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. WINISTORFER, AND THOMAS ZEIGLE'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendants Todd J. Delain, Heidi Michel, Brown County, Joseph P. Mleziva, Nathan K. Winistorfer (incorrectly spelled as "Winisterfer"), and Thomas Zeigle (collectively "County Defendants"), by their attorneys, Crivello Carlson, S.C., respectfully submit the following Brief in Support of their Motion for Summary Judgment.

INTRODUCTION

This case stems from City of Green Bay ("the City") Police Officer Erik O'Brien's use of deadly force against Jonathon Tubby in the sally port of the Brown County Jail ("the Jail") on October 19, 2018. Mr. Tubby was believed to be armed with a firearm in the back of Officer O'Brien's squad car, and, after refusing multiple commands to surrender, fled through the broken back window of the vehicle. Plaintiffs, Mr. Tubby's estate and some of his relatives, sued the City,

its Chief of Police, and Officer O'Brien, as well as Brown County, its Sheriff, Jail Administrator, and three members of the Sheriff's Department ("the County Defendants"), seeking damages and injunctive relief under federal and state law.

The County Defendants are entitled to judgment as a matter of law on all of the claims brought against them. First, Plaintiffs are not entitled to injunctive relief because they lack standing to seek injunctive relief and cannot show they are entitled to such relief. Second, Deputies Mleziva and Winistorfer did not fail to intervene in Officer O'Brien's use of deadly force, and, alternatively, they are entitled to qualified immunity. Third, Plaintiffs' municipal-liability claims against Brown County, Sheriff Delain, and Captain Michel based on a failure-to-train theory fails as a matter of law because Plaintiffs cannot establish a constitutional deprivation, and because Brown County's training meets constitutional standards and did not cause a constitutional injury. Fourth, Lieutenant Zeigle's and Brown County's acts are not cognizable bases for liability under a state-created theory, and Lt. Zeigle's acts and decisions do not shock the conscience. Fifth, all of Plaintiffs' state-law claims against Brown County are barred for lack of compliance with the notice requirements of Wis. Stat. § 893.80(1d), and, even assuming Plaintiffs partially complied with Wis. Stat. § 893.80(1d), Brown County and Lt. Zeigle are entitled to discretionary immunity against Plaintiffs' negligence claims. For these reasons, as explained more fully below, the County Defendants respectfully request that the Court grant their Motion for Summary Judgment and dismiss all claims against them on the merits and with prejudice.

BACKGROUND

All undisputed, material facts necessary to support the County Defendants' Motion for Summary Judgment are contained in their Proposed Findings of Fact filed concurrently with this

Brief. The County Defendants cite to those facts as relevant in the argument below by referring to "Brown County's Proposed Findings of Fact" or "BCPFOF."

In their operative pleading—their Third Amended Complaint—Plaintiffs bring the following causes of action against the County Defendants: (1) individual-capacity claims under 42 U.S.C. § 1983 ("Section 1983") against Deputies Mleziva and Winistorfer[1] for their alleged failure to intervene in Officer O'Brien's alleged use of excessive force, (3d Am. Compl. ¶¶ 33–42, ECF No. 83); (2) official-capacity Section 1983 claims against Sheriff Delain and Captain Michel, and an accompanying Section 1983 municipal-liability claim under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978), against Brown County, for allegedly failing to train Brown County deputies on the removal of suspects from squad vehicles and on the duty to intervene in excessive uses of force, (3d Am. Compl. ¶¶ 43–49, ECF No. 83); (3) Section 1983 claims against Brown County and Lt. Zeigle, in his official capacity as an alleged final policymaker for Brown County, premised on the state-created-danger exception to *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), (*id.* ¶¶ 62–71); (4) state-law negligence claims against Brown County and Lt. Zeigle, in his individual capacity, (*id.* ¶¶ 83–88); (5) a state-law negligence claim for vicarious liability against Brown County premised on the allegation that Officer O'Brien may have been acting under employment of Brown County pursuant Wisconsin's mutual assistance statute, Wis. Stat. § 66.0313, (3d Am. Compl. ¶¶ 77–82, ECF No. 83); and (6) a direct-action claim for indemnity against Brown County for the acts of Deputy Mleziva, Deputy Winistorfer, Lieutenant Zeigle, the unidentified John Doe deputies, and Officer O'Brien, pursuant Wis. Stat. §§ 895.46, 66.0313, (3d Am. Compl. ¶¶ 91–93, ECF No. 83.) Additionally, although they do not expressly allege the

[1] Plaintiffs bring the same claims against John Does 1–5, some of whom they allege are unidentified Brown County Sherriff's deputies. (3d Am. Compl. ¶¶ 17, 33–42, ECF No. 83.)

elements for any particular equitable relief in the causes-of-action section of their pleading, Plaintiffs request injunctive relief against Brown County that would require the County to adopt various types of policies and training. *See* (*id.* at 22.)

For the reasons outlined below, the County Defendants are entitled to judgment as a matter of law on all of Plaintiffs' claims.

ARGUMENT

I. Standard of Review on a Motion for Summary Judgment Under Fed. R. Civ. P. 56.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, establish that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. A material fact is one that is outcome determinative of an issue in the case with substantive law identifying which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Id.* at 242. Nor will speculation, hearsay, or conclusory allegations suffice to defeat summary judgment. *Gorbitz v. Corvilla, Inc.*, 196 F.3d 879, 882 (7th Cir. 1999); *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742 (7th Cir. 1997); *Mills v. First Fed. Sav.& Loan*, 83 F.3d 833, 840 (7th Cir. 1996).

The initial burden is on the moving party to demonstrate—with or without supporting affidavits—the absence of a genuine issue of material fact, and that judgment as a matter of law should be granted to the movant. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party has met that initial burden, the opposing party must go beyond the pleadings and designate the specific facts showing that a genuine issue exists. *Anderson*, 477 U.S. at 248. Further, "[w]hen the non-movant is the party with the ultimate burden of proof at trial, that party

retains its burden of producing evidence which would support a reasonable jury verdict." *Lawrence v. Kenosha Cnty.*, 304 F. Supp. 2d 1083, 1087 (E.D. Wis. 2004) (citing *Anderson*, 477 U.S. at 267).

II. Plaintiffs are not Entitled to Injunctive Relief as a Matter of Law.

A. Plaintiffs lack standing to seek injunctive relief.

"[T]hose who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). This means that Plaintiffs "must demonstrate a 'personal stake in the outcome' in order to 'assure that concrete adverseness which sharpens the presentation of issues' necessary for the proper resolution of constitutional questions." *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). "Abstract injury is not enough." *Id.* Rather, a plaintiff invoking federal courts' jurisdiction must show that he or she "ha[ve] sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical." *Id.* (internal quotations omitted).

