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Torts - Interference with Employment or Occupation, or Injury to Business: The North Dakota Supreme Court Definitely Recognizes the Tort of Unlawful Interference with Business

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TORTS—INTERFERENCE WITH EMPLOYMENT OR OCCUPATION, OR INJURY TO BUSINESS: THE NORTH DAKOTA SUPREME COURT DEFINITIVELY RECOGNIZES THE TORT OF UNLAWFUL INTERFERENCE WITH BUSINESS

Trade 'N Post, L.L.C. v. World Duty Free Americas, Inc., 2001 ND 116, 628 N.W.2d 707

I. FACTS

Trade 'N Post, a duty-free store in Pembina, North Dakota, brought suit against its competitor, Ammex, for using anticompetitive practices to drive it out of business.[1] In March 1998, Cameron Wilwand and his son, Tim Wilwand, opened Trade 'N Post next door to Ammex.[2] Ammex is one of a chain of duty-free stores owned and operated by World Duty Free Americas, Inc. and Ammex Tax and Duty Free Shops West, Inc. (Ammex).[3] Ammex opened its first store in Pembina in 1989 and then purchased its only competitor in that market in 1993.[4] Ammex maintained this local monopoly until March 1998, when Trade 'N Post opened.[5]

Trade 'N Post claimed that Ammex employees threatened to put Trade 'N Post out of business while the store was still being built.[6] Trade 'N Post also claimed that Ammex slashed its prices to below cost, charged less for items at its Pembina store than at its other North Dakota stores, pressured alcohol and tobacco suppliers not to do business with Trade 'N Post, and tried to discourage tour bus operators from stopping at Trade 'N Post with their passengers.[7]

On May 12, 1999, Trade 'N Post filed suit in the United States District Court for the District of North Dakota alleging that Ammex violated state

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1. Trade 'N Post, L.L.C. v. World Duty Free Ams., Inc., 2001 ND 116, ¶ 3, 628 N.W.2d 707, 708-09.

2. Brief for Appellant at 4, Trade 'N Post, L.L.C. v. World Duty Free Ams., Inc., 2001 ND 116, 628 N.W.2d 707 (No. 20000176).

3. *Trade 'N Post*, ¶ 3, 628 N.W.2d at 708.

4. Appellant's Brief at 5, *Trade 'N Post* (No. 20000176). Ammex purchased its competitor, Happy Harry's, for around $7,500,000. *Id.*

5. *Id.*

6. *Id.* at 5-6. Trade 'N Post claimed that managers from other Ammex stores threatened "that Ammex would do everything in its power to run Trade 'N Post out of business" and "that there would be a 'blood bath,' and 'it will be [Trade 'N Post's] blood.'" *Id.*

7. *Trade 'N Post*, ¶ 3, 628 N.W.2d at 709.

and federal antitrust laws, North Dakota's Unfair Trade Practices Law,[8] and North Dakota's Unfair Discrimination Law.[9] Trade 'N Post also alleged that Ammex committed the common law tort of unlawful interference with business.[10] Ammex moved for dismissal.[11] On October 5, 1999, the district court ruled that the state and federal antitrust claims could proceed, but it dismissed the remaining state law claims without prejudice.[12] The court ordered Trade 'N Post to amend its complaint to conform with the court's order.[13] Trade 'N Post amended its complaint to exclusively address the antitrust issues, and Ammex then filed another motion to dismiss that was denied on June 1, 2000.[14]

On November 23, 1999, Trade 'N Post filed suit against Ammex in Pembina County District Court asserting the state claims that were dismissed in federal court.[15] On December 14, 1999, Ammex removed the case to federal court and again moved for dismissal.[16] Ammex then moved to have the federal and state cases consolidated into one action.[17] On

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8. Unfair Trade Practices Law, N.D. CENT. CODE § 51-10-05 (1999). Section 5 of the Unfair Trade Practices Law states:

> Any retailer or wholesaler who shall advertise, offer to sell, or sell any article of merchandise at less than cost to such retailer or wholesaler as defined in this chapter, or who gives, offers to give, or advertises the intent to give away any article or merchandise, with the intent, or with the effect of injuring competitors and destroying competition, is guilty of a class A misdemeanor.

Id.

9. *Trade 'N Post*, ¶ 4, 628 N.W.2d at 709. Section 1 of the Unfair Discrimination Law states:

> Any person, firm, company, association, corporation, or limited liability company, foreign or domestic, doing business in this state and engaged in the production, manufacture, or distribution of any commodity in general use, that, for the purpose of destroying the business of a competitor in any locality, intentionally shall discriminate between different sections, communities, or cities of this state by selling such commodity at a lower rate in one section, community, or city than is charged therefor by said party in another section, community, or city, . . . is guilty of unfair discrimination.

Unfair Discrimination Law, N.D. CENT. CODE § 51-09-01 (1999).

10. *Trade 'N Post*, ¶ 4, 628 N.W.2d at 709.

11. Brief for Appellant at 2, Trade 'N Post, L.L.C. v. World Duty Free Ams., Inc., 2001 ND 116, 628 N.W.2d 707 (No. 20000176).

12. *Id.* at 2-3. The court refused to exercise its supplemental jurisdiction over the remaining state law claims because they involved novel state law issues that the North Dakota Supreme Court should decide. *Id.* The court dismissed the state claims of price discrimination, unfair trade practices, and unlawful interference with business. *Id.*

13. *Id.* at 2.

14. *Id.* at 3.

15. *Id.* The complaint alleged state law claims for unfair discrimination, unfair trade practices, and wrongful interference with business. *Id.* These claims were brought in state court because the federal district court had refused to exercise its supplemental jurisdiction over these claims and dismissed them. *Id.* at 2-3.

16. *Id.* at 3. This brought the same state law claims before the federal district court that the court had earlier dismissed without prejudice. *Id.*

17. *Id.* This motion was unopposed. *Id.*

February 16, 2000, the federal district court granted Ammex's motion and consolidated the state and federal cases.[18] Trade 'N Post then moved to certify the three questions concerning North Dakota law to the North Dakota Supreme Court.[19] On June 13, 2000, the district court granted the motion and filed its certification order with the North Dakota Supreme Court on June 16, 2000.[20]

The order certified three questions to the North Dakota Supreme Court.[21] The third certified question, and the focus of this comment, asked whether North Dakota recognizes the common law tort of unlawful interference with business.[22] The court answered this question in the affirmative and *held* that North Dakota common law recognizes this tort.[23]

II. LEGAL BACKGROUND

Nearly every jurisdiction in the United States recognizes two principle torts that provide claims against activities that interfere with economic relations.[24] These are known as the interference torts.[25] The first is

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18. *Id.*

19. *Id.* A certified question is a question concerning a point of law that a United States court of appeals presents to the United States Supreme Court or a state supreme court for clarification. BLACK'S LAW DICTIONARY 220 (7th ed. 1999).

20. Brief for Appellant at 3, Trade 'N Post, L.L.C. v. World Duty Free Ams., Inc., 2001 ND 116, 628 N.W.2d 707 (No. 20000176). Trade 'N Post and Ammex submitted a joint suggestion to the court concerning the wording of the three questions. *Id.* The district court examined the joint proposal and issued its certification order. *Id.*

21. Trade 'N Post, L.L.C. v. World Duty Free Ams., Inc., 2001 ND 116, ¶ 1, 628 N.W.2d 707, 708. The first certified question asked whether a private right of action for money damages exists under North Dakota's Unfair Discrimination Law. *Id.* This question was directed at the specific alleged facts of the case, but the North Dakota Supreme Court answered that no such action exists in general. *Id.* ¶ 2. The second certified question asked whether a private right of action for money damages exists under North Dakota's Unfair Trade Practices Law. *Id.* ¶ 1. This question was also directed at the specific alleged facts of the case, and the North Dakota Supreme Court again answered that no such action exists in general. *Id.* ¶ 2.

22. *Id.* ¶ 1.

23. *Id.* ¶ 2.

24. Alex B. Long, *Tortious Interference with Business Relations: "The Other White Meat" of Employment* Law, 84 MINN. L. REV. 863, 868 (2000).

25. *See* Della Penna v. Toyota Motor Sales, U.S.A., Inc., 902 P.2d 740, 743 (Cal. 1995) (referring to the "so-called 'interference torts'" while discussing their history).

interference with contract,[26] and the second is unlawful interference with business.[27]

A. ORIGINS OF THE INTERFERENCE TORTS

The roots of these two torts can be traced back to early Roman law.[28] The head of the Roman household, the *paterfamililas*, was legally responsible for relatives, dependents, and slaves.[29] As such, the *paterfamilias* was the person legally entitled to bring a claim for relief when members of the household were subjected to violence or insults.[30] This was because wrongs against a member of the household were considered wrongs against the *paterfamilias*.[31]

The modern origins of the interference torts emerged from English common law.[32] In the early fourteenth century, a master could sue for injury to the master's servant caused by violence.[33] The Ordinance of Labourers created an additional remedy for a master in 1349.[34] This statute

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26. RESTATEMENT (SECOND) OF TORTS § 766 (1979). The *Second Restatement* states:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Id.

27. *Id.* § 766B. The tort of unlawful interference with business is also known as interference with prospective business advantage or interference with prospective contractual relations. Long, *supra* note 24, at 868. The *Della Penna* court referred to it as interference with prospective economic relations. *Della Penna*, 902 P.2d at 743. This article, like the North Dakota Supreme Court, will refer to the tort as unlawful interference with business. Trade 'N Post, L.L.C. v. World Duty Free Ams., Inc., 2001 ND 116, ¶ 2, 628 N.W.2d 707, 708. The *Second Restatement* states:

> One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of inducing or otherwise causing a third person not to enter into or continue the prospective relation or preventing the other from acquiring or continuing the prospective relation.

RESTATEMENT (SECOND) OF TORTS § 766B.

28. Francis Bowes Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663, 663 (1923).

29. *Id.*

30. *Id.* Under later Roman law, some members of the household were allowed to bring actions directly for harm they suffered. *Id.*

31. *Id.*

32. *See id.* at 665 (noting that English common law recognized a claim for injury done to one's servant in the early part of the fourteenth century).

33. *Id.* Claims for injury to a master's servant were based upon the loss of services provided by the servant. *See id.* (stating that such claims were not based upon contract, but upon the relationship between master and servant).

34. *Id.* The Ordinance of Labourers was enacted to combat the labor shortages caused by the Great Plague. *Id.* It required every able-bodied person who was not a craftsman to work as a laborer. *Id.*

made it a criminal offense to entice servants away from their masters.[35] The courts enforced statutory enticement claims and common law claims for violence against a master's servant under one action of trespass.[36] Soon, the difference between the statutory claim and the common law claim was lost.[37] By the end of the eighteenth century, courts were allowing a common law claim for the procurement or enticement of a master's servant.[38] Courts had not yet recognized a claim for the procurement of the breach of a contract.[39] It was not until 1853 that courts began to recognize a claim for interference with a contract.[40]

1. Lumley v. Gye Set the Stage for the Modern Claim of Interference With a Contract

The modern tort claim for interference with contract arose in 1853.[41] Most authorities point to *Lumley v. Gye*,[42] an English case, as the beginning of the interference with contract tort.[43] Lumley was the owner of the Queen's Theatre.[44] He hired opera singer Johanna Wagner to sing at his theatre for three months.[45] The contract contained a provision that prohibited Wagner from singing at other theatres without Lumley's written permission.[46] Gye, the owner of a competing theatre, induced Wagner to sing at his theatre without Lumley's approval.[47] Lumley then sued Gye for

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35. *Id.* at 665-66.

36. *Id.* at 666.

37. *Id.* Courts originally separated the claims that involved violence from those that did not. *Id.* Claims that involved violence were properly brought under the common law, and claims that did not involve violence were brought under the Ordinance of Labourers. *Id.*

38. *Id.* Procurement protected all dependent members of a household, and a claim could also be brought for procuring a child away from his or her parents or procuring a wife away from her husband. *Id.* at 667.

39. *Id.*

40. *Id.* at 666-67.

41. Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61, 63 (1982).

42. 118 Eng. Rep. 749 (Q.B. 1853).

43. *See* Della Penna v. Toyota Motor Sales, U.S.A., Inc., 902 P.2d 740, 743 (Cal. 1995) (identifying *Lumley* as the origin of the interference torts); *see also* Gary Myers, *The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law*, 77 MINN. L. REV. 1097, 1120-21 (1993) (stating that the common law principle of tortious interference was established in *Lumley*); Perlman, *supra* note 41, at 63 (noting that in 1853, *Lumley* established a tort claim for intentional interference with a contract).

44. *Lumley*, 118 Eng. Rep. at 752.

45. *Id.* at 759. The contract stated that Wagner was to perform in operas at Lumley's theatre from April 15th to July 15th. *Id.*

46. *Id.*

47. *Id.* at 759-60. The complaint alleged that Gye, knowing of the contract, maliciously induced Wagner to breach the contract while it was in force. *Id.*

interfering with the contract.[48] The Queen's Bench affirmed the lower court's ruling for Lumley and recognized a cause of action for "wrongfully and maliciously" interfering with a contract.[49] The court stated that acting wrongfully and maliciously was equivalent to acting with notice of the contract's existence.[50] This holding was the start of the modern claim for interfering with an existing contract, but over the next forty years, the Queen's Bench would also come to recognize a claim for unlawful interference with business.[51]

2. *Temperton v. Russell Boycotted the Lumley Limitations and Recognized a Claim for Unlawful Interference With Business*

The *Lumley* holding was expanded in another English case, *Temperton v. Russell*,[52] when the Queen's Bench held that there was a cause of action for unlawful interference with business.[53] Temperton was a builder in the city of Hull.[54] The Operative Bricklayers' Society was a group of local bricklayers' unions that passed Rule 9, which prohibited union members from performing work for builders when that work was outside of the unions' contracts.[55] Temperton did not follow Rule 9, and the unions took measures to pressure him to comply.[56]

The initial measures by the unions did not work so they increased the pressure on Temperton by urging his suppliers not to provide him with materials.[57] Temperton's brother was one of his suppliers, and he continued to do business with Temperton.[58] The unions then attempted to force Temperton's brother to comply with their rules by passing another rule that boycotted businesses that dealt with him.[59] Temperton's brother sued the

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48. *Id.*

49. *Id.* at 752-53.

50. *Id.* (stating that if a person knows a contract exists and interferes with the contract, he or she can be held liable for damages).

51. Della Penna v. Toyota Motor Sales, U.S.A., Inc., 902 P.2d 740, 743 (Cal. 1995). The distinction between the two torts is that unlawful interference with business applies to prospective contractual relations, while interference with a contract applies to existing contractual relations. *Id.*

52. 1 Q.B. 715 (Eng. C.A. 1893).

53. *Temperton*, 1 Q.B. at 728.

54. *Id.* at 716.

55. *Id.*

56. *Id.* The unions ordered members not to work for Temperton and fined members that did. *Id.*

57. *Id.* at 716-17.

58. *Id.* at 717.

59. *Id.* The rule prohibited union members from using lime that was provided by suppliers doing business with builders violating Rule 9. *Id.* Brentano was a man that did business with

unions, alleging loss of business caused by their actions.[60] The jury found for Temperton's brother, and the Queen's Bench unanimously upheld the verdict.[61] Lord Esher, speaking for the court, analogized the case to *Lumley*:

> There was the same kind of injury to the plaintiff. It seems rather a fine distinction to say that, where a defendant maliciously induces a person not to carry out a contract already made with the plaintiff and so injures the plaintiff, it is actionable, but where he injures the plaintiff by maliciously preventing a person from entering into a contract with the plaintiff, which he would otherwise have entered into, it is not actionable.[62]

This reasoning established the modern tort of unlawful interference with business.[63] It was no longer necessary that there be interference with an existing contract.[64] It was sufficient that prospective contractual relations existed because the injury in both situations was merely identical.[65]

B. EVOLUTION OF THE BURDEN OF PROOF REQUIREMENTS

There has been much confusion and debate concerning the burden of proof required for the interference torts.[66] The focus on intent in *Lumley* and *Temperton* caused the interference torts to become closely tied with the intentional torts.[67]

1. Prima Facie Tort Theory

The result of the close historical relationship between the interference torts and the intentional torts was that the interference torts took on the "pleading and burden of proof requirements of the 'true' intentional torts."[68] This meant that the plaintiff was only required to establish a prima facie

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Temperton's brother. *Id.* at 726. The unions told Brentano that his business would be harmed because no union members would work with materials provided by Temperton's brother. *Id.*

60. *Id.* at 715-16.

61. *Id.* at 723-35.

62. *Id.* at 728.

63. *See* Myers, *supra* note 43, at 1120-21 (stating that the *Temperton* court extended the principle established in *Lumley* to include a claim for interference with prospective business relations).

64. Della Penna v. Toyota Motor Sales, U.S.A., Inc., 902 P.2d 740, 744 (Cal. 1995).

65. Myers, *supra* note 43, at 1120-21.

66. *See* Perlman, *supra* note 41, at 64-65 (stating that there are many areas of debate concerning the legal doctrine of the interference torts, but the most significant disagreements surround the burden of proof requirements).

67. *See Della Penna*, 902 P.2d at 744 (noting that legal historians have concluded that the early focus on intent resulted in the interference torts being closely aligned with the intentional torts such as battery and false imprisonment).

68. *Id.*

case by showing that the defendant was aware of the economic relation, that the defendant deliberately interfered with it, and that the plaintiff was injured as a result.[69] Under this prima facie theory, if the plaintiff establishes a prima facie case, the burden shifts to the defendant to prove that the conduct was privileged or justified by a recognized defense.[70]

The *Restatement* adopted the prima facie tort theory for both of the interference torts, stating that a party is liable for damages when that party, without privilege, purposely caused or induced a third person to breach a contract with another or caused a third person not to establish or continue business relations with another.[71] To determine whether a privilege exists, one must consider the nature of the interfering conduct, the nature of the expectancy interfered with, the relations of the parties, the interests the actions served, and the interests of society.[72] These factors are weighed to determine whether the expected harm is justified.[73]

The *Restatement* provides a separate section for the privilege of competition.[74] This privilege allows one to purposely cause a third person to refrain from or discontinue doing business with the actor's competitor if four conditions have been met.[75] First, the business relations must concern matters involved in the competition between the actor and competitor.[76] Second, the actor cannot employ improper means.[77] Third, the actor cannot intend to illegally restrain the competition.[78] And finally, the actor must be acting for the purpose of furthering competition with others.[79]

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69. *Id.*

70. *Id.* at 745.

71. RESTATEMENT OF TORTS § 766 (1939).

72. *Id.* § 767.

73. *Id.* § 767 cmt. a.

74. *Id.* § 768.

75. *Id.*

76. *Id.* A shoe distributor that induced prospective customers away from a competing shoe distributor would qualify under the first element. *Id.* § 768 cmt. d. However, a shoe distributor that induced a third party not to buy a competing shoe distributor's house would not qualify under the first element. *Id.*

77. *Id.* § 768. The use of physical violence, fraud, civil suits, and criminal prosecutions would be considered improper under this element. *Id.* § 768 cmt. e. However, an actor could use persuasion and some economic pressure. *Id.* The *Restatement* gives the example of *A* and *B* who operate competing beer breweries. *Id.* *C* operates a saloon in a building that *C* is leasing from *A*. *Id.* *A* has the power to terminate the lease at will. *Id.* *C* sells both *A*'s beer and *B*'s beer in the saloon. *Id.* In this situation, it would not be improper for *A* to threaten to terminate the lease unless *C* stops selling *B*'s beer in the saloon. *Id.*

78. *Id.* § 768. This element prohibits violations of anti-trust and unfair competition laws. *Id.* § 768 cmt. g. Thus, actors are not privileged when they interfere with business relations for the purpose of creating an illegal monopoly. *Id.*

79. *Id.* § 768. An actor that interfered with business relations must have been motivated, at least in part, by competitive interests. *Id.* § 768 cmt. h. If the actor was motivated wholly by ill-will or revenge and was not promoting competition, his or her acts were not privileged. *Id.*

The prima facie tort approach is considered the most favorable approach for the plaintiff because once the plaintiff proves intentional interference and injury, the burden shifts to the defendant to prove the interference was justified.[80] This places a heavy burden on the defendant and can chill legitimate competition.[81] Because of this burden, the prima facie tort approach has fallen out of favor and is now considered the "old view," although some jurisdictions still follow it.[82] This dissatisfaction has caused many states to look for a new approach.[83]

2. *The Wrongful Conduct Theory*

Many jurisdictions have rejected the *Restatement's* prima facie tort approach and have instead adopted an approach that focuses on the wrongful nature of the interfering conduct.[84] Early in the 1900s, the *Restatement's* prima facie tort position came under severe criticism for chilling competition in the marketplace.[85] Critics argued that the plaintiff's burden was too easy to meet.[86] All that plaintiffs were required to prove was an intentional act and damage to their business.[87] This low threshold led to the increased likelihood of lawsuits and potential liability for actions that the

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80. *See* Myers, *supra* note 43, at 1123 (stating that the prima facie tort approach is very much on the plaintiff's side of the legal spectrum).

81. *Id.*

82. *Id.* Myers lists as examples of jurisdictions that follow the prima facie tort approach: Thompson v. Allstate Insurance Co., 476 F.2d 746, 748-49 (5th Cir. 1973) (stating that Alabama follows the prima facie tort approach and does not require a plaintiff to prove that the defendant's actions were unjustified); Superior Models v. Tolkien Enterprises, 211 U.S.P.Q. (BNA) 876, 879 (D. Del. 1981) (stating that a claim for unlawful interference with business only requires a plaintiff to prove that the defendant knowingly interfered with a business relationship or expectancy and damages resulted); Alyeska Pipeline Services Co. v. Aurora Air Services, 604 P.2d 1090, 1095-96 & n.7 (Alaska 1979) (finding that disproving justification was not a part of the plaintiff's prima facie case); and Furlev Sales & Associates, Inc., v. North American Automotive Warehouse, Inc., 325 N.W.2d 20, 25 (Minn. 1982) (stating that the defendant carries the burden of proving justification in a Minnesota claim for interference with contractual relations). *Id.* n.128. Myers also refers to 2 RUDOLF CALLMAN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS; MONOPOLIES § 9.02 (4th ed. 1982); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 130 (5th ed. 1984), which cite cases from jurisdictions that follow the prima facie tort approach. *Id.*

83. *See* Della Penna v. Toyota Motor Sales, U.S.A., Inc., 902 P.2d 740, 745-46 (Cal. 1995) (noting that the dissatisfaction with the prima facie tort approach led to calls for changes that reached their height around the time of the *Second Restatement*).

84. *See id.* at 746-47 (listing jurisdictions that have adopted an approach that requires some form of independently wrongful conduct).

85. *See id.* at 745 (restating critics' arguments that the prima facie tort approach could lead to liability for legitimate business competition); *see also* Long, *supra* note 24, at 869 (noting that the main criticism of the prima facie tort approach is that it requires very little of the plaintiff).

