

IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

DISTRICT COURT
FILED

AUG 26 2021

DON NEWBERRY, Court Clerk
STATE OF OKLA. TULSA COUNTY

LESSIE BENNINGFIELD RANDLE *et al.*,)
)
Plaintiffs,)
)
v.)
)
CITY OF TULSA *et al.*)
)
Defendants.)

Case No. CV-2020-01179
Division G
The Honorable Caroline Wall

**REPLY IN SUPPORT OF DEFENDANTS BOARD OF COUNTY
COMMISSIONERS FOR TULSA COUNTY AND SHERIFF REGALADO'S
MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED PETITION**

Defendant Board of County Commissioners for Tulsa County (“BOCC”) and Defendant Vic Regalado, as Sheriff of Tulsa County (“Sheriff Regalado”), and with their Reply in Support of their Motion to Dismiss Plaintiff’s First Amended Complaint, request the Court to grant their Motion and enter judgment in their favor and against Plaintiffs.

ARGUMENT AND AUTHORITIES

Plaintiffs’ Response in Opposition to the Motion to Dismiss filed by the BOCC and Sheriff Regalado fails to breathe life into their defective pleading and causes of action. Faced with early dismissal, Plaintiff’s Response¹ resorts to far-fetched characterizations of the nature of their claims, and is counting on the Court to turn a blind eye to the face of the First Amended Petition and the applicable law.

¹In their Response in Opposition to the BOCC and Sheriff Regalado’s Motion to Dismiss, Plaintiffs incorporated by reference their response in opposition to the motion to dismiss of the City of Tulsa and the Tulsa Metropolitan Area Planning Commission as it relates to the common Oklahoma Governmental Torts Claims Act issues raised by the governmental entity defendants.

I. LACK OF STANDING.

In response to the Defendant BOCC and Sheriff Regalado's proposition, legal authority, and legal argument presented in their Motion to Dismiss, Plaintiffs incorporate by reference their Response in Opposition to the Defendant Tulsa Regional Chamber's ("Chamber") Motion to Dismiss. Defendant BOCC and Sheriff Regalado incorporate herein the Reply of the Chamber in support of its motion to dismiss as it applies to the duplicative issues.

II. OKLAHOMA'S GOVERNMENTAL TORTS CLAIMS ACT.

A. Plaintiffs Cannot Disguise the True Nature of the Relief Sought.

The Plaintiffs attempt to hide from the application of The Governmental Torts Claims Act ("GTCA") by arguing—with a wink—that they only seek equitable relief. This ploy, however, is transparent for all to see and is further exposed by the teachings of the United States Supreme Court.

Plaintiffs rely upon a theory that the GTCA does not apply to claims for equitable damages, and state this is all they seek through abatement, an accounting, and a disgorgement of monies identified in the accounting. *See* Response. This representation, however, is not intellectually honest. Plaintiffs seek the payment of monetary damages to the victims and descendants of the Tulsa Race Massacre for previously inflicted harms suffered by those groups over the past century. And, for that very purpose, Plaintiffs have established the Tulsa Massacre Victims Compensation Fund for the deposit of said payments. *See* First Amended Petition, p. 68 (underscore added). Despite Plaintiffs' attempt to characterize the Victim's Compensation Fund as something other than, well, a victim's compensation fund, should fool no one.

Plaintiffs' cite the Court to legal authority that, if one only reads Plaintiffs' brief and not the law, might offer some support to their position. A proper analysis, however, reveals the cited authority does not support Plaintiffs' propositions.

Plaintiffs cite *Sholer v. State ex rel. Dep't of Pub. Safety*, 1995 OK 150, ¶ 15, 945 P.2d 469, 472-73, and *Abab, Inc. v. City of Midwest City*, No. CIV-20-0134-HE, 2020 WL 9073568, at *1 (W.D. Okla. Sept. 1, 2020), for the blanket proposition that "the GTCA provides no bar" to their claims. See First Amended Petition, p. 19. That conclusion and those cases do not apply here.

Sholer was a class action lawsuit to recover driver's license reinstatement fees paid in excess of fee authorized by statute. 1995 OK 150. The Oklahoma Supreme Court noted that the plaintiffs did not seek compensation for a loss they suffered from the state, but, rather, sought a refund of an amount they overpaid to reinstate their driver's license. *Id.* The Oklahoma Supreme Court, applying the former definition of a tort under the GTCA, found that the refund was outside of the GTCA. Plaintiffs here do not seek a refund for payments made to any of the Defendants. Plaintiffs seek damages for the losses they claim to have suffered as the result of the Defendants' alleged past actions. This distinction is further made and explained in reviewing the cited legal authority within *Abab, Inc.*, the federal district court case relied upon by Plaintiffs.

In *Abab, Inc.*, the defendant municipality argued that plaintiffs failed to comply with the GTCA, and requested judgment on the pleadings. The plaintiffs argued that their claims were for injunctive relief only, and were not subject to the GTCA notice requirements. The federal trial court held that "the GTCA does not affect claims seeking only prospective injunctive relief." *Abab, Inc.*, 2020 U.S. Dist. LEXIS 252815, p. 3 *; 2020 WL 9073568, p.3 (citing *Barrios v. Haskell Cnty. Pub. Facilities Auth.*, 2018 OK 90, 432 P.3d 233, 237 n.13 (Okla. 2018)). To properly consider this interpretation of Oklahoma law by the federal trial judge in *Abab, Inc.* it is necessary

to review the legal authority the federal court relied upon, footnote 13 of *Barrios*.

In footnote 13 of *Barrios*, the Oklahoma Supreme Court noted that by operation of the Supremacy Clause, the GTCA “does not affect claims that fail to implicate the state's sovereign immunity, such as those . . . seeking only prospective injunctive relief. *See, e.g., Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 436–37, 124 S. Ct. 899, 157 L. Ed. 2d 855 (2004).” *Barrios*, 2018 OK 90, ¶ 9, n. 13. Because footnote 13 does not contain any analysis, but, instead cites to a United States Supreme Court case, it is necessary to review the cited U.S. Supreme Court case to understand the holding and whether it applies. The U.S. Supreme Court cases—which are at the root of the analysis here—reveal that Plaintiffs’ cited authority not only fails to support their proposition, but leads to an inevitable conclusion that dooms Plaintiffs’ entire argument.

In *Frew ex rel. Frew v. Hawkins*, the Supreme Court recognized that the Eleventh Amendment confirms the sovereign status of the States by shielding them from suits by individuals absent their consent. 540 U.S. at 437 (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996)). Important here, the Supreme Court explained that to ensure the enforcement of federal law, however, the Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law, and allows courts to order prospective relief. *Id.* (citing *Edelman v. Jordan*, 415 U.S. 651, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974)). Citing *Edelman v. Jordan*, 415 U.S. at 688, the *Frew* Court went on to note that courts may not award retrospective relief, “for instance money damages or its equivalent, if the State invokes its immunity.” *Id.*

Following the legal authority trail from *Ahab, Inc.* to *Barrios* to *Frew* to *Edelman*, leads to the following guidance and answer by the United States Supreme Court on the issue of prospective relief, retrospective relief, and money damages:

But that portion of the District Court's decree which petitioner challenges on Eleventh Amendment grounds goes much further than any of the cases cited. It requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications were processed [in the past] on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard. 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 v. Jordan, 415 U.S. at 688 (emphasis added).

And such is the case here. Plaintiffs describe the monetary relief sought as equitable in nature, when it is truly a claim for an award of damages against the state and local governments, to be paid from state and local government funds, "measured in the terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." *Id.* Plaintiffs do not seek money for *future* compliance by the governmental Defendants, but, rather, seek payment as a form of compensation for *previously* inflicted harms. Plaintiffs are not exempt from the GTCA, and their failure to follow the GTCA is fatal to their lawsuit against the BOCC and Sheriff Regalado.

B. Plaintiffs' Claims Sound in Tort under the GTCA.

Just as predicted by the BOCC and Sheriff Regalado in their Motion, Plaintiffs attempt to argue their claims fall outside of the broad net cast by the Oklahoma Legislature when it recently expanded the GTCA definition of "tort" to discourage judicial attempts to find exceptions where they do not exist.

The GTCA's expansive and exclusive definition of "tort" is as follows:

“Tort” means 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.

OKLA. STAT. tit. 51, § 152(14). The GTCA definition is purposefully broad and includes Plaintiffs’ causes of action.² See also *Fuller v. Odom*, 1987 OK 64, ¶¶ 4--5, 741 P.2d 449, 451--52 (“The plain language of the Act expresses the Legislature’s intent to abrogate any common law theories of recovery if a governmental tortfeasor may be liable.”).

Plaintiffs’ notion that a public nuisance is not a tort flies in the face of black letter law. Indeed, **“public nuisance” is defined in the RESTATEMENT (SECOND) OF TORTS:** “A public nuisance is an unreasonable interference with a right common to the general public.” *Id.* at § 821B. Professor Prosser, the official reporter for the Restatement (Second) of Torts, noted in the Comments of 821B that in the common law, “interference with the public right was so unreasonable that it was held to constitute a criminal offense. For the same reason it also constituted a tort.” *Id.* at cmt. b. The Oklahoma Supreme Court recognizes public nuisance as a tort for the purpose of determining whether the doctrine of sovereign immunity applies to a civil suit against the state and its political subdivisions. See *Coffey v. Oklahoma*, 1976 OK 20 (Okla. 1976) (concluding that because the plaintiffs’ assert that their case sounds in nuisance or in tort negates any right based upon Oklahoma’s sovereign immunity).

Plaintiffs’ tenuous “unjust enrichment” claim against the BOCC is subject to and barred by Oklahoma’s Governmental Tort Claim Act. Under the plain language of the statute, a GTCA “tort” is **“a legal wrong, independent of contract, involving violation of a duty imposed by**

²A discussion of the legislature’s consistent amendments to the GTCA and its definition of “tort,” to foreclose and nullify judicially created causes of action is found in *Barrios*, 2018 OK at ¶¶ 10-17.

general law, statute, the Constitution of the State of Oklahoma, **or otherwise.**” OKLA. STAT. tit. 51, § 152(14) (emphasis added). The purposeful breadth of this definition, by evolution of legislative amendment, cannot be understated or overlooked.

The Oklahoma Legislature has responded each time to judicial attempts to expose the state to liability, by consistently broadening the GTCA’s definition of “tort” beyond traditional common law notions, to include the alleged deprivation of statutory rights, state constitutional rights, and any other theory not sounded in contract. *Id.* Most tellingly, the Oklahoma Legislature then added what can be reasonably interpreted as a prophylactic statement as a warning to future judicial interference:

The liability of the state or political subdivision under The Governmental Tort Claims Act shall be exclusive and shall constitute the extent of tort liability of the state, a political subdivision or employee arising from common law, statute, the Oklahoma Constitution, or otherwise. If a court of competent jurisdiction finds tort liability on the part of the state or a political subdivision of the state based on a provision of the Oklahoma Constitution or state law other than The Governmental Tort Claims Act, the limits of liability provided for in The Governmental Tort Claims Act shall apply.

OKLA. STAT. tit. 51, § 153 (emphasis added). Indeed, the above events illustrate the depth of the Legislature’s resolve to limit actions against the state and its political subdivisions by broadening the definition of “torts” under the GTCA. The GTCA definition now effectively captures any imaginable wrongdoing, whether grounded in the common law, statute or even the Oklahoma Constitution, “**or otherwise,**” provided the wrongdoing is independent of contract. *See id.* at § 152(14) (emphasis added).

Despite this inescapable conclusion, Plaintiffs’ Response attempts to persuade this Court to act contrary to the express will of the Oklahoma Legislature. Plaintiffs’ case law from other states and jurisdictions has no persuasive value in Oklahoma, where the intent of the law and the

resolve of the Oklahoma Legislature is not one for debate. The mandate is clear. The outcome cannot be avoided. Dismissal of Plaintiffs' claims is proper under Oklahoma law.

Plaintiffs' unjust enrichment theory and the alleged wrongdoing do not arise out of any contract, but, rather, is based upon the alleged wrongdoing that the BOCC "appropriated" the "Tulsa Massacre for their own financial and reputational benefit." FAP, ¶ 177, p. 61. As pled, this cause of action meets the GTCA's expansive "tort" definition, and—like public nuisance—can only survive the doctrine of sovereign immunity if the GTCA's limited waivers of immunity expressly encompasses the claim.

Plaintiffs failed to address in their Response the other propositions related to the GTCA raised by the BOCC and Sheriff Regalado. Those issues should be treated as confessed by Plaintiffs.

Plaintiffs failed to identify or allege any specific act or omission by the BOCC or the Sheriff to justify their inclusion in this lawsuit. Instead, Plaintiffs cast the BOCC and the Sheriff into a hodgepodge stew of culpability for the events of 1921, and beyond. With respect to these general allegations, the GTCA expressly exempts the BOCC and the Sheriff from liability for any loss or claim arising from the:

4. Adoption or enforcement of or failure to adopt or enforce a law, whether valid or invalid, including, but not limited to, any statute, charter provision, ordinance, resolution, rule, regulation or written policy;

5. Performance of or the failure to exercise or perform any act or service which is in the discretion of the state or political subdivision or its employees;

6. **Civil disobedience, riot, insurrection or rebellion or the failure to provide, or the method of providing, police, law enforcement or fire protection; . . .**

16. Any claim which is limited or barred by any other law; . . .

18. An act or omission of an independent contractor or consultant or his or her employees, agents, subcontractors or suppliers or of a person other than an employee of the state or political subdivision at the time the act or omission occurred; . . .

37. Use of a public facility opened to the general public during an emergency.

OKLA. STAT. tit. 51, § 155 (emphasis added). To the extent Plaintiffs claims arise out of any allegation that the BOCC and/or the Sheriff failed in any of the above categories, the BOCC and the Sheriff are exempt from liability. Plaintiffs' Response fails to refute the same, and their First Amended Petition must be dismissed.

Even if Plaintiffs' claims were subject to a waiver of sovereign immunity, Plaintiffs failed to comply with the explicit mandatory notice provisions to maintain this lawsuit under the GTCA. The GTCA requires that a lawsuit may only be maintained if written notice of a claim has been given to the governmental subdivision within one year of the tort injury, and the action is commenced within 180 days after denial of the claim. OKLA. STAT. tit. 51, §§ 156 & 157. This procedure and the non-optional nature of the same is fully briefed in the BOCC and Sheriff Regalado's Motion to Dismiss. Plaintiffs' do not refute the same.

Plaintiffs also fail to address or refute—likely because they are unable—the fact they are out of time to file any claim under the GTCA, and are thus barred from maintaining this lawsuit against the BOCC and the Sheriff. Any claim against the BOCC and the Sheriff was required “to be presented within one (1) year of the date the loss occurs. A claim against the state or a political subdivision shall be forever barred unless notice thereof is presented within one (1) year after the loss occurs.” OKLA. STAT. tit. 51, § 156(B). *See also Slawson v. Bd. of County Comm'rs*, 2012 OK 87, ¶ 6. As shown in the BOCC and Sheriff Regalado's Motion to Dismiss, Plaintiffs state in their

First Amended Complaint that the BOCC and the Sheriff are liable for a nuisance Plaintiffs allege has existed for at least 70 years. First Amended Complaint, ¶¶ 140-142, p. 46. Viewing the allegations as true for purposes of a motion to dismiss, Plaintiffs admit the “nuisance conditions” existed as early as the 1950s. Similarly, Plaintiffs’ unjust enrichment claim against the BOCC relates back to 1921, and covers the last 100 years. ~~See First Amended Petition. Plaintiffs were~~ required to present notice of their nuisance and unjust enrichment claims “within one (1) year after the loss occurs.” OKLA. STAT. tit. 51, § 156(B). Accordingly, the right of the Plaintiffs to present their GTCA claims expired sometime in the 20th century.³ Dismissal of the claims against the BOCC and the Sheriff is proper under Oklahoma law.

Further, the GTCA excludes the BOCC and the Sheriff from any liability “for any act or omission of an employee acting outside the scope of the employee’s employment.” OKLA. STAT. tit. 51, § 153(A). The GTCA makes a clear distinction between a government employee acting within the scope of employment and one who was not. *Martin v. Johnson*, 1998 OK 127, P 28, 975 P.2d 889, 895; *Carswell v. Oklahoma State University*, 1999 OK 102, ¶ 20. The “scope of employment” is defined as “performance by an employee acting in good faith within the duties of his office or employment or of tasks lawfully assigned by a competent authority.” *Tuffy’s, Inc.*, 2009 OK at ¶ 8 (citing *Fehring v. State Ins. Fund*, 2001 OK 11, ¶ 25, n. 19). Conversely, “[a]n act of the employee is not in the scope of employment if the employee acted maliciously or in bad faith.” *Martin*, 1998 OK at ¶ 28 (citing *Nail v. City of Henryetta*, 1996 OK 12, ¶ 7). “A political subdivision is relieved from liability for tortious conduct committed by employees outside the scope of employment.” *Tuffy’s, Inc.*, 2009 OK at ¶ 8. As a matter of law, the alleged malicious and

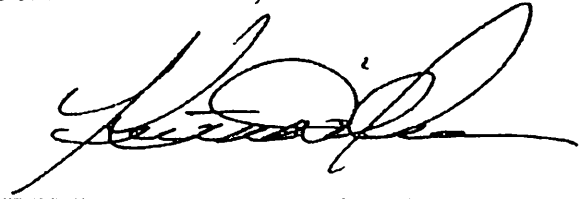
³ Outside of the GTCA, the statute of limitations for unjust enrichment is two years. *City of Tulsa v. Bank of Okla., N.A.*, 2011 OK 83, ¶ 20 (citing OKLA. STAT. tit. 12, § 95).

intentional criminal acts committed by employees of the county and sheriff's department relieves the BOCC and the Sheriff from any liability. *See Martin*, 1998 OK at ¶ 28, and *Tuffy's, Inc.*, 2009 OK at ¶ 8. The Plaintiffs made no attempt to address or refute the applicable law in this regard, and they are not entitled to recover against the BOCC or the Sheriff. Dismissal is proper.

Dated: August 26, 2021.

Respectfully submitted,

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.



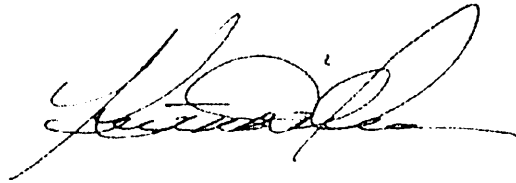
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**ATTORNEYS FOR DEFENDANTS BOARD
OF COUNTY COMMISSIONERS FOR
TULSA COUNTY and VIC REGALADO, IN
HIS OFFICIAL CAPACITY AS SHERIFF
OF TULSA COUNTY**

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of August, 2021, I caused the foregoing Response to be served by United States Mail, postage fully prepaid thereon, to the following:

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