In *Lyons*, Adolph Lyons alleged that City of Los Angeles police officers' previous use of a control hold technique on him constituted excessive force, and the Supreme Court held that he did not have standing to seek injunctive relief against the City of Los Angeles relating to LAPD's control holds policy. *Id.* at 97–100. Lyons alleged that the LAPD officers routinely applied such control holds that injured numerous persons, that "Lyons and others similarly situated" were threatened with irreparable bodily injury and death by the use of such control holds, and that Lyons feared any contact he may have with LAPD could result in his injury or death. *Id.* at 98.

The Court rejected Lyons' position, reasoning that, although Lyons had alleged sufficient facts to show that he had standing to pursue a claim for damages in relation to the officers' use of a choke hold on him, "[that] does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part." *Id.* at 105.

Here, none of the named Plaintiffs have alleged that they were subject to any of the County Defendants' challenged conduct in this case, nor that they are realistically likely to be the subject of such conduct in the future. In response to discovery, Plaintiffs assert that because they are residents of Brown County or nearby Outagamie County, there is a substantial risk that they will have contact with the Brown County Sheriff's Office in the future. (BCPFOF ¶¶ 134–35.) They also maintain that because a sister of a named Plaintiff has previously been arrested and taken into custody at the Brown County Jail, the conduct challenged in this case is likely to continue and harm Plaintiffs in the future. *See* (*id.*)

These assertions are speculative and they rely on past actions rather than establishing a future threat, and they even cite to the experiences of non-parties. Like in *Lyons*, Plaintiffs' claim based on past actions "does nothing to establish a real and immediate threat" that Plaintiffs would be subject to a future incident in the sally port as alleged in this case. *Lyons*, 461 U.S. at 105. Accordingly, the Court should grant summary judgment.

B. Even if standing exists, Plaintiffs are not entitled to injunctive relief.

In the context of a Section 1983 action, injunctive relief is appropriate only "where there is a persistent pattern of police misconduct . . . ." *Daniels v. Southfort*, 6 F.3d 482, 485 (7th Cir. 1993) (internal citations omitted). Even then, injunctive relief is "considered an extraordinary

remedy, especially when the plaintiff seeks to enjoin police conduct." *Id.* In addition to those principles, the Seventh Circuit requires that a plaintiff seeking injunctive relief satisfy the following five elements:

> (1) no adequate remedy at law exists; (2) it will suffer irreparable harm absent injunctive relief; (3) the irreparable harm suffered in the absence of injunctive relief outweighs the irreparable harm respondent will suffer if the injunction is granted; (4) the moving party has a reasonable likelihood of prevailing on the merits; and (5) the injunction will not harm the public interest.

Id. (quoting *United States v. Rural Electric Convenience Cooperative Co.*, 922 F.2d 429, 432 (7th Cir.1991)).

In *Daniels*, the Seventh Circuit held that the plaintiff was not entitled to injunctive relief, in part, because a Section 1983 action for damages constituted an adequate remedy at law for a plaintiff seeking redress for "false arrest, excessive force, unlawful detention and/or destruction of property in violation of the Fourth and Fourteenth Amendments." *Id.* at 485–86. Similarly, the court affirmed the district court's reasoning that the plaintiff failed to identify a "pervasive pattern of intimidation flowing from a deliberate plan by the named defendant to violate [the plaintiff's] Fourth Amendment rights," such that the plaintiff could not establish a persistent pattern of police misconduct that would probably occur in the future. *Id.*

Here, the undisputed facts show that Plaintiffs cannot satisfy the elements for injunctive relief. Just as in *Daniels*, Plaintiffs are unable to provide evidence that circumstances like the subject incident—where a firearm is believed to have been missed during a search, an arrestee slips his handcuffs in front of himself in route to the jail, and the arrestee refuses to surrender upon arrival in the jail's sally port—have ever previously occurred at the Brown County Jail or are likely to repeat. To that end, Plaintiffs cannot establish a persistent pattern of police misconduct that would probably occur in the future. Similarly, just as in *Daniels*, an adequate

remedy at law exists as indicated by the fact that Plaintiffs are seeking damages in this case as redress for the alleged violations of Tubby's Fourth and Fourteenth Amendment rights. Further, as already discussed, Plaintiffs cannot show that they would incur irreparable harm absent injunctive relief, and common sense dictates that court-ordered changes to the Brown County Sheriff's Department's policies and training would drastically impact the department's ability to carry out its law enforcement duties. Additionally, as explained in this Brief, Plaintiffs are not likely to succeed on the merits of their action because the undisputed facts show that the County Defendants are entitled to judgment as a matter of law. Accordingly, Plaintiffs are unable to establish that they are entitled to injunctive relief as a matter of law.

III. Deputies Mleziva and Winistorfer did not Fail to Intervene as a Matter of Law.

A. Deputies Mleziva and Winistorfer did not Fail to Intervene.

In order to hold Deputies Mleziva and Winistorfer liable under Section 1983, Plaintiffs must show that both deputies "(1) knew that a constitutional violation was committed; and (2) had a realistic opportunity to prevent it." *Gill v. City of Milwaukee*, 850 F.3d 335, 342 (7th Cir. 2017). Thus, if the Court finds that Officer O'Brien's use of deadly force did not violate the Fourth Amendment, then Deputies Mleziva and Winistorfer cannot be held liable as a matter of law. *See Fillmore v. Page*, 358 F.3d 496, 505–06 (7th Cir. 2004).

Further, Plaintiffs must do more than simply show that Deputies Mleziva and Winistorfer were on the scene at the time an unconstitutional act was committed. *See id.* (noting that "presence without more" is insufficient to establish liability). Similarly, Plaintiffs must show a realistic opportunity to stop unconstitutional conduct, which is a difficult bar to clear in cases where deadly force occurs in quickly unfolding circumstances. *See, e.g.*, *Stewart v. Moll*, 717 F. Supp. 2d 454, 462–63 (E.D. Pa. 2010) ("Given the quick sequence of events [whereby the

suspect "was shot twice in rapid succession"], . . . [the defendant-officer] simply did not have any opportunity to intervene . . . .").

Here, the undisputed evidence shows that Deputies Mleziva and Winistorfer could not have predicted that Officer O'Brien's use of deadly force would occur or be unconstitutional, and they did not have realistic opportunities to prevent it. Both Deputies Mleziva and Winistorfer relied on information they learned from dispatchers and their fellow law enforcement officers on scene, and believed that Tubby was armed with a firearm. (BCPFOF ¶¶ 84, 120.)[2]

Deputy Mleziva was 15 to 20 feet away from Officer O'Brien at the time he fired his weapon, (BCPFOF ¶ 127), and thus had no reasonable opportunity to predict or prevent O'Brien's use of force. Further, even from that distance, Deputy Mleziva perceived himself to be in imminent danger of death or serious bodily harm, making a distanced, split-second, pre-emptive constitutional analysis of Officer O'Brien's potential use of deadly force simply not feasible. (*Id.* ¶ 128.)

