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Torts—No Longer Living in a Glass House: Every Minnesotan is Entitled to a Right to Privacy

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TORTS—NO LONGER LIVING IN A GLASS HOUSE: EVERY MINNESOTAN IS ENTITLED TO A RIGHT TO PRIVACY

Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231 (Minn. 1998)

I. INTRODUCTION

While Minnesota has long recognized the right of privacy in certain contexts,[1] the Minnesota Supreme Court only recently analyzed a cause of action for invasion of privacy by private individuals. In *Lake v. Wal-Mart Stores, Inc.*,[2] the supreme court finally bestowed on every Minnesotan this

1. *See* State v. Gray, 413 N.W.2d 107, 111 (Minn. 1987) (recognizing a right to privacy in regard to fundamental rights under both the Minnesota and United States Constitutions). *See also* Michael K. Steenson, *Fundamental Rights in the "Gray" Area: The Right of Privacy Under the Minnesota Constitution*, 20 WM. MITCHELL L. REV. 383, 394-414 (1994) (discussing Minnesota precedent supporting privacy interests under the Minnesota and United States Constitutions).

2. 582 N.W.2d 231 (Minn. 1998).

much needed right.[3]

This case note will examine the historical and philosophical development of the right to privacy, delineating its foundations in tort law[4] and briefly outlining the development of the right to privacy protecting individuals from government intrusion.[5] This case note will then discuss how states have recognized the right to privacy tort[6] and examine Minnesota case precedent addressing this issue.[7]

This case note will then analyze the *Lake* decision and discuss why the Minnesota Supreme Court's holding was a correct one, particularly in light of recent technological advances.[8] Finally, this case note will posit that the supreme court failed to adequately explain its holding[9] and argue that Minnesota courts should look to the boundaries imposed on the right to privacy tort by other states for guidance in applying this cause of action.[10]

II. HISTORY

A. *The Right to Privacy in Tort*

Samuel D. Warren and Louis D. Brandeis supported the right to privacy in the late 1800s.[11] They argued that every person was entitled to "the right to be let alone."[12] Warren and Brandeis proposed that privacy encompassed the protection of thoughts, emotions and sensations[13] and listed photographs and newspapers as inventions necessitating the need for the recognition of privacy rights.[14] They also viewed the rise of "gossip

3. *See id.* at 236 (recognizing right to privacy, protecting against invasion by private individuals and stating that previous Minnesota cases had addressed privacy only in dicta).

4. *See infra* notes 11-35 and accompanying text.

5. *See infra* notes 36-46 and accompanying text.

6. *See infra* notes 47-78 and accompanying text.

7. *See infra* notes 91-113 and accompanying text.

8. *See infra* notes 114-141 and accompanying text.

9. *See infra* note 142 and accompanying text.

10. *See infra* notes 143-147 and accompanying text.

11. *See* Samuel D. Warren & Louis D. Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193, 193 (1890). Warren and Brandeis gave a legal definition to the boundary between personal and public space. *See* Randall Bezanson, *The Right to Privacy Revisited: Privacy, News and Social Change, 1890-1990*, 80 CALIF. L. REV. 1133, 1135 (1992) (discussing Warren and Brandeis article). Warren and Brandeis presented privacy as "fundamental to the wholeness of the individual, and reflecting the social environment in which people exist." *Id.* at 1134. Warren and Brandeis' article is considered pioneering and extraordinarily influential. *See id.* at 1133; *see also* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 383 (1960).

12. Warren and Brandeis, *supra* note 11, at 193.

13. *See id.* at 195.

14. *See id.*

as a trade" as warranting a right to privacy.[15] To Warren and Brandeis, these technological and societal changes made the recognition of the right to privacy essential, stating that "[t]he intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world . . . but modern enterprise and invention have, through invasions upon [an individual's] privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury."[16] The authors recommended that certain remedies, including the ability to bring actions in tort for damages or actions for injunctive relief, be available for claims of invasion of privacy by private individuals.[17]

Warren and Brandeis' concerns for individual privacy proved timeless.[18] Recently, in *Shulman v. Group W Productions, Inc.*,[19] the California Supreme Court embraced Warren and Brandeis' modern technologies concern when it declared that "the newspapers of 1890 have been joined by the electronic media; today, a vast number of books, journals, television and radio stations, cable channels and Internet content sources all compete to satisfy . . . our love of gossip [and] our curiosity about the private lives of others . . . ."[20]

In support of Warren and Brandeis' thesis, courts made efforts to apply the right to privacy.[21] Eventually, William L. Prosser classified these court decisions into four distinct causes of action.[22] The American Law Institute adopted Prosser's four-tort theory into the following separate torts: (1) unreasonable intrusion upon seclusion of another, (2) appro-

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15. *Id.* at 196.

16. *Id.*

17. *See id.* at 219. Warren and Brandeis suggested imposing limitations, such as allowing publication of matters of public interest and not allowing recovery when the publication is oral, absent special damages. *See id.* at 214-17.

18. *See* Bezanson, *supra* note 11, at 1134. Warren and Brandeis "presented the idea of privacy as it should be understood: as deeply entrenched in culture, evolving over time, fundamental to the wholeness of the individual, and reflecting the social environment in which people exist." *Id.*

19. 955 P.2d 469 (Cal. 1998).

20. *Id.* at 473.

21. *See* Diane Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 292 (1983) (commenting that Warren and Brandeis' article led a minor revolution in the development of the common law right to privacy).

22. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 117, at 850-51 (5th ed. 1984). While Prosser's classifications have been credited with stimulating academic thought about the right to privacy, they have also been accused of divorcing this thinking from the concept originally posited by Warren and Brandeis. *See* Sheldon W. Halpern, *Rethinking the Right of Privacy: Dignity, Decency, and the Law's Limitations*, 43 RUTGERS L. REV. 539, 543 (1991); *see also* Zimmerman, *supra* note 21, at 294-95 (stating that today the right of privacy is a "catch-all" having little or nothing to do with the tort envisioned by Warren and Brandeis).

priation of another's likeness, (3) publication of private facts, and (4) publicity that places another in false light.[23]

Intrusion upon seclusion is actionable when a person intrudes upon the solitude of another's affairs if the intrusion would be highly offensive to a reasonable person.[24] Forceful entry into another's place of seclusion, covertly listening to a conversation, and searching another's wallet or opening another's mail are examples of intrusion upon seclusion.[25] Appropriation occurs when a person takes the name or likeness of another for his or her own benefit.[26] Using a person's photograph to advertise a product without the person's consent is an appropriation.[27] This tort is not limited to appropriation for commercial use;[28] liability arises for impersonating another to obtain information, or filing a lawsuit in another's name.[29]

Publication of private facts is actionable when a person publicizes another's private matter if the publication is highly offensive and not of legitimate public interest.[30] This right is violated, for example, when a creditor posts a sign informing the public of another's debt or when a person steals a photograph from another and publicly presents it.[31]

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23. *See* RESTATEMENT (SECOND) OF TORTS §§ 652A–652E (1977); KEETON ET AL., *supra* note 22, at 851-66. This classification scheme has been criticized. For example, the Indiana Supreme Court stated that each privacy tort resembled other distinct torts. *See Doe v. Methodist Hosp.*, 690 N.E.2d 681, 685 (Ind. 1997) (opining that the privacy tort functions as "little more than a 'lite' version of trespass, outrage, or defamation—promising the same great take with only half the facts").

24. *See* RESTATEMENT (SECOND) OF TORTS § 652B (1977).

25. *See id.* § 652B cmt. b.

26. *See id.* § 652C.

27. *See id.* § 652C cmt. b, illus. 1.

28. *See id.* § 652C cmt. b.

29. *See id.* § 652C cmt. b, illus. 3, 6.

30. *See id.* § 652D. Publication of private facts is the most widely recognized privacy tort. *See* Zimmerman, *supra* note 21, at 365-67. However, some courts still have objections. *See id.* For example, the Indiana Supreme Court voiced its criticism of the tort by stating:

> Perhaps Victorian sensibilities once provided a sound basis of distinction, but our more open and tolerant society has largely outgrown such a justification. In our "been there, done that" age of talk shows, tabloids and twelve-step programs, public disclosures of private facts are far less likely to cause shock, offense, or emotional distress than at the time Warren and Brandeis wrote their famous article.

Doe v. Methodist Hosp., 690 N.E.2d 681, 692 (Ind. 1997).

31. *See* RESTATEMENT (SECOND) OF TORTS § 652D cmts. a-b (1977). The belief that wrongs of this nature should be compensated was strongly advocated by Warren and Brandeis when they stated, "for years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons." Warren and Brandeis, *supra* note 11, at 195.

The false light tort is publication of a matter that places another in a false light if the falsity would be highly offensive to a reasonable person and the publisher has knowledge of or has acted in reckless disregard of the falsity.[32] Publishing an article regarding fraud along with a photograph of an innocent person, implying he engages in fraudulent activity when he has never done so, is an example of false light invasion of privacy.[33]

Warren and Brandeis also proposed limitations to the right to privacy's application.[34] Specifically, they suggested that the tort not be extended to cases involving publication of matters of public interest or to cases where the plaintiff had not suffered damages.[35]

B. Protection of Privacy from Governmental Intrusion

The United States Supreme Court has recognized various rights to privacy under the United States Constitution.[36] The Supreme Court first recognized the right to privacy from governmental intrusion in *Griswold v. Connecticut*.[37] In *Griswold*, the Court held that Connecticut's birth control law, which made it a crime to discuss use of contraceptive devices,[38] was an unconstitutional intrusion on the right to marital privacy.[39] The Court ruled that the marital relationship resides in a "constitutionally-created zone of privacy" that is free from intrusion by the government.[40] Also, in

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32. *See* RESTATEMENT (SECOND) OF TORTS § 652E (1977).

33. *See id.* cmt. b, illus. 2.

34. *See* Warren and Brandeis, *supra* note 11, at 214-20.

35. *See id.* at 214-17.

36. *See infra* notes 37-44 and accompanying text. *See generally* Steenson, *supra* note 1, at 384-91 (analyzing privacy rights under the United States Constitution).

37. 381 U.S. 479, 485-86 (1965). The concept of privacy was addressed by the Court much earlier. *See* Olmstead v. United States, 277 U.S. 438, 474-78 (1928) (Brandeis, J., dissenting), *overruled by* Katz v. United States, 389 U.S. 347, 353 (1967). In *Olmstead*, Justice Brandeis stated in his dissent that:

> [The framers of the Constitution] undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

Olmstead, 277 U.S. at 478 (Brandeis, J., dissenting). The majority condoned the government's use of information obtained through wiretapping. *See id.* at 469.

38. *See Griswold*, 381 U.S. at 480.

39. *See id.* at 486.

40. *See id.* at 485. The Court stated that marital privacy is protected from governmental intrusion by the protective penumbra created by the Bill of Rights. *See*

perhaps the most famous decision regarding the right to privacy, the Court in *Roe v. Wade*[41] held that the constitutional right to privacy included a woman's right to terminate a pregnancy.[42] In *Katz v. United States*,[43] the Court determined that the government listening and recording telephone communications was an unconstitutional violation of privacy, ruling that the Constitution protects private conversations from government intrusion.[44]

Katz is significant because the court expressly gave the state courts the decision to recognize a common law right to protection from invasion of privacy by private individuals.[45] The Court determined that while the United States Constitution affords some specific protection against governmental invasion, the determination of whether a person is entitled to a general right to privacy is to be left to each state.[46]

III. INTERPRETATION OF THE RIGHT TO PRIVACY TORT

A. *Throughout the United States*

At the time *Lake* was decided, forty-seven states and the District of Columbia recognized a tort for invasion of privacy by private individuals.[47]

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id.

41. 410 U.S. 113 (1973).

42. *See id.* at 153.

43. 389 U.S. 347 (1967).

44. *See id.* at 359.

