IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

Susan Doxtator, Arlie Doxtator, and Sarah Wunderlich, as Special Administrators of the Estate of Jonathon C. Tubby,

Plaintiffs,

Case No. 19-CV-00137

v.

Erik O'Brien, Colton Wernecke, Andrew Smith, John R. Gossage, Heidi Michel, City of Green Bay, Brown County, and John Does 1-10,

Defendants.

BRIEF IN SUPPORT OF BROWN COUNTY DEFENDANTS' MOTION TO DISMISS

Defendants John R. Gossage, Heidi Michel, and Brown County ("Brown County Defendants"), by their attorneys, Crivello Carlson, S.C., respectfully submit this Brief in Support of their Motion to Dismiss.

INTRODUCTION

On January 24, 2019, Plaintiffs filed their Complaint alleging, among other causes of action, a *Monell* claim against the Brown County Defendants for an alleged policy of inadequate supervision leading to the alleged unconstitutional use of deadly force against Jonathon Tubby. (Dkt. 1). This is the sole claim against the Brown County Defendants.

The Brown County Defendants now move to dismiss Plaintiffs' claim against them pursuant to Rule 12(b)(6) for the following reasons:

1) The Complaint does not state a viable *Monell* claim; and

2) The Complaint's allegations regarding causation are inadequate to sustain a *Monell* claim.

In addition to dismissing Plaintiffs' *Monell* claim, this Court should dismiss Plaintiffs' state direct action claim under Wis. Stat. § 895.46 under Rule 12(b)(1).

ARGUMENT

I. STANDARDS OF REVIEW

To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain allegations that "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 533, 570, 127 S.Ct. 1955 (2007). "In reviewing the sufficiency of a complaint under the plausibility standard announced in *Twombly* and *Iqbal*, [the court should] accept the well-pleaded facts in the complaint as true, but legal conclusions and conclusory allegations merely reciting the elements of the claim are not entitled to this presumption of truth." *McCauley v. City of Chicago*, 671 F.3d 611, 616 (7th Cir. 2011) (quoting *Iqbal*, 129 S.Ct. at 1951). A court should essentially parse out the conclusory allegations and "determine whether the remaining factual allegations 'plausibly suggest an entitlement to relief.'" *Id*. "The degree of specificity required [of the factual allegations] is not easily quantified, but 'the plaintiff must give enough details about the subject-matter of the case to present a story that holds together.'" *Id*. (quoting *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010). "A more complex case . . . will require more detail, both to give the opposing party notice of what the case is all about and to show how, in the plaintiff's mind at least, the dots should be connected." *Swanson*, 614 F.3d at 405.

By the same token, "Rule 12(b)(1) requires that an action be dismissed if the court lacks jurisdiction over the subject matter of the lawsuit." *McCulley v. U.S. Dep't of Veterans Affairs*, 851 F. Supp. 1271, 1276, 1994 WL 190047 (E.D. Wis. 1994) (quoting *Unity Sav. Ass'n v.*

Federal Sav. & Loan Ins. Corp., 573 F. Supp. 137, 140 n. 4 (N.D. Ill. 1983). Accordingly, "[m]otions to dismiss under Rule 12(b)(1) are meant to test the sufficiency of the complaint, not to decide the merits of the case." *Ctr. for Dermatology & Skin Cancer, Ltd. v. Burwell*, 770 F.3d 586, 588–89 (7th Cir.2014) (citing *Weiler v. Household Fin. Corp.*, 101 F.3d 519, 524 n. 1 (7th Cir.1996)); *see also Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir.1990) (applying the same principle to motions under Rule 12(b)(6)). As when deciding a Rule 12(b)(6) motion, "[i]n the context of a motion to dismiss for lack of subject matter jurisdiction, [the Court must] accept as true the well pleaded factual allegations, drawing all reasonable inferences in favor of the plaintiff." *Iddir v. INS*, 301 F.3d 492, 496 (7th Cir.2002).

Plaintiffs' Complaint fails to state a claim against the Brown County Defendants upon which relief can be granted. Without a viable federal claim, this Court should dismiss Plaintiffs' direct action claim under Wis. Stat. § 895.46 for lack of subject matter jurisdiction. Accordingly, this Court should grant the Brown County Defendants' Motion to Dismiss and dismiss them from this case on the merits and with prejudice and costs.

II. DISMISSAL IS APPROPRIATE BECAUSE PLAINTIFFS FAIL TO STATE A CLAIM AGAINST THE BROWN COUNTY DEFENDANTS.

This Court should dismiss Plaintiffs' suit against the Brown County Defendants because their Complaint fails to state a viable *Monell* claim against them under 42 U.S.C. § 1983. *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978). In *Monell*, the Supeme Court ruled that a plaintiff must establish that the municipality itself caused the alleged constitutional violation. *Id.* To establish a viable *Monell* claim against the Brown County Defendants, Plaintiffs must allege at least one of the following: (1) Brown County had an express municipal policy that, when enforced, causes a constitutional deprivation; (2) Brown County had a widespread practice that, although not authorized by written law or express municipal policy, is so

permanent and well settled as to constitute a custom or usage within the force of law; or (3) the decedent's constitutional injury was caused by a person with final policymaking authority. *Id.*; *McCormick v. City of Chicago*, 230 F.3d 319, 324 (7th Cir. 2000).

Here, the Complaint contains no allegations to support a *Monell* claim based upon any of these three possibilities. Further, even if the Complaint broadly alleges a policy or custom of failing to supervise, these allegations are insufficient to establish the policy or custom as the "moving force" behind the alleged excessive force constitutional violation. This is particularly true as the individual capacity claims are against officers from a different jurisdiction. Accordingly, the Brown County Defendants are entitled to dismissal from this case on the merits and with prejudice.

A. The Complaint does not Allege a Viable *Monell* Claim.

Plaintiffs do not allege an express policy or a person with final policymaking authority caused the alleged excessive force leading to Mr. Tubby's death. Rather, Plaintiffs package their *Monell* claim as a failure to supervise claim based on the Brown County Defendants' "[failure to] implement policies to record or preserve video or audio recordings of the 'sally port' area." (Dkt. 1). The Complaint contains insufficient allegations to support this theory.

When a plaintiff complains of customs, widespread practices, or omissions in policies (as opposed to written or express policies) that allegedly cause a constitutional deprivation, the plaintiff must establish that "there is a true municipal policy at issue, not a random event" or an "isolated incident." *Calhoun v. Ramsey*, 408 F.3d 375, 380 (7th Cir. 2005). Such a claim "requires more evidence than a single incident to establish liability." *Id.*; *see Alexander v. City of South Bend*, 433 F.3d 550, 557-58 (instructing that *Monell* required the plaintiff to show that the defendant adopted a policy or had a custom of inadequate supervision.) The custom must result

in a "pattern of similar constitutional violations" to qualify as a viable *Monell* claim. *Connick v. Thompson*, 563 U.S. 51, 62 (2011). A plaintiff must further show that the municipality was deliberately indifferent to the consequences of failing to supervise by making a "deliberate choice" among various alternatives. *Frake v. City of Chicago*, 210 F.3d 779, 781 (7th Cir. 2000); *Calhoun*, 408 F.3d at 380 (observing that a *Monell* claim based on a city's failure to adequately train police officers requires proof that "the inadequacies resulted from conscious choice—that is, proof that the policymakers deliberately chose a training program which would prove inadequate.").

The foregoing authority renders Plaintiffs' inadequate supervision allegations against the Brown County Defendants insufficient to support a *Monell* claim. Although Plaintiffs allege that the Brown County Defendants' inadequate supervision of its officers exhibited deliberate indifference to Mr. Tubby's constitutional rights and caused a violation of those rights, Plaintiffs do not include any accompanying facts—aside from Mr. Tubby's own single experience with alleged excessive force—in support of their claim. That is, Plaintiffs do not allege other similar constitutional violations from which a plausible inference could be drawn that the Brown County Defendants deliberately implemented inadequate supervision policies or customs that caused excessive force incidents, including the death of Mr. Tubby. *See Connick*, 563 U.S. at 62.

This case is analogous to *Harris v. Sandoval*, 2015 WL 1727283, (N.D. Ill. Apr. 13, 2015) (attached). In *Harris*, a plaintiff brought a Fourth Amendment excessive force claim against Chicago police officers and a *Monell* claim against the city for developing policies and customs of inadequate supervision. *Id.*, *1-3. Plaintiff alleged the city's policy of inadequate supervision exhibited deliberate indifference to Chicago's citizens. *Id.*, *3. The defendants moved to dismiss plaintiff's *Monell* claim, arguing that the plaintiff's allegations were too

conclusory to meet *Iqbal*'s pleading standard. *Id.* *3. Citing to *Calhoun*, *Harris* agreed with the defense, holding that the plaintiff's *Monell* claim failed because he did not allege facts related to other similar constitutional violations such as the one he pled. *Id.* As *Harris* explained, "[i]t is simply not plausible, in this context, to infer such deliberate indifference without sufficient allegations of a pattern of similar constitutional violations." *Id.*, *4. The same is true here.

The Complaint does not show the Brown County Defendants' alleged failure to supervise "is a policy at issue rather than a random event." *Thomas v. Cook Cnty. Sheriff's Dept.*, 604 F.3d 293, 303 (7th Cir. 2009). Specifically, the Complaint contains no factual allegations connecting a policy or custom of inadequate supervision to incidents of alleged excessive force or any other constitutional violation. *See Calhoun,* 408 F.3d at 380 (explaining how a plaintiff must establish that a municipal policy causes "a pattern of similar constitutional violations," and is not merely a "random event" or "isolated incident") (citing *Connick*, 563 U.S. at 62). Here, the Complaint only states the following regarding a pattern of inadequate supervision:

> Due to the tense nature of transport of arrestees into jail and due to prior confrontations and incidents at Brown County Jail and the 'sally port,' Officers Smith, Gossage, Michel, Green Bay, and Brown County knew that it was highly predictable that excessive force would be used by Green Bay police officers and Brown County sheriff deputies and/or correctional officers unless these officers were adequately supervised.

(Dkt. 1, p. 10) (emphasis added). As in *Harris,* Plaintiffs have failed to allege how the Brown County Defendants' inadequate supervision policy led to a "pattern of similar constitutional violations" as the Supreme Court demands. 563 U.S. at 62. Further, the Complaint's allegations regarding what the Brown County Defendants "knew" is nothing more than speculation. *See E.E.O.C. v. Concentra Health Servs., Inc.*, 496 F.3d 773, 776 (7th Cir. 2007) (instructing that factual allegations in the complaint must be sufficient to rise about the "speculative level.")

(quoting *Twombly*, 550 U.S. at 555). These speculative allegations are insufficient to survive a Rule 12(b)(6) motion to dismiss.

In addition to failing to allege a widespread policy or custom, the Complaint fails to allege any deliberate indifference on the part of the Brown County Defendants. The Complaint states: "[i]t is a common and standard practice for jails to install video and audio recording equipment in the "sally port" area." (Dkt. 1, p. 10). The Complaint then criticizes the Brown County Defendants for allegedly "[failing to] implement policies to record or preserve video or audio recordings in the 'sally port' area," which Plaintiffs label "inadequate supervision." (Dkt. 1, p. 10). These allegations, even if true, are insufficient to show deliberate indifference. As the Seventh Circuit has observed, a *Monell* claim based on the failure to adequately train or supervise police officers requires proof that the inadequacies resulted from "conscious choice," *i.e.*, proof that the policymakers deliberately chose something which "would prove inadequate." *Calhoun*, 408 F.3d at 380. That is not the case here. It is insufficient for Plaintiffs to allege that the Brown County Defendants "could have done more" to video or audio record the sally port. *See, e.g., Del Raine v. Williford*, 32 F.3d 1027, 1042 (7th Cir. 1994) (noting that "courts regulate prisons with a considerably lighter tough than they regulate other public institutions."); *Butera v. Cottey*, 285 F.3d 601, 605 (7th Cir. 2002) ("The existence of possibility of other better policies which might have been used does not necessarily mean that the [defendant] was being deliberately indifferent."). The fact that the Brown County Jail allegedly may not have preserved video or audio recordings from the sally port area does not rise to the level of deliberate indifference.

The Seventh Circuit in *Butera* is dispositive of Plaintiffs' argument that the Brown County Defendants were deliberately indifferent by not installing video and audio recording

equipment in the sally port. In *Butera*, a plaintiff-detainee who was sexually assaulted by other detainees sued the Sheriff arguing that he acted with deliberate indifference for, among other reasons, not placing 24-hour video surveillance in cellblocks. 285 F.3d at 608-09. *Butera* rejected this argument, ruling that even if the sheriff installed the surveillance, the assault may have still occurred and, therefore, did not amount to deliberate indifference on the sheriff's part. *Id.* at 609. As in *Butera*, the fact that the Brown County Defendants could have installed recording devices in the sally port does not evince deliberate indifference.

B. The Complaint's Allegations Regarding Causation are Inadequate.

Even assuming the Complaint alleges the existence of a custom or policy of inadequate supervision, this Court should still dismiss Plaintiffs' claim against the Brown County Defendants. The Complaint fails to allege the requisite causative link between the alleged inadequate supervision and the alleged constitutional deprivation. Plaintiffs must demonstrate that the "deliberate action attributable to the municipality itself was the 'moving force'" behind the deprivation of Mr. Tubby's constitutional rights. *Bd. of the Comm'rs of Bryan Cnty. V. Brown*, 520 U.S. 397, 404 (1997) (citing *Monell*, 436 U.S. at 694). Although the Complaint alleges the Brown County Defendants' deliberate indifference was the "moving force" behind Mr. Tubby's alleged constitutional deprivations, this is nothing more than a conclusory allegation which cannot withstand a Rule 12(b)(6) motion to dismiss. *See McCauley*, 671 F.3d at 616 (citing *Iqbal*, 129 S.Ct. at 1951). (Dkt. 1, pp. 10-11).

The alleged inadequate supervision and lack of recording devices in the sally port cannot be considered the "moving force" or "direct causal link" behind Mr. Tubby's death. *Estate of Sims v. Cnty. of Bureau*, 506 F.3d 509, 515 (7th Cir. 2007) (citing *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989). The fact that Mr. Tubby was in the sally port without

recording devices and multiple officers around him, as Plaintiffs allege happened here, does not provide the moving force, or direct catalyst, for the alleged unconstitutional use of deadly force. If the Plaintiffs' claim is viable, then any time a municipality and its officers allowed a prisoner to be in a sally port without recording devices, an automatic ground for a constitutional violation claim would exist if inappropriate conduct allegedly occurred. The absence of recording equipment in the sally port is not enough to show that a widespread practice or custom was the *moving force* behind a constitutional deprivation. *Estate of Sims*, 506 F.3d at 514-15; *see also LaMarca v. Turner*, 995 F.2d 1526, 1538 (10th Cir. 1993) (stating that "our inquiry [is] whether an official's acts or omissions were *the cause*—not merely a contributing factor."). Accordingly, it is clear that the Brown County Defendants' alleged inadequate supervision could not have been the moving force or direct causal link toward an alleged constitutional violation associated with a policy shooting.

III. DISMISSAL OF PLAINTIFFS' DIRECT ACTION CLAIM IS APPROPRIATE BECAUSE THIS COURT LACKS SUBJECT MATTER JURISDICTION.

In addition to dismissing Plaintiffs' sole federal claim against the Brown County Defendants, dismissal of Plaintiffs' state direct action claim under Wis. Stat. § 895.46 is appropriate under Rule 12(b)(1) because this Court lacks jurisdiction over this claim.[1] District courts only have federal question jurisdiction over civil actions arising under the Constitution, laws, or treaties of the United States. 29 U.S.C. § 1331; *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 1675 (1994) ("Federal courts are courts of limited jurisdiction. They possess only the power authorized by the Constitution and statute.") The Supreme Court has long held that "the presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule…which provides that federal jurisdiction exists

[1] Wis. Stat. § 895.46 is a statutory indemnification provision and not an independent cause of action. This statutory claim is moot if this Court dismisses Plaintiffs' underlying claims against the Brown County Defendants.

only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. *Rivet v. Regions Bank*, 522 U.S. 470, 475 (1998). It is to be presumed that a cause of action lies outside federal jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction. *Id.*

Dismissal of Plaintiffs' state direct action claim is appropriate because they cannot meet this burden. Plaintiffs cannot meet their burden because Wis. Stat. § 895.46 does not present a federal question. Plaintiffs cannot establish subject matter jurisdiction by asserting a state statutory claim. Subject matter jurisdiction is a "threshold issue" in every federal case. When confronted with a motion to dismiss under Rule 12(b)(1), "the plaintiff has the obligation to establish jurisdiction by competent proof." *Sapperstein v. Hager*, 188 F.3d 852, 855 (7th Cir. 1999). Plaintiffs' inability to establish subject matter jurisdiction over the Brown County Defendants with their *Monell* claim is a fatal blow to their state direct action claim.

CONCLUSION

For the reasons above, this Court should grant the Brown County Defendants' Motion to Dismiss and dismiss them on the merits and with prejudice and costs awarded.

Dated this 18th day of February, 2019.

CRIVELLO CARLSON, S.C.
Attorneys for Defendants John R. Gossage,
Heidi Michel and Brown County

BY: s/ Samuel M. Mitchell
SAMUEL C. HALL, JR.
State Bar No. 1045476
BENJAMIN A. SPARKS
State Bar No. 1092405
SAMUEL M. MITCHELL
State Bar No. 1093820

PO ADDRESS:

710 N. Plankinton Avenue, Suite 500
Milwaukee, WI 53203
Phone: 414-271-7722
Fax: 414-271-4438
Email: shall@crivellocarlson.com
Email: bsparks@crivellocarlson.com
Email: smitchell@crivellocarlson.com