

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
PROPOSED FINDINGS OF FACT IN SUPPORT OF MOTION FOR SUMMARY
JUDGMENT**

1. Todd J. Delain is the Sheriff of Brown County, Wisconsin. (3d Am. Compl. ¶ 11, ECF No. 83.)
2. Heidi Michel is the Jail Administrator for the Brown County Jail. (3d Am. Compl. ¶ 12, ECF No. 83.)
3. Joseph P. Mleziva is and has been a patrol deputy at the Brown County Sheriff's Office since 2013. (Decl. of Benjamin A. Sparks, Nov. 2, 2020, ¶ 3, Ex. B, Dep. of Joseph P. Mleziva, June 4, 2020, at 9:8–21. [hereinafter "Mleziva Dep."].)

4. Nathan K. Winistorfer is and has been a patrol deputy at the Brown County Sheriff's Office since 2013. (Sparks Decl. ¶ 4, Ex. C, Dep. of Nathan K. Winistorfer, June 4, 2020, at 11:20–12:1 [hereinafter "Winistorfer Dep."].)
5. Thomas Zeigle is and 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. (Sparks Decl. ¶ 2, Ex. A, Dep. of Lt. Thomas Zeigle, January 10, 2020, at 11:6–23 [hereinafter "Zeigle Dep."].)
6. At the time of this incident, Erik O'Brien was a patrol officer with the Green Bay Police Department, having served in that role since December 2012. (Sparks Decl. ¶ 5, Ex. D, Dep. of Officer Erik O'Brien, December 19, 2019, at 8:11–23 [hereinafter "O'Brien Dep."].)
7. Michael Jansen is and has been a lieutenant at the Brown County Sheriff's Office since 2016. (Sparks Decl. ¶ 6, Ex. E, Dep. of Lt. Michael Jansen, June 4, 2020, at 14:2–18 [hereinafter "Jansen Dep."].)
8. Jason Katers is a lieutenant at the Brown County Sheriff's Office since 2019. At the time of the incident, he was a sergeant and had with Brown County since 2005. (Sparks Decl. ¶ 9, Ex. H, Dep. of Lt. Jason Katers, June 9, 2020, at 10:22–11:23 [hereinafter "Katers Dep."].)
9. At the time of the incident, Eric Allen was a patrol officer at the Green Bay Police Department for approximately 27 years. (Sparks Decl. ¶ 10, Ex. I, Dep. of Officer Eric, January 9, 2020, at 8:17–19, 11:5–8 [hereinafter "E. Allen Dep."].)

10. Nathan Allen is a lieutenant at the Green Bay Police Department since 2017. (Sparks Decl. ¶ 8, Ex. G, Dep. of Lt. Nathan Allen, January 10, 2020, at 11:11–18 [hereinafter “N. Allen Dep.”].)
11. Jeffrey Noble has been retained as Plaintiffs’ police practices expert. (Sparks Decl. ¶ 7, Ex. F, Dep. of Jeffrey Noble, September 28, 2020, at 6:19–21 [hereinafter “Noble Dep.”].)
12. 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. (Zeigle Dep. at 11:24–12:10.)
13. Brown County Sheriff’s Department deputies train extensively on, among other topics, resolving tactical situations, including those dealing with barricaded subjects, and intervention to prevent excessive force. (Zeigle Dep. at 45:13–21, 141:23–142:25.)
14. Brown County Sheriff’s Office deputies train that if someone is in custody in a squad car and is becoming combative through physical resistance, the normal practice would be to notify the jail intake of the situation and the jail could then provide support from their correction officers to assist in controlling that subject and transferring custody from the officer to the jail staff. However, if the situation involves a known or suspected weapon the correction officers would not assist in the situation as a practice. (Jansen Dep. 16:17–17:7.)
15. Brown County provides in-service training regarding high-risk vehicle stops, removing uncooperative suspects from squad cars (including suspects who may be

- armed), primarily through scenario-based training, decision making, and some key tactics training. (Jansen Dep. at 23:19–23.)
16. Brown County trains deputies to focus on officer safety, 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), team movement, and making a plan for how to bring the suspect into custody. (Jansen Dep. at 24:1–17.)
 17. Brown County also trains deputies to create a physical perimeter around the scene using vehicles, lights, and officers. (Jansen Dep. at 26:1–24.)
 18. 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”). (Jansen Dep. at 33:6–34:17.)
 19. These decision-making models help deputies decide what type physical intervention may be appropriate in a given situation, which could include completely disengaging or escalating force. (Jansen Dep. at 33:6–34:17.)
 20. 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 are trained to slow the situation down and use speaking techniques. (Jansen Dep. at 56:23–57:8.)

21. DAAT is a system of verbalization skills coupled with alternatives. (Jansen Dep. at 36:24–37:10)
22. 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. (Jansen Dep. at 19:3–17.)
23. Similarly, through the PCS manual, the Brown County Sheriff's Office trains its deputies on the concept of "officer override." (Jansen Dep. at 159:20–24.)
24. 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." (Jansen Dep. at 161:7–22.)
25. In his deposition, Lt. Jansen gave an example where, if a field-training officer observed a new officer using an improper handcuffing technique, that field-training officer has a duty to immediately step in to stop that improper use of force and document the incident. (Jansen Dep. at 161:23–162:19.)
26. Deputy Mleziva has been trained on a law enforcement officer's duty to intervene to prevent the use of excessive force by another officer, including through the Brown County Sheriff's Office training on situations of officer override. (Mleziva Dep. at 10:2–11:4.)
27. Deputy Winistorfer has been trained on a law enforcement officer's duty to intervene to prevent the use of excessive force by another officer, including through the Brown

- County Sheriff's Officer training on situations of officer override. (Winistorfer Dep. at 12:25–17:12.)
28. Lt. Zeigle has extensively trained on tactical situations, including those dealing with barricaded suspects. (Zeigle Dep. at 20:10–25, 22:19–23:4, 23:16–25:2, 26:7–27:22.)
 29. 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. (Zeigle Dep. at 22:20–23:23, 25:3–6; Noble Dep. at 39:19–23.)
 30. He has also received training from Tactical Energetic Entry Systems on barricaded suspects. (Zeigle Dep. at 23:21–24:19.)
 31. Mr. Noble does not criticize the adequacy or sufficiency of Brown County's training of its law enforcement officers. (Noble Dep. at 84:4–15.)
 32. Mr. Noble does not criticize Lt. Zeigle's level of training or experience as it relates to what occurred during the incident involving Mr. Tubby. (Noble Dep. at 79:5–10.)
 33. 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. (Noble Dep. at 31:14–20, 33:3–7.)
 34. This was because, “in policing . . . there are so many far-reaching possibilities, that there's no way [h]e could train for every possibility.” (Noble Dep. at 31:21–24.)
 35. Instead, Mr. Noble testified that his officers' training in basic tactics and uses of force would have adequately prepared them for such situations, which include general

barricaded subject scenarios, de-escalation, negotiation, isolation, and containment, and learning the levels of appropriate force applications, and identifying immediate threats to help officers understand the proper proportionality of force to use. (Noble Dep. at 32:12–34:8.)

Lieutenant Zeigle's Background and National Tactical Officers' Association Training

36. The NTOA is a group of the foremost experts in the country in teaching law enforcement and SWAT-related tactics. (Zeigle Dep. at 24:20–25:2.)
37. Lt. Zeigle has been involved with NTOA since 2002, gained his individual membership around 2008, and attends annual conferences all over the country that devote portions of training specifically to suspects who have barricaded themselves in buildings, houses, and vehicles. (Zeigle Dep. at 23:16–24:8, 25:3–26:16, 46:18–47:5.)
38. SWAT team members receive an additional 16 hours of training each month, and the substance of training includes firearms, less-lethal tactics, dignitary protection, and hostage rescue. (Zeigle Dep. at 13:18–14:3.)
39. Brown County also has a team membership to the NTOA, which allows deputies within the Brown County Sheriff's Office to have access to these training programs. (Zeigle Dep. at 25:7–9.)
40. 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. (Zeigle Dep. at 26:7–27:19.)
41. Lt. Zeigle also attended a five-day training course held in Milwaukee that was solely dedicated to barricaded subjects, as well as four-hour or eight-hour blocks of similar trainings held in Phoenix, Salt Lake City, and Pittsburgh. (Zeigle Dep. 28:13–23.)

42. As part of the NTOA training, Lt. Zeigle learned an NTOA continuum of actions for dealing with barricaded subjects. *See generally* (Zeigle Dep. at 6–16.)
43. The decision-making continuum with barricaded subjects generally starts with a patrol-based response. (Zeigle Dep. at 28:24–30:16.)
44. Under a patrol-based response, patrol officers will first arrive on scene and take into account the facts of the scene, such as if there is a weapon involved and what the specific threat is. (Zeigle Dep. at 28:24–30:16.)
45. The patrol officers will then look for staging areas and set up an inner and outer perimeter. (Zeigle Dep. at 28:24–30:16.)
46. The inner perimeter is set up to protect the area around the structure in which the person of interest is barricaded. (Zeigle Dep. at 28:24–30:16.)
47. The outer perimeter is set up to protect the public from the threat of the person of interest by creating a buffer between the inner and outer perimeter. (Zeigle Dep. at 28:24–30:16.)
48. The patrol officers will then look to establish communication with the person of interest by making a phone call or some other means, with the goal of getting the person to come out peacefully. (Zeigle Dep. at 28:24–30:16.)
49. If officers still cannot establish communication, then the patrol officers will look at other avenues to resolution, such as activating the SWAT team. (Zeigle Dep. at 28:24–30:16.)
50. If the SWAT team is activated, they will respond and replace the perimeter personnel. (Zeigle Dep. at 30:17–31:11.)

51. Leaders on scene will then establish an emergency team, which consists of four to five officers that are in place and ready to go in case the subject comes out and surrenders or comes out and escalates the threat. (Zeigle Dep. at 30:17–31:11.)
52. If the situation involved is a “criminal barricade,” officers will commonly give the person of interest approximately five minutes to surrender, which they will communicate once they establish contact. (Zeigle Dep. at 30:17–31:11.)
53. A criminal barricade typically involves a situation where someone has committed a crime, fled the scene, and has now barricaded in some type of structure. (Zeigle Dep. at 34:4–10.)
54. The exact interval of time to give the person of interest a chance to surrender depends on the location, time of day, and nature of the criminal offence. Leaders on scene will consider these factors. (Zeigle Dep. at 32:7–16.)
55. Next, officers will try throwing something or using some basic force through a window or other opening, in order to get the person of interest to react, move to a more visible position, or establish some other kind of visual contact. (Zeigle Dep. at 31:12–32:6)
56. Next, officers will take further actions to establish visual contact by, for example, breaking out a window or two. (Zeigle Dep. at 32:19–33:11.)
57. The purpose of this step is to again elicit some type of response, with the ultimate goal of seeing if the person of interest is conscious and able to engage in dialog. (Zeigle Dep. at 32:19–33:11.)
58. Next, officers would introduce some intervention options, such as OC spray. (Zeigle Dep. at 36:6–25.)

59. Officers might also introduce other forces of anxiety manipulation, such as attaching a ram to an armored vehicle and breaking down the front door. (Zeigle Dep. at 38:22–14.)
60. This step is taken to again establish some visual contact into the structure and ultimately to establish some sort of dialog to facilitate a surrender. (Zeigle Dep. at 38:22–14.)
61. Next, if feasible, officers might introduce a robot to try to enter the structure and obtain further visual contact. (Zeigle Dep. at 39:15–40:4.)
62. If force is ultimately used to take the person of interest into custody, the ultimate force used depends on the nature of the scene and threat of harm involved. (Zeigle Dep. at 41:17–42:1.)
63. As a last resort, depending on the situation, officers may decide to enter the barricade. (Zeigle Dep. at 43:8–44:23.)
64. Throughout a criminal barricaded subject situation, the goal is to bring the person of interest into custody by also to keep the safety of the officers involved as a top priority. (Zeigle Dep. at 43:8–44:23.)
65. In general, if the person of interest is a barricaded suicidal subject, the response may look slightly different to the criminal barricaded subject described previously. (Zeigle Dep. at 34:11–36:4.)
66. In a barricaded suicidal subject situation, the initial patrol officers will again respond to the scene, assess the situation, and attempt to communicate. (Zeigle Dep. at 34:11–36:4.)

