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THE OPIOID DRAGON OF JOHNSON & JOHNSON IS SLAYED. ALL HAIL THE KILLING OF THE NOT GUILTY.

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I. Introduction

The Opioid dragon of Johnson & Johnson is slayed. All Hail the killing of the not guilty.

The law is a place where legal stability is required, and as such, requires uniform application to avoid unfairness in the judicial system. Even in the face of societal crisis, the law must remain firm and not capitulate to the pressure of mob mentality. The courts must follow the rules of law set down and not deviate merely to placate the mob. Today, our society is in the grip of an opioid addiction crisis of epic proportion where there is no immediate solution and the public frustration is at a fever pitch.²

The recent Johnson & Johnson case decided in Oklahoma is one where the courts decided that the solution to societies' frustration over the opioid crisis was to give society what they wanted: a bad guy to blame and then hang.³ The court picked Johnson & Johnson, railroaded the company with questionable legal analysis and then made sure at the end of the trail the bad guy would be hung to the cheers of the crowds.⁴

This paper looks at the consequences of allowing the legal system to forego its duty and side with the mob simply to be a hero. This paper will examine how the courts mislead the mob and why they did it, and why by allegedly solving this crisis, they may have created an even bigger problem.

II. The Accusation against Johnson & Johnson

On June 30, 2017, the State of Oklahoma brought suit against Johnson & Johnson for the actions of its pharmaceutical subsidiary Janssen for allegedly fueling the opioid crisis in Oklahoma, which has

² See generally *Opioid Overdose Crisis*, NAT'L INSTITUTE ON DRUG ABUSE (Apr. 2020), <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis>.

³ State *ex rel.* Hunter v. Purdue Pharma L.P., No. CJ-2017-816, 2019 Okla. Dist. LEXIS 3486, at *2-4 (D. Okla. Aug. 26, 2019).

⁴ *Id.*

claimed the lives of more than 6,000 people in the State.⁵ The suit, originally filed in the District Court of Cleveland County, Oklahoma, and removed to federal court, seeks damages in the amount of \$17.5 billion.⁶

A. *Setting the Stage*

Janssen manufactures two opioid products, Duragesic and Nucynta ER.⁷ In addition, “Johnson & Johnson [] owned two companies that processed and imported the raw material used to manufacture oxycodone, a highly addictive opioid.”⁸

In the State’s complaint, “Oklahoma Attorney General Mike Hunter sued Johnson & Johnson arguing that the company is financially liable for the crisis under the state’s nuisance law and therefore must pay billions of dollars to fund an abatement plan to fix the state’s opioid crisis.”⁹ The crisis as viewed by the State is of epic proportions. “Addiction costs Oklahoma and its residents an estimated \$7.2 billion a year.”¹⁰ The opioid epidemic impacts society in many ways, and “[t]he direct and indirect costs are enormous. Incarceration chews up tax dollars. Business productivity plummets. Families crumble. Crime festers.”¹¹ The \$7.2 billion in costs per year includes \$1.8 billion in direct costs for hospital care, doctors, police and prisons, and \$5.4 billion in estimated lost productivity from workers who become ill or die.¹²

⁵ Jackie Fortier & Brian Mann, *Johnson & Johnson Ordered to Pay Oklahoma \$572 Million in Opioid Trial*, NPR (Aug. 26, 2019), <https://www.npr.org/sections/health-shots/2019/08/26/754481268/judge-in-opioid-trial-rules-johnson-johnson-must-pay-oklahoma-572-million>; See Complaint, State of Oklahoma, ex rel. Hunter v. Purdue Pharma L.P, et. al, No. CJ-2017-816.

⁶ Forter & Mann, *supra* note 5; See Notice of Removal, ECF No. 3, 5:18-cv-00574-M.

⁷ Scott Higham, Sari Horwitz, & Lenny Bernstein, *Johnson & Johnson Reaches \$20.4 Million Settlement in Huge Opioid Case*, WASH. POST (Oct. 1, 2019), https://www.washingtonpost.com/investigations/johnson-and-johnson-reaches-tentative-204-million-settlement-in-massive-opioid-case/2019/10/01/6a8a9670-e48e-11e9-b403-f738899982d2_story.html.

⁸ *Id.*

⁹ Xuan Thai, *Oklahoma’s multibillion-dollar case against Johnson & Johnson rests in the hands of the judge*, NBC NEWS (July 15, 2019) <https://www.nbcnews.com/news/us-news/oklahoma-s-multibillion-dollar-case-against-johnson-johnson-rests-hands-n1030196>.

¹⁰ Jaclyn Cosgrove, *Cost of addiction in Oklahoma: An Estimated \$7.2 billion per year*, THE OKLAHOMAN (Mar. 10, 2012), <https://oklahoman.com/article/3656381/cost-of-addiction-in-oklahoma-an-estimated-72-billion-per-year>.

¹¹ *Id.*

¹² *Id.*

According to the National Institute on Drug Abuse, there were 308 overdose deaths involving opioids in Oklahoma in 2018, a rate of 7.8 deaths per 100,000 persons.¹³ Additionally, “[i]n 2017 Oklahoma providers wrote 79.1 opioid prescriptions for every 100 persons.”¹⁴ Moreover, “NAS or NOWS [or neonatal opioid withdrawal syndrome,] may occur when a pregnant woman uses opioids during pregnancy.”¹⁵ A recent national study showed a fivefold increase in the incidence of NAS/NOWS between 2004 and 2014, from 1.5 per 1,000 hospital births to 6.5 per 1,000 hospital births.¹⁶

According to the Oklahoma State Department of Health, 60% of the over 700 accidental poisoning deaths in Oklahoma annually involved one or more prescription drugs.¹⁷ “Prescription opioids are the most common class of drugs involved in overdose deaths in Oklahoma (involved in 85% of prescription drug-related overdose deaths).”¹⁸ Further, “[m]ore overdose deaths involve prescription opioids than all illicit drugs combined.”¹⁹

B. *Now all we need to do is Vilify the Defendant*

The stage is now set with a title wave of aggrieved individuals standing at the ready. During the District Court Trial the State of Oklahoma called Tonya Ratcliff, “a foster mother to babies born addicted to opioids.”²⁰ These children are the offspring of mothers who themselves are in the clutches of the opioid epidemic. “Ratcliff called the first days of withdrawal for the infants ‘hell on earth, and that’s being polite about it.’”²¹ Ratcliff testified in riveting detail about the heart-wrenching withdrawal

¹³ *Oklahoma Opioid Summary*, NAT’L INST. ON DRUG ABUSE (Mar. 2020), <https://www.drugabuse.gov/opioid-summaries-by-state/oklahoma-opioid-summary>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Dramatic Increases in Maternal Opioid Use and Neonatal Abstinence Syndrome*, NAT’L INST. ON DRUG ABUSE (Jan. 2019), <https://www.drugabuse.gov/related-topics/trends-statistics/infographics/dramatic-increases-in-maternal-opioid-use-neonatal-abstinence-syndrome>.

¹⁷ *Drug Overdose*, OKLA. ST. DEP’T OF HEALTH, https://www.ok.gov/health/Prevention_and_Preparedness/Injury_Prevention_Service/Drug_Overdose/index.html (last visited Apr. 16, 2020).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Thai, *supra* note 9.

²¹ *Id.*

process that her foster children went through, wherein the children would “cry[] for days as they went through withdrawal while the state of Oklahoma showed an image of a newborn’s legs shaking uncontrollably as a result of the addiction.”²² The testimony was described as “perhaps the most powerful moment for the state.”²³

As the drama continued, the State employed every trial tactic known for pulling at a person’s heartstrings. The State called upon the testimony of witnesses who were recovering from opioid addiction and those who had lost family members.²⁴ The wave of those impacted grew to a tidal wave of cataclysmic proportion. Moreover, in the midst of it all, the attorney for Oklahoma played the theme music from the game show “Who Wants to be a Millionaire” while displaying a slide titled “Who wants to be a pain franchise billionaire?”²⁵ One could consider the music choice as either a musical tribute or an accusation depending on how they viewed the billions profited by Johnson & Johnson. Johnson & Johnson, rather than being a company known for good citizenship, is being portrayed as a drug cartel making billions off of the backs of the unfortunate.