45. *See id.* at 350-51. The Court clarified its holdings in *Olmstead* and *Griswold* by stating that while there are provisions in the Constitution that protect an individual's right to privacy against forms of government invasion, the Fourth Amendment and other provisions of the Constitution cannot be translated into giving a general privacy right. *See id.* at 350.

46. *See id.*

47. *See* MASS. GEN. LAWS ANN. ch. 214, § 1B (West 1989) (establishing a right to protection against unreasonable, substantial or serious interference with privacy); NEB. REV. STAT. ANN. § 20-201 (West 1995) (establishing a legal remedy for exploitation of one's name, picture, portrait or personality for advertising or trade purposes, intrusion upon one's place of solitude or seclusion, and for placing one in a false light); N.Y. CIV. RIGHTS LAW § 50 (McKinney 1992); R.I. GEN. LAWS § 9-1-28.1 (1997) (stating that every person has a right to privacy and listing four privacy torts when describing that right); VA. CODE ANN. § 8.01-40 (Michie 1992) (stating that one can sue in equity and for damages if one's name, portrait or picture is used for advertising or trade purposes without written consent); WIS. STAT. ANN. § 895.50 (West 1997) (stating that the right to privacy is recognized in the state and one can seek equitable relief and damages for intrusion); Busby v. Truswal Sys. Corp., 551 So. 2d 322, 328 (Ala. 1989); Breese v. Smith, 501 P.2d 159, 171 (Alaska 1972); Godbehere v. Phoenix Newspapers, Inc., 783 P.2d 781, 784 (Ariz. 1989); Dodson v. Dicker, 812 S.W.2d 97, 99 (Ark. 1991); Melvin v. Reid, 297 P. 91, 93 (Cal. Dist. Ct. App. 1931); Rugg v. McCarty, 476 P.2d 753, 754-55 (Colo. 1970); Goodrich v. Waterbury Republican-Am., Inc., 448 A.2d 1317, 1328 (Conn. 1982);

The majority of states recognizing the right to privacy tort have analyzed Prosser's four causes of action.[48] However, they differ as to which of the four causes of action to recognize[49] and disagree as to which standard to use when applying each tort.[50] The right to privacy has been discussed at length yet courts still have difficulty in its application. The Alaska Supreme Court, for example, has stated that "the concept of privacy has become pervasive in modern legal thought. But a clear definition of this

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Barbieri v. News-Journal Co., 189 A.2d 773, 774 (Del. 1963); Vassiliades v. Garfinckel's, 492 A.2d 580, 587 (D.C. 1985); Cason v. Baskin, 20 So. 2d 243, 250 (Fla. 1945); Pavesich v. New England Life Ins. Co., 50 S.E. 68, 69 (Ga. 1905); Fergerstrom v. Hawaiian Ocean View Estates, 441 P.2d 141, 143 (Haw. 1968); Baker v. Burlington N., Inc., 587 P.2d 829, 832 (Idaho 1978); Leopold v. Levin, 259 N.E.2d 250, 254 (Ill. 1970); State *ex rel.* Mavity v. Tyndall, 66 N.E.2d 755, 760 (Ind. 1946); Stessman v. American Black Hawk Broad. Co., 416 N.W.2d 685, 686 (Iowa 1987); Finlay v. Finlay, 856 P.2d 183, 189 (Kan. Ct. App. 1993); Yancey v. Hamilton, 786 S.W.2d 854, 860 (Ky. 1989); Young v. St. Landry Parish Sch. Bd., 673 So. 2d 1272, 1275 (La. Ct. App. 1996); MacKerron v. Madura, 445 A.2d 680, 682 (Me. 1982); Lawrence v. A.S. Abell Co., 475 A.2d 448, 450 (Md. 1984); Doe v. Mills, 536 N.W.2d 824, 828 (Mich. Ct. App. 1995); Candebat v. N.J. Flanagan, 487 So. 2d 207, 209 (Miss. 1986); Y.G. & L.G. v. Jewish Hosp., 795 S.W.2d 488, 497 (Mo. Ct. App. 1990); Sistok v. Northwestern Tel. Sys., Inc., 615 P.2d 176, 181 (Mont. 1980); Montesano v. Donrey Media Group, 668 P.2d 1081, 1084 (Nev. 1983); Hamberger v. Eastman, 206 A.2d 239, 242 (N.H. 1964); Rumbauskas v. Cantor, 649 A.2d 853, 858 (N.J. 1994); Andrews v. Stallings, 892 P.2d 611, 625 (N.M. Ct. App. 1995); Hall v. Post, 372 S.E.2d 711, 713 (N.C. 1988); Housh v. Peth, 133 N.E.2d 340, 343 (Ohio 1956); Eddy v. Brown, 715 P.2d 74, 77 (Okla. 1986); Hinish v. Meier & Frank Co., 113 P.2d 438, 446 (Or. 1941); Curran v. Children's Serv. Ctr., Inc., 578 A.2d 8, 12 (Pa. 1990); O'Shea v. Lesser, 416 S.E. 2d 629, 633 (S.C. 1992); Krueger v. Austad, 545 N.W.2d 205, 215-16 (S.D. 1996); Martin v. Senators, Inc., 418 S.W.2d 660, 662 (Tenn. 1967); Cain v. Hearst Corp., 878 S.W.2d 577, 578 (Tex. 1994); Turner v. Gen. Adjustment Bureau, Inc., 832 P.2d 62, 67 (Utah Ct. App. 1992); Hodgdon v. Mt. Mansfield Co., 624 A.2d 1122, 1129 (Vt. 1992); Eastwood v. Cascade Broad. Co., 722 P.2d 1295, 1296 (Wash. 1986); Roach v. Harper, 105 S.E.2d 564, 568 (W. Va. 1958).

48. *See supra* notes 22-23 and accompanying text; *see, e.g.*, Robert C. Ozer, P.C. v. Borquez, 940 P.2d 371, 377 (Colo. 1997) (developing a specific right against invasion of privacy by publication of private facts after noting the four types of invasion); *Goodrich*, 448 A.2d at 1329 (observing that the tort of privacy is not one tort, but the four torts as defined by Prosser).