Similarly, Deputy Winistorfer testified that, in the moment before Officer O'Brien stepped in front of him and fired his weapon, he perceived himself and his fellow officers to be in imminent danger of death or serious bodily harm. (*Id.* ¶¶ 121–23, 126.) Deputy Winistorfer's perception was based not only on his knowledge that Tubby was believed to have a firearm, but also on his firsthand observations of Tubby running directly at him, the inability of non-lethal force to stop Tubby, and his inability to see Tubby's hands because they were under his shirt. (*Id.* ¶¶ 124.) As such, Deputy Winistorfer feared that he was the last line of defense as part of

[2] "Observations of fellow officers . . . engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number." *U.S. v. Ventresca*, 380 U.S. 102, 111 (1965); *U.S. v. Sawyer*, 224 F.3d 675, 680 (7th Cir. 2000) ("When law enforcement officers are in communication regarding a suspect, the knowledge of one officer can be imputed to the other officer under the collective knowledge doctrine."); *United States v. Nicksion*, 628 F.3d 368, 376 (7th Cir. 2010) ("Under the 'collective knowledge' doctrine, the officers who actually make the arrest need not personally know all the facts that constitute probable cause if they reasonably are acting at the direction of other officers.").

the exterior perimeter containment, and he believed that other individuals or citizens in the community could be in danger if Tubby escaped. (*Id.* ¶¶ 121–23.)

While Deputy Winistorfer was processing what he perceived to be life-threatening events unfolding in split seconds, Officer O'Brien stepped in front of him immediately before firing his weapon, making it wholly impractical and unsafe for Deputy Winistorfer to react or attempt to stop Officer O'Brien from using deadly force. *See* (*id.* ¶¶ 126.) Indeed, it was realistically impossible for Deputy Winistorfer to know that Officer O'Brien was about to use deadly force, let alone determine whether such force would have been unconstitutional, necessitating pre-emptive intervention.

Thus, Deputies Mleziva and Winistorfer did not know that Officer O'Brien would use deadly force, and they did not have sufficient time or information to pre-determine whether such force would be unconstitutional. Further, they did not have a reasonable opportunity to prevent the use of force due to their positioning and the quick sequence of events. Accordingly, Deputies Mleziva and Winistorfer did not fail to intervene as a matter of law.

B. Deputies Mleziva and Winistorfer are Entitled to Qualified Immunity.

The United States Supreme Court has "repeatedly stressed the importance of resolving immunity questions at the earliest possible stage of litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). The Court has explained that "government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The purpose of qualified immunity is to allow for reasonable errors "because officials should not err always on the side of caution [for the] fear of being sued." *Humphrey v. Staszek*, 148 F.3d 719, 727 (7th Cir. 1998). The qualified

immunity defense "erects a substantial barrier for plaintiffs, and appropriately so because qualified immunity is designed to shield from civil liability all but the plainly incompetent or those who knowingly violate the law." *Kernats v. O'Sullivan*, 35 F.3d 1171, 1177 (7th Cir. 1994).

There is generally a two-part test in determining whether qualified immunity should be granted to a governmental actor: (1) whether the plaintiff has established a deprivation of a constitutional right; and, if so, (2) whether the right was clearly established at the time of the alleged violation. *Wilson v. Layne*, 526 U.S. 603, 609 (1999). The question of whether immunity attaches is a question of law. *Elder v. Holloway*, 510 U.S. 510, 516 (1994). If qualified immunity applies to an officer's conduct, "the officer should not be subject to liability or, indeed, even the burdens of litigation." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). It is Plaintiffs' burden to show that the law was "clearly established" at the time of the incident. *See Schlessinger v. Salimes*, 100 F.3d 519, 523 (7th Cir. 1996).

Law enforcement officers are entitled to qualified immunity for their actions if "a reasonable officer could have believed [that the action taken was] lawful, in light of clearly established law and the information the officers possessed." *Estate of Starks v. Enyart*, 5 F.3d 230, 233 (7th Cir. 1993). To show that a law was clearly established, a plaintiff must offer either a closely analogous case or evidence that the defendant's conduct was patently violative of a constitutional right that reasonable officials would know without guidance from a court. *See Hope v. Pelzer*, 536 U.S. 730, 739 (2002). An allegedly violated right must have been "defined at the appropriate level of specificity before a court can determine if it was clearly established." *See Wilson v. Layne*, 526 U.S. 603, 615 (1999). In addition, the Seventh Circuit requires "caselaw which clearly and consistently recognizes the constitutional right." *Lojuk v. Johnson*,

770 F.2d 619, 629 (7th Cir. 1985) (internal quotations and citations omitted) (finding that one supporting circuit court case, one supporting district court case and several other distantly related cases are insufficient to clearly establish a constitutional right). Last year, the Supreme Court again strongly reminded lower courts of the importance of considering whether rights were clearly established in excessive-force cases. *City of Escondido, Cal. v. Emmons*, --- U.S. ---, 139 S. Ct. 500, 503 (2019).

Here, it was not clearly established on October 19, 2018 that either Deputy Mleziva or Deputy Winistorfer were constitutionally required to predict and physically prevent Officer O'Brien's use of deadly force in the unique and dynamic circumstances presented by Tubby's actions. Deputy Mleziva's physical distance from Officer O'Brien at the time he discharged his weapon in and of itself deprived Deputy Mleziva of any reasonable opportunity to prevent or deter Officer O'Brien's use of force, let alone allow him to predict it or gauge its potential constitutionality. Deputy Mleziva's fear for his own life based on his reasonable belief that Tubby was armed with a firearm only further confirms his lack of reasonable opportunity or purpose for intervention.

Similarly, Officer O'Brien stepped in front of Deputy Winistorfer immediately before shots were fired, making it impractical and unsafe for Deputy Winistorfer to pre-emptively react or attempt to stop Officer O'Brien from using deadly force, and indicating a quick unfolding of events that would have made it nearly impossible for Deputy Winistorfer to know that Officer O'Brien was about to use deadly force or that such force would have been unconstitutional. Again, Deputy Winistorfer's fear for his own life based on his reasonable belief that Tubby was armed with a firearm only further illustrates the lack of reasonable opportunity for him to safely predict an intervene in Officer O'Brien's use of deadly force.

