

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

WAYNE B. LYNCH, Administrator of the
Estate of Donovan W. Lynch, Deceased,

Plaintiff,

v.

Case No. 2:21-cv-00341

SOLOMON D. SIMMONS, III,
a/k/a SOLOMON D. SIMMONS,
Individually and in his Official Capacity
as a Police Officer for the
City of Virginia Beach, Virginia,
and
CITY OF VIRGINIA BEACH,

Defendants.

**ANSWER AND GROUNDS OF DEFENSE
TO AMENDED COMPLAINT**

NOW COMES Defendant City of Virginia Beach, Virginia (the “City”) by counsel and for its Answer and Grounds of Defense to the Amended Complaint filed in this matter states as follows:

Introduction

1. The City admits the allegation of paragraph 1 that Solomon Simmons (“Officer Simmons”) shot Donovan W. Lynch (“Mr. Lynch”) but denies the allegation that the shooting was unlawful, as Officer Simmons acted reasonably and with appropriate lethal force under the circumstances of his encounter with Mr. Lynch. The City is without knowledge or information to admit or deny the remaining allegations of paragraph 1.

2. The City admits the allegation of paragraph 2 that Officer Simmons shot Mr. Lynch twice on March 26, 2021 and avers that the use of lethal force was justified under the

circumstances of Officer Simmons' encounter with Mr. Lynch. The City is without knowledge or information to admit or deny the remaining allegations of paragraph 2.

3. The City admits the allegation of paragraph 3 that Officer Simmons was on his way to respond to "an incident" when Mr. Lynch was shot. The City denies the remaining allegations of paragraph 3.

4. Paragraph 4 alleges the capacity in which Plaintiff brings this action which states a legal conclusion requiring no response from the City.

Jurisdiction

5. Paragraph 5 alleges this court's jurisdiction over the claim made pursuant to 42 U.S.C. § 1983 and the City does not contest this court's jurisdiction.

6. Paragraph 6 alleges this court's jurisdiction over pendant claims made pursuant to the laws of the Commonwealth of Virginia. The City does not contest this court's jurisdiction.

7. Paragraph 7 alleges satisfaction of notice requirements necessary for filing claims against the City of Virginia Beach. The City does not contest the satisfaction of the notice requirements.

Venue

8. The City admits the allegations in Paragraph 8 that venue is proper in this Court.

9. The City admits the allegations in Paragraph 9 that venue is proper in this Court

Parties

10. The City is without knowledge or information sufficient to admit or deny the allegations of paragraph 10.

11. The City is without knowledge or information sufficient to admit or deny the allegations of paragraph 11.

12. The City is without knowledge or information sufficient to admit or deny the allegations of paragraph 12.

13. The City is without knowledge or information sufficient to admit or deny the allegations of paragraph 13.

14. The City admits the allegations of paragraph 14.

15. The City admits the allegations of paragraph 15 and avers that because the Complaint names the City of Virginia Beach as a defendant, the suit against Officer Simmons in his official capacity is duplicative and should be dismissed.

16. The City admits the allegations of paragraph 16.

17. The City admits the allegations of paragraph 17.

Factual Allegations

18. The City is without knowledge or information sufficient to admit or deny the allegations of paragraph 18.

19. The City admits the allegations of paragraph 19.

20. The City is without knowledge or information sufficient to admit or deny the allegations of paragraph 20.

21. The City is without knowledge or information sufficient to admit or deny the allegations of paragraph 21.

22. The City admits the allegation of paragraph 22 that Mr. Lynch encountered Officer Simmons. The City is without knowledge or information sufficient to admit or deny the remaining allegations of paragraph 22.

23. The City admits that Officer Simmons encountered Mr. Lynch during an active shooter situation. The City avers that, upon information and belief, Officer Simmons feared for his life and the lives of other officers and citizens in the vicinity at the time he came in to contact

with Mr. Lynch and when he discharged his weapon. All further allegations of paragraph 23 are hereby denied.

24. The City is without knowledge or information to admit or deny the allegations of paragraph 24 and denies the allegations on this basis.

25. The City denies the allegations of paragraph 25 and avers that, upon information and belief, Officer Simmons feared for his life and the lives of other officers and citizens in the vicinity at the time he came in to contact with Mr. Lynch and discharged his weapon.

26. The City admits the allegation of paragraph 26 that Officer Simmons did not attempt to determine the identity of Mr. Lynch prior to firing his police issued firearm and avers that the circumstances of his encounter did not allow sufficient time to determine Mr. Lynch's identity. The City denies the remaining allegations of paragraph 26.

27. The City denies the allegations of paragraph 27.

28. The City admits only the allegations of paragraph 28 that Officer Simmons shot Mr. Lynch with his department-issued firearm, and that Mr. Lynch later died, and denies the remaining allegations of paragraph 28.

29. The City admits the allegations of paragraph 29.

30. The City denies the allegations of paragraph 30 except that Officers Simmons did not activate his Body Worn Camera ("BWC") prior to the encounter with Mr. Lynch.

31. The City denies the allegations of paragraph 31.

32. The City denies the allegation of paragraph 32 except that Officer Simmons did not activate his BWC prior to the shooting as explained in paragraph 30 above and affirmatively avers that officers, emergency medical personnel and fire personnel tended to Mr. Lynch after the

shooting for the purpose of rendering life-saving aid to him.

33. The City admits only that Plaintiff has referred to an audit report of the City Auditor that speaks for itself and must be read in full and in the appropriate context in response to the allegations of paragraph 33 and avers that Officer Simmons did not activate his BWC as explained in the response to paragraph 30, above. All other allegations of paragraph 33 are denied.

34. The City admits only that Plaintiff has referred to an audit report of the City Auditor that speaks for itself and must be read in full and in the appropriate context in response to the allegations of paragraph 34. All other allegations of paragraph 34 are denied.

35. The City denies the allegations of paragraph 35.

36. The City denies the allegations of paragraph 36.

37. The City denies the allegations of paragraph 37 and avers that, pursuant to police policy, other officers and first responders attended to Mr. Lynch after Mr. Lynch was shot while Officer Simmons was removed from the scene.

38. The City admits the allegations of paragraph 38 that Mr. Lynch died as a result of the shooting and avers that Mr. Lynch contributed to his own death by (a) entering into an active shooting zone, (b) crouching unannounced behind shrubbery, (c) arming himself with a weapon, (d) placing a bullet into the chamber of the weapon during an active shooting situation, (e) rising and turning toward a police officer with the loaded weapon in hand, a bullet in the chamber, and otherwise holding the loaded weapon in a threatening manner immediately before being shot by Officer Simmons, (f) all while, on information and belief, Mr. Lynch was under the influence of alcohol.

39. The City denies the allegations of paragraph 39.

40. The City denies the allegations of paragraph 40.

41. The City denies the allegations of paragraph 41 that Officer Simmons' actions were contrary to those of an appropriately trained and supervised officer and avers that Officer Simmons heard what sounded to him like the slide of a handgun placing a bullet into the chamber, turned in the direction of the sound and observed Mr. Lynch crouching behind shrubbery. The City further avers that Officer Simmons called out, whereupon Mr. Lynch rose and turned with a loaded firearm in hand, a bullet in the chamber, and held the loaded weapon in a threatening manner immediately before being shot by Officer Simmons.. The City admits that Officer Simmons then fired his police issued firearm and that two shots struck Mr. Lynch. The City admits that Mr. Lynch later died. The City avers that at the time Officer Simmons discharged his weapon he feared for his life and the lives of other officers and citizens in the immediate vicinity. The City further avers the Virginia Beach Police Department's training programs, policies and procedures are reasonable, effective and appropriate to adequately train officers to respond to deadly force situations. The City denies the remaining allegations of paragraph 41.

42. The City is without knowledge or information sufficient to admit or deny the allegations of paragraph 42.

43. The City denies the allegations paragraph 43. The City avers that the incident identified has been materially mischaracterized by Plaintiff and the City avers that a single event cannot establish a "long-standing pattern within the Virginia Beach Police Department of failing to enforce important safety policies," and further, that no such pattern exists.

44. The City admits that Plaintiff has referenced a newspaper article as part of paragraph 44 – which speaks for itself – but the City denies the accuracy of the contents and

allegations contained in the article and in paragraph 44. To the extent further response is required, the factual allegations of paragraph 44 are denied.

45. The City admits that the referenced lawsuits were filed against individual officers of the Virginia Beach Police Department but the City denies that Plaintiff has accurately alleged the facts and circumstances of the events underlying those lawsuits and their legal import to the instant case. The City avers that in each of the lawsuits referenced by Plaintiff, the City denied (and continues to deny) any liability or wrongdoing on the part of any involved officer and, instead, settled the referenced lawsuits out of court prior the entry of a final order to buy its peace from the burdens of further litigation but without any admission of fault or liability whatsoever. The City further avers that Plaintiffs characterization of the outcome of the matter of India Kager is also demonstrably false because – before settlement resolved this claim without entry of any judgment against any defendant – the jury found two of the four officers not liable. The City further avers that there is no “situation” involving a pattern of police misconduct in Virginia Beach and, in fact, the opposite is true given that the Virginia Beach Police Department has received CALEA’s highest accreditation award (“Gold Standard Advanced Accreditation with Excellence”) and has been accredited since 1986.

46. The City denies the allegations of paragraph 46 involving the 2019 incident and avers the officer acted reasonably and with legal justification by firing a single shot in response to a deadly threat posed by a 57-year-old man who raised a knife in a threatening manner over another officer and began moving towards him with the knife in a threatening manner so as to potentially cause imminent death, harm, or great bodily injury. The City further avers that this matter has been appealed and is pending on appeal before the Supreme Court of Virginia.

47. The City is without knowledge or information sufficient to admit or deny the

allegation of paragraph 47 concerning personal commentary from an unidentified attorney involving an unidentified man as reported on Good Morning America. To the extent the quoted language is assumed accurate for purposes of responding to the Complaint, the City denies the substance of the quotation.

Count I - 42 U.S.C. § 1983 - Excessive Force

48. As his response to paragraph 48, the City repeats and realleges its response to paragraphs 1 through 47.

49. Paragraph 49 alleges claims against Officer Simmons, individually, and requires no answer from the City.

50. The City admits the allegation of paragraph 50 that Officer Simmons used lethal force against Mr. Lynch, but the City denies the remaining allegations of paragraph 50 and avers that Officer Simmons acted reasonably, lawfully and with appropriate lethal force under the circumstances of the encounter with Mr. Lynch.

51. The City denies the allegations of paragraph 51.

52. The City admits the allegations of paragraph 52.

53. The City admits that Mr. Lynch died on March 27, 2021 as a result of the shooting incident described herein, but denies the remaining allegations of paragraph 53.

54. The City denies the allegations of paragraph 54.

55. The City denies the allegations of paragraph 55.

56. The City denies the allegations of paragraph 56.

Count II - 42 U.S.C. § 1983 - Failure to Properly Train and Supervise

57. As his response to paragraph 57, the City repeats and realleges his response to paragraphs 1 through 56.

58. The City admits the allegations of paragraph 58.

59. The City denies the allegations of paragraph 59.

60. The City denies the allegations of paragraph 60.

61. The City denies the allegations of paragraph 61.

62. The City denies the allegations of paragraph 62.

63. The City denies the allegations of paragraph 63.

64. The City denies the allegations of paragraph 64.

65. The City denies the allegations of paragraph 65.

66. The City admits that paragraph 66 quotes certain excerpted portions of the Virginia Code, the Virginia Beach Police Department General Orders and publications from the Commission on Accreditation for Law Enforcement Agencies (“CALEA”) and avers that those documents and publications speak for themselves and must be read in their full context as opposed to selected excerpts.

67. The City admits that paragraph 67 includes selected quotes from Operational General Order 5.01 and publications of the CALEA, and avers that those documents and publications speak for themselves and must be read in their full context as opposed to selected excerpts.

68. The City denies the allegations of paragraph 68.

69. The City admits the allegation of paragraph 69 that Officer Simmons did not first attempt any non-lethal force options because the circumstances of his encounter with Mr. Lynch did not allow reasonably opportunity him to do so, which circumstances include Officer Simmons’ reasonable belief that Mr. Lynch had placed a bullet in the chamber of his handgun during an active shooting situation and turning to face Officer Simmons with the loaded weapon in his hand, which weapon was pointed in Officer Simmons’ direction.

70. The City is without knowledge or information sufficient to admit or deny the allegations of paragraph 70.

71. The City denies the allegations of paragraph 71 and the City avers that its body-worn camera policy is effective, reasonable and does not demonstrate a deliberate indifference to the rights of citizens or visitors to the City of Virginia Beach.

72. The City admits the allegations of paragraph 72 except that the City denies that the Plaintiff's characterization that the change in any policies represented a "correction."

73. The City denies the allegations of paragraph 73.

74. The City denies the allegations of paragraph 74.

75. The City denies the allegations of paragraph 75.

76. The City denies the allegations of paragraph 76.

77. The City denies the allegations of paragraph 77.

78. The City denies the allegations of paragraph 78.

79. The City denies the allegations of paragraph 79.

80. The City denies the allegations of paragraph 80.

81. The City denies the allegations of paragraph 81.

82. The City denies the allegations of paragraph 82.

Count III - Gross Negligence

83. As his response to paragraph 83, The City repeats and realleges its response to paragraphs 1 through 82.

84. Paragraph 84 alleges claims against Officer Simmons in his individual capacity and requires no answer from the City.

85. The City admits the allegations of paragraph 85.

86. The City denies the allegations of paragraph 86, including the allegations that

Officer Simmons breached any applicable duty, and avers that Officer Simmons acted reasonably and with appropriate lethal force under the circumstances of the encounter with Mr. Lynch.

87. The City denies the allegations of paragraph 87.

88. The City admits the allegation of paragraph 88 that Mr. Lynch died as a result of the shooting but avers that Officer Simmons acted reasonably and with appropriate force under the circumstances of the encounter with Mr. Lynch and avers that Mr. Lynch contributed to his death by (a) entering into an active shooting zone, (b) crouching unannounced behind shrubbery, (c) arming himself with a weapon, (d) placing a bullet into the chamber of the weapon during an active shooting situation, (e) rising and turning toward a police officer with the loaded weapon in hand, a bullet in the chamber, pointed at police officers , (f) all while, on information and belief, Mr. Lynch was under the influence of alcohol.

89. The City denies the allegations of paragraph 89.

90. The City is without knowledge or information sufficient to admit or deny the allegations of paragraph 90.

Count IV - Assault and Battery

91. As his response to paragraph 91, the City repeats and realleges its responses to paragraphs 1 through 90.

92. Paragraph 92 alleges claims against Officer Simmons in his individual capacity and requires no answer from the City.

93. The City denies the allegations of paragraph 93 and avers that Officer Simmons acted reasonably and with appropriate force under the circumstances of the encounter with Mr. Lynch.

94. The City denies the allegations of paragraph 94 and avers that he acted reasonably and with appropriate force under the circumstances of the encounter with Mr. Lynch.

95. The City admits the allegations of paragraph 95 that Mr. Lynch died as a result of the shooting described herein but avers Officer Simmons acted reasonably and with appropriate force under the circumstances of the encounter with Mr. Lynch and that Mr. Lynch contributed to his death by (a) entering into an active shooting zone, (b) crouching unannounced behind shrubbery, (c) arming himself with a weapon, (d) placing a bullet into the chamber of the weapon during an active shooting situation, (e) rising and turning toward a police officer with the loaded weapon in hand, a bullet in the chamber, and otherwise holding the loaded weapon in a threatening manner immediately before being shot by Officer Simmons, (f) all while, on information and belief, Mr. Lynch was under the influence of alcohol.

96. The City denies the allegations of paragraph 96.

97. The City is without knowledge or information sufficient to admit or deny the allegations of paragraph 97.

Count V - Survivorship

98. As his response to paragraph 98, The City repeats and realleges his response to paragraphs 1 through 97.

99. Paragraph 99 requires no answer but, to the extent one is deemed necessary, the City admits it has been sued and that Officer Simmons has been sued in his individual capacity.

100. The City is without knowledge regarding the pain and anguish suffered by Mr. Lynch, and denies the remaining allegations of paragraph 100.

101. The City denies the allegations of paragraph 101.

Count VI - Va. Code § 8.01-50, et seq. - Wrongful Death

102. As his response to paragraph 102, The City repeats and realleges its response to paragraphs 1 through 101.

103. Paragraph 103 requires no answer but, to the extent one is deemed necessary, the

City admits it has been sued and that Officer Simmons has been sued in his individual capacity.

104. The City denies the allegations of paragraph 104.

105. The City admits only that, assuming for the purpose of responding to this allegation that Mr. Lynch's constitutional rights were violated – which the City factually and legally denies – if Mr. Lynch was still alive, he would procedurally be entitled to bring an action on his own behalf. The City denies the remaining allegations of paragraph 105.

106. The City denies the allegations of paragraph 106.

107. The City is without knowledge or information sufficient to admit or deny the allegations of paragraph 107.

Count VII - Punitive Damages

108. As his response to paragraph 108, the City repeats and realleges his response to paragraphs 1 through 107.

109. Paragraph 109 requires no answer but, to the extent one is deemed necessary, the City admits it has been sued and that Officer Simmons has been sued in his individual capacity.

110. The City denies the allegations of paragraph 110 and avers that “Punitive Damages” is not an individual cause of action nor an appropriate basis for a “Count” in the Complaint, and the City cannot be liable for punitive damages as a matter of Virginia law.

111. The City denies the allegations of paragraph 111 and avers that “Punitive Damages” is not an individual cause of action or an appropriate basis for a “Count” in the Complaint, and the City cannot be liable for punitive damages as a matter of Virginia law.

112. The City denies the allegations of paragraph 111 and avers that “Punitive Damages” is not an individual cause of action or an appropriate basis for a “Count” in the Complaint, and the City cannot be liable for punitive damages as a matter of Virginia law.

113. The City is without knowledge or information sufficient to admit or deny the

allegations of paragraph 113.

Averments and Affirmative Defenses

1. The City avers that some or all of Plaintiff's claims are barred by the doctrine of sovereign and/or governmental immunity where the City, at all times relevant to this matter, was engaged in the performance of the governmental function of operation of a police force.

2. The City avers that Plaintiffs have failed to state a claim that is plausible on its face and, therefore, Plaintiff has failed to state a claim upon which relief can be granted.

3. The City avers that it did not act with deliberate indifference and did not violate any clearly established law in establishing training, practices, policies and/or customs in the Virginia Beach Police Department.

4. The City avers that Plaintiff's Complaint fails to allege facts, even if proven as true, sufficient to establish a constitutional violation and/or a violation of clearly established law by the City (or any other defendant) which would give rise to liability in this matter as to the City.

5. The City avers that there is not a pattern of constitutional deprivations within the Virginia Beach Police Department nor is there any condonation of constitutional deprivations if they are known or believed to have occurred.

6. The City avers that its training, practices, policies and customs within the Virginia Beach Police Department are reasonable and appropriate in all material respects and that violations of constitutional rights, if any have occurred, are neither the predictable nor probable consequence of said training, practices, policies and customs.

7. The City avers that there is no direct causal link between any alleged deficiencies in training, practices, policies and customs of the Virginia Beach Police Department and any alleged constitutional injury in this matter.

8. The City avers that Officer Solomon Simmons did not violate the constitutional rights of Donavon Lynch because Officer Simmons acted reasonably from the perspective of a reasonable law enforcement officer on the scene at the time of the incident that forms the basis of the Complaint.

9. The City avers that, upon information and belief, that the actions of Officer Simmons were taken in self-defense and/or in the defense of others.

10. The City avers that Mr. Lynch was negligent in contributing to his injury and death by (a) entering an active shooting situation, (b) crouching unannounced behind shrubbery, (c) arming himself with a lethal weapon, (d) placing a bullet into the chamber of the weapon during an active shooting situation, (e) rising and turning toward police officers with the loaded weapon, bullet in chamber, and otherwise holding the loaded weapon in a threatening manner immediately before being shot by Officer Simmons, (f) all while, on information and belief, Mr. Lynch was under the influence of alcohol.

11. The City avers that Mr. Lynch assumed the risk of his injuries and death, and such assumption was a proximate cause of his injuries, death and damages.

12. The City avers that Mr. Lynch was contributorily negligent in his injuries and death, and such contributory negligence was a proximate cause of his injuries, death and damages.

13. The City avers that some or all of Plaintiff's claims are barred by Plaintiff's own intentional misconduct and/or voluntary participation in possible unlawful activity, including without limitation, possessing a firearm in a public place while intoxicated, which are the proximate causes of any injuries or damages of which Plaintiff now complains, if he is able to prove them.

Dated: March 21, 2021

Respectfully submitted,

/s/ Gerald L. Harris

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 2022, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing to the following counsel of record.

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