

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

JON SOTO and
THE ESTATE OF DONNA M. SOTO,

Plaintiffs,

v.

DAVID GIBBONS and
KEVIN ELY,

Defendants.

OPINION & ORDER

14-cv-234-jdp

Pro se plaintiff Jon Soto, a prisoner incarcerated at the Stanley Correctional Institution, submitted a proposed civil action under 42 U.S.C. § 1983 on his own behalf as well as on behalf of the estate of his deceased mother, Donna Soto, alleging that defendants David Gibbons and Kevin Ely, officers employed by the Trempealeau County Sheriff's Office, entered the Sotos' home to arrest Jon (who was not home at the time) without a warrant, shoving Donna in the process.¹ Jon's allegations stated that defendants' actions "contributed to the death" of Donna.

In a previous order I stated that Jon and the estate could proceed on Fourth Amendment claims, but I dismissed the remainder of the complaint as too vague to properly state claims under Federal Rule of Civil Procedure 8:

There are other potential claims related to the harm done to Donna, including a Fourth Amendment excessive force claim and state law claims for assault and battery and wrongful death. However, I cannot tell from Jon's extremely vague allegation that defendants "contributed to the death" of Donna whether he or the estate may proceed on any of these claims.

¹ To avoid confusion I will generally refer to Jon and Donna Soto by their first names.

Dkt. 6, at 3.

Now Jon had submitted supplemental allegations and medical records providing more detail in support of his and the estate's claims. Medical records show that in the months following the incident, Donna was hospitalized for atrial fibrillation and diagnosed with congestive heart failure. She died in May 2011. Dkt. 11 and 11-1. I understand Jon to be alleging that the incident caused Donna severe stress, which caused or contributed to her heart problems and ultimately led to her death. I also understand Jon to be alleging that the incident and aftermath caused him to suffer from depression and post-traumatic stress disorder.

I will first address the claims Jon wishes to bring on behalf of the estate. Under Wisconsin's survival statute, Wis. Stat. § 895.01, claims for damages to a deceased person survive that person's death and pass to the person's estate. "Survival actions are not new actions created by the death of the victim. They are actions that the victim would have had available to him if he had survived." *Christ v. Exxon Mobil Corp.*, 2015 WI 58, ¶ 19, 362 Wis. 2d 668, 866 N.W.2d 602. However, courts have concluded that "if the administrator is not the sole beneficiary of the estate, then he or she may not represent the estate in court" on a *pro se* basis. *Malone v. Nielson*, 474 F.3d 934, 937 (7th Cir. 2007); *see also Guest v. Hansen*, 603 F.3d 15, 20 (2d Cir. 2010); *Shepherd v. Wellman*, 313 F.3d 963, 970 (6th Cir. 2002). This is because "administrators do not act on behalf of themselves, but on behalf of all of the beneficiaries of an estate." *Malone*, 474 F.3d at 937.

It is clear from further research that Jon is not the sole beneficiary of the estate. He has already lost a state court case in which he sought to invalidate admission of Donna's will into probate. *See Soto v. Soto (In re Estate of Soto)*, 2014 WI App 90, 356 Wis. 2d 327, 855

N.W.2d 492, *review dismissed*, 2014 WI 122, 855 N.W.2d 698. Donna’s will excluded Jon and one of his three siblings from being beneficiaries. *See id.* at ¶ 2 n.1 (“The will states: ‘Due to the fact that they are otherwise provided for, I have specifically excluded my sons JON A. SOTO and JOE A. SOTO under the terms of this will.’”). So not only is Jon not the sole beneficiary, he is not a beneficiary at all. Nor is he the personal representative of Donna’s estate. Because the proper party to bring the survival claims is an attorney representing the estate, *Malone*, 474 F.3d at 937, I will dismiss the survival claims from this lawsuit, including the Fourth Amendment claim that I had previously stated Jon could pursue on behalf of the estate.

As for claims pertaining to Jon himself, I am already allowing him to proceed on a Fourth Amendment claim. Construing his complaint generously, I also understand him to be bringing state law claims for negligent infliction of emotional distress and wrongful death. I may consider these state law claims as part of this lawsuit under the court’s supplemental jurisdiction.

Jon alleges that he has suffered depression and post-traumatic stress disorder as a result of the harm done to Donna, so I understand him to be bringing a “bystander” claim for negligent infliction of emotional distress against defendants. This type of claim “compensates plaintiffs whose natural shock and grief upon the death or severe physical injury of a spouse, parent, child, grandparent, grandchild, or sibling are compounded by the circumstances under which they learn of the serious injury or death.” *Bowen v. Lumbermens Mut. Cas. Co.*, 183 Wis. 2d 627, 659, 517 N.W.2d 432, 445 (1994). The elements for this claim are: (1) “the injury suffered by the victim must have been fatal or severe”; (2) “the victim and the plaintiff must be related as spouses, parent-child, grandparent-grandchild or siblings”; and (3) “the plaintiff

must have observed an extraordinary event, namely the incident and injury or the scene soon after the incident with the injured victim at the scene.” *Id.* at 434-35.