This scenario is portrayed as reminiscent of the story of David and Goliath. However, here, rather than being a behemoth, Goliath claims to be a company that cares about people as Johnson & Johnson expresses on its website: “As human beings, it is our responsibility to help one another. We support the people on the front lines at the heart of delivering care, so that communities and health systems have the ability to address the health needs of the world’s most vulnerable people.”²⁶

The State of Oklahoma, conversely, sees the company equivalent to a drug cartel, subjugating the populace through a carefully scripted narrative. In the pleadings and throughout the trial, attorneys

²² *Id.*; See also News on 6, *Babies Born Addicted Is Tragic, Testifies Foster Mother in Oklahoma Opioid Trial*, KOTV-DF (June 19, 2019), <https://www.newson6.com/story/40682375/babies-born-addicted-is-tragic-testifies-foster-mother-in-oklahoma-opioid-trial>.

²³ Thai, *supra* note 9.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *A Commitment to Caring*, JOHNSON & JOHNSON, <https://www.jnj.com/caring> (last visited May 10, 2020).

“for the state referred to the company as a ‘kingpin’ and ‘cartel’ that fueled the crisis through deceptive marketing to doctors by claiming opioids were ‘safe and effective for every day pain,’” when according to the State itself, this was not the case.²⁷

III. The Misstatement of Legal Theory

The tort of nuisance figured principally in this lawsuit. Of the tort of nuisance, there are two varieties: Public Nuisance and Private Nuisance. Black’s Law Dictionary defines nuisance as “that activity which arises from unreasonable, unwarranted or unlawful use by a person of his own property, working obstruction or injury to the right of another or to the public, and producing such material annoyance, inconvenience and discomfort that the law will presume resulting damage.”²⁸

A. What is a Public Nuisance Anyway?

Nuisances fall into two categories of tort law; public and private.²⁹ As a general premise, “[a] public nuisance is one which effects an indefinite number of persons, or all of the residents of a particular locality, or all people coming within the range or operation, although the extent of the annoyance or damage inflicted upon individuals may be unequal.”³⁰

Oklahoma has codified their definition of nuisance in Title 50.³¹ Nuisance generally is defined in Section 1:

A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either:

First. Annoys, injures or endangers the comfort, repose, health, or safety of others; or
Second. Offends decency; or

²⁷ Thai, *supra* note 9.

²⁸ *Nuisance*, BLACK’S LAW DICTIONARY (5th ed. 1979).

²⁹ *Id.*

³⁰ *Id.*

³¹ OKLA. STAT. tit. 50 § 1 (2018).

Third. Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, stream, canal or basin, or any public park, square, street or highway; or

Fourth. In any way renders other persons insecure in life, or in the use of property, provided, this section shall not apply to preexisting agricultural activities.³²

In Oklahoma, the difference between statutory nuisance and common law nuisance is that “the statutory definition of nuisance encompasses common law’s *private and public* nuisance concepts ... [and] abrogates neither action.”³³ Under Oklahoma law, a nuisance in fact, or nuisance *per accidens*, is “an act, occupation, or structure, not a nuisance per se, but which may become a nuisance by virtue of the circumstances, location or surroundings.”³⁴ Under Oklahoma law, a nuisance *per se*, on the other hand, is one which requires that the act “is a nuisance at all times and under any circumstances, regardless of location or surroundings.”³⁵

One can think of a nuisance as intentionally and unreasonably interfering with another’s use and enjoyment of their property. The word intentionally refers not to motivation but rather to whether an action was committed which interfered with another or, for a public nuisance, a large group of people. The action taken can also be that of not fulfilling one’s legal duty to another.³⁶ Thus, a failure to perform what is legally required can also create a nuisance situation. Thus, for a nuisance to lie legally there must be an action or act by the person accused of committing the nuisance which interferes with another or effects another or group by an omission of their legal duty.

Oklahoma has a statutory definition of public nuisance under Section 2. Under the state statute, “[a] public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or

³² *Id.*

³³ Nichols v. Mid-Continent Pipe Line Co., 933 P.2d 272, 276 (Okla. 1996).

³⁴ Blocker v. ConocoPhillips Co., No. CIV-17-248-G, 2019 U.S. Dist. LEXIS 76322, at *8 n.3 (W.D. Okla. May 6, 2019).

