

Appeal No. 25-6153

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

SHAWN WALDEN,

Plaintiff/Appellant,

v.

THE CITY OF DUNCAN OKLAHOMA,
a municipal corporation,

CHRISTIAN ARCHER, in his official
capacity and individual capacity,

Defendant/Appellee.

Appeal No. 25-6153
23-cv-01075-PRW
(Western District of Oklahoma)

On Appeal from the United States District Court
for the Western District of Oklahoma
District Court Case No. 23-cv-01075-PRW
Honorable Patrick R. Wyrick
U.S. District Judge

APPELLANT'S REPLY BRIEF

RESPECTFULLY SUBMITTED THIS 9th DAY OF JANUARY, 2026.

s/ Mark Hammons

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

Table of Authorities	i-iii
I. - STATEMENT OF THE CASE.	1
II. - ARGUMENT AND AUTHORITY.....	2
1. - OFFICER ARCHER ACTED UNDER COLOR OF STATE LAW ...	2
A. - Officer Archer’s Actions Throughout The Arrest Were Based Solely On His Apparent Authority As A Duncan Police Officer	2
B. - Archer Was Acting In A Dual Capacity Utilizing Both His State Authority AND His Tribal Authority	6
2. - JUDGMENT IN FAVOR OF THE CITY WAS ERRONEOUS	8
A. - The District Court Should Not Have Retained Jurisdiction Over The State Law Claim	8
B. - When A City Employee Is Authorized By The City To Act Under A Tribal Commission, The City Remains Liable Under The OGTCa.	11
CONCLUSION	13
III. - STATEMENT REGARDING ORAL ARGUMENT	13
IV. - CERTIFICATE AS TO THE WORD COUNT OF THE BRIEF	13
CERTIFICATE OF COMPLIANCE	14
CERTIFICATE OF SERVICE.....	14

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

<i>Carlsbad Tech., Inc. v. HIF Bio, Inc.</i> , 556 U.S. 635 (2009)	8
<i>Carnegie-Mellon University v. Cohill</i> , 484 U.S. 343 (1988)	9
<i>McCain v. Des Moines</i> , 174 U.S. 168 (1899)	4, 5
<i>Minerva Surgical, Inc. v. Hologic, Inc.</i> , 594 U.S. 559 (2021).	7, 8
<i>Screws v. United States</i> , 325 U.S. 91(1945)	5
<i>United Mine Workers v. Gibbs</i> , 383 U.S. 715 (1966).	10

UNITED STATES COURTS OF APPEAL

<i>Ball v. Renner</i> , 54 F.3d 664 (10th Cir. 1995)	10
<i>Barnes v. Sec. Life of Denver Ins. Co.</i> , 945 F.3d 1112 (10th Cir. 2019).	10
<i>Bressi v. Ford</i> , 575 F.3d 891 (9th Cir. 2009)	8
<i>Dry v. City of Durant</i> , 242 F.3d 388 (10th Cir. 2000)	3, 4
<i>Hall v. Witteman</i> , 584 F.3d 859 (10th Cir. 2009).	5
<i>How v. City of Baxter Springs</i> , 217 F. App'x 787 (10th Cir. 2007)	4
<i>Roe v. Cheyenne Mt. Conf. Resort</i> , 124 F.3d 1221 (10th Cir.1997)	9, 10
<i>Ross v. Neff</i> , 905 F.2d 1349 (10th Cir.1990).	12
<i>Utah Ass'n of Counties v. Clinton</i> , 255 F.3d 1246 (10th Cir. 2001).	10
<i>United States v. Martin</i> , 163 F.3d 1212 (10th Cir.1998)	7

UNITED STATES DISTRICT COURTS

<i>Bordeaux v. Lynch</i> , 958 F. Supp. 77 (N.D.N.Y. 1997).	7
<i>Fernandes v. City of Broken Arrow</i> , 2017 U.S. Dist. LEXIS 15373, (E.D.Okla. Feb. 3, 2017)	6, 7

<i>Knudson v. Weeks</i> , 394 F. Supp. 963 (W.D.Okla. 1975)	12
<i>Smith v. Cochran</i> , 216 F. Supp. 2d 1286 (N.D.Okla. 2001).	5

OTHER AUTHORITY:

51 O.S. § 152(13)	11
Restatement (Third) of Agency , §§ 3.14, 3.16	7, 12

I. - STATEMENT OF THE CASE

Appellees apparently feel that it is a beneficial litigation tactic to make *ad hominen* attacks as part of their arguments. In their Answer Brief, p. 6 [Dkt # 18, p. 13], Defendants accused counsel of misrepresenting the records.

As part of his factual showing, Mr. Walden has argued that Officer Archer throughout his encounter with Mr. Walden presented himself as a City of Duncan police officer. These facts are set out in the Appendix at 315, which quotes the summary judgment materials. Therein Walden admitted that Officer Archer held a dual commission with the City and the Tribe, but showed that this commission was not displayed or utilized until well after the seizure and arrest:

RDF15: [Appx 315]. Admitted. However, Officer Archer wore his Duncan Police Department uniform, arrived in a Duncan PD car, and carried Duncan PD equipment. Ex 5, Archer, p. 8, lns 2-23; p. 61, lns 23-25 [Appx 365, 379]. Archer never identified himself as a tribal officer, showed a tribal commission card, nor wore anything that would identify him as a tribal officer. Ex 5, *id.*, p. 62, lns 4-18 [Appx 379]. The paperwork Archer filled out was Duncan PD forms or State of Oklahoma forms, and the charges Walden was initially arrested for were State of Oklahoma charges—not tribal charges. Ex 5, *id.*, p. 64, ln 8 to p. 67, ln 4 [Appx 379-380]; Exs 6, 9-11 [Appx 383-384, 394-397, 398, 399-405]; Ex 3, Archer BC, p. 13, lns 12-17 [Appx 355]; p. 30, lns 3-4 [Appx 359]. No one even asked Walden if he was a tribal member until after Walden had been transported to the Stephens County jail. Ex 2, Walden, p. 269, ln 24 to p. 270, ln 20 [Appx 249]. . .

Appellees claim that they ‘always’ argued that Archer was acting as a tribal officer, but this is not the case. Walden’s Complaint alleged that:

7. All of Defendant Archer’s actions were taken in his capacity as a police officer for the City of Duncan and such actions were accomplished under the color of law by use of the authority granted by virtue of his position.

Complaint at p. 2, Appx 11.

Both the City and Archer responded to this claim identically:

7. Defendant admits Archer approached Walden in his capacity as a police officer. Defendant is without sufficient information to admit or deny the remaining allegations of Paragraph 7 of the Complaint.

City Answer at p. 2 Appx 16, ¶ 7; Archer Answer at p. 2, Appx 22, ¶ 7.

Neither Answer mentioned that Archer was dual commissioned or was acting under a tribal commission at any point during the arrest. See City Answer, p. 1-6, Appx 15-20; Archer Answer, p. 1-6, Appx 21-26.

The closest either Appellee came to claiming that Archer was acting as a tribal officer was in the City's Answer at p. 4, ¶ 12, Appx 18 where it claimed that Archer "may not have been acting under color of state law, and the Court may not have jurisdiction over this matter."

II. - ARGUMENT AND AUTHORITY

Mr. Walden will address two issues:

1. Whether he satisfied the 'color of law' test for a Sec. 1983 action, and
2. Whether the trial court erroneously granted judgment to the City on the issue of state law liability.

1. - OFFICER ARCHER ACTED UNDER COLOR OF STATE LAW

Appellees argue that "[this case turns on a single dispositive issue: Officer Archer acted pursuant to his tribal authority when he arrested Walden, an Indian, in Indian Country." Ans Bf, p. 18.

Actually the question is more nuanced. The real question is what authority Archer *actually* used to arrest Walden.

A. - Officer Archer's Actions Throughout The Arrest Were Based Solely On His Apparent Authority As A Duncan Police Officer

The trial court recognized that "Officer Archer [was] clad in a Duncan Police

Department uniform, driving a Duncan P.D. cruiser, responding to a dispatch from Duncan P.D. . . . when he arrested Walden.” Order, p. 4-5, Appx 483-484. Despite the presence of apparent authority as a municipal officer, the Court decided against Mr. Walden because “Archer was incapable of wielding the power of state law against Walden.” *Id.*, Appx 484 (footnote omitted).

Appellees’ Prop. I, pg. 18-31 focuses almost exclusively on discussing the limits of state authority over Native Americans within tribal lands. Respectfully, this ignores settled precedent that the ‘color of law’ inquiry does not depend on the validity of the actor’s authority:

The mere fact that a defendant lacked actual state authority, however, is not determinative. As the Supreme Court has noted, if § 1983 ‘was designed to embrace only action which the State *in fact authorized*, the words “under color of any law” were hardly apt words to express the idea.’ [*Screws v. United States*, 325 U.S. 91, 111 (1945)] (emphasis added). Rather, the ‘misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is [also] action taken under color of state law.’ *Monroe v. Pape*, 365 U.S. 167, 184 (1961) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)), overruled on other grounds by *Monell v. Dep’t of Soc. Servs. of New York*, 436 U.S. 658 (1978).

The Supreme Court has never held that objective indicia of state authority, without more, can bring an officer’s otherwise ‘purely personal pursuits’ within the scope of § 1983. In *Griffin v. Maryland*, 378 U.S. 130 (1964), the Court held that a security guard for a private amusement park acted under color of law when he asked African-American patrons to leave the park, and arrested and instituted criminal proceedings against those who refused to comply. At the park’s request, the guard had been deputized as a sheriff, and he wore a sheriff’s badge during the encounter in question. *Id.* at 132. Although the badge was relevant to the ‘color of law’ analysis, the Court also relied on the facts that the officer consistently identified himself as a deputy sheriff, made arrests, transported arrestees to the police station, and swore out a complaint against them on a form entitled ‘Application for Warrant by Police Officer.’ *Id.* at 133-35. The Court held that ‘if an individual is possessed of state authority *and purports to act under that authority*, his action is state action.’ *Id.* at 135 (emphasis added); *see also Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 (1982) (‘If the

challenged conduct . . . constitutes state action . . . , then that conduct [is] also action under color of state law and will support a suit under § 1983.’).

Dry v. City of Durant, 242 F.3d 388 (10th Cir. 2000) (table, text at 2000 U.S. App. LEXIS 33330, *10-12)¹ (First boldface added by counsel).

Archer’s actions satisfy all of the elements described as necessary to the “color of law” requirement, both by how he presented himself (uniform, badge, gun, police care) and by exercising powers granted under state law— arrest, filing state charges, filing the state affidavit for revocation of the Oklahoma driver’s license. A number of Archer’s actions were exclusively based on state— not tribal— authority, such as arresting Walden based on state law charges (Appx 402), seizing Walden’s personal handgun and placing it in the custody of state officials (Appx 404), and in filing an “Officer’s Affidavit and Notification of Revocation/Disqualification” based on Walden’s refusal to consent to a state law blood alcohol test (Appx 398).

That Archer, after completing the arrest, ***later*** filed an affidavit for the tribal court, should be of no moment because “[w]here state action is concerned, the proper inquiry is whether, *at the time of the alleged constitutional violation*, the defendant was a state actor.” ***How v. City of Baxter Springs***, 217 F. App’x 787, 794 (10th Cir. 2007) (emphasis by the Court).

Appellees’ arguments, and apparently the trial court’s rationale, focus exclusively on the presence of actual authority, ignoring the precedent explaining that actual authority was **not** the determinative factor. ***Dry, supra***, 2000 U.S. App. LEXIS 33330, *10. “‘Color of law’ does not mean actual law. ‘Color,’ as a modifier, in legal

¹ Not for official publication, cited for its persuasive value.

parlance, means ‘appearance as distinguished from reality.’ Color of law means ‘mere semblance of legal right.’ **Kin. Law Dict. & Gloss.”** *McCain v. Des Moines*, 174 U.S. 168, 175 (1899). *See Screws v. United States*, 325 U.S. 91, 111(1945) (“It is clear that under ‘color’ of law means under ‘pretense’ of law.”).

Smith v. Cochran, 216 F. Supp. 2d 1286, 1297 (N.D.Okla. 2001), though not precedential, accurately summarizes this Court’s precedent on the sufficiency of apparent authority to meet the ‘color of law’ standard:

The power possessed by state authority can either be actual or apparent authority. The Tenth Circuit has held that the color of law test is one where the defendant’s actual or apparent authority is combined with a ‘real nexus’ between the conduct and his ‘badge of state authority.’ *David v. City and County of Denver*, 101 F.3d 1344, 1353 (10th Cir. 1996), *see Jojola v. Chavez*, 55 F.3d 488, 492-93 (10th Cir. 1995) (holding that authority with which the § 1983 defendant is clothed may be actual or apparent), *see also Lugar*, 457 U.S. at 937.

There is no doubt that a ‘real nexus’ existed between Archer’s apparent authority and his conduct in arresting Mr. Walden, placing him in jail, seizing his property, and attempt to revoke his state driver’s license.

Appellees attempt to distinguish this case law on the basis that many of these cases involve private citizens purporting to exercise state authority; however, the ‘color of law’ test applies just as readily in cases, such as this, where an officer has actual authority but exceeds the limits of that authority. In *Hall v. Witteman*, 584 F.3d 859, 866-67 (10th Cir. 2009) this Court noted that

‘[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law,’ *United States v. Classic*, 313 U.S. 299, 326 (1941), . . . is state action even if the state employee exceeds his authority, *see Screws*, 325 U.S. at 111.

Appellees cannot point to a single action throughout Archer’s interaction with

Walden through Walden's incarceration which was based on anything other than Archer's authority as a municipal police officer. Put another way, Archer's tribal authority was never put on display or utilized at any point until after Walden was already in custody.

WHEREFORE, the trial court erred in its analysis by ignoring Archer's apparent authority in deciding the color of law question.

B. - Archer Was Acting In A Dual Capacity Utilizing Both His State Authority AND His Tribal Authority

Mr. Walden argued that, alternatively, Officer Archer was at least using both his State and his Tribal authority in arresting him, such that the color of law requirement was satisfied.

Appellees argue that the trial court correctly rejected this theory because an officer cannot simultaneously exercise both state and tribal powers. Ans Bf, p. 25-26. In advocating this broad rule, Appellees rely, as did the trial judge, on the non-precedential decision in *Fernandes v. City of Broken Arrow*, 2017 U.S. Dist. LEXIS 15373, *8-9 (E.D.Okla. Feb. 3, 2017) (emphasis by the Court):

. . . Although Brown and Jackson may have been able to exercise either state or federal authority by virtue of their status as BAPD officers who have been deputized as members of the DEA task force, they may not exercise state and federal authority simultaneously. In other words, Brown and Jackson may act overall as dual agents, but their actions in any particular case are made pursuant to, and possible by, the authority of the state or federal government. Further, the Court's finding that Brown and Jackson could not, as a matter of law, have been acting under color of both state and federal law comports with other federal courts who have treated local officers assigned to federal task forces as acting either under color of state law or color of federal law. *See, e.g., Guerrero v. Scarazzini*, 274 F. App'x 11, 12 n.1 (2d Cir. 2008); *Majors v. City of Clarksville*, 113 F. App'x 659, 659 (6th Cir. 2004); *Pike v. United States*, 868 F. Supp. 2d 667, 677-78 (M.D. Tenn. 2012); *Bordeaux v. Lynch*, 958 F. Supp. 77, 84 & n.5 (N.D.N.Y. 1997); *Pou v. U.S. D.E.A.*, 923 F. Supp. 573, 579 (S.D.N.Y. 1996); *Amoakohene*

v. Bobko, 792 F. Supp. 605, 608 (N.D. Ill. 1992).

Respectfully, Walden does not believe the authorities cited in *Fernandes* actually reject the doctrine of dual authority *per se*. Rather, as explained in *Bordeaux v. Lynch*, 958 F. Supp. 77, 84 fn 5 (N.D.N.Y. 1997), “under 5 U.S.C. § 3374(c), local government employees on detail to a federal agency are deemed employees of the agency for the purposes of the Federal Tort Claims Act and *any other tort liability statute*.” Emphasis supplied.

Fernandes is not precedential and therefore the broad rule it sets out is persuasive at best. Given that its foundational cases do not support such a broad rule, *Fernandes*’ persuasive value is minimal.

The trial court and Appellees also rely on *United States v. Martin*, 163 F.3d 1212 (10th Cir.1998); however, *Martin* is both factually and legally inapposite. *Martin* dealt with the application of a federal criminal statute directed at assaults against federal officers. *Martin* construed the statute to apply to any persons who were designated to enforce federal law. *Id.*, at 1215. Neither the statute being interpreted nor the factual situation has anything to do with dual agents in a civil context.

The common law recognizes that an individual can serve as the agent for multiple principals or coprincipals. See **Restatement (Third) of Agency**, §§ 3.14, 3.16. In considering the application of 42 U.S.C. § 1983, common-law principles are to be considered:

We have said that ‘where a common-law principle is well established, . . . courts may take it as given that Congress has legislated with an expectation that the principle will apply’ absent statutory cues to the contrary. *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991); see also Eskridge, *Interpreting Law*, at 348 (‘[C]ourts will

assume that legislatures act against the background of the common law’)
...

Minerva Surgical, Inc. v. Hologic, Inc., 594 U.S. 559, 592 (2021).

In the specific context of cross-deputized tribal and state law enforcement officials, the Ninth Circuit appears to have endorsed the concept of dual agency. *Bressi v. Ford*, 575 F.3d 891, 897 (9th Cir. 2009) (tribal officers who are “authorized to enforce state as well as tribal law, and proceed to exercise both powers[,]” are subject to liability under § 1983).

WHEREFORE, it was error to reject that Archer was acting under color of state law when acting simultaneously as a state and tribal authority.

2. - JUDGMENT IN FAVOR OF THE CITY WAS ERRONEOUS

Judgment in favor of the City on Mr. Walden’s state law claim was erroneously entered for two reasons:

A. - The Court should not have exercised jurisdiction over the state law claim once the federal claim was dismissed.

B. - The Court decided a novel issue of state law based on an issued raised solely in Appellee City’s Reply Brief.

A. - The District Court Should Not Have Retained Jurisdiction Over The State Law Claim

The City offers only a limited rationale for the trial court retaining jurisdiction over the state law claim. See Ans Bf, Prop. II(A), p. 32-33.

The City mainly argues that the trial court has discretion to exercise supplemental jurisdiction over pendent state law claims. *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635 (2009). The City next argues that such a decision is subject to review under the abuse of discretion standard, citing *Brown v. City of Tulsa*, 124

F.4th 1251 (10th Cir.2025).

Even assuming that the abuse of discretion standard applies, the City offers no basis to distinguish the holding of *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350 n. 7 (1988), that “in the usual case in which all federal-law claims are eliminated *before trial*, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise over the remaining state-law claims.” (emphasis added).

The considerations for pendent jurisdiction are further explained in *Roe v. Cheyenne Mt. Conf. Resort*, 124 F.3d 1221, 1237 (10th Cir.1997):

In sum, plaintiff has raised a substantial issue with the possibility that Colorado would uphold an invasion of privacy by intrusion on seclusion, such as Roe’s. We are convinced that in such circumstances, an authoritative state court ruling on the privacy claim should be permitted, instead of a guess or uncertain prediction by a federal court. Remanding this claim to the Colorado courts is supported by *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), and other Supreme Court and Tenth Circuit precedents. *E.g., Sullivan v. Scoular Grain Co. of Utah*, 930 F.2d 798, 803 (10th Cir. 1991) (declining pendent jurisdiction is appropriate when the court needs “‘surer-footed’ analysis of state law in an area of particular importance to a state.’”). Exercising supplemental jurisdiction is within the district court’s discretion. However, in conformity with *Gibbs*, 28 U.S.C. § 1367(c) provides for declining to exercise supplemental jurisdiction where

- (1) the claim raises a novel or complex issue of state law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Where federal claims have dropped out of the picture, as here, our court

has stated that

The most common response to a pretrial disposition of federal claims has been to dismiss the state law claim or claims without prejudice--that is the seminal teaching of *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966),

Ball v. Renner, 54 F.3d 664, 669 (10th Cir. 1995).

In particular, the novelty of the issue is often a controlling factor in whether to exercise pendent jurisdiction. “Notions of comity and federalism demand that a state court try its own lawsuits, absent compelling reasons to the contrary.” *Ball, supra*, 54 F.3d at 669 (quoting *Thatcher Enters. v. Cache Cnty. Corp.*, 902 F.2d 1472, 1478 (10th Cir. 1990). “Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.” *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

The trial court’s decision exempting the City from liability because its employee was wearing a tribal hat while acting is a novel proposition for which there is no Oklahoma case on point. Thus, the considerations justifying retaining jurisdiction over the state claim are not present, and the court’s action was an abuse of discretion. However, since there were not findings by the trial court nor any explanation for why it was retaining jurisdiction, Mr. Walden suggests that a *de novo* standard of review should apply. *Cf. Utah Ass’n of Counties v. Clinton*, 255 F.3d 1246, 1249-1250 (10th Cir. 2001) and *Barnes v. Sec. Life of Denver Ins. Co.*, 945 F.3d 1112, 1121 (10th Cir. 2019).

WHEREFORE, the decision to retain jurisdiction should be reversed.

B. - When A City Employee Is Authorized By The City To Act Under A Tribal Commission, The City Remains Liable Under The OGTCA

The City admits that it did not raise a claim that Archer's actions relieved the City from liability until its Reply Brief, but argues that the trial court was within its discretion to consider that argument since Walden did not seek leave to file a surreply on such issue. While the trial court possesses discretion to consider that argument, deciding a novel question of state law after the federal claim was dismissed was an abuse of discretion.

Nonetheless, as pointed out in the Opening Brief, the trial court's decision was erroneous. Liability under the Oklahoma Governmental Tort Claims Act ("OGTCA") attaches to the good faith performance of "tasks lawfully assigned by a competent authority." 51 O.S. § 152(13). As the record reflects, Archer's dual commission was pursuant to an agreement between Duncan and its police department and the Chickasaw Nation. To again repeat from the Opening Brief, this agreement specifies that the Lighthorse Commissions are not merely for the benefit of the Tribe, but for the "shared governmental interest" of both the City of Duncan and the Chickasaw Nation and "in the interest of the general public's safety." Agreement, Appx 98.

The City argues that it "is only liable for acts performed pursuant to City-delegated authority," Ans Bf, p. 37; the Agreement and Archer's commission were created by City authority.

Finally, the City argues that Archer cannot simultaneously act as a City employee while acting under his tribal commission. In such, the City re-urges its arguments related to "color of law." Ans Bf, p. 37. But the OGTCA does not use any "color of law" language, and instead bases liability on the scope of employment. The

City offers neither authority nor facts to suggest that— contrary to the plain terms of the Agreement with the Chickasaw Nation— Officer Archer is not working as a City employee when performing a task approved by the City under the Agreement with the Chickasaws.

Generally speaking, an employee can be a dual agent simultaneously by two parties. See the **Restatement (Third) of Agency**, §§ 3.14, 3.16:

. . . Dual agency is not per se improper. 2A, CJS Agency § 32. The general rule that an agent may not act as agent for both parties to the same transaction does not apply to cases in which the interests of the two principals are not conflicting so that loyalty by the agent to one of them does not comprise a breach of his duty to the other. An agent may act as agent for both parties to the same transaction where there is not conflict of duty or where his duty to each does not require the doing of inconsistent things.

Knudson v. Weeks, 394 F. Supp. 963, 975 (W.D.Okla. 1975) (broker context).

The City has not presented argument or evidence that there was any conflict between its employees acting both for the City and for the Chickasaw Nation. Rather, the apparent intention is that the City's and the Chickasaw's interests coincide such that it is appropriate for a Duncan police officer to act for them both. ***Ross v. Neff***, 905 F.2d 1349 (10th Cir.1990), cited by the City in the Answer Brief, p. 37, is wholly inapposite and says nothing to contradict this point.

Further, the City has not met its summary judgment burden of showing that Archer was not a city employee when performing under this tribal commission. For instance, there is no suggestion that Archer was not paid as a City employee while performing the actions of arresting Walden.

WHEREFORE, the Order dismissing Walden's state law claims is erroneous both in that the district court should not have retained jurisdiction over this matter and

because its holding was erroneous as a matter of law.

CONCLUSION

The Order and Judgment of the trial court should be reversed and the matter remanded with direction that the ‘color of law’ requirement under 42 U.S.C. § 1983 is satisfied. The judgment should also be vacated as to the state law claim in that the district court failed to utilize the correct test, i.e. whether Archer was performing a task assigned by the City when he arrested Mr. Walden.

III. - STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested for the reason that this case represents novel arguments regarding the scope of the ‘color of law’ requirement, as well as novel arguments regarding the scope of liability under Oklahoma’s Governmental Tort Claims Act.

IV. - CERTIFICATE AS TO THE WORD COUNT OF THE BRIEF

Pursuant to Fed.R.App.P. 32(a)(7)(B)(i), this brief contains 3,930 words.

RESPECTFULLY SUBMITTED THIS 9TH DAY OF JANUARY, 2026.

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CERTIFICATE OF COMPLIANCE

Pursuant to 10th Cir. R. 32, Appellant hereby certifies that on December 9th, 2026 the “Appellant’s Reply Brief” is being filed using the court’s CM/ECF system which will then send notification of such filing to the following parties listed on the Certificate of Service below. Additionally, Appellant certifies that (a) all required privacy redactions have been made, (b) that the hard copies to be submitted to the court are exact copies of the version submitted electronically and (c) that the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program, and is free of viruses.

s/Mark Hammons

CERTIFICATE OF SERVICE

A true copy of the foregoing filed electronically and delivered via court’s CM/ECF to opposing counsel below listed on the 9th day of January, 2026:

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