67. They would still establish an inner and outer perimeter, attempt to do a phone call or other communication, and potentially activate SWAT. (Zeigle Dep. at 34:11–36:4.)
68. However, a threat of self-harm is not a crime by itself, and if there is no threat of a crime on the scene, the patrol officers may decide to walk away from the suicidal person if that person does not surrender after some time. (Zeigle Dep. at 34:11–36:4.)
69. The Brown County Sheriff’s Office trains its SWAT team and general patrol personnel in the principles of the NTOA continuum. (Zeigle Dep. at 45:13–21.)

October 19, 2018 Incident

70. On October 19, 2018, Officers O’Brien and Wernecke were working the afternoon shift on patrol. (O’Brien Dep. at 24:13–19.)
71. At approximately 7:30 p.m., Officers O’Brien and Wernecke initiated a traffic stop involving the vehicle driven by Mr. Tubby. (O’Brien Dep. at 27:3–7.)
72. This traffic stop resulted in Mr. Tubby being taken into custody by Officers O’Brien and Wernecke due to possession of marijuana and an outstanding arrest warrant. (O’Brien Dep. at 27:25–28:20, 35:1–4.)
73. Mr. Tubby’s passenger was taken into custody by another officer. (O’Brien Dep. at 65:7–17.)
74. Officer Wernecke conducted a pat-down search of Mr. Tubby, placed him in handcuffs with his arms behind his back, took him to the back of his squad car, and left the scene with Officer O’Brien to take Mr. Tubby to the Brown County Jail (“the Jail”). (O’Brien Dep. at 28:24–35:4.)
75. Once in the sally port of the Jail, Officer Wernecke got out and went to the trunk of the squad to store his weapons and tools before entering the jail. Shortly afterwards,

- Officer O'Brien also got out of the squad and went to the back by the trunk to begin removing his weapons and tools. (O'Brien Dep. at 38:5–23.)
76. At the same time, Officer Wernecke went to the rear driver's side door to remove Mr. Tubby. Officer Wernecke asked Mr. Tubby to get out of the squad and reached in to help Mr. Tubby out. (O'Brien Dep. at 39:21–40:16.)
77. While storing his weapons, Officer O'Brien saw rapid movement or a shift inside the squad and saw Officer Wernecke flinch back and away. (O'Brien Dep. at 39:21–40:21.)
78. Officer O'Brien came around from the back to the side of the squad and looked in through the door to see Mr. Tubby sitting with his body reclined away from the door. (O'Brien Dep. at 40:22–42:11.)
79. Officer O'Brien observed that Mr. Tubby had his arms positioned in front of him and he his hands tucked where they could not be seen. (O'Brien Dep. at 40:22–42:24.)
80. Officer O'Brien then observed a cylindrical object, which appeared to be the barrel of a gun, pointing to the area of Mr. Tubby's chin. (O'Brien Dep. at 42:25–43:19.)
81. Based on this observation, Officer O'Brien believed that Mr. Tubby possessed a firearm in his hand underneath his shirt. (O'Brien Dep. at 42:25–43:19.)
82. Officer O'Brien stated to Officer Wernecke, "I think he's got a gun," and both officers retreated to cover. (O'Brien Dep. at 58:2–25.)
83. Officer O'Brien radioed dispatch that they were inside the sally port and that Mr. Tubby has something in his hand. (O'Brien Dep. at 65:8–67:22.)
84. Officer O'Brien told various responding officers that he thought Mr. Tubby had a gun. (Mleziva Dep. at 21:5–15, 36:10–37:4; Winistorfer Dep. at 28:18–29:4, 48:5–9;

- O'Brien Dep. at 73:1–20, 74:20–75:6; Zeigle Dep. 18:17–20, 85:7–11; N. Allen Dep. at 29:22–30:8.)
85. Lt. Zeigle was on duty that night, working in the Sheriff's Office building, which is in a separate location than the Jail. (Zeigle Dep. at 17:3–5.)
86. Lt. Zeigle communicated with Lt. Buckman of the Green Bay Police Department who said a suspect, identified as Mr. Tubby, was in the back of a GBPD squad car and had a gun to his head. (Zeigle Dep. at 14:5–16, 15:5–16:1.)
87. Lt. Zeigle ordered Sgt. Katers to respond to the scene. (Zeigle Dep. at 16:16–17:2.)
88. Lt. Zeigle then responded to the scene and, on his way, spoke with Lt. Allen who briefed him on the situation. (Zeigle Dep. 16:3–18:20.)
89. Prior to Lt. Zeigle's arrival on scene, City of Green Bay officers had already requested additional tactical resources to the scene, including an armored response vehicle called a "BearCat" and 40 millimeter munitions that can fire less-lethal rounds including wooden dowels. (N. Allen Dep. at 31:2–19.)
90. There were also multiple officers on scene from the City of Green Bay and the Brown County Sheriff's office who were acting in their capacities as patrol officers, but also had tactical training and experience. (Zeigle Dep. at 122:7–13.)
91. For instance, in addition to Lt. Zeigle, Sgt. Katers, Lt. Allen, Officer Salzmann, Officer Allen, Lt. Zeigle, and Officer O'Brien were all SWAT team members. (Katers Dep. at 11:24–12:4, 18:5–7, 69:2–7; O'Brien Dep. 90:2–25; E. Allen Dep. at 11:19–24; N. Allen Dep. at 11:19–24.)

92. Once on the scene, Lt. Zeigle met with and established a plan with Lt. Allen and Officer Allen to remove Mr. Tubby from the back of the squad. (Zeigle Dep. at 19:2–10, 51:15–54:17.)
93. Lt. Zeigle did not agree with the initial plan proposed by Lt. Allen and Officer Allen because, in Lt. Zeigle’s view, that plan skipped important steps in the NTOA decision-making continuum, leading him to propose his own version of the plan based on his training and experience. (Zeigle Dep. at 19:20–23:15, 18:19–25, 45:22–46:17, 51:15–55:3.)
94. Lt. Zeigle’s testified that his decision-making was primarily guided by two factors: first, it was aimed at achieving the goal of bringing Mr. Tubby safely into custody; second, it was based on his extensive training and experience at both the state and national levels specifically relating to law enforcement contacts with barricaded suspects believed to be armed, like Mr. Tubby. (Zeigle dep. at 28:24–45:12, 149:16–150:5.)
95. 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. (Zeigle Dep. at 122:2–18.)
96. He observed that there were officers on scene with perimeters established, and he was aware that Mr. Tubby was not constructively communicating with officers on scene. (Zeigle Dep. at 117:1–18.)
97. Lt. Zeigle determined that the best way to handle the situation was to treat it like a barricaded situation. (Zeigle Dep. at 51:17–52:8.)

98. Lt. Zeigle noted that he could not get a visual on Mr. Tubby because the windows were fogging on the squad car. (Zeigle Dep. at 123:14–124:4)
99. Lt. Zeigle thought it best to break the back window of the squad to establish better visibility and offer better communications. (Zeigle Dep. at 51:17–52:8, 123:14–124:4)
100. If Mr. Tubby did not surrender or establish verbal communication, Lt. Zeigle's plan following the breakout of the squad's rear window was to introduce OC and see what type of reaction they would get. This would also give Mr. Tubby an opportunity to establish a dialog and surrender. (Zeigle Dep. at 52:16–53:9.)
101. In Lt. Zeigle's view, whenever OC is deployed in an enclosed environment, it is important to give that individual a way out, in part, so that they are not flooded in what could become a closed environment. (Zeigle Dep. at 52:16–53:17.)
102. To Lt. Zeigle, it was important to break out the rear windshield of the squad car compared to the rear-side window because there were bars in the side window and no bars on the rear windshield, thereby providing a way out if OC was introduced. (Zeigle Dep. at 52:16–53:9.)
103. Lt. Zeigle's plan was that by deploying the OC and leaving Mr. Tubby a way out, Mr. Tubby would exit through the rear windshield and surrender. (Zeigle Dep. at 54:13–17.)
104. Lt. Zeigle communicated this plan with various officers on the scene, including Lt. Allen, Officer Allen, and Sgt. Katers. (Zeigle Dep. at 54:23–55:14.)

105. No one from the Green Bay Police Department communicated to Lt. Zeigle that they were concerned about introducing OC spray into the vehicle. (Zeigle Dep. at 54:1–22.)
106. Lt. Zeigle felt that his plan for extracting Mr. Tubby from the squad car and bringing him into custody was consistent with his extensive training and experience with barricaded subjects. (Zeigle Dep. at 113:6–21, 149:16–150:5, 162:9–163:8.)
107. Lt. Zeigle also believed that his plan was the safest for the officers on scene and the safest for Mr. Tubby to enter custody. (Zeigle Dep. at 149:2–11.)
108. As part of the plan, an arrest team was formed, consisting of Sgt. Katers, and Officers Salzman, Allen, Lynch, Merrill, and Christensen. These officers then moved the Bearcat armored vehicle into position by backing into the sally port next to the squad car. (Katers Dep. at 32:21–33:2; N. Allen Dep. at 81:2–11; E. Allen Dep. at 48:12–22)
109. Officer Allen went into the turret of the Bearcat armored vehicle and shot out the back window of the squad with a 40mm munitions launcher with wooden dowel rounds. (O'Brien Dep. at 106:6–11; E. Allen Dep. at 7:14-19.)
110. From the passenger's seat in the Bearcat armored vehicle, Sgt. Katers cleared the remaining glass from the back window with a glass break pole to remove the broken glass that was still obscuring Mr. Tubby. (O'Brien Dep. at 107:17–24.)
111. Officer Allen gave multiple verbal commands to Mr. Tubby to show his hands. (O'Brien Dep. at 112:19–113:14.)

112. Since there was no reaction from Mr. Tubby, Officer Allen then proceeded to the next course of action and deployed OC into the back of the squad car. (Zeigle Dep. at 130:5–15.)
113. OC spray is a tool that could be used based on the subject's actions to overcome active resistance or its threat, or to gain compliance from an actively resisting suspect. (Jansen Dep. at 22:2–11; Zeigle Dep. at 37:1–25).
114. Shortly afterwards, Mr. Tubby came out of the back window in a rapid motion and stood on the back of the squad trunk with his right hand under his shirt. (Zeigle Dep. at 77:13–78:1.)
115. An officer deployed a less-lethal beanbag shotgun in an attempt to stop Mr. Tubby and gain compliance. (N. Allen Dep. at 94:11–15.)
116. Mr. Tubby jumped off the trunk and landed on the ground next to the squad. (Zeigle Dep. at 79:5–11.)
117. Mr. Tubby then rose and ran towards officers standing near the open sally port door. (N. Allen Dep. at 94:16–95:4.)
118. At this time, Officer Salzmann deployed his K-9 unit in an attempt to stop Mr. Tubby. (Zeigle Dep. at 79:25–80:12.)
119. Officers O'Brien, Werenecke, Denny, and Deputies Zeigle, Mleziva, Winistorfer, among others, were standing in various positions near the open sally port door and perceived themselves and the officers around them to be in imminent danger of death or serious bodily injury. (Zeigle Dep. at 87:5–21; N. Allen Dep. at 94:16–95:4; Winistorfer Dep. at 49:11–50:16; O'Brien Dep. at 143:20–144:16; Mleziva Dep. at 36:10–37:4.)

120. Deputies Mleziva and Winistorfer relied on information they learned from dispatchers and their fellow law enforcement officers on scene, and believed that Mr. Tubby was armed with a firearm. (Mleziva Dep. at 21:5–15, 36:10–37:4; Winistorfer Dep. at 28:18–29:4, 48:5–9.)
121. Deputy Winistorfer was standing in the open sally port area and perceived Mr. Tubby to be running directly at him with a firearm. (Winistorfer Dep. at 46:21–47:4.)
122. Deputy Winistorfer feared that he was the last line of defense as exterior scene security, and if Mr. Tubby got past him then other individuals or citizens in the community could be in danger. (Winistorfer Dep. at 49:11–50:16.)
123. Deputy Winistorfer feared that other law enforcement officers in the area were also in imminent danger of death or serious bodily harm. (Winistorfer Dep. at 49:11–50:16.)
124. Deputy Winistorfer's perception was based not only on his knowledge that Mr. Tubby was believed to have a firearm, but also on his firsthand observations of Mr. Tubby running directly at him, the inability of non-lethal force to stop Mr. Tubby, and his inability to see Mr. Tubby's hands because they were under his shirt. (Winistorfer Dep. at 46:21–47:4.)
125. Officer O'Brien acted upon his belief that multiple law enforcement officers in the area were in imminent danger of death or serious bodily harm and fired his weapon at Mr. Tubby. (O'Brien Dep. at 143:20–144:16.)
126. Officer O'Brien stepped in front of Deputy Winistorfer immediately before firing his weapon. (Winistorfer Dep. at 55:20–56:5.)
127. At the time that Officer O'Brien fired his weapon, Deputy Mleziva was 15 to 20 feet away from Officer O'Brien. (Mleziva Dep. at 34:8–23.)

128. Even from that distance, Deputy Mleziva perceived himself to be in imminent danger of death or serious bodily harm. (Mleziva Dep. at 36:10–37:4.)
129. Mr. Noble does not criticize the officers on the scene for believing that Mr. Tubby may have been armed if told by Officer O’Brien that he was armed. (Noble Dep. at 48:10–14.)
130. Once Mr. Tubby was down, officers at the scene radioed for medical assistance and nurses attempted lifesaving aid measures of Mr. Tubby. (Katers Dep. at 43:3–7.)

Notice of Claim

131. Plaintiffs served two Notice of Claim and Injury regarding this incident pursuant to Wis. Stat. §893.80 on January 25, 2019, and March 7, 2019. *See* (Sparks. Decl. ¶¶ 11–12, Ex. J–K.)
132. Plaintiffs filed their action on January 24, 2019. (Compl., ECF No. 1.)
133. Neither notice of claim contains any allegations or other written notice that Plaintiffs intended to pursue a claim against Brown County to hold it liable for the alleged acts of City of Green Bay Police Officer O’Brien by operation Wis. Stat. § 66.0313 or other state law. *See* (Sparks. Decl. ¶¶ 11–12, Ex. J–K.)

Contention Interrogatory Responses

134. Plaintiffs were served with contention interrogatories seeking information in support of their claim that they are currently sustaining injury or there is a substantial risk that they will in the future sustain injury caused by the County Defendants. (Sparks Decl. ¶ 13, Ex. L, Pls.’ 2d Supp. Answers and Resp. to County Defendants’ 2d Set of Written Interrogatories, September 1, 2020 [hereinafter “Pls.’ Interr. Resp.”].)

135. In response to each contention interrogatory seeking evidentiary support for Plaintiffs' contention that they are currently sustaining injury and/or that there is a substantial risk they will sustain injury caused by Brown County's policies, lack of policies, training, or lack of training, Plaintiffs provided the following response:

Plaintiff Wunderlich is a resident of Brown County. Plaintiffs Sue and Arlie Doxtator are residents of neighboring Outagamie County and frequently visit Brown County. Plaintiffs all have relatives that reside in, or frequently visit, Brown County. Some of these relatives have had contact, and have a substantial risk of having further contact, with law enforcement. For example, the record already shows that Plaintiff Wunderlich's sister, Theresa Rodriguez, was taken into custody at the Brown County jail on October 19, 2019. Therefore, there is a substantial risk that Plaintiffs will in the future sustain injury as a result of Brown County's unconstitutional policies and practices, either in their personal capacity or again as the representative of a family member.

....

[T]he record shows that Plaintiff Sarah Wunderlich's sister, Theresa Rodriguez, was arrested and in custody at the Brown County Jail in July 2020.

(Pls.' Interr. Resp. Nos. 9–11.)

Dated this 2nd day of November, 2020.

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