

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

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BRENDA MOMBOURQUETTE,  
by her guardian TAMMY MOMBOURQUETTE,  
E.S. (a minor), and C.S. (a minor),

ORDER

Plaintiffs,

05-C-748-C

WISCONSIN DEPARTMENT  
OF HEALTH AND FAMILY SERVICES,

Involuntary Plaintiff,

v.

CHARLES AMUNDSON, Individually  
in his supervisory capacity, JEANNE REINART, Individually,  
CANDACE WARNER, Individually; DAVID SHALDACH,  
Individually, SANDIE WEGNER, Individually, ANNA  
JANUSHESKE, Individually, MIKE WILDES, Individually,  
JANITA LEIS, Individually, SUE WIEMAN, Individually,  
and PATRICIA FISH, Individually,

Defendants.

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Plaintiff Brenda Mombourquette attempted suicide twice while detained in the  
Monroe County jail and suffered brain damage as a result. Her sister and guardian, Tammy  
Mombourquette, brought this suit, along with Brenda's children, contending that defendants

failed to take adequate steps to prevent Brenda from harming herself. The parties are briefing three motions for summary judgment filed by different groups of defendants.

Currently before the court is a motion filed by plaintiffs to strike defendant David Shaldach's motion for summary judgment. Plaintiffs' primary argument is that defendant Shaldach failed to file a brief in support of his motion. Although plaintiffs are correct that the court's procedures require parties to file a brief explaining why they are entitled to summary judgment, the rules do not prohibit parties from joining or adopting another party's brief, which is what defendant Shaldach did in this case. Dft. Shaldach's Statement Regarding Br., dkt. # 59, at 1-2 ("Defendant Shaldach joins in the . . . brief . . . filed in support of the Motion for Summary Judgment submitted by counsel for the Monroe County Defendants.")

Plaintiffs advance a similar argument that defendant Shaldach's motion violates Fed. R. Civ. 11, which requires that all documents filed with the court be signed by the attorney submitting the document. Plaintiffs argue that because counsel for defendant Shaldach did not sign the other defendants' brief himself, he cannot rely on it. This is an overly technical view of the rules. Counsel for defendant Shaldach did not sign the brief submitted by the other defendants, but he did sign the statement in which he adopted the brief. This was all that Rule 11 required.

Plaintiffs suggest that they are prejudiced by defendant Shaldach's failure to file his

own brief because Shaldach's situation is different from that of the other defendants. If this is true, it hurts defendant Shaldach, not plaintiffs. Under Fed. R. Civ. P. 56, defendant Shaldach has the initial burden to show that he is entitled to summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the other defendants' arguments do not apply to defendant Shaldach, his motion will be denied even if the other defendants' motions are granted. Plaintiffs will not be required to anticipate arguments that defendant Shaldach failed to make.

Plaintiffs argue also that defendant Shaldach's motion should be stricken because it is untimely, but I cannot consider this argument because it is made for the first time in plaintiffs' reply brief. Porco v. Trustees of Indiana University, 453 F.3d 390, 395 (7th Cir. 2006). In any event, it is difficult to surmise how plaintiffs could be prejudiced by the motion, which was filed two business days after the deadline. Defendant Shaldach adopted not only the brief but also the proposed findings of fact of the other defendants. Thus, plaintiffs have no additional arguments or proposed facts to rebut in responding to Shaldach's motion.

The practice of adopting another party's brief is a common one that may serve the purposes of both efficiency and economy. In fact, it is somewhat surprising that plaintiffs filed this motion, given the prevalence and generally uncontroversial nature of the practice. Whatever plaintiffs' reasons for bringing the motion, they are unfounded. Plaintiffs' motion

to strike defendant Shaldach's motion for summary judgment will be denied.

One further matter requires attention. In their amended complaint, filed on May 5, 2006, plaintiffs named the Wisconsin Department of Health and Family Services as an involuntary plaintiff. On page four of the complaint, plaintiffs allege, "Wisconsin Department of Health and Family Services is the funding source for Wisconsin medical assistance and upon information and belief may have provided benefits to the plaintiff as a result of the subject claim and, therefore, may be entitled to reimbursement under Wis. Stats. §49.89(2)." On May 18, 2006, attorney Shelley Malofsky filed with the court a waiver of service of summons on behalf of the department. Since that time, however, the department has been a nonentity in this case. The department has filed no documents with the court, not even a notice of appearance. More important, it appears that none of the other parties have been serving their filings on the department since the complaint was amended. In fact, they have left the department off the caption of all their documents.

If the Wisconsin Department of Health and Family Services is to be a party in this action, the other parties are required to serve all court filings on the department. Fed. R. Civ. P. 5(a) requires that "every pleading" filed must "be served upon each of the parties." I am aware of no exception to this rule for involuntary plaintiffs. If, on the other hand, plaintiffs have decided that the department is not a necessary party, then the department should be dismissed.

Plaintiffs may have until November 16, 2006, in which to show cause why the Wisconsin Department of Health and Family Services should not be dismissed for plaintiffs' failure to serve them after amending the complaint. If the department or defendants wish to oppose any submission by plaintiffs, they may have until November 30, 2006, in which to do so. Further, if the department or defendants believe that the department was improperly named an involuntary plaintiff, they may argue this in their response. (Plaintiffs may wish to anticipate any potential arguments in their submission to the court.) Fed. R. Civ. P. 19(a) (party may be joined as involuntary plaintiff in "proper case" only); Charles Alan Wright, et al., Federal Practice & Procedure § 1606, at 73-74 (3d ed. 2001) (arguing that "proper case" is limited to instances in which court could not exercise jurisdiction over party as defendant). Plaintiffs may have until December 7, 2006 in which to file a reply.

## ORDER

IT IS ORDERED that

1. The motion filed by plaintiffs Brenda Mombourquette, Tammy Mombourquette, E.S. and C.S. to strike defendant David Shaldach's motion for summary judgment is DENIED.

2. Plaintiffs may have until November 16, 2006, in which to show cause in writing why involuntary plaintiff Wisconsin Department of Health and Family Services should not

be dismissed. Involuntary plaintiff and defendants may have until November 30, 2006, in which to file a response, if they wish to do so. Plaintiffs may have until December 7, 2006, in which to file a reply.

Entered this 2d day of November, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge