

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

**TONYA SIMERLY,**

**Plaintiff,**

v.

**CIVIL ACTION NO. 2:20-cv-00119**

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

**Defendants.**

**ANSWER ON BEHALF OF DEFENDANTS**

COME NOW Defendants, C.L. Osborne and The City of Smithers (collectively “these defendants”), by their counsel, Timothy L. Mayo, Jeffrey A. Foster, and the law firm of Flaherty Sensabaugh Bonasso PLLC, and for their answer to Plaintiff’s Complaint, states that this responsive pleading has been prepared, served, and filed by counsel for the Defendants within the time frames prescribed by the Federal Rules of Civil Procedure. As permitted by Federal Rule of Civil Procedure 8, defenses to the claims made in the Complaint are being asserted alternatively and, in some cases, hypothetically. Defenses are being asserted regardless of their consistency and are based both on legal and equitable grounds. As the facts of this civil action are fully developed through the discovery process, certain defenses may be abandoned, modified, or amended as permitted by and consistent with the Federal Rules of Civil Procedure.

**FIRST DEFENSE**

The Defendants reserve the right to file a Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for the reason that the Complaint fails to state a cause of action against the Defendants once a scheduling deadline is established by the Court pertaining

to such motions. The filing of an Answer is not intended to waive any such Rule 12(b)(6) motion, but is made in the alternative and for judicial economy.

### **SECOND DEFENSE**

In response to the enumerated allegations of the Complaint, the Defendants answer and aver as follows:

1. The allegations set forth in Paragraph 1 of the Complaint constitute legal conclusions to which no response is required of the Defendants.

2. Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations set forth in Paragraph 2 of the Complaint.

3. Defendants admit the allegations set forth in Paragraph 3 of the Complaint.

4. Defendants admit the allegations set forth in Paragraph 4 of the Complaint.

5. In response to the allegations set forth in Paragraph 5 of the Complaint, Defendants admit that Defendant Osborne is a law enforcement official. Defendants deny the remaining allegations set forth in Paragraph 5 of the Complaint.

6. In response to the allegations set forth in Paragraph 6 of the Complaint, Defendants admit that on November 17, 2019, Defendant Osborne, while acting in the course and scope of his authority as a police officer with the City of Smithers, traveled to the Gertrude Apartments in an attempt to locate Tonya Simerly.

7. In response to the allegations set forth in Paragraph 7 of the Complaint, Defendants admit that Defendant Osborne pulled his patrol car near a Jeep vehicle and near Tonya Simerly. Defendants deny the remaining allegations set forth in Paragraph 7 of the Complaint.

8. Defendants deny the allegations set forth in Paragraph 8 of the Complaint.

9. In response to the allegations set forth in Paragraph 9 of the Complaint, Defendants admit that Defendant Osborne advised Tonya Simerly that she had a *capias* or a warrant in Fayette County, that she was under arrest, and requested that she put her hands behind her back. Defendants deny the remaining allegations set forth in Paragraph 9 of the Complaint.

10. Defendants deny the allegations set forth in Paragraph 10 of the Complaint.

11. Defendants deny the allegations set forth in Paragraph 11 of the Complaint.

12. Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations set forth in Paragraph 12 of the Complaint.

13. Upon information and belief, the Defendants admit the allegations set forth in Paragraph 13 of the Complaint.

14. In response to the allegations set forth in Paragraph 14 of the Complaint, Defendants admit that Tonya Simerly was placed under arrest. Defendants deny the remaining allegations set forth in Paragraph 14 of the Complaint.

15. In response to the allegations set forth in Paragraph 15 of the Complaint, upon information and belief, a neighbor interacted with Tonya Simerly on the night in question. Defendants deny the remaining allegations set forth in Paragraph 15 of the Complaint.

16. In response to the allegations set forth in Paragraph 16 of the Complaint, Defendants admit that Tanya Simerly was charged with resisting arrest. Defendants deny the remaining allegations set forth in Paragraph 16 of the Complaint.

17. Defendants admit the allegations set forth in Paragraph 17 of the Complaint.

18. Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations set forth in Paragraph 18 of the Complaint.

19. Defendants deny the allegations set forth in Paragraph 19 of the Complaint.

20. In response to the allegations set forth in Paragraph 20 of the Complaint, Defendants admit that Alyson Westfall was charged with the listed offenses. Defendants deny the remaining allegations set forth in Paragraph 20 of the Complaint.

21. Defendants deny the allegations set forth in Paragraph 21 of the Complaint.

22. There are no factual allegations set forth in Paragraph 22 of the Complaint that have not been already fully answered and therefore, no further response is required.

23. The allegations set forth in Paragraph 23 of the Complaint constitute legal conclusions to which no response is required of the Defendants.

24. Defendants deny the allegations set forth in Paragraph 24 of the Complaint.

25. Defendants deny the allegations set forth in Paragraph 25 of the Complaint.

26. Defendants deny the allegations set forth in Paragraph 26 of the Complaint.

27. Defendants deny the allegations set forth in Paragraph 27 of the Complaint.

28. Defendants deny the allegations set forth in Paragraph 28 of the Complaint.

29. Defendants deny the allegations set forth in Paragraph 29 of the Complaint.

30. Defendants deny the allegations set forth in Paragraph 30 of the Complaint.

31. Defendants deny the allegations set forth in Paragraph 31 of the Complaint.

32. There are no factual allegations set forth in Paragraph 32 of the Complaint that have not been already fully answered and therefore, no further response is required.

33. In response to the allegations set forth in Paragraph 33 of the Complaint, Defendants admit that Defendant Osborne was acting in the course and scope of his authority as a police officer with the City of Smithers. Defendants deny the remaining allegations set forth in Paragraph 33 of the Complaint.

34. Defendants deny the allegations set forth in Paragraph 34 of the Complaint.

35. Defendants deny the allegations set forth in Paragraph 35 of the Complaint.

36. Defendants deny the allegations set forth in Paragraph 36 of the Complaint.

37. Defendants deny the allegations set forth in Paragraph 37 of the Complaint.

38. The allegations set forth in Paragraph 38 of the Complaint constitute legal conclusions to which no response is required of the Defendants.

39. Defendants deny the allegations set forth in Paragraph 39 of the Complaint.

40. Defendants deny the allegations set forth in Paragraph 40 of the Complaint.

41. There are no factual allegations set forth in Paragraph 41 of the Complaint that have not been already fully answered and therefore, no further response is required.

42. Defendants deny the allegations set forth in Paragraph 42 of the Complaint.

43. Defendants deny the allegations set forth in Paragraph 43 of the Complaint.

44. Defendants deny the allegations set forth in Paragraph 44 of the Complaint.

45. Defendants deny that Plaintiff is entitled to any relief from the Defendants as set forth in the Prayer appended to the end of the specific counts and at the end of the Complaint.

46. Defendants deny all allegations contained in the Complaint that are not unconditionally and unequivocally admitted herein.

### **THIRD DEFENSE**

Defendants denies any and all allegations contained in the several paragraphs and counts of the Complaint that allege or imply any negligence, wrongdoing, intentional tort, unlawful act, violation of statute, violation of common law, Constitutional violation, or other fault on the part of these defendants; that allege or imply any responsibility, failure to meet a responsibility, or violation of duty with respect to these defendants; or that allege or imply that these defendants violated any applicable common law, public policy, statutes, rules, regulations, constitution or

standards whatsoever, as the same may prove applicable as discovery proceeds and the evidence is developed in this case; and therefore, Plaintiff is entitled to no relief from these Defendants.

#### **FOURTH DEFENSE**

Defendants assert that to the extent that the Plaintiff has entered a guilty plea or otherwise been convicted of any underlying charge, then such plea and/or conviction shall serve as a bar to her claims against the Defendants.

#### **FIFTH DEFENSE**

Defendants assert that the City of Smithers is not responsible, vicariously or otherwise, for the acts and conduct of its officers, that there is no factual or legal basis for imposition of supervisory liability, vicarious liability or *respondeat superior* and therefore, the Plaintiff is entitled to no relief.

#### **SIXTH DEFENSE**

Defendants, not being fully advised of all the circumstances surrounding the allegations set forth in the Complaint, assert that they are entitled to qualified, good faith and absolute immunity against the claims asserted in the Complaint and therefore, the Plaintiff is entitled to no relief from this Defendant.

#### **SEVENTH DEFENSE**

Defendants assert that their conduct did not violate any clearly established statutory, constitutional, or common law right of the Plaintiff and therefore, the Plaintiff is entitled to no relief. Additionally, Defendants assert the law enforcement privilege as the same may prove applicable as discovery proceeds and the evidence is developed in this case.

**EIGHTH DEFENSE**

Defendants assert that Plaintiff has failed to establish a *Monell* claim and therefore, the Plaintiff is entitled to no relief. To the extent that the *Monell* claims are not dismissed, then Defendants request bifurcation of such claims and issues.

**NINTH DEFENSE**

Defendants, not being fully advised of all the circumstances surrounding the allegations set forth in the Complaint, reserves the defense that the Complaint is or may be barred on the ground that the alleged injuries and damages in question were not caused by the Defendants but by the independent, intervening and/or superseding negligence, fault, wrongful conduct, intentional act or omission or other liability of persons other than the Defendants, over whom Defendants had no control, and for whom Defendants bear no responsibility, as the same may prove applicable as discovery proceeds and the evidence is developed in this case.

**TENTH DEFENSE**

Defendants assert that their conduct was objectively reasonable and therefore, the Plaintiff is entitled to no relief.

**ELEVENTH DEFENSE**

Defendants, not being fully advised of all the circumstances surrounding the allegations set forth in the Complaint, reserve the following affirmative defenses, as the same may prove applicable as discovery proceeds and the evidence is developed in this case: immunity, assumption of the risk, contributory negligence, waiver, statute of limitations, comparative fault, all affirmative defenses expressly set forth in Rule 8 of the Federal Rules of Civil Procedure, as the same may prove applicable as discovery proceeds and the evidence is developed in this case.

**TWELFTH DEFENSE**

Defendants, not being fully advised of all the circumstances surrounding the allegations set forth in the Complaint, reserve the defense that the claims presented in the Complaint are or may be barred by reason of improper venue, lack of jurisdiction, insufficiency of process, insufficiency of service of process, and all affirmative defenses set forth in Rule 12(b) of the Federal Rules of Civil Procedure, as the same may prove applicable as discovery proceeds and the evidence is developed in this case.

**THIRTEENTH DEFENSE**

Defendants assert that to the extent Plaintiff is making claims that invoke application of the West Virginia Governmental Tort Claims and Insurance Reform Act, West Virginia Code § 29-12A-1, *et seq.*, Defendants are immune and Plaintiff's claims must therefore, be dismissed with prejudice.

**FOURTEENTH DEFENSE**

Defendants, not being fully advised of all the circumstances surrounding the allegations set forth in the Complaint, reserve the right to assert as a defense that even should a *prima facie* case be established sustaining an award of punitive or exemplary damages, then any and all such claims are barred pursuant to West Virginia Code § 29-12A-7, *et seq.*, § 1983, applicable case law including the *City of Newport v. Fact Concerts*, 453 U.S. 247 (1981), and the United States and West Virginia Constitutions.

**FIFTHTEENTH DEFENSE**

Defendants, not being fully advised of all the circumstances surrounding the allegations set forth in the Complaint, invoke application of the West Virginia Governmental Tort Claims and Insurance Reform Act, West Virginia Code § 29-12A-1, *et seq.*, and its immunities,



limitations on damages, exclusion of punitive damages, dismissal of certain named party defendants as well as all other protections.

**SIXTEENTH DEFENSE**

Defendants, not being fully advised of all the circumstances surrounding the allegations set forth in the Complaint, reserve the defense that they may be entitled to a monetary offset, and the Plaintiff's claims presented in the Complaint are or may be barred by the Plaintiff's failure to mitigate damages, if any, or that such injuries were *de minimis*, as the same may prove applicable as discovery proceeds and the evidence is developed in this case.

**SEVENTEENTH DEFENSE**

Defendants assert that their investigation, investigatory stop, temporary detention, seizure and subsequent arrest of the Plaintiff was reasonable and proper pursuant to the United States and West Virginia Constitutions.

**EIGHTEENTH DEFENSE**

These defendants, not being fully advised of all the circumstances surrounding the allegations set forth in the Complaint, reserve the defense that this defendant is or may be entitled to a monetary offset and the Plaintiff's claims presented in the Complaint is or may be barred by the Plaintiff's failure to mitigate damages, if any, in the manner and to the extent required by applicable law, or that such injuries were *de minimis*, as the same may prove applicable as discovery proceeds and the evidence is developed in this case.

**NINETEENTH DEFENSE**

These defendants, not being fully advised of all the circumstances surrounding the allegations set forth in the Complaint, assert that they acted at all times in good faith, lawfully and in performance of their official duties.

**TWENTIETH DEFENSE**

These defendants, not being fully advised of all the circumstances surrounding the allegations set forth in the Complaint, reserve the right to amend their answer and supplement these enumerated defenses.

**TWENTY-FIRST DEFENSE**

The Defendants, not being fully advised of all the circumstances surrounding the allegations set forth in the Complaint, asserts the existence of probable cause, reasonable suspicion, a valid warrant, and/or the subsequent conviction of the plaintiff as the same may prove applicable as discovery proceeds and the evidence is developed in this case.

**TWENTY-SECOND DEFENSE**

These defendants, not being fully advised of all the circumstances surrounding the allegations set forth in the Complaint, assert that plaintiff cannot maintain both intentional torts and negligence claims concurrently as to the same acts or incidents and therefore, such claims should be dismissed.

These defendants request a trial by jury on all issues which may survive their motions for summary judgment.

**C.L. OSBORNE,  
THE CITY OF SMITHERS,**

**By counsel,**

/s/ Timothy L. Mayo

Timothy L. Mayo, Esquire (W. Va. Bar No. 5771)

Jeff A. Foster, Esquire (W. Va. Bar No. 9410)

**Flaherty Sensabaugh Bonasso PLLC**

200 Capitol Street

Charleston, West Virginia 25301

(304) 345-0200 – telephone

(304) 345-0260 – facsimile

[tmayo@flahertylegal.com](mailto:tmayo@flahertylegal.com)  
[jfoster@flahertylegal.com](mailto:jfoster@flahertylegal.com)

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

**TONYA SIMERLY,**

**Plaintiff,**

v.

**CIVIL ACTION NO. 2:20-cv-00119**

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

**Defendants.**

**CERTIFICATE OF SERVICE**

I, the undersigned counsel for Defendants, C.L. Osborne and The City of Smithers, do hereby certify that on **February 14, 2020**, I electronically filed the foregoing “*Answer on behalf of Defendants*” with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following counsel of record:

Michael M. Cary, Esquire  
**Cary Law Office, PLLC**  
122 Capitol Street, Suite 200  
Charleston, West Virginia 25301  
*Counsel for Plaintiff*

/s/ Timothy L. Mayo

Timothy L. Mayo, Esquire (W. Va. Bar No. 5771)

Jeff A. Foster, Esquire (W. Va. Bar No. 9410)

**Flaherty Sensabaugh Bonasso PLLC**