



DORITY v. YODER

2023 OK CIV APP 20

Case Number: 120367

Decided: 07/29/2022

Mandate Issued: 05/18/2023

DIVISION III



THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA, DIVISION III

Cite as: 2023 OK CIV APP 20, ___ P.3d ___

KIAH R. DORITY, Plaintiff/Appellant,

v.

RYAN C. YODER, individually; and BIG FIVE COMMUNITY SERVICES INC., a domestic not for profit corporation,
Defendants/Appellees.

APPEAL FROM THE DISTRICT COURT OF
POTTAWATOMIE COUNTY, OKLAHOMA

HONORABLE JOHN G. CANAVAN, TRIAL JUDGE

AFFRIMED IN PART, REVERSED IN PART, AND REMANDED

Nathan D. Rex, Greg S. Keogh, PARRISH DEVAUGHN, PLLC, Oklahoma City, Oklahoma, for Plaintiff/Appellant,

Drew A. Lagow, ROBERSON, KOLKER, COOPER, P.C., Edmond, Oklahoma, for Defendants/Appellees.

BARBARA G. SWINTON, JUDGE:

¶1 Plaintiff/Appellant Kiah R. Dority appeals from an order dismissing with prejudice her negligence petition against Defendants/Appellees Ryan C. Yoder and Big Five Community Services, Inc. (Big Five). Dority alleged she was injured in a motor vehicle accident involving Yoder while he was in the scope of his employment with Big Five. In its motion to dismiss, Big Five asserted it is a political subdivision, Dority failed to give timely notice of her tort claim as required by the Governmental Tort Claims Act (GTCA or the Act), and therefore this action is barred. Dority argued waiver and estoppel excused her failure to give Big Five proper notice of her claim because she had no notice that Big Five was a political subdivision and because Big Five's insurance agent told her she had two years to file suit. It is undisputed Yoder was acting in the course of employment for Big Five and the trial court therefore correctly dismissed Dority's claims against him. See 51 O.S.2021 §153(C). Our *de novo* review of the record shows Big Five has not presented evidence that it was a designated community action agency at the time of the alleged injury and Dority's affidavit indicated Big Five's agent lulled Dority into failing to give timely notice of her tort claim. Accordingly, questions of fact remain as to whether Big Five is estopped from challenging liability on that basis. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

¶2 In her November 12, 2021 Petition, Dority asserted she was injured December 11, 2019 due to Yoder's reckless and negligent operation of a motor vehicle. Dority alleged Big Five was liable because the collision occurred while Yoder was driving in the course and scope of his employment with Big Five.

¶3 Big Five responded with a motion to dismiss, asserting that it is a political subdivision under the GTCA, as evidenced by an attached letter from the Oklahoma Department of Commerce, and that Dority did not provide timely written notice of her claim to Big Five in accordance with the Act. Big Five argued Dority's suit was therefore barred as a matter of law.

¶4 Dority countered that Big Five was estopped from challenging her notice of claim. Dority denied Big Five was a political subdivision under the GTCA but urged that if it was, that fact was not readily apparent. Dority alleged that Yoder informed her that he worked for a "transport company" insured by Nationwide Insurance Company (Nationwide). Dority asserted Yoder did not tell her the name of his employer and Big Five is not named on the police report. Dority asserted she called Nationwide and claims representative Jon Wagner informed her she had two years from the date of the accident to bring a claim against both Yoder and Big Five. Dority averred that based on these representations, she did not acquire counsel until eighteen months after the accident. Dority attached her affidavit as well as four letters from Wagner to Dority's counsel, written between July and September 2021, in which Wagner asked for additional documents Nationwide needed to evaluate Dority's claim. Big Five filed a reply, to which it attached a September 11, 2020 letter from Nationwide to Dority indicating receipt of her claim for a loss occurring December 11, 2019 and asking for additional information.

¶5 Following a hearing, the trial court granted the motion to dismiss with prejudice, finding that Big Five is a political subdivision as defined within the GTCA, Dority failed to give Big Five the required pre-suit notice, and therefore the court lacked jurisdiction. Dority appeals from this order.¹

STANDARD OF REVIEW

¶6 While both the motion to dismiss and response included evidentiary materials, because Big Five sought dismissal for lack of jurisdiction, the motion to dismiss was not converted into one for summary judgment. *Ford v. Tulsa Public Schools*, 2017 OK CIV APP 55, ¶8, 405 P.3d 142. An order dismissing a petition is subject to *de novo* review. *Id.* In our *de novo* review of an order granting a motion to dismiss, we "must take as true all of the challenged pleading's allegations, together with all reasonable inferences that can be drawn from them Motions to dismiss are generally disfavored" *Wilson v. State ex rel. State Election Bd.*, 2012 OK 2, ¶4, 270 P.3d 155.

ANALYSIS

¶7 In the GTCA the State adopted sovereign immunity from liability for torts but also waived that immunity for certain torts committed by the State of Oklahoma and its political subdivisions. 51 O.S.2021 §152.1. "[C]ompliance with the written notice of claim and denial of claim provisions in §§ 156 and 157 are prerequisites to the state's consent to be sued and to the exercise of judicial power to remedy the alleged tortious wrong by the government." *Shanbour v. Hollingsworth*, 1996 OK 67, ¶7, 918 P.2d 73, citing *Cruse v. Bd. of County Comm'rs of Atoka County*, 1995 OK 143, 910 P.2d 998.

¶8 Under the GTCA, a "claimant is generally required to give notice and file a formal action within the prescribed statutory time period." *Watkins v. Central State Griffin Memorial Hospital*, 2016 OK 71, ¶21, 377 P.3d 124. Claims against the state or political subdivision are to be presented within one (1) year of the date the loss occurs. 51 O.S.2021 §156(B). "[A] claim...shall be forever barred unless notice thereof is presented within one (1) year after the loss occurs." *Id.* The Act directs that notice of a claim against a political subdivision "shall be in writing and filed with the office of the clerk of the governing body." 51 O.S.2021 §156(D). The record shows no dispute that Dority did not give written notice to the clerk of the governing body of Big Five within the statutory time period, but the record shows Dority gave notice to Big Five's insurer within one year. Dority argued waiver and estoppel excused her failure to follow the statutory notice requirements.

¶9 In opposing the motion to dismiss, Dority first disputed that Big Five is a political subdivision as defined in the Act. She asserted Big Five's status was not apparent and Dority was unaware it was subject to the GTCA. The Act's lengthy definition of political subdivisions includes "any community action agency established pursuant to Sections 5035 through 5040 of Title 74 of the Oklahoma Statutes." 51 O.S.2021 §152(11)(n). "A community action agency shall be defined as a public or private nonprofit agency, designated by the Oklahoma Department of Commerce." 74 O.S.2021 §5036. As noted above, Big Five attached a January 13, 2022 letter from the Oklahoma Department of Commerce (ODOC) affirming Big Five "is a community action agency established pursuant to Sections 5035 through 5040 of Title 74 of the Oklahoma Statutes."

¶10 In *Spane v. Central Oklahoma Community Action Agency*, 2015 OK CIV APP 29, 346 P.3d 437, another division of this court considered an argument that notice of tort claim was not required because a community action agency was not officially designated by ODOC. In *Spane*, a community action agency's former deputy director sued the agency for retaliatory discharge. The plaintiff did not submit a notice of tort claim and the agency sought summary judgment on that basis. The plaintiff urged that a notice of claim was not required because the agency had not been formally designated as a community action agency by ODOC and was therefore not a political subdivision under the GTCA. The trial court granted summary judgment to the agency. On appeal, the court noted there is no prescribed procedure for designating a community action agency under 74 O.S.2011 §5036. The court recognized that the agency had attached an affidavit from ODOC stating the agency had been designated as a community action agency since 1968, as well as additional exhibits supporting its status as a political subdivision. The appellate court concluded the agency "presented ample evidence in support of its assertions that it is a properly established community action agency in Oklahoma; that it has been established as a community action agency in Oklahoma for decades; and that designation as a community action agency does not hinge on the existence of a hypothetical certificate of designation." *Id.* at ¶18. The court found no dispute of fact that the agency was a political subdivision entitled to a timely notice of tort claim.

