



YATES v. GANNETT CO.

2022 OK CIV APP 41

Case Number: 119414

Decided: 11/15/2021

Mandate Issued: 12/15/2022

DIVISION I

THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA, DIVISION I



Cite as: 2022 OK CIV APP 41, ___ P.3d ___

TRAVIS YATES, an individual, Plaintiff/Appellant,

v.

GANNETT CO., INC., a Delaware Corporation d/b/a THE MIAMI NEWS-RECORD; GATEHOUSE MEDIA OKLAHOMA HOLDINGS, INC. d/b/a THE MIAMI-NEWS RECORD; COMCAST CORPORATION, a Pennsylvania corporation; NBCUNIVERSAL MEDIA, LLC; PUBLIC RADIO TULSA d/b/a KWGS FM 89.5, an Oklahoma resident; and CHRIS POLANSKY, an Oklahoma resident, individually and as an Employee of Public Radio Tulsa, Defendants/Appellees.

APPEAL FROM THE DISTRICT COURT OF
ROGERS COUNTY, OKLAHOMA

HONORABLE SHEILA CONDREN, TRIAL JUDGE

AFFIRMED

Douglas E. Stall, DOUGLAS E. STALL, PLLC, Tulsa, Oklahoma, and
J. Schaad Titus, Dallas L. Jones, TITUS HILLIS REYNOLDS LOVE, Tulsa, Oklahoma, for Plaintiff/Appellant,

S. Douglas Dodd, Anna M. Sanger, DOERNER, SAUNDERS, DANIEL & ANDERSON, Tulsa, Oklahoma, for
Defendant/Appellee Public Radio Tulsa and Chris Polansky, and

Robert D. Nelon, John Epstein, HALL ESTILL, Oklahoma City, Oklahoma, Molly Aspan, HALL ESTILL, Tulsa, Oklahoma, for
Defendants/Appellees Comcast Corporation, NBC UNIVERSAL MEDIA, LLC, GANNETT CO., INC., and GATEHOUSE
MEDIA OKLAHOMA HOLDINGS, INC.

THOMAS E. PRINCE, JUDGE:

¶1 Appellant Travis Yates, a Tulsa police major, appeals the trial court's February 22, 2021 Order granting the media Appellees' Motions to Dismiss his claims for defamation, intentional infliction of emotional distress, false light invasion of privacy, and malicious wrong pursuant to the Oklahoma Citizens Participation Act ("OCPA"), 12 O.S. §§ 1430 et seq. Yates' suit also challenged the constitutionality of the OCPA. The trial court, relying on *Krimbill v. Talarico*, 2018 OK CIV APP 37, 417 P.3d 1240, denied the constitutional challenge. Both the text of OCPA--and the First Amendment principles that undergird it--require this Court to affirm the trial court's Order dismissing Appellant's claims. This Court also holds that the OCPA is constitutional.

BACKGROUND

¶2 This appeal arises out of an action for defamation, intentional infliction of emotional distress, false light invasion of privacy and malicious wrong. Appellant initiated the action against Appellees Gannett Co., Inc. ("Gannett") *et al.* after Appellees published, in a series of independent but successive articles, accounts of a June 8, 2020 radio interview in which the

Appellant fielded many questions about policing, protests, and the use of force. Appellant alleges, *inter alia*, that the Appellees' articles and headlines distorted his words and falsely inferred he was a "racist cop."¹ During the interview, which spanned almost sixty minutes, the Appellant made, among others, this jarring statement:

And by the way, all the research says--including Roland Fryer, an African American Harvard professor, Heather Mac Donald, and the National Academy of Sciences--all of their research says, we're shooting African Americans at about 24% less than we probably ought to be based upon the crimes being committed.²

¶3 A day after the local radio interview, Public Radio Tulsa ("PRT") published and marketed a story by Chris Polansky, a PRT employee, entitled "TPD Major: Police Shoot Black Americans 'Less Than We Probably Ought To.'" The PRT article mentions the Appellant's race and highlights--via hyperlinking to articles unrelated to Appellant's June 8, 2020 radio interview--that the Appellant "is no stranger to racial controversy." The PRT article also includes the entirety of the Appellant's statement, set forth in detail above. See *supra* ¶ 2. Appellant's statement, which Polansky described as "[Appellant's] interpretation of crime data," appears as a separate paragraph, sandwiched between other statements he made.

¶4 On June 11, 2020, two days after PRT published and marketed Polansky's story, NBCUniversal Media, LLC ("NBCU") published a story of its own. By then, Tulsa Mayor G.T. Bynum had released a statement on the Appellant's radio interview remarks. The NBCU article spotlighted portions of Bynum's statement, in which the mayor distanced his administration, the Tulsa Police Department and the City of Tulsa from the Appellant and his comments. After several introductory paragraphs, the NBCU article (like Polansky's) quoted the entirety of the Appellant's statement, which this Court set forth in detail above. See *supra* ¶ 2. Unlike the PRT article, however, the NBCU article's headline reads: "African Americans 'probably ought to be' shot more by police, a Top Tulsa officer said."

¶5 The next day, the Gannett-owned *USA Today* published another story rehashing the details. Its headline, not unlike the NBC article, reads: "Oklahoma cop faces backlash but won't apologize after saying African Americans 'probably ought to be' shot more by police." The *USA Today's* article begins by stating that "[a] police commander in Oklahoma is 'under review' after he said that officers are shooting African Americans less than we probably ought to be' during a local radio interview." Despite its rather provocative opening, the *USA Today* article, like both of the articles published before it, went on to provide context and quoted Appellant verbatim.

¶6 On June 12, 2020, the Appellant appeared on *Tucker Carlson Tonight*, in what Appellant's counsel has described as an effort "to mitigate the damage [the Appellees] caused to [the Appellant's] reputation." About ninety days later, Appellant filed his Petition, later amended, which set forth claims against the Appellees for defamation, intentional infliction of emotional distress, false light invasion of privacy and malicious wrong. Appellees moved the trial court to dismiss Appellant's action pursuant to the OCPA (which the Appellant later alleged was unconstitutional) and for failure to state a claim for relief under 12 O.S. § 2012(B)(6). The trial court agreed and dismissed Appellant's action under the OCPA. The trial court denied Appellant's challenge to the OCPA on grounds that this Court already addressed the Act's constitutionality in *Krimbill*, 2018 OK CIV APP 37.

¶7 This interlocutory appeal timely followed.

STANDARD OF REVIEW

¶8 Pursuant to this Court's holding in *Krimbill*, 2018 OK CIV APP 37, ¶ 4, we apply the *de novo* appellate standard of review. In *Krimbill*, this Court held "that the OCPA provides a new summary process/dismissal procedure in certain cases [and that] Oklahoma appellate courts have reviewed decisions pursuant to such procedures by a *de novo* standard." *Id.* The OCPA dismissal procedure "requires dismissal if a plaintiff fails to show a *prima facie* case, and is hence similar to a motion for directed verdict," challenges to which "also are reviewed *de novo*." *Id.* Thus, not unlike motions to dismiss generally (which this Court also reviews under a *de novo* standard), this Court applies a *de novo* standard of appellate review under "existing precedent and persuasive authority." *Id.*; see also *Ladra v. New Dominion, LLC*, 2015 OK 53, ¶ 8, 353 P.3d 529, 531 (explaining that motions to dismiss are reviewed *de novo*) (citation omitted); 12 O.S. §§ 1430 et seq. (setting forth specific procedures for the filing, review, and ruling on motions to dismiss under the OCPA).

¶9 The constitutionality of the OCPA also is at issue in this appeal, which is a question of law to be reviewed *de novo*. *Lee v. Bueno*, 2016 OK 97, ¶ 6, 381 P.3d 736, 739. Under this standard of review, "this Court possesses plenary, independent, and non-deferential authority to examine the issues presented." *Id.* (citations omitted). When considering the constitutional validity of a statute, this Court does not consider policy. *Id.* ¶ 8 (citations omitted). Instead, this Court is guided by well-established principles, including that "[a] legislative act is presumed to be constitutional and will be upheld unless it is clearly, palpably[,] and plainly inconsistent with the [Oklahoma] Constitution." *Id.* ¶ 7 (citations omitted). In fact, "[e]very presumption is to be indulged in favor of a statute's constitutionality." *Id.* (citations omitted). "[A] heavy burden "is [therefore] cast on those challenging a legislative enactment to show its unconstitutionality." *Id.* (citations omitted).

ANALYSIS

¶10 Although Appellant presents this Court with a multiplicity of questions, the overarching question before us is whether the OCPA justified the trial court's Order granting Appellees' Motions to Dismiss the Appellant's claims for failing to establish "by clear and specific evidence a prima facie case for each essential element of the claim in question." This Court finds that it did and affirms the decision of the trial court.

Whether the OCPA Applies

¶11 The OCPA, enacted "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely[,] and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury," includes among its provisions specific procedures for the filing, review and ruling on motions to dismiss. 12 O.S. §§ 1430 et seq. The OCPA's dismissal procedure may be invoked where the Plaintiff's claim "is based on, relates to, or is in response to the [defendant's] exercise of the right of free speech, the right to petition, or the right of association." *Krimbill*, 2018 OK CIV APP 37, ¶ 9 (citing 12 O.S. § 1434(B)). Once the defendant has proven that the OCPA applies, the burden shifts to the plaintiff to show "by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.* (citing 12 O.S. § 1434(C)). Only if the court finds that the plaintiff has made a *prima facie* case for each element of each claim does the burden shift "back to the defendant to show by a preponderance of the evidence a defense to the plaintiff's claims." *Id.* (citing 12 O.S. § 1434(D)).

¶12 In this case, Appellees demonstrated that their motions to dismiss, which were filed in response to Appellant's Petition, as amended, fell within the scope of the OCPA. The publication of news articles and headlines is a legitimate exercise of the right to free speech, which the OCPA defines as "communication[s] made in connection with a matter of public concern." *Id.* § 1431(3). Notwithstanding Appellant's arguments to the contrary, the Appellees' articles and headlines addressed matters of public concern; indeed, the articles were written in response to the Appellant's public statements regarding policing and "community well-being," which the OCPA explicitly defines as a matter of public concern. *Id.* § 1431(7). Moreover, news reports and public comments about public officials and public figures are protected under both the First Amendment to the United States Constitution, e.g., *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153 (1967); *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964), and "the political speech protections afforded by the various clauses of the Oklahoma Constitution," *Gaylor Entertainment Co. v. Thompson*, 1998 OK 30, ¶ 51, 958 P.2d 128, 150; cf. Okla. Const. art. II, § 22 ("Every person may freely speak, write, or publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."). Put simply, there is "a formidable burden on a public figure plaintiff seeking to recover for defamation." *Herbert v. Oklahoma Christian Coalition*, 1999 OK 90, ¶ 16, 992 P.2d 322, 328 (citation omitted).

¶13 Because Appellees demonstrated that their motions to dismiss fell within the scope of the OCPA, the burden shifted to the Appellant who, in order to avoid dismissal of his action, had to establish, "by clear and specific evidence[,] a prima facie case for each essential element of the claim in question." 12 O.S. § 1434. In this case, Appellant sued Appellees for defamation, intentional infliction of emotional distress, false light invasion of privacy and malicious wrong. Because the Appellant was unable to establish a *prima facie* case for the claims in question, Appellant's Petition, as amended, was rightfully dismissed against all Appellees.

Whether Appellant Failed to Establish a Prima Facie Case for Each Essential Element for the Claims in Question

Defamation

¶14 In order to recover for defamation, a plaintiff must prove four elements: "(1) a false and defamatory statement [concerning the plaintiff]; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either the actionability of the statement irrespective of special damage, or the existence of special damage caused by the publication." *Trice v. Burrell*, 2006 OK CIV APP 79, ¶ 10, 137 P.3d 1253, 1257 (citation omitted). If and when the plaintiff is a public official--like the Appellant in this case--the plaintiff also must establish "[t]hat the defamatory falsehood was made with 'actual malice'--[i.e.,] made with knowledge that it was false, or with reckless disregard of whether it was false or not" *Miskovsky v. Tulsa Tribune Co.*, 1983 OK 73, ¶ 15, 678 P.2d 242, 246; see also *Akins v. Altus Newspapers, Inc.*, 1977 OK 179, ¶ 11, 609 P.2d 1263 (explaining that in a libel suit brought by an Altus police officer against his local newspaper, the level of fault was actual malice); *Gray v. Udevitz*, 656 F.2d 588, 591 (10th Cir. 1981) (explaining both that "[s]treet level policeman, as well as high ranking officers, qualify as public officials under the test of *Rosenblatt v. Baer*, 383 U.S. 75 (1966)" and that "[p]olice officials[--down to and including even the lowest-ranking patrolman--]have uniformly been treated as public officials within the meaning of *New York Times v. Sullivan*"); *Anaya v. CBS Broadcasting Inc.*, 626 F. Supp 2d 1158, 1184 (D.N.M. 2009) ("According to the [U.S.] Supreme Court, the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs. A determination that a plaintiff is a public figure rests on at least two important policy considerations: 'first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues.'" (citations omitted) (cleaned up). Therefore, for purposes of establishing a defamation claim, we find that the Appellant should be considered a "public official."

¶15 In this case, Appellant alleged that all three Appellees' articles and headlines contained materially false statements. For example, Appellant alleged that the PRT article asserted that he was a racist and "create[d] a false and reckless impression that [he] encourages police officers to shoot more African Americans." Appellant also alleged that NBCU's article falsely stated that "Tulsa Mayor G.T. Bynum on Wednesday blasted one of his police department's top commanders after the officer denied there's systemic racism in law enforcement, then said African Americans 'probably ought to be' shot more." That Bynum "demanded an apology and said the department is investigating [Appellant]" was also, in Appellant's view, patently false. Appellant also alleged that the *USA Today's* statements--including that "[a] police commander is 'under review' after he said that officers are shooting African Americans 'less than we probably ought to be' during a local radio interview" and that "[t]he Tulsa Police Department denounced the comments made by Major Travis Yates, who is white, and Tulsa Mayor [] Bynum called Yates' comments 'dumb' and demanded an apology in a Facebook statement" were also false and defamatory.

¶16 However, to be actionable news articles must contain statements of fact that are demonstrably false. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986); *Brokers' Choice of America, Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1107 (10th Cir. 2017) (explaining that "the plaintiff must shoulder the burden in his case-in-chief of proving the *falsity* of a challenged statement if he is a public figure or the statement involves a matter of public concern") (citation omitted) (emphasis in original). Here, like the trial court observed, the statements and headlines published by PRT, NBCU, and the *USA Today* did not contain statements that were materially false. Therefore, they were not actionable. See *Brokers' Choice of America, Inc.*, 861 F.3d at 1108 ("Unless a statement contains a *material* falsehood it simply is not actionable.") (citation omitted). For example, although the Appellant contends that the PRT article created a false and reckless impression that he was racist, his contention is based on PRT's description of him as "a white Tulsa Police Department major." The Appellant also takes issue with NBCU's insinuation that he was under formal investigation for his remarks. While the Appellant may not have been under formal investigation, Bynum took to Facebook to say that "[the Appellant's] comments [we]re under review by the Chief's Office." In Bynum's Facebook post addressing the Appellant's comments, and several other topics, the mayor pivoted to the topic of the Appellant this way: "[s]peaking of dumb comments, I first met [the Appellant] when I was on the City Council" Bynum's post continued: "I want to believe [the Appellant] didn't intend to say what he did, but what he did say goes against everything we are trying to achieve He does not speak for my administration, for the Tulsa Police Department, or the City of Tulsa." Simply put, although the Appellees' articles "played fast and loose" with the Appellant's statements, as well as the intensity of Bynum's reaction to them, not one of the statements is demonstrably false. Accordingly, Appellant's cause of action for defamation was properly dismissed as to all Appellees.

¶17 Even if the Appellant were able to establish that the articles and headlines contain statements of fact that are demonstrably false (which he cannot), to recover for defamation he must also establish, *inter alia*, that the Appellees acted with "actual malice," *i.e.*, "with knowledge that [their statements were] false, or with reckless disregard of whether [they were] false or not" *Miskovsky*, 1983 OK 73, ¶ 15; *see also Akins*, 1977 OK 179, ¶ 11, (explaining that in a libel suit brought by an Altus police officer against his local newspaper, the level of fault was properly actual malice); *Gray*, 656 F.2d 588, 591 (explaining that "[p]olice officials[--down to and including even the lowest-ranking patrolman--]have uniformly been classified as public officials within the meaning of *New York Times v. Sullivan*"). Despite the Appellant's complaints, the undisputed facts do not show that the Appellees knew they made false statements about the Appellant nor that they had an actual awareness at the time of publication that their statements were probably false. In short, even if the Appellant were able to establish that the articles and headlines contain statements of fact that are demonstrably false, he cannot prove actual malice during the editorial process, the requisite level of fault in public official defamation cases like this. *See Philadelphia Newspapers, Inc.*, 475 U.S. at 775.

Intentional Infliction of Emotional Distress

¶18 An action for the tort of intentional infliction of emotional distress lies where there is evidence of extreme and outrageous conduct coupled with severe emotional distress. *Gaylord Entertainment Co.*, 1998 OK 30, ¶ 45 (citation omitted). To recover, a plaintiff must prove that: (1) the defendant acted intentionally or recklessly; (2) the defendant's conduct was extreme and outrageous (*i.e.*, "where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community," *Breeden v. League Services Corp.*, 1978 OK 27, ¶ 8, 575 P.2d 1374, 1376 (citation omitted)); (3) the defendant's conduct caused the plaintiff emotional distress; and (4) the resulting emotional distress was severe. *Miller v. Miller*, 1998 OK 24, ¶ 34, 956 P.2d 887, 900. Determinations about whether a defendant's conduct may reasonably be regarded as sufficiently extreme and outrageous, and whether, based upon the evidence presented, severe emotional distress can be found, are the trial court's responsibility. *Breeden*, 1978 OK 27, ¶ 12; *Miller*, 1998 OK 24, ¶ 34.

¶19 The undisputed facts do not show conduct that may be regarded as sufficiently extreme and outrageous, which generally is found only where "the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" *Miller*, 1998 OK 24, ¶ 33. Indeed, "[o]nly when it is found that reasonable people would differ in an assessment of this central issue may the tort of intentional infliction of emotional distress be submitted to the jury." *Id.* Although the Appellant alleges that the articles and headlines published about him were extreme and outrageous, in reality they were straight from the "horse's mouth"--*i.e.*, accurate, albeit exaggerated, rearticulations of his own words. Accordingly, the law will not intervene and this claim was justifiably dismissed as to all Appellees.

False Light Invasion of Privacy

¶20 Appellant also brought a claim for false light invasion of privacy. Under Oklahoma law, the elements for a cause of action for false light invasion of privacy are based on the Restatement (Second) of Torts § 652E, which says that

[o]ne who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability . . . if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."

Sturgeon v. Retherford Publications, Inc., 1999 OK CIV APP 78, ¶ 26, 987 P.2d 1218, 1226 (citation omitted). Additionally, "[t]he disclosure must be a public disclosure, and *the facts must be private and of no legitimate public concern.*" *Id.* (emphasis added).

¶21 If the Appellees' reporting was anything in this case, it was undoubtedly a subject of legitimate public concern. Indeed, the Appellees, media organizations all, merely reported on the Appellant's statements regarding matters of public concern. Although the Appellees embellished headlines, their articles were riddled with the Appellant's verbatim quotations and official statements made in response to them. In our system of ordered liberty, individuals have the right to protect their own good name. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341. However, when individuals enter the fray, and make repeated, voluntary statements regarding matters of public concern--like the Appellant did in this case--the law will not intervene to

assign liability "for giving [additional] publicity to facts about the [person's] life which are [already] matters of public record." *McCormack v. Oklahoma Publishing Co.*, 1980 OK 98, ¶ 18, 613 P.2d 737. In this case, the Appellant entered the public square--as was his right--and made jarring statements regarding policing during a summer of nationwide protests. Although the Appellees' articles and headlines sensationalized the Appellant's remarks, the undisputed facts show that each article was a matter of legitimate public concern. Therefore, the Appellant is unable to make a *prima facie* case for false light invasion of privacy against any of the Appellees. Accordingly, this cause of action was properly dismissed as to all Appellees.

Malicious Wrong

¶22 Appellant's fourth and final cause of action was for the obscure tort of "malicious wrong." *Mangum Electric Co. v. Border*, 1923 OK 547, ¶ 9, 222 P. 1002, 1005 (explaining that a malicious wrong is "[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."). In the context of the tort of malicious wrong, "malice is an essential ingredient in [the] action . . . and is defined as the intentional doing of a wrongful act without justification or excuse." *Id.* ¶ 11 (citation omitted) (cleaned up).³ Although this tort appears to have been recognized in at least one form in *Mangum* (nearly a century ago), in the absence of definitive guidance from the Oklahoma Supreme Court, we hold that the tort's "dry bones" may not be brought back to life and extended to encompass the allegations in this case.⁴

¶23 Even if a cause of action for the tort of malicious wrong were recognized in the context of injury to reputation (which it is not), such a cause is not actionable in this case because the Appellant cannot show by clear and specific evidence that the Appellees published their articles or headlines "without just cause or excuse," which is one of the elements set forth in *Mangum*, 1923 OK 547, ¶ 9. Under the First Amendment, media outlets have a "just cause or excuse" to publish stories on subjects of lively public interest, including policing, protests, and the use of force. Moreover, Oklahoma courts will not tolerate the relabeling of claims in order to avoid the statutory and constitutional requirements of and limitations on particular claims. See *Nelson v. American Hometown Publishing, Inc.*, 2014 OK CIV APP 57, ¶ 21, 333 P.3d 962, 969 (explaining that a plaintiff cannot "recast a defamation claim as a different tort claim"); *Jordan v. World Publishing Co.*, 1994 OK CIV APP 30, ¶¶ 13--14, 872 P.2d 946, 948 (explaining that "one cannot circumvent the First Amendment by the label with which the suit is described"). Because Appellant's malicious wrong claim merely replicates his defamation and false light claims, and does not state a separate claim for relief, it was also properly dismissed as to all Appellees.

Whether the OCPA is Constitutional

¶24 Although this Court holds that the OCPA justified the trial court's Order granting Appellees' Motions to Dismiss Appellant's claims for failing to establish "by clear and specific evidence a prima facie case for each essential element of the claim in question," the Appellant's suit also challenged the constitutionality of the OCPA. This Court holds that the OCPA is constitutional.

¶25 The Appellant's constitutional challenge to OCPA moves along several fronts, beginning with an allegation that the Oklahoma Constitution guarantees access to the courts, which "must be available to all comers through simple and direct means and the right must be administered in favor of justice rather than being bound by technicalities." *Wall v. Marouk*, 2013 OK 36, ¶ 23, 302 P.3d 775, 786. While this Court agrees that the Oklahoma Constitution guarantees access to the courts, the judiciary is only bound "to be open to [] persons with actionable causes." *Rivas v. Parkland Manor*, 2000 OK 68, ¶ 21, 12 P.3d 452, 458, *superseded by statute*, 85 O.S. § 22(7) (as amended), *as recognized in Evans & Associates Utility Services v. Espinosa*, 2011 OK 81, 267 P.3d 1190. And it is the Legislature, rather than the courts, which determines and defines, *inter alia*, an actionable cause. See Okla. Const. art. V, § 1 ("The Legislative authority of the State shall be vested in a Legislature . . ."); *cf.* Oklahoma Code of Civil Procedure, 12 O.S. §§ 1 et seq.⁵

¶26 The Appellant also contends that the OCPA is an unconstitutional special law violative of the Oklahoma Constitution. See Okla. Const. art. V, § 46 ("The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law . . . [r]egulating the practice or jurisdiction of . . . or changing the rules of evidence in judicial proceedings."). Despite the Appellant's allegations to the contrary, the OCPA does not run afoul of the Oklahoma Constitution's Article V, Section 46 interdiction of special law because the OCPA "operates equally upon all the subjects within the class for which it was adopted." *Tulsa Exposition & Fair Corporation v. Board of County Commissioners of County of Tulsa*, 1970 OK 67, ¶ 9, 468 P.2d 501, 505 (citation omitted). In other words, although the OCPA sets forth specific procedures for the handling of cases

involving the constitutional rights of persons to petition, speak, and associate freely, including the procedures for the filing, review, and ruling on motions to dismiss, it does so reasonably and carefully, and in a way that "pertain[s] to some peculiarity in the subject matter [*i.e.*, the protection of the constitutional rights to participate in government] calling for the legislation." *Id.*

¶27 The remainder of Appellant's contentions regarding the constitutionality of the OCPA rely on the Appellant's mistaken reading of this Court's holding in *Krimbill*, 2018 OK CIV APP 37. In *Krimbill*, this Court wrestled with the so-called inherent contradictions of the OCPA before deciding, in a lengthy opinion, that the OCPA's provisions could be interpreted in a manner consistent with the Oklahoma Constitution. The Appellee would have us believe, however, that in *Krimbill* this Court "[raised concerns that the OCPA may be unconstitutional and essentially we-wrote the statute in an effort [to] give the Act some measure of acceptability." But this is inaccurate. In *Krimbill*, this Court did its duty and interpreted the OCPA "so as [not] to render it unconstitutional." 2018 OK CIV APP 37, ¶ 31; *see also Lee*, 2016 OK 97, ¶ 7 ("If two possible interpretations of a statute are possible, only one of which would render it unconstitutional, a court is bound to give the statute an interpretation which will render it constitutional, unless constitutional infirmity is shown beyond a reasonable doubt."); *Fent v. Oklahoma Capitol Improvement Authority*, 1999 OK 64, ¶ 3, 984 P.2d 200, 204 ("A court is bound to accept an interpretation that avoids constitutional doubt as to the legality of a legislative enactment.") (citation omitted). Moreover, this Court did not rewrite the OCPA "in an effort [to] give the Act some measure of acceptability." *Krimbill*, 2018 OK CIV APP 37, ¶ 31. Rather, this Court wrestled with the OCPA's text and determined that the Act, as written, did not contain constitutional infirmities. Despite the language this Court employed in *Krimbill*, 2018 OK CIV APP 37, ¶ 75, the OCPA's contradictions were but a mirage--*i.e.*, something that at first appeared to be there but, in reality, was not.

¶28 When considering the constitutional validity of a statute, this Court does not rewrite statutes to comport with its--or any other--policy preferences. This Court is instead guided by well-established principles, including that "[a] legislative act is presumed to be constitutional and will be upheld unless it is clearly, palpably[,] and plainly inconsistent with the [Oklahoma] Constitution." *Lee*, 2016 OK 97, ¶ 7 (citations omitted). Indeed, "[e]very presumption is to be indulged in favor of a statute's constitutionality." *Id.* (citations omitted). "[A] heavy burden "is [therefore] cast on those challenging a legislative enactment to show its unconstitutionality." *Id.* (citations omitted). In this case, the Appellant has not shown that the OCPA is clearly, palpably, and plainly inconsistent with the Oklahoma Constitution. Accordingly, this Court holds that the OCPA is constitutional.

CONCLUSION

¶29 Both the text of the OCPA--and the First Amendment principles that undergird it--require this Court to affirm the trial court's Order dismissing Appellant's claims. Put simply, the OCPA justified the trial court's Order granting Appellees' Motions to Dismiss Appellant's claims because the Appellant failed to establish "by clear and specific evidence" a *prima facie* case for each essential element of each cause of action. The Appellant's suit also challenged the constitutionality of the OCPA, but this Court again holds that the OCPA is constitutional. The trial court's Order is, therefore, AFFIRMED.

MITCHELL, J., and SWINTON, C.J., (sitting by designation), concur.

FOOTNOTES

THOMAS E. PRINCE, JUDGE:

¹ Pl.'s Resp. PRT's Mot. Dismiss/Summ. J. at 3; *see also* First Am. Pet. ¶ 16(b).

² First Am. Pet. ¶ 15.

³ This Court notes that, in the context of a malicious wrong, the meaning of "malice" (*i.e.*, the intentional doing of a wrongful act without justification or excuse) is different and distinct from the meaning connoted by "actual malice" in the context of libel and false light cases brought by a public official or figure.

⁴ See, e.g., *Tarrant v. Guthrie First Capital Bank*, 2010 OK CIV APP 82, ¶ 15, 241 P.3d 280, 284-85 ("[U]ntil the [Oklahoma] Supreme Court expressly adopts the prima facie tort theory of recovery, we are unwilling to do so."); *Fulton v. People Lease Corp.*, 2010 OK CIV APP 84, ¶ 50, 241 P.3d 255, 267 ("Plaintiff pled the more specific tort of interference with economic relations and, *in the alternative*, the general tort of malicious wrong[, which] leads us to conclude [it was not error] to dismiss[] below [] the general tort of malicious wrong."); *Merrick v. Northern Natural Gas Co., Division of Enron Corp.*, 911 F.2d 426, 433 (10th Cir. 1990) (applying Oklahoma law) (explaining that although "at common law there was a cause of action whenever one person did damage to another willfully and intentionally, without just cause or excuse . . . [the] Oklahoma Supreme Court [] has [not] extended this common law doctrine outside the context of malicious injury to business or property interests") (citation omitted) (cleaned up); *Charlson v. Bronco Drilling Co. Inc.*, No. CIV-07-0305-HE, 2007 WL 9710960, at *2 (W.D. Okla. July 30, 2007) ("None of the cases cited by plaintiff consider a malicious wrong tort in the employment context or under the circumstances of this case. Given that Oklahoma law already recognizes a tort remedy in some circumstances in the employment context, the court is reluctant, absent guidance from the Oklahoma courts, to superimpose some new theory on the law in this area.").

⁵ Indeed, in our system of ordered liberty, the centrality of legislatures in "prescrib[ing] the rules by which the duties and rights of every citizen are to be regulated" is well established. *The Federalist* No. 78 (Alexander Hamilton).

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Oklahoma Court of Civil Appeals Cases	
Cite	Name
1994 OK CIV APP 30, 872 P.2d 946, 65 OBJ 1429,	<u>Jordan v. World Pub. Co.</u>
	Discussed
2006 OK CIV APP 79, 137 P.3d 1253,	<u>TRICE v. BURRESS</u>
	Discussed
2010 OK CIV APP 82, 241 P.3d 280,	<u>TARRANT v. GUTHRIE FIRST CAPITAL BANK</u>
	Discussed
2010 OK CIV APP 84, 241 P.3d 255,	<u>FULTON v. PEOPLE LEASE CORPORATION</u>
	Discussed
2014 OK CIV APP 57, 333 P.3d 962,	<u>NELSON v. AMERICAN HOMETOWN PUBLISHING, INC.</u>
	Discussed
2018 OK CIV APP 37, 417 P.3d 1240,	<u>KRIMBILL v. TALARICO</u>
	Discussed at Length
1999 OK CIV APP 78, 987 P.2d 1218, 70 OBJ 2490,	<u>Sturgeon v. Retherford Publications</u>
	Discussed
Oklahoma Supreme Court Cases	
Cite	Name
1999 OK 90, 992 P.2d 322, 70 OBJ 3343,	<u>Herbert v. Oklahoma Christian Coalition, Inc.</u>
	Discussed
1923 OK 547, 222 P. 1002, 101 Okla. 64,	<u>MANGUM ELEC. CO. v. BORDER</u>
	Discussed at Length
1970 OK 67, 468 P.2d 501,	<u>TULSA EXPOSITION & FAIR CORP. v. BD. OF CO. COM'RS</u>
	Discussed
2011 OK 81, 264 P.3d 1190,	<u>EVANS & ASSOC. UTILITY SERVICES v. ESPINOSA</u>
	Cited
2013 OK 36, 302 P.3d 775,	<u>WALL v. MAROUK</u>
	Discussed
2015 OK 53, 353 P.3d 529,	<u>LADRA v. NEW DOMINION, LLC</u>
	Discussed
1978 OK 27, 575 P.2d 1374,	<u>BREEDEN v. LEAGUE SERVICES CORP.</u>
	Discussed at Length
1980 OK 98, 613 P.2d 737,	<u>McCormack v. Oklahoma Pub. Co.</u>
	Discussed
2016 OK 97, 381 P.3d 736,	<u>LEE v. BUENO</u>
	Discussed at Length

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<u>1977 OK 179, 609 P.2d 1263,</u>	<u>AKINS v. ALTUS NEWSPAPERS, INC.</u>	Discussed at Length
<u>1998 OK 24, 956 P.2d 887, 69 OBJ 1172,</u>	<u>MILLER v. MILLER</u>	Discussed at Length
<u>1998 OK 30, 958 P.2d 128, 69 OBJ 1404,</u>	<u>GAYLORD ENTERTAINMENT CO. v. THOMPSON</u>	Discussed at Length
<u>1999 OK 64, 984 P.2d 200, 70 OBJ 2100,</u>	<u>Fent v. Oklahoma Capitol Improvement Authority</u>	Discussed
<u>2000 OK 68, 12 P.3d 452, 71 OBJ 2366,</u>	<u>RIVAS v. PARKLAND MANOR</u>	Discussed
<u>1983 OK 73, 678 P.2d 242,</u>	<u>Miskovsky v. Tulsa Tribune Co.</u>	Discussed at Length

Title 12. Civil Procedure

Cite	Name	Level
<u>12 O.S. 1430,</u>	<u>Title - Purpose</u>	Discussed at Length
<u>12 O.S. 1434,</u>	<u>Ruling on a Motion to Dismiss - Standard of Proof</u>	Discussed at Length
<u>12 O.S. 1,</u>	<u>Title</u>	Cited
<u>12 O.S. 2012,</u>	<u>Defenses and Objections - When and How Presented - By Pleading or Motion</u>	Cited

Title 85. Workers' Compensation

Cite	Name	Level
<u>85 O.S. 22,</u>	<u>Repealed</u>	Cited