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Torts - Invasion of Privacy: North Dakota Declines to Recognize a Cause of Action for Invasion of Privacy

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TORTS—INVASION OF PRIVACY: NORTH DAKOTA DECLINES TO RECOGNIZE A CAUSE OF ACTION FOR INVASION OF PRIVACY

Hougum v. Valley Memorial Homes
1998 N.D. 24; 574 N.W.2d 812

I. FACTS

On December 16, 1994, Daniel Hougum entered the Sears department store in Grand Forks, North Dakota.[1] At the time, he was employed as a chaplain by Valley Memorial Homes, an elderly care facility in Grand Forks.[2] While at Sears, he entered the store's public restroom.[3] The restroom contained three enclosed stalls separated by metal partitions, each with a locking metal door.[4] The partitions did not extend all the way to the floor, and as such, the feet and shins of the occupant of a stall could be seen from the open area of the restroom.[5] Additionally, there was a hole approximately one and a half inches in size drilled in the partition separating the middle stall and the stall furthest from the door.[6] Hougum entered the middle stall.[7] According to his brief, he "then decided to masturbate."[8]

Shane Moran, an on-duty Sears loss prevention employee, was also in the bathroom, using the stall furthest from the door.[9] While reaching for toilet paper, Moran saw movement through the hole in the wall between stalls.[10] He watched for roughly ten seconds and determined it

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1. Hougum v. Valley Memorial Homes, 1998 N.D. 24, ¶ 1, 574 N.W.2d 812, 812. According to his brief, Hougum went to Sears for the purpose of purchasing towels, but did not find any that he wanted. *See* Brief of Appellant at 3, Hougum v. Valley Memorial Homes, 1998 N.D. 24, 574 N.W.2d 812 (No. 970108).

2. Hougum, ¶ 1, 574 N.W.2d at 814.

3. *Id.* ¶ 2, 574 N.W.2d at 815.

4. *Id.*

5. *Id.* There were also narrow gaps between the door and frame for latches and hinges. *Id.*

6. *Id.*

7. *Id.* ¶ 3; *see also* Brief of Appellant at 4, *Hougum* (No. 970108) (reviewing the facts of the case and describing in detail the physical layout and contents of the Sears bathroom).

8. *See* Brief of Appellant at 4, *Hougum* (No. 970108). The brief does not explain why Hougum masturbated; it simply notes, "[a]fter Pastor Hougum had relieved himself, he then decided to masturbate." *Id.*

9. Hougum, ¶ 3, 574 N.W.2d at 815. In their brief, Sears and Moran noted that although Moran was on duty, he entered the bathroom "for his own personal reasons and not as an undercover agent for Sears." *See* Brief of Appellees at 3, Hougum v. Valley Memorial Homes, 1998 N.D. 24, 574 N.W.2d 812 (No. 970108). However, the parties dispute the precise details of who entered the bathroom first. *Compare* Brief of Appellant at 4-5, *Hougum* (No. 970108) (asserting that Hougum did not remember anyone entering the bathroom after him) *with* Brief of Appellees at 3, *Hougum* (No. 970108) (claiming Moran thought he was alone in the bathroom when he noticed Hougum). The court noted only that Moran claimed he thought no one else was in the bathroom. *Hougum*, ¶ 3, 574 N.W.2d at 815.

10. Hougum, ¶ 3, 574 N.W.2d at 815.

was an individual, later identified as Hougum, masturbating.[11] Moran left the bathroom and called the Grand Forks Police Department.[12] The police arrived and told Moran that the sexual act he witnessed constituted disorderly conduct.[13] Moran executed a citizen's arrest form, and the police arrested Hougum for disorderly conduct.[14]

Acting without counsel, Hougum pled guilty to the criminal disorderly conduct charge in Grand Forks municipal court on December 20, 1994.[15] This plea was reported in the Grand Forks Herald.[16] Hougum then retained counsel, and on January 6, 1995, he withdrew his guilty plea.[17] The disorderly conduct charge was subsequently dismissed with prejudice on January 25, 1995.[18]

Hougum subsequently filed a lawsuit against both Sears and Moran, alleging invasion of privacy and both intentional and negligent infliction of emotional distress.[19] The invasion of privacy claim was based on the "intrusion upon seclusion formula" set forth in the Restatement (Second) of Torts (1977).[20] Both Sears and Moran moved for summary judgment; the trial court granted their motions, and Hougum appealed to the North Dakota Supreme Court.[21] The North Dakota Supreme Court heard the case, and unanimously *held* that the trial court correctly granted summary judgment because reasonable persons could not

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11. *Id.*

12. *Id.* According to his brief, Moran was unsure of how to proceed in such a situation, occasioning his call to the police. *See* Brief of Appellees at 4-5, *Hougum* (No. 970108).

13. Hougum, ¶ 4, 574 N.W.2d at 815.

14. *Id.* Hougum's brief noted that during the arrest he was handcuffed and driven to the police station for processing. *See* Brief of Appellant at 5, *Hougum* (No. 970108).

15. *Id.* Hougum asserts that he initially pled guilty because he wanted to bring the situation to a quick end, but he never believed that he had committed a crime. *See* Brief of Appellant at 5, *Hougum* (No. 970108).

16. Hougum, ¶ 4, 574 N.W.2d at 815.

17. *Id.* Hougum retained William McKechnie of Grand Forks as his counsel; McKechnie also represented Hougum during his lawsuit and subsequent appeal. *See* Brief of Appellant at 5, *Hougum* (No. 970108).

18. Hougum, ¶ 4, 574 N.W.2d at 815.

19. *Id.* ¶ 6. After his arrest but before his plea was withdrawn, Valley Memorial Homes terminated Hougum. *Id.* ¶ 5. Hougum named Valley Memorial Homes as a defendant in his suit, alleging that its termination of him violated the North Dakota Human Rights Act. *Id.* ¶ 34, 574 N.W.2d at 820 (citing N.D. CENT. CODE § 14-02.4 (1997)). The claim was based on an allegation that Valley Memorial Homes considered Hougum to be a homosexual. *Id.* The trial court dismissed the claim, but the North Dakota Supreme Court remanded; at the time of publication, the case had not yet proceeded to trial on remand. *Id.* ¶ 46, 574 N.W.2d at 822.

20. *Id.* ¶ 9, 574 N.W.2d at 816. "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." RESTATEMENT (SECOND) OF TORTS § 652B (1977).

21. *See* Hougum, ¶ 6, 574 N.W.2d at 815. The trial judge issued a detailed memorandum decision granting summary judgment, analyzing Hougum's claim and ultimately concluding, as the North Dakota Supreme Court did, that his claim would fail on the merits if North Dakota were to recognize invasion of privacy. *See* Hougum v. Valley Memorial Homes, Civil No. 96-981 (N.D. Dist. Ct. Feb. 25, 1997) (mem.).

conclude that the defendants' actions constituted an intentional intrusion upon seclusion by a method objectionable to a reasonable person.

II. LEGAL BACKGROUND

Unlike many torts, invasion of privacy did not develop from the English common law.[22] Rather, it was created primarily by Samuel D. Warren and Louis Brandeis, who in 1890 wrote an article in the Harvard Law Review arguing for its recognition.[23] They asserted that while the law once allowed recovery only for physical injuries, it later recognized "man's spiritual nature . . . his feelings and his intellect."[24] To accommodate this development, the law began allowing recovery for injuries that were more difficult to define.[25] For example, the protection against physical injury provided by the tort of battery was extended to include fear of injury, as seen in the tort of assault.[26] Warren and Brandeis argued that a similar development had occurred in the conception of property, such that intangible property, including intellectual property, was now recognized and protected in a manner that once only applied to real property.[27]

According to Warren and Brandeis, such a progression was inevitable.[28] The next step, they posited, was for the law to recognize a right to privacy.[29] Their special concern was the unauthorized publication of photos and stories by an overzealous press.[30] They stressed that

22. *See* generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193-95 (1890) [hereinafter Warren & Brandeis] (reviewing the history of invasion of privacy).

23. *Id.*

24. *Id.* at 193. This recognition of new legal rights, the authors argued, had gradually come to encompass a broadening of the scope of the rights. *Id.*

25. *Id.* at 193-94.

26. *See id.* at 194. According to Warren and Brandeis, the principle that led from battery to assault also led to nuisance, and eventually to actions protecting reputation and standing in the community, such as libel and slander. *Id.*

27. *Id.* at 194-95.

