No. 21-2101

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Susan Doxtator, Arlie Doxtator and Sarah Wunderlich,
as Special Administrators of the Estate of
Jonathon C. 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, Bradley A. Dernbach and John Does 1-5,

Defendants-Appellees.

On Appeal From The United States District Court
For the Eastern District of Wisconsin
Case No. 19-CV-00137
The Honorable Judge William C. Griesbach

BRIEF OF THE DEFENDANTS-APPELLEES CITY OF GREEN BAY, ANDREW SMITH, AND ERIK O'BRIEN

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No.: 21-2101

Short Caption: *Susan Doxtator, et al. v. Erik O'Brien, et al.*

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

(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:

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

(i) Identify all its parent corporations, if any; and
None

(ii) List any publicly held company that owns 10% or more of the party's or amicus' stock: None

Attorney's Signature: *Jasmyne M. Baynard* Date: 12/01/2021

Attorney's Printed Name: Jasmyne M. Baynard

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No ____

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Attorney's Signature: *Ann C. Wirth* Date: 12/02/2021

Attorney's Printed Name: Ann C. Wirth

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No ____

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JURISDICTIONAL STATEMENT

The Plaintiffs' Jurisdictional Statement is not complete and correct.

On October 19, 2018, Jonathon Tubby was shot by Green Bay Police Officer Erik O'Brien in the sally port of the Brown County Jail. Plaintiffs Susan Doxtator, Arlie Doxtator and Sarah Wunderlich, as Special Administrators of the Estate of Jonathon Tubby, filed a Complaint on January 24, 2019, in the United States District Court for the Eastern District of Wisconsin, Case No. 19-C-139, bringing claims pursuant to 42 U.S.C. § 1983 alleging violation of Tubby's rights under the Fourth Amendment to the United States Constitution and state law claims against the City of Green Bay, Andrew Smith, and Officer Erik O'Brien; and Brown County, Todd J. Delain, Deputy Joseph Mleziva and Nathan Winisterfer, Thomas Zeigle, and Heidi Michel. The District Court was vested with jurisdiction over these claims pursuant to 28 U.S.C. §§1331, 1343, and 1367. (R. 1)

The actions alleged in the Complaint occurred in the Eastern District of Wisconsin and, therefore, venue of their claims was vested in the District Court for the Eastern District of Wisconsin pursuant to 28 U.S.C. § 1391(b). (R. 1)

On May 19, 2021, the District Court, by the Hon. William C. Griesbach, entered an Order and Judgment granting Defendants' Motion for Summary Judgment, dismissing the case with prejudice. (R. 176, 177) This was a final order and judgment which disposed of all of the parties' federal claims.

On June 15, 2021, Plaintiffs filed a Notice of Appeal as to the final Order and Judgment on the Motion for Summary Judgment that disposed of their federal claims. (R.

186) This is not an appeal from a decision of a magistrate judge; therefore, this Court has jurisdiction of this appeal pursuant to 28 U.S.C. §§1331.

STATEMENT ON ORAL ARGUMENT

Oral argument is not required because the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. Fed. R. App. P. 34(a)(2)(c).

STATEMENT OF ISSUES

1. Based on the facts know to Officer O'Brien at the time he used deadly force, were Officer O'Brien's actions objectively reasonable, and thus not in violation of Tubby's Fourth Amendment rights?
2. Under the facts of this case and law in effect at the time of Tubby's seizure, is Officer O'Brien entitled to qualified immunity from Tubby's Fourth Amendment claim?
3. Did the Plaintiffs waive their federal claims against the City and Chief Smith, as well as all of their state law claims, by failing to develop them in their appellate brief?

STATEMENT OF THE CASE

On the night of October 19, 2018, what started with a routine traffic stop developed into a dangerous situation in the Brown County Jail sally port involving arrestee Jonathon Tubby, who barricaded himself in a police squad, pretended to have a gun concealed under his shirt and made statements suggesting that he would use it. Officers issued commands to Tubby to exit the vehicle, but he refused to do so. Officers pled with Tubby

for over forty minutes to show his hands and demonstrate he was unarmed, but he refused to do so. Tubby was given multiple opportunities to surrender, but he refused to do so.

The stand-off in the sally port reached peak danger after Tubby suddenly exited the squad and rushed towards officers with his hands still concealed. Ultimately, after exhausting all other use of force options, including OC spray, less-lethal beanbag rounds, and a police canine, Officer O'Brien shot Tubby to stop the threat he posed. It was later determined that Tubby was unarmed and only pretending to have a gun.

A. Tubby is Arrested and Transported to the Brown County Jail.

On October 19, 2018, at approximately 7:42 p.m., Green Bay Officer Wernecke and his field training Officer Erik O'Brien were on patrol when they attempted a traffic stop of a vehicle with an unregistered license plate that had driven through a red light. (R. 118, ¶15) The vehicle did not initially stop and turned into a parking lot and drove for about a minute before coming to a stop. (R. 118, ¶16) The occupants gave false identifications, but a records check eventually identified them as Jonathon Tubby and his passenger, Theresa Rodriguez. (R. 118, ¶¶17, 24-25) Both had active arrest warrants and marijuana was located in the vehicle. (R. 118, ¶¶21, 27, 33) Rodriguez told the officers that when Tubby picked her up, he appeared upset, and that he argued with his girlfriend on the phone while he drove through the parking lot. (R. 118, ¶¶18-19) Officer Wernecke handcuffed Tubby behind his back and conducted a pat down search (R. 118, ¶22)

Ultimately, Tubby and Rodriguez were arrested and transported separately to the Brown County Jail. (R. 118, ¶27) Other than providing false identification, Tubby was

cooperative during the initial arrest and remained quiet during the 12-minute transport to the jail. (R. 118, ¶¶34-35) Unbeknownst to the officers, while in the backseat, Tubby maneuvered his hands from behind his back to the front of his body under his shirt and remove his seatbelt—all while handcuffed. (R. 118, ¶¶29-32).

B. After Arriving at the Brown County Jail, Tubby Refuses to Exit the Squad Car and Appears to be Concealing a Weapon Under His Shirt.

At approximately 8:22 p.m. Officers Wernecke and O'Brien entered the sally port of the Brown County jail. (R. 118, ¶32) After parking the squad and turning off the engine, Officer O'Brien and Officer Wernecke exited the squad and placed their weapons in the trunk. (R. 118, ¶38) Officer Wernecke opened the rear door to remove Tubby and immediately became concerned. (R. 118, ¶39) Tubby had repositioned himself in the back seat and his hands were no longer behind his back where they had been handcuffed, but were now in front of his body and concealed under his shirt. (*id.*) At least one of Tubby's hands would remain concealed under his shirt throughout the entire encounter. (R. 118, ¶¶39-44; 114-122; R. 121-1, O'Brien Dep. at 42: 17-22, 129:22-130:05, 132:18-133:4)

Officer Wernecke ordered Tubby to exit the squad, but Tubby refused. Officer O'Brien came around to the back door of the squad to see why Tubby was not exiting. (R. 118, ¶¶40-42) Officer O'Brien looked into the rear door and observed what he believed to be the cylindrical barrel of a gun protruding from Tubby's shirt underneath his clothing, pointed up at his chin. (R. 118, ¶¶43-44)

At 8:25:08 pm, Officer O'Brien ordered, "Jonathon, bring your foot out," but Tubby refused to do so and then stated, "I'll fucking do it." (R. 118, ¶45) In that instance, Officer O'Brien believed Tubby was armed and suicidal. (*id.*) Officer O'Brien slammed the door to contain the threat, retrieved his handgun from the trunk of the squad and retreated to a position of cover to call for backup. (R. 118, ¶¶46-48, 51) Officer O'Brien asked Officer Wernecke what he was thinking, and Officer Wernecke told Officer O'Brien that he thought he must have missed something in searching Tubby. (R. 118, ¶49) Officer O'Brien radioed that Tubby had something in his hand and was refusing to exit the squad, and requested back up because he believed Tubby had a firearm. (R. 118, ¶52) Officer O'Brien also told Brown County Sheriff's Office ("BCSO") Corporal Kevin Smith that he believed Tubby had a knife or a handgun. (R. 148-1, Smith Dep. at 51:17-20)

While waiting for backup to arrive the squad windows began to fog up and officers could no longer see into the back seat. (R. 118, ¶54) Officer O'Brien still believing that Tubby had a firearm yelled to put it down. Tubby responded, "Fuck you. I'll do it." (R. 118, ¶¶55-56, 58) Officer O'Brien instructed Tubby to wipe down the windows. At one

point, Tubby did wipe down the window, which signaled to Officer O'Brien that Tubby could hear him. (R. 118, ¶59)

C. Law Enforcement Officers Arrive on Scene and BSCO Lieutenant Ziegle Develops a Plan to Remove Tubby from the Squad.

Approximately 20 minutes after Officers Wernecke and O'Brien entered the sally port, additional law enforcement officers from Brown County and the City of Green Bay respond. (R. 118, ¶¶57, 60) BSCO Lieutenant Thomas Ziegle was the ranking officer with regard to decisions made in the sally port. (R. 118, ¶69) Lt. Ziegle and GBPD SWAT supervisor Lieutenant Nate Allen discussed a plan to remove Tubby from the squad. (R. 118, ¶¶66-68) Lt. Ziegle ultimately asserted jurisdiction and developed a plan to remove Tubby that involved the use of a BearCat to break out the back window to try to communicate with Tubby, and if Tubby did not surrender; introduce OC spray into the rear window of the squad to get him to show his hands or surrender. (R. 118, ¶¶70-71)

At approximately, 9:02 p.m., GBPD Officer Joseph Merrill drove the BearCat armored vehicle into the sally port and Lt. Ziegle's plan went into action. (R. 118, ¶75) While the BearCat was getting into position Tubby can be seen and heard on the squad's interior camera. (R. 121-6, squad internet video at 2:24:37-2:26:12) The interior camera shows Tubby with what appears to be a cylindrical shape of a gun barrel pressed against the inside of his shirt. (R. 118, ¶77)

At 9:04 p.m., Tubby still had his hand under his shirt and then put an object in his mouth and stated what sounds like, "I'll fuckin' do it." At 9:05 p.m., Tubby faced the back window and a short time later stated, "I'll fuckin' do it." (R. 118, ¶77)

At approximately 9:06 p.m., GBPD Officer Allen opened the turret on top of the BearCat and directed a spotlight into the back of the squad car. Officer Allen then shot a 44-millimeter wooden dowel into the lower passenger corner of the rear window of the squad, breaking a portion of the rear window. (R. 118, ¶78) After breaking out the rear window, GBPD Officer Eric Allen was able to see Tubby and began issuing him commands to show his hands. At 9:07:01, GBPD Officer Allen stated, "Jonathon, put your hands up where I can see them." Tubby did not put his hands up. (R. 118, ¶80)

By 9:08, the entire back window was cleared out and GBPD Officer Allen saw that Tubby was facing back toward the rear window with his hands concealed under his shirt

holding something up under his chin. (R. 118, ¶¶82-83) Officer Allen believed Tubby was armed. Officer Allen pled with Tubby to show his hands, stating at 9:09 p.m., "Jonathon, put your hands up, bud, so I can see them. Come on, Jonathon." (R. 118, ¶84) Seconds later, Officer Allen stated, "Jonathon, we don't want to hurt you. Put your hands up, bud. Come on, Jonathon." (R. 118, ¶87) At one point, Officer E. Allen saw Tubby's empty left hand; however *never* saw Tubby's right hand. (R. 118, ¶88); *see also* (R. 121-13, E. Allen Dep. at 78:24; 83:24-25, 85:2-11, 92:10-15, 97:5-8, 101-102)("I was hoping I would see both hands. I never did."[…] "In a perfect world it would have been great if he would have showed me both hands." […] "I guess he could show both hands and still have a gun under his shirt. It would be great to see his hands. That would be fantastic. That never happened.")

At 9:10:51 p.m., Officer Allen deployed oleoresin capsicum (OC) spray into the back window of the squad. (R. 118, ¶91) The goal was to get Tubby to surrender or show his empty hands by potentially wiping the OC from his face. (R. 121-13, E. Allen Dep. at 83:23-85:1) Tubby held his shirt up to deflect the spray. Tubby still did not show both of his hands as instructed. Tubby yelled, "Fuck you, fuck you, fuck you," and started bouncing up and down in the seat. (R. 118, ¶91)

D. Approximately 10-Seconds Lapsed From the Time Tubby Erupted From the Rear Window and Ran Toward the Sally Port Door, and Officer O'Brien Discharged His Firearm.

Immediately after the OC was deployed, Tubby jumped through the rear window with his hand still concealed under his shirt, and the situation escalated rapidly. (R. 118, ¶¶92-93) Tubby exited the rear window and got onto his knees on the trunk of the squad.

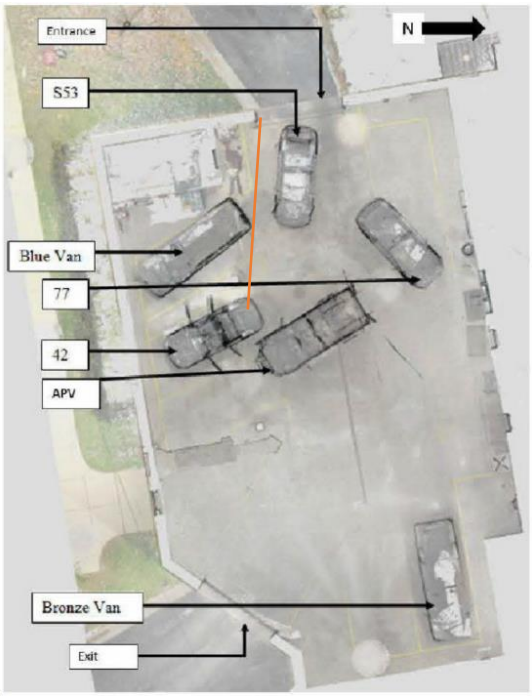
Tubby then got up onto his feet and stood on the trunk, facing out towards officers, with his left hand cradled under his right hand, which was up under his shirt. (*id.*)

Officer O'Brien could see Tubby's left hand as he exited the squad, but he could not see Tubby's right hand because it was concealed under his shirt behind his left hand. (R. 118, ¶¶100-101) Fearing that Tubby was armed, Officer O'Brien moved to a position of cover outside of the open sally port door. (R. 118, ¶¶101-102) At that time, Officer O'Brien still believed Tubby was armed. (R. 118, ¶¶103-105)

As Tubby quickly jumped out of the rear squad window, GBPD Sgt. Denney assessed Tubby's hands to see if they were both visible and free of a weapon. Tubby's hands were not visible and GBPD Sgt. Denney discharged one round from a beanbag gun, which hit Tubby in the lower abdomen. (R. 118, ¶93) The beanbag round caused Tubby to fall off squad 42, but did not stop him. (R. 118, ¶94) Tubby got back on his feet quickly and began to charge toward the open sally port door where Officer O'Brien and other officers were located. (R. 118, ¶95) Almost simultaneously, Officer Salzmann released the police canine. As the canine engaged Tubby in the buttock area, Officer Salzmann pulled back on the canine's lead to pull Tubby back and stop him from advancing towards the officers near the sally port entrance. (R. 118, ¶¶96-98) At that time, Officer Salzmann could not see Tubby's hands because they were concealed under his shirt. (R. 121-14, Salzmann Dep. at 83:21-25; 85:3-14) GBPD Sgt. Denney still could not see Tubby's hands and fired a second less lethal beanbag round at Tubby. (R. 118, ¶99)

Officer O'Brien was completely unaware that a canine bit Tubby and only saw Tubby as he was rushing toward the sally port door with his hands still concealed under his shirt. (R. 121-1, O'Brien Dep. at 172:11-15) In that instance, Officer O'Brien saw Tubby's hands pointed up towards officers and perceived Tubby to be moving in a target acquisition manner, meaning that he was moving in a manner to acquire a target to shoot. Officer O'Brien heard a "pop" sound and believed Tubby was firing the gun he had concealed under his shirt. (R. 118, ¶106) Believing that Tubby was armed, had fired, and could continue to fire at officers, Officer O'Brien discharged his firearm at Tubby, and Tubby fell to the ground. (R. 118, ¶¶107-108)

Approximately 10 seconds elapsed between Tubby exiting the squad and Officer O'Brien's shots. (R. 118, ¶109) In those split seconds, Tubby was shot with a bean bag round and engaged by a canine officer, but neither use of force could subdue him. (R. 118, ¶¶94-99) Tubby was able to get from the rear window of the squad to the entrance of the sally port all while his hands were concealed, which caused the officers to fear for their lives. *See* (R. 118, ¶37)



The video evidence at that time shows officers reacting to Tubby by stepping back to avoid being shot, drawing their firearm, and Officer Wernecke jumping over a retention wall for cover. (R. 137-35, at 0:06:58 – 0:07:14)

Even after Tubby was shot, it was still unclear whether he was armed and still posed a threat to the officers. (R. 118, ¶123) Accordingly, officers approached him with their guns drawn and behind the cover of a shield. (R. 118, ¶124) Officers pulled Tubby's

hands from under his shirt and ultimately determined that he was unarmed. (R. 118, ¶125) Life saving measures were performed, but Tubby died on scene. (R. 118, ¶126)

E. Procedural Posture

Plaintiffs, Susan Doxtator, Arlie Doxtator and Sarah Wunderlich, as Special Administrators of the Estate of Jonathon C. Tubby filed this action on January 24, 2019. Plaintiffs brought claims pursuant to 42 U.S.C. § 1983 alleging violation of Tubby's rights under the Fourth Amendment to the United States Constitution and state law claims against the City of Green Bay, Chief of Police Andrew Smith, and Police Officer Erik O'Brien (Green Bay Defendants); and Brown County, Brown County Sheriff Todd J. Delain, Deputy Sheriffs Joseph Mleziva and Nathan Winisterfer, Patrol Lieutenant Thomas Zeigle, and Jail administrator Heidi Michel (Brown County Defendants). (R. 83)

On November 2, 2020, the Green Bay Defendants and the Brown County Defendants each moved for summary judgment seeking dismissal of the Plaintiffs' claims in their entirety. (R. 108, 116) On February 2, 2021, at the Plaintiffs' request, the District Court heard oral arguments on the pending summary judgment motions. (R. 149, 155)

On May 19, 2021, the District Court, by the Hon. William C. Griesbach granted both the Green Bay and Brown County Defendants' respective Motions for Summary Judgment, dismissing the case with prejudice. (R. 176, 177)

On June 15, 2021, the Plaintiffs filed a Notice of Appeal as to the Order and Judgment on the Motion for Summary Judgment. (R. 186) Plaintiffs filed their moving brief on November 1, 2021.

SUMMARY OF ARGUMENT

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

On October 19, 2018, Officer O'Brien was faced with the excruciating, but legal decision to use deadly force against the active threat posed by Jonathon Tubby as he—while believed to be armed and had already discharged his weapon—rushed towards officers after refusing to show his hands. As we know now, Tubby was only pretending to be armed. And, although this fact in hindsight makes Tubby's death even more tragic, it does not render Officer O'Brien's use of deadly force unconstitutional.

The question posed by the Fourth Amendment jurisprudence as applied here is whether Officer O'Brien reasonably believed that Tubby posed an imminent danger to himself or others—not whether he was ultimately correct. The record demonstrates that Officer O'Brien's belief was reasonable.

The District Court evaluated the extensive record, heard oral arguments, and determined that under the circumstances he confronted, Officer O'Brien's belief that Tubby posed an imminent threat was reasonable. Thus, the force used was not excessive and no Fourth Amendment violation occurred. This was not in error.

The crux of the Plaintiffs' argument is that the District Court erred by not drawing factual inferences in their favor that Officer O'Brien "knew" Tubby was "unarmed and subdued" at that time he shot him. Not only is this argument inconsistent with the factual

record, but it impermissibly relies on speculation and assumptions made with hindsight. The District Courts' favor towards the Plaintiffs does not require it to accept a version of the event which are not supported by, nor reasonable to infer from, the factual record.

There are no genuine disputes of material fact concerning the constitutionality of Officer O'Brien's use of force. However, even *arguendo*, Officer O'Brien is entitled to qualified immunity shielding him from liability from Tubby's constitutional claims because the state of the law now and at the time of the incident is that an officer—consistent with the Fourth Amendment—may use deadly force when he *reasonably believes* he is confronted by an armed suspect, even if that belief is mistaken.

Plaintiffs have abandoned any claim against the City of Green Bay or Andrew Smith by failing to address them at all in their opening brief. Even if the Court were to consider such claims, the Plaintiffs cannot demonstrate liability against the City of Green Bay or Andrew Smith because Officer O'Brien did not violate Tubby's constitutional rights and the record does not demonstrate that the City had a policy pattern or practice of using excessive force.

Finally, the Plaintiffs' opening brief statement fails to provide citation to the record, thus violating Fed. R. App. P. 28(a)).

ARGUMENT

Standards of Review

The Court of Appeals reviews *de novo* the district court's grant of summary judgment. *Silk v. City of Chicago*, 194 F.3d 788, 798 (7th Cir. 1999). Summary judgment is proper if the record shows "that there is no genuine issue as to any material fact and that

the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed.2d 265 (1986). In evaluating the district court's decision, this Court "must construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in favor of that party." *Bellaver v. Quanex Corp.*, 200 F.3d 485, 491-92 (7th Cir. 2000). Even so, "[the] favor toward the nonmoving party does not extend to drawing '[i]nferences that are supported by only speculation or conjecture.'" *Argyropoulos v. City of Alton*, 539 F.3d 724, 732 (7th Cir. 2008).

If the non-moving party bears the burden of proof on an issue, however, that party may not rest on the pleadings and must instead show that there is a genuine issue of material fact. *Celotex*, at 322-26 (1986). The Plaintiffs were required to set forth "specific facts showing that there is a genuine issue for trial," Fed.R.Civ.P. 56(e), and to produce more than a scintilla of evidence in support of their position. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505 (1986). The Plaintiffs must present evidence from "which the jury could reasonably find for" them. *Id.*

Even if Plaintiffs dispute some of the facts the Green Bay Defendants provided to support their motion for summary judgment, the mere existence of an alleged factual dispute is not sufficient to defeat a summary judgment motion. *See Kuchenreuther v. City of Milwaukee,* 221 F.3d 967, 973 (7th Cir. 2000). The nonmovant will successfully oppose summary judgment only when it presents "definite, competent evidence to rebut the motion." *EEOC v. Sears, Roebuck & Co.*, 233 F.3d 432, 437 (7th Cir. 2000) The nonmovant must supply evidence sufficient to allow a jury to render a verdict in his favor. *See Nowak*

v. St. Rita High School, 142 F.3d 999, 1002 (7th Cir. 1998). Speculation and conjecture are not evidence. *King v. Hendricks Cty. Comm'rs*, 954 F.3d 981, 986 (7th Cir. 2020).

The Court of Appeals reviews *de novo* a district court's summary judgment determination on qualified immunity. See *Upton v. Thompson*, 930 F.2d 1209, 1211 (7th Cir. 1991), *cert. denied*, 503 U.S. 906, 112 S.Ct. 1262, 117 L.Ed.2d 491 (1992).

I. OFFICER O'BRIEN'S USE OF DEADLY FORCE DID NOT VIOLATE TUBBY'S FOURTH AMENDMENT RIGHT.

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

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

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

Garner, 471 U.S. at 11–12. 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).

Reasonableness is not based on hindsight, but rather determined considering the perspective of the officer on the scene, allowing "for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. 386, 396–97; *Scott*, 346 F.3d at 756. The test for reasonableness under the Fourth Amendment requires an analysis of the totality of the circumstances assessed "from the perspective of a reasonable officer on the scene, rather than with 20/20 hindsight." *Graham*, 490 U.S. at 97. **This perspective is critical.**

In seeking to understand the perspective of the officer on the scene, Courts consider: the information known to the officer at the time of the encounter; the duration of the encounter; the level of duress involved; "and the need to make split-second decisions under intense, dangerous, uncertain, and rapidly changing circumstances." *Horton v. Pobjecky*, 883 F.3d 941, 950 (7th Cir. 2018); *see also Graham*, 490 U.S. at 396–97.

Finally, "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id*. at 397.

A. No Reasonable Jury Could Find That Officer O'Brien's Use of Deadly Force Was Objectively Unreasonable Under the Circumstances.

To succeed on their excessive force claim, Plaintiffs must demonstrate that Officer O'Brien's use of force was **objectively unreasonable** under the totality of the circumstances. *See Kingsley v. Hendrickson*, 576 U.S. 389, 391–92, 135 S. Ct. 2466, 2470, 192 L. Ed. 2d 416 (2015)(emphasis added). The judge in *Kingsley* instructed as follows:

> In deciding whether one or more defendants used 'unreasonable' force against plaintiff, you must consider whether it was unreasonable from the perspective of a reasonable officer facing the same circumstances that defendants faced. You must make this decision based on what defendants knew at the time of the incident, not based on what you know now.

Id. 576 U.S. at 394.

On October 19, 2018, Officer O'Brien was confronted with an armed, suicidal, and barricaded subject. (R. 118, ¶46) At the time he made the split-second decision to use deadly force to stop the threat posed by Tubby, Officer O'Brien possessed the following information:

> Officer O'Brien personally observed Tubby holding what he perceived to be a barrel of a gun (described as a cylindrical in nature) under his clothing. (R. 147, ¶44)
>
> Tubby stated, "I'll do it," which Officer O'Brien interpreted to mean he intended to use the gun. Intent can be inferred. (R. 147, ¶¶45-47)
>
> Tubby refused commands to show both of his hands to demonstrate that he was unarmed. (R. 147, ¶¶78-89)
>
> As Tubby came out onto the squad's trunk, Officer O'Brien could see Tubby's left hand, but could not see Tubby's right hand because it was concealed under his shirt behind his left hand. (R. 118, ¶¶100, 103-106)
>
> Officer O'Brien observed Tubby rushing towards the open sally port door where several law enforcement officers were stationed, in an upright position, leaning slightly forward with his hands in front of his body. (R. 118, ¶102)

> Officer O'Brien heard a "pop" and believed Tubby shot the gun he was concealing under his clothing. (R. 118, ¶106)
>
> Officer O'Brien was never able to get a visual of both of Tubby's empty hands prior to firing. (R. 121-1, O'Brien Dep. pp. 129:22-130:5)

Plaintiffs do not genuinely dispute the dangerousness of the situation, but merely pontificate on how a reasonable officer should have reacted.

B. The Court Cannot Apply 20/20 Hindsight and Second Guess Officer O'Brien's Actions.

Plaintiffs ask the Court to judge Officer O'Brien's actions with the improper benefit of 20/20 hindsight, which is contrary to law. *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 595 (7th Cir. 1997). Plaintiffs play Monday morning quarterback by suggesting that a reasonable officer in the sally port would have seen Tubby as an unarmed man that had simply slipped his handcuffs in front of his body (Appellate Br. p. 25), was subdued, and thus not a threat. (*id.* pp. 36-37) Acceptance of this premise requires the Court to ignore long-standing tenets of Fourth Amendment law.

The issue here is whether Officer O'Brien reasonably believed Tubby was armed based on the information available to him at the time he fired the fatal shot—not based on the information gained after the fact. *Graham*, 490 at 396–97. A seizure under a mistaken understanding of the facts can still 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). We know now that Tubby was unarmed, but that is not what Officer O'Brien knew at the time he decided to use force. Nor does the fact that O'Brien was mistaken render his

actions unreasonable. The analysis must account for Officer O'Brien's understanding of the facts—even if later determined to be mistaken—and whether his actions were reasonable under those circumstances.

The circumstances surrounding Tubby's death are tragic. However, there is no guarantee that had Officer O'Brien acted differently the situation would have resolved differently. In fact, BCSO Deputy Dernbach testified that he would have shot Tubby if Officer O'Brien had not shot first. (R. 118, ¶122; R. 121-16, Dernbach Dep. at 77-78) Of course, this Court is not required to make those considerations and cannot apply 20/20 hindsight to Officer O'Brien's actions at the time he used force. *Id*.

II. THE DISTRICT COURT DID NOT ERR BY FAILING TO MAKE INFERENCES UNSUPPORTED BY THE FACTUAL RECORD.

The crux of Plaintiffs' argument is that the District Court failed to draw all reasonable factual inferences in their favor. (Appellate Br. pp. 20-22) Specifically the inference that Officer O'Brien did not reasonably believe that Tubby was armed (*id*. at 25); that even if Officer O'Brien reasonably believed Tubby was armed that belief was negated prior to the shooting (*id*. at 31); and that Tubby was subdued at the time Officer O'Brien shot him. (*id*. at 34). Plaintiffs ask the Court to accept a version of the events which is not supported by, nor reasonable to infer from, the factual record.

At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a "genuine" dispute as to those facts. Fed. Rule Civ. Proc. 56(c). "A genuine issue of material fact arises only if sufficient evidence favoring the nonmoving party exists to permit a jury to return a verdict for that party."

Brummett v. Sinclair Broad. Grp., Inc., 414 F.3d 686, 692 (7th Cir. 2005). A dispute of fact is not genuine if "the evidence supporting [one] version of events does not rise above speculation or conjecture." *King v. Hendricks Cty. Comm'rs*, 954 F.3d 981, 986 (7th Cir. 2020). The Court must draw inferences in the Plaintiffs' favor; but "[the] favor toward the nonmoving party does not extend to drawing '[i]nferences that are supported by only speculation or conjecture.'" *Argyropoulos v. City of Alton*, 539 F.3d 724, 732 (7th Cir. 2008). Evidence relied upon must be of a type that would be admissible at trial. *See Gunville v. Walker*, 583 F.3d 979, 985 (7th Cir. 2009).

Here the District Court was to view the facts in the light most favorable to Tubby. The District Court was not required to make inferences that are based solely on speculation and not supported by the factual record. The factual record demonstrates that Tubby was believed to be armed in the back seat of the squad, and had fired a round after he exited the squad and ran toward the sally port door, and was not subdued at any time prior to Officer O'Brien firing.

A. No Reasonable Jury Could Conclude That a Reasonable Officer Would Have Known Tubby Was Unarmed.

Plaintiffs ignore the objective evidence in the record that Tubby's hands appeared to be mimicking a gun and speculate into Tubby's intent while in the sally port. Plainitffs argue that Tubby was not intentionally concealing his hands from officers and suggest that Tubby's hands "could have been stuck under his shirt, and he could have been attempting to free them…" (Appellate Br. p. 30) Plaintiffs posture that Tubby did not position his hands to mimic a gun, but that "he could have been pointing his fingers in

an attempt to slide his hands out of the cuffs." (*id*. at 30-31) Even if it the Court accepts this inference in the Plaintiffs' favor, Tubby's subjective intent is irrelevant. It is what an objective officer on the scene perceived from those actions. *See Graham*, 490 at 396–97.

1. Officer O'Brien reasonably believed that Tubby was armed.

An assessment of Officer O'Brien's decision to use deadly force requires careful attention to the information and perception that Officer O'Brien gained during his interactions with Tubby on the night of October 19, 2018, prior to shooting. *See Cty. of Los Angeles, Calif. v. Mendez*, 137 S. Ct. 1539, 1546 (2017). The record demonstrates that Officer O'Brien personally observed what he believed to be the barrel of a gun protruding from Tubby's shirt underneath his clothing, pointed up at his chin. (R. 118, ¶¶43-44)

It is undisputed that after entering the sally port Officer Wernecke went to the open the rear door of the squad and immediately observed that Tubby's hands were not behind him and were instead in front and balled up under his shirt. (R. 118, ¶39) It is undisputed that Tubby refused to exit the squad car (R. 118, ¶¶40-42), or at least that an objective officer would have perceived Tubby's actions as a refusal to exit the squad voluntarily. The first time Officer O'Brien observed Tubby in the back seat of the squad Tubby hand maneuvered his handcuffed hands from the back to the front of his body. (R. 118, ¶43) Tubby's hands were underneath the front of his shirt and Officer O'Brien saw what he believed to be the cylindrical barrel of a gun underneath his clothing. (R. 118, ¶44)

Plaintiffs rely heavily on the squad video at this time and argue that the video from the back seat of the squad car does not show any "cylindrical shape." (Appellate Br. p. 26 citing APP035) Plaintiffs reference the following still frame from this moment:

See Id. The view from the rear interior squad camera at that time is not the exact perception that Officer O'Brien had from the open door. (R. 121-6, interior squad video at 1:44:45 -1:45:05) Even so, the interior video supports O'Brien's observation that Tubby had something cylindrical shaped under his shirt that appeared to him to be the barrel of a gun. *See id*.

The still frame from this time period shows a bulge under Tubby's shirt, that was cylindrical in nature, flat on top and pointed up towards his chin. (R. 118, ¶44)

Tubby then said, "I'll fucking do it." (R. 118, ¶45) It is undisputed that Officer O'Brien heard this statement. That statement coupled with Officer O'Brien's observation led him to believe that Tubby was an armed and suicidal subject, and therefore posed a deadly threat. (R. 118, ¶46) Officer O'Brien was trained that there are three criteria for assessing whether a suspect poses a deadly threat: weapon, intent, and delivery system. Intent can be inferred. (R. 118, ¶47) Officer O'Brien reasonably perceived a weapon, a delivery system, and he inferred Tubby's intent to use the weapon by the "I'll fucking do it" statement. (R. 121-1, O'Brien Dep. at 60: 15-20; 63:11-16)

Officer O'Brien's actions on scene were consistent with his reasonable belief that Tubby was armed. It is undisputed that Officer O'Brien slammed squad 42's door with Tubby still inside and told Officer Wernecke, "I think he's got a gun." (R. 118, ¶48) Officer Wernecke told Officer O'Brien that he must have missed something when he searched Tubby. (R. 118, ¶49) And, although not the norm, missed weapons during searches does occur. (R. 121-13, E. Allen Dep. at 25:14-27:16) Even Plainitffs' police practice expert

Jeffrey Noble testified that "there have definitely been situations where [missed weapons] occurred." (R. 113-6, Noble Dep. at 105:25-106:6)

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. (R. 118, ¶52) Officer O'Brien also told BCSO Cpl. Smith that he believed Tubby had a knife and/or a handgun. (R. 118, ¶53) 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. (R. 118, ¶¶51-52)

Plaintiffs have not raised a genuine dispute regarding the fact that Officer O'Brien perceived that Tubby was concealing the barrel of a gun under his shirt. Plaintiffs argue that it was unreasonable for Officer O'Brien to believe that Tubby was armed and suggest that a reasonable officer in the sally port on October 19, 2018, would have seen Tubby as an "unarmed man that had slipped his handcuffs in front of his body and was locked in the back of a squad car." (Appellate Br. p. 25) Plaintiffs argue that under those circumstances O'Brien's use of deadly force was unreasonable and in doing so cite three cases, none of which are controlling authority in this circuit. (*id*.) The suggestion that no reasonable officer would have believed Tubby was armed in the sally port on October 19, 2018, is wholly speculative and contrary to the testimony of numerous on-scene officers. (R. 118, ¶¶114-122)

> GBPD Sergeant Denney believed that at the moment Officer O'Brien discharged his firearm, Tubby presented an imminent threat of death or great bodily harm to himself and to all the officers in the area of the sally port. (R. 118, ¶115)

> GBPD Officer Salzmann believed that Tubby's behavior and mannerisms when he exited the rear window of squad 42 demonstrated that he was concealing a weapon under his shirt and was running at officers. (R. 118, ¶¶116-17)
>
> BCSO Deputy Mleziva perceived himself to be in imminent danger of death or seriously bodily harm at the time that Officer O'Brien fired his gun at Tubby due to Tubby aggressively exiting the squad while believed to be possessing a weapon. (R. 118, ¶118)
>
> BCSO Deputy Winisterfer perceived himself to be in imminent danger because Tubby presented to have a firearm concealed under his shirt, Tubby was running directly at him, and because none of the force applied to that point was successful in stopping Tubby. (R. 118, ¶119)
>
> Deputy Winisterfer feared that Tubby posed a safety threat to the general public because 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 also be in danger. (R. 118, ¶120)
>
> BCSO Deputy Dernbach perceived Tubby as a deadly threat as he ran towards him so much so that he would have shot Tubby if Officer O'Brien had not shot first. (R. 118, ¶¶121-22)

Plaintiffs cannot dispute this testimony by merely opining that if O'Brien actually saw a gun, he was trained to announce that to other officers, and therefor would have done so. *See* (Appellate Br. p. 27) Whether his failure to specifically announce that he saw a gun violated GBPD practices is merely a red herring and insufficient to demonstrate a constitutional violation. *Scott v. Edinburg*, 346 F.3d 752, 760 (7th Cir. 2003)("§1983 '"protects plaintiffs from constitutional violations, not violations of state laws or, in this case, departmental regulations and police practices."').

A theme throughout Plaintiffs' opening brief is to ignore evidence and attack Officer O'Brien's credibility. Plaintiffs ask this Court to make an impermissible assessment of O'Brien's credibility and suggest that the District Court erred by accepting

O'Brien's perception of what occurred in the sally port on October 19, 2018. (Appellate Br. p. 28) The Plaintiffs make the unsupported allegation that O'Brien is lying about his belief that Tubby was armed. (*id*. at 28-30) Plaintiffs go so far as to misrepresent the evidence to the Court and claim that "[d]irectly after the shooting, Officer O'Brien was interviewed by an investigator and did not mention the 'barrel' of a gun as the reason he shot Tubby." (*id*. at 27, *citing* ECF 112-1, Medical Examiners' Report at 3) Not only does the medical examiner's report not support this allegation, but there is no indication that the medical examiner ever spoke to Officer O'Brien after the shooting. *See id*. (The investigator from the medical examiner's office reported that contact was made with Lt. Nate Allen and Lt. Thomas Ziegle.)

Officer O'Brien's account of the incident has remained consistent, and Plaintiffs' suggestion otherwise is a misrepresentation of the record. To wit, Officer O'Brien recounted the following during his October 25, 2018, DCI interview:

> Officer O'Brien looked at Tubby, and **he observed what he believed to be the barrel of a gun** pointing up to the area of Tubby's chin. Officer O'Brien said the **object appeared to be cylindrical in nature and not simply a finger.** It was under Tubby's clothing and pushing up through the clothing toward Tubby's chin.

(R. 114-13, O'Brien DCI Statement, p. 9) When describing what he observed during his December 19, 2019 deposition, Officer O'Brien recounted the following:

> I observe Mr. Tubby is leaned back in a reclined position away from the open squad door, leaning back away from me. **I observe what I believe to be the barrel of a gun protruding from Mr. Tubby's shirt underneath his clothing.** It is pressed up creating tension in the clothing. **It appears cylindrical in nature,** and it is flat on top. It does not appear to me to be a finger or other instrument. It immediately appears to me to be the barrel of a gun.

(R. 121-1, O'Brien Dep. at 39:19—43:7).

The record demonstrates that Officer O'Brien reasonable believed Tubby was armed and therefore posed a threat to Officer O'Brien and anyone else in the sally port on the night of October 19, 2018.

2. Tubby's hands were never both empty and visible before O'Brien shot.

It was also reasonable for O'Brien to believe that Tubby was armed up until and at the moment he discharged his firearm. It is undisputed that Officer O'Brien was never in a position to see both of Tubby's hands at the same time before he fired. The Plaintiffs provide no supporting evidence—yet suggest that Officer O'Brien "knew" Tubby's hands were empty, thus he was unarmed before he fired. (Appellant Br. pp. 31-33) This is simply untrue. To be clear, Officer O'Brien did testify that he saw Tubby's empty left hand as Tubby exited the rear squad window:

Q. Okay. As he was coming up out of the vehicle, you said you could see his hands?
A. I could see his left hand.
Q. You could see his bare left hand?
A. Yes.
Q. Okay. Could you see his right hand?
A. No.
Q. Okay. Where was his right hand?
A. Concealed under the shirt and behind his left hand.

(R. 121-1, O'Brien Dep. pp. 129:22-130:5)

The event was dynamic. After Tubby exited the squad, Officer O'Brien retreated behind the opening of the sally port for cover because he thought Tubby was armed. (*id*.

at 130:15-20) Seconds later he heard a commotion and looked back into the sally port and saw Tubby rushing towards him. In that instance, Officer O'Brien *could* see Tubby's empty left hand, but *could not* see Tubby's right hand as it was still concealed under his shirt. (*id*. 132:18-133:4)

The law requires the reasonableness of Officer O'Brien's belief that Tubby was armed to be judged from the perspective of a reasonable officer on the scene. *Graham*, 490 U.S. at 97. Here we have the benefit of that perspective. There is no evidence that *any* of the officers on scene saw Tubby's empty right hand prior to O'Brien firing.

> Officer Allen testified "I was hoping I would see both hands. I never did." (R. 121-13, E. Allen Dep. at 78:24)
>
> Lieutenant Allen testified that Tubby's hands were concealed under his shirt—not visible—as he ran towards officers who were standing in the entrance of the sally port. (R. 121-12, A. Allen Dep. at 101:18-25;104:2-8)
>
> Sergeant Denney did not see either of Tubby's hands outside of his shirt prior to Officer O'Brien discharging his firearm. (R. 121-12, Denney Dep. at 151:11-13) Even after the shooting, Denney described Tubby's hands as follows:
>
> > He was lying there motionless. That said, his hands were still in his shirt. I couldn't see his hands, but they were in a similar position to what I had described before when he was running towards the door. His hands were like this in his shirt. I couldn't see them. (*id*. at 153:19-24)
>
> Officer Wernecke testified that Tubby exited the squad car and started running towards officers with his hand under his jacket. (R. 121-4, Wernecke Dep. at 150:21-23)
>
> Deputy Winistorfer testified that "[he] never saw [Tubby's] hands from underneath his shirt. (R. 121-18, Winistorfer Dep. at 47:3-4.)

> Lieutenant Zeigle did not see Tubby's empty hands and testified that he saw that Tubby's hands were concealed under his shirt in a position consistent with how someone would grip the handle of a gun. (R. 121-11, Zeigle Dep. at 86:1-15)
>
> Officer Salzmann never saw Tubby's empty hands prior to O'Brien firing. Officer Salzmann testified that when he saw Tubby stumbling backwards and then running towards the transport van, Tubby's hands were up under his shirt. (R. 121-14, Salzmann Dep. at 83:21-25; 85:3-14) Tubby's hands remained concealed under his shirt as the canine engaged him (*id*. at 115:6-21)
>
> Sergeant Dernbach testified that he did not see *even one* of Tubby's empty hands after he exited the squad. (R. 121-19, Dernbach Dep. at 66:23-67:4)

The Plaintiffs claim they adduced evidence that Tubby's right hand came out from under his shirt before he fell to the ground. (Appellate Br. p. 32) This evidence is a video from the outside of the sally port, that the Plaintiffs had enhanced. (*id*. citing R. 114-10) The District Court accepted the Plaintiffs' interpretation of the "enhanced video" and inferred—in their favor—that "as Tubby fell to the ground, his right hand was empty and fell above his head." (R. 176, p. 11) However, the "enhanced video" does not support the inference that Officer O'Brien "knew" Tubby was unarmed prior to discharging his firearm. (R. 114-10). Tubby's hands—left and right—were never simultaneously visible to Officer O'Brien at any time in the sally port on October 19, 2018. (R. 118, ¶¶ 101, 105-106, 108, 110)

Plaintiffs acknowledge that Tubby's left and right hands were never visible at the same time, yet still argue that "even if not visible at the same time, a reasonable officer would have known Tubby was unarmed" because other officers announced his empty left hand was visible. (Appellate Br. p. 33, *citing* 120-3 at 2:30:49-56) The evidence cited by

Plaintiffs does not support that any officer loudly announce that Tubby's *left* hand was visible. (*id*.) Even if it did, the conclusory assertion is the exact type of 20/20 hindsight courts warn against.

3. Officer O'Brien's belief that he heard the pop of a gun, even if mistaken, was not objectively unreasonable.

Plainitffs characterize Officer O'Brien's mistaken belief that the sound of a pop from the beanbag gun as Tubby firing at officers was unreasonable. (Appellate Br. pp. 33-34) Simply because other officers testified that they could distinguish between a beanbag round and a gunshot does not render Officer O'Brien's belief unreasonable. Even Officer O'Brien testified that under normal circumstances and in an isolated environment he believes he could have distinguished between a bean bag and real gun. (R. 121-1, O'Brien Dep. at 158) However, the circumstances as they unfolded in the sally port were neither normal, nor isolated. Officer O'Brien testified that given all the circumstances going on at the moment, he believed he heard the sound of a live ammunition gun firing and acknowledged that his perception was inaccurate. (*id*. at 161) That mistake was not objectively unreasonable.

Further, Plaintiffs' claim that no reasonable officer would mistake the beanbag shotgun from a lethal handgun is conjecture. Lt. Allen testified that he also heard the "pop" sound that night and thought Tubby had fired a gun. (R. 121-12, A. Allen Dep. at 109:18-110:10) Lt. Allen further testified that although he has never mistaken the sound of a bean bag gun with a real gun, the sound is **basically the same**. (*id*. at 111:14-25) To

not misrepresent the record in any way, with regards to the "pop" sound, Lt. Allen testified to the following:

> Q. All right. The pop, have you ever confused the sound of a bean bag gun with a real gun?
> A. No.
> Q. How often have you heard a bean bag gun being fired?
> A. I guess it's really no different than a shotgun, a 12-gauge shotgun. It's the same.
> Q. Same sound?
> A. Basically.
> Q. Can you tell the difference between the 12-gauge shotgun and the pistol?
> A. Yes. I guess with everything going on though things can -- you get auditory exclusion.

(*id.*)

The District Court did not err in reasoning that 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. (R. 176, p. 20) The Fourth Amendment requires courts to evaluate an officers' use of force based on the circumstances confronting them at the time the force is used.

B. No Reasonable Jury Could Conclude That Tubby Was Safely Subdued When Officer O'Brien Shot.

1. Tubby posed an active threat when Officer O'Brien made the split-second decision to use deadly force.

The District Court concluded that "no reasonable jury could conclude that Tubby was safely subdued before Officer O'Brien shot." (R. 176, p. 18) This was not in error.

It is undisputed that only 10 seconds elapsed from the time Tubby exited the vehicle and Officer O'Brien shot. (R. 118, ¶109) During those split seconds, Tubby—who

was believed to be armed—was able to make it from the rear window of the squad to the entrance of the sally port, after being shot by two beanbag rounds and being bitten by a police canine. (R. 118, ¶92-99) Plaintiffs suggest that the District Court should have accepted the factually unsupported inference that Tubby was "subdued"—handcuffed, blinded by OC, face-down on the ground, and being attacked by a police canine when Officer O'Brien shot him. (Appellate Br. pp. 34-35)

First, it is undisputed that Tubby was handcuffed at the time Officer O'Brien shot him, a fact which the District Court also accepted in their analysis. (R. 176, p. 17) However, the evidence shows that the handcuffs did not render Tubby "subdued." Notably, it is undisputed that Tubby—while handcuffed—maneuvered his body, removed his seatbelt, and put his hands underneath his shirt. (R. 147, ¶30, Plaintiffs' Response "Plaintiffs do not dispute that Tubby maneuvered the handcuffs from behind his back to the front of his body.")

Second, the characterization that Tubby was "blinded" by OC spray is purely speculative and not supported by any admissible evidence. (R. 147, ¶34) Despite that, the District Court inferred that Tubby was blinded by OC spray and correctly concluded that the OC did not render Tubby subdued because "he was still able to exit the squad car and rush toward the open sally port door." (R. 176, p. 17)

Third, Plaintiffs' claim that Tubby was face down when Officer O'Brien shot him is factually unsupported. To support this theory, Plainitffs erroneously refer to autopsy photos and the medical examiner's report to give their interpretation—without expert testimony—of the positioning of Tubby at the time O'Brien fired. However, the medical

examiner testified that he could not opine to the trajectory of the bullets or the position of Officer O'Brien or Tubby at the time of the shooting. (R. 147, ¶52) Regardless, the District Court inferred in the Plaintiffs' favor that Tubby had already "fallen to the ground" when Officer O'Brien shot him. (R. 176, p. 18)

Finally, Plaintiffs provide no record citation to support their claim that Tubby was "being attacked" by the police canine when Officer O'Brien shot him—presumably because none exists. (Appellant Br. pp. 34-35) While true that the police canine engaged Tubby, the undisputed evidence does not demonstrate that the canine "subdued" him. Officer Salzmann testified that when Pyro engaged Tubby, he had to apply more pressure and pull back on the lead to prevent Tubby from fleeing. (R. 121-14, Salzmann Dep. at 100:4-10) If Tubby was "under the control," Officer Salzmann would not have had to apply force to stop Tubby's forward momentum. (*id*. at 182:20-183:20) The on-scene officers testified that Tubby was running towards officers when Officer O'Brien fired. (R. 147, ¶¶94, 116-117, 119) Officer O'Brien did not learn of the fact that Pyro engaged Tubby until after the shooting—a fact which the Plaintiffs claim was due to O'Brien's lack of situational awareness. (Appellant Br. p. 36) The bite marks on Tubby's buttock demonstrate that the canine at most had control of his lower half. (R. 112-1, Medical Examiner's Report, p. 4 ([Tubby] had two punctures […] on upper, outer quadrant of right buttock, all consistent with animal bites.) There is absolutely no evidence that the canine had control of Tubby's hands or the ability to prevent him from firing the weapon Officer O'Brien believed he was concealing.

The record in this case demonstrates that Tubby was running towards the sally port door—whether to escape, to harm officers or simply because he was blinded by OC—at the time Officer O'Brien shot him. (R. 118, ¶¶101, 103, 105-106) At that time, Officer O'Brien believed Tubby was armed and had already fired a shot. (R. 118, ¶105) Under these circumstances, no reasonably jury could conclude that Tubby was safely subdued in the split-second that Officer O'Brien decided to use deadly force.

2. The District Court did not improperly rely on YouTube evidence.

Plainitffs argue that the District Court's reliance on YouTube video to weigh the evidence of record and make a factual finding was error. (Appellant Br. pp. 35-36) Plaintiffs' reliance on *Ayoubi v. Dart*, 729 F. App'x 455, 458 (7th Cir. 2018), for the proposition that it was improper for the judge to use internet research is completely misguided.

In *Ayoubi*, the district court in evaluating a pretrial detainee's deliberate indifference claim concluded—**in contradiction to the sworn testimony in the record**—that detainee did not have a serious medical condition. There, the district judge improperly used internet research to discredit the detainee's sworn testimony about how painful his condition was. *Id*. at 458. *Ayoubi* does not support the position that courts cannot rely on outside research in evaluating evidence on summary judgement. *Id*. *Ayoubi* supports the position that it is improper for district courts in summary judgment stage of § 1983 to make credibility determinations, weigh evidence, and draw inferences from an internet search **to contradict** actual evidence in the record. *Id*.

Here, the District Court referenced video from a police officer's body camera of an event where a man shoots an officer with a concealed gun. (R. 176, p. 19)[1] The District Court did not make any credibility determinations and simply used the video as an example of the real-life danger posed by a "handgun hidden by a suspect who refuses to comply with a lawful commands …" and the "…risks police officers face when they do not know if a suspect is armed." (R. 176, p. 19) This view that Tubby posed a threat to the officers based on his refusal to show his hands, making it impossible for officers to determine whether he was armed, is exactly what was testified to by the Officers on scene—most notably, Officer O'Brien. (R. 118, ¶¶92-93, 97, 101, 103, 105-106, 117)

The District Court did not impermissibly rely on the YouTube video to contradict evidence in the record.

III. OFFICER O'BRIEN IS ENTITLED TO QUALIFIED IMMUNITY.

Officer O'Brien's use of deadly force to stop the active threat posed by Tubby was justified under Fourth Amendment precedent. In addition, Officer O'Brien is entitled to qualified immunity shielding him from liability from Tubby's constitutional claims.

The doctrine of qualified immunity shields government officials from civil liability insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). In the context of the Fourth Amendment, a police officer is entitled to qualified

[1] CBS News, Estill, South Carolina, Officer's Camera Captures Shooting, YOUTUBE (Aug. 11, 2017), http://www.youtube.com/watch?v=7Qq3dXfzvdw.

immunity where clearly established law does not show that the seizure violated the Fourth Amendment. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

In evaluating a law enforcement officer's entitlement to qualified immunity, courts undertake the twofold inquiry of asking whether his conduct violated a constitutional right and, if so, whether that right was clearly established at the time of the alleged violation. *Lopez v. Sheriff of Cook Cty.*, 993 F.3d 981, 987 (7th Cir. 2021). The court may choose which prong to address first. *Pearson*, 555 U.S. at 236, 129 S.Ct. 808. However, a failure to demonstrate a constitutional violation can be dispositive of the qualified immunity inquiry. *Est. of Biegert by Biegert v. Molitor*, 968 F.3d 693, 701 (7th Cir. 2020)("Because we conclude that no constitutional violation occurred, we need not determine whether the officers are entitled to qualified immunity.").

A law is clearly established on an excessive force claim if: (1) there is a "closely analogous case" holding that the specific type of force used by the defendants is excessive; or (2) "a general constitutional rule already identified in the decisional law applies with obvious clarity to the specific conduct in question." *Cibulka v. City of Madison*, 992 F.3d 633, 639–40 (7th Cir. 2021) (internal quotation marks and alterations omitted).The Supreme Court has explained that the clearly established right must be defined with specificity, a principle which is "particularly important in excessive force cases." *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 503 (2019) (*per curiam*)(quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018)).

> Specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply

> to the factual situation the officer confronts. Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue.
>
> It does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.

See id.

Among the issues for which governing precedent must account in excessive force cases are the actions of the individual claiming wrongdoing and the time the officer had to react to the situation. *See, e.g., Kisela*, 138 S. Ct. at 1153 (holding that qualified immunity was required for officer who shot individual after having "mere seconds to assess the potential danger" posed by individual to their person, who was observed "hacking a tree with a large kitchen knife," and who had "failed to acknowledge at least two commands to drop the knife"); *see also, e.g., Mason-Funk v. City of Neenah*, 895 F.3d 504, 510 (7th Cir. 2018).

A. Officer O'Brien is Entitled to Qualified Immunity.

Qualified immunity is a matter of law for the court, not a jury question. *Riccardo v. Rausch*, 375 F.3d 521, 526 (7th Cir. 2004). There is no Supreme Court case law which involves a case with facts closely analogous to the case at hand. Therefore Officer O'Brien could not have violated any clearly established constitutional right by shooting Tubby on October 19, 2018.

Officer O'Brien's use of force was not excessive and thus no Fourth Amendment violation occurred. (R. 176, p. 20) Although this finding on the merits is dispositive of the claims against Officer O'Brien, *Biegert,* 968 F.3d at 701, the District Court evaluated the second prong of qualified immunity and concluded that Plaintiffs failed to identify controlling precedent that "squarely governs the specific facts at issue." (R. 176, pp. 23-24)

Plaintiffs assert that the District Court erred in ruling that O'Brien was entitled to qualified immunity because it was clearly established that O'Brien's conduct in using deadly force against Tubby "as he lay face-down on the ground, blinded, in handcuffs, under attack by a police canine, and unarmed." (R. 196, p. 41) As demonstrated above, Plaintiffs' account is not reflective of the actual record and incorrectly relies on the belief that Officer O'Brien knew Tubby was unarmed.

O'Brien's reasonable, yet mistaken belief that Tubby was armed does not bar his entitlement to qualified immunity as the protection of qualified immunity applies regardless of whether government official's error is mistake of law, mistake of fact, or mistake based on mixed questions of law and fact. Therefore, if reasonable minds would differ as to whether the official's conduct was clearly illegal, then immunity should attach. *See, e.g., Malley v. Briggs*, 475 U.S. 335, 341(1986).

B. The Authority Cited by the Plaintiffs Does Not Preclude Officer O'Brien's Entitlement to Qualified Immunity.

Although qualified immunity is an affirmative defense, plaintiffs carry the burden of defeating it once it is raised. *Archer v. Chisholm*, 870 F.3d 603, 613 (7th Cir. 2017). As

such, in the present case, Plaintiffs bear the burden to establish that under the facts and circumstances known to Officer O'Brien at the time of his decision to use deadly force, any and all reasonable police officers would have concluded, under existing law, these actions in this situation were unequivocally and absolutely prohibited. Plaintiffs ignore this burden and cite to legally and factually dissimilar cases where qualified immunity did not attach when an officer used deadly force against individuals who are unarmed, subdued, and nondangerous. (Appellate Br. pp. 40-41 citing *Garner*, 471 U.S. at 11; *Strand v. Minchuk*, 910 F.3d 909, 915 (7th Cir. 2018); and *Becker v. Elfreich*, 821 F.3d 920, 928 (7th Cir. 2016)).

Plaintiffs cite *Garner* for the proposition that it is well-established that "[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead." (Appellate Br. pp. 40-41 citing *Garner*, 471 U.S. at 11). However, the Supreme Court has held that "[w]hile cases like *Garner* and *Graham* are instructive in the excessive force context, "general statements of the law are not inherently incapable of giving fair and clear warning to officers." *Kisela*, 138 S. Ct. at 1153. Even if *Garner* was sufficient to define a clearly established right, the circumstances are insufficient to put Officer O'Brien on notice that his actions were violating such a right. In fact, *Garner* provides the opposite, holding that "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." 471 U.S. at 11.

It is undisputed that Tubby was ultimately determined to be unarmed. (R. 118, ¶¶ 124-25) However, this was determined **only after** Tubby was shot. (*id.*) The fact that

Tubby was ultimately determined to be unarmed is irrelevant to the analysis of qualified immunity. *Slattery v. Rizzo*, 939 F.2d 213 (4th Cir. 1991)(holding deadly force reasonable where officer could have had probable cause to believe that suspect posed deadly threat even though suspect turned out to be unarmed); *Sherrod v. Berry*, 856 F.2d 802 (7th Cir. 1988)(*en banc*)(holding that under circumstances of the case, fact that suspect was unarmed was irrelevant to excessive force claim where officer reasonably believed he was armed).

Plaintiffs cite *Becker v. Elfreich*, 821 F.3d 920, 928 (7th Cir. 2016) for the proposition that it is "well-established that police officers cannot continue to use force once a suspect is subdued." (Appellate Br. p. 41) *Becker* involved a police officer's use of excessive force against a suspect by pulling him down the steps and placing his knee on his back while allowing a police canine to continue to bite the suspect after the suspect had surrendered with his hands on his head. The *Becker* Court determined that the officer's use of force in allowing the police canine to continue to bite a suspect after the suspect had surrendered **with his hands above his head** was excessive. *Id*. 821 F.3d at 928. Although it may be clearly established that an officer cannot use deadly force against a suspect who has made a universal sign of surrender by placing their hands above their head, *see id*, that is not the case here.

The circumstances of *Strand* involve the nonfatal police shooting of an unarmed truck driver disputing a parking ticket. *Id*. at 912. Although the truck driver had assaulted him, the officer did not shoot until after the truck driver had stopped fighting, separated from the officer, stood up, backed up four to six feet away, put his hands in the air, and

said, "I surrender. Do whatever you have to do. I surrender, I'm done." *Id*. Further, the officer in *Strand* also emphasized that he was not contesting any facts and indeed, for purposes of the appeal, accepted them in the light most favorable to Strand as the non-moving party. *Id.* at 914. 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 no guidance to the facts of this case. In *Strand* the driver took actions that would demonstrate to an objective officer that he no longer in demonstrate that he would resume fighting or reach for a weapon. *Id*. at 916. That is simply not the case here. It is undisputed that Tubby was running towards the officers. (R. 118, ¶¶94-95) Whether he was rushing towards them to cause them harm as Officer O'Brien believed, or if he "stumbling blindly" as Plaintiffs speculate, there is no evidence in the record that demonstrates Tubby reasonably surrendered before Officer O'Brien shot him.

The District Court did draw *reasonable* inferences in Plaintiffs' favor by finding that Tubby appeared to have fallen as he was running toward the sally port entrance. (R. 176, p. 23) That does not negate Officer O'Brien's belief that Tubby posed an imminent threat. There is no evidence in the record that Tubby surrendered at any time prior to Officer O'Brien discharging his firearm, not during the approximately 40 minutes he was barricaded in the back of the squad, nor in the split seconds after Tubby exited the squad

and ran towards Officer O'Brien. The objective record and all reasonable inferences drawn from the record demonstrate the opposite.

The well-established law in the Supreme Court and this Circuit demonstrates that law enforcement officers can reasonably exercise the use of deadly force if another officer, or those in the immediate vicinity in imminent danger of death or serious bodily injury. *Siler v. City of Kenosha*, 957 F.3d 751 (7th Cir. 2020); *Kisela*, 138 S. Ct. at 1153. The Supreme Court recently noted that "[p]recedent involving similar facts can help move a case beyond the otherwise hazy borders between excessive and acceptable force and thereby provide an officer notice that a specific use of force is unlawful." *Kisela*, 138 S.Ct. at 153.

On the facts of this case, none of the cases cited by the Plaintiffs, nor any decision in this circuit are sufficiently similar. For that reason, Officer O'Brien is entitled to qualified immunity from Tubby's Fourth Amendment claims.

IV. THE PLAINTIFFS WAIVED THEIR CLAIMS AGAINST THE CITY OF GREEN BAY AND CHIEF SMITH.

Plaintiffs waived their claims against the City of Green Bay and Chief Smith in this appeal by not developing them in their opening brief. See *Gable v. City of Chicago*, 296 F.3d 531, 538 (7th Cir. 2002) citing *Jones Motor Co. v. Holtkamp, Liese, Beckemeier & Childress, P.C.*, 197 F.3d 1190, 1192 (7th Cir.1999)(holding that argument that was "so little developed in plaintiff's opening brief in this court" was waived). This includes federal claims for excessive force, failure to train, state created danger, and state claim for negligence alleged in the operative complaint. (R. 83, Third Am. Compl. pp. 12-17, 21)

It is well settled that a party's failure to address or develop a claim in its opening brief constitutes a waiver of that claim, for "[i]t is not the obligation of this court to research and construct the legal arguments open to parties, especially when they are represented by counsel ..." *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 668 (7th Cir.1998), (citing *Sere v. Bd. of Trustees of the Univ. of Ill.*, 852 F.2d 285, 287 (7th Cir.1988)); see also *Kramer v. Banc of Am. Sec., LLC*, 355 F.3d 961, 964 n. 1 (7th Cir.2004)("We have repeatedly made clear that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived (even where those arguments raise constitutional issues).")(quoting *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir.1991)). In order to develop a legal argument effectively, the facts at issue must be bolstered by relevant legal authority; a perfunctory and undeveloped assertion is inadequate to raise a separate basis for appeal. *Indurante v. Local 705, Int'l Bhd. of Teamsters*, 160 F.3d 364, 366 (7th Cir.1998).

Plaintiffs ask this Court to reverse the District Court's dismissal of their *Monell* claim relating to their allegation that Green Bay has a pattern or practice of excessive force. (Appellate Br. pp. 22-23) However, the opening brief is completely devoid of any argument on that point. Simply claiming that 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 must be reversed is insufficient to demonstrate that the City had a policy, pattern or practice of excessive force. Even if this Court were to reverse the District Court's dismissal of the excessive force claim against O'Brien, that would not automate reversal on the municipal liability claims. The singular incident of

O'Brien's use of force against Tubby is insufficient to establish *Monell* liability against the City of Green Bay or Andrew Smith. *Monell v. Dep't of Soc. Servs*., 436 U.S. 658, 694 (1978); *see also Montano v. City of Chicago*, 535 F.3d 558, 570 (7th Cir. 2008).

Plaintiffs' final argument relates to their state created danger claim against Zeigle and Brown County. They submit no argument on appeal and appear to no longer be pursuing a state created danger claim against the City of Green Bay, Erik O'Brien, or Andrew Smith.

Plaintiffs failed to address in any meaningful way any claim against the City of Green Bay or Andrew Smith. Accordingly, those claims have been abandoned for the purpose of this appeal.

V. PLAINTIFFS ABANDONED THEIR STATE LAW CLAIM AGAINST OFFICER O'BRIEN.

Plaintiffs' operative complaint asserts various state law claims alleging battery against Officer O'Brien (R. 83, ¶¶72-76), negligence against Officer O'Brien and the City arising out of the shooting of Tubby (R. 83, ¶¶77- 82), negligence against the City arising out of their execution of Defendant Zeigle's extraction plan (R. 83, ¶¶83-88), and a direct action against the City under Wis. Stat. § 895.46 (R. 83, ¶¶89-90).The District Court declined to exercise supplemental jurisdiction and dismissed without prejudice Plaintiffs' state law claims "so that they may be pursued in a state forum." (R. 176, p. 30) The Plaintiffs have abandoned their state law claims by failing to develop them in their opening brief, and this Court should not consider them

CONCLUSION

The judgment of the District Court should be affirmed. All of the Plaintiffs' claims should be dismissed.

Respectfully submitted this 1st day of December, 2021.

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CERTIFICATE OF COMPLIANCE WITH
FRAP RULE 32(a)(7), FRAP RULE 32(g) and CR 32(c)

The undersigned, counsel of record for the Defendants-Appellees, furnishes the following in compliance with F.R.A.P. Rule 32(a)(7):

I hereby certify that this brief conforms to the rules contained in F.R.A.P Rule 32(a)(7), for a brief produced with a proportionally spaced font. The length of this brief is 12,243 words.

Respectfully submitted this 1st day of December, 2021.

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PROOF OF SERVICE

The undersigned, counsel for the Defendants-Appellees, hereby certifies that on December 1, 2021, I electronically filed Defendants-Appellee's Brief with the Clerk of Court of the Court for the United States Court of Appeals for the Seventh Circuit Court and to counsel for Plaintiffs-Appellants, Susan Doxtator, Arlie Doxtator, and Sarah Wunderlich, as Special Administrator of the Estate of Jonathon Tubby, and counsel for Defendants-Appellees, Todd J. Delain, Heidi Michel, Brown County, Joseph P. Mleziva, Nathan K. Winisterfer, and Thomas Zeigle, using the CM/ECF system.

Dated this 1st day of December, 2021.

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CERTIFICATE OF SERVICE

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I hereby certify that on December 1, 2021, I electronically filed the foregoing 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.

s/ Jasmyne M. Baynard

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I hereby certify that on _____, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

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I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

counsel / party:	address:

s/_____