³⁵ *Id.*

³⁶ OKLA. STAT. tit. 50 § 1 (2018).

damage inflicted upon the individuals may be unequal.”³⁷ Oklahoma’s statutory definition of public nuisance relies on the Section 1 definition of a nuisance to clarify its meaning. That being said, Oklahoma case law adds clarity to the question of what actions or effects constitute a public nuisance under the statute.

B. *Modern Case Law as Clarity to most Jurists.*

The variety of caselaw clarifying public nuisance runs the gamut from cats to pollution. In *Boudinot v. State ex rel. Cannon*, the State of Oklahoma brought suit against the defendant, Ms. Boudinot, for housing forty cats in her residence, alleging that the act constituted a public nuisance.³⁸ The resulting smell and noise was of such a magnitude that the court found it a public nuisance and reduced the maximum number of allowable cats to be in a residence to four.³⁹

In the 1924 case of *Ferriman v. Turner*, the court held that the construction of two 10,000 gallon capacity gasoline storage tanks on private property was in and of itself not a nuisance *per se* unless it could be proven “that such steps and precautions will not be taken as are known to be necessary to avoid the danger of and prevent explosions.”⁴⁰

In the 2005 Appeals Court case of *Meinders v. Johnson*, evidence was sufficient to establish that the owners and operators of the mineral estate created or maintained a public nuisance on the landowner's property, in an action by a landowner seeking injunctive relief to compel cleanup and remediation.⁴¹ The property showed signs of surface pollution from salt brine and underground aquifers were contaminated by salt.⁴² The landowner testified that he observed the operators' predecessor in interest pumping salt brine into one or more open well bores.⁴³ Two experts testified

³⁷ OKLA. STAT. tit. 50 § 2 (2019).

³⁸ *Boudinot v. State ex rel. Cannon*, 340 P.2d 268, 269-70 (Okla. 1959).

³⁹ *Id.* at 270-72.

⁴⁰ *Ferriman v. Turner*, 227 P. 443, 445-46 (Okla. 1924).

⁴¹ *Meinders v. Johnson*, 134 P.3d 858, 870 (Okla. Civ. App. 2006).

⁴² *Id.* at 861.

⁴³ *Id.*

that the surface and subsurface pollution of property were attributable to the mineral operations of operators or their predecessors, and experts testified that the contamination of treatable and/or fresh-water strata underlying the property was directly attributable to operators' operation of insufficiently cased and cemented wells.⁴⁴

In each of these three cases as well as others mentioned in references to the statute, the defendant affirmatively took action against the plaintiff or public. In *Boudinot*, the defendant kept an unusually large number of cats which propagated excessive noise and noxious smells and created a public disturbance.⁴⁵ In *Ferriman*, the perceived threat posed by the erection of two large gasoline holding tanks, while an affirmative action, was neither illegal nor did they immediately pose a direct threat to the public safety.⁴⁶ The perception by the populace of a potential threat in the future was insufficient to trigger a remedial action by the court. In addition, in *Meinders*, the injection of salt brine into an oil well, which then migrated into a public water source, was deemed a public nuisance and allowed for the court order of remedial action and damages.⁴⁷

These cases have one thing in common: despite their different factual circumstances, the defendant accused of committing a public nuisance committed an affirmative act against either numerous persons as in *Boudinot* or put the public at risk due to the direct action as in *Meinders*.⁴⁸ These cases show that for an act to constitute a public nuisance, there must be an intentional act against the plaintiff.⁴⁹ This intentional act is distinguishable from, and often confused with, the motivation behind the action. In *Stevenson*, the court explains that intent, “being a state of mind, is rarely susceptible of direct proof,” but must ordinarily be inferred from the facts.⁵⁰ Furthermore, Black’s Law Dictionary

⁴⁴ *Id.*

⁴⁵ *Boudinot*, 340 P.2d at 269-70.

⁴⁶ *Ferriman*, 227 P. at 445-46.

⁴⁷ *Meinders*, 134 P.3d at 870.

⁴⁸ *See Boudinot*, 340 P.2d at 269-70; *Meinders*, 134 P.3d at 870.

⁴⁹ *See Boudinot*, 340 P.2d at 269-70; *Meinders*, 134 P.3d at 870.

⁵⁰ *Stevenson v. Koskey*, 877 F.2d 1435, 1439 (9th Cir. 1989).

provides that, “[i]ntent and motive should not be confused. Motive is what prompts a person to act or fail to act. Intent refers only to the state of mind with which the act is done or omitted.”⁵¹

It is this requisite of doing an act or omitting a duty, which is clearly stated in Oklahoma’s nuisance statute, that is the crux of the word “intentional.”⁵² There is no mention of the motivation behind the action, be it good or bad, but rather a focus on the affirmative act or lack thereof and the resulting injury sustained.⁵³

C. Potential Defenses

It is clear that in all legal cases there is a balance of competing rights. In nuisance cases, this is particularly true.⁵⁴ In the Oklahoma statute, if the defendant’s actions are legal, there may be a defense to a suit for nuisance, absent any breach of duty or compelling safety concern resulting from the defendant’s actions.⁵⁵ There is also the age-old doctrine of coming towards the nuisance as a defense.⁵⁶ A person cannot legally sue for nuisance if the nuisance of which they complain predated their arrival.⁵⁷ For example, purchasing a new home next to a town landfill and then later suing the town for nuisance due to the sometimes-objectionable smells would not lie as the offending odors were there before you moved in.⁵⁸ To avoid the odors, one simply need not purchase a home in that location. Similarly, it is unlikely that a judge would find for nuisance where a homeowner was complaining about the sounds made by children playing at a nearby school, if the school was there before the homeowner moved in.⁵⁹

⁵¹ *Intent*, BLACK’S LAW DICTIONARY (5th ed. 1979).

⁵² OKLA. STAT. tit. 50 § 1 (2019) (“A nuisance consists in unlawfully doing an act, or omitting to perform a duty”).

⁵³ *See id.*

⁵⁴ *Nuisance*, JUSTIA (Apr. 2018), <https://www.justia.com/real-estate/docs/nuisance/>.

⁵⁵ *See id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *See id.*

⁵⁹ *See id.*

The theory stands on the very simple premise that a person should be responsible for their actions. Therefore, if you choose to dine in a public restaurant, you should not complain or sue for nuisance if others are there eating there as well. The law of nuisance balances the rights of individuals or the public against unreasonable expectations. If the court finds the expectation to be unreasonable, then a suit for nuisance will fail. Similarly, if the problem complained of is caused directly by another, then a suit again will not lie. Thus, if a friend suggests that you eat at a particular restaurant and because the food is so good you gain fifty pounds, one would not be able to sue the friend for making the suggestion (even if the added weight makes you more likely to suffer a heart attack). Nuisance does analyze the problem alone, but also looks at the actions of all involved.

IV. Someone Needs to be Liable

In the present opioid crisis, the cost is not only too high to those addicted but to society as a whole.⁶⁰ The opioids themselves are very good at what they do, but at a cost.

A. *How Did We Get Here?*

The road we traveled to get to this point was chosen because we needed a solution to another problem: chronic pain. Prescription pain relievers work by:

attach[ing] to proteins called opioid receptors on nerve cells in the brain, spinal cord, gut and other parts of the body. When this happens, the opioids block pain messages sent from the body through the spinal cord to the brain. While they can effectively relieve pain, opioids carry some risks and can be highly addictive. The risk of addiction is especially high when opioids are used to manage chronic pain over a long period of time.⁶¹

When the bodies' pain receptors are blocked, there is an increased production in the level of receptors.⁶² Therefore, when the opioid wears off, the body feels increased pain.⁶³ In addition, as the body's need for endorphins, its natural pain suppressor, is reduced because of the use of the opioid,

⁶⁰ Cosgrove, *supra* note 10.

⁶¹ *What are Opioids*, AM. SOC'Y OF ANESTHESIOLOGISTS, <https://www.asahq.org/whensecondscount/pain-management/opioid-treatment/what-are-opioids/>.

⁶² *Id.*

⁶³ *Id.*

the body will produce less endorphins and thus be less able to independently combat the pain.⁶⁴ As a result, patients who experience this chronic form of pain need an incrementally increased dosage of opioid-based drugs to appropriately manage their pain, thus increasing patients' overall drug dependency.⁶⁵ The patients' attending physician will continue to either prescribe the drug or, after a time, stop writing out the prescriptions.⁶⁶ If the patient cannot get their opioid through legitimate means, they may attempt to locate alternative illegal sources. Either way, patients are addicted to and involved in a medication cycle which they alone cannot break.

B. *Is Someone at Fault for the Opioid Crisis?*

The answer is both yes and no; there is fault to assign, but not just to one person or entity. The patients who choose to purchase their opioids from illegal sources are at fault for not heeding their physician's advice to stop using the opioid. The physician who continues prescribing the opioid regardless of the dosage or the quantity simply because they cannot think of an alternative or because they may be receiving compensation from the drug's manufacturer through trips or speaking engagements is also at fault.⁶⁷ The pharmaceutical company who plays down the addictive nature of the drug but rather boast of its efficacy is at fault for not telling the whole truth. The legislature of our country is at fault for not supervising our medical community and the pharmaceutical industry more closely. The short story is that all parties are at fault collectively; no one person or group did this alone.

C. *So, what Happened in Oklahoma?*

A District Court judge named Judge Thad Balkman decided that, despite all prior legal precedent and logic, he would find Johnson & Johnson legally responsible for the opioid crisis in

⁶⁴ *Id.*

⁶⁵ See *How People Get Addicted to Prescription Drugs*, MENTALHELP, <https://www.mentalhelp.net/substance-abuse/prescription-drugs/how-people-get-addicted/> (last visited May 15, 2020).

⁶⁶ See *id.*

⁶⁷ AM. SOC'Y OF ANESTHESIOLOGISTS, *supra* note 61.

Oklahoma by using Oklahoma’s public nuisance statute in a way it was never intended to be used.⁶⁸ Judge Balkman proclaimed that “[t]he defendants caused an opioid crisis that is evidenced by increased rates of addiction, overdose deaths and neonatal abstinence syndrome in Oklahoma.”⁶⁹ He then went on to say that his judgment is supported by the statute, which allows for abatement of a nuisance: “‘The state met its burden,’ Balkman said in his comments, proving the company acted improperly with its ‘misleading marketing and promotion of opioids.’ ‘This is a temporary public nuisance that can be abated and the proper remedy for the public nuisance is equitable abatement.’”⁷⁰

The problem with the Judge’s decision was that it was unsupported by current law. Johnson & Johnson, through their drug subsidiary Janssen, did not promote the opioid crisis, but merely manufactured a drug pursuant to federal regulations.⁷¹ Johnson & Johnson and Janssen never prescribed the drug to anyone.⁷² That contact with the end-user was done by and through licensed physicians who could have chosen any other drug to offer their patients.⁷³ The Judge’s analysis is the same as making a car manufacturer liable for an accident caused by a reckless driver. The driver is in control of the car, not the manufacturer. Here, it is the physician who is driving the prescription bus, not the builder of the bus. The statute requires a direct connection or act with the person or persons being injured.⁷⁴ That direct connection is through the physician, not through the manufacturer. Johnson & Johnson and Janssen had no direct connection with those injured, nor breached their legal duty as prescribed by federal law.⁷⁵ Though whether they breached their ethical duty is another question entirely.

⁶⁸ See Fortier & Mann, *supra* note 5.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See *id.*

⁷² Jan Hoffman, *Johnson & Johnson Ordered to Pay \$572 Million in Landmark Opioid Trial*, N.Y. TIMES, Aug. 30, 2019, <https://www.nytimes.com/2019/08/26/health/oklahoma-opioids-johnson-and-johnson.html>.

⁷³ *Id.*

⁷⁴ OKLA. STAT. tit. 50, § 2 (2019).

⁷⁵ Hoffman, *supra* note 72.

Moreover, as to those people who chose to find illegal places to buy their opioids, that action and liability is on themselves personally. They are like someone on a bus who decides to drive the bus themselves without a licensed operator; they are using a prescription without a doctor.

The trouble with this case is that there was a great harm happening to the populous but our legal system did not have a quick and easy solution to remedy the problem. Our legal system requires that there be a causal connection between the action and the resulting harm. Keep in mind it is always possible for a group to be injured where no one is legally at fault. Or a situation where someone is at fault but due to an improperly pursued lawsuit, the guilty party goes free. A finding of not guilty does not mean a heinous act has not been done, it only means that the State failed to prove beyond a reasonable doubt that it was committed. A civil suit can also be lost where counsel fails to sue the correct party or where they fail to list the appropriate tort or statutory violation as part of their case in chief.

D. *Why the Decision and the Media's Reaction is Misguided*

The Judge in one fell swoop, placed the entirety of a complex societal problem on one company and, let those responsible parties such as medical facilities and individual doctors off the hook.⁷⁶ If this statement makes you uncomfortable, then good. The issue here is not Johnson & Johnson and Janssen. The issue is with the way we allow pharmaceutical companies to promote their products and the way we allow them to disclose the side effects of their products. Those guidelines for distribution must be regulated in a meaningful way by our legislature. The product disclosures must be done such that a person of average intelligence can evaluate the risks of taking those medications. This case discloses the enormity of the problem, but this caselaw should not be used to solve the problem. Johnson & Johnson and Janssen had no connection or action which *directly* affected

⁷⁶ Fortier & Mann, *supra* note 5.

those injured as required by Oklahoma's public nuisance statute.⁷⁷ The Company did not engage in illegal activity as required by the statute, nor did they breach a duty, which they directly owed to the public.⁷⁸ By all accounts, Johnson & Johnson violated no federal law in their production and manufacture of the drugs prescribed.⁷⁹ And, even if one believes that Johnson & Johnson's marketing strategy was somehow at fault or one which was a danger to the public, those injured voluntarily moved towards the danger or nuisance on the advice of their physicians, which according to law would prohibit a suit for nuisance.⁸⁰

It is important to remember that the patients chose to take and purchase the drug, albeit on the advice of their personal physicians or other medical professionals. The reality being that very few of us actually choose our medication in a knowing way; Nor do any Plaintiffs in a lawsuit write their own complaint. Professionals schooled in evaluating these situations and in fashioning the appropriate remedies are used. We rely on their judgment. When those professionals make a choice and it is wrong then in that event those professionals may be liable. As to the manufacturer's liability, they too may be liable for miscommunication of factual data about their drug. Given these facts why then did the Court do this? The reason is money. The State of Oklahoma needed money to combat their drug crisis: \$7.2 billion to be exact.⁸¹ Johnson & Johnson was seen as a deep pocket that the State could exploit and extract funds from. Johnson & Johnson refused to settle with the State out of Court, so the State held a sham of a trial and followed no legal precedent, all so Johnson & Johnson might consider paying them off after the damages were awarded to the State. Why else would the Court choose a damage of \$572 million, which was well below the \$17.5 billion the State had asked for but

⁷⁷ OKLA. STAT. tit. 50 § 2 (2019).

⁷⁸ *See id.*

⁷⁹ *See id.*

⁸⁰ *See Nuisance*, JUSTIA (Apr. 2018), <https://www.justia.com/real-estate/docs/nuisance/>.

⁸¹ Cosgrove, *supra* note 10.

higher than the settlements reached by other companies and even Johnson & Johnson in other States?⁸²

V. Conclusion:

The media portray the Judge in Oklahoma as a hero who slayed the dragon Johnson & Johnson. So now, the State will have the money it needs to fight the evils of opioid addiction. However, is the State of Oklahoma prepared to abandon its legal precedent for the rule that the ends justify the means? Is it acceptable to disregard relevant legal precedent in order to extract money from a large company? While monies are needed to fight to complexity of the opioid crisis, this paper urges legal practitioners to consider the implication of abandoning established caselaw to fight the complexities of drug addiction.

Have we as a society reached the point where principle is of no value? Can we as a society allow a judge to refuse to follow the law simply to steal money from someone even if they are someone of great wealth? And, if so, would Judge Balkman find it completely acceptable for a thief, who is hungry to break into the judge's home, to steal food and a few items, so he can have sufficient money to combat his family's hunger? It is unlikely that the Judge would be so inclined to rule in the thief's favor. What is good for the goose may not be good for the gander.

Societal confidence will wither in the light of more actions by judges who fail to follow the legal precedent, but rather make it up for political reasons. This does not mean that we should not help those in need. Yes, we each are our brother's keeper, however, we should not steal from another to pay my brother's keep.

⁸² Higham, Horowitz & Bernstein, *supra* note 7.