



**ORIGINAL**

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA  
COURT OF CIVIL APPEALS  
STATE OF OKLAHOMA

DIVISION II

APR 14 2022

BILLY GENE MARSHALL,

Plaintiff/Appellant,

vs.

G. SMITH,

Defendant/Appellee.

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JOHN D. HADDEN  
CLERK

Case No. 119,227

APPEAL FROM THE DISTRICT COURT OF  
PITTSBURG COUNTY, OKLAHOMA

HONORABLE TIM MILLS, TRIAL JUDGE

**REVERSED AND REMANDED**

Billy Gene Marshall  
McAlester, Oklahoma

*Pro se*

Jessica A. Wilkes  
OKLAHOMA ATTORNEY GENERAL'S OFFICE  
Oklahoma City, Oklahoma

For Defendants/Appellees

OPINION BY GREGORY C. BLACKWELL, JUDGE:

Billy Gene Marshall appeals the district court's dismissal of his petition alleging employees of the Department of Corrections violated several of Marshall's constitutional rights "under color of law." On review we find that Mr. Marshall's petition does not name the state as a party, which is required here, and did not show whether he had properly filed a notice of claim consistent with the notice provisions of the Governmental Tort Claims Act (GTCA). We find that

the proper procedure here would have been to grant the motion to dismiss Marshall's claims with leave to amend to add the state as a party and show the dates of GTCA notice and the date of GTCA denial, if possible. As such, we reverse the dismissal and remand with instructions.

### **BACKGROUND**

The appeal arises from a series of incidents at the Oklahoma State penitentiary in McAlester. Corrections officers alleged that the plaintiff/inmate, Billy Gene Marshall, used the identification card of another inmate to purchase various commissary and canteen items that he was not allowed to purchase by regulation. Several items in Mr. Marshall's possession were confiscated, and he was subject to disciplinary action.

According to Mr. Marshall's petition, he filed several grievances through the internal grievance process regarding this incident. His detailed history of these grievances runs for some fifty pages in his petition. His original complaints deal with the conduct of staff performing the initial investigation and confiscation of the alleged contraband, including: arguments that it would have been impossible for Mr. Marshall, who is black, to use the identification card of a white inmate, as alleged; that there was no evidence that the items in his possession were improperly obtained; that officers had given false testimony as part of the investigation and violated several of Marshall's constitutional rights "under color of law"; that these actions were motivated by race; and that he was improperly punished in this matter. His later complaints concern the response to his initial grievance, including imposing a "grievance restriction" policy because of the

volume of his filings. The petition named ten employees of the correctional center as defendants.<sup>1</sup>

The trial court requested the DOC to submit a special report in this matter which it did in August 2020. The report recommended that no action was necessary. The defendants, represented by the Attorney General's office,<sup>2</sup> subsequently filed a motion to dismiss Marshall's petition. The motion argued that: (1) pursuant to the terms of the GTCA state employees acting within the scope of their employment, could not be named as individual defendants; (2) Marshall's petition failed to allege or support any claim that the involved individuals were acting outside the scope of their employment; (3) Marshall had no constitutional right to an administrative grievance process, and hence a grievance restriction could not offend his rights; (4) the procedures and actions used against Marshall did not violate constitutional due process; (5) Marshall's petition failed to allege that there had been disparate treatment for non-minority prisoners accused of the same offences; and (6) the defendants were entitled to qualified immunity.<sup>3</sup>

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<sup>1</sup> These include: canteen employee Earlene Hodgens; Warden Tommy Sharp; Warden's assistant Nanci Battles; corrections officers G. Smith, Lowery, Shipley, Marshall and Salibury; review officer Mark Knutson, and an individual named J. Watson.

<sup>2</sup> Title 51 O.S.Supp.2012, § 162(A), provides that the state shall "provide a defense for any employee ... when liability is sought for any violation of property rights or any rights, privileges, or immunities secured by the Constitution or laws of the United States when alleged to have been committed by the employee while acting within the scope of employment ...."

<sup>3</sup> Marshall did not designate the defendants' pleadings, and the defendants did not designate a record. We have taken judicial notice of these facts from the OSCN docket because the initial question here is jurisdictional, that is, whether GTCA notice was given prior to suit.

