UNITED STATES DISTRICT COURT
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-137

vs.

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

Defendants.

DEFENDANTS' MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

Defendants City of Green Bay, Andrew Smith and Erik O'Brien, by their attorneys, Gunta Law Offices, S.C., submit this Memorandum in Support of their Motion for Summary Judgment, seeking dismissal of Plaintiffs' claims in their entirety.

PREFACE

Police officers are tasked with making split-second decisions to use deadly force in dynamic, rapidly-evolving and dangerous situations. For this reason, courts have consistently warned against seconding guessing those decisions. *Graham v. Connor*, 490 U.S. 386 (1989). This case arises out of one of those situations.

On the night of October 19, 2018, what started with a routine traffic stop developed into a dangerous situation in the Brown County Jail sally port involving Jonathon Tubby, who barricaded himself in a police squad, pretended to have a gun concealed under his shirt and made statements suggesting that he would use it. Officers issued commands to Tubby to exit the vehicle, but he refused to do so. Officers issued commands for Tubby to show his hands and demonstrate he was unarmed, and he refused to do so. Tubby was given opportunities to surrender, he refused to do so. The stand-off in the sally port reached a peak of danger after Tubby exited squad 42 and rushed towards officers with his hands still concealed. Ultimately, after exhausting all other use of force options, including OC spray, less-lethal beanbag rounds and a K9, Officer O'Brien shot Tubby to stop the threat he posed. It was later determined that Tubby was only pretending to have a gun.

Plaintiffs, administrators of Tubby's Estate, brought this suit against the City of Green Bay, Chief of Police Andrew Smith and Police Officer Erik O'Brien (Green Bay Defendants); and Brown County, Brown County Sheriff Todd J. Delain, Deputy Sheriffs Joseph Mleziva and Nathan Winisterfer, Patrol Lieutenant Thomas Zeigle, and Jail administrator Heidi Michel (Brown County Defendants) for their alleged involvement in the events of October 19, 2018. Specifically, the Complaint alleges claims for civil damages and injunctive relief pursuant to 42 U.S.C. § 1983 based upon violations of Tubby's rights under the Fourth, Eighth and Fourteenth Amendments to the United States Constitution. Plaintiffs also assert state law claims for negligence and battery.

The Green Bay Defendants now move for summary dismissal of Plaintiffs' claims on the merits and under the doctrine of qualified immunity. Dismissal of Plaintiffs' state law claims is also warranted under Wis. Stat. §§ 839.80(4) and 893.80(5).

BACKGROUND

All relevant facts are set forth in Defendants' Proposed Findings of Fact (hereinafter DPFF). The following is a brief summary of those facts.

On October 19, 2018 at approximately 7:42 p.m., Green Bay Officer Wernecke and his field training Officer Erik O'Brien were on patrol when they attempted a traffic stop of a vehicle with an unregistered license plate that had driven through a red light. (DPFF 15) The vehicle did not stop and instead turned into a hotel parking lot and continued to drive for about a minute before coming to a stop. (DPFF 16) The occupants initially gave false identifications, but a records check eventually identified them as Jonathon Tubby and his passenger, Theresa Rodriguez.(DPFF 17, 24-25) Both had active arrest warrants and marijuana in the vehicle. (DPFF 21, 27, 33) Rodriguez told the officers that when Tubby picked her up he appeared upset, and that he argued with his girlfriend on the phone while he drove through the parking lot. (DPFF 18-19)

Officer Wernecke handcuffed Tubby behind his back and conducted a pat down search, while Officer O'Brien observed. (DPFF 22) Tubby was then secured in the back of squad 42 while officers waited next to Tubby's vehicle for a tow.(DPFF 27-29) Prior to departing for the jail and while handcuffed in the back of squad 42, Tubby maneuvered his body and moved his hands to the front of his body and underneath his shirt. (DPFF 29-32) Tubby was hunched forward and quiet when Officers O'Brien and Wernecke returned to squad 42. (DPFF33-35) Tubby and Rodriguez were transported separately to the Brown County Jail. (DPFF 27) Other than providing a false identification, Tubby was cooperative during the initial arrest and transport to the jail. (DPFF 34-35)

However, when the officers arrived at the sally port everything changed. Officer O'Brien and Officer Wernecke parked in the sally port and placed their gear and weapons in the trunk of squad

42 pursuant to the jail's policy that officers are not to bring weapons into the jail. (DPFF 36-38) Officer Wernecke then opened the door to remove Tubby and immediately became concerned. (DPFF39) Officer Wernecke observed for the first time that Tubby had repositioned himself in the back seat and his hands were no longer behind his back where they had been handcuffed, but were now in front of his body and concealed under his shirt. *Id.*

Officer Wernecke ordered Tubby to exit squad 42, Tubby refused. Officer O'Brien came around to the back door of the squad to see why Tubby was not exiting.(DPFF 40-42) Officer O'Brien looked into the rear door and observed what he believed to be the barrel of a gun protruding from Tubby's shirt underneath his clothing, pointed up at his chin. (DPFF43-44) Tubby looked at Officer O'Brien and stated, "I'll fucking do it." Officer O'Brien believed Tubby was armed and suicidal. (DPFF45) Officer O'Brien slammed the door to contain the threat, retreated to a position of cover, and called for backup. (DPFF 46-48,51)

While waiting for backup, squad 42's windows began to fog and officers could not see into the back seat. (DPFF 54) Officer O'Brien believed Tubby had a firearm and yelled to put it down. Tubby responded, "Fuck you. I'll do it." (DPFF55-56, 58) Officer O'Brien instructed Tubby to wipe the windows down. At one point, Tubby did wipe the window down, which signaled to Officer O'Brien that Tubby could hear him. (DPFF 59)

Numerous law enforcement officers from the Green Bay Police Department and the Brown County Sheriff's Office responded to the sally port. (DPFF 57, 60) Brown County Lieutenant Thomas Ziegle was the ranking officer with regards to decisions made in the sally port in the Brown County Jail. (DPFF 61, 69) Lieutenant Nate Allen was a SWAT supervisor for the GBPD and also responded to the sally port. (DPFF 62-63) GBPD Lt. Allen and BC Lt. Ziegle discussed their

respective plans to extract Tubby from squad 42. (DPFF 64-68) Ultimately, Lt. Ziegle asserted jurisdictional control over the sally port and, although Lt. Nate Allen disagreed with the plan, the GBPD officers assisted in executing Lt. Ziegle's plan. (DPFF 68-73)

