OH, WHAT A TANGLED WEB WE WEAVE: REALITY TV SHINES A FALSE LIGHT ON *LADY DUFF-GORDON*

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I. INTRODUCTION

The problem with popular culture and its symbol of the day, 'Reality TV,' is not the fact of its existence, but the possibility that it is emblematic of a fading society.[1] The potential for depravity in Reality TV appears

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1. For examples of the incursion of Reality TV into our collective reality, see the Dec. 22, 2003 edition of *People*: Greg Adkins, et al., *Bachelor Breakup! Say It Ain't So! Days After Trista and Ryan's Wedding, Reality TV's Other Hot Couple, Andrew Firestone and Jennifer Schefft, Suddenly Split*, PEOPLE, Dec. 22, 2003, at 17; Greg Adkins, et al., *Justin Guarini: Fallen American Idol?*, PEOPLE, Dec. 22, 2003, at 21 (Justin Guarini seemed poised for stardom after winning second place in last year's American Idol. But he was nowhere to be seen in FOX's *American Idol* holiday special that aired last month.); Pete Norman, *Simon Cowell Sounds Off*, PEOPLE, Dec. 22, 2003, at 44 - review of Simon Cowell's new book, *I Don't Mean to be Rude, But. . ..* (Simon is a critic on FOX's *American Idol.*) An example of his pith on reality shows: "I love the first *Joe Millionaire.* I watched a bit of *The Bachelor* and thought it was quite amusing. The problem with reality shows is that they're not reality anymore. The more you do, the more you turn people into actors. They are like drama documentaries. . ..."; Alex Tresniowski, *Lights! Camera! Love! Thirty Thousand Roses, Two 'I Do's, 'One Kiss: Trista Rehn and Ryan Sutter, Reality TV's It Couple, Tie the Knot in a $4 Million Extravaganza*, PEOPLE, Dec. 22, 2003, at 50; Michael Lipton, et al., *Ruben Dishes: Hot for Halle, Reality TV Junkie: 10 Things You Don't Know About Idol's Ruben Studdard*, PEOPLE, Dec. 22, 2003, at 63; Michael Lipton, et al., *The Simple Life's Nicole Richie Quits Drugs, Terrorizes Farmers*

endless. For example, from tasteless to bizarre, from voyeuristic to sadistic, "reality television has made stars of barely dressed people competing for $1 million, singers competing for recording contracts, and bachelors and bachelorettes competing for love."[2] This diversity has spawned a frenetic competition for newer and riskier plots and scenarios. For example, "[m]ore than three years after CBS began airing the reality phenomenon *Survivor,* Showtime Networks wants to launch a simulated presidential campaign, to be shown when the actual presidential campaign is heating up next summer."[3]

These "cutting-edge" shows increase the risk of lawsuits. The rights of the participants will be protected by a diverse variety of causes of actions which might include the following: breach of contract, defamation, false light, invasion of privacy, tortious interference with a business relationship, statutory and constitutional violations, publication of private facts, commercial appropriations of a name or likeness, intrusion in public places, breach of confidence, and intentional infliction of emotional distress.[4] An example of Reality TV's legal boundaries is a recent lawsuit

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and Becomes a TV Star, PEOPLE, Dec. 22, 2003, at 71; *Get Ready to Wallow: Survivor's Finale Raises a Question: What's Dirtier - the Deception or the Hygiene?*, PEOPLE, Dec. 22, 2003, at 84; Jill Smolowe, et al., *Goodbye Joe, Hello Love. Breaking the Hearts of Average Joes Everywhere, Melana Scantlin Chooses Hunky Jason Peoples*, PEOPLE, Dec. 22, 2003, at 108.

2. *See* McDonough (AP), *Showtime Considering Reality Show on Politics*, HOUS. CHRON., Dec. 6, 2003, at 25A.

3. *Id.*

4. *See, e.g.*, Anthony J. Degiralamo, *The Tort of Invasion of Privacy in Ohio: Videotape Invasion and the Negligence Standard*, 52 OHIO ST. L.J. 1599 (1991); Jonathan P. Graham, *Privacy, Computers, and the Commercial Dissemination of Personal Information*, 65 TEX. L. REV. 1395-97 (1987); Adam Chrzan, *No-Fault Publicity: Trying to Slam the Door Shut on Privacy - The Battle Between the Media and the Nonpublic Persons it Thrusts into the Public Eye*, 27 VILL. L. REV. 341 (2002); Nicholas D. Bieter, *Minnesota's Right of Privacy Torts: Expanding Common Lay Beyond Its Reasonable Constitutional Bounds in* Lake v. Wal-Mart Stores, Inc., 20 HAMLINE J. PUB. L. & POL'Y 177 (1998); D. Scott Gurney, *Celebrities and the First Amendment: Broader Protection Against the Unauthorized Publication of Photographs*, 61 IND. L.J. 697, 699 (1986); Frank S. Cavico, *Invasion of Privacy in the Private Employment Sector: Tortious and Ethical Aspects*, 30 HOUS. L. REV. 1263 (1993); Jane E. Prine, *Torts - No Longer Living in a Glass House: Every Minnesotan is Entitled to a Right to Privacy*, 25 WM. MITCHELL L. REV. 999, 1003-04 (1999); Sean M. Scott, *The Hidden First Amendment Values of Privacy*, 71 WASH. L. REV. 683 (1996); Neal T. Buethe, *Things to Come in Minnesota: Ways in Which the Privacy Tort Has Affected Employment Law in Other States*, 23 HAMLINE L. REV. 38, 39-45 (1999); John D. Blackburn, et al., *Invasion of Privacy: Refocusing the Tort in Private Sector Employment*, 6 DEPAUL BUS. L.J. 41, 49-55 (1993); Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291 (1983); Jacqueline R. Rolfs, The Florida Star v. B.J.F.: *The Beginning of the End for the Tort of Public Disclosure*, 1990 WIS. L. REV. 1107 (1990); Michael Sewell, *Invasion of Privacy in Texas: Public Disclosure of Embarrassing Private Facts*, 2 TEX. WESLEYAN L. REV. 411 (1995); Diane L. Borden, *Invisibles Plaintiffs: A Feminist Critique on the Rights of Private Individuals in the Wake of* Hustler Magazine v. Falwell, 35 GONZ. L. REV. 291 (1999-00); Peter B.

by a participant in *Doggy Fizzle Televizzle*:

> An actress has sued rapper Snoop Dogg and MTV over an episode of the television show *Doggy Fizzle Televizzle,* in which she claimed she was unwittingly made to appear as if she were naked and engaging in sexual relations with another actor. In a lawsuit filed Friday, Doris Burns accuses Snoop Dogg, whose real name is Calvin Broadus, and MTV of breach of contract, fraud, invasion of privacy and defamation.[5]

The two causes of action that might synergize to create the best protection for maligned participants is breach of contract based on implied terms, as famously exemplified by *Wood v. Lucy, Lady Duff-Gordon,*[6] and false light invasion of privacy.[7] The vigorous advocate will use *Lady Duff-Gordon* to assert that implied in the Reality TV contract is the producer's good faith obligation to refrain from purposefully exposing the participant to implied false light publicity.

Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black,* 68 TEX. L. REV. 1195 (1990); Gregg M. Fishbein & Susan E. Ellingstad, *Internet Privacy: Does the Use of "Cookies" Give Rise to a Private Cause of Action for Invasion of Privacy in Minnesota,* 27 WM. MITCHELL L. REV. 1609 (2001); George P. Smith, *The Extent of Protection of the Individual's Personality Against Commercial Use: Toward a New Property Right,* 54 S.C. L. REV. 1 (2002); Jamie E. Nordhaus, *Celebrities' Rights to Privacy How Far Should Paparazzi Be Allowed to Go?* 18 REV. LITIG. 285, 295-301 (1999); Lucy Noble Inman, Hall v. Post: *North Carolina Rejects Claim of Invasion of Privacy by Truthful Publication of Embarrassing Facts,* 67 N.C. L. REV. 1474 (1989); Andrew J. Macclurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places,* 73 N.C. L. REV. 989 (1995); Susan Kirkpatrick, Falwell v. Flynt: *Intentional Infliction of Emotional Distress as a Threat to Free Speech,* 81 NW. U. L. REV. 993 (1987); Alan B. Viskery, *Breach of Confidence: An Emerging Tort,* 82 COLUM. L. REV. 1426 (1982); Nathan E. Ray, *Let There Be False Light: Resisting the Growing Trend Against an Important Tort,* 84 MINN. L. REV. 713 (2000); Greg C. Wilkins, *The Night the Light Went Out in Texas - The Texas Supreme Court Rejects the Tort of False Light Invasion of Privacy:* Cain v. Hearst Corp., 873 S.W.2d. 577 (Tex. 1994), 26 TEX. TECH. L. REV. 249 (1995); Robin L. Blume, *Court of Appeals Leaves False Light Invasion of Privacy Issue Unresolved in Libel and Invasion of Privacy Case,* 47 S.C. L. REV. 151 (1995); David A. Logan, *Tort Law and the Central Meaning of the First Amendment,* 51 U. PITT. L. REV. 493 (1990); Bradley H. Smith, *Torts* - West v. Media General Convergence, Inc.: *Tennessee's Recognition of the Tort of False Light Invasion of Privacy,* 32 U. MEM. L. REV. 1053 (2002); Walter D. Fisher, Jr., Renwick v. News & Observer Publishing Co.: *North Carolina Rejects the False Light Invasion of Privacy Tort,* 63 N.C. L. REV. 767 (1985); and Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light That Failed,* 64 N.Y. CITY L. REV. 364 (1989).

5. *Rapper, MTV Sued Over Show,* HOUS. CHRON., Dec. 15, 2003, at 10.

6. *See* Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214 (N.Y. 1917); *see also* Walter F. Pratt, Jr., *American Contract Law at the Turn of the Century,* 395 S.C. L. REV. 415 (1988); Robert A. Hillman, *Instinct With an Obligation and the Normative Ambiguity of Rhetorical Power,* 56 OHIO ST. L.J. 775 (1995).

7. *See generally* Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light that Failed,* 64 N.Y.U. L. REV. 364 (1989); and Nathan E. Ray, *Let There be False Light: Resisting the Growing Trend Against an Important Tort,* 84 MINN. L. REV. 713 (2000).

II. BACKGROUND: REALITY TV AND THE LAW

The so-called privacy torts are the logical choice to begin the analysis of the interaction between Reality TV and the law. "One 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."[8] The "invasion may be by physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff's room in a hotel or insists over the plaintiff's objection in entering his home."[9] Also,

> [o]ne who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not a legitimate concern to the public.[10]

In *A.A. Dietemann v. Time, Inc.*,[11] the court found *Time Magazine* liable for invasion of privacy.[12] Defendant's photographers entered the office portion of plaintiff's house by subterfuge, and photographed and recorded plaintiff's conversations with a third person.[13] Additionally, in *Miller v. National Broadcasting Co.*,[14] the court held that a heart attack victim's wife could sue a local television news producer when a camera crew entered her bedroom along with paramedics.[15] A valid cause of action existed against the television network and the news producer for invasion of privacy.[16] Reasonable people could see this intrusion as highly offensive.[17]

Moreover, the *Dietemann* court extended privacy to cover the case where a reasonable person might expect that a defendant should be excluded.[18] In *Miller*, a private matter was publicized.[19] For example,

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8. *See* RESTATEMENT (SECOND) OF TORTS § 652B (1977). *See generally* Eduardo W. Gonzalez, *Get that Camera Out of My Face! An Examination of the Viability of Suing Tabloid Television for Invasion of Privacy*, 51 U. MIAMI L. REV. 935 (1997).

9. RESTATEMENT, *supra* note 8, § 652B, at cmt. b.

10. *Id.* at § 652D. *See also* Clay Calvert, *The Voyeurism Value in the First Amendment Jurisprudence*, 17 CARDOZO ARTS & ENT. L.J. 273 (1999).

11. Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971).

12. *See id.* at 250.

13. *See id.* at 245-46.

14. Miller v. Nat'l Broad. Co., 232 Cal. Rptr. 668 (Cal. Ct. App. 1986).

15. *See id.* at 673-74.

16. *See id.* at 678-81.

17. *Id.* at 679.

18. *Dietemann*, 449 F.2d at 249 (citing with approval, Pearson v. Dodd, 410 F.2d 701, 704 (D.C. Cir. 1969)).

publishing a nude photograph may be sufficient to base a "public disclosure" claim.[20] Also, filming nude prison inmates constitutes an invasion of privacy.[21] An individual's privacy warrants some form of protection against an overzealous intrusion into one's private life.[22] Lastly, filming individuals in instances where they no longer consent to be filmed and in times when they are undergoing a personal crisis might be viewed as offensive to a reasonable person.[23]

The most prevalent context of the present legal analysis into Reality TV are those cases where the media accompanies law enforcement personnel in some variation of a "ride-along."[24] Primarily, in *Wilson v. Layne*,[25] the Supreme Court held that media ride-alongs violate the Fourth Amendment when media accompanies law enforcement officers.[26] Also, in *Food Lion, Inc. v. ABC, Inc.*,[27] the operator of grocery stores sued a television network alleging fraud, trespass, negligent supervision, and civil conspiracy for damages resulting from a PrimeTime Live undercover story that exposed unsanitary food conditions. The court disallowed a motion for summary judgments on the basis that a factual question existed as to the misrepresentation by network employees masquerading as potential employees, on their employment contracts with Food Lion.[28]

Additionally in *Howell v. Tribune Entertainment Co.*,[29] a sixteen-year-old girl who appeared on a television talk show with her sister and stepmother to participate in discussion of problems with stepparents brought an action for invasion of privacy against the show's producer. The court found against the plaintiff on the grounds that she waived any privacy right that attached to the police report filed against her by making statements during the show that accused her stepmother of adultery and

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19. *See Miller*, 232 Cal. Rptr. at 674.

20. *See generally* Myers v. U.S. Camera Publ'g Corp., 167 N.Y.S.2d 771, 774 (N.Y. 1957).

21. *See* Commonwealth v. Wiseman, 249 N.E.2d 610, 615 (Mass. App. Ct. 1969); *see, e.g.*, Darryl C. Wilson, *The Legal Ramifications of Saving Face: An Integrated Analysis of Intellectual Property and Sport*, 4 VILL. SPORTS & ENT. L.J. 227 (1992).

22. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

23. *See Miller*, 232 Cal Rptr. at 679.

24. *See generally* David E. Bond, *Police Liability for the Media Ride-Along*, 77 B.U. L. REV. 825 (1997).

25. Wilson v. Layne, 526 U.S. 603 (1999).

26. *Id.*; *see also* DeLeith Duke Gossett, *Constitutional Law and Criminal Procedure – Media Ride-Alongs into the Home: Can They Survive a Head-on Collision Between First and Fourth Amendment Rights?* Wilson v. Layne, 22 U. ARK. LITTLE ROCK L. REV. 679 (2000).

27. Food Lion, Inc. v. Capital Cities/ABC, Inc., 951 F. Supp. 1217 (M.D.N.C. 1996).

28. *Id.*; *see also* Charles C. Scheim, *Trash Tort or Trash TV?* Food Lion, Inc. v. ABC, Inc., *and Tort Liability of the Media for News Gathering*, 72 ST. JOHN'S L. REV.185 (1998).

29. Howell v. Tribune Entm't Co., 106 F.3d 215 (7th Cir. 1997).

mistreatment.

