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Tort Law—Tortious Interference with Contract: The Arkansas Supreme Court Clarifies Who Has the Burden and What They Have to Prove. *Mason v. Wal-Mart Stores, Inc.*, 333 Ark. 3, 969 S.W.2d 160 (1998).

Odette Woods

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TORT LAW—TORTIOUS INTERFERENCE WITH CONTRACT: THE ARKANSAS SUPREME COURT CLARIFIES WHO HAS THE BURDEN AND WHAT THEY HAVE TO PROVE. *MASON V. WAL-MART STORES, INC.*, 333 Ark. 3, 969 S.W.2d 160 (1998).

I. INTRODUCTION

In *Mason v. Wal-Mart*,¹ the Arkansas Supreme Court held that for a claim of tortious interference to be actionable, the plaintiff must prove that the defendant's conduct was at least improper.² The decision represents an attempt by the court to limit expansion of the tort of interference with a contractual or business expectancy.³ It also suggests that the underlying policy tension between competitiveness and protecting contractual relationships is moving in the direction of encouraging competition.⁴

This note reviews the significant facts of the *Mason* decision. It then examines the history of the tort of interference with a contractual relationship or business expectancy in Arkansas and highlights key decisions. It concludes with an analysis of the court's reasoning and a discussion of the significance of *Mason v. Wal-Mart*.

II. SUMMARY OF FACTS

A. Relevant Facts

John Mason worked as an independent manufacturer's sales representative for Century Products Company ("Century") and Pentech International ("Pentech").⁵ He also represented Okla Homer Smith Manufacturing Company ("Okla Homer").⁶ These vendors had accounts with Wal-Mart Stores, Inc. ("Wal-Mart").⁷ Mason served as the vendors' sales representative

1. 333 Ark. 3, 969 S.W.2d 160 (1998).

2. *See id.* at 7, 969 S.W.2d at 162.

3. *See* Elisa Masterson White, Comment, *Arkansas Tortious Interference Law: A Proposal for Change*, 19 U. ARK. LITTLE ROCK L.J. 81, 102 (1996). White points to the danger of labeling legitimate business practices tortious by expanding tort liability for interference torts while at the same time leaving them largely undefined. *See id.* White urged Arkansas courts to require the plaintiff to bear the burden of proving improper interference by the defendant and to define what behavior constitutes improper conduct. *See id.* at 108. White further opined that this would insure freedom of movement within the economy and serve to encourage an efficient allocation of resources. *See id.*

4. *See* White, *supra* note 3, at 101.

5. *See Mason*, 333 Ark. at 5, 969 S.W.2d at 160-61.

6. *See id.*, 969 S.W.2d at 161.

7. *See id.* at 5, 969 S.W.2d at 160. Throughout this note, the terms manufacturer, vendor, and supplier are used interchangeably to refer to Okla Homer, Century, and Pentech.

to Wal-Mart on an at-will contractual basis.⁸ He alleged that his contracts with Century and Okla Homer were effective from July 1967 until early 1992.⁹ Mason's contract with Pentech allegedly ran from August 1980 until December 1991.¹⁰

For more than ten years, Wal-Mart demonstrated its discontent with dealing indirectly with vendors through independent manufacturer representatives.¹¹ On November 6, 1991, Wal-Mart, through its president and CEO, sent a letter telling vendors of Wal-Mart's decision to deal directly with the vendors' principals.¹² The letter included a definition of the term principal.¹³ The definition specifically excluded persons who claimed they had a principal relationship with one or more companies, and implied that Wal-Mart would no longer deal with independent manufacturer representatives.¹⁴ After Wal-Mart issued the letter, Century, Pentech and Okla Homer removed Mason from their Wal-Mart accounts.¹⁵ Century re-assigned Mason to other accounts, but Pentech terminated Mason because his service for Pentech was on the Wal-Mart account.¹⁶

B. Procedural History

Mason sued Wal-Mart after his relationship with the vendors ended.¹⁷ He alleged that he had a contract with the vendors to act as their Wal-Mart representative.¹⁸ Mason asserted that Wal-Mart had interfered with his

8. *See id.*, 969 S.W.2d at 161.

9. *See id.* at 6, 969 S.W.2d at 161.

10. *See id.*, 969 S.W.2d at 161.

11. *See Mason*, 333 Ark. at 5, 969 S.W.2d at 161.

12. *See id.*, 969 S.W.2d at 161; Brief for Appellee at 27-28, *Mason v. Wal-Mart Stores, Inc.*, 333 Ark. 3, 969 S.W.2d 160 (1998) (No. 96-01351). Wal-Mart asserted that the letter was not sent to Pentech or Okla Homer Smith, only Century. It further stated that Century did not terminate its relationship with Mason as a result of the letter. Century simply assigned Mason to deal with other Century accounts. Wal-Mart stated Mason voluntarily resigned from representing Century shortly after Century decided to deal directly with Wal-Mart. *See* Brief for Appellee at 27-28, *Mason* (No. 96-01351).

13. *See Mason*, 333 Ark. at 5, 969 S.W.2d at 161. "The letter defined a 'principal' as 'an employee of your company empowered to make decisions and act on your behalf.'" *Id.*, 969 S.W.2d at 161.

14. *See id.*, 969 S.W.2d at 161. The letter told vendors someone from Wal-Mart would contact them within the next few weeks. Once contacted, the vendor was to inform the person whether the vendor agreed with Wal-Mart's decision to deal directly with the vendor's principal. *See id.*, 969 S.W.2d at 161.

15. *See id.*, 969 S.W.2d at 161.

16. *See id.*, 969 S.W.2d at 161. Okla Homer's president testified that he continued to deal with Wal-Mart himself, as he always had. *See id.* at 5-6, 969 S.W.2d at 161.

17. *See id.* at 6, 969 S.W.2d at 161.

18. *See id.* at 6, 969 S.W.2d at 161.

contractual relationship and business expectancy by using its economic powers to coerce suppliers to deal directly with Wal-Mart rather than through him.¹⁹

The Crittenden County, Arkansas Circuit Court said that for an interference to be actionable, it must be improper.²⁰ The court granted summary judgment in favor of Wal-Mart, holding that Mason did not prove that Wal-Mart's conduct was improper, a necessary element of his claim.²¹ Because Mason did not present proof of an essential element, the trial court found that this entitled Wal-Mart to a judgment as a matter of law.²²

Mason appealed the summary judgment to the Arkansas Supreme Court, raising two arguments.²³ First, Mason argued that the trial court improperly required him to prove an element of intentional interference with a contractual relationship that Arkansas law does not require: that the defendant's conduct was improper or wrongful.²⁴ Second, Mason argued that, even if Arkansas law required he prove that Wal-Mart acted improperly, he had provided sufficient evidence to create a genuine issue of material fact as to improper conduct on Wal-Mart's part.²⁵

The Arkansas Supreme Court held that a claim of interference with a contractual relationship requires that the plaintiff prove that the defendant's conduct was at least improper.²⁶ Because the trial court concluded that Mason

19. See *id.* at 6, 969 S.W.2d at 161; Brief for Appellant at 72, *Mason v. Wal-Mart Stores, Inc.*, 333 Ark. 3, 969 S.W.2d 160 (1998) (No. 96-01351). Mason claimed that Wal-Mart was able to exert economic coercion on the vendors because of the substantial volume of business Wal-Mart conducted with each vendor. Specifically, Wal-Mart's account with Century represented 15% to 20% of all Century sales; its account with Pentech represented 25% of Pentech's total sales; and Wal-Mart's account with Okla Homer Smith represented 25% to 30% of its sales. Mason asserted that because of Wal-Mart's sheer economic influence over each vendor's business, the vendors had no choice but to deal with Wal-Mart in the manner Wal-Mart preferred. See Brief for Appellant at 72, *Mason* (No. 96-01351).

20. See *Mason*, 333 Ark. at 6-7, 969 S.W.2d at 161.

21. See *id.* at 6, 969 S.W.2d at 161.

22. See *id.*, 969 S.W.2d at 161. The trial court did not address Wal-Mart's assertion of privilege. Because both the trial court and the appellate court did not address this issue, this note will not include a discussion of the privilege assertion.

23. See *id.* at 7, 969 S.W.2d at 162.

24. See *id.*, 969 S.W.2d at 162.

25. See *id.*, 969 S.W.2d at 162. The evidence Mason referred to was the letter sent by Mr. Glass, CEO of Wal-Mart, and a 1982 incident where an employee of Wal-Mart allegedly asked Century to end its relationship with Mason and transfer any savings it gained by the termination to Wal-Mart. See *id.* at 6, 969 S.W.2d at 161. While the trial court conceded that economic pressure could be improper conduct, it found that Wal-Mart's competitive conduct was not improper, because it was neither illegal nor independently actionable. See *id.* at 6-7, 969 S.W.2d at 161-62.

26. See *Mason*, 333 Ark. at 7, 969 S.W.2d at 162.

did not show that Wal-Mart's conduct was improper, the Arkansas Supreme Court affirmed the grant of summary judgment.²⁷

III. BACKGROUND

A. General Background

Tortious interference had its origin in early Roman law, where it allowed the head of a household to bring an action against a person who injured any member of his household.²⁸ It later expanded to allow a master to recover for the loss of service when someone inflicted injury upon his servant.²⁹ Liability grew when England introduced compulsory labor to combat a severe labor shortage and gave a remedy to an employer whose employee left to work for someone else.³⁰

*Lumley v. Gye*³¹ extended the doctrine beyond a master-servant relationship. *Lumley*, which dealt with an opera singer who was under contract to sing in the plaintiff's theater and was induced by the defendant to breach her agreement, is credited with beginning the doctrine of tortious interference with a contract.³² A defendant may either be liable for interfering with an existing contract between the plaintiff and a third person, or for interfering with the plaintiff's expected economic gain.³³ A tortious interference claim may lie in tort, which will allow punitive damages, or contract, which seeks to give parties the benefit of their bargain.³⁴

27. See *id.* at 4-5, 969 S.W.2d at 160.

28. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 129, at 979-80 (5th ed. 1984).

29. See KEETON ET AL., *supra* note 28, at 980.

30. See KEETON ET AL., *supra* note 28, at 980; see also Dan B. Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335, 340 (1980).

31. 118 Eng. Rep. 749 (Q.B. 1853).

32. See KEETON ET AL., *supra* note 28, at 980.

33. See KEETON ET AL., *supra* note 28, at 978.

34. See, e.g., *L.L. Cole & Son, Inc. v. Hickman*, where the court addressed a tortious interference of an existing contract or business expectancy action in tort or contract. 282 Ark. 6, 665 S.W.2d 278 (1984). The court held that a plaintiff alleging tortious interference "must specifically plead and prove his cause of action in tort in order to be awarded punitive damages." *Id.* at 10, 665 S.W.2d at 281. Otherwise, the court would assume the action was in contract. See *id.* at 10, 665 S.W.2d at 281.

B. Tortious Interference with Contract—Infancy Stage in Arkansas History

Early Arkansas tortious interference with contract cases required malice or willful interference, with the burden of proof on the plaintiff.³⁵ In *Mahoney v. Roberts*,³⁶ Roberts sued Mahoney, along with Mahoney's wife and stepson, for intentional interference with contract containing a covenant not to compete.³⁷ The court found the defendants were liable because their actions were done with the intent to injure Roberts or to gain some benefit at Roberts' expense.³⁸

In *Mason v. Funderburk*,³⁹ the Arkansas Supreme Court stated that a malicious act does not require actual malice (i.e. spite, ill will); rather, it requires legal malice (an intentional doing of something harmful, without justification or excuse).⁴⁰ The court acknowledged that recovery of damages is allowed when a person, without privilege, purposely causes another not to enter into or continue a business relationship with a third party, if the inducement is tortious.⁴¹ In *Elliott v. Elliott*,⁴² the court cited *Funderburk* and reinforced the notion that malice is a necessary requirement of the tort of wrongful interference with the contractual rights and business relationships of another.⁴³

35. See generally *Mahoney v. Roberts*, 86 Ark. 130, 110 S.W. 225 (1908); *Mason v. Funderburk*, 247 Ark. 521, 446 S.W.2d 543 (1969); *Elliott v. Elliott*, 252 Ark. 966, 482 S.W.2d 123 (1972).

36. 86 Ark. 130, 110 S.W. 225 (1908).

37. See *id.* at 136, 110 S.W. at 226.

38. See *id.* at 139, 110 S.W. at 228.

39. 247 Ark. 521, 446 S.W.2d 543 (1969).

40. See *id.* at 526, 446 S.W.2d at 546. The court also recognized a tortious interference of contract claim as including situations where the employment is for an unexpired fixed term or terminable at-will. See *id.* at 526, 446 S.W.2d at 546. Fred Mason was a district manager who worked for Field Enterprises Education Corporation. He sold encyclopedias and dictionaries on a commission basis in northeast Arkansas. His contract was terminable at will upon 30 days notice by either party. Mason became a member of the local school board and began to have problems with other board members, a school superintendent, and a school principal. As a result of the conflict, the school superintendent sent letters to Mason's employer, asking Field Enterprises to fire Mason and also stating that he would not buy a new set of encyclopedias from the company through Mason. Field Enterprises, through its agent, Funderburk, terminated Mason's contract. See *id.* at 523, 531, 446 S.W.2d at 545, 549.

41. See *id.* at 525-26, 446 S.W.2d at 546 (citing RESTATEMENT OF TORTS § 766 cmts. (1939)). In discussing what is meant by tortious behavior, the Restatement gives examples of intimidation, fraud, or other wrongful behavior that A uses to coerce B to choose one course of conduct over the other. See RESTATEMENT OF TORTS § 766 cmts. (1939).

42. 252 Ark. 966, 482 S.W.2d 123 (1972).

43. See *id.* at 974, 482 S.W.2d at 128.

The rationale for the early endorsement of malice or wilful interference as a requirement of tortious interference with a contract was based on the premise that the right to perform a contract and reap the benefits derived from it was a property right which entitled each party of a contract to its fulfillment.⁴⁴ This fundamental right was reiterated in *Mason v. Funderburk*, where the court stated that a person has a right to pursue valid contractual and business expectancies free from wrongful and officious intermeddling by third parties.⁴⁵

C. Growing Pains—Expand or Constrict Defendant's Liability?

In *Stebbins & Roberts, Inc. v. Halsey*,⁴⁶ the Arkansas Supreme Court announced a new development in tortious interference with contract claims by beginning a shift away from requiring the plaintiff to prove the defendant acted with malice or wilful intention as an element of the tort.⁴⁷ The court adopted the approach of Prosser and stated that intentional interference with the contractual rights of another is prima facie sufficient for liability.⁴⁸ Once the plaintiff proved intentional interference, the burden shifted to the defendant to prove privilege.⁴⁹ The approach adopted in *Stebbins* created a new emphasis on the purpose or object which the defendant sought to advance.⁵⁰ It also upheld the ethical concept that a competitor should have a "hands off" approach to the contracts of others and stressed that existing contracts take precedent over an interest in unbridled competition.⁵¹ After *Stebbins*, Arkansas courts recognized four elements that a plaintiff had to prove in a tortious interference with an existing contract or a business

44. See *Mason v. Funderburk*, 247 Ark. at 526, 446 S.W.2d at 546-47; see also White, *supra* note 3, at 93-94.

45. See *Mason v. Funderburk*, 247 Ark. at 527, 446 S.W.2d at 547. The court also stated that just because employment is at the will of the parties does not make it subject to the will of others. See *id.* at 528, 446 S.W.2d at 548.

46. 265 Ark. 903, 582 S.W.2d 266 (1979).

47. See *id.* at 907, 582 S.W.2d at 268.

48. See *id.* at 906-07, 582 S.W.2d at 267-68. The approach was also recognized in RESTATEMENT OF TORTS § 766, which imposed liability for any intentional interference without justification or defense. See RESTATEMENT OF TORTS § 766 (1939).

49. See *Stebbins*, 265 Ark. at 907, 582 S.W.2d at 268. The court in *Stebbins* cited Prosser for the proposition that other circumstances may privilege the defendant's conduct when she acts to her own advantage. See also PROSSER, LAW OF TORTS § 129 (4th ed., 1971). For example, a defendant is privileged to prevent the performance of a contract that threatens an existing economic interest. A privilege does not exist, however, if defendant's interest is simply to protect a prospective advantage, such as business competition. See *Stebbins*, 265 Ark. at 906, 582 S.W.2d at 267.

50. See *id.*

51. See *id.* at 906-07, 582 S.W.2d at 267.

expectancy as including: (1) the existence of a valid contractual business relationship or expectancy; (2) the defendant's knowledge of the relationship or expectancy; (3) intentional interference that induced or caused a breach of the relationship or expectancy; and (4) damage to the party who experienced a disruption of the relationship or expectancy.⁵²

The Arkansas Supreme Court appeared to reintroduce the element of bad faith in *Walt Bennett Ford, Inc. v. Pulaski County Special School District*,⁵³ where the appellee brought an action as a result of an unsuccessful bid on a school contract. The court held that the school officials were not liable because they did not act in bad faith and their interference was privileged as protecting the public interest.⁵⁴ The court then issued a supplemental opinion that reiterated the general rule announced in *Stebbins* that bad faith or improper motive is not an essential element of plaintiff's claim of interference with existing contractual relations and that the burden shifts to the defendant to show her conduct was privileged.⁵⁵ The court distinguished *Walt Bennett* from *Stebbins* and stated that *Walt Bennett* dealt with interference with a business expectation and not an existing contract.⁵⁶ The court stated that the primary difference between an interference with an existing contract and an interference with a business expectancy is that the tort of interference with business expectations allows more privileges.⁵⁷

52. See *Walt Bennett Ford, Inc. v. Pulaski County Special Sch. Dist.*, 274 Ark. 208, 214, 624 S.W.2d 426, 429 (1981). See also *W.E. Long Co. v. Holsum Baking Co.*, 307 Ark. 345, 820 S.W.2d 440 (1991); *Mid-South Bev., Inc. v. Forrest City Grocery Co.*, 300 Ark. 204, 778 S.W.2d 218 (1989); *Jim Orr & Assocs., Inc. v. Waters*, 299 Ark. 526, 773 S.W.2d 99 (1989); *Kinco Inc. v. Schueck Steel, Inc.*, 283 Ark. 72, 671 S.W.2d 178 (1984). These cases list the four elements of tortious interference with contract and state that bad faith is not a requirement, but that the defendant can show privilege. But see *United Bilt Homes, Inc. v. Sampson*, 310 Ark. 47, 832 S.W.2d 502 (1992), for a momentary retreat from *Stebbins*. The court in *United* defined tortious interference with contract as imposing liability on someone who intentionally and with malice interferes. It also stated that punitive damages could be awarded if a person maliciously interferes. In *United, Sampson*, a person whose home was damaged by a fire, filed a claim against the mortgagee, United Bilt, saying that United Bilt interfered with a contractual relationship Sampson had with a third party to repair the home. The court held that United Bilt's interference was wrongful and that the defendant's conduct forced Sampson to breach his contract. See *United*, 310 Ark. at 51-52, 832 S.W.2d at 503-04.

53. 274 Ark. 208, 624 S.W.2d 426 (1981).

54. See *id.* at 214, 624 S.W.2d at 429.

55. See *id.* at 214-A, 624 S.W.2d at 429.

56. See *id.* at 214-A-B, 624 S.W.2d at 429.

57. See *id.* at 214-B, 624 S.W.2d at 430. The court cited PROSSER, THE LAW OF TORTS, 749 (2d ed. 1955), HARPER & JAMES, THE LAW OF TORTS, § 6.12 (1956), and RESTATEMENT OF TORTS § 767, cmt. d (1939) to support the proposition that a protection of a public interest is recognized as affording a privilege to acts of interference. See *Walt Bennett*, 274 Ark. at 214-B, 624 S.W.2d at 430.

The Arkansas Model Jury Instructions, Civil adopted the *Stebbins* approach in AMI 406, Interference with Contractual Relationship or Business Expectancy.⁵⁸ The approach received criticism from several sources, however.⁵⁹ It was criticized primarily because it placed liability on a defendant without giving her notice that the conduct was prohibited or permitted, and required the defendant to justify her behavior without specifying what constituted justification.⁶⁰ The defendant was left knowing that she was entitled to a defense, although it remained ambiguous as to what would suffice as an acceptable one.⁶¹ Also, the claimant in a tortious interference with contract complaint did not have to prove in any way that the interference was improper as part of her prima facie case.⁶² The plaintiff was only required to show: (1) the existence of a contractual relationship or business expectancy, (2) that the defendant intended to interfere with her interest, and (3) the defendant did in fact interfere.⁶³

D. All Grown Up—Burden on Plaintiff to Show Conduct Improper

The Arkansas Supreme Court abandoned the *Stebbins* approach in *Fisher v. Jones*.⁶⁴ In *Fisher*, the court held that for a tortious interference of contract claim to be actionable, it must be improper.⁶⁵ The court erroneously cited *Walt Bennett* as holding that conduct must be improper for an interference to be actionable.⁶⁶ Although the *Fisher* court introduced impropriety, it did not

58. ARKANSAS MODEL JURY INSTRUCTIONS, CIVIL 3d., § 406 (1995 Supp.). AMI 406 lists five essential elements that a plaintiff has to prove: (1) that she sustained damages; (2) that she had a valid contractual relationship or business expectancy; (3) that the defendant had knowledge of the contractual relationship and/or business expectancy; (4) that by intentional interference the defendant induced or caused a disruption or termination of the contractual relationship and/or business expectancy; and (5) that the disruption or termination was a proximate cause of the plaintiff's damages. The defendant could claim the conduct was privileged as an affirmative defense to the plaintiff's claim. If the defendant claimed this defense, the defendant bore the burden of proof. Although AMI 406 lists five elements, courts often combine elements (1) and (5) and refer to four elements of the tort.

59. See generally KEETON ET AL., *supra* note 28, at 983-84 & n.61-62; see also Dobbs, *supra* note 30, at 335; White, *supra* note 3, at 81.

60. See KEETON ET AL., *supra* note 28, at 983.

61. See Dobbs, *supra* note 30, at 345.

62. See White, *supra* note 3, at 81.

63. See White, *supra* note 3, at 87.

64. 311 Ark. 450, 844 S.W.2d 954 (1993).

65. See *id.* at 458, 844 S.W.2d at 959. But see *Nicholson v. Simmons First Nat'l Corp.*, 312 Ark. 291, 849 S.W.2d 483 (1993); *Belin v. West*, 315 Ark. 61, 864 S.W.2d 838 (1993). In both cases the court listed four elements of tortious interference that the plaintiff is required to prove and does not list improper conduct by defendant as an element of the action.

66. See *Fisher*, 311 Ark. at 458, 844 S.W.2d at 959. The supplemental opinion in *Walt Bennett* actually stated, "[t]he general rule is that an improper motive or bad faith is no longer

specifically state which party bore the burden with respect to the propriety of the defendant's conduct.⁶⁷ The court cited the multi-factored test of the Restatement (Second) of Torts to determine when interference is improper.⁶⁸

*Hunt v. Riley*⁶⁹ represents the first instance where the Arkansas Supreme Court imposed the burden of pleading improper conduct by the defendant on the plaintiff.⁷⁰ In *Hunt*, an attorney brought a suit for tortious interference of a business expectancy on behalf of a class of attorneys against several defendants.⁷¹ The plaintiff alleged that the defendants solicited accident victims and referred the victims to specific attorneys.⁷² The Arkansas Supreme Court dismissed the claim because the plaintiff did not allege that the defendants' conduct was improper.⁷³ The court listed the four elements of a tortious interference with contract claim and restated the rule in *Fisher*, which required that interference be improper for a claim to be actionable.⁷⁴ The rules

an essential part of the plaintiff's case in the tort of interference with existing contractual relations." *Walt Bennett*, 274 Ark. 208, 214-A, 624 S.W.2d 426, 429.

67. See *Fisher*, 311 Ark. at 458, 844 S.W.2d at 959.

68. See RESTATEMENT (SECOND) OF TORTS § 767 (1979):

In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:

- a) the nature of the actor's conduct,
- b) the actor's motive,
- c) the interests of the other with which the actor's conduct interferes,
- d) the interests sought to be advanced by the actor,
- e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
- f) the proximity or remoteness of the actor's conduct to the interference and
- g) the relations between the parties.

Id.

In addition, the court also considered RESTATEMENT (SECOND) OF TORTS § 769: One who, having a financial interest in the business of a third person intentionally causes that person not to enter into a prospective contractual relation with another, does not interfere improperly with the other's relation if he (a) does not employ wrongful means and (b) acts to protect his interest from being prejudiced by the relation.

Id.

69. 322 Ark. 453, 909 S.W.2d 329 (1995).

70. See *id.* at 459, 909 S.W.2d at 332.

71. See *id.* at 455, 909 S.W.2d at 330.

72. See *id.* at 456, 909 S.W.2d at 331.

73. See *id.* at 458-60, 909 S.W.2d at 332-33.

74. See *id.* at 458, 909 S.W.2d at 332. But see *Cross v. Arkansas Livestock and Poultry Comm'n*, 328 Ark. 255, 943 S.W.2d 230 (1997); *Brown v. Tucker*, 330 Ark. 435, 954 S.W.2d 262 (1997). In *Cross* and *Brown*, the court listed four elements of a claim for tortious interference with a contract or business expectancy, and does not list or refer to improper conduct by the defendant as a necessary element of the tort. The *Cross* court also cited *United* for the principle that a person who maliciously interferes with the contractual relations of another incurs liability. The court in *Cross* recognized that a contractual relationship does not

announced in *Fisher* and *Hunt* suggested that impropriety was an element of an action for tortious interference with a contract, and that the plaintiff must make the allegation. *Mason v. Wal-Mart* represents the court's effort to crystallize what the elements of the tort are and who bears the burden of proof.

IV. REASONING OF THE COURT

A. Majority Opinion

In *Mason v. Wal-Mart*,⁷⁵ the Arkansas Supreme Court held that a plaintiff in an interference with contract claim must show that the defendant's conduct was at least improper.⁷⁶ The court began with an extensive review of the tort's history in Arkansas law.⁷⁷ It then discussed the three approaches used in Arkansas law at various times to assign liability in an interference with contract claim: (1) requiring plaintiff to show defendant acted maliciously or with bad faith; (2) requiring the plaintiff to show some type of interference and then shifting the burden to the defendant to prove her actions were justified in some way; and (3) requiring the plaintiff to show that the defendant acted improperly.⁷⁸

1. Requirement of Malice or Bad Faith

As outlined by the court, early Arkansas cases on interference with an existing contract claim required that the plaintiff show the interference was

have to exist to maintain an action and stated the premise that a person has a right to pursue a valid contract and/or business expectancy without being bothered by wrongful interference or intermeddling of another. See *Cross*, 328 Ark. at 262, 943 S.W.2d at 234.

75. 333 Ark. 3, 969 S.W.2d 160 (1998).

76. See *Mason*, 333 Ark. at 7, 969 S.W.2d at 162.

77. See *id.* at 7-8, 969 S.W.2d at 162.

78. See *id.*, 969 S.W.2d at 162. See also *Mason v. Funderburk*, 247 Ark. 521, 446 S.W.2d 543 (1969) (requiring plaintiff to establish that defendant acted wrongfully or improperly); *Elliott v. Elliott*, 252 Ark. 966, 482 S.W.2d 123 (1972) (requiring that the interference be malicious); *Stebbins & Roberts, Inc. v. Halsey*, 265 Ark. 903, 582 S.W.2d 266 (1970) (holding that once plaintiff established wrongful intent, the burden shifted to the defendant to show conduct was privileged); *Walt Bennett Ford, Inc. v. Pulaski County Special Sch. Dist.*, 274 Ark. 209, 624 S.W.2d 426 (1981) (holding that the general rule in Arkansas is that bad faith is no longer an essential requirement of an interference with contract claim). *But see* *United Bilt Homes v. Sampson*, 310 Ark. 47, 51, 832 S.W.2d 502, 503 (1992) (imposing liability for malicious interference); *Cross v. Arkansas Livestock & Poultry Comm'n*, 328 Ark. 255, 262, 943 S.W.2d 230, 234 (1997) (citing *United* for the proposition that a person must act maliciously); *Fisher v. Jones*, 311 Ark. 450, 844 S.W.2d 954 (1993) (holding that for an interference with contract claim to be actionable, the conduct must be improper).

wrongful or malicious.⁷⁹ However, this requirement was abandoned.⁸⁰ The court compared language from a former edition of Prosser and Keeton on Torts to the language of a later edition and agreed that malice or spite is not a requirement for liability.⁸¹

2. *Imposing Liability for Any Intentional Interference Resulting in Harm and Requiring that Defendant Prove the Action Was Privileged*

The court next discussed the approach adopted in *Stebbins & Roberts, Inc. v. Halsey*.⁸² Under the *Stebbins* approach, once the plaintiff proved wrongful interference plus damages, the burden shifted to the defendant to prove the existence of a justification or privilege.⁸³ The court rejected the second approach because it entitled the interferer to a defense of privilege or justification without clearly defining what constituted privilege or justification.⁸⁴

3. *Subjecting Defendant to Liability for Knowingly and Purposefully Interfering with a Contract Only When the Plaintiff Can Prove Defendant's Actions Were Improper*

After discussing the two previous approaches and the problems associated with them, the court proceeded to the approach it would embrace: requiring proof of impropriety as an element of a plaintiff's claim of interference with a contractual contract.⁸⁵

The court cited examples of how it had applied the improper conduct concept intermittently in the past, first in *Kinco v. Schueck Steel, Inc.*,⁸⁶ and

79. See *Mason*, 333 Ark at 8, 969 S.W.2d at 162.

80. See *id.* at 10-11, 969 S.W.2d at 163-64 (citing *L.L. Cole & Son, Inc. v. Hickman*, 282 Ark. 6, 8-9, 665 S.W.2d 278, 290 (1984) (holding that bad faith is not a requirement)). The *Mason* court also cited *United Bilt Homes v. Sampson*, 310 Ark. 47, 51, 832 S.W.2d 502-03 (1992).

81. See *Mason*, 333 Ark. at 9-10, 969 S.W.2d at 163; KEETON ET AL., *supra* note 28, at 983-84 & nn.61, 62.

82. 265 Ark. 903, 582 S.W.2d 266 (1979).

83. See *id.* at 907, 582 S.W.2d at 268. For a general discussion of the *Stebbins* approach see *supra* text accompanying notes 46-63.

84. See *Mason*, 333 Ark. at 13, 969 S.W.2d at 165. The court points to language used by Dan B. Dobbs, Professor of Law, University of Arizona, which describes the procedure used in the second approach as "a sorry state of affairs." See Dobbs, *supra* note 30, at 345.

85. See *Mason*, 333 Ark. at 14, 969 S.W.2d at 165.

86. 283 Ark. 72, 671 S.W.2d 178 (1984). In *Kinco*, the court affirmed the lower court's decision for the plaintiff, based on evidence of misconduct by Kinco. See *id.* at 77, 671 S.W.2d at 181.

then in *Fisher v. Jones*.⁸⁷ In addition, the court referenced its affirmance of the lower court's dismissal of the plaintiff's complaint in *Hunt v. Riley*⁸⁸ because the plaintiff failed to allege that the defendant's conduct was improper.⁸⁹ The court noted that the Restatement (Second) of Torts has also endorsed the requirement of improper conduct.⁹⁰ While the court appeared sensitive to the view that a third party should be held liable only if the conduct is independently tortious, it declined to go that far and instead held that the conduct must be at least improper as defined by the factors listed in the Restatement.⁹¹

After the court endorsed the approach requiring that the plaintiff who alleges tortious interference with a contract or business expectancy prove that defendant's conduct was improper, it applied the approach to the facts before it.⁹² The court considered the economic pressure that Wal-Mart allegedly used, applying the factors listed in section 767, comment c of the Restatement (Second) of Torts to determine if the pressure was proper (these factors include the circumstances in which the pressure is exerted, the purpose gained, the amount of force used, the extent of harm threatened, the effect of the pressure upon neutral parties as well as competition and the overall reasonableness of the pressure as a way to accomplish the actor's intention).⁹³ The court then rejected Mason's argument that Wal-Mart's conduct was improper and explained that requiring a jury to evaluate Wal-Mart's conduct in relation to the guidance provided in the Restatement would mandate the same evaluation every time a business refused to do business to obtain a better price.⁹⁴

B. Dissenting Opinion

Justice Glaze dissented and indicated that the court's decision was at odds with the Arkansas Model Instructions and overruled long-standing precedent.⁹⁵ Justice Glaze stated that the court reached its decision through

87. 311 Ark. 450, 844 S.W.2d 954 (1993). The *Fisher* court held that an interference must be improper to be actionable. *See id.* at 458, 844 S.W.2d at 959.

88. 322 Ark. 453, 909 S.W.2d 329 (1995).

89. *See Mason*, 333 Ark. at 13, 969 S.W.2d at 165.

90. *See id.*, 969 S.W.2d at 165.

91. *See id.*, 969 S.W.2d at 165. For a listing of the factors in THE RESTATEMENT (SECOND) OF TORTS §767, *see supra* text accompanying note 68.

92. *See Mason*, 333 Ark. at 14, 969 S.W.2d at 165-66.

93. *See id.*, 969 S.W.2d at 165-66 (citing RESTATEMENT (SECOND) OF TORTS § 767 cmt. c (1979)).

94. *See Mason*, 333 Ark. at 14-15, 969 S.W.2d at 166.

95. *See Mason*, 969 S.W.2d at 166 (Glaze, J., dissenting). Justice Arnold joined in the dissent and both Justice Arnold and Justice Glaze dissented again on the denial of rehearing.

erroneous reliance on *Fisher*, which, according to Justice Glaze, misstated the court's rule in *Walt Bennett*.⁹⁶ Justice Glaze reasoned that the court also erred by relying on *Hunt*, which, citing *Fisher* and *Walt Bennett*, listed the four elements in a tortious interference with contract claim but also said that, in order to claim interference, the conduct must be improper.⁹⁷ Justice Glaze noted, however, that neither *Fisher* nor *Hunt* announced any intention by the court to abandon its general rule established in *Walt Bennett* that a plaintiff did not have to show that the defendant's conduct was improper.⁹⁸ Justice Glaze finally noted that proving that defendant's conduct was improper is not one of the elements that the plaintiff is required to prove under the Arkansas Model Instructions.⁹⁹

V. SIGNIFICANCE

The decision by the Arkansas Supreme Court to require the plaintiff to prove improper conduct in a tortious interference with contract claim has placed Arkansas in line with a majority of jurisdictions in the United States.¹⁰⁰ By doing so, the court changed long standing Arkansas precedent that the plaintiff alleging tortious interference with contractual relations or a business expectancy did not have to prove that the defendant's conduct was in any way malicious, made with bad faith, or improper in order to prevail on a claim. The introduction of a new element that the plaintiff is required to prove creates an inconsistency between the elements specified in the Arkansas Model Jury Instructions, Civil section 406 and the elements now required by the Arkansas Supreme Court.

One potential problem with the use of the term "improper" lies with the vagueness of its definition. The use of the word improper by the court resulted in a vigorous dissent. Justice Glaze felt that the term was ambiguous and suggested that the court require the plaintiff to show that the defendant acted with bad faith.¹⁰¹ The term was also criticized for vagueness by Professor Dobbs, who believed the conduct should be independently actionable to be tortious.¹⁰²

96. *See id.* (Glaze, J., dissenting).

97. *See id.* (Glaze, J., dissenting).

98. *See id.* (Glaze, J., dissenting).

99. *See id.* at 166-67 (Glaze, J., dissenting).

100. *See White, supra* note 3, at 102.

101. *See Mason*, 969 S.W.2d at 167 (Glaze J., dissenting). The term bad faith is defined in ARKANSAS MODEL JURY INSTRUCTIONS, CIVIL, 3d § 407 as "dishonest, malicious, or oppressive conduct carried out with a state of mind characterized by hatred, ill will or a spirit of revenge." *See AMI Civ.3d* § 407.

102. *See Dobbs, supra* note 30, at 335.

In an introductory note on the subject of tortious interference with an existing contract or prospective contractual relations, the drafters of the Restatement explained that they adopted the word improper because it was neutral on its face.¹⁰³ Also, section 870 of the Restatement, which serves as a guide to determine when to impose liability for harm that was intentionally inflicted, requires that a defendant's conduct be culpable and not justifiable.¹⁰⁴ A list of factors, similar to the ones included in section 767 (describing factors to consider to decide if conduct is improper) are included to determine when the defendant's conduct meets this standard.¹⁰⁵ The Restatement, section 766 (defining intentional interference with performance of contract by a third person) is patterned after section 870 and uses the term improper to represent the balancing test between culpable and non-justifiable conduct.¹⁰⁶

The use of the terms "culpable" and "non-justifiable" allowed flexibility in determining who bears the burden of proof. If the plaintiff claimed the conduct was culpable, she bore the burden of proof. On the other hand, if the defendant claimed the conduct was justifiable, the defendant bore the burden. Like section 870, the Restatement section 766 does not identify who bears the burden of proof, recognizing that the burden may shift with the facts presented. By placing the burden of proof directly on the shoulders of the plaintiff, the Arkansas Supreme Court has not allowed the flexibility deemed attractive by the drafters of the Restatement. Instead, the court has sought to clarify what the law regarding tortious interference with a contract in Arkansas is by settling what the requirements of the tort are and who bears the burden of proof.

Allocating the burden of proof to the plaintiff may result in a restriction of tort liability. Professor Dobbs vigorously argued for restricting liability for the tort as necessary for social policy reasons such as encouraging competitiveness in the marketplace, allowing free speech, and maintaining integrity of the legal system.¹⁰⁷ Creating prima facie liability for a defendant whenever the defendant's conduct is deemed intentional discourages competitiveness in the marketplace because it creates a duty upon strangers to a contract.¹⁰⁸

103. See RESTATEMENT (SECOND) OF TORTS, Ch. 37, Introductory Note (1985). In the Introductory Note, the drafters state that their objective was to adopt a word that was neutral on its face. The neutrality of the word improper serves two functions. First, it allows the word to have a special meaning not identifiable by any other tort. Second, it does not suggest on its face whether a matter at issue is part of a plaintiff's or a defendant's case. This eliminated such words as unreasonable, unfair, undue, unjust, inequitable and unjustified.

104. See RESTATEMENT (SECOND) OF TORTS § 870 (1984).

105. See *id.*

106. See RESTATEMENT (SECOND) OF TORTS § 766 Introductory Note (1984).

107. See Dobbs, *supra* note 30, at 335.

108. See Dobbs, *supra* note 30, at 335.

Through its decision in *Mason*, the Arkansas Supreme Court appears to be encouraging uninhibited competitiveness so long as the competition is neither illegal nor improper.

Odette Woods

