

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**(1) THE ESTATE OF JAMES DYLAN
GONZALES,**
By and Through Personal Representative Dollie
Gonzales, *and*
(2) Dollie Gonzales, Individually;

Plaintiffs,

vs.

(3) CALVIN BROWN, Individually and in his Official
Capacity;
(4) THE CITY OF PAWNEE, OKLAHOMA, and
(5) HERB ADSON, Chief of Police for the City of
Pawnee, Individually and in his Official Capacity,

(6) LARRY MILLER, Individually and in his Official
Capacity;
(7) MIKE WATERS, Sheriff of Pawnee County. In
his Official Capacity;

(8)PAT LEADING FOX, Individually and in his
Official Capacity, *and*
(9) DAVID KANUHO, Chief/Director of Police of
the Pawnee Nation Police Department. Individually
and in his Official Capacity.

Defendants

Case No. 12-CV-495-JED-PJC

**PLAINTIFFS' RESPONSE TO DEFENDANT PAT LEADING FOX'S MOTION TO
DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT AND BRIEF IN
SUPPORT**

COME NOW, Plaintiffs above named by and through counsel and hereby present this
Response to Defendant Pat Leading Fox's *Motion to Dismiss the Second Amended Complaint*
(Doc. 55).

STANDARD OF REVIEW

The assertion of the Fed.R.Civ.P. 8(c)(1) statute of limitations defense by Defendant Leading Fox *via* Fed.R.Civ.P. 12(b)(6) subjects his request for dismissal to a “*more challenging standard of review*.” “*A motion to dismiss for failure to state a claim is viewed with disfavor, and is rarely granted*.” (internal quotations omitted); *Id.* citing Lone Star Indus., Inc. v. Horman Family Trust, 960 F.2d 917, 920 (10th Cir.1992).

Rule 12(b)(6) motions are disfavored in the law, and a court will rarely encounter circumstances that justify granting them. Mahone v. Addicks Utility District of Harris County, 836 F.2d 921, 926 (5th Cir. 1988).

A judge ruling on a motion to dismiss must accept all allegations as true and may not dismiss on the ground it appears unlikely the allegations can be proven. Bell Atlantic Corp v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1974, (2007). Further, “[T]o survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). “*The court must accept as true all well-pleaded facts, liberally construe the pleadings, and make all reasonable inferences in favor of the plaintiff.*” Ruiz v. McDonnell, 299 F.3d 1173, 1181 (10th Cir. 2002), *cert. denied*, 123 S.Ct. 1908 (2003).

Further,

The purpose of relation back is “*to balance the interests of the defendant protected by the statute of limitations with the preference expressed in the Federal Rules of Civil Procedure in general, and Rule 15 in particular, for resolving disputes on their merits.*” Krupski v. Costa Crociere S.p.A., 130 S.Ct. 2485, 2494 (2010).

“The rationale of Rule 15(c) is that a party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitations were intended to provide.” Baldwin Cnty. Welcome Cntr. V. Brown, 466 U.S. 147, 149 n. 3 (1984). (The same general standard of notice applies regardless of whether a litigant seeks to add defendants, plaintiffs, or claims. *See, e.g.*, Fed.R.Civ.P.15 advisory committee’s note.).

Plaintiffs’ Response to Defendant Leading Fox’s Proposition I:

“Plaintiffs’ Claims Against Defendant Leading Fox are Barred by the Applicable Statute of Limitation”

Defendant Leading Fox’s argument in support of his request for a time bar dismissal is identical to the argument submitted on behalf of Defendant Waters (Doc. 32) and Defendant Miller (Doc. 52). Counsel incorporates herein the arguments previously made and authority cited in *Response to the Waters’ Motion*. (Doc. 38) and to the Miller *Motion* of record in this cause.

The report generated by the Oklahoma State Bureau of Investigations which wholly supports and upon which the request to add additional claims and defendants was based was not received until subsequent to the expiration of the statute of limitations. Further, it was not received until the time for adding additional parties had come and gone in accordance with the original scheduling order when the municipal defendants were the only named defendants in this cause. The request to amend the *Complaint* was made as quickly as possible after multiple witness interviews and investigation into the soundness of the request upon completion of a thorough review of the OSBI Report..

Frankly, until the OSBI Report was received (under seal and pursuant to *Protective Order* which also took some time), Plaintiffs were left in the mistaken position – despite speculation to the contrary given the surreal number of law enforcement officers from

numerous agencies present at the death scene of James Dylan Gonzales - that Defendant Calvin Brown was the only law enforcement officer in close proximity to the deceased at the time of his death by his own admission. Respectfully, Officer Brown's version of the events of that evening are put at issue by the contents of OSBI Report. This is precisely the "*mistake*" addressed in Krupski. (citation omitted).

The lately added Defendants did not come forward. They did not offer information as to their participation in the events which precipitated and culminated in the deprivation of the constitutional rights of James Dylan Gonzales. Defendants Kanuho and Leading Fox both have sons implicated in these events as averred in the *Second Amended Complaint* (Doc. 25) - one the victim of an alleged burglary and the other – the second suspect who was permitted to leave while James Dylan Gonzales was chased down. They volunteered no information which might have spared time running. Municipal Defendant Brown did not advise as to the details contained in the OSBI Report.

Counsel submits prior to suit being filed, multiple attempts were made to ascertain the particulars of that evening by *repeated* requests to obtain a copy of the incident report *surely* generated by the municipality as a result of their investigation into an alleged burglary of clothing and video games which ended with a young man's death. That report was received by counsel almost three years after the incident.

The only eye witness to Defendants' participation in the events of that evening – both timely and lately added – who was not a law enforcement officer is not here to give his accounting – alas, the complaining witnesses' cause is brought through his Estate. Those involved did not volunteer information of the like contained in the OSBI Report, and the version of events told by the only Defendant who has spoken of that night – doesn't match up

with the discovery in Plaintiffs' possession. Based thereon, counsel submits the statute of limitations is tolled pursuant to Oklahoma's doctrine of equitable tolling, *to wit*: 1) *where the plaintiff was under a "legal disability" which prevented him from timely prosecuting his claims* and 2) *where the defendant has engaged in "false, fraudulent, misleading conduct calculated to lull plaintiffs into sitting on their rights."* (citations omitted).

Plaintiffs' Response to Defendant Leading Fox's Proposition II:

"Plaintiffs' Claims Against Defendant Leading Fox Are Barred by Sovereign Immunity"

Opposing counsel's argument that Defendant Leading Fox may shield himself *Individually*, with sovereign immunity is misplaced. The Court is bound to take the allegations set forth in the *Second Amended Complaint* (Doc. 25) as true when considering the Fed.R.Civ.P. 12(b)(6) *Motions to Dismiss*. Counsel submits the *Second Amended Complaint* (Doc. 25) withstands any challenge where the allegations as to Defendant Leading Fox's participation and culpability in the deprivation of the constitutional rights of JD Gonzales are concerned. The actions attributable to Mr. Leading Fox in his official capacity are his to bear *Individually*.¹ *"The general bar against official-capacity claims, however, does not mean that tribal officials are immunized from individual-capacity suits arising out of actions they took in their official capacities."* Maxwell et al v. County of San Diego, No. 10-56671 (9th Cir. 2012) *citing* Native American Distributing, Inc v. Seneca-Cayuga Tobacco Company, et al. No. 07-5104 (10th Cir. 2008). In his *Individual* capacity, Plaintiffs

¹ *In short, Cook conflated the "scope of authority" and "remedy sought" principles because they are coextensive in official capacity suits. Maxwell (p. 11201 ¶1). "This does not mean that the "scope of authority" and remedy sought" principles are coextensive in individual capacity claims." Id. (p. 11202 ¶1).*

seek accountability from Officer Leading Fox and have pled recompense accordingly.² He is certainly not – a nominal defendant to this suit.

Regarding the claim against Defendant Leading Fox, Officially –

Yes, Plaintiffs have included tribal officers – *officially* and individually – same as the other agencies, defendants hereto. Opposing counsel correctly states that there is no explicit waiver of sovereign immunity in the *Cross-Deputation Agreement* (Doc. 25-1) – in fact to the contrary, she cites; *to wit*: “*Nothing in this Agreement shall be construed as a waiver of any government’s sovereign immunity, not otherwise expressly waived by legislative act.*” (Doc. 55, p. 12 ¶2 *citing* Doc. 25-1). Neither have Plaintiffs been advised of an expression congressional abrogation of immunity by authorizing suit.

What should be of grave concern to this Court and the citizens of Oklahoma is the fact that the State, Pawnee County and the City of Pawnee, executed a law enforcement *Agreement* with a sovereign without securing a waiver on behalf of the citizens of this State. This poses an impediment to Plaintiffs’ ability to hold the tribe accountable along with the municipality and the county. Further, there is a significant possibility based upon discovery to date - that tribal culpability exceeds that of the other two governmental defendants. Plaintiffs continue to submit as they did in their *Motion for Expedited Determinations and Declarations* (Doc. 65) the unconstitutionality of the *Cross Deputation Agreement* (Doc. 25).

The *Cross Deputation Agreement* lists 69 Fed. Reg. 6,321 – as part of the authority upon which the Agreement rests (Attached hereto as Exhibit “A”): *[T]o increase the*

² “In short, our tribal sovereign immunity cases do not question the general rule that individual officers are liable when sued in their individual capacities. We see no reason to give tribal officers broader sovereign immunity protections than state or federal officers given that tribal sovereign immunity is coextensive with other common law immunity principles.” Maxwell (p. 11203 ¶ 2)

effectiveness of law enforcement in Indian country, the authority and status of law enforcement departments, as well as potential liability and liability coverage, must be clear."

There are no provisions in the *Agreement* addendums with regard to liability and liability coverage. The tribe may have coverage which covers liability incurred under the *Cross Deputation Agreement* and therein may well lie the waiver. Plaintiffs will not know until such time as Defendant Leading Fox *Answers* this cause – officially and individually - triggers discovery so that this matter may proceed on the merits – and indubitably the argument and briefing to come.³

WHEREFORE, the foregoing having been offered in objection to Defendant Leading Fox's request for dismissal of the claims as set forth against him in the *Second Amended Complaint* [Doc.25]— Plaintiffs request Defendant Leading Fox's *Motion to Dismiss* be denied.

Dated this 12th day of August, 2013.

Respectfully submitted,

s/ Gina Ann Cowley

Gina Ann Cowley, OBA No. 18928

2017 South Elm Place, Suite 108

Broken Arrow, Oklahoma 74012

918/770-6967 telephone

gina@ginaanncowley.com electronic mail

³ "The Supreme Court has acknowledge that tribes could use their immunity as a sword rather than a shield, as is alleged here, writing that 'immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims' . . . Whether a tribal entity has affirmatively led or passively permitted another party to believe it is amenable to suit, in both cases the entity has concealed its immunity, to its benefit and the other's detriment." Native American Dist. V. Seneca-Cayuga Tobacco Co., No. 07-5104 (10th Cir. 2008).

CERTIFICATE OF SERVICE

I hereby certify that on August 12th, 2013, *Plaintiffs' Response to Defendant Leading Fox's Motion to Dismiss* was filed electronically with Clerk of Court for the United States District Court for the Northern District of Oklahoma using the ECF System. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system:

David L. Weatherford OBA No. 9409

Birmingham, Morley, Weatherford & Priore, P.A.

Attorney for Calvin Brown(3); City of Pawnee(4) and Herb Adson (5);

davidweatherford@sbcglobal.net email

Chris J. Collins, OBA No. 1800

Jamison C. Whitson, OBA. No. 18490

Collins, Zorn & Wagner, P.C.

Attorneys for Mike Waters (7) and Larry Miller (6)

ccollins@czwglaw.com email

jwhitson@czwglaw.com email

Alyssa D. Campbell, OBA No. 20177

Legal Advocates for Indian Country, LLP

Attorney for Pat Leading Fox (8) and David Kanuho (9)

missalyssacampbell@yahoo.com email

s/ Gina Ann Cowley

Gina Ann Cowley