Accordingly, at the very least, Deputies Mleziva and Winistorfer are entitled to qualified immunity, and are entitled to judgment as a matter of law.

IV. Plaintiffs' Failure-to-Train *Monell* Claims Against Brown County, Sheriff Delain, and Captain Michel Fail as a Matter of Law.

A. The official-capacity claims are redundant.

Plaintiffs' sole federal claims against Sheriff Delain and Captain Michel are the same as their claim against Brown County, as they have not alleged any individual-capacity claims against Sheriff Delain or Captain Michel. *See* (3d Am. Compl. ¶¶ 11–12, 43–49, ECF No. 83.) "An official capacity claim is tantamount to a claim against the government entity itself." *Gusman v. Sheahan*, 495 F.3d 852, 859 (7th Cir. 2007); *Smith v. Sangamon County Sheriff's Dept.*, 715 F.3d 188, 191 (7th Cir. 2013). For that reason alone, the official-capacity claims against Sheriff Delain and Captain Michel should be dismissed. *Comsys, Inc. v. City of Kenosha Wisconsin*, 223 F. Supp. 3d 792, 802 (E.D. Wis. 2016) ("[D]istrict courts routinely dismiss official capacity claims against individuals as 'redundant' where the appropriate municipality is also named.").

B. The *Monell* claim fails as a matter of law because Plaintiffs cannot establish a constitutional deprivation.

As a threshold matter, there generally can be no municipal liability where claims fail against the individual law enforcement officers. *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 597–98 (7th Cir. 1997). In other words, if this Court determines there is no basis for individual-capacity liability against Deputies Mleziva and Winistorfer, there is no need to address Plaintiffs' municipal-liability claim against Brown County. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986); *Pasiewicz v. Lake Cnty. Forest Preserve Dist.*, 270 F.3d 520, 527 (7th Cir. 2001).

As explained above, Plaintiffs' failure-to-intervene claims against Deputies Mleziva and Winistorfer fail as a matter of law. Further, there are no individual-capacity claims against any Brown County law enforcement officer based on an allegation that they improperly removed Tubby from a squad vehicle. Because there is no basis for individual-capacity liability against any Brown County law enforcement officer, there can be no municipal liability.

C. Brown County's training meets constitutional standards and did not cause a constitutional injury.

A plaintiff who seeks to impose municipal liability under Section 1983 and *Monell* must prove that an "official municipal policy" caused the complained-of injury. *Monell*, 436 U.S. 658, 691 (1978). To do so:

> a plaintiff must prove (1) the alleged deprivations were conducted pursuant to an **express policy, statement, ordinance, or regulation** that, when enforced, **caused** the constitutional deprivation; (2) the conduct was one of a **series of incidents amounting to an unconstitutional practice** so **permanent**, well-settled, and known to [the municipality] as to constitute a "custom or usage" **with force of law**; or (3) the conduct was caused by a **decision** of a **municipal policymaker** with final policymaking authority in the area in question.

Abraham v. Piechowski, 13 F. Supp. 2d 870, 880 (E.D. Wis. 1998) (emphasis added); *Connick v. Thompson*, 563 U.S. 51, 60–61 (2011). As further guidance, the Seventh Circuit has instructed that plaintiffs "must demonstrate that the 'deliberate action attributable to [the municipality] itself is the "moving force"' behind the deprivation of [the plaintiff's] constitutional rights." *Johnson v. Cook County*, 526 F. App'x 692, 695 (7th Cir. 2013) (quoting *Bd. of Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 399 (1997) (citing *Monell*, 436 U.S. at 694)).

Here, Plaintiffs seek to hold the County liable under Section 1983 based on a failure-to-train theory. (3d Am. Compl. ¶¶ 43–49, ECF No. 83.) "A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick*,

563 U.S. at 61. Relief under such a theory is available only in "limited circumstances." *Id.*; *Ruiz-Cortez v. City of Chicago*, 931 F.3d 592, 599 (7th Cir. 2019); *Palmquist v. Selvik*, 111 F.3d 1332, 1344 (7th Cir. 1997). In kind, failure-to-train "claims are subject to *rigorous* fault and causation requirements . . . ." *Ruiz-Cortez*, 931 F.3d at 599–600 (emphasis added; internal quotations and citations omitted).

"To satisfy [Section 1983], a municipality's failure to train its employees in a relevant respect must amount to deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." *Connick*, 563 U.S. at 61 (internal quotations and citations omitted). "Only then can such a shortcoming be properly thought of as a [municipal] policy or custom that is actionable under § 1983." *Id.* (internal quotations omitted). "[D]eliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Id.* (internal quotations omitted).

In *Ruiz-Cortez*, the Seventh Circuit explained that evidence of other constitutional deprivations caused by the alleged lapse in training "is normally required for . . . a failure-to-train claim." *Ruiz-Cortez*, 931 F.3d at 599–600; *Connick*, 563 U.S. at 62 ("A pattern of similar constitutional violations by untrained employees is "ordinarily necessary" to demonstrate deliberate indifference for purposes of failure to train."); *see also Braun v. Abele*, No. 15–CV–252–JPS, 2015 WL 3904960, at *7 (E.D. Wis. June 25, 2015) ("[F]acts evidencing a pattern of similar constitutional violations by untrained employees . . . is ordinarily necessary for a *Monell* claim under that theory." (internal quotations and citations omitted)). "Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights." *Connick*, 563 U.S. at 62.

Here, the undisputed facts show that Brown County's training relative to resistive suspects and the duty to intervene satisfies the Constitution and did not cause the constitutional harm alleged here. Plaintiffs' own expert witness, Jeffrey Noble, testified that he is not critical of Lt. Zeigle's training and experience as it relates to this incident, and that he will not offer any opinions as to Brown County's training at trial. (BCPFOF ¶¶ 31–32.) Mr. Noble also testified that, in his own experience as a training sergeant, he never provided specific training addressing situations where an arrested subject was believed to be armed and refused to leave the back of a squad car in a sally port, and he never provided specific training addressing how officers should remove an armed arrested subject from the back of a squad vehicle. (*Id.* ¶¶ 33.) This was because, "in policing . . . there are so many far-reaching possibilities, that there's no way [h]e could train for every possibility." (*Id.* ¶ 34.) Instead, Mr. Noble testified that his officers' training in basic tactics and uses of force would have adequately prepared them for such situations. (*Id.* ¶ 35.) Basic tactical training includes general barricaded subject scenarios, de-escalation, negotiation, isolation, and containment. (*Id.*) Basic use-of-force training would involve learning the levels of appropriate force applications, and identifying immediate threats to help officers understand the proper proportionality of force to use. (*Id.*)

Like Plaintiffs' expert, the Brown County Sheriff's Office trains its deputies on the fundamentals of tactical, strategic, and use-of-force techniques. Brown County's Rule 30(b)(6) witness, Lt. Michael Jansen, testified that Brown County Sheriff's Office deputies are specifically trained in high-risk vehicle stops, including those stops where someone in a vehicle may be armed. (BCPFOF ¶¶ 7, 15–16.) In those situations, depending on the weapon involved, deputies are trained with a focus on officer safety and placing themselves in the best tactical position they can in order to control the situation, such as finding hard cover, concealing cover,

or another physical barrier between themselves and the armed suspect. (*Id.* ¶ 16.) Deputies are also trained to create a physical perimeter around the scene using vehicles, lights, and officers. (*Id.* ¶ 17.)

