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Breach of Confidence - The Need for a New Tort - Watts v. Cumberland County Hospital System

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BREACH OF CONFIDENCE—THE NEED FOR A NEW TORT—Watts v. Cumberland County Hospital System.

INTRODUCTION

When a patient divulges embarrassing, intimate, or even incriminating information to a therapist he or she usually expects that such disclosures will be kept completely confidential. A wrongful disclosure by a therapist potentially injures a patient in two distinct ways. First, the patient is injured by the adverse effects flowing from the wrongful disclosure and second, the wrongful disclosure destroys the patient's expectation that communications will be kept confidential. Since confidentiality is vital to the adequate functioning of a patient-therapist relationship, the legal protection of these confidences is necessary to promote a relationship that is beneficial to society.

The North Carolina Court of Appeals in Watts v. Cumberland County Hospital System, Inc. held that the disclosures of confidential information by a family therapist about his patient to third parties constituted an actionable wrong based in medical malpractice. By characterizing the wrong as medical malpractice, the North Carolina court bypassed an opportunity to establish a separate breach of confidence tort which could include wrongful disclosures in other confidential relationships such as lawyer-client, priest-penitent, and school-student.

Although courts have been willing to protect confidential relationships, the protection of the relationships has been accom-

2. Id., 446 N.Y.S.2d at 804 (1982).
5. Id. at 9, 330 S.E.2d at 249 (1985).
6. See, e.g., In re Fischel, 557 F.2d 209 (9th Cir. 1977).
plished in a rather haphazard fashion. Various theories have been advanced as bases to prevent wrongful disclosures. These traditionally have included invasion of privacy, breach of implied contract, breach of the duty of confidentiality, and causes of action created by statute. The courts have often relied upon more than one theory in a single case and occasionally have mixed the theories.

The right to redress wrongfully disclosed confidences through a separate breach of confidence tort is the topic of this Note. Not all disclosures are actionable wrongs. This Note will deal mainly with extrajudicial disclosures of customarily confidential information and will touch only superficially on testimonial privileges. This Note also will examine the inadequacies of theories advanced by many courts thus far as remedies for wrongful disclosures and the justification for the development of a separate breach of confi-
Breach of Confidence tort in North Carolina.

THE CASE

In Watts v. Cumberland County Hospital System, Inc.,\textsuperscript{17} the North Carolina Court of Appeals addressed the issue of wrongful disclosure of confidential information by a family therapist.\textsuperscript{18} The action was based upon the following facts:

In June 1974, the plaintiff, Linda Watts, was involved in an automobile accident.\textsuperscript{19} The plaintiff alleged that the treatment by doctors and hospitals immediately after the accident negligently failed to discover that her spine was fractured.\textsuperscript{20} Late in 1974, the plaintiff sought the counseling services of Dan Hall, a family and marital therapist, for treatment of stress caused by her husband’s drinking.\textsuperscript{21} During the course of her counseling, the plaintiff spoke to the therapist about severe pain that she had been suffering since the automobile accident.\textsuperscript{22} The plaintiff asserted that the therapist tried to make her accept that her pain was predominantly emotional rather than physical and that he discouraged her from seeing other doctors.\textsuperscript{23} The plaintiff continued counseling with Hall until 1981.\textsuperscript{24} Throughout this period the plaintiff’s family was repeatedly harassed by calls from the therapist and the plaintiff alleged that the therapist made improper advances.\textsuperscript{25}

In light of her continuing pain, the plaintiff sought medical advice of several additional doctors.\textsuperscript{26} These doctors were contacted by Hall, who discussed the plaintiff’s case with them even though the plaintiff had not authorized him to do so.\textsuperscript{27} Consequently, the doctors informed the plaintiff that her distress was psychological rather physical.\textsuperscript{28} In May 1979, another doctor, Dr. Coin, performed a scan and advised the plaintiff that she was suf-

\begin{itemize}
\item \textsuperscript{17} 75 N.C. App. 1, 330 S.E.2d 242 (1985).
\item \textsuperscript{18} Id. at 5-12, 330 S.E.2d at 247-50.
\item \textsuperscript{19} Id. at 5, 330 S.E.2d at 246.
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Id. at 13, 330 S.E.2d at 251.
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Id. at 19, 330 S.E.2d at 254.
\item \textsuperscript{25} Id. at 14, 330 S.E.2d at 251.
\item \textsuperscript{26} Id. at 13, 330 S.E.2d at 251.
\item \textsuperscript{27} Id. at 8, 330 S.E.2d at 248.
\item \textsuperscript{28} Id. at 18, 330 S.E.2d at 254.
\end{itemize}
Dr. Coin found two neck breaks on the original X-ray taken on the day of the plaintiff's accident. Thereafter, the plaintiff was treated first by Dr. Pennick, then Dr. Toole. The plaintiff alleged these doctors discussed her case with Hall, her therapist. She claimed that these discussions continued even after Hall had been dismissed as her therapist.

In June 1982, the plaintiff filed an action against the Cumberland County Hospital System, seven doctors, North Carolina Baptist Hospitals, Inc. and Dan Hall. This action alleged negligence in medical treatment and counseling, fraudulent concealment by all parties of the nature and extent of the plaintiff's injuries, and breach of fiduciary duty. The superior court granted summary judgment for all defendants except Cumberland County Hospital System who had failed to move for summary judgment. The superior court found no genuine issue of material fact.

The plaintiff brought two appeals from that decision. The first appeal was based on whether the court erred in granting summary judgment for Hall on the claims asserted by the plaintiff. The second appeal was based on whether the court erred in granting summary judgment for the hospital and doctors. The North Carolina Court of Appeals reversed summary judgment granted in favor of the therapist Hall, holding that the complaint alleged all essential elements of malpractice in the claim for breach of fiduciary duties. The court based this decision upon Article 1B, Chapter 90 of the North Carolina General Statutes, defining malpractice actions, and upon N.C. Gen. Stat. § 90-21.11, which defines the term "health care providers." The court further held that the summary judgment denying the plaintiff's claim of negligence and fraudulent concealment by the therapist Hall was improvidently

29. Id. at 19, 330 S.E.2d at 254.
30. Id.
31. Id.
32. Id.
33. Id. at 22, 330 S.E.2d at 256.
34. Id. at 5, 330 S.E.2d at 246.
36. 75 N.C. App. at 5, 330 S.E.2d at 246.
37. Id. at 6, 330 S.E.2d at 246.
38. 74 N.C. App at 770, 330 S.E.2d at 258.
39. Id.
40. 75 N.C. App. at 11-12, 330 S.E.2d at 250.
41. Id. at 8, 330 S.E.2d at 249.
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granted. The dissent to this opinion concurred that summary judgment on the claims for breach of fiduciary duty and negligence should be reversed, but stated that the plaintiff's fraudulent concealment claim was but another aspect of the malpractice claim.43

BACKGROUND

Although the court in Watts was not willing to establish a separate breach of confidence tort, there is ample authority for it based on both English and American law. The exact beginnings of the breach of confidence action are unclear. English courts have often granted recovery for wrongful disclosure based on a variety of theories including property, contract and unjust enrichment.44 The earliest English cases involving the breach of confidence issue were based on the law of the common law copyright.45

The first English case which actually recognized the breach of confidence as a separate cause of action was the 1849 case of Prince Albert v. Strange.46 In Prince Albert, royal etchings were forged by a printer who also prepared a catalogue of them.47 The display or use of the copies by third parties could be enjoined since these copies were protected under common law copyright principles as a form of expression.48 However, the catalogue was not a form of expression but merely informational.49 Information could be protected only if disclosed in a confidential relationship.50 The court held that an injunction was proper not only because the court was willing to extend the property rights in the etchings to the catalogue, but also based on alternate theories of breach of trust, confidence and contract rights.51

Following this case, the English courts developed an extensive body of law delineating the breach of confidence tort.52 The tort

42. 75 N.C. App. at 22, 330 S.E.2d at 256.
43. Id. at 22, 330 S.E.2d at 256. (Wells, J., concurring in part, dissenting in part).
44. The Law Commission, Breach of Confidence, No. 110, at 3.3 (H.M. Stat. Off. 1981); see also Note, supra note 10, at 1452 n.132.
45. Id.
46. 41 Eng. Rep. 1171 (Ch. 1849).
47. Id. at 1172.
48. Id. at 1178.
49. Id.
50. Id.; see also 3 M. Nimmer, On Copyright § 16.01 (1982).
52. See supra note 46.
was expanded to cover wrongful disclosures in a variety of circumstances including banker-customer relationships, accountant-client relationships, trade secrets and confidential commercial transactions. In 1981, the British Law Commission suggested a statutory reformulation of the breach of confidence tort into a single set of principles to apply to all wrongful disclosures.

In contrast, in America the breach of confidence tort was employed by the judiciary only in isolated cases. Corliss v. E.W. Walker Co., decided in 1894, was one of the earliest American cases to recognize this tort. In Corliss, the wife of a deceased inventor sought to enjoin publication of his portrait. The court stated that the engagement of a photographer to take a picture "assumes the form of a contract; and it is a breach of contract, as well as a violation of confidence, for the photographer to make additional copies from the negative." However, the Massachusetts court held that innocent third parties who had purchased pictures of the deceased inventor could print them. This decision was based on the grounds that third parties were not subject to the confidence binding the photographer and had no notice of the wrongful conduct of the photographer.

Following the Corliss decision, the breach of confidence tort broke into three separate bodies of law: common law copyright, trade secrets, and personal breach of confidence. The common law copyright and trade secrets law developed into extensive bodies of law, each which included elements dependent on the breach of confidence. However, breach of confidence as a separate tort action was almost dormant until 1960. This dormancy was due mainly to the development of the breach of privacy tort following a 1890 Harvard Law Review article by Warren and Brandeis, which proposed a constitutional right to privacy.

After 1960, the breach of confidence tort as a separate action

53. Note, supra note 10, at 1453.
54. Id. at 1453-54.
55. 64 F. 280 (C.D. Mass. 1894).
56. Id. at 281.
57. Id.
58. Id. at 282.
59. Id.
60. Note, supra note 10, at 1454 n.146.
61. Id.
62. Id.
appeared in an increasing number of cases. The breach of confidence tort emerged in relationships such as physician-patient, banker-customer and school-student. The physician-patient line of cases appeared with the holding by the Utah court in Berry v. Moench. There the parents of a patient's prospective bride sought information about him from his psychiatrist. The wrongful disclosure of confidential information by the psychiatrist about his patient gave rise to the patient's cause of action in libel. The court stated that it was the doctor's duty not to discuss information revealed in confidence, and that it was the policy of the law to encourage confidential physician-patient relationships.

Similarly, the New York court in Clark v. Geraci stated that a patient has a cause of action against a physician for disclosing information obtained in the physician's professional capacity. In this case, the patient was a civilian employee of the United States Air Force. He was fired after his employer received a letter from his doctor stating that the patient's absences from work were due to alcoholism. The patient filed a complaint which alleged that the doctor's disclosures of confidential information constituted malpractice. Although the court noted that there was no common law basis for the action, it concluded that statutory law regulating physicians' conduct, accepted usage, and the Hippocratic oath provided grounds for the breach of confidence action.

64. Note, supra note 10.
65. See, e.g., MacDonald, 84 A.D.2d 482, 446 N.Y.S.2d 801; see generally Note, To Tell Or Not To Tell: Physician's Liability For Disclosure of Confidential Information, 13 CUM. L. REV. 617 (1983); Annot., 20 A.L.R.3d 1109 (1968).
68. 8 Utah 2d 191, 331 P.2d 814 (1958).
69. Id. at 195, 331 P.2d at 816.
70. Id. at 196, 331 P.2d at 817.
71. Id. at 197, 333 P.2d at 817. The court recognized the need to encourage confidential relationships in this case. However, the court also recognized that disclosure might be necessary to protect a third party's interests.
72. 29 Misc. 2d 791, 208 N.Y.S.2d 564 (1960). This case is a good example of the court's willingness to limit the breach of confidence tort in situations in which there is an overriding concern. Here the doctor's duty to fully disclose to the government overrode his duty of confidentiality to his patient.
73. Id. at 566.
74. Id.
75. Id.
76. Id. at 567.
The Pennsylvania court in *Alexander v. Knight*\(^{77}\) explained that the physician owes a patient a duty of total care which includes a duty to refuse to aid the patient's opponent in litigation.\(^{78}\) The breach of confidence action in this case arose as a result of injuries sustained by the plaintiff in an automobile accident.\(^{79}\) The plaintiff claimed that the physician who examined her had delivered a copy of the examination report to the defendant's representative.\(^{80}\) The court noted, in dictum, that the doctor's disclosures constituted a breach of confidence which was to be condemned.\(^{81}\)

The Supreme Court of New York in *Felis v. Greenberg*\(^{82}\) also dealt with the duty of physician-patient confidentiality. The plaintiff alleged in *Felis* that her physician had intentionally submitted a false report to her insurer.\(^{83}\) This report contained a diagnosis which conflicted with an earlier diagnosis by the same physician.\(^{84}\) The court held that the plaintiff's cause of action lay in tort, and that the doctor's false report constituted an unlawful violation of the confidential relationship of physician and patient.\(^{85}\) The court based its reasoning upon the theory that there was a recognized legal duty owed by the defendant to the plaintiff which was breached by the defendant's disclosure.\(^{86}\)

More recent examples of the judiciary's willingness to redress wrongful disclosures in physician-patient relationships include New York court decisions of *Doe v. Roe*\(^{87}\) and *MacDonald v. Clinger*.\(^{88}\) In *Doe*, the doctor communicated information about her patients to her husband who published a book of case studies.\(^{89}\) The book revealed intimate details of a patient's life including thoughts, feelings, sexual fantasies and biographies.\(^{90}\) Although the court discussed several different theories of liability, the court ap-

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78. Id. at 80, 177 A.2d at 146.
79. Id. 177 A.2d at 142.
80. Id.
81. Id. The court condemned one doctor's role in inducing another doctor to breach a confidential relationship with a patient.
82. 51 Misc. 2d 441, 273 N.Y.S.2d 288 (1966).
83. Id. at 290.
84. Id.
85. Id.
86. Id.
89. 400 N.Y.S.2d at 671.
90. Id. at 678.
peared to have relied on the tortious breach of confidence doctrine. 91 Similarly, MacDonald stated that a wrongful disclosure by a psychiatrist is a breach of confidence which gives rise to a tort action. 92 The psychiatrist had revealed information to the patient's wife without the patient's consent which the patient claimed led to the deterioration of his marriage. 93 The MacDonald court acknowledged that when a physician discloses personal information learned in the course of treatment, the most appropriate theory of recovery is based on the breach of confidence tort. 94 The court stated that "an action in tort for a breach of a duty of confidentiality and trust has long been acknowledged in the courts of this state." 95

Apart from the physician-patient relationship, the breach of confidence tort has been applied in other confidential relationships. For example, bankers have been subjected to liability under the breach of confidence tort. 96 The first such case was Peterson v. Idaho First National Bank. 97 The plaintiff's employer in Peterson requested information on the finances of his employees from the manager of a local bank. 98 The bank supplied information which revealed that the plaintiff was experiencing financial difficulty. 99 The plaintiff brought an action alleging personal embarrassment and loss of reputation. 100 The Idaho Supreme Court upheld the complaint based on the violation of an implied contract and the bank's duty of confidence. 101 A more recent case, Suburban Trust Co. v. Waller, 102 held that a bank was liable for a breach of confidence involving one of its customers. The plaintiff cashed his federal tax refund check at the Treasury Department and deposited the sequentially numbered bills in the bank. 103 The bank notified the police and supplied a photograph of the plaintiff which was

91. Id. at 677.
92. 446 N.Y.S.2d at 804.
93. Id. at 802.
94. Id. at 804.
95. Id.
98. Id. at 582, 367 P.2d at 286.
99. Id.
100. Id.
101. Id. at 583-89, 367 P.2d at 286-90.
103. Id. at 337, 408 A.2d at 760.
later falsely connected to a robbery. The court stated that the false arrest of the bank's customer stemming from information supplied by the bank was a violation of the bank's duty to maintain confidences.

