

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

Susan Doxtator, Arlie Doxtator and
Sarah Wunderlich, as Special
Administrators of the Estate of
Jonathon C. Tubby,

Plaintiffs,

Case No. 19-CV-137

vs.

Erik O'Brien, Colton Wernecke,
Andrew Smith, John R. Gossage,
Heidi Michel, City of Green Bay,
Brown County and John Does 1-10,

Defendants.

**DEFENDANTS ERIK O'BRIEN, COLTON WERNECKE,
ANDREW SMITH AND CITY OF GREEN BAY'S
ANSWER AND AFFIRMATIVE DEFENSES**

Defendants Erik O'Brien, Colton Wernecke, Andrew Smith and City of Green Bay, by their attorneys, Gunta Law Offices, S.C., answer Plaintiffs' Complaint as follows:

INTRODUCTION

1. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 1, and therefore deny.

JURISDICTION AND VENUE

2. Answering Paragraph 2, the averments contained therein are conclusions of law to which no response is required. To the extent a response is deemed to be required, these answering

Defendants are without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore deny.

3. Admit.

4. Admit.

PARTIES

5. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 5, and therefore deny.

6. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 6, and therefore deny.

7. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 7, and therefore deny.

8. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 8, and therefore deny.

9. Admit.

10. Admit.

11. Admit.

12. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 12, and therefore deny.

13. Admit.

14. Admit.

15. Deny.

STATEMENT OF FACTS

16. Admit.

17. Admit.

18. Admit that Mr. Tubby was arrested and then handcuffed behind his back by Officer Wernecke. Further answering Paragraph 18, admit that Officer Wernecke conducted a search of Mr. Tubby incident to arrest that revealed no apparent weapons. Further answering Paragraph 18, deny the remaining allegations.

19. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 19, and therefore deny.

20. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 20, and therefore deny.

21. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 21, and therefore deny.

22. Admit as to all City of Green Bay Police Department employees.

COUNT I - Unconstitutional Use of Deadly Force - 42 U.S.C. § 1983 **(Against Officer O'Brien)**

23. These Defendants reallege and incorporate Paragraphs 1 through 22 of this Answer.

24. Deny.

25. Admit at the time officer O'Brien used deadly force he was acting under color of law. Further answering Paragraph 25, lack knowledge and information sufficient to form a belief as to the truth or falsity of the remainder of Paragraph 25, and therefore deny.

26. Admit at the time of Mr. Tubby's death he was handcuffed and appeared to be armed.

Further answering Paragraph 26, deny the remaining allegations.

27. Deny.

28. Deny.

29. Deny.

COUNT II - Failure to Intervene - 42 U.S.C. § 1983
(Against Officers Wernecke, John Does 1-10)

30. These Defendants reallege and incorporate Paragraphs 1 through 29 of this Answer.

31. Deny.

32. Deny.

33. Deny.

34. Deny.

35. Deny.

36. Admit Officer O'Brien and all other Green Bay Police Department employees at all relevant times acted under color of law. Further answering Paragraph 36, deny the remaining allegations.

37. Deny.

38. Deny.

39. Deny.

COUNT III - Failure to Supervise - 42 U.S.C. § 1983
(Against Defendants Smith, Gossage, Michel, City of Green Bay and Brown County)

40. These Defendants reallege and incorporate Paragraphs 1 through 39 of this Answer.

41. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 41, and therefore deny.

42. Deny.

43. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 43, and therefore deny.

44. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 44, and therefore deny.

45. Deny.

46. Deny.

COUNT IV - Direct Action - Wis. Stat. § 895.46
(Against City of Green Bay)

47. These Defendants reallege and incorporate Paragraphs 1 through 46 of this Answer.

48. Admit that Officer O'Brien, Officer Wernerke and all other City of Green Bay Defendant employees are entitled to indemnification for any judgment for damages or costs entered against them in regard to their contact with Mr. Tubby. Further answering Paragraph 48, deny the remaining allegations.

COUNT V - Direct Action - Wis. Stat. § 895.46
(Against Brown County)

49. These Defendants reallege and incorporate Paragraphs 1 through 48 of this Answer.

50. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 50, and therefore deny.

RELIEF REQUESTED

a. Deny that the Plaintiffs are entitled to any relief.

b. Deny that the Plaintiffs are entitled to any relief.

c. Deny that the Plaintiffs are entitled to any relief.

- d. Deny that the Plaintiffs are entitled to any relief.
- e. Deny that the Plaintiffs are entitled to any relief.
- f. Deny that the Plaintiffs are entitled to any relief.
- g. Deny that the Plaintiffs are entitled to any relief.

AFFIRMATIVE DEFENSES

- 1. Plaintiffs' Complaint fails to state claims upon which relief can be granted.
- 2. Defendant Erik O'Brien is entitled to qualified immunity from suit.
- 3. Defendant Colton Wernecke is entitled to qualified immunity from suit.
- 4. Defendant Andrew Smith is entitled to qualified immunity from suit.
- 5. Defendant Erik O'Brien is entitled to discretionary act immunity.
- 6. Defendant Colton Wernecke is entitled to discretionary act immunity.
- 7. Defendant Andrew Smith is entitled to discretionary act immunity.
- 8. Defendant Erik O'Brien at all relevant times acted in good faith.
- 9. Defendant Colton Wernecke at all relevant times acted in good faith.
- 10. Defendant Andrew Smith at all relevant times acted in good faith.
- 11. Defendant Erik O'Brien's use of force at all relevant times was privileged as necessary to protect his life and the lives of other officers from the reasonably perceived threat posed by Mr. Tubby's actions.
- 12. Defendant Colton Wernecke's use of force at all relevant times was privileged as necessary to protect his life and the lives of other officers from the reasonably perceived threat posed by Mr. Tubby's actions.

13. To the extent force was used by Officer Erik O'Brien, it was justified in the exercise of the right of self defense.

14. To the extent force was used by Officer Colton Wernecke, it was justified in the exercise to the right of self defense.

15. Defendants Erik O'Brien, Colton Wernecke and Andrew Smith are all entitled to indemnification under Wis. Stat. § 895.46 from Defendant, Brown County. At all relevant times these Defendants were under the jurisdiction, direction, supervision and control of the requesting agency, the Brown County Sheriff's Department, and as such are deemed by law to be employees of Brown County for the purposes of Wis. Stat. § 895.46.

16. All allegations of failure to intervene on the part of Defendant Officer Colton Wernecke or any other City of Green Bay Police Department employees are without basis in fact or law and fail to state a cause of action upon which relief can be granted and must be dismissed.

17. Defendant Officer Colton Wernecke or any other City of Green Bay Police Department employee had no duty to intervene in the lawful conduct of Officer Erik O'Brien.

18. Any injuries or damages suffered by Mr. Tubby were caused by reason of his own wrongful acts, conduct, deception and his willful resistance to the lawful acts of the Defendants.

19. Mr. Tubby failed to mitigate his damages.

20. Plaintiffs' state law claims, if any, are subject to the procedural prerequisites for bringing or maintaining a cause of action under § 893.80(1)(a) and (1)(b), Wis. Stats. and the exclusions, immunities and limitations on liability set forth in § 893.80, Wis. Stats.

21. Andrew Smith and/or the City of Green Bay properly trained and supervised all relevant Defendant City of Green Bay Police Officers and were at no time deliberately indifferent to the rights

of Mr. Tubby or any other person.

22. Andrew Smith and/or the City of Green Bay are not liable to the Plaintiffs because the force used against Mr. Tubby was reasonable and the Plaintiffs have failed to identify a rule, regulation, policy or custom that is persistent and wide spread that resulted in a constitutional violation of any of Mr. Tubby's rights.

23. Plaintiffs' Complaint fails to state a claim or a cause of action against the City of Green Bay pursuant to Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) since there can be no recovery for a federal civil rights violation where there is no constitutional deprivation occurring pursuant to government policy, custom, or practice.

WHEREFORE, these Defendants request judgment dismissing Plaintiffs' complaint and awarding costs and attorneys fees as allowed by law.

Dated at Wauwatosa, Wisconsin, this 15th day of February, 2019.

GUNTA LAW OFFICES, S.C.
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Colton Wernecke, Andrew Smith and City of
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