When determining whether physical intervention may be necessary in a scenario involving an armed suspect in a vehicle, deputies are trained to rely on what is known as the "DONE" concept, which stands for "Danger, Overriding concern, No progress, Escape," their Professional Communications Standards ("PCS") manual, and Defense and Arrest Tactics ("DAAT"). (*Id.* ¶ 18.) These decision-making models help deputies decide what type physical intervention may be appropriate in a given situation, which could include completely disengaging with a suspect or escalating force. *See* (*id.* ¶ 19) For example, the "DONE" concept trains deputies that, if there is no danger, there are no overriding concerns, there is progress in communication, and there is no risk of escape, then deputies can try to slow the situation down and use de-escalation verbal techniques. (*Id.* ¶ 20.) DAAT is a system of verbalization skills coupled with alternatives. (*Id.* ¶ 21.) Additionally, as it relates to removing suspects from vehicles, the Brown County Sheriff's Office provides scenario-based training focused on decision-making and key tactics aspects. (*Id.* ¶ 22.)

Similarly, through the PCS manual, the Brown County Sheriff's Office trains its deputies on the concept of "officer override." (*Id.* ¶ 23.) The "officer override" concept refers to situations where non-primary officers—officers not speaking directly with a subject—are trained not only to provide back up and cover in use-of-force scenarios, but also that they "must intervene in any situation in which the contact officers are deemed inappropriate or clearly ineffective." (*Id.* ¶ 24.) In his deposition, Lt. Jansen gave an example where a field-training officer observes a new officer using an improper handcuffing technique, officer-override training

requires the field-training officer to immediately step in to stop that improper use of force and document the incident. (*Id.* ¶ 25.) Deputies Mleziva and Winistorfer have both received this officer-override training in relation to the duty to intervene in a fellow officer's use of excessive force. (*Id.* ¶¶ 26–27.)

Moreover, Lt. Zeigle has received extensive, specialized training with the National Tactical Officers Association ("NTOA"), a group of which he, the Brown County Sheriff's Department, and Plaintiffs' expert are all members. (*Id.* ¶ 28.) Lt. Zeigle has been involved with NTOA since 2002, gained his individual membership around 2008, and attends annual conferences all over the country that focus specifically on suspects who have barricaded themselves in buildings, houses, and vehicles. (*Id.* ¶ 29.) He has also received training from Tactical Energetic Entry Systems on barricaded suspects. (*Id.* ¶ 30.) In fact, Lt. Zeigle hosted and attended more than one NTOA Commander five-day training courses at the Brown County Sheriff's Office, where a specific time-block during that week focused just on barricaded subjects. (*Id.* ¶ 40.) Lt. Zeigle also attended a five-day training course held in Milwaukee that was solely dedicated to barricaded subjects, as well as four-hour and eight-hour blocks of similar trainings held in Phoenix, Salt Lake City, and Pittsburgh. (*Id.* ¶ 41) Lt. Zeigle testified that the Brown County Sheriff's Office has trained its deputies in the principles taught by the NTOA, and Lt. Zeigle engaged his extensive training throughout the incident involving Tubby. (*Id.* ¶ 69.)

Thus, based on these undisputed facts, it is clear that Brown County's training satisfies the Constitution and did not cause the constitutional harm alleged here as a matter of law. At minimum, no reasonable jury could find that Brown County was deliberately indifferent to equipping its officers with sufficient training to address resistive subjects in squad vehicles and the duty to intervene in excessive force. Moreover, there is no evidence that prior incidents like

the Tubby incident revealed a lapse in a particular area of training that somehow contributed to the events on October 19, 2018. Accordingly, the County Defendants are entitled to judgment as a matter of law as to Plaintiffs' failure-to-train *Monell* claims.

V. Lt. Zeigle's and Brown County's acts were not State-Created Danger as a Matter of Law.

Although Plaintiffs do not challenge the constitutionality of any of the uses or shows of force prior to Officer O'Brien's use of deadly force, they allege that Lt. Zeigle, in his official capacity, and Brown County are liable for a "state created danger." (3d Am. Compl. ¶¶ 62–71, ECF No. 83.) For the reasons explained below, Plaintiffs' state-created-danger theory stretches both the law and the undisputed facts beyond their limits, requiring judgment as a matter of law.

A. Plaintiffs' state-created-danger theory is not cognizable based on the circumstances of this case.

Last year, the Seventh Circuit clarified that "state created danger" refers to a judicially created exception to *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), a Supreme Court case holding "that the Constitution, as a charter of negative liberties, does not require the government to protect the public from *private predators* . . . ." *Weiland v. Loomis*, 938 F.3d 917, 918 (7th Cir. 2019) (emphasis added). In *Weiland*, the Seventh Circuit granted qualified immunity to a prison guard who allowed a hospitalized prisoner an opportunity to escape and steal his weapon, causing non-physical injuries to the plaintiffs—two persons at the hospital. *Id.*

The court explained that "[t]he 'state-created danger exception' to *DeShaney* does not tell any public employee what to do, or avoid, in any situation. It is a principle, not a rule. And it is a principle of liability, not a doctrine (either a standard or a rule) concerning primary conduct." *Id.* at 919. The court recognized the Supreme Court's undisturbed precedent that "the Due

Process Clause of the Fourteenth Amendment does not require a state to protect its residents from *private violence*." *Id.* (emphasis added). "Other courts cannot create an 'exception' to *DeShaney* that contradicts this principle, and as a result [the Seventh Circuit] cannot treat the 'state-created danger exception' as a rule of primary conduct forbidding any acts by public officials that increase *private* dangers." *Id.* (emphasis added).

The court further revisited some of its prior cases that articulated a three-part test for state-created-danger, which, in the *Weiland* court's view, did not have its footing in *DeShaney*:

> First, the state, by its affirmative acts, must create or increase a danger faced by an individual. Second, 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. Third, the state's failure to protect the individual must shock the conscience.

Id. at 920 (quoting *Johnson v. Rimmer*, No. 18-1321, 936 F.3d 695, 708, 2019 WL 4123382 (7th Cir. Aug. 30, 2019), *King v. East St. Louis School District*, 496 F.3d 812, 817–18 (7th Cir. 2007)). After examining its own cases employing this formulaic three-part test, the court noted that its cases with the strongest connection to the reasoning in *DeShaney* where those "decisions [that] find liability outside of prisons when the state has disabled or undermined self-help or sources of private assistance." *Id.* at 921.

The Seventh Circuit's discussion in *Weiland* illuminates how Plaintiffs' claim stretches the state-created-danger theory beyond its already hazy limits. Plaintiffs seek to morph the theory from one that considers a state actor's narrow window for potential liability by exposing a citizen to "private violence," into one that applies Fourteenth-Amendment scrutiny to law enforcement officials' decisions prior to a fellow officer's seizure by force under the Fourth Amendment. *See Weiland*, 938 F.3d at 919; *see also D.S. v. East Porter County School Corp.*, 799 F.3d 793, 798 (7th Cir. 2015) (characterizing "state created danger" as an "exception" to the

rule that the Due Process Clause "generally does not impose upon the state a duty to protect individuals from harm by *private* actors" (emphasis added)).

The state-created-danger theory's inapplicability to this case is highlighted by its close resemblance to an attempt to hold Lt. Zeigle and Brown County liable for acts performed prior to Officer O'Brien's seizure of Tubby by deadly force. The Seventh Circuit has previously held that pre-seizure conduct is not subject to Fourth Amendment scrutiny, and it is far from clearly established that such conduct is subject to scrutiny under the Due Process Clause as an exception to *DeShaney*. *See Marion v. City of Corydon, Indiana*, 559 F.3d 700, 705 (7th Cir. 2009) ("[P]re-seizure police conduct cannot serve as a basis for liability under the Fourth Amendment; we limit our analysis to force used when a seizure occurs."); *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992) (an officer's "pre-seizure conduct is not subject to Fourth Amendment scrutiny"); *see also Williams v. Indiana State Police*, 797 F.3d 468, 483 (7th Cir. 2015) ("Our caselaw is far from clear as to the relevance of pre-seizure conduct, or even as to a determination as to what conduct falls within the designation 'pre-seizure,' although the majority of cases hold that it may not form the basis for a Fourth Amendment claim.").

Further adding to the inconsistency in their legal theory, Plaintiffs appear to invoke terms of art from *Monell* case law by alleging that Lt. Zeigle was a "policy-making official of Brown County" whose decision to break the back window of the squad vehicle "was announcing a policy of Brown County." (3d Am. Compl. ¶ 63, ECF No. 83.) However, "[n]ot every municipal official with discretion is a final policymaker; authority to make final policy in a given area requires more than mere discretion to act." *Milestone v. City of Monroe, Wis.*, 665 F.3d 774, 780 (7th Cir. 2011); *See, e.g.*, *Latuszkin v. City of Chicago*, 250 F.3d 502, 505 (7th Cir. 2001) (holding Chicago Police Department supervisors and superiors are not policymakers for the City

of Chicago); *Estate of Brown v. Thomas*, 7 F. Supp. 3d 906, 916 (E.D. Wis. 2014) ("The Estate offers no evidence that Sergeant Delain, or anyone else involved with the search, had final policy making authority for the County or even for the Sheriff's Department.").

Further, "[t]he fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion." *Pembaur*, 475 U.S. at. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481–82 (1986). In order to prevail on an official-capacity claim premised on a single decision by an alleged policymaker, Plaintiffs must show that a "policymaker responsible for establishing final policy with respect to the subject matter in question made a deliberate choice to follow a course of action from among various alternatives." *De Smet v. Snyder*, 653 F. Supp. 797, 802 (E.D. Wis. 1987); *Pembaur*, 475 U.S. at 483.

Simply put, the undisputed evidence shows that Lt. Zeigle was not a final policymaker for Brown County announcing municipal policy that would carry the force of law, but instead a highly trained tactical law enforcement officer making tactical decisions tailored to a very specific and dynamic situation. The decisions surrounding his plan to safely bring Tubby into custody did not establish a Brown County rule that had the effect of law to be applied to any situation in the future.

Thus, as shown by their conflation of various inapplicable legal theories, Plaintiffs' state-created-danger theory of liability against the County Defendants does not amount to a cognizable Section 1983 claim against the County Defendants for Tubby's death. Plaintiffs' theory strains the evidence and the law in such a way that fails to reconcile different standards of constitutional scrutiny, and that fails to properly contextualize the facts of this case. For these reasons alone, Plaintiffs' federal claims against Lt. Zeigle and Brown County fail as a matter of law.

B. Lt. Zeigle's acts and decisions do not shock the conscience, and, to the extent Plaintiffs pursue their state-created-danger-theory against him in his individual capacity, he is entitled to qualified immunity.

Even setting aside the legal insufficiency of Plaintiffs' theory of liability and applying the scrutinized elements from prior state-created-danger cases, *see Weiland*, 938 F.3d at 920, the County Defendants are nonetheless entitled to judgment as a matter of law.

Lt. Zeigle has been a lieutenant at the Brown County Sheriff's Office since 2012, and he has been the SWAT commander for the Brown County SWAT Team since approximately 2016. (BCPFOF ¶ 5.) The Brown County SWAT Team is an interagency group, including members from the Brown County Sheriff's Office, a member from the Oneida Tribal Police Department, four members from the De Pere Police Department, and two members from the Ashwaubenon Public Safety Department. (*Id.* ¶ 12.) As discussed above, Lt. Zeigle has extensive training in relation to tactical scenarios relating to suspects who barricade themselves in buildings, houses, and vehicles.

Lt. Zeigle testified that his decisions on October 19, 2018, preceding Officer O'Brien's use of deadly force were guided by his training with the NTOA. (BCPFOF ¶ 94.) In his deposition, Lt. Zeigle discussed the NTOA training he received for assessing barricade situations, and he discussed a general, yet dynamic decision-making continuum, including establishing perimeters, creating communication opportunities, establishing an emergency team of officers, creating diversions, showing force, and using force. *See* (*id.* ¶¶ 42–68.)

When he arrived on scene, Lt. Zeigle considered a plan proposed by officers from the City of Green Bay Police Department, but, because in Lt. Zeigle's view that plan skipped important steps in the NTOA decision-making continuum, he decided to implement a different plan. (*Id.* ¶¶ 92–93.) As the Commander of the Brown County SWAT Team, Lt. Zeigle

assessed the situation and determined that a SWAT activation was not necessary because there were ample resources already on scene, including multiple officers on scene with tactical training, an armored vehicle, and a K-9 unit. (*Id.* ¶¶ 89–95.) He observed that there were officers on scene with perimeters established, and he was aware that Tubby was not actively communicating with officers on scene. (*Id.* ¶ 96.)

Like Deputies Mleziva and Winistorfer, Lt. Zeigle believed that Tubby was armed with a firearm. (*Id.* ¶¶ 84–86.) Thus, he approached the scene and his tactical decision-making like an armed barricade situation, and his tactical plan reflected the hallmarks of the NTOA continuum on which he had been trained for years. *See* (*id.* ¶¶ 93–108.) For example, by breaking the back window to the squad vehicle, Lt. Zeigle sought to gain a visual on Tubby, establish a communication portal, and provide Tubby with an opportunity to surrender. (*Id.* ¶¶ 48, 55–56, 98–99, 102–03, 109–10.) Similarly, by directing the armored vehicle into the sally port, Lt. Zeigle sought to allow officers to have a better vantage point while maintaining safety behind cover, as well as putting an arrest team in place closer in proximity to Tubby. (*Id.* ¶¶ 16, 55–56, 59–60, 98, 108–11.) Further, by introducing OC spray into the vehicle, Lt. Zeigle sought to create a diversion or get a reaction from Tubby that may induce his peaceful surrender or otherwise provide officer's with better visual of Tubby. (*Id.* ¶¶ 58–60, 100–01, 112–14.)

In short, nothing in Lt. Zeigle's development or execution of his plan shocks the conscience. Lt. Zeigle's plan and execution of that plan were rooted within the parameters of his training, experience, and the guidelines of the NTOA. Nothing in Lt. Zeigle's tactical decision-making process suggests that he had any motive, focus, or goal other than a calculated and informed effort to safely resolve the barricade situation by inducing Tubby's peaceful surrender.

Indeed, the correctional officer's conduct in *Weiland* is incomparably more egregious than Lt. Zeigle's methodical, tactical decision-making process, as the defendant in *Weiland* disobeyed an order, unshackled a prisoner, and allowed his firearm to be taken from him. 938 F.3d at 918. Lt. Zeigle's conduct is far from conscience-shocking by comparison and, to the extent Plaintiffs' intended to sue Lt. Zeigle in his individual capacity under the state-created-danger exception to *DeShaney*, Lt. Zeigle should enjoy the same qualified immunity protection as the one enjoyed by the defendant in *Weiland*. At the very least, *Weiland* shows that clearly established law does not support the an individual-capacity claim against Lt. Zeigle.

Accordingly, the County Defendants are entitled to judgment as a matter of law as to Plaintiffs' state-created-danger claims.

VI. Plaintiffs' State-Law Claims Against Brown County are Barred for Lack of Compliance with the Notice Requirements of Wis. Stat. § 893.80(1d).

Wisconsin's notice requirements outlined in Wis. Stat. § 893.80 apply to all state-law claims. *DNR v. City of Waukesha*, 184 Wis. 2d 178, 515 N.W.2d 888 (1994) (holding Wis. Stat. § 893.80 applies to all causes of action, not just those in tort and not just those for money damages); *see also Nesbitt Farms v. Madison*, 2003 WI App 122, ¶ 6 n.2, 265 Wis. 2d 422, 665 N.W.2d 379 ("continu[ing] to read *DNR v. City of Waukesha* as stating a general rule that the Wis. Stat. § 893.80(1) notice requirement applies to all actions against a municipality except for certain statutory actions excepted from the rule").

To substantially comply with the statutory requirement of notice of claims against government bodies, a notice must satisfy two related but distinct notice requirements: (1) a notice of injury requirement of written notice of the circumstances of the claim signed by the party, agent or attorney, served on the governmental body in question within 120 days after the event causing the injury; and (2) a notice of claim requirement that requires notice of the

claimant's identity and address, along with an itemized statement of relief sought, to the proper person at the governmental body and subsequent denial. Wis. Stat. § 893.80(1d)(a) and (b).

Compliance with both of these two distinct provisions is mandatory in order to avoid dismissal of an action. *Vanstone v. Town of Delafield*, 191 Wis. 2d 587, 530 N.W.2d 16 (Ct. App. 1995). "The notice of injury and notice of claim provisions of § 893.80(1) are unambiguously stated in the conjunctive; therefore, both provisions must be satisfied before the claimant may commence an action against a governmental agency." *Snopek v. Lakeland Med. Ctr.*, 223 Wis. 2d 288, 301, 588 N.W.2d 19 (1999). "Failure to comply with this statute constitutes grounds for dismissal of the action." *Casteel v. Baade*, 167 Wis. 2d 1, 10, 481 N.W.2d 277 (1992).

"[T]here is a clear rationale for requiring that a notice of claim be filed before suit is commenced against a local government: A notice gives the local government an opportunity to investigate the claim and resolve the dispute before becoming enmeshed in costly litigation." *Willow Creek Ranch v. Town of Shelby*, 2000 WI 56, ¶ 82, 235 Wis. 2d 409, 611 N.W.2d 693; *see also Thorp v. Town of Lebanon*, 2000 WI 60, ¶ 28, 235 Wis. 2d 610, 612 N.W.2d 59 (confirming the notice of injury provision allows governmental entities to investigate and evaluate potential claims and the notice of claim provision affords a municipality the opportunity to compromise and settle a claim).

Here, Plaintiffs did not serve a written notice of claim relating to their state-law claims prior to filing the instant action. (BCPFOF ¶¶ 131–33.) Rather, Plaintiffs filed their action on January 24, 2019, *see* (Compl., ECF No. 1), and their two notices of claims are dated January 25, 2019, and March 7, 2019. (*Id.*) Plaintiffs' failure to comply with the notice requirements before filing their state-law claims in federal court is jurisdictional. Written notices must be served and

disallowed before a claim may be brought. *See Colby v. Columbia Cnty.*, 202 Wis. 2d 342, 357–58, 550 N.W.2d 124 (1996) (holding "Section 893.80(1)(b) requires that the plaintiff first provide the county with a notice of claim, followed by either a denial of such claim by the county, or the expiration of the 120-day disallowance period, prior to the filing of a summons and complaint"). Compliance with § 893.80(1)(b) is a necessary prerequisite to all actions brought against the entities listed in the statute whether brought as an initial claim, counterclaim, or cross-claim. *City of Racine v. Waste Facility Siting Bd.*, 216 Wis. 2d 616, 620, 575 N.W.2d 712 (1998).

