

**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,
and John Does 1-5,

Defendants.

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

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

INTRODUCTION

1. Admit that on October 19, 2018, Jonathan Tubby, died as a result of a Green Bay Police Office Involved shooting in the sally port of the Brown County Jail, and that Mr. Tubby was later found to have been unarmed. Deny the characterization that Mr. Tubby was shot in the back of the head, while face-down and while restrained by a police canine. Admit that the shooting incident was

observed by several Green Bay police officers and Brown County sheriff deputies and/or correctional officers, however deny that any of the Green Bay Defendants failed to intervene in violation of Mr. Tubby's constitutionally protected rights.

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. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 11, and therefore deny.

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. Admit.

16. Admit.

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

STATEMENT OF FACTS

18. Admit.

19. Admit.

20. Admit that Mr. Tubby was arrested and then handcuffed behind his back by Officer Wernecke. Further answering Paragraph 20, admit that Officer Wernecke conducted a search of Mr. Tubby incident to arrest that revealed no apparent weapons. Further answering Paragraph 20, deny the remaining allegations.

21. Admit that after arriving in the sally port of the Brown County Jail, Mr. Tubby refused to exit the police squad car that had transported him to the Brown County Jail. Further answering Paragraph 21, lack knowledge and information sufficient to form a belief as to the truth or falsity of the remaining allegations, and therefore deny the same.

22. Deny that Green Bay Police Department had no procedures or training for removing a non-compliant suspect from a squad car, such by use of a negotiator or non-lethal force, further deny that the lack of said polices led to a “disagreement” between the Green Bay Police Department ad

the Brown County Sheriffs' Office concerning how to remove Mr. Tubby. Further answering Paragraph 22, lack knowledge and information sufficient to form a belief as to the truth or falsity of the remaining allegations, and therefore deny the same.

23. Admit that after the OC spray was deployed, Mr. Tubby exited the squad car and continued to ignore the officers' commands and was shot with a "bean bag" round and bitten by a police canine. Deny that Mr. Tubby's hands were clearly visible or that Mr. Tubby was unarmed at any time prior to the use of lethal force and that Mr. Tubby was restrained by a police canine at the time lethal force was deployed. Further answering Paragraph 23, lack knowledge and information sufficient to form a belief as to the truth or falsity of the remainder of the allegations contained in Paragraph 23, and therefore deny the same.

24. 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 24, deny the remaining allegations.

25. Admit.

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

26. These Defendants reallege and incorporate Paragraphs 1 through 25 of this Answer.

27. Deny.

28. Admit at the time Officer O'Brien used deadly force he was acting under color of law. Further answering Paragraph 28, lack knowledge and information sufficient to form a belief as to the truth or falsity of the remainder of the allegations, and therefore deny the same.

29. Deny.

30. Deny.

31. Deny.

32. Deny.

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

33. These Defendants reallege and incorporate Paragraphs 1 through 32 of this Answer.

34. Deny.

35. Deny.

36. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 36, and therefore deny.

37. Deny.

38. Deny.

39. Admit Officer O'Brien and all other Green Bay Police Department employees at all relevant times acted under color of law. Further answering Paragraph 39, deny the remaining allegations.

40. Deny.

41. Deny.

42. Deny.

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

43. These Defendants reallege and incorporate Paragraphs 1 through 42 of this Answer.

44. Deny.

45. Deny.

46. Deny.

47. Deny.

48. Deny.

49. Deny.

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

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

51. Deny.

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. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 54, and therefore deny.

55. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 55, and therefore deny.

56. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 56, and therefore deny.

57. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 57, and therefore deny.

58. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 58, and therefore deny.

59. Deny.

60. Deny.

61. Deny.

**COUNT V - State-Created Danger—§ 1983
(Against Defendants Zeigle, Brown County and Green Bay)**

62. These Defendants reallege and incorporate Paragraphs 1 through 61 of this Answer.

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 that Mr. Tubby communicated that he needed help to or responded to communications from any Green Bay Police Officers after the window of the squad car was broken out. Further answering Paragraph 69, deny the remaining allegations.

70. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 70, and therefore deny.

71. Deny.

COUNT VI – Battery
(Against Defendant O’Brien)

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

73. Deny.

74. Admit.

75. Admit that the shots fired at Mr. Tubby caused his death. Further answering Paragraph 75, deny the remaining allegations.

76. Deny.

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

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

78. Admit that Officer O’Brien bore a duty of care to provide Mr. Tubby a minimum level of well-being and safety, up until maintaining that duty was no longer feasible.

79. Deny.

80. Deny.

81. Admit.

82. Deny.

COUNT VIII – Negligence
(Against Defendants Zeigle, Brown County and Green Bay)

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

84. Admit that on October 19, 2018, the Green Bay Defendants bore a duty of care to provide Mr. Tubby a minimum level of well-being and safety, up until it was no longer feasible to do so. Deny that the Green Bay Defendants were negligent during their encounter with Mr. Tubby on

October 19, 2018 or that they breached their duty of care to Mr. Tubby. Further answering Paragraph 84, lack knowledge and information sufficient to form a belief as to the truth or falsity of the remaining allegations and therefore deny.

85. Deny that any of the Green Bay Defendants were negligent during their encounter with Mr. Tubby on October 19, 2018 or that they breached their duty of care to Mr. Tubby. Further answering Paragraph 84, lack knowledge and information sufficient to form a belief as to the truth or falsity of the remaining allegations and therefore deny.

86. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 86 with regard to Mr. Tubby's state of mind and/or any decisions made by Mr. Tubby and/or the reasons for his decisions, and therefore deny. Further answering Paragraph 86, deny the remaining allegations.

87. Upon information and belief, admit.

88. Deny.

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

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

90. 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 90, deny the remaining allegations.

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

91. These Defendants reallege and incorporate Paragraphs 1 through 90 of this Answer.

92. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 92, and therefore deny.

93. 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.

AFFIRMATIVE DEFENSES

1. Plaintiffs' Third 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. No City of Green Bay Police Department employee had a duty to intervene in the lawful conduct of Officer Erik O'Brien.

13. Any injuries or damages suffered by Mr. Tubby were caused by 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' Third Amended 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' Third Amended Complaint and awarding costs and attorneys fees as allowed by law.

Dated at Wauwatosa, Wisconsin, this 7th day of April, 2020.

GUNTA LAW OFFICES, S.C.
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