Additionally, school-student, priest-penitent, attorney-client, husband-wife and administrator-patient relationships have been deemed confidential in a number of cases. The variety of case law within which the breach of confidence tort appears indicates that there is substantial authority to establish a separate tort to remedy the problem of wrongful disclosure. This tort has been defined recently as a "limited duty that attaches to nonpersonal relationships customarily understood to carry the obligation of confidence." Recent decisions have indicated an increasing trend toward recognition of the breach of confidence tort as a separate cause of action.

**ANALYSIS**

Although the breach of confidence tort has been utilized in several jurisdictions as a remedy for wrongful disclosures of personal information, this issue was not addressed in North Carolina until *Watts v. Cumberland County Hospital System, Inc.* The plaintiff in *Watts* brought a suit against her marital therapist for wrongful disclosures of confidential information to third parties. In establishing whether the plaintiff had stated a claim for which relief could be granted, the court listed four possible theories as bases for the cause of action. While noting that courts consider-

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104. *Id.* at 338, 408 A.2d at 761.
105. *Id.* at 339-46, 408 A.2d at 762-65.
108. See, e.g., *In re Fischel*, 557 F.2d 209 (9th Cir. 1977).
109. See, e.g., *United States v. Cameron*, 556 F.2d 752 (5th Cir. 1977).
111. *See supra* notes 108-112.
116. *Id.* at 9, 330 S.E.2d at 248.
117. *Id.* The court listed four theories which included invasion of privacy, breach of implied contract, breach of fiduciary duty or duty of confidentiality, and
ing this issue had not agreed upon the "proper characterization of the cause of action," the North Carolina Court of Appeals labeled it as an action grounded in malpractice. The court determined that the plaintiff had an implied statutory cause of action in malpractice based upon Article 1B of Chapter 90 of the North Carolina General Statutes characterizing medical malpractice and N.C. Gen. Stat. § 90-21.11 defining the term "health care provider."

However, a closer scrutiny of the case authority on which the court relied indicates that the court mislabeled this cause of action. The court relied on Humphers v. First Interstate Bank, which rejected a claim for malpractice as a remedy for wrongful disclosure. In Humphers, the physician revealed his patient's name to the patient's natural child who had been adopted. The court narrowly defined the practice of medicine as active treatment and indicated that a disclosure of confidential information after treatment had been terminated was not included within the definition of malpractice. The court stated, "[a]n action for medical malpractice will only lie for activities in which the defendant was involved in the practice of medicine." Although the court in Humphers recognized two causes of action for wrongful disclosures, invasion of privacy and breach of confidence, it refused to recognize medical malpractice as an appropriate cause of action. Malpractice was also rejected as a cause of action in wrongful disclosures by the New York court in Hammer v. Polsky. The Hammer court held that unprofessional conduct does not constitute malpractice and dismissed the plaintiff's claim based upon the insufficiency of the pleadings.

The Watts court also cited MacDonald v. Clinger. The New York Supreme Court in MacDonald examined a number of theo-

medical malpractice.

118. Id.
119. Id. at 9, 330 S.E.2d at 249.
120. Id. at 9-10, 330 S.E.2d at 249.
122. Id. at 577, 684 P.2d at 584.
123. Id.
124. Id.
125. Id. at 578-84, 684 P.2d at 585-88.
126. Id. at 578, 684 P.2d at 585.
128. 233 N.Y.S.2d at 111.
129. 84 A.D. 482, 446 N.Y.S.2d 801 (1982).
ries providing a cause of action for the wrongful disclosure of confidential information. Although it recognized an action in implied contract, the court also noted an additional cause of action "springing from but extraneous to the contract and that breach of such duty is actionable in tort." Both Humphers and MacDonald recognized a separate cause of action based upon the breach of confidence tort.

The Watts court also cited the Alabama decision of Horne v. Patton. The court cited Horne as a case in which liability had been imposed under more than one theory. The Horne case found three independent bases of liability: invasion of privacy, breach of implied contract, and breach of confidence. Medical malpractice was not advanced as a theory of liability. In fact, all of the preceding cases cited by Watts as persuasive authority are analogous; they have all recognized the breach of confidence tort as a separate cause of action to remedy wrongful disclosures of confidential information and none of these cases set forth medical malpractice as a basis for recovery.

The court in Watts used Mazza v. Huffaker as precedential authority of North Carolina for characterizing wrongful disclosures as malpractice. In Mazza the patient brought a suit against his doctor on the grounds of negligence. The court stated that the psychiatrist's conduct in having sexual relations with his patient's spouse constituted a breach of duty to maintain the patient's trust. The court characterized the cause of action as malpractice and awarded damages to the plaintiff.

