No. 21-2101

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

SUSAN DOXTATOR, ARLIE DOXTATOR, AND SARAH WUNDERLICH, AS SPECIAL ADMINISTRATORS OF THE ESTATE OF JONATHON TUBBY,

Plaintiffs-Appellants,

v.

ERIK O'BRIEN, ANDREW SMITH, TODD J. DELAIN, HEIDI MICHEL, CITY OF GREEN BAY, BROWN COUNTY, JOSEPH P. MLEZIVA, NATHAN K. WINISTERFER, THOMAS ZEIGLE, AND JOHN DOES 1-5,

Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of Wisconsin, No. 1:19-cv-00137
Hon. William C. Griesbach, District Judge

APPELLANTS' OPENING BRIEF

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RULE 26.1 DISCLOSURE STATEMENT

(1) The full name of every party that the attorney represents in this case: Susan Doxtator, Arlie Doxtator, Sarah Wunderlich.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court: Dorsey & Whitney LLP; David Armstrong, attorney at law.

(3) If the party or amicus is a corporation:

i. Identify all its parent corporations, if any: N/A

ii. List any publicly held company that owns 10% or more of the party's or amicus' stock: N/A.

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JURISDICTIONAL STATEMENT

On October 19, 2018, Jonathon Tubby ("Tubby") was shot five times in the back of the head, neck, and torso by a Green Bay Police Officer inside of the Brown County jail. Tubby died from his injuries. Appellants, the Special Administrators of his estate, brought claims under 42 U.S.C. § 1983 and state law against the police officer who killed Tubby, nearby officers that failed to intervene, the City of Green Bay, Brown County, and several Green Bay and Brown County officials. The district court had jurisdiction under 28 USC §§ 1331, 1343, and 1367. On May 19, 2021, the District Court granted summary judgment in favor of the defendants on all claims. ECF 176. On May 19, 2021, a final judgment was entered. ECF 177. Appellants timely filed a notice of appeal on June 15, 2021. ECF 186. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1) It is fundamental that on a motion for summary judgment the evidence is viewed in the light most favorable to the nonmovant and all reasonable inferences must be drawn in his favor. Viewing the evidence in this light, Jonathon Tubby was known to be *un*armed, forced out of a locked squad car in violation of accepted police practices, subdued by OC spray and a canine, and then shot five times in the back of the head, neck, and torso as he lay face-down on the pavement. Was it error for the District Court to grant summary judgment and dismiss all claims where it weighed disputed evidence, ignored evidence in Appellants' favor, and engaged in speculation based on circumstances not in the record, including reliance on a YouTube video of an unrelated shooting?

2) Police officers have a duty to intervene to prevent excessive force by other officers. Was it error for the District Court to create a *per se* exception to this duty in cases where the use of excessive force takes the form of a shooting?

3) It has been the law in this Circuit for decades that the "state-created danger" doctrine is *not* limited to cases where the state creates a danger of violence from a private actor. Was it error for the District Court to limit the doctrine to only cases of "private danger" from third-parties?

STATEMENT OF THE CASE

Tubby was arrested for non-violent crimes by Green Bay Police Officers Erik O'Brien ("O'Brien") and Colton Wernecke ("Wernecke") after a routine traffic stop. O'Brien observed Tubby's search at the time of arrest, and knew he was unarmed. Tubby slipped his handcuffed hands to the front of his body, and became noncompliant when he arrived at the Brown County jail. Because Tubby's hands were in front of his body, O'Brien radioed that he thought Tubby might have "something." Officers did not believe Tubby to be armed—had O'Brien seen a weapon he would have specifically said so, per his training, and responding officers brought ride-alongs to the scene, which they would not have done had they believed Tubby was armed.

Frustrated that the jail was not at normal operations due to the incident, Brown County SWAT Commander, Lieutenant Thomas Zeigle ("Zeigle") decided to force Tubby out of the squad car by breaking the back window and spraying a blinding eye irritant, OC spray, into the vehicle. After officers broke the window, Tubby pleaded, "help me," "I'm scared." Without warning, Tubby was then sprayed with OC and forced to blindly exit the vehicle. Acting in haste, Zeigle refused to activate a SWAT team. As a result, an "arrest team" was not at the ready and Tubby stumbled blindly around the sally port of the jail. Eventually, he was taken down by a police canine. Before he fell, his empty left hand was visible, and as he was knocked down his empty right hand also became visible. As he lay face-down on the ground, being pulled backward by a police canine, O'Brien (the same officer that supervised his earlier search) opened fire, shooting him five times in the back of his head, neck, and torso.

The District Court ignored much of this evidence and merely credited O'Brien's *ex facto* testimony that he thought Tubby was armed. As additional support, the District Court relied on irrelevant evidence, such as a screenshot of a video of Tubby taken thirty-eight minutes after O'Brien claims he saw a gun, during a time when no officers could see Tubby. The District Court also relied on outright speculation supported by its own search of YouTube. The District Court went on to hold that officers have no duty to intervene in police shooting cases, and that a state-created danger claim cannot be asserted unless it involves a "private danger." The District Court also held that Zeigle was not deliberately indifferent to Tubby's rights, and was entitled to qualified immunity. As a result, the District Court dismissed all claims. This Court should reverse.

A. Tubby Is Arrested for Nonviolent Crimes and Brought to Jail Where He is Noncompliant But Not Believed to Be Armed.

On the evening of October 19, 2018, Tubby was subject to a traffic stop by O'Brien and Wernecke due to a suspicious license plate. DCI Report, APP125; O'Brien Depo., APP039 at 27:3-7. Tubby had an outstanding bench warrant for a nonviolent crime (failure to appear) and was in possession of a small amount of marijuana. DCI Report, APP119; Wernecke Depo., APP062 at 54:7-9. Tubby was thoroughly searched by Wernecke, who was "confident" in the search. *Id.*, APP062 at 54:13—56:4. No weapon was found. *Id.*

O'Brien was Wernecke's field training officer and personally observed the search. *Id.*, APP060, at 48:21—49:3, APP062 at 54:23-25. In addition, no weapons could have been stashed in the squad car, because Wernecke had searched the vehicle prior to

the pair's shift, and no one else had been in the rear of the squad that night. *Id.*, APP061 at 50:19—51:8, 51:23—52:11, 53:15-23. Therefore, Officer O'Brien knew at that moment with substantial certainty that Tubby was unarmed. Tubby was then transported to the Brown County jail. O'Brien Depo., APP040 at 35:1-4.

Upon arriving at the sally port (a garage where arrestees are taken from a squad car to the interior of the jail, Ariel Map, ECF 120-5; Nelson Depo., ECF 120-6 at 12:4—14:1), Tubby refused to exit the squad car. Internal Squad Video, ECF 120-3 at 1:44:43-1:44:50. Wernecke also noticed that Tubby had slipped his handcuffed hands to the front of his body. Wernecke Depo., APP063-64 at 65:14-66:1. Later, O'Brien would claim that at this moment he believed he saw the "barrel" of a gun "protruding" several inches from Tubby's shirt. O'Brien Depo., APP041-42 at 39:19-42:11, 43:8-12. Video evidence of this crucial moment when O'Brien and Wernecke opened the rear door of the squad car has been preserved.

Notably, however, the District Court did not rely on video of this crucial moment. Instead, the District Court gave greater weight to video from thirty-eight minutes later at time when officers could not even see Tubby due to the squad car's fogged windows and open trunk. *Compare* Internal Squad Video, ECF 120-3 at 1:45:00 (officer contact of Tubby in vehicle at time stamp 20:24:49) *with* Decision, APP015 (screen shots came from time 9:02:35 pm); E. Allen Depo., 114-6 at 21:8-15; Denney Depo, 114-4 at 37:14-22, 56:10-17; O'Brien Depo., APP043 at 59:5-6, APP044-45 at 93:6—94:19, APP053-54 at 184:10—187:7. This is significant because video of the crucial

moment in time when O'Brien claims he saw the barrel of a gun does not show anything that reasonably appears to be the barrel of a gun:

APP035. As Wernecke, who was on the scene with O'Brien, testified, Tubby had "hands [] in front of him balled up," but it did *not* look like he had a gun. Wernecke Depo., APP063-64 at 65:18-66:5.

Officers O'Brien and Wernecke then reached down to grab Tubby's foot and he said: "I'll fucking do it," and the officers then shut the door. Internal Squad Video, ECF 120-3 at 1:44:50-1:45:21. Moments later, O'Brien radioed police dispatch to tell them that "it look[ed] like" Tubby had "something." Radio, ECF 114-28 at 00:00—00:11. This word choice is significant—it demonstrates that O'Brien (contrary to his later claims) did not believe Tubby was armed. Had O'Brien believed Tubby was armed, he was trained to specifically say so, such as by using the word "gun." Warych Depo., APP107

at 101:7-13. This is confirmed by the testimony of officers who arrived on the scene. *See* Denney Depo., APP091 at 105:2-7 ("no one had told me 'I saw a gun.'").

In response to Officer O'Brien's radio call, dozens of officers from both the Green Bay Police Department and Brown County Sheriff's Office arrived at the scene. *See* Green Bay Defs.' Initial Disclosures, ECF 120-16 at 1-5 (listing officers on scene). Underscoring the fact that the officers did not believe Tubby was armed, two "ride-alongs" were brought to the scene (bringing a "ride-along" would be prohibited in responding to the scene of an armed subject), one of whom recorded the scene with a cell phone (also inconsistent with a fear of being shot by an armed subject). Denney Depo., APP085 at 11:12-23, APP094 at 160:2-23, APP095 at 180:13—181:1; Warych Depo., APP107-108 at 101:24—102:6, 103:16-23; DCI Report, APP121.

B. Brown County SWAT Commander Declines to Activate SWAT Team or Crisis Negotiators, and Instead Forces Tubby Out of the Car With OC Spray As He Begs for Help.

Among the officers responding to the sally port was Zeigle, the Brown County SWAT Commander. Zeigle, Depo., APP069 at 11:20-23, APP070 at 18:23-24. Zeigle deliberated with other officers on the scene, such as Green Bay Lieutenant Nathan Allen, to formulate a plan to respond to Tubby's noncompliance. *Id.*, APP070 at 18:3-20:9. Zeigle decided to treat the situation as a "barricade." *Id.*, APP074 at 46:15-17. The accepted police response in this geographical area to a barricaded subject (whether evaluated under Green Bay's policies, Brown County's policies, general police practices, or the National Tactical Officers Association ("NTOA") training that Lieutenant Zeigle received as SWAT commander) is to activate and deploy a SWAT team. BCSO SWAT

Policy, ECF 120-18 at BC_JCT002659; Green Bay SWAT Policy, ECF 120-19 at §§ 404.7, 404.8.1; J. Nobel Expert Report, ECF 120-17 ¶ 58(d); *see also* Denney Depo., APP086 at 24:9-20. Zeigle admitted that his training for barricaded situations included activation of SWAT. Zeigle Depo., APP072-73 at 28:24—30:2.

One reason SWAT activation is so important is the "universal acceptance" of the need for de-escalation. R. Willis Expert Report, ECF 114-18 at 30; *see also* Green Bay Police Policy, ECF 137-3 at § 409.4.1 (advising to "avoid forceful confrontation" in barricade situation). SWAT activation is accompanied by deployment of a trained Crisis Negotiation Team. BCSO Crisis Negotiation Team Policy, ECF 120-20 § 6(c) at BC_JCT002621-22; *see also* Denney Depo., APP086 at 25:17-23. The purpose of the Crisis Negotiation Team is to "de-escalate and effect peaceful resolutions" in "critical situations" such as barricaded subjects. BCSO Crisis Negotiation Team Policy, ECF 120-20 at 1. De-escalation techniques are particularly important for barricaded subjects because the only accepted option is to wait for the barricaded person to surrender. Jansen Depo., ECF 137-4 at 29:3-5. And, in the case of Tubby specifically, no exigency existed, officers had the luxury of hours that they could have used to de-escalate, negotiate, and wait for Tubby to surrender. Denney Depo., APP090 at 75:24—76:25.

Zeigle, however, was anxious to return the Brown County jail to normal operations (the sally port was not in use during the incident), and decided that he did not want to wait for Tubby to voluntarily surrender. *See* Salzmann Depo., APP103 at 130:5-16; Zeigle, Depo., APP081 at 127:19—128:12; K. Smith Depo., ECF 120-22 at 61:9-15. Instead, Zeigle decided to force Tubby out of the squad car by breaking the car's

back window and firing a stream of OC spray into the confined space of the car. Zeigle, Depo., APP075 at 51:15—53:6. OC spray is an irritant that causes a burning sensation and, when it gets in a person's eyes, causes that person to shut their eyes due to the burning and watering of their eyes. Denney Depo., APP092 at 138:16-139:13.

Acting in haste, Zeigle did not communicate his plan to all the officers on the scene. Zeigle, Depo., APP076 at 66:4-25; O'Brien Depo., APP047 at 106:12-18; Denney Depo., APP089 at 68:2-22. 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. Zeigle, Depo., APP076 at 66:4-25; Denney Depo., APP089 at 68:2-22; N. Allen Depo., APP112 at 63:17—64:1. Zeigle also decided not to activate a SWAT team or deploy a trained Crisis Negotiation Team. Zeigle, Depo., APP080 at 121:15-21.

Zeigle's plan to force Tubby out of the squad car was criticized by others, such as Lieutenant Allen who later called it "just a real bad plan." N. Allen Depo., APP113 at 123:19. In particular, accepted practices are to *contain* a subject. N. Allen Depo., APP110 at 45:12-17; Jansen Depo., ECF 120-11 at 72:3-7, *see* Warych Depo., APP105-106 at 89:17—90:14. And Tubby was already contained; he was locked inside a squad car. O'Brien Depo., APP046 at 100:10-13. Yet, Lieutenant Zeigle's plan caused that containment (and control) to be lost. *Id.*, APP047 at 107:25—108:7. Notably, Zeigle formulated his plan without knowing why Tubby had been arrested and without going into the sally port to assess the situation. Zeigle Depo., APP079 at 115:4-116:1.

Some forty minutes after Tubby first arrived at the sally port, Zeigle's plan was set into action. Internal Squad Video, ECF 120-3 at 1:42:45-1:43:00 (depicting change of light indicating that squad went indoors at 8:22 pm); Dash Video 1, ECF 120-13 at 33:04 (BearCat entering sally port at 9:02 pm). A mixed team of Brown County and Green Bay officers drove the armored vehicle (known as the "Bearcat") into the sally port and parked next to the squad car with Tubby inside. Katers Depo., ECF 120-14 at 39:24-25; Dash Video 1, ECF 120-13 at 33:00—34:00. An officer in the Bearcat broke the rear window of the squad car and cleared the glass. Internal Squad Video, ECF 120-3 at 2:30:49-56; Dash Video 1, ECF 120-13 at 37:00—38:42.

With officers situated merely feet away, Tubby began pleading for help. Dash Video 1, ECF 120-13 at 38:56. He said, "what are you guys doing to me," "I'm sorry," "help me!," and "I'm scared." Internal Squad Video, ECF 120-3 at 2:29:05-2:30:00. As Tubby pleaded for help, officers could clearly see Tubby's empty *left* hand, a fact that they specifically stated aloud. Internal Squad Video, ECF 120-3 at 2:30:49-56 ("I can see that one is clear"). However, without a Crisis Negotiation Team present, the officers were either untrained to listen for Tubby's cries for help, or did not care. Rather than engaging and de-escalating by asking Tubby what was wrong (for instance, it may have been that his hands were stuck in his shirt due to the handcuffs), officers merely proceeded with the plan to force him from the vehicle.

Rather than permitting an officer to use a standard sized spray from his duty belt, Zeigle passed a large canister (generally used for crowd control) of OC spray—an irritant that forces a person to shut his eyes—into the sally port and it made its way up

to the turret of the BearCat. Dash Video 1, ECF 120-13 at 39:15—41:03; Zeigle, Depo., APP077-78 at 73:21—74:25; J. Nobel Expert Report, ECF 120-17 ¶ 75. Without warning or instruction on how to properly surrender so he could receive the help he was requesting, an officer then sprayed a stream of OC spray from that crowd control canister directly into Tubby's face while he was still enclosed in the squad car. Internal Squad Video, ECF 120-3 at 2:31:00—2:31:04; Dash Video 1, ECF 120-13 at 41:03—41:18. The OC spray created a "torture chamber" in the vehicle. N. Allen Depo., APP111 at 46:14-18. Without any means to surrender or otherwise end the torture, Tubby was forced to blindly flee the vehicle through the broken rear window. Dash Video 1, ECF 120-13 at 41:19—41:34; Zeigle Depo., APP075 at 52:16—53:6.

