

**IN 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,

Case No. 1:19-cv-00137-WCG

AMENDED COMPLAINT

Plaintiffs,

vs.

Erik O'Brien, Andrew Smith, Todd J.
Delain, Heidi Michel, City of Green
Bay, Brown County, Joseph P. Mleziva,
Nathan K. Winisterfer, Thomas Zeigle,
Bradley A. Dernbach, and John Does 1-
5,

Defendants,

Plaintiffs Susan Doxtator ("Sue Doxtator"), Arlie Doxtator, and Sarah Wunderlich (collectively "Plaintiffs"), in their capacities as the special administrators of the Estate of Jonathon C. Tubby, as and for their Complaint against Erik O'Brien, Andrew Smith, Todd J. Delain, Heidi Michel, the City of Green Bay, Brown County, Joseph P. Mleziva, Nathan K. Winisterfer, Thomas Zeigle, Bradley A. Dernbach, and John Does 1-5, allege and state as follows:

INTRODUCTION

1. On October 19, 2018, Jonathon Tubby, a twenty-six year old resident of Green Bay, Wisconsin, was shot multiple times by a Green Bay police officer, including in the head, while Mr. Tubby was unarmed, in handcuffs, face-down, restrained by a

police canine, and in custody at the Brown County jail. The shooting occurred in the “sally port” of the Brown County Jail and was observed by several Green Bay police officers and Brown County sheriff deputies and/or correctional officers, who failed to intervene. The shooting of an unarmed and restrained man by a police officer at the jail is an egregious violation of the U.S. Constitution. Plaintiffs, the personal representatives of Mr. Tubby’s estate, bring this civil action to vindicate his constitutional rights.

JURISDICTION AND VENUE

2. This is an action for civil damages and injunctive relief pursuant to 42 U.S.C. § 1983 based upon violations of Mr. Tubby’s rights under the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution. Jurisdiction in this Court exists pursuant to 28 U.S.C. §§ 1331 and 1343 based on violations of 42 U.S.C. § 1983 and claims arising under the United States Constitution. After the statutory notice period in Wis. Stat. § 893.80 expires, Plaintiffs will seek leave to amend their Complaint to add claims arising under Wisconsin state law. Supplemental jurisdiction over Plaintiffs’ state law claims will exist pursuant to 28 U.S.C. § 1367.

3. This Court has personal jurisdiction over all Defendants because they have substantial contacts with and/or are domiciled within this District.

4. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(2) in that “a substantial part of the events giving rise to the claim occurred” in this District.

PARTIES

5. At the time of his death, Jonathon Tubby was a resident of Green Bay, Wisconsin.

6. Plaintiffs Sue Doxtator, Arlie Doxtator, and Sarah Wunderlich were appointed Special Administrators of Mr. Tubby's estate pursuant to Letters of Special Administration dated December 7, 2018 in the probate matter captioned *In the Matter of the Estate of Jonathon C. Tubby*, 2018-PR-000428, in Brown County Circuit Court. Under the Letters of Special Administration, Sue Doxtator, Arlie Doxtator, and Sarah Wunderlich were jointly granted all the same powers, duties, and liabilities as a Personal Representative for Mr. Tubby's estate.

7. Sue Doxtator and Arlie Doxtator are residents of Seymour, Wisconsin.

8. Sarah Wunderlich is a resident of Green Bay, Wisconsin.

9. At the time of Jonathon Tubby's death, Defendant Erik O'Brien was a police officer employed by the Green Bay Police Department. Officer O'Brien is sued in his individual capacity.

10. Defendant Andrew Smith is the Chief of Police of the Green Bay Police Department, and in his official capacity is responsible for the hiring, training, and supervision of Defendant O'Brien and the Defendant John Doe police officers employed by the Green Bay Police Department who were present during the shooting of Jonathon Tubby. Defendant Smith is sued in his official capacity.

11. Defendant Todd J. Delain is the Sheriff of Brown County, Wisconsin, and in his official capacity is responsible for the operation of the Brown County Jail, and the hiring, training, and supervision of Defendant Heidi Michel, Defendants Mleziva, Winisterfer, Zeigle, and Thomas, and the Defendant John Doe sheriff deputies and

correctional officers employed by the Brown County Sherriff's Department who were present during the shooting of Mr. Tubby. Delain is sued in his official capacity.

12. Defendant Heidi Michel is the Jail Administrator for the Brown County Jail, and is responsible for the day-to-day operation of the jail. Administrator Michel is sued in her official capacity.

13. Defendant City of Green Bay is a municipal corporation with its principal place of business at 100 North Jefferson Street, Green Bay, WI 54301. The City maintains and operates the Green Bay Police Department.

14. Defendant Brown County is a municipal corporation with its principal place of business at 305 E. Walnut Street, Green Bay, Wisconsin 54301. Brown County maintains and operates the Brown County Sherriff's Department and Brown County Jail.

15. Joseph P. Mleziva and Nathan K. Winisterfer are Deputy Brown County Sheriffs. Mleziva and Winisterfer are sued in their individual capacities. Mleziva and Winisterfer were previously named in this action as John Doe defendants.

16. Thomas Zeigle is a Patrol Lieutenant with the Brown County Sheriff's Office. Zeigle is sued in his individual capacity. Zeigle was previously named in this action as a John Doe defendant.

17. Bradley A. Dernbach is a Green Bay Police Officer. He is sued in his individual capacity. Dernbach was previously named in this action as a John Doe defendant.

18. John Does 1-5 are Green Bay police officers, Brown County sheriffs, and/or Brown County correctional officers who were present at the arrest and/or shooting

of Jonathon Tubby on October 19, 2018, or whose actions or failures to act contributed to Mr. Tubby's death. John Does 1-5 are sued in in their individual capacities.

STATEMENT OF FACTS

19. On October 19, 2018, Jonathon Tubby was stopped for a traffic violation by Officers O'Brien and Colton Wernecke of the Green Bay Police Department.

20. During the course of this stop, Officers O'Brien and Wernecke determined that Mr. Tubby had an outstanding warrant for failure to report to the Brown County Jail for a 60-day sentence for Operating While Revoked, a non-violent crime under the laws of the state of Wisconsin.

21. Officers O'Brien and Wernecke handcuffed Mr. Tubby and placed him in their patrol vehicle for transport to the Brown County Jail. Officer Wernecke conducted a search incident to the arrest and handcuffing of Mr. Tubby and determined that he was unarmed. This search was directly observed by Officer O'Brien.

22. After Officers O'Brien and Wernecke's arrival at the jail with Mr. Tubby, Mr. Tubby refused to exit the police squad car that had transported him to the Brown County Jail. Following this refusal, a large number of police officers and sheriff deputies came to the "sally port" of the jail. This included Defendants Mleziva, Winisterfer, Zeigle, and Thomas, as well as the John Doe defendants. The "sally port" is a secured entryway of the jail, where arrestees are transported from a squad car into the jail itself.

23. Defendants Mleziva, Winisterfer, Zeigle, and Thomas, and the John Doe defendants, were informed that Mr. Tubby was handcuffed and had previously been searched and determined to be unarmed.

24. Neither the Green Bay Police Department nor the Brown County Sheriff's Office had standard procedures or training for removing a non-compliant suspect from a squad car, such as by use of a negotiator or non-lethal force. As a result of the lack of training, a disagreement emerged between the Green Bay Police Department and Brown County Sheriff's Office concerning how to remove Mr. Tubby from the squad car. Eventually, against the suggestion of the ranking SWAT officer of the Green Bay Police Department, Defendant Zeigle commanded the officers present to use potentially lethal force to break the back window of the squad car and mace Mr. Tubby.

25. After Mr. Tubby was maced, he exited the squad car and he was shot by a "bean bag" gun and bitten by a police canine. Due to the force of the "bean bag" projectile or canine, or both, Mr. Tubby fell to the ground. As he did so, Mr. Tubby's hands were clearly visible and he was clearly unarmed. Nonetheless, while Mr. Tubby lay face-down on the ground, in handcuffs and restrained by a police canine, Officer O'Brien fired multiple shots from close range at Mr. Tubby, killing him. These shots by Officer O'Brien struck Mr. Tubby in the back of the head, back of the neck, and back.

26. At the time, Officer O'Brien drew his gun and fired at Mr. Tubby, Defendants Mleziva, Winisterfer, Zeigle, Dernbach, and John Does 1-5 were in close proximity to O'Brien. Yet, none of these Defendants intervened to prevent O'Brien from using deadly force against the unarmed, handcuffed man.

27. At all times Defendants Officers O'Brien, Mleziva, Winisterfer, Zeigle, Dernbach, and John Does 1-5 were acting under color of state law.

COUNT I—Unconstitutional Use of Deadly Force—42 U.S.C. § 1983

(Against Officer O'Brien)

28. Plaintiffs incorporate by reference all allegations set forth in paragraphs 1 through 27 above, as if fully set forth below.

29. Officer O'Brien's use of deadly force against an unarmed, handcuffed man constitutes a violation of the Fourth, Eighth, and Fourteenth Amendments of the U.S. Constitution. The use of deadly force against unarmed, handcuffed man by a police officer employed by the City of Green Bay constitutes an unreasonable seizure, a deprivation of Mr. Tubby's right of liberty without due process of law, a violation of his bodily integrity in violation of his right to substantive due process, and cruel and unusual punishment.

30. At the time Officer O'Brien use of deadly force, Officer O'Brien was acting under the color of law. O'Brien's ability to shoot Mr. Tubby multiple times, including in the head, while Mr. Tubby was unarmed, handcuffed, restrained by a police canine, and face-down on the ground was made possible only because O'Brien was clothed with the authority of a Green Bay police officer.

31. At the time of Officer O'Brien's use of deadly force, no reasonable officer in his position would have believed deadly force was justified. It was clearly established at the time of Mr. Tubby's death that an officer may use deadly force only when a reasonable officer, under the same circumstances, would believe that a suspect's actions placed the officer or others in the immediate vicinity in imminent danger of death or serious harm. At the time of Mr. Tubby's death, he was handcuffed, unarmed, restrained

by a police canine, and face-down on the ground. No reasonable officer could have believed that Mr. Tubby's actions placed the officer or others in the immediate vicinity in imminent danger of death or serious harm.

32. The conduct of Officer O'Brien thus violated clearly established rights of Mr. Tubby of which reasonable officers knew or should have known.

33. As a direct and proximate result of the conduct of Officer O'Brien described above, committed in reckless disregard of Mr. Tubby's rights, Mr. Tubby and Plaintiffs have been damaged in various respects, including but not limited to the deprivation of Mr. Tubby of his life and his pre-death pain and suffering and pecuniary loss, all resulting from and attributable to the deprivation of his constitutional and statutory rights guaranteed by the Fourth, Eighth and Fourteenth Amendments of the Constitution of the United States and protected under 42 U.S.C. § 1983.

34. As a result of Officer O'Brien's violations of Mr. Tubby's constitutional rights, Mr. Tubby's estate is entitled to damages in an amount to be determined at trial and Plaintiffs are entitled to injunctive relief that will prevent other incidents of deadly force by Green Bay police officers.

**COUNT II—Failure to Intervene—42 U.S.C. § 1983
(Against Mleziva, Winisterfer, Zeigle, Dernbach, and John Does 1-5)**

35. Plaintiffs incorporate by reference all allegations set forth in paragraphs 1 through 34 above, as if fully set below.

36. Mleziva, Winisterfer, Zeigle, Dernbach, and John Does 1-5 owed Mr. Tubby a duty to intervene if another officer used excessive force on him.

37. Mleziva, Winisterfer, Zeigle, Dernbach, and John Does 1-5 could see Officer O'Brien draw his gun and begin firing at Mr. Tubby, and knew that Officer O'Brien was about to use deadly force against Mr. Tubby by shooting him multiple times, including in the head. Mleziva, Winisterfer, Zeigle, Dernbach, and John Does 1-5 knew that the use of deadly force by Officer O'Brien would violate clearly established rights of Mr. Tubby of which reasonable officers knew or should have known, as Mr. Tubby did not pose a risk of imminent danger of death or serious harm to Officer O'Brien or any others in the immediate vicinity because Mr. Tubby was unarmed, handcuffed, and restrained by a police canine.

38. Mleziva, Winisterfer, Zeigle, Dernbach, and John Does 1-5 were present in the "sally port" in close proximity to Officer O'Brien and had a realistic opportunity to take steps to prevent Officer O'Brien from shooting Mr. Tubby.

39. Mleziva, Winisterfer, Zeigle, Dernbach, and John Does 1-5 failed to take reasonable steps to prevent Officer O'Brien from shooting Mr. Tubby multiple times in the back and in the head, while Mr. Tubby was unarmed, handcuffed, restrained by a police canine, and face-down on the ground.

40. As a result of Mleziva, Winisterfer, Zeigle, Dernbach, and John Does 1-5's failure to act, Mr. Tubby was killed by Officer O'Brien.

41. At the time of Officer O'Brien's improper use of deadly force, Mleziva, Winisterfer, Zeigle, Dernbach, and John Does 1-5 were acting under the color of law. Mleziva, Winisterfer, Zeigle, Dernbach, and John Does 1-5 possessed the power to intervene to prevent violation of Mr. Tubby's constitutional rights by virtue of their

authority under state law as police officers, sheriff deputies, and/or correctional officers. They misused this power by failing to intervene.

42. The conduct of Mleziva, Winisterfer, Zeigle, Dernbach, and John Does 1-5 thus violated clearly established rights of Mr. Tubby of which reasonable officers knew or should have known.

43. As a direct and proximate result of the conduct of Mleziva, Winisterfer, Zeigle, Dernbach, and John Does 1-5 described above, committed in reckless disregard of Mr. Tubby's rights, Mr. Tubby and Plaintiffs have been damaged in various respects, including but not limited to the deprivation of Mr. Tubby, of his life, and his pre-death pain and suffering and pecuniary loss, all resulting from and attributable to the deprivation of his constitutional and statutory rights guaranteed by the Fourth, Eighth and Fourteenth Amendments of the Constitution of the United States and protected under 42 U.S.C. § 1983.

44. As a result of violations of Mr. Tubby's constitutional rights by Mleziva, Winisterfer, Zeigle, Dernbach, and John Does 1-5, Mr. Tubby's estate is entitled to damages in an amount to be determined at trial and Plaintiffs are entitled to injunctive relief that will prevent other incidents of deadly force in the presence of Green Bay police officers, Brown County sheriff deputies, and/or Brown County correctional officers.

COUNT III—Failure to Train—42 U.S.C. § 1983

(Against Defendants Smith, Delain, Michel, City of Green Bay, and Brown County)

45. Plaintiffs incorporate by reference all allegations set forth in paragraphs 1 through 44 above, as if fully set below.

46. Defendants Smith, Delain, Michel, City of Green Bay, and Brown County failed to train their law enforcement officers on how to remove non-compliant suspects from squad cars.

47. Just as policymakers “know to a moral certainty” that law enforcement officers will be required to arrest fleeing suspects, *City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989), Smith, Delain, Michel, Green Bay, and Brown County knew that Green Bay Police Officers and Brown County Sheriff Deputies would encounter suspects that refuse to exit squad vehicles, particularly at the “sally port.” The nature of the “sally port” is tense—arrestees are at the first point of the transition from ordinary society into jail. As a result, it is obvious that some arrestees may become non-compliant and refuse to exit the squad car that transported them to jail.

48. Despite the highly likelihood of the need to remove a non-compliant suspect from a squad car at the “sally port” area of the jail, none of Smith, Delain, Michel, Green Bay, or Brown County promulgated any policies concerning the constitutional use of force to remove a suspect from a squad car or use of alternatives to force, such as professional negotiators. On information and belief, none of Smith, Delain, Michel, Green Bay, or Brown County provided any training at all concerning the constitutional use of force to remove a suspect from a squad car or use of alternatives to force, such as professional negotiators.

49. The failure to train officers constitutes deliberate indifference by Smith, Delain, Michel, Green Bay, and Brown County to the constitutional rights of those that will come into contact with police officers and/or sheriff deputies. This deliberate

indifference was the moving force behind O'Brien's use of unconstitutionally excessive and deadly force against Mr. Tubby, and the other officers' failure to intervene. Without any training on the constitutional use of force to remove a suspect from a squad car, the officers on the scene resorted to using several levels of force, including deadly force, against Mr. Tubby nearly simultaneously.

50. As a result of the failure to train by Smith, Delain, Michel, Green Bay, and Brown County, Mr. Tubby's estate is entitled to damages in an amount to be determined at trial and Plaintiffs are entitled to injunctive relief that will prevent other incidents of deadly force at the Brown County Jail or by Green Bay police officers.

COUNT IV—Failure to Supervise—42 U.S.C. § 1983

(Against Defendants Smith, Delain, Michel, City of Green Bay, and Brown County)

51. Plaintiffs incorporate by reference all allegations set forth in paragraphs 1 through 50 above, as if fully set below.

52. Defendants Smith, Delain, Michel, City of Green Bay, and Brown County failed to adequately supervise Officers O'Brien, Mleziva, Winisterfer, Zeigle, Dernbach, and John Does 1-5.

53. Defendants Smith, Delain, Michel, City of Green Bay, and Brown County have a longstanding and widespread practice of failing to install video and audio recording equipment in the "sally port" area of the Brown County jail or on the persons of individual officers (known as "body cams"). The practice of Delain, Michel, and Brown County of failing to install video and audio recording equipment in the "sally port" has been in existence since at least 2001 when the Brown County jail was

constructed with surveillance video incapable of recording. At least three years ago, then-Brown County Sheriff John Gossage identified the lack of recording equipment as a “risk.” In 2017, Brown County Supervisors approved funding for video upgrades, but no upgrades were made.

