

2019 WL 3851258 (Ohio Com.Pl.) (Trial Pleading)  
Court of Common Pleas of Ohio.  
Hamilton County

Ron PLUSH Individually as Father and as Administrator of the Estate of Kyle Plush and Jill Plush Individually as Mother of Kyle Plush c/o Gerhardstein & Branch Co. LPA 441 Vine Street, Suite 3400 Cincinnati, OH 45202,  
Plaintiff,

v.

CITY OF CINCINNATI Harry Black Amber Smith Stephanie Magee Edsel Osborn Brian Brazile c/o City of Cincinnati 801 Plum Street Cincinnati, OH 45202, Defendants.

No. A 1903752.  
August 12, 2019.

Judge

### Complaint and Jury Demand

Alphonse A. Gerhardstein (0032053), trial attorney plaintiff, Jennifer L. Branch (0038893), M. Caroline Hyatt (0093323), Gerhardstein & Branch Co. LPA, 441 Vine Street Suite 3400, Cincinnati, Ohio 45202, (513) 621-9100, Fax (513) 345-5543, agerhardstein@gbfirm.com, jbranch@gbfirm.com, chyatt@gbfirm.com, for plaintiff.

1. On the afternoon of April 10, 2018, Kyle Plush entered his family's van to retrieve items from the rear of the vehicle. The back seat unexpectedly folded up on him, pinning him against the back door. He could not move. He could barely breathe. But his cell phone was in his pocket. Despite being pinned upside down, alone and almost completely helpless, he used his fading energy and breath to successfully place two calls to 9-1-1. He told operators that he was "stuck in van," and "going to die soon." He provided his location and a description of the van. He screamed, pounded and begged for help. No one helped him.

### I. PRELIMINARY STATEMENT

- The first call taker, Defendant Magee, chose to exclude critical information when passing the call to dispatch and chose not to properly classify the call as trapped and in need of rescue which would have dispatched fire and EMS. She also chose not to give police officers or a sheriff's deputy who called in later Kyle's precise location, which she had through wireless mapping technology;
- The second call taker, Defendant Smith, heard Kyle asking for help and saying he was at Seven Hills School but chose to treat Kyle's call as a "silent call" and improperly enabled the TTY function, knowing it reduced the volume of Kyle's voice, and then she chose not to play back the call to hear what he said. *She never even advised dispatch or the officers still on the scene that she had received a second call from Kyle or that he stated he was almost dead;*
- The responding officers knew the caller was stuck inside a van parked in the Seven Hills Thrift shop parking lot, yet they never searched that entire lot or left their vehicle to search for Kyle. The call takers had a map that pinpointed Kyle's cell phone, and the officers had the ability to populate a map on their computers and cell phones with the address they were given, yet they left the scene without utilizing that information.

Kyle was still alive when the officers abandoned the scene. Kyle's father, not the police, finally discovered his lifeless body hours later. City Manager Harry Black knew that training and supervision of call takers were extremely deficient. Those deficiencies directly led to the failure to direct police officers to Kyle's vehicle. Defendant Black was also aware of inadequate training for officers on wireless location mapping and of a custom by officers to stay in their vehicles when investigations on foot were needed. Defendant Black chose not to solve these problems, which also led to the failure to rescue Kyle before he died. Plaintiffs Ron and Jill Plush, Kyle's parents, file this action seeking fair compensation and to encourage

the reforms that are necessary to prevent other deaths in the future.

## **II. PARTIES**

2. Plaintiff Ron Plush is the father of Kyle Plush and administrator of the estate of his son. He brings this action on behalf of himself and the next of kin of Kyle Plush.
3. Plaintiff Jill Plush is the mother of Kyle Plush.
4. Defendant City of Cincinnati is a unit of local government organized under the laws of the state of Ohio. The City of Cincinnati is a subdivision under R.C. § 128.01 (M).
5. Defendant Harry Black was at all times relevant to this action an employee of the City of Cincinnati working as City Manager. He is sued individually and in his official capacity as a former employee of the City of Cincinnati.
6. Defendant Stephanie Magee was at all times relevant to this action an employee of the City of Cincinnati working as a call taker in the Emergency Communications Center (ECC). She is sued individually and in her official capacity as an employee of the City of Cincinnati.
7. Defendant Amber Smith was at all times relevant to this action an employee of the City of Cincinnati working as a call taker in the ECC. She is sued individually and in her official capacity as an employee of the City of Cincinnati.
8. Defendant Edsel Osborn was at all times relevant to this action an employee of the City of Cincinnati working as a police officer. He is sued individually and in his official capacity as an employee of the City of Cincinnati.
9. Defendant Brian Brazile was at all times relevant to this action an employee of the City of Cincinnati working as a police officer. He is sued individually and in his official capacity as an employee of the City of Cincinnati.

## **III. FACTS APPLICABLE TO ALL CLAIMS**

### **A. Kyle Plush**

10. Kyle Plush was born on XX/XX/2001. He had several physical challenges which he met with courage and determination. He participated in sports and physical activities as he was able, with loving support and encouragement from his parents and sister.
11. Kyle was a good student at Seven Hills School and was in 10<sup>th</sup> grade at the time of his death.
12. On April 10, 2018 Kyle drove to school in a 2004 Honda Odyssey van owned by the family.
13. At that time, Kyle weighed 117.5 pounds and was 5' 2" tall.
14. Kyle was a positive, loving child. He was very close to his sister and his parents.

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### **B. Emergency Communications Overview**

15. Emergency communications in Cincinnati are organized under state law. R.C. § 128.01 et seq.
16. The City of Cincinnati is a “public safety answering point” (PSAP) under R.C. § 128.01 (P), which means it has established and maintains a facility to which 9-1-1 calls are routed, and from which personnel dispatch emergency service responders including those providing police, fire, ambulance, rescue, and/or emergency medical services.
17. The 9-1-1 service is partially funded by a charge on each wireless subscriber phone bill, pursuant to R.C. § 128.42.
18. Under state law, liability is imposed on local governments and/or their employees for “willful or wanton misconduct” in connection with bringing into operation the 9-1-1 system. R.C. § 128.32.
19. On April 10, 2018 the 9-1-1 calls in the Cincinnati PSAP were handled by call takers and dispatchers who worked in the Emergency Communications Section (ECS) of the Cincinnati Police Department. They normally worked at the Emergency Communications Center (ECC). On that date they were working at a back-up center while renovations were being completed to the main center.
20. 9-1-1 calls are initially taken by “call takers” or “operators.”
21. Defendants Magee and Smith were call takers.
22. Call takers enter information from calls into the computer aided dispatch system (CAD).
23. Information from the call takers is passed on to dispatchers who are also located in the ECC.
24. Police and Fire emergency personnel are assigned to various service calls by the dispatchers.
25. Police and Fire emergency responders read the CAD entries in their vehicles on their mobile data computers (or “MDCs”).

### **C. History of Emergency Communication Failures and Problems in Cincinnati**

26. The emergency response system in the City of Cincinnati (“Cincinnati” or “the City”) has a history of failing to timely dispatch responders, failing to locate callers, and unnecessarily delaying dispatch in response to calls.
27. In the years leading up to Kyle Plush’s tragic death, the ECC had several leadership changes.
28. When Defendant Harry Black was hired as Cincinnati’s City Manager in 2014, he described the 9-1-1 system as “a mess.” He has also stated that the ECC “bordered on dysfunctional.”
29. When Defendant Black started as City Manager, the ECC was led by a civilian director who reported to the City Manager.
30. The Director of the ECC in January 2014, Joel Estes, warned Black and the City that turnover and burnout were serious problems at the ECC. In January 2014 there were 18 vacant operator and dispatcher positions and one open supervisor position.
31. In March 2015, Defendant Black reported to the City on the status of operations at ECC and vowed to fill the vacant positions at ECC, but that never happened.
32. Defendant Black shifted responsibility for emergency communications to the Police Department in 2016 and established the Emergency Communications Section (ECS) within the police department. Elliott Isaac was the Chief of Police. Captain Jeffrey Butler was appointed director of the ECS of the police department in 2016. Shortly afterwards, on January 4, 2016, he wrote a report to Chief Isaac stating that ECS needed more money, more operators, and better training for staff. He

specifically described training as “at best disorganized and inconsistent.” Defendant Black was aware of this report.

33. In May 2016, Defendant Black again promised the City that he would fully staff the ECC, predicting it would take four months, but this was not done.

34. Between June 2016 and March 2017 there were at least nine systemwide emergency communication failures, resulting in more than seven hours when the entire 9-1-1 system was down. On July 18, 2017 alone, the system was totally down for more than three hours. At that time, city councilmember Chris Seelbach stated, “The city administration is playing Russian roulette with people’s lives.”

35. Capt. Jeff Butler was removed as ECS Director on January 1, 2017 by Defendant Black.

36. Soon after Captain Butler was removed from the ECS, discipline he had recommended against several ECS staff for deficient 9-1-1 performance was reversed by Defendant Black.

37. At the time Butler was removed, ECS was engaged in a major upgrade of the CAD system which required careful attention to detail and coordination between operations and IT staff.

38. Capt. Gramke was appointed Director of ECS in March 2018 by Defendant Black. Capt. Gramke had no significant knowledge of the technology challenges and no appropriate experience in emergency communications.

39. In January 2017, an eyewitness promptly called 9-1-1 regarding a murder on Washington Terrace in Cincinnati but it took over one hour to locate the victim. The call taker improperly entered information into the CAD system, had difficulties determining the location of the caller, improperly coded the call, and when the officers did arrive on scene, they improperly investigated. The officers failed to exit their cruiser, and they initially failed to find the deceased person as a result.

40. On January 3, 2017, a Cincinnati resident in the neighborhood of College Hill called 9-1-1 late at night to report multiple gunshots right outside of his house. The police responded and drove down the street but did not get out of their cars. If they had, they would have found the body of a shooting victim on the sidewalk, directly across from the house of the caller. Instead, neighbors found the body in the morning, while walking their dog, much too late for any aid to be rendered.

41. A Cincinnati resident tried to call 9-1-1 in July 2017 three separate times to report his car had been broken into, but no one picked up. In a report to the media, he noted “I could have been dying.”

42. These failures were all known to the City of Cincinnati and Defendant Black prior to April 2018.

43. In August of 2017, an ECC employee filed a grievance with the City, alleging that the managers within ECS were unqualified, did not understand the technology the center used, and that the managers failed to properly train staff how to use the technology.

44. In the fall of 2017 and early 2018 the phone system at the ECC was switched from Cincinnati-based Cincinnati Bell to Seattle, Washington-based West Communications. This required all supervisors and staff to receive training on the new phone system.

45. West Communications provided the training. The ECS staff had no input into the training. The training provided by West failed to educate staff on the proper use of the TTY function on the phone system for communicating with those callers suspected of having hearing impairments.

46. In February 2018, an ECS employee wrote that “the mismanagement [of ECS] rises to the level of a public safety concern that poses a threat to members of the public.” She also claimed that the ECS was a “dumping ground for sergeants that are not fit for the field.” The ECS employee also said that ECC “is a recipe for disaster that has been mismanaged and ignored too long.” Her complaints were sent to Defendants Black, the Cincinnati Mayor, and to the members of City Council.

47. By April 2018, Defendants City Manager Black and the City of Cincinnati were well aware that the following problems made injury to citizens seeking help through 9-1-1 foreseeable if allowed to continue:

- Staffing was not adequate, causing burnout and requiring many employees to work mandatory overtime;
- Training and supervision on the TTY function of the new phone system, often used to determine if a “silent” call was in fact a call from a hearing-impaired citizen, was inadequate, causing communication to be disrupted;
- The new CAD system was regularly freezing, and staff were not properly instructed and supervised on how to save and convey the data they were attempting to enter when this happened;
- The system was plagued by technological problems, including system-wide outages and mysteriously distorted and inaudible calls that were not distorted on playback, requiring call takers to regularly play back calls to be able to finally hear what was actually said;
- Police officers were not trained or supervised on their use of wireless location technology even though they were provided searchable street addresses for cell phones using that technology;
- Training and supervision of police officers in the field failed to ensure they investigated call locations on foot when needed; and
- Training and supervision of officers in the field failed to ensure they would locate addresses provided by dispatch on their MDCs using mapping technology.

48. Instead of responding to these well-known problems, Defendant Black and the City of Cincinnati failed to act, and Defendant Black removed and retaliated against those who raised concerns.

49. Defendant Black’s retaliation led to several lawsuits being filed by City employees, some connected to the ECS, accusing Defendant Black of mistreatment and retaliation. In March 2018 Mayor Cranley asked City Manager Black to resign, and when he refused the Mayor requested that a special prosecutor be appointed to investigate Black. City Manager Black resigned on April 21, 2018, eleven days after the death of Kyle Plush. He was eventually paid \$644,000.00 in severance and to settle any claims by him.

50. Cincinnati Mayor Cranley admitted on April 12, 2018, two days after Kyle’s death, that “the problems with management, supervision and technology have been reported at the 9-1-1 center for years. Based on the problems that I have been made aware of, I have repeatedly requested solutions.... have been told by the administration that problems were being resolved through Cincy Stat and other efforts. This tragedy may ultimately suggest the problems have not been resolved or that not enough changes have been made.”

51. The actions of Defendant Black and the City of Cincinnati were negligent, reckless, wanton, willful and deliberately indifferent to the safety and health of 9-1-1 callers, including Kyle Plush and caused his death. This includes actions bringing into operation the 9-1-1 system in Cincinnati.

52. Defendants Black and the City of Cincinnati had an opportunity to protect Kyle Plush and they acted negligently, recklessly, wantonly, willfully, and with deliberate indifference in failing to do so.

**D. Kyle Is Trapped in His Van and Calls 9-1-1; Defendant Magee Does Not Relay Critical Information; Chooses Not to Classify the Call as Rescue Call**

53. On April 10, 2018, Kyle Plush parked his van in the sophomore lot near the thrift shop at Seven Hills School.

54. After school he returned to his lot to retrieve items that were in the back of the van.

55. He knelt on the bench seat in the van and reached into the back. As he did so, the bench seat flipped up, pinning Kyle against the back door.

56. Kyle was trapped, unable to move the seat or move his body. He had difficulty breathing.

57. The collapsing bench seat put 80 pounds of pressure on his chest.

58. Kyle had a cell phone in his pocket. He could not physically reach the phone, but he used the “Hey Siri” app to make a call simply by using a voice command. He called 9-1-1 at 3:14 p.m.

59. Call taker Defendant Magee took Kyle’s call. Defendant Magee could hear Kyle banging and yelling for help and saying:

- Help.

- I am stuck in the van.

- Help. Help.

- Help. I’m stuck inside the van outside of Seven Hills parking lot.

- Help. I need help.

- Help. Help. Help.

- [Banging can be heard.]

- [Kyle screams.]

- Can you hear me?

- I’m at the Seven Hills parking lot. I am trapped in my van. Help. Help.

- I can’t hear you. I’m in desperate need of help.

- Help. Help. Help. I can’t hear you.

- Help. I am going to die soon.

- [Banging can be heard]

- Help.

- [Kyle can be heard banging]

- Finally, Kyle Screams “Help.”

60. Defendant Magee identified Kyle’s location as 5471 Red Bank Road, based on his cell phone GPS coordinates.

61. The call disconnected at 3:17 p.m. and Defendant Magee called back and received a voicemail message that identified the caller as “Kyle.”

62. Defendant Magee delayed initiating any CAD entry for more than seven minutes.

63. Defendant Magee labeled the call “unknown trouble.” She entered the following in the computer aided dispatch system at 3:21 p.m.:

[1] PCO HEARD FEMALE STATING, “HELP HELP IM STUCK INSIDE MY VAN, IM IN SEVEN HILLS PARKING LOT” LOC FROM PHASE 2, COMP KEPT STATING SHE WAS UNABLE TO HEAR PCO, CALLER H/U, VM ON CB

She added the following information in the CAD at 3:22 p.m.:

[2] POSS IN THRIFT STORE PARKING LOT ACROSS FROM SCHOOL

64. The call was classified as Code 2, giving it a high priority.

65. Defendant Magee described Kyle as a female, which was inaccurate.

66. Defendant Magee did not record any of the following information in her CAD entry:

- She could hear banging twice
- She could hear Kyle scream for help twice
- The urgency in Kyle's voice
- That Kyle was in desperate need of help and that he was going to die soon
- That he pleaded for help 17 times
- That he repeatedly said he could not hear her
- She did not share her mapping detail with officers even though she knew that officers had maps on the MDC and could insert GPS coordinates
- The caller's name was Kyle based on voicemail greeting
- The caller sounded far away from the phone, consistent with his claim that he was trapped

67. Two other call takers listened to Kyle's call. One heard Kyle say, "Help me, I'm going to die." Defendant Magee decided not to include that critical information in the CAD entry.

68. The call from Kyle should not have been labeled "unknown trouble." That code triggers a police response. Based on all the facts known by Defendant Magee during the call she should have classified the run as a request for rescue which would have resulted in the dispatch of fire personnel to extract Kyle from the vehicle and EMS personnel to treat his injuries. Fire and EMS vehicles are outfitted with mapping software similar to that used by call takers and, armed with Kyle's location, fire and EMS personnel would have found him.

69. It appears from the recording of Kyle's call that Kyle could not hear the call taker. However, during the initial three-minute phone call with Kyle, Defendant Magee failed to comply with the standard of practice by explaining what she was doing, and she improperly allowed for extended periods of silence which would have increased Kyle's anxiety.

70. At approximately 3:44 p.m. Defendant Magee received a call from a Hamilton County Deputy who was working at Seven Hills School directing traffic. He asked for more information, specifically inquiring about "phase 2." Defendant Magee chose not to provide the precise location of Kyle, choosing instead to give a general description of phase 2 mapping technology. This inadequate response did not direct the deputy to Kyle, who was still alive at the time of the call.

71. Defendant Magee knew that the caller was trapped in his van, was begging for help, and that he thought was going to die. Therefore, she knew he was at serious risk of harm.

72. According to the Emergency Communications Expert John Melcher's Preliminary Report:<sup>1</sup>

- Stephanie Magee unduly delayed any CAD entry for seven minutes; omitted critical information from her CAD entry; misclassified the call for service as "unknown trouble" rather than a fire/rescue call for service; and failed to share the precise location data she had with the responding officers. All of these acts increased the risk of harm to Kyle.
- Stephanie Magee's actions reflect a complete abandonment of professional duties in the face of a known and serious risk to the safety and health of Kyle Plush.
- Stephanie Magee completely failed to follow applicable standards of practice in responding to Kyle Plush's call.

73. The actions of Defendant Magee were negligent, reckless, wanton, willful and deliberately indifferent to the safety and health of Kyle Plush and caused his death. This includes actions bringing into operation the 9-1-1 system in Cincinnati.

74. Defendant Magee had an opportunity to protect Kyle Plush and she acted negligently, recklessly, wantonly, willfully, and with deliberate indifference in failing to do so.

**E. Defendants Osborn and Brazile Chose Not to Get Out of Their Car, Go to the Correct Section of the Parking Lot, or Map Kyle's Location on their Devices**

75. Defendant officers Edsel Osborn and Brian Brazile were dispatched to the scene at 3:22 p.m.

76. The following information was told to the officers by dispatch over the radio at 3:22 p.m.:

Unknown trouble. 5471 Red Bank Road. Female caller. Call taker can hear female yelling "Help me, I'm stuck inside my van. I'm in Seven Hills parking lot. We got the location from Phase 2, complainant kept stating she was unable to hear the call taker. Caller hung up. Voicemail on callback. She is possibly in the thrift store parking lot across from school there. 5471 Red Bank Road."

77. The address provided to them, 5471 Red Bank Road, was near the location of Kyle's van and properly placed his location in the correct section of the parking lot. See Google Map below where the pin indicates the location of 5471 Red Bank Road and the P indicates the location where Kyle's van was parked 12 spaces north of the address location.

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78. The officers arrived at the scene at 3:26:52 and activated their body cams.

79. The officers did not drive to the address given of 5471 Red Bank Road. If they had, the officers would have been able to locate Kyle's van a few feet away and easily visible.

80. The officers did not know what "phase 2" meant and did not inquire of the dispatcher or their supervisors what it meant. Had they inquired and learned that phase 2 was a reasonably accurate location derived from wireless location technology, the officers would have been able to locate Kyle.

81. The wireless location technology utilized by the call takers and dispatchers pinpointed the location of Kyle's cell phone to within several feet of the actual location of his parked van.

82. The officers were not trained on wireless location technology and terminology and that failure of training caused them not to locate Kyle Plush.

83. The officers had the ability to display the dispatched address on a map in their vehicle, but consistent with custom and

practice, the officers did not use the mapping function on their MDC. They chose not to use the mapping tools on their cell phones. Doing so would have made it simple to locate the Plush van.

84. The officers entered the south end of the parking lot where Kyle's van was parked but chose not to drive to the northern end of the lot, travel past Kyle's van, or leave their vehicle and look into any of the few vans that were in that parking lot. If they had searched the entire lot, the officers would have located Kyle's vehicle and found Kyle trapped inside.

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### **Diagram 2<sup>2</sup>**

85. The officers also traveled through lots on the wrong side of the street even though they were told Kyle was likely in the thrift store lot across from the school. The routes the officers took are shown in Diagram 1 from Preliminary Report of Police Practice Expert Michael Lyman. The red line depicts the officer's vehicle path and the green X depicts Kyle's van parked in the northern end of the thrift store lot.

86. The officers were eating and had their radio playing music while they were driving around the school parking lots.

87. While they were on scene, the Defendant Officers called Kyle's cell phone and heard his voicemail identifying him as Kyle. They did not use the name to investigate his identity.

88. The officers did not use the address they were provided to locate Kyle Plush on their MDC or their cellphones. They also chose not to call dispatch and secure more precise information about Kyle's location. If they had taken any of those actions, they would have located the vehicle and Kyle trapped inside and saved his life.

89. The officers turned off their body cams as they were driving around the school parking lots. Turning off their body cams before clearing a scene violated city policy.

90. Although they had not yet officially cleared the scene, the officers turned off their body cameras because they had decided to stop searching for the van. They chose not to search the northern lot by the thrift shop, where Kyle's van was.

91. The officers spoke with the off-duty deputy directing traffic. Instead of completing the search, they asked him if he had seen anything. He told them he had not, and they left, without searching the remaining northern end of the lot, where Kyle's van was parked in plain sight. No one ever searched the northern end of the lot where Kyle's van was parked.

92. The Defendant officers chose not to engage the call taker or dispatcher for more information about Kyle's location before abandoning their search.

93. The Defendant officers incorrectly assumed that the call was a prank.

94. Defendant Magee classified the call by Kyle Plush as "unknown trouble." The City did not train the officers or establish policies for officers to follow when investigating calls labeled "unknown trouble," which was coded a high priority call. This failure to train the officers on unknown trouble calls contributed to the officers failing to discover Kyle Plush before he died.

95. Defendants Osborn and Brazile knew from the CAD incident ticket that the caller was trapped in his van and therefore knew he was at serious risk of harm.

96. According to the Preliminary Report of Police Practices Expert Michael Lyman:

- The operational response by Cincinnati Police officers Brian Brazile and Edsel Osborn to the 9-1-1 call made by Kyle Plush was completely mishandled. This is because the "search" for the van described by Kyle consisted of an abbreviated, 11 minute effort in which Brazile and Osborn (1) never exited their patrol vehicle to look inside any of the parked vehicles located in the thrift store parking lot -especially vans; (2) failed to look through the entire thrift store lot and thus completely missed the van in which Kyle Plush stated he was trapped; (3) made an unreasonable assumption that the call involved a

citizen having mechanical problems with their vehicle's locking mechanism; (4) never utilized the navigation button of the MDT that populates a map in the police vehicle; (5) failed to communicate with supervisory personnel regarding the status of the brief search; and, (6) failed to communicate with supervisory personnel for clarification of a "Phase 2" action which was understood only by dispatch personnel.

- These operational shortcomings, individually or collectively, illustrate a perilous disregard for the safety of a citizen who was known to be in harm's way. This is crucial because both officers were aware that a citizen called 9-1-1 seeking help and was stuck in a van. It was unknown the extent that the 9-1-1 caller was in harm's way, but the fact that the caller made a distressed 9-1-1 call requesting help was sufficient evidence to require Osborn and Brazile to conduct a thorough search of the area before concluding that the call was unfounded.

97. The actions of Defendants Osborn and Brazile were negligent, reckless, wanton, willful and deliberately indifferent to the safety and health of Kyle Plush and caused his death. This includes actions bringing into operation the 9-1-1 system in Cincinnati.

98. Defendants Osborn and Brazile had an opportunity to protect Kyle Plush and they acted negligently, recklessly, wantonly, willfully, and with deliberate indifference in failing to do so.

#### **F. Kyle Calls 9-1-1 Again While the Officers are On Scene; Defendant Amber Smith Does Not Notify Officers**

99. At 3:34:59 p.m. Kyle Plush used the "Hey Siri" app on his cellphone again and successfully called 9-1-1 while the officers were still on scene.

100. Defendant call taker Amber Smith took that call.

101. The previous year, in May 2017, Defendant Smith posted on social media that, "I'm always at work and working overtime...all it does (is) makes us hate our job and hate the people that are off for months...Just feel like venting. That's all. Nothing will change."

102. Defendant Smith was working overtime when she handled the call from Kyle Plush. She had had only 8 hours off since she ended her prior 12-hour shift.

103. Defendant Smith heard Kyle ask for help and say he was in the Seven Hills Parking lot" at the start of this call.

104. Defendant Smith nonetheless activated the TTY function as if this were a silent call, even though she knew it was not a silent call. She knew that activating TTY caused the volume of Kyle's voice to be reduced, thus making it more difficult for her to hear what Kyle was saying.

105. Kyle stated the following while Defendant Smith had him on the line:

- *Help me*
- *In a lot at Seven Hills School*
- *Help me*
- *I can't hear what you're saying*
- *Just send quickly... gold Odyssey van*
- *I probably don't have much time left, so tell my mom that I love her if I die.*
- *This is not a joke. This is not a joke.*

- *I'm trapped inside my gold Honda Odyssey van in the sophomore parking lot of Seven Hills Hillsdale*
- *Send officers immediately. I'm almost dead*
- *Seven Hills Hillsdale. Seven Hills (distressed breathing sounds) Hillsdale. (muffled sound as if Kyle's phone changed position.)*
- *Can you hear me? (gasping sound)*
- *Hey Siri, (strained breathing) Hey Siri, I'm in a gold (strained breathing), Hey Siri, Hey Siri, Hey Siri, Hey Siri, (strained breathing), Hey Siri, (strained breathing), call the Plush(muffled sound)*
- *Hey Siri, Hey Siri (slow breathing)*

106. Defendant Smith was trained by West Communications in December 2017 on the phone system she was using.

107. That training did not clearly explain to operators the impact that activating the TTY system had on voice calls. Defendant Smith nonetheless knew from her training and experience that if she heard the caller's voice it was not a silent call.

108. Defendants Black and the City failed to ensure that call takers including Defendant Smith were trained and supervised to use the TTY system appropriately.

109. When Defendant Smith activated TTY tones during the second call from Kyle, she knew that automatically reduced the volume of her receiver and would make it harder to hear what he was saying.

110. Defendant Smith hung up on Kyle without rendering any aid or recording any information.

111. Toward the end of the call, Defendant Smith could hear Kyle say, "hey Siri." Defendant Smith knew she could hear the caller's voice at the beginning and end of the call and she knew the volume of the caller's voice was reduced when she activated the TTY, yet she chose not to play back the call from Kyle.

112. It was common practice for call takers to play back the call recording if they had trouble hearing the call, nonetheless, Defendant Smith chose to play back the call. Defendant Smith's decision not to play back his call meant that she did not take the opportunity to hear any of Kyle's his statements. If she had done so, she would have had all the information she needed to ensure that Kyle was located while he was still alive.

113. Defendant Smith called Kyle's phone back and heard Kyle's voicemail message.

114. The CAD system "froze" for Defendant Smith when she was attempting to save the call in the system and enter it as an advised run. Smith saw "error messages" on her screen and knew the call did not save to the CAD system. Smith knew that when there were CAD issues, she was to notify a supervisor. She chose not to notify her supervisor. She chose not to fill out the paper card with the information so someone could manually enter it in the CAD.

115. Defendant Smith looked up previous runs for this number and located the previous call from Kyle handled by call taker Magee.

116. Defendant Smith knew from the CAD incident ticket that the caller was trapped in his van, therefore, she knew he was at serious risk of harm.

117. Defendant Smith knew the officers were still on scene at the time of Kyle's call to Defendant Smith. She did not inform the officers that a second call had been made.

118. Defendant Smith did not update CAD, did not advise her supervisor, did not request a new dispatch to the scene, and did not update the officers or their supervisors that she had received a second call from the trapped caller. Her decision not to take these steps increased the risk of harm to Kyle and caused the officers not to locate Kyle.

119. Defendant Smith affirmatively engaged the TTY function and thereby placed Kyle in more danger than he was in before she engaged it. She did not disengage the TTY function, which would have allowed her to better hear Kyle speaking in real time. Kyle was on the phone talking to Defendant Smith for almost three minutes before she hung up on him. During that time, he gave her all the information necessary to locate him. As soon as Smith hung up, Kyle tried to engage Siri one more time to make a call, but due to his weakened state, he was unable to activate the Siri app to place another call. Kyle's call with Defendant Smith was Kyle's last chance to be rescued. At the end of his call to Smith, Kyle tried to get Siri to call "Plush." Smith's actions caused Kyle not to make additional successful calls to anyone, including his parents, while he was more physically able to do so. Defendant Smith failed to ensure that the officers even knew about the second call.

120. Even though there were two 9-1-1 calls by Kyle Plush received at the ECC, the officers only received information from the first call. They received no information from the second call.

121. The Defendant officers cleared the scene at 3:37:30 p.m. and entered the following on their mobile data computer, "nothing found...called phone and got voicemail." Kyle was still alive when the officers drove away because he accessed the Siri app after 3:37 p.m., between 3:38 and 3:43 p.m.

122. According to the Emergency Communications Expert John Melcher's Preliminary Report:

- Kyle Plush was at risk of serious harm, including death, when he told Amber Smith he was going to die. She knew he was at risk of death from what he told her and from the CAD ticket that said he was trapped in his van.
- Amber Smith disregarded the obvious risk to Kyle Plush and acted unreasonably when she heard Kyle's voice yet chose to treat his call as a silent call; she turned on the TTY function; she chose not to play back the call; she failed to involve a supervisor; failed to use manual cards to enter the call for service; and she failed to advise dispatch and the officers of the second call.
- Amber Smith's actions were a complete abandonment of caller Kyle Plush and abandonment of professional duties in the face of a known and serious risk to the safety and health of Mr. Plush.
- Amber Smith completely failed to follow standards of practice in responding to Kyle Plush's calls.

123. The actions of Defendant Smith were negligent, reckless, wanton, willful and deliberately indifferent to the safety and health of Kyle Plush and caused his death. This includes actions bringing into operation the 9-1-1 system in Cincinnati.

124. Defendant Smith had an opportunity to protect Kyle Plush and she acted negligently, recklessly, wantonly, willfully, and with deliberate indifference in failing to do so.

#### **F. Ron Plush Discovers his Son**

125. Plaintiffs Ron and Jill Plush were very worried about their son when he did not return home after his tennis match that evening.

126. Jill Plush called Kyle's cell phone and heard his voicemail message.

127. Jill then used her "Life 360" app to locate Kyle's phone at the school. Ron Plush drove to the school to find Kyle's van.

128. At approximately 8:56 that night, Ron Plush discovered his son trapped in the van at the precise location first identified by Defendant call taker Magee five hours earlier.

129. With help from a school employee, Mr. Plush removed his son and attempted CPR but it was too late. Kyle was dead.

130. The Hamilton County Coroner listed Kyle's cause of death as "mechanical asphyxiation."

### **G. Culpable Conduct, Inadequate Policies, Procedures, Staffing, and Training**

131. On April 10, 2018 and for several months previously, ECC staff regularly experienced lockdown/slowdowns of the CAD system at some of the call taker positions. This problem caused delays in transferring CAD data and delayed the response to certain 9-1-1 calls.

132. Amber Smith experienced a lockdown/slowdown of the CAD software at her workstation on April 10, 2018. Following this event, she did not follow protocol to contact a supervisor and fill out a paper card which would have provided additional information to the officers at the scene that would have helped them locate Kyle.

133. Defendants Black and the City knew about the pattern of lockdowns/slowdowns of the CAD system and knew that these lockdowns/slowdowns put the public at risk but failed to remedy the problem.

134. Between March 19, 2018 and the evening of April 10, 2018 the entire ECC was operating out of a back-up 9-1-1 call center.

135. During this period, including on April 10, 2018, the call takers had difficulty hearing calls while they were working in the back-up center.

136. Despite the fact that it was common knowledge at ECC that call takers had trouble hearing calls, no steps were taken by Defendants Black and the City to resolve this problem.

137. All 9-1-1 calls are recorded. The calls were easier to hear on playback, which call takers routinely did to better hear what was said by the caller. Amber Smith failed to use her playback function in order to hear Kyle when he made his second 9-1-1 call.

138. ECS call takers are instructed to use the TTY function if it appears to be a silent call. This will allow communication with the deaf who are using a TTY enabled device (which rarely are available on a cell phone). Call takers know that when the call is in fact a voice call the TTY function will reduce the volume of the caller's voice by 75%. The call takers also know that on playback they can hear the call at full volume.

139. ECS call takers were not adequately trained on the TTY function, including how to operate the function so they could hear the call and when to disengage the function.

140. Defendant Amber Smith was not adequately trained on the operation of the TTY function. That inadequate training caused her to mishandle Kyle Plush's call.

141. ECS was chronically understaffed in April 2018. Many employees, including Amber Smith, were required to frequently work mandatory overtime. Morale among call takers and dispatchers was very low in April 2018.

142. ECS procedures for suspected silent calls were confusing and inadequate and did not give appropriate guidance to call takers.

143. ECS procedures did not require that responders be dispatched based on a second call received from the same cellular number, whether the initial call was dispatched or not. This inadequate procedure caused the police not to discover Kyle Plush.

144. Cincinnati police vehicles did not have GPS tracking software or automatic vehicle location software on April 10, 2018. This impeded the ability of the ECS to determine if the responding police vehicle was near the caller or the location to which

it has been dispatched. Cincinnati fire vehicles had this software at that time, but police vehicles did not. The lack of this software caused the police not to discover Kyle Plush. 145. Defendants Black and the City were aware of the extensive problems plaguing the ECS, including problems with training, supervision, understaffing, too much overtime, low morale, and technology malfunctions.

146. Despite this knowledge, Defendants Black and the City took no action to effectively remedy these problems.

147. In fact, Defendant Black actively shut down attempts to reform the emergency communication system, including transferring people who complained away from communications and yelling at people who raised concerns.

148. The City investigated the actions of defendants Magee, Smith, Osborn and Brazile. Except for counseling for the officers regarding use of the body worn camera, each of these Defendants were “exonerated” with respect to their response to the call by Kyle Plush and his request for help. No discipline was imposed on any of them.

149. The City of Cincinnati has ratified all of the conduct of the individual Defendants in this case and ignored violations of city and professional standards by the Defendants.

150. Defendant Magee violated and abandoned City standards and professional standards and acted negligently, recklessly, wantonly, willfully, and with deliberate indifference to the safety and health of Kyle Plush.

151. Defendant Smith violated and abandoned City standards and professional standards and acted negligently, recklessly, wantonly, willfully, and with deliberate indifference to the safety and health of Kyle Plush.

152. The conduct of Defendants Magee and Smith has been carefully reviewed based on extensive public record analysis by an expert in 9-1-1 emergency communications, John Melcher, and his opinions supporting the allegations in this complaint are presented in his preliminary report.

153. Defendants Osborn and Brazile violated City and abandoned professional standards and acted negligently, recklessly, wantonly, willfully and with deliberate indifference to the safety and health of Kyle Plush.

154. The conduct of Defendant Officers Osborn and Brazile has been carefully reviewed based on extensive public record analysis by an expert in police practices and procedures, Dr. Michael Lyman, and his opinions supporting the allegations in this complaint are presented in his preliminary report.

155. The actions of Defendants Black and the City directly and through their employees including Magee, Smith, Osborn and Brazile were all negligent, reckless, wanton, willful and deliberately indifferent to the safety and health of Kyle.

156. The actions by all Defendants proximately caused the extensive and horrific suffering and needless death of Kyle Plush and the injuries to his parents and family.

157. Looking back after Kyle’s death Defendant Police Chief Eliot Isaac stated that something went “terribly wrong” in the second call. “This young man was crying out for help and we were not able to get information to officers on the scene,” Isaac said. Mayor John Cranley echoed these sentiments stating, “I think we failed.”

### **G. Kyle Plush and Family Injuries**

158. As a proximate result of the wrongful actions of Defendants, Kyle Plush endured excruciating pain, horrifying emotional distress including fear of loss of life, extensive physical injury, and a slow, painful and terrifying death.

159. Kyle Plush did what everyone in his situation would hope to do - successfully call 9-1-1. He reached 9-1-1 operators twice. He explained his dire situation very clearly. He trusted in defendants to help him. As the minutes passed with no relief his fear increased and his hope faded. He knew he was dying and even shared that horrible fact with Defendant Smith. His fear and horror were more than anyone should have to endure.

160. Plaintiffs Ron and Jill Plush have suffered mental anguish, severe emotional distress, lost wages, and will be tormented for the rest of their lives by the failure of Defendants to rescue their son.

161. As a further direct and proximate result of the wrongful death of Kyle Plush, his survivors and/or next of kin have suffered permanent damages, including but not limited to the loss of his support, services, and society, including lost companionship, care, assistance, attention, advice, counsel, guidance, instruction, training, education, and the loss of a prospective inheritance.

162. As a further direct and proximate result of the wrongful death of Kyle Plush, his survivors, next of kin, and/or heirs have suffered permanent damages, including but not limited to, grief, depression, and severe emotional distress. They have incurred funeral bills, medical bills and will need treatment in the future.

**V. FIRST CLAIM - FAILURE TO PROTECT IN VIOLATION OF OHIO CONSTITUTION ARTICLE I  
SECTIONS 1 AND 16**

163. Defendants have deprived Plaintiffs of rights secured to them by the Ohio Constitution, including the right to due process under Section 16 and the right to obtaining safety under Section 1.

164. Defendants acted recklessly and with deliberate indifference in failing to protect Kyle Plush, causing him to suffer greatly before his death.

**VI. SECOND CLAIM - WRONGFUL DEATH**

165. Defendants Black, Magee, Smith, Osborn and Brazile negligently, willfully, wantonly, recklessly and with deliberate indifference caused the wrongful death of Kyle Plush, resulting in damages recoverable under R.C. § 2125.02.

**VII. THIRD CLAIM - BREACH OF DUTY BY MAGEE AND SMITH**

166. Defendants Magee and Smith owed a duty of care to Kyle Plush under Ohio law.

167. It was foreseeable that Kyle Plush would suffer injury or death from their negligent, reckless, wanton, willful and deliberately indifferent response to his calls for assistance to 9-1-1.

168. Defendants Magee and Smith's actions breached the duty of care they owed to Kyle Plush.

169. Defendants Magee and Smith acted negligently, recklessly, wantonly, willfully and with deliberate indifference to the safety and health of Kyle Plush in causing the injury to Kyle Plush and the Plaintiffs.

**VIII. FOURTH CLAIM - FAILURE TO SUPERVISE 9-1-1 EMPLOYEES BY BLACK**

170. Defendant Black owed a duty of care as a supervisor to Kyle Plush under Ohio law.

171. Defendants Magee and Smith were employees of the City of Cincinnati and performed their jobs incompetently, causing injury to Kyle Plush and the Plaintiffs. It was foreseeable that Kyle Plush would suffer injury or death from their negligent, reckless, wanton, willful and deliberately indifferent acts. The emergency communications system itself, including the CAD system and the phone system, were dysfunctional, with numerous technological problems, including system-wide downtime during which no calls could come in, CAD freezing, distorted and inaudible calls, and the lack of effective quality assurance. It was foreseeable that Kyle Plush would suffer injury or death from the defective system and the incompetent performance

of call takers in the system.

172. Defendant Black breached the duty of care he owed to Kyle Plush when he failed to ensure adequate supervision, training, and management of Defendants Magee and Smith and the Emergency Communications Section.

173. Defendants Black acted negligently, recklessly, wantonly, willfully and with deliberate indifference in causing injury to Kyle Plush and the Plaintiffs.

#### **IX. FIFTH CLAIM - BREACH OF DUTY TO PROTECT BY POLICE OFFICERS**

174. Pursuant to R.C. § 737.11, Defendants Osborn and Brazile owed a duty to protect persons, including Kyle Plush.

175. It was foreseeable that Kyle Plush would suffer injury or death from their negligent, reckless, wanton, willful and deliberately indifferent response to his calls for assistance.

176. Defendants Osborn and Brazile breached the duty of protection they owed to Kyle Plush.

177. Defendants Osborn and Brazile acted negligently, recklessly, wantonly, willfully and with deliberate indifference in causing the injury to Kyle Plush and the Plaintiffs.

#### **X. SIXTH CLAIM - FAILURE TO SUPERVISE POLICE OFFICERS BY BLACK**

178. Defendants Brazile and Osborn were employees of the City of Cincinnati. They operated under the supervision of Defendant Black.

179. Defendants Brazile and Osborn incompetently performed their jobs on April 10, 2018.

180. Defendant Black had actual or constructive knowledge of Defendants Brazile and Osborn as well as other officers' incompetence demonstrated by failing to exit their vehicles when investigating calls, but failed to provide adequate supervision, training, or upgraded procedures.

181. The actions of Defendants Brazile and Osborn caused Plaintiffs' injuries, including the wrongful death of Kyle Plush.

182. Defendant Black acted negligently, recklessly, wantonly, willfully and with deliberate indifference to the health and safety of 9-1-1 callers including Kyle Plush proximately causing these injuries.

#### **XI. SEVENTH CLAIM - BREACH OF DUTY BY CITY OF CINCINNATI**

183. Defendant City Manager Black and other city employees were negligent in designing, constructing, maintaining, and operating the emergency communications system. Their negligence occurred within or on the grounds of buildings and grounds including virtual buildings and grounds that are used in connection with the performance of a governmental function.

184. The defect in the equipment making up the 9-1-1 system is a physical defect within or on the grounds of buildings including virtual buildings used in connection with the performance of a governmental function, and its operation caused injury to Kyle Plush and the Plaintiffs.

185. Kyle Plush was in the virtual building and on the virtual grounds of the 9-1-1 system at the time of his injury.

#### **XII. EIGHTH CLAIM - LIABILITY UNDER R.C. § 128.32**

186. As a subdivision participating in a 9-1-1 system under R.C. § 128.32 (A)(1), the City of Cincinnati and its agents and employees, Defendants Black, Magee, Smith, Osborn and Brazile, are liable for the injuries to Plaintiffs and death of Kyle Plush, due to their willful and wanton misconduct in bringing into operation the 9-1-1 system in Cincinnati pursuant to R.C. § 128.01 et seq.

### **XIII. NINTH CLAIM - INTENTIONAL INFLICTION OF SERIOUS EMOTIONAL DISTRESS**

187. Defendants Black, Magee, Smith, Osborn and Brazile have, by their extreme and outrageous conduct, intentionally or recklessly inflicted severe emotional distress on Kyle Plush, Jill Plush, and Ron Plush.

188. All injuries and damages described above were proximately caused by the wrongful acts of Defendants Black, Magee, Smith, Osborn and Brazile.

### **XVI. TENTH CLAIM-LOSS OF CONSORTIUM**

189. As a result of the wrongful acts of Defendants Black, Magee, Smith, Osborn and Brazile, Plaintiffs Ron Plush and Jill Plush were caused to suffer, and will continue to suffer in the future, loss of consortium, loss of society, affection, assistance, and parental fellowship of their dearly beloved son.

190. All injuries and damages described above were proximately caused by the wrongful acts of Defendants Black, Magee, Smith, Osborn and Brazile.

### **XV. JURY DEMAND**

191. Plaintiffs request a jury on all claims triable to a jury.

### **XVI. PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs request that this Court:

A. Award Plaintiffs compensatory damages against Defendants in an amount in excess of \$25,000.00 as will be shown at trial;

B. Award Plaintiffs punitive damages against Defendants Black, Magee, Smith, Osborn and Brazile in an amount to be shown at trial (punitive damages are not sought against Defendant City of Cincinnati);

C. Award Plaintiffs reasonable attorney fees pursuant to any applicable law;

D. Award Plaintiffs prejudgment interest and post judgment interest;

E. Award Plaintiffs such other and further relief, as the Court deems appropriate. This includes but is not limited to any court supervised reforms to the Cincinnati 9-1-1 system that the parties may identify and pursue by agreement or that may be ordered by the Court.

Respectfully submitted,

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### **Footnotes**

- <sup>1</sup> Plaintiff cites to opinions contained in preliminary reports of experts John Melcher and Michael Lyman and expects these reports to be revised after discovery is conducted.
- <sup>2</sup> This diagram is based on the body cam footage, video footage from Seven Hills School, and the statements of Officers Brazile and Osborn.