No SWAT team had been activated, and the Green Bay officers who had been designated as the "arrest team" were untrained in Brown County's SWAT procedures and were *not* at the ready—they did not have the rear door of the BearCat open so that they could exit and apprehend Tubby. Katers Depo., ECF 120-14 at 38:6—39:5, 39:10—40:5. At this time, O'Brien was watching the events unfold just outside an open sally port garage door, along with Brown County Sheriff Deputies Mleziva and Winisterfer. Dernbach Depo., ECF 120-27 at 87:18—88:11; Winisterfer Depo., ECF 120-32 at 49:3-5. O'Brien specifically testified that, at the time, he could see Tubby's empty left hand. O'Brien Depo., ECF 137-6 APP048-49 at 128:15-24, 129:22-130:1.

As the "arrest team" fumbled to open the rear door of the BearCat, Tubby stumbled around the sally port blinded by the OC spray. Salzmann Depo., APP098 at 83:10—85:22, APP099 at 86:20—88:10. He fell to the ground, got up, stumbled, and ran

into a parked van. *Id.* 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 sally port garage doors had been left open. Zeigle Depo., APP076 at 66:4-25; Denney Depo., APP089 at 68:2-22; O'Brien Depo., APP046 at 100:1-16, APP047 at 106:12-18. Therefore, the perimeter officers interpreted Tubby's blind stumbling as an attempt to flee, or worse, that he was running at officers. Dernbach Depo., ECF 120-27 at 68:15-23; Salzmann Depo., APP099 at 86:20—87:7, 88:5-8, APP100 at 91:10-18. Accordingly, one officer shot him with a bean bag gun. Denney Depo., APP093 at 146:20—147:6. Moments later, the arrest team finally came into action and Tubby was taken down by a police canine. Salzmann Depo., APP101 at 98:15—99:24.

C. Tubby is Shot Five Times in the Back of the Head, Neck, and Torso While Unarmed, Handcuffed, Facedown on the Ground, and Under Attack by a Canine.

When Tubby fell to the ground he was alive. Wernecke Depo., APP065-66 at 101:19—104:6; Enhanced Video, ECF 114-10 at 0:09-0:10; *see also* ECF 114-11. As shown by the video evidence, as Tubby fell his arms extended away from his body, displaying his empty right hand. Enhanced Video, ECF 114-10 at 0:09, APP033-34. The video evidence shows, prior to the fall, the open garage door and rear of a squad car:

APP033. The video shows Tubby then quickly falling to the ground—as he does the flesh of an empty hand, which based on the perspective of the video compared to his body must be his right hand, comes into view:

APP034; *see also* Denney Depo., APP096 at 184:18—185:10 (officer conceding hand visible in video).

With officers (including O'Brien) remarking that his *left* hand was visible and empty, O'Brien Depo., APP048-49 at 128:15-24, 129:22-130:1; *see also* Internal Squad Video, ECF 120-3 at 2:30:49-56 ("I can see that one is clear"), Tubby's empty *right* hand conclusively revealed that he was ***not*** armed and, did not have "something" in his hands at all. Enhanced Video, ECF 114-10 at 0:09-0:10; APP034. Tubby (still alive) was then pulled backwards, Enhanced Video, ECF 114-10 at 0:09-0:10, by the police canine, Salzmann Depo., APP101 at 98:15-100:15.

Around the same time that he was taken down by the police canine, Tubby was shot a second time with the beanbag gun. Denney Depo., APP093 at 148:13—149:13. Claiming he mistook the sound of this beanbag gun for the sound of a lethal handgun (despite not firing after the first time the same beanbag gun was fired), O'Brien opened fire. O'Brien DCI Stmt., ECF 120-29 at 10; Medical Examiner's Report, ECF 112-1 at 3. O'Brien telegraphed his intent to use deadly force by leaning out from behind a wall and then side-stepping in a specific movement called "getting off the X." O'Brien Depo., APP049 at 132:18—133:2, APP052 at 147:20—148:14[1] Despite these warning signs, nearby officers such Deputies Mleziva and Winisterfer did not intervene.

As a result, O'Brien fired a total of eight shots. ECF 114-27 at BC_JCT001016. Five bullets hit Tubby while he lay face down on the ground. Medical Examiner's Report, ECF 112-1 at 15-17. Tubby was shot in the back of the head, neck, and torso. *Id.*; Autopsy Photos, ECF 137-7. All of these shots were in a *downward* direction. Medical Examiner's Report, ECF 112-1 at 15–17. Tubby had *pre-mortem* injuries to his chin consistent with falling face-first to the ground. Dr. Tranchida Depo., ECF 114-12 at 81:19—82:9. Tubby did not die instantly, but instead suffered as he bled to death. Dr. Tranchida Depo., ECF 137-8 at 79:22-80:1. Officer O'Brien was the only officer who fired. DCI Report, APP126.

[1] Despite the availability of video evidence from the scene, neither Tubby nor O'Brien were captured on video at the time of the shooting.

D. O'Brien's Credibility Problems

The night of the shooting, the sole reason that O'Brien gave for shooting was that he mistook the sound of the beanbag gun for the sound of a lethal handgun. *See* Medical Examiner's Report, ECF 112-1 at 3 ("supposedly there was a loud popping sound and an Officer reacted by firing."). However, several officers specifically noted that they could tell the difference between the sound of the beanbag gun and the sound of O'Brien's handgun that night. *E.g.*, DCI Report, APP116—APP118, APP122—APP124, APP127—APP129; Salzmann Depo., APP102 at 102:6—103:2, E. Allen Depo., ECF 114-6 at 109:8-110:5; Wernecke Depo., APP059 at 39:19—40:10. During discovery, several officers even specifically testified that it would not be reasonable to mistake the two sounds. Katers Depo., ECF 114-14 at 40:17-21; Mleziva Depo., ECF 114-15 at 31:9-14.

O'Brien subsequently changed his story and began claiming he had seen the "barrel" of a gun under Tubby's shirt when he and Wernecke opened the rear door of the squad, O'Brien Depo., APP041-42 at 39:19—42:11, and fired because he thought Tubby pointed the "barrel" at him, O'Brien Depo., APP050 at 134:18—135:9, or at other officers, *id.*, APP051 at 143:20—144:6. Notably, however, O'Brien has a history of dishonesty. In particular, he made two material false statement or omissions on his application to become a police officer.

First, he was asked to disclose "*ALL instances* in which you were convicted of a crime (misdemeanors or felonies), ordinance violations, traffic violations and the like," Employment Application, ECF 114-20 at DOXT00000723 (capitalization in original, italics added), but failed to disclose a disorderly conduct conviction. O'Brien Depo.,

APP055 at 211:7—212:20; Employment Application, ECF 114-20 at DOXT00000723. The employment application also asked O'Brien to provide his "complete work history." Employment Application, ECF 114-20 at DOXT00000726 (emphasis in original). O'Brien had been in the Army National Guard but was discharged due to depression. Military R., ECF 137-28; O'Brien Depo., APP037 at 9:3-4, APP038 at 11:16—24; APP056-57 217:24—219:3. O'Brien omitted this military service, and affirmatively lied about his employment history, stating that he had been "unemployed but was a full time stay at home parent to a [redacted] spouse" during the time. *Id.*, APP056 at 216:20—217:9; Employment Application, ECF 114-20 at DOXT00000726. These omissions are not trivial or minimal. Green Bay's Lieutenant Allen testified that such dishonesty could be disqualifying, and that failing to disclose this information: "That's bad." N. Allen Depo., APP114 at 134:11-20, 136:5-18.

E. Procedural History

Appellants commenced their action on January 24, 2019. Appellants asserted several claims, including: (1) excessive force against O'Brien; (2) failure to intervene against Mleziva and Winisterfer; (3) failure to train against the Green Bay Chief of Police (Smith), Brown County Sherriff (Delain), Brown County Jail Administrator (Michel), the City of Green Bay, and Brown County; (4) a *Monell* claim against Green Bay (discovery revealed a pattern of excessive force and dishonesty so bad that an officer tattooed himself every time he killed a civilian to commemorate the death of an "enemy," 2d Salzmann Depo., ECF 137-19 at 176:3—177:25, 181:17—182:1; (5) state-

created danger against Zeigle (in both individual and official capacities), Brown County, and Green Bay; and (6) state law claims.

On November 2, 2020, the Green Bay Defendants (Appellees O'Brien, Smith, and Green Bay are collectively the "Green Bay Defendants") and the Brown County Defendants (Appellees Mleziva, Winisterfer, Zeigle, Delain, Michel, and Brown County are the "Brown County Defendants") each moved for summary judgment. The same day, Appellants moved to exclude the testimony of the Green Bay Defendants' and Brown County Defendants' retained expert witnesses, and to transfer trial from Green Bay to Milwaukee.

On May 19, 2021, the District Court resolved these motions. Notwithstanding the standard for summary judgment, the District Court weighed the evidence concerning the shooting and decided that O'Brien was credible in his assertions that he believed Tubby had a "cylindrical" object and had "already fired once" when he heard the pop of the beanbag gun. *See* Decision at APP015, APP018. The District Court also accepted the Green Bay Defendants' speculation that Tubby "intentionally" made officers believe he had a gun and, as support, cited the screenshot of squad video from thirty-eight minutes after O'Brien claimed he saw a gun, when officers could not see inside the squad. *Id.* at APP014-15. The District Court further speculated that Tubby was not subdued, despite being unarmed, handcuffed, blinded, face-down on the ground, and under attack by a police canine, because a theoretical possibility always exists that a person could use a weapon; and, as support, the District Court relied upon a YouTube video not in evidence. *Id.* at APP018-19. The District Court also decided

that O'Brien would be entitled to qualified immunity based on this same fact-finding. The District Court stated "[n]one of the cases cited by Plaintiffs involve a suspect pretending he was armed, refusing to obey lawful commands that he show his hands, and rushing toward a group of officers." *Id.* at APP022. Accordingly, the District Court dismissed the excessive force claim against O'Brien.

Based on the dismissal of the claim against O'Brien, the District Court then dismissed the *Monell* claim against the Green Bay Defendants, and also the failure to intervene claim against Mleziva and Winisterfer. *Id.* at APP024. The Court went on to dismiss the failure to intervene claim based on its finding that Mleziva and Winisterfer had no opportunity to intervene because, as a matter of physics, a gunshot is "nearly instantaneous." *Id.* at APP025. Without a failure to intervene claim, the District Court dismissed the failure to train claim (Brown County does not train its officers on the duty to intervene at all, Dernbach Depo., ECF 120-27 at 15:15-23; Zeigle Depo., APP082-83 at 141:16—142:11). Decision at APP025-26.

The District Court next considered the state-created danger claim. Despite binding Seventh Circuit precedent in *White v. Rochford* that state-created dangers are not limited to dangers from private violence, the District Court held that the doctrine can only apply to "private danger." Decision at APP026-28. The District Court further held, in conclusory fashion, that Zeigle was not deliberately indifferent, but acted in "good faith." *Id.* at APP029. With respect to the individual capacity claim, the District Court held that Zeigle was entitled to qualified immunity. *Id.* at APP030. Accordingly, the Court dismissed the state-created danger claim, and with no pending federal claims

dismissed the state law claims. *Id.* Having dismissal of all the claims, the District Court then denied the remaining motions as moot. *Id.* at APP031. This appeal followed.

SUMMARY OF ARGUMENT

The evidence, drawing reasonable inferences in Appellants' favor as required by law, establishes that, when he was shot, Tubby's empty hands were visible to officers, that he was blinded by OC spray, that he was already face-down on the pavement, and that he was being pulled backward by a police canine. Despite these facts, O'Brien shot him five times in the back of the head, neck, and torso. This is an unconstitutional seizure in violation of the Fourth Amendment, and O'Brien is not entitled to qualified immunity. *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985) ("A police officer may not seize an unarmed, nondangerous suspect by shooting him dead."); *Strand v. Minchuk*, 910 F.3d 909, 915-19 (7th Cir. 2018) (denying qualified immunity to officer that shot unarmed man).

The District Court only came to the opposite conclusion because it failed to draw reasonable factual inferences in Appellants' favor. The District Court weighed the evidence and engaged in fact-finding to assert that Tubby "intentionally led Officer O'Brien . . . to believe he was armed," Tubby's "hand remained hidden under his shirt," or O'Brien believed Tubby "had already fired once." Decision at APP014-15, APP018, APP023. All of these findings were the subject of genuine dispute. The video evidence, combined with testimony, shows that when he was shot, Tubby's hands were not hidden under his shirt, but were visible to officers. The evidence further rebutted any notion that O'Brien reasonably believed Tubby had "already fired" because he mistook

the sound of a beanbag gun for a lethal handgun—the testimony was that such a mistake was entirely *un*reasonable. And it is further discredited by the fact O'Brien shot Tubby only after a *second* bean bag round was fired. The District Court further erred by engaging in speculation and supporting that speculation with its own internet investigation on YouTube.

The District Court also erred in holding that failure to intervene claims can never be asserted in cases of police shootings. The District Court noted that a gunshot is nearly "instantaneous" and therefore opined that an officer would not have the opportunity to intervene to stop a shooting. This holding ignored the evidence that O'Brien's movements telegraphed his intent to shoot, and that nearby officers did, therefore, have a reasonable opportunity to intervene. The District Court also erred in creating a *per se* rule eliminating shooting cases from the purview of the duty to intervene. *See, e.g.*, *Lombardo v. City of St. Louis*, 141 S. Ct. 2239, 2241-42 (2020) (holding that *per se* rules are inconsistent with excessive force precedent); *Robins v. Meecham*, 60 F.3d 1436, 1442 (9th Cir. 1995) (permitting claims against officers that failed to intervene in prevent shooting).

The District Court also erred in holding that Appellants are precluded from asserting Due Process claims under the state-created danger doctrine. The District Court held that such claims must be limited to "private dangers" because, in the District Court's view, the "origins" of the doctrine were cases involving private violence. Decision at APP027-28. The District Court was mistaken -- the origins of the doctrine can be traced to this Court's decision in *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979),

which did not involve a danger from a "private" third-party, but instead concerned danger to children from frigid temperatures.

The District Court also dismissed the state-created danger claim based on its conclusion that Zeigle was not deliberately indifferent and was entitled to qualified immunity. This was also error. Again, the District Court's decision failed to draw all reasonable inferences in Appellants' favor. Appellants adduced evidence that Zeigle's plan to force Tubby out of the squad car was contrary to his training, governing policies, and accepted police practices. The implementation of the plan also shocks the conscience—Tubby was sprayed in the face with OC without warning as he begged "help me." Zeigle's failure to activate the SWAT team meant that no one was prepared for Tubby to exit the squad car (even though the plan intended his exit), and Tubby was provided no instructions on how to surrender. Accordingly, he was forced to stumble blindly around until O'Brien killed him. Zeigle was deliberately indifferent to his duty protect Tubby's well-being and is not entitled to qualified immunity.

For these reasons, and the others discussed below, the District Court's decision should be reversed. The jury should be permitted to decide Appellants' claims that (1) O'Brien used excessive force, (2) Green Bay has a pattern or practice of excessive force, (3) Mleziva and Winisterfer failed to intervene to prevent that excessive force, (4) Brown County fails to train its officers to intervene, (5) Zeigle and Brown County created a danger to Tubby, and (6) related state law claims.

ARGUMENT

A. Standard of Review

Summary judgment rulings are reviewed *de novo*. *Abdullahi v. City of Madison*, 423 F.3d 763, 769 (7th Cir. 2005). A district court should grant summary judgment only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The record must be viewed "in the light most favorable to the plaintiffs and construing all reasonable inferences from the evidence in their favor." *McCottrell v. White*, 933 F.3d 651, 661-62 (7th Cir. 2019). Accordingly, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge" in considering a summary judgment motion. *Anderson*, 477 U.S. at 255.

B. Genuine Issues of Material Fact Exist Concerning Constitutionality of O'Brien's Use of Force.

The District Court's dismissal of the excessive force claim against O'Brien (and the resulting dismissal of the *Monell* claim against the other Green Bay Defendants and failure to intervene claim against Mleziva and Winister) must be reversed. Because Tubby was unarmed and subdued, O'Brien's use of deadly force was unconstitutional. "The question whether a particular use of force has crossed the constitutional line is governed by the Fourth Amendment, which prohibits unreasonable seizures." *Weinmann v. McClone*, 787 F.3d 444, 448 (7th Cir. 2015). "[I]t is reasonable for a law

enforcement officer to use deadly force if an objectively reasonable officer in the same circumstances would conclude that the suspect posed a threat of death or serious physical injury to the officer or to others." *Estate of Williams v. Ind. State Police Dep't*, 797 F.3d 468, 473 (7th Cir. 2015) (citing *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985)). "A police officer may not seize an unarmed, nondangerous suspect by shooting him dead." *Garner*, 471 U.S. at 11; *Strand v. Minchuk*, 910 F.3d 909, 915 (7th Cir. 2018). "[S]ince the *Graham* reasonableness inquiry 'nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, . . . summary judgment . . . in excessive force cases should be granted sparingly.'" *Abdullahi*, 423 F.3d at 773 (quotation omitted).

