

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

LESSIE BENNINGFIELD RANDLE,)
VIOLA FLETCHER,)
HUGHES VAN ELLISS SR,)
HISTORIC VERNON AME CHURCH INC,)
LAUREL STRADFORD,)
ELLOUISE COCHRANE-PRICE,)
TEDRA WILLIAMS,)
DON M ADAMS,)
DON W ADAMS,)
STEPHEN WILLIAMS,)
THE TULSA AFRICAN ANCESTRAL)
SOCIETY,)
Plaintiffs,)
v.)
CITY OF TULSA,)
TULSA REGIONAL CHAMBER,)
TULSA DEVELOPMENT AUTHORITY,)
TULSA METROPOLITAN AREA)
PLANNING COMMISSION,)
BOARD OF COUNTY COMMISSIONERS,)
FOR TULSA COUNTY, OKLAHOMA,)
VIC REGALADO, IN HIS OFFICIAL)
CAPACITY AS SHERIFF OF TULSA)
COUNTY)
OKLAHOMA MILITARY)
DEPARTMENT,)
Defendants.)

DISTRICT COURT
FILED

AUG 03 2022

DON NEWBERRY, Court Clerk
STATE OF OKLA. TULSA COUNTY

CASE NO. CV-2020-1179
CIVIL DOCKET G

ORDER ON DEFENDANTS' MOTIONS TO DISMISS

Now on this 3rd day of August, 2022, comes before the court Defendants' Motions to Dismiss Plaintiffs' First Amended Petition, Plaintiffs' Responses in opposition, Defendants' Replies to Plaintiff's Responses, *Plaintiff's Notice of Supplemental Authority* filed November 10, 2021, *Plaintiffs' Supplemental Memorandum of Law Addressing State of Oklahoma v. Johnson & Johnson* filed January 31, 2022, *Joint Response of All Defendants to Plaintiffs' Supplemental*

Memorandum of Law filed March 7, 2022, and *Plaintiffs' Reply Memorandum of Law Addressing State of Oklahoma v. Johnson & Johnson* filed April 6, 2022. On September 28, 2021 the matter came on for hearing on the motions to dismiss, objections in response and replies. On May 2, 2022 the matter came on for further hearing pursuant to Plaintiff's Notice of Supplemental Authority and the supplemental memorandums of law. On May 2, 2022 the court heard the argument and statements of counsel regarding the Oklahoma Supreme Court's decision in *State of Oklahoma v. Johnson & Johnson, et al*, 2021 OK 54, issued on November 9, 2021 (the "*J&J Decision*"). Upon review of the record, considering the pleadings and briefs filed in the matter, and considering the arguments and statements of counsel the court hereby finds and orders as set forth below.

On May 2, 2022 pertaining to Claim #2 Unjust Enrichment against Defendants City of Tulsa, Tulsa Development Authority, Tulsa Metropolitan Area Planning Commission, Board of County Commissioners for Tulsa County and Tulsa Regional Chamber, Plaintiffs' counsel stipulated there were certain defects in pleading. Counsel for Plaintiffs and counsel for said Defendants stipulated the defects could be cured and jointly requested dismissal without prejudice with leave to amend. The court finds and orders Plaintiffs' claim #2 shall be dismissed without prejudice with leave granted to file a second amended petition. The court further finds the Oklahoma Pleading Code, 12 O.S. §2008 E.2., allows Plaintiffs to state their claims for unjust enrichment and/or in the alternative statutory claims pursuant to 12 O.S. §1448-§1449 (commonly referred to as unauthorized use of name and likeness). Therefore, Defendants' motion to dismiss the alternate claims with prejudice are denied.

As to the public nuisance claims, the court first considers the threshold issue of Plaintiffs' standing to sue. Each of the eleven (11) named Plaintiffs must establish legal standing for the public nuisance claims.

Oklahoma's statutes pertaining to nuisances are set forth in 50 O.S. §§1 – 21.

The court finds the named Plaintiff, “Historic Vernon A.M.E. Church, Inc.”, lacks standing to sue in this matter. It is undisputed that this church entity did not exist until 2019. The Church claims injuries derived from the unknown members of a prior entity. The entity owning the property of the Church at the time of the Massacre in 1921 was an unincorporated association. Thereafter, in 1962 an entity other than Plaintiff was incorporated. See *Tulsa Regional Chamber's Amended Motion to Dismiss and Brief in Support* filed March 12, 2021, page 6-7. Plaintiffs Laurel Stradford, Ellouise Cochrane-Price, Tedra Williams, Don M. Adams, Don W. Adams, Stephen Williams, and The Tulsa African Ancestral Society, an unincorporated association, all claim injuries as descendants of Massacre victims. Whether a plaintiff possesses legal standing turns on whether each has a sufficient interest in an otherwise justiciable controversy to obtain judicial resolution of that controversy. *Indep. School Dist. No. 5 of Tulsa v. Spry*, 2012 OK 98, ¶2; *Estate of Doan v. First Nat'l Bank and Trust Co. of Tulsa*, 1986 OK 15, ¶7; *Indep. School Dist. No. 9 of Tulsa County v. Glass*, 1982 OK 2, ¶8. Standing comprises at least three elements: 1) does each Plaintiff possess a legally protected interest that was injured in fact, *i.e.*, an injury that is actual, concrete, and not merely conjectural; 2) is there a causal nexus between the injury and the complained of conduct; and 3) is there a likelihood – as opposed to mere speculation – a favorable court decision will redress the injury? *J.P. Morgan Chase Bank, Nat'l Assoc. v. Eldridge*, 2012 OK 24, ¶7. The court finds these eight (8) Plaintiffs have failed to establish standing to sue on claims of public nuisance in this case. In so finding, the court adopts the reasoning and citation to authority set forth in the *Tulsa Regional Chamber's Amended Motion to Dismiss and Brief in Support*, filed March 12, 2021, pages 1-16 (Legal Standards for Standing to Sue, Proposition 1).

As to the public nuisance claims, the court similarly considers the threshold issue of whether each of the Tulsa Race Massacre Survivor Plaintiffs have established standing to sue: Lessie Benningfield Randle, Viola Fletcher and Hughes Van Ellis, Sr. “It is not necessary to decide whether a litigant will ultimately be entitled to any relief in order to hold that the party has standing to seek judicial redress for his/her grievance,” but the relief being sought must, if granted, be capable of remedying the injury. *Glass*, 1982 OK 2, ¶10.

Oklahoma law provides: “A private person may maintain an action for a public nuisance if it is specially injurious to himself, but not otherwise.” 50 O.S. §10. The court finds Plaintiffs Randle, Fletcher and Van Ellis, Sr. meet this statutory criteria, at least to withstand a motion to dismiss under Oklahoma’s liberal pleading code (discussed with more particularity below). However, this criteria is not the only element to be considered in the determination of whether each of these three (3) Plaintiffs have justiciable public nuisance claims as pled in this case.

As 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 powers provided by the Constitution of the State of Oklahoma. See Okla. Const. Art. IV, §1; Okla. Const. Art. V, §1. Further, the court finds these claims present political questions and therefore dismissal is proper. See *Oklahoma Educ. Ass’n v. State ex rel. Oklahoma Legislature*, 2007 OK 30, ¶¶ 18-19; *In Re De-Annexation of Certain Real Prop. from City of Seminole*, 2004 OK 60, ¶14. Therefore, the court dismisses with prejudice the public nuisance claims described in Plaintiff’s Amended Petition seeking relief for all alleged unreasonable, unwarranted, and unlawful acts or omissions of defendants in the decades subsequent to the 1921 Race Massacre, including but not limited to policing, urban planning, urban renewal, and public schools. Further, in dismissal of these claims

the court relies upon the Oklahoma Supreme Court's decision in *State of Oklahoma v. Johnson & Johnson, et al*, 2021 OK 54.

In the *J&J Decision*, the Oklahoma Supreme Court stated:

“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 statutes 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; the branches that are more capable than courts to balance the competing interests at play in societal problems. Further, the district court stepping into the shoes of the Legislature by creating and funding government programs designed to address social and health issues goes too far. This court defers policy-making to the legislative and executive branches and rejects the unprecedented expansion of public nuisance law.” See *State of Oklahoma v. Johnson & Johnson, et al*, 2021 OK 54, ¶39.

Thus, based on the above findings and orders of the court, the remaining claims are the public nuisance claims from the 1921 Tulsa Race Massacre of Plaintiffs Lessie Benningfield Randle, Viola Fletcher and Hughes Van Ellis, Sr. As to these claims, the court dismisses with prejudice defendants Tulsa Development Authority and Tulsa Metropolitan Area Planning Commission as neither of these two public bodies existed in 1921.

On May 2, 2022, Defendants moved to dismiss these public nuisance claims pursuant to 12 O.S. §2012 B.6. for failure to state a claim upon which relief can be granted on the grounds that the specifically pled abatement remedies are not cognizable under Oklahoma law because the remedies would require the court to engage in the management of public policy matters. See generally Plaintiffs' requested remedies, *Plaintiffs' Amended Petition*, pages 67-73.

On May 2, 2022, pertaining to whether Plaintiffs amended petition should be dismissed pursuant to the *J&J Decision* of the Supreme Court of Oklahoma, counsel for Plaintiffs represented

to the court that the abatement remedies were preliminary in nature and any defect in pleading can be cured by Plaintiffs if granted leave to amend.

Counsel for Plaintiffs and Defendants dispute whether a general statement requesting the remedy of abatement is sufficient to state a claim for public nuisance. Oklahoma statute 50 O.S. §8 provides three remedies against a public nuisance: “1. Indictment or information, or; 2. A civil action, or; 3. Abatement.”

When considering a motion to dismiss for failure to state a claim, the court is **required** to take as true all of the factual allegations together with all reasonable inferences that can be drawn from them and to examine the controlling law. *Ladra v. New Dominion, LLC*, 2015 OK 53, ¶8 (emphasis added). Courts view motions to dismiss with disfavor under Oklahoma’s liberal pleading standard. See *Ladra*, 2015 OK 53, ¶8. “A pleading must not be dismissed for failure to state a legally cognizable claim unless the allegations indicate beyond any doubt that the litigant can prove no set of facts which would entitle him to relief.” *Frazier v. Bryan Memorial Hosp. Authority*, 1989 OK 73, ¶13.

For the reasons set forth above, the court finds defendants’ motions to dismiss should be granted for failure to state a cognizable abatement remedy. This court declines to engage in the management of public policy matters that should be dealt with by the legislative and executive branches. See *J&J Decision*, 2021 OK 54, ¶39.

However, applying Oklahoma’s liberal pleading standard, the court cannot find beyond any doubt that Plaintiffs Randle, Fletcher and Van Ellis, Sr. can prove no set of facts which would entitle Plaintiffs to relief on their public nuisance claims. See *J&J Decision*, 2021 OK 54, ¶18 & fn 13.

To the extent that there may be a legally cognizable abatement remedy the court grants leave to amend the petition pursuant to 12 O.S. §2012 G. The court takes judicial notice of the findings of the Oklahoma Legislature pursuant to the final report of *The 1921 Tulsa Race Riot Commission* codified in Title 74 O.S. §8000.1, as cited in *Plaintiff's Amended Petition* filed February 2, 2021, page 3, fn 3. A copy of the findings of the Oklahoma Legislature is attached hereto as Exhibit A and incorporated herein. Also, the court takes judicial notice of Oklahoma legislation as cited in *Tulsa Regional Chamber's Amended General Motion to Dismiss As to All Plaintiffs and Brief in Support*, filed March 12, 2021, pages 5-6. The court attaches hereto as Exhibit B and incorporates herein excerpts of Oklahoma legislation which the court finds directly applicable to the issues raised in *Plaintiffs Amended Petition*.

WHEREFORE, THE COURT HEREBY FINDS AND ORDERS Defendants' motions to dismiss are granted in part and denied in part as more specifically set forth hereinabove. Plaintiffs shall be granted leave to file a second amended petition no later than September 2, 2022.

IT IS SO ORDERED on this 3rd day of August, 2022.


DISTRICT JUDGE

Oklahoma Statutes Citationized

Title 74. State Government

Chapter 83A - Findings of The 1921 Tulsa Race Riot Commission

Section 8000.1 - 1921 Tulsa Race Riots

The Oklahoma Legislature hereby finds, pursuant to the final report of The 1921 Tulsa Race Riot Commission regarding the 1921 Tulsa Race Riot of May 31-June 1, 1921, and the riot's place in the history of race relations in Oklahoma:

1. The root causes of the Tulsa Race Riot reside deep in the history of race relations in Oklahoma and Tulsa which included the enactment of Jim Crow laws, acts of racial violence (not the least of which was the 23 lynchings of African-Americans versus only one white from 1911) against African-Americans in Oklahoma, and other actions that had the effect of "putting African-Americans in Oklahoma in their place" and to prove to African-Americans that the forces supportive of segregation possessed the power to "push down, push out, and push under" African-Americans in Oklahoma;

2. Official reports and accounts of the time that viewed the Tulsa Race Riot as a "Negro uprising" were incorrect. Given the history of racial violence against African-Americans in Oklahoma, including numerous lynchings by white mobs, and the breakdown of the rule of law in Tulsa on May 31-June 1, 1921, it is understandable that African-Americans believe they needed to assist Tulsa police in protecting Dick Rowland, an African-American accused of attempting to rape a white woman, against an assembled white mob. The documentation assembled by The 1921 Tulsa Race Riot Commission provides strong evidence that some local municipal and county officials failed to take actions to calm or contain the situation once violence erupted and, in some cases, became participants in the subsequent violence which took place on May 31 and June 1, 1921, and even deputized and armed many whites who were part of a mob that killed, looted, and burned down the Greenwood area;

3. The staggering cost of the Tulsa Race Riot included the deaths of an estimated 100 to 300 persons, the vast majority of whom were African-Americans, the destruction of 1,256 homes, virtually every school, church and business, and a library and hospital in the Greenwood area, and the loss of personal property caused by rampant looting by white rioters. The Tulsa Race Riot Commission estimates that the property costs in the Greenwood district was approximately \$2 million in 1921 dollars or \$16,752,600 in 1999 dollars. Nevertheless, there were no convictions for any of the violent acts against African-Americans or any insurance payments to African-American property owners who lost their homes or personal property as a result of the Tulsa Race Riot. Moreover, local officials attempted to block the rebuilding of the Greenwood community by amending the Tulsa building code to require the use of fire-proof material in rebuilding the area thereby making the costs prohibitively expensive;

EXHIBIT

A

4. Perhaps the most repugnant fact regarding the history of the 1921 Tulsa Race Riot is that it was virtually forgotten, with the notable exception of those who witnessed it on both sides, for seventy-five (75) years. This "conspiracy of silence" served the dominant interests of the state during that period which found the riot a "public relations nightmare" that was "best to be forgotten, something to be swept wellbeneath history's carpet" for a community which attempted to attract new businesses and settlers;

5. The work of many individual Oklahomans and now of The 1921 Tulsa Race Riot Commission has forever ended the "conspiracy of silence" surrounding the events in Tulsa of May 31-June 1, 1921, and their aftermath. The Commission has subsequently turned the responsibility for how the State of Oklahoma will respond to the historical record to the 48th Oklahoma Legislature; and

6. The 48th Oklahoma Legislature in enacting the 1921 Tulsa Race Riot Reconciliation Act of 2001 concurs with the conclusion of The 1921 Tulsa Race Riot Commission that the reason for responding in the manner provided by this act is not primarily based on the present strictly legal culpability of the State of Oklahoma or its citizens. Instead, this response recognizes that there were moral responsibilities at the time of the riot which were ignored and has been ignored ever since rather than confront the realities of an Oklahoma history of race relations that allowed one race to "put down" another race. Therefore, it is the intention of the Oklahoma Legislature in enacting the 1921 Tulsa Race Riot Reconciliation Act of 2001 to freely acknowledge its moral responsibility on behalf of the state of Oklahoma and its citizens that no race of citizens in Oklahoma has the right or power to subordinate another race today or ever again.

Historical Data

Laws 2001, HB 1178, c. 315, § 2, emerg. eff. July 1, 2001.

EXHIBIT B

The Oklahoma Legislature finds: “The work of many individual Oklahomans and now of The 1921 Tulsa Race Riot Commission has forever ended the “conspiracy of silence” surrounding the events in Tulsa of May 31-June 1, 1921, and their aftermath. The Commission has subsequently turned the responsibility for how the State of Oklahoma will respond to the historical record to the 48th Oklahoma Legislature.” See Title 74 O.S. §8000.1, paragraph 5. The findings and intent of the Oklahoma Legislature were codified pursuant to the *1921 Tulsa Race Riot Reconciliation Act of 2001* enacted by the 2001 Oklahoma State Legislature, House Bill No. 1178, c. 315, Section 2, effective July 1, 2001. The *1921 Tulsa Race Riot Reconciliation Act of 2001* also enacted the *Greenwood Area Redevelopment Authority Act* and the *Tulsa Reconciliation Education and Scholarship Act*. [For historical legislation creating *The 1921 Tulsa Race Riot Commission* and its statutory duties See Also 74 O.S. §8201 and §8202, both repealed by laws 2001, HB 1022, c. 277, §16, emerg. eff. July 1, 2001.]

The creation, powers and duties of the *Tulsa Reconciliation Education and Scholarship Program* are set forth in the Title 70 O.S. §§2620-2626. “The purpose of the program is to provide a scholarship award to residents of the Tulsa School District, which was greatly impacted both socially and economically by the civil unrest that occurred in the City of Tulsa during 1921.” See 70 O.S. §2621

The creation, powers and duties of the *Greenwood Area Redevelopment Authority* are set forth in Title 74 O.S. §§8221 – 8226. “The Authority is created in order to provide a method to facilitate the redevelopment of the Greenwood Area.” Title 74 O.S. §8223.B. Upon examination of the *Greenwood Area Redevelopment Authority Act*, the Act mandates development of a long term plan and assessment of numerous conditions, including but not limited to:

“population, per capita income, employment or unemployment rates, workforce characteristics, assessed value, existing land use regulations or restrictions, available utilities such as water, electricity, solid and other waste disposal and access to telecommunication services, including but not limited to conventional or fiber optic cable, identification of persons or entities doing business within the Greenwood Area, identification of existing infrastructure such as water, sewer, roads, and other public sector assets which are material to business location, business investment and business reinvestment decisions, traffic volume and characteristics, any existing economic development incentives applicable to persons or entities within the Greenwood Area, *including but not limited to areas which qualify as enterprise zones pursuant to Section 690.1 et seq. of Title 62 of the Oklahoma Statutes and any existing or proposed increment or incentive districts pursuant to the Local Development Act, Section 850 et seq. of Title 62 of the Oklahoma Statutes*, and such other demographic data or characteristics as the Authority or its consultants or advisors consider to be relevant to the mission and responsibilities imposed upon the Authority pursuant to this section;” See 74 O.S. §8225 B. 1. (emphasis added).

