

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

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

Plaintiffs,

Case No. 19-CV-00137

v.

Erik O'Brien, 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.

**DEFENDANTS TODD J. DELAIN, HEIDI MICHEL, BROWN COUNTY,
JOSEPH P. MLEZIVA, NATHAN K. WINISTERFER, AND THOMAS ZEIGLE,
ANSWER AND AFFIRMATIVE DEFENSES TO
PLAINTIFFS' THIRD AMENDED COMPLAINT (ECF NO. 66)**

NOW COME the above-named Defendants, Todd J. Delain, Heidi Michel, Brown County, Joseph P. Mleziva, Nathan K. Winisterfer, and Thomas Zeigle (also referred to herein collectively, as "Defendants" and/or "County Defendants," as referenced in ECF Nos. 38, 52, 67), by their attorneys, Crivello Carlson, S.C., and as and for their Answer and Affirmative Defenses to the Plaintiffs' Third Amended Complaint dated March 26, 2020, (ECF No. 83), hereby admits, denies, alleges, and shows to the Court as follows:

INTRODUCTION

1. Answering paragraph 1 of the Third Amended Complaint, deny Plaintiffs' description is either complete or correct; as further answer, Defendants deny any allegation of

improper conduct and affirmatively allege that Tubby's rights were not violated or infringed by the County Defendants.

JURISDICTION AND VENUE

2. Answering paragraph 2 of the Third Amended Complaint, deny Plaintiffs' description is either complete or correct; as further answer, Defendants deny any allegation of improper conduct and affirmatively allege that Tubby's rights were not violated or infringed by the County Defendants.

3. Answering paragraph 3 of the Third Amended Complaint, admit.

4. Answering paragraph 4 of the Third Amended Complaint, admit.

PARTIES

5. Answering paragraph 5 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

6. Answering paragraph 6 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

7. Answering paragraph 7 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

8. Answering paragraph 8 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

9. Answering paragraph 9 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

10. Answering paragraph 10 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

11. Answering paragraph 11 of the Third Amended Complaint, admit that Todd J. Delain is Brown County's Sheriff and acts, and has acted, in the course and scope of his office and authority, consistent with the laws of the State of Wisconsin and the United States Constitution; as further answer, Defendants deny any allegation of improper conduct and affirmatively allege that Tubby's rights were not violated or infringed by the County Defendants; as further answer to any remaining allegations, deny Plaintiffs' description is either complete or correct.

12. Answering paragraph 12 of the Third Amended Complaint, admit that Heidi Michel is the Jail Administrator for the Brown County Jail and acts, and has acted, in the course and scope of her office and authority, consistent with the laws of the State of Wisconsin and the United States Constitution; as further answer, Defendants deny any allegation of improper conduct and affirmatively allege that Tubby's rights were not violated or infringed by the County Defendants; as further answer to any remaining allegations, deny Plaintiffs' description is either complete or correct.

13. Answering paragraph 13 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

14. Answering paragraph 14 of the Third Amended Complaint, admit that Brown County is a municipal entity in the State of Wisconsin and that Brown County maintains and operates the Brown County Sheriff's Department which, in turn, maintains and operates the Brown County Jail; as further answer, Defendants deny any allegation of improper conduct and affirmatively allege that Tubby's rights were not violated or infringed by the County Defendants.

15. Answering paragraph 15 of the Third Amended Complaint, admit that Joseph P. Mleziva and Nathan K. Winisterfer are Deputy Brown County Sheriffs and act, and have acted, in the course and scope of their offices and authorities, consistent with the laws of the State of Wisconsin and the United States Constitution; as further answer, Defendants deny any allegation of improper conduct and affirmatively allege that Tubby's rights were not violated or infringed by the County Defendants; as further answer to any remaining allegations, deny Plaintiffs' description is either complete or correct.

16. Answering paragraph 16 of the Third Amended Complaint, admit that Thomas Zeigle is a Patrol Lieutenant with the Brown County Sheriff's Office and acts, and has acted, in the course and scope of his office and authority, consistent with the laws of the State of Wisconsin and the United States Constitution; as further answer, Defendants deny any allegation of improper conduct and affirmatively allege that Tubby's rights were not violated or infringed by the County Defendants; as further answer to any remaining allegations, deny Plaintiffs' description is either complete or correct.

17. Answering paragraph 17 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

STATEMENT OF FACTS

18. Answering paragraph 18 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

19. Answering paragraph 19 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

20. Answering paragraph 20 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

21. Answering paragraph 21 of the Third Amended Complaint, admit that, upon arrival at the jail, Tubby refused to exit the police squad car; as further answer, admit that more than one police officer and sheriff's deputies responded to the "sally port" of the jail; as further answer, admit that, in general terms, the "sally port" is a secured entryway of the jail, where arrestees are transported from a squad car into the jail itself; as further answer to any remaining allegations, deny Plaintiffs' description is either complete or correct.

22. Answering paragraph 22 of the Third Amended Complaint, deny.

23. Answering paragraph 23 of the Third Amended Complaint, deny Plaintiffs' description is either complete or correct.

24. Answering paragraph 24 of the Third Amended Complaint, deny.

25. Answering paragraph 25 of the Third Amended Complaint, admit that, at all times relevant to the Third Amended Complaint, the County Defendants acted in the course and scope of their offices and authorities, consistent with the laws of the State of Wisconsin and the United

States Constitution; as further answer to any remaining allegations, deny Plaintiffs' description is either complete or correct.

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

(Against Officer O'Brien)

26. Answering paragraph 26 of the Third Amended Complaint, reallege and incorporate by reference as though set forth fully herein their answers to paragraphs 1 through 25 above, and the affirmative defenses herein.

27. Answering paragraph 27 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

28. Answering paragraph 28 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

29. Answering paragraph 29 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

30. Answering paragraph 30 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

31. Answering paragraph 31 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

32. Answering paragraph 32 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

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

33. Answering paragraph 33 of the Third Amended Complaint, reallege and incorporate by reference as though set forth fully herein their answers to paragraphs 1 through 32 above, and the affirmative defenses herein.

34. Answering paragraph 34 of the Third Amended Complaint, deny Plaintiffs' description is either complete or correct.

35. Answering paragraph 35 of the Third Amended Complaint, deny.

36. Answering paragraph 36 of the Third Amended Complaint, deny.

37. Answering paragraph 37 of the Third Amended Complaint, deny.

38. Answering paragraph 38 of the Third Amended Complaint, deny.

39. Answering paragraph 39 of the Third Amended Complaint, admit that, at all times relevant to the Third Amended Complaint, the County Defendants acted in the course and scope of their offices and authorities, consistent with the laws of the State of Wisconsin and the United States Constitution; as further answer to any remaining allegations, deny.

40. Answering paragraph 40 of the Third Amended Complaint, deny.

41. Answering paragraph 41 of the Third Amended Complaint, deny.

42. Answering paragraph 42 of the Third Amended Complaint, deny.

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

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

43. Answering paragraph 43 of the Third Amended Complaint, Defendants state, reallege and incorporate by reference as though set forth fully herein their answers to paragraphs 1 through 42 above, and the affirmative defenses herein.

44. Answering paragraph 44 of the Third Amended Complaint, deny.

45. Answering paragraph 45 of the Third Amended Complaint, deny Plaintiffs' description is either complete or correct.

46. Answering paragraph 46 of the Third Amended Complaint, deny Plaintiffs' description is either complete or correct.

47. Answering paragraph 47 of the Third Amended Complaint, deny.

48. Answering paragraph 48 of the Third Amended Complaint, deny.

49. Answering paragraph 49 of the Third Amended Complaint, deny.

COUNT IV—Excessive Force—42 U.S.C. § 1983

(Against Defendant City of Green Bay)

50. Answering paragraph 50 of the Third Amended Complaint, Defendants state, reallege and incorporate by reference as though set forth fully herein their answers to paragraphs 1 through 49 above, and the affirmative defenses herein.

51. Answering paragraph 51 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

52. Answering paragraph 52 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

53. Answering paragraph 53 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

54. Answering paragraph 54 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

55. Answering paragraph 55 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

56. Answering paragraph 56 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

57. Answering paragraph 57 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

58. Answering paragraph 58 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

59. Answering paragraph 59 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

60. Answering paragraph 60 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

61. Answering paragraph 61 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

COUNT V—State Created Danger—§ 1983
(Against Defendants Zeigle, Brown County, and Green Bay)

62. Answering paragraph 62 of the Third Amended Complaint, Defendants state, reallege and incorporate by reference as though set forth fully herein their answers to paragraphs 1 through 61 above, and the affirmative defenses herein.

63. Answering paragraph 63 of the Third Amended Complaint, deny Plaintiffs' description is either complete or correct.

64. Answering paragraph 64 of the Third Amended Complaint, deny Plaintiffs' description is either complete or correct.

65. Answering paragraph 65 of the Third Amended Complaint, deny.

66. Answering paragraph 66 of the Third Amended Complaint, deny.

67. Answering paragraph 67 of the Third Amended Complaint, deny.

68. Answering paragraph 68 of the Third Amended Complaint, deny.

69. Answering paragraph 69 of the Third Amended Complaint, deny.

70. Answering paragraph 70 of the Third Amended Complaint, deny.

71. Answering paragraph 71 of the Third Amended Complaint, deny.

COUNT VI—Battery
(Against Defendant O’Brien)

72. Answering paragraph 72 of the Third Amended Complaint, Defendants state, reallege and incorporate by reference as though set forth fully herein their answers to paragraphs 1 through 71 above, and the affirmative defenses herein.

73. Answering paragraph 73 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

74. Answering paragraph 74 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

75. Answering paragraph 75 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

76. Answering paragraph 76 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

COUNT VIII—Negligence
(Against Defendants O’Brien, City of Green Bay, and Brown County)

77. Answering paragraph 77 of the Third Amended Complaint, Defendants state, reallege and incorporate by reference as though set forth fully herein their answers to paragraphs 1 through 76, above and the affirmative defenses herein.

78. Answering paragraph 78 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

79. Answering paragraph 79 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

80. Answering paragraph 80 of the Third Amended Complaint, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

81. Answering paragraph 81 of the Third Amended Complaint, deny Plaintiffs' description is either complete or correct.

82. Answering paragraph 82 of the Third Amended Complaint, deny.

COUNT IX—Negligence
(Against Defendants Zeigle and Brown County)

83. Answering paragraph 83 of the Third Amended Complaint, Defendants state, reallege and incorporate by reference as though set forth fully herein their answers to paragraphs 1 through 82 above, and the affirmative defenses herein.

84. Answering paragraph 84 of the Third Amended Complaint, deny Plaintiffs' description is either complete or correct.

85. Answering paragraph 85 of the Third Amended Complaint, deny.

86. Answering paragraph 86 of the Third Amended Complaint, deny.

87. Answering paragraph 87 of the Third Amended Complaint, admit that Defendant Zeigle is a Patrol Lieutenant with the Brown County Sheriff's Office and acts, and has acted, in the course and scope of his office and authority, consistent with the laws of the State of

Wisconsin and the United States Constitution; as further answer to any remaining allegations, deny Plaintiffs' description is either complete or correct.

88. Answering paragraph 88 of the Third Amended Complaint, deny.

COUNT X—Direct Action—Wis. Stat § 895.46
(Against City of Green Bay)

89. Answering paragraph 89 of the Third Amended Complaint, Defendants state, reallege and incorporate by reference as though set forth fully herein their answers to paragraphs 1 through 88, above and the affirmative defenses herein.

90. Answering paragraph 90 of the Third Amended Complaint, these allegations are not directed to the County Defendants and, therefore, no answer is required; to the extent an answer is required, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, therefore, deny them, putting Plaintiffs to their proof thereon.