Even construing Jon’s allegations generously, I conclude that he does not state a claim for negligent infliction of emotional distress. Jon does not allege that he witnessed the search itself or the immediate aftermath of it. Even if he had, Donna’s health appears to have deteriorated over the span of a couple of years, as opposed to Donna suffering a cataclysmic injury during the search itself. While I have no doubt that Donna’s health problems and death were traumatic experiences for Jon, the circumstances he describes here do not fit within the fairly narrow scope of bystander claims allowed under *Bowen*. To prevent proliferation of bystander-type claims for harm done to third parties, Wisconsin courts have limited negligent infliction of emotional distress claims to situations where the bystander “[w]itness[es] either an incident causing death or serious injury or the gruesome aftermath of such an event minutes after it occurs . . . distinct from the experience of learning of a family member’s death through indirect means.” *Id.* at 444-45; *see also Seamonson v. Nazareth Health & Rehab. Ctr.*, 2015 WI App 52, ¶ 10, 866 N.W.2d 404 (unpublished table decision) (“the pattern we observe is that the public policy factors articulated in *Bowen* have been interpreted narrowly under Wisconsin law”); *Rosin v. Fort Howard Corp.*, 222 Wis. 2d 365, 372-73, 588 N.W.2d 58, 62-63 (Ct. App. 1998) (upholding dismissal of bystander claim of nine-year-old child because child’s observance of scene of father’s fatal accident “did not occur minutes after his father’s death,” but rather through viewing newspaper photograph eighteen hours later).

Jon also brings a wrongful death claim. An action for wrongful death is separate and distinct from a survival action. *Day v. Allstate Indem. Co.*, 2011 WI 24, ¶ 61, 332 Wis. 2d

571, 798 N.W.2d 199. “The purpose of the wrongful death statute, Wis. Stat. § 895.04, is to allow plaintiffs to recover pecuniary injury, or to compensate for loss of the relational interest existing between the beneficiaries and the deceased.” *Estate of Lamers v. Am. Hardware Mut. Ins. Co.*, 2008 WI App 165, ¶ 9, 314 Wis. 2d 731, 761 N.W.2d 38 (internal quotation omitted). Under Wis. Stat. § 895.04(1), the proper plaintiff for such a claim is “the personal representative of the deceased person or by the person to whom the amount recovered belongs.” It is already clear that Jon is not the personal representative. But it appears that he is one of the persons “to whom the amount recovered belongs,” because under § 895.04(2), the right to bring a wrongful death claim belongs to those who are identified as beneficiaries under intestate succession rules. It appears from the documents in this case and the above-mentioned state court litigation that Donna was not survived by a spouse or domestic partner, so Jon, as one of Donna’s children, is next in line. *See* Wis. Stat. §§ 852.01 (“Basic rules for intestate succession”) and 895.04(2). It may be difficult for Jon to prove that Donna’s death was actually caused by defendants’ actions, but for now I will allow him to proceed on a wrongful death claim.

The next step is for Jon to serve his complaint upon defendants. I will give him 120 days to do so. *See Keller v. United States*, 444 F. App’x 909, 912-13 (7th Cir. 2011) (prisoner must wait for court’s screening to serve complaint, so Federal Rule of Civil Procedure 4(m)’s 120-day timeline for service from filing of complaint is implicitly extended from date of screening). However, that is an outside limit with few exceptions. This court requires that a plaintiff act diligently in moving his case to resolution. If Jon acts promptly, he should be able to serve his complaint on defendants well before this deadline.

To help Jon understand the procedure for serving a complaint on individuals in a federal lawsuit, I will direct the clerk of court to send him a copy of the court's "Procedure for Serving a Complaint on Individuals in a Federal Lawsuit."

ORDER

IT IS ORDERED that:

1. Plaintiff Jon Soto's supplement to the complaint, Dkt. 11, is accepted as part of the operative pleading in this case.
2. Plaintiff is GRANTED leave to proceed on Fourth Amendment and wrongful death claims against defendants David Gibbons and Kevin Ely.
3. Plaintiff is DENIED leave to proceed on his negligent infliction of emotional distress claim and all claims brought on behalf of Donna Soto's estate. The estate is DISMISSED as a party to this action.
4. Plaintiff should promptly serve copies of his complaint on defendants and file proof of service of his complaint as soon as service has been accomplished. If, in the time allowed, plaintiff fails to submit proof of service of his complaint on defendants or explain his inability to do so, I will direct plaintiff to show cause why his case should not be dismissed for lack of prosecution.
5. For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendant's attorney.
6. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered September 14, 2015.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge