



**ORIGINAL**

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

**FILED  
COURT OF CIVIL APPEALS  
STATE OF OKLAHOMA**

MAY - 6 2022/

**JOHN D. HADDEN  
CLERK**

MIKE LEE CASTANON, )  
ELITE OILFIELD SERVICES, LLC, )

Plaintiffs/Appellants, )

vs. )

Case No. 119,879

THE OKLAHOMA HORSE RACING )  
COMMISSION, )

Defendant/Appellee, )

and )

KELLY CATHEY, an individual; )  
MIKE CORY, an individual; )  
RICHARD BICKLE, an individual; )  
DAVID MOORE, an individual; and )  
DEBBIE SCHAUF, an individual, )

Defendants. )

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APPEAL FROM THE DISTRICT COURT OF  
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE CINDY H. TRUONG, TRIAL JUDGE

**REVERSED AND REMANDED FOR FURTHER PROCEEDINGS**

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Commission

OPINION BY KEITH RAPP, JUDGE:

The plaintiffs, Mike Lee Castanon (Castanon) and Elite Oilfield Services, LLC (EOS), appeal the trial court's order dismissing their action against the defendant, Oklahoma Horse Racing Commission (Commission). Plaintiffs dismissed without prejudice all claims against the Estate of Debbie Schauf, defendant. During the course of the case proceedings, the matter was removed to federal court. There, the federal court dismissed the remaining defendants and remanded the case to state court to proceed on Plaintiffs' negligence claim against the Commission. This appeal proceeds under Okla.Sup.Ct.R. 1.36, 12 O.S. Supp. 2020, Ch. 15, app. 1.

### **BACKGROUND**

Commission is a state regulatory agency with responsibility for regulating horse racing. The individual defendants, Cory, Bickle and Moore, are stewards, either with Remington Park Racetrack or Commission. Cathey is executive director of the Commission. Schauf was the Executive Director of the Oklahoma Quarter Horse Race Association.

EOS is a Texas entity and the registered owner of two quarter horses, EOS Trumpster and EOS A Political Win. Castanon owns EOS and is licensed by Commission. Plaintiffs retained Alfredo Gomez, a licensed quarter horse trainer, for training services for both of their horses.

Plaintiffs began their petition with a recital of the Commission's statutory background. The Commission is empowered to regulate horse racing, make rules, and delegate the enforcement of the rules to an executive director and/or stewards and assistant stewards. The Commission establishes licensing requirements for the animals and their attendants. The Commission also establishes causes for suspension or revocation of a license for participants including racehorse trainers. Plaintiffs alleged that Commission has promulgated rules, including rules governing banned substances for horses, testing, and penalties for violations. Stewards have final authority to decide questions of eligibility to race and other racing questions. The Commission regulates drugs and medications that may be administered to racehorses and it also enforces its rules and provides details regarding allowed medications and doses. Commission has promulgated rules pursuant to the foregoing authority. The petition alleges the provisions claimed to be applicable here, including summary suspension procedures for drug and medication violations.

The petition continues with the following charging allegations. On April 8, 2017, EOS Trumpster entered and won a race at Remington Park. The horse was then submitted for post-race blood and urine samples. The test samples were sent to a laboratory. The petition alleges that a race steward contacted the laboratory before the report was issued on April 20, 2017, and knew the report's contents prior to the report being issued.

The laboratory report was formally received on April 21, 2017, and it reflected trace amounts of Clenbuterol in the urine. The substance is an FDA-approved medication for horses. The Commission rules recognize that medications may be necessary for the health of the horse.

The report did not reflect any positive test in the blood or serum. Citing Commission rules, the petition states that a violation due to therapeutic drugs can be established only by a blood/serum test. At about the close of the business day on April 21, 2017, Commission, acting through steward Cory, suspended trainer Gomez's license and collaterally scratched all horses under his training.

Because Gomez was Plaintiffs' retained trainer, EOS A Political Win was scratched from a race to be held on April 22, 2017. EOS A Political Win was entered in that race, which had a million-dollar purse. EOS A Political Win was favored to win.

Plaintiffs claim that no notice or opportunity to be heard was provided. The petition cites *McLean v. Oklahoma Horse Racing Commission*, CJ-2017-2206, an Oklahoma County District Court case, as holding that the Commission procedures are unconstitutional. Examination of the District Court docket in *McLean* does not reflect any final order so holding and shows that the case was dismissed without prejudice. Another Oklahoma County District Court case cited for a similar ruling is *Willis v. Oklahoma Horse Racing Commission*, CJ-2017-2810. The docket sheet in that case reflects a dismissal for failure to prosecute.

Counsel for Plaintiffs sought an emergency hearing which the chief steward denied. A request to substitute trainers was also denied. The petition alleges the commissioner and stewards were influenced by actions of a third party. The petition alleges a claim for relief on the ground of the negligence of its employees.

After the case was returned to state court for trial on the negligence claim, Commission filed a motion to dismiss for failure to state a claim. The motion recited much of the same set of events as set out in the petition and stated that the Commission followed existing rules and law.

Commission claimed sovereign immunity pursuant to the Governmental Tort Claims Act (GTCA), specifically 51 O.S. Supp. 2016, § 155 (4), (5), (12), (13), (16), and (30). The motion did not present any factual or legal argument other than the recital of the statutory provisions.

The motion attached the Commission's federal court motion which argued immunity of Commission and its employees. Here, after remand, there are no claims against the individual Commission employees. In the federal court motion, Commission argued that Plaintiffs had not adequately pled negligence by Commission and that, nevertheless, the Commission is immune by statute.

The statutory provisions cited by Commission provide:

The state or a political subdivision shall not be liable if a loss or claim results from:

.....

4. Adoption or enforcement of or failure to adopt or enforce a law, whether valid or invalid, including, but not limited to, any statute, charter provision, ordinance, resolution, rule, regulation or written policy;

5. Performance of or the failure to exercise or perform any act or service which is in the discretion of the state or political subdivision or its employees;

.....

12. Licensing powers or functions including, but not limited to, the issuance, denial, suspension or revocation of or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authority;

13. Inspection powers or functions, including failure to make an inspection, review or approval, or making an inadequate or negligent inspection, review or approval of any property, real or personal, to determine whether the property complies with or violates any law or contains a hazard to health or safety, or fails to conform to a recognized standard;

.....

16. Any claim which is limited or barred by any other law;

.....

30. Acts or omissions done in conformance with then current recognized standards.

51 O.S. Supp. 2016, § 155(4), (5), (12), (13), (16), (30).

Plaintiffs' response first argues that Sections 155(4) and 155(5) do not provide immunity to Commission when the claim is based on the negligent performance of duties by employees. Next, Plaintiffs argue that the licensing provisions of Section 155(12) do not apply because Plaintiffs did not claim a denial, revocation, or suspension of their license but rather claim Commission, through its agents, were "negligent in the performance of its duties and its daily implementation of its functions."

According to Plaintiffs, the inspection provision of Section 155(13) has been narrowly construed by the Oklahoma Supreme Court so that it does not apply. In addition, Plaintiffs argue this is not a negligent inspection action but is one for negligent enforcement of policies.

Plaintiffs maintain that Section 155(16) does not apply because the reference to statutes or laws means statutes or laws separate from the GTCA. Here, Plaintiffs assert that there is no such law and none were cited by Commission.

Section 155(30) provides exemption where the conduct is in accord with recognized standards. Plaintiffs argue here that there is no standard set by the statute. Therefore, the application is dependent on facts that must be developed by trial, so dismissal is inappropriate.

Commission replied. First, Commission maintains that Plaintiffs have not demonstrated any employee negligence so as to avoid immunity under Sections

155(4) and (5). Commission adds that it is charged with ensuring the integrity of horse racing and that its actions were in performance of that duty.

Second, Commission argues that to the extent Plaintiffs' claim follows from the suspension of the trainer's license, immunity exists under Section 155(12).

Third, Commission disagrees with Plaintiffs that facts need to be established at trial before Section 155(30) applies. Commission references the litigation history including the federal court proceedings. Commission did not reply as to Section 155(16), thereby leaving one of its arguments seemingly abandoned.

The trial court entered an order granting the motion to dismiss. The trial court did not specify any GTCA section as the basis for the decision. The trial court's Journal Entry did not provide for amendment to the petition.

### **STANDARD OF REVIEW**

The standard of review of a dismissal for failure to state a claim is stated in *Darrow v. Integris Health, Inc.*, 2008 OK 1, ¶ 7, 176 P.3d 1204, 1208-09 (citations omitted).

In reviewing a nisi prius disposition by dismissal, this court examines the issues *de novo*. Motions to dismiss are generally viewed with disfavor. The purpose of a motion to dismiss is to test the law that governs the claim in litigation, not the underlying facts. A motion to dismiss for failure to state a claim upon which relief may be granted will not be sustained unless it should appear without doubt that the plaintiff can prove no set of facts in support of the claim for relief. When considering a defendant's quest for dismissal, the court must take as true all of the challenged pleading's allegations together with all reasonable inferences that may be drawn from them. A



plaintiff is required neither to identify a specific theory of recovery nor to set out the correct remedy or relief to which he may be entitled. If relief is possible under any set of facts which can be established and is consistent with the allegations, a motion to dismiss should be denied. A petition can generally be dismissed **only** for lack of any cognizable legal theory to support the claim or for insufficient facts under a cognizable legal theory.

The underlying premise is the application of the GTCA.

The District's motion argues it is immune from liability based on provisions of the Governmental Tort Claims Act. "The applicability of a GTCA immunity provision presents an issue of law." *State ex rel. Okla. Dep't of Pub. Safety v. Gurich*, 2010 OK 56, ¶ 6, 238 P.3d 1 (citations omitted). . . . Statutory interpretation presents a question of law. *Troxell v. Okla. Dep't of Human Servs.*, 2013 OK 100, ¶ 4, 318 P.3d 206. Legal questions involving statutory interpretation are subject to de novo review. *Heffron v. Dist. Ct. of Okla. Cnty.*, 2003 OK 75, ¶ 15, 77 P.3d 1069.

*J.W. v. Independent School District No. 10 of Dewey County, Oklahoma*, 2021 OK CIV APP 34, ¶ 29, 500 P.3d 649.

## ANALYSIS

### A. Section 155(4)

"Section 155(4) provides, in part, that the [government entity] is not liable for the adoption of or failure to adopt or enforce a policy or law." *J.W.*, 2021 OK CIV APP 34 ¶ 35. As the *J.W.* Court stated:

However, once the initial enforcement decision is made, section 155(4) immunity ends. *Cf., Morales v. City of Oklahoma City ex rel. Oklahoma City Police Dep't*, 2010 OK 9, ¶ 12, 230 P.3d 869:

The purpose of § 155(4) is to protect the discretionary acts of law enforcement officers in deciding whether a

given situation calls for enforcing a law or not. That choice, whichever way it goes, may result in a detriment visited upon either the person with whom the officer is engaged or upon a third person. It is the exercise of that discretion which is protected by this exemption. Once an officer makes the decision to enforce a law by making an arrest, he or she must do so in a lawful manner. If a tort is committed in the process of making an arrest, § 155(4) does not provide immunity from suit to the officer's governmental employer for the resulting damages.

*Id.* ¶ 39.

Here, the Commission has promulgated rules and undertaken enforcement. However, the charging allegations, taken as true, along with the general negligence allegation show that the immunity provided by Section 155(4) is not in issue. Therefore, to the extent that the trial court's dismissal is based on Section 155(4), the decision is in error, and reversed.

#### B. Section 155(5)

The immunity provided by Section 155(5) extends to the "operations and planning" phases.

Under this approach, once a discretionary policy decision has been made, government employees have a duty to execute the policy on the operational level without negligence. Moreover, the general rule under the planning-operational test is that the discretion is exhausted by the initial adoption of policy, and that decisions to apply broad policy in specific cases are operational level decisions. Thus, under this approach the government retains its immunity with respect to formulation of policy, but is subject to liability for routine decisions and daily implementation of the policy or planning level decision.

*Nguyen v. State*, 1990 OK 21, ¶ 5, 788 P.2d 962, 965. See also *J.W.*, 2021 OK CIV APP 34, for a detailed analysis of Section 155(5).

Plaintiffs' claim of employee negligence does not invoke the immunity provisions of Section 155(5). To the extent that the trial court's dismissal is based upon Section 155(5), it is error and reversed.

### C. Section 155(12)

Section 155(12) immunizes the exercise of licensing powers by Commission, including the suspension of a license. For purposes of the motion to dismiss, Plaintiffs did not have any license action against them. However, it is equally true that Plaintiffs' trainer did have his license suspended and that action set in motion disqualification of Plaintiffs' non-offending other horse in a later separate race with a million dollar purse. Plaintiffs' argument that Section 155(12) does not apply misses that point. However, Plaintiffs' argument that Commission has no immunity for negligent performance by employees does apply. This Court perceives no legal reason to depart from the analysis and holdings regarding Section 155(4) and Section 155(5) and the absence of immunity for negligent performance by employees.

Plaintiffs have alleged employee negligence. Therefore, to the extent that the trial court's dismissal is based on Section 155(12), the ruling is in error and reversed.

#### D. Section 155(13)

Section 155(13) provides immunity to agencies with inspection powers.

This Court need not decide whether an inspection includes chemical and therapeutic drug testing of a racehorse because the Section does not provide immunity for Plaintiffs' claims.

Plaintiffs do not dispute that Commission has the power to test horses.

Likewise, Plaintiffs do not dispute that Commission tested their racehorse for therapeutic drugs without their knowledge or permission, a day before the race, and sent the test samples to a recognized laboratory. Plaintiffs do not allege that the test was negligently performed. The laboratory reported the results of its analysis and Plaintiffs do not dispute the results or the analysis method.

In summary, Plaintiffs claim that the Commission employees acted negligently on the content of the laboratory report. Plaintiffs allege that the results of the laboratory report did not authorize suspending the trainer or scratching Plaintiffs' horse that had not been tested.

At this stage, the allegations are taken as true. The same rationale and ruling applies here and that is that immunity does not extend to performance. Therefore, to the extent that the trial court's dismissal is based on Section 155(13), the ruling is in error and reversed.

#### E. Section 155(16)

This Section looks outside the statutes and regulations specifically covering Commission. Commission cites no such statute or regulation.

This Court notes that Commission did not respond to Plaintiffs' argument that Section 155(16) would bar an action against Commission only if some law outside the GTCA barred the action. *Morales v. City of Oklahoma City ex rel. Oklahoma City Police Department*, 2010 OK 9, ¶ 18, 230 P.3d 869, 877.

Commission has not demonstrated that any such laws exists. Therefore, to the extent that the trial court's dismissal is based on Section 155(16), the ruling is in error and reversed.

#### F. Section 155(30)

Section 155(30) provides immunity when "Acts or omissions [are] done in conformance with then current recognized standards." The statute does not define a standard applicable here and Commission does not supply a standard.

Plaintiffs have alleged employee negligence. The settled standard for negligence is ordinary care. Plaintiffs' allegations of employee negligence will require that Plaintiffs show that the negligent employee or employees did not act with ordinary care. However, this does not provide a legal basis for dismissal for failure to state a claim. Therefore, to the extent that the trial court's dismissal is based on Section 155(30), the ruling is in error and reversed.

## CONCLUSION

This Court has examined the Record and finds that the GTCA does not provide immunity for Plaintiffs' claims. The trial court's Journal Entry dismissing Plaintiffs' action for failure to state a claim is reversed and this matter is remanded for further proceedings.

**REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.**

WISEMAN, P.J., concurs, and BLACKWELL, J., dissents.

BLACKWELL, J., dissenting:

I respectfully dissent. In my view, the plaintiffs' negligence claim "results from" the "suspension or revocation of" a state-issued "license." 51 O.S. § 155. The federal district court, in dismissing the plaintiffs' federal claims, agreed: "Plaintiffs' argument, at bottom, amounts to a collateral challenge to the Stewards' suspension of Gomez's license." R., Tab 3, pg. 13, n. 9. Because I read 51 O.S. § 155(12) to bar such a claim, I would affirm the dismissal.

May 6, 2022