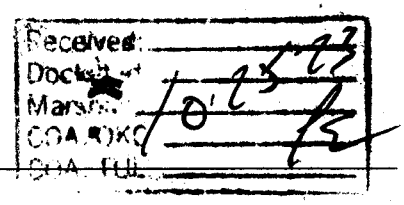
ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

LESSIE BENNINGFIELD RANDLE, VIOLA FORD FLETCHER, AND HIGHES VAN ELLIS SR., Plaintiffs/Appellants, v. CITY OF TULSA, TULSA REGIONAL CHAMBER, BOARD OF COUNTY COMMISSIONERS FOR TULSA COUNTY, VIC REGALADO, IN HIS OFFICIAL CAPACITY AS SHERRIFF OF TULSA COUNTY, AND OKLAHOMA MILITARY DEPARTMENT Defendants/Appellees.	Case No. 121,502



RESPONSE BRIEF IN CHIEF ON BEHALF OF APPELLEE CITY OF TULSA

RESPECTFULLY SUBMITTED,

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October 25, 2023

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INTRODUCTION

Plaintiff Lessie Benningfield Randle and others filed a Petition in Tulsa County District Court against the City of Tulsa and other Defendants seeking damages spanning a more than 100-year time frame stemming from the 1921 Tulsa Race Massacre. The Plaintiffs assert two causes of action: public nuisance and unjust enrichment. Despite being given the opportunity by the trial court to amend the Petition to correct deficiencies, the Plaintiffs' Second Amended Petition still failed to state a cognizable claim for relief on either claim, and was properly dismissed by the trial court. Thus, for the reasons set forth herein, and those briefed by the other appellees, the City of Tulsa respectfully requests this Court affirm the district court's dismissal of this case.

PROCEDURAL HISTORY

On September 1, 2020, nine (9) Plaintiffs filed suit in the Tulsa County District Court seeking damages related to the 1921 Tulsa Race Massacre. This is not the first lawsuit brought against the City of Tulsa over the years seeking damages arising from the Race Massacre. In 2003, nearly 400 Plaintiffs sued in the United States District Court for the Northern District of Oklahoma seeking reparations for the same series of events. *John Melvin Alexander, et al., v. City of Tulsa, et al*, No. 03-CV-133-joe-PJC. That case was dismissed on pretrial motions and that ruling was affirmed on appeal. 382 F.3d 1206 (10th Cir. 2004).

In 2004, another group of Plaintiffs attempted to bring suit, this time in the District Court in and for Tulsa County, in a case styled *J.C. Latimer, et al., v. City of Tulsa, et al.*, case no. CJ-2004-4138. That case was also disposed of on a motion to dismiss. In affirming the District Court's dismissal in *Alexander*, the 10th Circuit rejected Plaintiffs'/Appellants' argument that their cause of action did not accrue until the State issued its Race Riot Commission Report, in 2001, and concluded:

> The Tulsa Race Riot represents a tragic chapter in our collective history. While we have found no legal avenue exists through which Plaintiffs can bring their claims, we take no great comfort in that conclusion. As the Supreme Court has recognized, "[i]t goes without saying that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose....

Understanding the statute of limitations issues presented in the other lawsuits regarding this 102 year old claim, Lessie Benningfield Randle, and the other Plaintiffs couched their claims in this lawsuit as ones for public nuisance and asked the Court to abate "the public nuisance of racial disparities, economic inequalities, insecurity, and trauma" they contend were caused by the 1921 Tulsa Race Massacre and have continued since. ROA Doc. 1, Vol. I, p. 11-12. All Defendants, including the City of Tulsa, filed motions to dismiss the original Petition. ROA, Doc. 4, Vol. II, p. 3-14.

On November 9, 2021, this Court issued its opinion in *State ex rel Attorney General v. Johnson & Johnson*, 2021 OK 54, 499 P.3d 719 (2021), holding that the tort of public nuisance, codified in the nuisance statute, is meant "to address discrete, localized problems, not policy problems." The Court held that "(e)rasing the traditional limits on nuisance liability leaves Oklahoma's nuisance statute impermissibly vague." *Id.*, at ¶39. The parties in the present case briefed and argued the impact of the Supreme Court's decision to the trial court.

On August 3, 2022, the trial court issued its Order on Defendants' Motions to Dismiss. The Court dismissed eight Plaintiffs and two Defendants and held that "defendants' motions to dismiss should be granted for failure to state a cognizable abatement remedy." The Court "decline(d) to engage in the management of public policy matters that should be dealt with by the legislative and executive branches," citing the Supreme Court's decision in *Johnson & Johnson*, but granted the remaining Plaintiffs leave to file a second amended petition to: (1)

cure defects in their claim for unjust enrichment, and (2) state a legally cognizable abatement remedy. The Court dismissed "with prejudice the public nuisance claims…seeking relief for all alleged unreasonable, unwarranted, and unlawful acts or omissions of defendants in the decades subsequent to the 1921 Race massacre…." ROA, Doc. 36, Vol. IV, p. 3-15.

On September 2, 2022, the remaining Plaintiffs filed their Second Amended Petition. Notwithstanding the court's clear direction, Plaintiffs continued to base their nuisance claim on allegations of "Defendants' unreasonable, unwarranted, and/or unlawful acts, course of conduct, and omissions in the years and decades following the Massacre," which Plaintiffs allege "blighted the Greenwood neighborhood, endangering the health and safety of the Greenwood community." ROA, Doc. 37, Vol. IV, p. 17-108 at ¶90.

While in the Second Amended Petition Plaintiffs no longer specifically named the public nuisance as "racial disparities, economic inequalities, insecurity, and trauma", the substance of their allegations made clear that they were still in fact seeking to address racism and other public policy issues. The Second Amended Petition makes allegations that: "unlawful policies and actions that stifled the ability of all Greenwood residents…to rebuild and thrive" (¶62); "the massacre and its ongoing marginalization of Black Tulsans constitute racial terrorism" (¶63); "after the massacre, Black homeownership in Tulsa declined almost 20% and the gap between White Tulsans and Black Tulsans ballooned and worsened each year…" (¶102); and "…residential and economic segregation that arose after the 1921 race riot…" (¶107). The Second Amended Petition alleges a 2016 report identified "nuisance conditions" such as higher levels of poverty amongst black Tulsa residents, steady decline of incomes, and lower median incomes. (¶115).

As allowed for by law, all Defendants, including the City, filed motions to dismiss the Second Amended Petition as Plaintiff's claims for relief still only identified the type of policy problems prohibited by this Court in *Johnson & Johnson, supra*. ROA, Doc. 39, Vol. IV, p. 136-154.

On July 7, 2023, the Court entered an Order finding that "Defendants' motions to dismiss Plaintiffs' second amended petition should and shall be granted upon the grounds set forth in the defendants' briefs filed of record." ROA, Doc. 46, Vol. IV, p. 283. The Court also incorporated its previous Order of August 3, 2022 and the reasoning contained therein. *Id.* Then on July 12, 2023, the Court issued a "Final Order of Dismissal with Prejudice" (ROA, Doc. 47, Vol. IV, p. 286) which further clarified that:

> The court determines Plaintiffs' Second Amended Petition fails to state a justiciable public nuisance claim under Oklahoma law. Plaintiffs' Second Amended Petition fails to allege a legally cognizable abatement remedy. Plaintiffs' Second Amended Petition fails to cure the defect in the pleading which the court found to exist and liberally granted leave to amend pursuant to 12 O.S. 2012§G.

It is from these Orders the Plaintiffs bring the present appeal. Importantly, at no time have the Plaintiffs filed a Notice of Tort Claim as required by the Oklahoma Governmental Tort Claims Act.

STANDARD OF REVIEW

"This Court subjects a trial court's judgment dismissing a petition to de novo review." *Wilson v. State ex rel. State Election Bd.*, 2012 OK 2, ¶ 4, 270 P.3d 155, 157, quoting *Darrow v. Integris Health, Inc.*, 2008 OK 1, ¶ 7, 176 P.3d 1204, 1208. "When evaluating a motion to dismiss, the court examines only the controlling law, not the facts." *Id.* "Thus, the court must

take as true all of the challenged pleading's allegations together with all reasonable inferences that can be drawn from them." *Id.*

PROPOSITION I: PLAINTIFFS' SECOND AMENDED PETITION FAILED TO STATE A COGNIZABLE CLAIM FOR PUBLIC NUISANCE THUS DISMISSAL WAS APPROPRIATE

Plaintiffs' claim for public nuisance very clearly sought to remedy issues such as racism, racial disparities in poverty and income, and other social and public policy issues which have been expressly rejected as a ground for public nuisance by this Court. Plaintiffs' Second Amended Petition makes complaints about life expectancy, "food deserts", housing values, poverty levels, lack of hospitals, public services, education, etc., which squarely fall within this Court's ruling in *State of Oklahoma v. Johnson & Johnson, et al*, 2021 OK 54 (hereinafter the "*J&J* decision"), that public nuisance claims are not meant to address policy problems.

Addressing nuisance law, this Court in the *J&J* decision made clear that the judicial branch of the government does not have the authority to step in and cure societal ills, even when the legislative and executive branches have yet to do so:

> The Court has allowed public nuisance claims to address discrete, localized problems, not policy problems. Erasing the traditional limits on nuisance liability leaves Oklahoma's nuisance statute impermissibly vague. The district court's expansion of public nuisance law allows courts to manage public policy matters that should be dealt with by the legislative and executive branches. These branches are more capable than courts of balancing the competing interests at play in societal problems.

Id. at ¶ 39.

The Appellants have attempted to limit this Court's review of the trial court's decision to the narrow finding that the survivors failed to state a cognizable abatement *remedy*. However, a reading this narrow is disingenuous to the trial court's decision and orders. The trial court's initial order dated July 7, 2023, dismissed the case for the "grounds set forth in the defendants'

briefs filed of record." That initial Order was not withdrawn, but instead, *supplemented* by the Final Order of Dismissal with Prejudice entered July 12, 2023. In that Order, the trial court made *several* clarifications including that the "Plaintiffs' Second Amended Petition fails to state a justiciable public nuisance claim under Oklahoma law." This finding was not limited to the remedy requested by the Plaintiffs, but instead, found that no legally cognizable public nuisance claim had been asserted.

This finding by the trial court should be upheld and is clearly supported by Oklahoma law. Plaintiffs' Second Amended Petition requested relief from societal ills which this Court, in the *J&J* decision, found was not within the purview of the judicial branch. As expressed in the *J&J* decision, allowing a Plaintiff to extend the public nuisance laws to cover these types of social issues will result in an impermissibly vague statute. Should the Plaintiffs be allowed to use the public nuisance statute to attempt to seek redress for over 100 years of racial disparities, the door would be opened to a never-ending barrage of lawsuits seeking recompense for an array of social justice issues. This is exactly the type of degradation of the state's public nuisance statute that the Court expressly rejected in the *J&J* decision. Thus, the trial court was correct in finding that the Second Amended Petition does not state a legally cognizable cause of action and dismissal was appropriate.

The trial court also found that the Plaintiffs failed to state a legally cognizable abatement remedy. Appellants allege that it is sufficient under a notice pleading standard to generically ask for abatement and let the court sort out a remedy later on. Appellants rely on the *Tyson* case filed in the Northern District of Oklahoma to support this contention. *Tyson*, No. 05-CV-329-GFK-SH (N.D. Okla. 2005). The *Tyson* case is clearly distinguishable as the conduct alleged in that case is within the purview of what this Court has found to be within the purview

of the public nuisance statute. The Findings and Conclusions issued in the *Tyson* case by Judge Frizzell provide the clearest possible distinction between current activities, which can give rise to a cognizable, abatable nuisance claim, and past harms, for which plaintiffs seek compensation. In the *Tyson* case, the Court noted:

> Defendants have known or should reasonably have known since at least the mid-to-late 1980s that phosphorus in the runoff of land applied poultry waste injures the waters of the IRW. Yet they have continued to place their birds in the IRW, to import feed, and to apply—and allow their growers to apply—poultry waste from defendants' birds to fields in the IRW.

(Findings of Fact and Conclusions of Law, at ¶43, p.196). Poultry waste is still applied daily to land in the Illinois River Watershed, and so "Defendants assert that the appropriate remedy is development of a Total Maximum Daily Load ('TMDL')." (Findings of Fact and Conclusions of Law, at ¶86, p.209, emphasis added).

By contrast, the Plaintiffs in the present case are not asking the Court to enjoin City officials from continuing to deputize civilians whom they allege are still killing, burning, and looting. In its August 8, 2022 Order ruling on Defendants' Motions To Dismiss, the trial court made clear that "[a]s to the claims of 'ongoing' public nuisance for events in the decades subsequent to the 1921 Tulsa Race Massacre the court finds these 'ongoing' claims of public nuisance must be dismissed with prejudice because these claims request relief that violates the separation of power provided by the Constitution of the State of Oklahoma." ROA, Doc. 36, Vol. IV, at p. 6.

In the case presently before this Court, in contrast to the *Tyson* case, there is no remedy available to the Plaintiffs. Throughout the Petition the Plaintiffs ask for abatement of social issues. As set forth above, this Court has made clear that such issues are not within the purview

of the judicial branch. Thus, the way the Plaintiffs have pled the alleged nuisance, there is no cognizable abatement remedy which doesn't place them in violation of the *J&J* decision.

"The character of an action is determined by the nature of the issues framed by the pleadings and the rights and remedies of the parties, and not solely by the form in which the action is brought or by the prayer for relief." *Arvest Bank v. SpiritBank, N.A.*, 2008 OK CIV APP 55, ¶ 20, as corrected (May 23, 2008), as corrected (Sept. 11, 2008) (emphasis added), citing *Comstock v. Little*, 1961 OK 35, 359 P.2d 704; *Green v. Correll*, 1928 OK 501, ¶ 0. Further, it is fundamental that a claim cannot be a viable cause of action without an effective remedy.

Because the Plaintiffs' allegations do not form the basis of a public, ongoing nuisance, these claims are simply a tort claim for property and personal injury damages related to a tragic event that occurred more than 100 years ago and for which the statute of limitations has long expired. Dismissal of the Second Amended Petition was thus appropriate and should be affirmed.

PROPOSITION 2: PLAINTIFFS' CLAIMS ARE SUBJECT TO DISMISSAL BECAUSE THEY FAILED TO COMPLY WITH THE NOTICE REQUIREMENTS OF THE GOVERNMENTAL TORT CLAIMS ACT

While the trial court didn't make any detailed findings about the applicability of the Governmental Tort Claims Act (GTCA), it did make the finding that the Second Amended Petition should be dismissed for the reasons set forth in the Defendant's briefing which included arguments about the GTCA. ROA, Doc. 46, Vol. IV, p. 283[1]. The City of Tulsa maintains that the trial court did not have subject matter jurisdiction over the Plaintiffs' claims

[1] This July 7, 2023, Order was never withdrawn but instead was "supplemented" by the Court's Order of July 12, 2023. [ROA, Doc. 37, Vol. IV., p. 286]

because of their failure to comply with the notice requirements of the GTCA, thus presenting another grounds for affirming the dismissal.

The Oklahoma Governmental Tort Claims Act provides "the exclusive remedy for an injured plaintiff to recover against a governmental entity in tort." *Tuffy's, Inc. v. City of Okla. City*, 2009 OK 4, ¶ 7, 212 P.3d 1158, 1163. Title 51 O.S. § 157(B) specifically provides: "No action for any cause arising under this act, Section 151 et seq. of this title, shall be maintained unless valid notice has been given and the action is commenced within one hundred eighty (180) days after denial of the claim as set forth in this section." "Compliance with the written notice of claim and denial of claim provisions . . . are prerequisites to the state's consent to be sued and to the exercise of judicial power to remedy the alleged tortious wrong by the government." *Crockett v. C. Okla. Transp. & Parking Auth.*, 2010 OK CIV APP 30, 231 P.3d 748, 752, quoting *Shanbour v. Hollingsworth*, 1996 OK 67, 918 P.2d 73, 75.

The case law in Oklahoma is clear that "[i]f recovery is sought under the Political Subdivision Tort Claims Act; the petition must factually allege either actual or substantial compliance" with the GTCA's notice requirements in order to withstand a motion to dismiss. *Willborn v. City of Tulsa*, 1986 OK 44, 721 P.2d 803, 805; *Mansell v. City of Lawton,* 1995 OK 81, 901 P. 2d 826. Notice and timely commencement of suit are conditions precedent to the right to pursue judgment against a political subdivision. *Johns v. Wynnewood School Board of Education,* 1982 OK 101, 656 P. 2d 248.

The GTCA defines "tort" for purposes requiring compliance with the Statute 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." 51 O.S. § 152(14). Plaintiffs' Second Amended Petition in paragraph 1 asks the Court to issue an Order under 50 O.S. § 1 to abate a public nuisance; therefore, Plaintiffs' claim involves a duty "imposed by statute" falling under the GTCA definition of "tort." ROA, Doc. 37, Vol. IV, p. 18.

While the Legislature's definition of tort in the GTCA is broader than the common law, common law nuisance is a tort. Restatement (Second) of Torts, Chapter 40, "Nuisance" ("This Chapter deals with two fields of tort liability that, through the accident of historical development, are called by a single name, that of 'nuisance.'"); William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 1004 (1966) ("The modern tort of public nuisance is 'the invasion of an interest, a type of harm or damage, through any conduct which falls within the three traditional categories of liability' – intent, negligence, or strict liability.").

Oklahoma law is clear that nuisance is a tort for which the provisions of the GTCA are applicable. "It has been held that a nuisance is a tort, or at least involves tortious conduct, for the purpose of determining applicability of the doctrine of governmental immunity because it falls into the usual categories of tort liability." *State ex rel. Coffey v. Dist. Court of Oklahoma Cty.*, 1976 OK 29, 547 P.2d 947, 950. See also *Oklahoma City v. Tytenicz*, 171 Okla. 519, 43 P.2d 747, 748, quoting Corpus Juris, Municipal Corp. § 1734 ("Where a municipal corporation creates or permits a nuisance by nonfeasance or misfeasance, it is guilty of tort...."); *Cities of Service Oil Co. v. Merritt*, 1958 OK 185, 332 P.2d 677, 680 ("Nuisance and negligence are distinct torts."); *Truelock v. City of Del City*, 1998 OK 64, 967 P.2d 1183. This was again affirmed by this Court in the *J&J* decision wherein it recognized that "public nuisance evolved into a common law tort." 499 P.3d at 724. Even the Court in the *Tyson* case which the

Appellant's rely upon (*supra*) noted that "...plaintiff has asserted the intentional torts of nuisance and trespass." (Findings of Fact and Conclusions of Law, at n.44).

Plaintiffs argued to the trial court they are not seeking compensation or damages for nuisance, only prospective injunctive relief, so the GTCA does not apply. However, Plaintiffs' prayer for relief in the Second Amended Petition belies that assertion.

Plaintiffs requested an "accounting of the damages caused by the public nuisance created by Defendants...," and they define abatement to mean "replacing buildings, homes and businesses destroyed during the Massacre," "returning misappropriated land to the Black community," and "restoring property." Finally, they ask for "punitive damages." Regardless of their characterization, it is clear from the allegations and the Prayer for Relief that Plaintiffs seek to recover losses and recoup damages attributable to the Massacre, not just for themselves but for all of the "Greenwood neighborhood," the "Greenwood community," and the entirety of the "Black community." ROA, Doc. 37, Vol. IV, p. 17- 107.

For a viable claim of public nuisance, as distinguished from a 102-year-old time-barred claim for damages, Appellants must allege not just lingering effects of the 1921 Race Massacre, but ongoing conduct, which can be arrested and abated by court order. See Restatement (Second) of Torts, Chapter 40, "Nuisance," § 821B comment i ("...an award of damages is retroactive, applying to past conduct, while an injunction applies only to the future."). In other words, to distinguish the claims courts have already dismissed as time-barred, Plaintiffs must allege that the adult perpetrators of the 1921 Massacre are still today looting, burning, and killing, and that the Court can make them stop and repair the damage.

Unable to allege present-day conduct constituting an ongoing Race Massacre, Appellants instead alleged lingering effects attributed to a century of social and economic policies, from

redlining to the location of an interstate highway. When the District Court appropriately narrowed the scope of what constitutes an ongoing public nuisance, the impossibility of the Appellants legal theory became clear.

"A plaintiff cannot transform a claim for damages into an equitable action by asking for an injunction that orders the payment of money." *Jaffee v. United States*, 592 F.2d 712, 715 (3d Cir. 1979); *State of N.M. v. Regan*, 745 F.2d 1318, 1322 (10th Cir. 1984) ("...Claims Court's exclusive jurisdiction may not be avoided by framing a complaint in the district court as one seeking injunctive, declaratory, or mandatory relief when, in reality, the thrust of the suit is one seeking money...."). In lieu of an order to turn back the clock to May 29, 1921, the Plaintiffs are asking the Court to order the Defendants to compensate for the losses, as well as the alleged accumulated injuries of the last century.[2]

Plaintiffs' nuisance claim against the City is governed by the GTCA, but Plaintiffs have failed to comply with the notice requirements therein and the Plaintiffs have failed to allege facts in the Petition which would establish compliance with the Act, thereby depriving this Court of subject matter jurisdiction over this matter, dismissal is mandated.

Because of their failure to submit a timely tort claim, Plaintiffs claims are time barred. Section 156(b) of the GTCA states ". . .claims against the state or a political subdivision are to be presented within one (1) year of the date the loss occurs." 51 O.S. § 156(b). "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."

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[2] The GTCA applies whether the claim is exclusively for damages or also includes a claim for injunctive relief. In *Minie v. Hudson*, 1997 OK 26, 934 P.2d 1082, 1087, where the plaintiff sought damages *and* injunctive relief for a city sewage discharge which flowed onto his land, the Oklahoma Supreme Court held that the "clear and mandatory language of 51 O.S.Supp.1992 § 156(D) requires that notice of a claim to a political subdivision must be in writing."

Plaintiffs' nuisance complaint dates to 1921. Plaintiffs acknowledge that they have been aware of the losses attributable to the Massacre for more than a century, alleging memories and flashbacks, which have caused them "to constantly relive the terror of May 31 and June 1, 1921." ROA, Doc. 37, Vol. IV, p. 22, at ¶17. "...108-year-old Mother Fletcher and 107-year-old Mother Randle are both able to vividly recall and describe what they saw, heard, and smelled during the massacre and how the Massacre impacts them today." *Id.*, at ¶63. [3]

Plaintiffs clearly had a requirement to comply with the GTCA and failed to do so, thus creating additional grounds for this Court to affirm the trial court's dismissal.

PROPOSITION III: THE CITY IS EXEMPT FROM LIABILITY UNDER THE GTCA

Even if the Appellants had complied with notice requirements of the GTCA, the City is exempt from liability under the plain language of the Act. As raised by the City of Tulsa in its briefing below, the State of Oklahoma has consented to suit against its political subdivisions and its employees acting within the scope of their employment through the enactment of the GTCA, but only subject to its provisions, conditions, and exemptions. 51 O.S. § 152.1. Section 155 of the GTCA sets forth a list of exemptions for which political subdivisions of the State, including the City of Tulsa, "shall not be liable if a loss or claim results." *Id.*

Among those exemptions from liability is an exception for "[c]ivil disobedience, riot, insurrection or rebellion or the failure to provide, or the method of providing, police, law enforcement or fire protection." The entire scope of Plaintiffs' claims against the City revolves

[3] Plaintiffs have stated that their nuisance claims accrued in 2017, when they became aware of the potential to cite the nuisance statute as a basis for recovery. Even disregarding that public nuisance has been a basis for claims since before statehood (*U.S. v. Choctaw, O. & G.R. Co.*, 3 Okla. 404, 41 P. 729 (1895)), that the public nuisance statute is unchanged since 1910, and that the GTCA is clear that claims against a political subdivision are to be presented within one year of "the date the loss occurs" (51 O.S. § 156(b)), not the date Plaintiffs' attorneys develop a theory of recovery, Plaintiffs conceded they knew of the claims and the legal theories for asserting them at least three years before filing suit.

around their allegations that in 1921 "[a] large, angry White mob, including some members of the Tulsa Police Department, the Tulsa County Sheriff's Department, and the National Guard, as well as other city and county leaders and members of the chamber of commerce, overwhelmed the approximately 40-square-block community, killing hundreds of Black residents, injuring thousands more, burning down almost fifteen hundred homes and businesses, and stealing residents ' personal property." ROA, Doc. 37, Vol. IV, p. 18 at ¶ 2. The Plaintiffs' description of what occurred in 1921 clearly falls within the GTCA exemption.

The City is further exempt under the GTCA for the acts of its employees that fall "outside the scope of employee's employment." 51 O.S. § 153. The GTCA statutory definition of "scope of employment means performance by an employee acting in good faith within the duties of the employee's office or employment." 51 O.S. § 152(12). Thus, "scope of employment" excludes all acts done in bad faith outside the duties for which they were employed. *Id.* see generally *Tuffy's, Inc. v. City of Oklahoma City*, 2009 OK 4, ¶13, 212 P.3d 1158, 1165. Clearly, Plaintiffs claims of intentional conduct are alleging acts that fall outside the scope of city employees' and officers' employment, thereby placing any alleged conduct outside the scope of what the City may be held liable for under the GTCA.

The acts comprising the Plaintiffs' Petition cannot have been conducted in good faith within the scope of employment. See *Parker v. City of Midwest City*, 1993 OK 29, 850 P.2d 1065 (holding that good faith cannot be shown under the GTCA where "defendant must have acted because of ill-will or hatred, or willfully in a wanton manner...."); *Houston v. Reich*, 932 F.2d 883, 890 (10th Cir. 1991) (interpreting GTCA and holding that officers "acted outside the scope of their employment because...their conduct '[a]mounted to gross negligence and willful and wanton conduct amounting to reckless disregard of plaintiff's rights'").

Since Plaintiffs' Petition must relate its claims back to those alleged acts occurring in 1921, for which the City is exempted from liability, the Plaintiffs have failed to allege a claim against the City for which relief can be granted[4]. The Court's dismissal should be affirmed.

PROPOSITION IV: THE DOCTRINE OF LACHES PROVIDES ADDITIONAL GROUNDS FOR AFFIRMING DISMISSAL OF PLAINTIFFS' CLAIMS

Another claim raised by the City of Tulsa in its briefing to the trial court and thus part of the "grounds set forth in the defendants' briefs filed or record" relied upon by the Court in dismissing the Plaintiffs' claims is the defense of laches.

Laches is an equitable defense that prevents the advancement of claims after an "inexcusable delay" for an "unreasonable and unexplained length of time." *Parks v. Classen Co.*, 1932 OK 157, ¶ 29, 9 P.2d 432, 435; *Osage Nation v. Board of Commissioner of Osage County*, 2017 OK 34, 394 P.3d 1224, 1238 (applying laches to bar injunctive relief after three-year delay in filing claim). "One must be diligent and make such inquiry and investigation as the circumstances reasonably suggest and means of knowledge are equivalent to actual knowledge." *Winn v. Shugart*, 112 F.2d 617, 622 (10th Cir. 1940).

An unreasonable delay in asserting a claim that materially prejudices a defendant is sufficient to invoke laches. *Hutchinson v. Pfeil*, 105 F.3d 562, 564 (10th Cir. 1997); *See also Brown v. Bd. Of Ed. of City of Duncan*, 1930 OK 570, 298 P. 249, 253. "The prejudice and disadvantage which supports laches is generally of two kinds: (1) the loss of evidence which

[4] Municipal immunity pre-dates the adoption of the GTCA, and the Oklahoma Supreme Court made clear well before 1921 that, in the absence of a statute abrogating a city's immunity, it was "...well established and abundantly supported by authorities, that a city is not liable for arrests, such as the one complained of in the case at bar, made by police officers, and which are illegal for want of a warrant, or for unlawful acts of violence in the exercise of his official duties...." *City of Lawton v. Harkins*, 1912 OK 584, 126 P. 727, 729.

would support the respondents' position, and (2) a change in position in a way that would not have occurred but for the delay." Corpus Juris Secundum, Equity, at § 153.

"On a claim to the laches defense, evidentiary prejudice includes such things as lost, stale, or degraded evidence, or witnesses whose memories have faded." *Id.*, at § 158, citing *Evergreen Safety Council v. RSA Network Inc.*, 697 F.3d 1221 (9th Cir. 2012). Accounts of the Massacre were ambiguous, contradictory, and distorted by bias from the beginning, and they have only faded with the passage of 100 years. Those two horrible days have been very thoroughly studied, but even the State's comprehensive 2000-2001 examination had evidentiary limitations.

> Unfortunately, no impartial investigation was conducted of the 1921 Tulsa race riot in its immediate aftermath, while memories of the participants and victims were still fresh, and the physical evidence, including the bodies of the dead, could be forensically examined. Today, eight decades after the event, only the documentary evidence — much of it lost or of doubtful authenticity — and the fading memories of the rapidly dwindling survivors remains.

"Tulsa Race Riot, A Report by the Oklahoma Commission to Study the Tulsa Race Riot of 1921" (February 28, 2001), at 110. See also *Id.*, at 169 n.3 ("On questions of historical interpretation, where the record is only imperfectly preserved, there are inevitable uncertainties."), and n.5 ("The fire marshal's report cannot be located.").

There is no evidence that *any* of the City officials or employees who allegedly perpetrated or authorized the violence in 1921 are still alive today and available to testify. They would not likely be, as they would have been working adults 101 years ago. "Laches is particularly applicable where the difficulty of doing entire justice arises through the death of one of the parties to the transaction in question, or of one of the witnesses to the transactions." Corpus Juris Secundum, Equity § 154.

Plaintiffs' Second Amended Petition makes clear that the Plaintiffs directly observed the Massacre and its immediate aftermath more than a century ago, but unreasonably waited to file suit. As such, the doctrine of laches provides additional grounds to affirm the trial court's dismissal of Plaintiffs' claims.

PROPOSITION V: PLAINTIFFS' UNJUST ENRICHMENT CLAIM WAS PROPERLY DISMISSED

The trial court's dismissal of Plaintiffs' unjust enrichment claim was justified and should be affirmed. "Unjust enrichment is a condition which results from the failure of a party to make restitution in circumstances where not to do so is inequitable, i.e., the party has money in its hands that, in equity and good conscience, it should not be allowed to retain." *Oklahoma Dept. of Securities ex rel. Faught v. Blair*, 2010 OK 16, 231 P.3d 645, 658. "One is not unjustly enriched, however, by retaining benefits involuntarily acquired which law and equity give him absolutely without any obligation on his part to make restitution." *City of Tulsa v. Bank of Oklahoma*, N.A., 2011 OK ¶19, 280 P.3d at 319 (emphasis added), citing *McBride v. Bridges*, 1950 OK 25 ¶ 8, 215 P.2d 830, 832, 202 Okl. 508.

Initially, the Appellants claim that the Defendants' somehow stipulated at the May 2, 2022 hearing before the trial court that if certain allegations were removed from the Petition that the unjust enrichment claims could proceed without further legal challenge. This is an inaccurate and misleading characterization of what occurred at the hearings before the trial court.

During the September 28, 2021 hearing, counsel for the City argued the issue of laches. In response, counsel for the Plaintiffs' indicated that laches would not apply to the unjust enrichment claim because there is a two-year statute of limitations. Counsel for the City then noted that the Plaintiffs' Petition specifically asked for injuries related to alleged unjust

enrichment going back more than 100 years. ROA, Doc. 35, Vol. III, p. 331-332. Counsel for Plaintiffs indicated on the record that they were not seeking damages past the two-year time frame for unjust enrichment and would be willing to amend the Petition to that effect. ROA, Doc. 35, Vol. III, p.333.

This "clean up" of the requested time frame for the unjust enrichment claims was brought up again by the Court at the May 2, 2022 hearing. ROA, Doc. 50, Vol. V, p. 57-56. Plaintiffs' counsel recounted the previous discussion as an agreement that they "could clean up by distinguishing which of these accountings related to the two-year period and which went back further in time." ROA, Doc. 50, Vol. V, p. 56. Counsel then conferred off the record and announced to the Court:

> Mr. Adams: Okay. So the parties have agreed with respect to page 69, Paragraph 10 of the Petition, that Plaintiffs will file a Second Amended Petition that strikes the subparagraphs A through N of that paragraph. And that will be the only purpose of the amendment. **And then Defendants will rest on their existing Motions to Dismiss with respect to their legal arguments**. And there won't be a new round of briefing related to the Second Amended Petition.

ROA, Doc. 50, Vol. V, p. 86 (emphasis added)

The Defendants agreed to this in an effort to allow the Court to keep the pending motions to dismiss ripe for ruling by the Court on the legal arguments presented rather than requiring all parties to re-brief the same issues simply to allow the Plaintiffs to "clean up" an error. The Court inquired about a date for this to be done to which Plaintiffs' counsel advised "it's just a matter of striking -- just deleting some paragraphs. So, we could do that one week from today, Your Honor." ROA, Doc. 50, Vol. V, p. 86.

However, that "clean up" amendment was never filed because the Court verbally announced its ruling on the Motions to Dismiss at that hearing and then later entered its Order. In the Order the Court struck various parties and claims and allowed the Plaintiffs' to attempt to correct various deficiencies, which they were ultimately unable to do.

A genuine reading of the transcripts makes perfectly clear the intent of the Defendants was not to permanently waive any arguments to the legal sufficiency of the unjust enrichment claims. In fact, the record is replete with evidence that the Defendants' intended to stand on the existing legal arguments challenging the sufficiency of the claim. The agreement by Defendants' in no way had any affect on their ability to challenge the legal sufficiency of the unjust enrichment claim as it was presented in the Second Amended Petition which was allowed by the Order of the Court. Any argument otherwise is disingenuous to the record in this case.

Plaintiffs' raised this argument in their response to the Defendants' Motions To Dismiss the Second Amended Petition and was addressed by counsel at the May 23, 2023 hearing. ROA, Doc. 49, Vol. IV, p. 365-368. At that hearing the trial court made clear that the motions to dismiss the Second Amended Petition were timely filed and that she would be "considering all of the argument of plaintiff and defendant – plaintiffs and defendants." ROA, Doc. 49, Vol. IV, p. 368-369.

Appellants' unjust enrichment claim as plead fails as a matter of law and the trial court's order should be affirmed. Appellants claimed that it would be "grossly inequitable for the Defendants to retain the benefits they receive from marketing Black Wall Street rather than providing those benefits to the Black residents and businesses in the Greenwood District and North Tulsa, with top priority placed on those who are survivors of the Black residents who

resided in the Greenwood District at the time of the Massacre." ROA, Doc. 37, Vol. IV, p. 65 at ¶154. They alleged the Defendants are exploiting the Massacre "for their own economic and political gain," and "enriching themselves by promoting the site of the Massacre as a tourist attraction...." *Id.*, at ¶1 and ¶5.[5]

The City of Tulsa is a representative, municipal government with a Charter duty to "promote the general welfare of the City of Tulsa and its inhabitants," and "make public improvements." It does not "have money in its hands" that it should not from the tax-supported community and economic development work that is its very mission and purpose. Plaintiffs base their unjust enrichment claim on the fact that City officials are doing what they were elected and employed to do – fulfill their Charter responsibilities and improve conditions in the community. To the extent the community at-large is enriched and benefited by such public investments and promotion, those benefits accrue as well to the Plaintiff who is a resident of Tulsa, as a constituent of the city.

To find otherwise would be to hold that any efforts to promote, develop, or improve the community would be subject to constituents' claims that the City's public, municipal purpose is at their individual expense and that they should be personally compensated. Establishing such a basis for recovery would foreclose the City from working to improve the very conditions of which Plaintiffs complain in their nuisance allegations.[6]

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[5] The only specific allegation Plaintiffs make against the City in this regard is that the Mayor made a speech in which he told a story about Dr. A.C. Jackson (not the Plaintiffs), without apologizing to Dr. Jackson's heirs. ROA, Doc. 37, Vol. IV, p. 61, at ¶135.

[6] As a point of clarification, the City has not received *any* of the private funds donated for the construction of the Greenwood Rising History Center, which the City does not own, did not build, and does not operate. Yet, Plaintiffs do not even mention the millions in tax funds the City is spending to renovate the Greenwood Cultural Center. See "Black architectural firm chosen to renovate Greenwood

Moreover, Plaintiffs have not alleged that they were individually in possession of or owed any money from the general reputation of Greenwood or Black Wall Street, either before or after the Massacre. See *McBride v. Bridges*, 1950 OK 25, 215 P.2d 830, 832 (Plaintiffs did not show that defendants were unjustly enriched "at the expense of plaintiffs."). Plaintiffs assert that the Defendants are "using a well-orchestrated, multi-faceted marketing campaign designed to influence wealthy donors and business interests to give them money and distract the public from the fact Defendants refuse to accept responsibility for the Massacre...." ROA, Doc. 37, Vol. IV, p. 60 at ¶133. However, Plaintiffs provide no facts that would establish that they, individually, would be entitled to any benefits from any such marketing campaign or any projects developed as a result. Plaintiffs' only claim to such projects (if they could even establish that there was any benefit or enrichment derived from such projects) is that they are in some way linked to the events of 1921.

Simply being connected to a historical event does not provide a person with unlimited rights to seek compensation from any project in any way related to that historical event. If that were the case, every person connected to any historical event could make similar unjust enrichment claims against every museum or point of remembrance. This would effectively stifle the development of such museums, cultural and historical sites.

Further, Plaintiffs' Second Amended Petition claims the Defendants used the "names and likenesses of survivors" without permission. ROA, Doc. 37, Vol. IV, p. 60 at ¶ 134. They have not alleged any facts that suggest Defendants have used these specific Plaintiffs' names and likenesses. All of these arguments and issues were raised by the Defendants in the briefing

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Cultural Center in Tulsa," BLACK ENTERPRISE (April 14, 2021) ("Tulsa residents voted to approve $5.3 million for the renovations as part of 2019 Improve Our Tulsa sales tax renewal package.").

before the trial court, thus, the Court was justified in finding that the Plaintiffs' Second Amended Petition should be dismissed for the reasons set forth in the Defendants' briefs. This Court should affirm the Court's ruling.

CONCLUSION

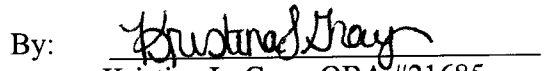
The Plaintiffs' Second Amended Petition failed to assert a legally cognizable claim for public nuisance or unjust enrichment. Thus, for the reasons set forth herein, and those addressed by the other appellees[7], the trial court's order granting the Defendants' motions to dismiss should be affirmed.

[7] To the extent the other appellees/co-Defendants raise additional grounds for affirming the trial court's order which the City has not raised in this brief, the City adopts and incorporates those arguments and would urge the Court to affirm the trial court's ruling.

Respectfully submitted,

CITY OF TULSA, OKLAHOMA
A municipal corporation

JACK C. BLAIR,
City Attorney

By: 

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CERTIFICATE OF SERVICE

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