The district court granted the motion to dismiss for failure to exhaust administrative remedies, which was a defense not raised by the defendants. Marshall timely appealed.<sup>4</sup>

### **STANDARD OF REVIEW**

An order dismissing a case for failure to state a claim upon which relief can be granted is subject to *de novo* review. *Kristie Ho v. Tulsa Spine & Specialty Hospital, L.L.C.*, 2021 OK 68, ¶ 9, \_\_\_ P.3d \_\_\_. The purpose of a motion to dismiss is to test the law that governs the claim in litigation, not the underlying facts. 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 the plaintiff to relief. *Id.* ¶10.

### **ANALYSIS**

#### *“TORT AND CIVIL CLAIMS” and the GTCA*

The defendants’ first argument on appeal is that Marshall’s petition is defective as a matter of law because it fails to name the state as a party. Pursuant to the GTCA,

[s]uits instituted pursuant to the provisions of this act **shall name** as defendant the state or the political subdivision against which liability is sought to be established. In no instance shall an employee of the state or political subdivision acting within the scope of his employment be named as defendant with the exception that suits based on the conduct of resident physicians and interns shall be

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<sup>4</sup> The defendants did not file a response to Marshall’s appeal. This court, unable to determine conclusively from the record whether the assistant district attorney representing defendants had been served with the appellate petition in error, sent the Attorney General’s office notice of the appeal. The defendants responded claiming a lack of service. They asked this court to dismiss the appeal. As service appeared to be an undecided question of fact, we declined to dismiss. The defendants then replied to Marshall’s petition in error.

made against the individual consistent with the provisions of Title 12 of the Oklahoma Statutes.

51 O.S.2011, § 163(C) (emphasis added).

This statute clearly requires that the state *shall* be named as a party in “suits instituted pursuant to the provisions of this act.” It further appears to require, if an individual is named, an allegation that the employee acted outside the scope of employment. Section § 153(C) places the same requirements on tort claims that may originate *outside* the GTCA:

If an action is commenced alleging tort liability on the part of the state or a political subdivision of the state or an **employee of the state** or of a political subdivision of the state based on a provision of the Oklahoma Constitution or state law **other than The Governmental Tort Claims Act**, the action shall name as defendant the state or political subdivision against which liability is sought to be established. In no instance in any such action shall an employee of the state or of a political subdivision of the state acting within the scope of employment be named as defendant; provided, however, such person may be named as defendant under alternative allegations that such person did not act within the scope of employment.

*Id.* § 153(C) (emphasis added).

These statutes are clear that the individual defendants may be named under alternative allegations that they acted outside the scope of employment. It is also clear that, even if a plaintiff alleges that a state employee acted outside the scope of employment, the employee may be named only under an “alternative allegation,” *i.e.*, the state must *always* be a party to such suits. If only the employee and the plaintiff are parties, the state could not be bound by a decision

that the employee's actions were within the scope of employment.<sup>5</sup> The state is therefore a necessary party even if the employees are alleged to have acted outside their scope of employment.

That portion of Title 57 specifically involving prisoner cases and the GTCA has a more stringent requirement:

No **tort action or civil claim** may be filed against **any employee**, agent, or servant of the state, the Department of Corrections, private correctional company, or any county jail or any city jail **alleging acts related to the duties of the employee**, agent or servant, until **all of the notice provisions of the Governmental Tort Claims Act have been fully complied with by the claimant**. This requirement shall apply to any claim against an employee of the state, the Department of Corrections, or any county jail or city jail in either their official or individual capacity, and to any claim against a private correctional contractor and its employees for actions taken pursuant to or in connection with a governmental contract.

