

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

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

Plaintiffs,

vs.

Case No. 19-CV-00137

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

Defendants.

**PLAINTIFFS' RESPONSES TO DEFENDANT 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**

In support of their motion for summary judgment, Defendants, Todd Delain, Heidi Michel, Joseph Mleziva, Nathan Winistorfer, Thomas Zeigle, and Brown County (collectively "the Brown County Defendants") submitted the below-numbered proposed findings of fact. In the bolded text that follows each numbered paragraph, Plaintiffs provide a concise response to the factual contentions submitted by the Brown County Defendants.

I. PLAINTIFFS' RESPONSE TO THE BROWN COUNTY DEFENDANTS' STATEMENT OF FACTS

1. Todd J. Delain is the Sheriff of Brown County, Wisconsin. (3d Am. Compl. ¶ 11, ECF No. 83.)

Response: Not disputed.

2. Heidi Michel is the Jail Administrator for the Brown County Jail. (3d Am. Compl. ¶ 12, ECF No. 83.)

Response: Not disputed.

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."].)

Response: Not disputed.

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."].)

Response: Not disputed.

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."].)

Response: Not disputed.

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."].)

Response: Not disputed to the extent "this incident" refers to the unconstitutional shooting of Jonathon Tubby ("Tubby") at the Brown County Jail on October 19, 2018.

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."].)

Response: Not disputed.

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."].)

Response: Not disputed to the extent "this incident" refers to the unconstitutional shooting of Tubby at the Brown County Jail on October 19, 2018.

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."].)

Response: Not disputed to the extent "this incident" refers to the unconstitutional shooting of Tubby at the Brown County Jail on October 19, 2018.

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."].)

Response: Not disputed.

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."].)

Response: Not disputed that Jeffrey Noble has been retained by Plaintiffs as an

expert witness in this case, but his retention was not limited to police practices. ECF 114-19

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.)

Response: Not relevant to the Brown County Defendants' Motion for Summary Judgment, none of the claims or defenses in this action concern the makeup of the Brown County SWAT team.

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.)

Response: Disputed, the Brown County Sheriff's Office ("BCSO") does not train its officers regarding their duty to intervene at all. ECF 120-27 at 15:15-23; ECF 120-15 at 141:16—142:11. Moreover, the BCSO does not train the scenario of a barricaded and armed subject within a car. The BSCO does not provide scenario-based training to its personnel regarding removal of armed suspects from a squad car, but instead teaches only "basic concepts" such as obtaining cover. 2d Tahdooahnippah Decl. Ex. 4 at 25:16—26:9, 55:12—56:2.

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.)

Response: Not disputed.

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.)

Response: Disputed, the BCSO does not train the scenario of a barricaded and armed subject within a car. The BSCO does not provide scenario-based training to its personnel regarding removal of armed suspects from a squad car, but instead teaches only “basic concepts” such as obtaining cover. 2d Tahdooahnippah Decl. Ex. 4 at 25:16—26:9, 55:12—56:2.

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.)

Response: Not relevant to the Brown County Defendants’ Motion for Summary Judgment, Plaintiffs failure to train claim concerns Brown County’s failure to train its officers on their duty to intervene to prevent excessive force, and also Brown County’s failure to train officers how to address barricaded subjects within cars. Plaintiffs’ failure to train claim does not concern the training of officers to seek cover.

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.)

Response: Disputed, ambiguous as to what is meant by “the scene.”

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.)

Response: Disputed, the “DONE” concept is a general concept not specific to an armed suspect in the vehicle as the Brown County Defendants suggest. 2d Tahdooahnippah Decl. Ex. 11 at BC_JCT001938-39. The BCSO does not train the scenario of a barricaded and armed subject within a car. The BSCO does not provide any scenario-based training regarding removal of armed suspects from a squad car, but instead teaches only “basic concepts” such as obtaining cover. 2d Tahdooahnippah Decl. Ex. 4 at 25:16—26:9, 55:12—56:2.

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.)

Response: Disputed, in the case of an armed barricade, there is no choice other than to wait for a subject to voluntarily surrender. 2d Tahdooahnippah Decl. Ex. 4 at 29:3-5.

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.)

Response: Not disputed as a general matter.

21. DAAT is a system of verbalization skills coupled with alternatives. (Jansen Dep. At 36:24–37:10)

Response: Disputed, the DAAT manual teaches officers “when and how to use physical force to control people.” 2d Tahdooahnippah Decl. Ex. 34 at BC_JCT001326.

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.)

Response: Disputed, the BCSO does not train the scenario of a barricaded and armed subject within a car. The BSCO does not provide any scenario-based training regarding removal of armed suspects from a squad car, but instead teaches only “basic concepts” such as obtaining cover. 2d Tahdooahnippah Decl. Ex. 4 at 25:16—26:9, 55:12—56:2.

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.)

Response: Disputed, the PCS manual mentions the concept of “officer override,” but this minimal reference is insufficient to discharge Brown County’s duty to train its officers. See *J.K.J. v. Polk County*, 960 F.3d 367, 379 (7th Cir. 2020) (holding that telling officers that sexual contact with inmates was prohibited and then offering a single training session on an anti-rape statute was insufficient training).

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.)

Response: Disputed, the “officer override” concept does not relate to use of force situations at all, but rather applies only to professional communications. The concept is mentioned in the Professional Communications Skills manual, and does not mention use of force at all. 2d Tahdooahnippah Decl. Ex. 11 at BC_JCT001872-73.

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.)

Response: Not relevant to the Brown County Defendants’ Motion for Summary Judgment, none of the claims or defenses in this action relate to proper handcuffing technique.

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 Officer training on situations of officer override. (Mleziva Dep. at 10:2–11:4.)

Response: Disputed, the “officer override” concept does not relate to use of force situations at all, but rather applies only to professional communications. The concept is mentioned in the Professional Communications Skills manual, and does not mention use of force at all. 2d Tahdooahnippah Decl. Ex. 11 at BC_JCT001872-73. Brown County does not offer any training concerning the duty to intervene to prevent the use of excessive force. ECF

120-27 at 15:15-23; ECF 120-15 at 141:16—142:11.

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.)

Response: Disputed, the “officer override” concept does not relate to use of force situations at all, but rather applies only to professional communications. The concept is mentioned in the Professional Communications Skills manual, and does not mention use of force at all. 2d Tahdooahnippah Decl. Ex. 11 at BC_JCT001872-73. Brown County does not offer any training concerning the duty to intervene to prevent the use of excessive force. ECF 120-27 at 15:15-23; ECF 120-15 at 141:16—142:11.

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.)

Response: Disputed, Zeigle has some training on tactical situations, but it is the province of the jury to decide whether such training is “extensive[.]”

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.)

Response: Disputed, Zeigle has received training with NTOA, but it is the province of the jury to decide whether such training is “extensive[.]”

30. He has also received training from Tactical Energetic Entry Systems on barricaded suspects. (Zeigle Dep. at 23:21–24:19.)

Response: Not disputed.

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.)

Response: Disputed, Noble has no opinion regarding Brown County's training, *see generally* ECF 114-19. Plaintiffs have no duty to offer expert testimony on every issue, *e.g.*, *Gustafson v. Bi-State*, 2020 U.S. Dist. LEXIS 11918, at *14 (E.D. Mo. Jan. 24, 2020), and it is therefore improper for the Brown County Defendants to invite the inference that Noble's lack of an opinion indicates support for their training regime.

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.)

Response: Disputed, Noble has no opinion regarding Zeigle's training, *see generally* ECF 114-19. Plaintiffs have no duty to offer expert testimony on every issue, *e.g.*, *Gustafson*, 2020 U.S. Dist. LEXIS 11918, at *14, and it is therefore improper for the Brown County Defendants to invite the inference that Noble's lack of an opinion indicates support for their training regime.

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.)

Response: Not relevant—Noble does not contend, as do Defendants here, that it is foreseeable that a firearm will be missed during a search incident to arrest. Therefore, unlike Defendants, Noble would have no duty to train the scenario. *J.K.J.*, 960 F.3d at 380 (noting that there is duty to train where “the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights’ that a factfinder could find deliberate indifference to the need for training”) (quoting *City of Canton v. Harris*, 489 U.S. 378, 390 (1989)).

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.)

Response: Not relevant—Noble does not contend, as do Defendants here, that it is foreseeable that a firearm will be missed during a search incident to arrest. Therefore, unlike Defendants, Noble would have no duty to train the scenario. *J.K.J.*, 960 F.3d at 380 (noting that there is duty to train where “the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights’ that a factfinder could find deliberate indifference to the need for training”) (quoting *City of Canton*, 489 U.S. at 390).

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.)

Response: Not relevant—Noble does not contend, as do Defendants here, that it is foreseeable that a firearm will be missed during a search incident to arrest. Therefore, unlike Defendants, Noble would have no duty to train the scenario. *J.K.J.*, 960 F.3d at 380 (noting that there is duty to train where “the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights’ that a factfinder could find deliberate indifference to the need for training”) (quoting *City of Canton*, 489 U.S. at 390.

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.)

Response: Disputed, NTOA is a group focused on teaching law enforcement and SWAT tactics, whether the group is made up of the “foremost experts” is an inference within the province of the jury.

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.)

Response: Disputed, the cited testimony does not say that all NTOA trainings devote a portion of their training specifically to suspects who have barricaded themselves in buildings, houses, and vehicles.

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.)

Response: Not relevant, Plaintiffs' failure to train claim concerns Brown County's failure to train its officers on their duty to intervene to prevent excessive force, and Brown County's failure to train officers how to address barricaded subjects within cars. Plaintiffs' failure to train claim does not concern the overall number of hours that SWAT receives or the general substance of SWAT training.

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.)

Response: Not relevant, Plaintiffs' failure to train claim concerns Brown County's failure to train its officers on their duty to intervene to prevent excessive force, and Brown County's failure to train officers how to address barricaded subjects within cars. Plaintiffs' failure to train claim does not concern whether or not Brown County's Sheriff's Office or SWAT team have a membership to NTOA.

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.)

Response: Not relevant, Plaintiffs' failure to train claim concerns Brown County's failure to train its officers on their duty to intervene to prevent excessive force, and Brown County's failure to train officers how to address barricaded subjects within cars. Plaintiffs' failure to train claim does not concern the amount of training received by Lieutenant Zeigle.

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.)

Response: Not relevant, Plaintiffs' failure to train claim concerns Brown County's failure to train its officers on their duty to intervene to prevent excessive force, and Brown County's failure to train officers how to address barricaded subjects within cars. Plaintiffs' failure to train claim does not concern the amount of training received by Lieutenant Zeigle.

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.)

Response: Not relevant, Plaintiffs' failure to train claim concerns Brown County's failure to train its officers on their duty to intervene to prevent excessive force, and Brown County's failure to train officers how to address barricaded subjects within cars. Plaintiffs' failure to train claim does not concern the type of training received by Lieutenant Zeigle.

43. The decision-making continuum with barricaded subjects generally starts with a patrol-based response. (Zeigle Dep. at 28:24–30:16.)

Response: Not relevant, Plaintiffs' failure to train claim concerns Brown County's failure to train its officers on their duty to intervene to prevent excessive force, and Brown County's failure to train officers how to address barricaded subjects within cars. Plaintiffs' failure to train claim does not concern the type of training received by Lieutenant Zeigle.

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.)

Response: Not relevant, Plaintiffs' failure to train claim concerns Brown County's failure to train its officers on their duty to intervene to prevent excessive force, and Brown County's failure to train officers how to address barricaded subjects within cars. Plaintiffs' failure to train claim does not concern the type of training received by Lieutenant Zeigle.

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.)

Response: Not disputed.

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.)

Response: Not disputed.

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.)

Response: Not disputed.

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.)

Response: Not disputed.

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.)

Response: Not disputed, from Zeigle’s failure to comply with this training, ECF 120-15 at 121:15-21, a reasonable fact finder could infer that he acted with deliberate indifference to Tubby’s safety.

50. If the SWAT team is activated, they will respond and replace the perimeter personnel. (Zeigle Dep. at 30:17–31:11.)

Response: Not disputed, from Zeigle’s failure to comply with this training, ECF 120-15 at 121:15-21; ECF 120-4 at 99:18—100:16, a reasonable fact finder could infer that he acted with deliberate indifference to Tubby’s safety.

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.)

Response: Not disputed, from Zeigle’s failure to comply with this training, ECF 120-4 at 99:18—100:16; ECF 120-27 at 68:15-23; ECF 120-28 at 84:17—85:4, 86:20—87:7, 88:5-8, 91:10-18; ECF 120-14, at 38:6—39:5, 39:10—40:5; 2d Tahdooahnippah Decl. Ex. 4 at 91:24—92:4, a reasonable fact finder could infer that he acted with deliberate indifference to Tubby’s safety.

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.)

Response: Disputed, in the case of an armed barricade, there is no choice other than

to wait for a subject to voluntarily surrender. 2d Tahdooahnippah Decl. Ex. 4 at 29:3-5.

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.)

Response: Not disputed.

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.)

Response: Disputed, sometimes, such as in the case of an armed barricade, there is no interval of time that should be given to a person of interest. In such circumstances, there is no choice other than to wait for a subject to voluntarily surrender. 2d Tahdooahnippah Decl. Ex. 4 at 29:3-5.

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)

Response: Disputed, sometimes, such as in the case of an armed barricade, there is no choice other than to wait for a subject to voluntarily surrender. 2d Tahdooahnippah Decl. Ex. 4 at 29:3-5.

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.)

Response: Disputed, sometimes, such as in the case of an armed barricade, there is no choice other than to wait for a subject to voluntarily surrender. 2d Tahdooahnippah Decl.

Ex. 4 at 29:3-5.

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.)

Response: Disputed, sometimes, such as in the case of an armed barricade, there is no choice other than to wait for a subject to voluntarily surrender. 2d Tahdooahnippah Decl.

Ex. 4 at 29:3-5.

58. Next, officers would introduce some intervention options, such as OC spray. (Zeigle Dep. at 36:6–25.)

Response: Disputed, sometimes, such as in the case of an armed barricade, there is no choice other than to wait for a subject to voluntarily surrender. 2d Tahdooahnippah Decl.

Ex. 4 at 29:3-5.

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.)

Response: Disputed, sometimes, such as in the case of an armed barricade, there is no choice other than to wait for a subject to voluntarily surrender. 2d Tahdooahnippah Decl.

Ex. 4 at 29:3-5. Also not relevant—officers did not use a ram attached to an armored vehicle on the night of October 19, 2018.

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.)

Response: Disputed, sometimes, such as in the case of an armed barricade, there is

no choice other than to wait for a subject to voluntarily surrender. 2d Tahdooahnippah Decl. Ex. 4 at 29:3-5. Also not relevant—officers did not use a ram attached to an armored vehicle to create visual contact on the night of October 19, 2018.

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.)

Response: Disputed, sometimes, such as in the case of an armed barricade, there is no choice other than to wait for a subject to voluntarily surrender. 2d Tahdooahnippah Decl. Ex. 4 at 29:3-5. Also not relevant—officers did not use a robot on the night of October 19, 2018.

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.)

Response: Disputed, officers often use excessive force as has been well documented by many, many high-profile cases, such as in the case of police brutality victims Rodney King, Oscar Grant, Walter Scott, Justin Damond, to name just a few. The Associated Press, Rodney King Riot: Timeline of Key Events (Apr. 29, 2017), <https://apnews.com/article/fa4d04d8281443fc8db0e27d6be52081>; Brakkton Booker, California District Attorney Says Probe of Oscar Grant Killing Will be Reopened, NPR News (Oct. 6, 2020), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/10/06/920895464/california-district-attorney-says-probe-of-oscar-grant-killing-will-be-reopened>; USA Today, Witness Video of Police Shooting a Man in an Oakland Train Station, YouTube (Oct. 15, 2010), <https://www.youtube.com/watch?v=c-ntTJLXYMA>; Matthew Vann & Erik Ortiz, Walter Scott Shooting: Michael Slager, Ex-

Officer, Sentenced to 20 Years in Prison, NBC News (Dec. 7, 2017), <https://www.nbcnews.com/storyline/walter-scott-shooting/walter-scott-shooting-michael-slager-ex-officer-sentenced-20-years-n825006>; NBC News, A Closer Look at the Walter Scott Shooting (Apr. 8, 2015), <https://www.nbcnews.com/video/a-closer-look-at-the-walter-scott-shooting-424905283706>; Phil Helsel & David K. Li, Ex-Minneapolis Officer who Killed Justine Damond Sentenced to 12.5 Years, NBC News (June 7, 2019), <https://www.nbcnews.com/news/us-news/ex-minneapolis-officer-who-killed-justine-damond-sentenced-12-5-n1013926>.

63. As a last resort, depending on the situation, officers may decide to enter the
barricade. (Zeigle Dep. at 43:8–44:23.)

Response: Disputed, sometimes, such as in the case of an armed barricade, there is no choice other than to wait for a subject to voluntarily surrender. 2d Tahdooahnippah Decl. Ex. 4 at 29:3-5. Also not relevant—officers did not enter the barricaded squad car on the night of October 19, 2018.

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.)

Response: Not disputed, from Zeigle’s failure to comply with this training, permitting Tubby to stumble around the sallyport without an arrest team ready, ECF 114-8 at 83:10—85:22, 86:20—88:10; ECF 120-14, at 38:6—39:5, 39:10—40:5; 2d Tahdooahnippah Decl. Ex. 4 at 91:24—92:4, a reasonable fact finder could infer that he acted with deliberate indifference to Tubby’s safety.

