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# Prince v. St. Francis-St. George Hospital, Inc.

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## ***PRINCE V. ST. FRANCIS-ST. GEORGE HOSPITAL, INC.***

Samuel Warren and Louis Brandeis advocated legal recognition of the right of privacy in their 1908 law review article, *The Right of Privacy*.<sup>1</sup> In 1905 Georgia became the first jurisdiction to recognize the invasion of the right of privacy as an actionable tort.<sup>2</sup> In 1955 the Ohio Supreme Court recognized invasion of privacy as actionable in *Housh v. Peth*.<sup>3</sup> The *Housh* court identified three means by which one's privacy could be invaded:

“An actionable invasion of the right of privacy is the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.”<sup>4</sup>

In *Housh*,<sup>5</sup> the court acknowledged invasion of privacy through three distinct means: appropriation of another's personality, publicizing another's private affairs, and intruding into another's solitude. Decisions in Ohio since *Housh* have refined the definition of the elements of the three branches of this tort.<sup>6</sup>

One issue which has not been explicitly ruled on by the Ohio Supreme Court is whether negligence can be the basis of an action for the invasion of privacy. Perhaps this is because the majority of invasion cases involve actions which are obviously intentional and often malicious. The typical example involves creditors harassing, threatening, and embarrassing debtors.<sup>7</sup> Other instances include newspaper or television broadcasts of information on another.<sup>8</sup> In such cases, the issue of negligence does not arise. In *Prince v. St. Francis-St.*

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<sup>1</sup>This concept of the right to privacy refers to the right not to have personal information made known to the general public. “The common law secures each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.” Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890). For discussion recommending limiting the privacy tort see D. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291 (1983).

<sup>2</sup>*Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905) (involving unauthorized use of plaintiff's name and picture by defendant insurance company in advertisement).

<sup>3</sup>*Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956) (Defendant creditor engaged in pattern of harassment of plaintiff to collect debt; harassment included reported telephone calls to employer and to her home late at night).

<sup>4</sup>*Id.*

<sup>5</sup>*Id.*

<sup>6</sup>See *supra* notes 37-50 and accompanying text.

<sup>7</sup>*Stevens v. Harmony Loan Corp.*, 37 Ohio App. 2d 23, 306 N.E.2d 163 (1973) (Creditor instituted legal proceedings on four occasions after plaintiff informed creditor that plaintiff was not debtor).

<sup>8</sup>*Zacchini v. Scripps-Howard Broadcasting Co.*, 47 Ohio St. 2d 224, 351 N.E.2d 454 (1976), *cert. granted*, 429 U.S. 1037 (1977), *rev'd*, 433 U.S. 562 (1977), *on remand* 54 Ohio St. 2d 286, 376 N.E.2d 582 (1976) (Defendant filmed and broadcasted on television plaintiff's entire act as a daredevil human cannonball contrary to his express wish; however, plaintiff's action failed in favor of defendant's first amendment right to broadcast newsworthy material).

*George Hospital, Inc.*,<sup>9</sup> the court of appeals for Hamilton County considered whether negligence can be the basis of an actionable invasion of privacy. The defendants argued that their acts were merely negligent and thus not actionable.<sup>10</sup> The court rejected this defense and held that a cause of action does exist for *negligent* invasion of privacy.<sup>11</sup>

This note considers the possible impact on Ohio law of the *Prince* holding. A review of Ohio's prior position on invasion of privacy<sup>12</sup> suggests that the holding of *Prince* represents a substantial departure from past decisions in two respects: first, the plaintiffs alleged that their privacy was invaded when information was communicated to only one other person,<sup>13</sup> and second, the invasion of the privacy of one spouse served as the basis for a claim of the other spouse.<sup>14</sup> This apparent departure of *Prince* from prior decisions is discussed in the context of a physician's duty of confidentiality and defendant's breach of that confidence.

## FACTS

Mrs. Prince underwent treatment for alcoholism at St. Francis-St. George Hospital.<sup>15</sup> She was admitted under the care of Dr. Newman and was cared for by him and Dr. Scharold.<sup>16</sup> Upon admission, she and her husband were given a guarantee of privacy concerning medical information. Near the end of her stay, without her knowledge or approval, Dr. Scharold sent a health insurance claim form to Mr. Prince's place of employment, in care of a fellow employee who was not authorized to receive such claim forms.<sup>17</sup> The form indicated that Mrs. Prince was treated for acute and chronic alcoholism.<sup>18</sup> Mr. Prince's co-worker was the only person who was alleged to have seen the private medical information.<sup>19</sup> The Princes filed suit charging invasion of privacy. Mrs. Prince alleged that she suffered extreme humiliation and she sought money damages. Mr. Prince also alleged that he suffered extreme humiliation as well as lost

<sup>9</sup>*Prince v. St. Francis-St. George Hosp. Inc.*, 20 Ohio App. 3d 4, 484 N.E.2d, 265 (1985).

<sup>10</sup>*Id.* at 6, 484 N.E.2d at 267.

<sup>11</sup>*Id.* at 7, 484 N.E.2d at 268. See *supra* notes 23-27 and accompanying text.

<sup>12</sup>See, e.g., *Jackson v. Playboy Enterprises, Inc.*, 574 F. Supp. 10 (S.D. Ohio 1983) (reviews Ohio Supreme Court position on right of privacy); see also notes 37-40 and accompanying text.

<sup>13</sup>See, e.g., RESTATEMENT (SECOND) OF TORTS § 652D, comment a (1977), "Publicity, on the other hand, means that the matter is made public by communicating it to the public at large or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."

<sup>14</sup>See, e.g., *Young v. That Was the Week That Was*, 312 F. Supp. 1337 (N.D. Ohio 1969), *aff'd* 423 F.2d 265 (6th Cir. 1970), (holding that the right to privacy is personal and can be asserted only by the one whose privacy was invaded and not by family members).

<sup>15</sup>*Prince*, 20 Ohio App. 3d at 5, 484 N.E.2d at 266.

<sup>16</sup>*Id.*

<sup>17</sup>*Id.*

<sup>18</sup>*Id.*

<sup>19</sup>*Id.* at 6, 484 N.E.2d at 267.

employment opportunities as a result of the acts of the defendant. He also sought money damages. The trial court granted a motion for summary judgment for all defendants and the Princes appealed.<sup>20</sup>

On appeal, defendant doctors argued that the plaintiffs had offered no proof that the defendants had intentionally invaded Mrs. Prince's privacy. Relying on *McCormick v. Haley*,<sup>21</sup> defendants contended that the mere negligent invasion of privacy is not actionable. Since they were merely negligent in sending the claim to the wrong person, they were not liable for invading Mrs. Prince's privacy.<sup>22</sup>

The *Prince* court reviewed Ohio's position on invasion of privacy as articulated in *Housh v. Peth*,<sup>23</sup> and concluded that Ohio permits an actionable invasion of privacy based on the negligence of the defendant.<sup>24</sup> The *Prince* court reviewed the dicta of *McCormick* which stated that "A mere negligent intrusion into one's private activities does not constitute an actionable invasion of the right of privacy."<sup>25</sup> The *Prince* court then held "*McCormick v. Haley* notwithstanding, as we read the rule of *Housh*, it does not limit 'wrongful intrusion' to intentional intrusion; it seems to us the *Housh* rule allows for an actionable invasion of the right of privacy through negligence as well as intent."<sup>26</sup> The court permitted Mrs. Prince's claims to proceed to trial.<sup>27</sup>

The court considered whether to allow Mr. Prince's claim. While the court expressed its belief that the amount of damages which he sought might be fanciful, the court permitted his cause of action.<sup>28</sup> The court did not discuss the basis of Mr. Prince's claim, nor is it clear from the record upon what basis he was proceeding. The only mention of any cause of action in the opinion was the statement concerning whether sending the letter to Mr. Prince's co-worker invaded Mrs. Prince's privacy.<sup>29</sup> The court considered Mr. Prince's claim as a correlated issue to the invasion of Mrs. Prince's privacy and permitted him to

<sup>20</sup>*Id.* at 5, 484 N.E.2d at 266 (Defendants included the hospital, a corporation which operated the detoxification unit in the hospital, Dr. Neumann who admitted Mrs. Prince and Dr. Scharold, her attending physician; the claim against the hospital was disallowed for lack of employer-employee relationship between the hospital and the physicians who were characterized as independent contractors; while the corporation which operated the unit was included as a defendant, the term defendant(s) will only refer to physician(s)).

<sup>21</sup>*McCormick v. Haley*, 37 Ohio App. 2d 73, 307 N.E.2d 34 (1973) (Defendant-physician on three occasions mailed notice encouraging patient who had died to come in for check-up; family of deceased had initiated malpractice suit against physician in death of patient; family claimed mailing of notices was malicious intrusion into privacy; court in dicta stated that negligent intrusion was not actionable and that plaintiff must show physician intended to harass family).

<sup>22</sup>*Prince*, 20 Ohio App. 3d at 6, 484 N.E.2d at 267..

<sup>23</sup>*Housh*, 165 Ohio St. 35, 133 N.E.2d 340.

<sup>24</sup>*Prince*, 20 Ohio App. 3d at 7, 484 N.E.2d at 268 (1985).

<sup>25</sup>*Id.* (quoting *McCormick*.)

<sup>26</sup>*Id.*

<sup>27</sup>*Id.*

<sup>28</sup>*Id.* at 8, 484 N.E.2d at 269.

proceed in an effort to prove damages. There was no discussion of the underlying theory of his cause of action.<sup>30</sup>

### NEGLIGENT INVASION OF PRIVACY

The *Prince* court held that negligence may serve as the basis of actionable invasion of privacy.<sup>31</sup> The *McCormick* court held that invasion of privacy must be intentional, not merely negligent.<sup>32</sup>

This apparent discrepancy between the opinions of the *Prince* court and the *McCormick* court must be considered in light of the fact that invasion of privacy is composed of three distinct forms in Ohio.<sup>33</sup> One commentator has stated that the failure to recognize that there are distinct forms of invasion of privacy has resulted in much of the apparent confusion in decisions.<sup>34</sup>

Since its recognition of the three forms of invasion of privacy in *Housh*, the Ohio Supreme Court has expressly adopted the Restatement (Second) of Torts position concerning two of the three forms of invasion: intrusion into seclusion of another,<sup>35</sup> and appropriation of another's liberties.<sup>36</sup> The Supreme Court has not considered a case involving the third form of invasion: publicizing the private affairs of another. However, considering the Ohio Supreme Court's reliance on the Restatement, it is probable that the Restatement's position on invasion through publication of private affairs would also be adopted by the court.<sup>37</sup> Thus, the evaluation of the *Prince* holding must be considered in light of Ohio's position concerning each of the three distinct forms of invasion which are recognized.

<sup>30</sup>*Id.* at 8, 484 N.E.2d at 269.

<sup>31</sup>*Id.* at 7, 484 N.E.2d at 268.

<sup>32</sup>*McCormick*, 37 Ohio App. 2d at 78, 307 N.E.2d at 38.

<sup>33</sup>*See, e.g., Housh*, 165 Ohio St. 35, 133 N.E.2d 340 (definition of three bases for actionable invasion of privacy).

<sup>34</sup>W. PROSSER, LAW OF TORTS 814 (4th ed. 1971). *See also* Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960) (Identifies four branches of invasion of privacy: first, intrusion into another's seclusion; second, public disclosure of private facts; third, appropriation of another's likeness; fourth, publicity placing another in a false light). For discussion of conflict between false light invasion and first amendment rights see Amen, *Tort Recovery for Invasion of Privacy*, 59 NEB. L. REV. 808 (1980); Fisher, *Renwick v. News and Observer Publishing Co: North Carolina Rejects False Light Invasion of Privacy Tort*, 63 N. CAR. L. REV. 767 (1985); Annual Survey of Oklahoma Law, 6 OKLA. CITY L. REV. 33, 299 (1981).

<sup>35</sup>*Sustin v. Fee*, 69 Ohio St. 2d 143, 431 N.E.2d 992 (1982) (Defendant municipal employee observed plaintiff's dog kennel; defendant was acting in course of employment; under sovereign immunity doctrine, plaintiff is required to show defendant acted with malice to recover; court quoted Restatement (Second) position on all four branches of invasion and used Restatement (Second) to consider elements of intrusion).

<sup>36</sup>*Zacchini*, 47 Ohio St. 2d 224, 351 N.E.2d 454.

<sup>37</sup>*See e.g. Jackson*, 574 F. Supp. 10. Federal District Court here reviewed Ohio Supreme Court and, relying on *Sustin*, concluded that Ohio has in fact adopted the Restatement (Second) position completely. *But see* *Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 6 Ohio St. 3d 369, 453 N.E.2d 666 (1983). In *Yeager* the Court stated "Under the facts of instant case, we find no rationale which compels us to adopt the false light theory of recovery at this time." *Id.* at 372, 453 N.E.2d at 670.

The Restatement (Second) position on liability for the invasion of privacy through appropriation of another's likeness occurs when one "appropriates to his own use or benefit the name or likeness of another."<sup>38</sup> It is difficult to imagine a situation where one would negligently appropriate the name or likeness of another.<sup>39</sup> Such actions in Ohio generally have involved use by media of likeness or information concerning another without obtaining permission.<sup>40</sup> Another type of invasion through appropriation involves the unauthorized use of another's name or likeness to advertise a product. This type of appropriation was alleged in *Wilk v. Andrea Radio Corporation*.<sup>41</sup> Here the defendant included the names of the plaintiffs in advertisement without obtaining their permission.<sup>42</sup> It appears that invasions of privacy through appropriation of another's likeness would be intentional and therefore not applicable to *Prince*.

The second basis for invasion of privacy is through "wrongful intrusion into one's activities in such a manner as to outrage or cause mental suffering or shame or humiliation to a person of ordinary sensibilities."<sup>43</sup> This definition, given in *Housh*, does not specifically address the element of intent. The *Prince* court read the definition to include a negligent intrusion.<sup>44</sup> The *McCormick* court limited such intrusions to those which were intentional.<sup>45</sup>

In *Sustin v. Fee*, Ohio adopted the Restatement (Second) position concerning this type of invasion of privacy.<sup>46</sup> The Restatement (Second) position is that "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 the invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."<sup>47</sup> The Restatement (Second) expressly requires that the intrusion be intentional. Thus, for the invasion of privacy by intrusion, Ohio requires intent. The discussion of the *McCormick* court, that the intrusion must be intentional, appears to be consistent with Ohio's posi-

<sup>38</sup>RESTATEMENT (SECOND) OF TORTS § 652C (1977).

<sup>39</sup>See *Id.* illustrations 1 through 6. All involve intentional appropriation by one of the name or likeness of another, including impersonating another, using another's picture in an advertisement, signing another's name to a document.

<sup>40</sup>See *Zacchini*, 47 Ohio St. 2d 224, 351 N.E.2d 454.

<sup>41</sup>*Wilk v. Andrea Radio Corporation*, 200 N.Y.S.2d 522 (1960), modified 13 App. Div. 2d 745, 216 N.Y.S.2d 662 (1961).

<sup>42</sup>*Id.* at 523. (Negligence was raised by defendant who stated he believed that he had plaintiff's permission to use their names; the court rejected this defense; thus, while the appropriation was clearly intentional, the defendant may have negligently failed to get permission; this type of negligence relates to a defense and not to the initial intrusion by appropriation; thus, this type of negligence differs from that discussed in *Prince*, where the initial intrusion may have been done negligently).

<sup>43</sup>*Housh*, 165 Ohio St. 35, 133 N.E.2d 340.

<sup>44</sup>*Prince*, 20 Ohio App. 3d at 7, 484 N.E.2d at 288.

<sup>45</sup>*McCormick*, 37 Ohio App. 2d at 78, 307 N.E.2d at 38.

<sup>46</sup>*Sustin*, 69 Ohio St. 2d at 145, 431 N.E.2d at 993.

<sup>47</sup>RESTATEMENT (SECOND) OF TORTS § 652B (1977).

tion.<sup>48</sup> The *Prince* court's conclusion that a negligent intrusion may be actionable appears to differ from Ohio's current position.<sup>49</sup>

The final basis of invasion of privacy is by publicizing one's private affairs with which the public has no legitimate concern.<sup>50</sup> The Ohio Supreme Court has not expressly adopted the position of the Restatement (Second) on this type of invasion. However, the Restatement (Second) is a useful authority in light of the court's reliance on the Restatement for defining the elements of the other branches of invasion. The Restatement (Second) position is:

One who gives publicity to a matter concerning private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that:

- a) would be highly offensive to a reasonable person, and
- b) is not of legitimate concern to the public.<sup>51</sup>

Neither the definition of the *Housh*<sup>52</sup> court nor the position of the Restatement (Second)<sup>53</sup> requires that the publication be intentional. The elements expressly stated in both *Housh*<sup>54</sup> and the Restatement (Second)<sup>55</sup> are:

- 1) that there be publicity,
- 2) that the matter be private, and
- 3) that the public have no legitimate concern about the information.

The Restatement (Second) includes a further requirement: that a reasonable person would be highly offended by the publication.<sup>56</sup>

This is the type of invasion of privacy which the plaintiff alleged in *Prince*.<sup>57</sup> The *Prince*<sup>58</sup> court held that the defendant may be liable even if he acted negligently. This holding appears to be consistent with the Ohio position articulated in *Housh*,<sup>59</sup> as well as with the position of the Restatement (Second).<sup>60</sup>

In summary, the holding of *Prince*,<sup>61</sup> that negligence can serve as the basis of an action for an invasion of privacy, is consistent with Ohio's position of in-

<sup>48</sup>*McCormick*, 37 Ohio App. 2d at 78, 307 N.E.2d at 38.

<sup>49</sup>*Prince*, 20 Ohio App. 3d at 7, 484 N.E.2d at 268.

<sup>50</sup>*Housh*, 165 Ohio St. 35, 133 N.E.2d 340.

<sup>51</sup>RESTATEMENT (SECOND) OF TORTS § 652D (1977).

<sup>52</sup>*Housh*, 165 Ohio St. 35, 133 N.E.2d 340.

<sup>53</sup>See *supra* note 51 and accompanying text.

<sup>54</sup>*Housh*, 165 Ohio St. 35, 133 N.E.2d 340.

<sup>55</sup>See *supra* note 51 and accompanying text.

<sup>56</sup>RESTATEMENT (SECOND) OF TORTS § 652D (1977).

<sup>57</sup>*Prince*, 20 Ohio App. 3d at 5, 484 N.E.2d at 267.

<sup>58</sup>*Id.* at 8, 484 N.E.2d at 269.

<sup>59</sup>*Housh*, 165 Ohio St. at 41, 133 N.E.2d at 344.

<sup>60</sup>See *supra* note 51 and accompanying text.

<sup>61</sup>*Prince*, 20 Ohio App. 3d at 8, 484 N.E.2d at 269.

vasion through publication. However, the court's holding in *Prince*<sup>62</sup> appears to be inconsistent with Ohio's position on invasion through intrusion into the seclusion of another or through appropriation of another's likeness.<sup>63</sup> *Prince* appears to be limited to the type of invasion which was alleged by the plaintiffs; the publication of private information.

#### PUBLICATION RESULTING FROM BREACH OF CONFIDENCE

In *Prince* it was alleged that the private information was communicated to only one other person.<sup>64</sup> Without discussion of this issue, the court agreed with the plaintiffs' claim for the invasion of the right of privacy.<sup>65</sup> The Ohio Supreme Court has never directly ruled on the definition of publication. However, the position of *Prince*,<sup>66</sup> permitting an action when the publication is to only one other, is inconsistent with the position of the Restatement (Second): "Thus it is not an invasion of the right of privacy, within the rule stated in this Section, to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons."<sup>67</sup>

The Ohio Supreme Court has neither expressly adopted the Restatement (Second)<sup>68</sup> position nor has the court expressly ruled on the definition of publication. No Ohio court has considered whether the publication requirement is met when information is revealed to only one or a small number of individuals. Decisions from other jurisdictions have been based on the Restatement (Second) position that the publication must be made to many persons or available to the public at large.<sup>69</sup> The discrepancy between the position of the court in *Prince* and that of the Restatement (Second) is substantial. The holding of the *Prince* court, if applied literally, would appear to include disclosures made in private conversations. It is unlikely that this was the intent of the *Prince* court. Rather, the facts suggest that the reinterpretation of the

<sup>62</sup>*Id.*

<sup>63</sup>*Housh*, 165 Ohio St. 35, 133 N.E.2d 340. See also RESTATEMENT, *supra* note 51 and accompanying text.

<sup>64</sup>*Prince*, 20 Ohio App. 3d at 5, 484 N.E. 2d at 266.

<sup>65</sup>The court stated:

The threshold issue as presented by this appeal is whether the sending of the bill with the medical diagnosis prominently indicated in connection therewith by Dr. Scharold to the office of the husband's employer was publication of personal information without permission so that it violated the wife's right to privacy.

The court acknowledged Mr. Prince's co-worker's affidavit in which he admitted he opened and read the bill. The court then concluded that this presented an issue of fact whether he read the diagnosis and whether the summary judgment of the trial court was improper. Thus the court assumed that if the co-worker read the diagnosis this would constitute publication. *Prince*, 20 Ohio App. 3d at 6, 484 N.E.2d at 267.

<sup>66</sup>*Id.* at 484 N.E.2d at 268.

<sup>67</sup>RESTATEMENT (SECOND) OF TORTS § 652D comment a (1977).

<sup>68</sup>*Id.*

<sup>69</sup>See e.g. *Peterson v. Idaho-First Nat'l Bank*, 83 Idaho 578, 367 P. 2d 284 (1961) (court rejected invasion of privacy, failure of plaintiff to allege publicity of information). Compare *Beaumont v. Brown*, 401 Mich. 80, 257 N.W. 2d 522 (1977) (Employer sent letter to Army Reserve concerning employee; even though a small group of people saw the letter, this relatively small group may be adequate to meet publicity requirement).

publication requirement occurred because the defendants were physicians. All physicians assume a duty for treating information concerning their patients with confidentiality.<sup>70</sup> Mrs. Prince's physician breached his duty of confidentiality by divulging this information to another.<sup>71</sup>

Thus, the *Prince*<sup>72</sup> holding can be seen as permitting a cause of action when a physician breaches his duty of confidentiality even when the act does not completely meet the traditional requirements of invasion of privacy. Here, the publication was only to one other individual. This appears to be an extension of Ohio's current position. Courts in two other jurisdictions have expressly acknowledged breach of confidence as an actionable tort.<sup>73</sup> There is some support in prior Ohio decisions for a distinct tort based on a physician's breach of confidence. In *Hammonds v. Aetna*,<sup>74</sup> an insurance company induced a physician to breach his duty of confidentiality to a patient.<sup>75</sup> The company falsely told the physician that the patient was about to file a malpractice suit against him.<sup>76</sup> This led the physician to terminate his services to the patient and to provide the company with confidential information concerning the patient.<sup>77</sup> The patient sued the company. The company defended by arguing that physicians have no legal duty to maintain confidentiality.<sup>78</sup> The court presented the policy reasons for the physician's duty of confidentiality and concluded:

"We are of the opinion that the preservation of the patient's privacy is no mere ethical duty upon the part of the doctor; there is a legal duty as well. The unauthorized revelations of medical secrets, or any confidential communication given in the course of treatment, is tortious conduct which may be the basis for an action in damages."<sup>79</sup>

In *Knecht v. Yandalis Medical Center, Inc.*,<sup>80</sup> Plaintiff sued a non-professional

<sup>70</sup>All state medical societies have an ethical standard concerning maintaining confidentiality. See *Rights to Privacy in Medical Records*, 3 J. OF LEG. MED. 30 (July/Aug. 1975) (review of ethical and legal obligations of physicians to maintain confidentiality; quoting PRINCIPLES OF MEDICAL ETHICS OF THE AMERICAN MEDICAL ASSOCIATION 9 (1957):

"A physician may not reveal the confidence entrusted to him in the course of medical attendance, or the deficiencies he may observe in the character of his patients, unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or the community."

<sup>71</sup>*Prince*, 20 Ohio App. 3, at 5, 484 N.E.2d at 267.

<sup>72</sup>*Id.* at 8, 484 N.E.2d at 269.

<sup>73</sup>See e.g. *MacDonald v. Clinger*, 84 A.D.2d 482, 446 N.Y.S.2d 801 (1982) (Defendant physician breached confidence of patient; court held that the patient-doctor relation includes an additional duty of confidence and if the duty is breached it is actionable). See also *Horney v. Patten*, 291 Ala. 701, 287 So. 2d 824 (1973) (Physician disclosed confidential information to patient's employer; court states that action could be based on breach of confidence). For general discussion of topic of tort of breach of confidence see Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426 (1982).

<sup>74</sup>*Hammonds v. Aetna*, 243 F. Supp. 793 (N.D. Ohio 1965).

<sup>75</sup>*Id.* at 795.

<sup>76</sup>*Id.*

<sup>77</sup>*Id.*

<sup>78</sup>*Id.* at 795-96.

<sup>79</sup>*Id.* at 801-802.

employee in a medical center. Defendant disclosed information concerning plaintiff's medical treatment.<sup>81</sup> In considering plaintiff's appeal from a summary judgment, the court reviewed plaintiff's claim that any wrongful divulgence of medical information is actionable in Ohio.<sup>82</sup> The court cited *Hammonds*<sup>83</sup> but concluded that since a non-professional divulged the information, the breach of confidence issue was not relevant.<sup>84</sup>

As the courts in both *Hammonds* and *Knecht* note, Ohio provides statutory support for an action against a physician for breach of confidentiality. R.C. 2317.02<sup>85</sup> defines the scope of the physician-patient privilege in testifying, and R.C. 4731.22<sup>86</sup> provides for disciplinary action against a physician who breaches his duty of confidentiality.

Whether the *Prince*<sup>87</sup> holding will create acceptance for invasion of the right of privacy through breach of medical confidence remains to be seen. A number of factors argue for acceptance of this extension. There is some support in cases from other jurisdictions.<sup>88</sup> As noted in *Hammonds*, public policy encourages maintaining medical confidentiality. Additionally, a disclosure to only one other person is often most personally damaging especially if it is made to one's employer or spouse.<sup>89</sup> Finally, the public's loss of faith in medical confidentiality runs counter to the need for uninhibited disclosure by patient to physician. These factors suggest that other courts should consider adopting the position of *Prince*<sup>90</sup> that breach of confidence by a physician, even if the infor-

<sup>81</sup>*Id.* at 130, 470 N.E. 2d at 231.

<sup>82</sup>*Id.* at 130-31, 470 N.E.2d at 232.

<sup>83</sup>243 F. Supp. 793 (N.D. Ohio, 1965).

<sup>84</sup>*Knecht*, 14 Ohio App. 3d at 131, 470 N.E.2d at 232 (Here the court reviewed the statute defining physician's testimony privilege and the statute which establishes the basis for disciplinary action against physician, and held that these do not apply to non-professional employees such as the defendant; thus, no duty of confidence existed between plaintiff and defendant; in this case, the court held on different grounds for defendant, that she was privileged to reveal information to protect health of third party).

<sup>85</sup>OHIO REV. CODE ANN. § 2317.02 B (Page 1984).

<sup>86</sup>OHIO REV. CODE ANN. § 4731.22 B (Page 1984).

<sup>87</sup>*Prince*, 20 Ohio App. 3d at 8, 484 N.E.2d at 269.

<sup>88</sup>*See, e.g.*, MacDonald v. Clinger, 84 A.D.2d 482, 446 N.Y.S.2d 801 (1982); *see also* Horne v. Patton, 291 Ala. 701, 287 So. 2d 824 (1973) (Both holding breach of confidence by physician as actionable tort).

<sup>89</sup>For discussion of this topic see Note, *Breach of Confidences: An Emerging Tort*, 82 COLUM. L. REV. 1426 (1982). *See also* *Right to Privacy in Medical Records*, J. OF L. MED. 30 (July/Aug. 1975). *But see* RESTATEMENT (SECOND) OF TORTS § 652D comment a (1977); Annot., 20 ALR 3d 1109 (1968); Wachsmann, *Hear All, See All, But Silence May Be Golden: Confidentiality, Privacy and Privileged Communication*, 13 LEGAL ASP. OF MED. PRAC., February 1985 at 5. Both reviews discuss the possible bases for actionable breach of confidence which courts has recognized. These include invasion of privacy, breach of contract, and breach of fiduciary relationship. *See also* Firestone, *Sh! Patient Confidentiality in a Lawsuit: Physician Privilege and a Lawsuit*, 13 LEGAL ASP. OF MED. PRAC., February, 1985 at 1, which reviews the increasing liability for physicians in actions based on breach of confidence. For further discussion of common law protections of medical records see Note, *Privacy Rights in Medical Records*, 13 FORDHAM URBAN L. J. 165, 175-181 (1985).

<sup>90</sup>*See also* Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426, 1439 (1982) for extended discussion of different interests protected by invasion of privacy and breach of confidence. Confidentiality protects one's interests in all the expectation of confidentiality arising from the assurance of secrecy and

mation is communicated to only one other person, is actionable as invasion of privacy.

### THE PERSONAL NATURE OF THE RIGHT OF PRIVACY

The *Prince* court permitted an action by the husband of the woman whose privacy was invaded. His claim for damages included mental suffering and lost wages resulting from lost opportunities at work. The court's only discussion of his claim concerned the amount sought. The court did not address the issue of whether his privacy was invaded. This would seem to be an important issue since this case appears to be the only Ohio case to permit an action by one other than the person whose privacy was invaded.<sup>91</sup>

In *Young v. That Was the Week That Was*<sup>92</sup> the court held that the children could not assert that their privacy was invaded when a television program made statements concerning their mother. The court stated that the right of privacy is personal and can only be asserted by the one whose privacy was invaded.<sup>93</sup> The Restatement (Second)<sup>94</sup> is also clear in identifying the right as personal.

In *Prince* it is not clear how Mr. Prince's right of privacy was invaded. A departure from current authority exists if the rule in *Prince* permits Mr. Prince an action based on invasion of his wife's privacy. Alternatively, the court may have concluded that Mr. Prince's privacy was invaded by the communication of his wife's diagnosis to a co-worker. It is not clear whether the court concluded that Mr. Prince had a cause of action based on the invasion of his wife's privacy or whether his own privacy was invaded. Regardless of which position the court may have adopted, it is not likely that this holding will have an impact outside of the facts of this case. The well settled rule is that an action for invasion of privacy is personal. The interest protected is one's reputation, a personal interest. There appears to be no compelling reason to extend this personal right to permit an action by anyone other than the one whose privacy is invaded.

### CONCLUSION

The *Prince* court held that an invasion of privacy through the *negligence* of another is actionable.<sup>95</sup> This holding is consistent with the Ohio Supreme

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one's reliance thereon and 2) freedom from circulation of damaging information. The invasion of privacy, as defined in the Restatement (Second), does not protect the first of the confidentiality interest and protects the second only if the circulation of the information is to the public at large.

<sup>91</sup>The only Ohio case discussing this issue is *Young*, 312 F. Supp. 1337. Compare 35 O. JUR. 3d *Defamation and Privacy* § 160 (1982) (Discussion of rights of third person to assert invasion of privacy if defendant maliciously invades another's privacy for the purpose of injuring third party's business or trade).

<sup>92</sup>*Young*, 312 F. Supp. at 1341.

<sup>93</sup>*Id.*

<sup>94</sup>Restatement (Second) of Torts § 652I (1977).

<sup>95</sup>*Prince*, 20 Ohio App. 30 at 8, 484 N.E. 2d at 269.

Court's position on the invasion of privacy by publication of private facts. It is inconsistent with Ohio's position on other forms of invasion of privacy which requires *intentional* conduct.

*Prince* also held actionable an invasion of privacy where the defendant publicized private information concerning plaintiff to only one other person.<sup>96</sup> This appears to be a departure from the position of the Restatement (Second) which requires that the communication be made to a group of individuals or to the public at large.<sup>97</sup> However, it is more likely that this decision is meant to be limited to the situation presented; a breach of confidentiality by a physician. Whether future decisions will explicitly recognize this right of action is not clear, but strong public policy arguments support such a right.

Finally, *Prince* permitted a husband to assert a claim based on the invasion of his wife's privacy. It is unclear whether the *Prince* court expanded the right to privacy action to include all persons injured by the invasion, or if Mr. Prince's privacy was also invaded.

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<sup>96</sup>*Id.*

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<sup>97</sup>RESTATEMENT (SECOND) OF TORTS § 652D comment a (1977).

