

**IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA**

- 1. LESSIE BENNINGFIELD RANDLE,)
Tulsa Race Massacre Survivor,)
- 2. VIOLA FLETCHER,)
Tulsa Race Massacre Survivor,)
- 3. HUGHES VAN ELLISS, SR.)
Tulsa Race Massacre Survivor,)
- 4. HISTORIC VERNON A.M.E. CHURCH, INC.,)
a domestic not-for-profit corporation,)
- 5. LAUREL STRADFORD,)
great-granddaughter of J.B. Stradford,)
- 6. ELLOUISE COCHRANE-PRICE,)
daughter of Clarence Rowland and)
cousin of Dick Rowland,)
- 7. TEDRA WILLIAMS,)
granddaughter of Wess Young,)
- 8. DON M. ADAMS,)
nephew and next friend of Dr. A.C. Jackson,)
- 9. DON W. ADAMS,)
great-grandson of Attorney H.A. Guess,)
- 10. STEPHEN WILLIAMS,)
grandson of A.J. Smitherman,)
- 11. THE TULSA AFRICAN)
ANCESTRAL SOCIETY,)
an unincorporated association,)
- Plaintiffs,)
- v.)
- 1. CITY OF TULSA,)
a municipal corporation,)

**DISTRICT COURT
FILED**

JUL 19 2021

DON NEWBERRY, Court Clerk
STATE OF OKLA. TULSA COUNTY

Case No. CV-2020-1179
Division G
The Honorable Caroline Wall

- 2. TULSA REGIONAL CHAMBER,)
a domestic not-for-profit corporation,)
- 3. TULSA DEVELOPMENT AUTHORITY,)
- 4. TULSA METROPOLITAN AREA PLANNING)
COMMISSION,)
- 5. BOARD OF COUNTY COMMISSIONERS)
FOR TULSA COUNTY, OKLAHOMA,)
- 6. VIC REGALADO, IN HIS OFFICIAL)
CAPACITY AS SHERIFF OF TULSA)
COUNTY,)
- 7. OKLAHOMA MILITARY DEPARTMENT,)
Defendants.)

**PLAINTIFFS’ OPPOSITION TO DEFENDANTS’ MOTION FOR LEAVE TO FILE
REPLIES IN SUPPORT OF THEIR MOTIONS TO DISMISS**

On Friday, July 16, 2021, Defendants in this action filed a purported “Joint **Unopposed** Motion for Leave to File Replies in Support of Their Motions to Dismiss” (emphasis added) (the “Joint Motion”) seeking leave to file reply briefs, an enlargement of the time to file reply briefs if permitted, and an enlargement of the lengths of the reply briefs in response to Plaintiffs’ Opposition Briefs (the “Opposition Briefs”).

Forty-five days after the pending motions to dismiss were fully submitted, Defendants now seek an *additional* thirty days to submit a remarkable 140 pages of further briefing. If Defendants’ request were to be granted, the unnecessarily protracted briefing process would effectively delay a trial in this action for months. Any such delay is unacceptable, particularly since the Plaintiffs include the three last living survivors of the Tulsa Race Massacre, all of whom are 100 years of age or older and have waited their entire lives to have their day in court.

This day should be afforded to the surviving Plaintiffs while their health still allows them to offer in person testimony without unnecessary delay for briefing 140 pages of reply briefs.

Remarkably, Defendants represent that their Joint Motion was “unopposed.” That is patently false. Plaintiffs did not consent to any of the relief requested in the Joint Motion. On top of that, Defendants seek that the page limit for *each* reply brief be increased by a factor of four (from five to twenty), totaling 140 pages of briefing. Defendants request would result in reply briefing that is *longer* than the Opposition Briefs themselves.

Notably, Defendants make their substantial request after having *opposed* Plaintiffs’ request to file a single omnibus brief in response to Defendants’ motions to dismiss, using the same number of pages that Plaintiffs were permitted as a matter of right. When opposing Plaintiff’s request, Defendants asserted that the omnibus brief would be “wholly unnecessary and would only serve to waste the resources of all parties and this Court.” Chamber Resp. 2.¹ While Plaintiffs’ disagree with that assertion with respect to a request that would not have increased the number of pages filed by Plaintiffs, it surely applies to Defendants’ outrageous request. Granting such an extraordinary request would be unusual and unjust.

As set forth below, the Joint Motion should be denied because (i) Plaintiffs never consented to the Joint Motion, (ii) the Joint Motion is untimely, (iii) the reasons cited by the Defendants for the need for reply briefs are not persuasive and, in fact, only underscore why the issues before the Court should not be resolved on motions to dismiss, and (iv) the requested page enlargement is completely unjustified.

¹ “Chamber Resp.” refers to Defendant Chamber’s Response to Plaintiffs’ Motion for Leave to File Omnibus Brief in Opposition to Defendants’ Motions to Dismiss filed April 21, 2021.

ARGUMENT

I. Plaintiffs Did Not Consent to the Joint Motion

As the Court is aware, between March 12, 2021 and March 15, 2021 Defendants in this action filed seven motions to dismiss Plaintiff's Amended Petition (the "Motions to Dismiss"). On June 1, 2021, Plaintiffs timely filed their Opposition Briefs.

The rules of this Court do not permit a movant to file a reply brief as a matter of right. Instead, a movant may only file reply briefs with leave of the Court. Specifically, Rule CV 18 of the RULES OF THE FOURTEENTH JUDICIAL DISTRICT provides:

Reply briefs are permitted only by leave of Court by applications stating the reason for filing a reply brief. Reply briefs should not be attached to the application but should be filed separately within five days after permission is granted. No reply brief may exceed five (5) pages in length. No further briefs shall be filed without prior permission of the Court.

Accordingly, upon the filing of the Opposition Briefs on June 1, the Motions to Dismiss were fully submitted to the Court. Plaintiffs have requested a hearing on the Motions to Dismiss.

One month later, on June 30, 2021, John Tucker, Esq., who represents Defendant Tulsa Regional Chamber, wrote to counsel for Plaintiffs stating "On behalf of defendants, I request an additional 30 days to reply to your response. Thank you." *See* Ex. A.² That was the entirety of Mr. Tucker's request. Mr. Tucker's request suggested that Defendants in this matter believed they had an automatic right to file a reply brief and merely sought an extension of time to file it.

² Defendant Tulsa Regional Chamber is the party that submitted the Joint Motion and the defendant who communicated with counsel for Plaintiffs. For the Chamber to be the driving force seeking reply briefs is especially conspicuous given that the Chamber filed *two separate motions to dismiss* which it used as a purported basis to file two full length briefs, thus giving itself over 40 pages of briefing, without the consent of Plaintiffs or the Court.

On July 9, 2021, counsel for Plaintiffs responded to Mr. Tucker stating “Regarding your request, it is my understanding that Tulsa County local rules requires that you request leave of court to file a reply.” This response merely corrected Mr. Tucker’s apparent misunderstanding that his client had a right to file a reply brief; it did not constitute “consent” to anything.

One week later, on July 16, 2019, Defendants filed the Joint Motion, seeking leave to file a brief, an enlargement of the time to file the brief, and an enlargement of the page numbers in the reply brief, representing that none of the requested relief was unopposed. That representation was untrue.

While Plaintiffs’ counsel did state that leave of the Court was required to file a reply brief, he never expressed consent to the filing of reply briefs, and intended to oppose the Joint Motion whenever Defendants filed it. Moreover, even assuming that Mr. Tucker in good faith understood Plaintiffs counsel’s comment to constitute consent (which is difficult to conceive), it was incumbent upon him to confirm any such consent before representing to the that the requested relief was unopposed.

Even more outrageous is the representation that Plaintiffs consented to a page length extension. Defendants never even mentioned a request for more pages in the dialogue with Plaintiffs’ counsel. Given that, Defendants have no good faith basis for representing to the Court that Plaintiffs had consented to that relief.

After being served with the Joint Motion, counsel promptly advised Mr. Tucker via e-mail that the characterization of the Joint Motion was incorrect and demanded that Mr. Tucker withdraw the Joint Motion. *See* Exhibit B. Mr. Tucker stated that he would do so

through a “supplemental notice” with the Court. At the time of this filing, Plaintiffs are unaware that any supplemental notice has been filed.

II. The Joint Motion Is Untimely

The Opposition Briefs were filed on June 1, 2021. At that time, the Motions to Dismiss were fully submitted under the rules of the Court. Defendants filed their Joint Motion to file reply briefs on July 16, 2021, a full 45 days *after* the Motions to Dismiss were fully submitted, and are seeking an additional 30 days to file reply briefs if the leave requested is granted. Thus, even if the Court were to have granted the Joint Motion on the day it was submitted on July 16, 2021, Defendants would be taking 75 days to file their reply briefs.

It is reasonable to expect that Defendants and their counsel would promptly review the Opposition Briefs and promptly conclude whether or not they wished to seek leave to file reply briefs. To wait 45 days to even ask for permission to file extra briefs is undue delay, and the Court should deny the Joint Motion on that basis.

III. Defendants Fail to Justify Their Request

Rule CV 18 requires that Defendants state a “reason” as to why a reply brief is necessary. Defendants state reply briefs are necessary “[d]ue to the amount of information pled in Plaintiffs’ Amended Petition, breadth of law implicated in this action” and “to address the multitude of new and complex issues and arguments raised by Plaintiffs” in the Opposition Briefs. Joint Motion ¶¶ 2-3.

Plaintiffs did not raise “new” issues in the Opposition Briefs. Rather, Plaintiffs responded to the legal arguments made in the Motions to Dismiss. Plaintiffs provided the Court with a chart that specifically shows where the legal arguments made in the Motions to

Dismiss are specifically responded to in the Opposition Briefs.³ Moreover, Defendants have failed to make a showing of any purported new issues that were raised by Plaintiffs.

Defendants' acknowledgement of the fact that the Amended Petition contains a substantial amount of information and that there are "complex issues and arguments" addressed in the briefs are not reasons Defendants should be afforded reply briefs. They are reasons that the Motions to Dismiss should be denied. As the Oklahoma Court of Appeals has made clear, a motion to dismiss shall not be granted "unless it should appear without doubt that the plaintiff can prove no set of facts in support of the claim for relief." *Edelen v. Bd. of Comm'rs of Bryan Cty.*, 2011 OK CIV APP 116, ¶ 3, 266 P.3d 660, 663 (citations omitted).

If the issues before the Court on the pending motions are so complicated that Defendants require another 140 pages of briefing, then they are not issues that should be resolved on a motion to dismiss. Plaintiffs, who include the last living survivors of the Tulsa Race Massacre, should be afforded their day in court and a full opportunity to prove their claims.

IV. The Requested Page Enlargement Should Be Denied

Under Rule CV 18, if the Court grants Defendants leave to file a reply brief, "No reply brief may exceed five (5) pages in length." Defendants ask for that length be increased by a factor of four to 20 pages for each of the seven Motions to Dismiss. This totals 140

³ See Plaintiffs' Opposition in Response to Defendant State of Oklahoma's Motion to Dismiss filed on June 1, 2021 at 7-8.

pages of briefing that is not contemplated by the rules. Stunningly, this is the same amount of briefing that was afforded to Plaintiffs in their Opposition Briefs.⁴

Typically, even in courts where reply briefs are allowed as matter of right, the pages permitted for reply briefs are fewer in number than the pages permitted for opening and response briefs. Reply briefs are meant to be succinct final responses to issues already briefed. If the Court permits another 140 pages of briefing for reply briefs, it is a near certainty that Defendants will raise new issues that Plaintiffs did not have a full opportunity to address in the Opposition Briefs. If Plaintiffs are then not afforded an opportunity to file a sur-reply to respond to those new issues, that could constitute a basis for reversal of any dismissal. *Ford v. Tulsa Pub. Sch.*, 2017 OK CIV APP 55, ¶ 21, 405 P.3d 142, 149 (reversing trial court’s granting of a motion to dismiss because among other reasons defendant raised new issues in reply brief that Plaintiff had no opportunity to respond to). Efficiency and fairness thus require that no further briefing be permitted on the pending motions and that, in any event, any reply briefs are not permitted to exceed five pages in length.

Indeed, it is not even clear that the Court has discretion to enlarge the pages for a reply brief under the Rules. When discussing the length of motions and responses, Rule CV 18 states that such papers “shall not exceed twenty (20) pages in length **without prior permission of the Court.**” (emphasis added) When discussing reply briefs, Rule CV 18

⁴ Requests for 20 page reply briefs is especially strange for certain of the defendants who did not even use the full 20 page limit in their respective motions to dismiss. For example, Defendant Tulsa Development Authority’s Motion to Dismiss is 12 pages long and Plaintiffs’ opposition to that motion is 6 pages long. It would make no sense for the Tulsa Development Authority to now have the opportunity to write a reply brief which is *longer* than the opening and opposition briefs combined.

simply states “No reply brief may exceed five (5) pages in length” and does not provide that it may be enlarged with the Court’s permission. The omission of the phrase “without prior permission of the Court” when discussing reply briefs strongly implies that parties filing reply briefs are bound to the five page limit and may not seek enlargements from the Court.

V. The Court Should Deny the Motions to Dismiss Now or Hold a Hearing

By seeking 140 pages of additional briefing on the basis the issues here are “complex” Defendants have effectively admitted that the issues before the Court are not the kind that should be resolved on motions to dismiss, which are disfavored in this jurisdiction. *Am. Nat. Res., LLC v. Eagle Rock Energy Partners, L.P.*, 2016 OK 67, ¶ 6, 374 P.3d 766, 769.

The Court should deny the Motions to Dismiss and let this case proceed while the three remaining survivors are healthy enough to offer their testimony in person before the Court. If the Court is not inclined to deny the Motions to Dismiss at this time, Plaintiffs request that the Court schedule a hearing on those motions at the Court’s convenience. It would be more efficient and more equitable for Defendants to respond to Plaintiffs’ Opposition Briefs at a hearing, rather than to further protract this proceeding with the additional, extensive briefing requested by Defendants. As such, Defendants’ Joint Motion should be denied.

Dated: July 19, 2021

Respectfully submitted,

SOLOMONSIMMONSLAW



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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of July 2021, I served the foregoing by email and U.S. Mail to the following:

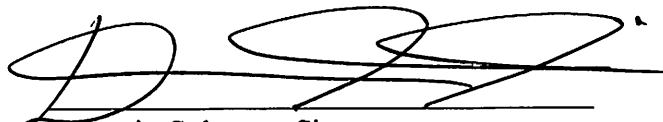
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Attorney for Tulsa Development Authority

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Tucker & Gable, PLLC
P.O. Box 21100
Tulsa, OK 74121-1100
jhtucker@rhodesokla.com



Damario Solomon-Simmons

EXHIBIT A

From: Damario SolomonSimmons
To: John Tucker
Cc: "Gray, Kristina"; "kwilkes@hallestill.com"; "kevin.mcclure@oag.ok.gov"; "Bender, Gerald"; "jot@hartleylawfirm.com"; Mary Jo. Hales; Colin H. Tucker; Austin Jackson; "Jot Hartley"; Maynard M. Henry, Sr., Esq.; Spencer Bryan; Steven Terrill; Cordal Cephas; Lashandra Peoples-Johnson; Kvm Heckenkemper; Solfanelli; Sara; Haynes, McKenzie; Swartz, Michael; Adams, Randall
Subject: Re: Randle v. COT, et al.
Date: Friday, July 9, 2021 4:22:54 PM

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Good afternoon John,

First, I apologize for the delayed response. I inadvertently overlooked your email below until a few days ago. In the future if there is a long delay from me please feel free to contact me on my cell phone at 918-810-7253.

Regarding your request, it is my understanding that Tulsa County local rules requires that you request leave of court to file a reply.

Damario Solomon-Simmons, Esq., M.Ed.
Managing Partner
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Sent: Wednesday, June 30, 2021 5:18 PM

To: Damario SolomonSimmons
Cc: 'Gray, Kristina'; 'kwilkes@hallestill.com'; 'kevin.mcclure@oag.ok.gov'; 'Bender, Gerald'; 'jot@hartleylawfirm.com'; Mary Jo. Hales; Colin H. Tucker; Austin Jackson; 'Jot Hartley'
Subject: RE: Randle v. COT, et al.

Damario: On behalf of defendants, I request an additional 30 days to reply to your response. Thank you.

RHODES
HIERONYMUS
– Est. 1931 –

John H. Tucker
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Mailing: P.O. Box 21100, Tulsa, OK 74121-1100
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From: John Tucker
Sent: Wednesday, June 30, 2021 4:47 PM
To: 'Jot Hartley' <jothartley@gmail.com>
Cc: Gray, Kristina <kgray@cityoftulsa.org>; kwilkes@hallestill.com; kevin.mcclure@oag.ok.gov; Bender, Gerald <GBENDER@cityoftulsa.org>; jot@hartleylawfirm.com; Mary Jo. Hales <mhales@rhodesokla.com>; Colin H. Tucker <CHTucker@rhodesokla.com>; Austin Jackson <AJackson@rhodesokla.com>
Subject: RE: Randle v. COT, et al.

Based on a lack of responses to my suggestion, it appears that only the Chamber and TDA will request a 30 day extension. Is that correct?

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– Est. 1931 –

John H. Tucker
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From: Jot Hartley <jothartley@gmail.com>
Sent: Tuesday, June 15, 2021 8:16 PM
To: John Tucker <jhtucker@rhodesokla.com>

Cc: Gray, Kristina <kgray@cityoftulsa.org>; kwilkes@hallestill.com; kevin.mcclure@oag.ok.gov; Bender, Gerald <GBENDER@cityoftulsa.org>; jot@hartleylawfirm.com; Mary Jo. Hales <mhales@rhodesokla.com>; Colin H. Tucker <CHTucker@rhodesokla.com>; Austin Jackson <AJackson@rhodesokla.com>

Subject: Re: Randle v. COT, et al.

Yes please on behalf of TDA.

Sent from my iPhone

On Jun 15, 2021, at 2:46 PM, John Tucker <jhtucker@rhodesokla.com> wrote:

Re requesting leave for reply brief: We would like to include a request for 30 days to file a reply. Would you like a joint request? .

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John H. Tucker
Rhodes, Hieronymus, Jones, Tucker & Gable, PLLC
Mailing: P.O. Box 21100, Tulsa, OK 74121-1100
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EXHIBIT B

From: Damario SolomonSimmons
To: John Tucker; Mary Jo. Hales; "Jot Hartley"; "Bender, Gerald"; "kevin.mcclure@oag.ok.gov"; "kwilkes@hallestill.com"
Cc: Swartz, Michael; Haynes, McKenzie; Solfanelli, Sara; Spencer Bryan; Steven Terrill; Maynard M. Henry, Sr. Esq.; Cordal Cephas; Lashandra Peoples-Johnson; Mary Jo. Hales
Subject: Re: Randle, et al. v. City of Tulsa, et al. [1386-00186]
Date: Friday, July 16, 2021 5:36:33 PM

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Thanks John,

Have a great weekend!

Damario Solomon-Simmons, Esq., M.Ed.
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From: John Tucker <jhtucker@rhodesokla.com>

Sent: Friday, July 16, 2021 4:34 PM

To: Damario SolomonSimmons; Mary Jo. Hales; 'Jot Hartley'; 'Bender, Gerald'; 'kevin.mcclure@oag.ok.gov'; 'kwilkes@hallestill.com'

Cc: Swartz, Michael; Haynes, McKenzie; Solfanelli, Sara; Spencer Bryan; Steven Terrill; Maynard M. Henry, Sr. Esq.; Cordal Cephas; Lashandra Peoples-Johnson; Mary Jo. Hales

Subject: RE: Randle, et al. v. City of Tulsa, et al. [1386-00186]

Well, Damario, I guess I misunderstood. I thought you were reciprocating our consent to your time

request. I will file a supplemental notice that indeed you do object

**RHODES
HIERONYMUS**
– Est. 1931 –

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Mailing: P.O. Box 21100, Tulsa, OK 74121-1100
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From: Damario SolomonSimmons <dss@solomonsimmons.com>

Sent: Friday, July 16, 2021 4:31 PM

To: Mary Jo. Hales <mhales@rhodesokla.com>; John Tucker <jhtucker@rhodesokla.com>; 'Jot Hartley' <jothartley@gmail.com>; 'Bender, Gerald' <GBENDER@cityoftulsa.org>; 'kevin.mcclure@oag.ok.gov' <kevin.mcclure@oag.ok.gov>; 'kwilkes@hallestill.com' <kwilkes@hallestill.com>

Cc: John Tucker <jhtucker@rhodesokla.com>; Swartz, Michael <Michael.Swartz@srz.com>; Haynes, McKenzie <McKenzie.Haynes@srz.com>; Solfanelli, Sara <Sara.Solfanelli@srz.com>; Spencer Bryan <jsbryan@bryanterrill.com>; Steven Terrill <sjterrill@bryanterrill.com>; Maynard M. Henry, Sr. Esq. <mhenryesquire@cox.net>; Cordal Cephias <cordal@johnsoncephiaslaw.com>; Lashandra Peoples-Johnson <lashandra@johnsoncephiaslaw.com>

Subject: RE: Randle, et al. v. City of Tulsa, et al. [1386-00186]

Importance: High

Thanks Mary Jo,

John, I object to the filing stating that Defendants Motion is unopposed by Plaintiffs.

If you recall your email inquired whether we opposed Defendants having an additional 30 days to file a reply. My response to you was that the "local rules required you seek leave of court." You responded "Thanks Damario." Accordingly I do not believe our original email exchange gave us notice or an opportunity to visit with our clients to inquire if they objected to your plan to actually file for leave of court. We certainly were not given an opportunity to state whether our clients objected to you seeking an additional 30 days from today (45 days after our response brief was filed) and a 15 -page limit extension if said leave was granted.

Frankly, representing to the court that your motion is unopposed is a misrepresentation. I request that that Defendants immediately withdraw your motion. Please let me know by the end of business today if Defendants agree to my request.

Thank you.

Damario Solomon-Simmons, Esq., M.Ed.

Managing Partner

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From: Mary Jo. Hales <mhales@rhodesokla.com>

Sent: Friday, July 16, 2021 3:55 PM

To: Damario SolomonSimmons <dss@solomonsimmons.com>

Cc: John Tucker <jhtucker@rhodesokla.com>; Mary Jo. Hales <mhales@rhodesokla.com>

Subject: Randle, et al. v. City of Tulsa, et al. [1386-00186]

Attached is a pdf of Defendants' Joint Unopposed Motion for Leave to File Replies in Support of their Motions to Dismiss which was filed in the above-referenced matter.

Please let me know if you have any difficulty opening the attachment.

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