

**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.

Case No. 5:08-cv-01040-D

**(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) POTTAWATOMIE COUNTY,
a political subdivision of the State of
Oklahoma,

Defendants.

**PLAINTIFF’S RESPONSE TO DEFENDANT KURT SHIREY’S
MOTION FOR SUMMARY JUDGMENT**

Plaintiff, MARY OUART, Individually and as the Personal Administrator of the Estate of Joe Wesley Hart, deceased, by and through her attorneys of record, Guy A. Fortney of Brewster and De Angelis and William J. Ervin, Jr. of Ervin and Ervin hereby respond to Defendant Kurt Shirey's Motion for Summary Judgment. Defendant's Motion seeks a ruling as a matter of law that the Defendant Deputies Irwin and Fleming were not exercising their authority as a Deputy Sheriffs for Pottawatomie County and therefore Defendant Sheriff Kurt Shirey could not have violated the Decedent's constitutional rights by failing to instruct, supervise, control and discipline on a continuing basis Defendant County Law Enforcement Officers. Defendant's Motion, like co-defendants Motion to Dismiss, is based upon a factual question that has been

resolved in Plaintiffs favor. The instant motion should be denied as the Defendant Deputies' actions which are the subject matter of the suit were pursuant to their state authority as Pottawatomie County Deputy Sheriffs as demonstrated by the record and as plead in Plaintiff's Complaint. In support thereof, Counsel would show the Court the following:

***PLAINTIFF'S RESPONSE TO DEFENDANTS'
STATEMENT OF MATERIAL FACTS***

Contrary to the local rule, Defendant does not set forth any facts to support his motion within the brief but instead adopts the Statement of Facts set forth in the Defendant Officers Motion to Dismiss. [DKT. 16]. Plaintiff responds accordingly:

- (1) Undisputed and Immaterial.
- (2) Undisputed and Immaterial.
- (3) Disputed to the extent that the officers are characterized as "Tribal" officers. As set forth below, the Defendant Deputies on that date were possessed of and exercising their authority as commissioned Deputy Sheriffs for Pottawatomie County. Documents and affidavits clearly establish that the Defendants are possessed of authority to act as either a tribal police officer of the Citizen Potawatomi Nation or as a Deputy Sheriff for Pottawatomie County. *Exhibit 1*, Intergovernmental Co-operative Agreement. The Defendant Deputies and Police Chief for the Citizen Potawatomi Nation also testified that the Defendants were commissioned Deputy Sheriffs for Pottawatomie County on the date of arrest and detention of Joe Wesley Hart. *Exhibit 2*, Deposition of Defendant Deputy Michael Fleming at 13:8-16; *Exhibit 3*, Deposition of Defendant Deputy Richard Irwin at 8:16-21; 41:21-25; *Exhibit 4*, Deposition of Chief of Tribal Police Donald Warren at 26:18-24; The Chief and Defendant Deputies also testified that the

commission empowered them with authority and ability to act with the same authority as a Deputy Sheriff (*i.e.* a state action for purposes of §1983). *Exhibit 2*, Fleming, 28:16-29:3; *Exhibit 3*, Irwin, 8:16-21. Both Defendants carried on their person at the time a card which identified them as a “duly authorized and commissioned Deputy Sheriff for the County of Pottawatomie, State of Oklahoma. *Exhibit 5*, Irwin’s Commission Card; *Exhibit 6*, Fleming’s Commission Card.¹

- (4) Disputed to the extent that the officers are characterized as “Tribal” officers. Response to Disputed Fact No. 3 adopted and incorporated by reference.
- (5) Disputed. It is unknown whether a tribal police officer or a deputy sheriff dispatched the Defendant Deputies. Testimony reveals that the Pottawatomie County Sheriff’s Office and the Citizen Potawatomi Nation *jointly* operated the dispatch office in January of 2007 with both law enforcement entities providing personnel to operate the dispatch from a central office for both law enforcement agencies. *Exhibit 4* at 22:15-25:8. Further, disputed to the extent that the officers are characterized as “Tribal” officers. Response to Disputed Fact No. 3 adopted and incorporated by reference.
- (6) Disputed to the extent that the officers are characterized as “Tribal” officers. Response to Disputed Fact No. 3 adopted and incorporated by reference.
- (7) Conclusion Disputed. The paragraph represents a conclusion of the author based upon facts that have been shown to be disputed though depositions taken in this

¹ At deposition, the Defendant Officers’ testified that they have been issued new Commission Cards since the incident on January 6, 2007. Further, that the Commission Cards in Exhibit 6 and 7 while not the actual cards issued on the date are the very same except that these exemplar exhibits are issued by the new sheriff of Pottawatomie County and reflect a different date for the commission. *Exhibit 2*, Fleming at 13:20-15:7; *Exhibit 3*, Irwin at 41:21-42:13.

matter.

- (8) Disputed and Immaterial. Plaintiff disputes that there has not been a waiver of tribal immunity but such waiver is not at issue in the instant motion.
- (9) Undisputed and Immaterial.
- (10) Undisputed and Immaterial.
- (11) Undisputed except as to the conclusory statement contained at the end of paragraph which is unsupported by the documents and testimony of the Defendants. Response to Disputed Fact No. 3 adopted and incorporated by reference.
- (12) Disputed to the extent that the officers are characterized as “Tribal” officers. Response to Disputed Fact No. 3 adopted and incorporated by reference. Also, with regard to contact by the Pottawatomie County Sheriff’s office, the Tribe and the Pottawatomie County Sheriff’s Office jointly operate the dispatch for all county and tribal law enforcement activities. As testified to by Chief Warren it is possible that they were dispatched by a Pottawatomie County Sheriff’s deputy Sheriff. Response to Disputed Fact No. 5 adopted and incorporated by reference. As Commissioned Deputy Sheriffs they would have been under the supervision and authority of the Pottawatomie County Sheriff’s Office. As Commissioned Deputy Sheriffs, the Defendants responded to the incident at the Firelake Casino.

STANDARDS GOVERNING A MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits on file, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law.” *Federal Rule of Civil Procedure 56(c)*. The moving party has the

burden of showing the absence of a genuine issue of material fact. *Adickes v. S.H. Kress and Co.*, U.S. 144, 90 S.Ct. 1598, 26 L.Ed. 142 (1970). The pleadings in a motion for summary judgment must be read in the light most favorable to the opponent of the motion. *McKay v. Hammock*, 730 F.2d 1367, 1371 (10th Cir. 1984). The moving party's burden may be met by identifying those portions of the record demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed. 265 (1968). Once the moving party has met its initial burden, the burden shifts to the party resisting the motion. That party must then "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Manders v. Oklahoma ex rel. Dept. of Mental Health*, 875 F.2d 263, 265 (10th Cir. 1989) citing *Celotex*, 477 U.S. at 322, 106 S.Ct. at 2552.

As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. This materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination. That is, while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

The party moving for summary judgment must establish its entitlement beyond a reasonable doubt. *Ellis v. El Paso Natural Gas Co.*, 754 F.2d 884, 885 (10th Cir.1985), cited in *Carland v. Metropolitan Life Ins. Co.*, 727 F.Supp. 592,595 (D.Kan.1989), aff'd, 935 F.2d 1114 (10th Cir.), cert. denied, 502 U.S. 1020, 112 S.Ct. 670, 116 L.Ed.2d 761 (1991). The Court is required to examine all evidence in the light most favorable to the non-moving party. *Barber v. General Electric Co.*, 648 F.2d 1272 (10th Cir. 1981). "Further, when evaluating the parties

submissions on a motion for summary judgment, the evidence of the nonmoving party is to be believed and all justifiable inferences are to be drawn in his favor.” *Feist v. Simonson*, 36 F.Supp.2d 1136, 1143 (citing *Anderson v. Liberty Lobby, Inc.*). “[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. at 2511.