Watts and Mazza are distinguishable from one another. Although both cases involved wrongful acts connected with medical

130. Id. at 483, 446 N.Y.S.2d at 802.
131. Id. at 484-86, 446 N.Y.S.2d at 803-04.
132. Id. at 486, 446 N.Y.S.2d at 804.
133. See supra notes 133, 139.
134. 291 Ala. 701, 287 So. 2d 824 (1973).
135. 75 N.C. App. at 9, 330 S.E.2d at 248.
136. 291 Ala. at 706-11, 287 So. 2d at 827-32.
137. Id.
139. 75 N.C. App. at 9-11, 330 S.E.2d at 249-50.
140. 61 N.C. App at 172, 300 S.E.2d at 835.
141. Id. at 176-77, 300 S.E.2d at 837-38.
142. Id. at 188-89, 300 S.E.2d at 844-45.
treatment, the issue stemming from the wrongful disclosure of confidential information in *Watts* is much broader than that posed by the doctor's affair with his patient's wife in *Mazza*. Although the court in *Mazza* discussed the duty of a doctor to act in the best interest of his patient during the course of their relationship, the court was mainly concerned with rectifying a breach that had already occurred.

In contrast, the issue of confidentiality in *Watts* is much broader. The expectation of confidentiality is required even prior to the establishment of a relationship so that the patient is willing to reveal necessary information in the first place. This expectation continues even long after the active relationship of doctor-patient has been discontinued. It is doubtful that an affair by the doctor with his patient's wife prior to the patient's treatment or ten years after his treatment would give rise to a cause of action for malpractice. However, the circumstances in *Watts* demonstrate both the necessity of protecting the expectation of confidentiality and the prevention of disclosure of confidential information during and after the patient's treatment. The malpractice cause of action which served well in *Mazza* is not broad enough to address the interests in *Watts*.

Medical malpractice is inadequate to remedy wrongful disclosures for several reasons. First, by limiting the remedy for wrongful disclosure in *Watts* to medical malpractice, the North Carolina court did not provide a remedy to prevent similar disclosures in other confidential relationships. Therefore, while a disclos-

143. *Id.* at 175-76, 300 S.E.2d at 837; 75 N.C. App. at 4-5, 330 S.E.2d at 246.
144. 61 N.C. App. at 177, 300 S.E.2d at 838.
145. *Id.* at 174-75, 300 S.E.2d at 837.
146. *See, e.g.*, Hague v. Williams, 37 N.J. 328, 181 A.2d 345 (1962), "A patient should be entitled to freely disclose his symptoms and condition to his doctor in order to receive proper treatment without fear that those facts may become public property. Only thus can the purpose of the relationship be fulfilled." *Id.* at 349.

147. *See, e.g.*, Alberts v. Devine, 479 N.E.2d 113 (Mass. 1985). The court found that confidentiality in doctor-patient relationships was so important that the court stated a patient may hold liable one who induces a physician to violate the duty of confidentiality. *Id.* at 121; *see also*, Humphers v. First Interstate Bank, 68 Or. App. 573, 684 P.2d 581 (1984). The physician in *Humphers* wrongfully disclosed the patient's name to his child long after the active doctor-patient relationship and was held in breach of confidence.

ure of personal information by a doctor about his patient could give rise to a cause of action.\textsuperscript{149} A disclosure of personal information by a school about a student would not.\textsuperscript{150} These results seem unjustified. North Carolina has a strong interest in promoting a variety of confidential relationships.\textsuperscript{151} Though societal interests injured by wrongful disclosures are not exactly the same in each case, every breach of a confidential relationship involves the same general kind of wrongful disclosure regardless of the societal interest injured.\textsuperscript{152}

Second, the medical malpractice theory is more difficult for the plaintiff to prove than the occurrence of a wrongful disclosure since it places additional burdens of proof on the plaintiff.\textsuperscript{153} Under the medical malpractice theory the plaintiff must show a duty by the defendant to conform to a certain standard of conduct and that the breach of that duty proximately caused the plaintiff’s injury.\textsuperscript{154} Seemingly innocuous disclosures by the defendant which do not violate the standard of conduct could violate a confidential relationship if the information had special significance to the parties involved or if the confessor is especially sensitive.

Case law,\textsuperscript{155} the limited application,\textsuperscript{156} and the difficulty of proof\textsuperscript{157} dictate that malpractice is not the solution to solve wrongful disclosures in confidential relationships.

Since the North Carolina court relied upon statutes to establish the cause of action in malpractice,\textsuperscript{158} it is necessary to determine if these statutes are directly applicable to the issue of wrong-

\textsuperscript{149} Watts, 75 N.C. App. 1, 330 S.E.2d 242.

\textsuperscript{150} See, e.g., Student Bar Association Board of Governors v. Byrd, 293 N.C. 594, 239 S.E.2d 415 (1977). This case discussed the right by students to forbid discussion of students in faculty meetings under the Family Education Rights and Privacy Act of 1974 [41 F.R. 24662]. The court stated “[t]he Buckley Amendment does not forbid such disclosure of information concerning a student and, therefore, does not forbid opening to the public a faculty meeting at which such matters are discussed.” Id. at 599, 239 S.E.2d at 419.

\textsuperscript{151} See generally N.C. GEN. STAT. §§ 8-53 to 53.5.