The District Court's determination that O'Brien's use of force was constitutional was the result of erroneously drawing several inferences in O'Brien's favor and accepting speculation offered by Appellees as fact. The District Court found that Tubby "intentionally" misled O'Brien into believing he was armed, that O'Brien reasonably believed Tubby was firing upon him, and that Tubby could have posed a threat despite being subdued. The District Court further found, despite evidence that O'Brien telegraphed his intent to use deadly force, that other officers had no opportunity to intervene. Each of these findings violates the fundamental requirement that the evidence be viewed in the light most favorable to Appellants. Each issue in considered in turn below.

1. A Reasonable Officer Would Never Have Believed Tubby to Be Armed.

Viewing the evidence in the light most favorable to Appellants, a reasonable officer in the sally port on October 19, 2018 would have seen Tubby for exactly what he was—an unarmed man that had slipped his handcuffs in front of his body and was locked in the back of a squad car. Under such circumstances, use of deadly force was clearly unconstitutional. *Garner*, 471 U.S. at 11; *see Vos v. City of Newport Beach*, 892 F.3d 1024, 1032 (9th Cir. 2018) (holding that officers used excessive force when they killed a man that charged them with "something in his hand" where "they did not believe he had a gun"); *A.K.H. v. City of Tustin*, 837 F.3d 1005, 1011-13 (9th Cir. 2016) (holding officer used excessive force in shooting man that was noncompliant and had hand in pocket but was "not known to carry weapons"); *Brown v. Nocco*, 788 F. App'x 669, 675 (11th Cir. 2019) (unpublished) (ruling shooting suspect in the back as he lay prone, face down, and unresisting was objectively unreasonable).

The District Court disagreed because it improperly weighed the evidence and decided that Tubby "intentionally led Officer O'Brien and the other law enforcement officers who were present at the Jail to believe he was armed." Decision at APP014-15. Such a finding is not supported by the record viewed most favorably to Appellants. The District Court simply credited O'Brien's self-serving testimony that he saw the "barrel" of a gun. The evidence did not support the reasonableness of this testimony, the testimony was not credible, and the District Court's weighing of "corroborating" evidence was error.

(a) No Reasonable Officer Would Have Seen the "Barrel" of A Gun.

The primary basis for the District Court's decision was O'Brien's own testimony that "he observed what appeared to be the cylindrical shape of the end of a gun barrel pressed against the inside of Tubby's shirt." Decision at APP015. The District Court accepted this testimony about O'Brien's professed subjective observations as conclusively establishing the objective reasonableness of those same observations—despite ample evidence in the record that observing a gun barrel would be *un*reasonable. To begin, the video evidence from the exact moment O'Brien claims he saw a gun "barrel" does not show any "cylindrical shape" whatsoever. O'Brien claims he saw the barrel when he went to assist Wernecke who had opened the rear door of the squad to remove Tubby. O'Brien Depo., APP041-42 at 39:19-42:6. Video of that moment shows nothing no "cylindrical shape:"

APP035. The reasonableness of O'Brien's claim that he saw the "barrel" of a gun is also rebutted by the testimony of Wernecke, who was standing with O'Brien at that exact time. Wernecke testified he merely saw Tubby with his hands "balled" up and rejected the notion that there was anything that resembled a gun. Wernecke Depo., APP063-64 at 65:14—66:8, 69:5-8.

Importantly, these "balled" up hands present no threat to officers—Tubby was locked in the car in handcuffs—and a reasonable officer would not have jumped to the conclusion that Tubby was an armed threat. Tubby was arrested on suspicion of *non*violent crimes. DCI Report, APP119; Wernecke Depo., APP062 at 54:7-9. With O'Brien's own supervision, Tubby was thoroughly searched incident to his arrest by Wernecke. Wernecke Depo., APP062 at 54:13—56:4. Tubby also could not have accessed weapons inside the car because it had been search and no one else had been inside it that night. Wernecke Depo., APP061 at 50:19—51:8, 51:23—52:11, 53:15-23.

O'Brien's later-offered testimony that he saw a gun is also not credible—it is contradicted by his statements the night of the shooting. Had O'Brien seen the barrel of a gun, he was trained to inform other officers using the word "gun." Warych Depo., APP107 at 101:7-13. Yet, in the audio recording that exists of O'Brien's that night—he *never* says he saw a gun or the barrel of a gun. Instead, he says he merely thought it "look[ed] like" Tubby had "something in his hand." Radio, ECF 114-28 at 00:00—00:11. Directly after the shooting, O'Brien was interviewed by an investigator and did *not* mention the "barrel" of a gun as the reason he shot. Medical Examiner's Report, ECF 112-1 at 3. In addition, not only does he have an incentive to lie to avoid liability in this

case, but he also has a demonstrated history of dishonesty as evidenced by his making of two separate false statements on this employment application. Employment Application, ECF 114-20 at DOXT00000723, 726; O'Brien Depo., APP037 at 9:3-4, APP038 at 11:16—24, APP055 at 211:7—212:20; APP056-57 at 217:7-9, 217:24—219:3, Military R., ECF 137-28.

(b) The District Court Impermissibly Weighed Evidence and Made Credibility Determinations.

Despite the evidence raising credibility issues, the District Court dismissed any concerns regarding O'Brien's credibility based on "corroborating" evidence. Decision at APP015-16. The District Court pointed to testimony from Wernecke and a video from the squad car to support its determination that O'Brien was credible. *Id.* "[C]redibility determination[s] at the summary-judgment stage constitute[] error," *Morfin v. City of E. Chi.*, 349 F.3d 989, 999 (7th Cir. 2003) (explaining that"), and the record does not support the District Court's findings.

First, the District Court noted that Wernecke testified that O'Brien had used the word "gun" that night. Decision at APP016. However, the testimony and conduct of the other officers on the scene again dispute this assertion. Another officer on the scene specifically recalled "no one had told me 'I saw a gun.'" Denney Depo., APP091 at 105:2-7. Even more fundamentally, even if O'Brien had used the word "gun," that does not demonstrate that his perception was objectively reasonable. *Weinmann v. McClone*, 787 F.3d 444, 449 (7th Cir. 2015) ("It does not matter for purposes of the Fourth

Amendment that [an officer] subjectively believed that his life was in danger. The test is an objective one . . . .").

As discussed above, the video evidence of the moment O'Brien claims he saw the "barrel" of a gun shows no "cylindrical shape" at all, as confirmed by Wernecke who saw only "balled" up hands. The District Court ignored this evidence and instead improperly relied on squad video from thirty-eight minutes later. *Compare* Internal Squad Video, ECF 120-3 at 1:45:00 (officer contact of Tubby in vehicle at time stamp 20:24:50) *with* Decision at APP015 (screen shots came from time 9:02:35 pm). This timing is particularly significant because officer specifically noted they *could not even see inside the squad car* because the windows were fogged and the trunk was open, obstructing their view. E. Allen Depo., 114-6 at 21:8-15; Denney Depo, APP087 at 37:14-22, APP088 at 56:10-17; O'Brien Depo., APP043 at 59:5-6, APP044-45 at 93:6—94:19, APP053-54 at 184:10—187:7. The District Court used this video to make a credibility determination, that it was "consistent" with O'Brien's testimony. Decision at APP015. Because the video is from a time when O'Brien did not claim to see a gun barrel and, in fact, is from a time when no officer could see inside the car, a reasonable jury is not bound to ascribe any weight to the video. The screenshot is not probative of what a reasonable officer would have perceived on the scene but rather is merely an *ex facto* justification for the shooting.

That officers did not reasonably believe Tubby to be armed is consistent with their conduct on the scene that night: officers brought two different "ride-alongs" to the scene, and permitted one to film the incident with a cell phone. Denney Depo., APP085

at 11:12-23, APP094 at 160:2-23, APP095 at 180:13—181:1; Warych Depo., APP107-108 at 101:24—102:6, 103:16-23; DCI Report, APP121. A reasonable jury could conclude that a reasonable officer would not have believed Tubby to be harmed. It was error for the District Court to weigh the evidence and treat the screenshot as dipositive evidence of a disputed issue.

It was also error to treat the screenshot as dispositive evidence because it is open to interpretation. "[V]ideos are sometimes unclear, incomplete, and fairly open to varying interpretations." *Smith v. Finkley*, 10 F.4th 725, 730 (7th Cir. 2021) (quotations omitted). Where "reasonable jurors could interpret the video evidence differently, summary judgment is not appropriate." *Hanson v. Madison Cnty. Det. Ctr.*, 736 F. App'x 521, 527 (6th Cir. 2018) (internal quotations and citation omitted) (unpublished); *see also McCottrell v. White*, 933 F.3d 651, 661 n.9 (7th Cir. 2019) (noting that court was bound to credit plaintiff's version of events on summary judgment, despite conflicting video evidence that was of poor quality).

The Green Bay Defendants' interpretation of the video (adopted by the District Court), that Tubby was "intentionally" mimicking a gun, is hardly the only interpretation. More than *an hour and a half* of video of Tubby in the rear of the squad exists. Internal Squad Video, ECF 120-3 at 55:15 (Tubby first placed in squad), 2:31:17 (Tubby forced out by OC spray). Given this volume of recording, it should not be surprising that isolated, out-of-context screenshots can be spun in a negative light. However, even this out-of-context grainy shot can be explained in terms other than Tubby intentionally mimicking a gun. Tubby's hands could have been stuck under his

shirt, and he could have been attempting to free them. He could have been pointing his fingers in an attempt to slide his hands out of the cuffs. Or, his behavior may simply be inexplicable because he is unavailable to testify to explain it.

The District Court weighed the evidence to arrive at a speculative conclusion—that Tubby deserved to be shot because he intentionally mimicked a gun. When viewed in the light most favorable to the Appellants, the record simply does not support this conclusion, and summary judgment was improper.

2. Any Belief that Tubby Was Armed Was Negated Prior to the Shooting.

Even assuming *arguendo* that O'Brien reasonably believed that Tubby had "something" while he was in the squad car, the shooting was still unconstitutional. As Tubby was forced out of the squad, that "something" became *nothing* because both of Tubby's empty hands became visible. "[A]n exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased." *Smith*, 10 F.4th at 748 (internal quotations and citation omitted) (alteration in original). This Court has specifically noted that "[w]hen an officer faces a situation in which he could justifiably shoot, he does not retain the right to shoot at any time thereafter with impunity." *Id.* (internal quotations and citation omitted). Accordingly, as soon as a reasonable officer would have seen Tubby's empty hands, any justification for the shooting ceased.

The District Court erred in disregarding this evidence. Again, the District Court made factual determinations reserved for the jury. In particular, the District Court

impermissibly minimized the video evidence showing Tubby's empty right hand, and improperly used an indisputably *un*reasonable mistake of sound (beanbag gun versus lethal handgun) to justify the shooting.

(a) Tubby's Empty Hands Were Visible.

The District Court was forced to accept that when Tubby fell to the ground, his "empty" "right hand" "fell above his head." Decision at APP011. However, the District Court went on to say, inexplicably and inconsistently, that at the time of the shooting Tubby's "hand remained hidden under his shirt." *Id.* at APP018. This is simply untrue—Appellants adduced evidence that Tubby's right hand (the only hand under his shirt just before the shooting), came out from under his shirt as he fell to the ground. APP034; Enhanced Video, ECF 114-10 at 0:09-0:10; *see also* Denney Depo., APP096 at 184:18—185:10.

Perhaps in order to reconcile this inconsistency, the District Court raised the burden on Appellants. The District Court demanded video evidence demonstrating that O'Brien could "see both of Tubby's hands at the same time before he fired." Decision at APP018-19. While video evidence proving O'Brien could see both of Tubby's hands empty at the same time prior to the shooting would certainly *command* a finding of liability, the standard to avoid summary judgment is not so demanding. It was the Green Bay Defendants' motion, and therefore all justifiable inferences had to be drawn in Appellants' favor. *Anderson*, 477 U.S.at 255.

A reasonable jury certainly could infer that a reasonable officer would have known that Tubby was unarmed. Tubby's left hand was outside of his shirt as he left

the squad and his right hand popped out as he fell to the ground—therefore, a jury could reasonably infer that both hands *were* visible at the same time. Dash Video 1, ECF 120-13 at 41:31; Enhanced Video, ECF 114-10 at 0:09-0:10; APP034. Moreover, even if not visible at the same time, a reasonable officer would still have known Tubby was unarmed. Officers loudly announced that his empty left hand was visible, Internal Squad Video, ECF 120-3 at 2:30:49-56; ("I can see that one is clear"), and O'Brien *admitted* seeing the empty left hand. O'Brien Depo., APP048-49 at 128:15-24, 129:22-130:1. A matter of ten seconds later Tubby's empty right hand also became visible. Enhanced Video, ECF 114-10 at 0:09-0:10; APP034; *see* Decision at APP011 (noting that time between Tubby exiting vehicle and shooting was about ten seconds). The District Court erred in finding that no reasonable jury could have decided that a reasonable officer would have known Tubby was unarmed.

(b) Beanbag Shotgun Does Not Reasonably Sound Like a Lethal Handgun.

To support its findings that O'Brien reasonably believed Tubby to be armed, the District Court also curiously relied on the disputed fact that O'Brien believed Tubby "had already fired once." Decision at APP018, APP023. The apparent basis for this statement are O'Brien's statements that he mistook the "pop" of a beanbag gun for the sound of a lethal handgun. The record, however, was replete with evidence that this was an *un*reasonable mistake.

During investigation of the shooting, many officers stated they could distinguish the sound of the beanbag gun from the sound of the lethal gun fired by O'Brien, and

could even describe the differences in the sounds. DCI Report, APP116—118, APP122—A124, APP127—129. Discovery confirmed the difference in sounds. Officers testified that the two sounds are different—some going as far as to specifically say that it is *not* reasonable to mistake the two sounds. Salzmann Depo., APP102 at 102:6—103:6, E. Allen Depo., ECF 114-6 at 109:8-110:5; Wernecke Depo., APP059 at 39:19—40:17; Katers Depo., ECF 114-14 at 40:17-21; Mleziva Depo., ECF 114-15 at 30:18–31:14.

The District Court attempted to brush this evidence aside by remarking that "[t]he fact that other officers can normally distinguish between the sound of a beanbag gun and a firearm when not under stress says little about how an officer might react when he believes a man with a gun is rushing toward him." Decision at APP020. This statement is unsupported by the record. The officers did not say that they can distinguish the sounds "when not under stress," rather they specifically said that they could and did actually distinguish the sounds of a beanbag gun and a real gun (O'Brien's gun) *on the scene that night*. DCI Report, APP116—118, APP122—A124, APP127—129; Salzmann Depo., APP102 at 102:6—103:6, E. Allen Depo., ECF 114-6 at 109:8-110:5. In fact, even O'Brien himself could distinguish between the sounds at first—he did not open fire when the first beanbag round was fired, only after the second. The District Court's failure to acknowledge this evidence was error.

3. Deadly Force Against Tubby Was Improper Because He Had Been Subdued.

Not only was Tubby unarmed when he was shot, but he had been subdued—he was handcuffed, blinded, face-down on the ground, and being attacked by a police

canine. "[O]fficers may not use unnecessary force when a civilian is already subdued or compliant." *Taylor v. City of Milford*, 10 F.4th 800, 810 (7th Cir. 2021). The District Court ruled that "[n]o reasonable jury could conclude that Tubby was safely subdued before Officer O'Brien shot." Decision at APP018. Again, the District Court only came to this conclusion by failing to draw inferences in Appellants' favor. In particular, the District Court found that Tubby was not subdued based on speculation stemming from a YouTube video not in evidence, and its finding that O'Brien could not see the canine that was attacking Tubby.

(a) It was Improper For District Court to Rely On YouTube Evidence From an Unrelated Shooting.

The District Court speculated that, even though Tubby was blinded by OC spray and under attack from a police canine, a theoretical possibility existed that Tubby could blindly shoot a gun from the ground while face-down and handcuffed. *See* Decision at APP017-18. As support, the District Court cited a YouTube video of an entirely unrelated encounter with an officer in South Carolina that was never submitted into evidence. *Id.* at APP019. In this YouTube video, an officer approaches a man talking on a phone with one hand in his pocket. CBS News, Estill, South Carolina, Officer's Camera Captures Shooting, YOUTUBE (Aug. 11, 2017), http://www.youtube.com/watch?v=7Qq3dXfzvdw at 0:09–0:46. After being ordered to take his hand out of his pocket, the man unexpectedly pulls out a gun and shoots the officer. *Id.* at 0:47.

The District Court's reliance on this YouTube video to weigh the evidence of record and make factual findings was error. *See Ayoubi v. Dart*, 729 F. App'x 455, 458 (7th Cir. 2018) (holding that it was improper for district judge to use internet research to contradict sworn testimony). The video is not relevant, was not authenticated, and is not admissible. Fed. R. Civ. P. 56(c)(4). The circumstances in the video have nothing to do with this case. Unlike Tubby, who was arrested on suspicion of nonviolent crimes, it is unknown if the man in the video was suspected of a violent crime. Unlike Tubby, the man in the video had not been searched, arrested, and handcuffed. Unlike Tubby, the man in the video was not blinded by OC spray, was not face down on the ground, and was not being pulled backward while under attack by a police canine. Therefore, that video is not probative of whether Tubby would have been able to use a weapon in the sally port on October 19, 2018.

That the District Court was able to, on its own initiative, find an example of a random act of violence in completely dissimilar circumstances is not an excuse for O'Brien's use of deadly force in this case. The unfortunate reality of life is that random acts of violence exist, but the remote possibility of a random act of violence is not an excuse for deadly force, particularly when officers had already searched *and* contained the person, as they had here. If it were, officers could go about randomly using deadly force on every citizen because some remote possibility always exists that any given person will engage in a random act of violence.

Fortunately, this is not the law. An officer must have some articulable basis that a person is armed or otherwise poses a threat. *Chew v. Gates*, 27 F.3d 1432, 1441-42 (9th Cir.

1994); *see also A.K.H.*, 837 F.3d at 1013 (denying qualified immunity where officer had "no basis for his belief" that suspect was armed "except to say that [the suspect] had one hand 'concealed'"). For all the reasons discussed above, viewing the evidence in the light most favorable to Tubby, no reasonable officer would have had reason to view him as a threat. He was searched, unarmed, handcuffed, blinded, face-down on the ground, and under attack by a police canine. That Tubby was not viewed as a threat is corroborated by the fact that dozens of officers were on scene, yet only O'Brien pulled his weapon and shot Tubby. Green Bay Defs.' Initial Disclosures, ECF 120-16 at 1-5; DCI Report, APP126.

(b) District Court's Other Fact-Finding Is Unsupported.

Finally, the District Court further remarked that "Officer O'Brien could not see that the canine had engaged Tubby." Decision at APP018. This is further evidence of the District Court's error—weighing evidence and fact-finding in favor of O'Brien. At the time of the shooting, a canine *had* engaged Tubby. Salzmann Depo., APP101 at 98:14-100:2. That O'Brien stated he could not see the canine only highlights O'Brien's lack of situational awareness and unreasonableness. A reasonable officer would have seen Tubby was subdued and refrained from using deadly force.

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In sum, the District Court's decision regarding the constitutionality of O'Brien's use of deadly force was erroneous—infected by its own weighing of the evidence and fact-finding. In this respect, the District Court's decision is reminiscent of, but more extreme than, the Supreme Court's recent decision in *Lombardo*. In that case, police officers killed a man by placing pressure on his back when he was handcuffed and

shackled in the prone position. 141 S. Ct. at 2240. The Eighth Circuit held the force was not excessive. *Id.* at 2240-41. The Supreme Court reversed, noting that the Eighth Circuit had impermissibly failed to analyze material facts or dismissed them as "insignificant." *Id.* at 2241. In doing so, the Eighth Circuit had erroneously created a *per se* rule permitting a prone restraint, contrary to "the careful, context-specific analysis required by [the Supreme Court's] excessive force precedent." *Id.*

Like the Eighth Circuit in *Lombardo*, the District Court here came to the wrong conclusion by ignoring facts or dismissing them out of hand. Like *Lombardo*, the District Court created an impermissible *per se* rule—the District Court's ruling gives officers impunity to use deadly force by merely claiming to have heard the sound of a gun—no matter how improbable it is a person possesses a gun or how unreasonable the mistaken sound. Accordingly, the District Court's determination that O'Brien use of force was constitutional should be reversed, and the Court must consider whether O'Brien is entitled to qualified immunity.

4. O'Brien Is Not Entitled to Qualified Immunity.

"Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004)). Qualified immunity is a two-step inquiry, asking whether (1) "[an officer's] conduct violated a constitutional right, and" (2) "whether that right was clearly established at the time of the alleged violation." *Strand*, 910 F.3d at 914. The Supreme Court has emphasized that the clearly-established right must not

be defined with too high a level of generality. *Id.* at 915 (citing *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014)). At the same time, "[t]he demand for specificity is not unyielding or bereft of balance." *Id.* (7th Cir. 2018) (citing *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018)). Plaintiffs are not required to locate "a case directly on point." *Id.* (citing *Kisela*, 138 S. Ct. at 1152).

Indeed, "every case differs in *some* respect from its predecessors." *Weiland v. Loomis*, 938 F.3d 917, 920 (7th Cir. 2019) (emphasis in original). "[A] search for identity is not required and would be a fool's errand." *Id.* Rather, "a principle can be clearly established without matching a later case's facts." *Id.* In other words, it is not the case that qualified immunity vanishes *only* when the very action in question has previously been held unlawful, but rather the analysis asks whether the unlawfulness of the action was apparent "in the light of pre-existing law." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). In other words, qualified immunity asks whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Abdullahi*, 423 F.3d at 775 (internal quotations and citation omitted).

The District Court's ruling that O'Brien is entitled to qualified immunity was error. The District Court erroneously drew factual inferences in O'Brien's favor and then demanded a case directly on point with those erroneous facts. The District Court remarked, "None of the cases cited by Plaintiffs involve a suspect pretending he was armed, refusing to obey lawful commands that he show his hands, and rushing toward a group of officers." Decision at APP022. The District Court went on to say "[a]lthough [Tubby] appears to have fallen as he was running toward the sally port entrance, he was

not restrained or subdued in any way that would have prevented him from firing the gun Officer O'Brien reasonably believed he still had and had already fired once." *Id.* at APP023. Of course, as discussed above, all of these factual points are disputed.

Viewing the evidence in the light most favorable to Appellants, Tubby was not "pretending to be armed" and "rushing toward a group officers." *Id.* at APP022. He was "scared" and asking for "help," only to be blinded and forced out the squad car. Internal Squad Video, ECF 120-3 at 2:29:05-2:30:00. He stumbled around, he did not "rush" toward officers. Salzmann Depo., APP098 at 83:10—85:22, APP099 at 86:20—88:10. O'Brien did not "reasonably" believe Tubby had "already fired once," the other officers were near-unanimous in stating that they did not, and would not, mistake the sound of a beanbag gun for a lethal handgun. DCI Report, APP116—118, APP122—A124, APP127—129; Salzmann Depo., APP102 at 102:6—103:6, E. Allen Depo., ECF 114-6 at 109:8-110:5; Wernecke Depo., APP059 at 39:19—40:17; Katers Depo., ECF 114-14 at 40:17-21; Mleziva Depo., ECF 114-15 at 30:18-31:14.

Finally, Tubby's empty hands were visible to officers on the scene, and any reasonable officer would have known he was unarmed—especially O'Brien as he had personally supervised the earlier search of Tubby. O'Brien Depo., APP048-49 at 128:15-24, 129:22-130:1; Enhanced Video, ECF 114-10 at 0:09-0:10; APP034; Wernecke Depo., APP060, at 48:21—49:3, APP062 at 54:23-25. When factual inferences are correctly drawn in Appellants' favor, it would be clear to a reasonable officer that deadly force was not justified. It is well-established that "[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead." *Garner*, 471 U.S. at 11; *Strand*,

910 F.3d at 915. It is also "well-established that police officers cannot continue to use force once a suspect is subdued." *Becker v. Elfreich*, 821 F.3d 920, 928 (7th Cir. 2016) (internal quotations and citation omitted).

In light of this precedent, it would be apparent to a reasonable officer that deadly force could not be constitutionally used to shoot Tubby five times in the back of the head, neck, and torso as he lay face-down on the ground, blinded, in handcuffs, under attack by a police canine, and unarmed. This constitutional question is not debatable, and the District Court only arrived at the opposite conclusion by impermissibly weighing the evidence to arrive at a different factual scenario. In doing so, the District Court erred, and its decision to dismiss the claims against the Green Bay Defendants must be reversed.

5. Other Officers Had The Opportunity to Intervene to Prevent Use of Deadly Force.

In addition to dismissing the claims against the Green Bay Defendants, the District Court also improperly dismissed the failure to intervene claims against Brown County Sherriff Deputies Mleziva and Winisterfer based on its erroneous findings that O'Brien acted constitutionally. The District Court went further and, as an alternative grounds, ruled that neither Deputy had an opportunity to intervene because "[a] gunshot is nearly instantaneous." Decision at APP025. Once again, the District Court's decision improperly ignored the evidence in Appellants favor and impermissibly created a *per se* rule.

In certain circumstances, "an officer who is present and fails to intervene to prevent other law enforcement officers from infringing the constitutional rights of citizens is liable under § 1983." *Abdullahi*, 423 F.3d at 774. Among the requirements for such a claim is that "the officer had a realistic opportunity to intervene to prevent the harm from occurring." *Id.* A "realistic opportunity to intervene" includes the ability for the officer to "call[] for a backup, call[] for help, or at least caution[] [the officer using excessive force] to stop." *Id.* The duty to intervene applies to constitutional violations of all kinds, including excessive force and including excessive force from police shootings. *See, e.g.*, *Robins*, 60 F.3d at 1442 (9th Cir. 1995) (upholding a denial of a summary judgment motion when two officers failed to intervene and allowed a third officer to shoot a prison inmate); *Stewart v. City of Prairie Vill.*, 904 F. Supp. 2d 1143, 1158 (D. Kan. 2012) (denying a summary judgment motion because, based on the facts alleged, five police officers had "an opportunity to stop [a sixth officer]" from shooting a plaintiff "rendering them liable for his use of excessive force"); *Donna Mills v. Owsley Cnty. Ky.*, 483 F. Supp. 3d 435, 468-69 (E.D. Ky. 2020) (denying qualified immunity to an officer who failed to prevent another officer from shooting).

The District Court erred in failing to view the evidence regarding Mleziva's and Winisterfer's opportunity to intervene in the light most favorable to Appellants. "Whether an officer had sufficient time to intervene or was capable of preventing the harm caused by the other officer is generally an issue for the trier of fact unless, considering all the evidence, a reasonable jury c*ould not possibly conclude otherwise*." *Abdullahi*, 423 F.3d at 774. In ruling that Mleziva and Winisterfer did not have an

opportunity to intervene, the District Court ignored the evidence that Winisterfer and Mleziva were feet away from O'Brien just before the shots. Winisterfer Depo., ECF 120-32 at 49:3-5; Cell Phone Video, ECF 120-31; Dernbach Depo., ECF 120-27 at 87:18—88:11. The District Court also ignored the evidence that O'Brien gave notice of his intent to shoot by making deliberate movements, leaning out from behind a wall and side stepping to "get[] off the X." O'Brien Depo., APP052 at 147:20—148:14. As trained law enforcement officers, Mleziva and Winistefer could have, and should have, recognized these movements as telegraphing that O'Brien was about to shoot Tubby. The District Court did not discuss this evidence at all, but merely ignored it.

The District Court found the deputies had no opportunity to intervene simply because "[a] gunshot is nearly instantaneous." Decision at APP025. There are several problems with this logic. First, even if a gunshot is "nearly instantaneous," so too is intervention. After seeing O'Brien start to "get[] off the X," either Winisterfer or Mleziva could have instantaneously called out for help or to caution O'Brien not to use force. Second, as a matter of physics, a gunshot is *always* "nearly instantaneous." Accordingly, if the District Court's reasoning is accepted, it will create a *per se* rule, contrary to *Lombardo*, and eliminate shooting (and other implements of "instantaneous" force such as tasers, chemical sprays, and the like) from the purview of officers' duty to intervene altogether.

As noted above, this is not the law—courts do allow failure to intervene claims in police shooting cases. Therefore, the District Court's dismissal of the failure to

intervene claims against Mleziva and Winisterfer, and resulting dismissal of the failure to train claims, should be reversed.

C. Appellants Asserted a Legally and Factually Well-Supported State-Created Danger Claim Against Zeigle and Brown County.

When Tubby arrived at the Brown County jail, he was handcuffed in the back of a squad car. Just over forty-minutes later, he lay face-down bleeding to death on the floor of the sally port, shot in the back of the head. Tubby was in this position due to the deliberate indifference of the Brown County SWAT Commander, Zeigle. Contrary to all policies and accepted police practices, Zeigle had placed Tubby in danger by failing to activate a SWAT team or crisis negotiators, and forcing Tubby from a locked squad car (as he pled for help) without ensuring a ready arrest team or communicating his plan to other officers.

Existing Seventh Circuit law permits a state-created danger claim where: "(1) the state created or increased a danger to him, (2) the state's failure to protect plaintiff was a proximate cause of his injuries, and (3) the state's failure to protect the individual shocks the conscience." *Wilson v. Warren Cnty.*, 830 F.3d 464, 469-70 (7th Cir. 2016). "[W]hen the circumstances permit public officials the opportunity for reasoned deliberation in their decisions, we shall find the official's conduct conscience-shocking when it evinces a deliberate indifference to the rights of the individual." *King v. E. St. Louis Sch. Dist. 189*, 496 F.3d 812, 819 (7th Cir. 2007). Appellants' adduced evidence to meet all these elements.

Nonetheless, the District Court dismissed the claim. First, the District Court held that the state-created danger doctrine could not apply at all because the danger did not come from a private actor (but instead came from a state actor, O'Brien). Second, the District Court ruled that Zeigle did not act with deliberate indifference. Finally, the District Court ruled that (for the individual capacity claim against Zeigle), he was entitled to qualified immunity. Each of these rulings was error.

1. State-Created Danger Doctrine Is Not Limited to "Private Dangers."

The District Court's decision to limit the state-created danger doctrine "to only to situations where state action gives rise to harm by third parties or renders a citizen more vulnerable to such harm," APP027, is directly contrary to Seventh Circuit precedent. *See White*, 592 F.2d at 383-86 (permitting claim based on injuries suffered by two children that were left by a police officer in a vehicle in frigid temperatures after the driver of the vehicle was arrested). The District Court's analysis was flawed because it did not appreciate that *White* is the foundational case for the state-created doctrine, not only in this Circuit but also nationwide.

The District Court's premise for its ruling was that the state-created danger doctrine "has its origins in cases in which state actors played a role in the creation of a private danger or rendered a citizen more vulnerable to the private danger." Decision at APP027-28. The District Court was referring to *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989), which involved a danger from a child's abusive parent. *Id.* at 193. In that case, the Supreme Court held that the Due Process clause was not

implicated by the failure of the state to protect against "private violence" but suggested the outcome may have been different had the state created the danger or made the child more vulnerable to it. *Id.* at 197, 201. Because *DeShaney* involved consideration of when Due Process requires the state to protect a person from "private violence," the District Court decided that state-created dangers must be limited to private violence in all instances. This was error.

The District Court's premise that the state-created danger doctrine traces its origins to *DeShaney* is wrong. While the doctrine was confirmed by the language of *DeShaney*, it actually traces its origins to *White*, as has been recognized both inside and outside this Circuit. *See Monfils v. Taylor*, 165 F.3d 511, 518 (7th Cir. 1998) (noting that "[i]n this circuit, a recognition of a claim based on a state-created danger precedes *DeShaney*" and discussing the history of the doctrine beginning with *White*); *see also Kennedy v. Ridgefield City*, 439 F.3d 1055, 1061 n.1 (9th Cir. 2006) (citing *White* for the proposition that "the 'state-created danger' doctrine predates *DeShaney*"); *DiJoseph v. City of Phila.*, 953 F. Supp. 602, 607 (E.D. Pa. 1997) ("Ten years before *DeShaney*, in 1979, the Seventh Circuit recognized the state-created danger doctrine in *White v. Rochford*.").

That the doctrine originated in *White* refutes the District Court's entire premise because *White* did not involve violence from a private third-party at all, but instead danger from frigid temperatures. 592 F.2d at 383-86. The District Court may have misunderstood *White* because it did not use the term "state-created danger"—as the foundational case for the doctrine, that vocabulary only arose after the decision. Instead, *White* permitted substantive Due Process claims to proceed based on the

danger that state actors created to children by leaving them alone in a car after arresting the driver. *Id.* at 383-86. After the decision, the terminology "state-created danger" arose, but it continues to be a species of Fourteenth Amendment Due Process claim. *Monfils*, 165 F.3d at 515-16 (explaining that state-created danger claim is a type of substantive Due Process claim that falls within exception to limitations of due process discussed in *DeShaney*); *see also King*, 496 F.3d at 817-818 (discussing the doctrine and its relationship to Due Process under the Fourteenth Amendment). Accordingly, *White* applies, is binding precedent, and commands reversal.

Notably, however, not only was the District Court's decision inconsistent with the law of this Circuit, but the law of other Circuits reinforces that the state-created danger doctrine is not limited to "private danger." The Third and Ninth Circuits have followed *White*, and held that state-created danger claims may be premised on claims that come from extreme weather. *Kneipp by Cusack v. Tedder*, 95 F.3d 1199, 1203, 1213-14 (3d Cir. 1996); *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1085–90 (9th Cir. 2000). The Ninth Circuit has also permitted a state-created danger claim based on danger stemming from illness. *Penilla by & Through Penilla v. City of Huntington Park*, 115 F.3d 707, 708-11 (9th Cir. 1997). Significantly here, the Ninth Circuit and Second Circuit have permitted state-created danger claims arising from dangers from police officers (although the Ninth Circuit case did not use the label "state-created danger" but merely noted the claim was asserted under the Fourteenth Amendment). *Jensen v. City of Oxnard*, 145 F.3d 1078, 1081-83, 1087 (9th Cir. 1998) (permitting claim premised on death of officer due to friendly fire from a sergeant known to use "mind-altering

drugs"); *Pena v. DePrisco*, 432 F.3d 98, 102, 107–12 (2d Cir. 2005) (permitting recovery against officers that encouraged another officer to drink, knowing he had a drinking problem, after the officer drove drunk and killed several people).

The District Court attempted to distinguish some, but not all, of this precedent. For instance, the District Court stated, "*Jensen* does not even mention the state-created danger theory of liability." Decision at APP028. Yet, this is a distinction without a difference—*Jensen* concerned claims under the Fourteenth Amendment, 145 F.3d at 1082-83, and a state-created danger claim *is* a substantive Due Process claim under the Fourteenth Amendment, *see White*, 592 F.2d at 383. Accordingly, it makes no logical sense to distinguish *Jensen*, and *Jensen* is directly on point: it specifically concerns a Fourteenth Amendment claim premised on a danger created by the state from another state actor—the exact same scenario as here.[2]

More fundamentally, the District Court did not attempt to distinguish *White* or *Kneipp* or any other case that did not require a private actor. The District Court's holding that state-created danger may only apply to a "private danger" is, therefore, *sui generis*. Due Process requires that the state be held responsible whenever it causes injuries to its citizens by creating or increasing danger to them in a way that shocks the conscience. *Wilson*, 830 F.3d at 469-70.

[2] Similarly, the court attempted to distinguish *Pena* on the grounds that the officer was off-duty. Decision at APP028. However, whether an officer is a "state actor" does not turn on whether that officer is on or off-duty. *Lopez v. Sheriff of Cook Cty.*, 993 F.3d 981, 986 (7th Cir. 2021).

Indeed, the District Court's decision creates a substantial loophole in liability for civil rights violations. "A danger" is inclusive of all dangers, whether from private violence, the weather (*White*, *Kneipp*, *Munger*), disease or illness (*Penilla*), or state actors (*Jensen*). Altering this rule to limit the doctrine to only private violence would immunize all sorts of conscience shocking conduct, from leaving children in frigid cold (*White*), to cancelling paramedics for an ill person (*Penilla*), to permitting a drug addicted officer to serve on a SWAT team (*Jensen*).

This concern is not academic. While a reasonable jury could (and should) find that a reasonable officer would have known Tubby was unarmed, if a jury disagrees, it creates a significant gap in liability. If officers truly believed Tubby to be armed, then forcing him from the security of the squad car into the open is the height of recklessness—as even officers on the scene largely agreed. *See* Wernecke Depo., APP067 at 117:1-4; *see also* Denney Depo., APP092 at 141:19-24. In that circumstance, it is highly foreseeable that deadly force would be used, yet the District Court's holding would create a gap in liability that would leave Tubby's estate without a remedy if a jury excuses O'Brien's conduct but finds Zeigle's to be deliberately indifferent. A rule that creates these types of gaps must be rejected.

2. Zeigle's Conduct Was Deliberately Indifferent.

In addition to erroneously limiting the application of the state-created danger doctrine to dangers from private actors, the District Court again erred by failing to view the evidence in the light most favorable to Appellants. Tubby was in police custody—locked in a car at the Brown County jail. Denney Depo., APP087 at 35:1-5, O'Brien

Depo., APP047 at 109:11-14. Because Tubby was in custody, the Constitution imposed a duty on Zeigle to assume some responsibility for his safety and general well-being. *See Deshaney*, 489 U.S. at 199–200 ("[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."). Yet, Zeigle was deliberately indifferent to this responsibility when he hastily implemented a reckless plan to blind Tubby and force him out of a locked squad car.

The District Court disagreed and found that "there is no evidence that the defendants were deliberately indifferent." Decision at APP029. The District Court stated that "[t]he undisputed evidence shows that Lt. Zeigle's decision-making was guided by his training and was made in good faith to obtain Tubby's peaceful surrender." *Id.* This is wrong—any evidence that Zeigle's decisions were guided by his training or made in good faith was hotly disputed. The District Court simply chose to ignore the dispute and weigh the evidence in favor of law enforcement.

In particular, Zeigle's plan was *contrary* to (not "guided by") his training, Brown County's policies, and accepted practices, all of which require the response to a barricaded subject (such as a man locked in a car) be activation of a SWAT team. Zeigle Depo., APP072 at 28:24—30:2; BCSO SWAT Policy, ECF 120-18 at BC_JCT002659, BC_JT002663–64; Green Bay SWAT Policy, ECF 120-19 at §§ 404.7, 404.8.1; J. Nobel Expert Report, ECF 120-17 ¶ 58(d); *see also* Denney Depo., APP086 at 24:9-20. A SWAT activation would include deployment of crisis negotiators trained in de-escalation and specifically trained to resolve barricade incidents. BCSO Crisis Negotiation Team

Policy, ECF 120-20 § 6(c); Jansen Depo., ECF 120-11 at 92:8-15, 109:18—110:16; s*ee also* Denney Depo., APP086 at 25:17-23.

The failure to follow the unambiguous directive of training, policies, and procedures to active SWAT and use its de-escalation resources amounts to deliberate indifference. Indeed, with de-escalation, barricaded subjects will often surrender without the use of any force. WI DOJ Manual, ECF 120-21 at p.57; J. Nobel Expert Report, ECF 120-17 ¶ 63(e). In fact, here, when officers broke the rear window of the squad car, Tubby appeared ready to surrender—he pleaded with officers, "help me!," "I'm scared." Internal Squad Video, ECF 120-3 at 2:29:05-2:30:00. But, the officers merely ignored him, and sprayed him directly in the face with OC spray from a large canister *without any warning*. Dash Video 1, ECF 120-13 at 41:03—41:18; Internal Squad Video, ECF 120-3 at 2:31:00—2:31:04. This created a "torture chamber" that forced Tubby out of the vehicle. N. Allen Depo., APP111 at 46:14-20. Forcing Tubby from the vehicle in this manner should "shock the conscience" of anyone with such a conscience.

Zeigle's plan was also not implemented in "good faith," as found by the District Court, but was implemented hastily with deliberate indifference. Zeigle's plan was motivated not by a desire to safeguard Tubby's well-being, but instead a desire to clear the sally port and return the jail to normal operations. Salzmann Depo., APP103 at 130:5-16; Zeigle, Depo., APP081 at 127:19—128:12. Due to haste, Zeigle did not activate a SWAT team or communicate the plan to force Tubby out of the car to perimeter officers. Zeigle, Depo., APP076 at 66:4-25, APP080 at 121:15-21; Denney Depo., ECF 120-8 at 68:2-22; O'Brien Depo., APP047 at 106:12-18.

Without a SWAT team, but instead a hodgepodge of officers, when Tubby was forced out of the vehicle, he had no instructions on how to surrender and no "arrest team" was ready to apprehend him. Katers Depo., ECF 120-14, at 38:6—39:5, 39:10—40:5; *see also* Jansen Depo., ECF 137-4 at 91:24—92:4. As a direct consequence, as Tubby stumbled around without any direction as to what to do next, and the perimeter officers erroneously interpreted Tubby's conduct as an attempt to flea and began using force against him. Dernbach Depo., ECF 120-27 at 68:15-23; Salzmann Depo., APP098 at 84:17—85:4, APP099 at 86:20—87:7, APP100 at 91:10-18. This culminated in the use of deadly force by O'Brien, which Lieutenant Allen testified would not have happened but for Zeigle's plan. N. Allen Depo., APP113 at 123:3-19.

Accordingly, a genuine dispute of material fact exists as to whether Zeigle acted with deliberate indifference. The District Court's decision otherwise was error, and the District Court's dismissal of the state-create danger claim against Brown County and official capacity claim against Zeigle should be reversed.

3. For The Individual Capacity Claim, Zeigle Is Not Entitled to Qualified Immunity.

With respect to the individual capacity claim against Zeigle, the District Court held that he was entitled to qualified immunity. In particular, the District Court held that:

> Plaintiffs have not identified, and the Court has not found, a controlling case or robust collection of persuasive authority that extends the state-created danger exception to cases where an alleged harm was inflicted by a government employee acting in the course of his office or analogous to the set of facts presented here that clearly establishes that Lt. Zeigle's conduct violated the Due Process Clause.

Decision at APP030. Yet, as discussed above, a clear line of authority *does* exist that Zeigle's conduct was subject to the Due Process Clause and state-created danger doctrine.

With respect to the District Court's statement that Appellants had not cited authority "analogous to the set of facts presented here," the District Court asked too much. *Siebert v. Severino*, 256 F.3d 648, 654–55 (7th Cir. 2001) (ruling no qualified immunity if a constitutional "violation is so obvious that a reasonable state actor would know that what they are doing violates the Constitution"). A SWAT Commander should recognize that blinding a man begging for help, and then forcing him out of a secure squad to roam an open area populated by numerous law enforcement officers without any instructions on how to surrender, creates a risk of harm. This is no different than forcing a prisoner from his cell and then shooting him in the head for trying to escape.

The constitutional violation is so obvious that any reasonable officer would know the conduct was unconstitutional. In the words of Lieutenant Allen: it was "just a really bad plan." N. Allen Depo., APP113 at 123:19. Therefore, the District Court erred in finding qualified immunity for the individual capacity claim against Zeigle as well.

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court's dismissal of Appellants' claims, and permit the jury to resolve the factual issues related to Defendant-Appellees' liability under 42 U.S.C. §1983 and state law.

Dated: November 3, 2021

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and (a)(6), as modified by Cir. R. 32(b), because I have prepared this brief in proportionally spaced typeface using Microsoft Word 2016 in 12-point (body) and 11-point (footnotes) Book Antiqua font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as modified by Cir. R. 32(c), in that it contains 13,908 words.

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2021, I electronically filed Appellants' Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

SUSAN DOXTATOR, ARLIE DOXTATOR, AND SARAH WUNDERLICH, AS SPECIAL ADMINISTRATORS OF THE ESTATE OF JONATHON TUBBY,

Plaintiffs-Appellants,

v.

ERIK O'BRIEN, ANDREW SMITH, TODD J. DELAIN, HEIDI MICHEL, CITY OF GREEN BAY, BROWN COUNTY, JOSEPH P. MLEZIVA, NATHAN K. WINISTERFER, THOMAS ZEIGLE, AND JOHN DOES 1-5,

Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of Wisconsin, No. 1:19-cv-00137
Hon. William C. Griesbach, District Judge

APPELLANTS' REVISED APPENDIX

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CIRCUIT RULE 30(D) CERTIFICATION

I hereby certify this revised appendix includes all materials required by Cir.R. 30(d).

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I hereby certify that on November 3, 2021, I electronically filed Appellants' Revised Appendix with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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REVISED APPENDIX TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

SUSAN DOXTATOR, et al.,

Plaintiffs,

v. Case No. 19-C-137

ERIK O'BRIEN, et al.,

Defendants.

DECISION AND ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Jonathon Tubby was fatally shot by a Green Bay police officer after he was transported to the Brown County Detention Center, or jail, following his arrest on the evening of October 19, 2018. The officer who shot Tubby claims he thought Tubby had a gun and posed a serious threat to himself and others. Plaintiffs, Special Administrators of Tubby's estate, dispute the officer's account and claim that the shooting is reflective of a widespread practice within the Green Bay Police Department of excessive and often deadly force enabled by a culture of dishonesty. Plaintiffs also allege that various members of the Brown County Sheriff's Office violated Tubby's constitutional rights by failing to intervene before the fatal shots were fired, failing to train officers to avoid such a situation, and creating the danger that caused Tubby's death. Plaintiffs seek damages under 42 U.S.C. § 1983 for violation of Tubby's constitutional rights by the City of Green Bay, Chief of Police Andrew Smith, and Officer Erik O'Brien (the Green Bay Defendants) as well as Brown County, Sheriff Todd Delain, Captain Heidi Michel, Deputy Joseph Mleziva, Deputy Nathan Winisterfer, and Lieutenant Thomas Zeigle (the Brown County Defendants). The third amended complaint also asserts common law claims for battery and negligence, and state law

statutory claims against the City and County for indemnification of officers for personal liability incurred while acting in the scope of their employment. The Court has jurisdiction over Plaintiffs' § 1983 claims under 28 U.S.C. § 1331 and supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367. The case is before the Court on Defendants' motions for summary judgment. For the following reasons, Defendants' motions will be granted, and the case will be dismissed.

BACKGROUND

On the evening of October 19, 2018, Green Bay Police Department (GBPD) Officer Colton Wernecke and his field training officer, Erik O'Brien, were on patrol in the City of Green Bay. At approximately 7:24 p.m., Officer Wernecke observed a vehicle with an unregistered license plate drive through a red light. He decided to initiate a traffic stop, activated his overhead lights, and followed the vehicle. Green Bay Defs.' Proposed Findings of Fact (GBPFOF) ¶ 15, Dkt. No. 118. The vehicle continued to drive and turned into the parking lot of the Hyatt Regency hotel. The vehicle drove through the parking lot despite Officer Wernecke turning on the squad car's overhead lights, shining a spotlight on the vehicle, and blipping the squad car's siren. *Id.* ¶ 16. The vehicle eventually pulled into a parking space. Although the occupants of the vehicle initially gave false identifications, *id.* ¶¶ 24–25, they were ultimately identified as Jonathon Tubby, who was driving the vehicle, and his aunt, Theresa Rodriguez, who was in the passenger seat. *Id.* ¶ 17. A records check disclosed active warrants on each.

Officer O'Brien requested a second squad car to provide cover for the officers, and GBPD Officer Tyler Haack responded. Officers Haack and O'Brien approached the passenger side of the vehicle while Officer Wernecke approached the driver's side. *Id.* ¶ 20. Officer Haack observed what he suspected to be marijuana, and Tubby and Rodriguez were ordered to exit the vehicle. *Id.* ¶ 21. Officer Wernecke handcuffed Tubby behind his back and searched him while Officer

O'Brien observed. Tubby was then placed in the rear seat of Officer Wernecke's squad, while Rodriguez was handcuffed and placed in Officer Haack's squad. Officer Haack then left to transport Rodriguez to the Brown County Jail, while Officers O'Brien and Wernecke stood by with Tubby's vehicle to wait for a tow truck. *Id.* ¶¶ 25–27.

At 7:35 p.m., Tubby was placed in the back of Officer Wernecke's squad car and seat belted in with his hands handcuffed behind his back. *Id.* ¶ 28. The squad's internal camera shows that at 7:40:36, Tubby moved his hands under his butt behind his bent legs as he remained seated, *id.* ¶ 29, and by 7:41, he maneuvered one leg through his handcuffed arms and began putting his right hand up his shirt. He then reached his hand down into his pants. *Id.* ¶ 30. At 7:43, Tubby removed his seat belt, *id.* ¶ 31, and moved his other leg out from under his handcuffed arms. At that time, both of Tubby's hands were in front of his body, still handcuffed together. Tubby put his right hand under his shirt, and he bent forward and manipulated his hand up under his shirt. *Id.* ¶ 32.

At 8:10:56, Officer Wernecke transported Tubby to the Brown County Jail to be booked on possession of marijuana and obstructing charges, as well as for an active warrant. *Id.* ¶ 33. The transport to the Brown County Jail took approximately 12 minutes. *Id.* ¶ 34. Officer O'Brien reported that Tubby remained quiet during the transport to the Jail. Tubby was leaning forward with his hands in front of his body during the transport and upon his arrival at the sally port. *Id.* ¶ 35.

Officers Wernecke and O'Brien entered the sally port of the Brown County Jail at approximately 8:22 p.m. *Id.* ¶ 36. The sally port is an enclosed area in the Jail that provides the secure transition of inmates from the custody of police officers to the intake area of the Jail. The sally port overhead door is controlled by the Jail's master control. *Id.* ¶ 37. Before parking the squad car, Officer O'Brien asked Tubby if he had anything on him. Tubby responded, "no." *Id.*

¶ 36. After parking the squad car and turning off the engine, Officers O'Brien and Wernecke exited the squad car and placed their gear and weapons in the trunk of the car pursuant to the Jail's policy that prohibits officers from bringing weapons into the Jail. *Id.* ¶ 38.

When Officer Wernecke went to open the rear driver's side door of the squad car to remove Tubby, he realized that Tubby's hands were not behind him and were balled up under the front of his shirt. *Id.* ¶ 39. Officer Wernecke asked Tubby to get out of the squad car, but Tubby did not exit. *Id.* ¶ 40. When Officer Wernecke told Tubby to "step out," Tubby remained in the squad car with his hands under his shirt. Officer Wernecke asked, "Stepping out?" and then instructed, "Come on, bring your foot out," as he reached for Tubby's ankle. Tubby flinched and backed further into the squad car, still bent forward. *Id.* ¶ 41.

Officer O'Brien came around from the back of the squad car and looked in the open door. He immediately noticed that Tubby's hands were no longer behind his back and that his hands were under his clothes. Brown County Defs.' Proposed Findings of Fact (BCPFOF) ¶ 79, Dkt. No. 111. At that time, Officer O'Brien observed what he believed to be the barrel of a gun pressing against the inside of Tubby's shirt. GBPFOF ¶ 44. At 8:25:08, Officer O'Brien ordered, "Jonathon, bring your foot out." *Id.* ¶ 45. Officer Wernecke attempted to pull Tubby's foot out of the car, and Tubby stated "don't" and then "I'll fucking do it." Pls.' Add'l Proposed Findings of Fact to Green Bay Defs.' Mot. for Summ. J. (PPFOFGB) ¶ 23, Dkt. No. 135; Pls.' Resp. to GBPFOF ¶ 45, Dkt. No. 135.

Believing that Tubby was armed and suicidal, GBPFOF ¶ 46, Officer O'Brien immediately slammed the squad car's door closed with Tubby still inside and told Officer Wernecke, "I think he's got a gun." *Id.* ¶ 48. Officer O'Brien asked Officer Wernecke what he was thinking, and Officer Wernecke responded that he thought he must have missed something in searching Tubby. *Id.* ¶ 49. Once Officer O'Brien shut the door, Tubby was locked inside the car. Pls.' Add'l

Proposed Findings of Fact to Brown County Defs.' Mot. for Summ. J. (PPFOFBC) ¶ 1, Dkt. No. 136.

Officer Wernecke ran to the booking window to alert jail staff that something was wrong. GBPFOF ¶ 50. Officer O'Brien retrieved his handgun from the trunk of the squad car, and he and Officer Wernecke retreated behind the transport van parked next to the squad car. *Id.* ¶ 51. Officer O'Brien radioed police dispatch requesting that another unit be sent to the sally port because "it looked like" Tubby had "something" in his hand and was refusing to exit the squad car. *Id.* ¶ 52. Officer O'Brien later reported over the radio that the male subject had something in his shirt pointed up at his chin and requested that an officer bring a shield from the Bearcat. A few minutes later, Officer O'Brien advised dispatch that Tubby's hands were up by his face, that Tubby was facing the back window, and that the windows were too fogged up to see if there was anything in his hands. Although Officer O'Brien did not state over the radio that he saw a gun, PPFOFGB ¶ 25, he told various responding officers that he thought Tubby had a gun. BCPFOF ¶ 84. That the officers believed Tubby had a gun is also apparent from their reactions and the steps they then took to avoid being shot.

The windows of the squad car began to fog up, and the officers could not see inside the squad car except for some vague movement in the back seat. GBPFOF ¶ 54. At 8:28 p.m., officers yelled to Tubby, "Jonathon, put it down," and Tubby replied, "Fuck you. I'll do it." *Id.* ¶ 55. At 8:29 p.m., Tubby stated, "I'll fucking do it at the first fucking person to open this door," and then, "I'm not going." *Id.* ¶ 56. At 8:31, Tubby stated, "Fuck you. I'll fucking do it," then "Fuck you," and "Shut the fuck up." Shortly thereafter, at 8:32:26, Tubby stated, "I can fucking hear you." At 8:35:09, Tubby stated, "The fuck away from me." *Id.* ¶ 58.

Defendants do not clearly distinguish between what the officers actually heard and saw at the time, and what the internal squad recording shows Tubby to be doing and saying. Plaintiffs

repeatedly contend that there is no evidence that the officers heard Tubby's statements and they are thus irrelevant to the state of mind of the officers. Pls.' Resp. to GBPFOF ¶¶ 55–56, 58. There is some evidence, however, that Tubby could be heard and seen at times. Officer O'Brien instructed Tubby to wipe the windows several times, and at one point, Tubby did wipe the window down. This signaled to Officer O'Brien that Tubby could hear him, and he continued to give commands to Tubby to wipe the windows. GBPFOF ¶ 59. But even if the officers on the outside could not hear and see all that Tubby was saying and doing, the recording confirms the fact, consistent with the earlier observations of Officers Wernecke and O'Brien, that Tubby was acting like he was armed with a gun and threatening to use it.

In the meantime, numerous law enforcement officers from GBPD and the Brown County Sheriff's Office (BCSO) responded to the sally port. *Id.* ¶ 60. At approximately 8:30 p.m., GBPD Sergeant Tom Denney drove into the entrance of the Brown County Jail sally port and parked just inside the entrance. Shortly thereafter, GBPD Officer Walvort responded to the scene and parked his squad car directly outside the sally port entrance. *Id.* ¶ 57. GBPD Lt. Nate Allen was a supervisor that night and responded to the sally port in response to the radio traffic from dispatch. *Id.* ¶ 62. While in route to the sally port, Lt. Allen began developing a plan to extract Tubby from the squad car. He authorized deployment of the Bearcat armored vehicle to provide cover and requested additional pieces of equipment, including 40-millimeter munitions to fire wooden dowels and a glass breaking implement. *Id.* ¶ 63.

Upon arriving in the sally port, Lt. Allen met with Sgt. Denney and GBPD Officer Eric Allen and called GBPD SWAT commander Lt. Gering to discuss options for removing Tubby from the squad car. *Id.* ¶ 64. Lt. Allen planned to drive the Bearcat within a few feet of the squad car, have a shield team with lethal cover open the rear door of the squad car, and give Tubby

commands to exit the vehicle. If Tubby did not exit the vehicle, they would send a K-9 unit to extract him. *Id.* ¶ 65.

Lt. Zeigle was working in the Sheriff's Office building, which is in a separate location from the Jail. BCPFOF ¶ 85. GBPD Lt. Buckman told Lt. Zeigle that a suspect, identified as Tubby, was in the back of a GBPD squad car and had a gun to his head. *Id.* ¶ 86. Lt. Zeigle ordered Sgt. Katers to respond to the scene. *Id.* ¶ 87. Lt. Zeigle then responded to the scene himself and, on his way, spoke with Lt. Allen who briefed him on the situation. *Id.* ¶ 88. Lt. Allen informed Lt. Zeigle that there was a subject in the back of a squad car with his hands and arms up in his shirt with an unknown possible weapon, threatening to harm himself. GBPFOF ¶ 66. There were also multiple officers on scene from GBPD and BCSO who were acting in their capacities as patrol officers and had tactical training and experience. BCPFOF ¶ 90. Lt. Zeigle, Sgt. Katers, Lt. Allen, Officer Salzmann, Officer Allen, and Officer O'Brien were SWAT team members of their respective agencies. *Id.* ¶ 91.

Once on the scene, Lt. Zeigle met with Lt. Allen and Officer Allen to establish a plan. *Id.* ¶ 92. Lt. Allen explained the extraction plan he, Lt. Gering, and Officer Allen had developed. GBPFOF ¶ 67. Lt. Zeigle did not agree with the plan proposed by Lt. Allen. BCPFOF ¶ 93. As the Commander of the Brown County SWAT team, Lt. Zeigle asserted his jurisdiction over the scene and determined that a SWAT activation was not necessary because there were ample resources already on scene, including multiple officers with tactical training, an armored vehicle, and a K-9 unit. *Id.* ¶ 95; GBPFOF ¶ 69. He observed that there were officers on scene with perimeters established, and he was aware that Tubby was not constructively communicating with officers on scene. BCPFOF ¶ 96.

Lt. Zeigle determined that it was appropriate to treat the situation like a barricaded situation. *Id.* ¶ 97. He could not get a visual on Tubby because the squad car's windows were

fogging, *id.* ¶ 98, so he planned to break the back window of the squad car to establish better visibility and offer better communication. *Id.* ¶ 99. If Tubby did not surrender or establish verbal communication following the breakout of the rear windshield, Lt. Zeigle planned to introduce oleoresin capsicum (OC) spray to get a reaction from Tubby and give him an opportunity to establish a dialog and surrender. *Id.* ¶ 100. In Lt. Zeigle's view, whenever OC spray is deployed in an enclosed environment, it is important to give the individual a way out. *Id.* ¶ 101. Lt. Zeigle decided to break out the rear windshield of the squad car rather than the rear-side window because the bars on the side windows would have prevented Tubby from exiting the vehicle if OC spray was introduced. *Id.* ¶ 102. By deploying the OC spray and leaving Tubby a way out, Lt. Zeigle believed Tubby would exit through the rear windshield and surrender. *Id.* ¶ 103. Lt. Zeigle communicated the plan to Lt. Allen, Officer Allen, and Sgt. Katers, *id.* ¶ 104, and observed the implementation of the plan from outside the sally port. GBPFOF ¶ 74.

Sgt. Katers and Officers Salzmann, Allen, Lynch, Merrill, and Christensen formed an arrest team in accordance with the plan. *Id.* ¶ 75. Officers O'Brien, Wernecke, and Denney; Deputies Mleziva and Winisterfer; Lt. Zeigle; and others were standing in various positions near the open sally port door. BCPFOF ¶ 119. At approximately 9:02 p.m. GBPD Officer Merrill drove the Bearcat armored vehicle into position by backing into the sally port next to the driver's side of the squad car. *Id.* ¶ 108; GBPFOF ¶ 75. BSCO Sgt. Katers sat in the front passenger seat, and GBPD Officers Allen, Lynch, Christensen, and Salzmann and K9 Pyro were also inside the Bearcat. GBPFOF ¶ 75. Officers Lynch and Christensen got out of the Bearcat with a shield and handguns, approached the back of the squad car, and closed its trunk to secure the weapons inside. *Id.* ¶ 76. While the Bearcat moved into position, at 9:04 p.m., Tubby, who still had his hand under his shirt, appeared to put something in his mouth through his shirt and stated, "I'll fucking do it." At 9:05 p.m., Tubby faced the back window, and a short time later stated, "I'll fucking do it." *Id.* ¶ 77.

At approximately 9:06 p.m., Officer Allen opened the turret on top of the Bearcat, directed a spotlight into the back of the squad car, and shot a 44-millimeter wooden dowel into the lower passenger corner of the rear windshield of the squad car, breaking a portion of the rear windshield. *Id.* ¶ 78. Tubby leapt back and took cover from the breaking glass, and said, "Fuck you." *Id.* ¶ 79. At 9:07:01, Officer Allen stated, "Jonathon, put your hands up where I can see them." *Id.* ¶ 80. Ten seconds later, Officer Allen repeated, "Jonathon, put your hands up." *Id.* Tubby tucked himself into the corner of the squad car and began to cry. He exclaimed, "Okay!" He then stated, "What are you guys doing to me?" and then stated, "help me" and "I'm scared." PPFOFGB ¶ 31. Tubby did not put both of his hands up. GBPFOF ¶ 80.

At 9:07:29, Officer Allen fired a second wooden dowel round at the squad car, breaking out a bigger portion of the rear windshield, and retreated back into the Bearcat. *Id.* ¶ 81. From the passenger's seat in the Bearcat, Sgt. Katers used a rake tool to clear the remaining glass from the rear windshield that was still obscuring Tubby. *Id.* ¶ 82; BCPFOF ¶ 110. After breaking out the rear window, Officer Allen obtained partial visibility into the back seat of the squad car. He believed he saw Tubby facing the rear windshield with his hands concealed under his shirt holding something under his chin. GBPFOF ¶ 83.

Officer Allen gave Tubby multiple verbal commands to show both of his hands. BCPFOF ¶ 111. Tubby did not show both of his hands. GBPFOF ¶ 84. At 9:08 p.m., Officer Allen commanded, "Put your hands up Jonathon." Tubby made moaning and crying noises but did not show both of his hands. *Id.* ¶ 85. Officer Allen used the loudspeaker and stated, "Jonathon, put your hands up." *Id.* ¶ 86. Tubby did not show his hands but stated, "What are you guys doing to me?" *Id.* At 9:09 p.m., Officer Allen stated, "Jonathon, put your hands up, bud, so I can see them. Come on, Jonathon." *Id.* ¶ 87. Seconds later, Officer Allen stated, "Jonathon, we don't want to hurt you. Put your hands up, bud. Come on, Jonathon." *Id.*

At some point, Officer Allen could see Tubby's left hand outside of his shirt, but Tubby did not show both hands. *Id.* ¶ 88. At 9:10 p.m., Tubby looked out the back window, and Officer Allen stated, "Jonathon, put your hands up for me, bud." *Id.* ¶ 89. Seconds later, Officer Allen stated, "Put your hands up for me, Jonathon. I can see that one is clear. Let me see your other hand. Let me see your other hand, bud." *Id.* Tubby did not show both of his hands. *Id.* Officer Allen was handed a canister of OC spray. *Id.* ¶ 90. At 9:10:51 p.m., Officer Allen deployed OC spray into the rear windshield of the squad car. Officers did not warn Tubby that they would spray the OC spray. PPFOFGB ¶ 33. Tubby yelled and started bouncing up and down in the seat. GBPFOF ¶ 91.

Soon thereafter, Tubby rapidly exited the back of the car through the rear windshield and got onto his knees on the trunk of the squad car. Tubby then stood on the trunk of the squad car, facing out toward the officers. *Id.* ¶ 92. His left hand was visible, but his right hand was under his shirt. BCPFOF ¶ 114. Sgt. Denney assessed Tubby's hands to see if they were both visible and free of a weapon. Because only Tubby's left hand was visible when he jumped out of the rear windshield, Sgt. Denney discharged one round from a beanbag gun, which hit Tubby in the lower abdomen. GBPFOF ¶ 93. The beanbag round caused Tubby to fall off of the trunk of the squad car and land on the ground next to the car. *Id.* ¶ 94; BCPFOF ¶ 116. Tubby then rose to his feet and stumbled in the direction of the open sally port door where Officer O'Brien and other officers were standing. GBPFOF ¶ 95; BCPFOF ¶ 117.

At this time, Officer Salzmann opened the back doors of the Bearcat and K9 Pyro, who was on a 15-foot lead, jumped out and rounded the corner of the Bearcat. As Officer Salzmann rounded the corner of the Bearcat behind Pyro, he saw Tubby stumbling backwards toward the squad car then move toward the blue transport van and entrance of the sally port. GBPFOF ¶ 97. As Tubby moved around the transport van toward the sally port entrance, Pyro engaged Tubby in

the buttock area. As Pyro engaged Tubby, Officer Salzmann pulled back on Pyro's lead to pull Tubby back and prevent him from advancing toward the officers near the sally port entrance. *Id.* ¶ 98. Sgt. Denney positioned himself near the rear of his squad car and fired a second beanbag round at Tubby. *Id.* ¶ 99; PPFOFGB ¶ 38. The beanbag round hit Tubby, and he fell to the ground, alive, with his head landing near the rear bumper of Sgt. Denney's squad car. PPFOFGB ¶ 39. As Tubby fell to the ground, his right hand was empty and fell above his head. *Id.* ¶ 40. Tubby's body was pulled backward by the police canine. *Id.* ¶ 41. Officer O'Brien then opened fire—shooting Tubby five times. *Id.* The time between Tubby exiting the rear windshield and Officer O'Brien shooting Tubby was approximately ten seconds. GBPFOF ¶ 109. No other officer fired his or her weapon. PPFOFGB ¶ 51.

According to the defendants, shortly after the OC spray was deployed into the back of the squad car, Officer O'Brien heard a noise and then saw Tubby "erupting" from the backseat of the squad car. GBPFOF ¶ 100. As Tubby came out onto the trunk, Officer O'Brien could see Tubby's left hand but could not see his right hand, as it was concealed under his shirt behind his left hand. Officer O'Brien retreated back to his position of cover. *Id.* ¶ 101. Officer O'Brien peeked back around the corner of the door jamb and saw Tubby in an upright position, leaning slightly forward as he rushed toward the sally port entrance door where Officer O'Brien and other officers were located. *Id.* ¶ 102. Tubby's right hand was still concealed under his shirt as he rushed toward the sally port door. *Id.* ¶ 103. Officer O'Brien retreated back into his position of cover and, simultaneously, Tubby came back into Officer O'Brien's line of sight from that position of cover. *Id.* ¶ 104. Officer O'Brien believed that Tubby was armed and that Tubby would shoot through his clothing at him or other officers. *Id.* ¶ 105. Officer O'Brien heard a "pop" sound and believed Tubby shot the gun he was concealing under his clothing. *Id.* ¶ 106. Officer O'Brien observed Tubby's body was descending in a downward direction. *Id.* ¶ 107. He noted that Tubby's body

was twisting to the left and saw Tubby look across his body to the left and toward the officers that were located behind Sgt. Denney's squad car. *Id.* ¶ 108.

Deputies Mleziva and Winisterfer relied on information they learned from officers on scene and believed that Tubby was armed with a gun. BCPFOF ¶ 120. Deputy Winisterfer was standing in the open sally port area and perceived Tubby to be running at him with something under his shirt. *Id.* ¶ 121. He feared that he was the last line of defense as exterior scene security, and if Tubby got past him, then other individuals or citizens in the community could be in danger. *Id.* ¶ 122. Deputy Mleziva was closer than 15 to 20 feet from Officer O'Brien at the time Officer O'Brien fired his weapon and also perceived himself to be in imminent danger. *Id.* ¶¶ 127–28. Officer O'Brien stepped in front of Deputy Winisterfer before firing his weapon. *Id.* ¶ 126.

Once Tubby was down, officers at the scene radioed for medical assistance and nurses attempted lifesaving aid measures to Tubby. *Id.* ¶ 130. Sgt. Denney, Officer Merrill, and Officer Christensen approached Tubby with a shield. GBPFOF ¶ 123. The officers used the shield to pin Tubby's hands to his chest, so they could pull Tubby's hands down. *Id.* ¶ 124. At this time, the officers saw both of Tubby's hands and that he was unarmed. *Id.* ¶ 125.

LEGAL STANDARD

Summary judgment is appropriate when the moving party shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In deciding a motion for summary judgment, the Court must view the evidence and make all reasonable inferences in the light most favorable to the non-moving party. *Johnson v. Advocate Health & Hosps. Corp.*, 892 F.3d 887, 893 (7th Cir. 2018) (citing *Parker v. Four Seasons Hotels, Ltd.*, 845 F.3d 807, 812 (7th Cir. 2017)). The party opposing the motion for summary judgment must "submit evidentiary materials that set forth specific facts showing that there is a genuine issue for trial." *Siegel v. Shell Oil Co.*, 612 F.3d 932, 937 (7th Cir. 2010)

(citations omitted). "The nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* Summary judgment is properly entered against a party "who fails to make a showing to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Austin v. Walgreen Co.*, 885 F.3d 1085, 1087–88 (7th Cir. 2018) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

ANALYSIS

A. Excessive Force Claim against Officer O'Brien

The Court begins with Plaintiffs' claim that Officer O'Brien used excessive force in violation of the Fourth Amendment since that claim is the predicate for all of their remaining claims. The Green Bay Defendants assert that summary judgment should be granted as to this claim because Plaintiffs cannot meet their burden of showing that Officer O'Brien's use of deadly force was unreasonable. Alternatively, the Green Bay Defendants argue that the undisputed evidence establishes that Officer O'Brien is entitled to qualified immunity.

A police officer's use of force to effect an arrest is a seizure within the meaning of the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985); *Graham v. Connor*, 490 U.S. 386, 388 (1989). As such, it is subject to the Fourth Amendment's reasonableness requirement. *Id.* In order to prevail on a claim under § 1983 that an officer used excessive force against an arrestee in violation of his Fourth Amendment rights, "[a] plaintiff must show the officer's use of force was objectively excessive from the perspective of a reasonable officer on the scene under the totality of the circumstances." *Horton v. Pobjecky*, 883 F.3d 941, 949 (7th Cir. 2018). "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Garner*, 471 U.S. at 11. Even without any possibility of escape, an officer is justified in using

deadly force when he reasonably believes the suspect poses an imminent threat of serious physical harm to himself or others. *Siler v. City of Kenosha*, 957 F.3d 751, 758–59 (7th Cir. 2020).

The inquiry required to assess an excessive force claim involves "a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396. This inquiry is highly fact-intensive and "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* (citations omitted).

The Court's analysis of the objective reasonableness of an officer's actions must be "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* In excessive force claims, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396–97. "This is true even when, as judged with the benefit of hindsight, the officers may have made 'some mistakes.'" *City & Cty. of San Francisco v. Sheehan*, 575 U.S. 600, 612 (2015) (quoting *Heien v. North Carolina*, 574 U.S. 54, 61 (2014)). Finally, "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 397.

The relevant question here is whether Officer O'Brien reasonably believed that Tubby posed a threat of death or serious bodily injury based on the information Officer O'Brien had at the time he shot Tubby. The record before the Court establishes that Tubby intentionally led Officer O'Brien and the other law enforcement officers who were present at the Jail to believe he

was armed. Tubby managed to manipulate his body and move his hands, which were originally handcuffed behind his back, to his front where he hid them under his shirt and, pretending he had a gun, threatened to "do it." Officer O'Brien's statement that he observed what appeared to be the cylindrical shape of the end of a gun barrel pressed against the inside of Tubby's shirt is consistent with the video images that appear on the recording from the squad's internal camera.

Figure C: Camera Footage from Squad #42 (9:02:35 p.m.)

Dkt. No. 121-20 at 13. It is clear from the officers' description of Tubby's statements and behavior, confirmed by the audio/video recording, that Tubby was pretending that he was armed with a gun and intent on using it at least on himself. Given the risk of death or serious bodily harm that a firearm poses, it was not unreasonable to take Tubby's threats seriously.

Plaintiffs contend that a factual dispute exists as to whether Officer O'Brien truly believed Tubby was armed, noting that he did not use the word "gun" in his initial communications with dispatch. Plaintiffs suggest that Tubby put his hands under his shirt because they were cold and got stuck there. Plaintiffs also contend that Officer O'Brien has a history of dishonesty, pointing to his omissions in his 2012 employment application with the Green Bay Police Department. But

as explained above, Officer O'Brien's statements concerning what he saw and heard are corroborated by Officer Wernecke and the recording of Tubby's behavior when he was left alone in the squad. Officer O'Brien told various responding officers that he thought Tubby had a gun, including Officer Wernecke. Although Officer Wernecke felt confident in his search of Tubby when he placed him in the squad, he later thought he must have missed something as the events in the sally port unfolded.

That the officers truly believed Tubby had somehow managed to arm himself was also clear from their response. For approximately forty minutes, officers attempted to get Tubby to show his hands and exit the squad car. Officer Allen then knocked out the rear windshield to communicate with Tubby, and Tubby refused multiple commands to show his hands. Although Officer Allen saw that one hand was clear, Tubby did not show him his other hand. After Officer Allen deployed OC spray into the rear windshield of the squad car, Tubby rapidly exited the car through the rear windshield and stood on the trunk of the squad car with his right hand under his shirt. Tubby fell off the trunk of the squad car after being hit in the abdomen with a beanbag gun round and landed on the ground next to the car. He then rose to his feet and moved in the direction of the open sally port door where Officer O'Brien and other officers scurried for cover. Officer O'Brien heard the "pop" of the beanbag shotgun and believed that Tubby shot the gun he was holding under his shirt. Approximately ten seconds elapsed from the time Tubby climbed out the rear windshield of the squad car to the time Officer O'Brien shot him. In the split-second of time Officer O'Brien had to react, he fired his weapon.

As we know now, Tubby was only pretending to be armed. Officer O'Brien's decision to use deadly force on the mistaken belief that Tubby was armed and an imminent danger to himself and others was tragic, but that does not make it unconstitutional. Whether an officer is ultimately correct that a suspect was armed is not the issue. Indeed, in *Sherrod v. Berry*, the court held that

evidence that the suspect was unarmed was irrelevant to the question whether the officer's decision to use deadly force was reasonable and thus was inadmissible in the civil rights action arising from the shooting. 856 F.2d 802 (7th Cir. 1988) (*en banc*). The issue in such a case is whether the officer reasonably believed the suspect was armed based on the information available to him at the time he fired the fatal shot. *Id.* at 804–05. A mistaken understanding of the facts that is reasonable under the circumstances can render a seizure based on that understanding reasonable under the Fourth Amendment. *Milstead v. Kibler*, 243 F.3d 157 (4th Cir. 2001) *abrogated in part on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009); *see also Hill v. California*, 401 U.S. 797, 803–04 (1971) (holding that when police have probable cause to arrest first party but reasonably mistake second party for first party, arrest of second party is not violation of Fourth Amendment).

Plaintiffs assert that deadly force was not justified because, at the time Officer O'Brien fired, Tubby was handcuffed, facedown, under the control of a police canine, blinded by OC spray, and outnumbered twenty-to-one by police. "It is well established that a police officer may not continue to use force against a suspect who is subdued and complying with the officer's orders. But that principle depends critically on the fact that the suspect is indeed subdued." *Johnson v. Scott*, 576 F.3d 658 (7th Cir. 2009) (internal citations omitted). It does not apply when the suspect falls to the ground while in possession of and firing a gun.

Plaintiffs contend that Tubby was handcuffed and blinded by OC spray, but this did not make him less dangerous in the eyes of the officers at the scene. Although Tubby was handcuffed, he had managed to maneuver his body so that his hands were in front of him and was acting as if he was armed with a gun. Even if blinded by OC spray, he was still able to exit the squad car and rush toward the open sally port door. In addition, Plaintiffs assert that Tubby was outnumbered twenty-to-one. But the number of officers at the sally port does not mean that Tubby did not pose a deadly threat. If anything, the fact that there were numerous officers present increased the danger

since they offered more targets. An armed assailant who is bent on taking life, including his own, poses a severe risk of danger for all who are present.

Plaintiffs also maintain that there is a dispute over whether Tubby was facing Officer O'Brien when Officer O'Brien shot his weapon. Plaintiffs contend that, if Tubby was facedown at the time of the shooting, Officer O'Brien could not have reasonably believed that his life was in danger. To support this theory, Plaintiffs refer to the autopsy photographs to establish the trajectory of the bullets. Based on this evidence, as well as the video evidence and testimony of Officer Wernecke concerning his location at the time the shots were fired, Plaintiffs contend that Tubby was face down on the ground when he was shot.

But even if he had fallen to the ground, Tubby could still pose a deadly threat to those around him. Plaintiffs' argument assumes with hindsight that Tubby did not have a gun that he had already fired once and could readily fire again. But that is not what Officer O'Brien believed. Although Tubby was brought to the ground after being hit with a beanbag gun round and was then engaged by a canine from behind, his upper body was unrestrained and his hand remained hidden under his shirt. The canine engaging Tubby did not establish that he was unarmed. It could not have been more than a couple seconds between the canine attaching and the use of force by Officer O'Brien, and from where he was standing, Officer O'Brien could not see that the canine had engaged Tubby. No reasonable jury could conclude that Tubby was safely subdued before Officer O'Brien shot.

Plaintiffs cite *Weinmann v. McClone*, 787 F.3d 444 (7th Cir. 2015), for the proposition that "an officer cannot simply execute a person for possessing a gun, particularly where that gun is not pointed at officers." Pls.' Br. at 24, Dkt. No. 132. But in that case, the gun that the suicidal plaintiff was holding, a shotgun, was clearly visible and lying across the plaintiff's lap while he was seated in a lawn chair in his garage when the officer entered unannounced and shot him. *Weinmann*, 787

F.3d at 447. Here, Officer O'Brien reasonably believed that Tubby was armed with a handgun hidden under his shirt, that he had repeatedly refused directions to show his hands, and that he had already shot at least once while fleeing the squad car.

A handgun hidden by a suspect who refuses to comply with a lawful command poses a far more serious threat to an officer, as this video caught on a South Carolina police officer's body camera clearly shows: CBS News, *Estill, South Carolina, Officer's Camera Captures Shooting*, YOUTUBE (Aug. 11, 2017), http://www.youtube.com/watch?v=7Qq3dXfzvdw. This real-life occurrence illustrates the risks police officers face when they do not know if a suspect is armed. It also makes clear the difficult choices an officer must make when encountering a suspect who refuses to obey a lawful command, an occurrence that is unfortunately far too common in today's world. Tubby not only refused the officers' lawful commands but intentionally led them to believe he was holding a gun under his shirt, thereby making himself appear to be a serious risk of physical harm to all in the vicinity. This is also a relevant consideration. *See Scott v. Harris*, 550 U.S. 373, 384 (2007) ("We think it appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability. It was respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that Scott confronted.").

Plaintiffs argue that, even if Officer O'Brien genuinely believed he saw a gun when Tubby was in the squad car, that belief would have been negated at the time Officer O'Brien fired because video footage shows that both of Tubby's hands were empty and visible to officers before the shots were fired. Plaintiffs contend that the video evidence shows Tubby's empty left hand was visible to officers when the rear windshield of the squad car was broken and that later video evidence shows that Tubby's empty right hand was arguably extended above his head as he fell to the ground. Plaintiffs cite no evidence, however, that Officer O'Brien was in a position to see both of

Tubby's hands at the same time before he fired. It only takes one hand to fire a handgun. It was not until after Sgt. Denney, Officer Merrill, and Officer Christensen approached Tubby with a shield after he was shot that the officers saw both of his hands at the same time.

In sum, Plaintiffs' arguments that Tubby was not armed are based on hindsight and conjecture. Only the facts known to Officer O'Brien at the time of the seizure matter in the reasonableness determination. Officer O'Brien reasonably believed that Tubby was armed based on Tubby's own actions and statements. When officers repeatedly ordered Tubby to show both of his hands, he did not comply. Tubby rapidly exited the squad car and ran in the direction of the sally port door and the officers stationed there. Officer O'Brien heard a "pop" and believed Tubby was shooting his gun from under his shirt. The fact that other officers can normally distinguish between the sound of a beanbag gun and a firearm when not under stress says little about how an officer might react when he believes a man with a gun is rushing toward him. Under the circumstances he confronted, Officer O'Brien's belief that Tubby posed an imminent threat of serious injury or death to himself or others was reasonable. It thus follows that the force used was not excessive and no Fourth Amendment violation occurred.

B. Qualified Immunity

The Green Bay Defendants argue in the alternative that Plaintiffs' claim against Officer O'Brien should be dismissed because he is immune from civil liability for any constitutional violation that may have occurred. Under the doctrine of qualified immunity, government officials performing discretionary functions are immune from civil liability for constitutional violations "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). "Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018)

(per curiam) (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam)). The doctrine reflects an accommodation between the public interest in safeguarding constitutional guarantees on the one hand, and on the other, the concern that subjecting government officials to personal liability and harassing litigation would inhibit them in the performance of their duties. *Id.* Qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). "Because of the importance of qualified immunity to society as a whole, the [Supreme] Court often corrects lower courts when they wrongly subject individual officers to liability." *City & Cty. of San Francisco, California v. Sheehan*, 575 U.S. 600, 611 (2015) (internal citation omitted).

Although the defense of qualified immunity is available to all governmental officials in the performance of discretionary acts, it is especially important for law enforcement officers who are frequently forced to make life and death decisions of constitutional import within a matter of seconds. This contrasts sharply with nonfatal decisions made by judges who, under *Pierson v. Ray*, 386 U.S. 547, 553–54 (1967), have absolute immunity:

> Judges view facts from afar, long after the gunsmoke cleared, and might take months or longer to decide cases that forced police officers to make split-second decisions in life-or-death situations with limited information. We as judges have minutes, hours, days, weeks, even months to analyze, scrutinize and ponder whether an officer's actions were "reasonable," whereas an officer in the line of duty all too frequently has only that split-second to make the crucial decision. The events here unfolded in heart-pounding real time, with lives on the line. Pobjecky lacked our luxury of pausing, rewinding, and playing the videos over and over.

Horton v. Pobjecky, 883 F.3d 941, 950 (7th Cir. 2018) (internal quotation marks and citations omitted). Other than law enforcement officers, no other government officials are called upon to use deadly force as a normal part of their duties, sometimes, as in the occurrence shown in the video linked above, when their own lives are at stake. Every decision concerning the use of deadly force carries with it the risk of death or serious bodily injury to someone—the suspect, an innocent

third party, or the officer. To impose personal liability for losses of this magnitude upon officers called upon to act in a split second with less than perfect knowledge and without clear guidance in the law would seriously inhibit the officers in carrying out their duties, if not cause them to leave the profession altogether. It would also thereby seriously endanger the public.

Turning to the specific issue in this case, Plaintiffs cite *Graham*, *Garner*, and various lower court decisions to support their contention that Officer O'Brien's use of deadly force violated clearly established law. But "[w]hile cases like *Garner* and *Graham* are instructive in the excessive force context, they 'do not by themselves create clearly established law outside an obvious case.'" *Lopez v. Sheriff of Cook Cty.*, 993 F.3d 981, 988 (7th Cir. 2021) (quoting *Kisela*, 138 S. Ct. at 1153). None of the cases cited by Plaintiffs involve a suspect pretending he was armed, refusing to obey lawful commands that he show his hands, and rushing toward a group of officers. This is significant. "Determining whether an officer violates clearly established law requires a look at past cases with specificity." *Id.*

The Supreme Court has repeatedly instructed lower courts "not to define clearly established law at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). Specificity is critical to making qualified immunity a workable doctrine in the Fourth Amendment context, where it "is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015). "If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004); *accord Sheehan*, 575 U.S. at 613 ("Qualified immunity is no immunity at all if 'clearly established' law can simply be defined as the right to be free from unreasonable searches and seizures."); *Wilson v. Layne*, 526 U.S. 603, 615 (1999) (similar); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (similar). Specificity is particularly

important in cases involving excessive force claims. "Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue." *Kisela*, 138 S. Ct. at 1152 (internal quotation marks omitted).

Plaintiffs have failed to identify a controlling precedent that "squarely governs the specific facts at issue." *Id.* Plaintiffs cite *Strand v. Minchuk*, 910 F.3d 909 (7th Cir. 2018), which involved the nonfatal police shooting of an unarmed truck driver disputing a parking ticket. Although the truck driver had assaulted him, the officer did not shoot in that case until after the truck driver had stopped fighting, backed up four to six feet away, put his hands up, and said, "I surrender. Do whatever you have to do. I surrender, I'm done." *Id.* at 912. The court reversed the district court's summary judgment dismissing the case based on qualified immunity. In so ruling, the court noted that "[i]f the facts and circumstances show that an individual who once posed a threat has become 'subdued and complying with the officer's orders,' the officer may not continue to use force." *Id.* at 915 (citing *Johnson v. Scott*, 576 F.3d 658, 660 (7th Cir. 2009)).

Strand provides little guidance for this case. Nor does *Estate of Smith v. City of Milwaukee*, 410 F. Supp. 3d 1066 (E.D. Wis. 2019), which involved the fatal police shooting of a fleeing suspect as he lay face up on the ground with his hands plainly visible near his head. *Id.* at 1070 ("What is clear is that Smith was on his back, his feet raised in the air, his hands above his head, and was located in a corner of the yard between the fence and a house, when Heaggan-Brown fired a second shot, this one into Smith's upper left chest."). Tubby led the officers to believe he was armed, repeatedly refused to show his hands, and never surrendered. Although he appears to have fallen as he was running toward the sally port entrance, he was not restrained or subdued in any way that would have prevented him from firing the gun Officer O'Brien reasonably believed he still had and had already fired once. Neither *Strand* nor *Smith* govern the facts of this case. Nor

do any other cases cited by Plaintiffs. For this reason as well, Officer O'Brien is entitled to summary judgment on Plaintiffs' excessive force claim.

C. Failure to Train and *Monell* Claims against the City of Green Bay and Chief Smith

Plaintiffs assert that the City and Chief Smith failed to train its officers regarding the removal of a non-compliant suspect from a squad car. They also assert a claim under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978), alleging that the City has a persistent and widespread custom and practice of using excessive force against unarmed individuals. "[A] municipality cannot be liable under *Monell* when there is no underlying constitutional violation by a municipal employee." *Sallenger v. City of Springfield, Illinois*, 630 F.3d 499, 504 (7th Cir. 2010); *see also Tesch v. Cty. of Green Lake*, 157 F.3d 465, 477 (7th Cir. 1998) ("A failure to train theory or a failure to institute a municipal policy theory requires a finding that the individual officers are liable on the underlying substantive claim."). Because Officer O'Brien did not violate Tubby's constitutional rights, Plaintiffs' claim for municipal liability fails.

D. Failure to Intervene Claim against Deputies Mleziva and Winisterfer

Plaintiffs assert that Deputies Mleziva and Winisterfer are liable under 42 U.S.C. § 1983 for the wrongful death of Tubby based on their failure to intervene and prevent Officer O'Brien from using deadly force. Because Officer O'Brien's use of force was not constitutionally excessive, Plaintiffs' claim that Deputies Mleziva and Winisterfer violated Tubby's rights by failing to intervene necessarily fails. But even if the claim against Officer O'Brien survived, Plaintiffs' claim against Deputies Mleziva and Winisterfer would still fail.

"[A]n officer who is present and fails to intervene to prevent other law enforcement officers from infringing the constitutional rights of citizens is liable under § 1983 if that officer had reason to know: (1) that excessive force was being used, (2) that a citizen has been unjustifiably arrested, or (3) that any constitutional violation has been committed by a law enforcement official; and the

officer had a realistic opportunity to intervene to prevent the harm from occurring." *Yang v. Hardin*, 37 F.3d 282, 285 (7th Cir. 1994). "Whether an officer had sufficient time to intervene or was capable of preventing the harm caused by the other officer is generally an issue for the trier of fact unless, considering all the evidence, a reasonable jury could not possibly conclude otherwise." *Abdullahi v. City of Madison*, 423 F.3d 763, 774 (7th Cir. 2005) (quoting *Lanigan v. Vill. of East Hazel Crest*, 110 F.3d 467, 478 (7th Cir. 1997)).

The undisputed evidence in this case establishes that the deputies could not reasonably be expected to have acted to stop Officer O'Brien from shooting because they did not have a reasonable opportunity to prevent the shooting. "There is a realistic opportunity to intervene if an officer could have 'called for a backup, called for help, or at least cautioned [the other officer] to stop' using excessive force." *Pitzer v. City of East Peoria, Illinois*, 708 F. Supp. 2d 740, 749–50 (C.D. Ill. 2010) (quoting *Abdullahi*, 423 F.3d at 774) (alterations in original). A gunshot is nearly instantaneous, and the deputies could not have prevented the shooting, given the rapidly evolving, fast-paced nature of the situation. Only ten seconds elapsed from the time Tubby exited the squad car to the time Officer O'Brien fired his weapon. There is no evidence from which a reasonable jury could conclude that Deputies Mleziva and Winisterfer had sufficient time to prevent the use of force, which lasted only seconds. Therefore, Deputies Mleziva and Winisterfer are entitled to summary judgment on this claim.

E. Failure to Train Claim against Brown County, Sheriff Delain, and Captain Michel

Plaintiffs assert that Brown County, Sheriff Delain, and Captain Michel failed to train Brown County officers regarding their duty to intervene, despite known and obvious risks. As an initial matter, the official capacity claims against Sheriff Delain and Captain Michel will be dismissed because they are redundant of the claim asserted against the County. And because Deputies Mleziva and Winisterfer did not violate Tubby's constitutional rights, Plaintiffs' claim

for municipal liability based upon the County's failure to train its officers fails as well. *See Tesch*, 157 F.3d at 477.

F. State-Created Danger Claim

Plaintiffs assert that Lieutenant Zeigle, Brown County, and the City of Green Bay created the danger to Tubby that led to the shooting and are thus liable for that state-created danger. The Seventh Circuit has traced the origins of the state-created danger theory of liability to the Supreme Court's decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). *See King ex rel. King v. East St. Louis Sch. Dist. 189*, 496 F.3d 812, 817–18 (7th Cir. 2007). In *DeShaney*, the Department of Social Services (DSS) suspected a four-year-old child had been abused by his father but allowed him to return home with his father. 489 U.S. at 192. Shortly thereafter, the father beat the child nearly to death, and the child and his mother sued DSS under 42 U.S.C. § 1983. *Id.* at 193. Although the Supreme Court noted that the Constitution imposes a duty upon the state to protect individuals with whom it has a "special relationship" by virtue of the state's custody over the individual, *id.* at 199–200, the Court observed that the Due Process Clause of the Fourteenth Amendment generally does not impose a duty upon the state to protect individuals from harm by private actors. *Id.* at 195–96. It explained that the Due Process Clause "does not transform every tort committed by a state actor into a constitutional violation." *Id.* at 202. The Court held that, because "the State had no constitutional duty to protect [the child] against his father's violence, its failure to do so—though calamitous in hindsight—simply does not constitute a violation of the Due Process Clause." *Id.* at 202.

Though the Supreme Court's decision in *DeShaney* does not contain any mention of a "state-created danger" exception to its holding, "courts of appeals have . . . inferred from *DeShaney* that the substantive component of the Due Process Clause imposes upon the state a duty to protect individuals against dangers the state itself creates under the state-created danger doctrine." *King*,

496 F.3d at 817. The Seventh Circuit has articulated a three-part test to determine whether the state-created danger exception to *DeShaney* applies: "First, the state, by its affirmative acts, must create or increase a danger faced by an individual. Second, the failure on the part of the state to protect an individual from such a danger must be the proximate cause of the injury to the individual. Third, the state's failure to protect the individual must shock the conscience." *Johnson v. Rimmer*, 936 F.3d 695, 708 (7th Cir. 2019) (citing *King*, 496 F.3d at 817–18).

The Seventh Circuit in *Weiland v. Loomis*, 938 F.3d 917 (7th Cir. 2019), recently called into question whether the state-created danger theory of liability can be inferred from *DeShaney*. The court noted that, "[i]n recent years, the 'state-created danger' exception has been treated as if it were a rule of common law" and has been turned into a "'three-part test.'" *Id.* at 920. "Every once in a while," the court observed, "a court should step back and ask whether local jurisprudence matches the instructions from higher authority." *Id.* at 921. The court ultimately found that it did not need to decide whether the Circuit's approach should be revised because it found that the state actor was entitled to qualified immunity. The court has since issued a decision applying the state-created danger exception in *Estate of Her v. Hoeppner*, 939 F.3d 872, 876 (7th Cir. 2019). Despite *Weiland*'s concern that the Supreme Court has not recognized the state-created danger theory of liability, the Seventh Circuit has recognized the exception, and the three-part test articulated in *Johnson* and *King* apparently remains the standard for determining whether the state-created danger exception applies in certain circumstances.

Regardless of whether such a claim is still viable, the state-created danger exception has no application to the facts of this case. The exception applies only to situations where state action gives rise to harm by third parties or renders a citizen more vulnerable to such harm. It was intended to be a narrow exception to the general rule that the state has no duty to protect its citizens from private harms. The exception has its origins in cases in which state actors played a role in

the creation of a private danger or rendered a citizen more vulnerable to the private danger. In those cases, the plaintiffs did not have recourse under § 1983 against the actor or occurrence that directly injured them because those actors or sources of harm were not occurring within the scope of a state actor's employment. Here, Plaintiffs can (and have) asserted claims under § 1983 against Officer O'Brien, other officers present at the scene, the City, and the County. It makes no sense to apply the state-created exception where the state actors are themselves alleged to have caused the harm.

Although Plaintiffs cite *Jensen v. City of Oxford*, 145 F.3d 1078 (9th Cir. 1998), and *Pena v. DePrisco*, 432 F.3d 98 (2d Cir. 2005), to support their assertion that the exception applies in cases in which the danger created by an officer comes from the decisions made by another officer, those cases do not actually stand for the proposition that Plaintiffs suggest. *Pena* involved the actions of an intoxicated off-duty police officer whose conduct occurred outside the scope of his employment, and *Jensen* does not even mention the state-created danger theory of liability. In short, the state-created danger exception does not apply to cases in which the alleged direct harm was inflicted by a state actor acting in the course of his office, and Plaintiffs' claim against Lieutenant Zeigle, Brown County, and the City of Green Bay fails on this basis.

It should also be noted that, even if the exception did apply, Plaintiffs' claim would fail on the merits because Plaintiffs cannot establish the key element that Defendants' conduct "shocks the conscience." "The shocks the conscience prong is an attempt to quantify the rare most egregious official conduct required for substantive due process liability." *Flint v. City of Belvidere*, 791 F.3d 764, 770 (7th Cir. 2015) (internal quotation marks and citation omitted). Conscious-shocking conduct "requires a culpable state of mind equivalent to deliberate indifference." *Estate of Her*, 939 F.3d at 876. The Seventh Circuit has explained that, under this standard, "governmental defendants must act with a *mens rea* akin to criminal recklessness for constitutional

liability to attach." *Id.* at 877 (quoting *Flint*, 791 F.3d at 770). "Neither bad decision-making nor grossly negligent behavior meets the stringent test." *Flint*, 791 F.3d at 770; *see also Daniels v. Williams*, 474 U.S. 327, 328 (1986) ("[T]he Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property.").

Plaintiffs argue that Lt. Zeigle's decision to force Tubby from the squad car shocks the conscience because it was foreseeable that Tubby would be subject to deadly force. Plaintiffs assert that Lt. Zeigle should have instead activated a SWAT team and deployed the Crisis Negotiation Team with members specifically trained in de-escalation techniques. They assert that all officers on the scene, including Lt. Zeigle, had an opportunity to deliberate how to properly handle Tubby's refusal to exit the squad car, but Lt. Zeigle deliberately decided not to deploy the SWAT team or Crisis Negotiators. Pls.' Br. at 29, Dkt. No. 133.

There is no evidence that the defendants were deliberately indifferent in their decision-making. The undisputed evidence shows that Lt. Zeigle's decision-making was guided by his training and was made in good faith to obtain Tubby's peaceful surrender. While Plaintiffs may disagree with Lt. Zeigle's decision to force Tubby out of the squad car and other officers may have pursued different plans, Defendants' conduct was not the type of reckless, conscience-shocking conduct that might be actionable as a constitutional violation.

A third and final reason for granting summary judgment on Plaintiffs' state-created danger claim is that Lt. Zeigle is immune. Even if the state-created danger exception applied to this case and even if the evidence supported such a claim, summary judgment would nevertheless be granted in his favor on qualified immunity grounds. As noted above, the doctrine of qualified immunity protects government officials from liability for civil damages insofar as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). As with the claim against Officer

O'Brien, summary judgment is proper here because Plaintiffs have not identified, and the Court has not found, a controlling case or robust collection of persuasive authority that extends the state-created danger exception to cases where an alleged harm was inflicted by a government employee acting in the course of his office or analogous to the set of facts presented here that clearly establishes that Lt. Zeigle's conduct violated the Due Process Clause. "An officer 'cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in his shoes would have understood that he was violating it, meaning that existing precedent placed the statutory or constitutional question beyond debate." *Sheehan*, 575 U.S. at 611 (internal quotation marks, citations, and alterations omitted). Because no clearly established law supports the claim against Lt. Zeigle, he is entitled to qualified immunity.

G. State Law Claims

Plaintiffs have alleged state law claims against the defendants. Generally, when federal claims drop out of a case, federal courts decline to exercise supplemental jurisdiction over state law claims. 28 U.S.C. § 1367(c)(3); *see Carlsbad Tech. Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009) ("A district court's decision whether to exercise [supplemental] jurisdiction after dismissing every claim over which it had original jurisdiction is purely discretionary."). The Seventh Circuit has described a "sensible presumption that if the federal claims drop out *before trial*, the district court should relinquish jurisdiction over the state-law claims." *Williams Elecs. Games, Inc. v. Garrity*, 479 F.3d 904, 907 (7th Cir. 2007). The Court follows this presumption and declines to exercise supplemental jurisdiction over Plaintiffs' state law claims. Accordingly, Plaintiffs' state law claims against the defendants are dismissed without prejudice so that they may be pursued in a state forum.

CONCLUSION

For the reasons set forth above, the Green Bay Defendants' motion for summary judgment (Dkt. No. 116) and the Brown County Defendants' motion for summary judgment (Dkt. No. 108) are **GRANTED** with respect to the federal claims, and such claims are **DISMISSED**. The remaining state law claims are **DISMISSED without prejudice**. Plaintiffs' unopposed motion to restrict the medical examiner's report (Dkt. No. 112) and unopposed motion to restrict the autopsy photos (Dkt. No. 134) are **GRANTED**. Plaintiffs' motion to change venue to Milwaukee (Dkt. No. 106), motion to exclude expert opinions of John Peters (Dkt. No. 109), and motion to exclude expert testimony of Robert Willis (Dkt. No. 115) are **DENIED as moot**. The Clerk is directed to enter judgment forthwith.

SO ORDERED at Green Bay, Wisconsin this 19th day of May, 2021.

s/ William C. Griesbach
William C. Griesbach
United States District Judge

AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

EASTERN DISTRICT OF WISCONSIN

SUSAN DOXTATOR,

Plaintiff,

v.

JUDGMENT IN A CIVIL CASE
Case No. 19-C-137

ERIK O'BRIEN,
ANDREW SMITH,
HEIDI MICHEL,
CITY OF GREEN BAY,
BROWN COUNTY,
TODD DELAIN,
JOSEPH P. MLEZIVA,
NATHAN K. WINISTERFER, and
THOMAS ZEIGLE,

Defendants.

☒ **Decision by Court.** This action came before the Court for consideration.

IT IS HEREBY ORDERED AND ADJUDGED that Susan Doxtator takes nothing, the federal claims are DISMISSED, and the remaining state law claims are DISMISSED without prejudice.

Approved: s/ William C. Griesbach
WILLIAM C. GRIESBACH
United States District Judge

Dated: May 19, 2021

GINA M. COLLETTI
Clerk of Court

s/ Terri Lynn Ficek
(By) Deputy Clerk