

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

SUSAN CARNABY

v.

CITY OF HOUSTON, ET AL.

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CIVIL ACTION NUMBER H-08-1366

JURY TRIAL DEMANDED

DEFENDANTS' ANSWER TO PLAINTIFF'S ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF THIS COURT:

COMES NOW City of Houston, a municipal corporation, Andrew J. Washington, and Cecil A. Foster, Defendants herein, filing this their Original Answer to Plaintiff's First Amended Original Complaint, and would show the Court as follows:

1. Defendants admit this Court has jurisdiction in this matter.
2. Defendants admit venue is properly placed in this matter.
3. Defendants lack sufficient information to either admit or deny Plaintiff's statement in ¶ 3 of Plaintiff's First Amended Original Complaint.
4. Defendants admit Cecil Foster is a City of Houston police officer, as stated in ¶ 4 of Plaintiff's First Amended Original Complaint.
5. Defendants admit Andrew J. Washington is a City of Houston police officer, as stated in ¶ 5 of Plaintiff's First Amended Original Complaint.
6. Defendant City admits it is a municipality situated within the Southern District of Texas, ¶ 6 of Plaintiff's First Amended Original Complaint.
7. Defendants admit that Roland Carnaby was stopped for a speeding violation on April 29, 2008. Defendant City's investigation is on-going. Defendants can neither admit nor deny the remainder of Plaintiff's allegations, as stated, in ¶ 7 of Plaintiff's First

Amended Original Complaint. To the extent further answer is required, Defendants deny those allegations. Defendants specifically deny that they endangered “any man, woman or child that they passed.”

8. Defendants admit that the Carnaby vehicle came to a stop. Defendants deny Plaintiff’s allegation that the officers had “full knowledge of Carnaby’s background.” Defendants admit Carnaby was fired on. Defendants deny all other allegations of ¶ 8 of Plaintiff’s First Amended Original Complaint. Defendants specifically deny that they were not in objectively reasonable fear of their lives or the lives of another.

9. Defendants admit that Chief Hurtt made statements regarding police procedure following the incident. Defendants admit that Carnaby died of a gunshot wound to the back. Defendants do not possess sufficient information to either admit or deny all other allegations stated in ¶ 9 of Plaintiff’s First Amended Original Complaint. To the extent further answer is required, Defendants deny.

10. Defendant Washington admits to past sustained disciplinary actions, but denies that Plaintiff has made a correct representation of any sustained discipline in ¶ 10 of Plaintiff’s First Amended Complaint.

11. Defendants deny that the information provided in ¶ 11 of Plaintiff’s First Amended Original Complaint is accurate. Defendants further state that this information is irrelevant. The information contained in this paragraph is inappropriate for Plaintiff’s pleading, and is hearsay. It is cut and pasted from an internet blog, created and maintained by a person who has nothing to do with this lawsuit.

12. Defendants admit that the Fourth Amendment is quoted, in part, correctly, in ¶ 12 of Plaintiff’s First Amended Original Complaint.

13. Defendants deny that Carnaby's Fourth Amendment rights were violated in the incident made the basis of this lawsuit. Defendants deny all allegations contained in ¶ 13 of Plaintiff's First Amended Original Complaint. Defendant City specifically denies Plaintiff's allegations regarding "custom, practice policy and procedure."

14. Defendants admit that the Fourteenth Amendment has been correctly paraphrased in ¶ 14 of Plaintiff's First Amended Original Complaint.

15. Defendants deny each and every allegation contained in ¶ 16 of Plaintiff's First Amended Original Complaint. Defendants specifically deny that any constitutionally guaranteed rights were violated at the time of the incident made the basis of this lawsuit.

16. Defendants deny any conspiracy as alleged in ¶ 16 of Plaintiff's First Amended Original Complaint. Defendants specifically deny that Carnaby was deprived of any civil rights.

17. Defendants deny each and every allegation contained in ¶ 17 of Plaintiff's First Amended Original Complaint.

18. Defendants deny each and every allegation contained in ¶ 18 of Plaintiff's First Amended Original Complaint.

19. Defendants deny each and every allegation contained in ¶ 19 of Plaintiff's First Amended Original Complaint.

20. Defendants deny that Plaintiff is entitled to recover under the Texas Tort Claims Act, as stated in ¶ 20 of Plaintiff's First Amended Original Complaint.

21. Defendants deny that Plaintiff is entitled to recover punitive damages against the Defendants as stated in ¶ 21 of Plaintiff's First Amended Original Complaint.

22. Defendants admit that Sergeant Washington and Officer Foster were acting

within the course and scope of their employment with HPD at the time of the incident in question.

23. Defendants admit that Carnaby died by a gunshot wound, but deny that his death was “caused by the use of tangible personal property” as implied in ¶ 23 of Plaintiff’s First Amended Original Complaint.

24. Defendants deny each and every allegation contained ¶ 24 of Plaintiff’s First Amended Original Complaint, including subparts (a) through (d).

25. Defendants deny the allegations contained in ¶ 25 of Plaintiff’s First Amended Original Complaint.

26. Defendants deny the allegations contained in ¶ 26 of Plaintiff’s First Amended Original Complaint.

27. Defendants deny the that the Plaintiffs [sic] are entitled to the damages asserted in ¶ 27 of Plaintiff’s First Amended Original Complaint, including subparts (a) and (b).

28. Defendants deny the that the Plaintiffs [sic] are entitled to the damages asserted in ¶ 28 of Plaintiff’s First Amended Original Complaint, including subparts (a) - (c).

29. Defendants can neither admit nor deny the statement contained in ¶ 29 of Plaintiff’s First Amended Complaint. To the extent further answer is required, Defendants deny.

30. Defendants deny that Plaintiff has any basis for declaratory relief as stated in ¶ 30 of Plaintiff’s First Amended Complaint.

31. Defendants deny that Plaintiff has any basis for the injunctive relief sought

in ¶ 31, subparts (A) through (G) of Plaintiff's First Amended Original Complaint.

32. Defendants admit Plaintiff is entitled to recover attorney's fees, as stated in ¶ 32 of Plaintiff's First Amended Original Complaint, if Plaintiff prevails in her lawsuit against Defendants.

33. Defendants deny that Plaintiff is entitled to any of the damages sought in the Prayer of Plaintiff's First Amended Original Petition.

AFFIRMATIVE DEFENSES

FIRST DEFENSE

34. Defendants Andrew Washington and Cecil Foster, at all times relevant hereto, acted in good faith in the discharge of their duties. Accordingly, they are entitled to qualified immunity from suit pursuant to *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Scheur v. Rhodes*, 416 U.S. 232 (1984); §101.001, *et seq.*, TEXAS CIVIL PRACTICES AND REMEDIES CODE. The officers acted in good faith under the circumstances presented to them. At all times material hereto, the officers possessed and exercised a reasonable belief in the validity of the statutes and Constitution upon which they exercised authority. Any and all actions taken by the officers with regard to decedent were lawfully made in furtherance of effecting lawful police action. The above-mentioned Defendants assert a qualified immunity defense.

SECOND DEFENSE

35. Defendant City of Houston specifically and affirmatively pleads and claims all of the exemptions and exceptions from, and limitations on, liability provided by the Texas Tort Claims Act, §101.001, *et seq.*, TEXAS CIVIL PRACTICES AND REMEDIES CODE.

THIRD DEFENSE

36. The incident out of which this lawsuit grew, and the consequent damages, if any, to Plaintiff were not caused by any act of negligence either of omission or of commission on the part of Defendants, but to the contrary, such injuries and damages alleged by Plaintiff were directly and proximately caused by the negligence and intentional acts and omissions of the decedent and/or a third party.

FOURTH DEFENSE

37. For further and special answer, if the same be necessary, Defendant City of Houston, would show the Court that the City is a municipal corporation, functioning as such under a Special Charter granted it by the Legislature of the State of Texas, as well as by Article XI, Section 5, (the "Home Rule Amendment") of the Constitution of the State of Texas, and the various laws of the State of Texas germane thereto; thus, as such, by the doctrine of governmental immunity, it is not obligated by law to respond in damages for its acts and/or omissions nor for those of its agents, servants, and/or employees, incident to, resulting from, or arising or developing out of its governmental functions nor may Plaintiff's claim benefit of any waiver of such immunity.

FIFTH DEFENSE

38. With respect to the pendent state claims asserted against Defendants, if any, Plaintiff is not entitled to any relief against Defendants under the doctrine of governmental and official immunity.

SIXTH DEFENSE

39. Defendants specifically and affirmatively plead and claim all of the exemptions and exceptions from, and limitations on, liability by official immunity, sovereign

immunity and/or governmental immunity.

SEVENTH DEFENSE

40. Defendants Washington and Foster specifically and affirmatively plead and claims all of the exemptions and exceptions from, and limitations on, liability by official immunity, sovereign immunity and/or governmental immunity.

EIGHTH DEFENSE

41. Defendants affirmatively alleges that the officers' acts and /or omissions with regard to the Plaintiff's decedent and/or this incident were discretionary and thus, Defendants Washington and Foster are not an cannot be liable to the Plaintiff.

NINTH DEFENSE

42. Defendants Washington and Foster allege that they are entitled to derivative immunity. Defendants assert that they are entitled to the official and/or governmental or sovereign immunities and other immunities derivative and otherwise afforded Sergeant Washington, Officer Foster and/or the City of Houston.

TENTH DEFENSE

43. Defendants Washington and Foster further allege that they are entitled to immunity derivative of the City of Houston's various immunities since a suit against the officers in their official capacity amounts to suit against the governmental defendant. Defendant City alleges that it is entitled to immunity derivative of the officers' immunities.

ELEVENTH DEFENSE

44. Defendant City of Houston alleges the lack of any custom, practice, policy or procedure which served as the moving force behind any alleged violation, damages or cause of action.

TWELFTH DEFENSE

45. Defendants further allege that Roland Carnaby was contributorily negligent and/or assumed the risk for this incident.

THIRTEENTH DEFENSE

46. Defendants further allege that the shooting made the basis of this lawsuit was justifiable.

FOURTEENTH DEFENSE

47. Defendants further allege that the deceased failed to obey an officer's command.

FIFTEENTH DEFENSE

48. Defendants further allege that the deceased fled from the officers, thereby committing a felony.

SIXTEENTH DEFENSE

49. Defendants further allege that there was no intentional violation of any policy, practice or procedure by the officers involved.

SEVENTEENTH DEFENSE

50. All of the acts of the Defendants were privileged by law in every respect.

WHEREFORE, PREMISES CONSIDERED, Defendants City of Houston, Andrew Washington and Cecil Foster pray that upon final hearing hereof Plaintiff takes nothing against said Defendants by reason of this suit; that Defendants go hence without day, and that they recover attorney's fees, their costs, and have such other and further relief, at law and in equity, to which these Defendants may be justly entitled.

Respectfully submitted,

By ISI/L.A. Teehan

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ATTORNEY-IN-CHARGE
FOR DEFENDANTS CITY OF HOUSTON,
ANDREW WASHINGTON, and
CECIL FOSTER

OF COUNSEL:

ARTURO MICHEL
City Attorney

CERTIFICATE OF SERVICE

I, L.A. Teehan, hereby certify that on the 28th day of May, 2008, a copy of the foregoing document was served upon the following attorney of record:

Randall Kallinen
Attorney at Law
1406 Castle Court
Houston, Texas 77006
Via DC e-filing

ISI/L.A. Teehan

L. A. Teehan

