

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

BALIN BRAKE,)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:20-cv-345
)	
CITY OF FORT WAYNE,)	JURY TRIAL REQUESTED
JOHN DOE, in his official)	
and individual capacity,)	
)	
Defendants.)	

COMPLAINT

Introduction

1. Balin Brake, the Plaintiff in this case, is a 21-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.

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, an

unidentified police officer (“John Doe” or “Defendant”)¹ 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.



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, and the unreasonable and excessive use of force by law enforcement officers in response to these lawful protests.

¹ Upon information and belief, Mr. Brake was shot by a member of either the Public Safety Response Team (“PSRT”) or Emergency Services Team (“EST”), which are both units of the Fort Wayne Police Department.

Jurisdiction, Venue, Cause of Action

4. This Court has original jurisdiction pursuant to 28 U.S.C. § 1331.
5. Venue is proper in this district pursuant to 28 U.S.C. § 1391.
6. 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.

Parties

7. Mr. Brake is a resident of Fort Wayne, Indiana.
8. Defendant City of Fort Wayne is a municipality located in Allen County, Indiana, and is the employer and principal of Defendant John Doe.
9. Defendant John Doe is currently, or was at the time of these events, an unidentified Fort Wayne Police Department officer who committed the acts set forth below as an agent of Defendant City of Fort Wayne. John Doe engaged in the conduct complained of in the course and scope of employment and under color of law.

Relevant Facts

10. On May 30, 2020, protestors gathered at the Courthouse Green outside of the Courthouse, located in downtown Fort Wayne, Indiana.
11. On May 30, 2020, there was no state or local curfew in place for Fort Wayne.² Around 4:00 PM, Plaintiff Balin Brake arrived and stood on Clinton Street—the street just outside the Courthouse—with his friend.
12. Mr. Brake attended the protest in solidarity with the Black Lives Matter movement.
13. At all times, Mr. Brake demonstrated peacefully.

² Jonathan Shelley, *Spokesman: Mayor Henry has no plans for curfew*, *National Guard*, WPTA 21 (May 31, 2020), <https://wpta21.com/2020/05/31/spokesman-mayor-henry-has-no-plans-for-curfew-national-guard/>.

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

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

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

17. 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.

18. 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.



19. 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.

20. When Mr. Brake turned his head back toward the police officers, an unidentified officer, John Doe, fired a tear gas canister that hit Mr. Brake directly in the face, rupturing his right eye.³

21. 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.

22. 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.

23. 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.

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

25. 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.

26. 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.

³ This action may have been performed recklessly, negligently, without proper regard, or even intentionally.

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

28. 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.

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

30. 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.

31. 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.

32. 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.

33. 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.

34. 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. 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.

Jury Demand

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

Legal Claims

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

36. Mr. Brake restates and realleges paragraphs 1–35 as if fully set forth herein.

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

38. 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.

39. 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.

40. Defendant 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, 2020.⁴

41. 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.

42. Defendant Doe 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.

43. The actions of the defendants towards Mr. Brake were not narrowly tailored and did not leave open ample alternatives for communication.

44. 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.

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

46. 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.

47. Defendant Doe 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

⁴ Ella Abbott & Katy Anderson, *A Weekend of Protests in Fort Wayne*, Northeast Indiana Public Radio, (June 1, 2020) <https://www.wboi.org/post/weekend-protests-fort-wayne#stream/0>; *FYPD: Nearly 100 Arrested, Officers and Protestors Hurt After 2 Days of Protests*, Wane.com, (May 31, 2020), <https://www.wane.com/news/crime/fwpd-nearly-100-arrested-officers-and-protesters-hurt-after-2-days-of-protests/>.

and other similar weaponry by defendant Doe 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.

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

49. The City of Fort Wayne is liable for the constitutional violations inflicted on Mr. Brake by defendant Doe 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.

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

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

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

52. Mr. Brake restates and realleges paragraphs 1–35 as if fully set forth herein.

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

54. 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

55. 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.

56. Defendant Doe 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 Doe 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.⁵

57. Defendant Doe 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 Doe and other officers to eject protestors from streets, sidewalks, and other public areas, even though the protestors—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 Doe 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.

⁵ Although the Allen County prosecutor, Karen Richards, recognizes that video clips of the protest reveal as many as five examples of potentially unreasonable force from police officers, she has declined to prosecute any of the officers involved. Jeff Neumeyer, *Criminal cases proceed against dozens of Black Lives Matter protestors; no charges directed at police*, WPTA 21 (Aug. 17, 2020) <https://wpta21.com/2020/08/17/criminal-cases-proceed-against-dozens-of-black-lives-matter-protesters-no-charges-directed-at-police/>.

58. 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.

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

60. 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.

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

62. 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.

WHEREFORE, Mr. Brake requests that this Court:

- i. accept jurisdiction of this case and set it for hearing at the earliest opportunity;
- ii. declare that the actions of the defendants, their officers, agents, and employees violated, and continue to violate, the First and Fourth Amendments to the United States Constitution, as applied to the states and municipalities by the Fourteenth Amendment;
- iii. award Mr. Brake damages, compensating him for his injuries against all Defendants, jointly and severally, following a jury trial;

- iv. award Mr. Brake punitive damages against defendant Doe;
- v. award Mr. Brake his reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and
- vi. award all other proper relief.

Date: October 2, 2020

Respectfully submitted,

/s/ Kenneth J. Falk

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