

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

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

OPINION AND
ORDER

Plaintiffs,

05-C-748-C

v.

WISCONSIN COUNTIES MUTUAL INSURANCE
CORPORATION, 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.

This is a civil action for monetary relief arising out of injuries sustained by plaintiff Brenda Mombourquette when she attempted suicide while detained in the Monroe County jail. Mombourquette's minor children, E.S. and C.S., are also plaintiffs in this lawsuit. Plaintiffs have brought this lawsuit under 42 U.S.C. §§ 1983 and 1985, alleging that defendants violated Mombourquette's rights under the Eighth and Fourteenth Amendments

when they displayed deliberate indifference towards the likelihood that she would harm herself. Presently before the court is defendant Wisconsin County Mutual Insurance Corporation's motion to dismiss this lawsuit against it pursuant to Fed. R. Civ. P. 12(c). Defendant's motion will be granted because plaintiffs are alleging intentional acts in violation of the United States Constitution, and Wisconsin law only allows a direct action against an insurer when the underlying claim against the insured is for negligence, not when the underlying claim is grounded on constitutional violations. For the sole purpose of deciding this motion, I accept as true the allegations in the complaint.

ALLEGATIONS OF FACTS

A. Parties

Plaintiff Brenda Mombourquette is an adult resident of Monroe County, Wisconsin. She is incompetent for the purposes of this proceeding. This lawsuit is brought on her behalf by her guardian and sister, Tammy Mombourquette. Plaintiffs E.S. and C.S. are Brenda Mombourquette's minor children. (From here on, I will use "plaintiff" to refer to Brenda).

At all relevant times, defendant Charles Amundson was sheriff of Monroe County and the remaining defendants were employed at the Monroe County jail. Defendants Jeanne Reinart and Candace Warner were nurses; defendant David Shaldach was a lieutenant; defendants Sandie Wegner, Anna Janusheske, Michael Wildes, Janita Leis, Sue Wieman and

Patricia Fish were certified jailors. Defendant Wisconsin County Mutual Insurance Corporation is a Wisconsin corporation in the business of writing liability insurance for Wisconsin counties and their employees.

B. Monroe County Jail

On November 10, 2002, plaintiff was booked into the Monroe County jail on a probation hold pending transfer to a substance abuse treatment program as a result of her addiction to the prescription pain medication, oxycontin. Her jail screening report notes that she was taking Zoloft, an antidepressive.

At approximately 2 p.m. on November 12, a jailor wrote in the jail log that she had been cautioned by plaintiff's probation officer that plaintiff was sad and had stated that "if [I] can't have [my] kids back what is the use of going on." The jailor wrote in the log that "we will keep an eye on her" but did not commence a suicide watch. Later on November 12, shortly after 8 p.m., plaintiff told defendant Shaldach that she could not make it through another night without killing herself. Defendant Shaldach relayed the information to defendant Reinart and noted in the log that "we will keep an eye on her" but did not commence a suicide watch. Monroe County jailors are required to exchange information about inmates' suicidal behavior with each other. On November 12, 2002, defendants Wildes, Wegner, Reinart, Shaldach, Leis and Amundson were all on duty at the Monroe

County jail.

At approximately 7:30 a.m. on November 13, 2002, defendant Reinart told defendant Janusheske to keep an eye on plaintiff. Defendant Janusheske did not commence a suicide watch. That afternoon, at approximately 4:45 p.m., defendant Leis found plaintiff in her cell with her wrists cut; she had attempted suicide. Defendants Amundson, Wildes, Wegner, Warner, Fish, Wieman and Janusheske were on duty at the Monroe County jail at the time and were notified of plaintiff's suicide attempt. Plaintiff was transported to the Gundersen Lutheran Psychiatric facility and stayed there until November 18, 2002. On November 18, when plaintiff returned to the Monroe County Jail, she was met by defendants Wegner, Wildes and Reinart. Plaintiff told defendants Wildes and Reinart that she had attempted suicide in the psychiatric facility; staff at the psychiatric facility confirmed that this was true. Plaintiff's physician at the psychiatric facility directed the staff at Monroe County jail to place plaintiff on suicide watch and to give her medication for depression and anxiety. Defendant Reinart signed off on these instructions and placed the instruction sheet in plaintiff's file at the jail.

On November 20, 2002, an incident occurred in plaintiff's cell block involving plaintiff and other inmates. Plaintiff asked to be moved to another location but the jailors denied her request. On November 22, at around 6 a.m., another incident occurred in the cell block, again involving plaintiff and another inmate. At approximately 3 p.m. on

November 22, plaintiff attempted suicide by hanging herself in her cell with a sheet. Defendant Janusheske found her unconscious and without a pulse. Plaintiff suffered a loss of oxygen to the brain, which caused anoxic brain injury; she is now confined to a wheelchair, is required to reside in an adult foster home under 24-hour care and is unable to communicate with her children.

The Monroe County Jail Suicide Prevention Policy in effect in 2002 when plaintiff attempted suicide required that inmates known to be suicidal be housed in the observation cell and monitored at intervals of five to fifteen minutes. Plaintiff was not in the observation cell and was not being monitored at such intervals when she attempted suicide on November 22, 2002.

At all times relevant, defendant Wisconsin County Mutual Insurance Corporation provided liability insurance to all other defendants.

OPINION

A motion for judgment on the pleadings under Fed. R. Civ. P. 12(c) is appropriate if “it appears beyond doubt that the plaintiff cannot prove any facts that would support [her] claim for relief.” Forseth v. Village of Sussex, 199 F.3d 363, 368 (7th Cir. 2000). The court considers the complaint, answer and any written instruments attached to those pleadings, accepts all well-pleaded allegations in the complaint as true and draws all inferences in favor

of the plaintiff. McMasters v. United States, 260 F.3d 814, 817 (7th Cir. 2001).

This is a case in which defendant Wisconsin County Mutual Insurance Corporation's Rule 12(c) motion is appropriate. The law does not support plaintiffs' claim against the insurance company. This lawsuit is brought under 42 U.S.C. §§ 1983 and 1985 and plaintiffs' sole allegation is that defendants (other than Wisconsin County Mutual Insurance Corporation) violated plaintiff Brenda Mombourquette's constitutional rights. Plaintiffs do not allege that defendant Wisconsin County Mutual Insurance Corporation engaged in any conduct that violated plaintiffs' constitutional rights or otherwise violated 42 U.S.C. §§ 1983 or 1985. Therefore, defendant Wisconsin County Mutual Insurance Corporation's connection to this lawsuit arises solely from the fact that it insured every other defendant in this lawsuit.

In Wisconsin, the ability to sue an insured's insurance carrier is authorized by Wis. Stat. § 632.24, which states:

Any bond or policy of insurance covering liability to others for negligence makes the insurer liable, up to the amounts stated in the bond or policy, to the persons entitled to recover against the insured for the death of any person or for injury to persons or property, irrespective of whether the liability is presently established or is contingent and to become fixed or certain by final judgment against the insured.

"Courts have interpreted the 'direct action' statute as creating a separate claim against the insurer for damages caused by negligence of the insured." Akright v. Graves, 2006 U.S.

Dist. LEXIS 19122 (E.D. Wis. 2006) (citing Rich Product Corp. v. Zurich American Insurance Co., 293 F.3d 981, 982 (7th Cir. 2002); Gibson v. City of Glendale Police Department, 786 F. Supp 1452, 1455 (E.D. Wis. 1992); Decade's Monthly Income and Appreciation Fund v. Whyte & Hirschboeck, S.C., 164 Wis. 2d 227, 235, 474 N.W.2d 766 (Ct. App. 1991)). Wis. Stat. § 632.24 allows a direct action against an insurer when the underlying claim against the insured is for negligence, Kranzush v. Badger State Mutual Casualty Co., 103 Wis. 2d 56, 75, 307 N.W.2d 256 (1981), but not when the underlying claim is grounded on constitutional violations under §§ 1983 and 1985. Plaintiffs have not asserted a negligence claim against any defendant; their only claims are for constitutional violations under 42 U.S.C. §§ 1983 and 1985. Plaintiffs' argument that a claim of deliberate indifference "encompasses negligence," Plts.' Opp. Br., dkt. #12 at 2-3, has no support in the law. To prove deliberate indifference, a plaintiff must show *not* that defendant was negligent, but that defendant disregarded a serious risk to plaintiff and caused "unnecessary and wanton infliction of pain." Estelle v. Gamble, 429 U.S. 97, 105-06. For this reason, plaintiffs cannot bring a direct action under 42 U.S.C. §§ 1983 and 1985 against defendant Wisconsin County Mutual Insurance Corporation. Its motion to dismiss will be granted.

ORDER

IT IS ORDERED that defendant Wisconsin County Mutual Insurance Corporation's motion to dismiss is GRANTED and defendant Wisconsin County Mutual Insurance Corporation is dismissed from this lawsuit.

Entered this 3d day of May, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge