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,

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, and John Does 1-5,

Defendants.

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

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR LEAVE TO FILE A THIRD AMENDED COMPLAINT

Plaintiffs Susan Doxtator, Arlie Doxtator, and Sarah Wunderlich (collectively "Plaintiffs"), in their capacities as the special administrators of the Estate of Jonathon C. Tubby, submit this memorandum of law in support of their Motion for Leave to File a Third Amended Complaint.

INTRODUCTION

This action seeks to hold the Defendants responsible for the death of Jonathon Tubby ("Mr. Tubby"), who was shot multiple times by a Green Bay police officer, while unarmed, in handcuffs, face-down, and restrained by a police canine inside the "sally port" of the Brown County Jail. Plaintiffs ask for leave to amend their complaint in light

of recent discovery. In particular, Plaintiffs seek to add a "state created danger" claim against Defendant City of Green Bay ("Green Bay").

Good cause exists because Plaintiffs only recently learned of Green Bay's participation in the creation of a danger to Mr. Tubby during discovery. A state created danger claim was previously pled against Defendants Brown County and Thomas Zeigle (a Brown County Sherriff's Lieutenant) due to their reckless plan to force Mr. Tubby from a secured police squad by creating an escape route and then introducing mace into the vehicle (Mr. Tubby was then shot after fleeing the vehicle). Discovery has shown, however, that Green Bay officers also contributed to the state created danger to Mr. Tubby by participating in this plan and also by failing to share this plan with officers on scene (such as Defendant Erik O'Brien, who shot Mr. Tubby). Accordingly, Plaintiffs seek to add allegations concerning Green Bay's contribution to the state created danger. Plaintiffs also seek to make a variety of other amendments to conform the complaint to facts learned in discovery, including withdrawing several claims.

Defendants oppose the amendments on the grounds of futility—asserting that a state created danger claim cannot be premised on a danger from a state (as opposed to private actor) and that Plaintiffs could not seek injunctive relief. However, neither of these issues is new, and therefore not a proper basis to oppose an amendment. Moreover, Defendants' assertion that a state created danger claim must be premised on danger from a private actor is without any support in the case law, and an injunctive relief claim is proper under the public interest exception to mootness. For these reasons, and the others discussed below, Plaintiffs respectfully request the Court grant it leave to file the Third

Amended Complaint attached hereto as **Exhibit A**, a redline of which is attached as **Exhibit B**.

RELEVANT BACKGROUND

Plaintiffs initiated this action by filing a Complaint with this Court on January 24, 2019, asserting claims for unconstitutional use of force, failure to intervene, failure to supervise, and direct action indemnity claims. ECF No. 1 ¶¶ 23-50. After receiving materials from the Brown County District Attorney's Office regarding the criminal investigation of the shooting, Plaintiffs learned the identities of several defendants that had been sued as "John Does." Accordingly, on March 5, 2019, Plaintiffs filed an Amended Complaint that named these defendants. ECF No. 22.

On August 29, 2019, Plaintiffs filed a Second Amended Complaint. ECF No. 66. The primary amendment that Plaintiffs made in that complaint was to add Wisconsin state law claims that were previously barred by the notice requirements of Wis. Stat. § 893.80. *See* ECF No. 66 ¶¶ 2, 77-93. Plaintiffs also added a claim for "state-created danger" against Brown County and a Brown County Sherriff's Lieutenant, Defendant Thomas Zeigle. ECF No. 66 ¶¶ 71-76. Plaintiffs added this claim based on discovery materials that showed that Defendant Zeigle, as a policy maker for Brown County, had developed the reckless plan to create an escape route for Tubby and then force Tubby from a secure police vehicle using mace, which contributed to the subsequent use of force against him. *Id.* The deadline for amendments to the pleadings then passed on September 1, 2019.

Since September 1, 2019, however, Plaintiffs have learned additional facts that warrant amendment of the Complaint. Before and after September 1, 2019, Plaintiffs diligently pursued discovery, including serving multiple requests for documents, interrogatories, and depositions. In January 2020, Plaintiffs took the depositions of three Green Bay Police Officers: Lieutenant Thomas Zeigle, Lieutenant Nathan Allen, and Officer Eric Allen. During these depositions these officers testified that, rather than Green Bay police officer simply executing a plan to force Mr. Tubby from the police vehicle, as ordered by Brown County Lieutenant Zeigle, as is currently pled in the Complaint, Green Bay police officers participated in the creation of the plan by deciding when to use mace to force Mr. Tubby from the vehicle. Declaration of Forrest Tahdooahnippah ("Tahdooahnippah Decl.") ¶¶ 2-3, Ex. 1, Deposition of Officer Allen (Officer Allen Dep.") 73:21-74:21 (testifying that the use of mace was not planned ahead of time), Ex. 2, Deposition of Lieutenant Allen ("Lt. Allen Dep.") 90:9-22 (testifying that he handed the mace up to the officer for use). Plaintiffs also learned during these depositions (as well as in a deposition in December 2019) that, contributing to the recklessness of law enforcements actions, was the decision by both Brown County and Green Bay officers not to share their plan to force Mr. Tubby from the vehicle with Defendant O'Brien or other officers on scene. Lt. Allen Dep. 77:21-78:5; Tahdooahnippah Decl. ¶ 4, Ex. 3, Deposition of Lieutenant Zeigle ("Lt. Zeigle Dep.") 66:4-71:21. During the deposition of Officer Allen, Officer Allen further discussed an incident with similar facts to the current case—the shooting of an unarmed citizen by Green Bay police. Officer Allen Dep. 126:10-128:10.

Based on these revelations, Plaintiffs seek to amend their Complaint to assert claims against the City of Green Bay for violations of 42 U.S.C. § 1983 under a theory of state created danger, and for negligence. *See* Exhibit A ¶¶ 62-71, 83-88. The Third Amended Complaint adds details obtained during these depositions regarding the Defendants conduct, including that Lieutenants Zeigle and Allen "decided to introduce mace into the squad car," and that they failed to share this plan with the officers establishing a containment perimeter. Exhibit A ¶¶ 64-65. Based on this same deposition testimony, the proposed Third Amended Complaint also removes the former Count IV – Failure to Supervise under Section 1983, and removes Defendants Zeigle and Dernbach from Count II – Failure to Intervene under Section 1983. Exhibit A ¶¶ 33-42. The Third Amended Complaint also adds additional details to support its claim in proposed Count IV – Excessive Force in violation of Section 1983 against Green Bay, specifically information concerning a similar incident in which Green Bay officers shot and killed against an unarmed individual, while he was exiting a vehicle. Exhibit A ¶ 56. Finally, the Third Amended Complaint amends its requested relief, eliminating a prior request that Brown County "install, operate, and maintain appropriate visual recording equipment to capture and preserve a record of any events occurring on jail property." Exhibit A, Relief Requested.

ARGUMENT

This Court should grant Plaintiffs' Motion as newly discovered evidence provides good cause for leave to file the Third Amended Complaint. Where a party seeks to amend the pleadings after the deadline established in the court's scheduling order has

passed, courts first examine whether the party has established good cause for the delay under Rule 16 before analyzing the proposed amendment under the liberal standard of Rule 15(a)(2). *Alioto v. Town of Lisbon*, 651 F.3d 715, 719 (7th Cir. 2011). In this case, the Court's scheduling order set September 1, 2019 as the deadline for amendments to the pleadings. ECF No. 61 ¶ 2. As plaintiffs have good cause to modify the scheduling order, this Court should grant Plaintiffs' motion.

I. PLAINTIFFS HAVE SHOWN GOOD CAUSE FOR LEAVE TO AMEND

Plaintiffs' discovery of new evidence supporting their claims establishes good cause to amend their complaint following the deadline set forth in the scheduling order. "To amend a pleading after the expiration of the trial court's Scheduling Order deadline to amend pleadings, the moving party must show 'good cause.'" *Trustmark Ins. Co. v. Gen. & Cologne Life Re of Am.*, 424 F.3d 542, 553 (7th Cir. 2005). The primary concern of courts assessing whether a party has good cause to amend is whether that party has exercised "diligence" in seeking amendment. *Id.* Courts in this Circuit have found that a party has acted diligently in seeking to amend a complaint where they have sought leave approximately a month following a deposition that formed the basis for the amended pleading. *See Vettel v. Bassett Trucking LLC*, No. 1:17-CV-400-PRC, 2018 U.S. Dist. LEXIS 52961, at *4 (N.D. Ind. Mar. 29, 2018); *see also Eads v. Prudential Ins. Co. of Am.*, No. 1:13-cv-01209-TWP-MJD, 2014 U.S. Dist. LEXIS 94305, at *5 (S.D. Ind. July 11, 2014) (granting leave to amend, where the plaintiff brought the motion a month after learning the information forming the basis for the amendment, and more than five months after the deadline to amend).

Here, Plaintiffs notified Defendants of their intent to seek leave to amend approximately one month after depositions revealed new information about the actions of Green Bay police officers, and only a matter days after serving an expert report discussing the importance of this new information. Tahdooahnippah Decl. ¶ 5. The proposed amendments to the Complaint are based on new factual information that Plaintiffs learned during the depositions of Green Bay Police Officers Allen, Lieutenant Allen, and Lieutenant Zeigle, which took place on January 9 and 10, 2020. Tahdooahnippah Decl. ¶ 2-4. Moreover, the true significance of this testimony as it concerns these officers' deviation from accepted police practices was only known to Plaintiffs after consulting with their expert, who served his report on January 31, 2020. Tahdooahnippah Decl. ¶ 5. During those depositions, these officers testified that, rather than simply executing a plan prepared by Brown County as the Complaint initially alleged, these officers actively participated in the preparation of the plan, as well as its execution. For example, Lt. Zeigle testified that he sought out and provided officer Allen a large canister of mace to spray at Jonathan Tubby in the back of the police car. Lt. Zeigle Dep. at 73:23-74:25. In addition, Green Bay Police Officer Eric Allen testified during his deposition that he made the decision to introduce mace into the squad car with assistance from Zeigle and Allen. Officer Allen Dep. at 73:21-74:21.

As Plaintiffs learned new information during recent depositions, they acted swiftly to incorporate that information in their Complaint. After notifying Defendants of their intent to amend their Complaint on February, Plaintiffs did not receive a response from the Green Bay Defendants regarding their opposition to this motion until February 20,

2020. Tahdooahnippah Decl. Ex. 7. This motion followed shortly thereafter. Therefore, Plaintiffs acted diligently and have shown good cause to modify the scheduling order to allow Plaintiffs to file a Third Amended Complaint.

II. THE FEDERAL RULES' LIBERAL STANDARD FOR GRANTING LEAVE TO FILE AMENDED PLEADINGS

With good cause to modify the scheduling order, this Court should grant Plaintiffs leave to file a Third Amended Complaint. Under Fed. R. Civ. P. 15(a)(2), this Court should "freely give leave [to amend] when justice so requires." In other words, "[i]n the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive . . . undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – then leave sought should, as the rules require, be 'freely given.'" *Foman v. Davis*, 371 U.S. 178, 182 (1962). As shown above, Plaintiffs have been diligent in bringing this motion to amend, and have done so in good faith, based upon the testimony of Lt. Zeigle and Officer Allen. Officer Allen Dep. 73:21-74:21; Lt. Allen Dep. 90:9-22; Lt. Zeigle Dep. 66:4-71:21. Accordingly, Plaintiffs have not delayed or acted with dilatory motive.

