No. 21-2101

IN THE
United States Court of Appeals
FOR THE SEVENTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

As explained in Plaintiff-Appellants' ("Appellants") opening brief, the shooting of Jonathon Tubby was clearly unconstitutional. Tubby's empty hands were visible prior to the shooting, and he was handcuffed, blinded from pepper spray, face-down on the ground, and under the control of a police canine. Unable to rebut these facts, Defendant-Appellees ("Defendants") simply ignore them, or attempt to sweep aside as "speculation." But, there is record evidence to support all of Appellants' facts, and it is Defendants who resort to speculation in their effort to defend the District Court's indefensible decision.

The Green Bay Defendants, for instance, speculate that O'Brien was not in a "position" to see Tubby's empty hands—yet, O'Brien was looking directly at Tubby just before the shooting (he merely offered excuses to justify the shooting, excuses that are disproven by the video, testimony, and physical evidence). Similarly, despite evidence that Tubby was face-down when shot (he was shot through the back of the head) and blinded (he ran into a van), and the fact that he was being bitten by a police canine, the Green Bay Defendants speculate that he was not "subdued" because of an erroneous *sua sponte* search of YouTube for a factually dissimilar video.

In addition to speculation, the Green Bay Defendants attempt to improperly raise the burden—arguing that Appellants needed video evidence from the "exact perception" that O'Brien had of Tubby in the squad car, and needed video evidence conclusively showing both of Tubby's hands "simultaneously." Of course, the standard is not so demanding. Appellants have video evidence showing each of Tubby's empty hands

within a matter of a few seconds. Appellants also offered testimony of another officer who had the same view as O'Brien, and who says it did not look like Tubby had a gun in the squad car at all. These are just a few of the many factual disputes that justify reversal.

Similarly, with respect to the failure to intervene claim, the Brown County Defendants ignore the District Court's impermissible *per se* rule exempting police shootings from the duty to intervene. They also fail to address that, as a factual matter, O'Brien telegraphed his intent to use deadly force, giving Mleziva and Winisterfer a reasonable opportunity to intervene. Accordingly, factual issues exist with respect to both the merits of the claim and their qualified immunity defense.

With respect to the state-created danger claim, the Brown County Defendants cannot reconcile the District Court's decision with *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979). Accordingly, they are forced to argue that Appellants waived this argument. Not so. While Appellants acknowledged below the contribution of *DeShaney v. Winnebago Cnty.*, 489 U.S. 189 (1989) to the origins of the doctrine, they never suggested that *DeShaney* was the exclusive foundation of that doctrine. To the contrary, Appellants specifically brought *White* to the District Court's attention. The Brown County Defendants next erroneously argue that the Seventh Circuit has *sub silentio* overruled *White*—which is not possible. The Brown County Defendants then simply ask for a new rule that would provide them an exception because the danger created by Zeigle came from another state actor. They offer no rationale for this exception, which would be inconsistent with the law elsewhere and would create a substantial gap in liability for constitutional violations.

As applied to Zeigle specifically, factual issues exist regarding both the official and individual capacity state-created danger claims. His failure to deploy the SWAT team was deliberately indifferent—the Brown County Defendants acknowledge in their own brief that the situation called for SWAT activation. The failure to active SWAT lead to Tubby's death—the officers ignored his pleas for help, forced him from a secure area without informing other officers they intended to do so, and no "arrest team" was ready, forcing him to stumble around the sally port until he was shot in the head. It is beyond debate that this is unconstitutional conduct, and Zeigle is not entitled to qualified immunity.

Finally, Appellants have not abandoned any claims. They specifically explained that the District Court's dismissal of the *Monell* claim against the Green Bay Defendants, the failure to train claim against Brown County, and the state law claims were entirely dependent on the District Court's dismissal of the other claims. Opening Br. at 19–20, 23, 44, 53. Accordingly, Appellants were not required to dwell on elements of claims that the District Court did not even discuss. *Pagel v. Tin Inc.*, 695 F.3d 622, 627 (7th Cir. 2012).

ARGUMENT

A. District Court Erred in Dismissing the Excessive Force Claim Against O'Brien.

1. Any Belief That Tubby Had a Gun Was Negated Prior to Shooting.

The Green Bay Defendants dedicate substantial briefing to whether O'Brien believed he saw a gun while Tubby was in the squad car. As discussed below, the Green Bay Defendants are wrong. However, even assuming *arguendo* that O'Brien did believe he saw a gun, that belief was negated prior to the shooting. A reasonable officer would

have seen both of Tubby's empty hands, and would have known Tubby was subdued, blinded, face-down on the ground, and under control of a police canine.

a. Both of Tubby's Hands Were Visible Prior to Shooting.

While the Green Bay Defendants accuse Appellants of "speculation," it is they who speculate that "O'Brien was never in a position to see both of Tubby's hands at the same time before he fired." Green Bay Defs.' Br. at 28. There is no basis for this statement. The video showing Tubby's empty right hand was taken from a squad car positioned just outside the sally port. *See* APP034. O'Brien was also positioned just outside the sally port. O'Brien Depo., APP046 at 101:12-17; Cell Phone Video, ECF 120-31. The Green Bay Defendants notably fail to provide any citation for their assertion. In fact, O'Brien *never* testified he was unable to see Tubby. Rather, he testified he could see Tubby, and shot him *as* he fell to the ground. O'Brien Depo., ECF 121-1, at 138:23-141:7. O'Brien's version of events is disputed—Tubby fell to the ground prior to being shot. *See* Wernecke Depo., APP065-66 at 101:19—104:6; Enhanced Video, ECF 114-10 at 0:09-0:10; Dr. Tranchida Depo., ECF 114-12 at 81:19—82:9. The Green Bay Defendants cannot now manufacture a completely new argument from whole cloth to claim that O'Brien was not in "position" to see Tubby's empty hands.

The Green Bay Defendants further dispute the visibility of Tubby's empty right hand by arguing that no officer outright admitted that the hand was visible. Green Bay Defs.' Br. at 29. However, actions speak louder than words. Not a single other officer—and there were many—fired a shot. Green Bay Defs.' Initial Disclosures, ECF 120-16 at 1-5; DCI Report, APP126. In other words, despite the Green Bay Defendants' *ex facto*

narrative that Tubby "pretended to have a gun concealed under his shirt and made statements suggesting that he would use it," Green Bay Defs.' Br. at 2, if a reasonable officer *really* would have believed an armed suspect was "rushing" at him, *id.* at 10, 18, 42, one would expect the other officers next to O'Brien (who are presumably reasonable officers) to have fired. None did. Based on these facts, a jury could reasonably find that Tubby's right hand was visible.

The Green Bay Defendants further speculate (as did the District Court) that Tubby's hands were never "simultaneously" visible. Green Bay Defs.' Br. at 30. As discussed previously, Tubby's empty left hand was visible as he was forced from the squad car, and his empty right hand was visible several seconds later. From these facts, a reasonable jury could conclude either that his hands *were* simultaneously visible[1] and, more importantly, that "an objectively reasonable officer in the same circumstances" would not have concluded that Tubby was armed. *Est. of Williams v. Ind. State Police Dep't*, 797 F.3d 468, 473 (7th Cir. 2015).

To demand video evidence that Tubby's hands were simultaneously visible impermissibly raises this burden. A reasonable officer would have known Tubby was unarmed based on seeing his empty left hand and then seconds later seeing his empty right hand. Tubby was handcuffed, blinded, and slammed to the ground by a canine when his empty right hand popped out from his shirt. There has never been a suggestion

[1] Appellants previously argued this and the Green Bay Defendants are simply wrong to claim that Appellants have "acknowledge[d] that Tubby's [ ] hands were never visible at the same time." *Compare* Green Bay Defs.' Br. at 30 *with* Opening Br. at 33.

by anyone that he could have somehow transferred a gun from his right hand to his left as this happened.

b. A "Beanbag" Shotgun Does Not Sound Like A Handgun.

The Green Bay Defendants contend it was reasonable for O'Brien to believe Tubby had "already fired a shot" based on the firing of a "beanbag" shotgun. Green Bay Defs.' Br. at 35. By all accounts, this was an *un*reasonable mistake to make. In response, the Green Bay Defendants grasp at straws.

First, the Green Bay Defendants argue that the circumstances of October 19, 2018 were not "normal." However, this does not make O'Brien's mistake reasonable—many officers testified that on that night they *actually did* distinguish between the sounds of the "beanbag" shotgun and a handgun (O'Brien's). DCI Report, APP116—18, APP122—24, APP127—29; Salzmann Depo., APP102 at 102:6—103:6, E. Allen Depo., ECF 114-6 at 109:8-110:5.

Second, the Green Bay Defendants point to testimony from Lieutenant Allen that a "beanbag" shotgun sounds "basically" the same as a real shotgun. Green Bay Defs.' Br. at 31–32. No one has suggested, however, that O'Brien thought Tubby had a shotgun. At most, O'Brien has claimed he thought Tubby had a handgun with a barrel several inches long. O'Brien Depo., APP041-42 at 39:19-42:11, 43:8-12. This is significant because Lieutenant Allen specifically said that "Yes," he could tell the difference between the sound of "beanbag" shotgun and a pistol. N. Allen Depo., ECF 121-12 at 111:22-24. And, regardless, testimony of a single officer cannot eliminate this factual dispute because

multiple officers testified that they did distinguish the sounds of the "beanbag" shotgun and handgun that night.

c. Tubby Was Subdued By a Canine Face-Down On The Ground.

In addition to disputing the facts concerning the "simultaneous" visibility of Tubby's empty hands and sound of a "beanbag" shotgun, the Green Bay Defendants further dispute the facts concerning whether Tubby was subdued.

The Green Bay Defendants admit Tubby was handcuffed, but express confusion as to how that would contribute to him being subdued. Green Bay Defs.' Br. at 33. It is beyond dispute, however, that handcuffs impede a person's ability to use their hands.

Next, the Green Bay Defendants claim that the inference that Tubby was blinded is "not supported by any admissible evidence." *Id.* Not so. While sadly, Tubby is unable to testify that he was blinded, it is a reasonable inference to draw from the evidence that he was sprayed in the face with OC spray, an eye irritant, and then stumbled into a parked van. Denney Depo., APP092 at 138:16-139:13; Salzmann Depo., APP098 at 83:10—85:22, APP099 at 86:20—88:10.

Third, the Green Bay Defendants argue that it is "factually unsupported" that Tubby was face-down when shot (although they appear to concede that he was on the ground). Green Bay Defs.' Br. at 33. This is curious: the position of Tubby's bullet wounds (combined with the fact that he fell face first to the ground on his chin) demonstrate he was face-down when shot—he was shot in the top back of his head, back of his neck, and the top back of his torso. Autopsy Photos, ECF 137-7; Dr. Tranchida Depo., ECF 114-12 at 81:19—82:9; *see also* Medical Examiner's Report, ECF 112-1 at 15–17.

On this point, the Green Bay Defendants demand expert testimony on bullet trajectory and "positioning." Green Bay Defs.' Br. at 33-34. However, given the fact that Tubby fell to the ground, and the position of the bullet wounds on the top and back of his head, neck, and back, a jury could easily conclude that Tubby was face-down. Understanding this evidence is commonsense, it is not complex scientific evidence that requires an expert for a jury to understand. *See United States v. King-Vassel*, 728 F.3d 707, 716–17 (7th Cir. 2013) (reversing grant of summary judgment where expert testimony was not necessary to explain evidence).

Finally, the Green Bay Defendants dispute the characterization of Tubby being "under attack" by a canine. Green Bay Defs.' Br. at 33. Yet, the Green Bay Defendants also discuss "[t]he bite marks on Tubby's buttock." *Id.* Clearly, it is fair to characterize Tubby as being "under attack," and regardless, it is undisputed that Tubby was under control, he was being pulled backward. Enhanced Video, ECF 114-10 at 0:09-0:10; Salzmann Depo., APP101 at 98:15-100:15.

Based on the foregoing, the record supports inferences that, at the time he was shot, Tubby was handcuffed, blinded, face-down on the ground, and under the control of a police canine. Given this, it is fair to characterize him as "subdued." Notably, while accusing Appellants of "speculation," the Green Bay Defendants speculate that, despite all of this, Tubby somehow could have fired a weapon (which no reasonable officer would have thought he had, as discussed above). On that point, the support the District Court relied on was its erroneous *sua sponte* search of YouTube. But, the Green Bay Defendants are barely able to muster a defense of the YouTube video. They do not

suggest that the YouTube incident has any factual similarity or other relevance to this case. Instead, they weakly point out a few factual differences between this case and *Ayoubi v. Dar*t, 729 F. App'x 455 (7th Cir. 2018). *See* Green Bay Defs.' Br. at 35. The Green Bay Defendants, however, do not marshal any authority, from any court anywhere, that holds a court's *sua sponte* search of the internet to resolve a contested factual point on a motion for summary judgment is appropriate.

2. Tubby Was *Never* Reasonably Believed to be Armed.

The relevant period of time for assessing the reasonableness of O'Brien's use of force is the time of the shooting. *Smith v. Finkley*, 10 F.4th 725, 748 (7th Cir. 2021). At that moment, any prior belief that Tubby was armed or dangerous was negated—his hands were visible and he was subdued. Nonetheless, it is also significant that a genuine dispute of material fact exists as to whether a reasonable officer *ever* would have believed Tubby was armed.

Video evidence of the precise moment O'Brien claims he saw a gun "barrel" exists:

In these screenshots, Defendants are not able to point to *anything* resembling a barrel at all, but weakly argue that the angle of the camera "is not the exact perception that Officer O'Brien had from the open door." Green Bay Defs.' Br. at 23. The standard is not whether the video evidence is from the "exact perception" of an officer. The standard is whether a genuine dispute of material fact exists. The video evidence showing *no* gun barrel creates a factual issue.

The Green Bay Defendants tacitly concede the weight of the video evidence from the moment O'Brien opened the door by all but abandoning the video evidence they submitted to the District Court (upon which it relied) from thirty-eight minutes later. Instead, they offer a new screenshot from closer in time. *See* Green Bay Defs.' Br. at 24. However, this merely underscores the need for a jury to resolve the issue—the new screenshot does not show a "barrel," and the jury could (and likely would) give greater

weight to the portion of the video at the exact moment O'Brien claims he saw a barrel. And, to the extent the video is ambiguous, the jury may credit Wernecke's testimony that there was nothing resembling a gun but merely Tubby's hands "balled up." Wernecke Depo., APP063 at 65:18-20.

"Balled up" hands would not lead a reasonable officer to jump to the improbable conclusion that Tubby had a gun that was somehow missed during his search incident to arrest—particularly where that arrest was for *non*-violent crime. Here, the Green Bay Defendants again resort to speculation, stating that "although not the norm, missed weapons during searches does occur." Green Bay Defs.' Br. at 24. The mere theoretical possibly of a missed "weapon," however, does not mean that every officer can assume that any "ball[]" or bulge is a gun and kill a suspect. Viewing the evidence in the light most favorable to Appellants, a reasonable officer would have perceived exactly what Wernecke saw: Tubby with his hands balled up.

In an effort to confuse the issue, the Green Bay Defendants point to testimony from other officers on the scene that claim *ex facto* that they were fearful or that O'Brien told them he saw a gun (or, inconsistent with their theory of the case, a knife). Green Bay Defs.' Br. at 25–26. A reasonable jury is not required to credit any of this testimony—these officers were on the scene and *none* of them fired on Tubby. The officers took other action inconsistent with supposed fear of an armed subject—such as bringing "ride-alongs" to the scene (another fact never addressed by Defendants). Denney Depo., APP085 at 11:12—23, APP095 at 180:13—181:1. Again, actions speak louder than words—particularly when those words are after-the-fact testimony from witnesses who have a

bias to support a fellow officer. More probative than officers' inconsistent recollections of what was said on the scene are the *actual recordings* of what was said. In those recordings, O'Brien says he merely saw "something," *not* a gun.

Indeed, in light of O'Brien's own statement from that night that he only saw "something," combined with his history of dishonesty, a jury would be more than reasonable in discrediting O'Brien's testimony. In response, the Green Bay Defendants simply ignore O'Brien's credibility issues, and argue that a week after the shooting he claimed to have seen a gun. *See* Green Bay Defs.' Br. at 37. The jury is not bound to accept this story, and in light of the other evidence, a genuine dispute of material fact exists.

3. O'Brien Is Not Entitled to Qualified Immunity

With respect to qualified immunity, the Green Bay Defendants urge this Court to repeat the error of the District Court—evaluating immunity based on their skewed presentation of the facts, rather than in the light most favorable to Appellants. The evidence, properly viewed, is that Tubby's empty hands were visible, and he was subdued by handcuffs, a police canine, and OC spray while face-down on the ground. No one can seriously debate whether an officer may shoot a citizen in the back of the head in such circumstances—such conduct is clearly unlawful. *Taylor v. City of Milford*, 10 F.4th 800, 807 (7th Cir. 2021).

B. District Court Erred in Dismissing The Failure to Intervene Claim.

1. District Court Impermissibly Created a *Per Se* Rule.

Previously, Appellants explained that the District Court's holding that Winisterfer and Mleziva did not have a reasonable opportunity to intervene because a gunshot is

"nearly instantaneous," impermissibly created a *per se* rule exempting police shooting cases from the purview of the constitutional duty to intervene. Opening Br. at 37–38 (discussing *Lombardo v. City of St. Louis*, 141 S. Ct. 2239, 2241–42 (2020)). Moreover, despite this Court's admonishment that the "analysis almost always implicate[s] questions of fact for the jury," *Abdullahi v. City of Madison*, 423 F.3d 763, 774 (7th Cir. 2005), the District Court failed to view facts in the light most favorably to Appellants. In particular, that O'Brien telegraphed his intent to use deadly force —leaning out from behind a wall and "get[ing] off the X." O'Brien Depo., APP052 at 147:20—148:14.

The Brown County Defendants' response is half-hearted at best. They merely recite their preferred version of the facts. These facts are contradicted by the evidence, as discussed in Appellants' opening brief. The Brown County Defendants also fail to even mention *Lombardo*—much less attempt to salvage the District Court's impermissible *per se* rule.

2. Mleziva and Winisterfer Are Not Entitled to Qualified Immunity.

Instead, the Brown County Defendants attempt to take refuge in qualified immunity. Their arguments do not meet their burden to demonstrate the absence of any genuine dispute of material fact. The Brown County Defendants frame the issue as to whether Mleziva and Winisterfer "were constitutionally required to predict" the use of deadly force. Brown Cnty. Defs.' Br. at 35. Yet, no prediction was necessary—O'Brien's deliberate movement of "get[ting] off the X" telegraphed his intent to use deadly force (a fact that is absent from the Brown County Defendants' brief). O'Brien Depo., APP052 at 147:20—148:14. Similarly, the Brown County Defendants claim there was a "physical

distance" between Mleziva and O'Brien, yet the video evidence shows them in close proximity seconds before the shooting. *Compare* Brown Cnty. Defs.' Br. at 35 *with* Cell Phone Video, ECF 120-31; Dernbach Depo., ECF 120-27 at 87:18—88:11.

The Brown County Defendants also fall back on these officers' own testimony about their "fear" of Tubby. Brown Cnty. Defs.' Br. at 35–36. As discussed above, however, a reasonable officer on the scene would have seen that Tubby was both unarmed and subdued. Indeed, despite their *ex facto* testimony that they were in "fear"—neither Winisterfer nor Mleziva fired a single shot. The Brown County Defendants do not attempt to grapple with any of the facts showing that Tubby's hands were visible or that he was subdued, or that officers on the scene brought "ride-alongs" or otherwise acted inconsistently with supposed "fear." As discussed above, it is not debatable that deadly force was unconstitutional. It is also not debatable that intervention was required. *Brown v. Nocco*, 788 F. App'x 669, 675 (11th Cir. 2019) (unpublished) (ruling shooting suspect in the back as he lay prone, face-down, and unresisting was objectively unreasonable); *Robins v. Meecham*, 60 F.3d 1436, 1442 (9th Cir. 1995) (permitting claims against officers that failed to intervene to prevent shooting).

C. State-Created Danger Claim Should Not Have Been Dismissed.

1. Appellants Did Not Waive Arguments Related to *White*.

As discussed in Appellants' opening brief, *White* is binding precedent that is irreconcilable with the District Court's ruling that the state-created danger doctrine is limited to "private danger." As discussed below, the Brown County Defendants cannot defend this ruling. Recognizing this, they instead propose a new rule that would

conveniently have the doctrine embrace all dangers except the danger at issue here—danger from a state actor. In order to avoid that tightrope, however, the Brown County Defendants first argue, incorrectly, that Appellants waived their argument.

Appellants have waived no argument. They specifically argued below that the "State Created Danger Does Not Require 'Private Violence.'" ECF 133 at 18. On appeal, Appellants argue that "The State-Created Danger Doctrine Is Not Limited to 'Private Dangers.'" Opening Br. at 45. Moreover, Appellants specifically brought *White* to the attention of the District Court. ECF 133 at 19; *see also* Hr'g Tr. 80:18-23 (arguing that limiting doctrine to danger from a private actor would be inconsistent with prior Seventh Circuit authority permitting danger to come from weather).

The Brown County Defendants' waiver argument is premised on out-of-context statements. In particular, they argue that Appellants' statements on appeal that "the origins of the doctrine can be traced to this Court's decision in *White*" or that "[t]he District Court's premise that the state-created danger doctrine traces its origins to *DeShaney*, is wrong," are incongruent with their prior statements below that "*DeShaney* [was] a case that indirectly led to the state-created danger doctrine" or that "the state-created danger doctrine has its origins in cases concerning private violence . . ." *Compare* Brown Cnty. Defs.' Br. at 37–38 *with* ECF 133 at 18–19. This argument misses the forest for the trees.

Appellants do not contend that *DeShaney* is irrelevant to the origins of the state-created danger doctrine. *DeShaney* did contribute to the origins of the doctrine. However, *White* ***also*** contributed to the origins of the doctrine, and pre-dates *DeShaney*.

Below, Appellants acknowledged the contribution of *DeShaney* to the doctrine, but *never* suggested that origins of the doctrine were ***exclusive*** to *DeShaney*. Quite to the contrary, Appellants specifically pointed out *White* to the District Court. ECF 133 at 19; *see also* Hr'g Tr. 80:18-23. At the time, Appellants could not have anticipated that the District Court would simply ignore *White* and over-attribute the origins of the doctrine to *DeShaney*. This over-attribution was error. Accordingly, on appeal, Appellants have focused on the fact that the District Court ignored *White*, which after all, is binding precedent. This is congruent with the argument below, and is not new matter.

2. State-Created Danger Doctrine Is Not Limited to Only Certain Dangers.

Unable to establish that the District Court's decision does not directly conflict with *White*, the Brown County Defendants take a scattergun approach. They first fault Appellants for not discussing three cases they like: *Weiland v. Loomis*, 938 F.3d 917 (7th Cir. 2019), *First Midwest Bank v. City of Chi.*, 988 F.3d 978 (7th Cir. 2021) ("*LaPorta*"), and *Nelson v. City of Chi.*, 992 F.3d 599 (7th Cir. 2021)—apparently arguing that *White* was overruled *sub silentio*. The Brown County Defendants then briefly touch on "pre-seizure" conduct rules, before abandoning "private violence" altogether and asking the Court to create an new exception for them because O'Brien, although from a different agency, is a state actor. None of these arguments has merit.

a. *White* is Binding Precedent

Appellants did not discuss *Weiland*, *LaPorta*, or *Nelson* because they are inapposite. Each of *Weiland*, *LaPorta*, and *Nelson* ***happened*** to concern private violence—a suicidal pretrial detainee, *Weiland*, 938 F.3d at 918, an off-duty police officer, *LaPorta*, 988 F.3d at

983, an armed robber, *Nelson*, 992 F.3d at 602. Accordingly, these cases refer to "private violence" or "private danger." However, ***none*** of these cases purports to limit the doctrine to cases of private violence, and Seventh Circuit authority typically recites just "danger" as an element of the claim without requiring that it be "private danger." *See, e.g.*, *Est. of Her v. Hoeppner*, 939 F.3d 872, 876 (7th Cir. 2019)[2]; *Wilson v. Warren Cnty.*, 830 F.3d 464, 469–70 (7th Cir. 2016).

Therefore, it is a logical fallacy to assume (as do the Brown County Defendants) that *Weiland*, *LaPorta*, or *Nelson* overruled *White*, which indisputably did *not* require "private violence" or "private danger." The Brown County Defendants' logic is akin to finding a case discussing a gender-based Equal Protection claim without mentioning race, *e.g.*, *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 60 (2001), and then proclaiming that Equal Protection no longer applies to race-based claims. Indeed, *Weiland*, *LaPorta*, and *Nelson* do not even discuss *White*, and none are *en banc* decisions and therefore could not have overruled *White* even if they had. *Brooks v. Walls*, 279 F.3d 518, 522 (7th Cir. 2002) ("One panel of this court cannot overrule another implicitly. Overruling requires recognition of the decision to be undone and circulation to the full court under Circuit Rule 40(e).").

b. Pre-Seizure Conduct Rules Are A Red Herring.

The Brown County Defendants attempt to buttress their "private violence" argument by arguing that Appellants' claim has a "close resemblance to an attempt to

[2] Indeed, *Estate of Her* concerned the danger from a man-made swimming pond. 939 F.3d at 874. While this Court affirmed dismissal of the claims; notably, it did ***not*** do so because there was no "private violence."

hold Lt. Zeigle liable" for "pre-seizure" conduct. Brown Cnty. Defs.' Br. at 42–43. This is significant because, according to the Brown County Defendants, in the Seventh Circuit "pre-seizure conduct is not subject to Fourth Amendment scrutiny." *Id.* at 43. This is an attempt to confuse the issues, Appellants do not assert a Fourth Amendment claim against the Brown County Defendants. Appellants' claim is based on state-created danger under the Fourteenth Amendment.

In any event, the Brown County Defendants are wrong that pre-seizure conduct is immune from any Fourth Amendment scrutiny. The Supreme Court has recognized that while a Fourth Amendment violation (such as warrantless home entry) that occurs prior to the use of deadly force cannot convert an otherwise reasonable use of deadly force into a second Fourth Amendment violation, officers may *still* be liable for any injuries proximately caused by the initial Fourth Amendment violation. *Cnty. of L. A. v. Mendez*, 137 S. Ct. 1539, 1548 (2017). In other words, that pre-seizure conduct cannot itself be the basis for an excessive force claim, does *not* immunize pre-seizure conduct from *any* claim. This is significant here because just as a state actor may be liable for a Fourth Amendment violation that proximately causes a later injury, *id.*, so too should a state actor be liable for a Fourteenth Amendment violation (such as creating or increasing a danger) that proximately causes a later injury (such as being shot by an officer from a different law enforcement agency).

c. Court Should Not Create A New Exception To State-Created Danger.

Perhaps unimpressed with their own argument in defense of the District Court's decision to limit the state-created danger doctrine to "private violence," the Brown County Defendants switch tack halfway through their argument. Rather than attempting to reconcile the District Court's holding with *White*, the Brown County Defendants ask the Court to create a new exception: to hold that the state-created danger doctrine does not apply when the danger comes from a state actor. *See* Brown Cnty. Defs.' Br. at 44–46.

Notably, however, the Brown County Defendants provide ***no*** rationale for this proposed new rule. They suggest that their proposed new rule would avoid the conflict the District Court's ruling has with *White*, *Kneipp*, *Munger*, *Penilla*, and similar cases. Brown Cnty. Defs.' Br. at 45. However, their proposed new rule continues to conflict with the Ninth Circuit's ruling in *Jensen*. In their opening brief, Appellants explained how the District Court erroneously distinguished *Jensen* on the grounds that it did not recite the words "state-created danger" because *Jensen* was a case that concerned substantive due process under the Fourteenth Amendment, which is the source of law for the state-created danger doctrine. Opening Br. at 48.

The Brown County Defendants do not address this argument head-on but merely insist that *Jensen* is "a friendly-fire case where no substantive due process or state-created-danger theories were at issue." Brown Cnty. Defs.' Br. at 45. *Jensen* cannot be so easily distinguished: it concerned state action that increased the danger from another state actor —a police department permitted a drug-addicted officer to serve on its SWAT team. 145

F.3d at 1082–1083. While the *Jensen* decision does not specifically mention labels such as "state-created danger," it is viewed as a "state-created danger" case within the Ninth Circuit. *Gonzales ex rel. Est. of Gonzales v. Hickman*, 2006 U.S. Dist. LEXIS 96999, at *40 (C.D. Cal. Jan. 23, 2006). Therefore, the proposed new rule would create a circuit split.

The proposed new rule would also create a significant gap in liability for civil rights violations. The Brown County Defendants argue that in cases like *White*, "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." Brown Cnty. Defs.' Br. at 46. Yet, the Brown County Defendants simply take it for granted that Appellants have "recourse" against O'Brien because he is a state actor—while O'Brien of course challenges the notion that Appellants have any claim against him. *See generally* Green Bay Defs.' Br. Indeed, in his own brief, O'Brien repeatedly states that the circumstances on October 19, 2018 were "dynamic," "uncertain," or "rapidly" evolving, and required "split-second" decisions. *Id.* at 8, 13, 17, 18, 28, 32, 35. To the extent any of this is true—it is entirely the fault of the Brown County Defendants.

Tubby was *locked* inside a car. Denney Depo., APP087 at 35:1-5, O'Brien Depo., APP047 at 109:11-14. The decision to exit the car and stumble around the sally port was not Tubby's free will—he was *forced* out the car when it was transformed into an OC spray "torture chamber." N. Allen Depo., APP111 at 46:14-20. While O'Brien is not entitled to summary judgment for the reasons discussed above, if a jury were to excuse his conduct based on the argument that the situation was "dynamic" or "uncertain"

then basic fairness dictates that the jury should *also* have the option of holding the Brown County Defendants liable for *making* the situation "dynamic" or "uncertain."

3. Genuine Disputes of Material Fact Exist Concerning State-Created Danger Claim Against Zeigle.

a. Zeigle Acted With Deliberate Indifference, Shocking the Conscience.

The Brown County Defendants argue that Zeigle's conduct does not meet the standard for state-created danger. They mistakenly claim that Appellants "confuse[ ]" the applicable standard. They acknowledge that the standard is that conduct must shock the conscience. Brown Cnty. Defs.' Br. at 50 (citing *LaPorta*, 988, F.3d 989). Inexplicably, however, they then treat the "shock the conscience" standard as though it precludes any further explanation or definition.

Yet, the Seventh Circuit *has* given that phrase further explanation and definition. In particular, "when the circumstances permit public officials the opportunity for reasoned deliberation in their decisions, ***we shall find the official's conduct conscience shocking when it evinces a deliberate indifference*** to the rights of the individual." *King v. E. St. Louis Sch. Dist. 189*, 496 F.3d 812, 819 (7th Cir. 2007) (emphasis added). The Brown County Defendants do not claim that *King* has been overruled, or is inapplicable—in fact, their only mention of *King* is an approving citation. Brown Cnty. Defs.' Br. at 40. Any confusion is on the part of the Brown County Defendants.

Zeigle was deliberately indifferent to his duty to safeguard Tubby's safety. As the Brown County Defendants *themselves* repeatedly acknowledge, the proper course of action for a barricade is to activate SWAT. *See* Brown Cnty. Defs.' Br. at 8, 10–11.

Accordingly, while the Brown County Defendants attempt to emphasize the amount of training or experience that Zeigle has, *id.* at 50–51, this only highlights Zeigle's indifference. Despite knowing better, Zeigle failed to activate a SWAT team (accompanied by trained Crisis Negotiators) and failed to contain Tubby. Instead, Zeigle deliberately forced Tubby out of a secured squad, as Tubby pleaded for help, without communicating that plan or ensuring an "arrest team" was at the ready.

The Brown County Defendants also argue that Appellants' arguments regarding causation are "speculation." Brown Cnty. Defs.' Br. at 53. However, the record fully supports causation—Lieutenant Allen testified that Tubby would not have died but for Zeigle's plan. N. Allen Depo., APP113 at 123:3-19. Brown County policies call for a SWAT activation specifically because of the "risk of injury or loss of life" without a trained SWAT team. ECF 120-18 at BC_JCT002659. The ignoring of Tubby's pleas for help, lack of ready "arrest team," and lack of communication with perimeter officers are all due to the lack of a cohesive SWAT team. Finally, as noted previously, if a jury accepts the Green Bay Defendants' narrative that Tubby was believed to be armed, then it is simply commonsense that forcing him out of a contained area into an area occupied by numerous law enforcement officers was a bad idea, Wernecke Depo., APP067 at 117:1-4; *see also* N. Allen Depo., APP113 at 123:19 (remarking that it was "just a real bad plan"), and forcing such a confrontation would foreseeably lead to deadly force.

b. Zeigle is Liable in Both Official and Individual Capacities.

Because Zeigle was deliberately indifferent, a state-created danger claim lies against him in his official capacity. The Brown County Defendants' make oblique

reference to his status as a policymaking official without actual articulating what exactly they are arguing—i.e., whether they are asking this Court to affirm dismissal of the claim against him on alternative grounds based on their argument that he is not a policymaking official. *See* Brown Cnty. Defs.' Br. at 47–48. In any event, whether a person is a "final policymaker" "is a question of state or local law." *Kujawski v. Bd. of Comm'rs*, 183 F.3d 734, 737 (7th Cir. 1999). Accordingly, Brown County's citation to cases from other cities or counties are inapposite. Brown County has delegated policymaking authority to the SWAT Commander *as it concerns the SWAT team*. In Zeigle's own words, the SWAT Commander is the "top of the line." Zeigle Depo., APP096 at 12:23—13:1. He determines the content of SWAT policies, decides the training of the SWAT team, and selects team members. Brown Cnty. 30(b)(6) Depo., ECF 137-4 at 114:18-21, 135:12—136:2. The SWAT Commander is also responsible for activating SWAT and Crisis Negotiators, terminating an activation, and all tactical decision-making. ECF 120-18 at BC_JCT002661—62; *see also* Brown Cnty. 30(b)(6) Depo., ECF 137-4 at 93:22—94:2, 113:14-24, 127:10-14, 143:12—144:3.

Moreover, a state-created danger claim also lies against Zeigle in his individual capacity. On this point, the Brown County Defendants argue that he is entitled to qualified immunity because the defendant in *Weiland* was immune and (according to them) his conduct was "incomparably more egregious." Brown Cnty. Defs.' Br. at 53. The reliance on *Weiland* is misplaced. The conduct in *Weiland* is benign compared to the wrongful conduct in this case. In *Weiland*, the misconduct of the officer, a guard, was to unshackle a prisoner in order to permit him to use the bathroom. 938 F.3d at 918. The

prisoner then overpowered the guard, took his weapon, and terrorized a hospital full of people. *Id.*

Unshackling a prisoner to allow him to use the bathroom is not "incomparably more egregious" than Zeigle's conduct here. To the contrary, Zeigle's conduct is "incomparably more egregious" than that in *Weiland*. Zeigle's conduct is not the unshackling of a prisoner, but instead is implementing a plan where a handcuffed prisoner shouting "help me!" was: sprayed in the face with OC spray without warning; forced from a secure vehicle due to the "torture chamber" created by that OC spray; forced to stumble blindly around a sally port because he had no instructions on how to surrender and a trained SWAT "arrest team" was not ready to apprehend him; and then shot in the back of the head because the plan to force him out of the vehicle was never communicated to perimeter officers. As discussed before, this is akin to opening the door of a cell and forcing a prisoner out, to only then shoot him in the back of the head for trying to escape. In such circumstances, qualified immunity can provide no refuge.

D. Appellants Did Not Abandon *Monell*, Failure to Train, or State Law Claims

Defendants' arguments that Appellants have waived their *Monell,* failure to train, or state law claims,[3] Green Bay Defs.' Br. at 43–45; Brown Cnty. Defs.' Br. at 22, evince a fundamental misunderstanding of the District Court's decision. In particular, the *only*

[3] Appellants pursue their state created danger and failure to train claims against the Brown County Defendants alone, and while they do not agree with the District Court that the fail to train claim against Brown County officials was redundant of the claim against Brown County itself, they are satisfied that they will be able to adequately pursue remedies against Brown County now that the law of the case is redundancy.

reason the District Court gave for dismissing Appellants' *Monell* claim was the dismissal of the excessive force claim against O'Brien. APP024. The *only* reason that the District Court gave for dismissing Appellants' failure to train claim (as to Brown County) was the dismissal of the failure to intervene claim. APP025-26. And, the *only* reason the District Court gave for dismissing Appellants' state law claims was its dismissal of the federal claims. APP030.

Accordingly, Appellants dedicated their opening brief to addressing the very reasons the District Court gave for dismissal—Appellants argued at length that the federal claims for excessive force against O'Brien and failure to intervene claims against Mleziva and Winisterfer should not be dismissed. That Appellants did not dwell on other elements or aspects of the *Monell*, failure to train, or state law claims was simply because the District Court did not raise any other elements or aspects of those claims as deficient. Accordingly Appellants preserved those claims. *See Pagel*, 695 F.3d at 627 (rejecting waiver argument and declining to fault appellant for focusing heavily on element of claim that district court found lacking).[4]

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[4] The Green Bay Defendants wrongfully suggest that there was no evidence of additional instances of excessive force before the District Court. Green Bay Br. at 44–45. Ironically, it is this type of perfunctory reference that leads to abandonment—the Green Bay Defendants did not develop their argument and it cannot be construed as an alternative grounds for affirmance. Regardless, Appellants did offer evidence of other incidents of excessive force, dishonesty to cover up that excessive force, and inadequate discipline. ECF 137-10; ECF 137-14; ECF 137-16; ECF 137-18; ECF 137-21, ECF 137-22, ECF 137-23, ECF 137-24, ECF 137-27. Appellants also offered evidence that it is permissible under Green Bay's policies to use deadly force against someone with their arms pinned and unmovable. ECF 137-1 at 117:6-15. The culture of excessive force is so bad that an officer tattooed himself every time he killed a civilian, to signify the death of an "enemy." 2d Salzmann Depo., ECF 137-19 at 176:3—177:25, 181:17—182:1

CONCLUSION

The District Court's grant of summary judgment must be reversed.

Dated: December 22, 2021

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and (a)(6), as modified by Cir. R. 32(b), because I have prepared this brief in proportionally spaced typeface using Microsoft Word 2016 in 12-point Book Antiqua font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as modified by Cir. R. 32(c), in that it contains 6,950 words.

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2021, I electronically filed Appellants' REply Brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: December 22, 2021

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