54. Similarly, a longstanding and widespread practice of Smith and Green Bay to fail to equip officers with body cams has existed since at least 2014, when Green Bay participated in trial runs and focus groups for body cams. Despite similar cities (such as Appleton, Wisconsin) equipping officers with body cams, Smith, on behalf of the City of Green Bay, made the deliberate choice not to equip Green Bay police officers with body cams.

55. The primary purpose of video and audio recording equipment, whether in a sally port or on an individual officer’s body, is to detect, deter, and discipline unconstitutional uses of force. Therefore, Defendants Smith, Delain, Michel, City of Green Bay, and Brown County were on notice that the unconstitutional use of force in the “sally port” area of the jail was a highly predictable consequence of their failure to require video and audio recording equipment. Indeed, on information and belief, there have been prior confrontations and incidents at the “sally port” area of the Brown County Jail.

56. The failure to supervise officers with video and audio recording equipment constitutes deliberate indifference by Smith, Delain, Michel, Green Bay, and Brown County to the constitutional rights of those that will come into contact with police officers and/or sheriff deputies.

57. This deliberate indifference was the moving force behind O'Brien's use of unconstitutionally excessive and deadly force against Mr. Tubby, and the other officers' failure to intervene. Had O'Brien known that video and audio recording equipment was poised to capture his use of lethal force against Mr. Tubby, an arrestee who was lying face-down on the ground in handcuffs while engaged by a police canine and who's empty hands had been clearly visible moments before, he would not have fired the lethal shots for fear of future discipline or sanction. For the same reason, had Defendants Mleziva, Winisterfer, Zeigle, Dernbach, and John Does 1-5, known that their failure to intervene would be captured by video and audio recording equipment, they would have acted to stop O'Brien from his unconstitutional use of deadly force.

58. As a result of the failure to supervise by Smith, Delain, Michel, Green Bay, and Brown County, Mr. Tubby's estate is entitled to damages in an amount to be determined at trial and Plaintiffs are entitled to injunctive relief that will prevent other incidents of deadly force at the Brown County Jail or by Green Bay police officers.

COUNT V—Direct Action—Wis. Stat. § 895.46

(Against City of Green Bay)

59. Plaintiffs incorporate by reference all allegations set forth in paragraphs 1 through 58 above, as if fully set below.

60. The City is responsible and liable under Wis. Stat. § 895.46 to pay any judgment for damages and costs entered against Defendant O'Brien and those Defendant John Doe officers employed by the Green Bay Police Department, because their acts at issue resulting in the death of Mr. Tubby were done within the scope of their employment

as City police officers while carrying out their duties as officers and employees of the City.

COUNT VI—Direct Action—Wis. Stat. § 895.46

(Against Brown County)

61. Plaintiff incorporates by reference all allegations set forth in paragraphs 1 through 48 above, as if fully set below.

62. Brown County is responsible and liable under Wis. Stat. § 895.46 to pay any judgment for damages and costs entered against Defendants Mleziva, Winisterfer, Zeigle, Dernbach, and those John Doe sheriff deputies employed by Brown County, because their acts at issue resulting in the death of Mr. Tubby were done within the scope of their employment as County deputies while carrying out their duties as employees of Brown County.

RELIEF REQUESTED

Wherefore the Plaintiffs sue for relief as from the Defendants, jointly and severally, as follows:

- A. Actual monetary damages in an amount determined by a jury for each of plaintiffs' causes of action.
- B. The award of punitive damages in an amount to be determined by a jury.
- C. The award of reasonable attorneys' fees, costs, and disbursements of this action.
- D. Injunctive relief requiring the City of Green Bay and Brown County to adopt policies regarding the use of force to prohibit the use of lethal force against anyone who is in custody and restrained.
- E. Injunctive relief requiring the City of Green Bay and Brown County to adopt policies regarding the use of force, or alternatives to force, to remove non-compliant individuals from squad cars.

- F. Injunctive relief requiring the City of Green Bay and Brown County to conduct training for all law enforcement officers and correctional staff on the appropriate use of force.
- G. Injunctive relief requiring Brown County to install, operate, and maintain appropriation audio visual recording equipment to capture and preserve a record of any events occurring on jail property.
- H. Injunctive relief requiring Green Bay to install, operate, and maintain appropriation audio visual recording equipment to capture and preserve a record of any use of force by police officers.
- I. Such other and further relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff demands trial by jury in this action of all issues so triable.

Dated: March 5, 2019

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