49. *Compare* Doe v. Methodist Hosp., 690 N.E.2d 681, 692 (Ind. 1997) (failing to recognize invasion of privacy by publication of private facts) *with Ozer*, 940 P.2d at 377 (recognizing only the tort of publication of private facts).

50. *See* Kinsey v. Macur, 165 Cal. Rptr. 608, 611 (Cal. Ct. App. 1980) (stating that to recover under the tort of publicity, a plaintiff must show that the publicity was to the public at large or to a large number of people, as opposed to simply a few individuals); Young v. Jackson, 572 So. 2d 378, 382 (Miss. 1990) (stating the standard for recovery under public disclosure includes the requirement that one must reasonably foresee that another would be offended by the publication); Blevins v. Sorrell, 589 N.E.2d 438, 441 (Ohio Ct. App. 1990) (finding that for invasion of privacy to be actionable the invasion must cause outrage or serious emotional distress).

right . . . has eluded both courts and legal scholars."[51]

States recognizing the right to privacy have done so under the federal or their state constitutions,[52] the common law,[53] or by statute.[54] Most states have placed limits on its invocation.[55]

1. *Constitutional Foundations for the Privacy Tort*

Georgia's supreme court was the first to embrace the right to privacy in the context of an action against a private individual. In *Pavesich v. New England Life Insurance Co.*,[56] the court maintained that individuals surrender many rights that they would otherwise be free to exercise in return for the benefits they receive for being members of society.[57] The court added, however, that individuals do not relinquish all such rights, reasoning that people have the right to keep purely private matters away from the public eye.[58] The court ultimately determined that the right to privacy was derivative of natural law and from rights guaranteed by the constitutions of both the United States and the state of Georgia.[59] The *Pavesich* court found that it could recognize the right to privacy because it had been acknowledged under other causes of action and fell within the right to personal liberty.[60]

Other states that recognize the privacy tort as grounded in the federal or their state constitutions include Missouri, California, and Florida. In *Munden v. Harris*,[61] the Missouri Supreme Court held that the right to privacy was part of the constitutional right to life and happiness.[62] California courts found a tort action for invasion of privacy in its state constitution under the right to pursue and obtain happiness.[63] Florida found the right grounded in the Declaration of Rights in its state constitution.[64]

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51. Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1128 (Alaska 1989).

52. *See infra* notes 56-64 and accompanying text.

53. *See infra* notes 65-72 and accompanying text.

54. *See infra* notes 73-78 and accompanying text.

55. *See infra* notes 79-90 and accompanying text.

56. 50 S.E. 68 (Ga. 1905).

57. *See id.* at 72.

58. *See id.*

59. *See id.* at 71.

60. *See id.* at 71-72.

61. 134 S.W. 1076 (Mo. Ct. App. 1911).

62. *See id.* at 1078.

63. *See* Melvin v. Reid, 297 P. 91, 93 (Cal. Dist. Ct. App. 1931). The court noted that privacy rights did not exist at common law and that it would be loathe to recognize the right as accepted by other jurisdictions absent any provision of law. *See id.*

64. *See* Cason v. Baskin, 20 So. 2d 243, 250-51 (Fla. 1944). The *Cason* court determined that the word "person" in the declaration meant not just one's body, but the "whole man, his personality as well as his physical body." *Id.* at 250. Thus,

2. *The Right to Privacy Grounded in the Common Law*

Other state courts recognize the right to privacy as evolving from the common law. Many of these decisions echo Warren and Brandeis' concerns[65] regarding the need for the common law to address societal change and advancing technology.[66] In *Truxes v. Kenco Enterprises, Inc.*,[67] the South Dakota supreme court stated:

> One of the principle arguments advanced in support of the doctrine of privacy by its original exponents is that the increased complexity and intensity of modern civilization and the development of man's spiritual sensibilities have rendered man more sensitive to publicity and have increased his need of privacy, while the great technological improvements in the means of communications have more and more subjected the intimacies of his private life to exploitation by those who pander to commercialism and to prurient and idle curiosity.[68]

In *Hinish v. Meier & Frank Co.*,[69] the Oregon Supreme Court also stated that modern scientific inventions made invasions of privacy more common and more offensive.[70] The court recognized the common law's unique ability to meet increasing technological threats to personal privacy,[71] declaring that "[t]he common law's capacity to discover and apply remedies for acknowledged wrongs without waiting on legislation [was] one of its cardinal virtues."[72]

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this "person" could be injured emotionally as well as physically, and such emotional injury demanded remedy. *See id.*

65. *See supra* notes 11-17 and accompanying text.

66. *See, e.g.*, Beverly v. Reinert, 606 N.E.2d 621, 622-26 (Ill. App. Ct. 1992) (examining the effects of facsimile transmissions on the right to privacy and warning courts to proceed with caution in defining which communications constitute invasions of privacy because of the societal importance of a free flow of information).

67. 119 N.W.2d 914 (S.D. 1963).

68. *Id.* at 916 (quoting 41 AM. JUR. *Privacy* § 9). *See also* McCormack v. Oklahoma Publ'g Co., 613 P.2d 737, 740 (Okla. 1980). "[T]he common law is not static, but is a dynamic and growing thing and its rules arise from the application of reason to the changing conditions of society." *Id.*

69. 113 P.2d 438 (Or. 1941).

70. *See id.* at 440. The court also viewed a demand for privacy as "growing out of the conditions of life in the crowded communities of to-day [sic]. . . ." *Id.* at 441 (citing Dean Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 362-63 (1915)).

71. *See id.* at 446.

72. *Id.* at 447.