The Authority's plan shall include in pertinent part:

“Specific recommendations regarding the redevelopment and reinvestment of capital within the Greenwood Area, including, but not limited to recommendations regarding the uses of real property most conducive to the redevelopment and reinvestment of the Greenwood Area, whether for residential dwellings, wholesale or retail business activity, commercial and industrial activity, governmental uses, community assets such as parks and similar development, and such other uses of the Greenwood Area real property most conducive to a sustained and viable redevelopment and reinvestment resulting in a productive use of the real property and improvements located within the Greenwood Area”; 74 O.S. §8225 B.2.

The Authority's plan shall include in pertinent part:

“A specific list of resources that might be utilized in the redevelopment and reinvestment effort, including, but not limited to:

- a. federal grants or loans or programs offered through any federal agency.....,
- b. state programs which would have the effect of stimulating redevelopment and reinvestment in the Greenwood Area,
- c. local programs... which would have the effect of stimulating redevelopment and reinvestment in the Greenwood Area, and
- d. any program or resource available through private not-for-profit organizations that would be compatible with the goals and objectives of the Authority with respect to its duties for the development of the long-term plan and the identification of specific actions which could be taken to stimulate redevelopment and reinvestment in the Greenwood Area;” 74 O.S. §8225 B.4.

In reference to the Act, the court emphasized the additional statutory provisions of the *Oklahoma Enterprise Zone Act* and the *Local Development Act*. The *Local Development Act* specifically provides, “In addition to any other powers conferred by law, a city, town or county may exercise any powers necessary...and do all things necessary or convenient to carry out the powers granted in this act...”62 O.S. §854.

CERTIFICATE OF MAILING

I, Don Newberry, Court Clerk of Tulsa County, hereby certify that on the 4 day of August 2022, a true and correct copy of the foregoing Order was mailed to each of the persons listed below and a true and correct copy of the foregoing Order was filed in each of the below foregoing cases.

JOHN TUCKER
COLIN TUCKER
KERRY LEWIS
AUSTIN JACKSON
P O BOX 21100
TULSA, OK 74121-1100

DAVID O'MEILIA
GERALD BENDER
KRISTINA GRAY
T MICHELLE MCGREW
R LAWSON VAUGHN
STEPHEN WANGSGARD
175 E. SECOND ST, STE 685
TULSA, OK 74103

JOT HARTLEY
TRAVIS HARTLEY
177 W DELAWARE AVE
P O BOX 553
VINITA, OK 74301

KEITH WILKES
320 S BOSTON AVE, STE 200
TULSA, OK 74103-3708

KEVIN MCCLURE
ASST ATTY GEN
313 NE 21ST ST
OKLAHOMA CITY, OK 73105

DEMARIO SOLOMON-SIMMONS
KYMBERLI HECKENKEMPER
601 S BOULDER AVE, STE 600
TULSA, OK 74119

J SPENCER BRYAN
STEVEN TERRILL
3015 E SKELLY DR, STE 400
TULSA, OK 74105

ERIC MILLER
919 ALBANY ST, BURNS 307
LOS ANGELES, CA 90015


LASHANDRA PEOPLES-JOHNSON
CORDAL CEPHAS
3939 S HARVARD AVE, STE 238
TULSA, OK 74135

MAYNARD HENRY SR
10332 MAIN ST, STE 308
FAIRFAX, VA 22030

MICHAEL SWARTZ
RANDALL ADAMS
ANNALISE BENDER-BROWN
ANGELA GARCIA
VICTORIA HARRIS
EKENEDILICHUKWU UKABIALA
AMANDA BARRETT BARKIN
SARA ELENA SOLFANELLI
919 THIRD AVE
NEW YORK, NY 10022

MCKENZIE HAYNES
901 FIFTEENTH ST, NW, STE 800
WASHINGTON, DC 20005

DON NEWBERRY, COURT CLERK



Deputy Clerk