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County Clerk



Winnebago County
Office of the County Clerk

The Wave of the Future

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NOTICE OF CLAIM

Date: October 9, 2018

To: Doug, Linda and Joan

Re: Claim from Adam Kuborn and Joseph & Nancy Kuborn for damages as a result of an incident with local police agencies

This claim will be presented to the County Board at their October 16, 2018 meeting.

FILED

OCT 08 2018

WINNEBAGO COUNTY
CLERK'S OFFICE
WINNEBAGO, WI

NOTICE OF CLAIM FOR DAMAGES

TO: City of Oshkosh Police Department City of Oshkosh
Dean Smith, Chief of Police Pamela R. Ubrig, City Clerk
420 Jackson Street 215 Church Avenue
Oshkosh, Wisconsin 54902 Oshkosh, Wisconsin 54901

Winnebago County Sheriff's Office Winnebago County
John Matz, Sheriff Sue Ertmer, County Clerk
4311 Jackson Street 112 Otter Avenue
Oshkosh, Wisconsin 54901 Oshkosh, Wisconsin 54901

The following claim for damages by Adam Kuborn and Joseph and Nancy Kuborn, is hereby made pursuant to sec. 893.80(1)(b), *Stats.* A notice of injury was timely filed and served upon the above-named parties on February 5, 2016. The claimant Adam Kuborn's injuries, recovery and condition have now reached a plateau, so the instant claim is being filed for consideration by the City and County, pursuant to the requirements of sec. 893.80, *Stats.*

1. Claimant Adam J. Kuborn is an adult resident of the State of Wisconsin, who resides with his parents at W72 N408 Mulberry Avenue, Cedarburg, Wisconsin 53012, when he was not attending college. At all times referenced below, Adam was a college student.

2. Claimants Joseph Kuborn and Nancy Kuborn (Adam's parents) are adult residents of the State of Wisconsin, residing at W72 N408 Mulberry Avenue, Cedarburg, Wisconsin 53012, and are the natural parents of Adam J. Kuborn.

3. The City of Oshkosh Police Department is an agency of the City of Oshkosh, which is a city government organized and existing under Chap. 62, *Wis. Stats.*, and the laws of the State of Wisconsin.

4. The City of Oshkosh Police Department is located at 420 Jackson Street, Oshkosh, Wisconsin 54902. Dean Smith currently serves as the Chief of Police. The chief

of police is the city official under whom the law enforcement officers of the Oshkosh Police Department serve and answer to pursuant to sec. 62.13, *Wis. Stats.*

5. The Winnebago County Sheriff's Office is an agency of Winnebago County, which is a county government organized and existing under Chap. 59, *Wis. Stats.*, and the laws of the State of Wisconsin.

6. The Winnebago County Sheriff's Office is located at 4311 Jackson Street, Oshkosh, Wisconsin 54901. John Matz currently serves as the Sheriff, and he is the official under whom the law enforcement officers of the Winnebago County Sheriff's Office serve and answer to, pursuant to sec. 59.26 and .27, *Wis. Stats.*

7. The Winnebago County Sheriff's Office directs and has responsibility for the operations of the Winnebago County Jail, and its officers and employees, including intake, booking, health care and injury screening and assessment of suspects and pretrial detainees at the jail facility, pursuant to sec. 59.27, *Wis. Stats.*

8. Both the City of Oshkosh Police Department and the Winnebago County Sheriff's Office, and their officers and employees, have a statutory duty to provide appropriate medical care and treatment, and where appropriate, hospital care to a person in their custody who is injured or intoxicated. Sec. 302.38, *Wis. Stats.*

9. During the late evening of October 10, 2015, Adam Kuborn was walking in the vicinity of Wisconsin Street south of West Irving Avenue in the City of Oshkosh with a female friend, when they stopped to rest on the sidewalk near the front yard around 650 Wisconsin Street.

10. According to police reports later obtained by Kuborn's legal counsel through Open Records requests, at approximately the same time on October 10, 2015, City of Oshkosh Police Officer Scott Sopata and/or others were actively engaged in trying to apprehend a male suspect, suspected of resisting/obstructing an officer and marijuana possession. This suspect was not Adam Kuborn and Kuborn did not match the suspect's description.

11. Based on the police reports reviewed and on information and belief, other City of Oshkosh Police Officers were engaged in trying to apprehend this suspect, including, but not limited to, Officer Sopata, Officer Benjamin Boese and Officer Andrew Lecker. The suspect they were looking for was apprehended by other law enforcement officers in the late evening of October 11, 2015.

12. Upon information and belief, while Kuborn and his female friend were resting on the public sidewalk in the 600 block of Wisconsin Street, Officer Sopata was driving his squad car on East Irving Avenue and saw both of them.

13. Kuborn and his friend were not doing anything illegal or suspicious at the time Officer Sopata drove by in his squad car. Sopata did not see Kuborn or his friend commit any crime, nor did Sopata have a reasonable suspicion that Kuborn had committed or was about to commit a crime, or that he might be armed or presently dangerous.

14. Sopata activated his patrol car lights, stopped and exited his vehicle and approached Kuborn on foot. Sopata did not have information that identified Kuborn as a suspect of any violation of criminal laws.

15. Upon Sopata's approach, Kuborn and his friend got up and began to walk away. Kuborn walked faster in one direction as Sopata approached, and his friend rapidly walked away from Sopata in a different direction.

16. Sopata pursued Kuborn on foot in the block encompassing the east side of Wisconsin Street between West Irving Avenue to the north and Amherst Avenue to the south.

17. Based on the police reports reviewed and on information and belief, Officers Boese and Lecker were on foot patrol in the area and joined in Officer Sopata's pursuit of Kuborn.

18. As with Officer Sopata, Officers Boese and Lecker did not see Kuborn commit any crime, nor did either of them have a reasonable suspicion that Kuborn had

committed or was about to commit a crime, or that he might be armed or presently dangerous. Kuborn had not been involved in any criminal activity, was not armed and did not pose a threat to anyone.

19. Like Officer Sopata, Officers Boese and Lecker did not have information that identified Kuborn as a person suspected of violating the criminal law.

20. Based on a review of relevant police reports and information obtained from the City and County, Officer Boese and/or other officers in conjunction with him, who were in pursuit of Kuborn, at some point grabbed and ripped Kuborn's clothing, spun him around, tackled and slammed him into the ground, pinned him down, pushing Kuborn into the pavement. At least one of the officers put much of his weight onto Kuborn and forcefully kned him in the back, as he lay on the pavement on Amherst Avenue, just east of Wisconsin Street.

21. Officer Boese's and/or the other officers' who took Kuborn down, utilized undue, unnecessary and excessive physical force, to a person not suspected of any crime, which caused Kuborn to suffer severe, life-threatening physical injuries.

22. Upon review of the reports and on information and belief, once Kuborn was lying face-down on the ground, Officer Boese and at least one other police officer continued to utilize undue, unnecessary and excessive physical force by restraining, holding, pinning and pushing Kuborn down into the pavement, using direct physical pressure, force and contact upon Kuborn, and that the police officers' actions caused Kuborn to suffer injuries, pain and great bodily harm.

23. Kuborn recalls that he called out to the officers to stop, stating that they were hurting him, as he experienced great pain in his flank and rib cage area, because of the police officers' continuing use of undue, unnecessary and excessive physical force.

24. Due to the actions of the police officers, Kuborn suffered a large abrasion to his left upper abdomen and left front rib cage area, head injuries, including bruising, and very serious internal injuries. Upon information and belief, Kuborn's external injuries

may have been photographed by Officers Sopata, Boese and/or other law enforcement officers, or might be seen on officer collar camera or squad camera videos, as well as photographs and videos taken at the County Jail.

25. Kuborn was handcuffed and placed in the back seat of the squad car. While in the back seat, Kuborn told the police officer who was driving, that he was injured and his ribs might be broken. The officer refuted Kuborn's claim stating that he would know if Kuborn was hurt, even though the officer had not conducted any examination of him.

26. Kuborn was transported to the Winnebago County Sheriff's Department, where he was held for some time in the Winnebago County Jail.

27. While Kuborn was in the County Jail, photographs and video recordings were taken of him, some of which show abdominal bruising and Kuborn being dazed and lethargic.

28. During the period of time when Kuborn was in the custody and control of City and County law enforcement agencies, Kuborn complained of pain, which was evidenced by the difficulty Kuborn had removing his socks as commanded. Kuborn was not taken to or examined by the jail nurse, or by an EMT or other health care professional, while he was at the jail, and he was not provided with any medical care.

29. While he was in custody at the Winnebago County Jail, Kuborn began to urinate blood and expel blood-tinged vomit, but no medical care was provided to him, despite these symptoms of internal injury and bleeding.

30. After Kuborn was released from the Winnebago County Jail to his friend, she called for medical attention and contacted Kuborn's parents.

31. Kuborn's parents subsequently had their son Adam Kuborn admitted to the Emergency Department of Aurora Medical Center-Oshkosh.

32. While being examined and treated at Aurora Medical Center-Oshkosh, the emergency treating physician determined that the severity of the injuries suffered by Kuborn exceeded the treatment capabilities of Aurora Medical Center-Oshkosh, and that

Kuborn would need to be promptly transferred to a trauma hospital that could handle the life-threatening injuries that had been inflicted on him by the police officers.

33. During discussions and consultation between Aurora Medical Center-Oshkosh and St. Luke's Medical Center, a trauma hospital in Milwaukee, concerning the requested transfer of Kuborn to St. Luke's, the emergency physician on duty at St. Luke's determined that the severity of Kuborn's internal injuries also exceeded the capabilities of St. Luke's and that Kuborn needed to be immediately transferred to a Level I trauma center, i.e., Froedtert Hospital in Milwaukee.

34. In the early morning hours of October 11, 2015, Kuborn was flown by a Flight for Life helicopter from Aurora Medical Center-Oshkosh to Froedtert Hospital, in critical and grave medical condition, suffering severe pain due to the extensive internal injuries directly caused by the undue, unnecessary and excessive use of force inflicted on him by law enforcement officers.

35. Upon a review of hospital records, and on information and belief, the Level I Trauma Center team and specialists at Froedtert confirmed Aurora's preliminary diagnosis that Kuborn suffered a shattered left kidney Grade 5 injury, with active urine extravasation, a large left retroperinephric hematoma and capsular Grade 1 laceration of the inferior pole of his spleen. Kuborn also suffered large abrasions to his left upper abdomen and left front rib cage area, an obvious frontal abrasion to his head and a blackened eye.

36. As a result of the Grade 5 acute kidney injury and spleen laceration, both of which were the direct result from the grave bodily harm caused by officers of the Oshkosh Police Department, Kuborn was hospitalized at Froedtert Hospital in the Surgical Intensive Care Unit (SICU) from October 11 until the evening of October 16 and was readmitted to Froedtert Hospital from November 12 until November 14 for complications from these injuries.

37. Kuborn was catheterized and required to have a urinary catheter after being discharged from the hospital on October 16. He had to wear the catheter and collection

bag continuously for many weeks, which was painful, debilitating and traumatic as he tried to return to attending classes at the university.

38. As a direct result of the Grade 5 acute kidney injury, Kuborn suffered a substantial urinary disability and pain for well over a year, and continues to suffer limiting symptoms because of the injury. Kuborn will have a permanent reduction in the function of the left kidney, which will lead to life-long complications, increased risk of needing renal replacement, increased life-long risk of infection, high blood pressure, physical limitations, certain disability and diminished urinary function, increased medical expenses and reduced quality of life.

39. As a direct result of the Grade 5 acute kidney injury, Kuborn could not play the usual sports he had engaged in for more than six months following his recovery, and his doctors have prohibited him from playing the contact sports he engaged in previously, because if he injured his kidney, he would risk being on dialysis for the rest of his life and/or need a transplant.

40. As a direct result of the Grade 5 acute kidney injury, Kuborn is at a significantly increased risk for future morbidity and mortality, as studies documenting the long-term effects of acute kidney injury are indicating. See, Doyle & Forni, "Acute kidney injury: short-term and long-term effects", 20 *Critical Care* 188 (July 2016).

41. Kuborn has valid claims for false arrest and false detention/imprisonment which will be brought under state tort law as well as under 42 U.S.C. sec. 1983 for violation of his Fourth and Fourteenth Amendment rights.

42. The Fourth Amendment prohibits unreasonable seizures of a person. Arrests are not constitutionally valid in the absence of probable cause. Officers Sopata, Boese and Lecker did not have probable cause to seize and arrest Kuborn.

43. Officers Sopata, Boese and Lecker did not have reasonable suspicion under *Terry v. Ohio*, 392 U.S. 1 (1968), or other law, to pursue, stop, seize and arrest Kuborn, or to use significant, excessive force to stop and immobilize him.

44. Detentions which arguably might be initially justified as a *Terry* investigatory stop, will not justify seizures which are unreasonable in manner, length or scope in light of the original purpose of the officers, who also used unnecessary excessive force to seize Kuborn. The officers had no legal justification or sufficient evidence to justify the greater intrusion on Kuborn's liberty or the amount of force used, when no crime was suspected or being committed by Kuborn.

45. Kuborn's claims for damages for infliction of injuries to him and severe emotional distress by the excessive use of force applied by the above-named officers and/or others, during and following his take-down and seizure, his arrest and being taken in held in custody, and not being provided with a prompt medical examination and necessary care, exist under both state tort law (intentional and negligent conduct), as well as constitute violations of his Fourth, Fifth, Eighth and Fourteenth Amendment rights, which are actionable under 42 U.S.C. sec. 1983. His parents' claims for damages the costs of their son's treatment and recovery expenses, as well as for infliction of severe emotional distress exist under state tort law as well.

46. In *Graham v. Connor*, 490 U.S. 386 (1989), the United States Supreme Court held that the use of excessive force during an arrest, an investigatory stop, or any other seizure of a person at liberty is actionable as an unreasonable seizure and arrest under sec. 1983, and such claims are governed by Fourth Amendment standards.

47. Kuborn was subjected to a seizure within the meaning of the Fourth Amendment through the application of force by the above-named City police officers, and perhaps others.

48. The force that was used against Kuborn was excessive, particularly given the fact that Kuborn was not committing any crime and did not pose an immediate threat to the safety of the officers or others, when the officers unnecessarily exposed him to danger during the seizure and arrest, in violation of his substantive due process rights and Fourth Amendment rights.

49. *Graham* held that the test for reasonableness under Fourth Amendment is an objective one. Where the government's interests in using force are weak or nonexistent, as in Kuborn's case, the serious injuries inflicted on him are clearly sufficient to establish a Fourth Amendment violation.

50. The force that was used against Kuborn, as well as the manner and technique leading up to such use of force, given the totality of the circumstances, was not reasonable under Wisconsin state law or the Fourth Amendment.

51. The above-named officers, and others who may have been involved, did not use alternative lesser-intrusive methods of capturing or immobilizing Kuborn, which were known, available and should have been utilized, according to their training, applicable standards of police practice and the Fourth Amendment.

52. As a direct and proximate result of the intentional, reckless and/or negligent acts and omissions of the above-referenced and/or other unnamed City and County law enforcement officers, Kuborn suffered significant past and future pain, severe and life-threatening personal injuries, severe emotional distress, anguish, pain, suffering, disability and disfigurement, and incurred significant past medical expenses and also faces increased future risk of morbidity and mortality, which will result in future medical expenses, disability and limitations on activities, among other damages.

53. Claimants Joseph and Nancy Kuborn sustained the loss of the aid, society, comfort and companionship of their son, Adam J. Kuborn, and may be further deprived of same in the future as a result of his injuries. Kuborn's parents sustained significant severe emotional distress and trauma in the immediate aftermath and as a result of their son's life-threatening injuries and condition. They have also incurred past and may incur future medical expenses.

54. At all times material, the City of Oshkosh Police Department, the City of Oshkosh, the Winnebago County Sheriff's Office and the Winnebago County Clerk's Office had actual notice of the claimants' injuries, resultant damages and of the above-described incident, and the City and County may possibly have investigated same.

55. Counsel for Kuborn has retained Robert C. Willis, a recognized expert on police practices and appropriate use of force, to conduct a preliminary review of post-incident reports and information that counsel has obtained regarding the events of October 10 and 11, 2015.

56. Based on his review of such and Adam Kuborn's medical records identifying his injuries, Mr. Willis preliminarily opines that Oshkosh Police Officer Sopata's initial contact with Kuborn was flawed.

57. Mr. Willis is also of the opinion that the above-named police officers' continued contact with Kuborn was not appropriately conducted, remained unreasonable, and that probable cause for the arrest of Kuborn never existed, even though an arrest was made.

58. Mr. Willis is of the opinion that established professional communication skills and techniques were not evident or utilized, verbal solution oriented strategies were not used and the officer-created jeopardy was a negative consequence of overly-zealous, careless and aggressive police behavior.

59. Mr. Willis finally opines that based on officer training, current law enforcement standards and the Fourth Amendment considerations, the use of force employed by Oshkosh police officers against Kuborn was excessive, unreasonable and out of balance with the behavior of Kuborn, and such use of force was unjustified and not objectively reasonable under *Graham v. Connor*.

60. Upon the City and County's receipt of this notice of claim for injuries and damages, and their assignment of government legal counsel or insurance adjustors to review the claims, counsel for Kuborn will share Mr. Willis' preliminary report and opinions to assist in their assessment and possible resolution of Adam Kuborn's and his parents' claims.

61. As a direct and proximate result of the intentional and/or negligent actions and omissions of officers of the City of Oshkosh Police Department and of deputies and

employees of the Winnebago County Sheriff's Office, including Officers Scott Sopata, Benjamin Boese and Andrew Lecker and/or other officers at the scene of Kuborn's injuries, and the officers who later conveyed Kuborn to the County Jail, and deputies and employees who were responsible for him while he was at the Jail, Adam J. Kuborn sustained damages as follows:

a.	past medical and hospital expenses:	\$105,750.57
b.	past travel expense for care:	\$1,723.19
c.	future medical and hospital expenses:	\$200,000.00
d.	past pain, suffering and disability:	\$250,000.00
e.	future pain, suffering and disability:	\$350,000.00
e.	future loss of ability to engage in sporting activities and enjoyments of life because of his injuries and limitations imposed:	\$100,000.00
f.	past loss of earnings and earning capacity:	\$35,000.00
g.	future loss of earnings and earning capacity:	\$100,000.00
h.	past legal costs and expenses relating and arising from Oct. 10, 2015 incident (through Sept. 2018)	\$40,000.00

62. As a direct and proximate result of the intentional and/or negligent actions and omissions of City of Oshkosh Police Department and the Winnebago County Sheriff's Office, and their officers and agents, including, but not limited to, Officers Scott Sopata, Benjamin Boese and Andrew Lecker and/or other officers' involved, Joseph and Nancy Kuborn suffered great worry, anguish and severe emotional distress and were deprived of the aid, society, comfort and companionship of their son, Adam J. Kuborn and will be deprived of same in the future, and incurred significant expenses, in addition to suffering great emotional trauma, all to their damage in the sum of \$ 150,000.00.

WHEREFORE, Adam J. Kuborn demands satisfaction in the amount of \$1,182,473.70 against City of Oshkosh Police Department, the City of Oshkosh, the Winnebago County Sheriff's Office, the Winnebago County Clerk's Office for the actions of their officers, deputies and employees and injuries and losses he has suffered as are described herein.

WHEREFORE, Joseph and Nancy Kuborn demand satisfaction in the amount of \$150,000.00 against City of Oshkosh Police Department, the City of Oshkosh, the Winnebago County Sheriff's Office, the Winnebago County Clerk's Office for the actions of their officers, deputies and employees and injuries and losses as are described herein.

Dated at Milwaukee, Wisconsin this 2nd day of October, 2018.

GIMBEL, REILLY, GUERIN & BROWN, LLP

By: 

RAYMOND M. DALL'OSTO

State Bar No. 1017569

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Joseph Kuborn and Nancy Kuborn

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