

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

KA YANG, YIA YANG and
XAI YANG, a minor through
his guardian ad litem,
Daniel F. Schmeeckle,

Plaintiffs,

v.

PORTAGE COUNTY, WISCONSIN,

Defendant.

ORDER

12-cv-797-bbc

In this case brought under 42 U.S.C. § 1983, the parties are debating the extent to which they are entitled to a \$25,000 settlement plaintiffs received from their insurance company after a car accident. After plaintiffs filed a motion for summary judgment, defendant filed a motion for relief under Fed. R. Civ. P. 56(d), arguing that it could not respond to plaintiffs' motion without conducting discovery. In response to defendant's motion, plaintiffs said that discovery was unnecessary because the primary questions raised in their summary judgment motion are questions of law: "whether 42 U.S.C. §§ 1396p(a)(1), 1396p(b)(1) and Ahlborn prohibit the type of lien claimed by Portage County and whether the Ahlborn pro-rata allocation formula should apply to this matter." Plts.' Br., dkt. #14, at 9. In an order dated December 18, 2012, I denied defendant's motion, but limited the summary judgment motion to the issues plaintiff identified to avoid the need for

discovery at this stage of the proceedings. Dkt. #16.

Having now reviewed the parties' summary judgment submissions, I see that there is a threshold question I must resolve, which is whether plaintiffs may use § 1983 to sue for violations of 42 U.S.C. § 1396p. Plaintiffs included an argument that they can in their opening brief, but defendant refused to respond to it on the ground that it was outside the scope of the issues identified in the December 18 order. That was unfortunate. If defendant had a question about the issue, it could have asked the court for clarification. It seems however that common sense would have suggested that the issue fell within the scope of plaintiffs' summary judgment motion when no discovery was required to develop an argument on the question whether plaintiffs have a private right of action. It would make little sense to resolve that issue after deciding the merits of plaintiffs' claim.

Accordingly, I will give defendant an opportunity to address this issue now. If defendant does not respond, I will construe its silence as a waiver. Bertrand ex rel. Bertrand v. Maram, 495 F.3d 452, 457-58 (7th Cir. 2007) (existence of private right of action is not jurisdictional and therefore is subject to waiver).

ORDER

IT IS ORDERED that defendant Portage County may have until February 25, 2013, to file a brief on the question whether plaintiffs Kai Yang, Yia Yang and Xai Yang may use 42 U.S.C. § 1983 to sue for violations of 42 U.S.C. § 1396p. Plaintiffs may have until

March 6, 2013, to file a reply.

Entered this 20th day of February, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge