

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

SHAWN WALDEN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.: CIV-23-1075-PRW
	)	
THE CITY OF DUNCAN, OKLAHOMA	)	
A municipal corporation,	)	
CHRISTIAN ARCHER, in his official and	)	
Individual capacity,	)	
Defendants.	)	

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**DEFENDANT CITY OF DUNCAN'S REPLY TO PLAINTIFF'S RESPONSE TO  
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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## **REPLY TO RESPONSE TO MOTION FOR SUMMARY JUDGMENT**

Defendant City of Duncan (“the City”) hereby submits this brief in reply to Plaintiff’s Response to the City’s Motion for Summary Judgment. (Doc 46). As discussed in the initial motion and further herein, the City is entitled to summary judgment.

In his response, Plaintiff dismisses all 42 U.S.C. § 1983 claims against the City; thus, limiting his claims against the City to those under the Oklahoma Governmental Torts Claims Act. (Doc. 46, pp. 15-16). Plaintiff tries to frame his state law tort claim as one of negligence, but the only possible remaining state law claim against the City is for false arrest. Thus, the only relevant question in this case is whether Officer Archer had probable cause to support the arrest of Plaintiff. As the undisputed evidence in the record demonstrates, probable cause for the arrest existed and the City is entitled to judgment.

### **I. THERE IS NO GENUINE DISPUTE OF MATERIAL FACT**

After reviewing the Plaintiff’s Response to Officer Archer’s facts, it is clear that every **material** fact identified in Officer Archer’s Motion for Summary Judgment is expressly admitted or otherwise undisputed. Accordingly the following can be established:

Officer Archer was dispatched to the Chisolm Corner Store due to a report that a man inside the store, who would later be identified as Plaintiff, was acting suspiciously and had dropped a gun several times while inside the store. When Officer Archer interacted with Plaintiff, he observed that Plaintiff appeared lethargic. Officer Archer performed the horizontal gaze nystagmus test, a standardized field sobriety test, on Plaintiff. Officer Archer also had prior interactions with Plaintiff, during which Plaintiff had been under the

influence of something and was belligerent. (Ex. 1, Deposition of Archer, 17:1-13).<sup>1</sup> Based on his observations at the scene and during the field sobriety test, along with his knowledge of Plaintiff from previous interactions, Officer Archer determined that there was evidence to establish probable cause and continuing with the other field sobriety tests had a potential to put his safety at risk. (Ex. 1, Deposition of Archer 16:2-17:13).

Plaintiff does not dispute that Officer Archer knew about Plaintiff's behavior in the store, that Plaintiff seemed lethargic, and that Officer Archer had interacted with Plaintiff previously and knew him to act erratic while under the influence. (Doc. 46, Plaintiff's Response to Defendant's Facts Nos. 4-6; 11-12). Plaintiff tries to negate these clear facts by claiming that Plaintiff was lethargic because he was tired and implying that Officer Archer's previous interactions with him are somehow irrelevant because there was not a written report about them at the time of the arrest. This is patently erroneous. When determining probable cause, an officer is allowed to consider the totality of the circumstances, including the officer's previous interactions with the individual. *United States v. Phillips*, 71 F.4th 817, 823 (10th Cir. 2023) (finding it reasonable that an officer considered his previous interactions with a suspect as part of his basis for initiating a traffic stop). The fact that Officer Archer did not write down his previous interaction with Plaintiff does not mean he cannot consider those observations. Plaintiff has not, and cannot, offer any authority to the contrary sufficient to defeat summary judgment on this point.

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<sup>1</sup> Officer Archer's Deposition is already included in its entirety as an exhibit to Plaintiff's Response to the City's Motion for Summary Judgment (Doc. 46-5). For the Court's convenience, the City reattaches only the pages it relies on as an exhibit to its reply.

Plaintiff also admits that Officer Archer and other officers on the scene, observed nystagmus<sup>2</sup>, as well as circular swaying, tremors in Plaintiff's chest, shoulder, and arms, and slurred speech. (Doc. 46, Plaintiff's Response to Defendant's Facts 9-10; Plaintiff's Fact 26). But Plaintiff claims that none of these indicators of intoxication were actually observable, and thus they must not exist. As "support" for every fact in which he claims that none of these indicators were observable he misrepresents testimony of Archer, cites to the affidavit of his "expert", cites to his own testimony, or cites to the transcript of Officer Archer's body cam footage. (Doc. 46, Plaintiff's Facts Precluding Summary Judgment 25-29). Each of these are problematic for their own reasons and will be addressed in turn.

First, Plaintiff claims, "Officer Archer admits that the circular swaying is not visible on his body cam footage" (Doc. 46, Plaintiff's Facts Precluding Summary Judgment 25). Officer Archer explained that the circular swaying was present on either Sergeant Lard or Officer Aguilera's body camera footage. (Ex. 1, Deposition of Archer, p. 40:14-22) This is not the "proof of dispute" that Plaintiff would like to believe it is. Officer Archer clearly testifies that the circular swaying is visible on other officers' body cam footage. Other officers also saw such swaying present while at the scene. (Docs 29-11; 29-12). It is only Plaintiff's expert who claims that the circular swaying is not visible on the body cam footage. (Doc. 46, Plaintiff's Facts Precluding Summary Judgment 25).

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<sup>2</sup> Nystagmus is involuntary jerking of the eyes and lack of smooth pursuit of the stimuli. The presence of nystagmus is a common indication of intoxication. (Ex. 1, 16:2-20 28: 3-18; 30:13-20; 33:3-22)

Second, Plaintiff repeatedly cites an affidavit written by Plaintiff's expert, David Ballard, to support his conclusion that no indicator of intoxication was observable. These opinions include that the indicators Officer Archer saw were "not actually present or they were so insignificant as to not constitute a basis for a probable cause determination." (Doc. 46-8, ¶ 4); "no reasonable officer would rely on such claimed conditions as supporting a finding of intoxication by either alcohol or drugs" (Doc. 46-8, ¶ 4); and "from an objective standpoint, there was not an arguable basis to believe Mr. Walden was impaired by drugs or alcohol." (Doc. 46-8, ¶ 18). These statements amount to nothing more than conclusory statements that attempt to bolster Plaintiff's version of events. It is well established that conclusory expert opinions, such as the ones offered in Mr. Ballard's affidavit, are not enough to raise a genuine issue of material fact. *Medina v. Cram*, 252 F.3d 1124, 1133 (10th Cir. 2001). Mr. Ballard's affidavit should not be considered.<sup>3</sup> See *City of Chanute, Kan. v. Williams Nat. Gas Co.*, 743 F. Supp. 1437, 1445 (D. Kan. 1990) (holding that an expert affidavit of conclusory statements is not enough to show a genuine issue of material fact.) *aff'd*, *City of Chanute, Kan. v. Williams Nat. Gas Co.*, 955 F.2d 641 (10th Cir. 1992)

Third, Plaintiff cites only to his own testimony to support his conclusion that indicators of intoxication, such as slurred speech, are not observable. (Doc. 46, Plaintiff's Facts Precluding Summary Judgment No. 27). As discussed below, Officer Archer and the other officers on the scene all testified that they observed indicators of intoxication.

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<sup>3</sup> Additionally, as fully expounded upon in Defendants' Motion to Exclude the Testimony of Mr. Ballard, Mr. Ballard is not qualified to testify. Nor can he offer legal conclusions or define the applicable law, which is exactly what he attempts to do with this affidavit.

Plaintiff's version of the events is not enough to show a genuine dispute of material fact.

Finally, Plaintiff claims that no indicators of intoxication are actually observable on the body cam footage, and thus these indicators cannot serve as Officer Archer's basis for probable cause. However, Plaintiff does not submit any video or audio recording as an exhibit. He only submits a transcript of the body cam footage of Officer Archer. (Doc. 46-3). One cannot rely on a transcript to show things such as tremors or circular swaying. It makes little sense for Plaintiff to argue that one cannot observe any indicators of intoxication on the video without actually attaching the video as an exhibit.

Plaintiff's lack of actual viable support for his claims means there is not enough evidence to create a dispute of material fact. While the Court must view the facts in the light most favorable to the moving party, this is only true if there is a "genuine" dispute of material fact. *Scott v. Harris*, 550 U.S. 372, 380 (2007) (citing Fed. R. Civ. Pro. 56(c)). Meaning that a party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts .... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Id.* (quoting *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–587 (1986) (footnote omitted)). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.*

The Plaintiff's self-serving version of events is clearly contradicted by the record, especially when reviewing the video rather than solely relying on the interpretations of the

Plaintiff and the Plaintiff's expert, as the Plaintiff does in his Response. The remainder of Plaintiff's facts are irrelevant, specifically his facts regarding the performance of the field sobriety test. Probable cause can exist even without a field sobriety test as probable cause is based on the totality of the circumstances presented to the officer. Thus, Plaintiff's facts regarding the performance of the field sobriety test do not preclude summary judgment. Rather, the undisputed material facts in the record clearly show that Officer Archer had ample evidence to establish probable cause to arrest the Plaintiff for driving while intoxicated and possessing a firearm while intoxicated.

## **II. THE "POST HOC" EVIDENCE CAN BE CONSIDERED.**

Plaintiff claims that this Court must disregard multiple pieces of evidence, including the declarations of Officer Davidson and Officer Aguilera who were both on the scene, in which they both state they saw indicators of intoxication. (Doc 29-11; Doc 29-12). This argument is unsupported and should be disregarded. Plaintiff's basis for his argument is that Officer Archer did not know this information when he chose to arrest Plaintiff. While Officer Archer does not concede that Plaintiff's statement is accurate, it is irrelevant for the affidavits. The probable cause analysis under Oklahoma state law considers whether the officer had "reasonable cause" or "an honest suspicion or belief." *Roberts v. Goodner's Wholesale Foods, Inc.*, 50 P.3d 1149, 1152 (Okla. Civ. App. 2002). The observations of other officers on the scene are relevant to demonstrate the reasonableness of Officer Archer's probable cause determination. The Court need not disregard such evidence.

### **III. THE CITY IS NOT LIABLE UNDER THE OKLAHOMA GOVERNMENTAL TORT CLAIMS ACT**

Plaintiff's only remaining claims against the City are those under the Oklahoma Governmental Tort Claims Act. ("GTCA"). Plaintiff claims that the City has waived any potential exemption from liability based on the GTCA by not raising it in its underlying motion. Additionally, Plaintiff contends that his only basis for liability under the GTCA is vicarious liability. He has "not pled a failure to train and has never argued this as an issue."<sup>4</sup> Plaintiff's claim that the City cannot assert any exemption from liability is unsupported. The City is exempt from liability as the officers on the scene were acting under tribal authority and are thus subject to sovereign immunity. However, even if this Court believes the officers were acting within the scope of their employment as state officers, the City still cannot be held liable because Officer Archer had probable cause to arrest Plaintiff.

#### **A. Officer Archer Was Acting Under Tribal Authority.**

Plaintiff first argues that the City has waived any defense based on the cross-deputization of officers due to its "failure" to argue such in its underlying motion. This is untrue. Plaintiff's contention that the City cannot raise any exemptions based on the cross-deputization of officers mischaracterizes the nature of the City's argument. The City is not simply asserting a statutory exemption – it is raising a jurisdictional bar to liability based

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<sup>4</sup> This claim is entirely disingenuous, as his own Complaint explicitly states "[B]ecause the failure to train and supervise Officer Archer is, at the least, negligent, the City of Duncan is also liable for the negligent actions of its officer." (Doc 1, ¶ 22). His attempt to now distance himself from this clear allegation is nothing more than a strategic misrepresentation made by Plaintiff to distract the City from what he sees as the "real issues" when the City drafted its original brief. Even so, if Plaintiff truly is abandoning this argument against the City will not address it further.



on the scope of the GTCA itself. Under the GTCA, sovereign immunity is waived only for torts committed by employees acting within the scope of their employment on behalf of the State or a political subdivision of the State. *See* 51 O.S. § 152. When an employee acts on behalf of a tribal government or under tribal authority, that conduct falls outside the jurisdictional reach of the GTCA entirely. Thus, is no waiver of immunity by the state because the conduct of the officers is not attributable to the state. The conduct is attributable to the tribe as the state lacks independent authority in these scenarios. *See Ross v. Neff*, 905 F.2d 1349, 1353 (10th Cir. 1990) (“states [lack] independent authority to enforce their own laws over Indians on Indian land.”). Jurisdictional arguments such as this cannot be waived.

Moreover, Plaintiff had notice of this issue. The City did raise the issue of sovereign immunity under the GTCA in its underlying motion and raised the issue of the officers acting under their tribal authority, not their state authority, in the context of 42 U.S.C. § 1983. (Doc. 29, pp. 7-8; 15-16) Plaintiff now has dismissed his 42 U.S.C. § 1983 claims and asserts that since his claims are now limited to the GTCA and the City never raised the issue of Officer Archer’s cross-deputation taking him out of the scope of his employment in that context, the City has waived such a defense. The City clearly gave Plaintiff notice that the cross-deputation and sovereign immunity was an issue and argued such issue in their brief. The City should not be further prejudiced because Plaintiff continues to move the target and reframe his claims in an attempt eliminate possible defenses for the City. Officer Archer had no jurisdiction over Plaintiff within his capacity as a state employee. As discussed in the City’s underlying motion, Officer Archer only had jurisdiction over

Plaintiff due to his cross-commissioned status. Thus, it cannot be said he was acting within the scope of his employment as a state employee, and the City cannot be held liable.

**B. Plaintiff has Failed to Establish Any Claim Under the GTCA**

Plaintiff tries to frame this claim as a “negligence” claim, asserting that the City is liable because “Defendant Archer was negligent in arresting the Plaintiff without completing a proper field sobriety test, offering a breath test, and by talking the Plaintiff into declining blood test.” (Doc. 46, p. 22). A negligence claim premised upon an arrest cannot stand. *Williams v. City of Norman*, CIV-16-1008-C, 2017 WL 4248879, at \*3 (W.D. Okla. Sept. 25, 2017). “A claim for false arrest is an intentional tort and therefore it cannot give rise to a claim for negligence.” *Id.* (citing *Broom v. Wilson Paving & Excavating, Inc.*, 2015 OK 19, ¶ 32, 356 P.3d 617, 629). Plaintiff has not asserted this as a negligence claim before. (Doc. 1, ¶ 18). To the extent that he wishes to do so now, he fails to show any facts, evidence, or law to demonstrate that such a claim would exist in this case. *Id.*

What Plaintiff actually asserted, and the only potential claim he may have under the GTCA, is a false arrest claim. To succeed on such a claim he must show that Officer Archer acted without probable cause. The existence of probable cause is a complete defense to a false arrest claim. *Adamson v. Dayton Hudson Corp.*, 774 P.2d 478, 479 (Okla. Civ. App. 1989). Plaintiff bears the burden of proving, by affirmative evidence, that there was an absence of probable cause. *Id.* This means that Plaintiff must present facts that show that the arresting officer lacks reasonable grounds to believe that the plaintiff committed a crime. *Id.*; *see also Shaw v. City of Okla. City*, 380 P.3d 894, 900 (Okla. Civ. App. 2016). An officer’s belief can be based on “his own knowledge and upon facts communicated to

him by others.” *Shaw*, 380 P.3d at 900. An officer need not prove “that a felony was actually committed in order to justify such an arrest; as long as reasonable cause existed to believe the person committed a felony, the arrest . . . is valid, even though it may later turn out that no felony was committed.” *Id.* at 900 (internal citation omitted)

Plaintiff has not met his burden of proof and has failed to show that there was an absence of probable cause in this case. As discussed in depth in the City’s underlying motion, and Officer Archer’s underlying motion and reply, Officer Archer had a reasonable belief that Plaintiff committed a crime. Officer Archer, and other officers on the scene, all observed Plaintiff exhibiting classic signs of intoxication: physical swaying of the body, tremors in his chest and hands, clear lethargic appearance, slurred speech, and rapid uncontrollable eye movements. (Doc. 29, Defendant’s Statement of Facts 7). Officer Archer also had been told that Plaintiff had been acting suspiciously and dropped a gun in the convenience store multiple times. All these signs supported Officer Archer’s belief that Plaintiff was driving while intoxicated and had possession of a firearm while intoxicated.

As discussed in depth in Officer Archer’s Reply, Plaintiff’s belief that probable cause did not exist is completely premised on his self-serving version of the facts and his claim that certain indicators of intoxication cannot be seen on the bodycam footage. He offers no affirmative evidence of a dispute as to whether Officer Archer lacked probable cause. Plaintiff cannot meet his burden and show that there was an absence of probable cause. Thus, Plaintiff’s claim for false arrest against the City must fail.

For the reasons set forth in the Motion and further above, the City is entitled to Summary Judgment on all claims against it.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 2nd of May, 2025, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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s/ Jessica James Curtis  
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