

**IN 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,

Case No. 1:19-cv-00137-WCG

Plaintiffs,

**PLAINTIFFS' OBJECTIONS TO
BROWN COUNTY DEFENDANTS' BILL
OF COSTS**

vs.

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

Defendants.

Plaintiffs are the Special Administrators of the estate of Jonathon C. Tubby ("Tubby"). Tubby was shot and killed by a Green Bay Police Officer, Defendant Erik O'Brien, while at the Brown County Jail sallyport. Tubby was unarmed, hand-cuffed, face-down, and restrained by a police canine. The District Court dismissed Plaintiffs' claims against Defendants Todd J. Delain, Heidi Michel, Brown County, Joseph P. Mleziva, Nathan K. Winisterfer, and Thomas Zeigle (collectively, the "Brown County Defendants"). Unsatisfied with the dismissal, the Brown County Defendants now seek to recover \$19,920.59 in litigation costs under Rule 54. The Brown County Defendants' Bill of Costs is improper, however, because the only entity that can be liable—Tubby's estate—has no assets and costs should not be taxed against Tubby's indigent estate.

Plaintiffs did not sue in their personal capacities, but rather asserted claims on behalf of Tubby's estate in their capacities as special administrators of that estate. 3d. Am. Compl, ECF 83, at 1; Armstrong Decl. Ex. 2. Special Administrators are appointed when, among other things,

there is no estate and an act needs to be performed on the part of the decedent, or a cause of action exists for the decedent. Wis. Stat. § 867.07. Here, Tubby had no assets to form an estate, except for the causes of action assert in this litigation. *See* Armstrong Decl. ¶¶ 3, 6, Ex. 1; S. Doxtator Decl. ¶ 3. Accordingly, Plaintiffs were appointed special administrators for the purpose of asserting those causes of action. Armstrong Decl. ¶ 4, Ex. 2.

As special administrators, they have the powers and duties of a personal representative of the estate. Wis. Stat. § 867.17. Therefore, Plaintiffs are not personally liable for any taxed costs, but instead those costs come out of their administration account from the estate, unless the litigation was in bad faith (i.e., “without just cause,” which has not been alleged here) or the Court orders Plaintiffs to be personally liable. Wis. Stat. § 857.07; *see also* *Stone v. Hendry*, No. 17-14177-CIV-ROSENBERG/MAYNARD, 2020 U.S. Dist. LEXIS 92669, at *3-4 (S.D. Fla. May 26, 2020) (“Consequently this Court construes only one party-plaintiff who is bringing this lawsuit on Cox's behalf, and that party-plaintiff is Monica Stone in a representative capacity. As such, costs may be awarded against Mrs. Stone only in her role as personal representative, and the Defendants may recover that cost award only as a claim against Cox's estate. Costs may not be recovered from the survivors.”); *Robertson v. Prelesnik*, File No. 5:90-CV-31, 1992 U.S. Dist. LEXIS 11526, at *7-8 (W.D. Mich. May 1, 1992) (“Plaintiffs . . . instituted this action as co-representatives of the Estate . . . , not as individuals. Accordingly, any assessment of costs would be against the estate.”).

Other than the causes of action that were dismissed, Tubby’s estate has no significant assets, and therefore the estate cannot be taxed nearly \$20,000 in costs. “It is within the discretion of the district court to consider a plaintiff’s indigency in denying costs under Rule 54(d).” *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 387 n.9 (2013); *Rivera v. City of Chicago*, 469 F.3d 631,

635 (7th Cir. 2006); *see also* *Plair v. E.J. Brach & Sons*, No. 94 C 244, 1995 U.S. Dist. LEXIS 8910, at *3 (N.D. Ill. June 27, 1995) (declining to award costs based on party's indigency). In considering indigency, the Court should first decide whether the losing party is incapable of paying the costs at this time or in the future. *Rivera*, 469 F.3d at 635. Tubby's estate is clearly incapable of paying \$19,920.59 now or in the future.

Tubby's estate had no assets—no significant cash, no banking accounts, no stocks, insurance, investments, real property, or the like. Armstrong Decl. ¶¶ 3, 6; S. Doxtator Decl. ¶ 2. At the time of his death, Tubby's property consisted merely of personal effects (such as clothing and \$50 pocket money), and a vehicle. S. Doxtator Decl. ¶ 2. Tubby's vehicle – a 1997 Pontiac Grand Am – is worth about \$1,700 according to the Kelley Blue Book,¹ but is not in the estate's possession in any event. S. Doxtator Decl. ¶ 2. The vehicle was seized the night Tubby was killed and never returned. *Id.* Moreover, because Tubby is deceased, his estate is not gaining any property. He had no life insurance. *Id.* ¶ 3. His funeral was paid for with bereavement assistance from the Oneida Nation, of which \$2,000 remains. *Id.* The only other asset of value are the claims that have now been dismissed with prejudice in this action. *Id.*; Armstrong Decl. ¶ 6.

The next step in the analysis is to consider “the amount of costs, the good faith of the losing party, and the closeness and difficulty of the issues raised.” *Rivera*, 469 F.3d at 635. The amount of costs is high compared to the assets of the estate. Moreover, Plaintiffs' pursued claims against the Brown County Defendants in good faith. Indeed, the issues raised in this case were close. Although the Court held that law enforcement officer have no duty to intervene in a police-shooting case due to the quick interval of time in which a shot is fired, Plaintiffs did present

¹ Kelley Blue Book, 1997 Pontiac Grand Am Trade-in Value, *available at* <https://www.kbb.com/pontiac/grand-am/1997/gt-sedan-4d/?vehicleid=8310&mileage=100000&modalview=false&intent=trade-in-sell&pricetype=trade-in&condition=good&options=6428961%7cttrue> (accessed June 3, 2021 at 10:50am).

evidence that Officer O'Brien telegraphed his intent to shoot by "getting off the X" and that the Brown County Defendants were in close proximity to Officer O'Brien and could have intervened verbally or physically. Similarly, while Plaintiffs did not prevail on their state-created danger claim, they presented substantial evidence, including testimony from the former chief of police in a city similar in size to Green Bay, that a SWAT deployment was called for and that it was reckless for the Brown County Defendants to refrain from deploying a SWAT team (which would have arrived with trained Crisis Negotiators). Plaintiffs presented additional evidence, in the form of testimony from Green Bay police officers, that it was reckless and violated clearly established rights for the Brown County Defendants to force Tubby from the squad car confining him the night of his death. Moreover, Plaintiffs could not have anticipated that the Court would hold that a state-created danger requires the creation of danger from a *private* actor—this case was the first ever to expressly so hold. For all these reasons, Plaintiffs respectfully request that the Clerk decline to impose costs on Tubby's estate.

Dated: June 4, 2021

By /s/ Forrest Tahdooahnippah _____

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