

AUG 26 2021

DON NEWBERRY, Court Clerk
STATE OF OKLA. TULSA COUNTY

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

LESSIE BENNINGFIELD RANDLE, <i>et al.</i> ,)	
)	
)	
Plaintiffs,)	
vs.)	CASE NO. CV-2020-1179
)	
CITY OF TULSA, <i>et al.</i> ,)	
)	
)	
Defendants.)	

**DEFENDANT MILITARY DEPARTMENT’S REPLY TO
PLAINTIFFS’ RESPONSE TO MOTION TO DISMISS**

COMES NOW, Defendant State of Oklahoma, *ex rel.*, Oklahoma Military Department, to Reply to Plaintiff’s Response to the Military Department’s Motion to Dismiss. In reply, the Military Department shows this Court the following:

PLAINTIFFS’ RESPONSE

In response to the Military Department’s Motion to Dismiss for failure to state a cognizable claim for relief, Plaintiffs sidestep that argument claiming they have adequately pled a valid cause of action in their Amended Petition. They claim they have pled enough facts for their “public nuisance” claim. However, to plead a valid claim in Oklahoma they must not only plead sufficient facts, they must also plead a valid claim “**upon which the Court can grant them relief.**” 12 O.S. § 2012(B)(6) (emphasis added).

Plaintiffs have failed to plead a cognizable claim for Relief

Courts in Oklahoma do in fact interpret our civil rules of procedure with the help of the Federal Rules of Civil Procedure. *See A-Plus Janitorial & Carpet Cleaning v. Employers’ Workers’ Compensation Ass’n*, 1997 OK 37, 936 P.2d 916 (Oklahoma’s Pleading Code is patterned on the Federal Rules); *Pan v. Bane*, 2006 OK 57, 141 P.3d 555 (Oklahoma’s Pleading Code is based on the Federal Rules of Civil Procedure); *Roth v. Mercy Health Center, Inc.*, 2011 OK 2, 246 P.3d

1079 (Interpreting Oklahoma's pleading code with the help of the federal rules which they mirror). Plaintiffs' argument to the contrary is wrong.

In their Amended Petition, Plaintiffs have sued the Military Department for "CLAIM # 1 - PUBLIC NUISANCE". See Amended Petition, ¶ 186-197. In their Response to the Military Department's Motion to Dismiss, they attempt to sidestep the GTCA by couching their requested relief as prospective in nature only. Yet, they failed to allege how the Oklahoma Military Department is still creating an ongoing "public nuisance." They have failed to allege the Oklahoma Military Department is continuing to violate any of the Plaintiffs' rights. All factual allegations, in regard to the Military Department, relate to actions that occurred in 1921.

Finally, Plaintiffs have now responded by admitting they have not pled a claim **upon which this court can grant them relief**. Their argument for relief is contrived. They argue they are not asking for money damages (and that is why the GTCA does not apply), but then they seek money anyway as part of some elaborate equitable remedy. Their PRAYER FOR RELIEF (Am. Pet. pg. 67-73) asks this Court for "money" and "monies" (PRAYER - ¶ 2, ¶ 7, ¶ 8, ¶ 10a, ¶ 10b, ¶ 10c, ¶ 10d, ¶ 10e, ¶ 10f); for "the costs of" (PRAYER - ¶ 4); for "compensation for" (PRAYER - ¶ 6); for "fees" or "revenue" (PRAYER - ¶ 9); for "payment" (PRAYER - ¶ 6, ¶ 12a); for the "value of" (PRAYER - ¶ 10g, ¶ 10h, ¶ 10i, ¶ 10j, ¶ 10k, ¶ 10l, ¶ 10n); for "the creation of a Compensation fund" (PRAYER - ¶ 11); for the "Development of programs" (PRAYER - ¶ 12c, ¶ 12d); for this Court to order the "purchase of" (PRAYER - ¶ 12b); for the "creation of" (PRAYER - ¶ 12e, ¶ 12h); for the "Construction of" (PRAYER - ¶ 12f); for the "immunity from taxes, fees and assessments" (PRAYER - ¶ 12g); for "punitive damages" (PRAYER - ¶ 13); for "attorney fees and costs" (PRAYER - ¶ 14); and for "pre and post-judgment interest." (PRAYER - ¶ 15). Plaintiffs' "equitable remedies" are nothing but "money damage claims" masquerading as

equitable relief. Their claimed equitable remedies would require the enactment and funding of laws. They are suing a governmental entity asking this Court to Order a coordinate branch of state government (*i.e.*, the Military Department or the Oklahoma Legislature) to enact laws to create programs and laws, and then to fund those programs with taxpayer money. That is something courts of equity are not allowed to do.

The Separations of Powers Doctrine

The Oklahoma Military Department has no power to enact legislation, nor create any kind of the funds requested. They are a state agency within the executive branch of the government, and have only those funds appropriated to it by the Oklahoma Legislature. That would leave only the Oklahoma Legislature as the object of this Court's intended equitable order.

However, this Court has no power to order the Oklahoma Legislature to "create a fund" or to "appropriate money" to fund the Plaintiffs' requested equitable relief. Such an Order (by declaration or mandamus) would violate the Separations of Powers doctrine.¹ That doctrine found in Oklahoma's Constitution at article IV, section 1 provides:

"The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial; and except as provided in this Constitution, the Legislative, Executive, and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others."

That article prohibits one branch of the government from controlling or subjecting another branch to coercive influences either directly or indirectly. *Okla. Educ. Ass'n. v. State, ex rel., Okla. Legislature*, 2007 OK 30 ¶19, 158 P.3d 1058. Furthermore, money can only be paid out of the

¹ "[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution, because it will be least in a capacity to annoy or injure them ... The Judiciary ... has no influence over either the sword or the purse, no direction either of strength or of the wealth of the society, and can take no active resolution whatever." THE FEDERALIST No. 78, at 522-23 (A. Hamilton) (J. Cooke ed. 1961).

State Treasury pursuant to a legislative appropriation act. *Fent v. State, ex rel., Office of State Finance*, 2008 OK 2 ¶ 16, 184 P.3d 467 (citing OKLA. CONST., art. V, § 55). Plaintiffs' requested "equitable remedies" would require this Court to **order** the Legislature to not only appropriate money, contrary to the Separations of Powers doctrine, but also (in effect) would be ordering the Legislature to enact laws to implement those equitable remedies in order to fund those programs. Whether to enact a law or not, is purely a "policy question," one which is vested exclusively in the legislative branch of government. *Okla. Educ. Ass'n v. State, ex rel., Okla. Legislature*, 2007 OK 30 at ¶18, 158 P.3d 1058 (discussing "political questions" and how those questions are beyond a Court's ability to address). Just as the Legislature cannot encroach on the Judiciary's powers (*Yocum v. Greenbriar Nursing Home*, 2005 OK 27, 130 P.3d 213) or the Executive's powers (*Fent v. Contingency Review Board*, 2007 OK 27, 163 P.3d 512), neither can the Judiciary invade the prerogative of the Legislature by ordering it to appropriate money or create laws to comply with a Court's equitable order. *Dank v. Benson*, 2000 OK 40, 5 P.3d 1088. The power of the Legislature to enact (or not to enact) laws is unquestioned. The wisdom of the Legislature in the exercise of that prerogative is not open to judicial review. *Polk v. Okla. Alcoholic Beverage Control Bd.*, 1966 OK 224, 420 P.2d 520. Such laws are purely "policy questions" founded in the Political Question Doctrine. Those questions are beyond this Court's authority to order the Legislature to perform and are prohibited by the Separations of Powers doctrine. *State, ex rel., Robinett v. Jarrett*, 1948 OK 145, 196 P.2d 849. Since Plaintiffs admit they are not making a claim under the GTCA in their Response, and since this Court has no power to order the Legislature to enact the kind of laws requested, this Court has no choice but to dismiss the Military Department from this lawsuit because the Amended Petition fails to state a valid claim **for relief**.

Abatement

With respect to a nuisance, to “abate” means to put an end to, to nullify, or to become void. CJS Nuisances § 144, n.4. In order for a court to grant abatement or an injunction for a nuisance, there must be an allegation of **continuous nuisance**. *Winget v. Winn-Dixie Stores, Inc.*, 242 S.C. 152, 130 S.E.2d 363 (1963) (abatement and/or injunction is not permissible when the alleged nuisance has ended). However, Plaintiffs’ request for an abatement or injunction fails to state what exactly the Military Department is currently doing, or will continue to do in the future, to cause a nuisance. *See* 12 O.S. § 2008(A)(1) (requiring a “short and plain statement of the claim showing that the pleader is entitled to relief”).² All allegations, related to the Military Department, occurred in 1921; only the alleged **effects** of that claimed 1921 nuisance are continuing. They have failed to state what, if anything, the Military Department is currently doing or will do to cause a nuisance to their rights today. Since Plaintiffs’ have no right to recover money damages from the State, and there are no allegations that the Military Department is currently doing anything to cause a continuing “nuisance” to Plaintiffs, there is nothing for this Court to order the Military Department to abate, and an injunction is not necessary. Furthermore, too much time has passed since this incident occurred.

Laches

The right to equitable relief in nuisance cases may be lost by laches or by acquiescence. *Osage Nation v. Bd. of Comm’rs of Osage Cty*, 2017 OK 34, 394 P.3d 1224 (the equitable defense of laches bars a claim where delay in bringing or prosecuting the claim is unreasonable, and the defendant has been materially prejudiced by the delay). The Oklahoma Military Department is

² 12 O.S. § 2009(B) imposes a particularity requirement in some instances, such as, when there are averments of fraud or mistake.

materially prejudiced by Plaintiffs delay in filing this lawsuit 100 years after the event took place. *Parks v. Classen Co.*, 1932 OK 157, 9 P.2d 432 (when it appears on the face of the Petition that laches is apparent, the court should dismiss the case). Plaintiffs are asking this Court to ignore the doctrine of laches. The loss of evidence after 100 years cannot be overstated. Most, if not all, of the evidence to defend this case no longer exists. Finally, Plaintiffs have ignored several of the Military Departments' defenses.

The Military Department

Plaintiffs have failed to address the fact that the Oklahoma Military Department did not exist in 1921. They have also failed to address the application of 74 O.S. § 840-5.3, which states that "Officers and members of the Oklahoma National Guard" are not considered state employees. Nor have they addressed the fact that their allegations are criminal in nature. No state employee can be acting in good faith within the scope of their employment if they are violating criminal laws. 51 O.S. § 152(12). The State has only consented to be sued based on that "scope of employment" requirement. *Okla. Agric. and Mech. Coll. v. Willis*, 1898 OK 15, 52 P. 921 (The State is not liable, except by its own consent); *see also*, 51 O.S. § 152.1. Plaintiffs have also failed to respond to the Military Department's exemptions from liability found in 51 O.S. § 155(3) (execution of lawful orders of a court, *i.e.*, a Court ordered Marshal Law); § 155(4) (enforcement of any law); § 155(6) (civil disobedience, riot, insurrection, or rebellion or the failure to provide, or the method of providing, police, law enforcement, or fire protection); § 155(24) (activities of the state military forces when on state active duty orders). As such, this Court must dismiss the Oklahoma Military Department with prejudice.

CONCLUSION

Plaintiffs have failed to comply with the GTCA, and the Military Department is exempt from the claims pled. Plaintiffs' amended claims for relief are nothing but money damage claims masquerading as equitable relief. The Separation of Powers doctrine prevents this Court from granting Plaintiffs their requested relief. Laches prevent their claims after 100 years, and no plea allows recovery for criminal acts since such violations would be outside the scope of employment. The Military Department did not exist at the time, and the numerous exemptions ignored by Plaintiffs in their Response requires dismissal. Therefore, this Court must dismiss the Oklahoma Military Department with prejudice.

Respectfully submitted,



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CERTIFICATE OF MAILING

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