Plaintiffs initiated this action containing state-law claims before filing a notice of claim, itemization of relief sought, and receiving a disallowance of claim from Brown County. (BCPFOF ¶¶ 131–33.) For this reason alone, the County Defendants are entitled to judgment as a matter of law as to all of Plaintiffs' state-law claims contained in Counts VII, VIII, and X of the Third Amended Complaint. *See* (3d Am. Compl. ¶¶ 77–82, 83–88, 91–93, ECF No. 83.)

Moreover, even setting aside the clear timing deficiency with Plaintiffs' notice of claim, Plaintiffs' claim that Brown County is liable for Officer O'Brien's conduct is also barred by Plaintiffs' lack of compliance with Wis. Stat. § 893.80. In their Third Amended Complaint, Plaintiffs allege that, at the time he used deadly force, Officer O'Brien may have been acting "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." (3d Am. Compl. ¶ 81, ECF No. 83.) In turn, Plaintiffs allege that Brown County is liable for Officer O'Brien's conduct. (*Id.* ¶¶ 77–82, 93.)

However, both of Plaintiffs' notices are completely silent as to any allegations of liability for Officer O'Brien's actions by operation of Wis. Stat. § 66.0313 or any other state law.

Neither notice of claim contains any allegations or other written notice that Plaintiffs intended to pursue a state-law negligence claim against Brown County to hold it liable for the alleged acts of City of Green Bay Police Officer O'Brien, nor that they sought to hold Brown County liable for Officer O'Brien's acts based on the applicability of Wisconsin law, such as Wis. Stat. § 66.0313. *See* (BCPFOF ¶ 133.) Thus, not only were both notices of claims filed after Plaintiffs filed their lawsuit, but the notices contain no substantive information whatsoever about any potential claim for liability against Brown County for the acts of Officer O'Brien. Thus, at the very least, the notices are wholly insufficient to satisfy Wis. Stat. § 893.80 in relation to Plaintiffs' claim that the County is liable for Officer O'Brien's actions.

Accordingly, all of Plaintiffs state-law claims, or, at the very least, Count VII and part of County X of Plaintiffs' Third Amended Complaint should be dismissed because, as a matter of law, such claims are barred by Plaintiffs' undisputed lack of compliance with the notice requirements of Wis. Stat. § 893.80.

VII. Even Assuming Plaintiffs Partially Complied with Wis. Stat. § 893.80(1d), Brown County and Lt. Zeigle are Entitled to Discretionary Immunity Against Plaintiffs' State-Law Negligence Claims.

Governmental immunity under Wisconsin law is "extremely broad." *Estate of Perry v. Wenzel*, 872 F.3d 439, 463 (7th Cir. 2017), *cert. den'd*, 138 S. Ct. 1440 (Apr. 2, 2018). Such immunity is committed to the Wisconsin statutes at Wis. Stat. § 893.80(4). *See also Lodl v. Progressive Northern Ins. Co.*, 2002 WI 71, ¶ 20, 253 Wis. 2d 323, 646 N.W.2d 314. Wisconsin's governmental immunity "'provides that state officers and employees are immune from personal liability for injuries resulting from acts performed within the scope of their official duties.'" *Perry*, 872 F.3d at 462 (quoting *Pries v. McMillon*, 326 Wis. 2d 37, 784 N.W.2d 648, 654 (2010)). "Wisconsin courts have interpreted this protection as extending to all conduct

involving 'the exercise of discretion and judgment.'" *Thomas v. Correctional Healthcare Companies, Inc.*, 15–CV–633–JPS, 2016 WL 7046795, at *4 (E.D. Wis. Dec. 2, 2016) (quoting *Milwaukee Metro Sewerage Dist. v. City of Milwaukee*, 277 Wis. 2d 635, 672, 691 N.W.2d 658 (2005)). "There are four exceptions to this broad doctrine: '(1) the performance of ministerial duties; (2) the performance of duties with respect to 'known danger;' (3) actions involving medical discretion; and (4) actions that are 'malicious, willful, and intentional.'" *Perry*, 872 F.3d at 462 (quoting *Bicknese v. Sutula*, 260 Wis. 2d 713, 660 N.W.2d 289, 296 (2003)).

Here, the County Defendants are entitled to immunity under Wis. Stat. § 893.80(4), as none of the exceptions apply. First, the medical-discretion exception does not apply as there are no allegations in this case relating to medical care. Second, there is no evidence that any of the County Defendants acted with malice, willfulness, or with intent to harm Mr. Tubby. Rather, the undisputed evidence shows that Lt. Zeigle believed that his plan was the safest for the officers on scene and the safest for Tubby to enter custody. (BCPFOF ¶¶ 107–08.) Third, the known-danger exception is inapplicable. That exception is a "narrow, judicial-created exception that arises only when there exists a danger that is known and compelling enough to give rise to a ministerial duty on the part of a municipality or its officers." *Lodl*, 2002 WI 71, ¶ 4 (emphasis added). Here, the known-danger exception is inapplicable because the fluid, quick, and dynamic nature of the situation highlights the degree of discretion at issue.

Fourth, the ministerial-duty exception is inapplicable. In *Sheridan v. City of Janesville*, the Wisconsin Court of Appeals recognized that that the decisions that go into making an arrest, including the use of force, are discretionary, entitling officers to immunity under Section 893.80. 164 Wis. 2d 420, 427–28, 474 N.W.2d 799 (Ct. App. 1991). Similarly, the Eastern District previously held that "decisions by law enforcement officers concerning whether and how to

arrest someone are discretionary for purposes of Section 893.80(4)." *Id.* at 1130; *see also Johnson v. City of Milwaukee*, 41 F. Supp. 2d 917, 932 (E.D. Wis. 1999); *Estate of Phillips*, 123 F.3d at 598–99.

Here, as explained above, each decision Lt. Zeigle made during the time preceding Officer O'Brien's use of deadly force was aimed at achieving the goal of safely bringing Mr. Tubby into custody. This decision-making is similar an officer's discretion in deciding whether and how to make an arrest, and employing reasonable law enforcement discretion in deciding whether and what degree of force to use in making that arrest. Clearly, this decision is discretionary and the ministerial-duty exception is inapplicable.

Because none of the judicially-created exceptions to Wis. Stat. § 893.80(4) governmental immunity apply in this case, the County Defendants are immune from Plaintiffs' negligence claims. Accordingly, the Court should grant summary judgment on Plaintiffs' negligence claims against the County Defendants.

CONCLUSION

For the foregoing reasons, the County Defendants respectfully request that the Court grant their Motion for Summary Judgment and dismiss this action in its entirety as to these moving Defendants on the merits, with prejudice, and with such costs and disbursements as the Court deems equitable.

Dated this 2nd day of November, 2020.

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