A. Defendants will not suffer undue prejudice

Defendants will not be unduly prejudiced as a result of the Third Amended Complaint, and during the meet-and-confer process identified no prejudice in allowing the Third Amended Complaint. In addressing a similar circumstance, the Seventh Circuit in *Bower v. Jones*, reversed a district court's decision to deny leave to amend where the plaintiff learned of information supporting the proposed additional claim following a

deposition late in discovery, and promptly sought to amend its complaint. 978 F.2d 1004, 1010 (7th Cir. 1992). The court noted that, though the motion to amend was brought late in the case, the defendants would not be prejudiced because "the claim and likely defenses to it are quite similar to those involved in the original written contract claim, meaning that the defendants will incur little extra time or expense in defending the claim. Also the necessary discovery on the claim is complete." *Id.*

This case is factually similar to *Bower*. Here, Plaintiffs only recently learned of the additional information supporting their claims for negligence and violation of 42 U.S.C. § 1983 under a theory of state created danger against Green Bay. Significantly, state created danger is a theory already pled in the Complaint, the amendments merely clarify the Green Bay Police Department's role in creating the danger. Moreover, as detailed above, Plaintiffs have acted diligently to bring this Motion to the Court. Furthermore, the claims that Plaintiffs are supplementing are similar to others that are before this Court, and Defendants likely will not need to conduct additional discovery. Even if they did, Defendants have until June 1, 2020 to do so, (ECF No. 61 ¶ 4), giving them ample time to investigate any of the additional claims. *See also Erickson v. Wis. Dep't of Corr.*, No. 04-C-265-C, 2004 U.S. Dist. LEXIS 20770, at *5 (W.D. Wis. Sep. 29, 2004) (granting leave to amend because the parties had sufficient time to complete discovery, even with the amendment). As the discovery involved in responding to Plaintiffs' Third Amended Complaint will overlap with the discovery already accomplished by the parties, the Defendants have time to conduct any necessary additional discovery, and Plaintiffs brought this motion in a timely fashion, this Court

should hold that Defendants will not be prejudiced by granting Plaintiffs leave to file their Third Amended Complaint.

B. The proposed amendments are grounded in fact and law

The proposed amendments to the Complaint are not futile. "[A]n amendment may be futile when it fails to state a valid theory of liability, or could not withstand a motion to dismiss." *Bower*, 978 F.2d at 1008 (citations omitted). Here, Defendants do not challenge the negligence claim or any other amendments. Instead, Defendants assert that (1) state-created dangers under § 1983 must relate to dangers from private actors, and (2) Plaintiffs do not have standing to seek an injunction. However, neither of these claims is new. Injunctive relief has been requested since the original complaint was filed on January 24, 2019. State created danger is already pled against Brown County (Plaintiffs merely with to add Green Bay), and has been since August 29, 2019. Defendants did not previously challenge these claims, and therefore cannot use an objection to them to oppose a motion for leave to amend.

Moreover, even if Defendant had timely raised their objections, they are without merit. Plaintiffs Third Amended Complaint (and Second Amended Complaint) adequately pled state-created danger. A plaintiff must allege three elements for state-created danger under § 1983: (1) "the state, by its affirmative acts, must create or increase a danger faced by an individual;" (2) "the failure on the part of the state to protect an individual from such a danger must be the proximate cause of the injury to the individual;" and (3) "the state's failure to protect the individual must shock the conscience." *King v. E. St. Louis Sch. Dist. 189*, 496 F.3d 812, 818 (7th Cir. 2007). The

shocks the conscience standard is akin to recklessness by law enforcement. *Flint v. City of Belvidere*, 791 F.3d 764, 770 (7th Cir. 2015) (stating that for conduct to be conscious shocking, "governmental defendants must act with a *mens rea* akin to criminal recklessness").

Here, the "danger" created by the state was the danger from law enforcement (as it turned out, Officer O'Brien) of using force against Tubby. The state created this danger because they created an escape route from a contained vehicle, forced him to take that escape route by macing him, all while telling officers he was armed while failing to share the plan to force him to flee the vehicle. Exhibit A ¶¶ 64-67. This is reckless police conduct, Exhibit A ¶ 68, and the only argument offered by Defendants is that the Third (and Second) Amended Complaint do not state a claim that the danger must come from a private actor, not other law enforcement officers or agencies.

Simply put—Defendants are wrong. They cited no authority for this proposition during the parties' meet and confer and there is *no requirement* that the danger created by the state come from a private actor (as opposed to state actor). In fact, dangers cognizable under a state-created danger theory often come from *no actor* (state or private) at all. *See, e.g.*, *White v. Rochford*, 592 F.2d 381, 383 (7th Cir. 1979) (reversing dismissal of a complaint alleging violations of due process where a police officer arrested the driver of a car, leaving two children in the vehicle during frigid temperatures, resulting in hospitalization); *see also Kneipp by Cusack v. Tedder*, 95 F.3d 1199, 1213 (3d Cir. 1996) (reversing entry of summary judgment and holding that a jury could reasonably find that police officers were liable under a state created danger theory when

they left an intoxicated woman in the cold near an embankment, ultimately causing her hypothermia and leading to brain damage). For state-created danger liability, it is sufficient that a danger be created by the state, there are no further requirements regarding the source of that danger—danger may come from private actors, state actors, acts of God, or any other source.

Plaintiffs have also pled facts sufficient to support their claim for injunctive relief. During the meet and confer process, Defendants argued that Plaintiffs do not have standing to assert for a claim for injunctive relief. Presumably, Defendants are referring to the fact that Tubby is now deceased due to their actions—and therefore cannot ever suffer the use of excessive or deadly force ever again, no matter how pervasive the use of excessive force or how derelict the supervision and training of Defendants is.

Yet, injunctions are equitable remedies. It would be highly inequitable if Defendants could evade an injunction regarding their use of deadly force merely because every person that is subject to their use of deadly force dies. Fortunately, the standing requirements are not so strict. While it is true that Tubby cannot be subject to any future uses of force, the law provides an exception to "mootness" for the public interest and for cases capable of repetition yet evading review. *United States v. Woods*, 995 F.2d 894, 896 (9th Cir. 1993) (resolving an otherwise mooted case because it was capable of repetition, yet evading review, and presented an "issue of continuing and public importance"). Plaintiffs allege in the Third (and Second) Amended Complaint that Green Bay has a policy and custom of excessive force, that Green Bay and Brown County have failed to adequately train their officers regarding the use of force, that Green Bay and

Brown County created a danger that lead to the death of one of their citizens, and that Green Bay and Brown County negligently caused the death of one of their citizens by failing to employ accepted law enforcement standards. Exhibit A ¶¶ 43-71, 77-88. Surely, the public has an interest in ensuring that such conduct is enjoined and not repeated.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their Motion to Amend the Scheduling Order and for Leave to File a Third Amended Complaint.

