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PHYSICIANS' LIABILITY FOR BREACH OF CONFIDENTIALITY: BEYOND THE LIMITATIONS OF THE PRIVACY TORT

I. INTRODUCTION

In two recent cases, South Carolina courts recognized the value of confidentiality in doctor-patient communications. In *South Carolina State Board of Medical Examiners v. Hedgepath*[1] the South Carolina Supreme Court ruled that physicians in South Carolina have a duty to maintain the confidentiality of doctor-patient communications.[2] Then in *McCormick v. England*[3] the South Carolina Court of Appeals took the next step and recognized a cause of action in tort for breach of this duty of confidentiality.[4] The unique nature of the doctor-patient relationship is central to both of these decisions.

An excerpt from *Hammonds v. Aetna Casualty & Surety Co.*[5] perhaps best sets out the defining characteristics of the doctor-patient relationship. The *Hammonds* court explained that "[w]hen a patient seeks out a doctor . . . , he must admit him to the most private part of the material domain of man. Nothing material is more important or more intimate to man than the health of his mind and body."[6] The court warned that complete candor is absolutely necessary to recovery, reasoning that because "the layman is unfamiliar with the road to recovery" and cannot discern medically relevant information from the irrelevant, the layman "must disclose all information in his consultations with his doctor—even that which is embarrassing, disgraceful or incriminating."[7] In exchange for this complete disclosure, "the medical profession extends the promise of secrecy."[8] Protecting the confidentiality

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1. 325 S.C. 166, 480 S.E.2d 724 (1997).
2. *Id.* at 169, 480 S.E.2d at 726.
3. 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997).
4. *Id.* at 643, 494 S.E.2d at 439.
5. 243 F. Supp. 793 (N.D. Ohio 1965). Courts often quote *Hammonds* for its description of the particular nature and significance of the doctor-patient relationship. *See, e.g.*, Horne v. Patton, 287 So. 2d 824, 830 (Ala. 1973) (quoting language from *Hammonds* describing the doctor-patient relationship).
6. *Hammonds*, 243 F. Supp. at 801.
7. *Id.*
8. *Id.* The promise of secrecy is embodied in the following passage from the Hippocratic Oath, taken by all physicians upon entering practice: "Whatever, in connection with my professional practice, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret." AM. JUR. 3D PROOF OF FACTS *Taber's Cyclopedic Medical Dictionary* 769 (15th ed. 1988).

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of doctor-patient communications may result in societal health benefits such as accurate diagnosis and treatment. Moreover, "it is impossible to conceive of countervailing benefits which would arise by according a physician the right to gossip about a patient's health."[9] The burden and challenge of protecting this confidentiality falls upon "men of law" who must strive to establish the most effective means for encouraging the complete candor that "men of medicine" recognize as crucial to health and recovery.[10] South Carolina courts have risen to this challenge by establishing a more effective theory for the enforcement and promotion of doctor-patient confidentiality.[11] In so doing, these South Carolina men and women of law recognized a cause of action that makes it easier[12] for patients to recover for a physician's breach of confidence and is well-suited ideologically to address and deter this particular wrong.

Part II of this Note discusses South Carolina legal developments in this area and the significance of the *Hedgepath* and *McCormick* decisions. Part III describes the nature and importance of the newly recognized cause of action. Finally, this Note compares the doctor-patient breach of confidentiality tort with the "invasion of privacy" tort, which has traditionally been used to address this particular wrong,[13] and explains why the confidentiality tort is better suited, both practically and ideologically, for recovery from physicians that disclose confidential doctor-patient communications.

II. BACKGROUND

A. Development of Physician-Patient Relationship Under South Carolina Law

In 1997 South Carolina courts squarely faced the issues of whether physicians owe a duty of confidentiality to their patients and whether patients may recover in tort for violations of this duty. Although the South Carolina Supreme Court has recognized the confidential nature of the physician-patient relationship,[14] courts of this state have consistently held that no statutory doctor-patient evidentiary privilege exists in South Carolina.[15] However, while some jurisdictions have looked to

9. *Horne*, 287 So. 2d at 827.

10. *Hammonds*, 243 F. Supp. at 797.

11. *See supra* notes 1-4 and accompanying text.

12. Under the tort of breach of confidentiality, the patient need only show that (1) the doctor-patient relationship existed, and (2) the doctor divulged information gained from the patient in the course of this relationship to a third party. Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426, 1442, 1455 (1982).

13. *Id.* at 1426.

14. Hodge v. Shea, 252 S.C. 601, 608, 168 S.E.2d 82, 85 (1969).

15. *See, e.g.*, Peagler v. Atlantic Coast Line R.R., 232 S.C. 274, 283, 101 S.E.2d 821, 825 (1958) (stating that while most states have enacted statutes establishing a physician-patient privilege, South Carolina has not); Aakjer v. Spagnoli, 291 S.C. 165, 173, 352 S.E.2d 503, 508 (Ct. App. 1987) ("There is no physician-patient privilege in South Carolina."). However, South Carolina does recognize, among

doctor-patient evidentiary statutes as indications of the underlying public policy justifying adoption of this tort,[16] South Carolina's lack of such an evidentiary privilege did not prevent its recognition of the tort of breach of doctor-patient confidence. Indeed, other jurisdictions with no doctor-patient evidentiary privilege have recognized the tort.[17]

B. Recognizing the Physician's Duty of Confidentiality

In *Hedgepath*, a medical disciplinary case, the South Carolina Supreme Court faced the question of whether physicians in South Carolina have an "ethical duty to maintain . . . patients' confidences."[18] The controversy arose in the context of a doctor-patient relationship between Dr. Larry L. Hedgepath and a married couple, Mr. and Mrs. C.[19] Doctor Hedgepath initially acted as a family therapist for the couple and then later as the wife's individual therapist.[20] During the couple's subsequent divorce proceedings, and at the request of Mr. C's counsel, Dr. Hedgepath voluntarily provided an affidavit[21] without the consent of Mrs. C.[22] The affidavit's contents were "not flattering" to Mrs. C and "revealed confidences entrusted to him by Mrs. C. during their doctor-patient relationship."[23] Doctor Hedgepath's disclosure was the subject of a disciplinary action brought before the South Carolina Board of Medical Examiners.[24] Finding that Dr. Hedgepath had breached his ethical duty, the Board "imposed a public reprimand upon him."[25] On appeal, the circuit court reversed the Board's decision,[26] reasoning that Dr.

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others, a spousal privilege, an attorney-client privilege, a priest-penitent privilege, a probation agent privilege, and a professional health care provider privilege. *See* S.C. CODE ANN. § 19-11-30 (Law. Co-op. Supp. 1997) (spousal privilege); S.C. CODE ANN. § 19-11-90 (Law. Co-op. 1976) (priest-penitent privilege); S.C. CODE ANN. § 24-21-290 (Law. Co-op. Supp. 1997) (probation agent privilege); S.C. CODE ANN. §§ 40-71-10 to -20 (Law. Co-op. 1986) (professional health care provider privilege); Drayton v. Industrial Life & Health Ins. Co., 205 S.C. 98, 31 S.E.2d 148 (1944) (attorney-client privilege).

16. *See, e.g.*, Schaffer v. Spicer, 215 N.W.2d 134, 138 (S.D. 1974) ("The physician-patient privilege expresses a long-standing policy to encourage uninhibited communication between a physician and his patient.").

17. *See* Horne v. Patton, 287 So. 2d 824, 827 (Ala. 1973); Hague v. Williams, 181 A.2d 345, 348-49 (N.J. 1962).

18. South Carolina State Bd. of Med. Exam'rs v. Hedgepath, 325 S.C. 166, 167, 480 S.E.2d 724, 725 (1997).

19. *Id.* at 168, 480 S.E.2d at 725.

20. *Id.*

21. The affidavit was "not compelled by subpoena or other legal process." *Id.*

22. *Id.*

23. *Id.*

24. *Hedgepath*, 325 S.C. at 167-68; 480 S.E.2d at 725.

25. *Id.* at 167, 480 S.E.2d at 725. At the time Dr. Hedgepath provided the affidavit, physicians had an ethical duty to "respect the rights of patients, of colleagues, and of other health professionals, and [to] safeguard patient confidences within the constraints of the law." *Id.* at 168, 480 S.E.2d at 725 (quoting 26 S.C. CODE ANN. REGS. 81-60(D) (Supp. 1995)).

26. *Id.* at 168-69, 480 S.E.2d at 725-26.

Hedgepath had no duty to refrain from disclosing information gained in his professional capacity because "South Carolina does not recognize an evidentiary doctor-patient privilege."[27] The South Carolina Supreme Court reversed the circuit court's ruling,[28] agreeing with the Board's finding that "[a] physician acts ethically when she maintains patient confidences, and when she provides confidential information to others as required by law or as authorized by the patient."[29] As a result, the court in *Hedgepath* imposed a duty of confidentiality on physicians with regard to voluntarily disclosing their doctor-patient communications.

C. *Recognizing a Cause of Action for the Breach of this Duty*

In *McCormick v. England*[30] the South Carolina Court of Appeals, recognizing the physician's duty of confidentiality established in *Hedgepath*, held that "South Carolina shall recognize a cause of action for a physician's breach of a duty of confidentiality."[31] The holding in *McCormick* is essential if the supreme court's decision in *Hedgepath* is to have any meaning. In contrast to redress through the regulatory system, a tort cause of action more effectively deters a physician's wrongful disclosure and thus encourages candor in doctor-patient relationships. Both the physician's duty of confidentiality and the cause of action for its breach could have been established in one decision.[32] However, because *Hedgepath* was a disciplinary action by a medical review board,[33] thus not a private suit, the case was ill-suited as a vehicle for the creation of a private cause of action.

The facts of *McCormick* are remarkably similar to those of *Hedgepath*. As a family physician, Dr. England treated Mrs. McCormick, her former husband, and the couple's children.[34] In a contentious divorce action, Mrs. McCormick's husband submitted a letter to the family court written by Dr. England and addressed "To Whom It May Concern."[35] In his letter, Dr. England disclosed information gained through his doctor-patient relationship with Mrs. McCormick, including that she suffered from "major depression" and "acute and chronic alcoholism with binge drinking episodes," with related "marital and family discord . . . with both physical

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27. *Id.* at 169, 480 S.E.2d at 726.

28. *Id.* (distinguishing "confidences" from "privileges" and noting that a physician's "duty to maintain his client's confidences is independent of the issue [of] . . . whether those communications are privileged").

29. *Id.*

30. 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997).

31. *Id.* at 630, 494 S.E.2d at 432.

32. Some other jurisdictions have adopted both the physician's duty of confidentiality and the cause of action for its breach in one case. *See, e.g.*, Brandt v. Medical Defense Assocs., 856 S.W.2d 667, 674 (Mo. 1993) (recognizing simultaneously both a duty of confidentiality and a cause of action for its breach).

33. *Hedgepath*, 325 S.C. at 167, 480 S.E.2d at 725.

34. *McCormick*, 328 S.C. at 630, 494 S.E.2d at 432.

35. *Id.*

and emotional rage episodes."[36] Doctor England further opined that Mrs. McCormick was "a danger to herself and to her family" and "strongly recommend[ed] that she be kept from the family and hospitalized against her wishes."[37]

Mrs. McCormick sued Dr. England on several causes of action, including breach of confidence.[38] The trial court judge granted Dr. England's motion to strike the breach of confidence cause of action because no alleged "statutory duty of confidentiality" applied.[39] The judge noted that "'South Carolina does not recognize the physician-patient privilege at common law.'"[40] However, the court of appeals reversed, reasoning that the lack of a physician-patient privilege in South Carolina was not dispositive of the issue because an "evidentiary privilege" and the "duty of confidentiality" are distinguishable, independent legal concepts.[41]

III. ANALYSIS

A. The Importance of the New Cause of Action

The decisions in *Hedgepath* and *McCormick* are not unique or radical. Rather, they follow the modern trend explicitly recognized by the South Carolina Court of Appeals in *McCormick*.[42] The tort of a physician's breach of confidentiality has been "defined in general terms as the unconsented, unprivileged disclosure to a third party of nonpublic information that the defendant has learned within a confidential relationship."[43] Clearly, this tort emphasizes the sanctity of the physician's duty of confidentiality—a duty that arises from the fiduciary nature of the doctor-patient relationship[44] and "out of broadly applicable societal norms and public policy concerning the kind of relationship at issue."[45] From a practical standpoint, the

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36. Final Brief of Appellant at 2.

37. *Id.*

38. *McCormick*, 328 S.C. at 631, 494 S.E.2d at 433. The other causes of action included negligence, libel, invasion of privacy, outrage, and civil conspiracy. *Id.*

39. *Id.*

40. *Id.* (quoting the trial judge).

41. *Id.* at 634, 494 S.E.2d at 434.

42. *Id.* at 636, 494 S.E.2d at 435 (citing numerous jurisdictions that recognize "a cause of action against a physician for the unauthorized disclosure of confidential information"). *See generally* Judy E. Zelin, Annotation, *Physician's Tort Liability for Unauthorized Disclosure of Confidential Information About Patient*, 48 A.L.R.4th 668, 693-94 (1986) (explaining that many jurisdictions have a cause of action for a physician's breach of confidentiality).

43. Vickery, *supra* note 12, at 1455.

44. The doctor-patient relationship is one of inherent trust and has long been recognized as such by the South Carolina Supreme Court. *See* Hodge v. Shea, 252 S.C. 601, 608, 168 S.E.2d 82, 85 (1969).

45. Vickery, *supra* note 12, at 1451. Several courts, including the South Carolina Court of Appeals in *McCormick*, have relied in part on the Hippocratic Oath's promise of secrecy to justify their recognition of the cause of action. *See McCormick*, 328 S.C. at 635, 494 S.E.2d at 435; *see also* Horne v. Patton, 287 So. 2d 824, 829 (Ala. 1973) (quoting the Hippocratic oath); Brandt v. Medical Defense

simplicity of the elements required to establish a prima facie case[46] should make it easier for a plaintiff to recover from a physician who has disclosed confidential information.

The breach of confidence cause of action focuses on the patient's rights, which a physician violates by disclosing confidential information. First, the patient has a right to avoid any injury resulting from the disclosure.[47] Possible injuries include reputational damage as well as more tangible harm.[48] Second, the plaintiff has a right to be secure in the confidential relationship and to rely on the "corresponding expectation of secrecy"[49]—the expectation that ultimately prompted the communication of confidential information in the first place.[50] Moreover, society has an interest in the promotion of "full disclosure necessary to effective medical treatment" that is also violated by a physician's disclosure of confidential information.[51] When patients fear being candid with their doctors, the public health could be adversely affected. These rights and interests are better protected under the new breach of confidentiality tort than under the common alternative remedy, the tort of invasion of privacy.

B. Invasion of Privacy and the Public Disclosure of Private Facts Tort

1. Defining the Privacy Tort

South Carolina recognizes the invasion of the right to privacy tort. In *Meetze v. Associated Press*[52] the South Carolina Supreme Court defined the tort as an "'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 private activities, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities.'"[53] The second branch, more commonly referred to as the public

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Assocs., 856 S.W.2d 667, 671 n.1 (Mo. 1993) (same); Vassiliades v. Garfinckel's, 492 A.2d 580, 590-91 n.5 (D.C. 1985) (same).

46. *See supra* note 12.

47. Vickery, *supra* note 12, at 1434.

48. *Id.* at 1435. Reputational injury can be actionable even if disclosure is made to a single person or a small group of people. *Id.* The tangible effects can be varied and severe. *See, e.g.*, Leger v. Spurlock, 589 So. 2d 40, 41 (La. Ct. App. 1991) (stating that as a result of a doctor's breach of confidentiality, the plaintiff's reputation and marriage suffered, criminal charges were brought against him, and he was fired from his job); MacDonald v. Clinger, 446 N.Y.S.2d 801, 802 (App. Div. 1982) (repeating plaintiff's allegation that, because of his doctor's disclosure of confidential information, his marriage deteriorated, he was fired, he experienced financial troubles, and he sought psychiatric treatment for emotional distress).

49. Vickery, *supra* note 12, at 1434.

50. *Id.*

51. *Id.* at 1435.

52. 230 S.C. 330, 95 S.E.2d 606 (1956).

53. *Id.* at 335, 95 S.E.2d at 608 (quoting 41 AM. JUR. *Privacy* § 2 (1942)). The *American*

disclosure of private facts tort, most closely parallels the breach of confidentiality tort. Therefore, comparing these two torts may illuminate the inherent limitations of the public disclosure of private facts tort in providing plaintiffs redress against physicians that disclose confidential information.

2. *Limitations of the Public Disclosure of Private Facts Tort*

The public disclosure of private facts tort inadequately redresses a doctor's breach of confidentiality because it does not "adequately recognize the distinct interests present in a confidential relationship."[54] At least one scholar has commented that even "[a]fter ninety years of evolution, the common law private-facts tort has failed to become a usable and effective means of redress for plaintiffs" and may even "have obscured analysis and impeded efforts to develop a more effective and carefully tailored body of privacy-protecting laws."[55]

The rights protected by the public disclosure of private facts tort[56] are not as broad as the rights protected by the breach of confidentiality tort.[57] The breach of confidentiality tort focuses entirely on the confidential relationship between the patient and the doctor, affording the patient recovery if the doctor acts inconsistently with this relationship by disclosing confidential information in any manner to anyone—even to a single person.[58] In contrast, the public disclosure of private facts tort ignores the individual's interest in the confidential relationship itself.[59] While the aim of the public disclosure of private facts tort may be to protect "the individual's fundamental human dignity,"[60] the tort does so only to the extent that its requirements regarding the type of information and the manner of communication are satisfied. Thus, the nature of the public disclosure of private facts tort is distinct from the breach of confidentiality tort.[61] The various

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Jurisprudence definition has only three branches of privacy; in contrast, the more common definition has four separate branches: (1) appropriation; (2) unreasonable intrusion; (3) public disclosure of private facts; and (4) false light in the public eye. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 851-63 (5th ed. 1984).

54. Vickery, *supra* note 12, at 1426 (The tort's "doctrinal principles and limitations make [it] ill-suited to enforcement of confidences").

55. Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 362 (1983).

56. Vickery, *supra* note 12, at 1434.

57. *Id.* at 1439.

58. *Id.* at 1442.

59. *Id.* at 1426.

60. Zimmerman, *supra* note 55, at 338.

61. The distinction has been aptly characterized as follows:

> Privacy is a right against the public at large. Its doctrinal limits narrowly circumscribe the zone of proscribed conduct in order to prevent hindrance of public expression. In contrast, a right to confidentiality exists against a specific person, who, by virtue of his relationship to the confider, has notice of the duty to preserve the secrecy of clearly identifiable information. Privacy's doctrinal limits are thus unnecessary in breach-of-confidence situations, and should not bar

requirements of the public disclosure of private facts tort, which limit its effectiveness in enforcing and promoting the confidentiality of doctor-patient communications, are discussed below.

a. The Publicity Requirement

In *McCormick* the South Carolina Court of Appeals explained that "the gravamen of the tort [of public disclosure of private facts] is publicity as opposed to mere publication."[62] This publicity requirement demands that "[t]he disclosure of private facts must be a public disclosure, and not a private one . . . [; therefore, c]ommunication to a single individual or to a small group of people . . . will not give rise to liability."[63] Consider a situation in which a physician discloses confidential information to an individual and then that individual publicizes the information. Under the public disclosure of private facts tort, the physician may escape liability even though the doctor-patient confidence was breached. However, the individual may be held liable even if that individual owed no fiduciary duty to the patient. Because the doctor is not deterred from making similar disclosures in the future, the public disclosure of private facts tort is ill-suited to properly enforce and promote confidential doctor-patient communications. In contrast, the breach of confidentiality tort serves the desired deterrent function because it allows recovery from a physician "if unauthorized disclosure is made to only one person not a party to the confidence."[64]

In *Swinton Creek Nursery v. Edisto Farm Credit*[65] the plaintiff sought damages for invasion of privacy by alleging that a lender disclosed confidential financial information to a third party.[66] The South Carolina Court of Appeals ruled that no evidence existed that the lender *publicly* disclosed the information and so the plaintiff failed to meet the publicity requirement of the public disclosure of private facts tort.[67] As a result, the trial court should not have allowed the invasion of privacy issue to go to the jury.[68]

Courts have traditionally justified the requirement of "mass or widespread

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recovery to plaintiffs deserving of a remedy.

Vickery, *supra* note 12, at 1440.

62. McCormick v. England, 328 S.C. 627, 640, 494 S.E.2d 431, 437-38 (Ct. App. 1997).

63. Rycroft v. Gaddy, 281 S.C. 119, 124, 314 S.E.2d 39, 43 (Ct. App. 1984); *see also* KEETON ET AL., *supra* note 53, at 856 (stating a common-law requirement of public disclosure). *But see id.* at 857-58 (indicating that doubt exists as to whether public disclosure is required).

64. Vickery, *supra* note 12, at 1442.

65. 326 S.C. 426, 483 S.E.2d 789 (Ct. App. 1997).

66. *Id.* at 432, 483 S.E.2d at 792.

67. *Id.* at 436-37, 483 S.E.2d at 794; *see also* Hobbs v. Lopez, 645 N.E.2d 1261, 1263 (Ohio Ct. App. 1994) (holding that a plaintiff did not meet the publicity requirement of the public disclosure of private facts tort when the information concerning her pregnancy and possible abortion was communicated only to her mother). Had the physician's breach of confidentiality tort been available in *Hobbs*, the plaintiff may have prevailed.

68. *Swinton Creek Nursery*, 326 S.C. at 436-37, 483 S.E.2d at 794.

communication as an element" of the public disclosure of private facts tort because it avoids the "impossible legal tangle [that would result] if [courts] subjected back-fence and front-parlor gossip to liability."[69] Because the confidentiality tort is based on the existence of an easily ascertainable doctor-patient relationship, it avoids opening these floodgates by limiting actionable communications to those involving the duty of confidentiality owed by a physician to a patient.

b. The Nature of Harm Requirement

As the South Carolina Court of Appeals explained in *McCormick*, a communication actionable under the public disclosure of private facts tort must "be highly offensive and likely to cause serious mental injury to a person of ordinary sensibilities."[70] By focusing on the content of the information rather than its source, this requirement is inconsistent "with the duty attaching to a confidential relationship."[71] Because the doctor's confidential relationship with the patient encourages the patient's candor, any communication should be protected regardless of its offensiveness.[72] Moreover, as a practical matter, the offensiveness requirement burdens recovery because the offensiveness of a given disclosure is subject to debate.[73] Finally, the "highly offensive to a reasonable person" standard applied in the public disclosure of private facts tort[74] is inappropriate in a breach of confidentiality tort because "even hypersensitive people should have a right to be secure in their confidential relationships."[75]

c. The "No Legitimate Public Interest" Requirement

For a communication to be actionable, the public disclosure of private facts tort also requires that the matter is not subject to legitimate public interest.[76] This limitation is grounded in the "countervailing interest of the public right to know"[77] and arises in the context of public figures and, in exceptional circumstances, private

69. Zimmerman, *supra* note 55, at 337.
70. McCormick v. England, 328 S.C. 627, 640, 494 S.E.2d 431, 438 (Ct. App. 1997).
71. Vickery, *supra* note 12, at 1441.
72. *Id.*
73. *See, e.g.*, Y.G. v. Jewish Hosp., 795 S.W.2d 488, 504 (Mo. Ct. App. 1990) (Gaertner, J., dissenting) (illustrating that a reasonable couple might not find it offensive to have their participation in an *in vitro* fertilization program made public); Doe v. Group Health Coop., 932 P.2d 178, 180, 182 (Wash. Ct. App. 1997) (illustrating, by reference to the lower court's ruling, that disclosure of a plaintiff's "name and consumer number" may not be considered "highly offensive to a reasonable person" even though "a reasonable person could infer from the context of the disclosure that [the plaintiff] was a recipient of mental health treatment").
74. Vickery, *supra* note 12, at 1441.
75. *Id.*
76. McCormick v. England, 328 S.C. 627, 640, 494 S.E.2d 431, 438 (Ct. App. 1997).
77. Vickery, *supra* note 12, at 1442.

figures.[78] Both public and private figures, however, have the same interests in maintaining the confidentiality of doctor-patient communications. The confidential nature of one's relationship with a physician is constant and does not change even if the public becomes interested in the communication. No one should be without a remedy if a physician voluntarily discloses confidential information in violation of the rule in *Hedgepath*. "Subject to limited exceptions, private figures should not lose their right of secrecy when the content of their confidential revelations is also of legitimate public interest."[79] Additionally, "[p]ublic figures, because of their relative lack of privacy, have at least as great, if not greater, need to be secure in their confidential relationships as private individuals."[80] Even under the theory that public figures have waived their right to privacy, they should not be held to have waived their right to confidential relationships.

IV. CONCLUSION

In *Hedgepath* and *McCormick*, South Carolina seized the opportunity to preserve the sanctity of doctor-patient communications. The newly adopted tort of breach of a physician's duty of confidentiality allows patients to recover from doctors that have breached this duty. Although the right to privacy sometimes allows patients to recover, it "is a right against the public at large."[81] In contrast, the right to confidentiality is a more personal right—one specific to the confidential relationship. As a result, the breach of confidence tort is better suited to protect the rights of patients and further society's goals than is the alternative public disclosure of private facts tort.

Joseph Glenn White

78. *See* Snakenburg v. Hartford Cas. Ins. Co., 299 S.C. 164, 171, 383 S.E.2d 2, 6 (Ct. App. 1989) (articulating that under South Carolina law, "where the plaintiff [in a public disclosure of private facts tort case] is a public figure, other considerations, including whether the defendant acted with malice, may be relevant to establishing a cause of action").

79. Vickery, *supra* note 12, at 1443.

80. *Id.* at 1443-44.

81. *Id.* at 1440.