\textsuperscript{152} Note, supra note 10, at 1434.

\textsuperscript{153} 75 N.C. App. at 11, 330 S.E.2d at 250. See also E. HIGHTOWER, NORTH CAROLINA LAW OF DAMAGES § 36.13 at 434 (1981).

\textsuperscript{154} 75 N.C. App. at 11, 330 S.E.2d at 250.

\textsuperscript{155} See supra notes 128, 134.

\textsuperscript{156} See supra notes 108-112 for other relationships for which a cause of action should be established.

\textsuperscript{157} See supra note 160.

\textsuperscript{158} 75 N.C. App. at 9-10, 330 S.E.2d at 249.
ful disclosure. Although N.C Gen. Stat. § 90-2.11 and Article 18C of Chapter 90 do place marital therapists within the realm of health care providers,\textsuperscript{160} it is unclear if the Legislature intended to include wrongful disclosures by health care providers within the statutory definition of medical malpractice. Article 1B, Chapter 90, states that “a medical malpractice action is any action for damages for personal injury or death arising out of furnishing or failure to furnish professional services. . . .”\textsuperscript{160} The one question which must be answered is whether the Legislature intended that the term “personal injury” include the injuries normally suffered as a result of wrongful disclosures: humiliation, loss of confidence and deterioration of relationships. The court in \textit{Watts} did hold that the Legislature intended to include such injuries,\textsuperscript{161} but it relied only upon \textit{Black's Law Dictionary}\textsuperscript{162} to define the conduct included in malpractice.\textsuperscript{163}

The court avoided a more direct and effective approach to the problem by its piecemeal efforts to fashion a remedy for wrongful disclosure in this case.\textsuperscript{164} North Carolina courts could directly ad-

\textsuperscript{159} Id.; N.C. GEN. STAT. § 90-21.11 defines “health care provider” as “any person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, psychology; or a hospital as defined by G.S. 131-126.1(3); or a nursing home as defined by G.S. 130-9(e)(2); or any other person who is legally responsible for the negligence of such person, hospital or nursing home; or any other person acting at the direction or under the supervision of any of the foregoing persons, hospital, or nursing home. . . . “Article 18C of Chapter 90 provides for the certification of marital and family therapists, and such persons” [who] clearly engage in the practice of or otherwise perform duties associated with psychology.” \textit{Id.}

\textsuperscript{160} \textit{Id.}

\textsuperscript{161} \textit{Id.}

\textsuperscript{162} \textit{BLACK'S LAW DICTIONARY} 864 (rev. 5th ed. 1979).

\textsuperscript{163} 75 N.C. App. at 10, 330 S.E.2d at 249. This definition of malpractice included “any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct.” \textit{Id.}

\textsuperscript{164} Courts also fashion piecemeal remedies by a reliance on testimonial privileges as a basis for liability for extrajudicial disclosures. Quarles v. Sutherland, 215 Tenn. 651, 389 S.W.2d 249 (1965). The purpose served behind permitting a testimonial privilege in providing competent testimony is entirely different than that served in protecting the revelations of confidential relationship. \textit{Humphers}, 68 Or. App. at 578-79, 684 P.2d at 585. The revelations of a confidential relationship may at times be outweighed by the need for judicial administra-
dress the problem of wrongful disclosures by establishing a breach of confidence tort. Many courts have included breach of confidence as a remedy for wrongful disclosure. A number of other courts have yet to specifically recognize the breach of confidence tort but have clearly applied the theory of the tort. As stated by the Supreme Court of New York in Doe v. Roe, "[i]t is generally accepted that there is no necessity whatever that a tort must have a name. New and nameless torts are being recognized constantly."

The courts which have refused to recognize the breach of confidence tort have usually done so based on a lack of statutory authority. At common law there was no legally recognized confidential relationship between patient and physician. Courts have also refused to remedy wrongful disclosures of confidential information based on the absence of implied contract or the absence of a doctor-patient relationship. These cases usually involve a doctor who has been employed by a third party to examine the patient. Other courts have been more subtle in their refusal to establish the breach of confidence tort as a separate action. These


167. 400 N.Y.S.2d at 677.


169. Id.


171. See, e.g., Collins, 156 F. Supp. 322; Quarles, 215 Tenn. 651, 389 S.W.2d 249 (1965).
jurisdictions have protected confidential disclosures under other established theories and have avoided recognizing a new breach of confidence tort. The Watts decision falls into this category. The North Carolina court addressed the breach of confidence problem but limited it to an action for malpractice, thereby only providing a partial remedy for wrongful disclosures.

North Carolina needs to be bold in its recognition of a new tort. While the North Carolina court was willing both to provide a remedy for extrajudicial disclosures and to cite cases which recognized the breach of confidence tort, it was not bold enough to establish a separate action on its own. Watts provided the North Carolina court with an opportunity to establish the proper parameters for a new tort which would directly address extrajudicial disclosures. By establishing such a tort the North Carolina court would protect interests not directly protected by medical malpractice statutes including "(1) the expectation of confidentially arising from the assurance of secrecy and the reliance thereon; and (2) freedom from circulation of damaging information."