Dated: February 27, 2020

By */s/ Forrest Tahdooahnippah*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of February, 2020, I served the foregoing PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR LEAVE TO FILE A THIRD AMENDED COMPLAINT via the Court's CM/ECF system, causing Defendants to be served electronically.

/s/ Forrest Tahdooahnippah
Forrest Tahdooahnippah

EXHIBIT A

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,

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, and John Does 1-5,

Defendants.

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

THIRD AMENDED COMPLAINT

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 Third Amended 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, 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, and restrained by a

police canine, while in the "sally port" of the Brown County jail. The shooting 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. Supplemental jurisdiction over Plaintiffs' state law claims exists pursuant to 28 U.S.C. § 1367. For all state law claims asserted below, Plaintiffs have complied with the notice requirements of Wis. Stat. § 893.80.

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 Sherriff 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 Office 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 official and individual capacity. Zeigle was previously named in this action as a John Doe defendant.

17. 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

18. 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.

19. 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.

20. 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.

21. 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.

22. 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 and Green Bay Police Officers present at the scene decided to break the back window of the squad car and mace Mr. Tubby.

23. 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.

24. At the time, Officer O'Brien drew his gun and fired at Mr. Tubby, Defendants Mleziva, Winisterfer, 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.

25. 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 Defendant O'Brien)

26. Plaintiffs incorporate by reference all allegations set forth in paragraphs 1 through 25 above, as if fully set forth below.

27. 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.

28. 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.

29. 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.

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

31. 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.

32. 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 Defendants Mleziva, Winisterfer, and John Does 1-5)

33. Plaintiffs incorporate by reference all allegations set forth in paragraphs 1 through 32 above, as if fully set forth below.

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

35. Mleziva, Winisterfer, 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, 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.

36. Mleziva, Winisterfer, and John Does 1-5 were present in close proximity to Officer O'Brien and had a realistic opportunity to take steps to prevent Officer O'Brien from shooting Mr. Tubby.

37. Mleziva, Winisterfer, 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.

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

39. At the time of Officer O'Brien's improper use of deadly force, Mleziva, Winisterfer, and John Does 1-5 were acting under the color of law. Mleziva, Winisterfer, 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.

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

41. As a direct and proximate result of the conduct of Mleziva, Winisterfer, 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.

42. As a result of violations of Mr. Tubby's constitutional rights by Mleziva, Winisterfer, 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)

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

44. 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.

45. 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.

46. 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.

47. Moreover, Brown County knows that its officers will observe excessive use of force by other officers, yet Brown County does not train its officers on intervention to prevent excessive use of force at all.

48. 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. None of the Brown County officers acted to intervene to prevent this unconstitutional use of force.

49. 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—Excessive Force—42 U.S.C. § 1983

(Against Defendant City of Green Bay)

50. Plaintiffs incorporate by reference all allegations set forth in paragraphs 1 through 49 above, as if fully set forth below.

51. At the time of Officer O'Brien's unconstitutional use of deadly force against Mr. Tubby, the Green Bay Police Department had a custom and practice of using excessive force that was persistent and widespread, so that it was the Green Bay Police Department's standard operating procedure.

52. The Green Bay Police Department's custom and practice of using excessive force was often directed to unarmed individuals, like Mr. Tubby, and was rationalized and excused by police officers, and the Department, by pointing to innocuous actions by the unarmed individuals and claiming that such actions were suspicious or dangerous.

53. For example, on February 26, 2017, Green Bay police officers used excessive force on an unarmed man during a traffic stop. A Green Bay Police Officer initiated a traffic stop of a vehicle. After a passenger exited the vehicle, he reached to pull up his pants and two Green Bay Police Officers used Tasers on the man three times

without warning. A third Officer then violently tackled the man. The Officers involved subsequently claimed they thought the man was reaching for a weapon when he was simply pulling up his pants.

54. As another example, in 2010, Green Bay Police Officers used a baton, shackles, and bodily force against a man inside his own apartment, injuring his head, face, and neck. The City of Green Bay agreed to pay monetary damages to the man as a result of the wrongful conduct by the Officers involved.

55. As another example, in April 2014, a man directed profanity toward a Green Bay Police Officer but posed no physical threat. The Green Bay Police Officer slammed the man against a squad car, threw him to the ground, and continued to beat him while the man lay on the ground. A complaint was lodged but the Green Bay Police Department concluded that the Officer acted appropriately.

56. As another example, on April 21, 2007 four Green Bay Police Officers shot and killed Ben Sonnenberg as he was exiting his vehicle. Sonnenberg was unarmed. However, the shooting officers were not disciplined by Green Bay because they claimed, without any corroboration, that they heard a shot and mistook a cell phone in Sonnenberg's hand for a firearm.

57. As another example, in December 2017, a Green Bay Police Officer arrested a woman in downtown Green Bay. When the woman reached for identification from her purse, the Officer involved tackled her to the ground, causing her to sustain a concussion and broken facial bones. The Green Bay Police Department then claimed the

woman's injuries were the result of her own intoxication and not the excessive force used against her.

58. As another example, in January 2018, a man, a self-proclaimed First Amendment auditor, was video recording public spaces of the Green Bay Police Department. A Green Bay Police Lieutenant confronted the man, who was doing nothing illegal, and used excessive physical force against him.

59. Defendant Chief of Police Smith, or his predecessors, knew of this pattern of excessive force and allowed it to continue. Smith and his predecessors took no action, or took inadequate action, to discipline the Police Officers involved.

60. Based on the foregoing, the Green Bay Police Department has a custom and practice of excessive force, which was a moving force behind O'Brien's decision to shoot and kill Mr. Tubby while Mr. Tubby lay handcuffed and unarmed on the ground. Had O'Brien believed that his shooting of Mr. Tubby would be disciplined or severely sanctioned by the Green Bay Police Department, he would not have used lethal force against Mr. Tubby, an arrestee who was lying face-down on the ground in handcuffs while engaged by a police canine and whose empty hands had been clearly visible moments before. Instead, as a result of the Green Bay Police Department's custom and practice of using excessive force, he knew or believed that he could use deadly force and later claim that innocuous activity seemed suspicious or dangerous.

61. As a result of the Green Bay Police Department's custom and practice of using excessive force, 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 excessive force at the Brown County Jail or by Green Bay Police Officers, such as by enhancing supervision of police officers through the use of body cameras or other means.

COUNT V—State Created Danger—§ 1983

(Against Defendants Zeigle, Brown County, and Green Bay)

62. Plaintiffs incorporate by reference all allegations set forth in paragraphs 1 through 61 above, as if fully set forth below.

63. Defendant Zeigle, a Patrol Lieutenant of the Brown County Sheriff's Office, is a policy-making official of Brown County. Zeigle had final authority over the actions of the law enforcement officers in the sally port on the night of October 19, 2018. Accordingly, when Zeigle ordered officers present in the sally port to use potentially lethal force to break the back window of the squad car, he was announcing a policy of Brown County.

64. Lieutenant Nathan Allen of the Green Bay Police Department is a policy-making official of the Green Bay Police Department. When a Green Bay police officer decided to introduce mace into the squad car, he was assisted by Lieutenant Zeigle and Lieutenant Allen, who were creating policies of Brown County and the Green Bay Police Department.

65. Despite being aware of the plan to break the back window and introduce mace into the squad car, neither Lieutenant Allen nor Lieutenant Zeigle nor any other law enforcement officers privy to the plan shared that plan with the officers establishing a containment perimeter in and around the sally port.

66. The decision to break the back window of a vehicle and spray mace onto a person in a confined space creates a foreseeable risk of serious t harm—as a result of being subjected to mace in a confined space, the person will attempt to escape the confined space. As a result of attempting to escape, the person will likely be subjected to the use of force by law enforcement.

67. This risk of serious harm was further increased by the decision of officers not to share the plan to create an escape route and force Mr. Tubby from the vehicle. Officers establishing a perimeter did not know Mr. Tubby would exit the vehicle, and therefore immediately resorted to force once he did exit the vehicle.

68. Zeigle's, Brown County, and Green Bay's culpability in making this decision is reckless and shocks the conscience. The back doors of squad cars cannot be opened from the inside. Therefore, when Police Officers maced Mr. Tubby, he had no reasonable means of escape or surrender. Spraying mace onto a person in a confined space with no reasonable means of escape or surrender is tantamount to torture. Accepted law enforcement practices would call for de-escalation—use of a negotiator, waiting for the suspect to become calm, obtaining visual contact with the suspect through less than lethal means, etc.

69. When the rear window of the squad car was broken, Mr. Tubby began calling for help. His calls for help were not heeded, and no dialog or negotiation with Mr. Tubby was undertaken. Instead, Green Bay Police Officer Eric Allen made the decision to introduce mace into the squad car with assistance from Zeigle and Green Bay Lieutenant Nathan Allen.

70. As a result of spraying mace on Mr. Tubby in a confined space, Mr. Tubby exited the car through the only possible means of escape or surrender, the broken rear window. His decision to exit the car through a broken window made Mr. Tubby more vulnerable to use of force, and in fact several forms of force were deployed against him almost simultaneously. He was shot with a bean bag gun and engaged by a police canine. His attempt to flee also contributed to O'Brien's decision to use deadly force against Mr. Tubby. Accordingly, the officers' decision to break the window and introduce mace proximately caused Mr. Tubby's death, bodily injury, and pain and suffering.

71. As a result of Zeigle, Brown County's, and Green Bay's creation of danger, resulting in O'Brien's use of deadly force, 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 state created danger by Green Bay officers, Brown County officers, or at the Brown County Jail.

COUNT VI—Battery

(Against Defendant O'Brien)

72. Plaintiffs incorporate by reference all allegations set forth in paragraphs 1 through 74 above, as if fully set forth below.

73. O'Brien's shooting of Mr. Tubby, while he lay unarmed face-down on the ground in handcuffs and engaged by a police canine, constituted an unlawful use of force or violence upon Mr. Tubby.

74. O'Brien intentionally directed his shots toward Mr. Tubby.

75. The shots fired at Mr. Tubby caused bodily injury, pain and suffering, and death.

76. As a result of O'Brien's battery, 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 battery at the Brown County Jail or by Green Bay Police Officers.

COUNT VII—Negligence

(Against Defendants O'Brien, City of Green Bay, and Brown County)

77. Plaintiffs incorporate by reference all allegations set forth in paragraphs 1 through 76 above, as if fully set forth below.

78. After arresting Mr. Tubby, O'Brien owed Mr. Tubby a duty to use reasonable and ordinary care to protect Mr. Tubby's life and health.

79. O'Brien breached that duty by shooting Mr. Tubby multiple times, including in the head, while Mr. Tubby was unarmed, in handcuffs, face-down, and restrained by a police canine. No reasonable law enforcement officer would have shot Mr. Tubby in the circumstances. O'Brien knew Mr. Tubby was unarmed. He observed the search incident to arrest of Mr. Tubby by Officer Wernecke. Officer Wernecke thoroughly searched Mr. Tubby in accordance with Green Bay Police Department

policies, and conclusively determined that Tubby did not have a weapon. Moreover, at the time he was shot, Tubby was lying face down, on the ground, and was engaged by a police canine.

80. As a result of O'Brien's breach of duty, O'Brien inflicted bodily injury, pain and suffering, and death on Mr. Tubby.

81. O'Brien shot Mr. Tubby while acting within his scope of employment as a Police Officer with the Green Bay Police Department and/or within the scope of his employment as a Police Officer at the request of Brown County within Brown County's jurisdiction pursuant to Wis. Stat. § 66.0313.

82. As a result of O'Brien's negligence, 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 excessive force at the Brown County Jail or by Green Bay Police Officers.

COUNT VIII—Negligence

(Against Defendants Zeigle, Brown County, and Green Bay)

83. Plaintiffs incorporate by reference all allegations set forth in paragraphs 1 through 82 above, as if fully set forth below.

84. As the Patrol Lieutenant in charge of the sally port, Zeigle owed Mr. Tubby a duty to use reasonable and ordinary care to protect Mr. Tubby's life and health. As a result of Mr. Tubby's arrest by Green Bay Police Officers, Green Bay also owed Mr. Tubby a duty to use reasonable and ordinary care to protect Mr. Tubby's life and health.

85. Zeigle and Green Bay breached this duty when officers present in the sally port used potentially lethal force to break the back window of the squad car and maced Mr. Tubby in a confined space, without sharing the plan to do so with other officers and without heeding his calls for help. Accepted law enforcement standards would have called for officers to engage a professional negotiator, and/or use less than lethal means to obtain visual contact of Mr. Tubby and wait for the situation to de-escalate, particularly after Mr. Tubby called for help when the rear window of the squad was breached. Accepted law enforcement standards would have also called for the plan to be shared with other officers on the scene.

86. As a result of being escalating the situation, i.e., spraying mace on Mr. Tubby in a confined space with no reasonable means of escape or surrender, and ignoring his calls for help, Mr. Tubby became agitated and exited the vehicle through a broken rear window. His agitated state, act of escaping through the rear window, and lack of communication of the plan to force him out of that same window, contributed to O'Brien's decision to use deadly force against Mr. Tubby, and accordingly, Zeigle's and Green Bay's negligence proximately caused Mr. Tubby's death, bodily injury, and pain and suffering.

87. Zeigle made the decision to break the car window and introduce mace into a confided space while acting within his scope of employment as a Patrol Lieutenant with the Brown County Sheriff's Office.

88. As a result of Zeigle's and Green Bay's negligence, 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 negligence at the Brown County Jail or by Brown County officers.

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

(Against City of Green Bay)

89. Plaintiffs incorporate by reference all allegations set forth in paragraphs 1 through 88 above, as if fully set below.

90. 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 X—Direct Action—Wis. Stat. § 895.46

(Against Brown County)

91. Plaintiff incorporates by reference all allegations set forth in paragraphs 1 through 94 above, as if fully set below.

92. 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.

93. Brown County is responsible under Wis. Stat. § 895.46 to pay any judgment for damages and costs entered against O'Brien to the extent O'Brien was acting as a law enforcement officer within Brown County's jurisdiction at Brown County's request pursuant to Wis. Stat. § 66.0313

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 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.
H. 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: February __, 2020

By */s/ Forrest Tahdooahnippah* _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the __th day of February, 2020, I served the foregoing **THIRD AMENDED COMPLAINT** via the Court's CM/ECF system, causing Defendants to be served electronically.

/s/ Forrest Tahdooahnippah
Forrest Tahdooahnippah

EXHIBIT B

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,

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

Defendants.~~,~~

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

~~**SECOND AMENDED COMPLAINT**~~
THIRD AMENDED COMPLAINT

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 ~~Second~~ Third Amended 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, and restrained by a police canine, ~~and in custody~~while in the "sally port" of~~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. Supplemental jurisdiction over Plaintiffs' state law claims exists pursuant to 28 U.S.C. § 1367. For all state law claims asserted below, Plaintiffs have complied with the notice requirements of Wis. Stat. § 893.80.

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 Sherriff 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 Office 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 official and 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.~~17. 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.~~18. 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.~~19. 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.~~20. 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.~~21. 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.~~22. 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 and Green Bay Police Officers present at the scene decided

to ~~commanded the officers present, including Green Bay Police Officers, to use potentially lethal force to~~ break the back window of the squad car and mace Mr. Tubby.

~~25.~~23. 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.~~24. 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.~~25. 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 Defendant O'Brien)

~~28.~~26. Plaintiffs incorporate by reference all allegations set forth in paragraphs 1 through 25~~7~~ above, as if fully set forth below.

~~29.~~27. 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.~~28. 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.~~29. 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.~~30. The conduct of Officer O'Brien thus violated clearly established rights of Mr. Tubby of which reasonable officers knew or should have known.

~~33.~~31. 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.~~32. 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 Defendants Mleziva, Winisterfer, ~~Zeigle, Dernbach,~~ and John Does 1-5)

~~35.~~33. Plaintiffs incorporate by reference all allegations set forth in paragraphs 1 through 3~~2~~4 above, as if fully set forth below.

~~36.~~34. 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.~~35. 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.~~36. 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.~~37. 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.~~38. 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.~~39. 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.~~40. 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.~~41. 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.~~42. 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.~~43. Plaintiffs incorporate by reference all allegations set forth in paragraphs 1 through 44 above, as if fully set forth below.

~~46.~~44. 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.~~45. 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.

46. 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.

~~48.~~47. Moreover, Brown County knows that its officers will observe excessive use of force by other officers, yet Brown County does not train its officers on intervention to prevent excessive use of force at all.

~~49.~~48. 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. None of the Brown County officers acted to intervene to prevent this unconstitutional use of force.

~~50.~~49. 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 forth 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 IV—Excessive Force—42 U.S.C. § 1983

(Against Defendant City of Green Bay)

~~59.~~50. Plaintiffs incorporate by reference all allegations set forth in paragraphs 1 through 49~~58~~ above, as if fully set forth below.

~~60.~~51. At the time of Officer O'Brien's unconstitutional use of deadly force against Mr. Tubby, the Green Bay Police Department had a custom and practice of using excessive force that was persistent and widespread, so that it was the Green Bay Police Department's standard operating procedure.

~~61.~~52. The Green Bay Police Department's custom and practice of using excessive force was often directed to unarmed individuals, like Mr. Tubby, and was rationalized

and excused by police officers, and the Department, by pointing to innocuous actions by the unarmed individuals and claiming that such actions were suspicious or dangerous.

~~62.~~53. For example, on February 26, 2017, Green Bay police officers used excessive force on an unarmed man during a traffic stop. A Green Bay Police Officer initiated a traffic stop of a vehicle. After a passenger exited the vehicle, he reached to pull up his pants and two Green Bay Police Officers used Tasers on the man three times without warning. A third Officer then violently tackled the man. The Officers involved subsequently claimed they thought the man was reaching for a weapon when he was simply pulling up his pants.

~~63.~~54. As another example, in 2010, Green Bay Police Officers used a baton, shackles, and bodily force against a man inside his own apartment, injuring his head, face, and neck. The City of Green Bay agreed to pay monetary damages to the man as a result of the wrongful conduct by the Officers involved.

~~64.~~55. As another example, in April 2014, a man directed profanity toward a Green Bay Police Officer but posed no physical threat. The Green Bay Police Officer slammed the man against a squad car, threw him to the ground, and continued to beat him while the man lay on the ground. A complaint was lodged but the Green Bay Police Department concluded that the Officer acted appropriately.

~~65.~~56. As another example, on April 21, 2007 four Green Bay Police Officers shot and killed Ben Sonnenberg as he was exiting his vehicle. Sonnenberg was unarmed. However, the shooting officers were not disciplined by Green Bay because they claimed, without any corroboration, that they heard a shot and mistook a cell phone in

Sonnenberg's hand for a firearm. ~~on February 24, 2015, two Green Bay Police Officers went to an apartment in Green Bay to conduct a "wellness check" on a man known to have a mental illness. When the man resisted an unconstitutional search and seizure, the Officers involved shot and killed the man.~~

~~66.~~57. As another example, in December 2017, a Green Bay Police Officer arrested a woman in downtown Green Bay. When the woman reached for identification from her purse, the Officer involved tackled her to the ground, causing her to sustain a concussion and broken facial bones. The Green Bay Police Department then claimed the woman's injuries were the result of her own intoxication and not the excessive force used against her.

~~67.~~58. As another example, in January 2018, a man, a self-proclaimed First Amendment auditor, was video recording public spaces of the Green Bay Police Department. A Green Bay Police Lieutenant confronted the man, who was doing nothing illegal, and used excessive physical force against him.

~~68.~~59. Defendant Chief of Police Smith, or his predecessors, knew of this pattern of excessive force and allowed it to continue. Smith and his predecessors took no action, or took inadequate action, to discipline the Police Officers involved.

~~69.~~60. Based on the foregoing, the Green Bay Police Department has a custom and practice of excessive force, which was a moving force behind O'Brien's decision to shoot and kill Mr. Tubby while Mr. Tubby lay handcuffed and unarmed on the ground. Had O'Brien believed that his shooting of Mr. Tubby would be disciplined or severely sanctioned by the Green Bay Police Department, he would not have used lethal force

against Mr. Tubby, an arrestee who was lying face-down on the ground in handcuffs while engaged by a police canine and whose empty hands had been clearly visible moments before. Instead, as a result of the Green Bay Police Department's custom and practice of using excessive force, he knew or believed that he could use deadly force and later claim that innocuous activity seemed suspicious or dangerous.

~~70.~~61. As a result of the Green Bay Police Department's custom and practice of using excessive force, 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 excessive force at the Brown County Jail or by Green Bay Police Officers, such as by enhancing supervision of police officers through the use of body cameras or other means.

COUNT V~~I~~—State Created Danger—§ 1983

(Against Defendants Zeigle, ~~and~~ Brown County, and Green Bay)

~~71.~~62. Plaintiffs incorporate by reference all allegations set forth in paragraphs 1 through ~~70~~ 61 above, as if fully set forth below.

63. Defendant Zeigle, a Patrol Lieutenant of the Brown County Sheriff's Office, is a policy-making official of Brown County. Zeigle had final authority over the actions of the law enforcement officers in the sally port on the night of October 19, 2018. Accordingly, when Zeigle ordered officers present in the sally port to use potentially lethal force to break the back window of the squad car ~~and mace Mr. Tubby in a confined space~~, he was announcing a policy of Brown County.

64. Lieutenant Nathan Allen of the Green Bay Police Department is a policy-making official of the Green Bay Police Department. When a Green Bay police officer decided to introduce mace into the squad car, he was assisted by Lieutenant Zeigle and Lieutenant Allen, who were creating policies of Brown County and the Green Bay Police Department.

~~72.~~65. Despite being aware of the plan to break the back window and introduce mace into the squad car, neither Lieutenant Allen nor Lieutenant Zeigle nor any other law enforcement officers privy to the plan shared that plan with the officers establishing a containment perimeter in and around the sally port.

66. The decision to break the back window of a vehicle and spray mace onto a person in a confined space creates a foreseeable risk of serious ~~and direc~~t harm—as a result of being subjected to mace in a confined space, the person will ~~become agitated~~attempt to escape the confined space. As a result of attempting to escape, the person will ~~and~~ likely be subjected to the use of force by law enforcement ~~as a result of his agitation~~.

~~73.~~67. This risk of serious harm was further increased by the decision of officers not to share the plan to create an escape route and force Mr. Tubby from the vehicle. Officers establishing a perimeter did not know Mr. Tubby would exit the vehicle, and therefore immediately resorted to force once he did exit the vehicle.

~~74.~~68. Zeigle's, Brown County, and Green Bay's culpability in making this decision is reckless and shocks the conscience. The back doors of squad cars cannot be opened from the inside. Therefore, when ~~Zeigle directed~~ Police Officers ~~to mace~~maced

Mr. Tubby, he had no reasonable means of escape or surrender. Spraying mace onto a person in a confined space with no reasonable means of escape or surrender is tantamount to torture. Accepted law enforcement practices would call for de-escalation—use of a negotiator, waiting for the suspect to become calm, obtaining visual contact with the suspect through less than lethal means, etc.

69. When the rear window of the squad car was broken, Mr. Tubby began calling for help. His calls for help were not heeded, and no dialog or negotiation with Mr. Tubby was undertaken. Instead, Green Bay Police Officer Eric Allen made the decision to introduce mace into the squad car with assistance from Zeigle and Green Bay Lieutenant Nathan Allen.

~~75.~~70. As a result of spraying mace on Mr. Tubby in a confined space, Mr. Tubby ~~became agitated and~~ exited the car through the only possible means of escape or surrender, the ~~its~~ broken rear window. His ~~agitated state and~~ decision to exit the car through a broken window ~~(his only means of escape from the noxious mace)~~ made Mr. Tubby more vulnerable to use of force, and in fact several forms of force were deployed against him almost simultaneously. He was shot with a bean bag gun and engaged by a police canine. His ~~agitated state also~~attempt to flee also contributed to O'Brien's decision to use deadly force against Mr. Tubby. Accordingly, the officers' decision to break the window and introduce mace ~~Zeigle's decision~~ proximately caused Mr. Tubby's death, bodily injury, and pain and suffering.

~~76.~~71. As a result of Zeigle, ~~and~~ Brown County's, and Green Bay's creation of danger, resulting in O'Brien's use of deadly force, 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 state created danger by Green Bay officers, Brown County officers, or at the Brown County Jail.

COUNT VII—Battery

(Against Defendant O'Brien)

77.72. Plaintiffs incorporate by reference all allegations set forth in paragraphs 1 through 746 above, as if fully set forth below.

78.73. O'Brien's shooting of Mr. Tubby, while he lay unarmed face-down on the ground in handcuffs and engaged by a police canine, constituted an unlawful use of force or violence upon Mr. Tubby.

79.74. O'Brien intentionally directed his shots toward Mr. Tubby.

80.75. The shots fired at Mr. Tubby caused bodily injury, pain and suffering, and death.

81.76. As a result of O'Brien's battery, 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 battery at the Brown County Jail or by Green Bay Police Officers.

COUNT VIII—Negligence

(Against Defendants O'Brien, City of Green Bay, and Brown County)

~~82.~~77. Plaintiffs incorporate by reference all allegations set forth in paragraphs 1 through 76~~81~~ above, as if fully set forth below.

~~83.~~78. After arresting Mr. Tubby, O'Brien owed Mr. Tubby a duty to use reasonable and ordinary care to protect Mr. Tubby's life and health.

~~84.~~79. O'Brien breached that duty by shooting Mr. Tubby multiple times, including in the head, while Mr. Tubby was unarmed, in handcuffs, face-down, and restrained by a police canine. No reasonable law enforcement officer would have shot Mr. Tubby in the circumstances. O'Brien knew Mr. Tubby was unarmed. He observed the search incident to arrest of Mr. Tubby by Officer Wernecke. Officer Wernecke thoroughly searched Mr. Tubby in accordance with Green Bay Police Department policies, and conclusively determined that Tubby did not have a weapon. Moreover, at the time he was shot, Tubby was lying face down, on the ground, and was engaged by a police canine.

~~85.~~80. As a result of O'Brien's breach of duty, O'Brien inflicted bodily injury, pain and suffering, and death on Mr. Tubby.

~~86.~~81. O'Brien shot Mr. Tubby while acting within his scope of employment as a Police Officer with the Green Bay Police Department and/or within the scope of his employment as a Police Officer at the request of Brown County within Brown County's jurisdiction pursuant to Wis. Stat. § 66.0313.

~~87.~~82. As a result of O'Brien's negligence, 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 excessive force at the Brown County Jail or by Green Bay Police Officers.

COUNT VIIIX—Negligence

(Against Defendants Zeigle, ~~and~~ Brown County, and Green Bay)

~~88.~~83. Plaintiffs incorporate by reference all allegations set forth in paragraphs 1 through 8~~27~~ above, as if fully set forth below.

~~89.~~84. As the Patrol Lieutenant in charge of the sally port, Zeigle owed Mr. Tubby a duty to use reasonable and ordinary care to protect Mr. Tubby's life and health. As a result of Mr. Tubby's arrest by Green Bay Police Officers, Green Bay also owed Mr. Tubby a duty to use reasonable and ordinary care to protect Mr. Tubby's life and health.

~~90.~~85. Zeigle and Green Bay breached this duty when ~~by ordering~~ officers present in the sally port ~~to use~~used potentially lethal force to break the back window of the squad car and maced Mr. Tubby in a confined space, without sharing the plan to do so with other officers and without heeding his calls for help. Accepted law enforcement standards would have called for ~~Zeigle~~ officers to engage a professional negotiator, and/or use less than lethal means to obtain visual contact of Mr. Tubby and wait for the situation to de-escalate, particularly after Mr. Tubby called for help when the rear window of the squad was breached. Accepted law enforcement standards would have also called for the plan to be shared with other officers on the scene.

~~91.~~86. As a result of being escalating the situation, i.e., spraying mace on Mr. Tubby in a confined space with no reasonable means of escape or surrender, and ignoring his calls for help, Mr. Tubby became agitated and exited the vehicle through a broken

rear window. His agitated state, act of escaping through the rear window, and lack of communication of the plan to force him out of that same window, contributed to O'Brien's decision to use deadly force against Mr. Tubby, and accordingly, Zeigle's and Green Bay's ~~decision~~negligence proximately caused Mr. Tubby's death, bodily injury, and pain and suffering.

~~92.~~87. Zeigle made the decision to break the car window and introduce mace into a confided space while acting within his scope of employment as a Patrol Lieutenant with the Brown County Sheriff's Office.

~~93.~~88. As a result of Zeigle's and Green Bay's negligence, 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 negligence at the Brown County Jail or by Brown County officers.

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

(Against City of Green Bay)

~~94.~~89. Plaintiffs incorporate by reference all allegations set forth in paragraphs 1 through 88~~93~~ above, as if fully set below.

~~95.~~90. 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 XI—Direct Action—Wis. Stat. § 895.46

(Against Brown County)

96.91. Plaintiff incorporates by reference all allegations set forth in paragraphs 1 through 945 above, as if fully set below.

97.92. 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.

98.93. Brown County is responsible under Wis. Stat. § 895.46 to pay any judgment for damages and costs entered against O'Brien to the extent O'Brien was acting as a law enforcement officer within Brown County's jurisdiction at Brown County's request pursuant to Wis. Stat. § 66.0313

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.~~G. 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.~~H. 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: ~~August 29, 2019~~February __, 2020

By */s/ Forrest Tahdooahnippah* _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ~~29th~~ __th day of ~~August~~February, 202~~0~~19~~9~~, I served the foregoing ~~**SECOND**~~ **THIRD AMENDED COMPLAINT** via the Court's CM/ECF system, causing Defendants to be served electronically.

/s/ Forrest Tahdooahnippah
Forrest Tahdooahnippah