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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

JAN - 5 2023

JOHN D. HADDEN
CLERK

MARY SMITH, Plaintiff/Appellant, vs. ERIC KLOSTERMAN, Individually; INDEPENDENT SCHOOL DISTRICT NO. 89 OF OKLAHOMA COUNTY; CCMSI, a Claims Administration Company; GENESIS INSURANCE COMPANY and BERKSHIRE HATHAWAY, Defendants/Appellees.	)	Case No. 120,312

Rec'd (date) 1-5-23
Posted
Mailed
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APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE NATALIE MAI, TRIAL JUDGE

AFFIRMED

Anita F. Sanders Oklahoma City, Oklahoma	For Plaintiff/Appellant
Justin C. Cliburn THE CENTER FOR EDUCATION LAW, P.C. Oklahoma City, Oklahoma	For Defendant/Appellee Independent School District No. 89 of Oklahoma County and Eric Klosterman
Bruce A. McKenna McKENNA & McKENNA Tulsa, Oklahoma	For Defendant/Appellee CCMSI
Nathaniel T. Smith Roger N. Butler SECREST, HILL, BUTLER & SECREST Tulsa, Oklahoma	For Defendants/Appellees Genesis Insurance Company and Berkshire Hathaway Specialty Insurance Company

OPINION BY GREGORY C. BLACKWELL, JUDGE:

Mary Smith appeals the dismissal of her tort claim against Independent School District No. 89 of Oklahoma County (ISD 89), on the grounds of failure to give the notice required by § 156 of the Governmental Tort Claims Act, 51 O.S. §§ 151-172 (GTCA). She also appeals the court's summary judgment that employee Eric Klosterman was acting within the scope of his employment and the dismissal of her petition against claims administrator CCMSI and insurers Genesis Insurance and Berkshire Hathaway. On review, we find no error in the district court's decisions and affirm.

BACKGROUND

On February 9, 2018, an ISD 89 vehicle driven by Mr. Klosterman (allegedly) ran a red light and (definitely) collided with a vehicle driven by Ms. Smith. This vehicle was owned by Ms. Smith's daughter, Shree McConnell. Ms. McConnell, herself an insurance adjuster, negotiated a settlement of the damage to her vehicle through ISD 89's insurer's claims administrator CCMSI. She also attempted to negotiate a settlement on behalf of her mother for personal injuries. The claims administrator processed Ms. McConnell's property damage claims and Ms. Smith's personal injury claims separately and assigned them different claim numbers. Ms. McConnell was unsuccessful in obtaining a settlement of her mother's personal injury claims. No statutory notice of a GTCA tort claim was filed with ISD 89 prior to this appeal.

On February 6, 2020, Ms. Smith filed a petition against defendants Klosterman and ISD 89. The petition alleged that Mr. Klosterman, acting within

the scope of his employment, negligently drove a vehicle that struck Smith's vehicle at an intersection. The petition did not attempt to demonstrate GTCA notice compliance.

On March 16, 2020, Ms. Smith filed an amended petition through different counsel. The new petition was much wider ranging, adding three new parties, Berkshire Hathaway, Genesis Insurance Company, and CCMSI. It reversed the initial petition and alleged that Mr. Klosterman was acting *outside* his scope of employment. It also alleged that CCMSI, as the claim administrator, had a duty to give GTCA notice to ISD 89 and had failed to do so. It further alleged a breach of a fiduciary duty owed to Smith by CCMSI. It also alleged that CCMSI, by settling Ms. McConnell's vehicle damage claim, had "accepted tort claim liability" for Ms. Smith's personal injuries. It sought declaratory judgment that this "acceptance" had rendered ISD 89 "liable under Oklahoma law up to the policy limits" of any and all applicable insurance policies.

The petition also alleged that, in settling the property damage claim, the involved insurers had failed to settle an attorney's lien. It further alleged that the defendants had "acted together or severally to violate Oklahoma law regarding the provision of an insurance certificate after a collision" and attempted to "hide the fact that the school district" may have insurance in excess of GTCA liability limits. It alleged that this "hiding" of the identity of the insurer was intended to obstruct Ms. Smith from "achieving a final settlement" with the insurer.

ISD 89 responded with a motion to dismiss on the grounds that the jurisdictional requirement of GTCA notice within one year of the incident found in 12

O.S. § 156 was not demonstrated in the petition. Mr. Klosterman also filed an individual motion to dismiss on the grounds that he was immune from suit because he was acting in the scope of his employment at the time of the accident. Smith responded that notice was demonstrated by her allegation that ISD 89 had "admitted liability through their agent CCMSI," referring to an email chain she had attached to her petition as demonstrating the required compliance. She also argued that ISD 89 was estopped from arguing a lack of notice because CCMSI had settled Ms. McConnell's property damage claim arising from the same accident

The court held a hearing on these motions in July 2020, granting dismissal to ISD 89, but denying Klosterman's motion to dismiss because the allegation that he was not acting within his scope of employment was adequately pled on the face of the petition. A dispute then arose regarding an appropriate journal entry. In December 2020, the court entered a journal entry dismissing ISD 89 without prejudice.

In June 2021, Mr. Klosterman filed a motion for summary judgment on the question of whether he was acting in the scope of his employment. Ms. Smith filed a response arguing that Klosterman was acting outside the scope of his employment because his actions were criminal or fraudulent.[1] She also argued

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[1] The motion further appears to argue at times that the settlement of Smith's property claims by the school district's insurer constituted an admission by the insurer or school district that Klosterman was individually "liable." In fact, *if it indicates anything,* this indicates the opposite. Settling the property claim implies that the *school district's* insurer thought the *school district* was potentially liable for Klosterman's acts, and hence that he was operating in the scope of his employment.

for a Rule 13(d) continuance to obtain discovery and restated most of the theories of estoppel and illegal/fraudulent action she had brought in opposition to ISD 89's motion to dismiss. In August 2021, the court granted summary judgment to Mr. Klosterman. Ms. Smith then filed a motion to vacate this decision, arguing that because of newly received discovery she could now show GTCA notice, and that Klosterman's summary judgment was actually based on a lack of notice, rather than a ruling that he was acting within his scope of employment.

Meanwhile, insurers Berkshire Hathaway and Genesis Insurance were finally served with Ms. Smith's petition in August 2021, more than a year after she filed it. Both filed motions to dismiss, generally arguing that Ms. Smith had failed to obtain timely service and that her petition failed to state a viable claim for relief. In October, the court granted Berkshire Hathaway's motion to dismiss Smith's action for failure to obtain timely service and denied Smith's motion to reconsider the summary judgment in favor of Klosterman. Smith's attorney again refused to sign a journal entry on this issue, and the court entered one on November 11, 2021.

In December 2021, Ms. Smith filed an appeal of the summary judgment in favor of Mr. Klosterman in Case No. 120,082. The Supreme Court dismissed this case for lack of an appealable order. Hearing of the remaining motions by CCMSI and Genesis Insurance was set for more than one occasion, but Ms. Smith requested several continuances. In February 2022, the court granted Genesis Insurance's motion to dismiss without an in-person hearing on the grounds of failure to state a claim. On March 8, 2022, it granted CCMSI's motion to dismiss

on the same grounds, leaving no defendant remaining. Ms. Smith appeals each of these decisions.

STANDARD OF REVIEW

Appellate review of a trial court's entry of summary judgment is *de novo. Miller v. David Grace, Inc.*, 2009 OK 49, ¶10, 212 P.3d 1223, 1227. This Court will view all facts and inferences presented by the evidence in the light most favorable to the non-moving party. *Id.* Summary judgment is only appropriate when there is no substantial controversy as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* If the evidentiary materials show controverted material facts, or if reasonable minds could reach different conclusions from the undisputed material facts, a motion for summary judgment should be denied. *Hulett v. First Nat'l Bank & Trust Co. in Clinton,* 1998 OK 21, ¶3, 956 P.2d 879, 881.

When reviewing a motion to dismiss, this Court also exercises *de novo* review. *Wilson v. State ex rel. State Election Board*, 2012 OK 2, ¶ 4, 270 P.3d 155. When reviewing a motion to dismiss, the Court examines only the controlling law, not the facts, and thus, we must take as true all of the challenged pleading's allegations together with all reasonable inferences which may be drawn from them. *Id.*

ANALYSIS

Ms. Smith makes five allegations of error:

(1) The district court erred as a matter of law by granting ISD 89 "summary judgment"[2] on the issue of sufficient notice under the GTCA.

(2) The district court erred by granting employee Eric Klosterman summary judgment on the grounds that he was acting within the scope of his employment.

(3) The district court erred by granting appellees Genesis Insurance Company and Berkshire Hathaway's motions to dismiss for failure to obtain timely service and/or failure to state a claim upon which relief could be granted.

(4) The district court erred in granting appellee CCMSI's Motion to dismiss for failure to state a claim upon which relief could be granted.

(5) The decision of the district court has left Ms. Smith without judicial redress for her injuries in contravention of the Oklahoma Constitution.

Each will be addressed in turn.

The Granting of ISD 89's Motion to Dismiss

Ms. Smith's central argument is that timely GTCA notice was given within the one-year limitations period in this case. Neither the petition nor the record shows that written notice was ever given to ISD 89. "The petition must factually allege either actual or substantial compliance with the notice provisions of the [GTCA]." *Mansell v. City of Lawton*, 1995 OK 81, 901 P.2d 826, n. 2 (citation omitted). Ms. Smith argues, however, that communications with the claims administrator, CCMSI, constituted timely written notice of a claim to ISD 89 within one year of the accident, as required by 51 O.S. § 156. We disagree.

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[2] The court actually dismissed ISD 89 on the grounds of a lack GTCA notice, rather than grant summary judgment in its favor. Nevertheless, the scope of our review, and the result of that review, remains the same.

A recent Court of Civil Appeals case, *Alburtus v. Indep. Sch. Dist. No. 1 of Tulsa Cnty.*, 2020 OK CIV APP 39, ¶ 5, 469 P.3d 742, held that a motorist's email to a school's insurer stating "please let this email serve as notice that I will be filing a bodily injury claim with your company," when coupled with a statement from the insurer (as the school's agent) that the ninety-day decision period under GTCA § 157 had started to run, constituted an admission by the insurer that a tort claim been filed pursuant to § 156. *Albertus*, like many similar cases, limits its holding however to "the unique facts presented here" and specifically declined to hold that "written notice to an insurance agent is always effective notice under the GTCA." *Id.* ¶ 18.

The crucial statement in *Albertus* was a statement by the adjuster to the plaintiff's counsel that "the 90 days had begun." This could reasonably be understood as confirming that a GTCA claim had been filed, because the ninety-day decision period under § 157 does not begin to run *until* a claim is received. *See Stout v. Cleveland Cnty. Sheriff's Dept.*, 2018 OK CIV APP 11, ¶ 30, 419 P.3d 382, 389. *Albertus* relied on the principle that "[a] political subdivision may not lull an injured party into a false sense of security concerning the applicable denial date and then rely on the induced delay as a defense to an action." *Carswell v. Oklahoma State Univ.*, 1999 OK 102, ¶ 13, 995 P.2d 1118, 1122.

Carswell is exemplary of the type of statement that misleads a plaintiff into a "false sense of security" regarding GTCA compliance and prevents a public body from raising a GTCA requirement as a defense. In that case, Ms. Carswell received a letter dated November 21,1997, stating that her claim was denied

"effective as of the date of this letter." *Id.* ¶ 3. The state later claimed that denial had occurred by operation of law more than six weeks earlier and Ms. Carswell had failed to file suit within 180 days of that date. *Id.* The Court held her filing was, nonetheless, timely because of the state's misrepresentation of the denial date. *Id.* ¶ 14. We see no immediate reason why this principle should not be applied to the fact of initial notice under § 156, as well as a deemed-denied date under § 157, and *Albertus* did so. The statement in *Albertus* is similar: "the period started by filing a claim is running" is functionally the same as "we have received GTCA notice."

In this case, however, we find a complete absence of any explicit statement by the claims administrator indicating that GTCA notice was given. Ms. Smith evidently relies on an argument that normal claims negotiation activities, such as assigning a claim number, settling the property claim, "admitting liability,"[3] or the fact that ISD 89 "knew of the claim," constitute the same form of misleading statements that lulled her into a false sense of security that she had filed compliant GTCA notice.

Albertus specifically declined to hold that "written notice to an insurance agent is always effective notice under the GTCA." *Id.* ¶ 18. Placing common claims handling activities into the group of "misleading assertions" that would estop the state from asserting a lack of GTCA compliance would do just that,

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[3] Ms. Smith appears to propose a theory that, if an insurer verbally "admits negligence" during claim negotiations, neither the employee nor the government body may later contest the negligence question at trial. We find no support for this theory or that an "admission of negligence" by an insurer during claims negotiation is even admissible at trial.

however. Any and all attempts to negotiate a claim with an insurer could constitute notice. Further, Ms. McConnell's affidavit here does not allege that she understood she had to give GTCA notice or that she intended to give notice at all. It is difficult to see how she was "misled" into believing that notice had been given, when there is no record that she knew notice was necessary, or ever intended to give it.[4]

Given the difficulties that have arisen in the original GTCA notice scheme because public bodies now often carry private liability insurance, it may be that the GTCA *should* regard the opening of a standard insurance claim with a public body's insurer as constituting notice under § 156. This is entirely contrary to the text of the statute, however, and the matter is not merely one of insurance claims but concerns a waiver of the state's sovereign immunity that is a jurisdictional prerequisite in these cases. If such a revision is necessary, we believe it is the legislature's prerogative—not the courts'—to revise the GTCA to reflect modern practical realities and practice.

We do not find that filing a claim with the insurer here constituted GTCA notice. Nor do we agree with Ms. Smith's theories that settling the property claim of a third party constituted notice or misled her as to notice, or that an insurer confesses "liability" (and hence confesses notice) by attempting to negotiate a

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[4] The logical problem here is clear. It is difficult to see how Smith or her daughter could have *detrimentally relied* on a statement that could imply that notice had been given if they did not know of the need to give notice at the time, or at any time before the notice period expired. As such, this case differs significantly from *Albertus* where an attorney who was fully aware of the need to give notice was assured that notice had been given and acted in reliance on this assurance.

personal injury settlement. We find no misleading assurance by the insurer that GTCA notice had been properly given and no record that Ms. McConnell or Ms. Smith even understood that notice was necessary. We conclude that the trial court did not err in finding no GTCA notice was made in this case.

Along similar lines, Ms. Smith also argues that, even if the one-year notice period had expired, ISD 89 is "equitably estopped" from interposing the affirmative defense[5] of a limitations period. She argues this is so because Ms. Smith's daughter had negotiated and received a property settlement from the insurer, the school board had "voted to approve" a settlement of the daughter's property claim, and the insurer had already "accepted liability for Klosterman's actions."

Estoppel against public bodies is not generally favored. In *Strong v. State ex rel. The Oklahoma Police Pension & Ret. Bd.*, 2005 OK 45, ¶ 3, 115 P.3d 889, 892, the state gave a plaintiff incorrect information regarding the date on which he would be eligible to draw certain retirement benefits. When the plaintiff applied for these benefits, he was told that they would begin nine years later than he was previously told. The plaintiff argued that the State was estopped by his reliance in its prior statement from imposing the correct date. The Supreme Court said:

> The doctrine of estoppel is not ordinarily applicable to state agencies operating under statutory authority. Public officials performing acts which exceed their authority may not bind a public entity. Rather,

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[5] Although several cases have described a failure to meet the § 156 limitations period as an "affirmative defense," others have described timely § 156 notice as a "mandatory prerequisite and jurisdictional requirement" to filing a GTCA tort claim in district court. *See Hall v. GEO Grp., Inc.*, 2014 OK 22, ¶¶ 1, 19, 324 P.3d 399, 400, 406. If timely notice is a prerequisite to jurisdiction, a court may presumably raise the issue *sua sponte*, unlike a typical affirmative defense, such as a statute of limitations.

> they lack authority to expand their powers and are bound by mandatory law. The rationale for recognizing a governmental shield from estoppel is to enable the state to protect public policies and interests from being jeopardized by judicial orders preventing full performance of legally-imposed duties.

Strong, ¶ 9 (footnotes omitted). *Strong* is still good law and is clear that a public body cannot be required by estoppel to honor a promise or claim that it does not have the legal authority to make, even if the plaintiff relied on the promise to their detriment.

The Supreme Court has crafted avowedly narrow exceptions to this doctrine, however. In *Watkins v. Cent. State Griffin Memorial Hosp.*, 2016 OK 71, ¶ 27, 377 P.3d 124, 131, the Court found estoppel where a GTCA entity had actively suppressed material facts and made false statements which prevented a plaintiff from discovering a tort, and hence from filing notice within the one-year period § 156 mandates. The Supreme Court noted that a GTCA entity could be estopped from imposing the § 156 time limit where estoppel would "further some principle of public policy or interest." *Watkins*, ¶ 24 (citing *Burdick v. Independent Sch. Dist.*, 1985 OK 49 ¶ 7, 702 P.2d 48.)[6] Where a GTCA entity engages in "false, fraudulent or misleading conduct or some affirmative act of concealment to exclude suspicion and preclude inquiry, which induces one to refrain from timely bringing an action," estoppel is appropriate. *Watkins*, ¶ 23.

> Under these very narrow facts, estoppel may be applied to a time limitations defense under the GTCA. In this unique instance,

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[6] *Burdick* did not involve a GTCA question but examined whether the school district could remove children who had attended school there between 1975 and 1980 on the grounds that their honest belief that they lived in the school district for that entire period later turned out to be incorrect. The court estopped the school district from doing so. *See Burdick* at ¶ 17.

> estoppel furthers legitimate state purposes of not rewarding potentially wrongful government conduct and avoiding liability in tort.

Id. ¶ 28.

Assuming the estoppel theory of *Watkins* remains separate from the Supreme Court's later application of the discovery rule to such cases,[7] we find no evidence indicating that the case here falls under the narrow and unique *Watkins* exceptions. *Watkins* concerned affirmative efforts by an entity or its agents to conceal the existence of a tort by assuring the victim that what she suspected was an assault was, in fact, a necessary medical procedure, while it knew the facts to be the opposite. There is no question that the facts of the accident and the identity of the parties here were known to Ms. Smith, and no evidence whatsoever that ISD 89 or any agent committed any "affirmative act of concealment to exclude suspicion and preclude inquiry" as to the existence of a claim or in any way affirmatively obstructed her filing of GTCA notice.

Even if we were to extend *Watkins* beyond acts designed to conceal the *occurrence* of a tort to actions that might cause a plaintiff to believe that GTCA notice was timely filed, we have already answered this question in the earlier section of this opinion, finding no such misleading assurance by the insurer that

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[7] *Watkins* relied on an estoppel theory rather than tolling of the limitations period by the discovery rule. We note, however, that although this court had applied the discovery rule to the initial GTCA notice period several times prior to *Watkins,* the Supreme Court had not confirmed its application at that time, and does not appear to have explicitly done so until *Crawford on Behalf of C.C.C. v. OSU Med. Tr.*, 2022 OK 25, ¶ 7, 510 P.3d 824, 830 ("If the discovery rule applies to the underlying tort in a non-GTCA case, it applies to the commencement of the one-year notice period when that tort claim is subject to the GTCA"). There was no precedent that the discovery rule applied at the time of *Watkins*.

GTCA notice had been properly given. As such, we do not find any form of estoppel as to GTCA notice compliance appropriate here.

The Granting of Mr. Klosterman's Motion for Summary Judgment

Ms. Smith also appeals the court's grant of summary judgment to ISD 89 employee Erik Klosterman. The court found that Mr. Klosterman was acting within the scope of his employment during the events that led to the accident and hence was immune from individual suit. Ms. Smith presents three somewhat novel arguments.[8]

The first is that, at the moment ISD 89 obtained dismissal on the grounds of lack of statutory notice, the case "ceased to be a GTCA case," and hence, Mr. Klosterman lost personal immunity because a GTCA entity was no longer involved. We find no support for this argument. When a plaintiff sues an individual for acts taken within the scope of GTCA employment, "it is a suit against the entity that the officer represents and is an attempt to impose liability upon the governmental entity." *Speight v. Presley,* 2008 OK 99, ¶ 20, 203 P.3d 173. "A government employee acting within the scope of employment is relieved from private (individual) liability for tortious conduct." *Pellegrino v. State ex rel. Cameron Univ. ex rel. Bd. of Regents of State*, 2003 OK 2, ¶ 4, 63 P.3d 535, 537. Mr. Klosterman's immunity arises if he was acting within the scope of his employment regardless of whether the GTCA entity is sued or is later dismissed. A

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[8] Smith further persistently claims, even on appeal, that Klosterman was granted summary judgment because of "a lack of GTCA notice," even though the first proposition in Klosterman's summary judgment motion clearly argued that he was acting within the scope of his employment.

plaintiff cannot create individual liability by waiting until the GTCA notice period expires to file suit against a state employee.

Ms. Smith's second argument raises questions that are unique to GTCA cases as opposed to general respondeat superior cases. ISD 89 stipulated that Klosterman was acting in his scope of employment. An employer's admission than an employee acted within the scope of employment normally settles the question because the plaintiff has nothing to gain by arguing otherwise. All reported GTCA cases on this issue involve a plaintiff contesting a *denial* that the employee acted within the scope of employment.

Ms. Smith argues, however, that a plaintiff may contest a GTCA employer's stipulation that the employee acted in the scope of employment if the plaintiff wishes to sue the employee instead of the employer. As a general principle, Ms. Smith appears correct that a stipulation by the employer is not *conclusive* in this situation. Unlike common law respondeat superior cases, the scope of GTCA employment is statutorily defined. Pursuant to § 152 of the GTCA, acting within the "scope of employment" is defined as:

> performance by an employee acting in good faith within the duties of the employee's office or employment or of tasks lawfully assigned by a competent authority including the operation or use of an agency vehicle or equipment with actual or implied consent of the supervisor of the employee, but shall not include corruption or fraud ....

51 O.S. § 152.

If an act such as fraud is *statutorily* outside the scope of employment, we see no means by which a GTCA entity can bring the act back in by "confessing

scope of employment."[9] The liability of the state for an employee's actions is set by statute, and hence, a GTCA employer's decision as to scope of employment is subject to judicial review. We therefore find that ISD 89's confession of scope of employment is not conclusive of the issue.

Klosterman would have acted outside his scope of employment if he was not acting "in good faith" pursuant to § 152. Oklahoma courts have ruled several times on the statutory meaning of "acting in good faith" in a GTCA employment context. *Tuffy's, Inc. v. City of Oklahoma City*, 2009 OK 4, ¶ 7, 212 P.3d 1158, 1163, holds that acts committed in a "malicious manner" are outside the scope of employment. *Parker v. City of Midwest City*, 1993 OK 29, 850 P.2d 1065, 1067–68, held that "willful and wanton misconduct" is also outside the statutory scope of employment. In *Fehring v. State Ins. Fund*, 2001 OK 11, 19 P.3d 276, the Court used the standard of "intentional, willful and malicious behavior," and *McMullen v. City of Del City*, 1996 OK CIV APP 46, 920 P.2d 52, noted that "extreme and outrageous conduct that went beyond all bounds of decency" constituted bad faith under § 152.[10] *Gowens v. Barstow*, 2015 OK 85, ¶ 21, 364 P.3d

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[9] The entity would, of course, have no reason to do so under normal circumstances. However, where a plaintiff has missed the applicable GTCA notice period, the entity takes on no liability by confessing that an employee acted in the scope of employment, but still protects the employee from suit.

[10] In addition to these formulations, a federal trial court is mentioned in a footnote to the certified question analysis of *Medina v. State*, 1993 OK 121, n.1, 871 P.2d 1379,1381 as concluding that *gross negligence* of an employee could not fall within the scope of employment and hence is not within the ambit of the GTCA." The question of whether Oklahoma has added "gross negligence" to the category of "bad faith conduct" pursuant to § 152 was not, however, before the *Medina* court, and we find no further authority to that effect.

644, 652, however, refused to add "reckless disregard" to the list of acts that statutorily constitute bad faith under § 152.[11]

Hence, Ms. Smith alleges questions of fact as to whether Klosterman's acts constituted malicious behavior, willful and wanton misconduct, or "outrageous conduct that went beyond all bounds of decency." The first material fact she cites as demonstrative is that "Klosterman was seen by a witness on the scene looking at his cell phone." *Response to Motion for Summary Judgment*, Tab 23, pg. 3. Even if we take this as a statement that the unnamed witness saw Klosterman looking at his cell phone *while* driving, however, no affidavit, or even identification of this purported witness is attached to Smith's opposition to the motion for summary judgment and there is no mention of such a statement in the attached police report.

Although parties are not required to produce admissible evidence in response to a motion for summary judgment, they must show that they can bring admissible evidence that creates a material question of fact at trial. *Seitsinger v. Dockum Pontiac Inc.*, 1995 OK 29, 894 P.2d 1077, 1081. At a minimum, this would require some form of sworn statement by the purported witness as to his or her proposed testimony.[12] In this record we have neither a sworn statement nor even the name of the proposed witness. Ms. Smith had a further opportunity

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[11] "*Fehring* [*v. State Ins. Fund,* 2001 OK 11, 19 P.3d 276] is hereby overruled to the extent that its holding provides that acts performed with reckless disregard for an individual's rights automatically lack good faith." *Gowens*, ¶ 21.

[12] *See, e.g., Buckner v. Gen. Motors Corp.*, 1988 OK 73, 760 P.2d 803, 813 (holding that employer did not provide an affidavit from the nurse to support its assertion on summary judgment that an employee was told to return to work, or an affidavit from a member of management stating that the employee had been seen loitering).

to bring some proof of this allegation in her later motion to reconsider the summary judgment. She did not do so. As such, no question of disputed material fact was raised here.[13]

Ms. Smith's remaining arguments as to disputed material facts must be regarded as good faith attempts to argue for changes in the existing law as to what was material in the scope of employment and immunity inquiry. These include theories that Klosterman is open to individual suit because the claims administrator "admitted his negligence," that Klosterman committed an independently actionable tort by giving the officer at the scene of the accident proof of ISD 89's insurance (but not his personal insurance), that Klosterman (and possibly his insurer) is open to individual suit because the state requires him to carry "compulsory insurance," and that Klosterman was outside his scope of employment because he committed a "criminal act" by running a red light. We find no merit in the theory that these disputed facts or legal theories are material to the question of scope of employment.

Nonetheless, Ms. Smith argues that summary judgment was still inappropriate because, in her view, all questions of whether a state employee acted within the scope of employment are jury questions. Smith cites a federal trial court opinion as persuasive authority for this position. The cited opinion does

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[13] Further, we do not imply that, *had it been shown by evidence*, Klosterman's use of a cell phone would amount to malicious behavior or willful and wanton misconduct. We have been unable to find any case nationwide even hinting at such a result. The *Restatement (Third) of Agency* § 7.07—as well as our own intuition—indicates an opposite result: negligent driving that results from cell phone use is within the scope of employment if the vehicle was being driven as part of the employee's duties.

not so hold, however.[14] Even under general respondeat superior law, common-law scope of employment is not a question of fact if the facts are undisputed and lead to only one reasonable conclusion. *Baldwin v. SAI Riverside C, L.L.C.*, 2014 OK CIV APP 55, ¶ 8, 326 P.3d 555, 557.[15] We find no dispute as to the material facts here, and no error in the trial court's decision that Mr. Klosterman acted within the scope of his employment. We find no merit in any of these propositions and find no error in the summary judgment entered in favor of Mr. Klosterman.

The Claims Against the Insurers

Ms. Smith also sued two insurers. The bases of Ms. Smith's direct suit against Genesis Insurance Company and Berkshire Hathaway are not entirely clear. Her petition alleged that Berkshire Hathaway and Genesis had "created a trust relationship" with Smith by paying her daughter's property damage claim and further that the insurers were guilty of "wrongful payout," apparently on the basis they had paid Ms. McConnell's property damage claim without first paying an attorney lien.[16] She also appears to add theories that Berkshire Hathaway

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[14] *See* case CIV-20-306-RAW (E.D. OK) attached to opposition to summary judgment, Tab 23, Exhibit 6. Any rule that the GTCA scope of employment question *cannot* be resolved as a question of law is incorrect. *See, e.g., Speight v. Presley,* 2008 OK 99, ¶ 20, 203 P.3d 173, 179 (county clerk was not acting within scope of employment by Board of County Commissioners); *Shaw v. City of Oklahoma City,* 2016 OK CIV APP 55, ¶ 20, 380 P.3d 894, 899 (upholding summary judgment that an assault by a police officer was outside the scope of employment); and *Baldwin v. SAI Riverside C, L.L.C.,* 2014 OK CIV APP 55, ¶ 11, 326 P.3d 555, 558 ("[T]he trial court did not err in ruling as a matter of law that the knee-kick was clearly outside the scope of employment.").

[15] Further, unlike the parameters of the common law scope of employment, the GTCA scope of employment is statutorily defined by § 152 and the question of whether an act goes outside the statutory definition of "acting in good faith" pursuant to § 152 is more likely to be one of law unless the relevant actions of the employee are disputed.

[16] Ms. McConnell's property claim was settled more than a year before suit was filed, and we have no record that she was represented by an attorney at that time or that a lien

and Genesis are open to direct suit because they have "confessed liability" and are therefore "liable up to policy limits" and that they have tortiously "misrepresented the truth and hidden the actual insurance company with hopes of plaintiff not achieving a final settlement."

In August 2021, Berkshire Hathaway filed a special appearance and motion to dismiss on the grounds that it was not timely served within 180 days of the petition being filed. The Berkshire Hathaway motion was heard in October of 2021. It argued that it had been named in the amended petition filed on March 16, 2020, and had not been served until over a year later, in July of 2021. Title 12 O.S. § 2004(I) provides that:

> I. SUMMONS: TIME LIMIT FOR SERVICE. If service of process is not made upon a defendant within one hundred eighty (180) days after the filing of the petition and the plaintiff has not shown good cause why such service was not made within that period, the action shall be deemed dismissed as to that defendant without prejudice and Section 100 of this title shall be applicable to any refiling of the action.

Ms. Smith argued below that the court's grant of alias service over a year after the petition was originally filed functioned as an amended pleading under 12 O.S. § 2015 and that this reset the 180-day period to serve the insurers. When an amended petition *adds a party,* this does, of course, allow180 days for service of the new party. But no party was added here: the insurers were named in a petition filed over a year before alias summons was granted.

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existed. Even in her statement of the case on appeal Ms. Smith appears to regard Ms. McConnell as a party to the underlying litigation and an appellant here. She is not.

Smith also argued that the court's grant of alias service constituted a finding by the court of "good cause why such service was not made" in the prior year, and hence the action should not be dismissed. This is incorrect. *See Clark v. Ralston*, 2007 OK CIV APP 88, ¶ 15, 169 P.3d 413, 416 (holding that issuance of alias summons does not constitute a finding by the court that good cause exists for lack of service within 180 days). The court disagreed with Smith's interpretation of its actions and found no good cause for delay. We find no record facts requiring us to find differently and find no error in the court's decision. We further note that, even if service was somehow timely, Smith's petition fails to state a viable claim against either insurer, as we will discuss below.

Genesis Insurance also filed a motion to dismiss in September 2021 arguing lack of service and failure to state a claim. We find no indication that Smith filed any response. Due to Smith's requests for continuances, this motion had not been heard by February 2022, and, on February 16, the court, without hearing, granted dismissal for failure to state a claim, and denied leave to amend because amendment would be futile.

The bases of Ms. Smith's claims against the insurers raise two or three incorrect propositions of law. The first is that a plaintiff involved in a car accident has a right of direct suit against the defendant's insurance company to seek benefits if "liability" is confessed by a claims administrator. The majority of jurisdictions have ruled that a defendant's insurer cannot be directly sued by a plaintiff. *Daigle v. Hamilton*, 1989 OK 137, ¶ 5, 782 P.2d 1379, 1380, (citing 12A Couch on Insurance 2d (Rev Ed) § 45:784). As *Daigle* notes, direct liability of the

defendant's insurance company to an injured plaintiff does not exist unless it is created by statute or common law.[17] We find no general basis for suit against these insurers.

Ms. Smith's next argument appears to be that the involved insurers "accepted liability" for Smith's injuries and hence either may be directly sued for payment or have somehow breached a settlement agreement. The legal bases for this claim of an "acceptance of liability" for Smith's injuries appear to be twofold. First, there is an affidavit from Shree McConnell (Ms. Smith's daughter) stating that the CCMSI staff had "promised her" that "Mr. Klosterman's insurer" (presumably ISD 89's insurer) had "accepted liability for Ms. Smith's injuries." Second, Smith argues that the insurers could have not settled *the property damage* claim involving Ms. McConnell's vehicle without first "accepting liability" for the accident, and hence for Smith's personal injuries.

Ms. Smith does not cite, and we do not find, any statute or common law indicating that an insurer somehow confesses liability for a personal injury claim by settling the concurrent property damage claim of the vehicle owner.[18] Further, the property damage release attached to Ms. Smith's petition explicitly states:

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[17] Title 47 O.S. § 169 has long been interpreted to make a motor carrier and its insurer "jointly liable" and to allow an injured third party to bring a direct action against a tortfeasor motor carrier and its insurer when the liability policy or bond required by 47 O.S. § 169 has been filed with the Oklahoma Corporation Commission (OCC). *Alfalfa Elec. Coop., Inc. v. Mid-Continent Cas. Co.*, 2015 OK CIV APP 53, ¶ 16, 350 P.3d 1276, 128 (citing *Daigle* ¶ 8). Further, Oklahoma's uninsured motorist statute, 36 O.S. § 3636, allows an insured who has a claim against an uninsured motorist to file direct action against his *own* insurer. Outside these situations, "this Court has not recognized the right to a direct action by a third party against the insurer of a covered tortfeasor." *Daigle*, ¶ 9.

[18] In fact, such a rule would completely undermine the accepted practice of an insurer settling the property claim in a vehicle accident before trial to avoid the possibility of making

> It is understood and agreed that this settlement is not to be construed as an admission of liability on the part of the party or parties hereby released and that said releases deny liability therefore and intend merely to avoid litigation and buy their peace.

How Ms. Smith construes this as an "admission of liability" for even the purposes of the property damage claim (which is not at issue here) is unknown.

We reject the theory that negotiating an insurance settlement amounts to either a confession of negligence on the part of the insured or constitutes some form of an enforceable oral settlement agreement. If the parties attempt to agree on damages but cannot, we find no law estopping the insurer from arguing a lack of negligence in subsequent litigation. We find it clear that Ms. Smith had no contractual or agency relationship with either insurer that would support a direct suit.

Thus, suit against the insurers must have some other basis to be viable. Smith also alleges a fiduciary relationship between herself and the insurers. An insurer, "in dealing with a third-party claim against its insured, is acting in a fiduciary capacity *toward its insured.*" *Badillo v. Mid Century Ins. Co.*, 2005 OK 48, ¶ 27, 121 P.3d 1080 (emphasis added). An "insurer may not treat its own insured in the manner in which an insurer may treat third-party claimants *to whom no duty of good faith and fair dealing is owed.*" *Id.* ¶ 26. The insurers here had no fiduciary duty to Ms. Smith.

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at least part of the personal injury case fee-bearing by intermingling the property damage claim with the non-fee bearing injury claim. We further reject the theory that an insurer has any legal power to confess the tort liability of its insured. The insurer may defend, it may settle, or it may fulfill its contractual obligations by paying the policy limits, but it cannot simply declare its insured to have committed a tort.

This leaves the claims of "wrongful payout," and that the defendants had "misrepresented the truth and hidden the actual insurance company with hopes of plaintiff not achieving a final settlement." The "wrongful payout" claim is apparently pled on the basis that Genesis settled *Ms. McConnell's* property damage claim without settling an "attorney lien." We find no record that any attorney was involved in the matter at the time the property claim was settled. Even if this were so, this claim of a right to a percentage of any settlement of the property damage claim as a contingency fee would belong to Ms. McConnell's attorney, if any. As such, Ms. Smith has no standing to argue that a lien on Ms. McConnell's recovery for vehicle damages was not satisfied.

The most obscure claim against the insurers is that of "misrepresenting the truth and hiding the actual insurance company with hopes of plaintiff not achieving a final settlement." Although notice pleading is well established in our law, a petition should not require detailed forensic examination by a court to determine at which defendant a claim is aimed, or what that defendant is alleged to have done.[19] Such an examination is required here, however.

"Misrepresenting the truth" is a claim of fraud by the involved insurers or claims administrators (and possibly all the "defendants"). Pursuant to 12 O.S. § 2009(B), in "all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Under this standard,

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[19] The petition here engages in what we consider an unacceptable practice of naming five separate defendants, and then attributing all the alleged tortious acts to the "defendants" collectively. We strongly doubt, for example, that there was any possible justification for accusing defendant Klosterman of hiding the identity of ISA 89's insurer or tortiously obstructing settlement.

allegations of fraud must be stated with sufficient particularity to enable the opposing party to prepare his or her responsive pleadings and defenses. *Dani v. Miller,* 2016 OK 35, ¶ 25, 374 P.3d 779, 791. A simple statement that a defendant "misrepresented the truth" is insufficient to meet this standard.

If we reinterpret the pleading slightly, it could claim that some defendant "misrepresented the truth *by* concealing the identity of the actual insurance company." Ms. Smith goes no further, however, in explaining what right she had to know the identity of the "actual insurance company" while negotiating with the designated claims administrator. This may be a repetition of the claim that Ms. Smith had a direct right of suit against the insurer (but the identity of the insurer was tortiously concealed) or that she was somehow entitled to conduct direct negotiation without dealing with claims administrator, CCMSI. We find no support in law for either proposition here.

This leaves only the claim of "obstructing plaintiff from achieving a final settlement." It is not at all clear what this phrase alleges, and Ms. Smith filed no response to the motion to dismiss clarifying it. It is possibly a claim that at least one defendant somehow interfered with the formation of a settlement contract or intentionally interfered with a prospective economic advantage. Tortious interference with contract requires interference with an existing contractual right. *Wilspec Techs., Inc. v. DunAn Holding Grp., Co., Ltd.*, 2009 OK 12, ¶ 15, 204 P.3d 69, 74. We find no existing contractual right between Ms. Smith and ISD 89's insurers, however.

Tortious interference with a business relationship requires that the interference be by "unlawful" means. *Gaylord Entm't Co. v. Thompson*, 1998 OK 30, ¶ 50, 958 P.2d 128, 150. Even assuming (without finding) that some defendant attempted to block or interfere with a settlement here, we find no allegation or record whatsoever of this happening by "unlawful" means.[20] The court did not err in granting Genesis Insurance's motion to dismiss, because Smith's amended petition failed to state a claim against either insurance company.

The Claims Against CCMSI

CCMSI separately obtained dismissal of Smith's claims. We find the analysis above applies to the same claims when brought against CCMSI. We find no support for the theory that a claims administrator has any more of a fiduciary relationship with a third-party claimant than an insurer does.

Constitutional Claims

Smith finally argues that the application of the notice provisions of the GTCA here is unconstitutional because it denies her access to the courts and a remedy for her injuries, *i.e.*, it violates Okla. Const. Art. 2, § 6. The accepted constitutional norm prior to the enaction of the GTCA, however, was that of sovereign immunity. A state entity could not be sued in tort for actions taken in a governmental capacity. *See State ex rel. State Ins. Fund v. Bone*, 1959 OK 135, 344 P.2d 562, 565. The constitutionality of this rule was upheld by the courts

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[20] Even if we recharacterize the claim a third time as "tortious interference with potential economic advantage," this requires "interference with a business or contractual right." *Loven v. Church Mut. Ins. Co.*, 2019 OK 68, ¶ 18, 452 P.3d 418, 424. We find no business or contractual right to a settlement here.

on numerous occasions. *See e.g.*, *Neal v. Donahue*, 1980 OK 82, ¶ 15-16, 611 P.2d 1125, 1129. The GTCA provides greater access and remedies than were available under the constitutionally acceptable doctrine of sovereign immunity. As such, we found no basis to consider that it is currently constitutionally infirm.

CONCLUSION

The fact that many GTCA entities now carry private insurance has complicated the once simple GTCA notice question. As the state entity's authority to "accept or deny" an insured claim is now questionable, an inquiry to a state entity may be met simply with instructions to "talk to our insurer." The courts have, justifiably, created exceptions from the strict statutory notice requirements where the state or its agents have either actively obstructed the discovery of a tort, or where plaintiffs have relied on the state or its agents' affirmative statements that compliant notice has been filed, or that a statutory deadline expires on a certain date. The argument here goes beyond these currently established exceptions for reliance on affirmative implications, misrepresentations, or concealments, however. We find nothing in the text of the GTCA that would allow such an extension.

Smith thereby proposes that the initiation of an insurance claim against the state's insurer must estop the state entity from raising a lack of notice as a defense. If this is so, § 156's requirements and limitations are stripped of any meaning. Similarly, no § 157 limitation period would run until the insurer

formally announced that it will neither settle nor negotiate further.[21] To so hold would be a wholesale amendment of these provisions, not a judicial interpretation. Although substantial revisions to the GTCA may be necessary and desirable to conform the statute to modern practice, such revisions are a function of the legislature, not this body.

AFFIRMED.

WISEMAN, P.J., and HIXON, J. (sitting by designation), concur.

January 5, 2023

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[21] Section 157 of the GTCA states that a claim is deemed denied if not entirely settled within ninety days of notice of the claim, but this date can be extended by agreement. Hence, any claims activity by the insurer could be interpreted as implying an agreement that the ninety-day deadline had been extended.