Most of the problems associated with the recognition of the breach of confidence tort could be easily eliminated by narrowing the relationships included within it to "nonpersonal relationships customarily understood to carry an obligation of confidence." This standard was adopted recently by the District of Columbia in Vassiliades v. Garfinckel's as the basis for liability in tort. This standard recognizes that every "juicy rumor" cannot be quelled and establishes only a limited duty not to reveal confidences. The nonpersonal requirement removes friends and family from being included under the tort, thus avoiding the evidentiary problems associated with that type of personal litigation. It also establishes the "customarily" requirement which serves as a notice to defendants of their duty.

Since there are some situations in which the disclosure of confidential information is imperative, other limitations on this tort

173. 75 N.C. App. at 9, 330 S.E.2d at 248.
175. Note, supra note 10, at 1468.
177. Union Free School Dist., 324 N.Y.S.2d at 228.
178. Note, supra note 10, at 1455-68.
need to be established. The counterbalancing interests of society require that in cases of public safety, health, judicial administration, and the public right to know, the breach of confidence tort may not apply. Tarasoff v. Regents of University of California is a good example of circumstances in which public safety is paramount to enforcement of the tort. In Tarasoff, the California Supreme Court found there was a legal duty to breach the confidence of a mental patient who had been diagnosed as dangerous and did in fact kill his girlfriend after his release. The court held in this case there was an affirmative duty to reveal the patient’s communications. Public health is also an overriding concern that outweighs the interest in keeping confidences. Similarly, judicial administration requires that when an incomplete disclosure is made by a patient, the doctor who treated him should be allowed to make a full disclosure. Additionally, judicial privileges or the lack of judicial privileges should not be affected by the existence of this tort. The need to report confidences to prevent crime would also be a necessary limitation. Finally, the public’s right to know in some circumstances could outweigh the interest of keeping a matter in strict confidence.

Since a breach of confidence tort would directly address the problem of extrajudicial disclosures, the other theories listed by the North Carolina court, implied term of contract and invasion of privacy, would not be necessary. However, in the absence of a

179. See, e.g., Berry, 8 Utah 2d 191, 331 P.2d 814.
180. See, e.g., Simonsen, 104 Neb. 224, 177 N.W. 831.
181. See, e.g., Boyd v. Wynn, 286 Ky. 173, 150 S.W.2d 648 (1941).
184. Id. at 430-32, 551 P.2d at 339-40, 131 Cal. Rptr. at 19-20.
185. Id. at 450, 551 P.2d at 353, 131 Cal. Rptr. at 33.
186. See N.J. STAT. ANN. § 26:4-15 (West 1964); Simonsen, 104 Neb. at 224, 177 N.W. at 831.
188. See, e.g., Humphers, 68 Or. App. at 580, 684 P.2d at 586.
191. Watts, 75 N.C. App. at 9, 330 S.E.2d at 248.
breach of confidence tort, neither of these theories adequately address the issue of wrongful disclosures.

An expansive body of law has developed in the United States on the tort of invasion of privacy.\textsuperscript{192} The Oregon court in \textit{Humphers}\textsuperscript{193} stated that only one of the four types of invasion of privacy was applicable to extrajudicial disclosures of a confidential matter.\textsuperscript{194} That tort, as described by the \textit{Restatement (Second) of Torts}, is one in which:

There is likewise no liability unless the interference with the plaintiff's seclusion is a substantial one, of a kind that would be highly offensive to the ordinary reasonable man, as the result of conduct to which the reasonable man would strongly object.\textsuperscript{195}

The court also noted that the tort for interference with seclusion did not require publication as did all other types of invasion of privacy.\textsuperscript{196}

While this type of invasion of privacy tort overlaps with the breach of confidence tort, it would not provide a complete remedy for wrongful disclosures. The interests protected by each tort are different.\textsuperscript{197} The breach of confidence tort protects an expectation of secrecy and prevents the circulation of damaging information.\textsuperscript{198} The invasion of privacy tort for interference with seclusion does not protect the first interest at all and only partially protects the second.\textsuperscript{199} The requirement that the interference be a substantial and highly offensive one places a major limitation on the remedy for this wrong. Confidences should be protected without regard to their degree of offensiveness, since statements which would seem unoffensive to a reasonable man could have special importance to the parties concerned.\textsuperscript{200} This privacy standard also would not protect the highly sensitive person to whom disclosures could be very

\begin{itemize}
  \item \textsuperscript{192} Sloan & Hall, \textit{Confidentiality of Psychotherapeutic Records}, 5 J. LEGAL MED. 435-42. (1984).
  \item \textsuperscript{193} 68 Or. App. 573, 684 P.2d 581 (1984).
  \item \textsuperscript{194} 68 Or. App. at 583, 684 P.2d at 588.
  \item \textsuperscript{195} \textit{RESTATEMENT (SECOND) OF TOッツS} § 652B comment d (1977).
  \item \textsuperscript{196} 68 Or. App. at 583, 684 P.2d at 588.
  \item \textsuperscript{197} Prosser, \textit{Privacy}, 48 CALIF. L. REV. 383, 398 (1960). \textit{See also} Note, \textit{supra} note 10, at 1439.
  \item \textsuperscript{198} Prosser, \textit{supra} note 197, at 398.
  \item \textsuperscript{199} Id.
\end{itemize}
distressing even though the disclosures could not be highly offensive to a reasonable man. Even the release of harmless confidences could destroy the expectation of secrecy since the confider could reasonably suspect that if one statement was released others would be also.

