No. 21-2101

THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SUSAN DOXTATOR., et al.,

Plaintiffs-Appellants,

v.

ERIK O'BRIEN, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN,
CASE NO. 19-CV-137
HON. WILLIAM C. GRIESBACH

BRIEF OF DEFENDANTS-APPELLEES TODD J. DELAIN, HEIDI MICHEL, BROWN COUNTY, JOSEPH P. MLEZIVA, NATHAN K. WINISTERFER AND THOMAS ZEIGLE

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned counsel for Defendants-Appellees furnishes the following list in compliance with Circuit Rule 26.1:

1. The full name of every party the attorneys represent in this case:

   Sheriff Todd J. Delain, Heidi Michel, Brown County, Joseph P. Mleziva, Nathan K. Winisteorfer (incorrectly spelled as "Winisterfer") and Thomas Zeigle

2. The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court:

   Crivello Carlson, S.C. represents the Defendants-Appellees, Sheriff Todd J. Delain, Heidi Michel, Brown County, Joseph P. Mleziva, Nathan K. Winisterfer and Thomas Zeigle

3. Any parent corporation and any publicly held company that own 10% or more of stock or shares:

   Not Applicable— Defendants-Appellees, Sheriff Todd J. Delain, Heidi Michel, Brown County, Joseph P. Mleziva, Nathan K. Winistorfer and Thomas Zeigle were municipal/governmental employee at all relevant times.

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JURISDICTIONAL STATEMENT

The jurisdictional summary in Plaintiff-Appellant's Opening Brief is complete and correct.

STATEMENT OF THE ISSUES

1. Are Brown County Sheriff's Deputies Joseph Mleziva and Nathan Winistorfer entitled to judgment as a matter of law on the Estate of Jonathan Tubby's claim under 42 U.S.C. § 1983 that they failed to intervene in City of Green Bay Police Officer Erik O'Brien's alleged use of excessive force?

   The district court answered this question: Yes.

2. Alternatively, are Brown County Sheriff's Deputies Joseph Mleziva and Nathan Winistorfer entitled to qualified immunity on the Estate of Jonathon Tubby's claim under 42 U.S.C. § 1983 for failure-to-intervene?

   The district court did not answer this question.

3. Is Brown County entitled to judgment as a matter of law on the Estate of Jonathon Tubby's claim under 42 U.S.C. § 1983 based on a state-created-danger theory?

   The district court answered this question: Yes.

4. Is Brown County Sheriff's Lieutenant Thomas Zeigle entitled to judgment as a matter of law on the Estate of Jonathon Tubby's claim under 42 U.S.C. § 1983 based on a state-created-danger theory?

   The district court answered this question: Yes.

5. Alternatively, is Brown County Sheriff's Lieutenant Thomas Zeigle entitled to qualified immunity on the Estate of Jonathon Tubby's claim under 42 U.S.C. § 1983 based on a state-created-danger theory?

   The district court answered this question: Yes.

STATEMENT OF THE CASE

I. Background: Brown County Parties on Appeal and Their Training.

This case stems from City of Green Bay ("the City") Police Officer Erik O'Brien's use of deadly force against Jonathon Tubby in the sally port[1] of the Brown County Jail ("the Jail") on October 19, 2018. Mr. Tubby was believed to be armed with a firearm in the back of Officer O'Brien's squad car, and, after refusing multiple commands to surrender, fled through the broken back window of the vehicle. Plaintiff-Appellant, the Estate of Johnathon Tubby ("the Estate"), sued the City, its Chief of Police, and Officer O'Brien ("the City Appellees"), as well as Brown County, its Sheriff (Todd Delain), its Jail Administrator (Heidi Michel), and three members of the Sheriff's Department (Joseph Mleziva, Nathan Winistorfer, and Thomas Zeigle) ("the County Appellees"), seeking damages and injunctive relief under federal and state law. In addition to the background facts and procedural posture stated herein, the County Appellees join and adopt any and all consistent portions of the City Appellees' Statement of the Case.

[1] The "sally port" refers to a garage where officers transfer arrestees from squad vehicles to the Jail. (R. 120-5; R. 120-6 at 12:4–14:1.)

Joseph Mleziva and Nathan Winistorfer[2] have been patrol deputies with the Brown County Sheriff's Office ("BCSO") since 2013. (R. 111 ¶¶ 3–4.) Thomas Zeigle has been a lieutenant with BCSO since 2012, and he has been the commander for the Brown County Special Weapons and Tactics ("SWAT") team since approximately 2016. (R. 111 ¶ 5.) The Brown County SWAT team is an interagency group, including members from BCSO, a member from the Oneida Tribal Police Department, four members from the De Pere Police Department, and two members from the Ashwaubenon Public Safety Department. (R. 111 ¶ 12.) SWAT team members receive an additional 16 hours of training each month, and the substance of training includes firearms, less-lethal tactics, dignitary protection, and hostage rescue. (R. 111 ¶ 38.)

BCSO deputies, including Deputies Mleziva and Winistorfer, train extensively on, among other topics, resolving tactical situations, including those dealing with barricaded subjects, and intervention to prevent excessive force. (R. 111 ¶ 13; R. ¶¶ 26–27; R. 142 ¶¶ 56–57.) BCSO deputies train that if someone is in custody in a squad car in the sally port of the Jail and is becoming combative through physical resistance, they should notify the Jail intake of the situation and the Jail could then provide support from their

[2] Deputy Winistorfer's name was incorrectly spelled in the operative pleading as "Winisterfer." (R. 83 ¶ 15; R. 111 ¶ 4.)

correction officers to assist in controlling that subject and transferring custody from the officer to the Jail. (R. 111 ¶ 14.) However, if the situation involves a known or suspected weapon, the correction officers would not assist in the situation. (R. 111 ¶ 14.)

BCSO provides in-service training regarding high-risk vehicle stops, removing uncooperative suspects from squad cars (including suspects who may be armed), primarily through scenario-based training, decision-making, and some key tactics training. (R. 111 ¶ 15; R. 136 ¶ 15; *see also* R. 142 ¶ 58.) BCSO trains deputies to focus on officer safety, placing themselves in the best tactical position they can in order to control the situation (such as finding hard cover, concealing cover, or another physical barrier between themselves and the armed suspect), team movement, and making a plan for how to bring the suspect into custody. (R. 111 ¶ 16.) BCSO also trains deputies to create a physical perimeter around the scene using vehicles, lights, and officers. (R. 111 ¶ 17.)

When determining whether physical intervention may be necessary in a scenario involving an armed suspect in a vehicle, deputies are trained to rely on what is known as the "DONE" concept (which stands for "Danger, Overriding concern, No progress, Escape"), their Professional Communications Standards ("PCS") manual, and Defense and Arrest Tactics ("DAAT"). (R. 111 ¶ 18.) These decision-making models help deputies decide

what type of physical intervention may be appropriate in a given situation, which could include completely disengaging or escalating the mode of force. (R. 111 ¶ 19.) For example, the "DONE" concept trains deputies that, if there is no danger, there are no overriding concerns, there is progress in communication, and there is no risk of escape, then deputies may slow the situation down and rely just on speaking techniques. (R. 111 ¶ 20.) DAAT is a system of verbalization skills coupled with alternatives. (R. 111 ¶ 21.) Additionally, as it relates to removing suspects from vehicles, the BCSO provides scenario-based training focused on decision-making and key tactics aspects. (R. 111 ¶ 22.)

Similarly, through the PCS manual, BCSO trains its deputies on the concept of "officer override." (R. 111 ¶ 23.) The "officer override" concept refers to situations where non-primary officers—officers not engaging directly with a subject—are trained not only to provide backup and cover in use-of-force scenarios, but also that they "must intervene in any situation in which the contact officers are deemed inappropriate or clearly ineffective." (R. 111 ¶ 24.) In his deposition, BCSO Lieutenant Michael Jansen gave an example where, if a field-training officer observed a new officer using an improper handcuffing technique, that field-training officer is trained that he or she has a duty to immediately step in to stop that improper use of force and document the incident. (R. 111 ¶¶ 7, 25.) Deputies Mleziva and Winistorfer have been

trained on law enforcement officers' duties to intervene to prevent uses of excessive force by other officers, including through the BCSO's training on situations of officer override. (R. 111 ¶¶ 26–27.)

Lt. Zeigle has extensively trained on tactical situations, including those dealing with barricaded suspects. (R. 111 ¶ 28.) He has received extensive, specialized training with the National Tactical Officers Association ("NTOA"), a group of which he, BCSO, and the Estate's expert, Mr. Jeffrey Noble, are all members. (R. 111 ¶¶ 11, 29.) He has also received training from Tactical Energetic Entry Systems on barricaded suspects. (R. 111 ¶ 30.)

Mr. Noble does not criticize the adequacy or sufficiency of BCSO's training of its law enforcement officers. (R. 111 ¶ 31.) Similarly, Mr. Noble does not criticize Lt. Zeigle's level of training or experience as it relates to what ultimately occurred during the incident involving Mr. Tubby. (R. 111 ¶ 32.) In Mr. Noble's own experience as a law enforcement training sergeant, he never provided specific training addressing situations where an arrested subject was believed to be armed and refused to leave the back of a squad car in a sally port, and he never provided specific training addressing how officers should remove an armed arrestee from the back of a squad vehicle. (R. 111 ¶ 33.) This was because, according to Mr. Noble, "in policing . . . there are so many far-reaching possibilities, that there's no way [h]e could train for every possibility." (R. 111 ¶ 34.)