3. *Legislatively-created Right to Privacy*

Conversely, some courts do not recognize a right to privacy, ruling that the right was unknown in the common law and was not present in the federal or state constitutions.[73] For example, in *Roberson v. Rochester Folding Box Co.*,[74] the New York Court of Appeals found no support for the right to privacy tort under the United States Constitution or in the common law.[75] The court stated, "[T]he so-called 'right-of-privacy' has not yet found an abiding place in our jurisprudence, and . . .the doctrine cannot now be incorporated without doing violence to settled principles of law . . . ."[76] The New York legislature subsequently enacted a right to privacy by statute.[77] Other states have similarly enacted privacy statutes to protect their residents' privacy rights.[78]

4. *Judicially-imposed Limitations on the Right to Privacy*

Many states recognize that the right to privacy must have restrictions placed on it to limit litigation and protect the conflicting interests of the individual and society at large.[79] In an effort to impose restrictions, states

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73. *See* Brunson v. Ranks Army Store, 73 N.W.2d 803, 806 (Neb. 1955) (finding no common law right to privacy); Judevine v. Benzies-Montanye Fuel & Warehouse Co., 269 N.W. 295, 302 (Wis. 1936) (holding that it is more fitting for privacy rights to be created by legislature since the right does not exist in common law). *See also Hinish*, 113 P.2d at 440 (explaining that some courts believe that no legal redress could be granted for privacy claims because the right was unknown to the common law and to recognize it would be judicial legislation).

74. 64 N.E. 442 (N.Y. 1902).

75. *See id.* at 447.

76. *Id.* The *Roberson* court believed that recognition of the right to privacy would "necessarily result not only in a vast amount of litigation, but in litigation bordering on the absurd." *Id.* at 443.

77. *See* N.Y. CIV. RIGHTS LAW § 50 (1992). The New York privacy statute states that one "that uses for advertising purposes . . . the name, portrait or picture of any living person without having first obtained written consent . . . is guilty of a misdemeanor." *Id.* The statute also asserts that the identity of a victim of a sex offense is confidential and if disclosed, the victim may bring an action to recover damages. *See id.* at § 50b-50c. New York's privacy statute was held constitutional in *Time, Inc. v. Hill*, 385 U.S. 374 (1967), due to the United State Supreme Court's careful interpretation of the statute as not being invasive of the constitutional protections of freedom of the press and freedom of speech. *See id.* at 397.

78. *See* MASS. GEN. LAWS ANN. ch. 214, § 1B (West 1989); NEB. REV. STAT. ANN. § 20-201 (West 1995); R.I. GEN. LAWS § 9-1-28.1 (1997); VA. CODE ANN. § 8.01-40 (Michie 1992); WIS. STAT. ANN. § 895.50 (West 1997).

79. *See infra* notes 81-90 and accompanying text; *see also*, Truxes v. Kenco Enter., Inc., 119 N.W.2d 914, 916 (S.D. 1963) (noting that many courts have had great difficulty in fixing proper limits on privacy and recommending they proceed

have declared certain acts privileged from invasion of privacy claims.[80] For example, some acts done by creditors and employers are privileged.[81] States have also given privileges to publications that are deemed newsworthy, citing society's continuing interest in obtaining news.[82] In addition, courts have placed restrictions on public figures' and officials' ability to recover under this tort.[83] Courts require that those in the public eye meet a more stringent standard than private citizens in order to recover for invasions of their privacy.[84]

The United States Supreme Court examined the publication of private facts in *Cox Broadcasting Corp. v. Cohn*.[85] In *Cox*, a television broadcasting company publicized the name of a rape victim it had obtained from court documents.[86] The Court ruled that the company had a constitu-

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cautiously when doing so).

80. *See, e.g.*, Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1133-37 (Alaska 1989) (recognizing the public's interest in maintaining safe work environments and holding that employers may perform drug testing on their employees provided a specific procedure is followed); Pavesich v. New England Life Ins. Co., 50 S.E. 68, 73-74 (Ga. 1905) (stating that the right to privacy is unquestionably limited by the right to speak and print). Some states have applied the privileges afforded in defamation actions to invasion of privacy claims. *See* Senogles v. Security Benefit Life Ins. Co., 536 P.2d 1358, 1361-62 (Kan. 1975) (allowing privileges in libel and slander suits to privacy suit); Smith v. Arkansas La. Gas Co., 645 So. 2d 785, 789-90 (La. Ct. App. 1994) (holding that invasion of privacy is subject to same privileges as defamation); Lee v. Nash, 671 P.2d 703, 706 (Or. Ct. App. 1983) (determining that absolute privilege in defamation suits applies to invasion of privacy claims); Russell v. Thomson Newspapers, Inc., 842 P.2d 896, 906 (Utah 1992) (holding that qualified privileges in defamation actions apply to intentional infliction of emotional distress and privacy claims); Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70, 83 (W. Va. 1983) (determining that the same absolute and qualified privileges available in defamation actions are available in invasion of privacy actions).

81. *See, e.g., Luedtke*, 768 P.2d at 1136-37 (holding that employers have qualified privilege to perform drug testing on employees); Yoder v. Smith, 112 N.W.2d 862, 864 (Iowa 1962) (holding that a creditor sending a letter to a debtor's employer is not an invasion of privacy).

82. *See, e.g.*, CAL. CIVIL CODE § 47 (West 1992 & Supp. 1998) (granting privileges to certain types of publications and broadcasts); Cape Publications, Inc. v. Bridges, 423 So. 2d 426, 427-28 (Fla. Dist. Ct. App. 1982) (holding that the plaintiff may not recover for publication of a distressful photograph because of the newspaper's privilege to publish items of public interest); Hubbard v. Journal Publ'g Co., 368 P.2d 147, 148 (N.M. 1962) (stating that the publication was privileged even though plaintiff involuntarily participated in the activity described in article).

83. *See* Shulman v. Group W Prods., Inc., 955 P.2d 469, 477 (Cal. 1998) (limiting recovery for public figures who claimed invasion of privacy by publication of private facts); *see also Crump*, 320 S.E.2d at 83-84 (discussing the boundaries of the public figure doctrine).

84. *See supra* note 83 and accompanying text.

85. 420 U.S. 469 (1975).