28. *See id.* at 195. This progression was inevitable, they argued, because the heightened emotional and intellectual life caused by the advance of civilization mandated new and more sophisticated protections. *Id.*

29. *Id.*

30. *Id.* The genesis of the article was excessive newspaper coverage of the Warren family by Boston newspapers, culminating in detailed coverage of the wedding of Warren's daughter. *See* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 383 (1960) [hereinafter Prosser] (discussing the Warren & Brandeis article). At the time he wrote the article, Warren had stopped practicing law and was running his family's paper wholesaling business. *Id.* A representative of *The Boston Globe* once thanked Warren for the high quality of the paper he was selling; Warren replied that it was "a damn sight better than what you're giving us." *See* LOUIS M. LYONS, NEWSPAPER STORY: ONE HUNDRED YEARS OF THE BOSTON GLOBE 16 (1971). While the *Saturday Evening Gazette*, not the *Globe*, was the paper responsible for the coverage of his daughter's wedding, this story well illustrates Warren's attitude towards the press. *Cf. id.* (discussing Warren's connection with *The Boston Globe* around the same time he and Brandeis wrote the influential law review article).

the bustle of modern society has made tranquillity and privacy crucial.[31] However, rather than respecting the need for privacy, the press was overstepping its bounds and fueling a desire for public scandal.[32] This, they asserted, weakened society by feeding the weak side of human nature and taking the place of more important concerns.[33]

Warren and Brandeis' thesis depended on two bodies of decisions which, though expressly decided on other grounds, the authors contended relied on an implicit recognition of the right of privacy.[34] In the first line of cases, courts prevented the publication of various works on the basis of intellectual property rights.[35] The second line extended similar protections based on a breach of fiduciary duty.[36] In both cases, Warren and Brandeis asserted that the decisions actually depended on the implicit recognition of a right of privacy.[37]

While discussing the first line of cases, Warren and Brandeis argue that the law of intellectual property, which protects the right of an individual to protect the publication aspect of his or her work, is only an incident of the more general right "to be left alone."[38] Warren and Brandeis focused on cases discussing an author's decision to publish in the first instance.[39] Whether to publish at all is clearly an exclusive right of the artist, and yet it cannot be strictly a property right, as there has been no publication which would allow the property laws to control.[40] Therefore, they asserted that this right was derived from the right to privacy.[41]

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31. *See* Warren & Brandeis, *supra* note 22, at 196.

32. *See* Warren & Brandeis, *supra* note 22, at 196. The authors described the climate thus: "Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality." *Id.* This was the era of "yellow journalism," when some newspapers used new techniques, such as bigger headlines, color printing and pictures to "emphasize sensationalism at the expense of news." *See generally* EDWIN EMERY & MICHAEL EMERY, THE PRESS AND AMERICA 281-82 (5th ed. 1984). It was also the height of William Randolph Hearst's *New York Journal*, viewed as the epitome of yellow journalism. *See id.* at 285-95 (describing Hearst's work with the *New York Journal*). The *Journal* is remembered for feeding the fires of the Cuban-American War with its coverage of the explosion of the Maine, a United States battleship, in Havana, and asking, on its front page, "How do you like the Journal's war?" *Id.* at 295.

33. *See* Warren & Brandeis, *supra* note 22, at 196.

34. *See* Prosser, *supra* note 30, at 384 (summarizing Warren and Brandeis' methodology).

35. *See* Warren & Brandeis, *supra* note 22, at 199-207.

36. *Id.* at 207-12.

37. *See* Prosser, *supra* note 30, at 384 (summarizing Warren & Brandeis' methodology).

38. *See* Warren & Brandeis, *supra* note 22, at 205.

39. *Id.* at 200. For example, the authors discussed *Prince Albert v. Strange*, which prevented the publication not only of etchings of Queen Victoria, which the author clearly could refuse, but also a description of the etchings. *Id.* at 201-02 (discussing Prince Albert v. Strange, 2 DeGex & Sm. 652 (1849)).

40. *Id.* at 200-05.

41. *Id.* at 207. The authors describe this "as a part of the more general right to the immunity of the person,–the right to one's personality." *Id.*

In the second line of cases, courts granted injunctions to prevent publication of a plaintiff's work, relying on an implied contract or trust between the plaintiff and the one seeking to publish.[42] Warren and Brandeis, however, posited that the process of implying a trust or a term in a contract was actually a declaration that public morality, private justice, and general convenience demanded the result the courts reached.[43] Thus, while contract theory may have provided an appropriate way to resolve some cases, "[T]he court can hardly stop there."[44] Instead, these decisions recognized the legal right of the plaintiff in maintaining his or her right to privacy, which the authors describe as a right to "an inviolate personality," and simply used contract as a method of protecting that right.[45] Warren and Brandeis argued that these lines of cases rested on an implicit privacy right, and thus provided precedent for explicit recognition of a right to privacy.[46] Finally, they wrote that both damages and injunctions should be available as remedies for invasions of privacy.[47]

There were varying reactions to the article, as a series of courts considered and either rejected or embraced invasion of privacy as an actionable tort.[48] The first major case in this series was *Atkinson v. John E, Doherty & Co.*,[49] in which the Supreme Court of Michigan soundly rejected the Warren and Brandeis theory.[50] The defendant had produced

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42. *Id.* at 207-12. For example, the authors discussed *Abernathy v. Hutchinson*, which prevented publication of a professor's lectures. *Id.* at 207-08 (discussing Abernathy v. Hutchinson, 3 L.J. Ch. 265 (1625)). Despite rejecting the argument that lectures were property, the court still found that students admitted to hear lectures could record them only for their own purposes, and were thus prevented from publishing them. *Id.*

43. *Id.* at 210.

44. *Id.*

45. *Id.* at 210-11. The authors described this right as "the right of property in its widest sense, including all possession including all rights and privileges, and hence embracing the right to an inviolate personality." *Id.* at 211.

46. *Id.* at 213. Warren and Brandeis wrote:

> We must therefore conclude that the rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights as against the world; and, as above stated, the principle which has been applied to protect these rights is in reality not the principle of private property, unless that word be used in an extended and unusual sense.

Id.

47. *Id.* at 219. The authors also discussed limitations on the right of privacy, both for the plaintiff and defendant, which they drew largely from the law of libel and slander. *Id.* at 214-19. Warren and Brandeis recognized six limitations: 1) privacy cannot prevent publication of newsworthy information; 2) the privileges of libel and slander apply to privacy torts; 3) recovering for oral publication requires proof of special damages; 4) the right of privacy ceases with consent of the plaintiff or publication by the plaintiff; 5) truth is not a defense; and 6) absence of malice is not a defense. *Id.* at 214-19.

48. *See* Prosser, *supra* note 30, at 385-86 (discussing the immediate impact of the Warren & Brandeis article).

49. 80 N.W. 285 (Mich. 1899)

50. Atkinson v. John E. Doherty & Co., 80 N.W. 285, 289 (Mich. 1899) (calling invasion of privacy an ill for which the law affords no remedy).

a cigar and without permission named it for Col. John Atkinson, a well-known lawyer and politician.[51] His widow sought an injunction preventing sale of the cigars, claiming both libel and invasion of privacy.[52] The court rejected the privacy claim after discussing the Warren and Brandeis article, taking issue with its characterization of precedent as recognizing a right of privacy and rejecting its reasoning.[53]

The next state to make important contributions to invasion of privacy law was New York, when it too rejected Warren and Brandeis' theory in *Robberson v. Rochester Folding Box Co.*[54] Defendants had used an unauthorized picture of the plaintiff, a young woman, in an advertisement for flour.[55] The plaintiff sought to enjoin them from distributing the advertisements and to recover damages.[56] Citing lack of precedent and fear of vast and absurd litigation, the court rejected the contention that relief could be afforded the plaintiff based on invasion of privacy.[57] Like *Atkinson*, the *Robberson* decision considered and rejected the Warren and Brandeis theory, specifically disagreeing that any past decisions rested on an implicit right of privacy.[58] There was, however, a strong dissent,[59] and a year later the New York legislature passed a statute making it both a misdemeanor and a tort to use an

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51. *Id.* at 285. In addition to naming the cigar for Atkinson, the manufacturer sought to market under the Atkinson name, using a picture of Col. Atkinson. *Id.*

52. *Id.* The court summarily disposed of the libel claim on the grounds that no one would think less of Atkinson or his widow if cigars bearing his name were sold. *Id.*

53. *Id.* at 286-89. Judge Hooker, who wrote the *Atkinson* opinion, sharply criticized Warren and Brandeis, especially their characterization of earlier cases as resting on privacy rights. *Id.* He wrote at one point that Warren and Brandeis' theory was put forward "[n]otwithstanding the unanimity of the courts in resting the decisions adverted to upon property rights." *Id.* at 286. He then reviewed the cases himself, arguing throughout that they did in fact rest on property grounds, and not on a right of privacy. *Id.* at 286-89.

54. 64 N.E. 442 (N.Y. 1902).

55. Robberson v. Rochester Folding Box Co., 64 N.E. 442, 442 (N.Y. 1902). The plaintiff's picture appeared on the package under the words "The Flour of the Family." *Id.*

56. *Id.*

57. *Id.* at 443. The court also noted that the plaintiff could not recover based on libel had she attempted to do so, as the "likeness is said to be a very good one." *Id.* at 442.

58. *Id.* at 444-45. The court wrote, "[E]ach decision was rested either upon the ground of breach of trust, or that plaintiff had a property right in the subject of litigation which the court could protect." *Id.* at 445. The decision also cited favorably from *Atkinson*. *Id.* at 447.

59. *Id.* at 448-51. Judge Gray argued passionately that the majority relied too heavily on lack of precedent, and as a result failed to give plaintiff redress for the wrong committed against her. *Id.* Judge Gray attacked the defendants, noting that though they argued the plaintiff had no cause of action,

> These defendants . . . . admi[t] they have made, published, and circulated, without the knowledge or the authority of the plaintiff, 25,000 lithographic portraits of her, for the purpose of profit and gain to themselves, that these portraits have been conspicuously posted in stores, warehouses, and saloons in the vicinity of the plaintiff's residence, and throughout the United States, as advertisements of their goods; that the effect has been to humiliate her, and to render her ill . . . .

Id. at 448.

unauthorized name or portrait for "advertising purposes or for the purpose of trade."[60]

After rejection in Michigan and mixed results in New York, invasion of privacy was bolstered in 1905 when the Georgia Supreme Court embraced it wholeheartedly in *Pavesich v. New England Life Ins. Co.*[61] In a long, detailed opinion, the Georgia court gave relief to a plaintiff who, like the plaintiff in *Robberson*, sought to prevent the defendant from using an unauthorized picture of him for advertising purposes.[62] The court based its decision in part on natural law and in part on an analogy to the constitutional protection against unreasonable searches.[63] The Georgia Supreme Court became the first court to explicitly recognize an actionable common-law protection against invasion of privacy.[64]

Courts that subsequently considered the issue followed either the Georgia or the New York/Michigan analysis, leading to a wide variety of decisions.[65] The next step in the development of the law was a 1960 law review article by torts scholar William L. Prosser.[66] At the time, Prosser was able to identify twenty seven American jurisdictions which recog-

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60. N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1997). This law followed heavy public criticism of the *Robberson* decision. See Prosser, *supra* note 30, at 385 (discussing the public and political outcry in the aftermath of *Robberson*). The criticism was so severe it prompted one concurring justice to write a law review article defending the decision. See Denis O'Brien, *The Right to Privacy*, 2 COLUM. L. REV. 437 (1902).

61. 50 S.E. 68 (Ga. 1905).

62. Pavesich v. New England Life Ins. Co., 50 S.E. 68, 69 (Ga. 1905). The New England Life Insurance Company used a picture of Pavesich in an advertisement in the *Atlanta Constitution*. *Id.* at 68-69. The picture of Pavesich, who appeared healthy, was placed next to a picture of another man who was ill-dressed and sickly. *Id.* The advertisement indicated that Pavesich had purchased life insurance while the sick man had not; it quoted Pavesich as saying, "In my healthy and productive period of life I bought insurance in the New England Mutual Life Insurance Co., of Boston, Mass., and to-day my family is protected and I am drawing an annual dividend on my paid-up policies." *Id.* at 69. The picture was used without Pavesich's permission, and he had never actually purchased insurance from the defendant. *Id.*

63. *Id.* at 69-71. The court emphasized the role of natural law, writing, "The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence." *Id.* at 69. The court also analogized to the right against unreasonable searches and seizures, which it wrote was an implicit recognition of the right of privacy. *Id.* at 71-72.

64. *See* Prosser *supra* note 30, at 386. While the court discussed the merits of Pavesich's claim, it framed the issue of the case as "whether an individual has a right of privacy which he can enforce, and which the courts will protect against invasion." *See Pavesich*, 50 S.E. at 69. In a recent criminal case in which it overturned a criminal sodomy conviction on the grounds that the privacy of the accused was invaded, the Supreme Court of Georgia noted its place as the first court to recognize the general principle of invasion of privacy: "The *Pavesich* decision constituted the first time any court of last resort in this country recognized the right of privacy, making this Court a pioneer in the realm of the right of privacy." Powell v. The State, No. S98A0755, 1998 WL 804568, at *2. The court also pointed out that in previous cases it had "proudly noted that the right of privacy 'was birthed by this court.'" *See id.* (citing Cox Broadcasting Corp. v. Cohn, 200 S.E.2d. 127 (1973)).

65. Prosser, *supra* note 30, at 386 (discussing the effect of the *Pavesich* decision on courts which considered the invasion of privacy question).

66. *See generally id.*

nized an invasion of privacy tort in some form or another.[67] Prosser emphasized that the term "invasion of privacy" should be understood to encompass four distinct causes of action: 1) intrusion upon seclusion or solitude, or into private affairs; 2) public disclosure of embarrassing private facts; 3) false light publicity; and 4) appropriation of name or likeness.[68] Prosser also identified limitations and defenses to the tort, chiefly consent and the privileges of libel and slander.[69]

Prosser's four-part formulation of invasion of privacy was codified in the *Restatement* and achieved its modern form in the *Restatement (Second) of Torts* in 1977.[70] Following Prosser, the *Restatement* addressed absolute and conditional privileges to invasion of privacy, explicitly referring to the rules governing privilege in defamation.[71] Finally, the *Restatement* generally limits who may bring an invasion of privacy suit to a living individual whose privacy has been invaded.[72]

Today, the vast majority of states which have adopted the tort through the common-law system either explicitly recognize the four-part *Restatement*/Prosser structure or cite it favorably and explicitly recognize parts of it without rejecting or questioning the others.[73] Several states

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67. *Id.* at 386-87. Prosser identified Alabama, Alaska, Arizona, California, Connecticut, the District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nevada, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, and West Virginia as states which had adopted invasion of privacy by 1960. *Id.*

68. *Id.* at 389. Prosser argued the torts shared a common name and a few other characteristics, but should generally be viewed as separate causes of action. *Id.*

69. *Id.* at 419-23. Prosser wrote that Warren and Brandeis considered that the privileges of libel and slander, such as the absolute privilege of a witness, applied to invasion of privacy, and he saw no reason to doubt their conclusion. *Id.* at 421. Prosser also noted that while truth would be no defense for intrusion, disclosure or appropriation, it may suffice against a false light claim. *Id.* at 419-20.

70. RESTATEMENT, *supra* note 20, § 652. This section states:

> (1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.
> (2) The right of privacy is invaded by
> (a) unreasonable intrusion upon the seclusion of another, as stated in § 652B; or
> (b) appropriation of the other's name or likeness, as stated in § 652C; or
> (c) unreasonable publicity given to the other's private life, as stated in § 652D; or
> (d) publicity that unreasonably places the other in a false light before the public, as stated in § 652E.

Id.

71. *Id.* §§ 652F-652G. Sections 652F and 652G hold that the rules on absolute, conditional and special privileges for defamation "apply to the publication of any matter that is an invasion of privacy." *Id.*

72. *Id.* at § 652I. The one exception is appropriation, which may survive the death of the plaintiff because it protects a quasi-property right. *Id.*

73. The states which roughly employ the four-part structure, either from the RESTATEMENT (SECOND) OF TORTS § 652 (1977) or Prosser's article, are: Alabama (Norris v. Muskin Stores, 132 So. 2d 321, 323 (Ala. 1961)); Alaska (Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1137 (Alaska 1989)); Arizona (Godbehere v. Phoenix Newspapers, Inc., 783 P.2d 781, 787-88 (Ariz. 1989)); Arkansas (Milam v. Bank of Cabot, 937 S.W.2d 653, 657 (Ark. 1997)); California (Hill v. National Collegiate Athletic Ass'n, 865 P.2d 633, 647 (Cal. 1994)); Colorado (Robert C. Ozer, P.C. v.

generally accept the *Restatement* structure but either explicitly reject or seriously question either or both disclosure or false light, the third and fourth branches of the *Restatement's* four-part structure.[74]

Several states have adopted some form of invasion of privacy by statute. New York and Virginia maintain the original New York model of a statute creating a cause of action only for appropriation.[75] Nebraska and Rhode Island have codified the entire *Restatement*.[76] Wisconsin has codified the *Restatement* with the exception of false light.[77]

Borquez, 940 P.2d 371, 377 (Colo. 1997)); Connecticut (Goodrich v. Waterbury Republican-American, 448 A.2d 1317, 1329 (Conn. 1982)); Delaware (Shearin v. E.F. Hutton Corp., Inc., 652 A.2d 578, 595 (Del. 1994)); the District of Columbia (Vassiliades v. Garfinckles, Brooks Bros., 492 A.2d 580, 587 (D.C. 1985)); Georgia (Yarbray v. Southern Bell Tel. & Tel. Co., 409 S.E.2d 835, 836 (Ga. 1991)); Hawaii (Mehau v. Reed, 869 P.2d 1320, 1330 (Haw. 1994)); Idaho (Peterson v. Idaho First Nat'l Bank, 367 P.2d 284, 287 (Idaho 1961)); Illinois (Lovgren v. Citizen's First Nat'l Bank of Princeton, 534 N.E.2d 987, 988-89 (Ill. 1989)); Iowa (Anderson v. Low Cost Housing Comm'n, 304 N.W.2d 239, 248 (Iowa 1981)); Kansas (Dotson v. McLaughlin, 531 P.2d 1, 6 (Kan. 1975)); Kentucky (McCall v. Courier-Journal and Louisville Times Co., 623 S.W.2d 882, 887 (Ky. 1981)); Louisiana (Jaubert v. Crowley Post-Signal, Inc., 375 So. 2d 1386, 1388 (La. 1979)); Maine (Berthaiume's Estate v. Pratt, 365 A.2d 792, 794-95 (Me. 1976)); Maryland (Household Fin. Corp. v. Bridge, 250 A.2d 878, 881-82 (Md. 1969)); Michigan (Swickard v. Wayne County Med. Exam'r, 475 N.W.2d 304, 310 (Mich. 1991)); Mississippi (Deaton v. Delta Democrat Publ'g Co., 326 So. 2d 471, 473 (Miss. 1976)); Montana (State Bd. of Dentistry v. Kandarian, 886 P.2d 954, 957-58 (Mont. 1994)); Nevada (Montesana v. Donrey Media Group, 668 P.2d 1081, 1084-85 (Nev. 1985)); New Hampshire (Hamberger v. Eastman, 206 A.2d 239, 241 (N.H. 1964)); New Mexico (Andrews v. Stallings, 892 P.2d 611, 625 (N.M. Ct. App. 1995)); New Jersey (Rumbauskas v. Carter, 649 A.2d 853, 856-57 (N.J. 1994)); Oregon (Mouri v. Smith, 929 P.2d 307, 309-10 (Or. 1996)); Pennsylvania (Curran v. Children Serv. Ctr. of Wyoming County, Inc., 578 A.2d 8, 12-13 (Pa. 1990)); South Dakota (Truxes v. Kenco Enters., Inc., 119 N.W.2d 914, 917 (S.D. 1963)); Tennessee (Martin v. Senators, Inc., 418 S.W.2d 660, 662-63 (Tenn. 1967)); Vermont (Staruski v. Continental Tel. Co. of Vt., 581 A.2d 266, 268 (Vt. 1990)); and West Virginia (Greenfield v. Schmidt Baking Co., Inc., 485 S.E.2d 391, 404 (W. Va. 1997)).

74. Generally, states which reject disclosure or false light cite potential overlap with defamation, as well as First Amendment concerns. *See generally* Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998) (declining to recognize false light because of similarity to existing defamation provisions). Other states which do not recognize false light are Missouri (Sullivan v. Pulitzer Broad., 709 S.W.2d 475, 480-81 (Mo. 1986) (questioning and declining to recognize false light)); Ohio (M.J. DiCarpo v. Sweeney, 634 N.E.2d 203, 210 (Ohio 1994) (declining to recognize false light)); South Carolina (Snakenberg v. Hartford Cas. Ins. Co., Inc., 383 S.E.2d 2, 5 (S.C. Ct. App. 1989) (listing intrusion, appropriation, and disclosure as actionable invasion of privacy torts)); and Texas (Cain v. Hearst Corp., 878 S.W.2d 577 (Tex. 1994) (rejecting false light)). Indiana has rejected disclosure, Doe v. Methodist Hosp., 690 N.E.2d 681, 693 (Ind. 1997), and North Carolina rejects both false light and disclosure, Hall v. Post, 372 S.E.2d 711, 714 (N.C. 1988) (recognizing only intrusion and appropriation).

75. *See* N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1997); VA. CODE ANN. § 8.01-.40 (Michie 1992). Both statutes prohibit use of another's name for "purposes of trade" or "advertising purposes." N.Y. CIV. RIGHTS LAW §§ 50-51; VA. CODE ANN. § 8.01-.40.

76. NEB. REV. STAT. § 20-201 to -211 (1997); R.I. GEN. LAWS § 9-1-28.1 (1997).

77. WIS. STAT. ANN. § 895.50 (West 1997).

Florida,[78] Oklahoma,[79] and Utah[80] have appropriation statutes but also recognize common law suits.

Two states, Massachusetts and Washington, defy easy categorization. Massachusetts has a statute generally affirming protection of a right of privacy against unreasonable intrusion, which its courts have applied with reference to, but without explicitly recognizing, the *Restatement*.[81] Washington has a statute protecting privacy against surreptitious recording.[82] Its cases have mentioned but never applied the common-law formulation of invasion of privacy.[83] Only two states, North Dakota and Wyoming, have no cases or statutes recognizing at least some kind of a tort action for invasion of privacy.[84]

Until July 1998, when *Lake v. Wal-Mart Stores, Inc.* was decided,[85] Minnesota stood with North Dakota and Wyoming in terms of states without invasion of privacy torts.[86] The plaintiffs were two young women who had delivered film of their vacation to Wal-Mart for development.[87] Wal-Mart developed the majority of the photos, but indicated that some of them could not be processed because of their "nature."[88] The plaintiffs later discovered that the roll included a photo of them naked together in the shower.[89] Wal-Mart employees had in fact developed and

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78. FLA. STAT. ANN. § 540.08 (West 1997). Florida's statute explicitly outlaws disclosure, and specifically allows courts to hear common law privacy suits. *Id.*

79. OKLA. STAT. ANN. tit. 21, § 839 (West 1983); McCormack v. Oklahoma Pub. Co., 613 P.2d 737, 740 (Okla. 1980) (recognizing common law invasion of privacy actions in addition to those actions created by statute).

80. UTAH CODE ANN. § 45-3-1 to -6 (1993). Utah's statute, designed to prevent what it calls "abuse of personal identity," also allows common law suits, § 45-3-6, but its courts have yet to recognize them. Cox v. Hatch, 761 P.2d 556, 563-64 (Utah 1988) (considering but declining to recognize, on facts presented, common law privacy torts).

81. MASS. GEN. LAWS ANN. ch. 214, § 1B (West 1989); Alberts v. Devine, 479 N.E.2d 113, 120-21 (Mass. 1985) (applying statute with reference to RESTATEMENT (SECOND) OF TORTS § 652 (1977)).

82. WASH. REV. CODE ANN. § 9.73.010 - .140 (1998).

83. *See* Doe v. Group Health Co-op of Puget Sound, Inc., 932 P.2d 178 (Wash. Ct. App. 1997) (considering but declining to recognize, on the facts presented, common law invasion of privacy torts).

84. Hougum recently reaffirmed North Dakota's lack of an invasion of privacy tort. *See* Hougum v. Valley Memorial Homes, 1998 N.D. 24, ¶ 24, 574 N.W.2d 812, 818. The Wyoming courts have never analyzed a common-law invasion of privacy claim, and there are no statutes in Wyoming concerning invasion of privacy. *Cf.* Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 234 (Minn. 1998) (identifying Wyoming and North Dakota as the only states without invasion of privacy).

85. 582 N.W.2d 231 (Minn. 1998).

86. Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 234-35 (Minn. 1998) (recognizing invasion of privacy and identifying North Dakota and Wyoming as the only states which do not recognize any privacy torts).

87. *Id.* at 233. The women brought pictures of a trip to Mexico to the Wal-Mart in Dilworth, Minnesota. *Id.*

88. *Id.* The photos included a note indicating that several had not been developed. *Id.*

89. *Id.* at 232. The plaintiffs claimed the picture was taken by a friend as one of the plaintiffs was exiting and the other entering the shower. Brief for the Appellant at 1, Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231 (Minn. 1998) (No. C7-97-263).

copied this picture, and had circulated copies in the community.[90] Plaintiffs sued, alleging all four forms of invasion of privacy, none of which Minnesota had previously recognized.[91] The trial court granted summary judgment for the defendants, the appeals court affirmed, and the plaintiffs appealed to the Minnesota Supreme Court.[92]

Recognizing the power that the judicial system has in helping the law evolve, the court briefly discussed the history of invasion of privacy.[93] Notably, it also described the question as one of first impression, characterizing its previous discussions of the issue as dicta.[94] The Minnesota Supreme Court then held that Minnesota would recognize invasion of privacy based on the *Restatement*, but declined to address the merits of the case, writing only that the plaintiffs stated a claim sufficient to survive summary judgment.[95] The court then remanded the case for trial.[96]

North Dakota first addressed invasion of privacy in a tort context in the 1970 case of *Volk v. Auto-Dine Corp*.[97] Plaintiff sued for appropriation, claiming that the defendant used her name in an advertisement without her permission.[98] The court noted that the trial court found that the plaintiff consented to the use of her name by the defendant.[99] Thus, as it would do again in its discussion of the issue, the court held that it was unnecessary to decide whether North Dakota would recognize invasion of privacy, because even assuming it did, the plaintiff had failed to state a sufficient claim.[100]

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90. *See* Lake, 582 N.W.2d at 233.

91. *See id.* The opinion asserted that whether Minnesota should recognize invasion of privacy was a question of first impression. *Id.* Additionally, the court noted in a footnote that Minnesota had previously only dealt with the issue "tangentially, in dicta." *Id.* at n.1.

92. *See id.* The district court granted summary judgment because Minnesota did not recognize invasion of privacy; the court of appeals affirmed for the same reason. *Id.*

93. *See id.* at 234-35. Two justices joined a dissenting opinion which disagreed that it was the court's role to decide whether Minnesota should have invasion of privacy torts, arguing that such decisions should be left to the legislature. *See id.* at 236-37.

94. *Id.* at 233.

95. *Id.* at 234-35. The court noted that the naked body is a very private part of one's person and as such constitutes a privacy interest worthy of protection. *Id.* Additionally, the court declined to recognize false light. *Id.* at 235.

96. *Id.* As of publication, the case has not yet proceeded to trial on remand.

97. 177 N.W.2d 525 (N.D. 1970).

98. Volk v. Auto-Dine Corp., 177 N.W.2d 525, 526-27 (N.D. 1970). The plaintiff's claims also included breach of contract. *Id.* at 526. Although the plaintiff claimed simply invasion of privacy generally and not appropriation, the privacy claim would generally meet the elements of that branch of the tort. *Id.*

99. *Id.* at 528. The suit arose from Volk's assertion that she allowed Auto-Dine to use her recipe for cole slaw, and advertise the cole slaw as "Mother Volk's Cole Slaw," but that Auto-Dine failed to pay her as it had agreed. *Id.* at 527.

100. *Id.* at 529. In addition to rejecting the invasion of privacy claim, the court reversed the summary judgment on the contract claim and remanded for trial. *Id.* at 530.

The court next addressed the issue eleven years later, in *City of Grand Forks v. Grand Forks Herald, Inc.*[101] The City of Grand Forks was appealing a judgment ordering it to allow the Grand Forks Herald to inspect the personnel file of a former police chief.[102] Therefore, the case did not involve a tort claim.[103] One argument advanced by the city was that allowing the inspection would constitute an impermissible invasion of the police chief's privacy.[104] The court rejected the claim that an "informational right of privacy" existed, and noted in a footnote that North Dakota had not yet permitted tort claims for invasion of privacy.[105]

One year later, in *American Mutual Life Insurance Co. v. Jordan*,[106] the court addressed the issue more directly.[107] The plaintiff alleged that the defendant had used his name in a testimonial for its company without authorization.[108] The trial court dismissed this portion of the claim on the ground that the tort did not yet exist in North Dakota.[109] The North Dakota Supreme Court affirmed, holding that because the lower court found as a fact that the plaintiff granted the defendant permission to use his name, there could be no claim even if the tort existed.[110]

The Eighth Circuit Court of Appeals also recently addressed the stance of the North Dakota court in *Nelson v. J.C. Penney Co., Inc.*[111] The plaintiff claimed that his privacy had been invaded when his em-

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101. 307 N.W.2d 572 (N.D. 1981).

102. City of Grand Forks v. Grand Forks Herald, Inc., 307 N.W.2d 572, 573 (N.D. 1981). The Grand Forks Herald sought access to the personnel file of former police chief S.D. Knutson when Knutson became a candidate for county commissioner of Grand Forks County. *Id.* at 573-74. The city refused, and it subsequently sought a declaratory judgment that the contents of personnel files were not public records. *Id.* at 574. The trial court rejected the city's arguments, and the North Dakota Supreme Court affirmed. *Id.* at 574, 579. Thus, the court held that the records were open to the public. *Id.* at 578.

103. *Id.* at 574. Rather, the privacy issue arose in the context of a claim for a declaratory judgment that city personnel files are open to the public. *Id.* at 573.

104. *See id.* at 578. The court phrased the privacy argument thus: "Knutson asserts that a right of informational privacy exists under both the Federal and the State Constitutions which would prevent the disclosure of the contents of his personnel file." *Id.*

105. *See id.* at 578-79, 579 n.3 (rejecting informational privacy claim and noting North Dakota had not determined whether to permit invasion of privacy claims).

106. 315 N.W.2d 290 (N.D. 1982).

107. American Mut. Life Ins. Co. v. Jordan, 315 N.W.2d 290, 295-96 (N.D. 1982). Unlike *City of Grand Forks*, the court in *American Mutual Life* discussed a claim for the appropriation branch of invasion of privacy. *Id.*; *see also City of Grand Forks*, 307 N.W.2d at 578-79 (discussing the disclosure of contents of personnel files).

108. *See American Mut. Life*, 315 N.W.2d at 295. American Mutual sued Jordan to recover damages resulting from his sales of insurance to third parties on behalf of the company. *See id.* at 291-93. Jordan subsequently counterclaimed for appropriation. *Id.* at 291.

109. *See id.* (reviewing the procedural history of case).

110. *See id.* at 296. The court also found that the trial court's determination that the plaintiff had given consent was not clearly erroneous. *Id.*

111. 70 F.3d 962 (8th Cir. 1995).

ployer opened his locked desk.[112] The district court dismissed the claim because North Dakota had never recognized such an action.[113] In affirming the judgment, the court noted that North Dakota had declined on several occasions to recognize privacy claims.[114] The court wrote, "[T]his studied reluctance does not bode well for the acceptance of this kind of cause of action in North Dakota in the future."[115] This prediction has thus far been proven correct, as illustrated by the fact that the North Dakota Supreme Court in *Hougum v. Valley Memorial Homes*[116] rejected the next invasion of privacy claim it heard.[117]

III. ANALYSIS

In *Hougum*, the North Dakota Supreme Court provided its most detailed analysis of a privacy claim to date.[118] Justice Neumann, writing for a unanimous court, used the *Restatement*'s formulation for intrusion upon seclusion throughout the opinion.[119] An analysis of the issues was possible because the court again "assum[ed] without deciding" that a claim for invasion of privacy existed in North Dakota.[120] Under that formulation, the elements of intrusion upon seclusion are: 1) an intentional intrusion by the defendant; 2) into a matter the plaintiff has a right to keep private; and 3) which is objectionable to a reasonable person.[121]

The court further identified what it called "two primary factors for analyzing a claim for intrusion upon seclusion: 1) the means used for the intrusion; and 2) the defendant's purpose for obtaining the

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112. Nelson v. J.C. Penney Co., Inc., 70 F.3d 962, 966-67 (8th Cir. 1995). The invasion claim was only one of several by the plaintiff; the others included age discrimination, retaliatory discharge, disability discrimination, intentional infliction of emotional distress, and defamation. *Id.* at 964.

113. *Id.* at 966-67.

114. *Id.* at 967 (referring to *Volk*, *Jordan*, and *City of Grand Forks*).

115. *Id.*

116. 1998 N.D. 24, 574 N.W.2d 812.

117. *See* Hougum v. Valley Memorial Homes, 1998 N.D. 24, ¶ 24, 574 N.W.2d 812, 818 (rejecting plaintiff's unreasonable intrusion upon seclusion claim).

118. *See id.* ¶¶ 9-24, 574 N.W.2d 816-18. In comparison, the court spent only one paragraph on invasion of privacy in *Volk*, four in *City of Grand Forks*, and five in *American Mut. Life*. *See* American Mut. Life Ins. Co., v. Jordan, 315 N.W.2d 290, 295-96 (N.D. 1982); City of Grand Forks v. Grand Forks Herald, 307 N.W.2d 572, 578-79 (N.D. 1981); Volk v. Auto-Dine Corp., 177 N.W.2d 525, 529 (N.D. 1970).

119. *See Hougum*, ¶ 9-10, 574 N.W.2d at 816 (discussing RESTATEMENT (SECOND) OF TORTS § 652 (1977)). While the court was unanimous in its discussion of Hougum's claim against Sears and Moran, Chief Justice VandeWalle dissented from its discussion of Hougum's claim against Valley Memorial Homes. *Id.* ¶ 50, 574 N.W.2d at 822.

120. *Id.* ¶ 13, 574 N.W.2d at 816. The court employed a similar strategy in *Volk* and *American Mut. Life*, in which it held that specific claims could not go forward even if a general claim for invasion was recognized. *See Volk*, 177 N.W.2d at 529; *American Mut. Life*, 315 N.W.2d at 295-96 (holding that the facts would fail to state a sufficient claim even if invasion of privacy was recognized).

121. *See* Hougum, ¶ 14, 574 N.W.2d at 816-17 (citing the RESTATEMENT (SECOND) OF TORTS § 652A (1977)).

information."[122] These factors do not take the place of the three elements of an intrusion claim under the *Restatement*; rather, the court uses them as tools for evaluating the application of the *Restatement* elements to the facts of this case.[123] The court drew these factors from a text by Keeton and Prosser, which Hougum did address, and which Moran and Sears cited, but not for these factors.[124] Further, none of the cases the court reviewed explicitly mentions the factors.[125] Despite this, however, the court stressed these factors and structured its analysis around them.[126]

The court began by noting that invasion of privacy cases involving public restrooms usually include a planned intrusion accomplished through the use of equipment or surreptitious observation.[127] The court then briefly discussed four of these cases, each of which illustrated the trend the court had identified.[128] Although it did not explicitly cite them, the court's discussion of these cases emphasized the two primary factors it identified earlier as crucial in analyzing intrusion claims, the method of the intrusion, and the reason for it.[129]

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122. *Id.* (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 117, at 856 (5th ed. 1984)).

123. *See* generally Hougum, ¶¶ 16-24, 574 N.W.2d at 817-18. The court wrote that the "viability" of cases it reviewed depended on the two factors, and applied them to determine whether the intrusion in this case was objectionable to a reasonable person. *Id.* ¶ 20, 574 N.W.2d at 818.

124. *See* Brief of Appellant at 10, *Hougum* (No. 970108) (citing the rule from the RESTATEMENT (SECOND) OF TORTS § 652B (1977)); *see also* Brief of Appellees at 10, *Hougum* (No. 970108) (citing a different page of the Prosser & Keeton text than that from which the court drew the two factors).

125. *See* cases cited *infra* note 167.

126. *See* Hougum, ¶ 16-24, 574 N.W.2d at 817-18 (stating that the "viability" of cases reviewed by the court depends on the factors and employing them throughout discussion).

