esteem in the community. See, e.g. *Peckham, supra*; *Baker v. Lafayette College*, 532 A.2d 399, 402 (1987); *Corabi v. Curtis Pub. Co*., 441 Pa. 432, 442 (Pa. 1971). Similarly, an implication that a company engages in unfair and deceptive trade practices, are accusations of a crime, which are per-se defamatory. Thus, Plaintiffs have alleged a viable cause of action for Defamation.

IV. CONCLUSION

Plaintiffs respectfully request that this Honorable Court deny Defendants' Motion to Dismiss.

Respectfully Submitted,

Dated: November 28, 2006

s/ Allan S. Rubin

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on November 28, 2006 he/she did cause to be served a true and correct copy of Plaintiffs' Response to Motion to Dismiss Pursuant to Fed. R. Civ. Pro. 12 (b)(6) by electronic means through the ECF system as indicated on the Notice of Electronic Filing on:

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