86. Long, *supra* note 24, at 869.

87. *See Della Penna*, 902 P.2d at 745 (stating that the plaintiff's initial burden of proof under the prima facie tort approach only required an intentional act and damages).

marketplace would regard as legitimate business competition.[88] During the American Law Institute's debate over a proposed draft on tortious interference, one of its members, Professor Carl Auerbach, suggested "foreign lawyers reading the *Restatement* as an original matter would find it astounding that the whole competitive order of American industry is prima facie illegal."[89]

The *Second Restatement* drafters heeded the critics and departed from the prima facie tort position.[90] The revised rule for unlawful interference with business provided:

> One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.[91]

This rule focuses on whether the interference was improper.[92] Determining this requires balancing the seven factors provided in section 767 of the *Second Restatement*.[93] These factors are: (1) the nature of the conduct, (2) the motive behind the conduct, (3) the interests of the party that suffered the interference, (4) the interests the actions served, (5) the interests of society, (6) how closely related the actions were to the interference, and (7) the relations of the parties.[94]

The *Second Restatement* focused on "improper" interference and adopted the seven-factor balancing test described above to avoid taking a stance on the burden of proof issue.[95] The drafters defended this reluctance by noting the "considerable disagreement on who has the burden of

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88. *Id.*

89. Perlman, *supra* note 41, at 79 (quoting 46 ALI PROCEEDINGS 201 (1969) (statement of Professor Carl Auerbach)).

90. *Della Penna*, 902 P.2d at 745.

91. RESTATEMENT (SECOND) OF TORTS § 766B (1979). Unlike the *Restatement*, the *Second Restatement* more clearly distinguished between interference with contract and unlawful interference with business by providing a separate section for each. *Id.* §§ 766A-766B. Section 766A set out the rule for interference with contract and section 766B provided the rule for unlawful interference with business. *Id.*

92. *Id.* § 766B.

93. *Id.* § 766B cmt. a.

94. *Id.* § 767.

95. *See Della Penna*, 902 P.2d at 745 (noting the drafters' reluctance to take a stance on the burden of proof issue).

pleading and proving certain matters" and stating, "the law in this area . . . is still in a formative stage."[96]

Since the *Second Restatement*, the law of unlawful interference with business has continued to evolve.[97] Courts have been willing to reexamine the elements of the tort and the parties' burdens of proof.[98] The Oregon Supreme Court case of *Top Service Body Shop, Inc. v. Allstate Insurance Co.*[99] was a landmark case in this evolution.[100] In *Top Service*, the Oregon Supreme Court recognized the difficulties of defining the elements of this tort without conflicting with the competitive activities valued in our society.[101] The court wanted to create a rule that would provide a claim for wrongful interference and still allow legitimate competition.[102] The court held:

> [A] claim [for unlawful interference with business] is made out when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself. Defendant's liability may arise from improper motives or from the use of improper means. They may be wrongful by reason of statute or other regulation, or a recognized rule of common law, or perhaps an established standard of a trade or profession. No question of privilege arises unless the interference would be wrongful but for the privilege; it becomes an issue only if the acts charged would be tortious on the part of an unprivileged defendant.[103]

In *Leigh Furniture & Carpet Co. v. Isom*,[104] the Utah Supreme Court adopted the holding of *Top Service*.[105] It was looking for an alternative that was better than both the prima facie approach and the *Second Restatement's*

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96. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS ch. 37 at 5-6, Introductory Note (1965)).

97. *Id.* at 746.

98. *Id.*; *see also, e.g.*, Top Serv. Body Shop, Inc. v. Allstate Ins. Co., 582 P.2d 1365, 1371 (Or. 1978) (holding that a claim for unlawful interference requires conduct that was independently wrongful); Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 304 (Utah 1982) (rejecting the prima facie tort approach by requiring the plaintiff to prove that the interfering conduct was improper).

99. 582 P.2d 1365 (Or. 1978).

100. *See Della Penna*, 902 P.2d at 746 (stating that the Oregon Supreme Court was one of the state courts that reformed the unlawful interference with business tort); *see also* Perlman, *supra* note 41, at 66 (stating that the *Top Service* court departed from the traditional approach to the tort).

101. *Top Serv.*, 582 P.2d at 1368.

102. *See id.* at 1368-69 (recognizing that a broad definition could create liability for conduct that is legitimately competitive).

103. *Id.* at 1371 (footnote omitted).

104. 657 P.2d 293 (Utah 1982).

105. *Leigh Furniture*, 657 P.2d at 304.

approach.[106] The court found that the way the tort had been defined in the past "require[d] too little of the plaintiff."[107] It further found that the prima facie tort approach was inadequate because it made "actionable all sorts of contemporary examples of otherwise legitimate persuasion."[108] Although it agreed with the *Second Restatement's* abolishment of the prima facie tort approach, the court dismissed the *Second Restatement's* definition of the tort as being too complex.[109] The court found the Oregon Supreme Court's approach was a "middle ground" that was superior because it "require[d] the plaintiff to allege and prove more than the prima facie tort, but not to negate all defenses of privilege."[110]

The California Supreme Court, in *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*,[111] followed Oregon and Utah by adopting a standard that required interfering conduct that was independently wrongful.[112] In *Della Penna*, the plaintiff was a car dealer that sold Lexus automobiles, which he purchased from Toyota.[113] Toyota required all of its dealers in America to sign a contract that contained a "no export" clause, which prohibited its dealers from selling Lexus automobiles outside of the United States.[114] Della Penna violated this clause of the contract and, as a result, Toyota put his dealership on a list of dealers that were in violation of the "no export" clause.[115] It became increasingly difficult for Della Penna to find suppliers because of this listing.[116] Finally, he could find no suppliers at all.[117] Della Penna sued Toyota for violations of state antitrust laws and for unlawful interference with business.[118] The state antitrust law claim was dismissed, and the jury returned a divided verdict in Toyota's favor on the tort

106. *Id.*
107. *Id.* at 303.
108. *Id.*
109. *Id.* at 304.
110. *Id.*
111. 902 P.2d 740 (Cal. 1995).
112. *Della Penna*, 902 P.2d at 751.
113. *Id.* at 742. John Della Penna owned Pacific Motors, an automobile wholesaler. *Id.*
114. *Id.* Toyota introduced the Lexus in the United States in 1989. *Id.* The company planned to introduce the Lexus in Japan only after its introduction in the United States. *Id.* Toyota feared that a resale market for the Lexus would develop in Japan, and that its American dealers would re-export the cars back to Japan, harming their network of dealers in the United States. *Id.* To prevent this, Toyota included the "no export" clause in its dealership contracts. *Id.*
115. *Id.* From 1989 to 1990, Della Penna had made a profitable business out of buying Lexus automobiles from other dealers in the United States and reselling them in Japan. *Id.*
116. *Id.* Della Penna's main source for Lexus automobiles, Lexus of Stevens Creek, stopped selling to him because of the offenders list. *Id.*
117. *Id.*
118. *Id.*

claim.[119] The trial court denied Della Penna's request for a new trial and Della Penna appealed.[120] The appellate court granted a new trial.[121] The California Supreme Court then granted Toyota's request for review of the appellate court's decision.[122]

While addressing the unlawful interference with business claim, the California Supreme Court discussed the tort's evolution.[123] Over the years, courts had treated interference with existing contracts and interference with prospective contracts similarly.[124] The *Della Penna* court stated that this was not correct and there should be a distinction.[125] More protection should be afforded to existing contracts because there has been an exchange of promises between the two parties.[126] Less protection should be afforded when merely prospective contracts exist because the American economic system promotes competition.[127] The court reasoned that in such situations the rewards and risks of competition are greater.[128] The court held that in a claim for unlawful interference with business, the plaintiff must prove "the defendant's interference was wrongful 'by some measure beyond the fact of the interference itself.'"[129]

In *Wal-Mart Stores, Inc. v. Sturges,*[130] the Texas Supreme Court also followed the *Top Service* approach to unlawful interference with business by requiring conduct that was independently wrongful.[131] Sturges bought a parcel of land (tract two) in Nederland, Texas, on behalf of a group of investors.[132] The group planned to lease the land to Fleming Foods, which was looking for land to build a new store.[133] Wal-Mart operated a store on the adjacent lot (tract one).[134] Wal-Mart also had an easement on each tract

119. *Id.* at 743. The jury was split nine to three in Toyota's favor. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 743-47.
124. *See id.* at 750-51 (criticizing the view that the two claims should be treated the same).
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 751.
129. *Id.* (quoting Top Serv. Body Shop, Inc. v. Allstate Ins. Co., 582 P.2d 1365, 1371 (Or. 1978)).
130. 52 S.W.3d 711 (Tex. 2001).
131. *Wal-Mart*, 52 S.W.3d at 726.
132. *Id.* at 713.
133. *Id.* at 714.
134. *Id.*

of land that gave it the right to approve any improvements or modifications to the land.[135]

After purchasing the property, Sturges sought approval from Wal-Mart for the construction of the planned Fleming Foods store.[136] He contacted Wood, a manager in Wal-Mart's property management department, who told Sturges that Wal-Mart would approve the construction.[137] Shortly thereafter, Sturges negotiated a non-binding agreement with Fleming Foods in which Fleming Foods stated its intention to lease tract two.[138]

Wood was not aware that Watson, a manager in another Wal-Mart department, had already hired a realtor named Hudson to purchase tract two so Wal-Mart could expand its Nederland store.[139] The director of Wal-Mart's property management department, Fuller, was informed of the situation.[140] Fuller decided that Hudson should proceed with his attempts to buy tract two, and he directed Wood to deny Sturges' construction approval request.[141] Hudson then informed Fleming Foods that Wal-Mart wanted to expand onto tract two and told Fleming Foods that if Wal-Mart could not expand onto tract two, Wal-Mart would close its store on tract one and relocate it.[142] Fleming Foods then withdrew from the non-binding lease agreement with Sturges because Fleming Foods wanted its new store to be located next to a Wal-Mart.[143]

Sturges and the group of investors then sued Wal-Mart for unlawfully interfering with the prospective lease agreement.[144] The jury found for the plaintiffs and awarded actual damages, punitive damages, and attorney

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135. *Id.* at 713. One easement was filed in 1982, and the other was filed in 1988. *Id.* Wal-Mart obtained the easements to ensure that any development on the land was done according to a development plan. *Id.*

136. *Id.* at 714. The purchase contract for tract two contained a provision that allowed the purchasers to rescind the contract if they were unable to lease the land and obtain approval from Wal-Mart for the construction of the Fleming Foods store. *Id.* at 713.

137. *Id.* at 714. Wood told Sturges that Wal-Mart would approve the planned construction even though she did not have the authority to do so. *Id.*

138. *Id.*

139. *Id.* Watson had been assigned to find a way to expand the Nederland store. *Id.* She determined that the best way to do this was to expand onto the adjacent lot. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* Sturges and the group of investors then opted out of the purchase contract for tract two. *Id.* Wal-Mart purchased tract two several months later and expanded its Nederland store. *Id.*

144. *Id.* The plaintiffs also brought a second claim that alleged Wal-Mart breached its easement contracts by unreasonably refusing to approve the construction project on tract two. *Id.* at 714-15.

fees.[145] The trial court then entered judgment without awarding the attorney fees.[146] On appeal, the appellate court affirmed the actual damages but ordered a retrial of the punitive damages.[147] The Texas Supreme Court then granted Wal-Mart's petition for review.[148]

The Texas Supreme Court held that a plaintiff claiming unlawful interference with business must prove that the interfering conduct was independently tortious or wrongful.[149] The court explained that a plaintiff was not required to prove an independent tort, but must be able to prove that the interfering conduct "would be actionable under a recognized tort."[150] The court found that the defenses of justification and privilege were only effective to the point that they would be effective against the tortiousness of the alleged conduct.[151] The court reasoned that allowing these defenses was necessary so that the plaintiff bears the burden of proving that the conduct was not justified.[152]

The *Top Service* approach has been followed by Utah, California, and Texas, and has gained acceptance throughout the country.[153] Many states have adopted this approach with slight variations while maintaining the basic requirement that the plaintiff prove the interfering conduct was in some respect independently wrongful.[154] The current trend in the law is toward more widespread acceptance of this approach.[155]

Until 2001, North Dakota had not joined the group of states that have adopted variations of the *Top Service* approach.[156] In fact, it was not clear

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145. *Id.* at 715. The jury found for the plaintiffs on both the unlawful interference claim and the contract claim. *Id.* The jury awarded the plaintiffs $1,000,000 in actual damages, $500,000 in punitive damages on the unlawful interference claim, and $145,000 in attorney fees. *Id.*

146. *Id.*

147. *Id.* The court of appeals found that the trial court had improperly excluded evidence for the plaintiffs that concerned punitive damages. *Id.*

148. *Id.*

149. *Id.* at 726.

150. *Id.* The court gave the example of a plaintiff that brought a claim for unlawful interference with business against a defendant for making fraudulent statements about the plaintiff to a third person. *Id.* In such a situation, the plaintiff could recover without proving that fraud was actually committed. *Id.*

151. *Id.* at 726-27.

152. *Id.*

153. *See* Trade 'N Post, L.L.C. v. World Duty Free Ams., Inc., 2001 ND 116, ¶ 42, 628 N.W.2d 707, 719 (stating that an increasing number of jurisdictions have been requiring independently tortious or unlawful conduct in a claim for unlawful interference with business).

154. Della Penna v. Toyota Motor Sales, U.S.A., Inc., 902 P.2d 740, 746-47 (Cal. 1995) (observing that nearly a majority of states have required some form of wrongful conduct as required in *Top Service*).

155. *See Trade 'N Post*, ¶ 42, 628 N.W.2d at 719 (stating that the number of jurisdictions adopting this approach is growing).

156. *Id.* ¶ 34, 628 N.W.2d at 716.

whether North Dakota common law even recognized a claim for unlawful interference with business.[157]

C. UNLAWFUL INTERFERENCE WITH BUSINESS IN NORTH DAKOTA

Although the North Dakota Supreme Court had heard cases dealing with unlawful interference with business claims in the past, it had not made a definitive ruling on whether North Dakota common law recognizes the tort.[158] One reason for this may be that the issue had come before the court very few times.[159]

Fox v. Higgins[160] was the first case to present the issue to the court.[161] Fox was a farmer and rancher who sued Higgins for unlawful interference with business.[162] Fox claimed that Higgins committed various tortious acts against him in an attempt to intentionally and maliciously destroy his business.[163] The statutes of limitation had run on each of the individual torts Fox alleged.[164] To get around the statutes of limitation, Fox sued Higgins under the theory that the various tortious acts constituted a continuing tort of unlawful interference with business.[165] The court did not decide whether North Dakota recognized a cause of action for unlawful interference with business, but instead, it held that Fox had not sufficiently pleaded and proven the necessary elements of the tort.[166]

The next time the issue came before the court was in *Schneider v. Schaaf*.[167] The Schneiders were an elderly couple who owned a small farm in Stark County, North Dakota.[168] In 1982, they leased 380 acres of their

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157. *Id.*

158. *Id.* at 716.

159. *See id.* at 716-17 (citing Fox v. Higgins, 149 N.W.2d 369, 371 (N.D. 1967); Schneider v. Schaaf, 1999 ND 235, ¶¶ 25-28, 603 N.W.2d 869, 876-77; Fargo Women's Health Org., Inc. v. FM Women's Help & Caring Connection, 444 N.W.2d 683, 687-88 (N.D. 1989) (VandeWalle, J., concurring in result)).

160. 149 N.W.2d 369 (N.D. 1967).

161. *Fox*, 149 N.W.2d at 371.

162. *Id.* at 370.

163. *Id.* at 370-71. Fox alleged that Higgins committed "arson, assault with a deadly weapon, barratry, champerty and maintenance, the purchase of a pretended title, abuse of process, malicious mischief, [and] false arrest and imprisonment." *Id.* at 371.

164. *Id.*

165. *Id.*

166. *Id.* at 372. The court wrote:

> Our decision does not, as contended by the plaintiff, mean that no right of action exists in this State for interference with business or trade. All that we do hold is that the pleading of the plaintiff and the evidence which he produced in this case do not constitute or prove such a tort.

Id. (deciding to decline the petition for rehearing).

167. Schneider v. Schaaf, 1999 ND 235, ¶ 25, 603 N.W.2d 869, 876.

168. *Id.* ¶ 2, 603 N.W.2d at 872.

land to Michael Schaaf to farm.[169] After several extensions to the lease, the Schneiders wanted to put their land in the Conservation Reserve Program (CRP) starting in 1990.[170] Schaaf resisted and claimed that he had leased the land through 1990.[171]

The Schneiders sued, claiming that Schaaf was trying to drive them out of farming.[172] They claimed breach of contract, unlawful interference with business, and other tortious acts.[173] The North Dakota Supreme Court upheld the trial court's granting of summary judgment to dismiss the tort claims.[174] The court did not decide whether North Dakota recognized the tort of unlawful interference with business but simply held that dismissal of the claim was appropriate because the Schneiders had not proven actual damages.[175]

The court again declined to clearly state whether North Dakota recognized the tort.[176] *Schneider* was decided in December 1999 and left open the question of whether North Dakota common law recognized the tort of unlawful interference with business.[177]

D. SUMMARY OF LEGAL BACKGROUND

The modern tort claim for interference with an existing contract began in 1853 with the English case of *Lumley*.[178] In 1893, *Temperton* extended the *Lumley* holding and recognized a claim for unlawful interference with business.[179] There are two principal burden of proof theories for an unlawful interference with business claim.[180] The first theory is the prima facie theory.[181] Under this approach, if the plaintiff proves that the defendant intentionally interfered with economic relations, and injury resulted, the

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169. *Id.* The terms of the original lease were from March 1, 1982, to October 15, 1984, at eighteen dollars an acre per year. *Id.*

170. *Id.* ¶¶ 4-5. Extensions were made to the lease, but they were poorly documented and confusing. *Id.* ¶ 4. The CRP paid thirty-five dollars per acre. *Id.* ¶ 5.

171. *Id.* ¶ 7, 603 N.W.2d at 873. Schaaf claimed that he signed a lease extension agreement that gave him rights to the land through 1990, but the Schneiders claimed it was fraudulent. *Id.* ¶ 15, 603 N.W.2d at 874.

172. *Id.* ¶ 9, 603 N.W.2d at 873.

173. *Id.* ¶¶ 9-11. The Schneiders sued for fraud, "illegal acts in concert with each other," unlawful interference with business, and civil rights violations. *Id.* ¶ 11.

174. *Id.* ¶ 36, 603 N.W.2d at 878.

175. *Id.* ¶¶ 27-28, 603 N.W.2d at 876-77.

176. *Id.* ¶¶ 25-28.

177. *Id.*

178. *See supra* Part II.A.1.

179. Temperton v. Russell, 1 Q.B. 715, 728 (Eng. C.A. 1893).

180. *See* Long, *supra* note 24, at 868-69 (summarizing the prima facie theory and the wrongful conduct theory).

181. RESTATEMENT OF TORTS § 766 (1939).

burden shifts to the defendant to prove that the interfering conduct was privileged.[182] The prima facie theory has fallen out of favor because the heavy burden it places on the defendant can chill legitimate competition.[183]

The second theory is the wrongful conduct theory.[184] This approach focuses on whether the interfering conduct was improper.[185] In *Top Service*, the Oregon Supreme Court modified the wrongful conduct theory by requiring conduct that was wrongful, independent of the interference itself.[186] This was seen as an improvement because it required the plaintiff to prove more than the prima facie elements but did not negate all defenses of privilege.[187]

Many states have adopted a variation of the *Top Service* approach because of its increased protections for legitimate competition.[188] The trend in recent years has been toward further adoption of the *Top Service* approach.[189] The North Dakota Supreme Court recognized this trend when it decided which theory North Dakota would follow.[190]

III. ANALYSIS

The North Dakota Supreme Court decided *Trade 'N Post* unanimously.[191] Justice Sandstrom wrote the court's opinion.[192] The court answered three certified questions in the opinion.[193] This case comment focuses on the third certified question, whether North Dakota common law recognized the tort of unlawful interference with business.[194] The court held that North

182. Long, *supra* note 24, at 868.

183. Myers, *supra* note 43, at 1123.

184. RESTATEMENT (SECOND) OF TORTS § 766B (1979).

185. *Id.*

186. Top Serv. Body Shop, Inc. v. Allstate Ins. Co., 582 P.2d 1365, 1371 (Or. 1978).

187. Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 304 (Utah 1982).

188. *See* Della Penna v. Toyota Motor Sales, U.S.A., Inc., 902 P.2d 740, 746-47 (listing jurisdictions that have adopted an approach requiring some form of independently wrongful conduct).

189. *See* Trade 'N Post, L.L.C. v. World Duty Free Ams., Inc., 2001 ND 116, ¶¶ 40-42, 628 N.W.2d 707, 718-19 (noting the "growing body of cases" adopting the *Top Service* approach).

190. *Id.* ¶ 42, 628 N.W.2d at 719.

191. *Id.* ¶ 46, 628 N.W.2d at 721. District Judge Gerald H. Rustad sat in place of Justice Kapsner who was disqualified from the case. *Id.* ¶ 47.

192. *Id.* ¶ 1, 628 N.W.2d at 708.

193. *Id.* ¶¶ 1-2. The first certified question asked whether a private right of action for money damages exists under North Dakota's Unfair Discrimination Law. *Id.* The court held no such action exists. *Id.* ¶ 2. The second certified question asked whether a private right of action for money damages exists under North Dakota's Unfair Trade Practices Law. *Id.* ¶ 1. The court again held that no such action exists. *Id.* ¶ 2.

194. *Id.* ¶ 1.

Dakota does recognize a common law claim for unlawful interference with business.[195]

The court began its analysis of this issue by noting that it has recognized a claim for the related tort of interference with an existing contract.[196] A third party who wrongfully interferes with a contract, or prevents the formation of a contract, can be held liable for damages.[197] The court discussed interference with an existing contract because it is closely related to a claim for unlawful interference with business.[198]

The court then moved to unlawful interference with business.[199] Although the court had addressed the issue in previous cases, it had not made a definitive ruling on whether the tort was recognized under North Dakota common law.[200] To illustrate this, the court pointed to several cases.[201] First, the court cited *Fox* in which it was presented with an unlawful interference with business claim.[202] In *Fox*, the court did not decide whether North Dakota recognized a claim for unlawful interference with business.[203] The court instead dismissed the suit, holding that even if such a claim existed, the plaintiff's pleadings and proof were not adequate.[204]

Second, the court cited *Schneider* in which it upheld the summary judgment dismissal of an unlawful interference with business claim because the plaintiff failed to prove damages.[205] However, the court did not definitively rule on the existence of the tort in North Dakota.[206]

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195. *Id.* ¶ 2.

196. *See id.* ¶ 33, 628 N.W.2d at 716 (citing Messiha v. State, 1998 ND 149, ¶ 10, 583 N.W.2d 385, 388 (stating that a prima facie case for tortious interference with a contract requires "a breach of contract instigated without justification by the defendant"); Tracy v. Cent. Cass Pub. Sch. Dist., 1998 ND 12, ¶ 9, 574 N.W.2d 781, 782-83 (stating that a prima facie case for interference with a contract requires a plaintiff to prove that a contract existed, that the contract was breached, and that the defendant instigated the breach without justification); Fronteer Directory Co. v. Maley, 1997 ND 162, ¶ 14, 567 N.W.2d 826, 829 (stating that the existence of a contract and a breach of a contract are the first two elements of a claim for interference with a contract)).

197. Trade 'N Post, L.L.C. v. World Duty Free Ams., Inc., 2001 ND 116, ¶ 33, 628 N.W.2d 707, 716. "Wrongful interference with contractual rights, whether such interference induces or prevents a third person to refrain from forming a contract, or induces such person to break an existing contract, will render the person whose wrongful conduct is responsible for these results liable in damages to the party injured." *Id.* (quoting Bekken v. Equitable Life Assurance Soc'y of U.S., 293 N.W. 200, 217 (N.D. 1940)).

198. *See id.* (noting that the two claims are closely related).

199. *Id.* ¶¶ 33-34.

200. *Id.* ¶ 34. The court noted that it had not definitively ruled on the tort's existence before *Trade 'N Post*. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

Finally, the court cited Chief Justice VandeWalle's concurring opinion in *Fargo Women's Health Organization Inc. v. FM Women's Help & Caring Connection*.[207] Justice VandeWalle wrote that, although it was not pleaded, the appellee could possibly have brought a claim for unlawful interference with business.[208] This statement again lacked a clear pronouncement by the court regarding the recognition of the tort in North Dakota.[209]

The court then reiterated its definitive recognition of a claim for unlawful interference with business in North Dakota.[210] The court next defined its required elements.[211] To establish a claim for unlawful interference with business in North Dakota, a plaintiff must prove the following elements: (1) there was a valid business relationship or expectancy, (2) the interfering party knew of the relationship or expectancy, (3) the interfering conduct was independently tortious or otherwise unlawful, (4) the claimed damages were caused by the act, and (5) the party claiming the interference suffered actual damages.[212]

Realizing the third element, that the interfering conduct was independently tortious or otherwise unlawful, required further explanation, the court addressed it in-depth.[213] The court recognized that there has been much controversy concerning what constitutes an independently tortious or otherwise unlawful act.[214] The court noted that the major area of disagreement was whether the motive behind the interfering actions should be relevant.[215] The court further noted that many courts and commentators have argued that, in the context of business competitors, the motive or intent of the interfering party is irrelevant and the determining factor should be whether the actions were "independently tortious or unlawful."[216] The

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207. *Id.* (citing Fargo Women's Health Org., Inc. v. FM Women's Help & Caring Connection, 444 N.W.2d 683, 687-88 (N.D. 1989) (VandeWalle, J., concurring in result)).

208. *Fargo Women's Health*, 444 N.W.2d at 687-88. In *Fargo Women's Health*, the appellee's award of compensatory and punitive damages for violation of the false advertising statute was upheld over the appellant's claim that remedies under the statute were limited to criminal penalties and injunctive relief. *Id.* at 686.

209. *See id.* at 687-88 (stating that such a claim could be brought, but not stating whether the court would find the claim valid).

210. Trade 'N Post, L.L.C. v. World Duty Free Ams., Inc., 2001 ND 116, ¶ 35, 628 N.W.2d 707, 717.

211. *Id.* ¶ 36.

212. *Id.*

213. *See id.* ¶ 37 (noting that there are many different views about what conduct is actionable under this tort).

214. *Id.*

215. *Id.* ¶ 38.

216. *Id.* ¶ 39, 628 N.W.2d at 718 (citing Speakers of Sport, Inc. v. ProServ, Inc., 178 F.3d 862, 867 (7th Cir. 1999); Della Penna v. Toyota Motor Sales, U.S.A., Inc., 902 P.2d 740, 750-51

court agreed with the *Della Penna* holding, which required the interfering conduct to be "wrongful by some measure beyond the fact of the interference itself."[217]

The North Dakota Supreme Court then looked to Professor Gary Myers for further guidance on this issue.[218] Professor Myers argued that in the United States economic system, which puts great value on competition, motive should not be considered.[219] He argued that if motive was the defining factor, every competitor would be a tortfeasor because every business competitor would in some way have economic self-interest as a motive when interfering with business relations.[220] Professor Myers concluded that this was not acceptable in an economic system that rewards those who gain an advantage over their competitors.[221]

The court applied this analysis to the claim in *Trade 'N Post* and held that to recover for unlawful interference with business in North Dakota, the plaintiff must prove that the interfering conduct was "independently tortious or otherwise unlawful."[222] To support its holding, the court adopted the Texas Supreme Court's reasoning in *Wal-Mart Stores*.[223] The court quoted a passage from *Wal-Mart* in which the Texas Supreme Court laid out its approach to a claim for unlawful interference with business.[224] The *Wal-Mart* court held that a claim for unlawful interference with business required an act that was independently tortious or wrongful.[225] However, this does not mean the plaintiff must be able to prove an independent tort.[226] It simply means the plaintiff must be able to prove the interfering act was tortious under recognized law.[227]

(Cal. 1995); Vikings, U.S.A. Bootheel Mo. v. Modern Day Veterans, 33 S.W.3d 709, 711 (Mo. Ct. App. 2000); Wal-Mart Stores, Inc. v. Sturges, 52 S.W.3d 711, 713 (Tex. 2001); Dan B. Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335, 347-50 (1980); Myers, *supra* note 43, at 1142-43; Perlman, *supra* note 41, at 78-99).

217. *Id.* ¶ 40, 628 N.W.2d at 719 (quoting *Della Penna*, 902 P.2d at 751).

218. *Id.* ¶ 41. Professor Myers is an assistant professor of law at the University of Mississippi and the author of *The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law*, which was published in the *Minnesota Law Review*. Myers, *supra* note 43, at 1097 n.a.

219. Myers, *supra* note 43, at 1142.

220. Trade 'N Post, L.L.C. v. World Duty Free Ams., Inc., 2001 ND 116, ¶ 41, 628 N.W.2d 707, 719 (quoting Myers, *supra* note 43, at 1142).

221. *See id.* (quoting Myers, *supra* note 43, at 1142 (stating that economic competitors should not be liable in tort for legitimate competition in a free market system)).

222. *Id.* ¶ 42.

223. *Id.* at 719-21 (citing Wal-Mart Stores, Inc. v. Sturges, 52 S.W.3d 711, 726-27 (Tex. 2001)).

224. *Id.*

225. *Id.* at 720 (quoting *Wal-Mart*, 52 S.W.3d at 726).

226. *Id.* (quoting *Wal-Mart*, 52 S.W.3d at 726).

227. *Id.* (quoting *Wal-Mart*, 52 S.W.3d at 726).

The North Dakota Supreme Court quoted examples that the *Wal-Mart* court used to illustrate how a plaintiff could succeed in proving that interfering conduct was independently tortious or wrongful without proving an independent tort.[228] One example involved potential customers of a plaintiff who were kept away from the plaintiff's business by threats of physical harm.[229] The plaintiff in this example would have a claim for unlawful interference with business if he or she could prove the conduct constituted assault.[230] The plaintiff would not need to prove the potential customers were assaulted.[231]

Another example involved a business that was being boycotted.[232] The business in this example would have a claim for unlawful interference with business if it could show the boycott was illegal.[233] It would not have a claim if the boycott was legal because conduct that is "merely 'sharp' or unfair is not actionable and cannot be the basis for tortious interference."[234]

The North Dakota Supreme Court further quoted the *Wal-Mart* court, stating that a claim for unlawful interference with business was necessary to fill a gap in tort law.[235] The plaintiff in the first example above, although economically injured, could not sue for assault because he or she was not threatened.[236] The plaintiff would have no remedy at all without the tort of unlawful interference with business.[237] This tort would provide a remedy if the interfering conduct was "recognized as wrongful under the common law or by statute."[238]

The North Dakota Supreme Court adopted the *Wal-Mart* court's approach to possible defenses to unlawful interference with business.[239] The *Wal-Mart* court stated that the defenses of justification and privilege would be effective only inasmuch as they would be effective against the independent tortiousness of the interfering conduct.[240] Thus, if a plaintiff brings a claim for unlawful interference caused by defamation, the defendant may

228. *Id.* (quoting *Wal-Mart*, 52 S.W.3d at 726).
229. *Id.* (quoting *Wal-Mart*, 52 S.W.3d at 726).
230. *Id.* (quoting *Wal-Mart*, 52 S.W.3d at 726).
231. *Id.* (quoting *Wal-Mart*, 52 S.W.3d at 726).
232. *Id.* (quoting *Wal-Mart*, 52 S.W.3d at 726).
233. *Id.* (quoting *Wal-Mart*, 52 S.W.3d at 726).
234. *Id.* (quoting *Wal-Mart*, 52 S.W.3d at 726).
235. *Id.* at 721 (quoting *Wal-Mart*, 52 S.W.3d at 713).
236. *Id.* (quoting *Wal-Mart*, 52 S.W.3d at 713).
237. *See id.* (quoting *Wal-Mart*, 52 S.W.3d at 713 (stating that the plaintiff would not have a claim for assault)).
238. *Id.* (quoting *Wal-Mart*, 52 S.W.3d at 713).
239. *Id.* at 720.
240. *Id.* (quoting *Wal-Mart*, 52 S.W.3d at 726-27).

bring a defense of privilege.[241] If a defense does not relate to the tortiousness of the conduct, the defendant cannot assert it, and the plaintiff does not need to disprove it.[242]

The North Dakota Supreme Court definitively recognized a common law claim for unlawful interference with business and adopted the *Wal-Mart* court's analysis concerning the required elements of the tort and the character of the interfering conduct.[243] The court held that a plaintiff in a claim for unlawful interference with business must prove that the interfering conduct was conduct that was tortious by itself or against state law.[244]

IV. IMPACT

The North Dakota Supreme Court's express recognition of the tort of unlawful interference with business gave North Dakota lawyers a clear ruling on the tort's existence in North Dakota.[245] Before *Trade 'N Post*, the court had decided cases that brought claims under the tort, but it had not clearly addressed the validity of such claims.[246] The court defined the elements of the tort and discussed the types of interfering actions that are actionable under it.[247] Lawyers practicing before North Dakota courts can now bring claims for unlawful interference with business with confidence in the claims' validity and knowledge of the elements they must prove.[248]

The recognition of a claim for unlawful interference with business fills a gap in North Dakota tort law.[249] Situations exist where an injured party would likely have no claim for relief without the tort.[250] Business owners can now obtain a remedy for economic damages when relations with their potential customers have been interfered with by conduct that is indepen-

241. *Id.* (quoting *Wal-Mart*, 52 S.W.3d at 727).

242. *Id.* (quoting *Wal-Mart*, 52 S.W.3d at 727).

243. *Id.* ¶¶ 42-43, 628 N.W.2d at 719-21.

244. *Id.* ¶ 43, 628 N.W.2d at 721.

245. *See id.* ¶ 34, 628 N.W.2d at 716 (noting that the court had decided cases involving the tort, but had not expressly recognized its validity in North Dakota).

246. *Id.*

247. *Id.* ¶¶ 36-42, 628 N.W.2d at 717-21. The five elements are: (1) there existed a valid business relationship or expectancy, (2) the interfering party knew of the relationship or expectancy, (3) the interfering conduct was independently tortious or otherwise unlawful, (4) the claimed damages were caused by the act, and (5) the party claiming the interference suffered actual damages. *Id.* ¶ 36, 628 N.W.2d at 717.

248. *See id.* ¶¶ 35-42, 628 N.W.2d at 717-21 (recognizing the tort in North Dakota and defining its elements).

249. *See id.* ¶ 42, 628 N.W.2d at 721 (quoting Wal-Mart Stores, Inc. v. Sturges, 52 S.W.3d 711, 713 (Tex. 2001) (stating that a claim for unlawful interference with business provides a remedy where other claims will not)).

250. *Id.* (quoting *Wal-Mart*, 52 S.W.3d at 713).

dently tortious or in violation of state law.[251] Without the tort of unlawful interference with business, such business owners could not obtain a remedy without an existing contract or business relationship.[252]

The tort also provides a remedy for businesses that have been harmed by independently tortious or unlawful conduct that was not directed at the business, but at third persons.[253] A business owner now has a claim for relief if customers are driven away by physical threats.[254] Without an unlawful interference with business claim, the business owner had no remedy because the owner was not being threatened and thus could not sue for assault.[255]

The tort may also provide alternate or companion claims in certain suits.[256] Plaintiffs have brought unlawful interference with business claims as companions to antitrust claims.[257] They have also brought interference claims as companions to wrongful discharge claims.[258] The plaintiff in *Trade 'N Post* demonstrated these possibilities by bringing an interference claim as a companion to its antitrust claims.[259]

This tort also provides an alternative to claims based on the tortious acts themselves.[260] Plaintiffs can bring claims based on the interfering impact that actions had on prospective business relations.[261] This is an effective alternative because courts have been reluctant to award purely economic damages under traditional intentional torts and negligence

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251. *See id.* ¶ 43 (defining culpable conduct under the tort).

252. *See* Della Penna v. Toyota Motor Sales, U.S.A., Inc., 902 P.2d 740, 750-51 (recognizing the distinction between contractual relations and prospective contractual relations).

253. *See* Trade 'N Post, L.L.C. v. World Duty Free Ams., Inc., 2001 ND 116, ¶ 42, 628 N.W.2d 707, 721 (quoting *Wal-Mart*, 52 S.W.3d at 713 (stating that unlawful interference with business provides a claim in some circumstances where otherwise a claim would not exist)).

254. *Id.* (quoting *Wal-Mart*, 52 S.W.3d at 713).

255. *See id.* (quoting *Wal-Mart*, 52 S.W.3d at 713 (stating that a business owner cannot sue for assault when customers are physically threatened)).

256. *See, e.g., id.* ¶ 4, 628 N.W.2d at 709 (bringing a claim for unlawful interference with business along with antitrust and unfair trade practices claims); *see also* Long, *supra* note 24, at 874-75 (stating that an interference claim is a natural companion to a wrongful discharge claim); Myers, *supra* note 43, at 1099 (stating that plaintiffs in antitrust suits bring companion interference claims).

257. Myers, *supra* note 43, at 1099.

258. *See* Long, *supra* note 24, at 874-75 (stating that an unlawful interference with business claim could be brought with a wrongful discharge claim).

259. Trade 'N Post, L.L.C. v. World Duty Free Ams., Inc., 2001 ND 116, ¶ 4, 628 N.W.2d 707, 709.

260. Perlman, *supra* note 41, at 69.

261. *Id.* For example, if the plaintiff had a prospective contract with a third party that the defendant interfered with by fraud, the plaintiff could sue for fraud and for unlawful interference with business. *See id.* (using an example involving interference with an existing contract).

claims.[262] Thus, a plaintiff seeking purely economic damages for interference caused by tortious acts may have a better chance for recovery under an alternative claim for unlawful interference with business.[263]

V. CONCLUSION

In *Trade 'N Post*, the North Dakota Supreme Court held that North Dakota common law recognizes the tort of unlawful interference with business.[264] The court also set forth the five elements that a plaintiff must prove in order to establish the tort: (1) the existence of a valid business relationship or expectancy, (2) the interfering party knew of the relationship or expectancy, (3) the interfering conduct was independently tortious or otherwise unlawful, (4) the claimed damages were caused by the act, and (5) the party claiming the interference suffered actual damages.[265]

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262. *Id.* The justification for this is that purely economic damages are more remote or unforeseeable. *Id.* at 70.

263. *See id.* (stating that purely economic damages are difficult to obtain under the traditional intentional torts).

264. *Trade 'N Post*, ¶ 32, 628 N.W.2d at 716.

265. *Id.* ¶ 36, 628 N.W.2d at 717.

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