IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

(1) MARY OUART, Individually and as the Personal Administrator of the Estate of Joe Wesley Hart, deceased, Plaintiff, v. (1) MICHAEL FLEMING, Individually and in his official capacity; (2) LT. RICK IRWIN, Individually and in his official capacity; (3) JOHN DOE 1, casino security employee; (4) JOHN DOE 2, casino security employee; (5) JANE DOE 1, casino security employee; (6) KURT SHIREY, in his official capacity, Defendants.	)	Case No. CIV-08-1040-D

DEFENDANT KURT SHIREY'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

The Defendant Kurt Shirey[1], in his official capacity, ("Defendant"), moves this Court to enter an Order pursuant to Rule 56(c) of the Federal Rules of Civil Procedure granting summary judgment in his favor and dismissing Plaintiff's claims against him as set forth in Plaintiff's Second Amended Complaint (Doc. No. 36) with prejudice to the re-filing thereof. For the convenience of the Court, and to place the uncontroverted facts in a context in which they may be evaluated, this brief is presented in three sections: this introduction, a statement

[1]As of January 2, 2009, Defendant Shirey is no longer the Sheriff of Pottawatomie County, Oklahoma. Rather, his successor in office is Mike Booth.

of uncontroverted facts, and the argument and authority establishing why Defendant is entitled to summary judgment.

BRIEF IN SUPPORT

UNDISPUTED FACTS

Pursuant to Fed. R. Civ. P. 10(c), as its statement of undisputed facts, Defendant adopts and incorporates herein by reference the Statement of Facts as set forth in the Defendants Michael Fleming and Lt. Rick Irwin's Opening Brief in Support of Their Motion to Dismiss (Doc. No. 16, p. 7, ¶ 1 - p. 11, ¶ 12) filed herein on May 4, 2009 as well as all exhibits and materials attached in support thereof

ARGUMENT and AUTHORITY

Standard of Review

Rule 56 (c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Summary judgment is not a disfavored procedural shortcut, but an integral part of the federal rules as a whole. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986).

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505 (1986), the Supreme Court held that "there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." The Court further

held that "if the evidence is merely colorable, or not significantly probative, summary judgment may be granted." *Id.* In addition, the *Anderson* Court stated that "the mere existence of a scintilla of evidence in support of a plaintiff's position will be insufficient; there must be evidence on which a jury could reasonably find for the plaintiff." *Id.* A movant's summary judgment burden may properly be met by reference to the lack of evidence in support of Plaintiff's position. *See Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998) (citing *Celotex*, 477 U.S. at 325).

Furthermore, as described by the court in *Cone v. Longmont United Hosp. Ass'n.*, 14 F.3d 526 (10th Cir. 1994), "Even though all doubts must be resolved in [the nonmovant's] favor, allegations alone will not defeat summary judgment." *Cone* at 530 (citing *Celotex*, 477 U.S. at 324). *See also Hall v. Bellmon*, 935 F.2d 1106, 1111 (10th Cir. 1991); *Roemer v. Public Service Co. of Colorado*, 911 F. Supp. 464, 469 (D. Colo. 1996). Moreover, "[i]n response to a motion for summary judgment, a party cannot rely on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial." *Conaway v. Smith*, 853 F.2d 789, 794 (10th Cir. 1988).

Finally, a plaintiff's own conclusory testimony and allegations are insufficient to withstand summary judgment. *See Delange v. Dutra Const. Co., Inc.*, 183 F.3d 916, 921 (9th Cir. 1999) (non-movant's own unsupported testimony is insufficient in response to motion for summary judgment); *Hansen v. U.S.*, 7 F.3d 137, 138 (9th Cir. 1993) ("When the nonmoving party relies only on its own affidavits to oppose summary judgment, it cannot rely on conclusory allegations unsupported by factual data to create an issue of material

fact."); *Chemical Engineering Corp. v. Essef Industries, Inc.*, 795 F.2d 1565, 1571 (Fed. Cir. 1986) ("General assertions of fact issues, general denials, and conclusory statements are insufficient to shoulder the non-movant's burden."). In moving for summary judgment, a defendant simply does not have to negate a plaintiff's allegations. *See, e.g., Jenkins v. Wood,* 81 F.3d 988, 990 (10th Cir.1996). In this case, the pertinent facts are uncontested, and any remaining factual disputes are irrelevant to Plaintiff's claims.

PROPOSITION I:

THERE IS NO FACTUAL OR LEGAL BASIS FOR PLAINTIFF'S 42 U.S.C. § 1983 CLAIMS AGAINST DEFENDANT

Pursuant to Fed. R. Civ. P. 10(c), Defendant adopts and incorporates herein by reference the Defendants Michael Fleming and Lt. Rick Irwin's Opening Brief in Support of Their Motion to Dismiss (Doc. No. 16) filed herein on May 4, 2009 as well as all exhibits and materials attached thereto.

Plaintiff has asserted claims against Defendant in his official capacity pursuant to 42 U.S.C. § 1983. Specifically, Plaintiff alleges that Defendant is liable for the alleged violation of the decedent's Fourth, Fifth, and Fourteenth Amendment rights by the Defendants Fleming and Irwin because said violations were allegedly caused by the Defendant's official policy or custom of failing to "instruct, supervise, control, and discipline on a continuing basis Defendant County Law Enforcement Officers..." (Doc. No. 36, p. 7, ¶ 30 - p. 9, ¶ 38). In this regard, Plaintiff claims that, at all times relevant to the complaint, "Defendants Fleming and Irwin were County Law Enforcement officers commissioned by Defendant

Shirey, The Pottawatomie County Sheriff and were, in the subject matter acting under the authority, direction and control of Defendant Shirey." (Doc. No. 36, p. 7, ¶ 32).

However, as set forth in the Defendants Fleming and Irwin's Opening Brief in Support of Their Motion to Dismiss, there is simply no factual or legal basis for such an assertion. Indeed, the undisputed facts conclusively establish that the Defendants Fleming and Irwin were not acting under color of state law with regard to incident at issue, but were rather acting as police officers of the Citizen Potawatomi Nation (the "Tribe"). On the evening of the incident the officers were on active duty and patrolling within Tribal jurisdictional boundaries. They were dressed in Tribal Police Department uniforms, driving Tribal Police Department vehicles, and using equipment provided to them by the Tribal Police Department. (Doc. No. 16, p. 8, ¶ 3). The officers responded to a request by a Tribal Police dispatcher to respond to a situation at the FireLake Casino, which is located wholly within the geographic boundaries of the Tribe's jurisdiction. (Doc. No. 16, p. 8, ¶ 2; pp. 8-9, ¶ 5). The officers neither contacted, nor were contacted by, anyone employed by the Pottawatomie County Sheriff's Office. They were not supervised or assisted by anyone employed by the Pottawatomie County Sheriff's Office with regard to the incident at the FireLake Casino, nor did anyone from the Pottawatomie County Sheriff's Office respond to the request for assistance at the FireLake Casino. (Doc. No. 16, p. 11, ¶ 12). Thus, it is clear that Defendants Fleming and Irwin were acting as Tribal police officers, and not under color of state law.

In her Response to Defendant Officers' Motion to Dismiss (Doc. No. 38), Plaintiff argues that, because the Defendant officers did not have legal authority to arrest a non-Native

American, such as the decedent, on tribal land except by virtue of their cross-commissions, they were necessarily exercising state authority under their cross-commissions with regard to the decedent in this case. In support thereof, Plaintiff asserts that the that the Defendant officers and Chief Warren all testified that one of the purposes of the cross-commissions was to provide legal authority for Tribal officers to act on behalf of Pottawatomie County when exercising law enforcement authority over non-Native Americans on Tribal lands. (Doc. No. 38, p. 5). Plaintiff further cites portions of the depositions of Defendant Fleming and Chief Warren in support of her assertion that the Defendant officers did not have the legal authority to arrest non-Native Americans on Tribal land except by virtue of the cross-commissions. However, Plaintiff's citation of said testimony is misleading and taken out of context. When viewed in the proper context, these witnesses' testimony simply does not support Plaintiff's theory of liability.

First, contrary to Plaintiff's assertion, not all of the Defendant officers testified that the cross-commissions provided legal authority for Tribal officers to act on behalf of Pottawatomie County when exercising law enforcement authority over non-Native Americans on Tribal lands. Indeed, throughout his deposition, Defendant Irwin insisted that, as a Tribal officer, he had the legal authority to arrest or detain anyone, including non-Native Americans, who committed an offense on Tribal property. (Exhibit "1," Deposition of Defendant Irwin, p. 20:16 - p. 21:21; p. 22:7-25; p. 23:8-11; p. 31:11-20: p. 32:6 - p. 33:9; p. 35:7-24; p. 36:16 - p. 37:25; p. 38:14 - p. 40:6; p. 40:17 - p. 41:6; p. 46:8-12: p. 50:15-24).

With regard to Defendant Fleming's testimony, Plaintiff first misleadingly asserts in a footnote that there is no distinction between an "arrest" and a "detention". (Doc. No. 38,

p. 4, n. 3). However, Plaintiff fails to mention that, in his deposition testimony, Defendant Fleming did make a distinction between an arrest and a detention. Defendant Fleming testified that, to him, "arrest" means that he is going to read a suspect his Miranda rights and transport him to the jail, and that the decedent in this case was detained, not arrested. (Exhibit "2," Deposition of Defendant Fleming, p. 19:11-24; p. 20:20 - p. 21:6; p. 34:10-24). In this regard, Defendant Fleming further testified that he had no authority, except through his cross-commission, to transport a non-Native American suspect to the County jail because the jail is not on Tribal lands. (Exhibit "2," Deposition of Defendant Fleming, p. 23:4 - p.24:17; p. 26:5-23). Accordingly, it is clear that any deposition testimony of Defendant Fleming cited by Plaintiff to the effect that he did not have legal authority to arrest a non-Native American on Tribal lands except for his cross-commission was merely due to some confusion on the part of Defendant Fleming concerning the term "arrest". This is clearly the case because Defendant Fleming also testified that he had the legal authority to arrest or detain a non-Native American on Tribal property without regard to his cross-commission. (Exhibit "2," Deposition of Defendant Fleming, p. 19:2-10; p. 21:7 - p. 23:3). Defendant Fleming further clearly testified that, when arresting a non-Native American for an offense committed on Tribal lands, he would be exercising his authority as a Tribal officer, and that he was exercising such Tribal authority with regard to the decedent in this case. (Exhibit "2," Deposition of Defendant Fleming, p. 12:3-19; p. 27:14 - p.28:4; p. 40:4-11).

Likewise, Plaintiff's citation of a Chief Warren's testimony is similarly misleading. In this regard, Chief Warren testified that, to him, there is a distinction between an "arrest" and a "detention" and that "arrest" means that "you're actually going to formally charge that

person for a crime." (Exhibit "3," Deposition of Chief Warren, p. 34:9-21). Chief Warren further testified that a Tribal officer who did not have a cross-commission nevertheless had the legal authority to detain a non-Native American on Tribal lands. (Exhibit "3," Deposition of Chief Warren, p. 30:6 - p. 31:7). Thus, it is clear that any deposition testimony of Chief Warren cited by Plaintiff to the effect that Tribal officers do not have legal authority to arrest a non-Native American on Tribal lands except by virtue of a cross-commission was merely due to some confusion on the part of Chief Warren concerning the term "arrest". Accordingly, Plaintiff's citation of said testimony simply does not support her theory of liability.

Moreover, these witnesses' understanding or misunderstanding regarding the extent of a Tribal officers legal authority over a non-Native American on Tribal property is simply irrelevant. The issue is one of law, not of fact. In this regard, the United States Supreme Court has clearly stated that tribal law enforcement authorities possess "traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands," and therefore have "the power to restrain those who disturb public order on the reservation, and if necessary to eject them." *Duro v. Reina*, 495 U.S. 676, 696-97, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990) (superceded by statute on other grounds as stated in *Mousseaux v. Com'r of Indian Affiars*, 806 F.Supp. 1433, 1439-40 (D.S.D. Oct. 27, 1992)). Furthermore, "[w]here jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities." *Id.* at 697. Thus, as a matter of law, the Defendant officers clearly had the legal authority to detain the decedent in this case without regard to their cross-commissioned status. As such,

Plaintiff's contention that the Defendant officers were necessarily acting under color of state law is wholly without merit.

Considering the relevant circumstances, it is clear that the Defendant officers were exercising their Tribal authority with regard to the decedent. On the evening of the incident the officers were on active duty and patrolling within Tribal jurisdictional boundaries. They were dressed in Tribal Police Department uniforms, driving Tribal Police Department vehicles, and using equipment provided to them by the Tribal Police Department. The officers responded to a police dispatch request for Tribal officer to respond to a situation at the FireLake Casino, which is located wholly within the geographic boundaries of the Tribe's jurisdiction[2]. The officers neither contacted, nor were contacted by, anyone employed by the Pottawatomie County Sheriff's Office. They were not supervised or assisted by anyone employed by the Pottawatomie County Sheriff's Office with regard to the incident at the FireLake Casino, nor did anyone from the Pottawatomie County Sheriff's Office respond to the request for assistance at the FireLake Casino. Furthermore, Plaintiff has not alleged that the Defendant officers ever at any time transported the decedent off of Tribal property. Indeed, it is undisputed that they did not. (Exhibit "1," Deposition of Defendant Irwin, p. 30:9 - p. 31:10). Given these facts, it is clear that the Defendant officers were exercising their Tribal authority with regard to the decedent.

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[2]As discussed in Plaintiff's Response to Defendant Officers' Motion to Dismiss (Doc. No. 38), the witnesses' deposition testimony reveals that, at the time of the subject incident, the Pottawatomie County Sheriff's Office and the Tribe utilized a joint dispatch office and it is unknown at this time whether the dispatcher on the relevant evening was a tribal officer or an employ of the Pottawatomie County Sheriff's Office. However, this matter simply has no relevance to the issue of whether or not the Defendant officers where acting under color of state law.

Thus, because there was no underlying constitutional violation by an officer of Pottawatomie County acting under color of state law, there is no legal basis for imposition of liability on Defendant in his official capacity for an alleged failure to train, supervise, or discipline. *Trigalet v. City of Tulsa, Oklahoma*, 239 F.3d 1150, 1154-56 (10th Cir. 2001). Accordingly, Defendant is entitled to summary judgement with regard to Plaintiff's § 1983 claims against him and same Defendant should be dismissed with prejudice to the re-filing thereof.

PROPOSITION II:

THERE IS NO FACTUAL OR LEGAL BASIS FOR PLAINTIFF'S STATE LAW TORT CLAIMS AGAINST DEFENDANT

In Counts VI-VII of her Second Amended Complaint, Plaintiff alleges that Defendant should be liable under state tort law for Decedent's wrongful death and for negligent training and supervision. (Doc. No. 36, p. 12, ¶ 57 - p. 13, ¶ 65). However, for the reasons set forth in Proposition I above, no persons acting under the authority, supervision, or control of the Defendant were involved in the death of the decedent. Alternatively, Defendant respectfully requests that the Court decline to exercise jurisdiction over any state claims. See Scheibert v. University of Oklahoma Health Sciences Center, 867 F. 2d 591, 599 (10th Cir. 1989).

WHEREFORE, premises considered, the Defendant Kurt Shirey, in his official capacity, respectfully requests the Court to enter an Order pursuant to Rule 56(c) of the Federal Rules of Civil Procedure granting summary judgment in his favor and dismissing Plaintiff's claims against him as set forth in Plaintiff's Second Amended Complaint (Doc. No. 36) with prejudice to the re-filing thereof.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on July 13, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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