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

LESSIE BENNINGFIELD RANDLE, Tulsa Race Massacre Survivor, et al.,	)	
Plaintiffs,	)	Case No. CV-2020-1179
	)	Judge Caroline Wall
v.	)	
CITY OF TULSA, a municipal corporation, et al.,	)	
Defendants.	)	

DEFENDANTS CITY OF TULSA AND TMAPC'S REPLY TO PLAINTIFFS' COMBINED OPPOSITION TO THE MOTIONS TO DISMISS

Defendants City of Tulsa and Tulsa Metropolitan Area Planning Commission (TMAPC) filed motions to dismiss Plaintiffs' Amended Complaint on November 9, 2020. Plaintiffs filed a forty-page[1] combined response to the motions on June 1, 2021. The two primary issues that are the focus of Plaintiffs' response brief are (1) whether the Oklahoma Governmental Tort Claims Act is applicable to the claims against the City and TMAPC and (2) whether the doctrine of laches is grounds for dismissal of any equitable remedies. The City and TMAPC reply herein to each of these issues.

A. The GTCA Is Applicable And Bars Plaintiffs' Claims

Despite Plaintiffs' attempts to carefully phrase their remedies to try to avoid the GTCA, a review of what is actually being claimed by Plaintiffs and the language of the GTCA shows the statute is clearly applicable.

1. Plaintiffs' Claims Are For Money Damages

[1] Plaintiffs' counsel Damario Solomon-Simmons asked counsel for the City and TMAPC via email whether there was any objection to Plaintiffs' filing "one response brief instead of two". Plaintiffs' inquiry did not indicate that the "one" response would combine the page allowance to create one 40-page response brief.

The Oklahoma GTCA is applicable to claims against the state or political subdivision for "money damages under the laws of this state." 51 O.S. § 153 (A). Plaintiffs' response brief notes that the GTCA is the "cloak protecting public funds from tort claim liability." Plaintiffs' Response, at pg. 31, quoting *Nguyen v. State*, 1990 OK 21, 788 P.2d 962. Plaintiffs in this case attempt to argue the GTCA is never applicable in claims where equitable remedies are sought. This is simply not consistent with the case law cited by Plaintiffs or with the plain language of the GTCA.

The only controlling Oklahoma cases cited by Plaintiffs to support their position that the GTCA does not control claims for equitable relief are *Barrios v. Haskell Cnty. Public Facilities Auth.*, 2018 OK 90, 432 P.3d 233 and *Gay Activists All. v. Bd. Of Regents of Univ. Of Okla.*, 1981 OK 162, 638 P. 2d 1116. In neither of these cases does the Oklahoma Supreme Court make the sweeping pronouncement that the GTCA is inapplicable to all claims for equitable relief. Instead, both cases address the GTCA's applicability to "prospective injunctive relief". Further, in neither case did the requested injunctive relief require significant taxpayer funds to be involved, as is the case here.

In fact, in the portion of the *Barrios* opinion relied upon by Plaintiffs, the Court cited the United States Supreme Court's holding in *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437, 124 S. Ct. 899, 903 (2004). A review of the *Frew* decision shows that the Court relied upon its previous decision in *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347 (1974), wherein it evaluated whether sovereign immunity was applicable to a claim of equitable relief, but where money was being sought as part of the equitable claims. In *Edelman*, the Court held:

> While the Court of Appeals described this retroactive award of monetary relief as a form of 'equitable restitution,' it is in practical effect indistinguishable in many aspects from an award of damages against the State. It will to a virtual certainty

> be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action. It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.

Edelman, 415 at 667. In other words, the Court recognized that simply labeling a claim as "equitable relief" is not enough to overcome governmental immunity. If the claims for relief would require payment of government funds as a result of a past breach of a legal duty, government immunity applies.

In their response, Plaintiffs' assert they do not look to recover money damages from a public entity or seek taxpayer money, but this is entirely inconsistent from the relief sought in the their Amended Petition. It is also completely inconsistent with Plaintiffs' attorneys' continued characterization in the media of this as a case for "reparations". Among other things, Plaintiffs' Amended Petition seeks the following:

- "Payment of all outstanding claims presented to Greenwood residents as a direct result of losses sustained in the Massacre that were denied by Defendants or insurance companies because of Defendants' misrepresentation of the Massacre;" [Amended Petition at pg. 71]
- An accounting of things such as "the value of loss of private personal property stolen and looted", "the value of claims made by survivors", "the value of property lost", and "the value of loss of life" so that the amount identified in such "accounting" can be paid by the Defendants and placed in a "compensation fund." [Amended Petition at pg. 69-71]
- "Creation of a Victims Compensation Fund in which the valuation of the unjust enrichment derived from the accounting shall be placed as well as all monies

determined by the court to be necessary for the abatement of the nuisance based upon the accounting outlined in paragraph 10 above. Those funds shall be used for the sole benefit of the survivors of the Massacre and residents of the Greenwood and North Tulsa communities who have lived in Greenwood or North Tulsa for at least 10 years, five of which are consecutive, or were displaced from those communities at any time from May 31, 1921 until the present in that order;" [Amended Petition at pg. 71]

- Creation of a land trust into which all vacant or undeveloped land in the historical Greenwood neighborhood and North Tulsa community currently owned by Defendants will be placed. Residents who are descendants of those who lost homes or businesses in the Massacre shall be able to receive a parcel as close to the size that was destroyed in the Massacre or taken for less than fair market value during urban renewal; [Amended Petition at pg. 72]
- Immunity from all City of Tulsa and County of Tulsa taxes, fees, assessments, and/or utility expenses for the next 99 years for residents of the City of Tulsa or Tulsa County who are Massacre Survivors or descendants of those who were killed, injured, or lost property in the Massacre; [Amended Petition at pg. 72]
- Creation of a scholarship program for Massacre descendants of the Greenwood district who lived in Greenwood on May 31, 1921 or for at least 10 years, with at least five years consecutive, between May 31, 1921 and until the present. The scholarship shall pay tuition, room and board, book, and fees to attend a university, college or other post-high school education or training institution in Oklahoma. This program shall last 99 years. [Amended Petition at pg. 73]

Like the case in *Edelman, supra*, the practical effect of each of these requested claims for relief is that taxpayer money would be paid as damages for alleged misconduct on behalf of government entities or actors. As Plaintiffs have noted in their response, this is exactly what the GTCA was created to protect. Plaintiffs also cited *Feenstra v. Sigler*, 19-CV-00234-GKF-FHM, 2019 WL 6040401, at *12 (N.D. Okla. Nov. 13, 2019) in their response. The Court in Feenstra also made clear that:

> the Oklahoma Supreme Court recognized that the Legislature's decision to allow a tort suit against the government "is, after all, a decision as to whether the People's tax dollars should be used to pay money damages to those who successfully sue the state; so this recognition is consonant with our longstanding recognition of the Legislature's exclusive power to set the State's fiscal policy." *Barrios*, 432 P.3d at 237 (emphasis added). Thus, as interpreted by Oklahoma's highest court, the OGTCA reflects a concern regarding the imposition of money damages against the State.

Whether Plaintiffs now frame their damage claims as claims for "equitable" relief or "compensatory" damages, the substance of their requested relief makes clear that they are seeking "money damages" from the City and TMAPC.

Plaintiffs have aptly named the fund they seek to establish the "Victims Compensation Fund", as the very nature of their lawsuit is to seek "compensation" for alleged damages. Such a claim is the very heart of a tort claim. No matter how Plaintiffs want to classify their requests for damages, a request for "payment of all outstanding claims" is clearly a request for compensatory money damages, which is the very heart of what the GTCA is meant to cover.

B. Plaintiffs' claims clearly fall within the GTCA definition of a "tort"

Plaintiffs further contend that their claims for public nuisance and unjust enrichment are not "torts" under the GTCA. However, Section 152(17) of the GTCA defines "tort" as "a legal

wrong, independent of contract, involving violation of a duty imposed by general law, statute, the Constitution of the State of Oklahoma, or otherwise, resulting in a loss to any person, association or corporation as the proximate result of an act or omission of a political subdivision or the state or an employee acting within the scope of employment." Plaintiffs attempt to argue this is somehow not the complete picture and that if they are not seeking "money damages", they are not alleging a "tort" under the GTCA. This is conflating two separate parts of the Act.

The definition of "tort" under the GTCA is very clear and does not speak at all to the remedies sought. Plaintiffs refer to a separate section of the Act that involves the scope of liability found in Section 153. However, the scope of liability does not change the definition of "tort", which is set out separately and independently under the Act. This point was artfully articulated by Justice Scalia in a footnote to his concurring opinion in *City of Monterey v. Del Monet Dunes at Monterey, Ltd.*, 526 U.S. 687, fn 1, 119 S.Ct. 1624 (1999), wherein he stated:

> Before the merger of law and equity, a contested right would have to be established at law before relief could be obtained in equity. Thus, a suit in equity to enjoin an alleged nuisance could not be brought until a tort action at law established the right to relief. See 1 J. High, Law of Injunctions 476–477 (2d ed. 1880). Since the merger of law and equity, any type of relief, including purely equitable relief, can be sought in a tort suit—so that I can file a tort action seeking only an injunction against a nuisance. If I should do so, the fact that I seek only equitable relief would disentitle me to a jury, see, e.g., *Curtis v. Loether*, 415 U.S. 189, 198, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 471, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962); *Parsons v. Bedford*, 3 Pet. 433, 446–447, 7 L.Ed. 732 (1830); E. Re & J. Re, Cases and Materials on Remedies 46 (4th ed.1996)—but **that would not render the nuisance suit any less a tort suit**, so that if damages were sought a jury would be required.

In other words, regardless of the remedies sought, whether only equitable remedies or money damages, a nuisance suit is still a suit in tort.

Plaintiffs rely on *Helm v. Bd. of Cnty. Comm'rs*, 2019 OK CIV APP 68 for the proposition that their claims are not torts. However, *Helm* is clearly distinguishable. In *Helm*, the Court noted that the Legislature expanded the definition of "tort" in the GTCA to include statutory torts which create a private right of action. The Court found that the action there did not fall within the confines of the GTCA because the statute at issue did not create a private right of action but, instead, an action for a writ of mandamus requiring the governmental agency to perform its duties under a regulatory statute ("We hold that when the Legislature expanded the definition of 'tort' in the Governmental Tort Claims Act, 51 O.S. § 152(14), to include a 'duty imposed by ... statute' its intent was to include statutory torts that create a private right of action and not governmental regulatory laws." *Helm*, at ¶ 11) .

Oklahoma Statute Title 50, section 10 states, "[a] private person may maintain an action for a public nuisance if it is specially injurious to himself, but not otherwise". Section 8 identifies one of the remedies available for public nuisance as "a civil action". Clearly, the Public Nuisance statute creates a private right of action "permitting a citizen to maintain an action to recover damages", which is exactly the type of claim the Court in *Helm* indicated would be covered under the GTCA. *Helm*, 2019 OK CIV APP at ¶10.

The other cases cited by Plaintiffs for the proposition that creation of a duty imposed by statute does not bring the claim under the GTCA are cases that were decided before the recent amendment of the Act in 2018. This is important because the language "imposed by ... statute" was not included in the version of the GTCA prior to the 2018 amendment. Between April 21, 2014 and November 1, 2018, the definition of "tort" under the GTCA was "a legal wrong, independent of contract, involving violation of a duty imposed by general law or otherwise." So Plaintiffs' reliance on cases such as *Sweeten v. Lawton*, 2017 OK CIV APP

51 and *Barton v. City of Midwest City,* 2011 OK CIV APP 71 is misplaced as they were not interpreting the current version of the GTCA, which now includes in its definition of "tort" those claims which are created by statute.

Plaintiffs argue that the *Coffey* case cited by the City and TMAPC is distinguishable and does not make clear that a nuisance is a tort. *See State ex rel. Coffey v. District Court of Okla. Cty,* 1976 OK 29, 547 P.2d 947. Similarly, Plaintiffs complain that the City and TMAPC pointed to no Oklahoma case law, recognizes unjust enrichment as a tort. What Plaintiffs are conveniently overlooking is that the GTCA has made certain claims a "tort" for purposes of the GTCA. So, Plaintiffs' argument that traditionally unjust enrichment is not a "tort" in common law is not the proper analysis.

This Court's consideration should be whether Plaintiffs' claims fit within the very broad definition of "tort", which has been set by the Oklahoma legislature under the GTCA as those claims the state or other governmental entities have agreed to allow itself to be sued for money damages. Both Plaintiffs' claims for public nuisance and unjust enrichment are claims for a "legal wrong, independent of contract, involving violation of a duty imposed by general law, statute, the Constitution of the State of Oklahoma, or otherwise, resulting in a loss to any person, association or corporation as the proximate result of an act or omission of a political subdivision or the state or an employee acting within the scope of employment." Therefore, both of Plaintiffs' claims fall within the definition of a "tort" for purposes of the GTCA as set out by this State's legislature. As set forth in the City's and TMAPC's motions to dismiss, compliance with the notice requirements were mandatory for this court to have jurisdiction.

As set forth herein and in the motions to dismiss, the GTCA is applicable to Plaintiffs claims and the Plaintiffs have failed to comply with its requirements thereby depriving this Court of subject matter jurisdiction. Accordingly, this case against the City and TMAPC should be dismissed.

The doctrine of laches is applicable to bar or limit Plaintiffs' claims

The doctrine of laches is an equitable defense to stale claims. *Chesapeake Operating, Inc. v. Carl E. Gungoll Expl., Inc.*, 2005 OK CIV APP 45, ¶ 7, 116 P.3d 213, 216, quoting *Smith v. The Baptist Foundation of Oklahoma*, 2002 OK 57, ¶ 9, 50 P.3d 1132, 1138. "There is no arbitrary rule for when a claim becomes stale or what delay is excusable." *Id.* "Application of the doctrine is discretionary depending on the facts and circumstances of each case as justice requires." *Id.*

Plaintiffs rely on *Revard v. Hunt*, 1911 OK 425, 119 P. 589 for their assertion that their public nuisance claim should be exempt from any defense of laches. This is too broad a reading of *Revard*. What *Revard* clearly states is that, "where a party is specially injured by a public nuisance, and brings an action to abate the same, no lapse of time will either legalize the same, nor estop the injured party from bringing an action to effect its abatement." At most, this allows Plaintiffs to bring an action to abate the public nuisance for which they were specially injured, regardless of the passage of time. This does not, however, give Plaintiffs *carte blanche* to seek whatever legal remedies they want under the guise of "public nuisance" - making allegations that span 100 years' worth of conduct.

Black's Law Dictionary defines abatement as, "the act of eliminating or nullifying <abatement of a nuisance>." ABATEMENT, Black's Law Dictionary (11th ed. 2019). However, as set forth above, Plaintiffs' requested relief in this case seeks declaratory relief,

injunctive relief, an accounting of various past alleged damages, creation of a victims' compensation fund, and other remedies that are in no way even arguably related to abatement of a public nuisance from which Plaintiffs were specially injured.

Plaintiffs also cite no case law that would suggest that laches is not an available legal defense to their claim for unjust enrichment and their request for an accounting and disgorgement of funds which spans 100 years.

Plaintiffs further contend that there is no evidence on the face of the Petition that they unreasonably delayed filing their suit because they "relied" on "their representatives in government to protect their rights on their behalf". Plaintiffs' Response, pg. 15. However, at some point, the onus is placed on Plaintiffs to realize that they have a cause of action and move forward with any legal action. Plaintiffs' claims in this case span a 100-year time frame. Plaintiffs claim they have been prejudiced by actions which were taken by the City and TMAPC in the 1960's, 1970's, and 1980's. At some point during the decades Plaintiffs contend this alleged conduct has gone on, Plaintiffs' reliance on others to "do the right thing" becomes unreasonable and it is incumbent upon Plaintiffs to not continue to lay on their rights and proceed with legal action. Continued delay becomes unreasonable.

Further, Plaintiffs contend that they did not know that a legal action under a public nuisance theory was available until 2017. However, there are cases in Oklahoma dating back to 1895 wherein the legal theory of "public nuisance" was recognized as a legal action. *U.S. v. Choctaw, O. & G.R. Co.*, 3 Okla. 404, 41 P. 729 (1895). The Oklahoma Statute defining "public nuisance", 50 O.S. § 2, was enacted in 1910. So, the legal theory upon which Plaintiffs are proceeding is not a new or novel legal theory. Simply because someone else has tried to use it in a new or novel way does not excuse Plaintiffs' delay in bringing a suit before now.

Plaintiffs also claim that Defendants City of Tulsa and TMAPC have not shown any prejudice by this belatedly filed lawsuit; however, the prejudice is clear from the face of the Petition. Plaintiffs make claims going back 100 years. The prejudice to the Defendants in having to identify witnesses, locate documents, and defend allegations spanning 100 years is significant.

C. Plaintiffs' unjust enrichment claim should be dismissed

Plaintiffs fail to address the City's and TMAPC's arguments in their motions to dismiss that where a plaintiff has an adequate remedy at law, the Court will not ordinarily exercise its equitable jurisdiction to grant relief for unjust enrichment. "[T]o invoke equity jurisdiction, it must be shown that no adequate statutory or legal remedy is available, *Billingsley v. North*, 298 P.2d 418, 422 (Okla.1956), and Plaintiffs have not alleged or shown that is the case. Defendants' motion to dismiss Plaintiffs' unjust enrichment claim must, therefore, be granted." *Chieftain Royalty Co. v. Dominion Oklahoma Texas Expl. & Prod., Inc.*, CIV-11-344-R, 2011 WL 9527717, at *5 (W.D. Okla. July 14, 2011). Plaintiffs do not make an argument for why 12 O.S. § 1449 does not provide an adequate remedy at law.

Further, Plaintiffs recognize that to properly establish the element of an unjust enrichment claim, they must establish the "(1) unjust (2) retention of (3) a benefit received (4) at the expense of another." Plaintiffs' Response at pg. 39, quoting *Okla. Dep't. of. Sec., ex rel. Faught v. Blair*, 2010 OK 16, 231 P.3d 645. However, Plaintiffs have failed to establish any entitlement to the benefit they claim was unjustly received. This is not a class action suit, so Plaintiffs can only claim damages for which they are legally entitled. However, Plaintiffs seek disgorgement of funds for all alleged losses to the Greenwood District over a 100-year time period. Plaintiffs have not established any right to such claims. Plaintiffs' Amended Petition

establishes no set of facts which would entitle them to bring an unjust enrichment claim on behalf of all of Greenwood, or all of the victims of a historical event which occurred 100 years ago. Plaintiffs can only bring an action to seek damages for losses they have personally incurred. On the face of the Amended Petition, Plaintiffs have not pled a legally cognizable claim for unjust enrichment against the City of Tulsa or TMAPC.

D. Conclusion

For the reasons set forth herein and those detailed in the City of Tulsa and TMAPC's Motions To Dismiss, Defendants City and TMAPC respectfully request this Court dismiss all claims against them. Further, to the extent the legal arguments made in the reply briefs filed by the Co-Defendants in this matter apply equally to the City and TMAPC and are non-duplicative, the City and TMAPC adopt and incorporate by reference the same herein.

Respectfully submitted,

CITY OF TULSA, OKLAHOMA
A municipal corporation

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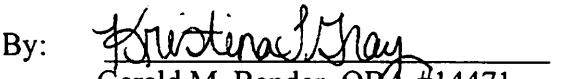
By: 

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I, Kristina L. Gray, hereby certify that on the 26th day of August, 2021, I mailed a true and correct copy of the above and foregoing document with proper postage thereon applied, to:

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