86. *See id.* at 472-74.

tionally protected right to publicize information it had obtained from public records.[87] While the Court did not determine whether one can publicize information that is not of legitimate public interest,[88] the Court did take note of the tension between the interests in privacy and constitutional rights.[89] The Court ultimately stated that "[b]ecause the gravamen of the claimed injury is the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press."[90]

B. Minnesota Precedent Addressing the Right to Privacy Tort

Minnesota decisions rejecting the right to privacy in cases that preceded *Lake* erroneously read a Minnesota Supreme Court decision as standing for the proposition that Minnesota did not recognize a cause of action for invasion of privacy by private individuals.[91] In *Hendry v. Conner*,[92] the Minnesota Supreme Court gave cursory treatment to the question of invasion of privacy by a private individual.[93] In *Hendry*, the plaintiff sought recovery for having been loudly told by a hospital employee that her child would not be admitted to the hospital until an outstanding bill was paid.[94] The hospital employee also made reference to the plaintiff's bankruptcy proceedings.[95]

The *Hendry* court listed factors that could give rise to a claim for invasion of privacy, including undue or oppressive publicity and the degree of offensiveness to a reasonable person.[96] The court stated that the extent of publicity or degree of harassment determined whether the right to privacy was invaded,[97] and it declared that the publicity must be undue or oppressive and lift the curtain on a subject matter that a reasonable person of ordinary sensibilities would find offensive and objectionable.[98]

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87. *See id.* at 494-95.
88. *See id.* at 491.
89. *See id.* at 488-89.
90. *Id.* at 489; *see also* Time, Inc. v. Hill, 385 U.S. 374, 387-88 (1967) (balancing constitutional rights and individual privacy in imposing limitations on the tort of false light); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (requiring the plaintiffs prove the defendant had knowledge of the falsity of the statements it published, or had reckless disregard of their falsity, before they could recover under the tort of false light).
91. *See infra* notes 92-113 and accompanying text.
92. 303 Minn. 317, 226 N.W.2d 921 (1975).
93. *See id.* at 318, 226 N.W.2d at 922.
94. *See id.*
95. *See id.*
96. *See id.* at 318-19, 226 N.W.2d at 922-23.
97. *See id.*
98. *See id.*

The court ultimately decided, however, that the plaintiff's situation did not warrant recovery under the right to privacy tort because the hospital employee's behavior did not meet these factors.[99] The *Hendry* court went on to declare that, because the plaintiff's allegations did not give rise to a privacy claim, it was not necessary for the disposition of the case to decide whether a cause of action for invasion of privacy should be recognized in Minnesota.[100] Thus, the court never decided whether Minnesota should adopt the tort.

In *Stubbs v. North Memorial Medical Center*,[101] the Minnesota Court of Appeals was presented with a situation that fit the factors articulated in *Hendry*.[102] In *Stubbs*, the plaintiff brought a privacy claim against a physician who performed cosmetic surgery on her and published her "before" and "after" photos without her consent.[103] The court felt that the plaintiff deserved some form of redress for the invasion of her privacy,[104] but denied her claims, ruling that it was not its role to establish new causes of action.[105]

In *Richie v. Paramount Pictures Corp.*,[106] the Minnesota Supreme Court had the opportunity to recognize the right to privacy in the context of a false light invasion of privacy claim.[107] The *Richie* plaintiffs brought a claim against a media producer for invasion of privacy, alleging that their photos were shown in a false light on a national television show.[108] Citing *Hendry*, the *Richie* court dismissed the plaintiffs' claims, stating that it had never recognized invasion of privacy as a cause of action.[109]

Subsequent Minnesota Court of Appeals' decisions read *Hendry* and

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99. *See id.* at 319, 226 N.W.2d at 923. The *Hendry* court held that the plaintiff's situation did not meet the elements of a privacy claim because (1) a bankruptcy record is a public fact; (2) the plaintiff could not establish extensive publicity of the comments, and (3) the incident occurred only once. *See id.* Hence, the publication was not oppressive enough to allow for recovery. *See id.*

100. *See id.*

101. 448 N.W.2d 78 (Minn. Ct. App. 1989).

102. *See id.* at 79-80.

103. *See id.*

104. *See id.* at 80. The court stated that "[w]here, as here, unwanted publicity is given to an aspect of an individual's life which is inherently private, justice would seem to require that there be some form of redress under the law." *Id.*

105. *See id.* at 81. However, in making this statement, the court did not indicate whether it was the function of the legislature, rather than the judicial system, to recognize privacy rights. *See id.*

106. 544 N.W.2d 21 (Minn. 1996).

107. *See id.*

108. *See id.* at 23-24. The plaintiffs alleged that the photos that aired on *The Maury Povich Show* were photos of themselves rather than photos of the parties being talked about on the show. *See id.* at 24. The photos were shown at times coinciding with assertions of sexual abuse. *See id.*

109. *See id.* at 28 (holding that to allow emotional harm as basis for defamation claim would be inconsistent with the court's rejection of privacy claims).

Richie to stand for the proposition that the Minnesota Supreme Court specifically declined to recognize the invasion of privacy tort.[110] However, the facts in many of these cases did not warrant recognizing privacy as a cause of action.[111] The plaintiffs in these actions either stated claims other than privacy under which they could recover or they did not encounter undue or oppressive publicity.[112] *Lake* provided sufficiently egregious facts for the supreme court to take notice.[113]

110. *See* Estate of Benson v. Minnesota Bd. of Med. Practice, 526 N.W.2d 634, 637 (Minn. Ct. App. 1995) (denying recovery to physician's widow who sued for violation of privacy for publication of physician's HIV status); Copeland v. Hubbard Broad., Inc., 526 N.W.2d 402, 406 (Minn. Ct. App. 1995) (denying recovery to homeowners who claimed a violation of privacy after events that were videotaped in their home were later broadcast); Robbinsdale Clinic, P.A. v. Pro-Life Action Ministries, 515 N.W.2d 88, 92 (Minn. Ct. App. 1994) (denying privacy claim for disclosure of public information and citing *Hendry* as expressly declining to recognize the privacy tort); Markgraf v. Douglas Corp., 468 N.W.2d 80, 84 (Minn. Ct. App. 1991) (denying recovery for claim of invasion of privacy for release of medical records and citing *Hendry* as the basis for its refusing to recognize the privacy tort); House v. Sports Films & Talents, Inc., 351 N.W.2d 684, 685 (Minn. Ct. App. 1984) (denying recovery for invasion of privacy to individuals who were filmed for a football recruiting video and citing *Hendry* as rejecting privacy tort). Federal courts interpreting Minnesota law have followed the Minnesota Court of Appeals' lead in this area. *See* Ruzicka v. Conde Nast Publications, Inc., 939 F.2d 578, 583 n.8 (8th Cir. 1991) (citing *Hendry* as reason for denying recovery to individual who alleged invasion of privacy by publication of personal information in *Glamour* magazine article); Bystrom v. Fridley High Sch., Indep. Sch. Dist. No. 14, 822 F.2d 747, 754 (8th Cir. 1987) (evaluating school publication guidelines and stating that *Hendry* rejected the tort of privacy); Movie Systems, Inc. v. Heller, 710 F.2d 492, 496 (8th Cir. 1983) (denying recovery to individual for electronic surveillance by television programming distributor and citing *Hendry* as rejecting the tort of invasion of privacy).

111. *See, e.g.*, Deli v. University of Minn., 578 N.W.2d 779, 783 (Minn. Ct. App. 1998) (holding that the court should not subvert the law of contract to create an exception to the plaintiff's case); *Estate of Benson*, 526 N.W.2d at 637 (holding that a privacy action does not survive death); *Copeland*, 526 N.W.2d at 406 (disallowing a privacy claim where the plaintiffs failed to allege any injury not addressed by their trespass claim); *Robbinsdale Clinic*, 515 N.W.2d at 92 (stating that the plaintiff had not shown a violation of the right of privacy); *Markgraf*, 468 N.W.2d at 81 (dismissing privacy claim as plaintiff lacked a factual basis for the claim); Tibbetts v. Crossroads, Inc., 411 N.W.2d 535, 537-38 (Minn. Ct. App. 1987) (holding that the privacy claim was not well articulated and that the plaintiff did not assert facts supporting it); *Sports Films*, 351 N.W.2d at 685 (holding that the facts did not support a claim for invasion of privacy).

112. *See supra* note 111 and accompanying text.

113. *See* Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998) (stating that the plaintiffs alleged privacy interests worthy of protection).

IV. THE *LAKE* DECISION

A. *The Facts*

Ellie Lake and Melissa Weber were on vacation in Mexico when Weber's sister took a picture of them standing naked together outside their hotel shower.[114] When they returned from their vacation, they took their rolls of film to the local Wal-Mart store for developing.[115] When they picked up the photos, they were informed that one of the negatives was not developed due to its "nature."[116]

A few months later, an acquaintance alluded to the supposedly undeveloped photograph and questioned their sexual orientation.[117] Another friend claimed to have been shown a copy of the photograph by a Wal-Mart employee.[118]

Alleging that a Wal-Mart employee put this photograph into circulation, Lake and Weber sued Wal-Mart and the employee for invasion of privacy.[119] They claimed that the defendants invaded their privacy, appropriated their likeness, published their private lives and placed them in a false light.[120] The trial court dismissed the action, stating that Minnesota does not recognize the tort of invasion of privacy.[121]

Citing both *Hendry* and *Richie*, the Minnesota Court of Appeals affirmed the trial court, again stating that Minnesota did not recognize invasion of privacy by private individuals as a cause of action.[122] The court also stated that its function was not to establish new causes of action.[123]

114. *See id.* at 232.
115. *See id.* at 233.
116. *See id.*
117. *See id.*
118. *See id.*
119. *See id.*
120. *See id.*
121. *See id.* at 232.
122. *See* Lake v. Wal-Mart Stores, Inc., 566 N.W.2d 376, 378 (Minn. Ct. App. 1997).
123. *See id.*

B. *The Court's Analysis*

Declaring its power to create common law doctrines,[124] the Minnesota Supreme Court in *Lake* established the right to privacy from private intrusion in Minnesota.[125] The *Lake* court stated that whether to recognize these torts was a question of first impression for the court because previous cases had addressed the issue only in dicta.[126]

Although the court did not provide any reasoning for its recognition of the specific torts, it ultimately recognized three of Prosser's four privacy torts: intrusion upon seclusion, appropriation, and publication of private facts.[127] It declined to recognize the tort of false light, reasoning that it was similar to defamation[128] and would expand litigation profusely.[129]

V. ANALYSIS OF THE *LAKE* DECISION

The Minnesota Supreme Court was correct to recognize the right to privacy. Today's technology makes the protection of individual privacy more crucial than ever.[130] Case precedent from across the United States

124. *See Lake*, 582 N.W.2d at 233 n.6 (referring to previous cases in which the court had abolished common law immunities as support for its assertion that it has the ability to create common law causes of action). The dissent, however, contended that the act of creating new causes of action is reserved solely for the legislature. *See id.* at 236-37 (Tomljanovich, J., dissenting). The Minnesota Supreme Court's decisions regarding the determination of whether the legislature or the courts have the power to create new causes of action have been contradictory. *Compare* Lambertson v. Cincinnati Corp., 312 Minn. 114, 125-29, 257 N.W.2d 679, 687-89 (1977) (fashioning a new damage rule for contribution and indemnity laws after stating that the legislature had removed a common law remedy, even though this area of law is primarily defined by the legislature) *with* Salin v. Kloempken, 322 N.W.2d 736, 738-41 (Minn. 1982) (refusing to recognize a cause of action for loss of parental consortium largely due to its difficulty in figuring damages, even though the action had some common law support).

125. *See Lake*, 582 N.W.2d at 234-36.

126. *See id.* at 233 n.1.

127. *See id.* at 236.

128. *See id.* at 235-36. The court declined to recognize the tort of false light because it is not subject to as many restrictions as defamation, a very similar cause of action. *See id.* at 236 n.27 (noting that defamation restrictions include an absolute privilege for public service or administration of justice, a conditional privilege for public officials, and retraction).

