



**ORIGINAL**

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

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

DIVISION IV

JUN 15 2023

JOHN D. HADDEN  
CLERK

BILLY GENE MARSHALL, )  
 )  
Plaintiff/Appellant, )  
 )  
vs. )  
 )  
G. SMITH, *et al.*, )  
 )  
Defendant/Appellee. )

Case No. 120,772

APPEAL FROM THE DISTRICT COURT OF  
PITTSBURG COUNTY, OKLAHOMA

HONORABLE TIM MILLS, TRIAL JUDGE

**AFFIRMED**

Billy G. Marshall  
Sayre, Oklahoma

*Pro se*

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

For Defendants/Appellees

Rec'd (date)	6-15-23
Posted	<input checked="" type="checkbox"/>
Mailed	<input checked="" type="checkbox"/>
Distrib	<input checked="" type="checkbox"/>
Publish	yes <input type="checkbox"/> no <input checked="" type="checkbox"/>

OPINION BY GREGORY C. BLACKWELL, PRESIDING JUDGE:

Billy Gene Marshall appeals the district court's dismissal of his petition alleging violations of his constitutional rights by prison employees. This Court, in Case No. 119,227, reversed and remanded the trial court's prior dismissal of this case with instructions to allow Marshall to plead compliance with the notice provisions of the Governmental Tort Claims Act (GTCA) and to add the state as a party, both of which were required to file such an action in district court. On

review, we find that although Marshall added the state as a party, compliance with the GTCA has not been, and cannot be, satisfied. Accordingly, we affirm the trial court's dismissal.

### **BACKGROUND**

This is the second time Mr. Marshall has appealed the district court's dismissal of his case. This case and both appeals arise from a series of incidents at the Oklahoma State penitentiary involving Mr. Marshall's alleged acquisition and possession of several prohibited items that ultimately lead to confiscation and disciplinary action. Marshall's initial petition listed several complaints regarding the incident. He claimed that the prison staff's conduct was inappropriate because there was no evidence that he improperly obtained said items and that their accusation that Marshall used a white inmate's identification card to obtain said items is impossible because Marshall is not white. Other claims in the petition were that the officers gave false testimony as part of their investigation into the prohibited items, that these actions were motivated by racial bias, and that he was unfairly punished.

Before either appeal, the trial court requested a special report on the matter from the DOC, which suggested no action was necessary. Subsequently the defendants filed a motion to dismiss Marshall's petition. The motion argued that: (1) state employees acting within the scope of employment could not be named as individual defendants under the GTCA; (2) Marshall's petition failed to allege or support any claim that the involved individuals were acting outside their scope of employment; (3) Marshall had no constitutional right to an

administrative grievance process and thus this right was not violated; (4) Marshall's due process rights were not violated by the procedures and actions used against him; (5) Marshall's petition failed to allege that there had been disparate treatment for non-minority prisoners accused of the same offenses; and (6) that the defendants were entitled to qualified immunity.

The trial court granted the motion to dismiss for failure to exhaust administrative remedies, which was not raised by the defendants. Marshall appealed and this Court reversed, instructing the district court to allow Marshall time to add the state as a party and show compliance with the GTCA's notice requirements, both of which were lacking in Marshall's initial petition. The trial court thereafter complied with our instructions and on April 20, 2022, granted Marshall sixty days to amend his petition with instructions to plead compliance with the GTCA and to name the state as a party.

On May 18, Marshall filed a motion for extension of time to complete the GTCA exhaustion requirement. Attached to this motion was a receipt of the claim from the Risk Management Department, which Marshall had submitted to that department on May 2, 2022. Marshall asked to have until July 31, as that would be ninety days after receipt of the claim. The same day Marshall also filed a motion in which he "request[ed] that this court allow petitioner to amend the Oklahoma Department of Corrections and/or the State of Oklahoma as additional party defendants." R. 121. Marshall argues the merits of his case over the seven pages of this motion. He "request[ed] the state or Oklahoma Department of Corrections be also named as party defendant(s) ...." R. 123. On

June 3, the court granted Marshall's motions. Although Marshall never actually filed an amended petition that named the state as a party, he filed a motion to allow the court clerk to serve the State of Oklahoma "who is a party defendant." R. 147. This was filed on August 17.

In July, Marshall also filed a motion for judgment on the pleadings, a request for production and inspection of documents, and a "Notice of Plaintiff's intent to proceed with civil action; notice that G.T.C.A. Requirements has Been Completed." The notice of intent to proceed states that Marshall "comes before this court and gives notice of his intent to proceed with civil action against all named defendants and the state." R. 138. The GTCA requirement completion notice included an email indicating his claim was received on May 2, 2022, and denied on May 25.

The trial court denied Marshall's motion for judgment on the pleadings and also denied his request for production because it was premature. The court found that Marshall successfully completed the GTCA requirements, but that his notice to name the state as a party was insufficient by statute and that he must rather amend his petition and name the state as a party.

The defendants filed a motion to dismiss, claiming that Marshall failed to timely amend his petition, and that he did not timely comply with the GTCA notice requirements. The trial court granted the defendants motion to dismiss in its entirety. From this order, Marshall appeals.

## 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, 507 P.3d 673, 677. 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

The trial court ordered as follows:

Therefore, pursuant to 51 O.S. §163(C), Marshall must name the State of Oklahoma as a party. Further, Marshall is granted leave to amend his Petition to plead his compliance with the Governmental Tort Claims Act (GTCA), if possible (i.e. notice of claim consistent with the notice provisions of the GTCA, and denial). Marshall is hereby granted sixty (60) days to comply with this Order.

The defendants allege in their motion to dismiss that Marshall failed to comply with both of these orders. The question before us is whether it was proper for the trial court to dismiss under either allegation.

### *Failure to Timely Amend Petition to Add a Party*

On April 20, the trial court granted Marshall sixty days to file his amended petition in accordance with our instructions to add the state as a party. The court then granted Marshall an extension of time, giving him until July 31 to file his amended petition. Although he filed a motion to amend and notice of plaintiff's intent to proceed with civil action, both of which indicated his desire to add the state as a party, Marshall never filed an amended petition. The trial

court deemed Marshall's actions insufficient by statute, citing the reasons set forth in defendants' combined response.

The defendants' combined response points to 12 O.S. § 2015 to support its contention that amending Marshall's petition is the proper, and *only*, avenue by which he can add the state to the suit. Section 2015(A) provides that "[a]mendments to add omitted counterclaims *or to add or drop parties* may be made as a matter of course within the time specified above," which is twenty days after service of the petition. 12 O.S. § 2015 (emphasis added). In its motion to dismiss, the defendants then urge the court to dismiss Marshall's case pursuant to 12 O.S. § 684, which allows a defendant to move for dismissal for failure of the plaintiff to comply with any order of the court.

We find dismissal for failure to add the state as a party improper under either basis. Nothing in the language of § 2015 suggests that amending a petition is the only method by which a plaintiff may add a party to its suit. To the contrary, 12 O.S. § 2021 provides that parties may be added as defendants "by order of the court on motion of any party or of its own initiative at any stage of the action." This appears to be what happened here. On May 23, Marshall filed a motion requesting that the trial court "allow petitioner to amend ... the State of Oklahoma as [an] additional party." R. 121. On June 3, the trial court granted this motion without qualification. Therefore, dismissal under § 684 for failure to comply with a court order is improper because the order of the trial court was

simply to name the state of Oklahoma as a party. The court did not order Marshall to add the state by way of an amended petition.<sup>1</sup>

*Failure to Timely Comply with GTCA Notice Requirements*

We previously remanded this case with instructions to allow Marshall to amend his petition to plead compliance with the GTCA notice requirements because we were unable to determine whether such notice had been given. The record before us at that time provided no evidence to show that he had given GTCA notice or that a claim had been denied, both of which are prerequisites to filing suit in district court.<sup>2</sup> The record before us now is also devoid of any evidence showing compliance with the GTCA notice requirements prior to the filing of this lawsuit.

Similarly, Marshall's claim filed with the state on May 2, 2022, is insufficient to satisfy the GTCA requirements. After being ordered by the trial court on remand to plead compliance with the GTCA, Marshall filed a claim with the state that was ultimately denied. The trial court originally ruled that this satisfied the GTCA notice requirements. But the trial court later dismissed the

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<sup>1</sup> The trial court later ordered that Marshall must bring suit against the State by amending his petition. R. 151. This was not a new, separate order, but rather it was a clarification of the court's original order (albeit an incorrect one) in response to the defendants claim that adding a party may only be done by amended petition. For the reasons set forth above, this conclusion is incorrect.

<sup>2</sup> Title 57 O.S. § 566.4(B)(2) makes clear that no tort or civil action may be filed without following the GTCA notice provisions. *See also I. T. K. v. Mounds Pub. Sch.*, 2019 OK 59, ¶ 15, 451 P.3d 125, 134 ("A notice of claim given to the State or political subdivision is a mandatory or jurisdictional prerequisite to filing a claim for tort damages in a District Court."). Title 51 O.S. § 157 provides that "[a] person may not initiate a suit against the state or a political subdivision unless the claim has been denied in whole or in part."

case based in part on Marshall's failure to timely comply with the GTCA notice requirements.

Dismissal on that basis was proper as the claim with the state should have been filed and denied *prior* to the filing of this lawsuit. Indeed, such an action in district court must be based upon the plaintiff filing a claim within *one year* of the date the loss occurs, or the claim is forever barred. 51 O.S. § 156(B), *Pellegrino v. State ex rel. Cameron Univ. ex rel. Bd. of Regents of State*, 2003 OK 2, ¶ 6, 63 P.3d 535, 537. Marshall's initial petition in response to his loss was filed in December of 2019. The state did not receive notice of Marshall's claim until May 2, 2022—well over two years after the loss occurred. This notice was clearly insufficient under the statute and required dismissal.

#### **CONCLUSION**

In the prior appeal we could not determine from the record whether Marshall had complied with the GTCA notice requirements, and thus could not discern if either this Court or the trial court had jurisdiction. Because of this, we remanded with instructions to grant Marshall leave to amend his petition to show compliance with the GTCA and to add the state as a party. Although we take no issue with any alleged failure to add the state as a party, we see no indication of compliance with the GTCA, and no indication compliance is possible under the facts as alleged by Marshall. As such, we affirm the trial court's dismissal.

**AFFIRMED.**



FISCHER, J., and HUBER, J., concur.

June 15, 2023