57 O.S.2011, § 566.4(B)(2) (emphasis added).

The statute articulates a more stringent standard for prisoner suits compared to the general public. Members of the general public are required to give notice of any tort claim against the state as a jurisdictional prerequisite and may name employees only on the alternate basis that they acted outside their scope of employment. A prisoner is required to give notice of any tort or civil action. A prisoner must additionally give GTCA notice of any tort or civil claim against any individual employee based on acts "related to the duties of the

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<sup>5</sup> The interests of the state and an individual employee may be adverse on the question of whether a tortious act occurred within the scope of employment, and the state is therefore a necessary party. A defendant employee would certainly argue against individual liability and in favor of state liability. The plaintiff may make the same argument if GTCA damages available from the state could exceed the amount that could be easily recovered from the defendant. Clearly, with no party to argue *against* inclusion of the employee's acts in the scope of employment, the state could not be bound by such a decision.

employee.” *Id.* The legislature has deliberately used more inclusive language here. Even if Marshall’s petition is read as alleging acts outside the scope of employment, it clearly and unambiguously alleges acts *related to the duties* of the nine individual employees named here. None of the interactions complained of here would have happened absent the employees’ duties. Hence, Marshall was required to make the state a party and give GTCA notice of these claims against the individual employees, even if he did not sue the state.

In *Hall v. GEO Grp., Inc.*, 2014 OK 22, ¶ 13, 324 P.3d 399, a case involving suit against a private prison, the Supreme Court noted that “[c]ompliance with the statutory notice provisions of the GTCA is a jurisdictional requirement to be completed prior to the filing of any pleadings.” Title 57 O.S. § 566.4 is clear that no tort action or civil claim may be filed without following the GTCA notice proceedings. We find no indication in the record that Marshall has complied with the notice provisions of the GTCA found at 51 O.S.2011, §§ 156-57, nor even an assertion that he has complied. His petition is therefore facially defective, as it does not show the jurisdictional prerequisite of GTCA notice. As such, the petition was subject to dismissal.

The question here is whether Marshall’s petition should have been simply dismissed, or dismissed with leave to file an amended petition stating when GTCA notice was given and that a denial of claim had occurred. Pursuant to 12 O.S.2011, § 2012(G),

[o]n granting a motion to dismiss a claim for relief, the court shall grant leave to amend if the defect can be remedied and shall specify the time within which an amended pleading shall be filed. If the

amended pleading is not filed within the time allowed, final judgment of dismissal with prejudice shall be entered on motion ....

Because we have little or no record here beyond the appellant's pleadings, we cannot determine if this defect could be remedied, i.e., whether Marshall provided GTCA notice within the required time frame, but failed to state so in his petition, or simply failed to provide notice, in which case 57 O.S. § 566.4 bars his claim. As such, we hold that the trial court should have granted the motion to dismiss with leave to amend to allow Marshall to plead GTCA compliance, if possible, assuming no other grounds for dismissal were proper.

As to the grounds for dismissal that the district court did state, we find the court's order to be somewhat mysterious. The defendants indicate that they did *not* seek dismissal for a lack of exhaustion of remedies. Nonetheless, the court chose exhaustion of remedies as its basis for dismissal. The court also cited the provisions of 57 O.S. § 566.4 as barring Marshall's request for "injunctive relief." The defendants did not mention § 566.4 in their brief to the trial court, and argued in their response to the petition in error that Marshall had not sought injunctive relief.

Evidently, the trial court raised a defense of exhaustion of remedies *sua sponte*, presumably on the grounds that exhaustion of remedies is a "jurisdictional" issue, and the court has a duty to independently inquire. However, the Supreme Court has indicated that failure to exhaust administrative remedies in a prisoner case is traditionally an *affirmative defense* available to the defendants, rather than a core jurisdictional prerequisite that may be raised *sua sponte*. *Dubuc v. Sirmons*, 2001 OK 57, ¶ 8, 93 P.3d 780. Even if the issue



were properly before the court, when a court *sua sponte* raises a theory of dismissal based on arguments not raised in the pleadings, the court should provide a reviewable order by identifying the facts it relied on to determine dismissal was appropriate. Here for example, the trial court should have stated exactly which administrative remedies remained available to Marshall. We find no alternative basis for dismissal.

### **CONCLUSION**

The question of whether Marshall has complied with the GTCA, and hence whether the district court, and this court, has jurisdiction to consider the merits of this matter, is currently undecided, and we find no record sufficient to allow us to decide it here. The proper procedure here on remand is for the trial court to dismiss Marshall's claims with leave to amend to add the state as a party and to show compliance with the GTCA's notice requirements. If such an amendment is not forthcoming within a specified, reasonable time, § 2012(G) requires a final judgment of dismissal with prejudice. The dismissal here is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

WISEMAN, P.J., and RAPP, J., concur.

April 14, 2022