

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

BALIN BRAKE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 1:20-cv-345-HAB-SLC
	)	
CITY OF FORT WAYNE and	)	
JUSTIN HOLMES, in his	)	
official and individual capacity,	)	
	)	
Defendants.	)	

ANSWER TO SECOND AMENDED COMPLAINT

The City of Fort Wayne and Officer Justin Holmes, in his official and individual capacity (collectively “Defendants”), by their attorneys, hereby respond to Plaintiff Balin Brake’s Second Amended Complaint and state:

Defendants object to Plaintiff’s inclusion in his complaint of photographs, footnotes and references that seem to incorporate generally the entire contents of articles without providing Defendants a fair opportunity to address specific allegations therein. To the extent Plaintiffs have used such tactics, Defendants generally deny any express or implicit allegations not specifically addressed below.

Introduction

1. Balin Brake, the Plaintiff in this case, is a 22-year-old resident of Fort Wayne whose right eye was destroyed while he was peacefully protesting on May 30, 2020. He lost his eye because a Fort Wayne Police Department officer deployed a tear gas canister at his face, and the force of the impact fractured Mr. Brake's facial bones

in four places, caused two facial lacerations, cut a nerve in his face, and ruptured the globe of Mr. Brake's right eye.

ANSWER: Defendants deny that Mr. Brake was peacefully protesting on May 30, 2020 and deny that a Fort Wayne Police Department officer deployed a tear gas canister at his face. Defendants admit that Mr. Brake sustained injuries when he ran into an area, approaching police officers, which area had previously been unoccupied and was struck by a chemical munition that had been deployed into that previously unoccupied area. Defendants lack knowledge and information sufficient to admit or deny the remaining allegations in paragraph 1 and therefore deny those remaining allegations.

2. Along with other protestors in Fort Wayne, Indiana, Mr. Brake came to the Allen County Courthouse ("Courthouse") on May 30, 2020, to peacefully demonstrate in the wake of the murder of George Floyd in Minneapolis by police officers. Mr. Brake was standing with his arms held in the air on South Clinton Street near the Courthouse when members of the Fort Wayne Police Department fired tear gas directly into the crowd of peaceful protestors. Mr. Brake began to run from the advancing officers when a tear gas canister fired by the police hit his right shoe, disintegrating part of his shoelaces. When Mr. Brake briefly turned to look behind him, police officer ("Justin Holmes ("Officer Holmes" or "Defendant Holmes")' fired a tear gas canister that hit Mr. Brake directly in his right eye. The impact threw him to the ground where he stayed, coughing from the tear gas and hunched over in

pain. A few seconds later, another protestor picked him up, carried him out of the reach of the swirling tear gas, and was able to find someone to help and call the paramedics. Once the paramedics arrived, Mr. Brake was rushed to the hospital and surgery. Due to the extent of the injuries, the doctors were forced to remove Mr. Brake's right eye.

ANSWER: Defendants deny that Mr. Brake was peacefully protesting at the time of the incident and deny that he was at the Allen County Courthouse at the time of the incident. Defendants further deny that Mr. Brake was running from a line of advancing officers at the time he was struck with a chemical munition deployed into a previously unoccupied area, as he was running toward a stationary line of officers at the time. Plaintiff appears to have buried certain allegations in footnote one to paragraph 2, and Defendants expressly deny that Mr. Brake was “shot” by officers. Plaintiff's paragraph 2 also includes an unauthenticated photograph and makes no specific allegations related to such photograph for Defendants to admit or deny; nevertheless, Defendants deny knowledge or information sufficient to admit or deny anything with respect to this photograph, including its authenticity or the circumstances under which it was taken. Defendants lack knowledge and information sufficient to admit the truth of the remaining allegations in paragraph 2 and therefore deny those allegations.

3. At issue in this case is Mr. Brake's devastating and permanent injury, the protections owed to individuals exercising their free speech rights to assemble

and peacefully protest, the unreasonable and excessive use of force by law enforcement officers in response to these lawful protests, and the commission of torts by Defendant Holmes for which the City of Fort Wayne is liable under Indiana law.

ANSWER: Defendants deny the allegations in paragraph 3.

Jurisdiction, Venue, Cause of Action

4. This Court has original jurisdiction pursuant to 28 U.S.C. § 1331.

ANSWER: Defendants admit the allegations in paragraph 4.

5. This Court further has supplemental jurisdiction over the claims against the City of Fort Wayne for the torts committed by its employee pursuant to 28 U.S.C. 1367, as these claims form part of the same case or controversy.

ANSWER: Defendants admit that the Court has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. 1367 as part of the same case or controversy but denies that its employee committed any torts and denies any remaining allegations in paragraph 5.

6. Venue is proper in this district pursuant to 28 U.S.C. § 1391.

ANSWER: Defendants admit the allegations in paragraph 6.

7. This case arises under 42 U.S.C. § 1983 to redress the deprivation, under the color of state law, of rights secured by the Constitution of the United States.

ANSWER: Defendants admit that Plaintiff alleges claims that arise under 42 U.S.C. § 1983 but deny any deprivation of such rights and deny any remaining allegations in paragraph 7.

Indiana Tort Claim Act Notice Requirements

8. On or about October 2, 2020, notice required under the ITCA was given to Defendant City of Fort Wayne via certified mail. There has been no response to the notice of tort claim.

ANSWER: Defendants admit that the City of Fort Wayne received via certified mail letter referencing Notice of Tort Claim by Balin Brake dated October 5, 2020, and that such tort claim has been deemed denied pursuant to statute.

Parties

9. Mr. Brake is a resident of Fort Wayne, Indiana.

ANSWER: Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations in paragraph 9 and therefore deny those allegations.

10. Defendant City of Fort Wayne is a municipality located in Allen County, Indiana, and is the employer and principal of Defendant Holmes.

ANSWER: Defendants admit the allegations in paragraph 10.

11. Defendant Holmes is currently, or was at the time of these events, a Fort Wayne Police Department officer who committed the acts set forth below as

an agent of Defendant City of Fort Wayne. Defendant Holmes engaged in the conduct complained of in the course and scope of employment and under color of law.

ANSWER: Defendants admit that Defendant Holmes is currently, and was at the time of the events relevant to this complaint, a Fort Wayne Police Department officer and that Holmes was acting in the course and scope of his employment under color of law. Defendants deny the remaining allegations in paragraph 11, including but not limited to the suggestion that he “committed the acts set forth below” or that he “engaged in the conduct complained of.”

Relevant Facts

12. On May 30, 2020, protestors gathered at the Courthouse Green outside of the Courthouse, located in downtown Fort Wayne, Indiana.

ANSWER: Defendants admit that on May 30, 2020, hundreds of protestors gathered at the Courthouse Green outside of the Courthouse Green outside of the court house, located in downtown Fort Wayne, Indiana.

13. On May 30, 2020, there was no state or local curfew in place for Fort Wayne. Around 4:00 PM, Plaintiff Balin Brake arrived and stood on Clinton Street—the street just outside the Courthouse—with his friend.

ANSWER: Defendants admit that on May 30, 2020, there was no state or local curfew in place for Fort Wayne. Defendants object to Plaintiff’s attempt in footnote 2 to incorporate the entirety of a media article without specific allegations and generally

deny any allegations Plaintiff seeks to incorporate implicitly by reference to such article. Defendants further admit that Balin Brake was illegally in Clinton Street in the late afternoon or early evening. Defendants lack knowledge and information sufficient to form a belief as to the truth of the remaining allegations in paragraph 13 and therefore deny them.

14. Mr. Brake attended the protest in solidarity with the Black Lives Matter movement.

ANSWER: Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations in paragraph 14 and therefore deny them.

15. At all times, Mr. Brake demonstrated peacefully.

ANSWER: Defendants deny the allegations in paragraph 15.

16. Shortly after protests began, Clinton Street was closed to vehicular traffic.

ANSWER: Defendants deny the allegations in paragraph 16.

17. Around 5:00 PM, Fort Wayne Police Department officers formed a line and moved toward the peaceful protesters on the public spaces.

ANSWER: Defendants deny the allegations in paragraph 17.

18. Mr. Brake did not hear any warning to disperse.

ANSWER: Defendants deny the allegations in paragraph 18.

19. Soon after 5:00 PM, officers fired tear gas indiscriminately towards persons in the Courthouse Green and on the public sidewalks and street outside the Courthouse.

ANSWER: Defendants deny the allegations in paragraph 19.

20. Mr. Brake was protesting with his arms held in the air when tear gas canisters began to fly. One of these tear gas canisters hit Mr. Brake in the foot, and he turned around and ran towards the Courthouse Green. Mr. Brake felt the heat of the tear gas canister through his shoe, and he would later discover that it had disintegrated his shoelaces and burned part of his shoe.

ANSWER: Defendants deny the allegations in paragraph 20. Defendants further note that to the extent that Plaintiff has included an unauthenticated photograph within paragraph 20 and has asserted no specific allegations with respect to such photograph, to the extent that a response to such photograph is required, Defendant lacks knowledge or information to admit the truth of any implicit allegations arising from the inclusion of such photograph.

21. As the crowd began seeking refuge, Mr. Brake turned his head back toward the police officers to see whether they were still releasing tear gas.

ANSWER: Defendants deny the allegations in paragraph 21.

22. When Mr. Brake turned his head back toward the police officers, Defendant Holmes, fired a tear gas canister that hit Mr. Brake directly in the face, rupturing his right eye.

ANSWER: Defendants deny the allegations in paragraph 22. Defendants further object to the inclusion of separate allegations in footnote 3 but nevertheless deny such those footnote allegations.

23. The force pushed Mr. Brake back so hard that his hat fell off, and he collapsed to the ground. Mr. Brake suffered immediate, immense pain from his injuries and the tear gas surrounding him. The right side of his face was numb, and blood streamed from his face and out of his mouth.

ANSWER: Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations in paragraph 23 and therefore deny those allegations.

24. Upon information and belief, the tear gas canister was fired from approximately 40 feet away. The canister sailed through the air and did not skip or bounce before hitting Mr. Brake's face and eye.

ANSWER: Defendants admit that the chemical munition that struck Mr. Brake did not skip or bounce as it was deployed in the air to a previously unoccupied area.

Defendants lack knowledge or information sufficient to form a belief as to the remaining allegations in paragraph 24 and therefore deny those allegations.

25. At the time the tear gas canister was fired, Mr. Brake was peacefully protesting with his hands in the air and posed no threat to anyone.

ANSWER: Defendants deny the allegations in paragraph 25.

26. Another protestor saw Mr. Brake's injury and carried him to a safe location—a nearby restaurant called the Hoppy Gnome.

ANSWER: Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations in paragraph 26 and therefore deny those allegations.

27. A police officer was across the street in the Citizens Square parking lot, and the other protestor called the police officer over to help and call a medic.

ANSWER: Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations in paragraph 27 and therefore deny those allegations.

28. The officer called an ambulance, which transported Mr. Brake to Lutheran Hospital. When the ambulance arrived, Mr. Brake's eye was swollen shut and was bleeding from underneath the eyelid.

ANSWER: Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations in paragraph 28 and therefore deny those allegations.

29. Mr. Brake stayed at the hospital from the evening of Saturday, May 30, 2020, through Tuesday, June 2, 2020.

ANSWER: Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations in paragraph 29 and therefore deny those allegations.

30. Mr. Brake suffered two eyelid lacerations, four occipital fractures, and permanent loss of vision and light perception in his right eye. One of the fractures from the canister cut a nerve in his face, and his right eye was completely ruptured and irreparable. His injuries were severe, and required extensive surgery. His right eye was surgically removed.

ANSWER: On information and belief, Defendants admit that Mr. Brake's eye was surgically removed. Defendants lack knowledge and information sufficient to form a belief as to the remaining allegations in paragraph 30 and therefore deny those allegations.

