

**UNITED STATES DISTRICT COURT
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-137

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.

FEDERAL RULE OF CIVIL PROCEDURE 26(f) REPORT

Pursuant to the Court's Notice for the Federal Rule of Civil Procedure ("FRCP") 16 Scheduling Conference, (Dkt. 53) the Plaintiffs and the Defendants respectfully submit their joint FRCP 26(f) Report, following their FRCP 26(f) Conference of the Parties on April 17, 2019.

I. NATURE OF THE CASE

The Plaintiffs allege that on October 19, 2018, Jonathon Tubby was shot multiple times by a Green Bay police officer while unarmed, in handcuffs, 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, Brown County Sheriff Deputies and correctional officers, who allegedly failed to intervene. The Plaintiffs' Amended Complaint specifically alleges: (1)

unconstitutional use of deadly force under 42 U.S.C. § 1983 against City Defendant, Officer O'Brien; (2) failure to intervene under 42 U.S.C. § 1983 against County Defendants Officers Mleziva, Winisterfer, Zeigle, Dernbach; (3) failure to train under 42 U.S.C. § 1983 against the City of Green Bay and City Defendant Andrew Smith, and Brown County and County Defendants Todd Delain, Heidi Michel; and (4) failure to supervise under 42 U.S.C. § 1983 against Defendants Andrew Smith, Todd Delain, Heidi Michel, the City of Green Bay and Brown County. The Defendants expressly deny these allegations and maintain that the actions of the City and County Defendants were constitutionally sound.

II. PROPOSED DISCOVERY PLAN

A. Rule 26(a) initial disclosures.

The parties shall submit their Initial Disclosures under Rule 26(a)(1) on or before May 31, 2019. The parties do not anticipate any changes to the form or requirement for the disclosures.

B. Subjects, Timing and Order of Discovery.

1. The parties anticipate discovery will be taken on:

- a. The actions of Plaintiff and Defendants on October 19, 2018;
- b. Policies and procedures of the Defendants;
- c. The Plaintiff's damages; and
- d. Immunity as to each Defendant.

2. The parties do not believe discovery should be conducted in phases or limited to particular issues.

3. The parties propose the following schedule:

Event	Proposed Date
Deadline to Amend Pleadings without Leave of Court	September 1, 2019
Plaintiff's Expert Designations/Reports	November 22, 2019
Defendants' Expert Designations/Reports	March 1, 2020
Rebuttal Expert Report	May 1, 2020
Discovery Cut-Off	June 1, 2020
Alternative Dispute Resolution	June 1, 2020
Dispositive Motions Deadline	July 6, 2020
Proposed Trial Date	Completed by November 30, 2020

C. Electronically Stored Information.

The parties agree that service by electronic means shall be allowed as set forth in Fed. R. Civ. P. 5(b)(2)(E) and that such service shall be considered personal service under the Federal Rules and complete upon transmission, such that three days are not added to the response deadline under Fed. R. Civ. P. 6(d), provided that the sender does not receive any indication that such electronic transmission was unsuccessful and that transmission occurred before 5:00 p.m. The parties agree that copies of all written discovery requests shall be provided in editable form (e.g., in Microsoft Word).

The Parties agree to produce documents as TIFF format image files. For documents whose native format is MS Excel, MS Access, Quickbooks, other database formats and various multi-media files (audio and video), the original native files shall be produced in addition to a single page tiff placeholder. Document level .txt files should be provided for all native and scanned paper documents. The files should be created using the extracted full text for electronically-stored information or OCR text for scanned paper. A Ringtail load file, .DAT file, or delimited .csv file shall be delivered for all images and shall include at least the following metadata fields: File Path, File Name, File Extension, Date Created, Date Modified, Title, Author, Company, Hash.

D. Claims of Privilege and Work Product.

The parties agree that the inadvertent production or disclosure of privileged or otherwise protected materials shall not be deemed a waiver or impairment per se of any claim of privilege or protection.

The parties agree that communications between a party and its trial counsel do not need to be included on any privilege log provided pursuant to Rule 26(b)(5). The parties further agree that other communications and documents generated after commencement of this litigation on January 24, 2019, if privileged or protected as work product, do not need to be included on any privilege log provided pursuant to Rule 26(b)(5).

The parties will conduct discovery in good faith and will attempt to resolve any discovery-related dispute without intervention from the Court. Parties will seek entry of a Protective Order from the Court if it intends not to produce any unprivileged and discoverable information.

E. Proposed Changes Limitations On Discovery.

For the purposes of determining the limitations on the number of discovery requests, the parties are as follows:

1. **Plaintiffs.** Plaintiffs are, Sue Doxtator, Arlie Doxtator and Sarah Wunderlich, as Special Administrators of the Estate of Jonathon C. Tubby
2. **The Green Bay Defendants.** The Green Bay Defendants are, the City of Green and its two employees: City of Green Bay Chief of Police, Andrew Smith; and City of Green Bay Police Officer Erik O'Brien.
3. **The Brown County Defendants.** The Brown County Defendants are, Brown County and its six employees: Todd J. Delain, Heidi Michel, Joseph P. Mleziva, Nathan K. Winisterfer, Thomas Ziegler, and Bradley A. Dernbach

The parties agree that discovery limitations apply on a per party basis. In other words, the limitation in Rule 33 that “a party may serve on any other party no more than 25 written interrogatories” means that each party may serve up to 50 interrogatories (25 interrogatories on each of the other two parties.) The parties reserve the right to seek relief from the Civil L.R. 33(a)(1) limitation of 25 interrogatories and the FRCP 30(d)(1) limitation of 1 day of 7 hours for the duration of depositions, if necessary.

The parties agree that it is necessary to exceed the 10-deposition limit set forth in FRCP 30(a)(2)(A)(i) and FRCP 31(a)(2)(A)(1). The parties agree to a 25-deposition limit for oral depositions per party. In other words, each party may be required to present up to 25 witnesses for oral depositions. If a party has already presented 25 witnesses for oral depositions, additional depositions of that party or its employees must be with leave of court. The parties agree that written depositions are appropriate to avoid the costs of more than 25 oral depositions, and agree to permit 25 written depositions of each party in addition to oral depositions.

F. The parties anticipate that they will stipulate to a proposed protective order for purpose of facilitating efficient discovery of confidential and/or sensitive information. Such stipulation and proposed protective order will be submitted to the Court in due course. At this time, the parties do not anticipate any other orders that the court should issue under FRCP 26(c) or under FRCP 16(b) and (c).

Respectfully submitted this 1st day of May, 2019.

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