During the execution of Lt. Ziegle's plan, a BearCat armored vehicle was positioned next to squad 42, the trunk was closed, and the rear window was broken out so that officers could get a visual and make contact with Tubby. (DPFF 75-83) After breaking out the rear window, GBPD Officer Eric Allen was able to see Tubby and began issued him commands to show his hands. (DPFF 83-89) Tubby refused to do so, and ultimately OC spray was introduced into the rear window. (DPFF 90-91) Immediately Tubby jumped through the rear window with his hand still concealed under his shirt and the situation the situation escalated rapidly. (DPFF 92-93) Tubby was shot with a bean bag round and a K9 officer was released, but neither use of force could subdue him. (DPFF 94-99)

As Tubby exited the rear window and leapt onto the trunk of the squad, Officer O'Brien was outside of the open sally port door in a position of cover. (DPFF 100-102) Officer O'Brien still believed Tubby was armed. (DPFF 103-105) As Tubby rushed towards the sally port door with his hands still concealed under his shirt, Officer O'Brien heard a "pop" sound. Officer O'Brien believed Tubby was firing the gun he had concealed under his shirt. Officer O'Brien fired at Tubby and Tubby fell to the ground. (DPFF 106-108) Approximately 10 seconds elapsed between Tubby exiting the squad and Officer O'Brien's shots. DPFF 109)

Officers using a shield as cover approached Tubby with weapons drawn due to the belief that Tubby was armed and still posed a threat. (DPFF 123-124) It was ultimately determined that Tubby was unarmed and had only pretended to have gun. (DPFF125) Life saving measures were performed, but Tubby died on scene. (DPFF 126)

Investigators from Wisconsin Department of Justice Division of Criminal Investigation (DCI) arrived to the sally port within hours of the shooting. (DPFF127) The DCI concluded its investigation and turned the investigative file over to the Brown County District Attorney, who declined to press criminal charges and concluded that Officer O'Brien was justified in using deadly force against Tubby. (DPFF 132-133)

An autopsy and toxicology of Tubby's femoral blood and urine indicated positive for the presence of Methamphetamine, THC, Methadone, Nicotine, Cotinine, Amphetamine, Alprazolam, Fentanyl, Norfentanyl, Morphine, Codeine, and Hydromorphone. (DPFF 128-131)

DISCUSSION

Summary Judgment Standard

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party has the initial burden to demonstrate that it is entitled to judgment as a matter of law and that no reasonable jury could reach a verdict in favor of the non-moving party. *Celotex*, supra, 477 U.S. at 323. Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. *Matsushita Electronics, Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In making its determination, the court must view the record in the light most favorable to the non-moving party, but "only if there is a 'genuine' dispute as to those facts." *Id.* at 587. The mere existence of some alleged factual dispute will not defeat summary judgment. The requirement is there be no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986).

I. Officer O'Brien's Use of Deadly Force Did Not Violate Tubby's Fourth Amendment Right.

A police officer's use of deadly force on a suspect is a seizure within the meaning of the Fourth Amendment, so the force must be reasonable to be constitutional. *Scott v. Edinburg*, 346 F.3d 752, 755 (7th Cir. 2003). The Supreme Court set out the fundamental framework for analyzing excessive force claims in *Tennessee v. Garner*, 471 U.S. 1(1985), and *Graham v. Connor*, 490 U.S. 386 (1989). *Graham* and *Garner* stand for the proposition that when a police officer reasonably believes a suspect's actions place "him, his partner, or those in the immediate vicinity in imminent danger of death or serious bodily injury, the officer can reasonably exercise the use of deadly force." *Sherrod v. Berry*, 856 F.2d 802, 805 (7th Cir. 1988); *Scott*, 346 F.3d at 757.

As a form of defense of others, a police officer also may constitutionally use deadly force to prevent escape.

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Garner, 471 U.S. at 11–12.

Reasonableness is not based on hindsight, but rather is determined considering the perspective of the officer on the scene, allowing "for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. 386, 396–97; *Scott*, 346 F.3d at 756. The test for reasonableness under the Fourth Amendment

requires an analysis of the totality of the circumstances assessed "from the perspective of a reasonable officer on the scene, rather than with 20/20 hindsight." *Graham*, 490 U.S. at 97. This perspective is critical.

In seeking to understand the perspective of the officer on the scene, Courts consider: the information known to the officer at the time of the encounter; the duration of the encounter; the level of duress involved; "and the need to make split-second decisions under intense, dangerous, uncertain, and rapidly changing circumstances." *Horton v. Pobjecky*, 883 F.3d 941, 950 (7th Cir. 2018); *see also Graham*, 490 U.S. at 396–97. Finally, "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id*. at 397.

To succeed on their excessive force claim, Plaintiffs must show Officer O'Brien's use of force was objectively unreasonable from the perspective of a reasonable officer on the scene under the totality of the circumstances. *Id*. at 396–97. Applying the principles above to the facts of this case, it is clear that Officer O'Brien was justified in using deadly force to stop the threat posed by Tubby.

A. No Reasonable Jury Could Find That Officer O'Brien Violated Tubby's Fourth Amendment Rights Under the Circumstances.

An assessment of Officer O'Brien's use of force requires careful attention to the information and perception that Officer O'Brien gathered during his interactions on the night of October 19, 2018 prior to shooting. *See Cty. of Los Angeles, Calif. v. Mendez*, 137 S. Ct. 1539, 1546 (2017). The record demonstrates that Officer O'Brien personally observed Tubby holding a gun under his shirt up to his chin. (DPFF 43-44) Tubby then stated "I'll do it" suggesting he would use the gun. (DPFF

45) Officer O'Brien perceived Tubby to be an armed, barricaded, suicidal individual. (DPFF 46) Based on his training, Officer O'Brien closed the squad door to contain the threat and retreated to a position of cover. (DPFF 47-48) Officer O'Brien notified Officer Wernecke that Tubby had a gun, and communicated that information with BCSO jail staff. (DPFF 48, 52-53) Officer Wernecke indicated he must have missed something during the search. (DPFF 49) Regardless, based on Officer O'Brien's own observations, he believed that Tubby was armed. (DPFF 44-48)

When Officer O'Brien radioed dispatch for backup he believed Tubby was armed. (DPFF 52) Officer O'Brien issued commands to Tubby to wipe the window down, which Tubby did. This signaled to O'Brien that Tubby could in fact hear what the officers were saying, but was choosing not to respond. (DPFF59) Tubby continued to yell "I'll fuckin' do it at the first fuckin' person to open this door," and then, "I'm not goin." (DPFF 55-56, 58) After the BearCat arrived, Tubby continue to refuse commands to show his hands and to demonstrate to officers that he was not armed. (DPFF 75-91)

Most relevant however, is the information and perception of Officer O'Brien at the moment that he decided to use deadly force. *Muhammed v. City of Chi*., 316 F.3d 680, 683 (7th Cir. 2002).

1. Officer O'Brien believed that Tubby was armed and concealing a gun under his shirt. (DPFF 103,105)

2. Officer O'Brien observed Tubby erupting from the rear window of the squad, with his hands still concealed under his shirt. (DPFF 100-101)

3. Officer O'Brien observed Tubby rushing towards the direction of the open sally port door where several law enforcement officers were stationed, in an upright position, leaning slightly forward with his hands in front of his body. (DPFF 102)

4. Officer O'Brien heard a "pop" sound and believed Tubby shot the gun he was concealing under his clothing. (DPFF 106)

5. As Tubby was descending, Officer O'Brien observed him twist his body to the left and look across his body toward the officers that were located behind squad 53. Tubby's right hand was still concealed and pointed right at the officers. (DPFF107-108)

6. Officer O'Brien perceived Tubby moving in a target acquisition manner, meaning that he was moving in a manner to acquire a target to shoot. (DPFF 108)

7. Officer O'Brien believed that Tubby was armed and posed an imminent threat at the moment he fired at Tubby. (DPFF112-114)

Reasonableness in this context is analyzed from "the perspective of a reasonable officer on the scene, rather than with 20/20 hindsight." *Graham*, 490 U.S. at 97. Not only did Officer O'Brien articulate why he reasonably perceived Tubby was posing a deadly threat, but his perception is also supported by the testimony of multiple law enforcement officers on scene during the critical incident response who also perceived Tubby as posing a deadly threat. (DPFF 114-122) Most notably, Brown County Sheriff's Deputy Bradley Dernbach, who testified that if Officer O'Brien would not have drawn and shot Tubby, he would have. (DPFF 122)

The critical Fourth Amendment inquiry in this case is whether at the moment Officer O'Brien fired his weapon, he reasonably perceived that Tubby posed an immediate threat to him or others. As demonstrated by the factual record and most importantly, the perception of the on-scene officers, Officer O'Brien did reasonably perceive Tubby as a threat, therefore the use of deadly force was constitutionally permissible. *See DeLuna v. City of Rockford*, 447 F.3d 1008, 1011–12 (7th Cir. 2006) (an officer's use of deadly force was reasonable when suspect said "I've got something for you. You are going to have to kill me," and refused to raise his hands or stop walking toward the officer). See, e.g., *Henning v. O'Leary*, 477 F.3d 492, 495–96 (7th Cir. 2007) (concluding deadly force was reasonable where suspect resisted arrest).

B. The Court Must Not Apply 20/20 Hindsight And Second Guess Officer O'Brien's Actions.

Plaintiffs allege that as Tubby fell to the ground his hands were "clearly visible and he was clearly unarmed." (Dkt. 83 ¶ 23) This allegation is contrary to the evidence in the case, notably the perception of the on-scene officers from both the Brown County Sheriffs Office and Green Bay Police Department. (DPFF 111-122) Ultimately it was determined that Tubby was only pretending to have a gun.(DPFF 124-126) Regardless, the fact that Tubby was only pretending to have a gun is irrelevant to the analysis of reasonableness, as courts must refuse to view the events through hindsight's distorting lens. *Graham*, 490 at 396–97. "When addressing the use of deadly force, the court considers whether a reasonable officer in the circumstances would have probable cause to believe that the [person] poses an immediate threat to the safety of the officers or others." *Sanzone v. Gray*, 884 F.3d 736, 740 (7th Cir. 2018). If the person of interest threatens the officer with a weapon, deadly force may be used, because the risk of serious physical harm to the officer has been shown. *Id.*

Further, any suggestions that Officer O'Brien could have or should have undertaken more investigation to determine whether or not Tubby was actually armed or just presenting to have a weapon is similarly irrelevant. (DPFF 110) Contrary to Plaintiffs' suggestion, the Fourth Amendment does not prohibit creating unreasonably dangerous circumstances in which to effect a legal arrest of a suspect. *Carter v. Buscher*, 973 F.2d 1328, 132 (7th Cir. 1992). The Fourth Amendment prohibits unreasonable seizures not unreasonable, unjustified or outrageous conduct in general. *Id*.; *e.g., Tom v. Voida*, 963 F.2d 952, 956 (7th Cir. 1992); *Cameron v. City of Pontiac*, 813 F.2d 782, 784 (6th Cir. 1987). Therefore, pre-seizure conduct is not subject to Fourth Amendment scrutiny**.** *Carter*, 973 F.2d at 1332.

Moreover, the Fourth Amendment does not require "the use of the least or even a less deadly alternative as long as the use of deadly force is reasonable under *Tennessee v. Gardner* and *Graham v. Connor* ...." *Plakas v. Drinski*, 19 F. 3d 1143, 1149 (7th Cir. 1994). And this is so whether or not the targeted person suffers from a mental illness—the critical consideration is whether he or she poses an immediate threat to the officers or others. *See King v. Hendricks Cty. Commissioners*, 954 F.3d 981, 985 (7th Cir. 2020).

The facts taken as a whole, without benefit of 20/20 hindsight, show that Tubby presented an immediate threat, thus Officer O'Brien use of deadly force was constitutionally justified.

II. Officer O'Brien is Entitled To Qualified Immunity

A. Legal Standard

The doctrine of qualified immunity "balances two important interests the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The doctrine shields government officials from civil liability insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Id*. In the context of the Fourth Amendment, a police officer is entitled to qualified immunity where clearly established law does not show that the seizure violated the Fourth Amendment. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

Qualified immunity is an affirmative defense, but plaintiffs carry the burden of defeating it once it is raised. *Archer v. Chisholm*, 870 F.3d 603, 613 (7th Cir. 2017). "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011); *see Pearson v. Callahan*, 555 U.S. at 231

(protection of qualified immunity applies regardless of whether government official's error is mistake of law, mistake of fact, or mistake based on mixed questions of law and fact. Therefore, if reasonable minds would differ as to whether the official's conduct was clearly illegal, then immunity should attach. *See*, e.g., *Malley v. Briggs*, 475 U.S. 335, 341(1986).

The Supreme Court has explained that the clearly established right must be defined with specificity, a principle which is "particularly important in excessive force cases." *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 503 (2019) (*per curiam*) (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018)).

> Specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue.
>
> It does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.
>
> *See id.*

Among the issues for which governing precedent must account in excessive force cases are the actions of the individual claiming wrongdoing and the time the officer had to react to the situation. *See, e.g., Kisela*, 138 S. Ct. at 1153 (holding that qualified immunity was required for officer who shot individual after having "mere seconds to assess the potential danger" posed by individual to their person, who was observed "hacking a tree with a large kitchen knife," and who had "failed to acknowledge at least two commands to drop the knife"); *Dockery v. Blackburn*, 911

F.3d 458, 461 (7th Cir. 2018) (affirming repeated use of Taser where plaintiff "kicked, attempted to stand up, and otherwise resisted commands to submit to their authority"); *see also, e.g., Mason-Funk v. City of Neenah*, 895 F.3d 504, 510 (7th Cir. 2018) ("To drive home the point, it is worth recounting what occurred in the short span of six minutes. Flathoff had continuously made threats that he would kill the hostages...."); *cf.*, e.g., *Graham*, 490 U.S. at 397 (1989) ("[P]olice officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.").

B. Officer O'Brien's Use of Force Did not Violate Clearly Established Law.

Garner and *Graham*, which set forth the long-established factors to consider in evaluating a claim for excessive force, do not by themselves create clearly established law. *Kisela*, 138 S. Ct. at 1153. Nonetheless, those factors provide the appropriate starting place for evaluating the reasonableness of Officer O'Brien's actions. In both *Tennessee v. Garner*, 471 U.S. 1 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989), the Supreme Court addressed the constitutionality of excessive and deadly force. In *Garner*, the Court held that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." 471 U.S. at 11. In *Graham*, the Court held that evaluating the reasonableness of an officer's use of force "requires careful attention to the facts and circumstances of each particular case, including ... whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." 490 U.S. at 396.

No clearly established law rendered Officer O'Brien's use of deadly force to stop the active threat posed by Tubby–who he believed to be armed and charged in the direction of officers–

unreasonable. *See Ford v. Childers,* 855 F.2d 1271, 1275 (7th Cir. 1988) (under the objective reasonableness standard, if it appears that an individual poses a serious threat of death or significant bodily harm, deadly force may be used if any misinterpretation of what appeared to be the case was reasonable under the particular facts and circumstances); *Henning,* 477 F.3d at 495("Deadly force…is reasonable where an officer has probable cause to believe the suspect poses a danger of serious bodily harm, such as when the officer believes the suspect has a weapon or has committed a violent crime."); *Conley-Eaglebear v. Miller,* (No. 1:2014cv1175 (E.D. Wis. 2016)(officer shooting suspect in back as he was beginning to turn toward officer with a gun in his hand was justified in doing so because the suspect posed a serious threat of physical harm in making this movement).

The fact that Tubby was ultimately determined to be unarmed does not bar Officer O'Brien's entitlement to qualified immunity. In *Mason-Funk v. City of Neenah*, the Seventh Circuit affirmed summary judgment in favor of two police officers who mistakenly shot and killed a hostage who was attempting to escape a gunman during a stand-off. 895 F.3d at 507-510. There the Court concluded that the officers made a mistake, a tragic mistake, but it does not follow that they violated the hostage's Fourth Amendment rights. *Id.* Police have been held justified in using deadly force when they have reason to believe that a suspect is armed, even if it later turns out they were mistaken. *Slattery v. Rizzo*, 939 F.2d 213 (4th Cir. 1991) (holding deadly force reasonable where officer could have had probable cause to believe that suspect posed deadly threat even though suspect turned out to be unarmed); *see also Sherrod v. Berry*, 856 F.2d 802 (7th Cir. 1988) (*en banc*) (holding that under circumstances of the case, fact that suspect was unarmed was irrelevant to excessive force claim where officer reasonably believed he was armed).

Officer O'Brien believed Tubby to be an armed, barricaded, suicidal subject who was threatening to shoot himself. (DPFF 46,113) O'Brien used his training to contain the threat and get to a position of cover. (DPFF 47-48, 137-138) The fact that Officer O'Brien interpreted Tubby's "I'll do it" statement as Tubby being suicidal, does not negate the potential deadly threat that an armed Tubby posed as a suicidal person can quickly become homicidal. (DPFF 45) Although law enforcement officers may not be entitled to qualified immunity if they use deadly force against a suicidal subject who did not pose a threat to others, that is simply not the case here. *C.f.*, *Williams v. Indiana State Police Dep't*, 797 F.3d 468 (7th Cir. 2015).

Officer O'Brien did not violate clearly established law when he used deadly force against a suspect he believed to be armed, even if it was later determined the suspect was only pretending to be armed. *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). To the contrary, the well established law in the Supreme Court and this Circuit demonstrates that law enforcement officers can reasonably exercise the use of deadly force if another officer, or those in the immediate vicinity in imminent danger of death or serious bodily injury. *Siler v. City of Kenosha*, 957 F.3d 751 (7th Cir. 2020).

Officer O'Brien is entitled to qualified immunity from Plaintiff's Fourth Amendment claims.

III. All Claims Against the City of Green Bay and Chief Smith Must Be Dismissed.

Plaintiffs assert various Section 1983 claims against the City and Chief Smith alleging a failure to train its officers relating to removing non-compliant suspects from squad cars (Third Cause of Action, Dkt. 83, ¶¶ 43-49), having a persistent and widespread custom and practice of using excessive force often against unarmed individuals (Fourth Cause of Action, Dkt. 83, ¶¶ 50-61), and for creating a danger that resulted in the death of Tubby (Fifth Cause of Action, Dkt. 83, ¶¶ 62-71).

Because Officer O'Brien did not violate Tubby's constitutional rights, there is no basis for

Section 1983 liability against the remaining Chief Smith or the City. *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571, 1573, 89 L.Ed.2d 806 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point."). Unlike the Eighth Amendment context, where courts have said that an agency may be subject to *Monell* liability for deliberate indifference at the policy level to prisoners' serious medical needs even when its individual agents did not act with deliberate indifference, see *Glisson v. Indiana Dep't of Corrs*., 849 F.3d 372, 378 (7th Cir. 2017), a government entity cannot passively commit a Fourth Amendment violation.

Even if Plaintiffs could demonstrate that Tubby was deprived of a constitutional right–which they cannot–any claim against the City or Chief Smith must fail because there is no evidence that the execution of a policy, practice or custom caused the alleged deprivation. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). In order to prove liability on the part of the City or Chief Smith under *Monell*, Plaintiffs must prove "either (1) an express policy that, when enforced, causes a constitutional deprivation; or (2) that the constitutional injury was caused by a person with final policymaking authority." *Montano v. City of Chicago* , 535 F.3d 558, 570 (7th Cir. 2008) (citation omitted). No such evidence exists.

A. There Is No Evidence To Support A Claim Against Chief Smith or The City For Failure to Train Its Police Officers.

Plaintiffs' failure to train claim is premised on the allegation that the City and Chief Smith failed to train police officers on how to remove non-compliant suspects from squad cars. (Dkt. 83, ¶ 44) To prevail on a failure to train claim, Plaintiffs must demonstrate that the City's "failure to

train the officers in a relevant respect evidences a 'deliberate indifference'" to the rights of the Plaintiff. *City of Canton v. Harris*, 489 U.S. 378, 389 (1989). Deliberate indifference itself is an elusive standard. The Supreme Court reasoned that policymakers would be deliberately indifferent when "in light of the duties assigned to the specific . . . employees[,] the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights." *Id*.

> In order to ensure that isolated instances of misconduct are not attributable to a generally adequate policy or training program, we require a high degree of culpability on the part of the policymaker. Coupled with a causation requirement, this standard ensures that the violation alleged is not too far removed from the policy or training challenged as inadequate. Taken together, these two considerations amount to a requirement that liability be based on a finding that the policymakers have actual or constructive notice that a particular omission that is likely to result in constitutional violations. Otherwise, we would risk creating de facto respondeat superior liability, which is contrary to *Monell*.

Cornfield By Lewis v. Consolidated High School Dist. No. 230, 991 F.2d 1316, 1327 (7th Cir. 1993).

Plaintiffs do not allege that the City took affirmative action to harm Tubby. To the contrary, their theory of *Monell* liability roots itself in inaction—in alleged gaps in the City's use of force policy and its failure to properly train its officers in the face of obvious and known risks to unarmed individuals in the sally port of the County Jail. *See generally* (Dkt. 83, ¶¶ 45-48)

"A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). The inadequacy of police training may serve as the basis for Section 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989). But the path to *Monell* liability based on inaction is steeper because, unlike in a case of affirmative municipal action, a failure to do something could

be inadvertent and the connection between inaction and a resulting injury is more tenuous. For these reasons, "[w]here a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Bd. of Cty. Comm'rs of Bryan Cty., Okl. v. Brown*, 520 U.S. 397, 405 (1997). Demonstrating that notice is essential to an ultimate finding and requires a "known or obvious" risk that constitutional violations will occur. *Bryan County*, 520 U.S. at 410. "Deliberate indifference" is a "stringent standard" and requires proof that the municipal actor disregarded or knew of [sic] obvious consequence of his actions." *Id*. Generally, Plaintiff must show a pattern of similar constitutional violations to demonstrate deliberate indifference for purpose of a failure-to-train claim. *Canton*, 489 U.S. at 62. Plaintiffs lack evidence to meet this stringent standard.

Plaintiffs' claim that the City and Smith provided no training to law enforcement officers on removing non-compliant subjects from squad cars is completely unfounded. *See* (Dkt. 83 ¶ 46) The evidence in this case overwhelmingly supports that the City was not deliberately indifferent to the rights of Tubby in training its officers. (DPFF 134-139) First, Wisconsin has established the Law Enforcement Standards Board to prescribe minimum requirements for police officer training. All Green Bay Police officers are trained on the DAAT Manual. (DPFF 134) There is no evidence that any Green Bay Police officer, let alone any of the officers on scene, did not meet the minimum training requirements. The City does not maintain a de facto policy, practice, or custom of failing to properly train it's police officers, and does not facilitate any type of misconduct by failing to adequately train its police officers. (DPFF 134-139)

With regard to dealing with non complaint subjects, Green Bay Police Department trains officers on scenarios involving armed individuals in confined spaces. Specifically, GBPD officers are trained on tactics related to isolating the potential threat and setting up perimeters in order to minimize harm to everybody involved within the area. (DPFF 138) The Green Bay Police Department trains officers on scenarios involving barricaded subjects. (DPFF 139) Furthermore, Green Bay Police Officers are trained on uses of force in compliance with the Wisconsin Defense and Arrest Tactics manual, specifically that officers are permitted to deadly force to protect him/herself or others from what he/she reasonably believes would be an imminent threat of death or serious bodily injury. (DPFF 136)

Plaintiffs have failed to produce sufficient evidence to support a claim against the City or Chief Smith based on allegations that it failed to properly train its officers, resulting in Tubby's death. Even if the City offered no training to its officers in this respect, Plaintiffs cannot demonstrate that additional training would have resulted in a different outcome for Tubby. Tubby was not merely a non-compliant subject. He was a barricaded, suicidal subject who was acting as though he had a gun concealed under his shirt. (DPFF 46, 75-91) Any suggestion otherwise is merely speculation and insufficient to demonstrate Section 1983 liability of the City or Chief Smith.

Plaintiffs' failure to train claim must be dismissed.

C. There Is No Evidence To Support A Claim Against The City of Green Bay For An Alleged Custom or Widespread Practice of Using Excessive Force.

Plaintiffs claim that the City has a custom or widespread practice of allowing the use of excessive force is premised on the unsubstantiated suggestion that the Green Bay Police Department "rationalizes instances of excessive force by pointing to innocuous actions by the unarmed

individuals and claiming that such actions were suspicions or dangerous." (Dkt. 83 ¶¶ 51-52) Plaintiffs further suggest–without factual support–that the Green Bay Police Department failed to discipline officers who used excessive force. *Id*. ¶ 60.

To prevail on a "widespread practices" claim, Plaintiffs must show that the City engaged in a practice "so permanent and well settled as to constitute a custom or usage with the force of law." *Wragg v. Vill. of Thornton*, 604 F.3d 464, 467 (7th Cir. 2010); *see also Moore v. City of Chicago*, 126 Fed.Appx. 745, 747 (7th Cir. 2005) (Plaintiff must show the police department "engaged in a widespread practice so well-settled that it had the effect of a custom."). A "widespread practice" is "not tethered to a particular written policy" and "requires more evidence than a single incident to establish liability."*Calhoun v. Ramsey*, 408 F.3d 375, 380 (7th Cir. 2005) The Seventh Circuit has declined to adopt bright-line rules defining a "widespread practice", recognizing that "there is no clear consensus as to how frequently such conduct must occur to impose *Monell* liability, except that it must be more than one instance ... or even three." *Thomas v. Cook Cty. Sheriff's Dep't*, 604 F.3d 293, 303(7th Cir. 2010) Plaintiff must provide "evidence that there is a true municipal policy at issue, not a random event." *Calhoun*, 408 F.3d at 380.

Plaintiffs cannot point to evidence to demonstrate the City of Green Bay or its Chief of Police inadequately disciplined officers in situations involving excessive force complaints. The record demonstrates that complaints of excessive force were always investigated and adjudicated. (DPFF140-149) Lacking evidence to demonstrate a pattern, Plaintiffs misrepresent the factual circumstances of dissimilar incidents. *See* (Dkt. 83, ¶¶ 53-58) Plaintiffs cite to six incidents of alleged excessive force by Green Bay Police officers since 2007, which they believes support a pattern or practice claim. However, none of these incidents involve a similar situation to Tubby.

All six incidents were investigated and only three were sustained. *See* (DPFF 143,147) In all instances where excessive force complaints were sustained, the officers were disciplined. (DPFF 141, 145-146, 149) Plaintiff has no basis for undermining the adjudications of excessive force complaints, nor do they allege a conspiracy between the City and the State DCI. (DPFF 143)

The mere fact that a police department has investigated complaints of excessive force is insufficient to demonstrate that the City has a widespread practice of using excessive force. Plaintiffs must prove a specific pattern of conduct or series of incidents violative of constitutional rights in order to establish the existence of a municipal policy or custom. *See Hossman v. Blunk*, 784 F.2d 793, 796–797 (7th Cir.1986)(citations omitted).

Here, Plaintiffs must identify other incidents or series of incidents where excessive force was used against an individual who was believed to have a gun and was refusing to exit a squad car in the sally port of the Brown County Jail. *See* (Dkt. 83, ¶¶ 53-58) Plaintiffs have failed to do so and cannot rely on dissimilar events, speculation, and innuendo to support their claims. Thus, Plaintiffs' widespread practice claim against the City must be dismissed.

B. There Is No Basis for Section 1983 Liability Against Chief Smith.

Plaintiffs' failure to train claim contains allegations against Chief Smith, in his capacity as chief of police. *See* (Dkt. 83, ¶¶ 45-46,48) Municipal supervisors cannot be subjected to a Section 1983 claim under a *respondeat superior* theory. Instead Plaintiffs must demonstrate an unconstitutional policy or practice attributable to municipal policymakers. *Gable v. City of Chicago*, 296 F.3d 531, 537–38 (7th Cir. 2002). For the similar reasons that Plaintiffs' failure to train claims against the City fail, so to must the claims against Chief Smith.

The inadequacy of police training serves as a basis for liability under Section 1983 only if the failure to train amounts to "deliberate indifference" to the rights of persons with whom the police deal. *Erwin v. County of Manitowoc*, 872 F.2d 1292, 1297–1298 (7th Cir. 1989) A plaintiff cannot prevail merely by proving that an injury could have been avoided had an officer received enhanced training. *Id.* at 1298. To establish the requisite deliberate indifference in this case, Plaintiffs must make three showings:

> (1) that Chief Smith knew to a moral certainty that officers will confront a given situation; (2) that the situation either presents the officer with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of officers mishandling the situation; and (3) that the wrong choice by the officer will frequently cause the deprivation of a citizen's constitutional rights.

See Alexander v. City of S. Bend, 320 F. Supp. 2d 761, 783–84 (N.D. Ind. 2004), aff'd, 433 F.3d 550 (7th Cir. 2006) (citing *Kitzman–Kelley ex rel. Kitzman–Kelley v. Warner*, 203 F.3d 454, 459 (7th Cir. 2000).

Smith has been the Chief of the Green Bay Police Department since February of 2016. (DPFF 5) Plaintiffs cannot establish the requisite notice and frequency of past violations necessary to establish a claim for failure to train or supervise against Chief Smith. Even considering that an individual may resist being taken from a police car into jail, it is not obvious that an individual will resist by barricading themselves in the police car, pretending to have a gun.

Regardless, the Green Bay Police Department does train its officers on uses of force on resistive subjects and individuals who are believed to be armed. (DPFF 136) Officer O'Brien reasonably employed that training on October 19, 2018. Therefore Plaintiffs' failure to train claim against Chief Smith must fail. *See Durkin v. City of Chicago*, 341 F.3d 606, 615 (7th Cir. 2003) ("a municipality cannot be found liable if there is no finding that the individual officer is liable on the underlying substantive claim.").

D. Plaintiffs Have No Claim Under the State-Created Danger Theory.

Plaintiffs allege a violation of Tubby's Fourteenth Amendment substantive due process rights under the state-created danger theory against the City. (Dkt. 83 ¶ ¶ 62-70) The Fourteenth Amendment provides that "[n]o state shall ... deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Supreme Court made clear in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989) that the due process clause does not impose a general, affirmative obligation upon the state to protect its citizens against the deprivation of life, liberty, and property by private actors. *Id*. at 195. Nor does it turn every tort committed by a state actor into a constitutional deprivation. *Id*. at 205. The Seventh Circuit has recognized a narrow exception to the *DeShaney* rule where a state actor "affirmatively places a particular individual in a position of danger the individual would not otherwise have faced." *Wilson-Trattner v. Campbell*, 863 F.3d 589, 593 (7th Cir. 2017) (citing *Doe v. Vill. of Arlington Heights*, 782 F.3d 911, 916 (7th Cir. 2015)). The state-created danger exception as alleged by Plaintiffs here, is quite narrow and reserved for "egregious" conduct by public officials. *Doe*, 782 F.3d at 917.

The Fourteenth Amendment substantive due process guarantee provides no recourse for Plaintiffs. When officers are faced with a "dangerous, fluid situation, in which they were forced to make decisions in haste, under pressure," their conduct does not violate the Fourteenth Amendment unless it "shocks the conscience." *Schaefer v. Goch*, 153 F.3d 793, 797–98 (citing *Lewis*, 523 U.S. at 846–47, 118 S.Ct. 1708). In these cases, "even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates the concerns of substantive due process." *Id*. "The *sine qua non* of liability" in these cases is "a purpose to cause harm." *Id*.

As a matter of law, there is no basis in the record to permit a characterization of the City's actions on October 19, 2018 as shocking the conscience. (DPFF 75-90, 111-113) In *Cty. of Sacramento v. Lewis*, the Supreme Court addressed whether police officers in a high-speed chase that resulted in the death of a passenger acted with a level of deliberate indifference that would be 'conscious shocking.' 523 U.S. 833, 853–54 (1998). In concluding that it did not, the *Lewis* Court reasoned that:

> Like prison officials facing a riot, the police on an occasion calling for fast action have obligations that tend to tug against each other. Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs. They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made "in haste, under pressure, and frequently without the luxury of a second chance." *Whitley v. Albers*, 475 U.S. 312, 320 (1986); *cf. Graham v. Connor*, 490 U.S., at 397, 109 S.Ct., at 1872 ("[P]olice officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving"). A police officer deciding whether to give chase must balance on one hand the need to stop a suspect and show that flight from the law is no way to freedom, and, on the other, the high-speed threat to all those within stopping range, be they suspects, their passengers, other drivers, or bystanders.
>
> *Lewis*, 523 U.S. at 853.

No reasonable jury could find that the City created or increased the danger to Tubby under the factual circumstances of this case. To the contrary, GBPD Officers gave commands, and implored Tubby to show his hands, to demonstrate that he was not armed, and to surrender so that the situation could de-escalate. (DPFF 42-45, 55-56, 78-89) Nor was the City Defendants' conduct so egregious and culpable that it "shocks the conscience," a necessary predicate for a court to find that an injury from a state-created danger amounts to a due-process violation. See *Estate of Her v. Hoeppner*, 939 F.3d 872, 874 (7th Cir. 2019), cert. denied, 140 S. Ct. 1121, 206 L. Ed. 2d 187 (2020).

We cannot speculate what Tubby was thinking while as he barricaded himself and refused to exit squad 42. See (DPFF 39-46) We will never know why Tubby pretended he had a gun held to his mouth and made statements like he would "do it," or took the other actions that he did. (DPFF45) However, we have video evidence depicting Tubby's erratic behaviors close up. We can infer that the substances in his system may have contributed to his behavior based on the Medical Examiner conclusion of intoxication as a factor present as the time of his death. (DPFF129-131) We also have video evidence depicting the Officers' attempts to get Tubby to surrender, by speaking to him in a respectful way, calling him by his first name and asking him to show his hands so they did not have to hurt him. (DPFF 78-89) The undisputed record demonstrates that Tubby was given multiple opportunities to surrender, to show his hands, and to demonstrate that he was not armed. *Id*. Tubby refused to do so and that refusal created a dangerous situation requiring deadly force. (DPFF 92-97) As such, no reasonable jury could find the actions of the Green Bay Defendants "conscious shocking." *C.f. Carter v. Simpson*, 328 F.3d 948, 952 (7th Cir.2003) ("in emergency situations (such as high-speed chases) ... conduct 'shocks the conscience' only if there was intent to cause harm.").

Additionally, as shown in Section I, above, Officer O'Brien's actions cannot be characterized as "conscience shocking" because the force he used was reasonable under the circumstances and was not unconstitutional.

Plaintiffs' due process claim must be dismissed.

IV. The Green Bay Defendants Are Immune From Plaintiffs' State Law Claims.

Plaintiffs assert various state law claims against the Green Bay Defendants alleging battery against Officer O'Brien (Sixth Cause of Action, Dkt. 83, ¶¶ 72-76), negligence against Officer O'Brien and the City arising out of the shooting of Tubby (Seventh Cause of Action, Dkt. 83, ¶¶ 77-82), negligence against the City arising out of their execution of Defendant Zeigle's extraction plan (Eighth Cause of Action, Dkt. 83, ¶¶83-88), and a direct action against the City under Wis. Stat. § 895.46 (Ninth Cause of Action, Dkt. 83, ¶¶ 89-90). Dismissal of each of Plaintiffs' state law claims is warranted.

Although Plaintiffs may assert state law claims against municipalities, their officials and employees, those claims are restricted by both common law and statutory principles based upon the notions of sovereign immunity. *See Liebenstein v. Crowe*, 826 F. Supp. 1174, 1183 (E.D. Wis. 1992). The standards for common law and statutory immunity mirror each other; statutory immunity protects municipalities from liability stemming from the acts of their officers and employees, while both statutory and common law immunity shield those officers and employees directly. Both provide immunity when the public officers or employees act discretionarily within their scope of duty. *Id*.; see Wis. Stat. §§ 893.80(4)-(5).

Wisconsin recognizes four exceptions to the general rule of immunity under section 893.80(4). Immunity does not apply to the performance of (1) ministerial duties; (2) duties to address a "known danger;" (3) action involving medical discretion; and (4) actions that are "malicious, willful and intentional." *Willow Creek Ranch, L.L.C. v. Town of Shelby*, 235 Wis.2d 409, 425, 611 N.W.2d 693 (2000). "Malice" in the legal sense connotes "wrongful intention" as in "[t]he intent,

without justification or excuse, to commit a wrongful act." Black's Law Dictionary 968 (7th ed.1999). "Reckless disregard of the law or of a person's legal rights" can also constitute malice. *Id*.

A. Officer O'Brien Is Entitled to Immunity From Plaintiffs' Battery Claim.

Officer O'Brien is entitled to discretionary act immunity under Wis. Stat. Sec. 893.80(4) shielding him from liability against Plaintiffs' state law claims of battery arising out of his use of force to apprehend Tubby. It is well-settled that decisions relating to arresting and trying to control a resistive subject is a discretionary act. *Wilson v. City of Milwaukee*, 138 F. Supp. 2d 1126, 1132 (E.D. Wis. 2001); *see also Spencer v. Brown County*, 215 Wis.2d 641, 573 N.W.2d 222, 226-27 (Ct. App.1997)([w]hether and how to arrest someone are discretionary for purposes of Section 893.80(4). Clearly such decisions call for "the exercise of judgment or discretion rather than the mere performance of a prescribed task.").

Furthermore, under Wisconsin law a battery is a common law tort that has been defined as "the unlawful and intentional use of force and violence upon the person of another, resulting in the infliction of physical harm to such other." Wis. JI-Civil 2005; *see McCluskey v. Steinhorst*, 45 Wis.2d 350, 357, 173 N.W.2d 148 (1970). Here, it is undisputed that Officer O'Brien intentionally shot Tubby, but his conduct was not unlawful. To the contrary, Officer O'Brien's decision to shoot Tubby was made in self defense and precipitated by Tubby's actions. (DPFF 110-113, 133) Under Wisconsin law a person is permitted to use deadly force when they reasonably believe that such force is necessary to prevent bodily harm or imminent death to themselves or others. *See* Wis. Stat. §§ 939.48(1),(4), *see also* Wis. JI-Civil 2008. For the reasons that Officer O'Brien use of deadly force was reasonable and justified under federal law, it was also reasonable under state law. Officer

O'Brien's use of force was reasonable under the Fourth Amendment, thus the state law claim of battery must fail. If there is no violation of 42 U.S.C. § 1983 because of Officer O'Brien's use of force, these state claims must also be dismissed. *See* (WIS JI-CIVIL 2008).

B. The Green Bay Defendants Are Entitled to Immunity from Plaintiffs' Negligence Claims.

Section 893.80(4), Wis. Stats., provides general immunity to the City and to Officer O'Brien "for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions." The terms "quasi-judicial" or "quasi-legislative," and "discretionary" are synonymous. *Sheridan v. City of Janesville*, 164 Wis. 2d 420, 425, 474 N.W. 2d 799, 801 (Ct. App. 1991). The City and Officer O'Brien are afforded immunity if the conduct for which each is found negligent involves "discretionary acts."

This state has defined what is discretionary by excepting what is not discretionary. An act is not discretionary if it is "ministerial." *Lister v. Board of Regents*, 72 Wis. 2d 282, 300-01, 240 N.W. 2d 610, 621-22 (1976). A ministerial act is defined as conduct that is "absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes, and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." *Id.* At 301, 420 N.W. 2d at 622. Ministerial duty can also arise under circumstances where "the nature of the danger is compelling and known to the officer and is of such force that the public officer has no discretion not to act." *C.L. v. Olson*, 143 Wis. 2d 701, 715, 422 N.W. 2d 604, 619 (1988). Immunity does not attach if there exists a known present danger of such force that the time, mode and occasion for performance is evident with such certainty that nothing remains for the exercise of judgment and discretion. *C.L. v. Olson*, 143 Wis. 2d at 717.

There is no provision in Wisconsin law which "imposes, prescribes, and defines the time, mode and occasion" for a police officer's application of use of force "with such certainty that nothing remains for judgment or discretion." *Sheridan v. City of Janesville*, 164 Wis. 2d 420, 474 N.W. 2d 799 (Ct. App. 1991). These decisions involved 'subjective evaluation of the law,' *C.L.*, 143 Wis. 2d at 718, 422 N.W.2d at 620...." Since the actions of the officer as alleged in the complaint rose to the level requiring governmental discretion, the officers could not be liable under this theory. Nor did the situation fall under the "known present danger" exception to qualified immunity recognized in *Cords v. Anderson*, 80 Wis. 2d 525, 259 N.W.2d 672 (1977).

Officer O'Brien was faced with making split second decisions in a rapidly evolving situation when he shot Tubby. His decision to shoot Tubby to stop the threat he posed involved the exercise of discretion and cannot be deemed as ministerial. Nor can it be deemed malicious. While it is undisputed that Officer O'Brien intended to shoot Tubby, it was not without justification. (DPFF110-113) The video evidence demonstrates that Officer O'Brien talked to Tubby in a professional tone, called him by his first name and gave him opportunities to surrender. (DPFF 55) Officer O'Brien shot Tubby after exhausting all other avenues. (DPFF 92-99, 110-114) The City and Officer O'Brien are therefore immune from liability and Plaintiffs' state law negligence claims relating to the shooting of Tubby.

The City is also immune from Plaintiffs' negligence claims relating to the execution of Brown County's extraction plan. See (Dkt. 83, ¶¶ 83-88) There is no evidence in the record to support the Plaintiffs' claims against the Green Bay Defendants based upon their alleged negligence in executing Lt. Ziegle's extraction plan of Tubby. (DPFF 61-74, 139) The manner by which a police department chooses to handle critical incidents involving its officers and barricaded, armed subjects

is a discretionary or quasi-judicial manner, thus, the City is immune from this action as a matter of law under Wisconsin common law and Wis. Stats. § 893.80(4).

Because Officer O'Brien was acting in a discretionary or quasi-judicial manner, the Court should find all of the Green Bay Defendants are immune from this action as a matter of law under Wisconsin common law and Wis. Stats § 893.80(4). Plaintiffs' direct action indemnity claim against the City of Green Bay, also must be dismissed.

CONCLUSION

These Defendants respectfully request that the Court grant them summary judgment dismissing all of Plaintiff's claims with prejudice.

Dated at Wauwatosa, Wisconsin, this 2nd day of November, 2020.

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