

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

BETHANY BARBEE, EDWARD BARBEE, DARLENE BARBEE,
THOMAS BARBEE, MARGARET BARBEE, GLADYS BARBEE,
MATTHEW BARBEE, HARVEY BARBEE, JANE BARBEE
and BERNICE WILLIAMS,

Plaintiffs,

MEMORANDUM AND ORDER

v.

05-C-249-S

UNITED STATES OF AMERICA and
MARY FALK, as Administrator and
Personal Representative of the
Estate of Danielle Skatrud, Deceased,

Defendants.

ESTATE OF JUSTIN VANDRE and
PAULA DORN,

Plaintiffs,

05-C-303-S

v.

UNITED STATES OF AMERICA and
THE ESTATE OF DANIELLE SKATRUD,

Defendants.

Plaintiffs Edward Barbee, Darlene Barbee, Thomas Barbee, Margaret Barbee and Jane Barbee (hereinafter Barbee plaintiffs) commenced this personal injury action against defendant United States of America seeking monetary relief. Plaintiffs allege defendant is liable for damages including those for loss of consortium pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. Jurisdiction is based on 28 U.S.C. § 1346(b)(1). The

matter is presently before the Court on defendant's motion for partial summary judgment on plaintiffs' loss of consortium claims. Also before the Court is defendant's motion to dismiss plaintiff Jane Barbee. Plaintiffs failed to respond to defendant's proposed findings of fact. Accordingly, the Court views defendant's proposed facts as undisputed. Doe v. Cunningham, 30 F.3d 879, 883 (7th Cir. 1994).

FACTS

On October 12, 2002 a five car accident occurred on Interstate 90/94 in Dane County. Two of the cars involved were driven by Barbee plaintiffs. One of the other drivers was Vaughn Larson. At the time of the accident Mr. Larson was acting within the course and scope of his employment as a Staff Sergeant for the United States Army. Accordingly, defendant was made a party to this action by order of the Court dated December 27, 2004 in the matter of Nationwide Mut. Fire Co. et al. v. United States of America, 04-C-729-S.

The Federal Tort Claims Act requires parties suing the United States to exhaust all available administrative remedies before they file an action in a district court. 28 U.S.C. § 2675(a). Accordingly, the United States Army received Edward Barbee's administrative claim form on October 8, 2004. In his claim he described the nature and extent of the injuries he suffered in the accident. He stated he suffered a scalp wound and

bilateral ankle fractures. He did not identify loss of consortium anywhere on the administrative claim form he filed with the United States Army.

The United States Army also received Darlene Barbee's administrative claim form on October 8, 2004. In her claim she stated she suffered torn ligaments in her left ankle and torn medial meniscus of her right knee. She also did not list loss of consortium on her administrative claim form.

Thomas Barbee also filed an administrative claim form with the United States Army. It received the form on October 8, 2004. He described the nature and extent of his injuries as follows: foreign body in ear, fracture of sternum, fracture of right hand, sprain of left knee, and sternal hematoma. Mr. Barbee did not identify loss of consortium on the claim form he filed with the United States Army.

Margaret Barbee's administrative claim was also received by the United States Army on October 8, 2004. In her claim she described the nature and extent of her injuries as follows: right ankle fracture, left second metatarsal shaft fracture, left minimally displaced scapular body fracture, retinal tear and scarring. She also did not identify loss of consortium on her administrative claim form.

Finally, Jane Barbee never filed an administrative claim form with the United States Army.

MEMORANDUM

Defendant argues it is entitled to summary judgment on plaintiffs' loss of consortium claims because none of the claims were described on the administrative claim forms. Accordingly, defendant argues plaintiffs did not exhaust their administrative remedies and the Court lacks jurisdiction to consider these claims. It also argues plaintiff Jane Barbee should be dismissed because she never filed an administrative claim form. Plaintiffs argue summary judgment is not appropriate because everyone (with the exception of Jane Barbee) filed an administrative claim form and listed their marital status as married. Plaintiffs argue this puts defendant on notice of loss of consortium claims. Plaintiffs also argue since Jane Barbee's husband filed an administrative claim and indicated he was married she sufficiently complied with the requirements of the Act.

Summary judgment is appropriate where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c).

A fact is material only if it might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). Disputes over unnecessary or irrelevant facts will not preclude summary judgment. Id. Further, a factual issue is genuine only if the evidence is

such that a reasonable fact finder could return a verdict for the nonmoving party. Id.

To determine whether there is a genuine issue of material fact courts construe all facts in the light most favorable to the non-moving party. Heft v. Moore, 351 F.3d 278, 282 (7th Cir. 2003) (citations omitted). Additionally, a court draws all reasonable inferences in favor of that party. Id. However, the non-movant must set forth "specific facts showing that there is a genuine issue for trial" which requires more than "just speculation or conclusory statements." Id. at 283 (citations omitted).