Instead, Mr. Noble trained his officers in basic tactics and uses of force that he believed would have adequately prepared them for such situations, which included general barricaded subject scenarios, de-escalation, negotiation, isolation and containment, learning the levels of appropriate force applications, and identifying immediate threats to help officers understand the proper proportionality of force to use. (R. 111 ¶ 35.)

NTOA is a group of the foremost experts in the country teaching law enforcement and SWAT-related tactics. (R. 111 ¶ 36.) Lt. Zeigle has been involved with NTOA since 2002, gained his individual membership during or near 2008, and attends annual conferences throughout the country that devote portions of training specifically to suspects who have barricaded themselves in buildings, houses, and vehicles. (R. 111 ¶ 37.)

BCSO also has a team membership with NTOA, which allows BCSO access to these training programs. (R. 111 ¶ 39.) Lt. Zeigle hosted and attended more than one NTOA Commander five-day training course at BCSO, where a specific time-block during the week focused just on barricaded subjects. (R. 111 ¶ 40.) Lt. Zeigle also attended a five-day training course held in Milwaukee that was solely dedicated to barricaded subjects, as well as four-hour or eight-hour blocks of similar trainings held in Phoenix, Salt Lake City, and Pittsburgh. (R. 111 ¶ 41.)

As part of NTOA training, Lt. Zeigle learned an NTOA continuum of decisions for dealing with barricaded subjects. (R. 111 ¶ 42.) The decision-making continuum with barricaded subjects generally starts with a patrol-based response. (R. 111 ¶ 43.) Under a patrol-based response, patrol officers will first arrive on scene and take into account the facts of the scene, such as if there is a weapon involved and identifying the specific threat. (R. 111 ¶ 44.) The patrol officers will then look for staging areas and set up inner and outer perimeters. (R. 111 ¶ 45.)

The inner perimeter is set up to protect the area around the structure in which the subject is barricaded. (R. 111 ¶ 46.) The outer perimeter is set up to protect the public from the threat of the subject by creating a buffer between the inner and outer perimeter. (R. 111 ¶ 47.) The patrol officers will then look to establish communication with the subject by making a phone call or by some other means, with the goal of getting the person to come out peacefully. (R. 111 ¶ 48.) If officers still cannot establish communication, then the patrol officers will look at other potential avenues of resolution, such as activating the SWAT team. (R. 111 ¶ 49.)

If the SWAT team is activated, they will respond and replace the perimeter personnel. (R. 111 ¶ 50.) Leaders on scene will then establish an emergency team, which consists of four to five officers that are in place and

ready to go in case the subject comes out and surrenders, or in case the subject comes out and escalates the threat. (R. 111 ¶ 51.)

If the situation involved is a "criminal barricade," officers will commonly give the subject approximately five minutes to surrender, which they will communicate once they establish contact. (R. 111 ¶ 52.) A criminal barricade typically involves a situation where someone has committed a crime, fled the scene, and is now barricaded in some type of structure. (R. 111 ¶ 53.) The exact interval of time to give the subject a chance to surrender depends on the location, time of day, and nature of the criminal offence, all of which are considered by leaders on scene. (R. 111 ¶ 54.)

Next, officers will try throwing something or using some basic force through a window or other opening, in order to get the subject to react, to get the subject to move to a more visible position, or to establish some other kind of visual contact. (R. 111 ¶ 55.) Next, officers will take further actions to establish visual contact by, for example, breaking out additional windows. (R. 111 ¶ 56.) The purpose of this step is to elicit some type of response from the subject, with the ultimate goal of seeing if that person is conscious and able to engage in meaningful dialog. (R. 111 ¶ 57.)

Next, officers would introduce some intervention options, such as OC spray. (R. 111 ¶ 58.) OC spray—also known as "pepper spray"—is a tool that could be used based on the subject's actions to overcome active resistance or

its threat, or to gain compliance from an actively resisting suspect. (R. 111 ¶ 113; R. 113-1 at 36:6–25.) Officers might also introduce other types of anxiety manipulation, such as attaching a ram to an armored vehicle and breaking down the front door of the structure. (R. 111 ¶ 59.) This step is taken to again establish some visual contact into the structure and ultimately to establish some sort of dialog to facilitate a surrender. (R. 111 ¶ 60.)

Next, if feasible, officers might introduce a robot to try to enter the structure and obtain further visual contact. (R. 111 ¶ 61.) If force is ultimately used to take the subject into custody, the ultimate force used depends on the nature of the scene and threat of harm involved. (R. 111 ¶ 62.) As a last resort, depending on the situation, officers may decide to enter the barricade. (R. 111 ¶ 63.)

Throughout a criminal-barricade situation, the goal is to bring the subject into custody, but the safety of the officers involved and others is a top priority. (R. 111 ¶ 64.) In general, if the subject is a barricaded suicidal subject, the response may look slightly different to the criminal barricaded subject response. (R. 111 ¶ 65.)

In a barricaded suicidal subject situation, the initial patrol officers will again respond to the scene, assess the situation, and attempt to communicate. (R. 111 ¶ 66.) They would still establish an inner and outer perimeter, attempt to do a phone call or other communication, and

potentially activate the SWAT team. (R. 111 ¶ 67.) However, a threat of self-harm is not necessarily a crime by itself, and if there is no threat of a crime on the scene, the patrol officers may decide to walk away from the suicidal person if that person does not surrender after some time and depending on the location. (R. 111 ¶ 68.) BCSO trains its SWAT team and general patrol personnel in the principles of the NTOA continuum. (R. 111 ¶ 69.)

II. Background: October 19, 2018.

On October 19, 2018, City of Green Bay Police ("GBPD") Officers Erik O'Brien and Colton Wernecke were working the afternoon shift on patrol. (R. 111 ¶¶ 6, 70.) At approximately 7:30 p.m., Officers O'Brien and Wernecke initiated a traffic stop of a vehicle driven by Mr. Jonathan C. Tubby. (R. 111 ¶ 71.) This traffic stop resulted in Mr. Tubby's arrest due to possession of marijuana and an outstanding arrest warrant. (R. 111 ¶ 72.) Mr. Tubby's passenger was taken into custody by another officer. (R. 111 ¶ 73.)

Officer Wernecke conducted a pat-down search of Mr. Tubby, placed him in handcuffs with his arms behind his back, took him to the back of his squad car, and left the scene with Officer O'Brien to take Mr. Tubby to the Jail. (R. 111 ¶ 74.)

Once in the sally port of the Jail, Officer Wernecke got out and went to the trunk of the squad car to store his weapons and tools before entering the Jail. (R. 111 ¶ 75.) Shortly afterwards, Officer O'Brien also got out of the

squad car and went to the back by the trunk to begin removing his weapons and tools. (R. 111 ¶ 75.) At the same time, Officer Wernecke went to the rear driver's side door to remove Mr. Tubby. (R. 111 ¶ 76.) Officer Wernecke asked Mr. Tubby to get out of the squad car and reached in to help Mr. Tubby out. (R. 111 ¶ 76.)

While storing his weapons, Officer O'Brien saw rapid movement or a shift inside the squad car and saw Officer Wernecke flinch back and away. (R. 111 ¶ 77.) Officer O'Brien came around from the back to the side of the squad and looked in through the door to see Mr. Tubby sitting with his body reclined away from the door. (R. 111 ¶ 78.) Officer O'Brien observed that Mr. Tubby had his arms positioned in front of him and he had his hands tucked where they could not be seen. (R. 111 ¶ 79.)

Officer O'Brien then observed a cylindrical object, which appeared to be the barrel of a gun, pointing to the area of Mr. Tubby's chin. (R. 111 ¶ 80.) Based on this observation, Officer O'Brien believed that Mr. Tubby possessed a firearm in his hand underneath his shirt. (R. 111 ¶ 81.) Officer O'Brien ordered, "Jonathon, bring your foot out." (R. 118 ¶ 45.) Officer Wernecke attempted to pull Mr. Tubby's foot out of the car, and Mr. Tubby stated "don't" and then "I'll fucking do it." (R. 135 ¶¶ 23, 45.)

Officer O'Brien stated to Officer Wernecke, "I think he's got a gun," and both officers retreated to cover. (R. 111 ¶ 82.) Officer O'Brien radioed

dispatch that they were inside the sally port and that Mr. Tubby has something in his hand. (R. 111 ¶ 83.) Officer O'Brien told various responding officers that he thought Mr. Tubby had a gun. (R. 111 ¶ 84.)

Lt. Zeigle was on duty that night, working in the Sheriff's Office building, which is in a separate location than the Jail. (R. 111 ¶ 85.) Lt. Zeigle communicated with GBPD Lt. Buckman, who said a suspect, identified as Mr. Tubby, was in the back of a GBPD squad car and had a gun to his head. (R. 111 ¶ 86.) Lt. Zeigle ordered BCSO Sergeant Jason Katers to respond to the scene. (R. 111 ¶¶ 8, 87.)

Lt. Zeigle then responded to the scene and, on his way, spoke with GBPD Lt. Nathan Allen who briefed him on the situation. (R. 111 ¶¶ 10, 88.) Prior to Lt. Zeigle's arrival on scene, GBPD officers had already requested additional tactical resources to the scene, including an armored response vehicle called a "BearCat," and 40-millimeter munitions that can fire less-lethal rounds including wooden dowels. (R. 111 ¶ 89.) There were also multiple officers on scene from GBPD and BCSO who were acting in their capacities as patrol officers, but also had tactical training and experience. (R. 111 ¶ 90.) For instance, Lt. Zeigle, Sgt. Katers, Lt. Allen, GBPD Officer Salzmann, GBPD Officer Eric Allen, and Officer O'Brien were all SWAT team members. (R. 111 ¶¶ 9, 91.)

Once on the scene, Lt. Zeigle met with and established a plan with Lt. Allen and Officer Allen to remove Mr. Tubby from the back of the squad vehicle. (R. 111 ¶ 92.) Lt. Zeigle did not agree with the initial plan proposed by Lt. Allen and Officer Allen because, in Lt. Zeigle's view, that plan skipped important steps in the NTOA decision-making continuum, leading him to propose his own version of the plan based on his training and experience. (R. 111 ¶ 93.)

Lt. Zeigle testified that his decision-making was primarily guided by two factors: first, it was aimed at achieving the goal of bringing Mr. Tubby safely into custody; second, it was based on his extensive training and experience at both the state and national levels specifically relating to law enforcement contacts with barricaded suspects believed to be armed, like Mr. Tubby. (R. 111 ¶ 94.)

As the Commander of the Brown County SWAT team, Lt. Zeigle assessed the situation on 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. (R. 111 ¶ 95.) He observed that there were officers on scene with perimeters established, and he was aware that Mr. Tubby was not constructively communicating with anyone on scene. (R. 111 ¶ 96.)

Further, as the district court found, "[t]he 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." (R. 176 at 5; R. 118 ¶ 54.) Officers yelled to Mr. Tubby, "Jonathon, put it down," and Mr. Tubby replied, "Fuck you. I'll do it." (R. 176 at 5; R. 118 ¶ 55.) Mr. Tubby then stated, "I'll fucking do it at the first fucking person to open this door," and then, "I'm not going." (R. 176 at 5; R. 118 ¶ 56.) Mr. Tubby then stated, "Fuck you. I'll fucking do it," then "Fuck you," and "Shut the fuck up." (R. 176 at 5; R. 118 ¶ 58.) Shortly thereafter, Mr. Tubby stated, "I can fucking hear you," and, "The fuck away from me." (R. 176 at 5; R. 118 ¶ 58.) It is not clear what officers on scene could actually see or hear within the squad car. (R. 176 at 5.)

Lt. Zeigle determined that the best way to handle the situation was to treat it like a barricaded situation. (R. 111 ¶ 97.) He noted that he could not get a visual on Mr. Tubby because the windows were fogging on the squad vehicle. (R. 111 ¶ 98.) In order to establish better visibility and create a communication portal, Lt. Zeigle decided that officers should break the back window of the squad vehicle. (R. 111 ¶ 99.)

If Mr. Tubby did not surrender or engage in verbal communication with officers, Lt. Zeigle's plan following the breakout of the squad's rear window was to introduce OC spray and see what type of reaction they would get. (R. 111 ¶ 100.) This would also give Mr. Tubby an opportunity to establish a

dialog and surrender. (R. 111 ¶ 100.) In Lt. Zeigle's view, whenever OC spray is deployed in an enclosed environment, it is important to give that individual a controlled way out, in part, so that they are not flooded with OC spray in what could become a closed environment. (R. 111 ¶ 101.) To Lt. Zeigle, it was important to break out the rear windshield of the squad car compared to the rear-side window because there were bars on the side window and no bars on the rear windshield, thereby providing a way out if OC spray was introduced. (R. 111 ¶ 102.)

Lt. Zeigle reasoned that, by deploying the OC spray and leaving Mr. Tubby a way out, Mr. Tubby would exit through the rear windshield and surrender. (R. 111 ¶ 103.) Lt. Zeigle communicated this plan with various officers on the scene, including Lt. Allen, Officer Allen, and Sgt. Katers. (R. 111 ¶ 104.) No one from GBPD communicated to Lt. Zeigle that they were concerned about introducing OC spray into the vehicle. (R. 111 ¶ 105.) Lt. Zeigle felt that his plan for extracting Mr. Tubby from the squad car and bringing him into custody was consistent with his extensive training and experience with barricaded subjects. (R. 111 ¶ 106.) He also believed that his plan was the safest for the officers on scene and the safest for Mr. Tubby to enter custody. (R. 111 ¶ 107.)

As part of the plan, an arrest team was formed, consisting of Sgt. Katers, and GBPD Officers Salzmann, Allen, Lynch, Merrill, and

Christensen. (R. 111 ¶ 108.) These officers then moved the Bearcat armored vehicle into position by backing into the sally port next to the squad car containing Mr. Tubby. (R. 111 ¶ 108.)

Officer Allen went into the turret of the Bearcat and shot out the back window of the squad vehicle with a 40-millimeter munitions launcher with wooden dowel rounds. (R. 111 ¶ 109.) From the passenger's seat in the Bearcat armored vehicle, Sgt. Katers cleared the remaining glass from the back window with a glass break pole to remove the broken glass that was still obscuring the officers' view of Mr. Tubby. (R. 111 ¶ 110.)

After the back window was broken, Officer Allen could see that Mr. Tubby was facing the rear window with his hands concealed under his shirt, holding something up to his chin. (R. 118 ¶ 83.) Officer Allen then gave multiple verbal commands to Mr. Tubby to show his hands—sometimes using a loudspeaker—and Mr. Tubby did not comply. (R. 111 ¶ 111; R 118 ¶¶ 84–86.) Officer Allen stated, "Jonathon, put your hands up, bud, so I can see them. Come on, Jonathon," and, "Jonathon, we don't want to hurt you. Put your hands up, bud. Come on, Jonathon." (R. 118 ¶ 87.) Since Mr. Tubby did not show the officers both of his hands, Officer Allen then proceeded to the next course of action and deployed OC into the back of the squad car. (R. 111 ¶ 112; R. 118 ¶¶ 88–89.)

Shortly afterwards, Mr. Tubby came out of the back window in a rapid motion and stood on the back of the squad trunk with his right hand under his shirt. (R. 111 ¶ 114; R. 118 ¶ 92.) An officer deployed a less-lethal beanbag shotgun in an attempt to stop Mr. Tubby and gain compliance. (R. 111 ¶ 115; R. 118 ¶ 93.)

Mr. Tubby jumped off the trunk and landed on the ground next to the squad. (R. 111 ¶ 116.) Mr. Tubby then rose and ran in the direction where officers were standing near the open sally port door. (R. 111 ¶ 117.) At this time, Officer Salzmann deployed his K-9 unit in an attempt to stop Mr. Tubby. (R. 111 ¶ 118.)

Officers O'Brien, Werenecke, Denny, and Lt. Zeigle, Deputy Mleziva, and Deputy Winistorfer, among others, were standing in various perimeter positions near the open sally port door and perceived themselves and the officers around them to be in imminent danger of death or serious bodily injury. (R. 111 ¶ 119.) Deputies Mleziva and Winistorfer relied on information they learned from dispatchers and their fellow law enforcement officers on scene, and they believed that Mr. Tubby was armed with a firearm. (R. 111 ¶ 120; R. 136 ¶¶ 84, 120–24.)

Deputy Winistorfer was standing in the open sally port area and perceived Mr. Tubby to be running directly at him with a firearm. (R. 111 ¶ 121.) Deputy Winistorfer feared that he was the last line of defense as

exterior scene security, and if Mr. Tubby got past him then other individuals or citizens in the community could be in danger. (R. 111 ¶ 122.) Deputy Winistorfer feared that other law enforcement officers in the area were also in imminent danger of death or serious bodily harm. (R. 111 ¶ 123.) Deputy Winistorfer's perception was based not only on his knowledge that Mr. Tubby was believed to have a firearm, but also on his firsthand observations of Mr. Tubby running directly at him, the inability of non-lethal force to stop Mr. Tubby, and his inability to see Mr. Tubby's hands because they were under his shirt. (R. 111 ¶ 124.)

Officer O'Brien acted upon his belief that multiple law enforcement officers in the area were in imminent danger of death or serious bodily harm and fired his weapon at Mr. Tubby. (R. 111 ¶ 125.) Officer O'Brien stepped in front of Deputy Winistorfer immediately before firing his weapon, and he was moving immediately before he fired. (R. 111 ¶ 126; R. 142 ¶ 54.) At the moment that Officer O'Brien fired his weapon, Deputy Mleziva was 15 to 20 feet away from Officer O'Brien. (R. 111 ¶ 127.) Even from that distance, Deputy Mleziva perceived himself to be in imminent danger of death or serious bodily harm. (R. 111 ¶ 128.)

Approximately 10 seconds passed between Mr. Tubby exiting the squad vehicle and Officer O'Brien's use of deadly force. (R. 135 ¶ 109.) Mr. Tubby was moving during the 10 seconds following his departure from the squad

vehicle, and multiple types of non-lethal force were utilized in that timeframe—all before Officer O'Brien's use of deadly force. *See* (R. 136 ¶¶ 116–18; R. 142 ¶¶ 45–49.) Once Mr. Tubby was down, officers at the scene radioed for medical assistance and nurses attempted lifesaving measures. (R. 111 ¶ 130.)

III. Background: Procedural Posture.

In its operative pleading—the Third Amended Complaint—the Estate brought the following causes of action against Sheriff Todd Delain, Heidi Michel, Brown County, Joseph Mleziva, Nathan Winistorfer, and Thomas Zeigle: (1) individual-capacity claims under 42 U.S.C. § 1983 ("Section 1983") against Deputies Mleziva and Winistorfer[3] for their alleged failure to intervene in Officer O'Brien's alleged use of excessive force, (R. 83 ¶¶ 33–42); (2) official-capacity Section 1983 claims against Sheriff Delain and Captain Michel, and an accompanying Section 1983 municipal-liability claim under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978), against Brown County, for allegedly failing to train Brown County deputies on the removal of suspects from squad vehicles and on the duty to intervene in excessive uses of force, (R. 83 ¶¶ 43–49); (3) Section 1983 claims against Brown County and Lt. Zeigle, in his official capacity as an alleged

[3] The Estate brought the same claims against John Does 1–5, some of whom it alleges are unidentified Brown County Sherriff's deputies. (R. 83 ¶¶ 17, 33–42.)

final policymaker for Brown County, premised on the state-created-danger exception to *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), (R. 83 ¶¶ 62–71); (4) state-law negligence claims against Brown County and Lt. Zeigle, in his individual capacity, (R. 83 ¶¶ 83–88); (5) a state-law negligence claim for vicarious liability against Brown County premised on the allegation that Officer O'Brien may have been acting under employment of Brown County pursuant Wisconsin's mutual assistance statute, Wis. Stat. § 66.0313, (R. 83 ¶¶ 77–82); and (6) a direct-action claim for indemnity against Brown County for the acts of Deputy Mleziva, Deputy Winistorfer, Lt. Zeigle, the unidentified John Doe deputies, and Officer O'Brien, pursuant Wis. Stat. §§ 895.46, 66.0313, (R. 83 ¶¶ 91–93.)

Additionally, although it did not expressly allege the elements for any particular equitable relief in the causes-of-action section of its pleading, the Estate also requested injunctive relief against Brown County that would require the County to adopt various types of policies and training. *See* (R. 83 at 22.)

On November 2, 2020, the County Appellees moved for summary judgment on all of the Estate's claims. *See* (R. 108, 110, 111.) On May 19, 2020, the district court granted the County Appellees' motion in full and

dismissed[4] all of the Estate's claims against the County Appellees. (R. 176 at 31.)

On appeal, the Estate appears to disagree with the entirety of the district court's summary judgment decision, *see* (Appellants' Br. at 20–22, ECF No. 15), but the Estate only raises two issues on appeal related to the County Appellees. Specifically, the Estate argues that: (1) Deputies Mleziva and Winistorfer failed to intervene in Officer O'Brien's use of deadly force, (*id.* at 41–44); and (2) Lt. Zeigle, in his official and individual capacities, and Brown County violated Mr. Tubby's substantive due process rights based on the state-created danger theory of liability, (*id.* at 2, 44–53.)

Because the Estate does not raise any arguments related to the other claims dismissed at summary judgment, those arguments and claims are waived on appeal. *O'Neal v. City of Chicago*, 588 F.3d 406, 409 (7th Cir. 2009); *Wragg v. Village of Thornton*, 604 F.3d 464, 466 (7th Cir. 2010). Accordingly, failure-to-intervene and state-created-danger are the only issues for this Court to consider on appeal, and Deputy Mleziva, Deputy Winistorfer, Lt. Zeigle, and Brown County are the only County Appellees involved with those issues.

[4] The federal claims were dismissed with prejudice, and the state claims were dismissed without prejudice. (R. 176 at 31.)

SUMMARY OF THE ARGUMENT

The district court granted summary judgment to the County Appellees on all of the claims brought against them, and this Court should affirm the district court's decision.

First, Deputies Mleziva and Winistorfer did not fail to intervene in Officer O'Brien's use of deadly force because (1) Officer O'Brien's use of force was not unconstitutional, and (2) the deputies did not have a reasonable opportunity to predict Officer O'Brien's use of deadly force, assess its constitutionality, and intervene in it. Alternatively, the deputies are entitled to qualified immunity.

Second, Lieutenant Zeigle's and Brown County's acts are not cognizable bases for liability under a state-created-danger theory, and Lt. Zeigle's acts and decisions do not shock the conscience. Alternatively, Lt. Zeigle is entitled to qualified immunity. Further, Lt. Zeigle was not a final policymaker for Brown County, and Brown County did not exhibit deliberate indifference or cause Mr. Tubby constitutional injury.

Further, the County Appellees adopt and join any arguments made by the City Appellees to the extent such arguments are not inconsistent with the arguments contained herein.

ARGUMENT

I. THE COURT REVIEWS GRANTS OF SUMMARY JUDGMENT *DE NOVO*.

This Court reviews a grant of summary judgment *de novo* and it may affirm on any ground that finds support in the record and was adequately presented in the trial court. *Biddle v. Martin*, 992 F.2d 673, 675 (7th Cir. 1993); *Hernandez ex rel. Hernandez v. Foster*, 657 F.3d 463, 478 (7th Cir. 2011). Summary judgment is proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, establish that no genuine issue as to any material fact exists and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

The initial burden is on the moving party to demonstrate, with or without supporting affidavits, the absence of a genuine issue of material fact and that judgment as a matter of law should be granted to the movant. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A material fact is one that is outcome-determinative of an issue in the case with substantive law identifying which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Once the moving party has met this initial burden, the opposing party must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *Id.* The mere existence of some alleged factual

dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Id.* at 247.

While the Court construes "all facts in the light most favorable to the nonmoving party," it "will not draw inferences that are supported by only speculation or conjecture." *Williams v. Brooks*, 809 F.3d 936, 941 (7th Cir. 2016) (internal quotes omitted); *McCoy v. Harrison*, 341 F.3d 600, 604 (7th Cir. 2003) (explaining that the Court is not "required to draw every conceivable inference from the record" (internal quotes omitted)). Further, hearsay and conclusory allegations will not suffice to defeat summary judgment. *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742 (7th Cir. 1997); *Mills v. First Federal Savings & Loan*, 83 F.3d 833, 840 (7th Cir. 1996).

II. BROWN COUNTY SHERIFF'S DEPUTIES MLEZIVA AND WINISTORFER ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THE ESTATE'S FAILURE-TO-INTERVENE CLAIMS.

A. The Failure-to-Intervene Claims Against Deputies Mleziva and Winistorfer Were Properly Dismissed as a Matter of Law.

In order to hold Deputies Mleziva and Winistorfer liable under Section 1983, the Estate must show that both deputies "(1) knew that a constitutional violation was committed; and (2) had a realistic opportunity to prevent it." *Gill v. City of Milwaukee*, 850 F.3d 335, 342 (7th Cir. 2017). Thus, if this Court finds, as the district court did, *see* (R. 176 at 13–20), that Officer

O'Brien's use of deadly force did not violate the Fourth Amendment, then Deputies Mleziva and Winistorfer cannot be held liable as a matter of law. *See Fillmore v. Page*, 358 F.3d 496, 505–06 (7th Cir. 2004); *Turner v. City of Champaign*, 979 F.3d 563, 571 (7th Cir. 2020).

Further, the Estate must do more than simply show that Deputies Mleziva and Winistorfer were on the scene at the time an unconstitutional act was committed. *See Fillmore*, 358 F.3d at 505–06 (noting that "presence without more" is insufficient to establish liability). Similarly, the Estate must show a realistic opportunity to stop unconstitutional conduct, which is a difficult bar to clear in cases where deadly force occurs in quickly unfolding circumstances. *See, e.g.*, *Stewart v. Moll*, 717 F. Supp. 2d 454, 462–63 (E.D. Pa. 2010) ("Given the quick sequence of events [whereby the suspect "was shot twice in rapid succession"], . . . [the defendant-officer] simply did not have any opportunity to intervene . . . .").

Here, the undisputed evidence in the record shows that Deputies Mleziva and Winistorfer could not have predicted that Officer O'Brien's use of deadly force would occur or be unconstitutional, and they did not have realistic, safe opportunities to prevent it. Both Deputies Mleziva and Winistorfer relied on information they learned from dispatchers and their

fellow law enforcement officers on scene,[5] and they believed that Mr. Tubby was armed with a firearm. (R. 111 ¶¶ 84, 120; R. 176 at 24–25.)

In analyzing the Estate's failure-to-intervene claim, the district court reasoned as follows:

> 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.

(R. 176 at 25.) The district court's observations are based on a common-sense, practical interpretation of the undisputed facts in the record.

Deputy Mleziva was 15 to 20 feet away from Officer O'Brien at the time he fired his weapon, (R. 111 ¶ 127), and thus had no reasonable opportunity to predict or prevent Officer O'Brien's use of force. Further, even from that distance, Deputy Mleziva perceived himself to be in imminent danger of death or serious bodily harm, making a distanced, split-second, pre-emptive constitutional analysis of Officer O'Brien's potential use of deadly force simply not feasible. (R. 111 ¶ 128.)

[5] *U.S. v. Sawyer*, 224 F.3d 675, 680 (7th Cir. 2000) ("When law enforcement officers are in communication regarding a suspect, the knowledge of one officer can be imputed to the other officer under the collective knowledge doctrine."); *United States v. Nicksion*, 628 F.3d 368, 376 (7th Cir. 2010) ("Under the 'collective knowledge' doctrine, the officers who actually make the arrest need not personally know all the facts that constitute probable cause if they reasonably are acting at the direction of other officers.").

Similarly, Deputy Winistorfer testified that, in the moment before Officer O'Brien stepped in front of him and fired his weapon, he perceived himself and his fellow officers to be in imminent danger of death or serious bodily harm. (R. 111 ¶¶ 121–23, 126.) Deputy Winistorfer's perception was based not only on his knowledge that Mr. Tubby was believed to have a firearm, but also on his firsthand observations of Mr. Tubby running directly at him, the inability of non-lethal force to stop Mr. Tubby, and his inability to see Mr. Tubby's hands because they were under his shirt. (R. 111 ¶ 124.) As such, Deputy Winistorfer feared that he was the last line of defense as part of the exterior perimeter containment, and he believed that other individuals or citizens in the community could be in danger if Tubby escaped. (R. 111 ¶¶ 121–23.)

While Deputy Winistorfer was processing what he perceived to be life-threatening events unfolding in 10 seconds, Officer O'Brien stepped in front of him immediately before firing his weapon, making it wholly impractical and unsafe for Deputy Winistorfer to attempt to stop Officer O'Brien from using deadly force. *See* (R. 111 ¶ 126; R. 135 ¶ 109.) Indeed, it was realistically impossible for Deputy Winistorfer to know that Officer O'Brien was about to use deadly force, let alone determine whether such force would have been unconstitutional, necessitating pre-emptive intervention.

The Estate argues that Deputies Mleziva and Winistorfer were present

and failed to prevent Officer O'Brien's use of deadly force. *See* (Appellants' Br. at 41–44, ECF No. 15.) The Estate also argues that the deputies had reason to know that excessive force was about to be used, and that they had a realistic opportunity to prevent such force. (*Id.*) However, as was the case before the district court, the Estate has not presented the Court with any legal authority from this circuit that expands the duty to intervene to include fast-paced, dynamic situations where officers are required to predict and prevent another officer from using deadly force, particularly where a suspect is believed to be armed with a firearm. *See* (*id.* at 42) (citing *Robins v. Meecham*, 60 F.3d 1436, 1442 (9th Cir. 1995); *Stewart v. City of Prairie Vill.*, 904 F. Supp. 2d 1143, 1158 (D. Kan. 2012); *Donna Mills v. Owsley Cnty. Ky.*, 483 F. Supp. 3d 435, 468–69 (E.D. Ky. 2020)).

The Estate did not genuinely dispute the facts that Deputies Mleziva and Winistorfer relied on information they learned from dispatchers and their fellow law enforcement officers on scene, and that they believed that Mr. Tubby was armed with a firearm. (R. 136 ¶¶ 84, 120.) Importantly, the deputies were not alone in this belief. *See* (R. 135 ¶¶ 44, 46, 52, 53, 62, 105, 110–13, 115, 118, 121, 123; R. 136 ¶¶ 81, 120, 24.) Even the Estate's own expert witness does not criticize the officers on scene for believing Mr. Tubby was armed if they were told as much by Officer O'Brien. (R. 136 ¶ 129.)

Thus, despite their efforts to cast doubt on Deputies Mleziva's and

Winistorfer's beliefs that Mr. Tubby was armed, the Estate did not present admissible evidence or cite to specific facts creating a genuine dispute as to the deputies' beliefs, and the Estate has not presented any legal authority showing why the collective knowledge doctrine would not be applicable here. *See* (R. 136 ¶¶ 120–24, 128); *see Sawyer*, 224 F.3d at 680.

The Estate primarily relies on one case, *Abdullahi*, to support its untenable contention that the questions of whether Deputies Mleziva and Winistorfer had sufficient time to predict that Officer O'Brien would use deadly force, determine that such use of force would be unconstitutional, and prevent such use of force are questions that should be left to the finder of fact. (Appellants' Br. at 42–43, ECF No. 15) (citing *Abdullahi v. City of Madison*, 423 F.3d 763 (7th Cir. 2005)).

However, *Abdullahi* is readily distinguishable. In *Abdullahi*, the use of force at issue was an officer kneeling on the back of the suspect's shoulder while the suspect was prone on the ground with his hands behind his back for between 30 and 40 seconds, and where the suspect died two minutes later. *Id.* at 765–66, 769. The failure-to-intervene claims were directed at officers who were securing the suspect's legs and applying handcuffs while their fellow officer knelt on the suspect's shoulder. *Id.* The Court explained that a "realistic opportunity to intervene" may exist whenever an officer could have "called for a backup, called for help, or at least cautioned [the officer using

excessive force] to stop," ultimately holding that questions of fact as to the reasonableness of the force and the opportunity to intervene precluded summary judgment. *Id.* at 773–75.

Here, it is undisputed that approximately 10 seconds passed between Mr. Tubby exiting the squad vehicle and Officer O'Brien's use of deadly force. (R. 135 ¶ 109.) Unlike in *Abdullahi*—where officers may have had the chance to observe the challenged use of force for 30 to 40 seconds and, at the very least, caution the officer to stop the force as it occurred—no such window of time or stationary circumstances existed for Deputies Mleziva and Winistorfer. It is undisputed that Mr. Tubby was moving during the 10 seconds following his departure from the squad vehicle, and multiple types of non-lethal force were utilized in that timeframe—all before Officer O'Brien's use of deadly force. *See* (R. 136 ¶¶ 116–18; R. 142 ¶¶ 45–49.)

Further, unlike the failure-to-intervene claim in *Abdullahi*, which this Court characterized as a "close one" at summary judgment, 423 F.3d at 774, the Estate seeks to hold Deputies Mleziva and Winistorfer liable for failing to prevent allegedly unconstitutional conduct from ever occurring in a fraction of the time and under far more dynamic circumstances than those contemplated in *Abdullahi*. The Estate's own proposed facts submitted at summary judgment acknowledge that, unlike the kneeling officer in *Abdullahi*, Officer O'Brien was moving immediately before and as he fired his

weapon. *See* (R. 142 ¶ 54.) No jury could possibly conclude that, in less than 10 seconds, Deputies Mleziva and Winistorfer should have observed Mr. Tubby and all of the other officers' reactions on scene, anticipated Officer O'Brien's use of deadly force, determined its constitutionality, and prevented it ever from happening while Mr. Tubby and Officer O'Brien were moving. *Abdullahi* offers no guidance here other than to show just how far the Estate's failure-to-intervene claim seeks to expand the law.

Thus, the undisputed evidence shows that Deputies Mleziva and Winistorfer did not know that Officer O'Brien would use deadly force, and they did not have sufficient time or information to pre-determine whether such force would be unconstitutional. Further, they did not have a reasonable opportunity to safely intervene in the use of force due to their positioning and the quick sequence of events. Accordingly, Deputies Mleziva and Winistorfer did not fail to intervene as a matter of law and they are entitled to judgment as a matter of law. This Court should affirm the district court's decision.

B. Alternatively, Deputies Mleziva and Winistorfer are Entitled to Qualified Immunity.

The United States Supreme Court has "repeatedly stressed the importance of resolving immunity questions at the earliest possible stage of litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). The Court has

explained that "government officials performing discretionary functions are shielded 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).

The purpose of qualified immunity is to allow for reasonable errors "because officials should not err always on the side of caution [for the] fear of being sued." *Humphrey v. Staszek*, 148 F.3d 719, 727 (7th Cir. 1998). The qualified immunity defense "erects a substantial barrier for plaintiffs, and appropriately so because qualified immunity is designed to shield from civil liability all but the plainly incompetent or those who knowingly violate the law." *Kernats v. O'Sullivan*, 35 F.3d 1171, 1177 (7th Cir. 1994).

There is generally a two-part test in determining whether qualified immunity should be granted to a governmental actor: (1) whether the plaintiff has established a deprivation of a constitutional right; and, if so, (2) whether the right was clearly established at the time of the alleged violation. *Wilson v. Layne*, 526 U.S. 603, 609 (1999). The question of whether immunity attaches is a question of law. *Elder v. Holloway*, 510 U.S. 510, 516 (1994). If qualified immunity applies to an officer's conduct, "the officer should not be subject to liability or, indeed, even the burdens of litigation." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). It is the Estate's burden to

show that the law was "clearly established" at the time of the incident. *See Schlessinger v. Salimes*, 100 F.3d 519, 523 (7th Cir. 1996).

Law enforcement officers are entitled to qualified immunity for their actions if "a reasonable officer could have believed [that the action taken was] lawful, in light of clearly established law and the information the officers possessed." *Estate of Starks v. Enyart*, 5 F.3d 230, 233 (7th Cir. 1993). To show that a law was clearly established, a plaintiff must offer either a closely analogous case or evidence that the defendant's conduct was patently violative of a constitutional right that reasonable officials would know without guidance from a court. *See Hope v. Pelzer*, 536 U.S. 730, 739 (2002). An allegedly violated right must have been "defined at the appropriate level of specificity before a court can determine if it was clearly established." *See Wilson v. Layne*, 526 U.S. 603, 615 (1999).

In addition, the Seventh Circuit requires "caselaw which clearly and consistently recognizes the constitutional right." *Lojuk v. Johnson*, 770 F.2d 619, 629 (7th Cir. 1985) (internal quotations and citations omitted) (finding that one supporting circuit court case, one supporting district court case and several other distantly related cases are insufficient to clearly establish a constitutional right). Recently, the Supreme Court again strongly reminded lower courts of the importance of considering whether rights were clearly

established in excessive-force cases. *City of Escondido, Cal. v. Emmons*, --- U.S. ---, 139 S. Ct. 500, 503 (2019).

Here, it was not clearly established on October 19, 2018 that either Deputy Mleziva or Deputy Winistorfer were constitutionally required to predict and prevent Officer O'Brien's use of deadly force in the unique and dynamic circumstances presented by Mr. Tubby's actions. Deputy Mleziva's physical distance from Officer O'Brien at the time he discharged his weapon in and of itself deprived Deputy Mleziva of any reasonable opportunity to prevent or deter Officer O'Brien's use of force, let alone allow him to predict it or gauge its potential constitutionality. Deputy Mleziva's fear for his own life based on his reasonable belief that Tubby was armed with a firearm only further confirms his lack of reasonable opportunity or purpose for intervention.

Similarly, Officer O'Brien stepped in front of Deputy Winistorfer immediately before shots were fired, making it impractical and unsafe for Deputy Winistorfer to pre-emptively react or attempt to stop Officer O'Brien from using deadly force, and indicating a quick unfolding of events that would have made it nearly impossible for Deputy Winistorfer to know that Officer O'Brien was about to use deadly force or that such force would have been unconstitutional. Again, Deputy Winistorfer's fear for his own life based on his reasonable belief that Mr. Tubby was armed with a firearm only

further illustrates the lack of reasonable opportunity for him to safely predict or intervene in Officer O'Brien's use of deadly force.

Accordingly, at the very least, Deputies Mleziva and Winistorfer are entitled to qualified immunity. Because this Court may affirm summary judgment "on any ground supported by the record so long as the issue was raised and the non-moving party had a fair opportunity to contest the issue in the district court," *Richards v. U.S. Steel*, 869 F.3d 557, 562 (7th Cir. 2017) (internal quotes omitted), (R. 110 at 10–13), the Court should alternatively affirm dismissal of the failure-to-intervene claims against Deputies Mleziva and Winistorfer on qualified immunity grounds.

III. BROWN COUNTY AND LIEUTENANT ZEIGLE ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THE ESTATE'S STATE-CREATED-DANGER THEORY.

Although the Estate does not challenge the constitutionality of any uses of force prior to Officer O'Brien's use of deadly force, the Estate alleges that Lt. Zeigle, in his individual and official capacities, and Brown County are liable for a "state created danger." (R. 83 ¶¶ 62–71; Appellants' Br. at 44–53, ECF No. 15.) For the reasons explained below, the Estate's state-created-danger theory stretches both the law and the undisputed facts beyond their limits, such that this Court should affirm the district court's dismissal of the Estate's claims as a matter of law.

A. The Estate Attempts to Reinvent its State-Created-Danger Argument for the First Time on Appeal.

On appeal, the Estate summarizes its criticism of the district court's state-created-danger holding as follows:

> 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.

(Appellants' Br. at 21, 45–46, ECF No. 15.)

More specifically, the Estate argues that "[t]he District Court's [state-created-danger] analysis was flawed because it did not appreciate that *White* [*v. Rochford*, 592 F.2d 381 (7th Cir. 1979),] is the foundational case for the state-created[-danger] doctrine, not only in this Circuit but also nationwide." (Appellants' Br. at 45, ECF No. 15.) The Estate also asserts that "[t]he District Court's premise that the state-created danger doctrine traces its origins to *DeShaney* [*v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989),] is wrong." (*Id.* at 46.)

These arguments are new. At the district court, the Estate expressly acknowledged: (1) "*DeShaney*[was] a case that indirectly led to the state-created danger doctrine," and (2) "the state-created danger doctrine has its origins in cases concerning private violence . . . ." (R. 133 at 18–19.) Although this shift in the Estate's state-created-danger argument is ultimately inconsequential to this Court's analysis, the Court should nonetheless disregard these new formulations of the argument because they were not raised and argued to the district court. *Nelson v. City of Chicago*, 992 F.3d 599, 604 (7th Cir. 2021); *Mahran v. Advocate Christ Medical Center*, 12 F.4th 708, 713 (7th Cir. 2021).

Further, the Estate's decision to reframe its approach to the state-created-danger argument for the first time on appeal is indicative of the lack of support the theory finds in this Court's precedent.

B. The Estate's State-Created-Danger Theory is Not Cognizable Based on This Court's Precedent and the Circumstances in This Case.

In 2019, this Court clarified that "state created danger" refers to a judicially created exception to the rule set out in *DeShaney*, a Supreme Court case holding "that the Constitution, as a charter of negative liberties, does not require the government to protect the public from *private predators* . . . ." *Weiland v. Loomis*, 938 F.3d 917, 918 (7th Cir. 2019) (emphasis added). In *Weiland*, the Court granted qualified immunity to a prison guard who

allowed a hospitalized prisoner an opportunity to escape and steal his weapon, causing non-physical injuries to the plaintiffs—two persons at the hospital. *Id.*

The Court explained that "[t]he 'state-created danger exception' to *DeShaney* does not tell any public employee what to do, or avoid, in any situation. It is a principle, not a rule. And it is a principle of liability, not a doctrine (either a standard or a rule) concerning primary conduct." *Id.* at 919; *see also Johnson v. City of Philadelphia*, 975 F.3d 394, 399–400 n.7–9 (3d Cir. 2020) (citing *Weiland* and collecting other cases critical of the state-created-danger theory).

In *Weiland*, the Court recognized the Supreme Court's undisturbed precedent that "the Due Process Clause of the Fourteenth Amendment does not require a state to protect its residents from *private violence*." 938 F.3d at 919 (emphasis added). "Other courts cannot create an 'exception' to *DeShaney* that contradicts this principle, and as a result we cannot treat the 'state-created danger exception' as a rule of primary conduct forbidding any acts by public officials that increase *private* dangers." *Id.* (emphasis added).

The Court further revisited some of its prior cases that articulated a three-part test for state-created-danger, which, in the Court's view, did not have its footing in *DeShaney*:

> 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.

Id. at 920 (quoting *Johnson v. Rimmer*, 936 F.3d 695, 708 (7th Cir. 2019), *King v. East St. Louis School District*, 496 F.3d 812, 817–18 (7th Cir. 2007)). After examining its own cases employing this formulaic three-part test, the Court noted that its cases with the strongest connection to the reasoning in *DeShaney* were those "decisions [that] find liability outside of prisons when the state has disabled or undermined self-help or sources of private assistance." *Id.* at 921.

Since its decision in *Weiland*, the Court has had the opportunity to revisit its state-created-danger jurisprudence in other contexts. For instance, in February of this year, the Court again revisited the history of the state-created-danger exception to *DeShaney* in a case where the Court held that the City of Chicago was entitled to judgment as a matter of law when an off-duty Chicago police officer shot the plaintiff in the head during an argument after a night of drinking. *First Midwest Bank Guardian of Estate of LaPorta v. City of Chicago*, 988 F.3d 978, 982–83, 988–91 (7th Cir. 2021).

In *LaPorta*, the Court again traced the origin of the state-created-danger theory to *DeShaney*:

> ***DeShaney*'s second exception** arises only by implication from a brief observation in the Court's opinion. The Court explained that although the county and its social workers "may have been aware" of the dangers the child faced in his father's home, they "played no part in the[ ] creation" of those dangers. *Id.* at 201, 109 S. Ct. 998. This language is generally understood as a second exception to *DeShaney*'s general rule, one that applies when the state "affirmatively places a particular individual in a position of danger the individual would not otherwise have faced." *Doe v. Village of Arlington Heights*, 782 F.3d 911, 916 (7th Cir. 2015) (quoting *Buchanan-Moore*, 570 F.3d at 827).
>
> **The *DeShaney* exception for state-created dangers** is narrow. *Id.* at 917. . . . .
>
> **Unless one of these limited exceptions applies, the state has no duty under the Due Process Clause to protect against private violence**. *DeShaney* made that clear, and we have frequently applied its teaching. . . . .

LaPorta v. City of Chicago, 988 F.3d 978, 988–89 (7th Cir. 2021) (emphasis added).

Similarly, in March of this year, the Court held that a police officer's claim premised on the state-created-danger theory failed as a matter of law where the officer alleged that her sergeant and other governmental actors increased the danger she faced in responding to an armed robbery, in part, by ignoring her calls for assistance. *Nelson*, 992 F.3d at 601–04.

In *Nelson*, the Court found multiple flaws in the plaintiff's theory, not the least of which was her status as a police officer: "That state-created-

danger doctrine does not apply to a public employee who has agreed to do dangerous work, whether the dangers are posed by animate or inanimate causes." *Id.* at 605. Therefore, although the plaintiff "tried to state a claim under the 'state-created-danger' exception to the general rule that the Due Process Clause does not protect a person from harm from a **private actor**," the Court concluded that, "[t]he claim fails." *Id.* at 604 (emphasis added).

This Court's discussions in *Weiland*, *LaPorta*, and *Nelson* illuminate how the Estate's claim stretches the state-created-danger theory beyond its already hazy limits. The Estate seeks to morph the theory from one that considers a state actor's narrow window for potential liability by exposing a citizen to "private" sources of harm, into one that applies Fourteenth-Amendment scrutiny to law enforcement officials' decisions prior to a fellow, on-duty officer's seizure by force under the Fourth Amendment. *See Weiland*, 938 F.3d at 919; *see also D.S. v. East Porter County School Corp.*, 799 F.3d 793, 798 (7th Cir. 2015) (characterizing "state created danger" as an "exception" to the rule that the Due Process Clause "generally does not impose upon the state a duty to protect individuals from harm by *private* actors" (emphasis added)).

The state-created-danger theory's inapplicability to this case is highlighted by its close resemblance to an attempt to hold Lt. Zeigle and Brown County liable for acts performed prior to Officer O'Brien's seizure of

Mr. Tubby by deadly force. This Court has previously held that pre-seizure conduct is not subject to Fourth Amendment scrutiny, and it is far from clearly established that such conduct is subject to scrutiny under the Due Process Clause as an exception to *DeShaney*. *See Marion v. City of Corydon, Indiana*, 559 F.3d 700, 705 (7th Cir. 2009) ("[P]re-seizure police conduct cannot serve as a basis for liability under the Fourth Amendment; we limit our analysis to force used when a seizure occurs."); *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992) (an officer's "pre-seizure conduct is not subject to Fourth Amendment scrutiny"); *see also Williams v. Indiana State Police*, 797 F.3d 468, 483 (7th Cir. 2015) ("Our caselaw is far from clear as to the relevance of pre-seizure conduct, or even as to a determination as to what conduct falls within the designation 'pre-seizure,' although the majority of cases hold that it may not form the basis for a Fourth Amendment claim.").

The Estate's Opening Brief is notably devoid of any meaningful discussion of *Weiland*, *LaPorta*, or *Nelson*. *See* (Appellants' Br. at 44–53, ECF No. 15.) However, as these recent decisions make clear, the state-created-danger theory is a creature of substantive due process that evolved through various courts' interpretations of the Supreme Court's discussion in *DeShaney*. The theory may provide citizens with a very narrow avenue of relief under Section 1983 where the state, through affirmative acts, places a citizen in the way of or increases the danger of private harm—whether that

harm be at the hand of another private citizen or some other non-governmental source, like the weather.

At the district court, the Estate conceded that the state-created-danger theory has its origins in cases concerning private dangers and the state playing a part in the creation of the danger or rendering a citizen more vulnerable to the danger. (R. 133 at 18–19.) However, the Estate nonetheless attempts to extend this theory to apply to conduct far beyond the circumstances that it was ever arguably intended to cover. Indeed, by opening its argument reciting the "three elements" of a "state-created danger claim," *see* (Appellants' Br. at 44, ECF No. 15), the Estate overlooks this Court's admonition that those elements do not have their "provenance in *DeShaney*." *Weiland*, 938 F.3d at 920.

Instead, the Estate focuses on this Court's pre-*DeShaney* decision in *White v. Rochford*, (Appellants' Br. at 45–46, ECF No. 15), where exposure to cold weather was the direct inflictor of harm, 592 F.2d at 382. As the County Appellees noted in their briefing before the district court, *White* falls into the category of cases distinguishable from the circumstances here because the source of direct harm came in the form of something other than a government actor. *See* (R. 140 at 9.) Thus, whether or not *White* contemplated a state-created-danger theory before *DeShaney* is immaterial because it is

distinguishable from the present case in that the direct source of danger was not a government actor.

That distinguishing feature in *White* is consistent throughout all of the cases on which the Estate relies, *see* (Appellants' Br. at 47–48, ECF No. 15), as the primary actors or sources of direct harm on the plaintiffs came about in non-governmental capacities, such as: an intoxicated pedestrian-plaintiff who fell down an embankment after officers allowed her to walk home alone, *Kneipp v. Tedder*, 95 F.3d 1199, 1201–04 (3d Cir. 1996); an intoxicated bar patron-plaintiff who was ejected from a bar by police, went missing, and died from hypothermia outdoors, *Munger v. City of Glasgow Police Dept.*, 227 F.3d 1082, 1084–85 (9th Cir. 2000); a plaintiff who died of respiratory failure after officers were called to his house, cancelled a call to emergency medical services, and left the plaintiff alone, despite his obvious need for urgent medical care, *Penilla v. City of Huntington Park*, 115 F.3d 707, 708 (9th Cir. 1997);[6] a friendly-fire case where no substantive due process or state-created-danger theories were at issue, and an officer's estate alleged unlawful seizure under the Fourth Amendment and municipal liability for failure to train and control fellow officers, *Jensen v. City of Oxnard*, 145 F.3d 1078, 1081–83,

[6] Although the Estate criticizes the district court for "attempt[ing] to distinguish some, but not all, of this precedent," (Appellants' Br. at 48, ECF No. 15), the Estate did not present all of this precedent to the district court. Specifically, the Estate did not cite to *Munger* or *Penilla* in its briefing. *See generally* (R. 132–133.)

1087 (9th Cir. 1998)); and an off-duty,[7] intoxicated police officer driving a car, *Pena v. DePrisco*, 432 F.3d 98, 102 (2d Cir. 2005).

Thus, in each of the state-created-danger cases the Estate cites, the plaintiffs did not have recourse under Section 1983 against the actors or occurrences that directly injured them because those actors or sources of harm were not government employees acting under color of law. However, because the defendants in those state-created-danger cases were acting within the scope of their government employment, and because their affirmative acts allegedly put the plaintiffs in positions of harm by non-governmental people or phenomena, the perceived exception to the *DeShaney*

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[7] The Estate argues that *Pena* is not distinguishable from the present case, despite the fact that the primary inflictor of harm was an off-duty police officer. (Appellants' Br. at 48 n.2, ECF No. 15.) Specifically, the Estate asserts that the police officer's off-duty status had no bearing on whether or not he was a "state actor," such that *Pena* exemplifies an application of the state-created-danger theory of liability to circumstances where the primary inflictor of harm was a state actor. (*Id.*) However, the Estate's position runs counter to this Court's reasoning in *LaPorta*. 988 F.3d at 991.

In *LaPorta*, the Court was unequivocal in its analysis of whether the officer was a government or private actor:

> LaPorta's claim fails at this first step. He did not suffer a deprivation of a right secured by the federal Constitution or laws. **It's undisputed that Kelly was not acting under color of state law when he shot LaPorta. His actions were wholly unconnected to his duties as a Chicago police officer. He was off duty. . . . . This was, in short, an act of private violence.**

Id. at 987 (emphasis added). Indeed, if the officer had been on duty—i.e., a government actor—then the plaintiff's claim would have arguably come under the Fourth Amendment's protection against unreasonable seizures. *Plumhoff v. Rickard*, 572 U.S. 765, 774 (2014) ("A claim that law-enforcement officers used excessive force to effect a seizure is governed by the Fourth Amendment's 'reasonableness' standard.").

rule arguably gave those plaintiffs recourse under Section 1983 and the substantive facet of the Due Process Clause.

By contrast, here, the Estate has alleged that a governmental actor acting under color of law shot someone, which constituted an unlawful seizure under the Fourth Amendment. (R. 83 ¶¶ 26–32, 50–61.) The Estate has not cited any case law from this Court or beyond that holds a state-created-danger theory of liability can exist in tandem with such claims for the same injury. In fact, just last month, the Sixth Circuit expressly recognized that its own "line of cases on the *state created danger exception*[to *DeShaney*] . . . includes the requirement that the state must expose the plaintiff 'to private acts of violence.'" *Sexton v. Cernuto*, --- F.4th ---, No. 21-1120, 2021 WL 5176953, at *7 (6th Cir. Nov. 8, 2021).

Further adding to the inconsistency in its legal theory, the Estate appears to invoke terms of art from *Monell* case law by alleging that Lt. Zeigle was a "policy-making official of Brown County" whose decision to break the back window of the squad vehicle "was announcing a policy of Brown County." (R. 83 ¶ 63.) However, "[n]ot every municipal official with discretion is a final policymaker; authority to make final policy in a given area requires more than mere discretion to act." *Milestone v. City of Monroe, Wis.*, 665 F.3d 774, 780 (7th Cir. 2011); *see, e.g.*, *Latuszkin v. City of Chicago*, 250 F.3d 502, 505 (7th Cir. 2001) (holding Chicago Police Department

supervisors and superiors are not policymakers for the City of Chicago); *Soderbeck v. Burnett Cty., Wis.*, 752 F.2d 285, 292 (7th Cir. 1985) (holding that a sheriff did not qualify as a policy-making official of the county government).

Moreover, "[t]he fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481–82 (1986). In order to prevail on an official-capacity claim premised on a single decision by an alleged policymaker, the Estate had to show that a "policymaker responsible for establishing final policy with respect to the subject matter in question made a deliberate choice to follow a course of action from among various alternatives." *De Smet v. Snyder*, 653 F. Supp. 797, 802 (E.D. Wis. 1987); *Pembaur*, 475 U.S. at 483.

Simply put, the undisputed evidence shows that Lt. Zeigle was not a final policymaker for Brown County announcing municipal policy that would carry the force of law. Rather, Lt. Zeigle was acting as a highly trained, tactical law enforcement officer making tactical decisions tailored to a very specific and dynamic situation. The decisions surrounding his plan to safely bring Mr. Tubby into custody did not establish a Brown County rule that had the effect of law to be applied to any situation in the future.

In sum, as shown by its conflation of various inapplicable legal theories and citations to readily distinguishable cases, the Estate's state-created-danger theory of liability against Lt. Zeigle and Brown County does not amount to cognizable Section 1983 liability for Mr. Tubby's death. The Estate's theory strains the evidence and the law in such a way that fails to reconcile different standards of constitutional scrutiny, fails to reckon with this Court's recent treatment of the state-created-danger theory, and fails to properly contextualize the facts of this case. For these reasons, the Estate's federal claims against Lt. Zeigle and Brown County fail as a matter of law, and the Court should affirm the district court's decision.

C. Even if the Estate's State-Created-Danger Theory is Cognizable, Lt. Zeigle's Conduct did not Shock the Conscience, and, Alternatively, he is Entitled to Qualified Immunity.

Even setting aside the legal insufficiency of the Estate's theory of liability and applying the scrutinized elements from prior state-created-danger cases, *see Weiland*, 938 F.3d at 920, Lt. Zeigle and Brown County are nonetheless entitled to judgment as a matter of law.

At the outset, the Estate confuses which standard is applicable to its substantive due process theory. *See* (Appellants' Br. at 49, ECF No. 15.) Indeed, at oral argument before the district court, counsel for the Estate remarked: "There's also some argument about the legal standard and what

does it mean to shock the conscience? Well, in this case, shock the conscience means deliberate indifference." (R. 192 at 44:21–23.)

The Estate's conception of the applicable standard is flawed. Rather, "because the right to protection against a state-created danger arises from the substantive component of the Due Process Clause, the state's failure to protect the plaintiff must shock the conscience." *LaPorta*, 988 F.3d at 989. "Only the most egregious official conduct will satisfy this stringent inquiry." *Id.* (internal quotes omitted).

Here, the undisputed evidence shows that Lt. Zeigle—either in his official or individual capacities—did not exhibit conduct which shocks the conscience. Alternatively, and at the very least, Lt. Zeigle is entitled to qualified immunity in his individual capacity.

Lt. Zeigle has been a lieutenant at the Brown County Sheriff's Office since 2012, and he has been the SWAT commander for the Brown County SWAT team since approximately 2016. (R. 111 ¶ 5.) As discussed above, Lt. Zeigle has extensive training in relation to tactical scenarios relating to suspects who barricade themselves in buildings, houses, and vehicles. Lt. Zeigle testified that his decisions on October 19, 2018, preceding Officer O'Brien's use of deadly force were guided by his training with NTOA. (R. 111 ¶ 94.) In his deposition, he discussed NTOA training he received for assessing barricade situations, and he discussed a general, yet dynamic

decision-making continuum, including establishing perimeters, creating communication opportunities, establishing an emergency team of officers, creating diversions, showing force, and using force. *See* (R. 111 ¶¶ 42–68.)

When he arrived on scene, Lt. Zeigle considered a plan proposed by officers from the City of Green Bay Police Department, but, because in Lt. Zeigle's view that plan skipped important steps in NTOA decision-making continuum, he decided to implement a different plan. (R. 111 ¶¶ 92–93.) As the Commander of the Brown County SWAT team, Lt. Zeigle assessed the situation and determined that a SWAT activation was not necessary because there were ample resources already on scene, including multiple officers on scene with tactical training, an armored vehicle, and a K-9 unit. (R. 111 ¶¶ 89–95.) He observed that there were officers on scene with perimeters established, and he was aware that Mr. Tubby was not actively communicating with anyone on scene. (R. 111 ¶ 96.)

Like Deputies Mleziva and Winistorfer, Lt. Zeigle believed that Mr. Tubby was armed with a firearm. (R. 111 ¶¶ 84–86.) Thus, he approached the scene and his tactical decision-making like an armed barricade situation, and his tactical plan reflected the hallmarks of NTOA continuum on which he had been trained for years. *See* (R. 111 ¶¶ 93–108.) For example, by breaking the back window to the squad vehicle, Lt. Zeigle sought to gain a visual on Mr. Tubby, establish a communication portal, and provide Mr.

Tubby with an opportunity to surrender. (R. 111 ¶¶ 48, 55–56, 98–99, 102–03, 109–10.) Similarly, by directing the armored vehicle into the sally port, Lt. Zeigle sought to allow officers to have a better vantage point while maintaining safety behind cover, as well as putting an arrest team in place closer in proximity to Mr. Tubby. (R. 111 ¶¶ 16, 55–56, 59–60, 98, 108–11.) Further, by introducing OC spray into the vehicle, Lt. Zeigle sought to create a diversion or get a reaction from Mr. Tubby that may induce his peaceful surrender or otherwise provide officers with better visual. (R. 111 ¶¶ 58–60, 100–01, 112–14.)

In short, nothing in Lt. Zeigle's development or execution of his plan shocks the conscience. Lt. Zeigle's plan and execution of that plan were rooted within the parameters of his training, experience, and the guidelines of NTOA. While the Estate attempts to characterize Lt. Zeigle as someone who was solely focused on returning the Jail to "normal operations," the Estate distorts Lt. Zeigle's testimony, which showed that he was actually concerned about members of the public coming to the Jail and becoming involved in what was believed to be a dangerous situation. (R. 142 ¶ 27.) Nothing in Lt. Zeigle's tactical decision-making process suggests that he had any motive, focus, or goal other than a calculated and informed effort to safely resolve the barricade situation by inducing Mr. Tubby's peaceful surrender.

Indeed, the correctional officer's conduct in *Weiland* is incomparably more egregious than Lt. Zeigle's methodical, tactical decision-making process, as the defendant in *Weiland* disobeyed an order, unshackled a prisoner, and allowed his firearm to be taken from him. 938 F.3d at 918. Lt. Zeigle's conduct is far from conscience-shocking by comparison, and Lt. Zeigle should enjoy the same qualified immunity protection as the one enjoyed by the defendant in *Weiland*. At the very least, *Weiland* shows that clearly established law does not support an individual-capacity claim against Lt. Zeigle.

Still, the Estate superficially criticizes Lt. Zeigle's plan, focusing primarily on his decision against initiating a formal SWAT team activation. (Appellants' Br. at 50–52, ECF No. 15.) The Estate's arguments around a hypothetical SWAT team activation and the events which could have transpired are rooted in pure speculation. The Court is "not required to draw every conceivable inference from the record, . . . and mere speculation or conjecture will not defeat a summary judgment motion." *McCoy*, 341 F.3d at 604 (internal quotes and citations omitted); *Springer v. Durflinger*, 518 F.3d 479, 484 (7th Cir. 2008).

Moreover, there is no evidence that Lt. Zeigle was deliberately indifferent or otherwise malicious in his methodical decision-making—all of the undisputed evidence shows that, at the very least, Lt. Zeigle's thought

process was guided by his training and in good faith both in his official and individual capacities.

To that end, Lt. Zeigle is entitled to qualified immunity. The Estate's argument that Lt. Zeigle's decision-making should be evaluated under the deliberate-indifference standard, rather than the shocks-the-conscience standard applied in the state-created-danger context is illustrative of the fact that the state-created-danger theory of liability was not clearly established at the time of this incident. The Estate does not cite controlling precedent establishing which level of scrutiny is applicable. (Appellants' Br. at 49, ECF No. 15); *Kemp v. Liebel*, 877 F.3d 346, 351 (7th Cir. 2017) (explaining that while plaintiffs need not "point to an identical case finding the alleged violation unlawful, but existing precedent must have placed the statutory or constitutional question beyond debate." (internal quotations and citations omitted)); *see also LaPorta*, 988 F.3d at 990 ("*Monell* and *DeShaney* are not competing frameworks for liability. The two cases concern fundamentally distinct subjects.").

Moreover, this Court's decision in *Weiland* called into question the compatibility of this circuit's prior applications of the state-created-danger theory, as well as its status throughout the country. 938 F.3d at 921 ("Every once in a while, a court should step back and ask whether local jurisprudence matches the instructions from higher authority."). Thus, the *Weiland*

decision provides a clear indication of the lack of clarity in the state-created-danger theory's application in this circuit and in this case. The Estate has provided no legal authority that would have put Lt. Zeigle on notice that his efforts to follow his NTOA training in extracting a believed-to-be-armed, barricaded suspect from a squad vehicle in a sally port would violate the arrestee's substantive due process rights when that suspect was shot by a different agency's officer acting under color of law.

Accordingly, the County Appellees are entitled to judgment as a matter of law as to the Estate's state-created-danger theory, and this Court should affirm the district court's decision.

CONCLUSION

For all of the aforementioned reasons, the Defendants-Appellees, Sheriff Todd J. Delain, Heidi Michel, Brown County, Joseph P. Mleziva, Nathan K. Winistorfer, and Thomas Zeigle, respectfully request that this Court affirm the district court's Order dismissing this action in its entirety as to these Defendants-Appellees.

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), FRAP RULE 32(c)

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

I hereby certify that this brief conforms to the type-volume rules contained in F.R.A.P Rule 32(a)(7) and 7th Circuit Rule 32(c) for a brief produced with a proportionally spaced 12-point (or larger) type-face font. The length of this brief is 13,264 words.

Dated this 1st day of December, 2021.

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PROOF OF SERVICE

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CERTIFICATE OF SERVICE

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