All other branches of the invasion of privacy require publication.²⁰¹ No cause of action exists unless the information has been given out to the public at large.²⁰² Therefore, cases involving disclosures to a small number of people could result in a great injury which would fail under the unwanted publicity branch of invasion of privacy.²⁰³ Since the privacy tort is a right against the public at large, the conduct which violates it is narrowly limited so as not to chill First Amendment freedoms.²⁰⁴ In contrast, the breach of confidence tort is a right against a single individual based upon a relationship which has notice of the expectation of confidentiality. As a result, the breach of confidence tort provides a broader remedy for wrongful disclosures of confidential information than the privacy tort.²⁰⁵

Another theory listed by the North Carolina court as a cause of action for wrongful disclosures was the breach of implied contract.²⁰⁶ This theory has been used by a number of courts as a basis for recovery since confidences are often disclosed in contractual relationships.²⁰⁷ The implied contract cause of action is founded on the contract principle that promises are inferred from the conduct of the parties, common usages, practices and understandings at the time of contracting.²⁰⁸ Courts have looked to licensing statutes, the

²⁰¹. Other cases involving disclosures have based their decisions on another aspect of the tort of invasion of privacy. This aspect protects against unwanted publicity and is described by the Restatement as follows:

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

(a) would be highly offensive to a reasonable person, and
(b) is not of legitimate concern to the public.

Restatement (Second) of Torts § 652D (1977).

²⁰². See generally Prosser, supra note 197.

²⁰³. See, e.g., MacDonald, 84 A.D.2d 482, 446 N.Y.S.2d 801.


²⁰⁵. See generally, Note, supra note 10.

²⁰⁶. Watts, 75 N.C. App. at 9, 330 S.E.2d at 248.

²⁰⁷. See supra note 12.

Hippocratic oath, and public policy as sources of justification in which to find an implied promise not to disclose confidential information.209 However, the implied contract action is also inadequate since it protects interests different from those protected by the breach of confidence tort.210

A comparison of the basic principles of law behind contract and tort shows the stark differences between these theories. Contract law is based on the consent of the parties211 while tort law does not depend on consent.212 The assurance of secrecy is not a bargained-for exchange in a confidential relationship as an individual would bargain for additional service.213 Additionally, the principles underlying the awarding of damages in these two areas of the law are also different. Contract law enforces the expectation interests of the parties214 while tort law compensates for injuries suffered at the hands of another215 and deters negligent conduct of the defendant. A number of courts have noted that the expectation interest is inadequate in redressing wrongful disclosures.216 The expectation interest objective is to provide for benefits reasonably anticipated at the time of contracting.217 This award is limited to damages in contemplation of the parties at the time of contracting.218 Since most parties do not anticipate disclosures of confidential information at the beginning of the relationship, contract damages do not provide a remedy for wrongful disclosures. As noted by the New York court in MacDonald v. Clinger:

If plaintiff's recovery were limited to an action for breach of contract, . . . he would generally be limited to economic loss flowing directly from the breach and would thus be precluded from recovery for mental distress, loss of his employment and deterioration of his marriage.219

Another fatal flaw in applying a contract remedy to recover for

209. See, e.g., Doe, 93 Misc. 2d 201, 400 N.Y.S.2d 668.
210. See, e.g., MacDonald, 84 A.D.2d 482, 446 N.Y.S.2d 801.
211. See supra note 131.
212. See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 102-08 (4th ed. 1971)
213. Note, supra note 10, at 1445.
214. See generally FARNSWORTH supra note 208, at 839 (1982).
215. W. PROSSER, supra note 212, at 613.
216. See, e.g., MacDonald, 84 A.D. 482, 446 N.Y.S.2d 801.
217. FARNSWORTH, supra note 208, at 839.
219. 84 A.D. at 486, 446 N.Y.S.2d at 804.
wrongful disclosures is that punitive damages are not readily available under contract law.\textsuperscript{220} Punitive damages are rarely given as a contract remedy except when the breach of contract occurs in conjunction with a tort for which punitives are allowed.\textsuperscript{221} The pain and suffering caused by breach of confidence which could be deterred by punitives would remain unaddressed by the compensatory damages of contract law. Therefore, the compensatory damages usually provided by contract law are wholly inadequate for wrongful disclosures.

The establishment of a breach of confidence tort is necessary to adequately protect against extrajudicial disclosures. Neither medical malpractice, invasion of privacy, nor implied term of contract fully protect the interests involved in confidential relationships. The establishment of a breach of confidence tort, which directly addresses this problem, is needed.

**CONCLUSION**

In *Watts*, the North Carolina Court of Appeals sought to remedy a wrongful disclosure by characterizing it as medical malpractice. However, as a number of other jurisdictions have recognized, the wrongful disclosure of confidential information is inadequately remedied by medical malpractice statutes or by the other traditional remedies of breach of contract and invasion of privacy. Rather, a new cause of action should be recognized which directly proscribes disclosures of confidential information in any non-personal relationship customarily understood to carry an obligation of confidence. Without such a cause of action, the court will be required to continue to indulge in the fiction apparent in *Watts* in order to protect the interests of those who suffer from the indiscretion of others.

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\textsuperscript{221} FARNSWORTH, supra note 208, at 842-43.