127. *Id.* ¶ 15, 574 N.W.2d at 817. The court cited five cases and an A.L.R. annotation. *Id.* A review of case law suggests the court's assertion is generally accurate. *See generally* Carter v. Innisfree Hotel, Inc., 661 So. 2d 1174, 1179 (Ala. 1995) (basing an intrusion claim on a see-through mirror in a hotel bathroom); New Summit Assocs. Ltd. Partnership v. Nistle, 533 A.2d 1350, 1354 (Md. 1987) (predicating claim on see-through mirror in apartment). Further, Hougum's brief did not cite any authority indicating otherwise, relying instead on a series of criminal cases which discuss privacy in a public restroom in a search and seizure context. *See* Brief of Appellant at 12-16, *Hougum* (No. 970108) (citing criminal cases to support argument for privacy in a public restroom). Some of these same cases were cited favorably by the district court judge in his memorandum decision granting summary judgment. *See* Hougum v. Valley Memorial Homes, Civil No. 96-981 (N.D. Dist. Ct. Feb. 25, 1997) (mem.) (citing favorably several criminal cases involving privacy in a public restroom, and describing one as "persuasive"). In their brief, Sears and Moran argued that these criminal cases did not control in this case, and the North Dakota Supreme Court did not mention any of them in its analysis. *See* Brief of Appellee at 11, *Hougum* (No. 970108) (arguing that criminal precedent does not control); *see also Hougum*, ¶¶ 15-24, 574 N.W.2d at 817-818 (analyzing the case without citing criminal cases briefed by the plaintiff).

128. Hougum, ¶¶ 16-19, 574 N.W.2d at 817-18 (discussing Harkey v. Abate, 346 N.W.2d 74 (Mich. Ct. App. 1983); Elmore v. Atlantic Zayre, Inc., 341 S.E.2d 905 (Ga. Ct. App. 1986); Kjerstad v. Ravalette Publications, Inc., 517 N.W.2d 419 (S.D. 1994); Lewis v. Dayton Hudson Corp., 339 N.W.2d 857 (Mich. Ct. App. 1983)).

129. *See generally id.* ¶ 16, 574 N.W.2d at 817 (discussing *Harkey* in terms of the two key factors, the means used for intrusion and the reason for intrusion).

In *Harkey v. Abate,*[130] the first case the court discussed, the plaintiffs were patrons of a roller rink who alleged that the owner had installed see-through panels in the ceiling of a bathroom.[131] They sued for intrusion upon seclusion; the trial court granted summary judgment in favor of the defendant, and the Michigan Court of Appeals reversed.[132] In its discussion of *Harkey*, the North Dakota Supreme Court noted that the Michigan court found the plaintiffs had a right to privacy in a public restroom which the defendant violated.[133] However, the court emphasized that it was the installation of hidden viewing devices that led the Michigan court to conclude that the invasion was one which a reasonable person would find highly offensive.[134] In an implicit reference to the two factors it identified earlier as instrumental in analyzing intrusion upon seclusion claims, the court wrote that the means of invasion in *Harkey* showed an intentional effort to intrude upon another's privacy, and that there was no legitimate purpose for doing so.[135]

Elmore v. Atlantic Zayre, Inc.,[136] the second case discussed by the court, arose when store patrons complained of homosexual activity in the store's restrooms.[137] Members of the store's staff, positioned above the stall, observed an individual engaging in homosexual acts; and he was subsequently arrested and pled guilty to criminal sodomy.[138] When he sued the store for intrusion upon seclusion, the court entered summary judgment against him, and the Georgia Court of Appeals affirmed.[139] While the Georgia court found, as did the Michigan court, that the plaintiff had a right to privacy in a public restroom, it held that this interest was not absolute.[140] In this instance, the North Dakota court noted that the privacy interest was outweighed by the store's interest in providing crime-free restrooms, an interest implicated by the fact that sufficient cause existed to believe that homosexual acts were occurring in

130. 346 N.W.2d 74 (Mich. Ct. App. 1993).

131. Harkey v. Abate, 346 N.W.2d 74, 75 (Mich. Ct. App. 1983). The plaintiff in *Harkey* alleged that the defendant observed her and her daughter as they used the restroom. *Id.*

132. *Id.*

133. *See* Hougum, ¶ 16, 574 N.W.2d at 817 (discussing *Harkey*, 346 N.W.2d at 76).

134. *Id.*

135. *Id.* The Michigan court which wrote *Harkey* did not refer at any point to the defendant's purpose in installing the viewing devices. *Harkey*, 346 N.W.2d 75-77.

136. 341 S.E.2d 905 (Ga. Ct. App. 1986).

137. Elmore v. Atlantic Zayre, Inc., 341 S.E.2d 905, 905 (Ga. Ct. App. 1986).

138. *Id.* The employees were in a storage area above the bathroom, where a crack in the stalls' ceiling allowed them to look into the restroom below. *Id.*

139. *Id.* at 905, 907.

140. *See id.* at 906. The opinion, written by a Georgia court, cites extensively from *Pavesich*, in part for the proposition that, "the law recognizes that the right of privacy is not absolute." *Id.* (quoting Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905)).

the bathroom.[141] This provided a legitimate reason for the search, making it reasonable and satisfying the two key factors.[142]

The plaintiff in the third case, *Lewis v. Dayton Hudson Corp.*, [143] sued a retail store, alleging intrusion based on an employee's observation of him while he was in a fitting room.[144] The fitting room had signs indicating that it would be monitored by store personnel.[145] The Michigan Court of Appeals affirmed summary judgment for the defendant, recognizing that the right of privacy was subordinate to other rights, including those that spring from business relationships.[146] In this case, the court found two facts combined to make the intrusion reasonable.[147] First, the signs in the room diminished the plaintiff's expectation of privacy.[148] Second, observation by store security staff who were the same sex as the plaintiff was not unreasonable.[149] Therefore, the business relationship provided a legitimate reason for the intrusion, and the means were not unreasonable, fulfilling the two primary factors.[150]

The final case, *Kjerstad v. Ravellette Publications, Inc.*, [151] received very short treatment from the court.[152] The defendant used a vacant room next to a restroom to observe female employees.[153] The court in *Kjerstad* affirmed the trial court's decision to submit the invasion of privacy question to the jury.[154] While the North Dakota Supreme Court merely mentions these facts, an application of the two factors would presumably show that there was no legitimate reason for the intrusion, and that the means used were objectionable.[155]

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141. *See* Hougum, ¶ 17, 574 N.W.2d at 817. The North Dakota Supreme Court read *Elmore* as holding that the intrusion was reasonable as a matter of law since it was not for the purpose of personally invading privacy. *Id.*

142. *See id.* As in the *Harkey* discussion, the court did not expressly mention the two key factors in its discussion of *Elmore*. *Id.*

143. 339 N.W.2d 857 (Mich. Ct. App. 1983).

144. Lewis v. Dayton Hudson Corp., 339 N.W.2d 857, 858 (Mich. Ct. App. 1983).

145. *Id.*

146. *Id.* at 859. The Michigan court relied upon an earlier Michigan case for this holding. *Id.* (citing Earp v. Detroit, 167 N.W.2d 841 (Mich. Ct. App. 1969)).

147. Hougum, ¶ 18, 574 N.W.2d at 817-18 (analyzing the facts of *Lewis*)

148. *Id.*

149. *Id.*

150. *Id.* Again, the court did not explicitly mention the two factors in its discussion. *Id.*

151. 517 N.W.2d 419 (S.D. 1994).

152. *Hougum*, ¶ 19, 574 N.W.2d at 818. The court devoted only two sentences to *Kjerstad*. *Id.*

153. *See id.* (reviewing the facts of Kjerstad v. Ravellette Publications, Inc., 517 N.W.2d. 419, 421-22 (S.D. 1994).

154. *Id.* The jury had found for the plaintiffs. *See Kjerstad*, 517 N.W.2d at 424.

155. *See* Hougum, ¶ 19, 574 N.W.2d at 818. The court did not analyze *Kjerstad* in detail, but an application of the two factors is consistent with the court's statement that the viability of the cases it discussed depends on the factors. *Id.* ¶ 20 (discussing the relationship between the two primary factors and the cases it discussed). Further, the conclusion that the factors would support the plaintiffs is supported by the *Kjerstad* court's affirmation of a verdict for the plaintiffs. *See Kjerstad*, 517 N.W.2d at 424.

After reviewing these cases, the court drew two conclusions about intrusion cases centering on public restrooms.[156] First, the court concluded that while all the cases recognize a privacy interest which exists in a public restroom, they also acknowledge that the privacy interest is not absolute.[157] Second, the court asserted that the intrusion cases' "viability generally turns" on the two factors it identified earlier: the purpose for the intrusion and whether the method of surveillance would be objectionable to the reasonable person.[158]

Applying these two factors to the facts of *Hougum*, the court turned first to the means employed to accomplish the intrusion.[159] The court noted that there was no evidence that Moran or Sears drilled the hole through which Moran observed Hougum, and that there was evidence that Sears had covered the hole with a metal plate, but that the plate had been removed by "unknown persons."[160] Moran testified that he thought the bathroom was unoccupied when he entered, and that he noticed Hougum inadvertently when he bent down to get toilet paper.[161] Hougum characterized Moran's actions as deliberate and intentional, but the court noted that he pointed to nothing in the record supporting this view and contradicting Moran's version.[162]

The court summarized these facts by stating that the observation was limited in time and scope, and was neither recorded nor seen by others.[163] Thus, the court determined that the means of the intrusion in this case were not unreasonable or offensive, since they were not intentional.[164] The court also emphasized that Moran's brief visual inspection was consistent with his work duties, because as a Sears employee he was not required to ignore the possibility of vandalism or shoplifting occurring in a stall he had believed to be unoccupied.[165] Therefore, the

156. *See* Hougum, ¶ 20, 574 N.W.2d at 818.

157. *Id.*

158. *Id.*

159. *Id.* ¶ 21.

160. *Id.* In their brief, Sears and Moran asserted that "Sears had, on several occasions, blocked the opening by covering it with metal plates riveting or screwing them securely in place," but that "unknown users of the restroom" removed the covers. *See* Brief of Appellees at 2, *Hougum* (No. 970108). The court did not cite the brief, but its mention of "unidentified persons" seems to indicate it relied on the appellee's statements. *See id.*

161. *See* Hougum, ¶ 21, 574 N.W.2d at 818. Moran further testified that he could see Hougum without putting his eye directly to the hole. *Id.*

162. *See id.* ¶ 22. The court pointed to Hougum's characterizations of Moran's actions as a "deliberate visual inspection" and an "intentional and direct observation." *Id.*

163. *Id.* ¶ 24 (holding reasonable persons could only conclude the inspection was not by a method reasonable persons would find offensive).

164. *See id.* ¶ 23.

165. *See id.* (citing Elmore v. Atlantic Zayre, Inc., 341 S.E.2d 905, 906-07 (Ga. Ct. App. 1986) (recognizing a store's interest in a crime-free restroom)). Although it is not entirely clear on this point, the court most likely meant that a brief visual inspection is consistent with work duties only after an employee has observed unusual activity in an unusual place, not that there is a general duty to look

reason for the intrusion, after the accidental discovery, was presumably legitimate.[166] The court therefore held, as a matter of law, that Hougum had not stated a cause of action for intrusion upon seclusion, and thus summary judgment had been properly granted.[167]

Throughout, the court's analysis focused on the two factors, and it did not explicitly discuss the *Restatement* elements of intrusion: 1) an intentional intrusion by the defendant; 2) into a matter the plaintiff has a right to keep private; and 3) which is objectionable to a reasonable person.[168] However, its discussion of other cases and the two factors essentially implicated these elements.[169]

First, the discussion of the means used for the intrusion roughly corresponds in this case to the element of intent.[170] The court found that the means were not offensive to the reasonable person, a finding predicated on Moran's statements that the intrusion was unplanned and inadvertent.[171] There was, therefore, no intentional intrusion, and thus the first element of an intrusion claim was not satisfied.[172]

The court's discussion also implicated the second element of an intrusion claim, that the intrusion must be into an area the plaintiff has a right to keep private.[173] In reviewing three of the cases, the court noted that while there is a right to privacy in a public restroom, it is a qualified right which may be abrogated by other rights and interests.[174] One such countervailing interest the court mentioned explicitly is that of a store in maintaining crime-free restrooms, an interest which justified Moran's brief inspection.[175] Therefore, the second element of an intrusion claim was missing: While the plaintiff had a general, limited right to privacy in a restroom, the right did not prevail in this case against this defendant.[176]

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in restrooms. *See id.* (stating that a brief visual inspection was consistent with Moran's work duties). Such a "duty" would likely qualify as a "planned or continued pattern of observation of private matters in a restroom," which the court distinguished from the facts of this case. *Id.*

166. *See id.* (finding intrusion was consistent with the employee's duty to prevent possible shoplifting or vandalism).

167. *Id.* ¶ 24 (affirming the trial court's grant of the defendant's motion for summary judgment on the plaintiff's intrusion upon seclusion claim).

168. *See id.* ¶ 14, 574 N.W.2d 816-17 (listing the elements of an intrusion claim and framing the discussion in terms of the key elements).

169. *See id.* ¶ 24, 574 N.W.2d at 818 (affirming summary judgment after reviewing cases and key factors).

170. *See id.* ¶ 21 (finding nothing to contradict Moran's testimony that the intrusion was unplanned and, at least initially, inadvertent).

171. *Id.*

172. *See id.* ¶ 14, 574 N.W.2d at 816-17 (listing intent as an element of intrusion upon seclusion).

173. *See id.* (listing the elements of intrusion upon seclusion).

174. *See id.* ¶ 16-18, 574 N.W.2d at 817 (citing *Harkey*, *Lewis* and *Kjerstad* for the proposition that the right to privacy in a public restroom is not absolute).

175. *Id.* ¶ 23, 574 N.W.2d at 818 (citing *Lewis* and *Kjerstad* for the proposition that stores have an interest in crime-free bathrooms and stating that Moran's brief inspection was consistent with his duties as a loss-prevention employee).

176. *See id.* (finding an inspection consistent with Moran's work duties).

Finally, the court specifically found that the third element, that the intrusion must be highly offensive to a reasonable person, was not met.[177] This conclusion seemed to be in part based on the fact the intrusion was not accomplished through use of surreptitious means or equipment.[178] Rather, Moran claimed that the intrusion was inadvertent, and Hougum could not show any facts disproving this claim.[179] Therefore, the final element of intrusion was not met.[180]

Therefore, the court's analysis dealt in some fashion with each of the elements of an intrusion claim under the *Restatement*.[181] However, its focus is clearly on the two analytical factors it identified for assessing intrusion claims.[182] While the court emphasized these factors, however, none of the cases the court reviewed mentions them.[183] Rather, these cases relied on prior state law.[184] Further, the plaintiff did not make any mention of the two factors, relying instead completely on the *Restatement*.[185] Moran and Sears cited the text from which the court drew the factors, but did not actually mention them.[186] The court relied on these factors in its analysis, however, and it held that Hougum had failed to state a sufficient claim for intrusion upon seclusion, even if such a claim were recognized in North Dakota.[187]

IV. IMPACT

The holding in *Hougum* was an affirmation of a summary judgment, granted by the trial court in keeping with established precedent.[188] As such, it did not declare new law or change existing rules.[189] However,

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177. *See id.* ¶ 24 (finding, as a matter of law, that the intrusion was not objectionable to a reasonable person).

178. *See id.* ¶ 23 (distinguishing the case from *Harkey* and *Kjerstad* on the ground that no equipment was used to accomplish the invasion).

179. *See id.* ¶ 21 (finding nothing to contradict Moran's testimony that the intrusion was unplanned and, at least initially, inadvertent).

180. *See id.* ¶ 24 (finding the intrusion was not objectionable to a reasonable person).

181. *See id.* (affirming summary judgment after reviewing cases and key factors).

182. *See id.* ¶ 20, 574 N.W.2d at 818 (stating the "viability" of restroom cases depends on the two factors).

183. *See* Harkey v. Abate, 346 N.W.2d 74, 75-76 (Mich. Ct. App. 1983) (citing Michigan precedent); Elmore v. Atlantic Zayre, Inc., 341 S.E.2d 905, 906 (Ga. Ct. App. 1986) (citing Georgia precedent); Lewis v. Dayton Hudson Corp., 339 N.W.2d 857, 859-60 (Mich Ct. App. 1983) (citing Michigan precedent); Kjerstad v. Ravalette Publications, Inc., 517 N.W.2d 419, 424 (S.D. 1994) (citing South Dakota precedent).

184. *See* cases cited *supra* note 183.

185. *See* Brief of Appellant at 10, *Hougum* (No. 970108) (citing the rule from the RESTATEMENT (SECOND) OF TORTS § 652A (1965)).

186. *See* Brief of Appellees at 10, *Hougum* (No. 970108) (citing a different page of Prosser & Keeton text than that from which the court drew the two factors).

187. *See* Hougum, ¶ 24, 574 N.W.2d at 818 (affirming summary judgment against the plaintiff).

188. *Id.*

189. *Id.*

the format and detail of the court's analysis may suggest several possibilities for the future of invasion of privacy torts in North Dakota, most notably because the court performed its first detailed analysis of an intrusion claim, and used the *Restatement* format for the first time.[190] The decision also affirms that the North Dakota Supreme Court, if it does eventually recognize invasion of privacy, will not do so until a case states sufficient facts to force it to make a decision.[191]

First, *Hougum* is by far the most detailed discussion of an invasion of privacy claim by the North Dakota Supreme Court.[192] The court had not previously given more than five paragraphs to a discussion of an invasion of privacy tort claim.[193] This may be due in part to the nature of Hougum's intrusion upon seclusion claim, which is factually the most invasive case to date.[194] Further, the trial courts in *Volk* and *American Mutual Life Insurance Company* predicated their decisions on the lack of an element, the lack of which had been clearly established in the record.[195] In both cases, therefore, its reliance on lower court findings meant that the North Dakota Supreme Court was not required to perform a complete analysis.[196]

The *Hougum* decision also rested in large part on a determination that the record did not substantiate Hougum's claim that Moran's inspection was intentional, and Hougum's failure on appeal to overcome Moran's consistent assertion that it was inadvertent.[197] Thus, the court might have relied on this fact and, as it had in the past, could have quickly disposed of the issue.[198] Yet the court performed a detailed

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190. *Cf. id.* ¶¶ 9-24, 574 N.W.2d at 816-18 (discussing an invasion of privacy claim using the RESTATEMENT (SECOND) OF TORTS § 652B (1977)).

191. *Cf. id.* ¶ 13, 24, 574 N.W.2d at 816, 818 (beginning discussion by assuming without deciding that an invasion claim exists in North Dakota and, after analysis, affirming summary judgment against the plaintiff and declining to recognize invasion of privacy).

192. *Compare id.* ¶¶ 9-24, 574 N.W.2d at 816-18 (devoting 16 paragraphs to discussion of invasion claim) *with* Volk v. Auto-Dine Corp., 177 N.W.2d 525, 529 (N.D. 1970) (devoting two paragraphs to invasion claim), City of Grand Forks v. Grand Forks Herald, 307 N.W.2d 572, 578-79 (N.D. 1981) (discussing invasion of privacy for four paragraphs), American Mut. Life Ins. Co. v. Jordan, 315 N.W.2d 290, 295-96 (N.D. 1982) (giving five paragraphs to privacy claim).

193. *See* American Mut. Life, 315 N.W.2d at 295-96.

194. *Compare Hougum*, ¶¶ 2-4, 574 N.W.2d at 815 (reviewing facts underlying intrusion claim) *with Volk*, 177 N.W.2d at 526-27 *and American. Mut. Life*, 315 N.W.2d at 295 (discussing facts of appropriation claims).

195. *See Volk*, 177 N.W.2d at 529 (dismissing a claim based on the plaintiff's admission, in a deposition, that she consented to the use of her name by the defendant); *see also American. Mut. Life*, 315 N.W.2d at 295-96 (basing affirmation of summary judgment on a lower court finding that the plaintiff consented to the use of his name).

196. *See* cases cited *supra* note 195.

197. *See Hougum*, ¶ 22, 574 N.W.2d at 818. The court asserted that Hougum did not meet the burden incumbent on a party resisting summary judgment, which is either to present competent evidence or demonstrate from the record that there is a disputed issue of material fact. *Id.*

198. *Cf. id.* (analyzing the case despite finding that the plaintiff had failed at the trial court to establish an element of his claim); *see also Volk*, 177 N.W.2d at 529 (dismissing the claim based on the

analysis on the facts of the case.[199] As noted, this may reflect a distinction between *Hougum* and prior cases concerning the extent to which the plaintiff's privacy was invaded and the subsequent effects of the invasion.[200] It may also, however, reflect a willingness on the part of the court to entertain in detail invasion of privacy claims.[201]

Also for the first time, the court explicitly employed the *Restatement* formulation of the tort.[202] This is due, in large part, to the fact that the plaintiff pleaded his case according to the *Restatement*.[203] This is not surprising since the majority of states that have recognized common law invasion of privacy have employed this standard, and thus the majority of case law is devoted to claims predicated on it.[204]

However, in its three previous discussions of invasion of privacy, the North Dakota Supreme Court had not explicitly mentioned the *Restatement*.[205] *Hougum*, therefore, generally brings North Dakota into the majority of states, at least insofar as its analysis employed the *Restatement* elements for intrusion upon seclusion.[206] Thus, the decision seems to indicate that any future common law invasion of privacy has in North Dakota lies in the *Restatement*.[207]

The court in *Hougum* also relied heavily on the two factors identified by Prosser and Keeton for use in analyzing intrusion upon seclusion claims, the means used for the intrusion and the reason for it.[208] While its use of the *Restatement* was dictated in part by the plaintiff's claim,[209] the use of these factors was not since neither party had briefed them, and none of the cases on which the court relied mentions them.[210] There is

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plaintiff's admission, in a deposition, that she consented to the use of her name by the defendant).

199. *See* Hougum, ¶¶ 9-24, 574 N.W.2d at 816-18 (analyzing the plaintiff's claim for 16 paragraphs despite the fact that the plaintiff failed to show evidence in the record that the invasion was intentional, a required element of an intrusion claim).

200. *See id.* ¶¶ 2-6, 574 N.W.2d at 815 (reviewing the facts of the case, including the initial discovery of Hougum, his arrest and the subsequent loss of his job).

201. *Cf. id.* ¶¶ 9-24, 574 N.W.2d at 816-18 (devoting 16 paragraphs to an analysis of the invasion claim, the first such detailed analysis by the North Dakota Supreme Court).

202. *See id.* ¶ 10-11, 574 N.W.2d at 816 (citing the RESTATEMENT (SECOND) OF TORTS § 652A (1977)); *see also* Volk, 177 N.W.2d at 529 (citing Am. Jur. and C.J.S. articles); City of Grand Forks v. Grand Forks Herald, 307 N.W.2d 572, 578-79 (N.D. 1981) (citing several non-tort U.S. Supreme Court cases); American Mut. Life. Ins. Co. v. Jordan, 315 N.W.2d 290, 295-96 (N.D. 1982) (rejecting a claim without citing the RESTATEMENT (SECOND) OF TORTS § 652 (1977)).

203. *See* Hougum, ¶ 9, 574 N.W.2d at 816.

204. *See* cases cited *supra* note 73 and accompanying text.

205. *See supra* note 201.

206. *See* Hougum, ¶¶ 9-24, 574 N.W.2d at 816-18 (citing the RESTATEMENT (SECOND) OF TORTS § 652 (1977)).

207. *Cf. id.* (predicating the discussion of the invasion of privacy claim on application of rules and principles derived from the RESTATEMENT (SECOND) OF TORTS § 652 (1977)).

208. *See id.* ¶ 20, 574 N.W.2d at 818 (stating that the "viability" of the analyzed cases depended on the two factors).

209. *See id.* ¶ 9, 574 N.W.2d at 816 (reviewing Hougum's claim, which he based on the RESTATEMENT (SECOND) OF TORTS § 652 (1977) formulation of invasion of privacy).

210. *See supra* notes 181-85 and accompanying text.

nothing in the court's analysis to indicate why it relied so heavily on these factors, and thus no way to know if it will do so again in the future.[211]

Whether invasion of privacy torts have a future at all in North Dakota is, however, an open question.[212] If they are ultimately recognized, the experience of Minnesota, which only recently recognized common law invasion of privacy, may provide a model for how it will happen.[213] When it first considered the matter in 1975, the Minnesota court, like the North Dakota court, found it unnecessary to decide whether to recognize invasion of privacy, because as it found the plaintiff had failed to state a sufficient case.[214] In subsequent years, Minnesota courts relied on this strategy to deny claims,[215] and appellate courts sometimes denied them out of hand because the Minnesota Supreme Court had not recognized invasion of privacy.[216]

In *Lake*, however, the Minnesota court characterized all of its previous cases as "dicta," asserting that this claim was the first time it had confronted the issue.[217] The implication of this assertion seems to be that this was the first time the court had been presented with facts which forced it to reach the ultimate issue.[218] When confronted with such a case, the court had little trouble deciding to recognize three of the four privacy torts.[219] Thus, following Minnesota, North Dakota could characterize its previous decisions as dicta and recognize invasion of

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211. *Cf. Hougum*, ¶ 14-20, 574 N.W.2d at 817-18 (identifying two key factors, analyzing several cases in terms of them, and asserting their viability depended on the factors).

212. *Id.* ¶ 13, 574 N.W.2d at 816 (holding that the intrusion claim was insufficient after assuming without deciding that such a claim exists in North Dakota).

213. *See* Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 236 (Minn. 1998) (recognizing invasion of privacy as an actionable tort 23 years after declining to recognize it).

214. *See* Hendry v. Conner, 226 N.W.2d 921, 923 (Minn. 1975). The plaintiff had based her claim on the actions of an employee of a hospital's credit department. *Id.* at 922. The employee, in a loud voice in a crowded waiting room, told the plaintiff that she could not obtain service because she had not paid a bill and also referred to her recent bankruptcy. *Id.* The court held this did not state a claim because records of bankruptcy are public facts and the announcement to a small number of people did not constitute publicity. *Id.* at 923.

215. *See generally* Robbinsdale Clinic, P.A. v. Pro-Life Action Ministries, 515 N.W.2d 88, 92-93 (Minn. Ct. App. 1994) (holding a disclosure claim, if recognized, would fail because the audience was too small for disclosure to constitute publicity); House v. Sports Films & Talents, Inc., 351 N.W.2d 684, 685 (Minn. Ct. App. 1984) (holding the plaintiff's appropriation and intrusion claims, if torts were recognized, would fail on the merits).

216. *See generally* Bohdan v. Alltool Mfg. Co., 411 N.W.2d 902, 906 (Minn. Ct. App. 1987) (affirming summary judgment because Minnesota had not recognized privacy torts); Markgraf v. Douglas Corp., 468 N.W.2d 80, 84 (Minn. Ct. App. 1991) (denying the plaintiff's claim because the supreme court had not recognized invasion of privacy).

217. *See* Lake, 582 N.W.2d at 233, 233 n.1.

218. *Cf. id* at 233, 235 (describing the question as one of first impression and, after brief discussion, holding the plaintiffs stated a claim upon which relief may be granted and remanding for trial).

219. *See id.* at 235 (recognizing intrusion, disclosure and appropriation after review of the history of invasion of privacy and a brief review of the plaintiffs' claim).

privacy when confronted with a compelling claim, which the court decided *Hougum* was not.[220]

V. CONCLUSION

In *Hougum*, the North Dakota Supreme Court provided its first real analysis of invasion of privacy, using for the first time the generally-accepted *Restatement* model. However, it again declined to recognize a cause of action for invasion of privacy because the plaintiff had not stated a case sufficient to compel it to resolve the issue.[221] The question, therefore, remains whether North Dakota will recognize invasion of privacy when confronted with a sufficient claim.

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220. *Cf. id* at 233, 235 (describing past discussions as dicta and, after analysis, recognizing invasion of privacy torts).

221. *See* Hougum, ¶ 24, 574 N.W.2d at 818 (affirming summary judgment).