

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.

**DECLARATION OF BENJAMIN A. SPARKS IN SUPPORT OF
DEFENDANTS TODD J. DELAIN, HEIDI MICHEL, BROWN COUNTY, JOSEPH P.
MLEZIVA, NATHAN K. WINISTERFER, AND THOMAS ZEIGLE'S
BRIEF IN OPPOSITION
TO PLAINTIFF'S MOTION TO COMPEL AND FOR SANCTIONS**

STATE OF WISCONSIN)
) SS
MILWAUKEE COUNTY)

Benjamin A. Sparks, being first duly sworn on oath, deposes and states:

1. I am an attorney duly licensed to practice law in the State of Wisconsin and in the United States District Court in the Eastern District of Wisconsin. I am one of the attorneys representing Defendants Todd J. Delain, Heidi Michel, Brown County, Joseph P. Mleziva, Nathan K. Winisterfer, and Thomas Zeigle in this lawsuit. This declaration is based upon my personal knowledge.

2. Attached hereto as Exhibit A are true and correct copies of the following excerpts from the deposition of Thomas Zeigle, taken on January 10, 2020: 1, 15–16, 18, 127, 85–86, 126–127, 131, 133–134.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 24th day of June, 2020.

s/ Benjamin A. Sparks
BENJAMIN A. SPARKS
State Bar. No.: 1092405

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,
vs. Case No. 1:19-cv-00137-WCG
Erik O'Brien, Andrew Smith,
Todd J. Delain, Heidi Michel,
City of Green Bay, Brown
County, Joseph P. Mleziva,
Nathan K. Winisterfer, Thomas
Zeigle, Bradley A. Dernbach,
and John Does 1-5,
Defendants.

* * * * *

DEPOSITION OF: LT. THOMAS ZEIGLE

TAKEN AT: Brown County Sheriff's Office
LOCATED AT: 2684 Development Drive
Green Bay, Wisconsin

January 10, 2020

11:02 a.m. to 3:57 p.m.

* * * * *

REPORTED BY PAULA A. ERICKSON, C.S.R., R.P.R.,
C.L.R.

EXHIBIT
A

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1 both?

2 A. It's both. It's all law enforcement
3 within Brown County with the exception of Oneida
4 Tribal, I believe.

5 Q. All right. So someone from the
6 dispatch center asked you to get in contact with
7 you said it was -- was it Sgt. Buckman?

8 A. I don't think they had sergeants at the
9 time.

10 Q. It was lieutenant?

11 A. Lt. Buckman I believe.

12 Q. All right. So someone asked you to get
13 in touch with Lt. Buckman. What do you do next?

14 A. Again, I apologize. I don't know if he
15 called me or I called him. I think I called
16 him, but he made me aware of a situation that
17 was occurring with some of their officers in the
18 sally port of the Brown County jail; and he
19 informed me that there was a person in the back
20 seat of the squad car that was saying he had a
21 gun and so they were -- at that time, they were
22 basically in a standoff inside the sally port.

23 Q. All right. So it was communicated to
24 you that the person in the back of the squad car
25 was saying that he had a gun?

1 A. Correct.

2 Q. Do you know whether anyone ever said
3 they actually saw a gun?

4 A. I am not aware of that. Nobody had
5 said that. At least Lt. Buckman at the time
6 didn't say that.

7 Q. Okay. After Lt. Buckman tells you
8 this, what do you do next?

9 A. And, again, about that same time, and,
10 again, I don't know if it was before or after I
11 talked with Lt. Buckman but I talked with one of
12 the dispatchers and he is the dispatch
13 supervisor and she asked me if I had heard about
14 the incident going on in the jail so I talked to
15 her.

16 Q. What did she say about what was going
17 on in the jail?

18 A. The exact same thing. That there was a
19 gentleman in the back of a Green Bay police car
20 that was saying he had a gun; so after that, I
21 got ahold of who was at the time Sgt. Jason
22 Katers, he is now a lieutenant. I told
23 Sgt. Katers to drive over to the sally port to
24 see what is exactly was going on.