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.)

Response: Disputed, the response to a barricaded suicidal person is different from the response to a criminal barricade under generally accepted police practices, but whether the difference is “slight” is a characterization that is within the province of the jury.

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.)

Response: Not relevant to the Brown County Defendants’ Motion for Summary Judgment, construing all facts in favor of Tubby, he was not suicidal. The statement “I’ll [] do it,” which Defendants contend was a suicidal threat, was made at the same time officers were attempting to grab Tubby’s foot and forcibly remove him from a squad car. ECF 120-3 at 1:44:50—1:45:21. Drawing all reasonable inference in favor of Plaintiffs, as required, Tubby was stating he would comply without need for force.

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.)

Response: Not relevant to the Brown County Defendants’ Motion for Summary Judgment, construing all facts in favor of Tubby, he was not suicidal as discussed above and therefore practices regarding suicidal barricades are not relevant. To the extent it is relevant, Zeigle’s failure to activate a SWAT team is evidence of his deliberate indifference to Tubby’s safety. ECF 120-15 at 121:15-21.

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.)

Response: The statement “I’ll [] do it,” which Defendants contend was a suicidal threat, was made at the same time officers were attempting to grab Tubby’s foot and forcibly remove him from a squad car. ECF 120-3 at 1:44:50—1:45:21. Taking all reasonable inference in favor of Plaintiffs, as required, Tubby was stating he would comply without need for force.

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.)

Response: Not relevant, Plaintiffs’ failure to train claim concerns Brown County’s failure to train its officers on their duty to intervene to prevent excessive force, and Brown County’s failure to train officers how to address barricaded subjects within cars. Plaintiffs’ failure to train claim does not concern whether SWAT team members are trained on the principles of the NTOA continuum.

70. On October 19, 2018, Officers O’Brien and Wernecke were working the afternoon shift on patrol. (O’Brien Dep. at 24:13–19.)

Response: Not disputed.

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.)

Response: Not disputed.

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.)

Response: Not disputed that Tubby was arrested by O'Brien and Wernecke for possession of marijuana and a non-violent warrant (failure to report to jail to serve time for OWI), or that there was probable cause to make such an arrest. Plaintiffs dispute whether Tubby was actually in possession of marijuana—Defendants have not cited any laboratory analysis confirming that the substance was marijuana or that Tubby (rather than his passenger, *see* ¶ 73 below) was the possessor of the marijuana.

73. Mr. Tubby's passenger was taken into custody by another officer. (O'Brien Dep. At 65:7–17.)

Response: Not relevant, none of the claims or defenses in this action relate to the arrest of the passenger in the car driven by Tubby.

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.)

Response: Disputed, Officer Wernecke did not conduct a "pat-down search" of Tubby, but rather conducted a thorough search incident to arrest that included searching in Tubby's pockets and waistband, ECF 114-1 at 54:13—56:4, and which uncovered objects as small as a \$20 bill, 2d Tahdooahnippah Decl. Ex. 10 at 18:25—20:3; ECF 114-1 at 54:10–21; ECF 114-27 at 27. It is not disputed that Tubby was handcuffed or transported to the Brown County Jail in Officer Wernecke's squad car.

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.)

Response: Not disputed that Wernecke stored his weapons and tools in the trunk of his squad car or that O'Brien began to do the same.

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.)

Response: Disputed, Officer Wernecke reached into the squad car to forcibly remove Tubby's leg, not to "help" Tubby out.

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.)

Response: Disputed, Officer O'Brien testified that he saw movement, but he did not characterize that movement as "rapid" or state that Wernecke "flinched." ECF 114-5 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.)

Response: Disputed, O'Brien came to the side of the squad car, but the video evidence does not show Tubby sitting with his body reclined away from the door. ECF 114-22 at 1:44:52—1:45:11.

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.)

Response: Disputed, Tubby's arms were positioned in front of him, but his hands could be seen under his clothes in front of his body. ECF 114-22 at 1:44:52—1:45:11; ECF 114-1 at 65:14—66:8, 69:5-8.

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.)

Response: Disputed. The video evidence does not show any "cylindrical object." ECF 114-22 at 1:44:52—1:45:11. Officer Wernecke was standing directly next to O'Brien and testified that he did not see a gun or anything that would have led him to believe Tubby was armed. ECF 114-1 at 65:14—66:8, 69:5-8. Had O'Brien seen a gun, under the training, policies, and practices of the Green Bay Police Department, O'Brien would have stated that he had seen a gun. ECF 114-17 at 101:7-13; 2d Tahdooahnippah Ex. 13 at 54:16-25. He did not do so—instead he merely stated that Tubby might have "something." ECF 120-9 at 00:00—00:11. O'Brien also stated over the radio that he did not believe "the whole Bearcat will do us any good," underscoring the fact that he did not genuinely believe Tubby to be armed. ECF 120-9 at 2:32—2:42. In addition, an officer on the scene specifically testified that no one expressly told him that Tubby had a gun. 2d Tahdooahnippah Decl. Ex. 9 at 105:2-7 ("no one told me 'I saw a gun.'"). That "something" is not equivalent to a "gun" is further underscored by the fact that the officers reporting to the scene did not act as if they were responding to a call involving an armed subject. They brought multiple "ride-alongs" to the scene, permitted one to film the incident with a cell phone, and mulled about the

sallyport with weapons holstered. ECF 114-17 at 101:24—102:6, 103:16-23; ECF 120-31; 2d Tahdooahnippah Ex. 35, Doxt_DA00001034 at 0:00—6:30.

In addition, the veracity of O’Brien testimony is questionable because he changed his story. Shortly after the shooting, O’Brien said he shot Tubby because he mistook the sound of the “bean bag shotgun” for the sound of a lethal handgun. ECF 114-13 at 10; *see also* ECF 112-1 at 3 (“supposedly there was a loud popping sound and an Officer reacted by firing.”). However, during the investigation by the Wisconsin Division of Criminal Investigation (“DCI”), several officers specifically noted that they could tell the difference between the sound of “bean bag shotgun” and sound of a real handgun. *E.g.*, ECF 114-27 at BC_JCT000725, 727, 748, 780, 834, 847, 896, 903–04. Several officers repeated this in depositions, ECF 114-8 at 102:6—103:2, ECF 114-6 at 109:8—110:5; ECF 114-1 at 39:19—40:10, and several officers even specifically testified that it would not be reasonable to mistake the two sounds. ECF 114-14 at 40:17-21; ECF 114-15 at 31:9-14. Officer O’Brien then *changed* his story after the DCI made their report public. He began claiming he saw the “barrel” of a gun under Tubby’s shirt when he and Wernecke opened the rear door of the squad car, ECF 114-5 at 37:10-18, 39:19—42:11, and fired because he thought Tubby pointed the “barrel” at him, 2d Tahdooahnippah Decl. Ex. 6 at 134:18—135:9, or at other officers, *id.* at 143:20—144:6.

The veracity of O’Brien testimony is also questionable because he has a history of dishonestly. When O’Brien applied to become a police officer, his employment application specifically asked him to disclose “*ALL instances* in which you were convicted of a crime (misdemeanors or felonies), ordinance violations, traffic violations and the like. . . . Failure to include *all information* requested under this section may result in denial of employment.

Use additional sheets if necessary.” ECF 114-20 at DOXT00000723 (capitalization in original, italics added). At the time, O’Brien had been convicted of disorderly conduct after he had threatened a store clerk. ECF 114-5 at 211:7—212:20. Yet, O’Brien did not disclose this conviction—instead listing only three speeding tickets. ECF 114-20 at DOXT00000723.

The employment application also asked O’Brien to provide his “complete work history.” ECF 114-20 at DOXT00000726 (emphasis in original). The application admonished him to “[b]e sure to clearly document your work history monthly, including periods of unemployment (ie, unemployed, in school, etc.) *Incomplete work histories will not be considered. Attach extra sheets if necessary.*” *Id.* (bolded lettering in original changed to italics). O’Brien was in the Army National Guard from 2004 to 2005 but was discharged due to depression. 2d Tahdooahnippah Decl. Ex. 28; ECF 114-5 at 9:3-4, 11:16-24; 2d Tahdooahnippah Decl. Ex. 6 at 217:24—219:3. Evidently fearful that his lack of an honorable discharge would harm his prospects, O’Brien omitted his military service. *Id.* at 216:20—217:9. Not only did he omit his military service, but he also affirmatively lied, stating that he had been “unemployed but was a full time stay at home parent to a [redacted] spouse” during the time he was in the military. ECF 114-20 at DOXT00000726. These omissions are not trivial or minimal. GBPD Lieutenant Nathan Allen testified that such omissions could be disqualifying, and that failing to disclose this information: “That’s bad.” 2d Tahdooahnippah Decl. Ex. 5 at 134:11-20, 136:5-19. Indeed, the GBPD Chief of Police agreed that the questions concerning Officer O’Brien’s dishonesty should be brought to the GBPD Internal Affairs supervisor. 2d Tahdooahnippah Decl. Ex. 15 at 100:16—101:2.

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.)

Response: Disputed, for all the reasons set forth in response to Paragraph 80 above, which response is incorporated by reference, O'Brien did not believe Tubby possessed a firearm, but merely reacted recklessly to the sound of a beanbag shotgun and then made up a story about seeing a "barrel" of a gun consistent with his history of dishonesty. Moreover, even if O'Brien subjectively believed Tubby to have a gun, such a belief was not relevant. The video evidence does not show any "cylindrical object."



ECF 114-22 at 1:44:52—1:45:11. Officer Wernecke was standing directly next to O'Brien and testified that he did not see a gun or anything that would have led him to believe Tubby was armed. ECF 114-1 at 65:14—66:8, 69:5-8.

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.)

Response: Disputed, for all the reasons set forth in response to Paragraphs 80 and 81 above, which responses are incorporated by reference, O'Brien's testimony that he saw a gun is an after-the-fact invention consistent with O'Brien's history of dishonesty.

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.)

Response: Disputed, radio recordings state that it "look[ed] like" there was something in his hands. ECF 120-9.

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.)

Response: Disputed, for all the reasons set forth in response to Paragraphs 80 and 81 above, which responses are incorporated by reference, O'Brien's testimony that he saw a gun is an after-the-fact invention consistent with O'Brien's history of dishonesty. The veracity of the other officers' testimony is also questionable due to the phenomenon known as the "blue wall of silence" where officers refuse to provide negative testimony that would harm another officer. Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. Pitt. L. Rev. 233, 234, 237–40 (1998); Olwyn Conway, "How Can I Reconcile with You When Your Foot is On My Neck?": *The Role of Justice in the Pursuit of Truth and Reconciliation*, 2018 Mich. St. L. Rev. 1349, 1373–75, 1374 n.114 (2018); Vida B. Johnson, *Bias in Blue: Instructing Jurors to*

Consider the Testimony of Police Officer Witnesses with Caution, 44 Pepp. L. Rev. 245, 253–54 (2017). And, also the culture of dishonesty at the Green Bay Police Department. *E.g.*, 2d Tahdooahnippah Decl. Ex. 14 at 17, Ex. 21 at 80-81, 85-86, 87.

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.)

Response: Not disputed.

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.)

Response: Disputed, recordings of the radio traffic from the night show that law enforcement believed only that Tubby may have “something.” ECF 120-9 at 0:33–0:36. This is corroborated by the fact that the officers responding to the scene did not act as if they were responding to the scene of an armed gunman, as discussed above in response to Paragraph s80, which response is incorporated by reference.

87. Lt. Zeigle ordered Sgt. Katers to respond to the scene. (Zeigle Dep. at 16:16–17:2.)

Response: Not relevant to the Brown County Defendants’ Motion for Summary Judgment.

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.)

Response: Not relevant to the Brown County Defendants’ Motion for Summary Judgment.

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.)

Response: Disputed, no Green Bay officer “requested” the Bearcat—to the contrary O’Brien initially stated that the Bearcat was not needed (underscoring the fact that he did not believe Tubby to be armed). ECF 120-9 at 2:32-2:42. Instead, a Green Bay police officer suggested, several times, that the Bearcat be used, and O’Brien finally agreed. ECF 114-5 at 90:2-8; ECF 120-9 at 2:23—2:43.

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.)

Response: Not disputed that several officers on scene had some unspecified level of tactical training and experience that may have been above zero hours. However, it is disputed that these officers were equipped to handle the situation. Brown County’s policies, Green Bay’s policies, general police practices, and the NTOA all would have called for activation of a SWAT team in response to a barricade situation. ECF 120-18 at BC_JCT002659; ECF 120-19 at §§ 404.7, 404.8.1; ECF 120-17 ¶ 58(d); ECF 120-8 at 24:9-20; 2d Tahdooahnippah Decl. Ex. 2. at 25:3—27:13, 28:24—30:2.

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.)

Response: Not disputed that these officers were members of the SWAT teams of their respective agencies; however, they as members of *different* SWAT teams (Brown County and

Green Bay) and without a formal SWAT activation to ensure that a tactical plan was shared between officers, the officers on the scene were not prepared to execute tactical functions, such as serving as an “arrest” team to apprehend Tubby after he was forced from the vehicle. ECF 120-14 at 38:6—39:5, 39:10—40:5.

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.)

Response: Disputed, Green Bay Lieutenant Nathan Allen was critical of the plan, he did not “establish” the plan with Zeigle. 2d Tahdooahnippah Ex. 5 at 66:5—67:15. Instead, Zeigle asserted his authority as a Brown County officer to decide the plan. *Id.*

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.)

Response: Not disputed that Zeigle may have subjectively disagreed with Lieutenant Allen’s initial plan. It is disputed whether Lieutenant Allen’s plan was deficient. Lieutenant Allen specifically testified that had his initial plan been followed, Tubby would not be dead today, but instead the worst that could have happened was a few dog bites. 2d Tahdooahnippah Decl. Ex. 5 at 122:21—123:19.

It is also disputed whether Lieutenant Ziegle’s plan was “based on” his training. NTOA training would call for a SWAT deployment, but SWAT was not deployed. 2d Tahdooahnippah Decl. Ex. 2 at 25:3—27:13, 28:24—30:2. NTOA training also described the

purposes of breaking a window as attempting to communicate or dialogue with the subject, such as by providing a warning. *Id.* at 32:22—33:6, 123:14—126:3. Yet, after breaking the squad window, officers did not provide any warnings to Tubby or respond to Tubby's attempts to dialogue with them by asking for help. ECF 120-3 at 2:29:05—2:31:04; ECF 120-13 at 41:03—41:18. Zeigle also testified it is “important” to communicate plans to officers on scene, 2d Tahdooahnippah Decl. Ex. 2 at 55:22—56:2, yet did not properly communicate his plan to all officers on the scene. ECF 120-15 at 66:4-25; ECF 120-8 at 68:2-22; ECF 120-4 at 106:12-18.

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.)

Response: Not disputed that Zeigle made these statements, but it is disputed whether Zeigle's plan was actually guided by brining Tubby safely into custody or whether Zeigle's plan was based on his training and experience. It is a known-risk that a barricade situation presents a safety risk, including to the barricaded person himself. ECF 120-18 at BC_JCT002659 (recognizing risk of “critical incidents” and defining “critical incidents to include “barricade”); Ex. 1 at 76:22—78:4. For the reasons articulated in response to Paragraphs 90 and 93, which responses are incorporated herein by reference, the response that would have been “based” on Lieutenant Zeigle's training and aimed at safely bringing Tubby into the interior of the jail would have been to activate a SWAT team. Without a

SWAT team, there was no deployment of a trained Crisis Negotiation Team. ECF 120-20 § 6(c) at BC_JCT002621; *see also* ECF 120-8 at 25:17-23; Therefore, despite the near “universal acceptance” of the need for police officers to de-escalate, ECF 114-18 at 30; *see also* 2d Tahdooahnippah Decl. Ex. 3 at 2 (advising to “avoid forceful confrontation” in barricade situation), a Crisis Negotiation Team was not activated to “de-escalate and effect peaceful resolution[]” of the barricade situation. ECF 120-20 at 1. Lieutenant Zeigle’s plan appears motivated not by a concern for Tubby’s safety, but by a simple desire to return the jail to normal operations, ECF 120-28 at 130:5-16; ECF 120-15 at 127:19—128:12; ECF 120-22 at 61:9-15.

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.)

Response: Disputed, for the reasons articulated in response to Paragraphs 90, 93, and 94, which responses are incorporated herein by reference, activation of a SWAT team (which would be accompanied by a Crisis Negotiation Team) was required. Without a Crisis Negotiation team, the “resources already on scene” were all implements of force: armed officers, bean bag guns, OC spray, police canines. ECF 120-27 16:24—20:8; 29:2-12; ECF 120-15 at 74:23—75:13, 76:2-15; ECF 120-13 at 34:42. No resources on scene were available to meet the “near universal” need for police officers to de-escalate, ECF 114-18 at 30; *see also* Ex. 3 at 2 (advising to “avoid forceful confrontation” in barricade situation).

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.)

Response: Disputed, the perimeter on scene the night of October 19, 2018 was deficient. Containment of a subject is extremely important. ECF 120-24 at 45:12-17; ECF 120-11 at 72:3-7, see ECF 120-10 at 89:17—90:14. While Tubby was contained in the squad car, he was under control of law enforcement—he could not leave. ECF 120-4 at 100:10-13. Yet, Lieutenant Zeigle’s plan caused that containment (and control) to be lost. *Id.* at 107:25—108:7. Brown County practices and procedures called for the sallyport garage doors to be closed, yet both were opened, further diminishing containment. ECF 120-4 at 99:18—100:16; 2d Tahdooahnippah Decl. Ex. 4 at 52:18-20, Ex. 13 at 27:16-25. In addition, Tubby attempted to communicate with officers saying “what are you guys doing to me,” “I’m sorry,” “help me!,” and “I’m scared.” ECF 120-3 at 2:29:05-2:30:00.

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.)

Response: Not disputed.

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)

Response: Not disputed that Zeigle could not observe details of Tubby within the squad car due to fogged windows, but several officers on scene indicated it was possible to view shadows and movement within the squad car. ECF 120-12 at 58:16-23, 70:14-19.

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)

Response: Disputed, the side windows of the squad car had horizontal bars, ECF 120-4 at 110:1-16, breaking these windows would have provided both visibility and better communication without creating an escape route or forcing Tubby from the vehicle, as occurred when the rear window was broken. As discussed above in response to Paragraph 94, which response is incorporated herein by reference, Zeigle’s plan was not motivated by visibility or better communications but rather was primarily motivated by a desire to return the jail to normal operations, at the expense of Tubby’s safety. ECF 120-28 at 130:5-16; ECF 120-15 at 127:19—128:12; ECF 120-22 at 61:9-15.

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.)

Response: Disputed, as discussed above in response to Paragraph 96, which response is incorporated herein by reference, after the officers broke the back window of the squad car, Tubby attempted to establish verbal communication and dialog. With officers situated merely feet away from Tubby, ECF 120-13 at 38:56, Tubby began pleading for help. He said, “what are you guys doing to me,” “I’m sorry,” “help me!,” and “I’m scared.” ECF 120-3 at 2:29:05-2:30:00. The officers refused to listen to him and did not attempt to engage him in further dialogue or provide him instructions on how to surrender. Instead, an officer simply sprayed Tubby in the face with OC spray without warning, dialog, or instructions on

how to surrender. ECF 120-13 at 39:15—41:18; ECF 120-15 at 73:21—74:25; ECF 120-3 at 2:31:00—2:31:04.

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.)

Response: Not disputed as to Lieutenant Zeigle's subjective belief, the accuracy of this subjective belief is disputed. Other officers testified it would do much more than “flood[]” a closed environment, but would actually create a “torture chamber” effect. 2d Tahdooahnippah Decl. Ex. 5 at 46:14-18.

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.)

Response: Disputed, there was no reason that OC spray had to be deployed into the vehicle. Officers could have accomplished the goals of visibility and communication by breaking out the side-window. If OC spray became necessary, the rear window could have been broken out later. However, officers sprayed OC into Tubby's face when it was not necessary—he was asking for help, not actively resisting. ECF 120-13 at 41:03—41:18; ECF 120-3 at ECF 120-3 at 2:29:05-2:31:04; *see also* 2d Tahdooahnippah Decl. Ex. 4 at 23:4-18 (testifying that OC spray is justified by active resistance or its threat).

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.)

Response: Not disputed that Lieutenant Zeigle's plan was to force Tubby out of the vehicle through the rear window, it is disputed that his plan was for Tubby to surrender. When Lieutenant Allen confronted Lieutenant Zeigle about what would happen after the rear window was broken, Lieutenant Zeigle had no response other than to state: "We need to see what we have." ECF 120-24 at 63:17—64:1.

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.)

Response: Not disputed that Lieutenant Allen, Officer Allen, or Sergeant Katers were aware of Lieutenant Zeigle's plan, but it is disputed that the plan was communicated to any other officers on scene. This is reflected by the fact that the arrest team was not prepared to capture Tubby after he left the squad vehicle, ECF 120-14 at 39:10-40:5, and several officers on scene testified that the plan had not been communicated to them. ECF 120-15 at 66:4-25; ECF 120-8 at 68:2-22; ECF 120-4 at 106:12-18.

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.)

Response: Not Disputed that none of the very limited number of individuals who were told of Zeigle's plan to introduce OC spray into the vehicle communicated a concern to Lt. Zeigle.

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.)

Response: Disputed, as discussed above in response to Paragraphs 90, 93, 94, 95, and 96, which responses are incorporated herein by reference, Zeigle’s plan was not consistent with his training and experience—a SWAT and Crisis Negotiation Team were not activated, de-escalation techniques were not used, Zeigle’s plan diminished containment of a barricaded subject, and ultimately contributed to Tubby’s death.

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.)

Response: Disputed, as discussed above in response to Paragraphs 90, 93, 94, 95, and 96, which responses are incorporated herein by reference, Zeigle’s plan seems primarily motivated by a desire to return the jail to normal operations, at the expense of Tubby’s safety. As discussed above, the need for SWAT, Crisis Negotiators, containment, and communication of a plan, are all well-known necessities to safely resolve a barricade situation. Yet, Lieutenant Zeigle’s plan provided for none of these.

108. As part of the plan, an arrest team was formed, consisting of Sgt. Katers, and Officers Salzmann, 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)

Response: Not disputed, the failure of Zeigle to ensure the readiness of this arrest team, ECF 120-14, at 38:6—39:5, 39:10—40:5; see also 2d Tahdooahnippah Decl. at 91:24—

92:4, was deliberate indifference to Tubby's safety.

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.)

Response: Not disputed.

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.)

Response: Not disputed.

111. Officer Allen gave multiple verbal commands to Mr. Tubby to show his hands. (O'Brien Dep. at 112:19–113:14.)

Response: Disputed, Officer Allen specifically told Tubby that he could see one of Tubby's hands, which video evidence shows was Tubby's left hand. ECF 120-3, DOXT_DA00000707 at 2:30:49-56 ("I can see that one is free, let me see your other hand.").

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.)

Response: Disputed, there was a reaction from Tubby, he pleaded for help, saying "what are you guys doing to me," "I'm sorry," "help me!," and "I'm scared." ECF 120-3 at 2:29:05-2:30:30. Tubby may have been pleading for help because he did not understand what he was required to do, needed help unwinding his hands stuck underneath his shirt, or required help because something was preventing him from following commands. Tragically, because the officers did not ask Tubby and then killed him, we will never know why he

needed help.

It is not disputed that despite Tubby's pleas for help, Officer Allen sprayed Tubby directly in the face with OC spray from a large canister (typically used for crowd control) that had been provided to him by Lieutenant Zeigle. ECF 120-13 at 39:15—41:18; ECF 120-15 at 73:21—74:25; ECF 120-17 ¶ 75; ECF 120-3 at 2:31:00—2:31:04.

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).

Response: Disputed, the testimony is that OC spray may *only* be used to overcome active resistance or its threat. 2d Tahdooahnippah Decl. Ex. 4 at 23:4-18 (testifying that OC spray is justified by active resistance or its threat). Tubby was not actively resisting, he was pleading for help. ECF 120-3 at 2:29:05-2:30:30.

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.)

Response: Not disputed.

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.)

Response: Lieutenant Allen has no foundation to testify as to why the bean bag shotgun was used, but it is not disputed that GBPD Sergeant Thomas Denney shot Tubby with a beanbag, ECF 114-4 at 148:13—149:13.

116. Mr. Tubby jumped off the trunk and landed on the ground next to the squad. (Zeigle Dep. at 79:5–11.)

Response: Disputed, Tubby did not jump of the trunk and land on the ground, he was knocked off the trunk by the beanbag and lasting effects of OC spray, and fell to the ground. ECF 113-7 at 11-15; ECF 118 at ¶¶ 93-94.

117. Mr. Tubby then rose and ran towards officers standing near the open sally port door. (N. Allen Dep. at 94:16–95:4.)

Response: Disputed, Tubby was blinded and disoriented from the OC spray, he did not run towards officers but rather stumbled into a van in the sallyport. ECF 114-8 at 83:10—85:22, 86:20—88:10.

118. At this time, Officer Salzman deployed his K-9 unit in an attempt to stop Mr. Tubby. (Zeigle Dep. at 79:25–80:12.)

Response: Not disputed that Officer Salzman deployed his canine and that the canine engaged, but disputed to the extent “stop” means stop Tubby from running towards officers. Tubby did not need to be “stopped” from running towards officers because he was not running towards officers at all, he was blinded and disoriented from the OC spray and stumbling around the sallyport. ECF 114-8 at 83:10—85:22, 86:20—88:10.

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.)

Response: Disputed. Officer Wernecke, Lieutenant Zeigle, Deputy Mleziva, and Deputy Winistorfer were all armed with lethal weapons (Sergeant Denney was not), yet *none* of them used deadly force against Tubby, ECF 114-27 at BC_JCT000891, an objective fact indicating that none of them perceived themselves or others to be in imminent danger. Some of these officers have attempted a *post hoc* rationalization of this fact by claiming there was a risk of “cross fire,” but officers are trained to use deadly force notwithstanding cross fire in the event that there is an imminent threat of death or serious bodily harm. 2d Tahdooahnippah Decl. Ex. 4 at 105:24—106:18; 2d Tahdooahnippah Decl. Ex. 13 at 38:2-21.

Moreover, for the reasons discussed above in response to Paragraphs 80, 81, and 84, which responses are incorporated herein by reference, none of these officers could have reasonably believed that Tubby posed a threat of imminent danger or serious bodily harm. For the reasons discussed above, O’Brien did not genuinely believe he saw a gun, did not inform others that Tubby had a gun, and the officers arriving on the scene did not act as if Tubby had a gun. Indeed, any belief that Tubby had a gun would have been negated as Tubby fell to the ground and displayed his empty right hand (as discussed above his empty left hand had already been shown to officers). ECF 114-1 at 101:19—104:6; ECF 114-10 at 0:09-0:10; ECF 114-11; ECF 120-7; ECF 120-8 at 184:18—185:10. Given these circumstances, the officers could not have reasonably feared that they were in imminent danger of death or serious bodily injury.

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.)

Response: Disputed, audio recordings of radio dispatch exist, and never once does the dispatcher state that Tubby has a gun. *See generally* ECF 120-9. Rather, the dispatcher reiterated what had been said by O’Brien—that Tubby may have “something.” *Id.* at 0:33-0:36.

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.)

Response: Disputed, Winistorfer specifically testified that he did not see a gun. ECF 120-32 at 46:21-23. In addition, for the reasons discussed above in response to Paragraphs 80, 81, 84, and 119, which responses are incorporated herein by reference, officers did not believe Tubby to be armed. Moreover, many officers stated that they did not believe Tubby was running at them or threatening them, rather he appeared to be simply fleeing or was disoriented. ECF 120-27 at 68:15-23; ECF 120-28 at 84:17—85:4, 86:20—87:7, 88:5-8.

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.)

Response: Disputed, Winistorfer specifically testified that he did not see a gun. ECF 120-32 at Tr. 46:21-23. In addition, for the reasons discussed above in response to Paragraphs 80, 81, 84, 119, and 121 which responses are incorporated herein by reference,

Winistorfer did not believe Tubby to be armed, and therefore could not have thought that individuals or citizens in the community could be in danger. Moreover, as discussed above in response to Paragraph 119, Winistorfer did not use deadly force, ECF 114-27 at BC_JCT000891, although he was armed with a gun, 2d Tahdooahnippah Decl. Ex. 36 at Tr. 55:20—56:15, an objective fact indicating that he did not perceive himself or others to be in imminent danger.

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.)

Response: Disputed, Winistorfer specifically testified that he did not see a gun. ECF 120-32 at 46:21-23. In addition, for the reasons discussed above in response to Paragraphs 80, 81, 84, 119, and 121 which responses are incorporated herein by reference, Winistorfer did not believe Tubby to be armed, and therefore could not have thought that law enforcement officers in the area could be in imminent danger. Moreover, as discussed above in response to Paragraph 119, Winistorfer did not use deadly force, ECF 114-27 at BC_JCT000891, although he was armed with a gun, 2d Tahdooahnippah Decl. Ex. 36 at Tr. 55:20—56:15, an objective fact indicating that he did not perceive himself or others to be in imminent danger.

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.)

Response: Disputed, Winistorfer did not have any “knowledge that Mr. Tubby was believed to have a firearm.” For the reasons discussed above in response to Paragraphs 80, 81, 84, 119, 121, 122, and 123, which responses are incorporated herein by reference, Winistorfer did not believe Tubby to be armed, Tubby was on the ground under the control of a police canine, and Tubby's empty hands were visible to law enforcement.

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.)

Response: Disputed, for the reasons discussed above in response to Paragraphs 80, 81, 84, and 119, which responses are incorporated herein by reference, O'Brien did not believe Tubby to be armed O'Brien, but instead saw that Tubby was face down on the ground, under the control of a police canine, with empty hands. Therefore, O'Brien could not have believed any law enforcement officer in the area was in imminent danger.

It is not disputed that O'Brien fired his weapon at Tubby.

126. Officer O'Brien stepped in front of Deputy Winistorfer immediately before firing his weapon. (Winistorfer Dep. at 55:20–56:5.)

Response: Not disputed that O'Brien stepped in front of Deputy Winistorfer before firing, but what constitutes “immediately” is within the province of the jury.

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.)

Response: Disputed, video evidence taken shortly before the shooting shows Mleziva

in much closer proximity to O'Brien. ECF 120-31; ECF 120-27 at 88:3-11.

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.)

Response: Disputed, Mleziva specifically testified that he never perceived Tubby to be armed with a gun or pointing a gun at officers. 2d Tahdooahnippah Decl. Ex. 37 at 37:5-16. In addition, for the reasons discussed above in response to Paragraphs 80, 81, 84, and 119, which responses are incorporated herein by reference, officers, including Mleziva, did not believe Tubby to be armed, and therefore could not have thought himself to be in imminent danger. Moreover, as discussed above in response to Paragraph 119, Mleziva did not use deadly force, ECF 114-27 at BC_JCT000891, an objective fact indicating that none he did not perceive himself or others to be in imminent danger.

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.)

Response: Disputed, while Noble cannot (nor could anyone) criticize an officer for believing that Tubby may have been armed if so told that by another officer *without more*—however, any such belief was negated when officers observed Tubby empty hands. ECF 114-1 at 101:19—104:6; ECF 114-10 at 0:09-0:10; ECF 114-11; ECF 120-7; ECF 120-8 at 184:18—185:10. In addition, it is disputed whether officers were ever told that Tubby was armed in the first place. 2d Tahdooahnippah Decl. Ex. 9 at 105:2-7 (“no one told me ‘I saw a gun.’”). Indeed, Noble specifically stated that “Whether a reasonable officer in Officer O'Brien’s position would have believed that Mr. Tubby was armed depends on credibility determinations to be made by the finder of fact.” ECF 114-19 ¶ 102.

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.)

Response: Not relevant to the Brown County Defendants’ Motion for Summary Judgment—it is undisputed that Tubby died as a result of being shot by O’Brien, 2d Tahdooahnippah Decl. Ex. 38 Brown County Defendants’ Responses to Plaintiffs’ First Set of Requests for Admission, at Request No. 1, and whatever medical aid was rendered is not relevant to any of the claims or defenses in this action.

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.)

Response: Disputed, Plaintiffs served a Wis. Stat. § 893.80 Notice of the Circumstances of Claim Against Brown County on Brown County on January 25, 2019 and on Jail Administrator Heidi Michel on January 29, 2019. 2d Tahdooahnippah Decl. ¶ 2. That notice was also directed to former Brown County Sheriff John Gossage but was not served. *Id.* After learning the names of several John Doe parties, and that John Gossage had been replaced as Sheriff by Todd Delain, Plaintiffs drafted a Wis. Stat. § 893.80 Amended Notice of the Circumstances of Claim Against Brown County. *Id.* ¶ 3. The amended notice also included additional facts concerning Lieutenant Zeigle’s deliberate indifference to Tubby’s safety, which had been learned by Plaintiffs after receiving a USB drive with files from the Wisconsin Department of Criminal Investigation on February 1, 2019. *Id.* Personal service of the amended notice was accomplished on March 11, 2019 for Sheriff Delain and Deputy Winistorfer, on March 18, 2019 for, Lieutenant Zeigle, and on

March 19, 2019 for Deputy Mleziva.

132. Plaintiffs filed their action on January 24, 2019. (Compl., ECF No. 1.)

Response: Not disputed.

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.)

Response: Disputed, Plaintiffs' notice contained the factual circumstances giving rise to Plaintiffs' claim against Brown County by operation of operation Wis. Stat. § 66.0313—that O'Brien was an officer acting under the direction of the Brown County Sheriff's Office within the jurisdiction of Brown County (the Brown County Jail). ECF 113-10 at 2. Plaintiffs were not required to identify legal labels, claims, causes of action, or cite statutes. *Townsend v. Neenah Joint Sch. Dist.*, 856 N.W.2d 644, 651 (Wis. Ct. App. 2014).

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."].)

Response: Not disputed.

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.)

Response: Not disputed.

II. PLAINTIFFS' STATEMENT OF FACTS REQUIRING DENIAL OF SUMMARY JUDGMENT

1. After Tubby refused to exit Officer Wernecke's squad car and Officer O'Brien shut the door, Tubby was locked inside the car. ECF 120-4 at 58:2-10, 109:11-14; ECF 120-8 at 35:1-5, ECF 120-4 at 109:11-14.

2. Afterward, O'Brien then radioed dispatch and stated that "it look[ed] like" Tubby had "something" in his hands. ECF 120-9 at 00:00—00:11.

3. The police dispatches reiterated what O'Brien said—that Tubby may have "something" and *never* once stated Tubby had a gun. *See generally* ECF 120-9; *id.* at 0:33-0:36. Notably, "something" is not equivalent to a gun: officers are trained to specifically say "gun" if they think they see a gun. ECF 114-17 at 101:7-13; Ex.13 at 54:16-25.

4. O'Brien then requested that an officer bring a shield to the sallyport, and asked several SWAT officers to come to the sallyport. Other officers suggested use of the "Bearcat,"

an armored (i.e., bullet proof) vehicle jointly owned by Green Bay and Brown County. ECF 120-9 at 01:18—01:33, 1:55—02:05, 02:21—02:42; ECF 120-11 at 140:13—141:5; ECF 120-12 at 61:17-20.

5. The radio traffic sending the Bearcat to the Brown County jail caught the attention of BCSO Sergeant Jason Katers, who alerted the on-duty shift commander, Lieutenant Thomas Zeigle (who also serves as Brown County's SWAT Commander). ECF 120-14 at 15:10—17:1, ECF 120-15 at 11:20-23.

6. Sergeant Katers and Lieutenant Zeigle both went to the sallyport, and instructed several BCSO deputies to do the same. ECF 120-14 at 17:2-14, 18:12-14; ECF 120-15 at 18:21-25.

7. In total, more than twenty officers went to the sallyport and brought with them, among other things, four police canines, the armored Bearcat, a bullet proof shield, a "bean bag shot" gun, and a large canister of OC spray (typically used for crowd control). ECF 120-16; ECF 120-27 at 16:24—20:8; 29:2-12; ECF 120-15 at 74:23—75:13, 76:2-15; ECF 120-13 at 34:42; ECF 120-17 ¶ 75.

8. The objective conduct of officers on the scene shows that they did not believe Tubby to be armed: they brought ride-alongs to the scene, one of those ride-alongs was permitted to record the scene with a cell phone, and officers mulled about the sallyport with weapons holstered—all actions that objectively violate policies governing responses to armed suspects. ECF 114-17 at 101:24—102:6, 103:16-23; ECF 120-31; 2d Tahdooahnippah Decl. Ex. 35, Doxt_DA00001034 at 0:00-6:30.

9. The officers on the scene were not told that Tubby had a gun. 2d Tahdooahnippah Decl. Ex. 9 at 105:2-7 ("no one told me 'I saw a gun.'").

10. Tubby's arresting officer, Officer Wernecke, also told officers on the scene that he was "confident" in his search of Tubby. 2d Tahdooahnippah Decl. Ex. 10 at 131:24—132:2.

11. With Tubby locked inside the squad car, Lieutenant Zeigle decided to treat the situation as a "barricade." ECF 120-15 at 46:15-17.

12. It is a well-known risk in law enforcement that a barricaded subject presents a high-risk of injury, including to the subject himself. ECF 120-18 at BC_JCT002659 (recognizing risk of “critical incidents” and defining “critical incidents to include “barricade”); 2d Tahdooahnippah Decl.Ex. 1 at 76:22—78:4.

13. The only acceptable response to a barricaded subject (whether evaluated under Brown County’s policies, Green Bay’s policies, general police practices, or NTOA training) is to formally activate a SWAT team. ECF 120-18 at BC_JCT002659; ECF 120-19 at §§ 404.7, 404.8.1; ECF 120-17 ¶ 58(d); see also ECF 120-8 at 24:9-20; 2d Tahdooahnippah Decl. Ex. 2 at 25:3—27:13, 28:24—30:2.

14. One reason SWAT activation is so important is that it is accompanied by deployment of a trained Crisis Negotiation Team. ECF 120-20 § 6(c) at BC_JCT002621; *see also* ECF 120-8 at 25:17-23.

15. The purpose of the Crisis Negotiation Team is to “de-escalate and effect peaceful resolutions” in “critical situations” such as barricaded subjects. ECF 120-20 at 1.

16. There is near “universal acceptance” of the need for police officers to de-escalate, particularly in a barricade situation. ECF 114-18 at 30; 2d Tahdooahnippah Decl. Ex. 3 at 2.

17. With de-escalation techniques, barricaded subjects will often voluntarily surrender without the need to use force. ECF 120-21 at PDF p.57; ECF 120-17 ¶ 63(e). With time, de-escalation techniques can peacefully resolve a barricade situation. ECF 120-20.

18. In the case of an armed barricade, there is no choice other than to wait for a subject to voluntarily surrender. 2d Tahdooahnippah Decl. Ex. 4 at 29:3-5.

19. The members of the Brown County Crisis Negotiation Team are trained on negotiation and de-escalation both in-house and through a forty-hour Federal Bureau of Investigation (“FBI”) negotiation course. ECF 120-11 at 109:18—110:16. This training of specifically focuses on resolving situations involving barricaded subjects. *See id.* at 92:8-15. The training of the Brown County SWAT team also specifically focuses on barricaded subjects. *Id.* at 121:10-13; ECF 120-8 at 24:9-20.

20. The Brown County SWAT Commander determines the content of SWAT policies, decides the training of the SWAT team, and also selects team members. 2d Tahdooahnippah Decl. Ex. 4 at 114:18-21, 135:12—136:2.

21. Under Brown County's express policies, the SWAT Commander is "responsible for the deployment of the SWAT team, tactical decision making, and tactical resolution of [an] incident," ECF 120-18 at BC_JCT002661; *see also* 2d Tahdooahnippah Decl. Ex. 4 at 127:10-14, and has the authority to: activate SWAT Team, ECF 120-18 at BC_JCT002662; ECF 120-15 at 12:19—13:1; activate a Crisis Negotiation Team, determine how many negotiators to use, Ex. 4 at 93:22—94:2, 113:14-24; and terminate a SWAT Team or Crisis Negotiation Team activation, *Id.* at 143:12—144:3.

22. In Lieutenant Zeigle's own words, as SWAT Commander he is "top of the line" of command for the SWAT team. ECF 120-15 at 12:23—13:1.

23. Due to the relationship between the SWAT and Crisis Negotiation Team, Lieutenant Zeigle is also in charge of deciding when to activate a Brown County Crisis Negotiation Team. 2d Tahdooahnippah Decl. Ex. 4 at 93:22—94:2, 113:14-24.

24. Despite Lieutenant Zeigle's authority to activate SWAT and Crisis Negotiators, he did not do so on the night of October 19, 2018. ECF 120-15 at 121:15-21.

25. Ignoring the "universal acceptance" of the need for de-escalation, Lieutenant Zeigle created a plan to force Tubby out of the police car by breaking the car's back window and firing a stream of OC spray directly into Tubby's face. ECF 120-15 at 51:15—53:6.

26. It is "important" to communicate tactical law enforcement plans to officers on scene. 2d Tahdooahnippah Decl. Ex. 2 at 55:22—56:2. But, Lieutenant Zeigle did not communicate his plan to all the officers on the scene. ECF 120-15 at 66:4-25; ECF 120-4 at 106:12-18; ECF 120-8 at 68:2-22. Therefore, officers were not instructed on how to respond when Tubby was forced to flee from the squad car, and were not even informed of the plan's goals, or how the plan intended to secure Tubby's compliance after he was forced out of the car. ECF 120-15 at 66:4-25; ECF 120-8 at 68:2-22; ECF 120-24 at 63:17—64:1.

27. Lieutenant Zeigle's decision to ignore de-escalation was most likely motivated by a simple desire to return the jail to normal operations, ECF 120-28 at 130:5-16; ECF 120-15 at 127:19—128:12; ECF 120-22 at 61:9-15, at the expense of Tubby's safety.

28. Officers could have waited hours before Tubby would have had to be taken out the vehicle. ECF 120-8 at 75:24—76:25. But, Lieutenant Zeigle set his plan into action only forty-some minutes after Tubby first arrived at the sallyport. ECF 120-3 at 1:42:45-1:43:00; ECF 120-13 at 30:02; *id.* at 37:00—38:42. Lieutenant Zeigle also created his plan without doing any basic investigation, such as asking what Tubby had been arrested for and without even looking inside of the sallyport. Ex. 2 at 115:4—116:16.

29. The reckless nature of Lieutenant Zeigle's plan was immediately apparent to other officers on the scene. Green Bay Lieutenant Nathan Allen was particularly critical of the plan. In Lieutenant Allen's own words, Lieutenant Zeigle's plan was "just a really bad plan." 2d Tahdooahnippah Decl. Ex. 5 at 123:19.

30. Containment of a subject is important. ECF 120-24 at 45:12-17; ECF 120-11 at 72:3-7, ECF 120-10 at 89:17—90:14. While Tubby was contained in the squad car, he was under control of law enforcement—he could not leave. ECF 120-4 at 100:10-13. Yet, Lieutenant Zeigle's plan caused that containment (and control) to be lost. *Id.* at 107:25—108:7.

31. Common sense dictates that you should not force a person believed to be armed outside of a secured car into an open area. 2d Tahdooahnippah Decl. Ex. 10 at 117:1-4, Ex. 9 at 141:19-24.

32. When Lieutenant Allen confronted Lieutenant Zeigle about what would happen after the rear window was broken, Lieutenant Zeigle had no response other than to state: "We need to see what we have." ECF 120-24 at 63:17—64:1.

33. Once the rear window of the squad was broken, and Sergeant Katers cleared the glass. ECF 120-3 at 2:30:49-56; ECF 120-13 at 37:00—38:42; ECF 120-14 at 28:1-15.

34. The NTOA describes the purposes of breaking a window as attempting to communicate or dialogue with a subject, such as by providing a warning. 2d Tahdooahnippah

Decl. Ex. 2 at 32:22—33:6, 123:14—126:3.

35. With officers situated merely feet away from Tubby, ECF 120-13 at 38:56, Tubby began pleading for help. He said, “what are you guys doing to me,” “I’m sorry,” “help me!,” and “I’m scared.” ECF 120-3 at 2:29:05-2:30:00. Officers did not respond to these cries for help.

Id.

36. As Tubby pleaded for help, officers could see Tubby’s empty left hand. ECF 120-3 at 2:30:49-56; 2d Tahdooahnippah Decl. Ex. 6 at 128:15-24, 129:22-130:1.

37. Lieutenant Zeigle then passed a large canister of OC spray (generally used for crowd control) into the sallyport and it made its way up to the turret of the Bearcat. ECF 120-13 at 39:15—41:03; ECF 120-15 at 73:21—74:25; ECF 120-17 ¶ 75.

38. Without warning, an officer then sprayed a stream of OC spray from that large canister directly into Tubby’s face. ECF 120-13 at 41:03—41:18; ECF 120-3 at 2:31:00—2:31:04.

39. The OC spray created a suffocating environment in the squad car that forced Tubby out through the broken rear window. ECF 120-13 at 41:19—41:34; ECF 120-15, at 52:16—53:6; ECF 120-15, at 52:16—53:6.

40. As Tubby exited the vehicle, the officers who were to serve as the “arrest team” to apprehend Tubby were not at the ready—they did not have the rear door of the BearCat open so that they could exit and apprehend Tubby—in contravention of Brown County’s SWAT training. ECF 120-14 at 38:6—39:5, 39:10—40:5; 2d Tahdooahnippah Decl. Ex. 4 at 91:24—92:4 (closed door hinders arrest team exiting vehicle).

41. While “arrest team” fumbled to open the door, they allowed Tubby to stumble around the sallyport disoriented from the OC spray. ECF 114-8 at 83:10—85:22, 86:20—88:10.

42. Compounding the failure of the “arrest team” to deploy, the plan to force Tubby from the vehicle had not been shared with the perimeter officers and the sallyport garage doors had been left open. ECF 120-15 at 66:4-25; ECF 120-8 at 68:2-22; ECF 120-4 at 99:18—100:16, 106:12-18.

43. Closing the garage doors is standard practice and helps maintain containment (without which there is a known risk of harm). 2d Tahdooahnippah Decl. Ex. 4 at 52:18-20, Ex. 13 at 27:16-25.

44. Perimeter officers interpreted Tubby's blind stumbling as an attempt to flee, or worse, that he was running at officers. ECF 120-27 at 68:15-23; ECF 120-28 at 84:17—85:4, 86:20—87:7, 88:5-8, 91:10-18.

45. GBPD Sergeant Denney shot Tubby with a bean bag gun. ECF 120-8 at 146:20—147:6.

46. Moments later, the arrest team finally came into action and Tubby was taken down by a police canine. ECF 120-28 at 98:15—99:24.

47. As Tubby was brought down by the police canine, his empty right hand became visible. ECF 114-10 at 0:09-0:10; ECF120-7; ECF 120-8 at 184:18—185:10.

48. Tubby hit the ground and was pulled backwards by the police canine. ECF 114-10 at 0:09-0:10.

49. At around the same time was falling to the ground, Tubby was shot a second time with the "bean bag shotgun." ECF 120-8 at 148:13—149:13.

50. As Tubby lay face down on the ground, Officer O'Brien opened fire. ECF 120-29 at 10; ECF 112-1 at pg. 3. Tubby was shot in the back of the head and torso in a downward direction. ECF 112-1 at ECF pp. 15-17; Ex. 7.

51. Tubby did not die instantly, but instead suffered as he bled to death on the concrete floor of the sallyport. Ex. 8 at 79:22-80:1

52. Video evidence from moments before the shooting show BCSO Deputies Mleziva and Winistorfer just feet away from Officer O'Brien. ECF 120-27 at 87:18—88:11; ECF 120-32 at 49:3-5. Winistorfer also admits he was within reaching distance at the time of the shots. ECF 120-32 at 49:3-5.

53. As the events unfolded, Officer O'Brien telegraphed his intent to use deadly force. He leaned out from a position of cover behind a wall. Ex. 6 at 129:14-17, 132:18—133:2.

He then began stepping side to side in a specific movement called “getting off the X,” a procedure which officers are trained to use when preparing to shoot. *Id.* at 147:20—148:14.

54. Neither Deputy Mleziva nor Deputy Winistorfer intervened to stop Officer O’Brien from shooting Tubby. 2d Tahdooahnippah Decl. Ex. 38, Brown County Defendants’ Responses to Plaintiffs’ First Set of Requests for Admission, at Request No. 1

55. Brown County does not train its officers that they have a duty to intervene to prevent excessive force. A BCSO *Sergeant* testified that prior to being named a defendant in this action for failing to intervene, he did not even know a duty to intervene existed. ECF 120-27 at 15:15-23. Similarly, Lieutenant Zeigle, a shift commander and the SWAT commander, testified that he had received training on the duty to intervene *once*, and only then in connection with his duties as a supervisor. ECF 120-27 at 15:15-23; ECF 120-15 at 141:16—142:11.

56. “Officer override” training is unrelated to the duty to intervene. “Officer override” is taught in the state *communications* manual *not* use of force training. 2d Tahdooahnippah Decl. Ex. 11 at BC_JCT001872-73. The “officer override” training is merely for an officer to step in to take over *communication* if another officer’s communication is ineffective or unprofessional. *Id.* It does not concern duty to intervene to stop excessive force at all.

57. Prior to October 19, 2018, there was an incident at the Brown County sallyport where an arrestee slipped his hands in front of him during transport, then opened the partition in the squad car, and grabbed an officer’s rifle and ammunition. 2d Tahdooahnippah Decl. Ex. 12. While that incident was resolved through use of a Taser rather than lethal force, *id.*, it certainly put Brown County on notice for the need for training concerning dealing with armed subjects in squad cars.

58. After the shooting, on January 24, 2019, the special administrators of Jonathan Tubby’s estate filed suit against Brown County and its officers. ECF 1. The original Complaint asserted claims under federal law and alleged Brown County had a duty to indemnify its officers under Wisconsin law for damages arising out of the officers’ violations of Tubby’s federal

constitutional rights. ECF 1 ¶¶ 23-50. The only reference to state law in the original Complaint was for indemnification of officers under Wisconsin Statutes section 895.46.

59. The next day, January 25, 2019, Plaintiffs arranged for service of a notice of the circumstances of state law claims against the then-Brown County Defendants, as required by Wisconsin Statutes section 893.80. ECF 113-11; 2d Tahdooahnippah Decl. ¶ 2. Thereafter, Plaintiffs were provided new information about the shooting by the Brown County District Attorney. 2d Tahdooahnippah Decl. ¶ 3.

60. Plaintiffs drafted an amended notice. The amended notice replaced former Brown County Sheriff John Gossage with his successor as Sheriff Todd J. Delain, named several John Does (including Defendants Nathan K. Winistorfer and Joseph P. Mleziva), and added discussion of circumstances involving Lieutenant Zeigle. Plaintiffs arranged for service on the Brown County Defendants of the amended notice, which was accomplished on each of them between March 11 and March 19, 2019. ECF 113-10; Tahdooahnippah Decl. ¶ 3.

61. The Brown County Defendants then had 120 days (or until July 17, 2019 at the latest) to consider whether to provide Plaintiffs any relief, after which the claims are deemed disallowed. Wis. Stat. § 893.80(1g).

62. July 14, 2019 came and went without any response from the Brown County Defendants. 2d Tahdooahnippah Decl. ¶ 4.

63. Plaintiffs then amended their Complaint on August 29, 2019 to assert claims for battery and negligence. ECF 66 ¶¶ 77-93.

Dated: December 2, 2020.

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