129. *See Lake*, 582 N.W.2d at 235-36. Although the court showed concern about false light competing with other societal interests, it did not express any reservations about the other torts. For example, the court did not discuss the publication of private facts tort as possibly conflicting with the public's interest in news and information. This tort, in particular, has been criticized as no longer reflecting needed rights due to the changing definition of what constitutes "public interest." *See supra* note 30 and accompanying text.

130. *See infra* notes 134-141 and accompanying text.

has embraced the concern, expressed long ago by Warren and Brandeis,[131] that modern enterprise and invention necessitates the need to recognize a right to privacy from intrusion by private individuals.[132] However, the court's failure to articulate a meaningful standard leaves the new right's application uncertain.[133]

New methods of communication and other technological advances have dramatically increased the possibility of invasion of a person's privacy.[134] For example, due to network developments, patients' medical records can be viewed by as many as eighty people after just a single trip to see a physician.[135] Further, devices such as Intellidata, a new telecommunications tool, provide businesses with personal information about incoming telephone callers without the caller's knowledge.[136] The Internet also presents substantial risks to personal privacy.[137] The advent of "cookies," a method by which Internet sites store information about persons browsing the web, poses serious privacy concerns because "cookie" data is frequently disclosed to companies for marketing purposes.[138] In addition, due to the rush to release new web browsers, software security is often left

131. *See supra* notes 65-72 and accompanying text; Warren and Brandeis, *supra* note 11, at 196.

132. *See supra* notes 13-16 and accompanying text.

133. *See infra* notes 142-147 and accompanying text.

134. *See* Christine A. Varney, *Consumer Privacy in the Information Age: A View from the United States*, 505 PRAC. L. INST./PATENTS 629, 634 (1996) (stating that personal information is being collected at a rate and to a degree unthinkable even five years ago); Anne Meredith Fulton, *Cyberspace and The Internet: Who Will be the Privacy Police?*, 3 COMM. L. CONSPECTUS 63, 70 (1995) (noting that the benefits of technology as relating to privacy dwindle, as information can be sent via computer in seconds with the possibility that it could intercepted, read and widely disseminated); *see also* Katrin Shatz Byford, *Privacy in Cyberspace: Constructing a Model of Privacy for the Electronic Communication Environment*, 24 RUTGERS COMPUTER & TECH. L.J. 1, 2 (1998) (noting that the need for privacy law has never been greater and listing numerous technological advances invoking privacy issues); Mark E. Budnitz, *Privacy Protection for Consumer Transactions in Electronic Commerce: Why Self-Regulation is Inadequate*, 49 S.C. L. REV. 847, 859 (1998) (discussing how businesses are covertly collecting information about consumers without their consent; mentioning the detrimental outcomes of inaccurate data).

135. *See* Christina M. Rackett, *Telemedicine Today and Tomorrow: Why "Virtual" Privacy is Not Enough*, 25 FORDHAM URB. L.J. 167, 173 (1997); *see also* Robert S. Peck, *Extending the Constitutional Right to Privacy in the New Technological Age*, 12 HOFSTRA L. REV. 893, 896 (1984) (discussing a new form of identification card that, when attached to a computer, can reveal personal data such as medical files and financial accounts).

136. *See* Paul Henroid, *Caller Intellidata: Privacy in the Developing Telecommunications Industry*, 76 WASH. U. L.Q. 351, 356 (1998).

137. *See* Varney, *supra* note 134, at 632 (noting that the transactional data trail [of the Internet] poses an incredible risk to personal privacy).

138. *See* Mary M. Luria, *Controlling Web Advertising: Spamming, Linking, Framing, and Privacy*, 14 COMPUTER L., Nov. 1997, at 10, 15 (1997).

by the wayside.[139] Recently, a security researcher discovered a bug in a web browser that allows computer hackers to steal files from the hard drives of browsing computers.[140] The benefits of these technological devices pale in comparison to the detrimental effects they could have on a person's right to privacy.[141] The *Lake* decision will allow Minnesotans to benefit from modern technological advances while providing relief for these intrusions.

Nonetheless, because the Minnesota Supreme Court did not fully explain why it chose to recognize the right to privacy torts or establish limits on these causes of action, the *Lake* decision may be difficult for lower courts to apply. Even Warren and Brandeis, in their inaugural discussion of privacy, recognized the need for limitations on the right.[142] Acknowledging this need, most states have fashioned limits on their privacy torts either by conferring privileges on some defendants[143] or by requiring certain plaintiffs to meet higher standards to recover.[144]

To limit litigation and protect conflicting interests, Minnesota's lower courts should likewise delineate privileges. For example, Minnesota courts should create privileges for news providers to protect their first amendment rights.[145] Courts should also give employers a qualified privilege to perform drug testing on their employees so as to maintain safe work environments.[146] In addition, Minnesota courts should place restrictions on plaintiffs who are public figures or public officials, making them achieve higher standards in order to recover under the tort.[147] The legislature should place limits on the tort as well by granting certain parties specific privileges that would protect them from suit.

VI. CONCLUSION

Considering the rapid advances in communication, Warren and Brandeis' argument that the common law must meet the demands imposed by continuous changes in modern society remains significant. In *Lake*, the Minnesota Supreme Court recognized this concern by granting every Minnesotan relief for invasion of their privacy by private individuals. In doing so, however, the court did not set guidelines for the application

139. *See* Scott Spanbauer, *More Bugs Found in Internet Explorer, Navigator* (visited Aug. 1, 1999) (Oct. 14, 1998) <http://www.cnn.com/TECH/computing/9810/14/mobugs.idg/index.html> (discussing the discovery of three holes in the security systems of Netscape Navigator and Microsoft Internet Explorer).
140. *See id.*
141. *See* Fulton, *supra* note 134, at 70.
142. *See supra* notes 34-35 and accompanying text.
143. *See supra* notes 80-82 and accompanying text.
144. *See supra* notes 83-84 and accompanying text.
145. *See supra* note 82 and accompanying text.
146. *See supra* note 81 and accompanying text.
147. *See supra* notes 83-84 and accompanying text.

of the tort. Minnesota's lower courts must look to other jurisdictions for direction and establish boundaries on the tort.

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