31. In the days following the loss of his eye, Mr. Brake rarely ate because his injuries made it painful to chew.

ANSWER: Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations in paragraph 31 and therefore deny them.

32. Mr. Brake has permanent loss of all vision in his right eye and loss of depth perception. He underwent a surgery to, among other things, repair his facial lacerations (including lacerations to his eyelid) and remove bone fragments from his facial tissue on May 31, 2020. His post-operative diagnoses included right globe rupture with expulsion of intraocular contents, right corneoscleral laceration, full-thickness right upper eyelid laceration, right lower eyelid and cheek full-thickness laceration, and open fracture of the right inferior orbital rim and orbital floor. Mr. Brake received a prosthetic right eye that he has to treat with eye drops every day.

ANSWER: Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations in paragraph 32 and therefore deny those allegations.

33. In connection with his extensive injuries, Mr. Brake has seen multiple doctors and specialists and must continue to do so for an extended period of time.

ANSWER: Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations in paragraph 33 and therefore deny those allegations.

34. Mr. Brake has incurred and will continue to incur significant medical bills for treatment related to the loss of his eye (including his prosthetic eye) and related injuries to his face.

ANSWER: Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations in paragraph 34 and therefore deny those allegations.

35. Before his injury, Mr. Brake was a part-time weekend editor for a local news station. Largely due to his injury, he is no longer working at this job. Mr. Brake's injury also contributed to his decision to leave Indiana Tech University, where he was previously a full-time student.

ANSWER: Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations in paragraph 35 and therefore deny those allegations.

36. The loss of Mr. Brake's right eye has permanently changed his life. He experiences severe headaches, and often feels pain where his eye once was. The loss of his eye has also permanently impacted his depth perception, creating new difficulties in his everyday life that are particularly pronounced when he drives at night. Loud, unexpected noises cause him fear and mental suffering. Mr. Brake's prosthetic is noticeable, and it changes the way that others look at and treat him. His injury has made it more difficult for him to find a job. Because of the time required for Mr. Brake's medical treatment, and for Mr. Brake to adjust his life to accommodate only one eye, he has a reduced ability to work.

ANSWER: Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations in paragraph 36 and therefore deny those allegations.

Jury Demand

37. Mr. Brake requests a trial by jury on all claims so triable.

ANSWER: To the extent that a response is required as to this allegation, Defendants admit that Mr. Brake requests a trial by jury on all claims so triable.

Count I – 42 U.S.C. § 1983 – First Amendment Free Speech and Free Assembly

38. Mr. Brake restates and realleges paragraphs 1-36 as if fully set forth herein.

ANSWER: Defendants incorporate by reference the responses to paragraphs 1 through 36 above as if fully set forth herein.

39. Defendant Holmes acted under the color of law, purporting to act in the performance of official duties as officers of the City of Fort Wayne.

ANSWER: Defendants admit the allegations in paragraph 39, except insofar as such allegations refer to Defendant Holmes “purporting to act” in performance of his duties as compared to acting in performance of his duties.

40. The actions of Defendants, in attempting to interfere with and stop Mr. Brake's protesting in Fort Wayne, Indiana, violated the First Amendment to the United States Constitution.

ANSWER: Defendants deny the allegations in paragraph 40.

41. Mr. Brake was lawfully exercising his First Amendment rights to free speech and peaceful assembly. Mr. Brake was demonstrating about matters of public

concern, including protesting the murder of George Floyd, systematic and systemic racism, and the responses by police departments nationwide.

ANSWER: Defendants deny the allegations in paragraph 41.

42. Defendant Holmes and other officers, with the full permission and authority of the City of Fort Wayne, and acting pursuant to the customs, policies, and practices of the City of Fort Wayne, fired tear gas canisters, shot munitions, and attacked peaceful protestors with pepper spray in response to lawful protests on May 30, 2020.

ANSWER: Defendants deny the allegations in paragraph 42. Defendants further object to such allegations as being wholly irrelevant to the circumstances of Mr. Brake's actions and subsequent injury in this case. Defendants further object to Plaintiff's attempt to incorporate further allegations into this paragraph through footnote 4 along with references to two separate media articles concerning protests generally. To the extent that Defendants have an obligation to respond to allegations incorporated using this pleading tactic, Defendants deny such obligations.

43. Mr. Brake's constitutional rights were violated when Defendants, without a proper —or audible—warning, responded to Mr. Brake's exercise of free speech and peaceful protest by firing tear gas directly at Mr. Brake, destroying his right eye, and causing a permanent loss of vision and other injuries and damages.

ANSWER: Defendants deny the allegations in paragraph 43.

44. Defendant Holmes acted with, at a minimum, callous and reckless indifference to the constitutional rights of Mr. Brake by firing a tear gas canister directly at Mr. Brake in attempts to deprive him of exercising free speech and peaceful assembly.

ANSWER: Defendants deny the allegations in paragraph 44.

45. The actions of Defendants towards Mr. Brake were not narrowly tailored and did not leave open ample alternatives for communication.

ANSWER: Defendants deny the allegations in paragraph 45.

46. Defendants retaliated against Mr. Brake for exercising his constitutional rights to free speech and peaceful protest by firing tear gas indiscriminately into a crowd and at close range.

ANSWER: Defendants deny the allegations in paragraph 46.

47. Defendants' actions would chill a person of ordinary firmness from continuing to engage in peaceful protest.

ANSWER: Defendants deny the allegations in paragraph 47.

48. The force taken against Mr. Brake was fully authorized and directed by the Chief of Police for the City of Fort Wayne and was fully authorized and directed

by the official policies, practices, and customs of the Fort Wayne Police Department and the City of Fort Wayne.

ANSWER: Defendants admit that officers used force in response to the actions and circumstances they faced on May 30, 2020, and that such use of force was in accordance with the policies of the Fort Wayne Police Department. Defendants deny the remaining allegations in paragraph 48.

49. Defendant Holmes was acting pursuant to official policies, practices, and customs of the Fort Wayne Police Department and the City of Fort Wayne that authorized the use of tear gas and other similar weaponry by Defendant Holmes and other officers to eject protesters from streets, sidewalks, and other public areas, even though the protesters—and Mr. Brake in particular—were not acting in a violent manner and were merely attempting to engage in peaceful protest.

ANSWER: Defendants admit that Defendant Holmes was acting pursuant to policies and practices of the Fort Wayne Police Department and otherwise deny the allegations in paragraph 49.

50. Defendant Holmes' conduct pursuant to these policies was the moving force behind the constitutional violations and Mr. Brake's permanent injury.

ANSWER: Defendants deny the allegations in paragraph 50.

51. The City of Fort Wayne is liable for the constitutional violations inflicted on Mr. Brake by Defendant Holmes inasmuch as the actions causing the violation were caused by the official policies, practices, and customs of the City of Fort Wayne and were fully authorized and controlled by the City of Fort Wayne.

ANSWER: Defendants deny the allegations in paragraph 51.

52. Mr. Brake suffered, and continues to suffer, physical and emotional injuries as a direct and proximate result of Defendants' violation of his First Amendment rights.

ANSWER: Defendants deny the allegations in paragraph 52.

53. Defendants are jointly and severally liable to Mr. Brake.

ANSWER: Defendants deny the allegations in paragraph 53.

*Count II – 42 U.S.C. § 1983 – Fourth Amendment
Use of Excessive Force and Unlawful Seizure*

54. Mr. Brake restates and realleges paragraphs 1-36 as if fully set forth herein.

ANSWER: Defendants incorporate by reference the responses to paragraphs 1 through 53 above as if fully set forth herein.

55. Defendants acted under the color of law, purporting to act in the performance of official duties as officers of the City of Fort Wayne.

ANSWER: Defendants admit the allegations in paragraph 55 with the exception of “purporting to act” rather than acting.

56. Defendants' use of tear gas, pepper spray, munitions, and other uses of force against peaceful protestors, such as Mr. Brake, was excessive force in violation of the Fourth Amendment of the U.S. Constitution. Defendants' use of excessive force against Mr. Brake, without adequate warning or dispersal order, prevented his freedom of movement and the exercise of his constitutional rights and effected an unlawful seizure of Mr. Brake.

ANSWER: Defendants deny the allegations in paragraph 56.

57. The force taken against Mr. Brake and his seizure were fully authorized and directed by the Chief of Police for the City of Fort Wayne and were fully authorized and directed by the official policies, practices, and customs of the Fort Wayne Police Department and the City of Fort Wayne.

ANSWER: Defendants deny that force was taken “against Mr. Brake” or that he was seized. Defendants admit that Defendant Holmes’s actions were fully authorized under the policies and practices of the Fort Wayne Police Department. Defendants deny any remaining allegations in paragraph 57.

58. Defendant Holmes and other officers, with the full authority and permission of the City of Fort Wayne and acting pursuant to the customs, policies, and practices of Fort Wayne, fired tear gas canisters, shot munitions, and attacked peaceful protestors with pepper spray in response to lawful protests on May 30, 2020. Defendant Holmes violated Mr. Brake's Fourth Amendment rights by shooting a tear gas canister directly at Mr. Brake's face within dangerously close range, without forewarning, while Mr. Brake was peacefully protesting. The Allen County Prosecutor herself has recognized that several officers may have used "unreasonable force" against protesters.

ANSWER: Defendants deny the allegations of paragraph 58. Defendants object to Plaintiff's use of the tactic (again) of attempting to incorporate into paragraph 58 additional allegations in a footnote that references hearsay and media coverage to incorporate a myriad of nonspecific allegations. To the extent Defendants are required to respond to such tactics, Defendants admit that Allen County prosecutor determined the County would not prosecute any officer involved and otherwise denies the express and implicit allegations in footnote 5.

59. Defendant Holmes and other officers were acting pursuant to official policies, practices, and customs of the Fort Wayne Police Department and the City of Fort Wayne that authorized the use of tear gas and other similar weaponry by Defendant Holmes and other officers to eject protesters from streets, sidewalks, and other public areas, even though the protesters and Mr. Brake in

particular—were not acting in a violent manner and were merely attempting to engage in peaceful protest. The City of Fort Wayne is liable for the constitutional violations inflicted on Mr. Brake by Defendant Holmes inasmuch as the actions causing the violation were caused by the official policies, practices, and customs of the City of Fort Wayne and were fully authorized and controlled by the City of Fort Wayne.

ANSWER: Defendants admit that Defendant Holmes and other officers were acting pursuant to policies, practices and customs of the Fort Wayne Police Department but deny the remaining allegations in paragraph 59.

60. Defendants' use of tear gas, pepper spray, munitions, and other uses of force against peaceful protestors, such as Mr. Brake, were intentionally done for the purpose of controlling the movements of these persons.

ANSWER: Defendants deny the allegations in paragraph 60.

61. The excessive force exerted by Defendants against Mr. Brake represented a seizure without cause.

ANSWER: Defendants deny the allegations in paragraph 61.

62. Mr. Brake did not pose a threat to the safety of Defendants or others, had not committed any severe or violent crime, and was neither actively resisting

arrest nor attempting to evade arrest by flight. The force used against Mr. Brake was excessive and objectively unreasonable.

ANSWER: Defendants deny the allegations in paragraph 62.

63. Defendant Holmes willfully engaged in this unconstitutional conduct and acted with callous and reckless indifference to Mr. Brake's Fourth Amendment rights.

ANSWER: Defendants deny the allegations in paragraph 63.

64. As a direct and proximate result of Defendants' violations of Mr. Brake's constitutional rights, Mr. Brake has suffered severe and permanent physical injury, including the loss of his right eye. He continues to receive treatment for this injury. He has suffered, and continues to suffer, emotional injuries.

ANSWER: Defendants deny the allegation that Mr. Brake's injuries were a direct and proximate result of any violation of his constitutional rights. Defendants admit that he has suffered severe and permanent injury. Defendants lack knowledge and information sufficient to form a belief as to the truth of the remaining allegations in paragraph 64 and therefore deny those allegations.

Count III – Indiana Tort Claims Act for Excessive Force, Assault, and Battery

65. Mr. Brake restates and realleges paragraphs 1-36 as if fully set forth herein.

ANSWER: Defendants incorporate by reference the responses to paragraphs 1 through 64 above as if fully set forth herein.

66. On May 30, 2020, Defendant Holmes committed an assault and battery upon Mr. Brake by his unlawful use of excessive force in criminally, maliciously, or willfully and wantonly firing a tear gas canister at Mr. Brake's face.

ANSWER: Defendants deny the allegations in paragraph 66.

67. At the time of Defendant Holmes' excessive force, assault, and battery upon Mr. Brake, Mr. Brake posed no threat to the Fort Wayne Police Department, Defendant Holmes, or any other individuals.

ANSWER: Defendants deny the allegations in paragraph 67.

68. As a direct and proximate result of Defendant Holmes' violations of Mr. Brake's rights, Mr. Brake has suffered severe and permanent physical injury, including the loss of his right eye. He continues to receive treatment for his injury. He has suffered, and continues to suffer, emotional injuries.

ANSWER: Defendants deny that Defendants violated Mr. Brake's rights. On information and belief Defendants admit that Mr. Brake incurred a permanent physical injury with respect to the loss of his right eye. Defendants lack knowledge and information sufficient to form a belief as to the truth of the remaining allegations in paragraph 68 and therefore deny those allegations.

Count IV – Indiana Tort Claims Act for Intentional Infliction of Emotional Distress

69. Mr. Brake restates and realleges paragraphs 1-36 as if fully set forth herein.

ANSWER: Defendants incorporate by reference the responses to paragraphs 1 through 68 above as if fully set forth herein.

70. Defendant Holmes' firing of the tear gas canister at Mr. Brake was extreme and outrageous conduct to a degree that would be regarded as atrocious and utterly intolerable in a civilized community.

ANSWER: Defendants deny the allegations in paragraph 70, including but not limited to the allegation that Defendant Holmes fired a tear gas canister at Mr. Brake.

71. Defendant Holmes' conduct of firing the tear gas canister towards Mr. Brake was extreme and outrageous conduct to a degree such that an average member of the community would consider such behavior outrageous.

ANSWER: Defendants deny the allegations in paragraph 71, including but not limited to the allegation that Defendant Holmes fired a tear gas canister toward Mr. Brake.

72. This extreme and outrageous conduct by Defendant Holmes intentionally or recklessly caused Mr. Brake severe emotional distress.

ANSWER: Defendants deny the allegations in paragraph 72.

SEPARATE DEFENSES

Defendants incorporate as if fully set forth herein their responses to Plaintiff's Complaint and further allege and state:

1. Defendants deny "liability" (and every allegation of supposed "wrongful conduct").
2. Plaintiff's Complaint fails to state a claim upon which relief can be granted.
3. Plaintiff's claims are barred in whole or in part under the *Monell* doctrine.
4. No act or omission of Defendants proximately caused the incident(s) of which Plaintiff complains.
5. No act or omission of Defendants proximately cause Plaintiff any injury (or supposed damage).
6. Defendants are entitled to qualified immunity, including but not limited to qualified immunity as to the individual capacity claims.
7. The use of force was reasonable.
8. Plaintiff's injuries were the result of his own actions.

9. To the extent Plaintiff's injuries were not the result of his own actions, they were the result of the actions of other non-parties and not Defendants.

10. The use of force by any Defendant was reasonable under the facts and circumstances.

11. Defendants reserve the right to plead additional defenses and other matters, as discovery in this case progresses.

WHEREFORE, Defendants, City of Fort Wayne and Justin Holmes, request that Plaintiff take nothing by way of his Complaint and for all other just and proper relief in the premises (including "costs" and attorneys' fees).

JURY DEMAND

Defendants, by counsel, hereby respectfully request the above-captioned matter be tried by a jury.

Respectfully submitted,

/s/Anne L. Cowgur

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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2021, a copy of the foregoing document was served via the Court's electronic filing system upon all counsel of record.

/s/ Anne L. Cowgur