

ATTYOPEN

**United States District Court  
Eastern District of Wisconsin (Milwaukee)  
CIVIL DOCKET FOR CASE #: 2:19-cv-01230-JPS**

Kowalczuk v. Giese et al  
Assigned to: Judge J P Stadtmueller  
Cause: 28:1331 Federal Question: Other Civil Rights

Date Filed: 08/23/2019  
Jury Demand: Plaintiff  
Nature of Suit: 440 Civil Rights: Other  
Jurisdiction: Federal Question

**Plaintiff**

**Michael A Kowalczuk**

represented by **Drew J DeVinney**  
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**ATTORNEY TO BE NOTICED**

V.

**Defendant**

**Eric Giese**

represented by **Jennifer M Luther**  
Foley & Lardner LLP  
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**TERMINATED: 10/03/2019**

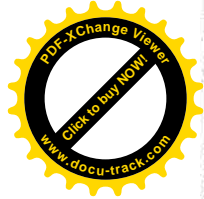
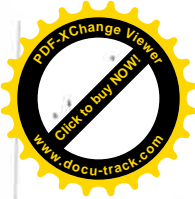
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**ATTORNEY TO BE NOTICED**

**Defendant**

**Matt Soens**

represented by **Jennifer M Luther**  
(See above for address)  
**TERMINATED: 10/03/2019**



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

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MICHAEL A. KOWALCZUK  
5826 Sunset Blvd.  
Racine, WI 53406

Case No.: 2:19-cv-1230

Plaintiff,

vs.

ERIC GIESE  
8811 Campus Drive  
Mount Pleasant, WI 53406

MATT SOENS  
8811 Campus Drive  
Mount Pleasant, WI 53406

VILLAGE OF MOUNT PLEASANT  
8891 Campus Drive  
Mount Pleasant, WI 53406

Defendants.

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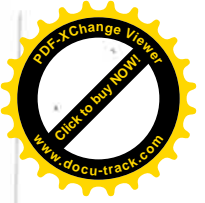
**NOW COMES** the above-named plaintiff, Michael A. Kowalczuk, by his attorneys, Martin Law Office, S.C., and as and for his claims for relief against the above-named defendants, alleges and shows to the Court as follows:

**Nature of the Case**

1. This is a civil action, pursuant to 42 U.S.C. § 1983, for redress of the deprivation, under color of law, of Michael A. Kowalczuk's rights secured by the Fourth and Fourteenth Amendments to the United States Constitution.

**Jurisdiction and Venue**

2. This court has jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3).



3. Venue in the Eastern District of Wisconsin is proper under 28 U.S.C. 1391(b).

### Parties

4. That the plaintiff, Michael A. Kowalczyk, is an adult citizen, born March 11, 1988, and resident of the State of Wisconsin, residing at 5826 Sunset Blvd., Mount Pleasant, Wisconsin 53406.

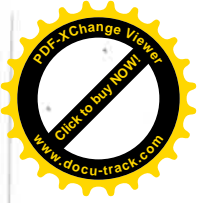
5. That the defendant, Village of Mount Pleasant, is a municipality duly incorporated, organized, and existing under the laws of the State of Wisconsin; that the Mount Pleasant Police Department is an agency of the Village of Mount Pleasant.

6. That the defendant, Eric J. Giese, is an adult resident of the State of Wisconsin; that, at all times material hereto, Eric J. Giese was employed by the defendant, Village of Mount Pleasant, as a police officer with the Mount Pleasant Police Department; that, at all times material hereto, Eric J. Giese was acting within the scope of his employment and authority as a Village of Mount Pleasant police officer; that the plaintiff sues Eric J. Giese in his individual and official capacities.

### General Allegations

7. That, at all times material hereto, the defendant Eric J. Giese acted under color of state law.

8. That on September 9, 2013, at approximately 12:30 am, Michael A. Kowalczyk ("Kowalczyk") was operating his motor vehicle in the Village of Mount Pleasant; that Kowalczyk was driving to the home that he shared with his parents; that, at all times material hereto, Kowalczyk was obeying all traffic rules and was operating his vehicle in a safe and reasonable manner.



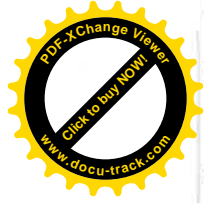
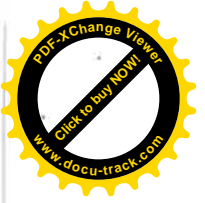
9. That, upon information and belief, at approximately 12:30 am, the defendant, Eric J. Giese (“Giese”) was operating a marked Village of Mount Pleasant squad care; that Giese observed Kowalczuk’s vehicle turn onto 16<sup>th</sup> street, in the Village of Mount Pleasant, Wisconsin; that Giese elected to follow Kowalczuk eastbound on 16<sup>th</sup> street; that Giese had no reasonable basis to believe that Kowalczuk had committed any crime or traffic violation when he decided to follow Kowalczuk.

10. That, at its intersection with South Emmersen Road, the speed limit for eastbound traffic on South 16<sup>th</sup> Street reduces from thirty-five miles per hour to twenty-five miles per hour; that, upon information and belief, the defendant, Giese, followed Kowalczuk eastbound on South 16<sup>th</sup> Street for the purpose of observing whether Kowalczuk would comply with the change in speed limit east of South Emmersen Road.

11. That, at all times material hereto, Kowalczuk was aware of that Giese was following him on South 16<sup>th</sup> Street; that Kowalczuk reduced the speed of his vehicle to comply with the change in speed limit east of S. Emmersen Road; that Giese was following Kowalczuk’s vehicle as he passed S. Emmerson Road; that Giese activated his squad lights after Kowalczuk passed South Emmerson Road.

12. That, upon viewing Giese’s squad lights, Kowalczuk drove his vehicle to his parents’ house at 5826 Sunset Boulevard, Mount Pleasant, which he believed to be a safe place to park his vehicle; that 5826 Sunset Boulevard near the location where Giese activated his squad lights.

13. That, at all times after Giese had activated his squad lights, Kowalczuk operated his vehicle under the posted speed limit and used turn signals to communicate his direction; that Kowalczuk operated his vehicle reasonably; that, based on the actions of Kowalczuk and the



circumstances presented to Giese, no reasonable officer would suspect that Kowalczuk had committed any crime or that Kowalczuk was attempting to flee or avoid arrest.

14. That Kowalczuk parked his vehicle in front of his parents' home; that, after stopping his vehicle, Kowalczuk slowly opened the driver's side door.

15. That, after stopping his vehicle, Giese exited his squad with his firearm aimed at Kowalczuk; that Giese yelled the following instruction to Kowalczuk: "Stop! Get out of the car! Stay in the car, right now!"

16. That Kowalczuk was confused by Giese's instructions; that Kowalczuk immediately stopped all movement when he heard Giese yell "Stop!"

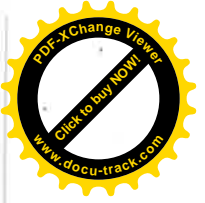
17. That Giese approached Kowalczuk with his firearm aimed at Kowalczuk.

18. That Giese instructed Kowalczuk: "Show me your hands!"; that Kowalczuk immediately put both of his hands up and in view of Giese; that Giese was or should have been able to observe that Kowalczuk's hands were empty and that he posed no physical threat.

19. That within approximately one second of instructing Kowalczuk to show his hands, Giese instructed Kowalczuk: "Stop the car!"; that Kowalczuk was confused by this instruction because his vehicle was already stopped.

20. That within approximately one second of instructing Kowalczuk to stop the car, Giese instructed Kowalczuk: "Get out of the car!"; that, at the same time, Giese grabbed Kowalczuk by Kowalczuk's left arm and used excessive force to remove Kowalczuk from the vehicle.

21. That as Giese was removing Kowalczuk from the vehicle, Giese yelled at Kowalczuk: "Get out of the car! Get on the ground"



22. That Kowalczuk attempted to comply with Giese's quick and changing instructions; that Giese's instructions were confusing to Kowalczuk; that Giese's sudden use of excessive physical force frightened Kowalczuk; that as Kowalczuk exited the vehicle Kowalczuk asked Giese: "What did I do, man?"

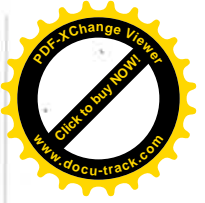
23. That in response to Kowalczuk's question, Giese yelled: "Get on the ground!"; that at the same time, Giese pulled Kowalczuk's arm and used excessive physical force to push Kowalczuk to the pavement; that the force exerted Giese combined with Giese's control of Kowalczuk's left arm caused Kowalczuk to turn and fall onto his backside.

24. That once Kowalczuk was on the ground, Giese continued to maintain physical control of Kowalczuk by gripping Kowalczuk's left arm; Giese again yelled at Kowalczuk: "Get on the fucking ground!"; that, at the same time, Giese placed his other hand behind Kowalczuk's head and pushed Kowalczuk onto his right side; that Giese then placed his weight on top of Kowalczuk.

25. That, as Giese was on top of Kowalczuk, Kowalczuk pleaded: "Let go, man."

26. That as Giese's weight was restricting Kowalczuk's mobility; that Giese yelled at Kowalczuk "Put your hands behind your back! Do it now! Put your hands behind your back and get on your stomach! Get on your stomach! put your hands behind your back! Do it now!"; that Kowalczuk was not physically able to follow Giese's commands while Giese was restricting Kowalczuk's mobility.

27. That Giese lessened the pressure he was exerting on top of Kowalczuk's allowing Kowalczuk to position himself on his stomach with his hands behind his back; that as Kowalczuk was attempting to comply with Giese's instructions, Giese yelled: "Put your hands behind your back, or you're going to get tased! (*sic*)"



28. That Kowalczuk was able to put his hands behind his back, at which point Giese secured Kowalczuk's hands in handcuffs.

29. That Kowalczuk's mother and father, Nancy Kowalczuk and Jeff Kowalczuk, were inside of their home and observed Giese use excessive force on Michael Kowalczuk without provocation; that Nancy and Jeff Kowalczuk exited their home; that Giese put his hand over his firearm and threatened Nancy and Jeff Kowalczuk: "Stay back! Stay back."

30. That Michael Kowalczuk was extremely frightened by Giese; that Kowalczuk remained handcuffed at all times; that Michael Kowalczuk yelled: "Mom!"

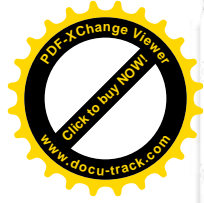
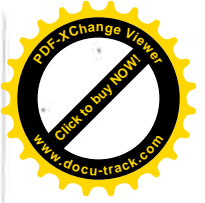
31. That Kowalczuk attempted to positioned himself on the ground to be able to see his mother; that Giese again grabbed Kowalczuk; that Jeff Kowalczuk yelled to Giese: "Hey, hey hey!"; that Giese yelled at Jeff Kowalczuk to "Stay back!"; that Nancy and Jeff Kowalczuk were frightened by the actions and demeanor of Giese.

32. That Giese tackled Michael Kowalczuk back to the pavement, yelling: "Stay the fuck down!"; that Giese physically attacking Kowalczuk; that Kowalczuk attempted to defend himself from Giese with his legs; that, as Kowalczuk was on the ground, Giese punched Kowalczuk in the face with his right hand.

33. That Giese got off of Kowalczuk and Kowalczuk was able to stand himself up; that Giese yelled at Kowalczuk: "stay back!"; that Kowalczuk then turned to face away from Giese to say something to his mother; that, as Kowalczuk's back was turned to Giese, Giese shot Kowalczuk with a taser; that Kowalczuk fell to the pavement and landed onto his head; that Kowalczuk lost conscious.

34. That Kowalczuk regained conscious approximately eleven seconds after being tasered by Giese and falling to the ground; that Kowalczuk was confused and frightened when he





regained conscious; that Kowalczyk attempted to stand; that the taser leads remained in Kowalczyk and Giese used the taser to debilitate Kowalczyk.

**First Claim for Relief: Excessive Force – Against Eric J. Giese**

35. Plaintiff realleges and incorporates herein by reference the allegations of the preceding paragraphs.

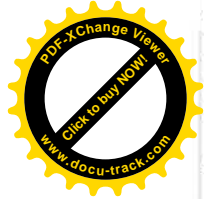
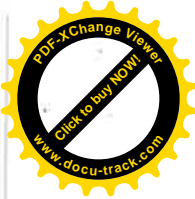
36. The uses of force employed by Eric J. Giese in the course of arresting Michael A. Kowalczyk, including, but not limited to, pulling Kowalczyk from his vehicle, pushing Kowalczyk onto the ground, exerting physical pressure onto Kowalczyk on the ground, handcuffing Kowalczyk, tackling Kowalczyk to the ground, attacking Kowalczyk, punching Kowalczyk, and twice using a taser to debilitate Kowalczyk, were not objectively reasonable under the Fourth Amendment to the United States Constitution.

37. The conduct alleged constituted unreasonable and excessive force and violated Michael A. Kowalczyk's right to be free from unreasonable seizures under the Fourth and Fourteenth Amendments to the United States Constitution.

38. Defendant Eric J. Giese's unreasonable and excessive use of force against Michael A. Kowalczyk was a cause of the injuries sustained by Michael A. Kowalczyk, including the violation of his constitutional rights, loss of liberty, past and future pain, suffering, emotional distress, mental anguish, past and future medical expenses, disability, loss of enjoyment of life and dignity, and other compensable injuries and damages, all to the damage of Michael A. Kowalczyk in an amount to be determined at a trial of this matter.

39. Defendant Eric J. Giese acted with malice or in reckless disregard of Michael A. Kowalczyk's federally protected rights.





**Second Claim for Relief: False Arrest – Against Eric J. Giese**

40. Plaintiff realleges and incorporates herein by reference the allegations of the preceding paragraphs.

41. That on or about September 3, 2013, defendant Eric J. Giese caused Michael A. Kowalczyk to be arrested and/or detained without probable cause in violation of Michael A. Kowalczyk's rights under the Fourth and Fourteenth Amendments to the United States Constitution.

42. That defendant Eric J. Giese acted knowingly, intentionally and with malice

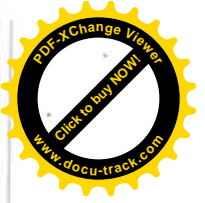
43. That defendant Eric J. Giese was deliberately indifferent to Michael A. Kowalczyk's constitutional rights.

44. That, as a direct and proximate result of the defendant, Eric J. Giese's, misconduct, as alleged, Michael A. Kowalczyk suffered injuries, including the violation of his constitutional rights, loss of liberty, past and future pain, suffering, emotional distress, mental anguish, past and future medical expenses, disability, loss of enjoyment of life and dignity, and other compensable injuries and damages, all to the damage of Michael A. Kowalczyk in an amount to be determined at a trial of this matter.

**Third Claim for Relief: Monell Claim against Defendant Village of Mount Pleasant  
(Policy, Practice, and/or Custom; Failure to Train and Supervise)**

45. Plaintiff realleges and incorporates herein by reference the allegations of the preceding paragraphs.

46. Upon information and belief, defendant Eric J. Giese acted within the written or unwritten policies, practices, and/or customs of the Village of Mount Pleasant Police Department, an agency of the defendant, Village of Mount Pleasant, when he employed



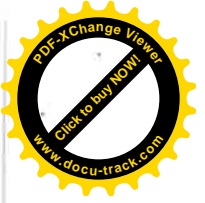
excessive force against Michael A. Kowalczuk and when he arrested Michael A. Kowalczuk without probable cause, as alleged.

47. Upon information and belief, the defendant, Village of Mount Pleasant, failed to adequately train and supervise its police officers, including Eric J. Giese, regarding the use of force and probable cause for arrest.

48. Upon information and belief, in light of the foreseeable consequences due to the failure to adequately train and supervise police officers as alleged, defendant Village of Mount Pleasant was deliberately indifferent to the rights of Michael A. Kowalczuk and other persons in Mount Pleasant by failing to adequately train and supervise its police officers including Eric J. Giese.

49. Upon information and belief, defendant Village of Mount Pleasant's law enforcement policies, practices, and/or customs and its failure to adequately train and supervise its police officers, including Eric J. Giese, was a cause of the violations of Michael A. Kowalczuk's constitutional right to be free from unreasonable seizures, in the form of excessive force, and false arrest.

50. Upon information and belief, defendant Village of Mount Pleasant's law enforcement policies, practices, and/or customs and its failure to adequately train and supervise its police officers, including Eric J. Giese, caused Michael A. Kowalczuk to injuries, including the violation of his constitutional rights, loss of liberty, past and future pain, suffering, emotional distress, mental anguish, past and future medical expenses, disability, loss of enjoyment of life and dignity, and other compensable injuries and damages, all to the damage of Michael A.



**Fourth Claim for Relief: Punitive Damages against Eric J. Giese**

51. Plaintiff realleges and incorporates herein by reference the allegations of the preceding paragraphs.

52. That upon information and belief, at all times material hereto, the defendant, Eric J. Giese, acted with intentional disregard of the rights of the plaintiff, Michael A. Kowalczyk, in such a manner as to subject Eric J. Giese to punitive damages in an amount to be determined at a trial of this matter.

