Case No. 121,502

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

LESSIE BENNINGFIELD RANDLE, VIOLA FORD FLETCHER, AND HUGHES VAN ELLIS, SR.,

Plaintiff-Appellants,

v.

CITY OF TULSA, TULSA REGIONAL CHAMBER, BOARD OF COUNTY COMMISSIONERS FOR TULSA COUNTY, OKLAHOMA, VIC REGALADO, IN HIS OFFICIAL CAPACITY AS SHERIFF OF TULSA COUNTY, AND OKLAHOMA MILITARY DEPARTMENT,

Defendant-Appellees.

BRIEF IN CHIEF

OF APPELLANTS LESSIE BENNINGFIELD RANDLE, VIOLA FORD FLETCHER, AND HUGHES VAN ELLIS, SR.

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Plaintiff-Appellants Mother Lessie Benningfield Randle, Mother Viola Ford Fletcher, and the late Hughes "Uncle Red" Van Ellis, Sr. (the "Survivors"), the last three known survivors of the Tulsa Race Massacre of 1921 (the "Massacre"), respectfully submit this Brief-in-Chief in support of their August 4, 2023 Petition in Error seeking reversal of the Tulsa County District Court's July 7, 2023 dismissal of the Survivors' Second Amended Petition (the "Second Amended Petition") under 12 O.S. § 2012(b)(6).

INTRODUCTION

Although this case carries the heavy weight of American and Oklahoman history, the issues presently before the Court are simple and procedural in nature. After finding that the Survivors had properly stated a public nuisance claim under 12 O.S. § 2012(b)(6), the District Court nevertheless dismissed their claim for failing to allege a proper remedy. But under the Oklahoma Pleading Code and blackletter law from this Court, a pleading that states a claim for liability cannot be dismissed for a purported failure to allege a proper remedy. Accordingly, the District Court erred as a matter of law and its judgment must be reversed.

We regret to inform the Court that Uncle Red passed away on October 9, 2023, the day before this brief's submission, at the age of 102. He was an American hero who fought for his country in World War II. Although he was only a baby during the Massacre, he died fighting for the Tulsa neighborhood of Greenwood, his neighborhood, which was destroyed in the worst act of domestic terrorism in this nation's history. With Uncle Red's passing only two Survivors remain with us, and time is of the essence. Swift reversal is in the interest of justice so that Mother Randle and Mother Fletcher might live to see their day in court.[1]

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[1] It is anticipated that Uncle Red's estate will seek to be substituted as the proper representative of the deceased party on appeal; however, such actions could not practically be taken before the filing deadline for this brief. As such, Counsel for Survivors have proceeded with the filing of the Brief in Chief with Uncle Red listed as a party so as to ensure its timeliness on behalf of the two remaining Survivors.

Beginning on the night of May 31, 1921, a mob descended on Greenwood, a thriving Black community known at the time as "Black Wall Street." The mob burned Greenwood to the ground, destroying forty square blocks, murdering hundreds of Greenwood residents and injuring thousands more. Greenwood was never rebuilt, and to this day, as a direct result of the Massacre, parts of Greenwood and North Tulsa (the area to which the Greenwood community was displaced) remain blighted, fallow, and otherwise a shell of the former Black Wall Street.

In the 102 years since the Massacre, no court has *ever* permitted an action relating to the Massacre to proceed to discovery, let alone to trial. This Court has the opportunity to correct this grave injustice. In fact, this is the final chance to do so while the two remaining Survivors, Mother Randle and Mother Fletcher, both aged 109, are able to take the stand and tell their stories on behalf of themselves, their families, and their community.

Oklahoma expressly authorizes the Survivors to bring an action on behalf of their community. Oklahoma law defines public nuisances as those "which affect[] at the same time an entire community or neighborhood" and authorizes individuals to bring public nuisance actions on behalf of their community or neighborhood. 50 O.S. § 2. The Survivors brought an action on behalf of the Greenwood community in the District Court of Tulsa County, alleging that the Massacre and its aftermath constituted a public nuisance under the plain text of the statute, as it was "unlawful conduct" that "[a]nnoys, injures or endangers the comfort, repose, health or safety of others" or "[i]n any way renders other persons insecure in life, or in the use of property." 50 O.S. § 1. Of the three statutory remedies for public nuisance enumerated in 50 O.S. § 8, the Survivors sought the third enumerated remedy, *i.e.*, "abatement."

There is no question that the operative pleading, the Second Amended Petition, adequately pleads a public nuisance claim under Oklahoma's notice pleading standard. Under this liberal

regime, "[a] pleading must not be dismissed for failure to state a legally cognizable claim unless the allegations indicate beyond any doubt that the litigant can prove ***no set of facts*** which would entitle the plaintiff to relief." *Harwood v. Ardagh Grp.*, 2022 OK 51, ¶ 15, 522 P.3d 473, 477 (emphasis added).

In fact, the District Court expressly held that the Survivors satisfied this standard: "**[T]he court cannot find beyond any doubt that Plaintiffs Randle, Fletcher and Van Ellis, Sr. can prove no set of facts which would entitle Plaintiffs to relief on their public nuisance claims.**" ROA, Doc. 36 at 6 (emphasis added). With that finding, the District Court was required to permit the case to proceed to discovery and toward trial.

But the District Court did not do so.

Instead, the District Court dismissed the public nuisance claim under 12 O.S. § 2012(b)(6) for a purported failure to state a proper remedy, holding as the basis for the dismissal that "Plaintiffs' Second Amended Petition fails to allege a legally cognizable abatement remedy." ROA, Doc. 47 at 1. That ruling contravenes well-settled Oklahoma law.

As this Court has squarely held, at the pleading stage, "a plaintiff is required neither to identify a specific theory of recovery nor to set out the correct remedy or relief to which he may be entitled. If relief is possible under any set of facts which can be established and is consistent with the allegations, a motion to dismiss should be denied." *Darrow v. Integris Health, Inc.*, 2008 OK 1, ¶ 7, 176 P.3d 1204, 1208-09. Here, the scope of any abatement remedy would only be determined by the District Court *if and when* the Survivors prevail at trial. Dismissal of a valid claim for a purported failure to allege the remedy puts the cart before the horse.

Importantly, if this Court affirms the District Court it will either be (i) rewriting the Oklahoma Pleading Code; or (ii) holding that special pleading requirements apply to the last three

survivors of the Massacre and nobody else. This Court should do neither. The judgment should be reversed, and the case should be permitted to proceed to discovery and toward trial.

Additionally, the District Court improperly dismissed the Survivors' claim for unjust enrichment. Previously, the parties stipulated in open court to certain amendments to the prior pleading that would negate the need for new motions to dismiss. Notwithstanding that, after the Survivors made the stipulated amendments, Defendant-Appellees *still* moved to dismiss the unjust enrichment claim in the Second Amended Petition and the District Court granted the motion, without comments or explanation. Defendant-Appellees should be held to their agreement. However, even if the stipulation is disregarded, the Survivors properly pled the elements of an unjust enrichment claim, requiring reversal of the District Court's dismissal.

This Court need not determine the merits of the Survivors' claims, but only whether the Survivors have satisfied Oklahoma's liberal pleading code. Because the Survivors have satisfied the notice pleading standard with respect to both their public nuisance and unjust enrichment claim, this Court should reverse the District Court's erroneous dismissal of the claims.

SUMMARY OF THE RECORD

A. Allegations in the Second Amended Petition

On May 31, 1921, Tulsa police arrested a 19-year-old Black man, Dick Rowland, on false charges of assaulting a white woman. ROA, Doc. 37 ¶ 28. A local newspaper, the *Tulsa Tribune*, published an inflammatory article rife with false statements about the arrest, and subsequently published an editorial that encouraged white Tulsans to "lynch a negro tonight." *Id.* ¶¶ 29-30.

The article fueled the formation of an angry white mob. *Id.* ¶ 31. The mob congregated at the police station, enraged by the accusations against Mr. Rowland. *Id.* ¶ 32. The police deputized the mob, issuing them weapons, and ordered the mob to attack the Black neighborhood of Greenwood. *Id.* The mob, consisting of City, Chamber and County officials (*id.* ¶ 51), crossed

the Frisco railroad yard into Greenwood, forcing their way into the neighborhood, shooting, wounding, and killing Black Tulsans, and burning down everything in their path. *Id.* ¶ 36.

The white mob outnumbered the Black residents of Greenwood, but when Black Tulsans tried to organize and defend themselves against the onslaught, the Governor of Oklahoma declared martial law. *Id.* ¶¶ 38-39. The Military Department, deployed to restore order, instead joined the white mob, firing their weapons on the Black Greenwood residents. *Id.* ¶¶ 37, 40. Airplanes were used to drop bombs on the streets of Greenwood. *Id.* ¶ 43. The carnage did not cease until 11:00 a.m. on the morning of June 1. *Id.* ¶ 48.

The white mob killed hundreds of Black Greenwood residents, injured thousands more, and looted and destroyed homes and businesses. *Id.* ¶ 50. By the end of the Massacre, the white mob had reduced approximately 40-square blocks of a thriving Black community to ash and rubble. *Id.* What was formerly a neighborhood of over 1,500 homes and businesses was destroyed. *Id.* ¶ 52. Over 9,000 Black Greenwood residents were left homeless, many never to return again. *Id.* ¶¶ 50, 57. Some of the surviving Greenwood residents were captured and kept in internment camps for over a year in squalid conditions. *Id.* ¶ 77.

The Survivors allege that Defendant-Appellees, each of which participated in the Massacre, unlawfully murdered Black Greenwood residents, committed arson on the 1,500 Greenwood homes and businesses, deprived Black Greenwood residents of the use of their property, looted and destroyed personal property, and affirmatively acted to injure and danger the comfort, repose, health, safety, lives, and property of Greenwood's Black residents. *Id.* ¶¶ 51-59.

In the aftermath of the Massacre, Defendant-Appellees engaged in a campaign to cover up the true nature of the destruction of Greenwood, calling the Massacre a "race riot" to misrepresent the attack and the extent of its damage. *Id.* ¶ 67. After the Massacre drew negative attention,

Defendant-Appellees promised to "formulate a plan of reparation in order that homes may be built .... [and] as quickly as possible rehabilitation will take place and reparation made." *Id.* ¶ 70. That never happened.

The Survivors allege that, from the Massacre to the present, Defendant-Appellees have stifled the ability of Greenwood residents to thrive and prevented them from fully recovering from the Massacre. *Id.* ¶¶ 62, 83. Structures like the hospital that were destroyed have still never been rebuilt. *Id.* ¶ 94. At least one third of the businesses destroyed never reopened. *Id.* ¶ 101.

Following the Massacre, the blighted condition of Greenwood persists. *Id.* ¶ 87. The Massacre destroyed many of the necessities essential to any community, including paved streets, running water, sewers, regular trash pickup, parks and playgrounds. *Id.* To this day, the Greenwood community is deprived of grocery stores, schools, and hospitals. *Id.* ¶ 116. The Defendant-Appellees have yet to replace or, rebuild the hundreds of homes, businesses, and other structures and institutions destroyed by the Massacre. *Id.* ¶ 93. What houses were rebuilt were substandard and "prone to rapid deterioration." *Id.* ¶ 91.

In addition, Defendant-Appellees are appropriating the trauma and terror suffered by the survivors, victims, and descendants of the Massacre for their economic benefit at the Survivors' expense. *Id.* ¶ 132. Defendant-Appellees have touted "Black Wall Street" with the stated purpose of promoting tourism and economic development. *Id.* ¶ 134. The $30 million Greenwood Rising History Center, built where Black Wall Street once stood, exists with the purpose of generating tourist revenue, while using the names, likenesses, and trauma of the Survivors. *Id.* ¶¶ 137, 139. The Survivors have been refused any income-producing opportunities from the Greenwood Rising History Center. *Id.* ¶ 137. Defendant-Appellees are unjustly profiting off the trauma that they

caused, without ensuring that the Greenwood community, the subject of the harm, is represented. *Id.* ¶ 136.

B. Procedural History

Over three years ago, on September 1, 2020, the original plaintiffs initiated this action in the District Court of Tulsa County, bringing claims of public nuisance under 50 O.S. § 1 against all then-named defendants and unjust enrichment against Defendant-Appellees City, County, and Chamber. ROA, Doc. 1. In response, the then-named defendants filed motions to dismiss on November 9, 2020 (ROA, Docs. 2-8), prompting the original plaintiffs to file the first amended petition (the "First Amended Petition") on February 2, 2021.[2] ROA, Doc. 9.

The First Amended Petition contained, among other things, a robust plan to abate the alleged public nuisance (the "Abatement Plan"). ROA, Doc. 9 at 71-73. For example, to abate the blighted land, including destroyed homes and businesses, the Abatement Plan proposed "[p]roperty development, including purchase of business and residential property and repairs and upgrading of existing property" in Greenwood (*id.* at 71, ¶ 12(b)) and the creation of "a land trust into which all vacant or undeveloped land" in Greenwood would be placed. *Id.* at 72, ¶ 12(e). To abate the destruction of Greenwood's health infrastructure, the Abatement Plan proposed the "[c]onstruction of a Level 1 Trauma Center, including an urgent care center." *Id.* at 72, ¶ 12(f).

The then-named defendants moved to dismiss the First Amended Petition (the "First Motions to Dismiss") on or around March 12, 2021. ROA, Docs. 10-16. The then-plaintiffs ("Plaintiffs") filed their oppositions to the First Motions to Dismiss on June 1, 2021 (ROA, Docs. 17-22), and then-named defendants replied on or about August 26, 2021. ROA, Docs. 23-28. A

[2] Mother Randle was one of the original plaintiffs in this action. Mother Fletcher and Mr. Van Ellis joined as plaintiffs in the First Amended Petition. ROA, Doc. 9.

six-hour oral argument was held on the First Motions to Dismiss on September 28, 2021 (the "September 28 Hearing"). ROA, Doc. 35. The three Survivors attended the entire duration of that hearing.

At the September 28 Hearing, rather than focus on whether the Plaintiffs stated a public nuisance claim, the then-defendants directed most of their argument at the Abatement Plan. ROA, Doc. 35. They argued that the Abatement Plan was too broad in scope. *Id.* at 51:5-7; 51:23-52:4.

In response, Plaintiffs made clear to the District Court that the Abatement Plan exceeded the requirements of notice pleading, and that the Abatement Plan was a proposed remedy that the District Court need not adopt. *Id.* at 144:16-25. Specifically, counsel for Plaintiffs stated that "anything [Plaintiffs] ask for that [] after a trial and witnesses and exhibits and depositions and discovery, [the District Court doesn't] decide should be a part of the abatement plan, [the District Court] will make that determination to strike it." *Id.* at 144:21-25.

On November 9, 2021, while the First Motions to Dismiss were *sub judice*, this Court decided *State of Oklahoma v. Johnson & Johnson*, 2021 OK 54, 499 P.3d 719. Given that *Johnson & Johnson* was this Court's first significant ruling on public nuisance since *Smicklas v. Spitz* in 1992, 1992 OK 145, 846 P.2d 362, Plaintiffs filed a notice of supplemental authority requesting additional briefing on the decision (ROA, Doc. 30), which the District Court granted.

On January 31, 2022, Plaintiffs filed a memorandum of law addressing the Court's decision in *Johnson & Johnson*, outlining its applicability to the case at bar. ROA, Doc. 32. This Court in *Johnson & Johnson* expressly clarified what a public nuisance is under Oklahoma law: "For the past 100 years, our Court, applying Oklahoma's nuisance statutes, has limited Oklahoma public nuisance liability to defendants (1) committing crimes constituting a nuisance, or (2) causing physical injury to property or participating in an offensive activity that rendered the property

uninhabitable." ROA, Doc. 32 at 11-12 (citing *Johnson & Johnson*, 2021 OK at ¶ 18, 499 P.3d at 724-25).

Plaintiffs explained to the District Court that the crimes committed during the Massacre—murder, failure to perform duty of burial, kidnapping, burglary, robbery, arson, and domestic terrorism—are crimes constituting a public nuisance. *Id.* at 12-14. Plaintiffs further explained that Defendant-Appellees caused physical injury to property and had rendered property uninhabitable by bombing the streets, burning down businesses, unlawfully taking land owned by deceased or missing Greenwood residents and otherwise reducing Greenwood to ash and rubble. *Id.* at 15-16.

On March 7, 2022, the then-defendants filed their joint response to Plaintiffs' memorandum of law on *Johnson & Johnson*. ROA, Doc. 33. Plaintiffs filed their reply. ROA, Doc. 34.

The District Court held a hearing on the *Johnson & Johnson* supplemental briefing on May 2, 2022 (the "May 2 Hearing"). ROA, Doc. 50. Again, all three Survivors attended the duration of that argument.

During the May 2 Hearing, the parties entered an on-the-record stipulation regarding the Prayer for Relief for the unjust enrichment claim: "[W]ith respect to page 69, Paragraph 10 of the [First Amended] Petition, that Plaintiffs will file a Second Amended Petition that strikes the subparagraphs A through N of that paragraph." *Id.* at 83:22-84:1 (referencing ROA, Doc. 9 at 69).

Also at the May 2 Hearing, the parties again discussed the then-plaintiffs' proposed Abatement Plan. ROA, Doc. 50. Plaintiffs reiterated that the Abatement Plan served as a suggested remedy, which proffered "alternatives" for the District Court to consider. *Id.* at 29:16-30; 70:23-24.

At the conclusion of the May 2 Hearing, the District Court orally ruled on the First Motions to Dismiss, stating:

> [T]he Court finds, based upon all of the argument of counsel which is in court and also filed of record, that based on all the premises the Motion to Dismiss is granted in part and denied in part. The Court will file a written order and mail it to all counsel of record.

ROA, Doc. 50 at 88:3-8.

The District Court issued its written order on the First Motions to Dismiss on August 3, 2022 (the "August 3 Order"). ROA, Doc. 36. In the August 3 Order, the District Court expressly held that the Survivors had adequately alleged a public nuisance claim against the Defendant-Appellees: **"[T]he court cannot find beyond any doubt that Plaintiffs Randle, Fletcher and Van Ellis, Sr. can prove no set of facts which would entitle Plaintiffs to relief on their public nuisance claims."** ROA, Doc. 36 at 6 (emphasis added) (citing *Johnson & Johnson*, 2021 OK 54, ¶ 18 & n.13, 499 P.3d at 724-25, 724 n.13). When doing so, the District Court acknowledged Oklahoma's "liberal pleading standard" and the "disfavor" with which Oklahoma courts view motions to dismiss. ROA, Doc. 36 at 6.

The District Court also acknowledged the stipulation between the parties with respect to the unjust enrichment claim in the August 3 Order. ROA, Doc. 36 at 2. The District Court recognized that: "[c]ounsel for Plaintiffs and counsel for said Defendants stipulated the defects could be cured and jointly requested dismissal without prejudice with leave to amend." *Id.*

When denying, in part, the First Motions to Dismiss, the District Court held that: (i) only the Survivors had standing to assert the public nuisance claim; (ii) the Tulsa Development Authority and the Tulsa Metropolitan Area Planning Commission were not proper defendants; (iii) certain issues including policing, schools, and urban renewal were non-justiciable; and (iv) it is an

open question as to whether a plaintiff alleging a public nuisance claim may generally request "abatement" as a remedy. ROA, Doc. 36.

On September 2, 2022, the Survivors filed the Second Amended Petition. ROA, Doc. 37. While not required to do so, the Survivors removed not only the language pursuant to the parties' stipulation, but also the parties and issues the District Court dismissed in the August 3 Order, with the hope that doing so would eliminate any roadblocks to the Survivors having their day in court during their lifetimes. *Id.*

In light of Defendant-Appellees objections to the proposed Abatement Plan, the Survivors removed it from the Second Amended Petition. *Id.* Instead, the Survivors generally requested abatement of the public nuisance created by Defendant-Appellees "as demonstrated by the evidence presented in this matter," consistent with courts' traditional equitable power. *Id.* at 50.

Defendant-Appellees then filed *another* round of motions to dismiss (the "Second Motions to Dismiss"). ROA, Docs. 38-41. The Second Motions to Dismiss contained nearly identical arguments to those made in the First Motions to Dismiss, with the only additional argument being that the Survivors did not make the appropriate changes to the Second Amended Petition to state a cognizable abatement remedy. *Id.*

On October 18, 2022, the District Court held a scheduling conference. ROA, Doc. 48. At this conference, the Survivors argued, among other things, that Defendant-Appellees' filing of the Second Motions to Dismiss violated the parties stipulation made on the record at the May 2 Hearing. *Id.* at 5:18-20.

On November 22, 2022, the Survivors filed an omnibus opposition to Defendant-Appellees Second Motions to Dismiss (ROA, Doc. 42), and on December 7, 2022, Defendant-Appellees filed

their joint reply. ROA, Doc. 43. On May 10, 2023, the District Court held a hearing on the pending motions to dismiss. ROA, Doc. 49.

Two months later, on the evening of Friday, July 7, 2023, the District Court—without explanation—granted the Second Motions to Dismiss, dismissing the Survivors' public nuisance and unjust enrichment claims (the "Final Judgment"). ROA, Doc. 46. Inexplicably, the District Court incorporated by reference its August 3 Order, which expressly found the Survivors had adequately alleged a public nuisance claim. *Id.*; ROA, Doc. 36 at 6.

On July 12, 2023, the District Court clarified its ruling on the public nuisance claim, stating: "Plaintiffs' Second Amended Petition fails to allege a legally cognizable abatement remedy." ROA, Doc. 47 at 1. The District Court again provided no reasoning for dismissing the unjust enrichment claim.

On August 4, 2022, the Survivors filed their Petition in Error, requesting that this Court retain the case and reverse the District Court's dismissal of both the public nuisance and unjust enrichment claims. On August 7, 2023, the Court retained the case on, and on September 20, 2023, it ordered the parties to file briefs in the matter pursuant to OKLA. SUP. CT. R. 1.36(g).

STANDARD OF REVIEW

"A district court's dismissal of an action is reviewed *de novo*." *Megee v. El Patio, LLC*, 2023 OK 14, ¶ 5, 524 P.3d 1283, 1285; *see also Ho v. Tulsa Spine & Specialty Hosp., L.L.C.*, 2021 OK 68, ¶ 9, 507 P.3d 673, 677 (a district court's dismissal of a petition "for failure to state a claim upon which relief can be granted is subject to *de novo* review"). "A *de novo* review involves a plenary, independent and non-deferential examination of the trial court's legal rulings." *Freightner v. Bank of Okla., N.A.*, 2003 OK 20, ¶ 2, 65 P.3d 624, 627.

A "case cannot be disposed of on its merits on a motion to dismiss." *Johnson v. Fisher*, 1941 OK 312, ¶ 5, 117 P.2d 769, 770. In deciding a motion to dismiss, the Court must "consider[]

the legal sufficiency of the petition and tak[e] all allegations in the plaintiff's petition as true." *Gens v. Casady Sch.*, 2008 OK 5, ¶ 8, 177 P.3d 565, 569 (citing *Shero v. Grand Savings Bank*, 2007 OK 24, ¶ 5, 161 P.3d 298).

A motion to dismiss for failure to state a claim upon which relief can be granted must be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle relief." *Id.* (citing *State ex rel. Wright v. Oklahoma Corp. Comm'n*, 2007 OK 73, ¶ 52, 170 P.3d 1024). "If any set of facts can be established which is consistent with the allegations, a motion to dismiss should be denied." *Id.* (citing *Lockhart v. Loosen*, 1997 OK 103, ¶ 4, 943 P.2d 1074).

PROPOSITION I

THE DISTRICT COURT'S DISMISSAL OF THE PUBLIC NUISANCE CLAIM SHOULD BE REVERSED BECAUSE THE DISTRICT COURT ERRED AS A MATTER OF LAW IN CONCLUDING THAT THE SURVIVORS FAILED TO STATE A CLAIM UNDER 12 O.S. § 2012(B)(6) BY "FAIL[ING]TO STATE A LEGALLY COGNIZABLE ABATEMENT REMEDY."

It is axiomatic that Oklahoma is a notice-pleading jurisdiction where "[m]otions to dismiss are generally disfavored." *Am. Nat. Res., LLC v. Eagle Rock Energy Partners, L.P.*, 2016 OK 67, ¶ 6, 374 P.3d 766, 769. The standard for dismissal is very high. 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." *Porter v. Oklahoma Farm Bureau Mut. Ins. Co.*, 2014 OK 50, ¶ 9, 330 P.3d 511, 514 (quoting *Darrow v. Integris Health, Inc.*, 2008 OK 1, ¶ 7, 176 P.3d 1204, 1208-09). "Where not all claims appear to be frivolous on their face or without merit, dismissals for failure to state a claim upon which relief may be granted are premature." *Gens*, 2008 OK 5, ¶ 8, 177 P.3d at 569.

It must again be emphasized that in the August 3 Order, the District Court found that the Survivors had adequately alleged a public nuisance claim against the Defendant-Appellees. ROA,

Doc. 36 at 6. The District Court explicitly held that it **[could not] "find beyond any doubt that Plaintiffs Randle, Fletcher and Van Ellis, Sr. can prove no set of facts which would entitle Plaintiffs to relief on their public nuisance claims."** ROA, Doc. 36 at 6 (emphasis added). Thus, the only issue for this Court to decide here is whether the District Court erred in dismissing the public nuisance claim because, according to the District Court, the Survivors "fail[ed] to state a cognizable abatement remedy." ROA Doc. 36 at 6.

As set forth below, the District Court erred in dismissing the Survivors' public nuisance claim pursuant to 12 O.S. § 2012(b)(6) for the following reasons: *First*, the District Court's sole reasoning that the Survivors "fail[ed] to state a cognizable abatement remedy" is contrary to the well-established precedent of this Court. *Second*, any abatement remedy can only be crafted *after* trial, as a public nuisance case pending in the U.S. District Court for the Northern District of Oklahoma illustrates. *See Oklahoma, ex rel. Drummond. v. Tyson Foods, Inc.*, No. 05-CV-329-GKF-SH (N.D. Okla. Jun. 13, 2005) ("*Tyson*") (abatement remedies for pollution of the Illinois River were determined after the court made its findings of fact and conclusions of law). *Third*, although a general request for abatement satisfies Oklahoma's pleading standard, the Second Amended Petition went further than that.

A. A pleading that otherwise states a claim cannot be dismissed under 12 O.S. § 2012(b)(6) for a purported failure to state a remedy.

In 1984, Oklahoma adopted the Oklahoma Pleading Code, which replaced the State's then-existing "fact pleading" regime with a "notice pleading" standard.[3] As this Court has repeatedly

[3] The "fact pleading" standard originated from New York's Field Code of 1848. John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1375 (1986). Oklahoma relied on many of the Field Code's provisions as part of the original territorial rules of civil procedure adopted in 1893, including its fact pleading standard. *Id.* at 1413, n.293. Fact pleading requires a higher standard of factual specificity in pleading (*id.* at 1378), and it was this more stringent standard that was utilized in Oklahoma until 1984 when it enacted the Oklahoma Pleading Code and adopted notice pleading. 12 O.S. §§ 2001-2027 (W. Supp. 1984).

and expressly held, the adoption of the Oklahoma Pleading Code "abolishes any requirement that a litigant correctly identify a theory of recovery or *describe the remedy affordable for an asserted right's vindication.*" *Finnell v. Seismic*, 2003 OK 35, ¶ 12, 67 P.3d 339, 343 (emphasis added).

Indeed, as this Court explained further in *Estate of Hicks ex rel. Summers v. Urban E., Inc.*, "[i]n *Finnell* we said that the court will craft the available relief that is justified by the facts ... *This regime abolishes any requirement that a litigant correctly identify a theory of recovery or describe the remedy affordable for vindication of asserted rights.*" 2004 OK 36, ¶ 15, 92 P.3d 88, 92 (emphasis added); *see also, e.g., Gens*, 2008 OK 5, ¶ 9, 177 P.3d at 569 ("Any requirement that a litigant correctly identify a theory of recovery or describe the remedy affordable for an asserted right's vindication is abolished and the doctrine of mandatory election of remedies *has become an anachronism.*") (Emphasis added).

As applicable in this action, the public nuisance statute expressly provides for three types of remedies: "The remedies against a public nuisance are: 1. Indictment or information, or, 2. A civil action, or, 3. Abatement." 50 O.S. § 8.

The Second Amended Petition identified "abatement" as its requested remedy and then described the general nature of the abatement the Survivors seek.

Specifically, the Survivors requested:

> 1. A declaration that Defendants' policies, actions, and omissions during and after the 1921 Massacre created a public nuisance under Oklahoma law and that said public nuisance is ongoing;
>
> 2. A declaration that the public nuisance created by Defendants must be abated;
>
> 3. A declaration that the actions of the National Guard in 1921 were inconsistent with its charter and that its conduct contributed to the creation of the nuisance;

> 4. An order requiring Defendants to abate the harm they caused by, among other things, replacing buildings, homes and businesses destroyed during the Massacre, and returning misappropriated land to the Black community; [and]
>
> 6. An order requiring the abatement of the public nuisance by Defendants, including the abatement of all the conditions . . . ***as demonstrated by the evidence presented in this matter*** and not addressed by any other demand in this prayer for relief, including, but not limited to, restoring property or removing impediments that continue to injure the comfort, repose, health, and safety of the Greenwood neighborhood and Greenwood community[.]

ROA, Doc. 37 at 49-50 (emphasis added).

There can be no serious question that the Survivors' requested remedy is sufficient under the Oklahoma Pleading Code when this Court has repeatedly held that at the pleading stage "[a] plaintiff is required neither to identify a specific theory of recovery nor to set out the correct remedy or relief to which he may be entitled. If relief is possible under any set of facts which can be established and is consistent with the allegations, a motion to dismiss should be denied." *Darrow v. Integris Health, Inc.*, 2008 OK 1, ¶ 7, 176 P.3d 1204, 1208-09; *see also Gens*, 2008 OK 5, ¶ 8, 177 P.3d at 569.

"[T]o withstand a motion to dismiss it is not necessary for a plaintiff to either identify a specific theory of recovery or set out the correct remedy or relief which he/she may be entitled. When a trial court is considering [a motion to dismiss, the court] should **not** ask whether the petition points to an appropriate statute or legal theory, but whether relief is possible under any set of facts that could be established consistent with the allegations." *Indiana Nat'l Bank v. State Dep't of Human Servs.*, 1994 OK 98, ¶ 4, 880 P.2d 371, 375-76 (emphasis in original, internal citation omitted). Furthermore, a federal court, applying a heighted pleading standard, has found similar pleadings to be sufficient. *Melton v. Oklahoma ex rel. Univ. of Okla.*, 532 F. Supp. 3d 1080 (W.D. Okla. 2021);); Complaint ¶ 75, *Melton v. Oklahoma ex rel. Univ. of Okla.*, No. CIV-

20-608-G (W.D. Okla. June 24, 2020), ECF No.1 (Complaint for public nuisance under Oklahoma law pleading, "[a]s a result of the public nuisance that has been created and proliferated by the Defendants, the Plaintiff seeks damages and abatement" survived a motion to dismiss.).

B. An appropriate abatement remedy will be crafted by the District Court and the parties only after the Survivors prevail at trial.

This Court's jurisprudence makes clear that a plaintiff need only make a simple demand for the relief sought. As this Court has taught, the ultimate remedy awarded is not based on the parties' initial pleadings, but instead on the evidence adduced at trial to prove the allegations. According to this Court, the District Court should "craft the available relief that is justified by the facts." *Estate of Hicks ex rel. Summers*, 2004 OK 36, ¶ 15, 92 P.3d at 92.

In addition to being the law, this makes good sense. A plaintiff alleging a public nuisance cannot know *ex ante* the exact scope of the public nuisance that will be proven at trial—before any formal discovery has occurred—and cannot be expected to provide the exact contours of the abatement remedy in the pleadings. If a public nuisance is established by the evidence, only then can a trial court, acting within its equitable powers, determine how the nuisance should be abated.

An instructive example of this is *Tyson*, a long-pending public nuisance case in the United States District Court for the Northern District of Oklahoma. In *Tyson*, the State of Oklahoma brought a public nuisance claim against certain poultry companies relating to pollution caused by the company's industrial processes. In its complaint, the State sought as a remedy a "permanent injunction requiring each and all [defendants] to immediately abate their pollution-causing conduct ... [and] to take all such actions as may be necessary to abate the imminent and substantial endangerment to the health and environment . . . ." Complaint at 35, *Tyson*, No. 05-CV-329-GKF-SH, (N.D. Okla. Aug. 19, 2005) ECF No. 18. After a 52-day trial and with over 8,000 exhibits presented, the court directed the State and defendants to submit supplemental findings of fact and

conclusions of law on the issue of an appropriate abatement remedy. *Tyson*, No. 05-CV-329-GKF-SH, (N.D. Okla. 2005) ECF Nos. 2890, 2891, 2979.

In issuing its findings of fact and conclusions of law, the Northern District of Oklahoma held that the State had proven a public nuisance and stated that defendants "may be enjoined pursuant to both Federal common law and Oklahoma statutory nuisance law from continuing [the] nuisance suffered by plaintiff in Oklahoma based on conduct by defendants . . . ." Findings of Fact and Conclusions of Law at 212, *Tyson*, No. 05-CV-329-GKF-SH (N.D. Okla. Jan. 18, 2023) ECF No. 2979. The court further "directed [the parties] to meet and attempt to reach an agreement with regard to remedies to be imposed in this action." *Id.* at 218. The court went on to say that "[t]he agreed remedies, if any, must be approved by the court. In the event the parties are unable to reach an accord, the court shall enter judgment." *Id.*

The District Court should—and must—follow the same approach here. Having found that it is possible that the Survivors could prove a set of facts which may constitute a public nuisance, the District Court must now permit them the opportunity to do so. If the Survivors prevail at trial, the District Court, with the assistance of the parties, will craft the appropriate abatement remedy just as the court and the parties are currently doing in *Tyson*.

Tyson is not the only public nuisance claim where the State has pled a general abatement remedy. Both the City of Tulsa and the State alleged only "abatement" as the remedy when they brought their public nuisance suits against certain opioid manufacturers.

In one of those cases, the City of Tulsa prayed in its petition for an "Order that Defendants compensate the [City] for the future costs to abate the ongoing public nuisance caused by the opioid epidemic[.]" Petition for City of Tulsa at 72, *City of Tulsa v. Purdue Pharma L.P.*, No. CJ-2020-02705 (Okla. Dist. Tulsa Cty. Sept. 2, 2020). Moreover, in the pleading that culminated in

the *Johnson & Johnson* decision, "[the State] pray[ed] for relief and judgment as follows . . . Abatement of the public nuisance Defendants have created and all costs necessary to abate such nuisance[.]" Petition for State of Oklahoma at 31, *State ex rel. Hunter v. Purdue Pharma L.P.*, No. CJ-2017-816, 2017 WL 8234419 (Okla. Dist. Cleveland Cty. June 30, 2017).

Notably, two of the Defendant-Appellees in this action—the City and the State—themselves generally requested abatement as a remedy, yet they now contend that the Survivors' Petition is somehow deficient for doing the same thing. Even more significantly, at no point did any court, including this Court, find or imply that the City's or the State's general request for abatement was insufficient at the pleading stage.

C. Even though a general request for abatement satisfies Oklahoma's pleading standard, the Second Amended Petition went further than that.

Even though only a general request for abatement is sufficient under Oklahoma law to survive a motion to dismiss, the Survivors pleaded more than a general request in the Second Amended Petition. In the Second Amended Petition, the Survivors sought abatement to the blight to property caused by Defendant-Appellees that began with the Massacre and persists to this day.

Specifically, in addition to their general request for abatement, the Survivors proposed (1) the replacing of "buildings, homes, and businesses destroyed during the Massacre"; (2) "returning misappropriated land" that belonged to the victims of the Massacre; and (3) "restoring property or removing impediments that continue to injure the comfort, repose, health, and safety of the Greenwood neighborhood." ROA, Doc. 37 at 50. Such proposals are directly connected to the Survivors' allegations regarding the Massacre.

The abatement the Survivors seek for the blighted property in Greenwood is the very type of abatement remedy this Court gave its nod of approval to in *Johnson & Johnson*. There, this Court clarified that Oklahoma's public nuisance statute extended liability to defendants "causing

physical injury to property or participating in an offensive activity that rendered the property uninhabitable." *Johnson & Johnson*, 2021 OK at ¶ 18, 499 P.3d at 724. When doing so, this Court relied on Oklahoma public nuisance cases spanning over a century in which courts abated public nuisances that harmed property.[4] *Id.*

Even if this Court finds that the Survivors did not adequately plead abatement as it relates to the blighted property in Greenwood, the Survivors requested additional forms of abatement that the District Court erroneously ignored. In addition to the requests for abatement of the blighted conditions of Greenwood, the Survivors further seek *declaratory relief* to abate the trauma caused by the Massacre and its aftermath. Specifically, the Survivors requested:

> 1. A declaration that Defendants' policies, actions, and omissions during and after the 1921 Massacre created a public nuisance under Oklahoma law and that said public nuisance is ongoing;
>
> 2. A declaration that the public nuisance created by Defendants must be abated; [and]
>
> 3. A declaration that the actions of the National Guard in 1921 were inconsistent with its charter and that its conduct contributed to the creation of the nuisance[.]

ROA, Doc. 37 at 49-50.

Such requests for declaratory relief are well within the scope of the relief that may be granted by an Oklahoma court and constitute part of the abatement remedy requested by the

[4] *Nichols v. Mid-Continent Pipe Line Co.*, 1996 OK 118, 933 P.2d 272 (pollution from a leaking oil pipeline considered a public nuisance); *Sharp v. 251st St. Landfill, Inc.*, 1991 OK 41, 810 P.2d 1270 (pollution in water from a waste disposal facility considered a public nuisance); *Phillips v. Altman*, 1966 OK 46, 412 P.2d 199 (pollution by crude oil considered a public nuisance); *Boudinot v. State ex rel. Cannon*, 1959 OK 97, 340 P.2d 268 (forty cats in a home considered a public nuisance); *State ex rel. Brown v. Armstrong*, 1952 OK 70, 241 P.2d 959 (barn in disrepair considered a public nuisance); *Goodall v. City of Clinton*, 1945 OK 235, 161 P.2d 1011 (installation of toilets causing sewage backflow and pollution to city water considered a public nuisance); *Swanson v. City of Tulsa*, 1981 OK CR 101, 633 P.2d 1256 (smoking indoors in violation of Oklahoma law considered a public nuisance).

Survivors. As such, the declarations are a "legally cognizable abatement remedy" (ROA, Doc. 36 at 6) that the Survivors have pleaded.

* * *

Defendant-Appellees have failed to show that there are "no set of facts" to substantiate the Survivors' request for abatement, and the proposed abatement remedy requested satisfies the notice pleading standards. As indicated by the District Court's August 3 Order, the Survivors have otherwise satisfied pleading requirements for a public nuisance claim.

The District Court erred in concluding that the Survivors' request for abatement was somehow fatal to this claim, and its dismissal of the claim should be reversed.

PROPOSITION II

THE DISTRICT COURT'S DISMISSAL OF THE SURVIVORS' UNJUST ENRICHMENT CLAIM FOR FAILURE TO STATE A CLAIM UNDER 12 O.S. § 2012(B)(6) SHOULD BE REVERSED BECAUSE THE PARTIES STIPULATED IN OPEN COURT THAT DEFENDANT-APPELLEES WOULD FORGO A MOTION TO DISMISS IF THE SURVIVORS REMOVED CERTAIN ALLEGATIONS IN THEIR SECOND AMENDED PETITION AND THE SURVIVORS SATISFIED THE NOTICE PLEADING STANDARD FOR THE UNJUST ENRICHMENT CLAIM.

The District Court erred in dismissing the Survivors' unjust enrichment claim for failure to state a claim under 12 O.S. § 2012(b)(6). As set forth below, the parties stipulated in open court that if the Survivors made certain amendments to the Second Amended Petition related to their unjust enrichment claim, Defendant-Appellees would forgo another round of motion to dismiss briefing. However, even if the parties' stipulation was not binding, the Survivors sufficiently pled their unjust enrichment claim.

First, at the May 2 Hearing, in an effort to move the case on to discovery from an already-protracted motion to dismiss briefing stage, the Survivors agreed to remove certain allegations from the First Amended Petition relating to the unjust enrichment claim. As the Court recognized,

"[c]ounsel for Plaintiffs and counsel for said Defendants stipulated the defects could be cured and jointly requested dismissal without prejudice with leave to amend." ROA, Doc. 36 at 2.

By removing the stipulated paragraphs, Survivors made a material concession in exchange for expediency. The Survivors honored their end of this bargain. The Defendant-Appellees did not, and filed new motions to dismiss on the unjust enrichment claim.

The Defendant-Appellees cannot walk away from their agreement. Stipulations by the parties "made in open court are binding and conclusive on the parties and the court." *Bill Hodges Truck Co. v. Gillum*, 1989 OK 86, ¶ 14, 774 P.2d 1063, 1068; *see also Callaway v. Sparks*, 1939 OK 180, 89 P.2d 275 (stipulation made in open court is binding and conclusive during trial and on appeal). Regardless of whether a stipulation is made in open court, it is considered "a tool for expediting trial through the disposition of uncontroverted issues by agreement." *McFarling v. Demco, Inc.*, 1976 OK 15, ¶ 13, 546 P.2d 625, 630.

This Court in *McFarling* categorized stipulations in two ways. *First*, some stipulations are tantamount to contracts, which can only be withdrawn on grounds for nullifying a contract, such as fraud or contrary to law or against public policy. *Id.* The *second* category of stipulations are procedural stipulations. "Withdrawal of a procedural stipulation is not permitted without the consent of the opposing party, except by leave of court for cause shown." *Id.* at ¶ 14, 546 P.2d at 630.

The stipulation at issue is procedural as it relates to the procedural[5] matter of whether another round of motions to dismiss is required if the amended petition contains no new allegations

[5] Even if the stipulation were contractual, dismissal would not have been proper as Defendant-Appellees cannot and do not argue that it was somehow fraudulent, contrary to law, or against public policy.

but only *removes* allegations. As such, Defendant-Appellees could not withdraw without the Survivors' consent or good cause.

The Survivors never consented to the withdrawal of the stipulation. The Defendant-Appellees never requested, and the District Court never determined, that the stipulation be withdrawn for good cause. Therefore, the District Court's dismissal of the unjust enrichment claim was improper.

Second, even if Defendant-Appellees and the District Court were permitted to disregard the stipulation —which they were not—the District Court still erred in dismissing the claim. Under Oklahoma's notice pleading standard, the Survivors are "merely" required to plead "a short and plain statement of the claim which will give the defendant fair notice" of the claim. *Niemeyer v. U.S. Fid. & Guar. Co.*, 1990 OK 32, ¶ 5, 789 P.2d 1318, 1320-21. The Survivors have more than met this requirement.

Unjust enrichment "describes a condition resulting from the failure of a party to make restitution in circumstances where it is inequitable." *Lapkin v. Garland Bloodworth, Inc.*, 2001 OK CIV APP 29, ¶ 7, 23 P.3d 958, 961. The elements of unjust enrichment are (1) the unjust (2) retention of (3) a benefit received (4) at the expense of another. *Okla. Dep't of Sec. ex rel. Faught v. Blair*, 2010 OK 16, ¶ 22, 231 P.3d 645, 658; *see also Horton v. Bank of Am., N.A.*, 189 F. Supp. 3d 1286, 1289 (N.D. Okla. 2016). "A right of recovery under the doctrine of unjust enrichment is essentially equitable, its basis being that in a given situation it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another." *Lapkin*, 2001 OK CIV APP 29, ¶ 7, 23 P.3d at 961; *see also Harvell v. Goodyear Tire & Rubber Co.*, 2006 OK 24, ¶ 18, 164 P.3d 1028, 1035. The Second Amended Petition sufficiently pleads an unjust enrichment claim under Oklahoma's notice pleading regime.

First, the Survivors expressly pleaded Defendant-Appellees' complicity in the Massacre, and any enrichment Defendant-Appellees receive from the Massacre is unjust. The Survivors allege in detail that City, County, and Chamber leaders and Military Department members were not only part of the white mob that violently overwhelmed Greenwood, but that they also directed the mob to commit acts of violence. ROA, Doc. 37 ¶¶ 2, 41-43, 51-53, 55, 58-59. The Survivors allege that it was the City police department that provided weapons to and deputized the white mob. *Id.* ¶¶ 32-33, 36, 38, 41-42, 48, 52, 54. To permit Defendant-Appellees to now benefit and profit from the death and destruction that *they caused*, would be inherently and undoubtedly unjust. Thus, the allegations of Defendant-Appellees' participation in the Massacre and the exacerbation of its impact satisfy the notice pleading requirements for the first element of an unjust enrichment claim.

Second and Third, the Survivors have pleaded that Defendant-Appellees have retained a benefit. The Survivors alleged that Defendant-Appellees have engaged in a marketing campaign that utilizes the story of the Massacre and the "triumph" of its survivors and descendants to obtain funds from wealthy donors. ROA, Doc. 37 ¶ 133.

The Survivors further allege that Defendant-Appellees have misappropriated the stories, names, and likenesses of Massacre victims and survivors to promote tourism. *Id.* ¶ 134. For example, the Survivors allege that Defendant-Appellees built a "cultural tourism" district, which includes the Greenwood Rising History Center (a $30 million project funded by wealthy donors), to generate revenue for Defendant-Appellees. *Id.* ¶ 137. The monetary benefit to Defendant-Appellees alleged in the Second Amended Petition satisfies the notice pleading requirements for the second and third elements of an unjust enrichment claim.

Finally, the Survivors pleaded that the unjust benefit retained by Defendant-Appellees is at the expense of another. The Survivors allege that, rather than any funds going to the Survivors or descendants of survivors and victims of the Massacre, money is instead being retained by the perpetrators—Defendant-Appellees. ROA, Doc. 37 ¶ 135. The Survivors allege that Defendant-Appellees are exacerbating the pain and trauma of the Survivors and descendants of the Massacre. The allegations of the detriment to the Survivors contained in the Second Amended Petition easily satisfy the notice pleading requirements for the fourth element of an unjust enrichment claim.

Accordingly, regardless of the Court's view on the stipulation between the parties, the Survivors have sufficiently plead an unjust enrichment claim and the District Court erred in dismissing it.

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court's dismissal of both the public nuisance and unjust enrichment claims.

Dated: October 10, 2023

Respectfully submitted,

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CERTIFICATE OF MAILING

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