

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION**

**TONYA SIMERLY,
Plaintiff,**

v.

**C.L. OSBORNE, individually and
in his capacity as an employee for the
City of Smithers, and
THE CITY OF SMITHERS, WEST
VIRGINIA,
Defendants.**

**CIVIL ACTION NO: 2:20-cv-00119
Removal from the
Circuit Court of
Fayette County, WV
(Civil Action No. 20-C-4)**

AMENDED COMPLAINT

Pursuant to Rule 15(b) of the Federal Rules of Civil Procedure, as a matter of course, for the **AMENDED COMPLAINT** against Defendants, C.L. Osborne and The City of Smithers, West Virginia, Plaintiff Tonya Simerly, states the following:

JURISDICTION

1. This Court has jurisdiction as the Plaintiff files her **AMENDED COMPLAINT** alleging common law claims and violations of her State constitutional rights. More specifically, Plaintiff alleges that her rights under parallel provisions in Article III, Sections 6 and 10 of the West Virginia Constitution were violated by Defendants when Defendant Osborne used excessive and wrongful force during the course and process of arresting Plaintiff on or about November 17, 2019, in Fayette County, West Virginia.

PARTIES

2. Plaintiff Tonya Simerly, at all times relevant, was a resident of Fayette County, West Virginia.

3. Defendant Osborne at all times relevant is a member of the Smithers Police Department. At all times alleged herein, Defendant Osborne was acting under color of law and within the scope of his employment.

4. Defendant City of Smithers is a political subdivision of the State of West Virginia and was at all times material hereto the employer of Defendant Osborne.

5. Upon information and belief, Defendant C.L. Osborne, is a law enforcement official who is responsible for the injuries of the Plaintiff involved.

FACTS

6. On November 17, 2019, the Defendant, who, at the time, was an Officer of the City of Smithers Police Department in the City of Smithers, was traveling to the address of the Plaintiff in Montgomery, West Virginia.

7. Plaintiff Tonya Simerly, her boyfriend, Jason Terrell, and passenger Alyson Westfall had left McDonald's and arrived at the apartment of Plaintiff Simerly and Jason Terrell when Defendant Osborne pulled his patrol car behind the vehicle of Jason Terrell.

8. The Defendant then exited the vehicle and began shouting profanities at Plaintiff Simerly.

9. Officer Osborne specifically yelled, "Simerly, put your fucking hands behind your back" and informed Plaintiff she had a capias for not appearing in the Fayette County Magistrate Court.

10. When Alyson Westfall interrupted the altercation by asking the Defendant why he was arresting the Plaintiff, he immediately picked up Ms. Westfall and slammed her body to the ground, rendering her unconscious and causing severe injuries to her face, head, and body.

11. Defendant Osborne escalated his aggressive behavior by then picking up Plaintiff Simerly and slamming her body to the ground as well, rendering her unconscious and causing severe injuries to her head, arm, and stomach.

12. While trying to provide help to his defenseless girlfriend and friend, Jason Terrell called 9-1-1 to report the situation.

13. Shortly thereafter, a responding officer arrived at the scene. The Plaintiff has identified the responding individual as Officer Oden.

14. Defendant Osborne and Officer Oden placed the Plaintiff under arrest. Plaintiff's handcuffs were so tight that she bled profusely.

15. The Plaintiff's neighbor also provided medical attention to her injuries during the forceful attack.

16. Plaintiff Simerly was charged with resisting arrest merely for asking why she had a capias. The Plaintiff never resisted arrest as she was knocked unconscious almost immediately by Defendant Osborne.

17. The Plaintiff was transported to Mount Olive Correctional Center for processing.

18. The Plaintiff required medical treatment at Montgomery General Hospital upon her release from jail for injuries to her arm, extreme bruising of her stomach area, and injuries to her head.

19. The Defendant's unlawful conduct caused such severe injuries to Ms. Westfall that she had to be transported to Montgomery General Hospital for immediate medical treatment where she received seven stitches to her eye and face.

20. The Defendant charged Alyson Westfall with obstructing an officer, resisting arrest, and appearing in public view while intoxicated. However, Ms. Westfall was also rendered unconscious immediately by Officer Osborne during the attack.

21. Such actions by the Defendants have caused and resulted in direct and long lasting effects that Plaintiff Tonya Simerly will have to live with forever.

COUNT I

STATE CONSTITUTIONAL VIOLATIONS

22. Plaintiff hereby realleges and incorporate by reference each and every allegation made in paragraphs 1 through 21 of this **AMENDED COMPLAINT**.

23. Count I alleges a constitutional tort action under the West Virginia Constitution, pursuant to the common law of West Virginia, and specifically is not filed pursuant to 42 U.S.C. § 1983 or any other related federal statute.

24. The actions of Defendants violated the constitutional rights guaranteed to Plaintiff under Article III, Sections 6 and 10 of the West Virginia Constitution.

25. The actions of Defendants also violated the constitutional rights guaranteed to Plaintiff under the Fourth and Fourteenth Amendment to the Constitution of the State of West Virginia.

26. The actions of Defendant were not taken in good faith and were in violation of clearly established law.

27. The Defendant violated Plaintiff's constitutional rights, as described and identified herein, by using excessive and wrongful force upon the Plaintiff on or about November 17, 2019.

28. Defendant City of Smithers also violated Plaintiff's constitutional rights, as described and identified herein, by failing to intercede and preventing the Defendant from using excessive and wrongful force during the course of arresting Plaintiff on or about November 17, 2019.

29. Furthermore, to the extent that the Defendant, City of Smithers, in their supervisory capacity failed to intercede in this unconstitutional use of excessive force of Plaintiff, Defendant City of Smithers have supervisory liability.

30. As a proximate result of Defendants' unconstitutional actions, Plaintiff seeks to recover damages to compensate her for:

- A. Physical pain and suffering, past and future;
- B. Mental pain and suffering, past and future;
- C. Permanent injuries;
- D. Past and future medical bills;
- E. Loss of earning capacity and lost wages;
- F. Scarring;

G. Humiliation, embarrassment, and degradation;

H. All other injuries proven by a preponderance of the evidence proximately caused by Defendants.

31. In an effort to prevent other similarly situated individuals from suffering the same violation of her constitutional rights, Plaintiff further seeks to have the Court order Defendant to undergo additional training and education addressing Defendant's use of excessive and wrongful force, the development of policies to preclude such actions in the future, and the implementation of discipline against the Defendant to hold him accountable for his wrongful actions.

32. The actions of Defendant against Plaintiff were wanton and in blatant disregard of the rights owed to Plaintiff.

COUNT II

NEGLIGENCE

33. Plaintiff hereby realleges and incorporates by reference each and every allegation made in paragraphs 1 through 32 of this **AMENDED COMPLAINT**.

34. Defendant City of Smithers and their agents and employees were negligent in the performance of their duties within the scope of their employment and such negligence was the proximate cause of Plaintiff's injuries.

35. Defendant City of Smithers was negligent in hiring, supervising, and/or retaining the Defendant, C.L. Osborne, who was involved in the attack of Plaintiff Tonya Simerly.

36. The Defendants breached their duty of care because the use of excessive force was completely unwarranted, excessive, and unreasonable as Plaintiff Tonya Simerly was

slammed to the concrete ground by Defendant Osborne, causing severe injuries to her head and body.

37. The City of Smithers also breached its duty to Plaintiff Tonya Simerly by failing to properly train, educate, and instruct Defendant Osborne on the appropriate use of force and properly communicating with members of the public.

38. As a proximate result of the Defendant's negligence, Plaintiff seeks to recover damages to compensate her for:

- A. Physical pain and suffering, past and future;
- B. Mental pain and suffering, past and future;
- C. Permanent injuries;
- D. Past and future medical bills;
- E. Loss of earning capacity and lost wages;
- F. Scarring;
- G. Humiliation, embarrassment, and degradation;
- H. All other injuries proven by a preponderance of the evidence proximately caused by Defendant.

39. The actions of Defendant against Plaintiff were wanton and in blatant disregard of the rights owed to Plaintiff.

40. It was clearly foreseeable that slamming the Plaintiff onto the concrete ground would cause some physical injuries, mental instability and emotional damage to the individual. But not only that, because of the Defendant's negligence, the Plaintiff has also suffered psychological damage.

COUNT III

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

41. Plaintiff hereby realleges and incorporates by reference each and every allegation made in paragraphs 1 through 40 of this **AMENDED COMPLAINT**.

42. Defendant Osborne negligently and brutally attacked Plaintiff Simerly without provocation and justification.

43. Unprovoked and unjustified attacks of civilians by law enforcement officers are intolerable in a civilized society. As such, the Defendant's unprovoked and unjustified attack on the Plaintiff was atrocious, intolerable and so extreme and outrageous that it exceeded the bounds of decency.

44. The Defendant knew, or should have known, that the Plaintiff would suffer extreme emotional distress as a direct and proximate result of being needlessly attacked in such a way to cause severe injuries.

45. The Defendant's conduct caused the Plaintiff to suffer severe emotional distress. No reasonable person could be expected to endure this type of immediate and direct hardship.

46. Such conduct by the Defendant unreasonably endangered the Plaintiff's physical safety and caused the Plaintiff to fear for her physical safety. As a direct result of the negligent, wrongful, and tortious acts of Defendant, Plaintiff Tonya Simerly has suffered and will continue to suffer emotional distress, mental anguish, humiliation, embarrassment, loss of self-confidence and trust and economic loss, including, but not limited to, medical expenses and lost income.

PRAYER

WHEREFORE, based on the above stated facts, the Plaintiff, Tonya Simerly, respectfully requests that this Honorable Court award:

1. Damages against Defendant, as a proximate result of his actions and inactions, in an amount to be determined at trial, which would fairly and reasonably compensate her for:
 - a. Past, present and future medical expenses;
 - b. Past, present and future pain and suffering, loss of enjoyment of life, annoyance, aggravation, inconvenience, psychological distress; and,
 - c. Any other compensatory damages to be proven at trial.
2. Be awarded reasonable attorney fees and costs.
3. Any other relief that this Court deems just and equitable.
4. All other damages provided by law.
5. Injunctive relief requiring Defendants City of Smithers, West Virginia and Officer C.L. Osborne to undergo additional training and education addressing said Defendant's use of excessive and wrongful force; the development of policies to preclude such actions in the future; and, the implementation of discipline against the Defendant to hold him accountable for his wrongful actions.

PLAINTIFF RESPECTFULLY REQUESTS A TRIAL BY JURY.

**TONYA SIMERLY,
Plaintiff,
BY COUNSEL:**

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