No liability was found in an unauthorized surfing documentary.[30] However, the family of an executive obtained injunctive relief against television reporters for placing their home under surveillance.[31] Also, the Supreme Court of California held that triable issues of fact existed in reference to a documentary rescue program.[32] A triable issue existed as to whether both plaintiffs had an objectively reasonable expectation of privacy in the interior of the rescue helicopter.[33] Likewise, the mother was entitled to a degree of privacy in her conversations with the rescue nurse and other medical rescuers at the accident scene. The nurse's conversations conveying medical information to the hospital commanded privacy as well.[34]

III. ANALYSIS: THE RIGHT TO PRIVACY AND *LADY DUFF-GORDON* MEET IN THE FALSE LIGHT OF REALITY TV

A. The Right to Privacy

In 1890, in their famous essay, *Right to Privacy*, Louis Brandeis and Samuel Warren commented that the press's "instantaneous photographs" and new "business methods" would be "overstepping in every direction the obvious bounds of propriety and of decency."[35] They observed that "numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the housetops.'"[36]

> [T]oday a vast number of books, journals, television and radio stations, cable channels and Internet content sources all compete to satisfy our thirst for knowledge and our need for news of political, economic and cultural events as well as our love of gossip, [and] our curiosity about the private lives of others.[37]

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30. Dora v. Frontline Video, Inc., 15 Cal. App. 4th 536 (Cal. Dist. Ct. App. 1991); *see also* Reeves v. Fox Television Network, 983 F. Supp. 703 (N.D. Ohio 1997) (holding no liability for arrest depicted on television); Anonsen v. Donahue, 857 S.W.2d 700 (Tex. Ct. App. 1993) (holding no liability for grandmother's account on Phil Donahue Show that plaintiff was offspring of interfamilial rape).

31. Wolfson v. Lewis, 924 F. Supp. 1413 (E.D. Pa. 1996).

32. Shulman v. Group W. Prod., Inc., 955 P.2d 469 (Cal. 1998).

33. *Id.* at 490.

34. *Id.* at 469.

35. Warren & Brandeis, *supra* note 22, at 195-96.

36. *Id.* at 195.

37. *Shulman*, 955 P.2d at 469.

This "curiosity" segues into morbidity and includes "that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors."[38] Since 1890, "the United States has also seen a series of revolutions in mores and conventions that has moved, blurred and, at times, seemingly threatened to erase the line between public and private life."[39] Even in 1890, "the details of sexual relations [were] broadcast in the columns of the daily papers."[40] Today, our society is voyeuristic[41] and quite capable of recounting in detail every nuance of what were formerly private matters because they have been depicted on Reality TV.[42]

However, "the desire for privacy must at many points give way before our right to know, and the news media's right to investigate and relate, facts about the events and individuals of our time."[43] Justices Brandeis and Warren recognized that a line must be drawn between private matters and those of "public and general interest" because there is a "legitimate concern" in the latter.[44] In 1931, a California appellate court observed that the right of privacy "does not exist in the dissemination of news and news events."[45] The freedom of the press, as protected by the First and Fourteenth Amendments to the United States Constitution, is extensive and far ranging.

The guarantees for speech and press are not the preserve of political expression or comment on public affairs, essential as those are to a healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.[46]

The "right to keep information private was bound to clash with the right to disseminate information to the public."[47] Some scholars have suggested that Warren and Brandeis exaggerated the sensationalism of the

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38. Warren & Brandeis, *supra* note 22, at 196.
39. *Shulman*, 955 P.2d at 469.
40. Warren & Brandeis, *supra* note 22, at 196.
41. *See generally*, Clay Calvert, *The Voyeurism Value in First Amendment Jurisprudence*, 17 CARDOZO ARTS & ENT. L.J. 273 (1999).
42. *Shulman*, 955 P.2d at 469.
43. *Id.* at 208
44. Warren & Brandeis, *supra* note 22, at 214.
45. Melvin v. Reid, 297 P. 91, 93 (Cal. Ct. App. 1931).
46. Time, Inc. v. Hill, 385 U.S. 374, 388 (1967).
47. Briscoe v. Reader's Digest, Inc., 483 P.2d 34 (Cal. 1971).

newspapers of that era.[48] Regardless, they certainly perceived the need to protect personal privacy. In short, Warren and Brandeis were the de facto parents of today's privacy torts.

B. False Light Invasion of Privacy

According to Prosser,[49] there are four forms of invasion of privacy: intrusion upon seclusion or solitude,[50] publication of embarrassing private facts,[51] appropriation of name or likeness,[52] and publicity placing an individual in a false light before the public eye.[53] False light invasion of privacy, the most relevant of privacy torts to Reality TV, involves exposing an otherwise private individual to unwanted and false publicity.[54] Reality TV that places a participant in a "false light" may be subject to tort liability.[55] An employer who publicized a matter that created a false conception about an employee may also be liable.[56] To recover, a plaintiff must show that the defendant employer widely publicized misinformation.[57] Publication is an essential element.[58] The published information must be false,[59] and the defendant must publicize the information either with knowledge of its falsity, or with reckless disregard as to its truth or falsity.[60] Some courts adhere to the reckless disregard standard;[61] others adhere to a negligence standard.[62] The standard for false light publicity is that it is highly offensive to a reasonable person.[63] The misrepresentation(s) must be major and refer to a person's character, history, activities, or beliefs.[64] The plaintiff must demonstrate that the

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48. *See* Warren & Brandeis, *supra* note 22, at 193; James H. Barron, *Demystifying a Landmark Citation*, 13 SUFFOLK U. L. REV. 875 (1979). *See also* Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291 (1983).

49. *See* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 398 (1960).

50. RESTATEMENT, *supra* note 8, § 652B.

51. *Id.* at § 652D.

52. *Id.* at § 652C.

53. *Id.* at § 652E.

54. *See id.*; *see generally* Nathan E. Ray, *Let There Be False Light: Resisting the Growing Trend Against an Important Tort*, 84 MINN. L. REV. 713, 713-15 (2000).

55. RESTATEMENT, *supra* note 8, § 652E.

56. *See* Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 742 F. Supp. 1359, 1372-74 (N.D. Ill. 1990).

57. *See id.* at 1372.

58. *See* Kelley v. Mercoid Corp., 776 F. Supp. 1246, 1257 (N.D. Ill. 1991).

59. RESTATEMENT, *supra* note 8, § 652E cmt. a, at 395.

60. *Id.* at § 652E(b).

61. *See, e.g.*, Tomson v. Stephan, 699 F. Supp 860, 866 (D. Kan. 1988).

62. *See, e.g.*, Wood v. Hustler Magazine, Inc., 736 F.2d 1084, 1092 (5th Cir. 1984).

63. RESTATEMENT, *supra* note 8, § 652E cmt. c, at 396.

64. *See* Goodrich v. Waterbury Republican-American, Inc., 448 A.2d 1317, 1330 (Conn. 1982).

misinformation was unreasonable and highly offensive,[65] and if the plaintiff fails to do so the claim will fail.[66]

C. Lady Duff-Gordon

Like Reality TV and its aspiring millionaire participants, Lucy, Lady Duff-Gordon, "employed the plaintiff to help her to turn this vogue into money."[67] Justice Cardozo implied terms into the contract to make it work:

> The agreement of employment is signed by both parties. It has a wealth of recitals. The defendant insists, however, that it lacks the elements of a contract. She says that the plaintiff does not bind himself to anything. It is true that he does not promise in so many words that he will use reasonable efforts to place the defendant's endorsements and market her designs. We think, however, that such a promise is fairly to be implied. The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be instinct with an obligation, imperfectly expressed. If that is so, there is a contract.[68]

"But in determining the intention of the parties, the promise has a value. It helps to enforce the conclusion that the plaintiff had some duties."[69] The intention of the parties implies an obligation of good faith to avoid fraudulent misrepresentation.[70]

The parties' intent also implies that they must use their best efforts to exploit "the number of people watching a specific television show."[71] "The obligation to exploit is at the heart of, and is the very essence of, the 'business' of show business."[72] The "best efforts" to exploit requirement in an agreement can either be expressed or read into the agreement by the court.[73] A part of the "best efforts" obligation would be to avoid fraudulent misrepresentation in a Reality TV contract.

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65. RESTATEMENT, *supra* note 8, § 652E cmt. c., at 396.

66. *See* Rouly v. Enserch Corp., 835 F.2d 1127, 1132 (5th Cir. 1988). *See generally* Frank J. Cavico, *Invasion of Privacy in the Private Employment Sector: Tortious and Ethical Aspects*, 30 HOUS. L. REV. 1263, 1276-79 (1993).

67. Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 90 (1917).

