

**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, Andrew Smith,
Todd J. Delain, Heidi Michel,
City of Green Bay, Brown County,
Joseph P. Mleziva, Nathan K.
Winisterfer, Thomas Zeigle,
Bradley A. Dernbach and John Does 1-5,

Defendants.

**DEFENDANTS ERIK O'BRIEN,
ANDREW SMITH AND CITY OF GREEN BAY'S
ANSWER AND AFFIRMATIVE DEFENSES
TO PLAINTIFFS' SECOND AMENDED COMPLAINT**

Defendants Erik O'Brien, Andrew Smith and City of Green Bay, by their attorneys, Gunta
Law Offices, S.C., answer Plaintiffs' Second Amended 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. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 2, 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. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 15, and therefore deny.

16. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 16, and therefore deny.

17. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 17, and therefore deny.

18. Deny.

STATEMENT OF FACTS

19. Admit.

20. Admit.

21. Admit that Mr. Tubby was arrested and then handcuffed behind his back by Officer Wernecke. Further answering Paragraph 21, admit that Officer Wernecke conducted a search of Mr. Tubby incident to arrest that revealed no apparent weapons. Further answering Paragraph 21, deny the remaining allegations.

22. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 22, and therefore deny.

23. Deny.

24. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 24, and therefore deny.

25. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 25, and therefore deny.

26. Admit at the time, Officer O'Brien drew his gun and fired at Mr. Tubby, Defendants Mleziva, Winisterger, Zeigle and Dernbach were in close proximity to O'Brien. Further answering Paragraph 26, deny the remaining allegations.

27. Admit.

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

28. These Defendants reallege and incorporate Paragraphs 1 through 27 of this Answer.

29. Deny.

30. Admit at the time officer O'Brien used deadly force he was acting under color of law. Further answering Paragraph 30, lack knowledge and information sufficient to form a belief as to the truth or falsity of the remainder of Paragraph 30, and therefore deny.

31. Deny.

32. Deny.

33. Deny.

34. Deny.

COUNT II - Failure to Intervene - 42 U.S.C. § 1983
(Against Mleziva, Winisterfer, Zeigle, Dernbach, and John Does 1-5)

35. These Defendants reallege and incorporate Paragraphs 1 through 34 of this Answer.

36. Deny.

37. Deny.

38. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 38, and therefore deny.

39. Deny.

40. Deny.

41. Admit Officer O'Brien and all other Green Bay Police Department employees at all relevant times acted under color of law. Further answering Paragraph 41, deny the remaining allegations.

42. Deny.

43. Deny.

44. Deny.

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

45. These Defendants reallege and incorporate Paragraphs 1 through 44 of this Answer.

46. Deny.

47. Deny.

48. Deny.

49. Deny.

50. Deny.

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

51. These Defendants reallege and incorporate Paragraphs 1 through 50 of this Answer.

52. Deny.

53. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 53, and therefore deny.

54. Deny.

55. Deny.

56. Deny.

57. Deny.

58. Deny.

COUNT V - Excessive Force - 42 U.S.C. § 1983
(Against Defendant City of Green Bay)

59. These Defendants reallege and incorporate Paragraphs 1 through 58 of this Answer.

60. Deny.

61. Deny.

62. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 62, and therefore deny.

63. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 63, and therefore deny.

64. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 64, and therefore deny.

65. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 65, and therefore deny.

66. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 66, and therefore deny.

67. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 67, and therefore deny.

68. Deny.

69. Deny.

70. Deny.

COUNT VI - State Created Danger– § 1983
(Against Defendants Zeigle and Brown County)

71. These Defendants reallege and incorporate Paragraphs 1 through 70 of this Answer.

72. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 72, and therefore deny.

73. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 73, and therefore deny.

74. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 74, and therefore deny.

75. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 75, and therefore deny.

76. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 76, and therefore deny.

COUNT VII – Battery
(Against Defendant O’Brien)

77. These Defendants reallege and incorporate Paragraphs 1 through 76 of this Answer.

78. Deny.

79. Admit.

80. Admit that the shots fired at Mr. Tubby caused his death. Further answering Paragraph 80, deny the remaining allegations.

81. Deny.

COUNT VIII – Negligence
(Against Defendants O’Brien, City of Green Bay, and Brown County)

82. These Defendants reallege and incorporate Paragraphs 1 through 81 of this Answer.

83. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 83, and therefore deny.

84. Deny.

85. Deny.

86. Admit.

87. Deny.

COUNT IX – Negligence
(Against Defendants Zeigle and Brown County)

88. These Defendants reallege and incorporate Paragraphs 1 through 87 of this Answer.

89. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 89, and therefore deny.

90. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 90, and therefore deny.

91. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 91, and therefore deny.

92. Admit.

93. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 93, and therefore deny.

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

94. These Defendants reallege and incorporate Paragraphs 1 through 93 of this Answer.

95. Admit that Officer O'Brien 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 95, deny the remaining allegations.

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

96. These Defendants reallege and incorporate Paragraphs 1 through 95 of this Answer.

97. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 97, and therefore deny.

98. Admit.

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.
- h. Deny that the Plaintiffs are entitled to any relief.
- i. Deny that the Plaintiffs are entitled to any relief.

AFFIRMATIVE DEFENSES

1. Plaintiffs' Second Amended 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 Andrew Smith is entitled to qualified immunity from suit.

4. Defendant Erik O'Brien is entitled to discretionary act immunity.

5. Defendant Andrew Smith is entitled to discretionary act immunity.

6. Defendant Erik O'Brien at all relevant times acted in good faith.

7. Defendant Andrew Smith at all relevant times acted in good faith.

8. Defendant Erik O'Brien's use of force at all relevant times was privileged as necessary to protect his life and the lives of others from the reasonably perceived threat posed by Mr. Tubby's actions.

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

10. Defendants Erik O'Brien 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.

11. All allegations of failure to intervene on the part of any City of Green Bay Police Department employee 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.

12. Any City of Green Bay Police Department employees had no duty to intervene in the lawful conduct of Officer Erik O'Brien.

13. 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.

14. Mr. Tubby failed to mitigate his damages.

15. 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.

16. 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.

17. 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.

18. 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' Second Amended Complaint and awarding costs and attorneys fees as allowed by law.

Dated at Wauwatosa, Wisconsin, this 19th day of September, 2019.

GUNTA LAW OFFICES, S.C.
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Andrew Smith and City of Green Bay

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