The United States is immune from suit unless it consents to be sued. United States v. Sherwood, 312 U.S. 584, 586, 61 S.Ct. 767, 769 (1941) (citations omitted). Additionally, any waiver of immunity must be strictly construed. Id. at 590, 61 S.Ct. at 771 (citations omitted). The Federal Tort Claims Act is a congressional waiver of sovereign immunity. Charlton v. United States, 743 F.2d 557, 558 (7th Cir. 1984) *citing* (Erxleben v. United States, 668 F.2d 268 (7th Cir. 1981)). Accordingly, a plaintiff must comply with the Act's requirements to have a forum for his or her claim. Id.

Section 2675(a) of the Federal Tort Claims Act requires a claimant to first present his or her claim to the appropriate federal agency before he or she can institute an action against the United States. 28 U.S.C. § 2675(a). This presentation includes giving sufficient notice to enable the agency to investigate the

claim and the setting of a "sum certain." Charlton, at 559-560 *citing* (28 C.F.R. § 14.2(a)). These two elements are necessary for institution of a federal court suit. Id. at 560. Notice not meeting these two requirements is invalid and a suit cannot be based upon an invalid request. Id. Accordingly, a federal court lacks jurisdiction of a suit filed pursuant to an insufficient request. Id. (citations omitted).

While courts have held neither the Federal Tort Claims Act nor 28 C.F.R. § 14.2 expressly require a claimant to state the nature and extent of the injuries for which damages are sought there has to be enough information to constitute sufficient notice. Loper v. United States, 904 F.Supp 863, 865 (N.D. Ind. 1995). Plaintiffs did not include enough information on their administrative claim forms to put defendant on notice they were claiming loss of consortium.

The prevailing rule is the filing of an administrative claim by the recipient of a direct injury is insufficient to put the government on notice of a claim for loss of consortium on the part of a related adult. See Pipkin v. United States Postal Serv., 951 F.2d 272 (10th Cir. 1991), Rucker v. United States Dept. of Labor, 798 F.2d 891 (6th Cir. 1986), Johnson v. United States, 704 F.2d 1431 (9th Cir. 1983). This is especially true when the claimant does not mention the lost services in his or her claim. Fol v. United States, 548 F.Supp. 1257, 1258 (S.D.N.Y. 1982). This case is distinguishable in the sense that each Barbee plaintiff

(with the exception of Jane Barbee) filed an administrative claim form of their own with the United States Army. Accordingly, plaintiffs are not relying on the administrative claim of a related adult to satisfy the notice requirement. However, on the form each plaintiff described his or her direct injuries in great detail and none of the plaintiffs mentioned loss of consortium on their forms. This does not comply with the notice requirement. Further, plaintiffs did not substantially comply with the notice requirement for their loss of consortium claims simply by indicating they were married. Rigdon v. United States Postal Serv., 2002 WL 31689422 at 3 (E.D. La. 2002). Imposing liability on defendant when it did not receive sufficient notice would circumvent the elementary principle that a waiver of sovereign immunity must be strictly construed. Sherwood, at 590, 61 S.Ct. at 771. Accordingly, the Court does not have jurisdiction to consider plaintiffs' loss of consortium claims.

Also before the Court is defendant's motion to dismiss plaintiff Jane Barbee. Defendant argues since she never filed an administrative claim her action must be dismissed for failure to comply with the Federal Tort Claims Act. Filing an administrative claim is an absolute prerequisite to maintaining a civil action against the government for damages arising from a "tortious occurrence due to the negligence of a federal employee." Best Bearings Co. v. United States, 463 F.2d 1177, 1179 (7th Cir. 1972).

Plaintiff admits she never filed an administrative claim with the United States Army. However, she argues since her husband filed a claim and indicated he was married she substantially complied with the Act. Her husband did file a form and he listed his direct injuries. However, he did not list any lost services. Additionally, Ms. Barbee's name does not appear on the form as a claimant and she never signed his form. Accordingly, her husband's claim cannot serve as notice of her loss of consortium claim. See Fol, at 1258, Johnson, at 1442. Since plaintiff failed to comply with the requirements of the act she does not have a forum for her claim against the government in this Court. Charlton, at 558. However, the Court will not dismiss her from the action. Although Jane Barbee cannot proceed against the United States she can maintain her action against defendant Mary Falk. Accordingly, she remains a party to the action.

ORDER

IT IS ORDERED that defendant United States of America's motion for partial summary judgment is GRANTED.

IT IS FURTHER ORDERED that said defendant's motion to dismiss plaintiff Jane Barbee is GRANTED as it concerns her claims against defendant United States and in all other respects DENIED.

Entered this 30 day of September, 2005.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge