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Billings v. Atkinson: Texas Recognizes Invasion of the Right of Privacy as An Actionable Tort

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NOTES

Billings v. Atkinson: Texas Recognizes Invasion of the Right of Privacy as an Actionable Tort

Defendant, an employee of the telephone company, placed a wiretap device in the terminal box of the plaintiff's telephone. Plaintiff sued the defendant and the telephone company for invasion of privacy. The district court directed a verdict for the telephone company since the defendant was acting outside the scope of his orders when he installed the device and since the telephone company had fired the defendant as soon as it identified him. The court submitted the case on special issues for invasion of the plaintiff's right of privacy. The jury found for the plaintiff and awarded compensatory and punitive damages. The judge granted the defendant's motion for judgment notwithstanding the verdict on the grounds that Texas did not recognize invasion of privacy as an actionable tort. The court of civil appeals affirmed.¹ *Held, reversed*: Texas now recognizes the right of privacy; invasion of the right of privacy is a legal wrong for which Texas courts will grant a remedy. *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973).

I. THE RIGHT TO PRIVACY

Warren and Brandeis. Samuel D. Warren and Louis Brandeis formally proposed legal recognition of the right to privacy in a law review article in 1890.² The right to privacy was an interest which the individual had in his personal life,³ but which was partially, though inadequately, protected in the common law by such actions as defamation, libel, and slander. Warren and Brandeis made broad suggestions about the nature of their new tort, but did not define it with great precision. Essentially, they argued that the individual had a right to be left alone if he chose to lead an anonymous life. The remedies for invasion of the right would be damages and injunctive relief. Since the gravamen of the tort was invasion of a legal right, the two lawyers did not believe that special damages were necessary to maintain the action or to recover general damages. The law would infer damages from violation of a legal right.⁴

Nature of the Tort. Since the appearance of their article, Warren and

¹ *Billings v. Atkinson*, 471 S.W.2d 908 (Tex. Civ. App.—Houston [1st Dist.] 1971).

² Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). *But see* Hadley, *The Right to Privacy*, 3 NW. U.L. REV. 1 (1894).

³ The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

Warren & Brandeis, *supra* note 2, at 196.

⁴ *Id.* at 214-19.

Brandeis have influenced courts which have had occasion to consider the right to privacy. Their proposals were broad and were made primarily in response to the unwanted publicity generated by contemporary mass-circulation newspapers. Probably as a result of the initial absence of precision in their proposals, no one type of tort action for the invasion of the right of privacy has been formulated over the years.⁵ The result has been judicial recognition of four distinct and perhaps unrelated actions by the defendant which constitute invasion of the right of privacy. Prosser has categorized these invasions as: 1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs. 2. Public disclosure of embarrassing private facts about the plaintiff. 3. Publicity placing the plaintiff in a false light in the public eye. 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.⁶ The essential element of each classification is invasion; the defendant is liable when he has violated the plaintiff's legal right to be left alone. The plaintiff need allege nothing else. Thus, by the law of most jurisdictions which recognize the tort, publication is not necessary when the defendant intrudes into the plaintiff's solitude.⁷ Physical injury⁸ and special damages⁹ need not be proven for recovery of

⁵ It is important to note that the tort remedy for invasion of the legal right of privacy differs from the right of privacy guaranteed by the United States Constitution. Justices of the Supreme Court have found the right of privacy in various parts of the Constitution: the 1st, 4th, 5th, 9th, and 14th amendments, as well as in the penumbra of the Bill of Rights. *Doe v. Bolton*, 410 U.S. 179 (1973) (9th and 14th amendments); *Roe v. Wade*, 410 U.S. 113 (1973) (9th and 14th amendments); *Stanley v. Georgia*, 394 U.S. 557 (1969) (1st and 14th amendments); *Terry v. Ohio*, 392 U.S. 1 (1968) (4th and 5th amendments); *Katz v. United States*, 389 U.S. 347 (1967) (4th and 5th amendments); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (penumbra); *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (14th amendment). See also *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 57, 75-85 (1973).

Justice Hugo Black vigorously and consistently dissented, basing his arguments on the absence of any mention of privacy in the Constitution. "[T]his Court, which I did not understand to have the power to sit as a court of common law, now appears to be exalting a phrase which Warren and Brandeis used in discussing grounds for tort relief, to the level of a constitutional rule which prevents the legislatures from passing any law deemed by this Court to interfere with 'privacy.'" *Griswold v. Connecticut*, 481 U.S. 479, 510 n.1 (1965) (Black, J., dissenting); *accord*, *Berger v. New York*, 388 U.S. 41, 70 (1967) (Black, J., dissenting).

The Court has yet to define the constitutional right of privacy with much more specificity than a "zone of privacy" which the individual has and into which the government cannot intrude. Konvitz, *Privacy and the Law: A Philosophical Prelude*, 31 LAW & CONTEMP. PROBLEMS 272, 276 (1966). Presently, the constitutional right to privacy protects at least some areas of human conduct such as abortion, search and seizure, and marriage. *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Katz v. United States*, 389 U.S. 347 (1967) (search and seizure); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (marriage). There is perhaps an overlapping with the intrusion aspect of the tort remedy, but the tort of invasion of privacy is not of federal constitutional dimensions. Some states find the tort right of privacy guaranteed by the state constitution or bill of rights. *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91, 93 (1931) (unauthorized use of plaintiff's life history in movie); *Pavesich v. New England Mut. Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68, 71 (1905) (photograph in advertising); *Munden v. Harris*, 153 Mo. App. 652, 134 S.W. 1076, 1078-79 (1911) (photograph in advertising); *Annot.*, 138 A.L.R. 22, 30 (1922).

⁶ See W. PROSSER, LAW OF TORTS 804-15 (4th ed. 1971). See also Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389, 392 (1960).

⁷ *LaCrone v. Ohio Bell Tel.*, 114 Ohio App. 299, 182 N.E.2d 15 (1961) (wiretap).

⁸ *McDaniel v. Atlanta Coca-Cola Bottling Co.*, 60 Ga. App. 92, 2 S.E.2d 810 (1939) (eavesdropping with mechanical devices).

⁹ *Rhodes v. Graham*, 238 Ky. 225, 37 S.W.2d 46 (Ct. App. 1931) (wiretap).

damages. Truth is no defense to publication of private facts.¹⁰ The action is a personal one which does not survive the plaintiff's death and which must be sued upon by the person injured.¹¹ Invasion of the right of privacy is a dignitary tort for which courts will infer damages once the plaintiff has proved the requisite invasion.¹² It is important to note that the tort is not the invasion of the plaintiff's privacy, but rather the invasion of the plaintiff's legal *right* to privacy.

Judicial Recognition. In 1905 the Supreme Court of Georgia was the first court to accept the right of privacy.¹³ The courts in most states now recognize the tort,¹⁴ or have indicated that they will recognize the right to privacy when the issue of recognition is squarely presented.¹⁵ The courts in several of the states, including Texas, have candidly admitted that the trend of the law favored recognition.¹⁶ The legislatures of four states have protected by statute the right of privacy which the plaintiff has in his own likeness or name, and have provided civil remedies for wrongful appropriation of name or likeness.¹⁷ Since the *Billings* decision, there remain but three states which flatly reject the right of privacy,¹⁸ and there is indication of judicial dissatisfaction with present law in at least one of those states.¹⁹

Rejection by Texas Courts. Prior to *Billings*, Texas courts consistently refused to consider the tort. Few plaintiffs have, therefore, attempted to

¹⁰ *Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243 (1944) (publication of book including discussion of plaintiff).

¹¹ *Young v. That Was The Week That Was*, 312 F. Supp. 1337 (N.D. Ohio 1969) (use of dead woman's name on national television).

¹² D. DOBBS, REMEDIES 530-31 (1973).

¹³ *Pavesich v. New England Mut. Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905) (unauthorized use of photograph in advertising). The *Restatement of Torts* preceded many states in recognizing the right of privacy. Entitled "Interference with Privacy," § 867 provides: "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other." RESTATEMENT OF TORTS § 867 (1939). The comments to this section reflect that "[t]his interest appears only in a comparatively highly developed state of society. It has not been recognized until recently." *Id.* comment *b* at 399.

¹⁴ For lists of cases, see D. PEMBER, *PRIVACY AND THE PRESS* 264-66 (1972); W. PROSSER, *supra* note 6, at 802-18; Prosser, *supra* note 6, at 384-89; Annot., 14 A.L.R.2d 750, 753-54 (1950). Note that not all states have ruled on the tort of invasion of privacy.

¹⁵ *Brauer v. Globe Newspaper Co.*, 351 Mass. 53, 217 N.E.2d 736 (1966) (newspaper story and photograph); *Martin v. Dorton*, 210 Miss. 668, 50 So. 2d 391 (1951) (news story).

¹⁶ *Smith v. Doss*, 251 Ala. 250, 37 So. 2d 118 (1948) (news story about deceased father); *Korn v. Rennison*, 21 Conn. Supp. 400, 156 A.2d 476 (Super. Ct. 1959) (photograph in advertising); *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973); *Roach v. Harper*, 143 W. Va. 869, 105 S.E.2d 564 (1958) (listening device in tenant's apartment).

¹⁷ N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1948); OKLA. STAT. ANN. tit. 21, §§ 839.1-3 (1922); UTAH CODE ANN. §§ 76-4-8, -9 (1953); VA. CODE ANN. § 8-650 (1957).

¹⁸ *Brunson v. Ranks Army Store*, 161 Neb. 519, 73 N.W.2d 803 (1955) (plaintiff placed in false light because of defendant's publicity stunt); *Henry v. Cherry & Webb*, 30 R.I. 13, 73 A. 97 (1909) (photograph in advertising); *Judevine v. Benzies-Montanye Fuel & Warehouse Co.*, 222 Wis. 512, 269 N.W. 295 (1936) (defendant distributed handbills about plaintiff's debt).

¹⁹ "The court feels that the right of privacy is destined for universal recognition, and it applauds this destiny as founded in the most basic concepts of human rights." *Gravina v. Brunswick Corp.*, 338 F. Supp. 1, 6 (D.R.I. 1972) (name used in advertising).

base a suit upon a theory of privacy. In 1941, a famous football player was unable to maintain an action on privacy for the unauthorized use of his photograph.²⁰ In *Milner v. Red River Valley Publishing Co.*²¹ the alleged invasion was a story in the defendant's newspaper about the criminal record of the plaintiff's dead father. The court refused to recognize the right of privacy, relying on the court's traditional and limiting view of Texas common law:

Our Texas courts are limited to the enforcement of rights under the common law as it existed on January 20, 1840, unless changed, modified, added to, or repealed by statute. . . . The right of privacy as such, not being recognized under the common law, as it existed when we adopted it, and our Legislature not having given such right by statute, no recovery can be had in Texas under the facts in this record.²²

The court's interpretation of the common law as a fixed structure which can be changed only by the legislature prompted immediate criticism,²³ but Texas courts, as well as federal courts applying Texas law, followed the *Milner* decision.²⁴

II. BILLINGS V. ATKINSON

The Right. The *Billings* court recognized the right of privacy as it has been defined by most courts and writers. The court defined the right as:

- [1] the right to be free from unwarranted appropriation or exploitation of one's personality,
- [2] the right to be free from the publicizing of one's private affairs with which the public has no legitimate concern, or
- [3] the right to be free from the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.²⁵

This definition encompassed the four variations of the tort—appropriation

²⁰ *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1941). When considering the unauthorized use of the plaintiff's signature, another court commented that the right might exist in Texas, but the facts of the case did not require a conclusion on its existence. *United States Life Ins. Co. v. Hamilton*, 238 S.W.2d 289 (Tex. Civ. App.—Waco 1951), *error ref. n.r.e.*

²¹ 249 S.W.2d 227 (Tex. Civ. App.—Dallas 1952). *Milner* has usually been the case cited to indicate rejection of the tort by Texas courts.

²² *Id.* at 229. The Supreme Court of Texas also relied on this interpretation of the common law when it initially refused to recognize the tort of intentional infliction of mental distress. *Harned v. E-Z Fin. Co.*, 151 Tex. 641, 254 S.W.2d 81 (1953).

²³ Seavey argued that the courts have recognized new areas of the law numerous times in the past, and Texas courts should thus recognize the right of privacy. Comment, *Can Texas Courts Protect Newly-Discovered Interests?*, 31 TEXAS L. REV. 309 (1953).

²⁴ *McCullagh v. Houston Chronicle Pub. Co.*, 211 F.2d 4 (5th Cir. 1954) (news story about plaintiff); *Hansson v. Harris*, 252 S.W.2d 600 (Tex. Civ. App.—Austin 1952), *error ref. n.r.e.* (circulation of police photograph of unindicted plaintiff). The court of civil appeals affirmed *Billings*, relying in part on *Milner*. 471 S.W.2d 908, 912-15 (Tex. Civ. App.—Houston [1st Dist.] 1971), *rev'd*, 489 S.W.2d 858 (Tex. 1973). Relief for invasion of privacy was also denied when the plaintiff failed to plead trespass, wiretapping, or other act which the court required for invasion. *Payne v. Laughlin*, 486 S.W.2d 192 (Tex. Civ. App.—Dallas 1972).

²⁵ *Billings v. Atkinson*, 489 S.W.2d 858, 859 (Tex. 1973). This definition parallels the one in 62 AM. JUR. 2D *Privacy* § 1 (1972).

tion, publicity, disclosure, intrusion—which Prosser categorized as falling within the right of privacy.²⁶

Implicitly rejecting the *Milner* rationale, the *Billings* court decided that it could base recognition of the tort on common law and Texas precedent.²⁷ Warren and Brandeis had located the right to privacy within the expansive common law and argued for separate recognition of an existing but then inchoate right.²⁸ The *Billings* court agreed. Texas courts had previously granted relief for what was essentially invasion of privacy when the plaintiff alleged “libel and slander, wrongful search and seizure, eavesdropping and wiretapping, and other similar invasions into the private business and personal affairs of an individual.”²⁹ The court preferred to recognize the right of privacy if it were going to award relief when the action was called by other names. Justice Denton, writing for the court, accomplished the transition from the common law to the right of privacy by analogizing the *Billings* wiretapping to eavesdropping, which was a common-law offense. Wiretapping was an invasion of privacy as a form of eavesdropping.³⁰

Damages. Before granting a judgment notwithstanding the verdict, the trial court had heard the *Billings* case on the tort theory of invasion of the right of privacy. On special issues, the jury assessed \$10,000 damages for mental anguish and \$15,000 exemplary damages.³¹ The plaintiff suffered mental anguish from the invasion, but there was no resulting physical injury. The supreme court sanctioned recovery for this tort despite the absence of physical injury because it viewed the invasion of the right to privacy as a “willful tort which constitutes a legal injury.”³² Invasion of the right to privacy in Texas is a dignitary tort so that the injury is “essentially mental and subjective.”³³ The standard for assessing damages is the impact of the invasion upon a “person of ordinary sensibilities.”³⁴

The court, however, neither overruled nor reconciled the previous opinions of *Harned v. E-Z Finance Co.*³⁵ and *Fisher v. Carousel Motor Hotel*,³⁶

²⁶ See note 6 *supra*, and accompanying text.

²⁷ 489 S.W.2d at 859-60.

²⁸ Warren & Brandeis, *supra* note 2, at 197, 198, 213. “Indeed, the elasticity of our law, its adaptability to new conditions, the capacity for growth, which has enabled it to meet the wants of an everchanging society and to apply immediate relief for every recognized wrong, have been its greatest boast.” *Id.* at 213 n.1.

²⁹ 489 S.W.2d at 860.

³⁰ *Id.* When considering eavesdropping and variations of eavesdropping such as wiretapping, courts have had no difficulty in labelling these activities as invasions of privacy. See, e.g., *McDaniel v. Atlanta Coca-Cola Bottling Co.*, 60 Ga. App. 92, 2 S.E.2d 810 (1939); *Hamberger v. Eastman*, 106 N.H. 107, 206 A.2d 239 (1964); *LaCrone v. Ohio Bell Tel. Co.*, 114 Ohio App. 299, 182 N.E.2d 15 (1961). Eavesdropping is “the surreptitious overhearing, either directly by ear or by means of some mechanical device such as a wiretap, microphone, or amplifier, of the words of another spoken on a private occasion, or the preservation of such words by a tape recorder or similar recording device.” *Annot.*, 11 A.L.R.3d 1296, 1297 (1967). Federal law prohibits most wiretapping and provides for civil remedies. Crime Control Act, 18 U.S.C. §§ 2510-20 (1970).

³¹ 489 S.W.2d at 859.

³² *Id.* at 861.

³³ *Id.*

³⁴ *Id.* at 859.

³⁵ 151 Tex. 641, 254 S.W.2d 81 (1953).

³⁶ 424 S.W.2d 627 (Tex. 1967).

upon which the court of civil appeals relied in its denial of recovery for mental suffering without physical injury.³⁷ In *Harned* the plaintiff sued for intentional interference with peace of mind. The supreme court refused to consider this proposed cause of action until the legislature acted. More importantly, it strongly disapproved of any tort theory which allowed recovery for mental suffering without the inseparable physical injury.³⁸ *Fisher* was a more ambiguous decision. The supreme court held that "plaintiff was entitled to actual damages for mental suffering due to the willful battery, even in the absence of any physical injury."³⁹ The core of that decision was that the tort sued upon was willful; as a willful act, injury would be determined by the fact of invasion and not by the "actual harm" which the plaintiff suffered.⁴⁰ The application of the *Fisher* decision to damages for mental suffering resulting from other intentional torts remained unclear, and the *Billings* court did not clarify its interpretation of *Fisher*. The *Billings* court cited invasion of privacy cases from Arkansas,⁴¹ California,⁴² and Oregon⁴³ to support its finding that damages for mental suffering only are recoverable. But the court failed to reconcile previous Texas case law with its new position on mental suffering. What is clear is that the plaintiff in a privacy action need not allege physical injury to recover for mental suffering.⁴⁴

The Texas right of privacy, therefore, is an interest which the individual has in maintaining his solitude and anonymity. The primary element is invasion of that solitude by an action of the defendant which constituted intrusion, disclosure, publicity, or appropriation. Since the interests which the remedy protects are mental and emotional and since the invasion is a willful act, the court will not require special damages to maintain the action.

The Supreme Court of Texas has assured the individual that he has a right to be left alone. The practical limitation of the tort, as shown by case law from other states, is the necessity of convincing the trier of fact that the plaintiff suffered an invasion because of the defendant's actions. Intrusion is apparently the easiest to prove.⁴⁵ The physical act of intrusion is usually enough to successfully support a claim for relief. The facts of

³⁷ *Billings v. Atkinson*, 471 S.W.2d 908 (Tex. Civ. App.—Houston [1st Dist.] 1971).

³⁸ 151 Tex. 641, 254 S.W.2d 81 (1953).

³⁹ 424 S.W.2d 627, 630 (Tex. 1967).

⁴⁰ *Id.*

⁴¹ *Olan Mills, Inc. v. Dodd*, 234 Ark. 495, 353 S.W.2d 22 (1962) (photograph in advertising without consent).

⁴² *Fairfield v. American Photocopy Equip. Co.*, 138 Cal. App. 2d 82, 291 P.2d 194 (1955) (name without consent).

⁴³ *Hinish v. Meier & Frank Co.*, 166 Ore. 482, 113 P.2d 438 (1941) (name without consent).

⁴⁴ See D. DOBBS, *supra* note 12, at 531:

[T]he courts tend to presume some harm of more than nominal nature in the dignitary tort cases. Perhaps the real explanation for this is that some of these suits serve public law purposes, since they often operate to enforce limits upon the official or unofficial power of persons in authority and to preserve rights of the public generally to be free from oppressive conduct. It may well be that substantial damages are permitted in these cases partly in recognition that such public purposes are being served rather than in any belief that a person falsely arrested has suffered humiliation worth \$100,000.

⁴⁵ *Welsh v. Pritchard*, 125 Mont. 517, 241 P.2d 816 (1952) (landlord entering premises without tenant's permission); *Hamberger v. Eastman*, 106 N.H. 107, 206

Billings, for instance, clearly show intrusion by wiretapping despite the court's refusal to require listening or publication as an element of intrusion.⁴⁶ The elements of invasion are less well defined in an action involving public disclosure or publicity, usually because of the plaintiff's difficulty in alleging that his privacy was invaded.⁴⁷ Most courts readily accept invasion by appropriation of the plaintiff's name or likeness,⁴⁸ although there are cases denying recovery.⁴⁹

III. CONCLUSION

With *Billings*, the Texas court gives tort remedies to Texans which are presumably available to the citizens of all but three other states.⁵⁰ The decision is clearly in the trend of judicial thinking.⁵¹ It is precipitous, however, to define the tort in Texas much beyond the individual's right to be left alone, because the court failed to decide some key issues. It is not completely clear after *Billings* whether the supreme court accepted the four variations of the right to privacy or merely accepted intrusion. Its definition of the tort is broad and seemingly includes all four areas.⁵² Furthermore, recovery for mental suffering remains an unclear area of Texas law. Plaintiffs, however, have more extensive rights as a result of the *Billings* decision's recognition of the right to privacy.

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A.2d 239 (1964) (recording device in tenants' bedroom); *Nader v. General Motors Corp.*, 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (Ct. App. 1970) (wiretapping and eavesdropping by mechanical means).

⁴⁶ *Accord*, *Hamberger v. Eastman*, 106 N.H. 107, 206 A.2d 239, 242 (1964) (wiretap): "The tort of intrusion on the plaintiffs' solitude or seclusion does not require publicity and communication to third persons although this would affect the amount of damages . . ." Certain wiretaps are legal. *See, e.g.*, Crime Control Act, 18 U.S.C. §§ 2510-20 (1970). Courts sometimes allow non-governmental monitoring of telephone calls. *See, e.g.*, *Schmukler v. Ohio-Bell Tel. Co.*, 66 Ohio L. Abs. 213, 116 N.E.2d 819 (C.P., Cuyahoga Co. 1953) (pen and manual monitoring by telephone company to determine use of subscriber's telephone).

⁴⁷ *Barbieri v. News-Journal Co.*, 56 Del. 67, 189 A.2d 773 (1963) (news story held not to violate "ordinary decencies"); *Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243 (1944) (dicta that, while demurrer denied, jury might well decide that publication was not an invasion); *Bremmer v. Journal-Tribune Pub. Co.*, 247 Iowa 817, 76 N.W.2d 762 (1956) (news story held to be news event); *Martin v. Dorton*, 210 Miss. 668, 50 So. 2d 391 (1951) (recovery denied because plaintiff, who was subject of news story, was a public official who had, therefore, waived his right of privacy).

⁴⁸ *Olan Mills v. Dodd*, 234 Ark. 495, 353 S.W.2d 22 (1962); *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.E.2d 742 (1952); *Pallas v. Crowley, Milner & Co.*, 322 Mich. 411, 33 N.W.2d 911 (1948); *Munden v. Harris*, 153 Mo. App. 652, 134 S.W. 1076 (1911); *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938).

⁴⁹ *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1941) (dicta that famous football player could not recover for use of his photograph even were Texas to recognize the cause of action); *Brauer v. Globe Newspaper Co.*, 351 Mass. 53, 217 N.E.2d 736 (1966) (demurrer granted because limited recognition of photograph of plaintiff did not invade privacy).

⁵⁰ Although not all states have affirmatively recognized the right of privacy, Texas was previously one of only four states to reject the right. *See* notes 13-19 *supra*, and accompanying text.

⁵¹ When considering a choice of law question on whether to apply state law which firmly rejects the right of privacy or state law that accepts it, federal judges will choose the law of the state recognizing the right of privacy as the better law. *Gravina v. Brunswick Corp.*, 338 F. Supp. 1, 6 (D.R.I. 1972) (name without consent); *Young v. That Was The Week That Was*, 312 F. Supp. 1337, 1339 (N.D. Ohio 1969) (name without consent).

⁵² 489 S.W.2d at 859.