¶11 The record in this case includes a letter from ODOC stating Big Five is a community action agency. However, the letter does not indicate when Big Five was designated or that it was so designated at the time of the alleged injury. Big Five also attached a copy of the Oklahoma Secretary of State's "Entity Summary Information" showing Big Five was incorporated in 1971, but that document indicates only that it is a domestic not for profit corporation. In *Spane*, in addition to the evidentiary materials showing the defendant agency had been designated by ODOC for decades, the plaintiff was necessarily familiar with the agency as its employee. In this case, Dority has averred in her affidavit that Yoder told her his employer was a transport company. Nothing in the record indicates Dority had or should have had notice Big Five was a designated community action agency subject to the GTCA.²

¶12 Dority next asserted waiver or estoppel barred Big Five from challenging the notice it received by misleading her about the time in which she had to file suit and effectively misleading her about Big Five's designation as a political subdivision. The Oklahoma Supreme Court has held that a government body may be equitably estopped from denying liability under the Act. See *McWilliams v. Bd. Of County Comm'rs*, 2011 OK 103, 268 P.3d 79. In that case, one county failed to inform the plaintiff that another county was liable for his injury, thereby lulling the plaintiff into failing to give timely notice to the other county. *Id.* at ¶20. The Court "recognize[d] that [while] a private defendant is under no obligation to voluntarily reveal other potential defendants in the preliminary stages of an action, a governmental subdivision may be obligated to do so under certain circumstances where...equity demands it." *Id.* at ¶22. *McWilliams* continued a line of authority that substantial compliance with the notice of claim requirements may be sufficient, noting:

In enacting the GTCA, it is clear that the Legislature intended not only to make the political subdivisions aware of an impending claim, but also provide the political subdivision with an opportunity to promptly investigate, assess any fiscal liability, and explore settlement options prior to a plaintiff commencing a lawsuit. . . . Rather than rely on a hyper-technical application of the Act, this Court will consider the purpose behind the GTCA and apply a more reasoned approach sounding in equity.

Id. at ¶24 (citation omitted).

¶13 The Oklahoma Supreme Court has more recently held estoppel may apply to bar a defendant from asserting failure to timely file a notice of tort claim in *Watkins*, *supra*. In that case, evidence showed that state employees provided false information to the plaintiff about her ward's treatment at a State hospital, which prevented the plaintiff from learning the ward had been assaulted by a nurse. 2016 OK 71 at ¶6. The court noted the ward had filed a complaint while in the hospital, but the guardian did not file suit until seeing the ward's medical records. The court noted the ward's contemporaneous complaint furthered two of the State interests served by the GTCA notice requirement-it allowed the State to investigate and prevent further harm. *Id.* at ¶22. This statement suggests substantial compliance with the notice requirements may be sufficient in certain cases. The court concluded that allegations of misleading statements which preclude one from timely filing a complaint may be sufficient for estoppel to bar a challenge to the timeliness of the complaint. *Id.* at 23. The court found that the record contained sufficient evidence to raise the question of whether estoppel should apply, which is for the trier of fact to determine. *Id.* at ¶27.

¶14 In *Alburtus v. Independent School District No. 1 of Tulsa County*, 2020 OK CIV APP 39, 469 P.3d 742 another division of this court considered whether a school's insurance agent could effectively receive notice of a tort claim and whether the school was estopped from challenging that notice. In *Alburtus*, following a collision with a school bus, the plaintiff contacted the school, which told him to contact its insurance agent. *Id.* at ¶15. The insurance agent communicated with the plaintiff and asked for additional information. The agent did not inform the plaintiff he needed to submit notice to anyone else. After the plaintiff filed suit, the school filed a motion to dismiss, asserting the notice was not sufficient. *Id.* at ¶13. The court noted several cases holding that a political subdivision is estopped from challenging a notice of tort claim where its agent's statements or actions lulled a plaintiff into failing to properly file a notice of tort claim. *Id.* at ¶¶14-16.

¶15 As noted above, in reviewing an order dismissing a petition, we must take as true the facts alleged by Dority. In this case, the record shows disputes of fact as to whether Big Five is estopped from challenging Dority's notice of claim given to Big Five's insurer. The record indicates Yoder, while acting in the scope of employment, led Dority to believe his employer was a transport company. The record also shows Dority contacted Big Five's insurance company within one year. Dority has averred the agent told her she had two years in which to file suit. The record also shows the adjuster continued to ask for additional information from Dority, suggesting it was considering her claim. Additionally, Dority has averred she did not have notice that Big Five is a political subdivision as defined under the GTCA. Indeed, given the necessity of a letter, dated after Dority's petition, from the Oklahoma Department of Commerce to show Big Five is a designated community action agency, Big Five's status as a political subdivision is not readily apparent to a layperson. And it is unclear from the letter whether Big Five was a political subdivision at the time of the injury.

CONCLUSION

¶16 Based on our review of the record and the applicable authority, the trial court correctly dismissed Dority's claims against Yoder and we affirm that part of the order. Because we find disputed issues of fact on waiver and estoppel, we reverse the dismissal as to Big Five and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

MITCHELL, V.C.J., and PRINCE, P.J., concur.

FOOTNOTES

BARBARA G. SWINTON, JUDGE:

¹ The parties do not dispute that Yoder was acting within the scope of his employment when the accident occurred. Under the GTCA, "[i]n no instance shall an employee of the state or political subdivision acting within the scope of his employment be named as defendant..." 51 O.S.2021 §153(C).

² Dority has not argued the discovery rule tolled the time to give notice of her tort claim. In *Crawford v. OSU Medical Trust*, 2022 OK 25, 510 P.3d 824, the plaintiffs argued they did not discover that the doctor who treated their child at a private hospital was in fact employed by a public hospital until months after the alleged negligence and that such fact tolled the time in which to give notice. In *Crawford*, the Oklahoma Supreme Court found that the discovery rule applied to GTCA claims, but only as to the discovery of an injury, not discovery of the identity of the physician's employer. The court there expressly limited its analysis to the discovery rule, noting the plaintiffs had failed to assert estoppel until their reply brief and the issue was therefore waived. *Id.* at n.1. Accordingly, *Crawford* is not instructive here, where Dority asserted estoppel in response to Big Five's motion to dismiss.

Citationizer[®] Summary of Documents Citing This Document

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None Found.

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Oklahoma Court of Civil Appeals Cases

Cite	Name	Level
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Cite Name**Level**

<u>2015 OK CIV APP 29, 346 P.3d 437,</u>	<u>SPANE v. CENTRAL OKLAHOMA COMMUNITY ACTION AGENCY</u>	Discussed
<u>2017 OK CIV APP 55, 405 P.3d 142,</u>	<u>FORD v. TULSA PUBLIC SCHOOLS</u>	Discussed
<u>2020 OK CIV APP 39, 469 P.3d 742,</u>	<u>ALBURTUS v. INDEPENDENT SCHOOL DISTRICT No. 1 OF TULSA COUNTY</u>	Discussed

Oklahoma Supreme Court Cases

Cite	Name	Level
<u>1995 OK 143, 910 P.2d 998, 66 OBJ 4005,</u>	<u>Cruse v. Board of County Commissioners of Atoka County</u>	Discussed
<u>1996 OK 67, 918 P.2d 73, 67 OBJ 1844,</u>	<u>Shanbour v. Hollingsworth</u>	Discussed
<u>2011 OK 103, 268 P.3d 79,</u>	<u>MCWILLIAMS v. BOARD OF COUNTY COMMISSIONERS OF COUNTY OF COMANCHE</u>	Discussed
<u>2012 OK 2, 270 P.3d 155,</u>	<u>WILSON v. STATE ex rel. STATE ELECTION BOARD</u>	Discussed
<u>2016 OK 71, 377 P.3d 124,</u>	<u>WATKINS v. CENTRAL STATE GRIFFIN MEMORIAL HOSPITAL</u>	Discussed at Length
<u>2022 OK 25, 510 P.3d 824,</u>	<u>CRAWFORD v. OSU MEDICAL TRUST</u>	Discussed

Title 51. Officers

Cite	Name	Level
<u>51 O.S. 156,</u>	<u>Claims - Petition - Limitation of Actions - Notice - Wrongful Death</u>	Discussed
<u>51 O.S. 152,</u>	<u>Definitions</u>	Cited
<u>51 O.S. 152.1,</u>	<u>Adoption of Doctrine of Sovereign Immunity</u>	Cited
<u>51 O.S. 153,</u>	<u>Liability - Scope - Exemption</u>	Discussed

Title 74. State Government

Cite	Name	Level
<u>74 O.S. 5036,</u>	<u>Community Action Agency - Right of Department of Commerce to Evaluate Service Areas and Community Action Agencies</u>	Discussed