**WHEREFORE**, the plaintiff demands judgment against defendants, Village of Mount Pleasant and Michael A. Kowalczyk, as follows:

A. declaring that the defendant, Eric J. Giese violated the plaintiff, Michael A. Kowalczyk's constitutional rights by using excessive force against him and by falsely arresting him; that the defendant, Village of Mount Pleasant, has liability for Eric J. Giese's actions, as alleged;

B. for compensatory damages against defendants, Village of Mount Pleasant, and Eric J. Giese, jointly and severally, in an amount to be determined at trial;

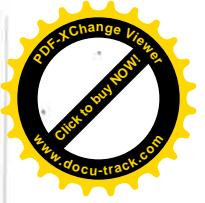
C. for punitive damages against defendant, Eric J. Giese, in an amount to be proved at trial;

D. for plaintiff's attorneys' fees, pursuant to 42 U.S.C. § 1988

E. for punitive damages to punish and deter the named individual defendant for their misconduct as alleged herein.

F. for such further and additional relief as this Court may deem equitable and just.

**PLEASE TAKE NOTICE THAT THE PLAINTIFF DEMANDS A TRIAL IN THE ABOVE-ENTITLED ACTION.**



Dated: August 22, 2019

**MARTIN LAW OFFICE, S.C.**  
Attorney for Plaintiff(s)

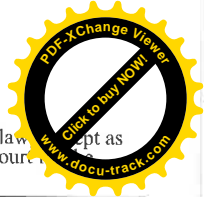
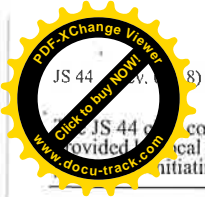
*Electronically Signed by Drew J. DeVinneyM*

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State Bar No. 01088576

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# CIVIL COVER SHEET

This cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law or the local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court in initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

Place an "X" in the appropriate box (required): ☐ Green Bay Division ☒ Milwaukee Division

## I. (a) PLAINTIFFS

Michael Kowalczuk

(b) County of Residence of First Listed Plaintiff Racine County  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Martin Law Office, S.C. 414-856-2310  
7280 S. 13th Street, Ste. 102, Oak Creek, WI 53154

## DEFENDANTS

Sergeant Eric Giese, Chief of Police Matt Soens, Village of Mt. Pleasant

County of Residence of First Listed Defendant Racine County  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

## II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff  
☒ 3 Federal Question (U.S. Government Not a Party)  
☐ 2 U.S. Government Defendant  
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   | PTF                        | DEF                        |   | PTF                        | DEF                        |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

## IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice <b>PERSONAL INJURY</b> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input checked="" type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education <b>PRISONER PETITIONS</b> <b>Habeas Corpus:</b> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <b>Other:</b> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

## V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District (specify) ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

## VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

42 U.S.C. § 1983

Brief description of cause:

Excessive Force Claim

## VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

In Excess of \$75,000.00

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

## VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE 08/22/2019 SIGNATURE OF ATTORNEY OF RECORD /s/ Drew J. DeVinney

## FOR OFFICE USE ONLY

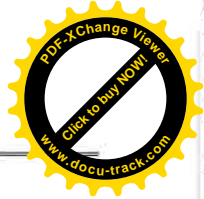
RECEIPT #

AMOUNT

APPLYING FEE

JUDGE

MAG. JUDGE



Defendant(s)

Civil Action No. 2:19-cv-1230

## SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Eric Giese  
8811 Campus Drive  
Mount Pleasant, WI 53406

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you receive it) – or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12(a)(2) or (3) – you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or the plaintiff's attorney, whose name and address are:

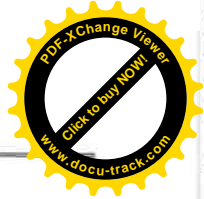
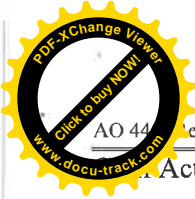
Drew DeVinney  
Martin Law Office, S.C.  
7280 S. 13th St, Ste. 102  
Oak Creek, WI 53154

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

STEPHEN C. DRIES, CLERK OF COURT

Date: \_\_\_\_\_

*Signature of Clerk or Deputy Clerk*



**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4(l))*

This summons and the attached complaint for *(name of individual and title, if any)*:

were received by me on *(date)* \_\_\_\_\_.

☐ I personally served the summons and the attached complaint on the individual at *(place)*:

\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I left the summons and the attached complaint at the individual's residence or usual place of abode with *(name)*

\_\_\_\_\_, a person of suitable age and discretion who resides there,

on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

☐ I served the summons and the attached complaint on *(name of individual)* \_\_\_\_\_

who is designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_

\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I returned the summons unexecuted because \_\_\_\_\_; or

☐ Other *(specify)*: \_\_\_\_\_

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ 0.00

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

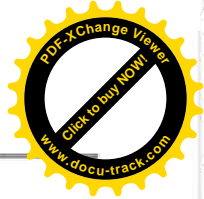
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*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc.: \_\_\_\_\_





Michael A. Kowalczyk

Plaintiff(s)

v.

Eric Giese, Matt Soens, Village of Mount Pleasant

Defendant(s)

Civil Action No. 2:19-cv-1230

## SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Matt Soens  
8811 Campus Drive  
Mount Pleasant, WI 53406

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you receive it) – or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12(a)(2) or (3) – you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or the plaintiff's attorney, whose name and address are:

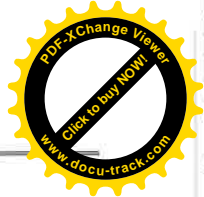
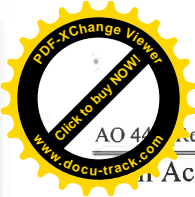
Drew DeVinney  
Martin Law Office, S.C.  
7280 S. 13th St, Ste. 102  
Oak Creek, WI 53154

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

STEPHEN C. DRIES, CLERK OF COURT

Date: \_\_\_\_\_

Signature of Clerk or Deputy Clerk



**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4(l))*

This summons and the attached complaint for *(name of individual and title, if any):*

were received by me on *(date)* \_\_\_\_\_.

☐ I personally served the summons and the attached complaint on the individual at *(place):*

\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I left the summons and the attached complaint at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_, a person of suitable age and discretion who resides there, on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

☐ I served the summons and the attached complaint on *(name of individual)* \_\_\_\_\_ who is designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I returned the summons unexecuted because \_\_\_\_\_; or

☐ Other *(specify):* \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ 0.00

I declare under penalty of perjury that this information is true.

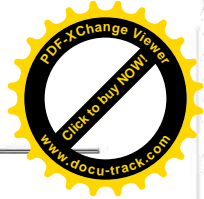
Date: \_\_\_\_\_

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*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc.:



for the  
Eastern District of Wisconsin

Michael A. Kowalczyk

Plaintiff(s)

V.

Eric Giese, Matt Soens, Village of Mount Pleasant

Defendant(s)

Civil Action No. 2:19-cv-1230

## SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Village of Mount Pleasant  
8891 Campus Drive  
Mount Pleasant, WI 53406

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you receive it) – or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12(a)(2) or (3) – you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or the plaintiff's attorney, whose name and address are:

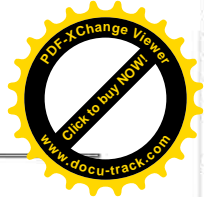
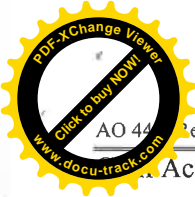
Drew DeVinney  
Martin Law Office, S.C.  
7280 S. 13th St, Ste. 102  
Oak Creek, WI 53154

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

STEPHEN C. DRIES, CLERK OF COURT

Date: \_\_\_\_\_

*Signature of Clerk or Deputy Clerk*



**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4(l))*

This summons and the attached complaint for *(name of individual and title, if any)*:

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\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

☐ I left the summons and the attached complaint at the individual's residence or usual place of abode with *(name)*

\_\_\_\_\_, a person of suitable age and discretion who resides there,

on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

☐ I served the summons and the attached complaint on *(name of individual)* \_\_\_\_\_

who is designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_

\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

☐ I returned the summons unexecuted because \_\_\_\_\_ ; or

☐ Other *(specify)*: \_\_\_\_\_

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ 0.00

I declare under penalty of perjury that this information is true.

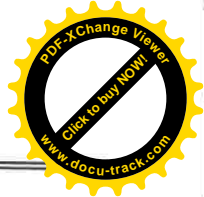
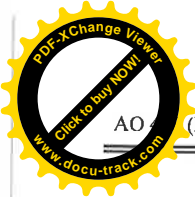
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*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc.: \_\_\_\_\_



# UNITED STATES DISTRICT COURT

for the

Eastern District of Wisconsin

\_\_\_\_\_  
MICHAEL A. KOWALCZUK,

*Plaintiff*

v.

\_\_\_\_\_  
ERIC GIESE, ET AL.,

*Defendant*

)  
)  
) Case No. 2:19-cv-1230  
)  
)

## APPEARANCE OF COUNSEL

To: The clerk of court and all parties of record

I am admitted or otherwise authorized to practice in this court, and I appear in this case as counsel for:

Eric Giese, Matt Soens, and the Village of Mount Pleasant

Date: 09/18/2019

\_\_\_\_\_  
s/ Lori M. Lubinsky

*Attorney's signature*

\_\_\_\_\_  
Attorney Lori M. Lubinsky / SBN 1027575

*Printed name and bar number*

Axley Brynelson, LLP

P.O. Box 1767

Madison, WI 53701-1767

\_\_\_\_\_  
*Address*

\_\_\_\_\_  
llubinsky@axley.com

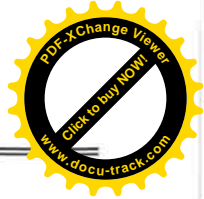
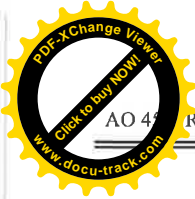
*E-mail address*

\_\_\_\_\_  
(608) 283-6752

*Telephone number*

\_\_\_\_\_  
(608) 257-5444

*FAX number*



# UNITED STATES DISTRICT COURT

for the

Eastern District of Wisconsin

\_\_\_\_\_  
MICHAEL A. KOWALCZUK,

\_\_\_\_\_  
*Plaintiff*

\_\_\_\_\_  
v.

\_\_\_\_\_  
ERIC GIESE, ET AL.,

\_\_\_\_\_  
*Defendant*

)  
)  
) Case No. 2:19-cv-1230  
)  
)

## APPEARANCE OF COUNSEL

To: The clerk of court and all parties of record

I am admitted or otherwise authorized to practice in this court, and I appear in this case as counsel for:

Eric Giese, Matt Soens, and the Village of Mount Pleasant

Date: 09/18/2019

\_\_\_\_\_  
s/ Jennifer M. Luther

\_\_\_\_\_  
*Attorney's signature*

\_\_\_\_\_  
Attorney Jennifer M. Luther / SBN 1065234

\_\_\_\_\_  
*Printed name and bar number*

Axley Brynson, LLP

P.O. Box 1767

Madison, WI 53701-1767

\_\_\_\_\_  
*Address*

\_\_\_\_\_  
jluther@axley.com

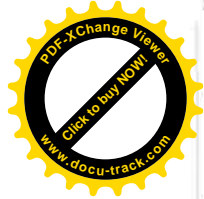
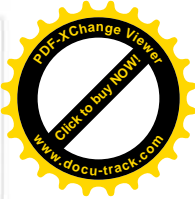
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*E-mail address*

\_\_\_\_\_  
(608) 283-6776

\_\_\_\_\_  
*Telephone number*

\_\_\_\_\_  
(608) 257-5444

\_\_\_\_\_  
*FAX number*



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

---

MICHAEL A. KOWALCZUK,

Plaintiff,

Case No. 2:19-cv-1230

v.

ERIC GIESE, MATT SOENS, and  
VILLAGE OF MOUNT PLEASANT,

Defendants.

---

**DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

---

NOW COME Defendants Eric Giese, Matt Soens, and the Village of Mount Pleasant, by and through their undersigned attorneys, and hereby respectfully move this Court, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing Plaintiff's Complaint on the grounds that the Complaint fails to state a claim upon which relief can be granted. The grounds for this motion are more specifically set forth in Defendants' Brief in Support of Motion to Dismiss and the supporting Declaration of Jennifer M. Luther, which are filed herewith.

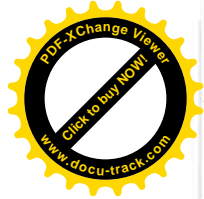
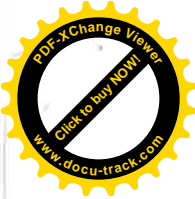
Dated this 18<sup>th</sup> day of September, 2019.

AXLEY BRYNELSON, LLP

/s/ Jennifer M. Luther

Lori M. Lubinsky (State Bar No. 1027575)  
Jennifer M. Luther (State Bar No. 1065234)  
Attorneys for Defendants  
Suite 200, 2 East Mifflin Street (53703)  
Post Office Box 1767  
Madison, WI 53701-1767  
Telephone: (608) 257-5661  
Facsimile: (608) 257-5444  
Email: llubinsky@axley.com  
jluther@axley.com





UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

---

MICHAEL A. KOWALCZUK,

Plaintiff,

Case No. 2:19-cv-1230

v.

ERIC GIESE, MATT SOENS, and  
VILLAGE OF MOUNT PLEASANT,

Defendants.

---

**BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO  
DISMISS PLAINTIFF'S COMPLAINT**

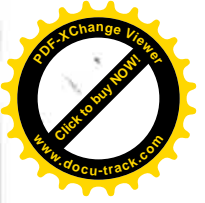
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**Introduction**

Plaintiff Michael A. Kowalczuk's ("Kowalczuk") Complaint against Defendants fails to state a claim upon which relief can be granted. Kowalczuk pled guilty to the charges of operating while intoxicated, resisting an officer, and battery of a peace officer arising out of his September 3, 2013 arrest. Despite his convictions, Kowalczuk now contends that Officer Eric Giese unlawfully arrested him and used excessive force to make his arrest. Kowalczuk's "theory" of the case is barred by *Heck v. Humphrey*. His claims of unlawful arrest and excessive force are entirely inconsistent with his convictions. Therefore, Kowalczuk's § 1983 claims are *Heck*-barred. For the reasons set forth below, this Court should dismiss the Complaint on the merits and with prejudice.

**Factual Background**

On September 3, 2013, Officer Eric Giese was on patrol on 16th Street in the Village of Mt. Pleasant, Racine County, Wisconsin. (Declaration for Jennifer M. Luther, ¶ 2, Ex. 1, Criminal Comp., p. 2.) Officer Giese observed a vehicle make a rather wide eastbound turn onto 16th Street

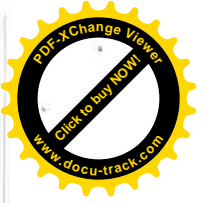


and appeared to be accelerating as the vehicle drove past his squad. (*Id.*) This garnered Officer Giese's attention and he conducted a U-turn and began following the vehicle. (*Id.*) Officer Giese observed that the vehicle was speeding. (*Id.*) Officer Giese then activated his lights. (*Id.*)

Officer Giese followed the vehicle for about 2/10 of a mile with just his lights on. (*Id.*) As they approached Green Bay road, the vehicle put its blinker on to make a right turn. (*Id.*) The light was red. (*Id.*) The vehicle did not come to a complete stop, but took a right turn southbound onto Green Bay road. (*Id.*) At this point, Officer Giese determined based on his training and experience that the vehicle was not going to stop for his lights. (*Id.*) He then activated his sirens. (*Id.*) Officer Giese ran the vehicle's plates and determined that the suspect driver lived on Sunset Boulevard. (*Id.*)

As Officer Giese continued to follow the vehicle, it became apparent that the vehicle was heading toward Sunset Boulevard. (*Id.*) Based on Officer Giese's training and experience, he knew that intoxicated drivers often try to make it home before stopping. (*Id.*) The vehicle pulled over on Sunset Blvd. (*Id.*) When the vehicle stopped, the driver's side door opened. (*Id.*) Based on his training and experience, Officer Giese knew that when intoxicated drivers open their doors, they sometimes try to flee and run into their home before being apprehended. (*Id.*)

Officer Giese ordered the driver to get back in the vehicle and show his hands. (*Id.*) Officer Giese drew his service weapon on the suspect. (*Id.*) The suspect, later identified as Michael Kowalczyk, complied and showed his hands. (*Id.*) At this point, Officer Giese ordered him to get out of the vehicle and on the ground so that he would be unable to flee. (*Id.*) Kowalczyk was not complying with the orders to get on the ground. (*Id.*) Officer Giese performed a decentralization and directed Kowalczyk to the ground. (*Id.*) While on the ground, Kowalczyk's hands were underneath him, at which point, Officer Giese told him to get on his stomach and put his hands



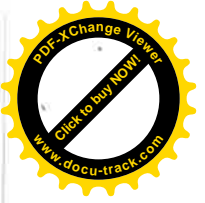
behind his back. (*Id.*) Kowalczuk was flailing on the ground and not complying with Officer Giese's commands. (*Id.*)

Officer Giese drew his Taser and told Kowalczuk that he needed to place his hands behind his back, get on his stomach, or he would be tased. (*Id.*) Kowalczuk complied and Officer Giese was able to detain him without using his Taser. (*Id.*) Officer Giese put his Taser back in the holster. (*Id.*)

At this time, two parties later identified as family members approached. (*Id.*) Officer Giese gave the two family members orders to stay back and for Kowalczuk to stay on the ground. (*Id.*) Kowalczuk began to get up, so Officer Giese directed him back down to the ground. (*Id.*) While he directed him to the ground, Kowalczuk was on his back and kicked Officer Giese in the abdomen. (*Id.* at p. 3) He then kicked Officer Giese a second time in the genitalia. (*Id.*) Officer Giese told Kowalczuk to stay down at which point he kicked Officer Giese off him. (*Id.*)

Kowalczuk got up and approached Officer Giese in an aggressive manner, at which point Officer Giese deployed his Taser into Kowalczuk's back. (*Id.*) The Taser deployed for five seconds and Kowalczuk landed on the pavement. (*Id.*) At this point, Kowalczuk began to get up again and failed to comply with Officer Giese's commands. (*Id.*) Based on his active resistance and prior assaultive behavior, Officer Giese then deployed another five-second Taser cycle to Kowalczuk. (*Id.*) This was successful and Kowalczuk collapsed to the ground. (*Id.*)

Kowalczuk had an odor of intoxicants emanating from his body and his eyes were bloodshot and glassy. (*Id.*) Officer Giese asked Kowalczuk if he had anything to drink and he responded that he had a couple of beers. (*Id.*) Kowalczuk was taken to the hospital for a legal blood draw. (*Id.*) He was also given three field sobriety tests and failed two of the three. (*Id.*) He was placed under arrest for operating while intoxicated in addition to other charges. (*Id.*) Kowalczuk



was also charged with battery of a peace officer, resisting an officer, misdemeanor bail jumping, and failure to obey traffic officer signal. (*Id.* at p. 1.)

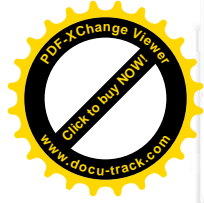
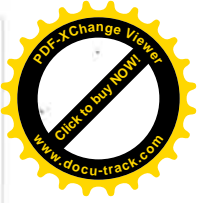
Kowalczyk was found guilty of operating while intoxicated on April 2, 2014. (Luther Dec., ¶ 3, Ex. 2, Defendant Court Record.) A judgment of conviction for battery of a peace officer, resisting or obstructing an officer, and bail jumping was also filed on January 14, 2015. (Luther Dec., ¶ 4, Ex. 3, Judgement of Conviction; *see also*, ¶ 5, Ex. 4, CCAP Record for Racine County Case No. 2013CF001200.)