COUNT XI—Direct Action—Wis. Stat § 895.46
(Against Brown County)

91. Answering paragraph 91 of the Third Amended Complaint, Defendants state, reallege and incorporate by reference as though set forth fully herein their answers to paragraphs 1 through 90 above, and the affirmative defenses herein.

92. Answering paragraph 92 of the Third Amended Complaint, deny that Dernbach is a named Defendant in this action and affirmatively allege that no judgment for damages and costs can be assessed against him; as further answer, admit that Brown County is responsible and liable under Wis. Stat. § 895.46 to pay any judgment for damages and costs entered against Defendants Mleziva, Winisterfer, and Zeigle; as further answer to any remaining allegations, deny Plaintiffs' description is either complete or correct.

93. Answering paragraph 93 of the Third Amended Complaint, deny.

AFFIRMATIVE DEFENSES

As and for affirmative defenses to Plaintiffs' Third Amended Complaint, Todd J. Delain, Heidi Michel, Brown County, Joseph P. Mleziva, Nathan K. Winisterfer, and Thomas Zeigle submit the following:

- a. The injuries and damages sustained by Plaintiffs were caused in whole or in part by the acts or omissions of Jonathon C. Tubby, and the failure to mitigate;
- b. The injuries and damages sustained by Plaintiffs were caused in whole or in part by the acts or omissions of persons other than the County Defendants;
- c. Plaintiffs cannot establish that any acts or non-acts of the County Defendants caused Tubby's constitutional deprivations, if any;
- d. The Third Amended Complaint contains allegations that fail to state claims upon which relief may be granted as against the County Defendants;
- e. The County Defendants are immune from suit by immunities, including qualified immunity and discretionary immunity;
- f. Plaintiffs have failed to state claims for and are not legally entitled to compensatory damages;
- g. Plaintiffs have failed to state claims for and are not legally entitled to punitive damages;
- h. Any injuries or damages sustained by Plaintiffs are the result of an intervening and/or superseding cause preventing Plaintiffs any rights of recovery against the County Defendants;
- i. Plaintiffs may have failed to name necessary and indispensable parties;

- j. Plaintiffs' state-law claims are subject to limitations, notice requirements, caps and immunities in Wis. Stat. § 893. 80;
- k. At all times relevant to matters alleged in Plaintiffs' Amended Complaint, the County Defendants acted in good faith, in accordance with established laws and administrative rules;
- l. No individual Defendant can be found liable for the actions of any other individual defendant(s) under a theory of *respondeat superior*, or supervisory liability;
- m. All or portions of Plaintiffs' Amended Complaint must be dismissed because one or more Defendants had no personal involvement whatsoever in the events leading to or surrounding the incident which is the basis of this lawsuit;
- n. Defendants reserve the right to name additional affirmative defenses, as they may become known through further discovery or other in this action.

WHEREFORE, Defendants, Todd J. Delain, Heidi Michel, Brown County, Joseph P. Mleziva, Nathan K. Winisterfer, and Thomas Zeigle, respectfully request the following relief:

- 1. for a dismissal of Plaintiffs' Third Amended Complaint upon its merits and with prejudice;
- 2. for the costs and disbursements of this action;
- 3. for reasonable actual attorneys' fees pursuant to 42 U.S.C. § 1988; and
- 4. for such other relief as this Court deems just and equitable.

DEFENDANTS HEREBY DEMAND A JURY OF 6

Dated this 8th day of April, 2020.

CRIVELLO CARLSON, S.C.

Attorneys for Defendants Todd J. Delain, Heidi Michel,
Brown County, Joseph P. Mleziva, Nathan K. Winisterfer,
and Thomas Zeigle

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PROOF OF SERVICE – ELECTRONIC FILING

The undersigned hereby certifies that this document was filed electronically this 8th day of April, 2020. Notice of this filing will be sent to counsel of record at the email addresses registered by them with the Court by operation of the Court's electronic filing system. If not registered with the Court, a copy of this document will be sent via U.S. Mail and/or email this date.

s/Electronically signed by Roxanne Champagne