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The Pride of the Common Law: Oklahoma's Struggle With the Prima Facie Tort Action

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THE PRIDE OF THE COMMON LAW: OKLAHOMA'S STRUGGLE WITH THE PRIMA FACIE TORT ACTION

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"From a mere glance at the photograph of it as it appears in the record, it is very evident that [the wall on defendant's said premises in close proximity to said line, and within six or eight inches of the west wall of plaintiff's said flat building] serves no useful, needful, or ornamental purpose, and that it was built some six or seven years ago, and ever since has been maintained out of pure malice and spite." Kane, J., *Hibbard v. Halliday*, 158 P. 1158, 1160 (Okla. 1916). Original photograph from the court file.

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I. INTRODUCTION

In 2010, two Oklahoma Court of Civil Appeals opinions reached wholly divergent conclusions on the viability of the "*prima facie* tort" theory of recovery in Oklahoma.[1] Subsequently, some thirteen federal district court and two state court of civil appeals opinions have cited one of these two opinions (with very little focus on the *prima* facie tort issue), though none have cited both cases. To date, the Oklahoma Supreme Court has not yet resolved the disagreement. The federal district court, providing the only substantive treatment, has acknowledged the unsettled nature of Oklahoma treatment of the tort:

> At a minimum, there is uncertainty regarding the continued viability of the tort of malicious wrong under Oklahoma law. Accordingly, the Court cannot say, as Blatnick asks the Court to do, that plaintiffs have no possibility of recovery against her. An Oklahoma court is more properly suited to decide unsettled issues of Oklahoma law.[2]

Given this open question, we analyze the existence of the *prima facie* tort under Oklahoma law. This paper begins with an overview of the development of the tort, with a focus on the foremost American proponent of the proposition, the esteemed Oliver Wendell Holmes. In Part II, we examine the historic application of the tort in the Oklahoma courts. Part III addresses the divergent opinions produced by the Oklahoma Civil Court of Appeals and, in particular, critiques the *Tarrant* opinion and its determination that the tort does not lie in Oklahoma. Part IV reviews the application of the tort in other jurisdictions. We conclude with our contention that Oklahoma has adopted the *prima facie* tort and suggest that it plays a useful but limited role in Oklahoma litigation.

II. OLIVER WENDELL HOLMES & INTENTIONAL TORT THEORY

Justice Holmes walked to the beat of his own drum; with a keen intellect and sharply honed wit, he was ripe for any challenge. "What is it? Tell me, I'll take the opposite side," he would offer.[3] He became known as the "Great Dissenter" for his refusal to conform to the prevailing views of other members of the Supreme Court—"How could he help dissenting, he asked, when the Supreme Court rendered such illiberal decisions?"[4] As the years passed, he maintained his sense of humor. During an interview on his ninetieth birthday, he quoted Virgil: "Death plucks my ear and says, Live – I am coming."[5] Another day, while on a walk with a friend, he passed a young woman on the street and sighed, "Ah, George, what wouldn't I give to be seventy-five again."[6]

Justice Holmes' legal pronouncements were every bit as thoughtful as his quips amusing. Among his many contributions to modern jurisprudence was his conception of a

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1. *Compare* Tarrant v. Guthrie First Capital Bank, 241 P.3d 280 (Okla. Civ. App. 2010), *with* Fulton v. People Lease Corp., 241 P.3d 255 (Okla. Civ. App. 2010), *cert. denied*, (May 17, 2010).

2. Rollins v. Blatnick, No. 14-CV-46-JED-PJC, 2014 WL 1466487, at *2 (N.D. Okla. Apr. 15, 2014).

3. Time Magazine, *Books: The Great Dissenter*, May 8, 1944, available at http://www.time.com/time/magazine/article/0,9171,933394,00.html (last visited January 19, 2016) (discussing Catherine Drinker Brown, YANKEE FROM OLYMPUS – JUSTICE HOLMES AND HIS FAMILY (1944)).

4. *Id.*

5. *Id.*

6. J. CRAIG WILLIAMS, *Forward* to OLIVER WENDELL HOLMES, THE PATH OF THE LAW AND THE COMMON LAW, p. ix (2008) (quoting Isaac Asimov, THE SENSUOUS DIRTY OLD MAN (1971).

tripartite scheme that segregated intentional, negligent and strict liability torts.[7] Justice Holmes first articulated his general theory of "intentional tort" in an 1894 Harvard Law Review article titled *Privilege, Malice, and Intent*.[8] Specifically, Justice Holmes opined that "the intentional infliction of temporal damage, or the doing of an act manifestly likely to inflict such damage and inflicting it, is actionable if done without just cause."[9] Justice Holmes clearly recognized that "[t]he right to swing my fist ends where the other man's nose begins."[10]

The precise genesis of Justice Holmes' prima facie theory is unknown. Perhaps, as a young officer in the Civil War, he was influenced by a man he was rumored to have warned of incoming gunfire at Fort Stevens: "[G]et down you damn fool, before you get shot," he yelled to President Abraham Lincoln.[11] President Lincoln, after all, had proclaimed, "[H]e cannot say that people have a right to do wrong."[12] Alternatively, maybe Justice Holmes' love for Plato swayed him—President Franklin D. Roosevelt once caught 92-year-old Justice Holmes reading Plato to "improve [his] mind."[13]

Certainly, his long-time friendship with Sir Frederick Pollack was essential to the development of his legal philosophy. The two met when Holmes was travelling in England in 1874 and regularly corresponded thereafter. Despite Holmes' critical contributions to the development of the *prima facie* tort, Pollack first clearly articulated the principle in 1887, stating the existence of "a general proposition of English law that it is wrong to do wilful harm to one's neighbour without justification or excuse."[14] In articulating his own theory, Holmes reached a similar conclusion (quoted above), predicated on two primary cases: *Walker* v. *Cronin*,[15] and *Mogul Steamship Co.* v. *McGregor*.[16] In the former, a case involving the inducement of a shoe manufacturer's craftsmen by a competitor, the Massachusetts Supreme Court stated: "The intentional causing of such loss to another, without justifiable cause, and with the malicious purpose to inflict it, is of itself a wrong."[17] Similarly, in the latter, a shipping association worked to underbid the competition and threatened to pull all business from agents who did not act exclusively for the association. In that instance, Lord Justice Bowen stated: "Now intentionally to do that which is calculated

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7. *E.g.*, Kenneth J. Vandevelde, *A History of Prima Facie Tort: The Origins of A General Theory of Intentional Tort*, 19 HOFSTRA L. REV. 447, 448 (1990). Professor Vandevelde's article provides a thorough history of the "general theory of intentional tort" and describes in detail the evolution of Justice Holmes' promotion of "*prima facie* tort" as a theory of recovery.

8. Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894); Vandevelde, *supra* note 7, at 472.

9. Holmes, *supra* note 8, at 3.

10. HOLMES, *supra* note 6, at vii.

11. JAMES A. MCPHERSON, BATTLE CRY OF FREEDOM 757 (1988).

12. Abraham Lincoln, *Mr. Lincoln's Reply to Judge Douglas in the Seventh and Last Debate. Alton, Illinois. October 15, 1858*, SPEECHES AND LETTERS OF ABRAHAM LINCOLN 155 (2006).

13. Books: The Great Dissenter, *supra* note 3. However, a strict adherence to Plato's teachings would suggest there could be no justification of a wrong at all. Plato, "Crito," DIALOGUES OF PLATO, 1900, http://ota.ox.ac.uk/desc/1941 (last visited January 19, 2016) ("Are we to say that we are never intentionally to do wrong, or that in one way we ought and in another way we ought not to do wrong, or is doing wrong always evil and dishonorable, as I was just now saying, and as has been already acknowledged by us? . . . Yes. Then we must do no wrong? Certainly not.").

14. Vandevelde, *supra* note 7, at 472 (quoting F. Pollock, THE LAW OF TORTS IX 22 (1894)).

15. 107 Mass. 555 (Mass. 1871).

16. 23 Q. B. D. 598 (1889), aff'd [1892] A.C. 25.

17. 107 Mass. at 562.

in the ordinary course of events to damage, and which does, in fact, damage another in that person's property or trade, is actionable if done without just cause or excuse."[18]

The lynchpin of Justice Holmes' theory of intentional tort was "justification" or "just cause" for intentionally causing harm.[19] Importantly, Justice Holmes did not design his proposition of a "general theory of intentional tort" to expand the universe of tort recovery.[20] For Justice Holmes, the general theory of intentional tort, which became the theory of liability for "*prima facie* tort," was a straw man for his focus on the role of legislators in defining the law and the role of judges in applying the law.[21] In other words, Justice Holmes paired his capacious view of liability with a nearly equally broad view of statutory "justification" in order to discourage "activist" judges from legislating from the bench.[22]

Justice Holmes anchored his potentially expansive "intentional tort" in malice. His investigation and delineation of malice revealed the true nature of his tort theory: a judge must be limited by the policy justifications pronounced by the legislature, but cannot let a defendant cause intentional harm to another while hiding behind the shield of "justification" or "privilege."[23] In order to define the bounds of justification, Justice Holmes needed a definition of malice that he could actually apply. Accordingly, he did not define malice merely as an absence of justification.[24] Instead, Justice Holmes defined malice as malevolence. Specifically, he defined "malice" as "a malevolent motive for action, without reference to any hope of a remoter benefit to oneself to be accomplished by the intended harm to another."[25] A defendant who acted malevolently could have also acted in a manner that was justified. In other words, Justice Holmes revealed that his primary motive was to write into law the common-sense notion that a defendant cannot act with the sole intention of hurting another and then seek the protection of some idiosyncratic statutory justification or privilege. To the contrary, if a defendant acts with the *sole* purpose of harming the plaintiff and succeeds, then the defendant violates the duty he owes to the plaintiff—indeed, to every person. We should hold him accountable. Malicious motives could make a lawful act unlawful.

As evidenced in *Privilege, Malice, and Intent*, Justice Holmes' primary policy concern was to define the socially acceptable bounds of injury to economic interests caused by trade unions and business competitors.[26] The business competition forum also called

18. 23 Q. B. D. at 613; *see also, The Prima Facie Tort Doctrine*, 52 COLUMBIA L. REV. 503, 503 (1952). Ultimately, the court determined that no cause of action existed as the association's actions were not unlawful.

19. Holmes, *supra* note 8, at 3.

20. *See generally* Holmes, *supra* note 8, at 3; Vandevelde, *supra* note 7, at 449.

21. Holmes, *supra* note 8, at 3 ("[W]hether, and how far, a privilege shall be allowed is a question of policy. Questions of policy are legislative questions, and judges are shy of reasoning from such grounds . . .When the question of policy is faced it . . . must be determined by the particular character of the case.").

22. Holmes, *supra* note 8, at 3; Vandevelde, *supra* note 7, at 458.

23. Holmes, *supra* note 8, at 2-3.

24. *Id.*

25. *Id.* at 2.

26. Vandevelde, *supra* note 7, at 476; *See generally* Holmes, *supra* note 8. In that way, the development of Justice Holmes' intentional tort theory mirrored the rise of negligence as a means of shielding corporations from liability for the accidental injuries to their employees and customers. Vandevelde, *supra* note 7, at 484.

forth Justice Holmes' most enduring opinion in promotion of *prima facie* tort—the Supreme Court case *Aikens v. Wisconsin*.[27] In *Aikens*, a Milwaukee newspaper publisher decided to raise the price for advertising by twenty-five percent. In response, the managers of competing newspapers agreed not to raise their advertising prices, but they also agreed to charge the higher price to any advertiser if that advertiser paid the higher price to the price-raising competitor. In that way, they would discourage advertisers from placing ads in the competitor's newspaper.[28] The State of Wisconsin, however, had promulgated a statute making it a crime for any two or more persons to "combine . . . for the purpose of wilfully or maliciously injuring another in his reputation, trade, business, or profession."[29] The state prosecuted the colluders and obtained a conviction. The defendants appealed the conviction to the United States Supreme Court because the criminal-collusion statute violated their right to contract under the Fourteenth Amendment to the United States Constitution.[30]

Justice Holmes, writing for the majority, affirmed the conviction and upheld the criminal-collusion statute.[31] In doing so, he seized on the *mens rea* wording of the statute—"wilfully or maliciously"—to introduce his conception of "malice" not only as an absence of justification but also as a negation of justification.[32] Justice Holmes readily conceded that he could not punish "wilfull" combinations on that ground alone.[33] "Wilfull" combination alone would encompass too much justified activity (*e.g.*, forming a partnership for competing in business with the clear intent that successful business practices would accrue benefit to the partnership and financial harm to its competitors) to form the basis of criminal liability.[34] However, Justice Holmes upheld the statute because if the defendants had acted "maliciously," then their malevolence toward the plaintiff would negate the justification for their intentional acts.[35]

In dicta—after all, the Supreme Court was reviewing the constitutionality of a criminal statute—Justice Holmes opined that the defendants' conduct would have resulted in civil liability under his version of the common law *prima facie* tort.[36] The colluders acted maliciously, which Justice Holmes interpreted as "malevolently, for the sake of the harm as an end in itself, and not merely as a means to some further end legitimately desired."[37] For Justice Holmes, when intentional acts "done maliciously" or "malevolently" result in injury, the power to punish those acts cannot be denied on the grounds that the conduct

27. 195 U.S. 194 (1904).
28. *Id.* at 202.
29. *Id.* at 201-02.
30. *Id.*
31. *Id.* at 204.
32. *Aikens, 195 U.S.* at 203-04.
33. *Id.* at 202-03 ("If it should be construed literally, the word 'wilfully' would embrace all injuries intended to follow the parties' acts, although they were intended only as the necessary means to ulterior gain for themselves."). As Justice White's short dissent notes, Holmes perhaps impermissibly read into the Wisconsin law a conjunctive—i.e., that the combination had to be "wilfull *and* malicious" despite the statutory text's disjunctive "wilfull *or* malicious"—based on an "intimation" by the Wisconsin Supreme Court that the narrower conjunctive version was correct. *Id.* at 207 (White, J., dissenting).
34. *Id.* at 203.
35. *Id.*
36. *Id.* at 204.
37. *Aikens, 195 U.S.* at 203.

would have been lawful but for the malicious intent.[38] "No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part."[39] If the defendants' malicious intent in *Aikens* warranted the state's prosecution, then a civil defendant's malicious intent should give rise to civil liability as well.

The Restatement (Second) of Torts follows the derivation of Justice Holmes' *prima facie* tort theory. Section 870 states:

> One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability.[40]

The Restatement version of *prima facie* tort deviates from Justice Holmes' theory where it fails to state that malice can negate justification. Instead, it focuses on a balancing of interests in determining the applicability of the tort.

> The determination of which ones should be the subject of tort liability is made by resorting to the balancing process described above and analyzed in more detail below. For negligence and strict liability it is a one-step process, and a single phrase is used to describe the test. For intentional torts, it is a two-step process. The requirements are worked out both for a prima facie tort and for a privilege amounting to an excuse or justification.[41]

It enumerates the following factors for consideration in the balancing analysis: (1) the nature and seriousness of the harm to the injured party, (2) the nature and significance of the interests promoted by the actor's conduct, (3) the character of the means used by the actor and (4) the actor's motive.[42]

The Restatement (Second) of Torts has appeared several times in Oklahoma's *prima facie* tort jurisprudence, but until recently, § 870 has not played a central role.[43]

38. *Id.* at 205-06.

39. *Id.* at 206.

40. Restatement (Second) of Torts § 870 (1979).

41. *Id.* at cmt. e.

42. *Id. See also*, STUART SPEISER, CHARLES F. KRAUSE, AND ALFRED GANS, THE AMERICAN LAW OF TORTS, § 35:6 (2012).

43. The following cases, which are relevant to Oklahoma's *prima facie* tort jurisprudence, have mentioned § 870: *Estate of Trentadue ex rel. Aguilar v. United States,* 397 F.3d 840, 862 n.17 (10th Cir. 2005) (rejecting an argument that § 870 creates a tort claim for spoliation of evidence in Oklahoma); *Cardtoons, L.C. v. Major League Baseball Players Ass'n,* 335 F.3d 1161, 1167-68 (10th Cir. 2003) ("[W]e need not further speculate about the vitality of prima facie tort in Oklahoma because, even assuming that Oklahoma would recognize the tort, Cardtoons' claim would fail . . . to prevail at common law on a theory of prima facie tort, a plaintiff must show that the defendant's conduct was 'generally culpable and not justified under the circumstances . . . Cardtoons has not shown that by sending the letter MLBPA acted maliciously or wrongfully or that MLBPA's actions were not privileged, justified, or excusable.") (internal citations omitted); *Nat'l Ass'n of Prof'l Baseball Leagues, Inc. v. Very Minor Leagues, Inc.*, 223 F.3d 1143, 1151 (10th Cir. 2000); *Merrick v. N. Natural Gas Co., Div. of Enron Corp.*, 911 F.2d 426, 433 (10th Cir. 1990); *Obsolete Ford Parts v. Ford Motor Co.*, 306 F. Supp. 2d 1154, 1157 n.3 (W.D. Okla. 2004); *Tarrant*, 2010 OK CIV APP 82.

III. *"PRIMA FACIE* TORT" AND THE TORT OF "MALICIOUS WRONG" IN OKLAHOMA JURISPRUDENCE.

Justice Holmes intended his *prima facie* tort theory to move the focus of tort jurisprudence away from the injury, towards the plaintiff's rights, and onto the breach of a legislatively defined duty by the defendant.[44] Thus, he viewed tort law as a government-imposed set of duties requiring actors to avoid injuries to others. In 1910, the Oklahoma legislature adopted a concept of duty-based tort when it promulgated a set of tort laws anchored by the directive, "Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his rights."[45] Another contemporaneously enacted statute furthered the concept: "Any person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefore in money, which is called damages."[46] Notably, despite the frequent and often sweeping reforms to various Oklahoma statutory schemes, the Oklahoma Legislature has not altered these provisions.

The Oklahoma Supreme Court first addressed the concept of general intentional tort in a 1916 case involving rather colorful facts.[47] The plaintiff had constructed a multi-story apartment complex on Okmulgee Avenue in Muskogee, Oklahoma. His neighbor was apparently displeased with the development and built a solid brick wall on the very edge of his property, effectively blocking any light or breeze from entering the twelve windows on that side of the apartment building. Evidence at the trial established that he had constructed the wall "without advantage to himself and without intention to benefit himself in any legal manner . . . for the sole purpose of injuring the [apartment owner] in and about the use and occupation of his property."[48] In a unanimous opinion affirming the lower court's decision in favor of the apartment owner, the Oklahoma Supreme Court determined, "The wanton infliction of damage can never be a right. It is a wrong, and a violation of right, and is not without remedy."[49] Indeed, in a case replete with references to the common law, the Court noted: "[i]t has always been the pride of the common law that it permitted no wrong with damage, without a remedy."[50] The Court continued: "[N]o man

44. Vandevelde, *supra* note 7, at 466; Holmes, *supra* note 8, at 6-7.

45. OKLA. STAT. ANN. tit. 76, § 1 (West 2001).

46. OKLA. STAT. ANN. tit. 23, § 3 (West). In *Stebbins v. Edwards*, 224 P. 714, 715 (Okla. 1924), the Oklahoma Supreme Court relied on this statute and *Schonwald v. Ragains*, 122 P.203, 203 (Okla. 1912) (finding "an actionable tort for one to maliciously interfere with a contract between two parties and induce one of them to break that contract to the injury of the other") to permit an action where the injury sustained by a person's business [was] by means of false and malicious statements and representations made by the defendants for such purpose and with the intention of destroying such person's established business.

47. *Hibbard v. Halliday*, 158 P. 1158 (Okla. 1916).

48. *Id.* at 1159.

49. *Id.* at 1160 (quoting *Burke v. Smith*, 37 N.W. 838, 842 (Mich. 1888)).

50. The *Burke* case expounds eloquently on the breadth of courts' ability to enforce rights and duties through a general scheme of intentional torts: "The right to breath the air, and to enjoy the sunshine, is a natural one; and no man can pollute the atmosphere, or shut out the light of heaven, for no better reason than that the situation of his property is such that he is given the opportunity of so doing, and wishes to gratify his spite and malice towards his neighbor. It is said that the adoption of statutes in several of the states making this kind of injury actionable shows that the courts have no right to furnish the redress . . . It has always been the pride of the common law that it permitted no wrong with damage, without a remedy. In all the cases where [intentional] injuries have occurred, proceeding alone from the malice of the defendant, it is held to be a wrong accompanied by damage." *Burke*, 37 N.W. at 842.

can pollute the atmosphere or shut out the light of heaven for no better reason than that the situation of his property is such that he is given the opportunity of so doing, and wishes to gratify his spite and malice toward his neighbor."[51]

Some seven years later, the Oklahoma Supreme Court encountered a set of facts so extraordinary as to make malicious wall-building seem mundane.[52] The mayor of Mangum, who also happened to be a full-time physician, was supporting a bond issue to construct a local power plant to service the city. Existing providers were not thrilled at the prospect and entered into a complex conspiracy to discredit the mayor. The first step in the master plan was to find a pregnant woman willing to undergo an illegal abortion. The second, to employ a woman to pose as the pregnant woman's mother—the conspirators determined that the mayor "would not commit the offense solely for a money consideration, but might be induced to do so if the purported mother would make a sympathetic appeal to the plaintiff."[53] When the prospective mother withdrew from the conspiracy, the defendants decided to move forward with a younger woman who would pose as a sister. To ensure the mayor's compliance, the defendants engaged a former minister who was acquainted with the mayor to tell the mayor "under the circumstances it would be a Christian act to perform the operation."[54] Finally, the defendants employed a detective agency to install a dictagraph in the hotel where the mayor would meet with the pregnant woman and presumably conduct the abortion. When the first meeting did not materialize, they installed additional dictagraphs in other hotels in various cities. There was just one problem—the mayor had a member of the conspiracy on his payroll. When the conspirators arrived for the meeting, the mayor had them arrested and initiated litigation.[55]

The Oklahoma Supreme Court determined that the defendants' actionable wrong was *not* their conspiracy to commit an illegal abortion or to slander the mayor, but rather their attempts to "willfully and maliciously . . . injure plaintiff in his business and profession, and in his official capacity by willful, malicious, and corrupt means . . . without just cause or excuse."[56] The Court found an action existed for "[t]he intentional doing of those acts which are intended to, and in fact do, damage another in his property or profession."[57] The Court then defined a "malicious wrong" as "[t]he intentional doing of that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another, or that other person's property or trade . . . if done without just cause or excuse."[58]

The Oklahoma Supreme Court again addressed the "*prima facie*" tort theory in *Ward v. First National Bank.*[59] The plaintiff was a veteran with significant competency issues who filed suit because a court appointed guardian limited the amount of money he could draw from a trust fund established to care for him in light of his wartime disability. The Supreme Court quoted *Magnum* for the proposition that "[t]he intentional doing of that

51. *Id.*
52. *Mangum Elec. Co. v. Border*, 222 P. 1002 (Okla. 1923).
53. *Id.* at 1006.
54. *Id.*
55. *Id.*
56. *Id.* at 1004-05.
57. *Mangum*, 222 P. at 1005.
58. *Id.*
59. 1937 OK 449, 69 P.2d 1041.

which is calculated in the ordinary course of events to damage, and which does, in fact, damage another, or that other person's property or trade is actionable, if done without just cause or excuse."[60] Because there was "sufficient cause" to institute the guardianship proceedings, the Supreme Court affirmed the judgment of the county court.[61]

Pacific Mutual Life Insurance Company of California v. Tetirick was decided the next year.[62] In that case, a patient recovering from a nervous breakdown in a hospital attempted to obtain insurance benefits for his injury. Against the advice of the patient's physician and with knowledge of his condition, an agent for the insurer entered into the patient's room and demanded he cancel the policy. The agent "attempted intimidation and threats, paced up and down in the room, and talked loudly, and in a boisterous and obstreperous manner."[63] "[O]n account of [Plaintiff's] physical and nervous condition the actions of defendant were seriously harmful to him and caused a serous relapse, destroying or delaying his chance for recovery, and rendered him totally and permanently disabled physically."[64] Without citing to a single case or any other authority, the Oklahoma Supreme Court provided several conditions which could be met for the plaintiff to establish a cause of action, including proof that the defendant "acted with such malice toward plaintiff as would indicate a conclusion to so act in disregard of whatever damage might be occasioned thereby."[65]

In *Patel v. OMH Medical Center*, the Oklahoma Supreme Court again discussed the *prima facie* tort. Justice Opala noted, "[t]he expression 'prima facie tort' does not appear to ever have been recognized in Oklahoma."[66] Justice Opala did not expressly state that such a tort was wholly unavailable, but rather acknowledged the semantics of Oklahoma tort law, which alone appears insufficient to rule out *prima facie* tort as a theory of recovery in Oklahoma. Instead, Justice Opala noted that the Tenth Circuit had determined that "the concept of prima facie tort has been applied in Oklahoma jurisprudence under limited circumstances."[67]

Relying on a number of historical Oklahoma cases, the Tenth Circuit Court of Appeals has tentatively acknowledged the existence of a "*prima facie* tort" theory of liability in Oklahoma.[68] The Tenth Circuit, however, narrowly construed the scope of the tort, restricting its application to business and property interests, which were often the focus of the older cases, notwithstanding the lack of limiting language in those cases and absence

60. *Id.* at 1043 (quoting *Magnum*, 222 P. at 1005).

61. *Id.*

62. *Pac. Mut. Life Ins. Co. of California v. Tetirick*, 89 P.2d 774 (Okla. 1938).

63. *Id.* at 775.

64. *Id.*

65. *Id.* at 774. Justice Davidson complained that the majority opinion "should contain a more thorough discussion of the issues," and engaged in a more detailed analysis. He relied in part on *Mangum Electric*. *Id.* at 776. He noted: "[W]here the cause of action arises from conduct which is not unlawful in itself, then both a malicious intent and a material detriment must be shown, though the malice may be implied from the circumstances surrounding such conduct." *Id.* at 781.

66. *Patel v. OMH Med. Ctr., Inc.*, 987 P.2d 1185, 1190 n.2 (Okla. 1999).

67. *Id.* (citing *Merrick*).

68. *Merrick*, 911 F.2d at 433. *Cf. Cardtoons, L.C.*, 335 F.3d at 1167-68 (refusing to make a determination of whether Oklahoma courts have acknowledged the *prima facie* tort theory of liability); *National Ass'n of Professional Baseball Leagues, Inc.*, 223 F.3d at 1151.

of any other limitation in Oklahoma law.[69] Indeed, the *Rollins* court specifically noted that "*Fulton*[70] . . . undermines the Tenth Circuit's statement in *Merrick* . . . that Oklahoma would likely not recognize the tort in an employment context."[71] Accordingly, there is no basis for adopting the Tenth Circuit's limitation on *prima facie* tort into Oklahoma law.

With such limited and somewhat conflicting direction, it is unsurprising that sound legal minds, focused on applying precedent, could reach different or opposite conclusions.

IV. RECENT DIVERGENT INTERPRETATIONS

On May 17, 2010, the Oklahoma Court of Civil Appeals, First Division, issued the opinion in *Fulton v. People Lease Corp*. The court explicitly acknowledged the existence of *prima facie* tort.[72] Consistent with Justice Opala's comment in *Patel*, the Court of Civil Appeals did not *call* the theory of recovery "*prima facie* tort" but rather employed the "malicious wrong" terminology.[73] Reaching back to *Mangum Electric*, *Hibbard*, *Schonwald*, and Restatement (Second) of Torts § 870 (1979), the Court of Civil Appeals determined that a malicious wrong theory of recovery existed under Oklahoma law.[74] Moreover, the Court of Civil Appeals determined that the theory of recovery was available in the context of an employment discrimination cause of action[75]—the same type of case the Tenth Circuit had determined would fall outside Oklahoma's *prima facie* tort cause of action.[76] While not explicitly addressing the Tenth Circuit's conclusion, *Fulton* appears to recognize that the *prima facie* tort is not limited to harm to property and business but rather applies the Restatement's broader prohibition against malicious injuries to "another."[77]

On July 27, 2010, the Court of Civil Appeals, Second Division, issued an opinion in *Tarrant v. Guthrie First Capital Bank*, which explicitly rejected the existence of a *prima facie* tort.[78] It did not address the *Fulton* opinion, any of the historic cases, or the Restatement,[79] only noting that the Tenth Circuit had recognized the tort but had essentially

69. *See Merrick*, 911 F.2d at 433. *Myers v. Knight Protective Serv., Inc.*, No. CIV-10-866-C, 2011 WL 39039, at *2 (W.D. Okla. Jan. 5, 2011) relies on *Merrick* (and no other source or analysis) to conclude that the tort of malicious wrong is not available in "an employment context."

70. 241 P.3d 255 (Okla. Civ. App. 2010) (discussed in detail *infra*).

71. *Rollins*, 2014 WL 1466487, *2.

72. *Fulton*, 241 P.3d 255. Judge Hetherington wrote the opinion, Judge Hansen concurred, and Judge Buettner concurred in part and dissented in part (without explanation). The Oklahoma Supreme Court denied both parties' requests for certiorari on May 17, 2010, by an 8-0 majority (Justice Reif not voting).

73. *Id.* at 265-267.

74. *Id.*

75. *Id.*

76. *Merrick*, 911 F.2d at 433.

77. *Fulton*, 241 P.3d at 266.

78. Tarrant v. Guthrie First Capital Bank, 241 P.3d 280 (Okla. Civ. App. 2010). Judge Fischer wrote the opinion, and Judges Wiseman and Barnes concurred. The parties did not seek certiorari from the Oklahoma Supreme Court.

79. *Id.* at 283. The Court of Civil Appeals also noted several of its unpublished cases reached similar conclusions. *Id.* at 283 n.6 (citing *Langlee v. ONEOK, Inc.*, Case No. 99,806, *slip op.* at 4 (March 30, 2004) ("Oklahoma has not recognized prima facie tort actions . . . Recognition of such a cause of action rests not with this Court acting as an error correcting Court, but rather with this State's Supreme Court."); Selby v. Mid-Continent Cas. Co., Case No. 101,214, *slip op.* at 4-5 (March 29, 2005) ("The Oklahoma Supreme Court has not recognized either spoliation of evidence or prima facie tort actions."); Toolpushers Supply Co. v. Kris Agrawal, Case No. 101,163, *slip op.* at 10-11 (August 29, 2006) ("Last, [plaintiff's] assertion that the trial court failed to recognize a 'prima facie claim for deceit' in the counterclaim has no merit . . . Oklahoma has not recognized prima facie tort actions . . . Recognition of such a cause of action rests with the Supreme Court.")).

reached its conclusion by relying on a "student" Oklahoma Bar Journal article.[80] The Court of Civil Appeals concluded that *Patel* was instructive:

> Although *Patel* does not specifically hold that the prima facie tort theory of recovery is unavailable in any other circumstances, it certainly did so with respect to the facts before the Court in that case. Nonetheless, until the Supreme Court expressly adopts the prima facie tort theory of recovery, we are unwilling to do so.[81]

Tarrant's holding is clearly predicated on its conclusion that it will not "adopt" a *prima facie* tort theory until the Oklahoma Supreme Court expressly does so. However, this is simply not the correct analysis. Even ignoring the abundance of prior Oklahoma case law, the *Tarrant* court should have asked whether the *prima facie* tort theory was a part of the common law before statehood. The common law was adopted thrice over in the formative days of the Indian Territory. First, the United States Congress passed the Organic Act of 1890, providing for a temporary government for the Oklahoma Territory.[82] Section 31 of the Organic Law stated that the "general laws of the State of Arkansas . . . as published . . . Mansfield's Digest of the Statutes of Arkansas . . . are hereby extended over and put in force in the Indian Territory . . ."[83] Explicitly included was "common and statute law of England, chapter twenty."[84] Mansfield's Digest then provided: "The common law of England, so far as the same is applicable and of a general nature . . . shall be the rule of decision in this state unless altered or repealed by the general assembly of this state."[85]

Additionally, in 1893, the Territorial Legislature enacted St. 1893, § 3874, which provides in pertinent part: "The common law, as modified by constitutional and statutory law, judicial decisions and the conditions and wants of the people, shall remain inforce in aid of the general statutes of Oklahoma."[86] The language has remained the same to this day, now codified at 12 O.S. § 2.

Finally, the Oklahoma Supreme Court has held:

> when people from all parts of the United States, on the 22d day of April, 1889, settled the country known as Oklahoma, built cities, towns, and villages, and began to carry on trade and commerce in all its various

80. The "student" article was written by K. Keith Cressman and entitled *The Prima Facie Tort Doctrine in Oklahoma: Common Law Protection of Business from Unjustified Interference*, OKLA. B. J., v. 56, No. 30, 1759-1764 (1985).

81. *Tarrant*, 241 P.3d at 284. The only case citing *Tarrant* is *Miller v. Johnson*, 307 P.3d 387 (Okla. Civ. App. 2013), which adopts this principle. As discussed below, while the principle itself might be sound—no creation of a "new" tort except as recognized by the Oklahoma Supreme Court—the application here is improper, there is no need to adopt the tort as it has long existed in Oklahoma.

82. 26 U.S. STAT. AT LARGE, ch. 120.

83. 26 U.S. STAT. AT LARGE, ch.. 120, § 31; *see also, Franco-Am. Charolaise, Ltd. v. Oklahoma Water Res. Bd.*, 855 P.2d 568, 572 (Okla. 1990).

84. *Id.*

85. W.W. MANSFIELD, A DIGEST OF THE STATUTES OF ARKANSAS, LITTLE ROCK: MITCHELL & BETTIS, SEAM BOOK AND JOB PRINTERS, 1884, ch. XX, § 566.

86. *Quoted in* St. Louis & S. F. R. Co. v. Yount, 1911 OK 480, 30 Okla. 371, 120 P. 627, 629.

> branches, they brought into Oklahoma, with them, the established principles and rules of the common law, as recognized and promulgated by the American courts, and as it existed when imported into this country by our early settlers, and unmodified by American or English statutes.[87]

Thus, the question becomes whether *prima facie* tort was a part of the common law in the early 1890's. The answer is not particularly clear. While Holmes' *The Common Law* was published in 1881, *Privilege, Malice, and Intent* did not go to press until 1894—after the latest potential date of adoption. However, the primary cases on which Holmes relied, *Walker* v. *Cronin* and *Mogul Steamship Co.* v. *McGregor*, were issued in 1871 and 1889, respectively. In addition, Pollack's seminal paper was published in 1887, again, predating the Indian Territory adoption of the common law. To further complicate matters, one must appreciate that, prior to this formulation and the general shift in tort theory, "numerous decisions . . . had articulated the principle that the infliction of injury without justification as actionable"—a position potentially construed as imposing strict liability.[88] Thus, to some degree, the *prima facie* tort, with its intent requirement, could be seen as narrowing the construction of the common law, without which courts would be required to impose strict liability on a much broader scale than most would find acceptable in today's practice.

This, however, appears to be a case where the proof is in the proverbial pudding, as Oklahoma courts have, in fact, repeatedly applied the *prima facie* tort doctrine.[89] Thus, even if their precedential value is ignored, they provide evidence that the common law included the *prima facie* tort concept when adopted in Oklahoma. Indeed, the Oklahoma Supreme Court, in *Hibbard v. Halliday*, explicitly relied on the seminal case of *Aikens v. Wisconsin*, when it stated: "At common law there was a cause of action whenever one person did damage to another willfully and intentionally, and without just cause or excuse."[90]

V. THE *PRIMA FACIE* TORT IN MODERN COURTS

While a significant number of jurisdictions have been identified as recognizing the *prima facie* tort doctrine,[91] only three states have detailed recent case law on the topic.

87. McKennon v. Winn, 33 P. 582, 585 (Okla. 1893). *See also*, Reaves v. Reaves, 82 P. 490, 494 (Okla. 1905) ("The canon and civil laws as they were administered in England were brought here by the early settlers of this country, and were regarded by them as parts of the common law, and have been adopted and used in all cases to which they were applicable, and whenever there have been conditions existing to call for their use. When it is conceded that these laws were a part of the common law of England, and were brought to this country by our ancestors, then it must follow that these laws have become, and are now, a part of the laws of Oklahoma."); Wright v. Grove Sun Newspaper Co., 873 P.2d 983, 996 (Okla. 1994) (Summers, J., concurring in part, dissenting in part).

88. Vandevelde, *supra* note 7, at 477 ("If taken at face value, this principle created a general theory of strict liability. At least where the common law forms of action were in place, however, the scope of this principle was limited by the requirement that the plaintiff plead facts which would state a case of action in trespass or case.").

89. Interestingly, a number of academic sources have identified Oklahoma as a jurisdiction recognizing the cause of action. Speiser et al, *supra* note 42, § 35:8; Kenneth J. Vandevelde, *The Modern Prima Facie Tort Doctrine*, 79 Ky. L. J. 519, 526 (Spring 1990/1991). James P. Bieg, *Prima Facie Tort Comes to New Mexico: A Summary of Prima Facie Tort Law*, 21 N.M. L. Rev. 327, 343 (1991); 52 Colum. L. Rev. at 504.

90. 158 P. at 1159.

91. For example, Speiser, *supra* note 42, § 35:8 provides that "Courts deciding cases under the law of Arizona, California, Connecticut, Delaware, the District of Columbia, Georgia, Hawaii, Idaho, Illinois, Massachusetts, Minnesota, Ohio, Oklahoma, Pennsylvania, Puerto Rico, South Dakota, Tennessee, and the Virgin Islands have applied the prima facie tort doctrine either explicitly or by implication, or at least in arrow circumstances."

New York has the most developed body of case law on *prima facie* tort. It also has the most restrictive version of the tort. "The requisite elements of a cause of action for prima facie tort are (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful."[92]

Of chief importance is the requirement that "there is no recovery in prima facie tort unless malevolence is the sole motive for defendant's otherwise lawful act or unless defendant acts from disinterested malevolence."[93] Additionally, New York requires that there not be a traditional tort, which provides the remedy.[94]

As described by one commentator, Missouri "examined the New York experience and the Restatement Second, Torts view and fashioned a prima facie tort doctrine that combined the fundamental policy view of the Restatement with the analytically consistent aspects of the New York experience."[95] Missouri has formulated the following requirements for its version of the tort: "The elements of a prima facie tort claim are: (1) an intentional lawful act by defendant; (2) defendant's intent to injure the plaintiff; (3) injury to the plaintiff; and (4) an absence of or insufficient justification for defendant's act."[96]

Similarly, the New Mexico Supreme Court has held: "The theory of a prima facie tort is that a party intending to cause injury to another should be liable if the conduct is culpable and unjustifiable," [97] espousing the following elements to establish the tort:

> The generally recognized elements of the tort are (1) an intentional and lawful act; (2) an intent to injure the plaintiff; (3) injury to the plaintiff as a result of the act; and (4) the absence of sufficient justification for the act. Our Supreme Court has emphasized that the tort is to be applied narrowly.[98]

Importantly, both Missouri and New Mexico have rejected New York's "disinterested malevolence" requirement—that intent to harm be the sole motivation for the action—in favor of the balancing approach of the Restatement regarding prima facie tort,[99]

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92. Miller v. Walters, 997 N.Y.S.2d 237, 246 (Sup. Ct. 2014), (quoting *Freihofer v. Hearst Corp.*, 480 N.E.2d 349 (1985)); Burns Jackson Miller Summit & Spitzer v. Lindner, 451 N.E.2d 459 (N.Y. 1983).

93. *Id.*

94. *See e.g.*, *Freihofer v. Hearst Corp.*, 480 N.E.2d 349, 355 (N.Y. 1985) ("[P]rima facie tort should not become a catch-all alternative for every cause of action which cannot stand on its own legs. Where relief may be afforded under traditional tort concepts, prima facie tort may not be invoked as a basis to sustain a pleading which otherwise fails to state a cause of action in conventional tort.").

95. Speiser et al, *supra* note 42, § 35:7.

96. Nazeri v. Missouri Valley Coll., 860 S.W.2d 303, 315 (Mo. 1993) (citing *Bandag of Springfield, Inc. v. Bandag, Inc.*, 662 S.W.2d 546, 552 (Mo. Ct. App. 1983)); Porter v. Crawford & Co., 611 S.W.2d 265, 268 (Mo.App.1980); *see also*, Philips v. Citimortgage, Inc., 430 S.W.3d 324, 332 (Mo. Ct. App. 2014).

97. Saylor v. Valles, 63 P.3d 1152, 1159(N.M. 2003) (citing Schmitz v. Smentowski, 785 P.2d 726, 734 (N.M. 1990)); *Lexington Ins. Co. v. Rummel*, 945 P.2d 992 (N.M. 1997). The New Mexico and Missouri approaches to prima facie torts have been described as "nearly identical." James P. Bieg, *Prima Facie Tort Comes to New Mexico: A Summary of Prima Facie Tort Law*, 21 N.M. L. Rev. 327, 349 (1991).

98. *Saylor*, 63 P.3d at 1159.

99. *Schmitz*, 785 P.2d at 735; Torres v. El Paso Elec. Co., 987 P.2d 386, 405 (N.M. 1999) *overruled on other grounds by* Herrera v. Quality Pontiac, 73 P.3d 181 (N.M. 2003); *Nazeri*, 860 S.W.2d at 315; LPP Mortgage, Ltd. v. Marcin, Inc., 224 S.W.3d 50, 54 (Mo. Ct. App. 2007).

that is, Missouri and New Mexico have applied § 870 with the additional New York requirement that no other traditional tort remedy be available.[100]

VI. CONCLUSION – APPLICATION OF THE *PRIMA FACIE* DOCTRINE IN OKLAHOMA

Given the Court of Civil Appeal's competing opinions and the lack of recent guidance from the Oklahoma Supreme Court, application of the *prima facie* tort lies with those sharing the courtroom on a regular basis. There would seem to be very little rationale to reject the "*prima facie* tort" in modern practice. It is consistent with the broad principles of law that the courts apply every day across Oklahoma, the United States and other common law systems. The theory was originally developed to explain the commonalities shared by all intentional torts. Moreover, negligent torts follow a very similar pattern—there are not statutes or cases purporting to comprehend all negligent acts. Rather, the trier of fact, in many circumstances, must weigh the conduct of the defendant and determine whether a duty exists. If it does, then the trier must determine whether the defendant breached that duty. Similarly, courts will grant equitable relief to correct certain wrongs that they cannot address otherwise. There is no hard and fast rule that defines the outer boundaries of equity. The same principles are at work with *prima facie* tort. Society simply does not condone conduct when the actor intends harm without good reason. At its core, that is exactly what we want our legal system to address.

Oklahoma should look to its nearby sister states to the west and northeast for guidance in applying the tort. After all, both New Mexico and Missouri have cited Oklahoma in their efforts to define the scope of the *prima facie* tort.[101] Indeed, in *Fulton*, the Oklahoma Court of Civil Appeals—without citing to either jurisdiction, essentially applied the same approach—looked to the Restatement position with the caveat that a more specific tort could not be available.[102] Nonetheless, Oklahoma is sorely in need of an opinion from its highest court clarifying the current state of the *prima facie* tort. Until then, and in an effort to afford the Oklahoma Supreme Court the opportunity to render such guidance, each party involved in the litigation process should ensure the tort is properly applied. Plaintiff's counsel, as the proponent of the tort's application, bears the initial responsibility of ensuring the claim is only presented where there is a reasonable basis to conclude: (1) the act was committed intentionally and maliciously *i.e.,* without sufficient justification; and (2) the facts fall outside the scope of existing remedies. Defense counsel must ensure that the elements of the tort are properly applied, with a significant focus on the reasons behind the defendant's conduct given that the tort specifically allows for recovery even though the party might have some general right to act (total lack of justification would

100. *Bandag*, 662 S.W.2d at 552 ("Having carefully considered the applicable precedents, we conclude that if, at the close of all the evidence, plaintiff's proof warrants submission under an existing, well-defined nominate tort cause of action, the action may not be submitted under the prima facie tort doctrine."); *Bradley v. Lovelace Sandia Health Sys.*, No. 27,936, 2009 WL 6667452, at *3 (N.M. Ct. App. Nov. 13, 2009) ("Prima facie tort may be pled in the alternative, but if the district court determines that the facts of the case would be more properly submitted under an established tort, it must dismiss the claim."). *See also*, Kenneth J. Vandevelde, *The Modern Prima Facie Tort Doctrine*, 79 Ky. L. J. 519, 547 (Spring 1990/1991).

101. *Bandag*, 662 S.W.2d at 552; *Schmitz*, 785 P.2d at 734 (both discussing *Mangum*).

102. *Fulton*, 241 P.3d at 266-267; *see also*, *Rollins*, 2014 WL 1466487 at *2 ("Thus the *Fulton* court appears to have affirmed the viability of the tort of malicious wrong *unless* a more specific claim for intentional interference with economic relations has been pled."); *Myers*, 2011 WL 39039, at *2.

seem to arise only on the rarest of occasions). Courts, at both the trial and appellate levels should not permit unfettered expansion of the tort. They must, for example, be vigilant to reject the use of the tort merely as a means to evade the stringent requirements of other theories of recovery, particularly given that Justice Holmes originally derived the tort, at least in part, as a means to reign in judicial activism. Similar to equitable relief, courts should only present a *prima facie* tort theory to a jury where a more defined tort is not applicable.

Oklahoma has historically recognized the existence of a tort for malicious wrong, although notably without using the term "*prima facie* tort." If properly applied, the tort, regardless of the semantic designation, will continue to fill an important, albeit very limited, role in modern jurisprudence.