ARGUMENT AND AUTHORITIES

To the extent Defendant’s adopts and incorporates the arguments and authorities contained within Defendant Officer’s Opening Brief in Support of Their Motion to Dismiss [DKT. 16], Plaintiff adopts and incorporates by reference her Response Brief. [DKT. 38].

I. Defendant Deputies were *possessed of and exercising* “state authority” at the time of the arrest/detention and therefore this court has jurisdiction over the Defendant Officers for Plaintiff’s 42 U.S.C. §1983 claims.

In seeking summary judgment, Defendant Shirey ignores facts that are contrary his motion, raises a question of fact or dismisses them as the result of confusion on the part of the witness. Rather than quiet all factual disputes, Defendants citations to the record merely serve to spotlight disputes of material facts which prevent the motion from being granted.

a. None Of The Defendants Can Dispute That The Defendants *Possessed State Authority By Virtue Of Their Commission As A Pottawatomie County Deputy Sheriff.*

The *undisputed* material fact is that the Defendant Officers were possessed of “state authority” at the time of the incident that resulted in the death of Joe Wesley Hart on January 6, 2007. Documents and affidavits clearly establish that the Defendants are possessed of authority to act as either a tribal police officer of the Citizen Potawatomi Nation or as a Deputy Sheriff for Pottawatomie County. *Exhibit 1*, Intergovernmental Co-operative Agreement. The Defendant Deputies and Police Chief for the Citizen Potawatomi Nation also testified that the Defendants

were commissioned Deputy Sheriffs for Pottawatomie County on the date of arrest and detention of Joe Wesley Hart.² *Exhibit 2*, Deposition of Defendant Deputy Michael Fleming at 13:8-16; *Exhibit 3*, Deposition of Defendant Deputy Richard Irwin at 8:16-21; 41:21-25; *Exhibit 4*, Deposition of Chief of Tribal Police Donald Warren at 26:18-24; The Chief and Defendant Deputies also testified that the commission empowered them with authority and ability to act with the same authority as a Deputy Sheriff (*i.e.* a state action for purposes of §1983). *Exhibit 2*, Fleming, 28:16-29:3; *Exhibit 3*, Irwin, 8:16-21. Both Defendants carried on their person at the time a card which identified them as “duly authorized and commissioned Deputy Sheriff for the County of Pottawatomie, State of Oklahoma. *Exhibit 5*, Irwin’s Commission Card; *Exhibit 6*, Fleming’s Commission Card. No confusion exists on the undisputed fact that the Defendant Officers were possessed of “state authority” at the time of the incident that resulted in the death of Joe Wesley Hart on January 6, 2007.

The fact that the Defendants were possessed of a dual commission is not dispositive of the inference to be drawn from the evidence that they were acting under “state authority” for purposes of a §1983 action. What is disputed by the parties is the inference to be drawn from this dual commission and its application to the facts of this case. None of the cases cited by the cited by the Defendant stand for the proposition that where an officer is possessed of both tribal and state authority and he arrests or detains a non-Native American, that he is exclusively exercising tribal authority.

2 As acknowledged by Defendant Officer Irwin, in this case, there is no distinction between arrest and detention.

A A detention is, in effect -- in the legal term that law enforcement uses, it is an arrest; it's a restriction of their freedom of movement.

Q So there isn't a distinction. While I might have been making a lay distinction --

A Correct.

Q -- there is no distinction between an arrest and a detention?

A In this question, there is not going to be on our side. It would be a restriction of their freedom of movement either way, and that is what we in law enforcement consider an arrest.

Exhibit 3 at 37:14-25.

Accordingly, there can be no dispute that the Defendants Fleming and Irwin were possessed of “state authority” on the date of the arrest/detention and resulting death of Joe Wesley Hart as alleged by the Plaintiff in the Complaint, ¶¶ 15, 16, 20, 31, 36; Amended Complaint, ¶¶15, 20, 31, 36; Second Amended Complaint, ¶¶15, 21, 32, 37.

b. The Defendant Deputies Were *Acting* Under the State Authority Granted To Them As Pottawatomie County Deputy Sheriffs.

The evidence of the Plaintiff is to be believed and all justifiable inferences are to be drawn in her favor regarding the exercise of “state authority” by the Defendant Officers in this case. As outlined below, testimony by the Defendant Deputies and the Chief established that not only were the Defendants *possessed* of state authority but in the early morning hours of January 6, 2007 but that they were *exercising* this state authority for the arrest and detention of Joe Wesley Hart.³ Defendant Shirey’s disagreement with the inferences to be drawn in the Plaintiff’s favor will not satisfy the standards on a motion for summary judgment.

The Defendant Deputies and the Chief all testified that the purpose of the cross commissions with the Pottawatomie County Sheriff’s Office was to provide legal authority to act on behalf of the County in two instances: (1) when acting as a law enforcement officer while not on tribal or trust lands (*Exhibit 2*, Fleming at 11:15-12:19; 16:23-17:9; *Exhibit 3*, Irwin at 16:16-20:24; *Exhibit 4*, Warren at 11:16-12:15) and (2) when exercising law enforcement authority over non-native Americans⁴ on trust land⁵ (*Exhibit 2*, Fleming at 26:17-27:1; 27:14-19; 28:10-29:3; 29:15-23; 33:12-16; 39:7-40:3; *Exhibit 4*, Warren at 29:2-19; 32:8-18; 33:1-16; 36:10-37:2). Testimony also established that when exercising their authority on behalf of the state as a Deputy Sheriff, they were representatives of the Pottawatomie County Sheriff’s Office. (*Exhibit*

³ The Defendants do not dispute that Joe Wesley Hart was a non-Indian as alleged in Plaintiff’s Complaint, ¶ 14; Second Amended Complaint, ¶ 14.

⁴ *Supra*, n. 4.

⁵ It was also established during the depositions that Fire Lake Casino is on trust lands for the Citizen Potawatomi Nation. *Exhibit 4*, Warren at 29:20-23. Additionally, Defendants have not disputed this fact.

2, Fleming at 33:12-16; *Exhibit 3*, Irwin at 8:16-21; *Exhibit 4*, Warren at 36:22-37:2).

In the instant matter, in the early morning hours of January 6, 2007, the Defendant Deputies were dispatched by the *joint* dispatching office for both the Pottawatomie County Sheriff's Office and Citizen Potawatomi Tribal Nation Police Department. *Exhibit 2*, Fleming at 35:8-39:16; *Exhibit 3*, Irwin at 27:9-14; *Exhibit 4*, Warren at 15:12-26:17. That in the bathroom at the Firelake Casino, the Defendant Deputies arrested and/or detained Joe Wesley Hart, a non-Native American. In effectuating the arrest and detention of Joe Wesley Hart, the Defendant Deputies were exercising state authority by virtue of their status as a Commissioned Deputy Sheriff with the Pottawatomie County Sheriff's Office responding to an incident involving a non-Native American on trust lands. Chief Warren testified:

Q So if Officer Irwin testified that he had, in fact, arrested Mr. Hart on this morning, the only way that he had authority to do that at the FireLake Casino that morning was by virtue of his cross-commission status as a Deputy Sheriff with the Pottawatomie County Sheriff's Department; correct?

MR. BLONGEWICZ: Object to form. You may answer.

THE WITNESS: **The -- yeah, I believe that's right.**

Q (By Mr. Fortney) I mean if he's exercising his authority as a Deputy Sheriff, he's a representative of the Sheriff's Department at that time; right?

MR. BLONGEWICZ: Object to form.

THE WITNESS: **Yeah, I believe so.**

Exhibit 4 at 33:24-34:8; 36:22-37 (emphasis added). Defendant Fleming testified:

Q Yeah. Do you agree or disagree with this statement: As a tribal officer who is not cross-commissioned, you do not have authority to make an arrest of a non-Native American on trust lands?

A **True.**

Q But if you are a cross-commissioned officer who is both possessed of Tribal authority and the authority of the State and you see a non-Native American commit a felony or misdemeanor on trust lands, you do have the authority to make an arrest?

A **Yes.**

Exhibit 2 at 28:10-21 (emphasis added). It is only pursuant to the Defendants' status as a Commissioned Deputy Sheriff with the Pottawatomie County Sheriff's Office pursuant to the Intergovernmental Co-operative Agreement (*Exhibit 1*) that the Defendant Deputies are able to effectuate an arrest of Non –Native American Joe Wesley Hart. That is the authority that they are *possessed* of and *exercising* on the morning of January 6, 2007.

Defendant Shirey on the one-hand holds up the facts surrounding the dispatch of the Defendants to the scene as dispositive and material (*Motion*, pp. 2 and 9) and on the other claims that it is simply irrelevant. *Motion*, n. 2. In fact, it is unknown whether they were dispatched by a tribal police officer or a Pottawatomie County deputy on that morning. Testimony reveals that the Pottawatomie County Sheriff's Office and the Citizen Potawatomi Nation *jointly* operated the dispatch office in January of 2007 with both law enforcement entities providing personnel to operate the dispatch from a central office. *Exhibit 4* at 22:15-25:8. The facts regarding who dispatched the officers are un-determinative in this matter. Additionally, the fact no one from the Pottawatomie County Sheriff's Office was formally dispatched to the scene of the arrest is also un-determinative as well. One inference from this fact is, as acknowledged by the Defendant Deputies, it is unnecessary to dispatch additional personnel by virtue of the Defendants' status as a Commissioned Deputy Sheriff. *Exhibit 2*, Fleming at 33:12-34:6; *Exhibit 3*, Irwin at 24:6-25:20; *Exhibit 4*, Warren at 32:8-18. Deputy Sheriffs (Fleming and Irwin) with Pottawatomie County Sheriff's Office were dispatched that morning and assisted each other in the arrest of non-Native American Joe Wesley Hart on the morning of January 6, 2007. The Pottawatomie County Sheriff's Office were on the scene that morning acting pursuant to the authority granted to them in recognition of a situation involving a non-Native American on tribal land.

Accordingly, the actions of the Defendant Officers are a “state action” for purposes of 42 U.S.C. § 1983. *Williams v. Board of County Com'rs of San Juan County*, 125 N.M. 445, 450, 963 P.2d 522, 527 (N.M.App., 1998)(“In their individual capacities, however, Native-American actors may be subject to a § 1983 claim if their actions were pursuant to state authority.”). Furthermore, as the acts complained of are the acts of Deputy Sheriffs of the Pottawatomie County Sheriff’s Office, there is a legal basis for the imposition of liability of Defendant Shirey in his official capacity for a failure to train, supervise or discipline the Defendant Deputies under §1983.

II. As Deputy Sheriffs of Pottawatomie County, Defendant Kurt Shirey is liable under the *respondeat superior* for Plaintiffs’ state law claims for the acts of its agents and for his own negligence in the training and supervision of the Defendant Deputies.

As set forth above, Defendant Deputies were both possessed of authority and acting as Deputy Sheriffs for Pottawatomie County. As undisputed agents of Pottawatomie County, Plaintiff’s state tort claims may proceed under theories of *respondeat superior* and against Defendant Shirey for his own negligent acts in the training and supervision of the Defendant Deputies. Accordingly, all state law claims are valid and this Court can exercise pendant jurisdiction over Plaintiff’s state claims which arise under the laws of the State of Oklahoma which this Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

CONCLUSION

Plaintiff, MARY OUART, requests that this Court deny Defendant Shirey’s Motion for Summary Judgment as there is a material factual dispute regarding the exercising of the undisputed authority that both Defendant Deputies Fleming and Irwin possessed on January 6, 2007.

Respectfully submitted,

s/ Guy A. Fortney
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CERTIFICATE OF SERVICE

I herby certify that on the 10th day of August, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the electronic records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the Following ECF registrants:

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