25 Q. And did you radio to Sgt. Katers or

1 A. If I could back up.

2 Q. Yeah.

3 A. On my way over, I had called the
4 communications center on the radio and asked if
5 the ranking officer on the scene for Green Bay
6 could give me a call just to give me some more
7 information; and if I remember correctly
8 Lt. Allen from the city called me.

9 Q. Okay. What did you guys talk about on
10 the phone?

11 A. Basically the same thing that
12 Lt. Buckman and I talked about. Just what they
13 had, the situation, so I told him I was just a
14 couple minutes out at the time, so...

15 Q. And what did he tell you about what the
16 situation was?

17 A. The same thing. That there was a
18 gentleman in the back of a Green Bay squad car,
19 that was making gestures and, you know, led
20 officers to believe that he had a gun.

21 Q. All right. After you talked to
22 Lt. Allen on the phone, what happened next?

23 A. I arrived on scene at the jail. Parked
24 outside the sally port and -- Do you want me to
25 keep going?

1 MR. GUNTA: Same objection.

2 MR. SPARKS: Join.

3 THE WITNESS: We wanted to make sure,
4 again, we talked about the communication portal
5 and like I said, with the windows fogged up, you
6 needed as much visual input of what he was doing
7 in there as possible.

8 So I guess from my perspective, there
9 was an exigency to get that window out of the
10 way so we could see exactly what's going on and
11 exactly what we have.

12 BY MR. TAHDOOAHNIPPAH:

13 Q. What were you specifically concerned
14 about with not being able to see him?

15 A. The weapon.

16 Q. So you wanted to see whether he had
17 actually had a weapon?

18 A. Correct.

19 Q. Was there any other reason why you
20 couldn't have just waited longer to see if he
21 would voluntarily surrender before breaking the
22 window?

23 MR. SPARKS: Object to form. Go ahead.

24 THE WITNESS: The jail property is open
25 to the public and so we always run the risk of,

1 that he was trying to escape out this unopened
2 or open door in the sally port, so...

3 Q. Okay. So that's based on what you
4 personally observed, you believe he was trying
5 to escape?

6 A. Correct.

7 Q. The fact that you believe that he might
8 have a handgun, is that based on what others
9 told you or based on something you personally
10 observed or both?

11 A. Both.

12 Q. Okay. What did you personally observe
13 that led you to think that he had a handgun?

14 A. Again, it was the hands underneath the
15 shirt up towards his head area so that's what I
16 personally observed.

17 Q. You observed that he had his hands
18 under his shirt?

19 A. Correct.

20 Q. But you didn't ever -- you never saw an
21 actual gun, right?

22 A. I did not.

23 Q. Did you see anything that looked like a
24 gun?

25 A. Not under his shirt, no.

1 Q. You just saw that there was kind of
2 like a bulge under his shirt?

3 A. He was making a motion like he had a
4 weapon in his hand.

5 Q. Okay. What do you mean he was making a
6 motion like he had a weapon in his hand?

7 A. Like somebody would hold a weapon if
8 they were going to commit suicide or, you know,
9 something of that nature.

10 Q. Okay. So the way that his hand was
11 positioned was consistent with gripping like a
12 gun, like the handle of a gun?

13 A. Correct.

14 Q. Anything else that you personally
15 observed?

16 A. No.

17 Q. Did you ever think that he was pointing
18 that gun at another officer?

19 A. Did I ever think he was?

20 Q. Yeah.

21 A. I never saw him point a weapon at an
22 officer, no.

23 Q. But it looked like it was pointing up
24 towards his own head, right, is what you said?

25 A. Correct. Correct.

1 have been a mistake?

2 A. It's something that should have been
3 included, yes.

4 Q. Like you have five minutes or we are
5 going to deploy OC spray, something like that?

6 MR. SPARKS: Object to form. Go ahead.

7 THE WITNESS: We probably would not
8 have let him know what we were exactly going to
9 do for a tactic, but we would let him know that
10 it's in his best interests to surrender or to
11 follow our commands.

12 BY MR. TAHDOOAHNIPPAH:

13 Q. All right. At the time that window was
14 broken, was there some exigency that existed
15 that required a law enforcement to have a visual
16 of him immediately?

17 MR. GUNTA: Objection to the form of
18 the question. Calls for a legal conclusion.

19 MR. SPARKS: Join.

20 THE WITNESS: Just so I am certain, can
21 you repeat your question?

22 MR. TAHDOOAHNIPPAH: Can you read it
23 back, please?

24 (Whereupon, the record was read
25 as requested.)

1 MR. GUNTA: Same objection.

2 MR. SPARKS: Join.

3 THE WITNESS: We wanted to make sure,
4 again, we talked about the communication portal
5 and like I said, with the windows fogged up, you
6 needed as much visual input of what he was doing
7 in there as possible.

8 So I guess from my perspective, there
9 was an exigency to get that window out of the
10 way so we could see exactly what's going on and
11 exactly what we have.

12 BY MR. TAHDOOAHNIPPAH:

13 Q. What were you specifically concerned
14 about with not being able to see him?

15 A. The weapon.

16 Q. So you wanted to see whether he had
17 actually had a weapon?

18 A. Correct.

19 Q. Was there any other reason why you
20 couldn't have just waited longer to see if he
21 would voluntarily surrender before breaking the
22 window?

23 MR. SPARKS: Object to form. Go ahead.

24 THE WITNESS: The jail property is open
25 to the public and so we always run the risk of,

1 A. I did not, no.

2 Q. But you didn't disagree with the
3 decision?

4 A. That's correct.

5 Q. Was there any sort of exigency that
6 existed at that moment that required the OC
7 spray?

8 MR. SPARKS: Objection. Form.

9 MR. GUNTA: Go ahead, Counsel.

10 MR. SPARKS: Object to form.

11 MR. GUNTA: Object to the form of the
12 question. It also calls for a legal conclusion.

13 THE WITNESS: During the whole
14 situation, there was exigency in my eyes based
15 on the imminent threat to the safety of the
16 officer, and there was civilian ride-alongs out
17 there so to me it was imminent throughout the
18 entire situation.

19 BY MR. TAHDOOAHNIPPAH:

20 Q. Was there any additional exigency other
21 than that threat that you just identified of a
22 potential weapon that existed at the moment the
23 OC spray was deployed?

24 A. Not that I recall.

25 Q. Was there any reason that officers

1 A. Yes.

2 Q. And so that's only a short window of
3 time where you can even know for sure that he is
4 even hearing the commands. Why not wait longer
5 to see if he will comply?

6 A. Based on what I was seeing, he had
7 every opportunity to comply.

8 Q. So anything -- any other sort of
9 exigency that existed that required the OC spray
10 to be deployed?

11 MR. GUNTA: Objection to form.

12 MR. SPARKS: Object to form.

13 THE WITNESS: Again, I guess I am not
14 understanding your question, sir.

15 BY MR. TAHDOOAHNIPPAH:

16 Q. Anything else besides his noncompliance
17 that would have led you to think that it was the
18 time to take the next step and use OC spray?

19 MR. SPARKS: Sorry. Object to form.
20 Asked and answered.

21 THE WITNESS: Yeah. Based on, like I
22 said, the entire situation was exigent.

23 BY MR. TAHDOOAHNIPPAH:

24 Q. Was there any additional exigency that
25 existed at that moment?

1 MR. SPARKS: Same objection.

2 THE WITNESS: No. Not that I recall.

3 BY MR. TAHDOOAHNIPPAH:

4 Q. All right. Before earlier today you
5 testified that you just really didn't have
6 enough time to share the plan with all the
7 officers that were on the scene. Do you recall
8 that?

9 A. I do.

10 Q. Was there some sort of time rush that
11 existed for some reason?

12 MR. SPARKS: Object to form. Go ahead.

13 THE WITNESS: Like I referred to
14 earlier, the entire situation in my eyes was
15 exigent and it needed to be controlled and the
16 entire time that, you know, the situation was
17 going on, it wasn't in control. Mr. Tubby was
18 controlling the narrative and what was going on,
19 so...

20 BY MR. TAHDOOAHNIPPAH:

21 Q. So it's not an option to just sit and
22 wait him out because he won't be in control of
23 that type of situation?

24 A. Like I mentioned earlier, he -- there
25 was plenty of opportunity for Mr. Tubby to