

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 INDIVIDUAL DEFENDANTS

COME NOW Plaintiffs in response to the Motion to Dismiss filed by the individual Defendants herein [Dkt. No. 34] and in opposition thereto would show the court as follows:

Plaintiffs have alleged in Dkt. No. 9: Three of the individual Defendants, Buhl, Fisher, and Faulkenberry acted at the scene of Plaintiffs' property on November 29, 2022, directing activity. Paragraph 10. They recklessly and intentionally escalated the situation, where Plaintiffs' decedent was inside the house, threatening him with arms when he was giving up, even though he was unarmed and not dangerous. Paragraphs 11-12. At the direction of those three, Defendant Smith's decedent shot Plaintiffs' decedent, which shooting was reckless and intentionally done without right as the individual Defendants had escalated the situation and Plaintiffs' decedent was unarmed

and not dangerous. Paragraphs 11-12. In addition to killing Plaintiffs' decedent, there was also the warrantless seizure and handcuffing of Plaintiff Frances Lloyd Englebright, the warrantless and without right removal from her property of Plaintiff Rosella Englebright, a post-killing warrantless entry into Plaintiffs' house and destruction of Plaintiffs' real and personal property. Paragraph 13. Further, the Cherokee Nation is under contract with the United States under the Indian Self-Determined Nation and Education Assistance Act. 25 C.F.R. §§ 900.180 et seq.; 25 C.F.R. §§ 1000.270 et seq. Paragraph 14. By virtue thereof, the actions of the individual Defendants become the liability of Defendant USA. Paragraph 14.

The individual Defendants raise the defenses of 1) sovereign immunity, 2) inapplicability of 42 USC § 1983, and 3) failure to claim actions that violated any rights. Plaintiffs submit that the individual Defendants are incorrect on all three counts; however, to the extent that there is insufficient allegation, then the proper procedure is to allow amendment. Plaintiffs submit contemporaneously herewith an alternative motion therefor.

Proposition I: The Individual Defendants Are Not Protected by Sovereign Immunity.

The gist of the argument of the individual Defendants is that their actions were all taken in their official capacities and within the scope of their employment; that is, within the scope of their employment as Cherokee employees. This, of course, presumes that their actions were within the scope of their employment and within Cherokee jurisdiction as such.

As to the latter point, the Cherokees, through their compact with the United States, act as federal law enforcement officers in enforcing federal law. It is undisputed

that the scene of the killing arose out of a claim that Plaintiff's decedent had abused an underage child. Dkt. No. 36, Page 1. That crime, however, falls within the purview of the so-called Major Crimes Act and 18 USC § 1153(a) places such squarely "within the exclusive jurisdiction of the United States." As such, the exclusive sovereign immunity would be that of the United States, except to the extent that it has waived it under the Federal Tort Claims Act, as they would be acting as federal agents. Also, as shown below, this jibes with the acceptance of federal liability for Indian law enforcement acts under the Federal Tort Claims Act.

As to the scope of employment possibility, if the actions of the individual Defendants were within that scope, then liability for their actions rests not with them, but with the United States under the Federal Tort Claims Act and the compact between the United States and the Cherokee Nation. The sovereign immunity would then rest with the United States, unless it has been waived. And, if they were acting within the scope of their employment, then it is the duty of the United States to certify that and be substituted in as the proper party Defendant for their actions. 28 U.S.C. § 2679(d).

However, the United States, through its authorized representative, has not stepped in as would be his statutory duty and made the certification. Until the United States does so, Plaintiffs have an alternative claim directly against the individual Defendants as acting outside the scope of their employment and therefore not protected. The individual Defendants also have the option of asking this court to make the certification, which would also remove them in favor of the United States. 28 USC § 2679(d)(3). But they have not done so.

To the extent that the United States, on the one hand, says it is not liable for their

actions, and they, on the other hand, say that they are not, Plaintiffs have pled alternative liability, something specifically allowed by the rules of pleading. F.R.Civ.P. 8(d)(2)(3). As such, until such time as the United States accepts or the court puts upon it responsibility for the actions of the individual Defendants, Plaintiffs have a viable claim that they were acting outside the scope in their killing of Plaintiffs' decedent and their other actions – the destruction of Plaintiffs' property, the invasion of their home, and the other things complained of.

Consider the case of Monroe v. Pape, 365 U.S. 167, 81 S.Ct.473, 5 L.Ed.2d 492 (1961). There the plaintiffs sued under 42 U.S.C. § 1983 for illegal acts committed upon them, similar to those committed upon Plaintiffs herein (but without the killing). The circuit court held that the officers acted outside the law and that they therefore could not be said to be acting “under color of” law under § 1983. This is the situation we have here. The difference, of course, is that the Supreme Court held that § 1983 is broader than the common law of *respondeat superior* liability and held that the individuals could be liable. Here, as the individual Defendants point out, § 1983 is not implicated and so the expansion in Monroe is not applicable; rather, the general rule that had been utilized by the circuit is applicable here, at least until the United States steps up to the plate and takes responsibility. In sum, the claim of sovereign immunity could obtain if and only if the United States takes responsibility. It has not done so and so the alternative allegations stand as acts outside their authority.

Proposition II: Plaintiffs Have Claims Under State Tort Law or Federal Common Law.

To the extent that the acts of the individual Defendants are not shielded by sovereign immunity/the Federal Tort Claims Act, then those Defendants stand in the

position of individuals committing egregious acts, including trespass *vi et armis*, negligent or willful injury to property, assault and battery, and wrongful death. 12 O.S. § 940, OUJI-CIV 3d 17.1, OUJI-CIV 3d, Chapter 19, and 12 O.S. § 1053. They are in violation of a general duty not to cause injury to others. McVay v. Rollings Constr., Inc., 1991 OK 102, 820 P.2d 1331.

In addition, Oklahoma recognizes negligence per se, the violation of the 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 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 statute incorporates constitutional-like requirements in the statutory law, separate and apart from the U.S. Constitution. As the actions complained of are in violation of this statute, the actions of the individual Defendants are neither protected by immunity (unless the United States steps up and takes responsibility) and constitute negligence per se, subjecting the individual Defendants to liability.

42 U.S.C. § 1983 was not enacted because the things it protects are not, for the most part, illegal under state laws; it was enacted because state courts (particularly in the South) refused to enforce their own laws against law enforcement actors. Thus, the Supreme Court in Monroe, *supra*, refers to the law as the “Ku Klux Act”. Even without

deriving Plaintiffs' complaints from the U.S. Constitution, there are parallel provisions under both state and federal law that prohibit the acts.

The U.S. Supreme Court has been faced before with constitutional violations not protected by § 1983 because the government actors were not state actors. Bivens v. Six Unknown Named Agents at the FBN, 403 US 388, 91 S.Ct.1999, 29 L.Ed.2d 619 (1971). Bivens is highly similar to this case on its facts. Even without a statutorily-created cause of action, Bivens created a federal common law action derived from a constitutional or statutory (under § 1302, *supra*) source against the individual Defendants.

Proposition III: Plaintiffs Have Sufficiently Pled Their Claim.

The general rules of pleading provide that a 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 understood to mean that a Plaintiff does not allege legal theories, but facts. Celli v. Shoell, 40 F.3d 324 (10th Cir. 1994)(the question is whether the facts pled fit into a legal framework, even if the framework is not pled); Johnson v. City of Shelby, Mississippi, 574 US 10, 135 S.Ct. 346, 190 L.Ed.2d 309 (2014)(the 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 or evidentiary facts, but only give fair notice of what the claim is and the grounds upon which it rests. Erickson v. Pardus, 551 US 89, 127 S.Ct.2197, 161 L.Ed.2d 1081 (2007).

In the instant case, Plaintiffs have alleged a time and place. See F.R.Civ.P. 9(f)–allegation of time or place is material. Plaintiffs have alleged that the three individual defendants acted jointly. Burger v. Hanlon, 129 F.3d 505 (9th Cir. 1997)(federal agents

had a deal to let CNN into the property while executing a warrant; CNN liable for participating in the conspiracy); Haddle v. Garrison, 525 US 121, 119 S.Ct. 489, 142 L.Ed 2d 502 (1998)(officers of employer encouraged it to fire him and can be liable in conspiracy). Conspiracy is generally shown by circumstantial evidence. U.S. v. Robinson, 978 F.2d 1554 (10th Cir. 1992). There need not be direct proof of an express agreement; the agreement may be informal and may be inferred entirely from the circumstantial evidence. U.S. v. Pulido-Jacobo, 377 F.3d 1124 (10th Cir. 2004). Here, Plaintiffs have alleged that the three were at the scene and worked together to misuse Plaintiffs, destroy their property, and kill their son.

The individual Defendants have two main points. One is an objection that decedent Ketcher “and/or others” shot Plaintiffs’ decedent. However, as shown above, alternative or even inconsistent pleadings are allowed. F.R.Civ.P. 8(d)(2), (3). This objection is not meritorious.

The second objection is that the individual Defendants were at the scene and jointly directed the activity there. Plaintiffs were there – that is something they saw. And Plaintiffs have alleged that the three directed Defendant’s decedent to shoot Plaintiffs’ decedent. A direction to shoot also seems to be a direct allegation.

CONCLUSION

The individual Defendants can be liable, to the extent that the Defendant United States does not accept its responsibility (which it has not, as yet). Further, Plaintiffs have adequately alleged wrongful and tortious acts by the individual Defendants, to the extent that they are not protected as properly acting within the scope of their employment.

For the foregoing reasons, Plaintiffs pray that the Motion to Dismiss of the individual Defendants 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