68. *Id.* at 90-1 (citations omitted); *see also* Robert A. Hillman, *Instinct with an Obligation and the Normative Ambiguity of Rhetorical Power*, 56 OHIO ST. L.J. 775 (1995).

69. *Wood*, 222 N.Y. at 92.

70. *See generally*, Emerson Radio Corp. v. Orion Sales, Inc., 253 F.3d 159 (3d Cir. 2001).

71. Daniel J. Coplan, *When is 'Best Efforts' Really 'Best Efforts': An Analysis of the Obligation to Exploit in Entertainment Licensing Agreements and an Overview of How the Term 'Best Efforts' has been Construed in Litigation*, 31 SW. U. L. REV. 725, 725 (2002).

72. *Id.*

73. *Id.*; *see also* Pundzak, Inc. v. Cook, 500 N.W.2d 424 (Iowa 1993) (discussing that performers could recover for breach of best efforts in exclusive agency agreement).

As aforementioned, the linchpin behind looking for reality in Reality TV contracts is the seminal case of *Wood v. Lucy, Lady Duff-Gordon*.[74] Otis F. Wood sued Lucy, Lady Duff-Gordon for breach of an agreement signed in 1915, which allegedly gave Wood an exclusive right to place Lucy's endorsements on products. When Lucy herself placed the endorsements, Wood contended that he should receive a share of those profits. Lucy argued that the agreement was unenforceable because it did not impose obligations on both parties; thus, no duties were imposed on Wood. The trial judge interpreted the agreement as requiring Wood to exercise his "bona fide judgment." The judge thought bona fide judgment was sufficient to create an obligation to make the agreement enforceable.[75] However, the appellate division unanimously reversed.[76] Next, the court of appeals, by a 4-3 vote, reversed the Appellate Division and agreed with the trial judge. Noticeably, Justice Cardozo's opinion used the phrase "reasonable efforts" to describe Wood's obligations.[77]

> The significance of the decision was that the judge sought to preserve some of the values of the past by requiring that the contracts be performed in good faith, the "bona fide judgment" required by the trial judge in Wood. The key characteristic of the new content for the old form was that the courts, not the parties or the market, would have the primary role in determining what was good faith. Consequently, the courts had both a new focus for their deliberations (performance rather than obligation) and a new standard for judgment (good faith).[78]

The *Lady Duff-Gordon* good faith standard should direct the parties in a Reality TV contract to abstain from fraudulent misstatements that would result in false light damages to plaintiff/participant.

IV. CONCLUSION

False light invasion of privacy recognizes a civil action for the dissemination of information to the public that makes inaccurate statements or creates false implications about the plaintiff.[79] The focus is on the resulting damage to the plaintiff's feelings, measured by the standard of whether the false light implication would be highly offensive

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74. *Wood*, 222 N.Y. at 90.

75. Wood v. Lucy, Lady Duff-Gordon, 164 N.Y.S. 576, 578 (N.Y. Sup. Ct. 1917), *reprinted in* Papers on Appeal at 13; *Wood*, 222 N.Y. at 90.

76. *Wood*, 164 N.Y.S. at 578.

77. *Wood*, 222 N.Y. at 92.

78. Pratt, *supra* note 6, at 443.

79. *See* RESTATEMENT, *supra* note 8, § 652E.

to a reasonable person.[80] Additionally, the potential for false light damages to Reality TV participants is obvious and oftentimes intentional.[81] *Lady Duff-Gordon* implies an obligation of good faith on the part of the producers in a Reality TV/participation agreement to avoid inaccurate statements or situations. As well, the agreement prohibits purposefully placing the plaintiff in a false light so false inferences can be made from the situation or false inferences (from statements or situations) that purposefully place plaintiffs in a false light.

80. *Id.* at cmt. c. *See generally* David A. Logan, *Tort Law and the Central Meaning of the First Amendment,* 51 U. PITT. L. REV. 493, 516 (1990).

81. *See* Matthew Stohl, *False Light Invasion Of Privacy In Docudramas: The Oxymoron Which Must Be Solved,* 35 AKRON L. REV. 251 (2002).