IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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

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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In an order dated November 2, 2006, I ordered plaintiffs to show cause why involuntary plaintiff Wisconsin Department of Health and Family Services should not be dismissed from this case. The department had been named as an involuntary plaintiff in

plaintiffs' first amended complaint, filed on May 5, 2006. Plaintiffs alleged in the complaint that the department had provided medical benefits to plaintiff Brenda Mombourquette as a result of the events that gave rise to this suit and that the department may be entitled to reimbursement under Wisconsin law if plaintiffs are successful. Two weeks later, the department filed a waiver of service of summons. After that, however, the department never made an appearance in the case and the other parties treated it as a nonentity, neither including the department in the caption of court filings nor in their certificates of service. Because there appeared to be great uncertainty regarding the department's status in the case, I issued the order to show cause to help determine whether involuntary plaintiff should be treated as a full and equal party or dismissed from the case.

Plaintiffs, the department and defendant Schaldach have each responded to the order. In its response, the department, which has now made an appearance, says that it *wants* to be a plaintiff and believes that it has the right to party status under Wis. Stat. § 49.89, which subrogates the department to the rights of anyone who has received medical assistance from the department as the result of an injury for which he or she is now suing. (The department does not, however, provide an adequate explanation for its delay in taking any action in the case.) On the other hand, plaintiffs now think that the department *should* be dismissed because the department does not have a subrogation interest. (They do not explain why, if this is their view, they named the department in the first place, why they changed their mind

or why, when they did change their mind, they did not move to dismiss the department instead of simply removing it from the caption and failing to serve it with subsequent court filings.) In addition, plaintiffs argue that the department has "defaulted" because it never filed an answer to the complaint. Defendant Schaldach agrees that the department has defaulted and requests without further explanation that the department be dismissed with prejudice.

One thing is immediately clear from the parties' responses: the department is not appropriately classified as an involuntary plaintiff and should not have been brought into the case as one. The procedure for naming an involuntary plaintiff is set forth in Fed. R. Civ. P. 19(a), which lists several categories of persons who should be joined as a party "if feasible." The rule states: "If the person should join as a plaintiff *but refuses to do so*, the person may be made a defendant, or *in a proper case*, an involuntary plaintiff." Fed. R. Civ. P. 19(a) (emphasis added).

The two key phrases are highlighted. First, no party has addressed whether this is "a proper case" under the rule, even though I raised this issue in the November 2 order. As I have noted before, "[t]raditionally, a 'proper case' is one in which the involuntary plaintiff is outside the court's jurisdiction . . . [and] has generally been limited to cases involving patent and copyright licensees." Impact Gel Corp. v. Rodeen, No. 05-C-223-C, 2005 WL 2122122, *3 (W.D. Wis. 2005) (citing Independent Wireless Telephone Co. v. Radio Corp.

of America, 269 U.S. 459, 472 (1926); Sheldon v. West Bend Equipment Co., 718 F.2d 603, 606 (3d Cir.1983); Eikel v. States Marine Lines, Inc., 473 F.2d 959, 962 (5th Cir. 1973)). Of course, the situation in this case does not involve a license or a party outside the court's jurisdiction and no one makes an argument why the rule should be interpreted to cover this situation. Generally, if a party refuses to join as a plaintiff, the proper procedure is to serve the complaint on that party as a defendant and then seek realignment. Eikel, 473 F.2d at 962; Balistreri v. Richard E. Jacobs Group, Inc., 221 F.R.D. 602, 604-05 (E.D. Wis. 2004).

Second, the department concedes that it has never refused to be a party to this action. Dkt. #152, at 9. In this case, we have the *reverse* of the situation that would be expected with respect to an involuntary plaintiff: the "involuntary" plaintiff wants to stay in the case while the plaintiffs who "forced" that party into the lawsuit wants it dismissed.

Although it is clear that plaintiffs did not follow the proper procedure in naming the department, the question is how to resolve this problem. For the reasons discussed above, the department cannot remain an "involuntary plaintiff," but this does not mean necessarily that the department must be dismissed. Rule 19 relates not just to involuntary plaintiffs but to all parties that should be joined if feasible. Further, the rule places an obligation on the court to insure that all necessary parties are joined as either a defendant or plaintiff. Fed. R. Civ. P. 19(a) (in situations in which parties fail to join necessary party, "the court shall

order that the person be made a party").

Thus, the primary question now is whether the department meets the substantive requirements of Rule 19 as a party "needed for just adjudication." Rule 19 identifies three situations in which a party should be joined: (1) complete relief may not be afforded without that party; (2) the defendant may incur multiple obligations if the party is not joined; (3) the party's ability to protect an interest will be "impair[ed] or impede[d]" if joinder is denied.