### **Authority and Argument**

#### **I. Standard of Review on Motion to Dismiss.**

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss an action for failure to state a claim upon which relief can be granted. A complaint survives a motion to dismiss if it contains sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). While “detailed factual allegations” are not necessary, a “plaintiff’s obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Id.* at 555; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

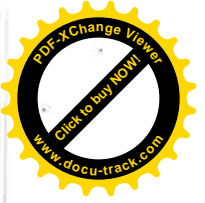
In making this determination, the court conducts a three-part analysis. First, the court must “tak[e] note of the elements a plaintiff must plead to state a claim.” *Iqbal*, 556 U.S. at 675. Second, the court should identify allegations that, “because they are no more than conclusions, are not entitled to the assumption of truth.” *Id.* at 679. “[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,” do not suffice. *Id.* at 678. Finally, “where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.” *Id.* at 679. This plausibility



determination is a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* A complaint cannot survive a motion to dismiss where a court can only infer that a claim is merely possible rather than plausible. *Id.*

The court’s review is limited to the pleadings; however, the court “may take into consideration documents incorporated by reference to the pleadings” and “may also take judicial notice of matters of public record,” including the proceedings and findings of other courts. *United States v. Wood*, 925 F.2d 1580, 1581-82 (7th Cir. 1991). This includes public court documents. *Henson v. CSC Credit Services*, 29 F.3d 280, 284 (7th Cir. 1994). The court may take judicial notice of state electronic court records. *Id.*; *see also General Electric Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1081 (7th Cir. 1997) (“The most frequent use of judicial notice of ascertainable facts is in noticing the contents of court records.”).

A corollary to this principle is that the reference to, and a court’s taking of judicial notice of, state electronic court records does not convert a motion to dismiss into a motion for summary judgment. *See Doss v. Clearwater Title Co.*, 551 F.3d 634, 640 (7th Cir. 2008) (citing Fed. Rule of Civ. Procedure 12(d)). A court may take judicial notice of facts that are (1) not subject to reasonable dispute and (2) either generally known within the territorial jurisdiction or capable of accurate and ready determination through sources whose accuracy cannot be questioned. *Gen. Elec.*, 128 F.3d at 1081. “Taking judicial notice of matters of public record need not convert a motion to dismiss into a motion for summary judgment” if the facts are “readily ascertainable from the public court record and not subject to reasonable dispute.” *Ennenga v. Starns*, 677 F.3d 766, 773-774 (7th Cir. 2012); *see also* Fed. R. Evid. 201(b).

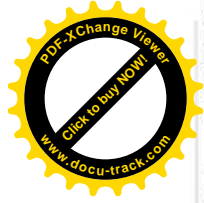
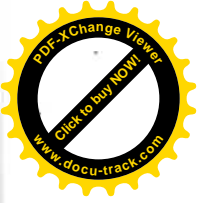


## II. Overview of *Heck v. Humphrey*.

Under *Heck v. Humphrey*, a complaint must be dismissed if “a judgment in favor of the plaintiff would necessarily imply the invalidity of [the plaintiff’s conviction or sentence.]” 513 U.S. 477, 487 (1994). If a complaint “makes *allegations* that are inconsistent with the conviction’s having been valid, *Heck* kicks in and bars his civil suit.” *Okoro v. Callaghan*, 324 F.3d 488, 490 (7th Cir. 2003) (emphasis added). The *Heck* doctrine is rooted in the “strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction.” *VanGilder v. Baker*, 435 F.3d 689, 691 (7th Cir. 2006) (citing *Heck*, 512 U.S. at 484).

It follows that a false arrest claim will not lie if there was any ground to arrest. *Stoner v. Vill. of Downers Grove*, 2014 WL 3734165, at \*4 (N.D. Ill. July 29, 2014) (citing *Holmes v. Vill. of Hoffman Estates*, 511 F.3d 673, 682 (7th Cir. 2007)) “Logic supports the distinction. An arrested individual is no more seized when he is arrested on three grounds rather than one; and so long as there is *a* reasonable basis for the arrest, the seizure is justified on that basis even if any other ground cited for the arrest was flawed.” *Id.*

Similarly, in *Jones v. Phillips*, the district court explained that under Wisconsin law, “a person can be convicted of resisting or obstructing only if the police officer is acting with lawful authority. ‘Lawful authority’ ‘requires that police conduct be in compliance with both the federal and state Constitutions, in addition to any applicable statutes.’” 2017 WL 1292376 (E.D. Wis. 2017). Therefore, “a conviction for resisting or obstructing an officer under Wisconsin law necessarily means that the jury concluded that the police officers’ actions at the time were constitutional (which means that the officers were not using excessive force at the time).” *Id.* at \*5 (citing *Helman v. Duhaime*, 742 F.3d 760, 763 (7th Cir. 2014)).



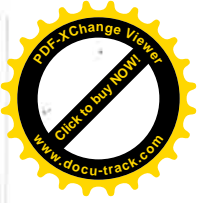
### III. Kowalczuk's False Arrest Claim is *Heck*-Barred by his Guilty Pleas.

*Heck* serves as a bar to false arrest claims if “specific factual allegations in the complaint are necessarily inconsistent with the validity of the conviction.” *McCann v. Neilsen*, 466 F.3d 619, 621 (7th Cir. 2006). Kowalczuk’s allegations “imply the invalidity” of his convictions. *Heck*, 512 U.S. at 487. Therefore, Kowalczuk’s false arrest claim must be dismissed with prejudice.

In *Claxton v. Byrne*, Claxton was convicted of carrying a loaded firearm in public, but he alleged that the gun was found 250 yards away from where officers encountered him and that the officers lied when they said the weapon was fully loaded. 2013 WL 5770526, at \*3 (N.D. Ill. Oct. 24, 2013). The court found that Claxton necessarily alleged that he was not carrying a loaded firearm in public. *Id.* The court further held that such allegations amount to a claim that Claxton was innocent of the crime for which he was convicted. *Id.* (citing *Okoro*, 324 F.3d at 490 (“[Plaintiff] adhered steadfastly to his position that there were no drugs, that he was framed; in so arguing he was making a collateral attack on his conviction, and *Heck* holds that he may not do that in a civil suit....”))).

Similarly, Kowalczuk alleges that Officer Giese unconstitutionally arrested him without probable cause that he committed a crime in violation of his Fourth and Fourteenth amendment rights. (Dkt. 1, Compl., ¶¶ 40-44.) This allegation is wholly without merit. At the outset, Kowalczuk plead guilty to and was convicted of the offense of operating while intoxicated in violation of Wis. Stat. § 346.63(1)(a). (Luther Dec., ¶ 3, Ex. 2, Defendant Court Record.) Kowalczuk’s allegation in Paragraph 8 of the Complaint that he was “at all times material hereto...obeying all traffic rules and was operating his vehicle in a safe and reasonable manner” is entirely inconsistent with and necessarily implies that his conviction for operating while intoxicated is invalid. *See Tolliver v. City of Chicago*, 2016 WL 1425865 (7th Cir. Apr. 12,





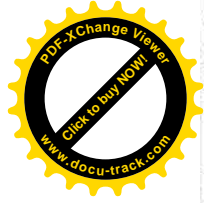
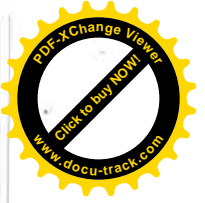
2016) (“if the plaintiff’s factual claims in the civil suit necessarily imply the invalidity of the criminal conviction, then *Heck* bars the civil suit”) (citing *Heck v. Humphrey*, 512 U.S. 477 (1994)).

Furthermore, Kowalczuk also plead guilty to the charges of battery of a peace officer, resisting or obstructing an officer, and bail jumping. (Luther Dec., ¶ 4, Ex. 3, Judgment of Conviction.) Kowalczuk’s allegation that he was arrested without probable cause is inconsistent with the charges and would necessarily imply the invalidity of these convictions stemming from the same incident with Officer Giese.

In sum, a finding that Officer Giese lacked probable cause to arrest Kowalczuk would necessarily imply that Kowalczuk’s criminal convictions were invalid. *Stoner v. Village of Downers Grove*, 2014 WL 3734165 (N.D. Ill. July 29, 2014) (granting motion to dismiss false arrest claim) (“A finding that Stoner was falsely arrested would necessarily imply that his conviction ... was invalid ... Stoner’s conviction ... precludes his § 1983 false arrest claim under *Heck*.”) *Vandenburgh v. Ogden*, 2016 WL 403663 (N.D. Ill. Feb 3, 2016 (granting motion to dismiss false arrest claim) (A challenge to probable cause would necessarily imply the validity of [the] conviction”))). Therefore, Kowalczuk’s false arrest claim must be dismissed with prejudice.

#### **IV. Kowalczuk’s Excessive Force Claim is *Heck*-Barred by his Convictions for Resisting an Officer and Battery to Law Enforcement.**

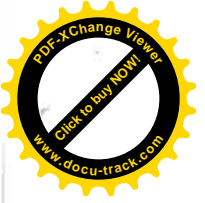
If a plaintiff was convicted of resisting arrest, the plaintiff can only proceed with an excessive force claim to the extent that the facts underlying the excessive force claim are not inconsistent with the essential facts supporting the conviction. *Helman*, 742 F.3d at 762 (citing *Evans*, 603 F.3d 362). Kowalczuk’s allegations necessarily “imply the invalidity” of his convictions. *Heck*, 512 U.S. at 487. Therefore, Kowalczuk’s excessive force claim must be dismissed with prejudice.



For example, in *Helman*, police were aware Helman had a weapon as they moved in to arrest him. *Id.* at 761. Shots were fired and Helman was hit multiple times. *Id.* The officers reported that Helman attempted to draw his weapon, so they fired. *Id.* Helman pled guilty to resisting an officer. *Id.* He later brought a Fourth Amendment excessive force claim against the officers. *Id.* at 762. The plaintiff's theory of the case was that he did not attempt to draw his weapon until after shots were fired at him. *Id.* at 763. That theory was inconsistent with the Indiana statute addressing resisting law enforcement *Id.* at 762-63. The Indiana statute provided that "[a] person who knowingly or intentionally ... forcibly resists, obstructs, or interferes with a law enforcement officer ... while the officer is lawfully engaged in the execution of [his] duties ... commits resisting law enforcement." *Id.* at 763. Indiana cases interpreting this statute have held that "the officer is not 'lawfully engaged in the performance of his duties' if he is employing excessive force, and therefore a person who reasonably resists that force cannot be convicted under that provision." *Id.*

The Seventh Circuit held that Helman's version of the facts was problematic because it necessarily implied the invalidity of the state court conviction for resisting arrest. *Id.* "It would have been objectively unreasonable for officers to open fire on a person who was not reaching for a weapon or otherwise acting in a threatening manner, and therefore the officers would have been employing excessive force if they did so." *Id.* (citing *Graham v. Connor*, 490 U.S. 386, 396-97 (1989)). The court upheld the district court's grant of summary judgment in favor of the defendants. *Id.*

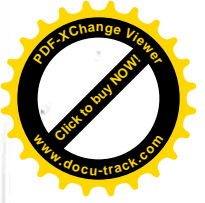
Similarly, in *Jones v. Phillips*, Jones brought an excessive force claim after being convicted of resisting arrest. 2016 WL 3255022, \*4 (E.D. Wis. 2016). Jones asserted that that "[he] did not resist arrest, only blocked and shielded [his] face with [his] hands the best way [he] could." *Id.* The district court held that "to the extent Jones's § 1982 claim is based on the allegation that he



did not resist arrest, it is barred by *Heck*.” *Id.* In a later decision in Jones’s case, the district court explained that, similar to the Indiana statute and case law analyzed in *Helman*, under Wisconsin law, “a person can be convicted of resisting or obstructing only if the police officer is acting with lawful authority. ‘Lawful authority’ ‘requires that police conduct be in compliance with both the federal and state Constitutions, in addition to any applicable statutes.’” *Jones v. Phillips*, 2017 WL 1292376, \*5 (E.D. Wis. 2017). Therefore, **“a conviction for resisting or obstructing an officer under Wisconsin law necessarily means that the jury concluded that the police officers’ actions at the time were constitutional (which means that the officers were not using excessive force at the time).”** *Id.* (citing *Helman*, 742 F.3d at 763.) (emphasis added).

As in *Helman*, Kowalczyk pled guilty to resisting arrest. He also pled guilty to battery of a peace officer. Yet, he now alleges Officer Giese used excessive force in arresting him. Kowalczyk’s version of the facts and theory of his case necessarily implies the invalidity of his resisting arrest conviction and battery to law enforcement conviction. *Id.* As set forth in *Helman* and *Jones*, a conviction for resisting arrest in Wisconsin necessarily means that the officers’ actions at the time were constitutional. 2017 U.S. Dist. LEXIS 52988, \*13 (E.D. Wis. 2017) (citing *Helman*, 742 F.3d at 763).

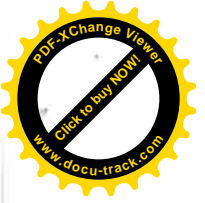
Furthermore, a judgment in favor of Kowalczyk would undermine the state court conviction and sentence. *Heck*, 513 U.S. at 487. The Criminal Complaint alleged that when Officer Giese approached the vehicle, Kowalczyk **refused to comply** with Officer Giese’s command to get down on the ground and needed to be decentralized to the ground. (Luther Dec., ¶ 2, Ex. 1., Criminal Complaint, p. 2.) The Criminal Complaint states that Kowalczyk was flailing while on the ground and that he **failed to comply** with commands. (*Id.*) Yet, Kowalczyk alleges that Officer Giese used excessive force in pulling him from the vehicle and pushing him to the ground. (*See*



Dkt. 1, Compl., ¶¶ 23-28.) Kowalczuk further alleges that Officer Giese used excessive force while attempting to handcuff Kowalczuk while he was on the ground. (*See id.*) Kowalczuk's allegations are entirely inconsistent with the facts set forth in the Criminal Complaint, which underlie his convictions. *Helman*, 742 F.3d at 762 (citing *Evans*, 603 F.3d 362).

The Criminal Complaint further alleges that when Kowalczuk's family members approached, he **began to get up despite Officer Giese's orders** to stay on the ground. Therefore, Officer Giese had to decentralize him a second time. (*Id.*) Yet, Kowalczuk alleges that he was positioning himself to see his mother and Officer Giese "tackled" him to the ground. (Dkt. 1, Compl., ¶¶ 31-32.) Kowalczuk's allegations are inconsistent with the facts set forth in the Criminal Complaint that he was **failing to comply with orders** to stay on the ground. *Helman*, 742 F.3d at 762 (citing *Evans*, 603 F.3d 362).

Finally, while on his back, the Criminal Complaint states that **Kowalczuk kicked Officer Giese** in the abdomen and genitalia. (Luther Dec., ¶ 2, Ex. 1, Criminal Complaint, p. 3.) He also kicked away from Officer Giese. (*Id.*) Kowalczuk then stood up and **approached Officer Giese in an aggressive manner** before Officer Giese deployed his Taser. (*Id.*) Kowalczuk stood up after being tased and again **aggressively approached** Officer Giese. Officer Giese deployed the Taser a second time. (*Id.*) Yet, Kowalczuk alleges that he was defending himself from Officer Giese with his legs and then was able to stand himself up. (Dkt. 1, Compl., ¶¶ 32-33.) Again, Kowalczuk's allegations are inconsistent with the Criminal Complaint, which sets forth that Kowalczuk **assaulted Officer Giese**, as well as his conviction for battery of a peace officer. (Luther Dec., ¶ 2, Ex. 1, Criminal Complaint.) Kowalczuk also alleges that he turned to face away from Officer Giese and his back was turned to Officer Giese the first time that he was tased. He further states that he was confused and frightened when he attempted to stand up after the first Taser cycle. (Dkt. 1,

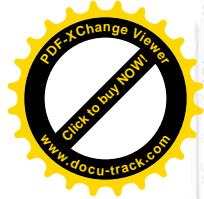
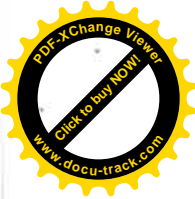


Compl., ¶ 34.) These allegations are inconsistent with the Criminal Complaint, which state that Kowalczuk approached Officer Giese in an **aggressive manner** before being tased the first time and was **failing to comply with commands** before being tased a second time. (Luther Dec., ¶ 2, Ex. 1, Criminal Complaint.)

Ultimately, Kowalczuk **pled guilty to the charges of resisting an officer and battery of a peace officer**, as set forth in the Criminal Complaint and the court entered a judgement of conviction on January 14, 2015. (Luther Dec., ¶ 4, Ex. 3, Judgement of Conviction; see also Luther Dec., ¶ 5, Ex. 4, CCAP Record for Racine County Case No. 2013CF001200.) The facts underpinning his convictions, as set forth in the Criminal Complaint, are inconsistent with those set forth in Kowalczuk's civil complaint. Therefore, his entire claim is *Heck*-barred.

**V. Kowalczuk's Complaint Fails to State a Claim Against Defendant Matt Soens.**

While Kowalczuk alleges that Officer Giese unlawfully arrested him and used excessive force against him, Kowalczuk does not make any allegations against Defendant Matt Soens. Notwithstanding the merits of Kowalczuk's claims, he can only make a claim against individuals who were personally involved in the incident. *See Colbert v. City of Chicago*, 851 F.3d 649, 657 (7th Cir. 2017)(quoting *Minix v. Canarecci*, 597 F.3d 824, 833 (7th Cir. 2010)(individual liability under § 1983 requires personal involvement in the alleged constitutional deprivation)). Kowalczuk must allege a causal connection between (1) the sued official and (2) the alleged misconduct. *Id.* (citing *Wolf-Lillie v. Sonquist*, 69 F.2d 864, 869 (7th Cir. 1983) ("Section 1983 creates a cause of action based on personal liability predicated upon fault. An individual cannot be held liable in a § 1983 action unless he caused or participated in an alleged constitutional deprivation ... A causal connection, or an affirmative link, between the misconduct complained of and official sued is necessary.")). Aside from naming him as a defendant in the caption, Kowalczuk's complaint



makes no allegations whatsoever against Soens. (Dkt. 1, Compl.) It follows that Defendant Matt Soens should be dismissed.

**VI. The *Monell* Claim Fails as There is no Underlying Constitutional Violation.**

The Complaint alleges a *Monell* claim against the Village of Mount Pleasant based on alternative theories of failure to train and/or supervise failure to train theory. (Dkt. 1, Compl., ¶¶ 45-50.) Municipal liability first requires an underlying constitutional violation. *Kitchen v. Dallas Cnty., Tex.*, 759 F.3d 468, 483 (5th Cir. 2014). As set forth above, Plaintiff's false arrest and excessive force claims fail as a matter of law. Therefore, Plaintiff's *Monell* claim against the municipality fails, as he cannot show that the municipality's alleged failure to supervise caused a violation of his constitutional rights. (Seventh Circuit Proposed Jury Instruction, 7.25, Liability of Municipality for Failure to Train, Supervise, or Discipline.)

**Conclusion**

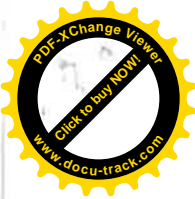
Based on the foregoing, the Defendants respectfully request that this Court dismiss the Plaintiff's Complaint, alleging excessive force, unlawful arrest, and the *Monell* claim on the merits and with prejudice.

Dated this 18th day of September, 2019.

AXLEY BRYNELSON, LLP

/s/ Jennifer M. Luther

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Jennifer M. Luther (State Bar No. 1065234)  
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Email: llubinsky@axley.com  
jluther@axley.com



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

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MICHAEL A. KOWALCZUK,

Plaintiff,

Case No. 2:19-cv-1230

v.

ERIC GIESE, MATT SOENS, and  
VILLAGE OF MOUNT PLEASANT,

Defendants.

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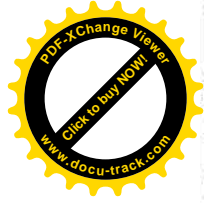
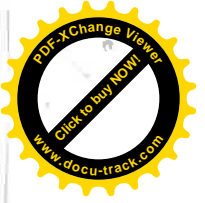
**DECLARATION OF JENNIFER M. LUTHER IN SUPPORT OF  
DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

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Pursuant to 28 U.S.C. § 1746, I, Jennifer M. Luther, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct:

1. I am an attorney with the law firm of Axley Brynelson, LLP. I am one of the attorneys representing the Defendants and I have personal knowledge of the following facts.
2. Attached as Exhibit 1 is a true and correct copy of the Criminal Complaint filed in *State of Wisconsin v. Michael A. Kowalczyk*, Racine County Case No. 2013CF001200, as Doc. No. 9 on September 3, 2013.
3. Attached as Exhibit 2 is a true and correct copy of Michael A. Kowalczyk's Defendant Court Record for his Operating While Intoxicated conviction dated April 2, 2014.
4. Attached as Exhibit 3 is a true and correct copy of Michael A. Kowalczyk's Judgement of Conviction in *State of Wisconsin v. Michael A. Kowalczyk*, Racine County Case No. 2013CF001200, electronically signed by Judge Michal J. Piontek and filed on January 14, 2015.





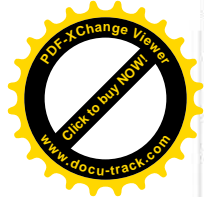
5. Attached as Exhibit 4 is a true and correct copy of the Wisconsin Consolidated Court Automation Program (“CCAP”) record for Racine County Case No. 2013CF001200.

6. This Declaration is made in support of Defendants’ Motion to Dismiss.

Dated this 18<sup>th</sup> day of September, 2019.

s/ Jennifer M. Luther

Jennifer M. Luther



State of Wisconsin

Br 10

Racine County

State of Wisconsin,  
versus

plaintiff,

**Michael A Kowalczyk** DOB: [REDACTED]5826 Sunset Bl  
Racine, WI 53406**CRIMINAL COMPLAINT**

Circuit Court File No: 2013CF001200

M W Brown Green Weight: 135 lbs Height: 5 ft 10 in  
[REDACTED]

defendant(s).

**FILED**

DA Case No: 2013RA007632  
Status: Prisoner on September 03, 2013 at 1:30 PM  
Prosecutor: Randall L Schneider  
Agency: Mt Pleasant Police Department 13-020923 Q8595812  
Officer(s): Eric J Giese # 57, of the Mt Pleasant Police Department

**SEP - 3 2013**CLERK OF CIRCUIT COURT  
RACINE COUNTY

The defendant did:

**Count 1: BATTERY OF A PEACE OFFICER**

The above-named defendant on or about Tuesday, September 03, 2013, in the Village of Mount Pleasant, Racine County, Wisconsin, did intentionally cause bodily harm to Eric J Giese # 57, a law enforcement officer acting in an official capacity, by an act done without the consent of such officer, and with knowledge or reason to know that Eric J Giese # 57 was a law enforcement officer, contrary to sec. 940.20(2), 939.50(3)(h) Wis. Stats., a Class H Felony, and upon conviction may be fined not more than Ten Thousand Dollars (\$10,000), or imprisoned not more than six (6) years, or both.

**Count 2: RESISTING AN OFFICER**

The above-named defendant on or about Tuesday, September 03, 2013, in the Village of Mount Pleasant, Racine County, Wisconsin, did knowingly resist an officer, while such officer was doing an act in an official capacity and with lawful authority, contrary to sec. 946.41(1), 939.51(3)(a) Wis. Stats., a Class A Misdemeanor, and upon conviction may be fined not more than Ten Thousand Dollars (\$10,000), or imprisoned not more than nine (9) months, or both.

**Count 3: MISDEMEANOR BAIL JUMPING**

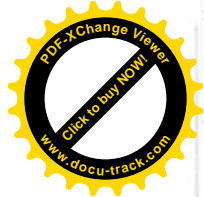
The above-named defendant on or about Tuesday, September 03, 2013, in the Village of Mount Pleasant, Racine County, Wisconsin, having been charged with a misdemeanor and having been released from custody under Chapter 969 Wis. Stats., did intentionally fail to comply with the terms of his bond, contrary to sec. 946.49(1)(a), 939.51(3)(a) Wis. Stats., a Class A Misdemeanor, and upon conviction may be fined not more than Ten Thousand Dollars (\$10,000), or imprisoned not more than nine (9) months, or both.

**Count 4: MISDEMEANOR BAIL JUMPING**

The above-named defendant on or about Tuesday, September 03, 2013, in the Village of Mount Pleasant, Racine County, Wisconsin, having been charged with a misdemeanor and having been released from custody under Chapter 969 Wis. Stats., did intentionally fail to comply with the terms of his bond, contrary to sec. 946.49(1)(a), 939.51(3)(a) Wis. Stats., a Class A Misdemeanor, and upon conviction may be fined not more than Ten Thousand Dollars (\$10,000), or imprisoned not more than nine (9) months, or both.

**Count 5: FAILURE TO OBEY TRAFFIC OFFICER/SIGNAL**

The above-named defendant on or about Tuesday, September 03, 2013, in the Village of Mount Pleasant, Racine County, Wisconsin, did, as an operator of a vehicle, after having received a visible or audible signal to stop his vehicle from a traffic officer or marked police vehicle, knowingly resisted the traffic officer by failing to stop his vehicle as promptly as safety reasonably permits, contrary to sec. 346.04(2t), 346.17(2t) Wis. Stats., a Misdemeanor, and upon conviction may be fined not more than Ten Thousand Dollars (\$10,000) or imprisoned for not more than 9 months, or both.



## STATE OF WISCONSIN - VS - Michael A Kowalczuk

The official records and files of the Racine County District Attorney's Office, the Wisconsin Department of Justice and/or Department of Transportation reflect that the defendant has the following record of convictions:

The complainant, being first duly sworn on oath, on information and belief, alleges and states that in the County of Racine, State of Wisconsin, the defendant(s) did commit the above described offense(s) and prays that said defendant(s) be dealt with according to the laws of the State of Wisconsin.

The complainant states that he or she is an adult citizen and has reviewed the official law enforcement reports prepared under the above mentioned complaint numbers by the above stated officer(s), whose reports your complainant relies upon as truthful and accurate inasmuch as they were prepared during the course of an official law enforcement investigation. The complainant relies upon the statements of the mentioned witnesses inasmuch as they are citizens and their statements are based on personal knowledge or eyewitness observations; the complainant relies upon the statements of the defendant(s), if any, inasmuch as they are contrary to the defendant's penal interests and are, therefore, to be believed.

**The complainant thereby informs the court that the basis for the above charge(s) is as follows:**

On September 3, 2013, Michael Kowalczuk was subject to a criminal bond in Racine County Circuit Court Case # 2013CM001594. A condition of bond was that Michael Kowalczuk not consume or possess any alcohol and not engage in any further criminal behavior.

On September 3, 2013, Off. Giese of the Mount Pleasant Police Department observed Michael Kowalczuk, the defendant, operating a motor vehicle on 16<sup>th</sup> Street off Oakes Drive, in the Village of Mount Pleasant, County of Racine, State of Wisconsin. The defendant made a wide turn as he drove past the officer and the officer began to follow him. Off. Giese noticed that the vehicle was speeding as he drove eastbound on 16<sup>th</sup> Street past Emmertsen Road.

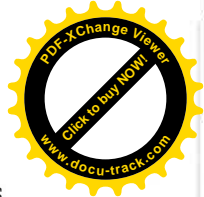
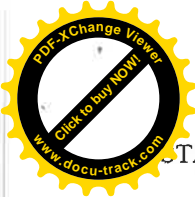
Off. Giese then activated his lights. The defendant drove his vehicle for 2/10ths of a mile. As the defendant approached Green Bay Road, he put his blinker on and approached the intersection at Green Bay Road. The light was red. The vehicle did not come to a complete stop and took a right turn southbound onto Green Bay Road. At this point, it became apparent that the vehicle was not going to stop so Off. Giese activated his siren.

Off. Giese ran the defendant's license plate and determined that the defendant lived on Sunset Boulevard.

Knowing that Sunset Boulevard was two blocks ahead, Off. Giese assumed that the defendant was going to try to make it home before stopping. Off. Giese followed the defendant with red lights and siren until the vehicle came to a stop on Sunset Boulevard. At this point, the defendant drove his vehicle another 2/10<sup>ths</sup> of a mile. The defendant drove his vehicle a total of 4/10ths of a mile from the point the officer initiated his lights.

The vehicle stopped on Sunset Boulevard, in the Village of Mount Pleasant, County of Racine, State of Wisconsin, and the vehicle door opened up. Off. Giese, based on his training and experience, believed that the driver was going to flee and run into his home. At that point, Off. Giese ordered the driver to get back into the vehicle and to show the officer his hands. Off. Giese also drew his service weapon on the party. The defendant, who was later identified as Michael Kowalczuk, complied and showed the officer his hands, however did not get back in his vehicle. Off. Giese, fearing that the defendant was going to run, holstered his weapon and placed the defendant in a blanket escort and told him to get onto the ground. The defendant refused to get on the ground and Off. Giese directed the defendant to the ground. While on the ground, the defendant had his hands underneath him, at which time Off. Giese told the defendant to get onto his stomach and put his hands behind his back. The defendant was flailing on the ground and not complying with commands so Off. Giese was forced to draw his taser. After the taser was drawn but not deployed, the defendant began to comply with the officer's directions.

At this point, two family members of the defendant approached Off. Giese. Off. Giese gave them orders to stay back and gave orders for the defendant to stay on the ground. At this point, the defendant began to get up so Off. Giese directed him back to the ground.



STATE OF WISCONSIN - VS - Michael A Kowalczyk

When Off. Giese directed the defendant back to the ground, the defendant was on his back. At this point, the defendant kicked Off. Giese in the abdomen, causing pain. The defendant then kicked Off. Giese a second time, this time in the genitalia, causing pain. Off. Giese told the defendant to stay down again, at which point the defendant kicked Off. Giese off of him. Complainant states upon information and belief that Off. Giese did not give the defendant consent to kick him.

The defendant got up and approached Off. Giese in an aggressive manner, at which point Off. Giese deployed his taser into the defendant's back. The taser deployment ran for a full five seconds and the defendant landed on the pavement. At this point, the defendant was getting up again, failing to comply with the officer's commands, so based on his active resistance and prior assaultive behavior, Off. Giese then hit another five second cycle on the taser to the defendant. This was successful and the defendant collapsed to the ground.

The defendant had an odor of intoxicants emanating from his body, his eyes were bloodshot and glassy and Off. Giese asked the defendant if he had anything to drink. The defendant stated that he did have a couple of beers. The defendant was then taken to the hospital for treatment and for a legal blood draw. The defendant was given three field sobriety tests and he failed two of the three. He was placed under arrest for OWI-1<sup>st</sup> in addition to other charges.

The defendant is being charged with two counts of misdemeanor bail jumping in that he, number one, committed a new crime while out on bond, and number two, consumed alcohol in violation of the bond.

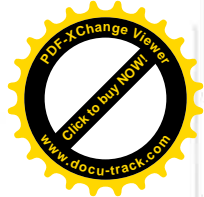
Subscribed and sworn to before me and approved for filing on the 3<sup>rd</sup> day of September, 2013.

*Deputy Chi Edunton*  
COMPLAINANT

6336 *[Signature]*  
ASSISTANT DISTRICT ATTORNEY

W. Richard Chiapete, District Attorney, State Bar No. 1017926 730 Wisconsin Ave., Racine, WI 53403 (262) 636-3172





## You Are Notified to Appear

Appearance Required: ☒ YES

RACINE COUNTY CIRCUIT COURT  
717 WISCONSIN AVE  
RACINE, WI 53403

Date: OCT-10-2013  
Time: 02:30 PM

Form No. MV4017  
Version CTL 0901  
CITATION NO. Q859581-2  
Estimated Points DEPOSIT 6 \$500.00  
Cash - Card N N  
Court Use DAY

Defendant (Last Name, First, Middle), Street Address, P.O. Box, City, State, Zip

KOWALCZUK, MICHAEL A

Birth Date Sex Race

5826 SUNSET BLVD  
RACINE, WI 53406

Telephone Number

HT 510 WT 135 lbs Hair BRO Eyes GRN

Driver License/Identification Card Number

State WI  
Exp. Yr. 2015

OPERATING AS:

DRIVER

License Plate Number

Plate Type

State WI  
Exp. Yr. 2014

Vehicle Class

D

Vehicle Endorsements

Vehicle Identification Number

US DOT No.

Hazmat No.

Holds CDL

CDL Waiver

1FALP52U1VG312547

Vehicle Year

Make

Type

Color

1997

FORD

4D

GRN

## Plaintiff

STATE OF WISCONSIN

Ordinance Violated

BAC

Overweight

Adopting State Statute

346.04 (2t)

## Violation Description

RESISTING/FAILING TO STOP/FLEEING

Agency Space

13-20923

Week Day

Date

Time

Actual Speed

Legal

Over

TUESDAY

SEP-03-2013 12:58 AM

County

City/Village/Town

RACINE - 51

MOUNT PLEASANT - 60, VILLAGE

ON Hwy No. and/or Street Name

Estimate Distance

16TH ST

From/AT Hwy No. and/or Street Name

GPS Coordinates

GREEN BAY RD S

Minor Passenger

N

Officer Name

OFCR ERIC GIESE

Zone: RR - Utility - School - Const  
N N N N

Accident Severity

Officer ID

Department

MOUNT PLEASANT POLICE DEPT

Date Citation Served,

SEP-03-2013

Method

IN PERSON

## POLICE RECORD

Police # 13-20923

Lanes

Road Condition

Traffic

Light Condition

2

DRY

L - LIGHT

DARK-NOT-LIGHTED

Highway

Weather Condition

NOT-PHYSICALLY-DIVIDED-(2-WAY TRAFFIC)

CLEAR

SEE REPORT





Mt Pleasant Municipal Court  
8811 Campus Drive  
Mount Pleasant, WI 53406  
262-664-7831

09/12/2019 10:31 AM

Page: 1

**Defendant Court Record**

Kowalczyk, Michael A  
5826 Sunset Blvd  
Mount Pleasant, WI 53406

Citation No: Q859579-0  
Department Mount Pleasant Police

Original Violation: 346.63(1)(a) Operate While Intoxicated

Amended Violation:

Violation Date: 09/03/2013 Status: Paid In Full Status Date: 06/02/2014

Plea: No Contest

Due: \$ 932.00 Viol. Due Date: 06/02/2014

Finding: Guilty Finding Date: 04/02/2014

Paid: \$ 932.00

Non-Cash: \$ 0.00

Balance \$ 0.00

**PROCEEDINGS**

Type	Date	Time	Status	Attorney
Initial	10/02/2013	4:00 pm	Scheduled	
Pre-Trial	11/06/2013	5:30 pm	Rep by Attorney	
Pre-Trial	12/04/2013	5:30 pm	Scheduled	
Pre-Trial	02/05/2014	5:30 pm	Appeared	
Pre-Trial	03/05/2014	5:30 pm	Appeared	
Pre-Trial	04/02/2014	5:30 pm	Appeared	

**ENFORCEMENT**

Type	Issue Date	Status	Status Date	Note
Suspend/Revocation	04/09/2014	Sent	04/09/2014	Citation Report Court of Disposition 04/09/2014 - SEI

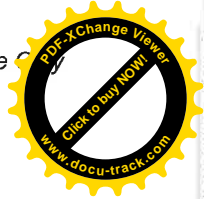
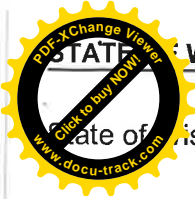
**PAYMENT**

Receipt #	Date	Type	Batch	Payment	Adjustment	Method	Status
00030717	06/02/2014	FINE	CR	\$ 932.00	\$ 0.00	CASH	RLSE

**CERTIFIED DOCUMENT**

Signed: Amanda N  
Date: 09/12/19

MUNICIPAL COURT  
VILLAGE OF MT. PLEASANT



Wisconsin vs. Michael A Kowalczyk

**Judgment of Conviction**Sentence Withheld, Probation  
Ordered

FILED

01-14-2015

Clerk of Circuit Court  
Racine County

Date of Birth: [REDACTED]

Case No. 2013CF001200

The defendant was found guilty of the following crime(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
1	Battery to Law Enforcement Officers, Fire Fighters or Commission Wardens	940.20(2)	No Contest	Felony H	09-03-2013		07-14-2014
2	Resisting or Obstructing an Officer	946.41(1)	No Contest	Misd. A	09-03-2013		07-14-2014
3	Bail Jumping-Misdemeanor	946.49(1)(a)	No Contest	Misd. A	09-03-2013		07-14-2014

**IT IS ADJUDGED** that the defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Agency	Comments
1	01-14-2015	Probation, Sent Withheld	2 YR	Department of Corrections	
2	01-09-2015	Probation, Sent Withheld	1 YR	Department of Corrections	
3	01-09-2015	Probation, Sent Withheld	1 YR	Department of Corrections	

**Conditions of Sentence or Probation****Obligations:** (Total amounts only)

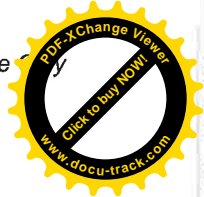
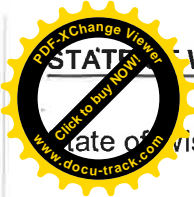
Fine	Court Costs	Attorney Fees	<input type="checkbox"/> Joint and Several Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Anal. Surcharge
	489.00			39.00	226.00		650.00

**Conditions**

Ct.	Condition	Length	Agency/Program	Begin Date	Begin Time	Comments
1	Jail Time	60 DA	County	03-07-2015	08:30 am	With Huber for work and/or school. DO NOT REPORT LATE OR UNDER THE INFLUENCE OF ALCOHOL OR CONTROLLED SUBSTANCES. ABSOLUTE SOBRIETY REQUIRED.
1	Community Service 10 HR		Agency			Defendant is to perform 10 hours of Community Service work when not employed and/or in school full time.
2	Community Service 10 HR		Agency			Defendant is to perform 10 hours of Community Service work per week when not employed and/or in school full time.
3	Community Service 10 HR		Agency			Defendant is to perform 10 hours of Community Service work per week when not employed and/or in school full time.

**Declaration of Jennifer M. Luther in Support  
of Defendants' Motion to Dismiss****EXHIBIT 3**





State of Wisconsin vs. Michael A Kowalczuk

**Judgment of Conviction**Sentence Withheld, Probation  
Ordered

FILED

01-14-2015

Clerk of Circuit Court  
Racine County

Date of Birth: [REDACTED]

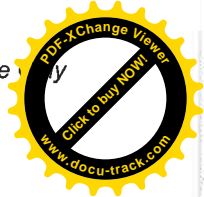
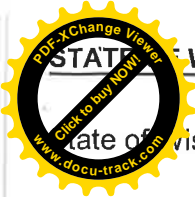
Case No. 2013CF001200

Ct.	Condition	Agency/Program	Comments
1	Costs		Defendant must submit a DNA sample as required by law. Defendant must pay all outstanding fees and court obligations. If supervision is revoked or discharged with outstanding financial obligations, a civil judgment shall be entered against the defendant and in favor of restitution victims and governmental entities for the balance due. Collections may include income assignment.
1	Employment / School		Obtain and maintain full-time employment OR attend school full-time, may be a combination of both to equal 40 hours per week.
1	Alcohol treatment		Alcohol assessment and follow through with recommendations. No alcohol, random UA's at discretion of agent.
1	Drug Treatment		Drug assessment and follow through with recommendations. No controlled substances, random UA's at discretion of agent. Do not associate with any known drug dealers or users. Defendant may only take medication pursuant to a prescription.
1	Other		Counseling, treatment, services as deemed appropriate by agent. Defendant must obey all rules and regulations of probation. Firearm warning given. Voting prohibited until sentence is complete and civil rights have been restored.
2	Costs		
2	Other		Conditions as in Count 1
3	Costs		
3	Other		Conditions as in Count 1.

**Pursuant to §973.01(3g) and (3m) Wisconsin Statutes, the court determines the following:**The Defendant is ☐ is not ☐ eligible for the Challenge Incarceration Program.The Defendant is ☐ is not ☐ eligible for the Substance Abuse Program.**The following charges were Dismissed but Read In**

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Date(s) Read In
5	Resisting/Failing to Stop/Fleeing	346.04(2t)		Misd. U	09-03-2013	07-14-2014
4	Bail Jumping-Misdemeanor	946.49(1)(a)		Misd. A	09-03-2013	07-14-2014

**IT IS ADJUDGED** that 1 days sentence credit are due pursuant to §973.155, Wisconsin Statutes**IT IS ORDERED** that the Sheriff shall deliver the defendant into the custody of the Department.



State of Wisconsin vs. Michael A Kowalczyk

**Judgment of Conviction**Sentence Withheld, Probation  
Ordered

Date of Birth: [REDACTED]

Case No. 2013CF001200

FILED

01-14-2015

Clerk of Circuit Court  
Racine County**Distribution:**Timothy D Boyle, Judge  
Rebecca L Sommers, State of Wisconsin  
Patrick K. Cafferty, Defense Attorney**BY THE COURT:**Electronically signed by Michael J. Piontek  
Circuit Court Judge/Clerk/Deputy Clerk

January 14, 2015

Date



## Racine County Case Number 2013CF001200 State of Wisconsin vs. Michael A Kowalczuk

### Case summary

<b>Filing date</b> 09-03-2013	<b>Case type</b> Criminal	<b>Case status</b> Closed	
<b>Defendant date of birth</b> [REDACTED]	<b>Address</b> 5826 Sunset Bl, Racine, WI 53406	<b>Branch ID</b> 10	<b>DA case number</b> 2013RA007632
<b>Case(s) cross-referenced with this case</b> 2014CF000918, 2013CM001594			

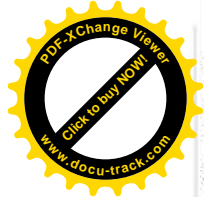
### Charges

<b>Responsible official</b> Boyle, Timothy D.	<b>Prosecuting agency</b> State of Wisconsin	<b>Prosecuting agency attorney</b> Sommers, Rebecca L	<a href="#">Printable version</a>
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Defendant owes the court: \$0.00

Count no.	Statute	Description	Severity	Disposition
1	940.20(2)	Battery to Law Enforcement Officers, Fire Fighters or Commission Wardens	Felony H	Guilty Due to No Contest Plea
2	946.41(1)	Resisting or Obstructing an Officer	Misd. A	Guilty Due to No Contest Plea
3	946.49(1)(a)	Bail Jumping-Misdemeanor	Misd. A	Guilty Due to No Contest Plea
4	946.49(1)(a)	Bail Jumping-Misdemeanor	Misd. A	Charge Dismissed but Read In
5	346.04(2t)	Resisting/Failing to Stop/Fleeing	Misd. U	Charge Dismissed but Read In

The Defendant was charged with the following offense:



Count	Statute cite	Description	Severity	Offense date	Plea
1	940.20(2)	Battery to Law Enforcement Officers, Fire Fighters or Commission Wardens	Felony H	09-03-2013	No Contest on 07-14-2014

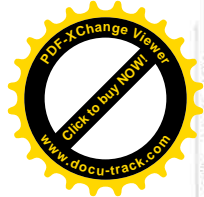
On 07-14-2014 there was a finding of:

Action	Court official	Notes
Guilty Due to No Contest Plea	Boyle, Timothy D.	

On 01-09-2015 the following was ordered:

Sentence	Time	Begin date	Notes
Probation, Sent Withheld	2 Years		

Condition	Time	Notes
Community service	10 Hours	Defendant is to perform 10 hours of Community Service work when not employed and/or in school full time.
Jail time	60 Days	With Huber for work and/or school. DO NOT REPORT LATE OR UNDER THE INFLUENCE OF ALCOHOL OR CONTROLLED SUBSTANCES. ABSOLUTE SOBRIETY REQUIRED.
Costs		Defendant must submit a DNA sample as required by law. Defendant must pay all outstanding fees and court obligations. If supervision is revoked or discharged with outstanding financial obligations, a civil judgment shall be entered against the defendant and in favor of restitution victims and governmental entities for the balance due. Collections may include income assignment.
Employment / School		Obtain and maintain full-time employment OR attend school full-time, may be a combination of both to equal 40 hours per week.
Alcohol treatment		Alcohol assessment and follow through with recommendations. No alcohol, random UA's at discretion of agent.
Drug treatment		Drug assessment and follow through with recommendations. No controlled substances, random UA's at discretion of agent. Do not associate with any known drug dealers or users. Defendant may only take medication pursuant to a prescription.
Other		Counseling, treatment, services as deemed appropriate by agent. Defendant must obey all rules and regulations of probation. Firearm warning given. Voting prohibited until sentence is complete and civil rights have been restored.



Count	Statute cite	Description	Severity	Offense date	Plea
2	946.41(1)	Resisting or Obstructing an Officer	Misd. A	09-03-2013	No Contest on 07-14-2014

On 07-14-2014 there was a finding of:

Action	Court official	Notes
Guilty Due to No Contest Plea	Boyle, Timothy D.	

On 01-09-2015 the following was ordered:

Sentence	Time	Begin date	Notes
Probation, Sent Withheld	1 Years		

Condition	Time	Notes
Community service	10 Hours	Defendant is to perform 10 hours of Community Service work per week when not employed and/or in school full time.
Costs		
Other		Conditions as in Count 1

Count	Statute cite	Description	Severity	Offense date	Plea
3	946.49(1)(a)	Bail Jumping-Misdemeanor	Misd. A	09-03-2013	No Contest on 07-14-2014

On 07-14-2014 there was a finding of:

Action	Court official	Notes
Guilty Due to No Contest Plea	Boyle, Timothy D.	

On 01-09-2015 the following was ordered:

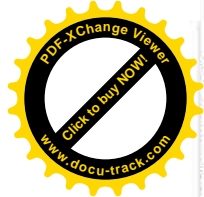
Sentence	Time	Begin date	Notes
Probation, Sent Withheld	1 Years		

Condition	Time	Notes
Community service	10 Hours	Defendant is to perform 10 hours of Community Service work per week when not employed and/or in school full time.
Costs		
Other		Conditions as in Count 1.

Count	Statute cite	Description	Severity	Offense date	Plea
4	946.49(1)(a)	Bail Jumping-Misdemeanor	Misd. A	09-03-2013	

On 07-14-2014 there was a finding of:

Action	Court official	Notes
Charge Dismissed but Read In	Boyle, Timothy D.	



Count	Statute cite	Description	Severity	Offense date	Plea
5	346.04(2t)	Resisting/Failing to Stop/Fleeing	Misd. U	09-03-2013	

On 07-14-2014 there was a finding of:

Action	Court official	Notes
Charge Dismissed but Read In	Boyle, Timothy D.	

## Defendant

Defendant name	Date of birth	Sex	Race
Kowalczuk, Michael A	[REDACTED]	Male	Caucasian

### Address (last updated

09-03-2013)

5826 Sunset Bl, Racine, WI 53406

JUSTIS ID

Fingerprint ID

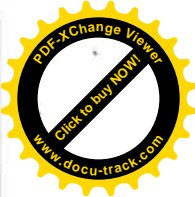
## Attorneys

Attorney name	Entered	Withdrawn
Campion, John W	09-05-2013	09-05-2013
Jensen, Dirk	09-05-2013	09-18-2013
Cafferty, Patrick K.	09-18-2013	

## Citations

### Citation Q8595812

Defendant name	Date of birth	Sex	Address (last updated 09-03-2013)
Kowalczuk, Michael A	[REDACTED]	Male	5826 Sunset Bl, Racine, WI 53406
Bond amount	Deposit type	Appearance date and time	Mandatory
\$500.00	None	09-03-2013 01:30 pm	Yes
Plate number	State	Expiration	VIN
216MJW	IA	2014	1FALP52U1VG312547
Issuing agency	Officer name	Violation date	MPH over
Village of Mt Pleasant PD		09-03-2013	



**Plaintff agency**  
State of Wisconsin

**Ordinance or statute**  
Statute

**Statute**  
346.04(2t)

**Charge description**  
Resisting/Failing to  
Stop/Fleeing

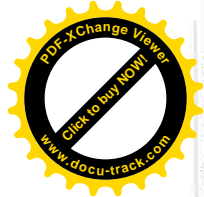
**Severity**  
Misd. U

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## Court record

Date	Event	Court official	Court reporter	Amount
09-13-2019	Records scanned <b>Additional text:</b> All records scanned			
11-15-2017	Records of prosec. are converted data. See file.			
01-25-2017	Discharge Certificate			
01-25-2017	Notice of case status change <b>Additional text:</b> Discharge - regular			
05-20-2015	Notes <b>Additional text:</b> Per RASO - mandatory jail time has been served			
01-14-2015	Assessment Report			
01-14-2015	Judgment of conviction	Piontek, Michael J.		
01-14-2015	Cash bond applied <b>Additional text:</b> 15A 039953			\$443.00
01-14-2015	Cash bond applied <b>Additional text:</b> 15A 039952			\$443.00
01-14-2015	Cash bond applied <b>Additional text:</b> 15A 039951			\$518.00
01-09-2015	Dispositional order/judgment	Boyle, Timothy D.		
01-09-2015	Letters/correspondence			





Date	Event	Court official	Court reporter	Amount
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**Additional text:**

Letters to be used at sentencing hearing on behalf of deft

01-09-2015	Sentencing hearing	Boyle, Timothy D.	Slaasted, Kim	
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**Additional text:**

Court Reporter: Kim Slaasted. Defendant Michael A Kowalczyk in court with attorney Patrick Kiernan Cafferty. Rebecca L Sommers appeared for the State of Wisconsin. This matter is calendared for 13 CF 1200 - sentencing - 13 CM 1594, 13 TRO 12985, 13 TRO 12986 - for plea/sentencing. BTC:: the 13 CM 1594 and 13 TRO 12985 and 13 TRO 12986 will track together and Counsel will draft order - these matters will be heard on 2/3/15 @ in Branch 7 PSI - No corrections - Recommendations put on record - J.K - statement put on record. Defendant - statement put on record. Colloquy of case put on record. BTC: 13 CF 1200 Count 1 - withhold sentence - probation 2 years. - 60 days RCJ - huber for work or school - Defendant shall report to RCJ on 3/7/15 @ 8:30 Count 2 - withheld - 1 year probation Count 3 - withheld - 1 year probation DNA sample & surcharge Absolute sobriety. No alcohol or controlled substances unless prescribed by a physician, to be monitored by random UA's & breathalyzers & community contacts. AODA & follow through. Any assessments/counseling/treatment deemed appropriate by agent & follow through with recommendations. Obtain/maintain full-time employment or employment / school to equal full time. 10 hours community service work when not employed or in school per week FAW / vote / jury service Bad Time Rules to be attached to JOC. CIP: no ERP: no costs / fine + CC credit for time served

01-08-2015	Report			
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**Additional text:**

ZCI

12-16-2014	Pre-sentence investigation filed			
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12-10-2014	Notice of hearing			
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**Additional text:**

Sentencing hearing on January 9, 2015 at 01:30 pm.

12-03-2014	Report			
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**Additional text:**

ZCI

07-14-2014	Order for pre-sentence investigation	Boyle, Timothy D.		
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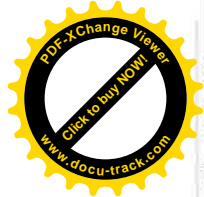
07-14-2014	Notice of hearing			
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**Additional text:**

Sentencing hearing on December 18, 2014 at 03:00 pm.



Date	Event	Court official	Court reporter	Amount
07-14-2014	Guilty plea questionnaire/plea advisement form	Boyle, Timothy D.	Slaasted, Kim	
07-14-2014	Plea hearing	Boyle, Timothy D.	Slaasted, Kim	
	<b>Additional text:</b> Defendant Michael A Kowalczyk in court with attorney Patrick Kiernan Cafferty. Rebecca L Sommers appeared for the State of Wisconsin. Court Reporter: Kim Slaasted. Plea - 13CF1200, Cts. 1,2,3 - NC. BTC: 13CF1200: Cts. 1,2,3 - GUILTY. Cts. 4&5 - DRI. 14CF918: DRI. PSI ordered. Parties stip to join 13CM1594. BTC: Granted. Sentencing hearing scheduled for December 18, 2014 at 03:00 pm.			
07-11-2014	Report			
	<b>Additional text:</b> ZCI			
06-26-2014	Witness list - plaintiff			
06-26-2014	Demand for discovery and inspection			
	<b>Additional text:</b> State			
06-25-2014	Notice of motion, motion			
	<b>Additional text:</b> to join			
05-19-2014	Notice of hearing			
	<b>Additional text:</b> Jury trial on September 30, 2014 at 01:30 pm.			
05-19-2014	Notice of hearing			
	<b>Additional text:</b> Status conference on July 14, 2014 at 09:30 am.			
05-19-2014	Status conference	Boyle, Timothy D.	Slaasted, Kim	
	<b>Additional text:</b> Defendant Michael A Kowalczyk in court with attorney Patrick K Cafferty. Rebecca L Sommers appeared for the State of Wisconsin. Court Reporter: Kim Slaasted. Defense is asking for JT. The State indicates that the offer will lapse at the next status date and new charges will be issued. Status conference scheduled for July 14, 2014 at 09:30 am. Jury trial scheduled for September 30, 2014 at 01:30 pm.			
05-16-2014	Report			



Date	Event	Court official	Court reporter	Amount
	<b>Additional text:</b> ZCI			
03-17-2014	Notice of hearing <b>Additional text:</b> Status conference on May 19, 2014 at 08:30 am.			
03-17-2014	Status conference <b>Additional text:</b> Defendant Michael A Kowalczuk in court with attorney Patrick Kiernan Cafferty. Rebecca L Sommers appeared for the State of Wisconsin. Court Reporter: Kim Slaasted. Defense indicates that there a status in br 3 for another case that this case be heard that day as well BTC: deft reminded to comply with ZCI Status conference scheduled for May 19, 2014 at 08:30 am.	Boyle, Timothy D.	Slaasted, Kim	
03-14-2014	Report <b>Additional text:</b> ZCI			
03-07-2014	Notice of hearing <b>Additional text:</b> Status conference on March 17, 2014 at 08:30 am.			
03-07-2014	Hearing <b>Additional text:</b> Defendant Michael A Kowalczuk not in court. Rebecca L Sommers appeared for the State of Wisconsin. Court Reporter: Kim Slaasted. The State ask that the Court issue and stay a warrant until 3/17 BTC: BW/BF - stayed until 3/17 Status conference scheduled for March 17, 2014 at 08:30 am.	Boyle, Timothy D.	Slaasted, Kim	
03-06-2014	Report <b>Additional text:</b> ZCI			
01-22-2014	Cash bond posted <b>Additional text:</b> 14R 002331C			\$2,000.00
01-18-2014	Cash bond signed			\$2,500.00
01-17-2014	Cash bond amended for Kowalczuk, Michael A	Boyle, Timothy D.		\$2,500.00



Date	Event	Court official	Court reporter	Amount
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**Additional text:**

DEFENDANT HAS POSTED \$500.00 ON 09-03-2013. Ct 1: 940.20(2)-Battery to Law Enforcement; Ct 2: 946.41(1)-Resisting/Obstruting; Cts 3 & 4: 946.49(1)(a)-BJ/Misd; Ct 5: 346.04(2t)-Resisting/Failing to Stop. \$208 advanced fee for installment of SCRAM must be paid prior to release from jail. Zimmerman Consulting Inc. (ZCI) to monitor - 524 S Main Street, 3rd floor, (262-632-1780). DO NOT DRIVE AT ALL. It is a condition of this bond that the defendant NOT consume or possess any alcohol. This is to be monitored by random UA's and/or breathalyzers. The defendant is to report to Zimmerman Consulting Inc. (ZCI) for monitoring - report to 524 Main Street, Suite 302, Racine, WI 53403 (third floor of the Monument Square Building) or call (262)632-1780 to immediately schedule an appointment. The defendant is further ordered to report for testing after each court appearance. \$208 advanced fee for installment of SCRAM must be paid prior to release from jail. Zimmerman Consulting Inc. (ZCI) to monitor - 524 S Main Street, 3rd floor, (262-632-1780). Failure to appear will result in the issuance of a warrant for your arrest, possible bail jumping charges and forfeiture of any bond on deposit.

01-17-2014	Notice of hearing			
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**Additional text:**

Status conference on March 7, 2014 at 09:30 am.

01-17-2014	Status conference			
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		Boyle, Timothy D.	Slaasted, Kim	
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**Additional text:**

Defendant Michael A Kowalczyk in court with attorney Patrick K. Cafferty. Rebecca Sommers appeared for the State of Wisconsin. Court Reporter: Kim Slaasted. The State moves for a new bond based on the 16 ZCI violations as noted in the latest ZCI report. The State is asking for \$3000.00 cash bond with SCRAM monitoring. Mr. Cafferty indicates that he works in Kenosha and does not drive. Defense indicates deft told him that he has informed Ken Torres of ZCI of that fact. Mr. Cafferty is asking the Court not to forfeit the bail or increase the bail. BTC: Bond to be increased to \$2,500.00 cash. SCRAM if deft is able to post. All other conditions remain Status conference scheduled for March 7, 2014 at 09:30 am. \*\*DEFENDANT TAKEN INTO CUSTODY\*\*

01-16-2014	Report			
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**Additional text:**

ZCI

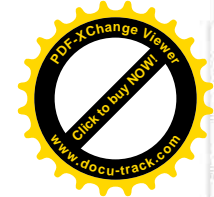
11-15-2013	Pre-trial conference			
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		Vanderhoef, Amy		
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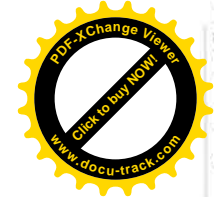
**Additional text:**

Status conference scheduled for January 17, 2014 at 10:00 am.

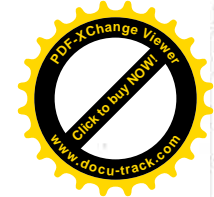
11-14-2013	Report			
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Date	Event	Court official	Court reporter	Amount
	<b>Additional text:</b> ZCI			
10-11-2013	Pre-trial conference <b>Additional text:</b> Pre-trial conference scheduled for November 15, 2013 at 08:15 am.	Vanderhoef, Amy		
10-10-2013	Report <b>Additional text:</b> ZCI			
09-23-2013	Demand for discovery and inspection <b>Additional text:</b> atty Cafferty			
09-18-2013	Notice of hearing <b>Additional text:</b> Pre-trial conference on October 11, 2013 at 08:15 am.			
09-18-2013	Arraignment <b>Additional text:</b> NG plea entered.	Simanek, Stephen	Thornton, Lori	
09-18-2013	Information <b>Additional text:</b> Reading waived.	Simanek, Stephen	Thornton, Lori	
09-18-2013	Prelim questionnaire and waiver	Simanek, Stephen	Thornton, Lori	
09-18-2013	Waiver of preliminary hearing <b>Additional text:</b> Waiver of Preliminary hearing filed. Probable cause found; bound over.	Simanek, Stephen	Thornton, Lori	
09-18-2013	Hearing <b>Additional text:</b> Defendant Michael A Kowalczyk in court with attorney Patrick K. Cafferty. Rebecca Sommers appeared for the State of Wisconsin. Court Reporter: Lori Thornton. Pre-trial conference scheduled for October 11, 2013 at 08:15 am.	Simanek, Stephen	Thornton, Lori	
09-17-2013	Report			



Date	Event	Court official	Court reporter	Amount
	<b>Additional text:</b> ZCI			
09-09-2013	Cash bond posted			\$500.00
	<b>Additional text:</b> 13R 030057C			
09-06-2013	Order	Flancher, Faye M.		
	<b>Additional text:</b> To Remove SCRAM Unit for Purposes of a Medical Procedure			
09-05-2013	Public defender order appointing counsel			
	<b>Additional text:</b> Dirk Jensen			
09-05-2013	Demand for discovery and inspection			
	<b>Additional text:</b> defendant			
09-05-2013	Notice of retainer			
09-03-2013	Cash bond signed			\$500.00
09-03-2013	Notice of hearing			
	<b>Additional text:</b> Preliminary hearing on September 18, 2013 at 08:30 am.			
09-03-2013	Cash bond set for Kowalczuk, Michael A	Rudebusch, Alice A	Phinisee, Pat	\$500.00
	<b>Additional text:</b> Charges per attached criminal complaint. Conditions: DO NOT DRIVE AT ALL. It is a condition of this bond that the defendant NOT consume or possess any alcohol. This is to be monitored by random UA's and/or breathalyzers. The defendant is to report to Zimmerman Consulting Inc. (ZCI) for monitoring - report to 524 Main Street, Suite 302, Racine, WI 53403 (third floor of the Monument Square Building) or call (262)632-1780 to immediately schedule an appointment. The defendant is further ordered to report for testing after each court appearance. \$208 advanced fee for installment of SCRAM must be paid prior to release from jail. Zimmerman Consulting Inc. (ZCI) to monitor - 524 S Main Street, 3rd floor, (262-632-1780). Failure to appear will result in the issuance of a warrant for your arrest, possible bail jumping charges and forfeiture of any bond on deposit.			
09-03-2013	Initial appearance	Rudebusch, Alice A	Phinisee, Pat	



Date	Event	Court official	Court reporter	Amount
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**Additional text:**

Defendant Michael A Kowalczuk in court with attorney Carolyn Delery. Defendant Michael A Kowalczuk in custody. Noah Wishau appeared for the State of Wisconsin. Court Reporter: Pat Phinisee. Reading of complaint is waived, probable cause found, bond set. BTC: Cause to waive time limits. Preliminary hearing scheduled for September 18, 2013 at 08:30 am.

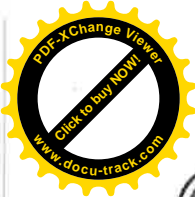
09-03-2013 Complaint filed

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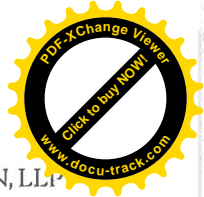
**Total receivables**

Court assessments	Adjustments	Paid to the court	Probation/other agency amount	Balance due to court	Due date
\$1,404.00	\$0.00	\$1,404.00	\$0.00	\$0.00	





**Axley**  
Attorneys Since 1885



AXLEY BRYNELSON, LLP

• • • • •

JENNIFER M. LUTHER  
[jluther@axley.com](mailto:jluther@axley.com)  
608.283.6776

September 25, 2019

**VIA ELECTRONIC FILING**

Hon. J.P. Stadtmueller  
U.S. District Court Eastern District of Wisconsin  
517 E Wisconsin Ave., Rm 471  
Milwaukee, WI 53202-4510

Re: *Michael A. Kowalczyk v. Eric Giese, et al.*  
Eastern District Case No. 2:19-cv-1230  
Our File: 11097.83236

Dear Judge Stadtmueller:

Defendants filed a Motion to Dismiss Plaintiff's Complaint on September 18, 2019. Our office hereby respectfully requests that the Court set a briefing schedule regarding this motion.

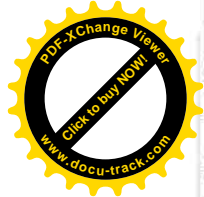
Sincerely,

AXLEY BRYNELSON, LLP

Jennifer M. Luther

JML:mjj

cc: All Counsel of Record – Via ECF



Attorneys

Kevin R. Martin\*  
Michael J. Jassak\*  
Anthony J. Skemp\*  
Drew J. DeVinney

\* Board Certified Civil Trial Lawyer  
by the National Board of Trial Advocacy

7280 S. 13<sup>th</sup> St., Ste. 102 | Oak Creek, WI 53154  
Phone: 414-856-2310 | Fax: 414-856-2315  
[www.martin-law-office.com](http://www.martin-law-office.com)

September 27, 2019

Hon. J. P. Stadtmueller  
United States District Court  
for the Eastern District of Wisconsin  
517 E. Wisconsin Avenue, Room 471  
Milwaukee, WI 53202

**Re: Kowalczyk v. Giese et al**  
**Eastern District of WI Case No.: 2:19-cv-01230-JPS**

Dear Judge Stadtmueller:

The defendants in this case have filed a Motion to Dismiss Plaintiff's Complaint on September 18, 2019 and have since requested that the Court set forth a briefing schedule. The plaintiff has no objection to this request.

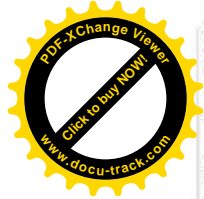
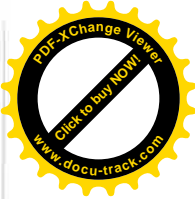
Sincerely,

**MARTIN LAW OFFICE, S.C.**

*Electronically Signed by Drew J. DeVinney*

Drew J. DeVinney  
(414) 856-2670 (direct)  
(414) 856-2677 (direct fax)  
[drew@martin-law-office.com](mailto:drew@martin-law-office.com)

DJD:djd



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

---

MICHAEL A. KOWALCZUK,

Plaintiff,

Case No. 2:19-cv-1230

v.

ERIC GIESE, MATT SOENS, and  
VILLAGE OF MOUNT PLEASANT,

Defendants.

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**NOTICE OF WITHDRAWAL OF COUNSEL**

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PLEASE TAKE NOTICE that Attorney Jennifer M. Luther withdraws as counsel of record for Defendants Eric Giese, Matt Soens, and Village of Mount Pleasant. Attorney Lori M. Lubinsky remains counsel of record for said Defendants.

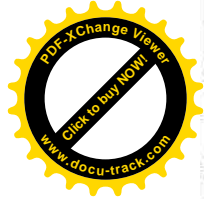
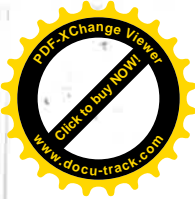
Dated this 3<sup>rd</sup> day of October, 2019.

AXLEY BRYNELSON, LLP

/s/ Jennifer M. Luther

---

Lori M. Lubinsky (State Bar No. 1027575)  
Jennifer M. Luther (State Bar No. 1065234)  
Attorneys for Defendants  
Suite 200, 2 East Mifflin Street (53703)  
Post Office Box 1767  
Madison, WI 53701-1767  
Telephone: (608) 257-5661  
Facsimile: (608) 257-5444  
Email: llubinsky@axley.com  
jluther@axley.com



**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN**

---

MICHAEL A. KOWALCZUK

Plaintiff,

Case No.: 2:19-cv-1230

vs.

SERGEANT ERIC GIESE, and  
VILLAGE OF MOUNT PLEASANT

Defendants.

---

**AMENDED COMPLAINT**

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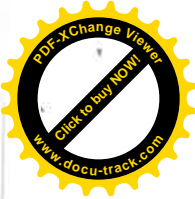
**NOW COMES** the above-named plaintiff, Michael A. Kowalczuk, by his attorneys, Martin Law Office, S.C., and as and for his amended claims for relief against the above-named defendants, alleges and shows to the Court as follows:

**Nature of the Case**

1. This is a civil action, pursuant to 42 U.S.C. § 1983, for redress of the deprivation, under color of law, of Michael A. Kowalczuk's rights secured by the Fourth and Fourteenth Amendments to the United States Constitution.

**Jurisdiction and Venue**

2. This court has jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3).
3. Venue in the Eastern District of Wisconsin is proper under 28 U.S.C. 1391(b).



### **Introduction**

4. This amended complaint is intended to relate back to the date of the original complaint under Rule 15(c)(1)(C) of the Federal Rules of Civil Procedure.<sup>1</sup>

5. This amended complaint is not intended to imply the invalidity of any conviction, judgment, or sentence imposed against the plaintiff.

6. The allegations in this amended complaint are intended to conform to and incorporate, by reference, squad camera video footage, taken September 3, 2013, which depicts the factual basis of the plaintiff's claims, as alleged herein.

### **Parties**

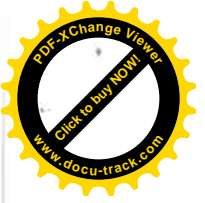
7. That the plaintiff, Michael A. Kowalczyk, is an adult citizen and resident of the State of Wisconsin, residing at 5826 Sunset Blvd., Mount Pleasant, Wisconsin 53406.

8. That the defendant, Village of Mount Pleasant, is a municipality duly incorporated, organized, and existing under the laws of the State of Wisconsin; that the Mount Pleasant Police Department is an agency of the Village of Mount Pleasant.

9. That the defendant, Eric J. Giese, is an adult resident of the State of Wisconsin; that, at all times material hereto, Eric J. Giese was employed by the defendant, Village of Mount Pleasant, as a police officer with the Mount Pleasant Police Department; that, at all times material hereto, Eric J. Giese was acting within the scope of his employment and authority as a Village of Mount Pleasant police officer; that the plaintiff sues Eric J. Giese in his individual and official capacities.

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<sup>1</sup> This amended complaint is filed in response to the defendants' Motion to Dismiss, pursuant to 12(b)(6), which was filed on September 18, 2019. (Dkt. 5, Def. Mot. to Dismiss, [of Record]). Pursuant to Rule 15(a)(1)(B) of the Federal Rules of Civil Procedure, a party "may amend its pleading once, as a matter of course" within 21 days after service of a motion under Rule 12(b).



### General Allegations

10. That, at all times material hereto, the defendant Eric J. Giese acted under color of state law.

11. That on September 3, 2013, at approximately 12:30 am, Michael A. Kowalczuk ("Kowalczuk") was operating his motor vehicle in the Village of Mount Pleasant; that Kowalczuk was driving to the home that he shared with his parents.

12. That, upon information and belief, at approximately 12:30 am, the defendant, Eric J. Giese ("Giese") was operating a marked Village of Mount Pleasant squad car; that Giese observed Kowalczuk's vehicle turn onto 16<sup>th</sup> street, in the Village of Mount Pleasant, Wisconsin; that Giese elected to follow Kowalczuk eastbound on 16<sup>th</sup> street.

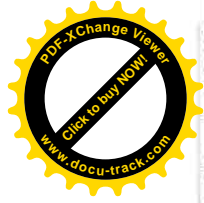
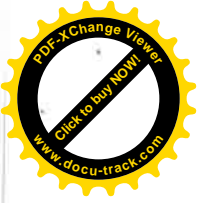
13. That, at its intersection with South Emmersen Road, the speed limit for eastbound traffic on South 16<sup>th</sup> Street reduces from thirty-five miles per hour to twenty-five miles per hour; that, upon information and belief, the defendant, Giese, followed Kowalczuk eastbound on South 16<sup>th</sup> Street.

14. That Giese activated his squad lights after Kowalczuk passed South Emmerson Road.

15. That, upon viewing Giese's squad lights, Kowalczuk drove his vehicle to his parents' house at 5826 Sunset Boulevard, Mount Pleasant.

16. That Kowalczuk parked his vehicle in front of his parents' home and slowly opened the driver's side door.

17. That, after stopping his squad car, Giese exited with his firearm aimed at Kowalczuk; that Giese yelled the following instruction to Kowalczuk: "Stop! Get out of the car! Stay in the car, right now!"



18. That Giese's instructions were contradictory; that Kowalczuk immediately stopped all movement when he heard Giese yell "Stop!"

19. That Giese approached Kowalczuk with his firearm aimed at Kowalczuk.

20. That Giese yelled at Kowalczuk: "Show me your hands!"; that Kowalczuk put both of his hands up and in view of Giese.

21. That within approximately one second of instructing Kowalczuk to show his hands, Giese instructed Kowalczuk: "Stop the car!"; that Kowalczuk's vehicle was already stopped.

22. That within approximately one second of instructing Kowalczuk to stop the car, Giese instructed Kowalczuk: "Get out of the car!"; that, simultaneously, Giese grabbed Kowalczuk by Kowalczuk's left arm and used physical force to remove Kowalczuk from the vehicle.

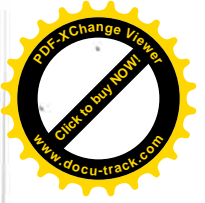
23. That as Giese was removing Kowalczuk from the vehicle, Giese yelled at Kowalczuk: "Get out of the car! Get on the ground"

24. That Kowalczuk was resistive and asked Giese: "What did I do, man?"

25. That in response to Kowalczuk's question, Giese yelled: "Get on the ground!"; that, simultaneously, Giese pulled Kowalczuk's arm and used physical force to push Kowalczuk to the pavement; that the force exerted Giese combined with Giese's control of Kowalczuk's left arm caused Kowalczuk to turn and fall onto his backside.

26. That once Kowalczuk was on the ground, Giese continued to maintain physical control of Kowalczuk by gripping Kowalczuk's left arm; Giese again yelled at Kowalczuk: "Get on the fucking ground!"; that, at the same time, Giese placed his other hand behind Kowalczuk's





head and pushed Kowalczuk onto his right side; that Giese then placed his weight on top of Kowalczuk.

27. That, as Giese was on top of Kowalczuk, Kowalczuk pleaded: "Let go, man."

28. That Giese yelled at Kowalczuk "Put your hands behind your back! Do it now! Put your hands behind your back and get on your stomach! Get on your stomach! put your hands behind your back! Do it now!"

29. That Giese allowed Kowalczuk to position himself on his stomach with his hands behind his back; that Giese yelled: "Put your hands behind your back, or you're going to get tased! (*sic*)"

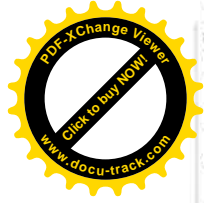
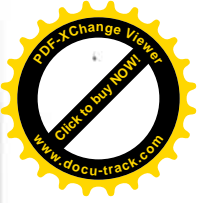
30. That Kowalczuk put his hands behind his back, at which point Giese secured Kowalczuk's hands in handcuffs.

31. That Kowalczuk's mother and father, Nancy Kowalczuk and Jeff Kowalczuk, were inside of their home and observed Giese use force on Kowalczuk; that Nancy and Jeff Kowalczuk exited their home; that Giese put his hand over his firearm and threatened Nancy and Jeff Kowalczuk: "Stay back! Stay back."

32. That Kowalczuk was extremely frightened by Giese; that Kowalczuk remained handcuffed at all times; that Kowalczuk yelled: "Mom!"

33. That, contradictory to Giese's instructions, Kowalczuk attempted to reposition himself on the ground to be able to see his mother; that Giese again grabbed Kowalczuk; that Jeff Kowalczuk yelled to Giese: "Hey, hey, hey!"; that Giese yelled at Jeff Kowalczuk to "Stay back!"; that Nancy and Jeff Kowalczuk were frightened by the actions and demeanor of Giese.

34. That Kowalczuk did not stay on his stomach and lifted himself to a seated position; that Giese tackled Kowalczuk back to the pavement, yelling: "Stay the fuck down!";



that Kowalczuk kicked Giese; that, as Kowalczuk was on the ground, Giese punched Kowalczuk in the face with his right hand.

35. That Giese got off of Kowalczuk and Kowalczuk stood up; that Giese yelled at Kowalczuk: “stay back!”; that Kowalczuk then turned to face away from Giese to speak to his mother; that, as Kowalczuk’s back was turned to Giese, Giese shot Kowalczuk with a taser; that Kowalczuk fell to the pavement, striking his head; that Kowalczuk lost conscious.

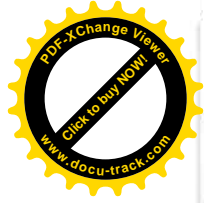
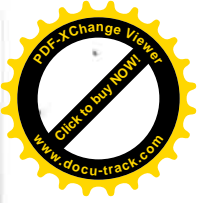
36. That Kowalczuk regained consciousness approximately eleven seconds after being tasered by Giese and falling to the ground; that Kowalczuk was confused and frightened when he regained conscious and began to move; that the taser leads remained in Kowalczuk and Giese again employed the taser to debilitate Kowalczuk.

**First Claim for Relief: Excessive Force – Against Eric J. Giese**

37. Plaintiff realleges and incorporates herein by reference the allegations of the preceding paragraphs.

38. The uses of force employed by Eric J. Giese in the course of arresting Michael A. Kowalczuk, including, but not limited to, pulling Kowalczuk from his vehicle, pushing Kowalczuk onto the ground, exerting physical pressure onto Kowalczuk on the ground, handcuffing Kowalczuk, tackling Kowalczuk to the ground, attacking Kowalczuk, punching Kowalczuk, and twice using a taser to debilitate Kowalczuk, were not objectively reasonable under the Fourth Amendment to the United States Constitution.

39. The conduct alleged constituted unreasonable and excessive force and violated Michael A. Kowalczuk’s right to be free from unreasonable seizures under the Fourth and Fourteenth Amendments to the United States Constitution.



40. Defendant Eric J. Giese's unreasonable and excessive use of force against Michael A. Kowalczuk was a cause of the injuries sustained by Michael A. Kowalczuk, including the violation of his constitutional rights, loss of liberty, past and future pain, suffering, emotional distress, mental anguish, past and future medical expenses, disability, loss of enjoyment of life and dignity, and other compensable injuries and damages, all to the damage of Michael A. Kowalczuk in an amount to be determined at a trial of this matter.

41. Defendant Eric J. Giese acted with malice or in reckless disregard of Michael A. Kowalczuk's federally protected rights.

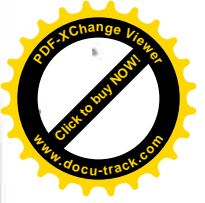
**Second Claim for Relief: Monell Claim against Defendant Village of Mount Pleasant**  
**(Policy, Practice, and/or Custom; Failure to Train and Supervise)**

42. Plaintiff realleges and incorporates herein by reference the allegations of the preceding paragraphs.

43. Upon information and belief, defendant Eric J. Giese acted within the written or unwritten policies, practices, and/or customs of the Village of Mount Pleasant Police Department, an agency of the defendant, Village of Mount Pleasant, when he employed excessive force against Michael A. Kowalczuk and when he arrested Michael A. Kowalczuk without probable cause, as alleged.

44. Upon information and belief, the defendant, Village of Mount Pleasant, failed to adequately train and supervise its police officers, including Eric J. Giese, regarding the use of force and probable cause for arrest.

45. Upon information and belief, in light of the foreseeable consequences due to the failure to adequately train and supervise police officers as alleged, defendant Village of Mount Pleasant was deliberately indifferent to the rights of Michael A. Kowalczuk and other persons in



Mount Pleasant by failing to adequately train and supervise its police officers including Eric J. Giese.

46. Upon information and belief, defendant Village of Mount Pleasant's law enforcement policies, practices, and/or customs and its failure to adequately train and supervise its police officers, including Eric J. Giese, was a cause of the violations of Michael A. Kowalczyk's constitutional right to be free from unreasonable seizures, in the form of excessive force, and false arrest.

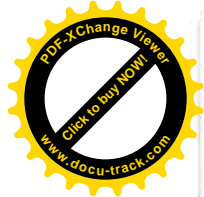
47. Upon information and belief, defendant Village of Mount Pleasant's law enforcement policies, practices, and/or customs and its failure to adequately train and supervise its police officers, including Eric J. Giese, caused Michael A. Kowalczyk to injuries, including the violation of his constitutional rights, loss of liberty, past and future pain, suffering, emotional distress, mental anguish, past and future medical expenses, disability, loss of enjoyment of life and dignity, and other compensable injuries and damages, all to the damage of Michael A.

**Third Claim for Relief: Punitive Damages against Eric J. Giese**

48. Plaintiff realleges and incorporates herein by reference the allegations of the preceding paragraphs.

49. That upon information and belief, at all times material hereto, the defendant, Eric J. Giese, acted with intentional disregard of the rights of the plaintiff, Michael A. Kowalczyk, in such a manner as to subject Eric J. Giese to punitive damages in an amount to be determined at a trial of this matter.

**WHEREFORE**, the plaintiff demands judgment against defendants, Village of Mount Pleasant and Michael A. Kowalczyk, as follows:



A. declaring that the defendant, Eric J. Giese violated the plaintiff, Michael A. Kowalczyk's constitutional rights by using excessive force against him and by falsely arresting him; that the defendant, Village of Mount Pleasant, has liability for Eric J. Giese's actions, as alleged;

B. for compensatory damages against defendants, Village of Mount Pleasant, and Eric J. Giese, jointly and severally, in an amount to be determined at trial;

C. for punitive damages against defendant, Eric J. Giese, in an amount to be proved at trial;

D. for plaintiff's attorneys' fees, pursuant to 42 U.S.C. § 1988

E. for such further and additional relief as this Court may deem equitable and just.

**PLEASE TAKE NOTICE THAT THE PLAINTIFF DEMANDS A TRIAL IN THE ABOVE-ENTITLED ACTION.**

Dated: 10/9/2019

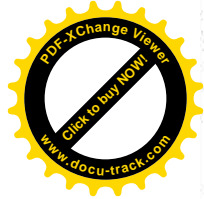
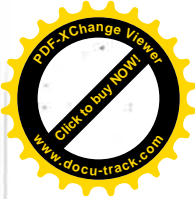
**MARTIN LAW OFFICE, S.C.**  
Attorney for Plaintiff(s)

*Electronically Signed by Drew J. DeVinney*

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Drew J. De Vinney  
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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN**

---

MICHAEL A. KOWALCZUK

Plaintiff,

Case No.: 2:19-cv-1230

vs.

SERGEANT ERIC GIESE, and  
VILLAGE OF MOUNT PLEASANT

Defendants

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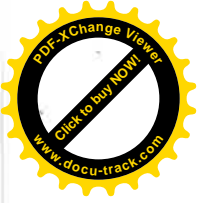
**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO  
DISMISS PLAINTIFF'S COMPLAINT**

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NOW COMES the plaintiff, Michael A. Kowalczuk, by and through his attorneys, Martin Law Office, S.C., and hereby submits, pursuant to Civil L. R. 7(b) this memorandum of law in opposition to the defendants' motion to dismiss.

**INTRODUCTION**

Pursuant to Rule 15(a)(1)(B), the plaintiff has contemporaneously filed an amended complaint. (Amended Complaint, [of Record].) The amended complaint states that the allegations are not intended to imply the invalidity of any convictions. (Amended Complaint, at ¶ 5.) Further, the amended complaint incorporates, by reference, video that depicts the incident—the allegations essentially amount to a play-by-play description of the video footage. (Id. at ¶ 6.) These changes are intended to avoid any perceived inference that the plaintiff is seeking to collaterally attack the validity of his convictions through this civil suit. (Id. at ¶ 5.) He is not.



To that end, the amended complaint no longer includes a claim for false arrest.<sup>1</sup> (*See Id.*) The plaintiff concedes that a judgment of false arrest arising out of these circumstances would necessarily imply the invalidity of his convictions.<sup>2</sup> (*See Luther Dec.*, ¶ 3, Ex. 2, Defendant Court Record; *see also Luther Dec.*, ¶ 4, Ex. 3, Judgment of Conviction.) As will be discussed, unlike the wrongful arrest claim, the excessive force claim arising out of Officer Eric J. Giese's conduct, is not *Heck*-barred.

## **BACKGROUND**

Kowalczuk alleges that Giese used excessive force in arresting him following a traffic stop on September 3, 2013. (Amended Complaint, [of Record], *in passim.*) Giese's use of force was excessive in many ways, including: "pulling Kowalczuk from his vehicle, pushing Kowalczuk onto the ground, exerting physical pressure onto Kowalczuk on the ground, handcuffing Kowalczuk, tackling Kowalczuk to the ground, attacking Kowalczuk, punching Kowalczuk, and twice using a taser to debilitate Kowalczuk." (*Id.* at 36.)

### **I. Subject Incident**

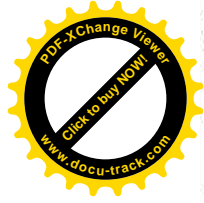
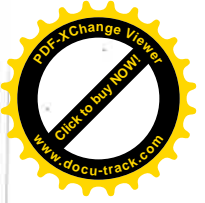
On September 3, 2013, Officer Giese initiated a traffic stop after following Kowalczuk, who was on his way home to his parents' house. (*Id.* at ¶¶ 8 – 12.) After Giese activated his squad lights, Kowalczuk made the unfortunate decision to continue driving an additional 4/10ths of a mile to his parents' house, (*Id.* at ¶ 13; *Luther Dec.*, ¶ 2, Ex. 1, Criminal Complaint). After stopping his vehicle in front of his parents' house, Kowalczuk slowly opened his driver's side door. (Amended Complaint at ¶ 14.)

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<sup>1</sup> The plaintiff also does not dispute the dismissal of defendant Chief of Police Matt Soens, with prejudice. (*See Dkt. 6, Def. Memo*, at p. 12-13.)

<sup>2</sup> The plaintiff was convicted of operating while intoxicated, resisting, battery of an officer, and bail jumping. (*Luther Dec.*, ¶ 3, Ex. 2, Defendant Court Record; *Luther Dec.*, ¶ 4, Ex. 3, Defendant Court Record).



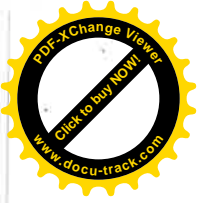


Giese approached Kowalczuk, with his firearm aimed, and gave Kowalczuk the contradictory instruction to “Stop! Get out of the car! Stay in the car, right now!” (Id. at ¶ 14.) Kowalczuk, not knowing what to do, stopped moving. (Id. at ¶ 15.) Giese told Kowalczuk to show him his hands, so Kowalczuk showed Giese his hands. (Id. at ¶ 18.)

Within one second, Giese instructed Kowalczuk to stop the car. (Id. at ¶ 19.) Kowalczuk’s car was already stopped, so he did nothing. (Id.) Within another second, Giese told Kowalczuk to get out of the car. (Id. at ¶ 20.) Simultaneously, Giese grabbed Kowalczuk and forced him out of the car. (Id.) As Giese pulled Kowalczuk out of his car, Kowalczuk asked “What did I do, man?” (Id. at ¶ 22.) Giese responded by telling Kowalczuk to “[g]et on the ground!” and simultaneously pushed him to the pavement. (Id. at ¶ 23.)

Giese continued to instruct Kowalczuk to get on the ground after Kowalczuk was already on the pavement with Giese’s weight on top of him. (Id. at ¶ 24.) Kowalczuk pleaded with Giese to let go as Giese instructed Kowalczuk to lay on his stomach with his hands behind his back. (Id. at ¶ 26.) Once Giese allowed Kowalczuk to position himself on his stomach, Giese threatened to taser Kowalczuk. (Id. at ¶ 27.) Kowalczuk put his hands behind his back and then allowed Giese to secure his hands in handcuffs. (Id. at ¶ 28.)

Unfortunately, the incident re-escalated when Kowalczuk’s parents, Jeff and Nancy Kowalczuk, came outside. (Id. at ¶ 29.) Jeff and Nancy Kowalczuk had observed Giese’s quick use of force on Kowalczuk from inside their home. (Id.) They were frightened by Giese. (Id. at ¶ 33.) Kowalczuk, too, was frightened and the presence of his parents caused him to begin resisting Giese’s instruction to stay on the ground. (Id. at ¶¶ 30-32.) Contrary to Giese’s instruction, Kowalczuk repositioned himself and yelled, “Mom!” (Id. at ¶ 30.) After yelling for his mother, Kowalczuk, still handcuffed, lifted himself to a seated position on the pavement. (Id.

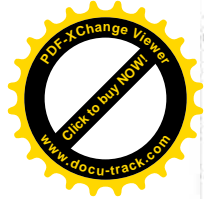
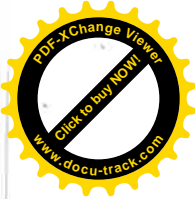


at ¶ 32). Giese tackled Kowalczuk back to the pavement. (Id.) In response, Kowalczuk kicked Giese. (Id. at ¶ 32.) According to Giese, Kowalczuk landed a painful blow to Giese's groin. (Luther Dec., ¶ 2, Ex. 1, Criminal Complaint). Kowalczuk does not deny this. (See Amended Complaint, *in passim*.)

In response, Giese punched Kowalczuk in the face. (Id. at ¶ 32.) Giese then stood up, allowing Kowalczuk to also stand. (Id. at ¶ 33.) Kowalczuk faced Giese, still handcuffed (Id. at ¶ 33.) Giese yelled at Kowalczuk to "stay back!" (Id.) Kowalczuk then turned his back to Giese to speak to his mother, Nancy. (Id.) Once Kowalczuk turned his back to Giese, Giese shot Kowalczuk with a taser. (Id.) This caused Kowalczuk to fall to the pavement, where, his hands secured behind his back, he struck his head. (Id.) Kowalczuk lost conscious for approximately eleven seconds after striking his head. (Id. at ¶¶ 33-34) After he regained consciousness, Kowalczuk, confused and frightened, attempted to stand. (Id. at ¶ 34). Giese re-employed his taser to finally debilitate Kowalczuk. (Id.)

## **II. Criminal Convictions**

Kowalczuk was arrested for battery of an officer, resisting an officer, bail jumping, traffic infractions, and operating while intoxicated. (Luther Dec., ¶ 2, Ex. 1, Criminal Complaint; Luther Dec., ¶ 3, Ex. 2., Defendant Court Record). Kowalczuk was charged in two separate cases. (CCAP Record for Racine County Cases No., 2013 CM001594 and 2013CF001200.) As these cases were pending, the State charged Kowalczuk with thirty counts of felony and misdemeanor bail jumping due to infractions of his bond. (CCAP Record for Racine County Case No., 2013CF00918.) On July 14, 2015, Kowalczuk plead no contest and was found guilty of resisting, battery of a police officer, and one count of misdemeanor bail jumping. (Luther



Dec., ¶ 4, Ex. 3., Defendant Court Record). The State dismissed the thirty added counts of bail jumping. (CCAP Record for Racine County Case No., 2013CF00918.)

## ARGUMENT

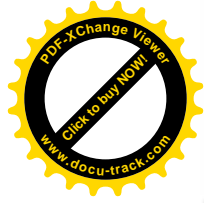
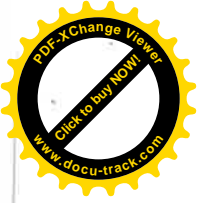
### **I. Michael Kowalczuk's claim of Excessive Force against Eric J. Giese is not barred by his criminal convictions for resisting and battery.**

*Heck v. Humphrey* does not bar the plaintiff's claim of excessive force against Officer Eric J. Giese. The *Heck* rule seeks to prevent incompatible judicial outcomes "arising out of the same or identical transaction." *Heck v. Humphrey*, 512 U.S. 477, 484 (1994). It is intended to "prevent collateral attack on a criminal conviction through the vehicle of a civil suit." *McCann*, 466 F.3d 619, 621 (7<sup>th</sup> Cir. 2006). Put simply, a person cannot accept a plea in his criminal case and then argue his innocence to those charges in a subsequent civil suit.

A criminal conviction, however, does not mean that a plaintiff cannot maintain a § 1983 action under the same set of circumstances. *See VanGlider v. Baker*, 435 F.3d 689, 691 (7<sup>th</sup> Cir. 2006). In determining whether *Heck* applies, "a district court must analyze the relationship between the plaintiff's § 1983 claim and the charge on which he was convicted." *Id.* The question is whether a judgment in favor of the plaintiff's civil claim would "necessarily imply the invalidity of his conviction . . ." *Id.* (quoting, *Heck v. Humphrey*, 512 U.S. at 487).

The word "necessarily" is critical. *See Nelson v. Campbell*, 541 U.S. 637, 647, (2004) ("[W]e were careful in *Heck* to stress the importance of the term 'necessarily.'") A claim is precluded only if the pleadings unambiguously attack the validity of the criminal conviction. *See McCann* at 622. A claim is not barred by *Heck* if there is a reasonable construction of the pleadings that avoids inconsistency with the criminal convictions. *Id.*

Applied to this case, a reasonable construction of Kowalczuk's complaint is compatible with his "no contest" pleas to resisting and battery. This is because a conviction for "resisting



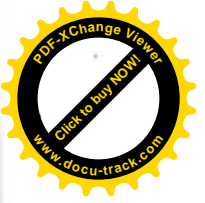
arrest or assaulting a police officer” does not bar a plaintiff “from maintaining a §1983 action for excessive force stemming from the same confrontation.” *McCann v. Neilsen*, 466 F.3d 619, 621 (7<sup>th</sup> Cir. 2006); *see also VanGlider v. Baker*, 435 at 692 (holding that a claim of excessive force does not necessarily imply the invalidity of a conviction for resisting). A jury can find that the use of force against a resisting person is excessive. *Id.*

In *McCann*, the defendant officer had pursued McCann on foot along some railroad tracks. *McCann* at 620. During the pursuit, McCann stopped, turned, and produced a “spike-type” weapon from his pocket and advanced toward the defendant officer. *Id.* After warning McCann to stop, the defendant officer fired a single shot that struck McCann in his chest. *Id.* A jury later convicted McCann of aggravated assault on the defendant officer. *Id.* McCann then sued the defendant officer for excessive use of force. *Id.* McCann’s complaint alleged:

6. At the time and date aforesaid, the plaintiff did not pose a threat of violence or great bodily harm to the defendant, was not in the commission of a forcible felony nor was he attempting to resist, escape or defeat an arrest otherwise [sic] *acting so as to justify the use of deadly force by the defendant.*

*Id.* (emphasis added). The Seventh Circuit held that, despite McCann’s seemingly categorical denial of his conviction, “giving the plaintiff the benefit of all reasonable inferences, the complaint could reasonably be read in a manner that does not implicate *Heck*.” *Id.* at 622. Specifically, the Seventh Circuit noted that “McCann is not denying his assaultive and obstructive conduct, but is alleging that regardless of what he may have done, the deputy’s use of deadly force as a response was not reasonable.” *Id.*

*McCann* is consistent with *Evans v. Poskon*, 603 F.3d 362 (7<sup>th</sup> Cir. 2010). Evans was convicted by a jury of attempted murder and resisting arrest. *Id.* at 636. Evans sued the arresting officers for excessive force. *Id.* In his complaint, Evans alleged that “he offered no resistance” to the arrest, directly contradicting his criminal conviction. *Id.* The district court granted summary



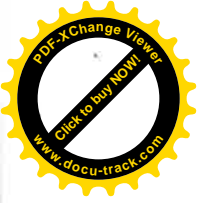
judgment for the defendants, concluding that *Heck* barred Evan's excessive force claim. *Id.* The Seventh Circuit reversed and remanded. *Id.* at 364

The Seventh Circuit explained that a "fourth-amendment claim can coexist with a valid conviction." *Id.* at 363. The court noted that Evans alleged three things: "(1) that he did not resist being taken into custody; (2) that the police used excessive force to effect custody; and (3) that the police beat him severely even after reducing him to custody..." *Id.* The Court held that, although Evans could not allege that he never resisted, he could still prove that the police used excessive force. *Id.* Thus, despite pleading allegations that necessarily invalidated his conviction, Evans was nonetheless "entitled to an opportunity to prove that the defendants used unreasonable force during and after his arrest." *Id.* at 634.

The defendants cite the decision in *Jones v. Phillips* for the proposition that an allegation of excessive force is wholly barred if a plaintiff is convicted for resisting or obstruction during the arrest. (Def. Memo at p. 6.) This is too broad an interpretation of the *Jones* decision. In *Jones*, the district court held that a conviction for resisting "might be" inconsistent with a finding that the use of force unlawful. 2017 WL 1292376, \*5 (E.D. Wis. 2017). The district court reasoned that a conviction for resisting means that the police officer's actions were lawful "at the time." *Id.* The *Jones* court qualified its holding:

If Jones's claim depends upon the jury concluding that *he never resisted or obstructed the officers*, or resisted *only in response to the officers' use of excessive force*, such a claim would be inconsistent with the jury's conclusion in his criminal trial and barred by *Heck*.

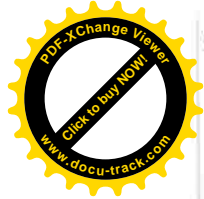
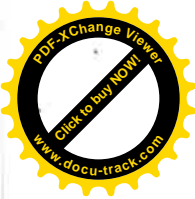
*Id.* (emphasis added). The *Jones* court denied the defendants' motion to bar the excessive force claim on the grounds that the plaintiff could maintain the excessive force claim so long as he did not insist on alleging that he never resisted. *Id.*



In *VanGlider v. Baker*, the Seventh Circuit held that a conviction of resisting does not invalidate an action for excessive force. 435 F.3d at 692. VanGlider was arrested for public intoxication. *Id.* at 690. The defendant officer brought VanGlider to the hospital for a blood draw, where VanGlider resisted the defendant officer and hospital personnel. *Id.* According to the police report, VanGlider, taunted the defendant officer telling him: “I’m going to keep you here all night.” VanGlider alleges that the defendant officer struck him in the face. *Id.* at 691. The police report alleged that VanGlider first kicked the defendant officer in the side of the head, causing him to suffer a concussion, to which he responded by punching VanGlider “repeatedly in the face with a closed fist.” *Id.* The defendant officer characterized the punches as an effort to regain control after VanGlider’s resistance. *Id.* A nurse who was present said that VanGlider was “belligerent and that she feared he might try to grab Baker’s gun.” *Id.* VanGlider was originally charged with battery of an officer but plead to resisting a law enforcement officer. *Id.* In refusing to bar the excessive force claim, the Seventh Circuit reasoned that doing so “would imply that once a person resists law enforcement, he has invited the police to inflict any reaction or retribution they choose, while forfeiting the right to sue for damages.” *Id.*

Kowalczyk does not deny his role in the altercation, or the validity of his convictions. Rather, he alleges that Giese’s responding force was unreasonable under the Fourth Amendment. (*Id.* at ¶¶ 5, 38). With respect to the conviction of resisting, Kowalczyk’s amended complaint concedes that Kowalczyk resisted Giese. Kowalczyk resisted Giese’s instructions to get on the ground. (*Id.* at ¶ 24.) Kowalczyk twice did not comply with Giese’s instructions to stay on the ground when his mother and father came outside. (*Id.* at ¶¶ 33-34.) Finally, Kowalczyk kicked Giese. (*Id.* at ¶ 35.) These allegations are consistent with his conviction for resisting, under Wis.





Stat. § 946.41(1).<sup>3</sup> As to the battery charge, Kowalczuk does not allege self-defense and does not dispute that the kick caused pain and was done without Giese's consent. (*See* Luther Dec., ¶ 2, Ex. 1, Criminal Complaint). As such, Kowalczuk's allegations are also consistent with his conviction for battery of an officer, under Wis. Stat. § 940.20(2)<sup>4</sup>

Kowalczuk simply does not seek to collaterally attack his convictions. Though regrettable, Kowalczuk's actions do not forfeit his § 1983 claims against Giese. As alleged, Giese use of force was "unreasonable" in light of the resistive acts of Kowalczuk that form the basis of his resisting and battery convictions. Accordingly, a finding of excessive force does not "necessarily imply" the invalidity of those convictions. As such, the defendants' motion to dismiss the excessive force claim should be denied. For the same reasons, the Court should deny the defendant's motion to dismiss the *Monell* claim.<sup>5</sup>

### CONCLUSION

For the reasons stated herein, the Court should deny the defendant's motion to dismiss the plaintiff's claim of excessive force against Eric J. Giese and the *Monell* claim against the Village of Mount Pleasant.

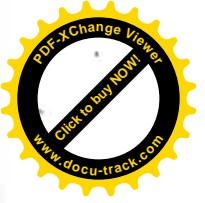
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<sup>3</sup> Except as provided in subs. (2m) and (2r), whoever knowingly resists or obstructs an officer while such officer is doing any act in an official capacity and with lawful authority is guilty of a Class A misdemeanor." Wis. Stat. § 946.41(1)

<sup>4</sup> Whoever intentionally causes bodily harm to a law enforcement officer or fire fighter, as those terms are defined in s. 102.475 (8) (b) and (c), or to a commission warden, acting in an official capacity and the person knows or has reason to know that the victim is a law enforcement officer, fire fighter, or commission warden, by an act done without the consent of the person so injured, is guilty of a Class H felony. Wis. Stat. § 940.20(2) (2013-2014)

<sup>5</sup> The defendant's motion to dismiss the *Monell* claim is predicated on the dismissal of the excessive force claim. (Dkt. 6., Def. Memo at 13.)





Dated: October 9, 2019

**MARTIN LAW OFFICE, S.C.**  
Attorney for Plaintiff(s)

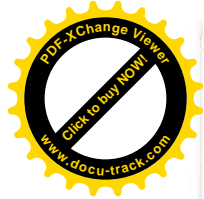
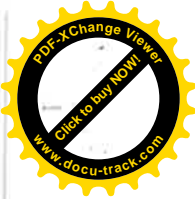
*Electronically Signed by Drew J. DeVinney*

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Drew J. De Vinney  
State Bar No. 01088576

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drew@martin-law-office.com



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

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MICHAEL A. KOWALCZUK,

Plaintiff,

Case No. 2:19-cv-1230

v.

ERIC GIESE and  
VILLAGE OF MOUNT PLEASANT,

Defendants.

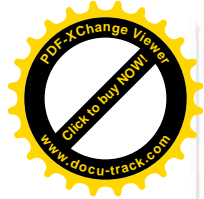
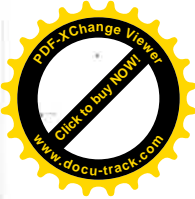
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**REPLY MEMORANDUM IN SUPPORT  
OF DEFENDANTS' MOTION TO DISMISS**

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On September 18, 2019, Defendants filed their Motion to Dismiss the Complaint arguing Plaintiff Kowalczuk's claims are barred by the United States Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994). On October 9, 2019, Plaintiff filed his opposition to this motion and filed his Amended Complaint. The Amended Complaint is materially the same as the original Complaint with the exception that Plaintiff abandoned his claim for false arrest and any claim against Officer Matt Soens. The claims for excessive force, violation of *Monell*, and punitive damages remain, as do Plaintiff's recitation of his intoxicated traffic stop encounter with Officer Eric Giese.

Defendants request dismissal of Plaintiff's remaining claims. To reflect Plaintiff's filing of an Amended Complaint, Defendants have concurrently filed an Amended Motion to Dismiss identifying Plaintiff's Amended Complaint as the operative document. For Kowalczuk to prevail on his excessive force claim, proofs of the elements of his claim necessarily implies the invalidity of his convictions for battery to a law enforcement officer and for resisting or obstructing arrest.



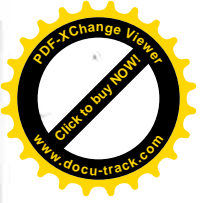
These proofs run afoul of the Supreme Court's ruling in *Heck* and his claim for excessive force should be dismissed. The claim under *Monell* and the claim for punitive damages should also be dismissed as they are dependent upon the excessive force claim. *See, e.g., Kitchen v. Dallas Cnty. Tex.*, 759 F.3d 468, 483 (5<sup>th</sup> Cir. 2014) (municipal liability requires an underlying constitutional violation).

### **ARGUMENT**

A person convicted of a criminal offense cannot raise a civil claim under section 1983 "which, if true, would have established the invalidity of his outstanding conviction." *Wallace v. Kato*, 549 U.S. 384, 392, 127 S. Ct. 1091, 166 L. Ed. 2d 973 (2007), *interpreting Heck*. It is inconsequential whether a plaintiff denies seeking to challenge his conviction because, "if he makes allegations that are inconsistent with the conviction having been valid, *Heck* kicks in and bars his civil suit." *Okoro v. Callaghan*, 324 F.3d 488, 490 (7<sup>th</sup> Cir. 2003), *citing Edwards v. Balisok*, 520 U.S. 641, 646-48, 117 S. Ct. 1584, 137 L. Ed. 2d 906 (1997). A plaintiff "can only proceed to the extent the facts underlying the excessive force claim are not inconsistent with the essential facts supporting the conviction." *Helman v. Duhaime*, 742 F.3d 760, 762 (7<sup>th</sup> Cir. 2014), *interpreting Evans v. Poskon*, 603 F.3d 362 (7<sup>th</sup> Cir. 2010). In the present case, Plaintiff's attempt to recast his claims cannot avoid the fact that his claims continue to directly challenge the facts underlying his criminal convictions.

#### **I. PLAINTIFF'S AMENDED COMPLAINT NECESSARILY IMPLIES THE INVALIDITY OF HIS CRIMINAL CONVICTIONS.**

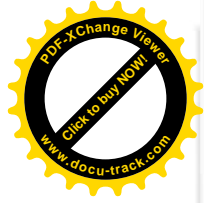
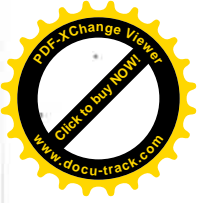
Plaintiff's excessive force claim is diametrically at odds with his convictions for battery to a law enforcement officer and resisting or obstructing a law enforcement officer. The United States District Court for the Eastern District of Wisconsin has observed that "[u]nder Wisconsin law, a person can be convicted of resisting or obstructing only if the police officer is acting with lawful



authority. ‘Lawful authority’ requires that police conduct be in compliance with both the federal and state Constitutions, in addition to any applicable statutes.” *Jones v. Phillips*, 2017 WL 1292376, \*5 (E.D. Wis. 2017) (emphasis added), citing *State v. Ferguson*, 2009 WI 50, ¶ 16, 317 Wis. 2d 586, 767 N.W.2d 187. In *Jones*, the district court concluded, “a conviction for resisting or obstructing an officer under Wisconsin law necessarily means that the jury concluded that the police officers’ actions at the time were constitutional (which means that the officers were not using excessive force at the time).” *Id.* Based on this line of reasoning alone, Plaintiff’s claims should be dismissed per *Heck* because Plaintiff’s conviction for resisting or obstructing an officer means that Officer Giese was not using excessive force in violation of the United States Constitution.

A close comparison of Kowalczyk’s Amended Complaint and the criminal complaint filed against him further confirms that Plaintiff’s Amended Complaint seeks to undermine Plaintiff’s conviction that he resisted or obstructed a police officer. The criminal complaint, which formed the basis for Kowalczyk’s ultimate plea and conviction, alleged that Kowalczyk exited his car on his own and refused to comply with Officer Giese’s command to get down on the ground. (Affidavit of Jennifer Luther, ¶ 2, Ex. 1, p. 2 [7].) Officer Giese directed Kowalczyk to the ground. (*Id.*) Kowalczyk started to get up when he saw his family members in spite of Officer Giese continuing to order him to remain on the ground. (*Id.*) After Officer Giese directed Kowalczyk to the ground a second time, Kowalczyk kicked Officer Giese first in the abdomen and second in the groin. (*Id.*, ¶ 3.) When Officer Giese instructed Kowalczyk to remain on the ground Kowalczyk kicked Officer Giese again. (*Id.*)

Kowalczyk then arose and approached Officer Giese in an aggressive manner at which point Officer Giese employed his taser causing Kowalczyk to fall to the ground. (*Id.*) Kowalczyk

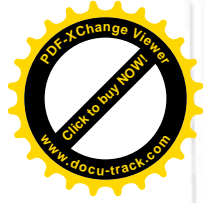
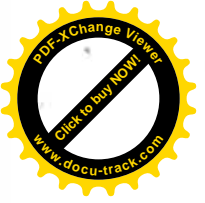


began to get up again, contrary to Officer Giese's commands, leading Officer Giese to use the taser a second time. (*Id.*)

Plaintiff's description of events in the Amended Complaint greatly differs from what is described in the criminal complaint. Kowalczuk alleged Officer Giese exerted great force in pulling him out of his vehicle and pushing him to the ground. (Amended Complaint, ¶ 25.) He further alleged that when got up from the ground he did not approach Officer Giese in an aggressive manner when Officer Giese used a taser on him. (*Id.*, ¶ 35.) He alleges Officer Giese used a taser a second time when Kowalczuk was on the ground as he began to regain consciousness and move. (*Id.*, ¶ 36.) The Amended Complaint makes no mention of Kowalczuk approaching Officer Giese in an aggressive manner immediately prior to the first use of the taser and makes a very brief, cursory reference to Kowalczuk refusing to obey Officer Giese's orders and kicking Officer Giese. (*Id.*, ¶¶ 33 – 35.)

The reason why Plaintiff's description of events is dramatically different is simple – he seeks to attempt to prove that Officer Giese's actions were not reasonable. However, in order to make this factual proof, Kowalczuk must deny (either explicitly or through silent omission) Kowalczuk's own actions that resulted in Officer Giese using force. Kowalczuk could not make a case of excessive force against an officer for using his taser while also conceding that immediately before the use of the taser he kicked the officer in the abdomen, kicked him again in the genitals, and kicked him a third time.

Kowalczuk's Amended Complaint seeks to establish his innocence for the incident through the guise of his civil excessive force claim. *Mordi v. Zeigler*, 870 F.3d 703, 708 (7<sup>th</sup> Cir. 2017) (in *Okoro* “we held that defendant Okoro's effort to complain about a search was just a disguised way of asserting his innocence.”) His claim, if successful, would necessarily imply the invalidity of



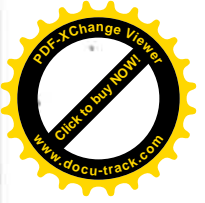
his actions that led to the criminal charges that were filed against him from the incident. It would also repudiate his criminal conviction for resisting and obstructing an officer. Such arguments and proofs are barred by *Heck* and his Amended Complaint should be dismissed.

## **II. ALTERNATIVELY, OFFICER GIESE'S USE OF FORCE WAS OBJECTIVELY REASONABLE.**

This court can also dismiss Plaintiff's claims finding that Officer Giese's use of a taser under the circumstances described in Plaintiff's Amended Complaint was not excessive force. The Fourth Amendment inquiry into reasonableness is an objective one to be determined in light of the facts and circumstances confronting the officer. *Graham v. Connor*, 490 U.S. 386, 396-97, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989); *Common v. City of Chicago*, 663 F.3d 940, 943 (7<sup>th</sup> Cir. 2011). In Kowalczyk's recitation of events in his Amended Complaint, he admitted Officer Giese employed his taser only after Kowalczyk kicked Officer Giese and refused to obey his orders to remain on the ground. (Amended Complaint, ¶¶ 33-35.) In *Helman*, the Seventh Circuit Court of Appeals declared that it was objectively not excessive force for officers to shoot a person resisting arrest who was reaching for a firearm. *Helman*, 742 F.3d at 763. The Seventh Circuit affirmed the district court's dismissal of Helman's section 1983 claim for excessive force. *Id.* In much the same way, it was objectively reasonable for Officer Giese to employ his taser after Kowalczyk kicked Officer Giese multiple times and repeatedly refused to obey his orders to remain on the ground.

## **CONCLUSION**

For the foregoing reasons and reasons contained in their moving and reply memoranda, Defendants request the Court dismiss the Plaintiff's claims contained in the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6).



Dated this 23rd day of October, 2019.

AXLEY BRYNELSON, LLP

Electronically signed by Kevin D. Trost

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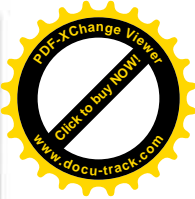
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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

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MICHAEL A. KOWALCZUK,

Plaintiff,

Case No. 2:19-cv-1230

v.

ERIC GIESE and VILLAGE OF  
MOUNT PLEASANT,

Defendants.

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**NOTICE OF RETAINER**

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PLEASE TAKE NOTICE that Axley Brynelson, LLP, Kevin D. Trost, is retained by and appears for Defendants, Eric Giese and the Village of Mount Pleasant in the present legal proceeding.

Dated this 23rd day of October, 2019.

AXLEY BRYNELSON, LLP

Electronically signed by Kevin D. Trost

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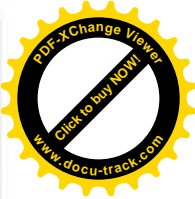
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UNITED STATES DISTRICT COURT  
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**DEFENDANTS' AMENDED MOTION TO DISMISS**

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NOW COME Defendants Eric Giese and the Village of Mount Pleasant, by and through their undersigned attorneys, and hereby respectfully move this Court, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing Plaintiff's Amended Complaint on the grounds that the Amended Complaint fails to state a claim upon which relief can be granted. The grounds for this amended motion are more specifically set forth in the previously filed Defendants' Brief in Support of Motion to Dismiss and Declaration of Jennifer M. Luther, and the Reply Memorandum In Support of Defendants' Motion to Dismiss filed herewith.

Dated this 23rd day of October, 2019.

AXLEY BRYNELSON, LLP

Electronically signed by Kevin D. Trost

Lori M. Lubinsky (State Bar No. 1027575)

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