

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

WAYNE K. ROESLER
and MARIEN ROESLER,

Plaintiffs,

v.

ORDER

11-cv-753-wmc

UNITED STATES,
AUTO-OWNERS INSURANCE COMPANY,
AMERICAN FAMILY MUTUAL INSURANCE
and OPERATING ENGINEERS LOCAL 139
HEALTH BENEFIT FUND,

Defendants.

Defendant United States moves to dismiss this action for lack of subject matter jurisdiction due to plaintiffs Wayne K. Roesler and Marien Roesler's failure to exhaust their administrative remedies as required by the Federal Tort Claims Act, 28 U.S.C. § 2765(a). (Dkt. #4.) Plaintiffs implicitly acknowledged the merit of the United States' motion by declining to respond to it (dkt. #9) and now affirmatively indicate they "do not oppose" it (dkt. #11).

Accordingly, the court dismisses the FTCA claim. *See Denton v. United States*, No. 10-3517, 2011 WL 4015629, at *4 (7th Cir. Sept. 12, 2011) ("Failure to exhaust administrative remedies before bringing a suit under the FTCA mandates dismissal." (citing *McNeil v. United States*, 508 U.S. 106, 113 (1993))).¹ Moreover, the court

¹ Dismissal is appropriate when a plaintiff has failed to exhaust. Contrary to the United States' representation in its brief to this court, however, the Seventh Circuit reiterated its

dismisses this claim with prejudice given plaintiffs' concession that it is time-barred for failure to exhaust since more than two years has lapsed since December 22, 2008, the date of the incident which forms the basis of their allegations against the United States. 28 U.S.C. § 2401(b). Finally, the court remands the remainder of this case against the remaining defendants to Marathon County Circuit Court for lack of subject matter jurisdiction.

ORDER

IT IS ORDERED that:

- 1) defendant United States of America's motion to dismiss (dkt. #4) is GRANTED;
- 2) plaintiffs' claim against defendant United States of America is DISMISSED WITH PREJUDICE;
- 3) plaintiffs' remaining claims are remanded to Marathon County Circuit Court; and
- 4) the Clerk of the Court is directed to close this case.

Entered this 4th day of January, 2012.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge

prior holding that "the FTCA's exhaustion requirement is *not* jurisdictional." *Denton*, 2011 WL 4015629, at *3 (emphasis added) (citing *Collins v. United States*, 564 F.3d 833, 837-38 (7th Cir. 2009); *Parrott v. United States*, 536 F.3d 629, 634-35 (7th Cir. 2008)).