44 F.3d 1345
United States Court of Appeals,
Seventh Circuit.

J.H. DESNICK, M.D., Eye Services, Limited; Mark A. Glazer; and George V. Simon, Plaintiffs–Appellants,
v.
AMERICAN BROADCASTING COMPANIES, INCORPORATED; Jon Entine; and Sam Donaldson, Defendants–Appellees.

No. 94–2399. | Argued Nov. 1, 1994. | Decided Jan. 10, 1995.

Opinion

POSNER, Chief Judge.

The plaintiffs—an ophthalmic clinic known as the "Desnick Eye Center" after its owner, Dr. Desnick, and two ophthalmic surgeons employed by the clinic, Glazer and Simon—appeal from the dismissal of their suit against the ABC television network, a producer of the ABC program *PrimeTime Live* named Entine, and the program's star reporter, Donaldson. The suit is for trespass, defamation, and other torts arising out of the production and broadcast of a program segment of *PrimeTime Live* that was highly critical of the Desnick Eye Center...

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In March of 1993 Entine telephoned Dr. Desnick and told him that *PrimeTime Live* wanted to do a broadcast segment on large cataract practices. The Desnick Eye Center has 25 offices in four midwestern states and performs more than 10,000 cataract operations a year, mostly on elderly persons whose cataract surgery is paid for by Medicare. The complaint alleges—and in the posture of the case we must take the allegations to be true, though of course they may not be—that Entine told Desnick that the segment would not be about just one cataract practice, that it would not involve "ambush" interviews or "undercover" surveillance, and that it would be "fair and balanced." Thus reassured, Desnick permitted an ABC crew to videotape the Desnick Eye Center's main premises in Chicago, to film a cataract operation "live," and to interview doctors, technicians, and patients. Desnick also gave Entine a videotape explaining the Desnick Eye Center's services.

Unbeknownst to Desnick, Entine had dispatched persons equipped with concealed cameras to offices of the Desnick Eye Center in Wisconsin and Indiana. Posing as patients, these persons—seven in all—requested eye examinations. Plaintiffs Glazer and Simon are among the employees of the Desnick Eye Center who were secretly videotaped examining these "test patients."

The program aired on June 10. Donaldson introduces the segment by saying, "We begin tonight with the story of a so-called 'big cutter,' Dr. James Desnick.... [I]n our undercover investigation of the big cutter you'll meet tonight, we turned up evidence that he may also be a big charger, doing unnecessary cataract surgery for the money." Brief interviews with four

patients of the Desnick Eye Center follow. One of the patients is satisfied ("I was blessed"); the other three are not—one of them says, "If you got three eyes, he'll get three eyes." Donaldson then reports on the experiences of the seven test patients. The two who were under 65 and thus not eligible for Medicare reimbursement were told they didn't need cataract surgery. Four of the other five were told they did. Glazer and Simon are shown recommending cataract surgery to them. Donaldson tells the viewer that *PrimeTime Live* has hired a professor of ophthalmology to examine the test patients who had been told they needed cataract surgery, and the professor tells the viewer that they didn't need it—with regard to one he says, "I think it would be near malpractice to do surgery on him." Later in the segment he denies that this could just be an honest difference of opinion between professionals.

An ophthalmic surgeon is interviewed who had turned down a job at the Desnick Eye Center because he would not have been "able to screen who I was going to operate on." He claims to have been told by one of the doctors at the Center (not Glazer or Simon) that "as soon as I reject them [i.e., turn down a patient for cataract surgery], they're going in the next room to get surgery." A former marketing executive for the Center says Desnick took advantage of "people who had Alzheimer's, people who did not know what planet they were on, people whose quality of life wouldn't change one iota by having cataract surgery done." Two patients are interviewed who report miserable experiences with the Center—one claiming that the doctors there had failed to spot an easily visible melanoma, another that as a result of unnecessary cataract surgery her "eye ruptured," producing "running pus." A former employee tells the viewer that Dr. Desnick alters patients' medical records to show they need cataract surgery—for example, changing the record of one patient's vision test from 20/30 to 20/80—and that he instructs all members of his staff to use pens of the same color in order to facilitate the alteration of patients' records.

One symptom of cataracts is that lights of normal brightness produce glare. Glazer is shown telling a patient, "You know, you're getting glare. I would say we could do significantly better [with an operation]." And Simon is shown asking two patients, "Do you ever notice any glare or blurriness when you're driving, or difficulty with the signs?" Both say no, and immediately Donaldson tells the viewer that "the Desnick Center uses a very interesting machine, called an auto-refractor, to determine whether there are glare problems." Donaldson demonstrates the machine, then says that "Paddy Kalish is an optometrist who says that when he worked at the Desnick clinic from 1987 to 1990, the machine was regularly rigged. He says he watched a technician tamper with the machine, this way"—and then Kalish gives a demonstration, adding, "This happened routinely for all the older patients that came in for the eye exams." Donaldson reveals that Dr. Desnick has obtained a judgment against Kalish for defamation, but adds that "Kalish is not the only one to tell us the machine may have been rigged. PrimeTime talked to four other former Desnick employees who say almost everyone failed the glare test."...

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[Plaintiff claims] that the defendants committed a trespass in insinuating the test patients into the Wisconsin and Indiana offices of the Desnick Eye Center, that they invaded the right of privacy of the Center and its doctors at those offices (specifically Glazer and Simon), that they

violated federal and state statutes regulating electronic surveillance, and that they committed fraud by gaining access to the Chicago office by means of a false promise that they would present a "fair and balanced" picture of the Center's operations and would not use "ambush" interviews or undercover surveillance.

To enter upon another's land without consent is a trespass. The force of this rule has, it is true, been diluted somewhat by concepts of privilege and of implied consent. But there is no journalists' privilege to trespass. *Prahl v. Brosamle,* 98 Wis.2d 130, 295 N.W.2d 768, 780–81 (App.1980); *Le Mistral, Inc. v. Columbia Broadcasting System,* 61 A.D.2d 491, 402 N.Y.S.2d 815 (1978). And there can be no implied consent in any nonfictitious sense of the term when express consent is procured by a misrepresentation or a misleading omission. The Desnick Eye Center would not have agreed to the entry of the test patients into its offices had it known they wanted eye examinations only in order to gather material for a television exposé of the Center and that they were going to make secret videotapes of the examinations. Yet some cases, illustrated by *Martin v. Fidelity & Casualty Co.,* 421 So.2d 109, 111 (Ala.1982), deem consent effective even though it was procured by fraud. There must be *something* to this surprising result. Without it 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 the dealer's showroom. Some of these might be classified as privileged trespasses, designed to promote competition. Others might be thought justified by some kind of implied consent—the restaurant critic for example might point by way of analogy to the use of the "fair use" defense by book reviewers charged with copyright infringement and argue that the restaurant industry as a whole would be injured if restaurants could exclude critics. But most such efforts at rationalization would be little better than evasions. The fact is that consent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him for perfectly understandable and generally ethical or at least lawful reasons to revoke his consent.

The law's willingness to give effect to consent procured by fraud is not limited to the tort of trespass. The *Restatement* gives the example of a man who obtains consent to sexual intercourse by promising a woman $100, yet (unbeknownst to her, of course) he pays her with a counterfeit bill and intended to do so from the start. The man is not guilty of battery, even though unconsented-to sexual intercourse is a battery. *Restatement (Second) of Torts* § 892B, illustration 9, pp. 373–74 (1979). Yet we know that to conceal the fact that one has a venereal disease transforms "consensual" intercourse into battery. *Crowell v. Crowell,* 180 N.C. 516, 105 S.E. 206 (1920). Seduction, standardly effected by false promises of love, is not rape, *Pletnikoff v. State,* 719 P.2d 1039, 1043 (Alaska App.1986); intercourse under the pretense of rendering medical or psychiatric treatment is, at least in most states. Compare *State v. Tizard,* 1994 WL 630498, *8–10 (Tenn.Crim.App. Nov. 10, 1994), with *Boro v. Superior Court,* 163 Cal.App.3d 1224, 210 Cal.Rptr. 122 (1985). It certainly is battery. *Bowman v. Home Life Ins. Co.,* 243 F.2d 331 (3d Cir.1957); *Commonwealth v. Gregory,* 132 Pa.Super. 507, 1 A.2d 501 (1938). Trespass presents close parallels. If a homeowner opens his door to a purported meter reader who is in fact nothing of the sort—just a busybody curious about the interior of the home—the homeowner's

consent to his entry is not a defense to a suit for trespass. See *State v. Donahue,* 93 Or.App. 341, 762 P.2d 1022, 1025 (1988); *Bouillon v. Laclede Gaslight Co.,* 148 Mo.App. 462, 129 S.W. 401, 402 (1910). And likewise if a competitor gained entry to a business firm's premises posing as a customer but in fact hoping to steal the firm's trade secrets. *Rockwell Graphic Systems, Inc. v. DEV Industries, Inc.,* 925 F.2d 174, 178 (7th Cir.1991); *E.I. duPont deNemours & Co. v. Christopher,* 431 F.2d 1012, 1014 (5th Cir.1970).

How to distinguish the two classes of case—the seducer from the medical impersonator, the restaurant critic from the meter-reader impersonator? The answer can have nothing to do with fraud; there is fraud in all the cases. It has to do with the interest that the torts in question, battery and trespass, protect. The one protects the inviolability of the person, the other the inviolability of the person's property. The woman who is seduced wants to have sex with her seducer, and the restaurant owner wants to have customers. The woman who is victimized by the medical impersonator has no desire to have sex with her doctor; she wants medical treatment. And the homeowner victimized by the phony meter reader does not want strangers in his house unless they have authorized service functions. The dealer's objection to the customer who claims falsely to have a lower price from a competing dealer is not to the physical presence of the customer, but to the fraud that he is trying to perpetuate. The lines are not bright—they are not even inevitable. They are the traces of the old forms of action, which have resulted in a multitude of artificial distinctions in modern law. But that is nothing new.

There was no invasion in the present case of any of the specific interests that the tort of trespass seeks to protect. The test patients entered offices that were open to anyone expressing a desire for ophthalmic services and videotaped physicians engaged in professional, not personal, communications with strangers (the testers themselves). The activities of the offices were not disrupted, as in *People v. Segal,* 78 Misc.2d 944, 358 N.Y.S.2d 866 (Crim.Ct.1974), another case of gaining entry by false pretenses. See also *Le Mistral, Inc. v. Columbia Broadcasting System, supra,* 402 N.Y.S.2d at 81 n. 1. Nor was there any "inva[sion of] a person's private space," *Haynes v. Alfred A. Knopf, Inc., supra,* 8 F.3d at 1229, as in our hypothetical meter-reader case, as in the famous case of *De May v. Roberts,* 46 Mich. 160, 9 N.W. 146 (1881) (where a doctor, called to the plaintiff's home to deliver her baby, brought along with him a friend who was curious to see a birth but was not a medical doctor, and represented the friend to be his medical assistant), as in one of its numerous modern counterparts, *Miller v. National Broadcasting Co.,* 187 Cal.App.3d 1463, 232 Cal.Rptr. 668, 679 (1986), and as in *Dietemann v. Time, Inc.,* 449 F.2d 245 (9th Cir.1971), on which the plaintiffs in our case rely. *Dietemann* involved a home. True, the portion invaded was an office, where the plaintiff performed quack healing of nonexistent ailments. The parallel to this case is plain enough, but there is a difference. Dietemann was not in business, and did not advertise his services or charge for them. His quackery was private.

No embarrassingly intimate details of anybody's life were publicized in the present case. There was no eavesdropping on a private conversation; the testers recorded their own conversations with the Desnick Eye Center's physicians. There was no violation of the doctor-patient privilege. There was no theft, or intent to steal, trade secrets; no disruption of decorum, of peace and quiet; no noisy or distracting demonstrations. Had the testers been undercover FBI agents, there would have been no violation of the Fourth Amendment, because there would have

been no invasion of a legally protected interest in property or privacy. *United States v. White,* 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971); *Lewis v. United States,* 385 U.S. 206, 211, 87 S.Ct. 424, 427–28, 17 L.Ed.2d 312 (1966); *Forster v. County of Santa Barbara,* 896 F.2d 1146, 1148–49 (9th Cir.1990); *Northside Realty Associates, Inc. v. United States,* 605 F.2d 1348, 1355 (5th Cir.1979). "Testers" who pose as prospective home buyers in order to gather evidence of housing discrimination are not trespassers even if they are private persons not acting under color of law. Cf. *id.* at 1355. The situation of the defendants' "testers" is analogous. Like testers seeking evidence of violation of anti-discrimination laws, the defendants' test patients gained entry into the plaintiffs' premises by misrepresenting their purposes (more precisely by a misleading omission to disclose those purposes). But the entry was not invasive in the sense of infringing the kind of interest of the plaintiffs that the law of trespass protects; it was not an interference with the ownership or possession of land. We need not consider what if any difference it would make if the plaintiffs had festooned the premises with signs forbidding the entry of testers or other snoops. Perhaps none, see *United States v. Centennial Builders, Inc.,* 747 F.2d 678, 683 (11th Cir.1984), but that is an issue for another day....

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