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

TAYLEUR RAYE PICKUP, et al,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 20-CV-346-JED-FHM**
	)	
THE DISTRICT COURT OF NOWATA COUNTY, OKLAHOMA, et al,	)	
	)	
	)	
Defendants.	)	

DEFENDANT DON NEWBERRY'S REPLY
TO PLAINTIFFS' RESPONSE TO HIS MOTION TO DISMISS

Defendant, Don Newberry, in his official capacity as the Tulsa County Court Clerk ("Newberry"), submits this Reply to Plaintiffs' Response (Doc. 80) to Newberry's Motion to Dismiss. Doc. 72. Newberry respectfully requests that the Court dismiss all of Plaintiffs' claims against him pursuant to Fed. R. Civ. P. 12(b)(1), Fed. R. Civ. P. 12(b)(6), and Fed. R. Civ. P. 21 for the reasons stated in his Motion to Dismiss (Doc. 72) and as provided below.

PRELIMINARY STATEMENT

Plaintiffs failed to demonstrate that Tulsa County is a proper party to this suit.[1] All of the complained actions attributed to Newberry in this case were performed by him in his role as an agent of the State. As Plaintiffs seek retrospective relief only, this Court does not possess subject matter jurisdiction over their § 1983 claims against Newberry. Further, Plaintiffs failed to state any claim against any of the named Defendants. As any amendment to their Complaint would be futile, Plaintiffs' claims against Newberry should be dismissed with prejudice.

[1] A suit against a county official in his or her official capacity is a suit against the county under both state and federal law. *See Porro v. Barnes*, 624 F.3d 1322, 1328 (10th Cir. 2010); *Pelligrino v. State ex rel. Cameron v. University ex rel. Board of Regents of State*, 2003 OK 2, ¶ 5, 63 P.3d 535, 537

I. PLAINTIFFS ERRONEOUSLY STATE THE STANDARD OF REVIEW

Plaintiffs claim that "Newberry, and other Defendants, overlook (or possible (sic) ignore) the requirements for notice pleading . . . ." Doc. 80, at 25. Plaintiffs incorporate into their Response their Standard of Review arguments from Docs. 75-78, wherein they argue that *Twombly* is not the applicable pleading standard in this case because it only applied to claims under the Sherman Antitrust Act. Doc. 80, at 9; Doc. 78, at 3. Plaintiffs argue that Newberry must prove that "there is no set of facts nor no legal theory upon which [] Plaintiff[s] can prevail," to be entitled to dismissal. Doc. 80, at 12. Plaintiffs do not and cannot provide any authority for their baseless argument because there is none. As the Supreme Court stated in *Iqbal*:

> Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. 550 U.S., at 554, 127 S.Ct. 1955. That Rule in turn governs the pleading standard "in all civil actions and proceedings in the United States district courts." Fed. Rule Civ. Proc. 1. Our decision in *Twombly* expounded the pleading standard for "all civil actions," *ibid.*, and it applies to antitrust and discrimination suits alike . . . .

Ashcroft v. Iqbal, 556 U.S. 662, 684, 129 S. Ct. 1937, 1953, 173 L. Ed. 2d 868 (2009); *see also Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007). Therefore, "[t]o survive a Rule 12(b)(6) motion, Plaintiff[s'] complaint must allege sufficient facts to state a claim for relief plausible on its face." *Strain v. Regalado*, No. 19-5071, 2020 WL 5985993, at *2 (10th Cir. Oct. 9, 2020) (citing *Iqbal*, 556 U.S. at 678) ("explaining that a claim is facially plausible 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."').

II. TULSA COUNTY IS AN IMPROPER PARTY

Plaintiffs complain that Newberry made "nearly four pages of fact based arguments for how he is functionally regulated by Oklahoma Supreme Court," and that such a "fact based analysis cannot be the basis for a motion to dismiss." Doc. 80, at 9. Newberry's argument,

however, demonstrates that "Plaintiffs impermissibly seek to hold Tulsa County liable for the acts of Newberry when he functions as the State Court's bursar," because in that capacity, he is a state actor. Doc. 72, at 12-15. This is not just a technical matter. It makes a difference as to who statutorily represents Newberry and whether the County vault or State vault is the target.

Plaintiffs make clear that they are not suing Newberry in his capacity as an arm of the court, but rather, the claim is "brought against the office of the court clerk" as a county officer. Doc. 80, at 9-10. Plaintiffs attempt to argue that Newberry is not an arm of state district court because the claims presented in *Petuskey v. Cannon*, 1987 OK 74, 742 P.2d 117, and *N. Side. State Bank v. Bd. Of Cty. Comm'rs of Tulsa Cty.*, 1994 OK 34, 894 P.2d 1046, are inapposite to the claims presented here. Plaintiff is mistaken.

It makes no difference what claims were alleged, the Oklahoma Supreme Court held as a matter of law that a court clerk acts as an arm of the state district court when he performs ministerial court functions. *Petuskey*, 742 P.2d at 1121; *N. Side. State Bank*, 894 P.2d at 1051. Furthermore, as a matter of law, "[t]he court clerk's function of receiving and disbursing funds of every character is inextricably connected, not with county government, but with that official's duty as state court's bursar." *N. Side. State Bank*, 894 P.2d at 1052.

Here, no further fact analysis needs to be had. Plaintiffs allege that Newberry "collected monies from Tribal members that were assessed by the Court as a fine, a court cost, or other fees." Doc. 2, at ¶ 19. As the Plaintiffs complain of actions taken by Newberry as the state district court's bursar, Tulsa County cannot be liable for Newberry's actions under any of the claims pled.

Plaintiffs' Response and Complaint are devoid from any mention of a Tulsa County policy or custom that caused any harm. To establish municipal liability under § 1983, Plaintiffs must, in part, establish that an official policy or custom of Tulsa County caused them harm. *See Schneider*

v. City of Grand Junction Police Dep't, 717 F.3d 760, 769-71 (10th Cir. 2013). As above, when a court clerk acts as the district's court's bursar, he is a state agent. The alleged policy of collecting monies from those convicted of criminal violations, which does nothing more than implement state law and requires adherence to state court judicial orders, is insufficient to establish municipal liability against Tulsa County. *See Whitesel v. Sengenberger*, 222 F.3d 861, 872 (10th Cir. 2000).

Likewise, Plaintiffs' claim for declaratory relief may not be brought against the County as "*Monell*'s 'policy or custom' requirement applies in § 1983 cases irrespective of whether the relief sought is monetary or prospective." *Los Angeles Cty., Cal. v. Humphries*, 562 U.S. 29, 39, 131 S. Ct. 447, 453–54, 178 L. Ed. 2d 460 (2010). Plaintiffs' state law claim must also be dismissed as Plaintiffs do not and cannot allege that Newberry's duties in collecting fines, fees, and costs set forth by judicial order and state statute, are discretionary. *See Petuskey,* 742 P.2d at 1121. The complained actions of Newberry and all other court clerks were in the performance of ministerial court functions, and were therefore state actions. *See N. Side. State Bank*, 894 P.2d at 1051-52. Plaintiffs offer zero rebuttal to this argument, and therefore, it should be deemed confessed and Plaintiffs' claims against Newberry should be dismissed.

Even if Tulsa County (or Newberry in his capacity as a state actor) was an appropriate defendant in this case, Plaintiffs failed to allege that any of the named Plaintiffs were actually harmed by Newberry. Nowhere in Plaintiffs' Complaint is it alleged that any of the Plaintiffs were prosecuted in Tulsa County, nor is it alleged that Plaintiffs paid any money to Newberry or one of his deputy clerks. Plaintiffs do not refute this. However, Plaintiffs bizarrely state that just because there are Native Americans living in the Cherokee Nation's alleged Reservation some of them might have been prosecuted and paid monies to some government entity, and therefore, "[e]very dollar paid to the court clerk by a member of the class would be a reason that the Plaintiffs and the

Plaintiff Class have standing in this case." Doc. 80, at 27. Plaintiff cannot rely on an unnamed future Plaintiff to establish standing. *See Thomas v. Metro. Life Ins. Co.*, 631 F.3d 1153, 1159 (10th Cir. 2011). Plaintiffs aren't allowed to subject Defendants to the federal judicial system, while they pray for some unnamed person to sign on and fill a gaping hole in their suit.

III. NEWBERRY IS ENTITLED TO ELEVENTH AMENDMENT AND QUASI-JUDICIAL IMMUNITY IN HIS ROLE AS THE DISTRICT COURT'S BURSAR

Even if Plaintiffs were to amend their Complaint and sue Newberry as a state actor, their claims would still fail as he is entitled to immunity. Plaintiffs provide a number of non-controlling cases[2] to support their argument that Newberry is not entitled to Eleventh Amendment Immunity when he acts as the court's bursar. Doc. 80, at 11-12. None of the cases cited by Plaintiffs denied a state official Eleventh Amendment immunity when he or she was sued in his or her official capacity. Here, the claim is against Newberry in his official capacity. Judgment against Newberry will bind the State as the damages or award sought will come out of the State's pocket. The Eleventh Amendment bars such action. *Edelman v. Jordan*, 415 U.S. 651, 663, 94 S. Ct. 1347, 1356, 39 L. Ed. 2d 662 (1974).

Newberry is further entitled to quasi-judicial immunity. Plaintiffs argue that court clerks are not entitled to quasi-judicial immunity when they are performing ministerial acts. Doc. 80, at 11. However, under Oklahoma law Newberry, is "judicial personnel." *Petuskey*, 742 P.2d at 1121; *See also* Okla. Stat. tit. 20, Ch. 1, App. 2, Rule 2. Quasi-judicial immunity applies to both judicial

[2] *Tindal v. Wesley*, 167 U.S. 204, 17 S. Ct. 770, 42 L. Ed. 137 (1897) (individual liability case that was not a judgment against the state); *Scott v. Evans*, 2006 U.S. Dist. LEXIS 11326 (E.D. Mich. 2006) (quasi-judicial immunity case against official in individual capacity); *Snyder v. Nolen*, 380 F.3d 279 (7th Cir. 2004) (quasi-judicial immunity case against official in individual capacity), *Geitz v. Overall*, 62 Fed. Appx. 744 (8th Cir. 2003) (judicial or quasi-judicial immunity case against official in individual capacity); and *Smith v. Finch*, 342 F.Supp.3d 1012 (E.D. Mo. 2018) (official capacity claim dismissed; quasi-judicial liability case against official in individual capacity).

and non-judicial personnel when "their duties had an integral relationship with the judicial process," and when they "perform[] ministerial acts at the direction of a judge." *See Whitesel,* 222 F.3d at 867, 869; *see also Saavedra v. City of Albuquerque*, No. 10CV067 MCA/RHS, 2010 WL 11618990, at *4 (D.N.M. Nov. 30, 2010) (court held that a pretrial services probation officer was "entitled to quasi-judicial immunity for her actions relating to the pretrial supervision of Plaintiff" because the court ordered the plaintiff to participate in pretrial supervision).

"[B]ecause quasi-judicial immunity derives from judicial immunity, for quasi-judicial immunity to apply, the order must be one for which the issuing judge is immune from liability." *Moss v. Kopp,* 559 F.3d 1155, 1163 (10th Cir. 2009) (quoting *Turney v. O'Toole*, 898 F.2d 1470, 1474 (10th Cir.1990)). Therefore, a government actor is immune from the damages arising from the execution of a judicial order or directive as long as the judge did not act in the "clear absence of all jurisdiction." *Id.* "A judge does not lose immunity for all judicial acts taken in excess of jurisdiction. If that were the case, every appellate invalidation of an order based upon lack of jurisdiction would expose the trial judge to a suit for damages." *Penn v. United States,* 335 F.3d 786, 789 (8th Cir. 2003).

"So long as a judge acts with 'at least a semblance of subject matter jurisdiction,' he is immune." *Derringer v. Chapel*, 98 F. App'x 728, 733 (10th Cir. 2004) (quoting *Lerwill v. Joslin,* 712 F.2d 435, 438 (10th Cir.1983).

Here, Plaintiffs allege that Newberry "collected monies from Tribal members that were assessed by the Court as a fine, a court cost, or other fees." Doc. 2, at ¶ 19. "The assessment of a fine is exclusively an adjudicative function of a judge . . . ." *Petuskey,* 742 P.2d at 1122. Therefore, any money collected by Newberry pursuant to a judicial order entitles him to quasi-judicial immunity, even if the act is found to be ministerial.

Furthermore, courts in Oklahoma are courts of general jurisdiction. *Hawkins v. Bryan*, 1927 OK 414, ¶ 3, 128 Okla. 27, 261 P. 167, 168. Oklahoma has subject-matter jurisdiction to prosecute crimes committed within its territorial borders. *See* Okla. Const. art. 7, § 7; Okla. Stat. tit. 22, § 121. A criminal defendant bears the burden to prove his status as an Indian and show that Oklahoma does not have jurisdiction to prosecute him. *State v. Klindt*, 1989 OK CR 75, ¶5, 782 P.2d 401, 403. Clearly, any Oklahoma judge that imposed fines, fees, and costs against a person who committed a crime within Oklahoma's borders in the last century acted with at least a semblance of jurisdiction. Therefore, Newberry is entitled to quasi-judicial immunity.

Plaintiffs further argue that the Eleventh Amendment does not bar their claim for declaratory relief under *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714, as they seek prospective equitable relief. Doc. 80, at 20. Under *Ex Parte Young*, a state official is protected from suit in federal court by the Eleventh Amendment, unless the plaintiff alleges that there is an ongoing violation of federal law for which they seek prospective relief. *Buchwald v. Univ. of New Mexico Sch. of Med.*, 159 F.3d 487, 495 (10th Cir. 1998).

Here, Plaintiffs are not seeking an order that Defendants must conform their future behavior to constitutional standards, but rather an order that voids past criminal violations and awards them monetary relief. "The equitable disgorgement remedy, for years of subjecting members of sovereign Indian tribes, to prosecution for crimes over which the Defendants had no jurisdiction, is what this case is about." Doc. 80, at 26. Thus, this case seeks to adjudicate past wrongs. *Ex Parte Young* does not apply and Plaintiffs' claims for declaratory relief must be dismissed.

IV. PLAINTIFFS' CRIMINAL ADJUDICATIONS ARE NOT *VOID AB INITIO*

Plaintiffs claim that they do not need to seek post-conviction relief in Oklahoma courts because the Supreme Court's decision in *McGirt* magically voided them all. Doc. 80, at 31-32. However, a plain reading of *McGirt* demonstrates otherwise. "[M]any defendants may choose to finish their state sentences rather than risk reprosecution in federal court where sentences can be graver. Other defendants who do try to challenge their state convictions may face significant procedural obstacles, thanks to well-known state and federal limitations on postconviction review in criminal proceedings." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2479, 207 L. Ed. 2d 985 (2020).

Likewise, Plaintiffs claim that because their criminal convictions are *void ab initio* the *Rooker-Feldma*n doctrine does not apply. Doc. 80, at 27-28. Plaintiffs do not provide any authority for this claim. The Tenth Circuit, in fact, has never "adopted the 'void ab initio' exception'" to the *Rooker-Feldman* doctrine. *Tso v. Murray*, 822 F. App'x 697, 701 (10th Cir. 2020); *Anderson v. Private Capital Grp.*, 549 F. App'x 715, 717-18 (10th Cir. 2013).

Plaintiffs have repeatedly stated they are not seeking damages in this this case (Doc. 80, at 10, 16, 30); however, in response to Newberry's *Rooker-Feldman* argument, Plaintiffs argue that "[t]he claims for vacatur of the state-court judgment trigger the *Rooker-Feldman* doctrine; the claims for money damages do not." Doc. 80, at 28 (citing *Cowan v. Hunter*, 762 F. App'x 521, 523 (10th Cir. 2019)). In *Cowan*, the state-court conviction did not need to be overturned for the plaintiff to recover damages for claims independent of the judgment against him. 762 F. App'x at 523-524; *see also Mayotte v. U.S. Bank Nat'l Ass'n for Structured Asset Inv. Loan Tr. Mortg. Pass-Through Certificates, Series 2006-4*, 880 F.3d 1169, 1176 (10th Cir. 2018).[3] Here, Plaintiffs'

[3] "In this case, to proceed on her federal-court claims for damages and to obtain a declaration that she has title to her home, Plaintiff need not set aside, or challenge in any way, the Rule 120 decision. All the facts she alleges in the Complaint to obtain such relief preexisted the Rule 120

alleged injuries, loss of money and an illegal conviction, were caused by the state-court judgment itself and not upon some independent right. However, even if Plaintiffs' claims were based upon an independent right, *Heck v. Humphrey*, would bar such a claim for damages as none of the Plaintiffs' criminal adjudications have been reversed on direct appeal, nor have they been granted relief through a writ of habeas corpus. 512 U.S. 477, 486-87, 114 S. Ct. 2364, 2372, 129 L. Ed. 2d 383 (1994). Therefore, Plaintiffs' failure to have their criminal adjudications overturned in Oklahoma State Court is fatal to their claims.

V. PLAINTIFFS FAILED TO STATE A CLAIM UNDER ANY LEGAL THEORY

Section 1983 requires that a person acting under color of state law violate another's rights. 42 U.S.C. § 1983. A judgment against a government official in his official capacity is a judgment against the entity that the official represents. *Brandon v. Holt*, 469 U.S. 464, 471, 105 S. Ct. 873, 878, 83 L. Ed. 2d 878 (1985). As Newberry is a state actor when he functions as the state court's bursar, he is immune from suit for damages and other retrospective relief in federal court. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S. Ct. 900, 908, 79 L. Ed. 2d 67 (1984). Newberry is likewise immune from Plaintiffs' claim for declaratory relief as they seek retrospective relief only (order voiding past criminal violations and monetary relief for past harms). *See Buchwald*, 159 F.3d at 495. Thus, Plaintiffs' federal law claims should be dismissed.

Plaintiffs' state law claims should also be dismissed as Plaintiffs failed to adequately plead their cases. Plaintiffs once again argue that because they plead the formulaic elements of their

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proceedings. She can prove her claims without any reference to the state-court proceedings. The present litigation thus does not 'complain[ ] of injuries caused by [the Rule 120 decision].' *Campbell*, 682 F.3d at 1283 (internal quotation marks omitted). In other words, because there is no need to set aside, or even consider the validity of, the Rule 120 decision for Plaintiff to establish her claim, we cannot say that 'an element of the claim' is that the Rule 120 order was 'wrongful.' *Id.* at 1284."

claim in conclusory terms, they have stated a claim. Doc. 80, at 30. As argued, *supra* Section I, Plaintiffs seek to overturn controlling Supreme Court authority. Plaintiffs offer no substantive rebuttal to Newberry's argument they have failed to state a claim. Plaintiffs did not address how Newberry can be liable for money had and received when he acted solely as an agent (cashier) for the State of Oklahoma, nor did they address their failure to plead a sum certain. Plaintiffs simply assert that "[t]here is no just reason why the state or the court clerks should be allowed to retain these funds, regardless of how they are used." Doc. 80, at 30.

Additionally, Plaintiffs cannot articulate why Plaintiffs' state law claims are not torts and lie outside of Oklahoma's Governmental Tort Claims Act's statutory restrictions. *Sholer v. State ex rel. Dept of Public Safety*, 1995 OK 150, 945 P.2d 469, is factually distinguishable from Plaintiffs' case and Plaintiffs cannot articulate how it is applicable here. Plaintiffs further failed to address the Oklahoma Legislature's amended and expanded definition of "tort" after *Sholer* was decided. 2014 Okla. Sess. Law Serv. Ch. 77 (H.B. 2405)(codified at Okla. Stat. tit. 51, § 152(14)). As Plaintiff failed to plead compliance with the GTCA, Plaintiffs claim must be dismissed.

Finally, Plaintiffs argue that equitable affirmative defenses are fact based inquiries that cannot be decided at the motion to dismiss stage. Doc. 80, at 33. However, when the elements of an affirmative defense appear on the face of the Complaint, a court can grant a Rule 12(b)(6) dismissal motion. *Fernandez v. Clean House, LLC*, 883 F.3d 1296, 1299 (10th Cir. 2018). The affirmative defenses identified by Newberry appear on the face of Plaintiffs' Complaint. Plaintiffs do not offer any argument to the contrary. Therefore, Plaintiffs state law claims should be dismissed.

For these reasons set for forth above and in his Motion to Dismiss (Doc. 72), Newberry respectfully requests that this Court dismiss Plaintiffs' claims against him with prejudice.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT DON NEWBERRY IN HIS OFFICIAL CAPACITY

CERTIFICATE OF ELECTRONIC NOTICE

I hereby certify that on October 22, 2020, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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s/ Mike Shouse
Mike Shouse