The parties do not discuss these requirements in their briefs. Instead, the department cites United States v. Aetna Casuality and Surety Co., 338 U.S. 366, 380 (1949), for the proposition that if a subrogee has paid part of a claimed loss, it is a "real party in interest" under Fed. R. Civ. P. 17, a related but obviously different question from the one at issue here. Nevertheless, I conclude that the department's ability to protect its interests would be impaired if it were dismissed from the suit. The Court of Appeals for the Seventh Circuit has held that an "insurer [that] has become partially subrogated to the rights of an insured" meets the requirements of Rule 19(a). Krueger v. Cartwright, 996 F.2d 928, 934 (7th Cir. 1993). According to the department (and to plaintiffs' complaint, which they have not sought to amend), Wis. Stat. § 49.89 puts the department in the same position as an insurance company that has paid for part of a plaintiff's loss.

In its response to the November 2 order, plaintiffs argue that Wis. Stat. § 49.89 is not

implicated. In plaintiffs' view, § 49.89 is limited to tort and contract actions, which do not encompass a claim asserting a violation of constitutional rights. I disagree. First, it is far from clear that Wis. Stat § 49.89 limits the department's subrogation rights to particular causes of action. Section 49.89(2) provides that the department "is subrogated to the rights" of anyone who received "public assistance . . . as a result of the occurrence of an injury, sickness or death that creates a claim or cause of action, *whether in tort or contract*" (emphasis added). The reference to tort and contract may not be intended as a limitation on the types of lawsuits to which the statute applies. Rather, a reasonable interpretation of this clause is simply that the department's subrogation rights are not limited to tort claims *only* or contact claims *only*. The statue says that either tort or contact claims are covered by the statute; it does not say that it is limited to those claims.

In any event, claims brought under 42 U.S.C. § 1983 *are* tort claims, as the Supreme Court has recognized countless times. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 727 (1999) (Scalia, J., concurring) ("This Court has confirmed in countless cases that a § 1983 cause of action sounds in tort.") (citing Imbler v. Pachtman, 424 U.S. 409, 417 (1976); Heck v. Humphrey, 512 U.S. 477, 483 (1994); Memphis Community School District v. Stachura, 477 U.S. 299, 305(1986); Smith v. Wade, 461 U.S. 30, 34(1983); Carey v. Piphus, 435 U.S. 247, 253 (1978)). Thus, it appears that plaintiffs were correct in seeking to add the department to the case, even if they stumbled

a bit procedurally.

The remaining question is whether there is any reason the department cannot remain a party. Plaintiffs and defendant Schaldach argue that there is, pointing to the department's failure to file an answer to the complaint, which plaintiffs and Schaldach say requires a finding of default. If plaintiffs had brought the department in as a defendant, I would agree that the department would have been required to answer the complaint. But the requirement to file an answer does not apply to other plaintiffs. Fed. R. Civ. P. 12(a)(1) ("a defendant shall serve an answer"). Neither plaintiffs nor defendant Schaldach cite any authority for treating an "involuntary" plaintiff any differently.

This does not necessarily end the matter, however. The department was not required to file its own pleading initially because plaintiffs had included the department in their amended complaint. Although plaintiffs have not moved expressly to amend their complaint to remove the allegations relating to the department, it would be awkward to say the least to allow the department to piggyback on a pleading of plaintiffs, whose current position is that the department should be dismissed from the lawsuit. Nevertheless, as a party seeking affirmative relief, the department must set forth its claim in a pleading. If it cannot rely on plaintiffs', it must file its own. Cf. Fed. R. Civ. P. 24(c) (procedure for intervening parties includes filing "pleading setting forth claim or defense for which intervention is sought").

Under normal circumstances, I would conclude that it is far too late in the

proceedings to allow a new pleading when briefing for defendants' motions for summary judgment has concluded and trial is now less than two months away. However, this case presents unusual circumstances. First, district courts may consider joinder under Rule 19 at any time and, in fact, have an affirmative obligation to do so. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 111 (1968) ("When necessary, however, a court . . . should, on its own initiative, take steps to protect the absent party, who of course had no opportunity to plead and prove his interest.") Second, the department was not on notice that it needed to file its own pleading until plaintiffs indicated a change of position in their response to the November 2 order. Third, allowing the department to file its own complaint should not delay the proceedings. The department's claim is contingent on plaintiffs' and will not be implicated unless plaintiffs prevail at trial. Further, the department has expressed no interest in participating independently in the defendants' motions for summary judgment. In any event, the department has waived any right to be heard on previously filed motions by failing to appear in the case until now.

Accordingly, IT IS ORDERED that the department may have until December 29, 2006, in which to file and serve its complaint. (In this case, the department should serve both defendants and plaintiffs because although the department is correctly aligned as a plaintiff, e.g., Ellsworth v. Schelbrock, 235 Wis. 2d 678, 611 N.W.2d 764 (2000), its claim for reimbursement is most appropriately characterized as a crossclaim against plaintiffs.)

Defendants and plaintiffs may have until January 8, 2007, in which to file an answer.

Entered this 20th day of December, 2006.

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