

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

FRANCIS A.L. ENGLEBRIGHT, and)
ROSELLA ENGLEBRIGHT, individually and)
as co-special administrators of the estate)
of FRANCIS A.L. ENGLEBRIGHT, JR.,)

Plaintiffs,)

v.)

Case No.: 24-CV-00552-CVE-CDL

SHANNON BUHL, KODY FISHER, ERIN)
FAULKENBERRY, BRYAN SMITH, special)
administrator of the estate of BRIAN)
CATCHER, deceased, and UNITED)
STATES OF AMERICA,)

Defendants.)

PLAINTIFFS' RESPONSE TO MOTION TO DISMISS OF USA

COME NOW Plaintiffs in response to the Motion to Dismiss filed by Defendant United States [Dkt. No. 36] and in opposition thereto would show the court as follows:

Proposition I: Defendant Faces a Heavy Burden on a Motion to Dismiss

The plaintiff need only set forth a “short and plain statement” of the claims showing entitlement to relief. F.R.Civ.P. 8(a). This has been interpreted to mean that a plaintiff does not allege legal conclusions, but facts. Celli v. Shoell, 40 F.3d 324 (10th Cir. 1994)(the law is not what is looked at, but the facts pled and whether those facts fit into a legal framework even if the framework is not pled); Johnson v. City of Shelby, Mississippi, 574 U.S. 10, 135 S.Ct. 346, 190 L.Ed.2d 309 (2014)(plaintiff set forth the facts but did not state his legal theory; facts are all that are required, plaintiff is not required to plead a legal theory, as well).

Nor is a plaintiff required to allege specific facts, but only give fair notice of what the claim is and the grounds upon which it rests. Erickson v. Pardus, 551 U.S. 89, 127 S.Ct. 2197, 161 L.Ed.2d 1081 (2007).

A dismissal should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him to relief. Crider v. Board of County Commissioners of the County of Boulder, 246 F.3d 1285 (10th Cir. 2001); Meade v. Merchants Fast Motorline, Inc., 820 F.2d 1124 (10th Cir. 1987). That there may be some inartful wording is not determinative. Such is a technicality that the court corrects and proceeds under the law which is applicable. Bolden v. City of Topeka, 441 F.3d 1129 (10th Cir. 2006).

Plaintiffs also note, in this connection, that the only objection to the Amended Complaint is that Defendant USA is not liable for constitutional violations as such, and that there is no claim of state violations. Any question of Twombly sufficiency and so forth are not raised.

In the instant case, Plaintiffs have alleged that Defendants searched, seized, and destroyed Plaintiffs' real and personal property and directed and conducted the shooting and killing of their decedent, who was unarmed and not dangerous. Plaintiffs have also alleged that Defendant USA is liable for the actions of the members of the Cherokee Nation Marshal Service by virtue of 25 C.F.R. and their contract under the Indian Self-Determination and Education Assistance Act. 25 C.F.R. 900.180 et seq.; 25 C.F.R. 1000.270, et seq.

Although the above may also be violations of the U.S. Constitution, they also give rise to liability under state law, as shown below. And, although state law is not quoted

in the Amended Complaint, as shown in this Proposition there is no need to; that law is applied to the facts that have been alleged.

Proposition II: The Facts as Alleged by Plaintiffs Give Rise to State Law Liability.

It is to be noted that Defendant USA is sued under the Federal Tort Claims Act, 28 U.S.C. § 2671, et seq., as the basis of jurisdiction. Section 2674 states, in pertinent part:

The United States shall be liable...in the same manner and to the same extent as a private individual under like circumstances...

In other words, to the extent that the members of the Cherokee Nation Marshal Service perpetrated acts that as private citizens would subject them to state law liability, then the federal government, which has taken upon itself such liability, becomes liable. See Paragraph 14 of the Amended Complaint.

Defendant USA denies the applicability of Oklahoma law. But there is a general duty not to cause injury to others. McVay v. Rollings Constr., Inc., 1991 OK 102, 820 P.2d 1331. And it can hardly be gainsaid that the individual Defendants, as private individuals coming onto Plaintiffs' property and damaging both real and personal property and shooting and killing Plaintiffs' decedent, would be subject to tort liability under state law. Indeed, the common law of "trespass *vi et armis*" is the first week in torts in the first year of law school, adopted by statute in Oklahoma. 12 O.S. § 2. See also, Annear v. Swartz, 1915 OK 195, 148 P. 706; Holden v. Lynn, 1911 OK 503, ¶ 19, 120 P. 246; Bilby v. Bean, 1913 OK 720, ¶ 6, 137 P. 691; State ex rel. AG v. Johnson & Johnson, 2021 OK 54, ¶ 13 of dissent, 499 P.3d 719.

Also, 12 O.S. § 940 codifies civil actions to recover damages for the negligent or willful injury to property. Trespass is actionable. OUJI-CIV 3d 17.1. Assault and battery

are actionable. OUJI-CIV 3d Chapter 19. Wrongful death is actionable. 12 O.S. § 1053.

In addition, Oklahoma recognizes negligence per se, the violation of a law, where the violation causes injury. OUJI-CIV 3d 9.10. And the laws might be federal, state or municipal. Howard v. Zimmer, Inc., 2013 OK 17, 299 P.3d 463. In this connection, it should be noted that there is statutory, as opposed to constitutional, authority for the protection of people from tribes. 25 U.S.C. § 1302(a) states in pertinent part:

No Indian tribe in exercising powers of self-government shall —

...

(2) violate the right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizures...

(5) take any private property for a public use without just compensation...

This incorporates the constitutional requirements into statutory law, separate and apart from the Constitution. As Oklahoma would enforce those rights against a private citizen or against persons through an Indian tribe separate¹ from a constitutional origin, Plaintiffs' claims are viable.

Thus, even though the Constitution is cited in the Amended Complaint (because those matters apply to the other Defendants, rather than to this Defendant), the court cannot be limited by that but must look at all claims supported by any legal theory. And, to the extent that those standards have been adopted by Oklahoma for use in other

¹There may be different origins for similar claims: state - federal; constitutional - statutory - common law; independent statutes. For example, race discrimination may be protected under Title VII (with various restrictions) or under Section 1981 (without those restrictions). These are two separate and independent grounds to protect the same rights. Indeed, liability under each has the same elements. Carney v. City and County of Denver, 534 F.3d 1269 (10th Cir. 2008). Heno v. Sprint/United Mgt. Co., 308 F.3d 847 (10th Cir. 2000). But, still, even if one does not apply, the other might. Calvert v. Midwest Restoration Services, Inc., 35 Fed. Appx. 798 (10th Cir. 2002)(race discrimination case dismissed for failure to have the 15 employee requirement of Title VII; case reversed because Section 1981 does not have a minimum employee requirement).

contexts, they are still valid allegations against this Defendant to the extent that the correlative obligations arise somewhere other than the Constitution.

CONCLUSION

Based on the foregoing, Plaintiffs submit that they have viable claims here and that the motion to dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2nd day of April, 2025, a true, correct, and exact copy of the foregoing document was served *via* electronic notice by the CM/ECF filing system to all parties on their list of parties to be served in effect this date.

By: **s/Steven R. Hickman**
Steven R. Hickman