IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DENNIS STRONG,

OPINION AND ORDER

Plaintiff,

07-C-86-C

v.

STATE OF WISCONSIN, MICHAEL VITACCIO, FRED SIGGELKOW, GREG VAN RYBROEK, DAVID POLLOCK, JAN GRAY, BRAD SMITH, CLAIR KRUEGER, JOHN FEENEY, KELLY VITENSE, PATRICIA DORN, CHERYL MARSHALL, LORI KLEMER, CHERYL HOFFMAN,

Defendants.

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In this civil action for monetary relief, plaintiff Dennis Strong alleges that defendants engaged in a litany of unlawful conduct against him while he was a patient at the Mendota Mental Health Institute in Madison, Wisconsin, including retaliating against him for speaking out on matters of public concern, sexually harassing him and failing to properly treat his mental illness. Included in plaintiff's complaint are state law claims for medical malpractice, sexual battery and violations of plaintiff's rights under Wisconsin's patients' rights law, Wis. Stat. § 51.61. Plaintiff has named defendant State of Wisconsin on these

claims because of its "oversight" of the institute and because the other defendants are "employees/agents" of the state. Cpt., dkt #2, exh. 1, ¶2.

Now before the court is the state's motion for partial summary judgment on the ground that it is entitled to sovereign immunity on plaintiff's medical malpractice and sexual battery claims. (The state concedes that it has waived its sovereign immunity to plaintiff's claim under Wis. Stat. § 51.61.) In addition, the state seeks a declaration that it is not required to indemnify defendant Kelly Vitense under Wis. Stat. § 895.46(1)(a) for any damages she is required to pay plaintiff as a result of this lawsuit. (Defendant Vitense was an employee at the institute who plaintiff alleges committed a sexual battery against him. The state says it has no duty to indemnify Vitense because any battery she committed did not occur while she was "acting within the scope of employment." Wis. Stat. § 895.46(1)(a).)

The first issue raised by the state is easily resolved. Plaintiff concedes in his response brief that he cannot maintain his claims for sexual battery and medical malpractice against the state. Fiala v. Voight, 93 Wis. 2d 337, 342, 286 N.W.2d 824, 827 (1980) (state cannot be sued under state law without authorization of state legislature); Brown v. State, 230 Wis. 2d 355, 363, 602 N.W.2d 79, 84 (Ct. App. 1999) (legislature has not waived sovereign immunity with respect to tort claims generally).

The second issue cannot be resolved at all because it is not ripe. Any opinion

regarding the state's duty to indemnify Vitense would be advisory because it has not yet been determined whether Vitense is liable to plaintiff for damages. Obviously, if Vitense is not found liable to plaintiff, the state will not have to indemnify her, regardless of the scope of § 895.46. Because federal courts "possess no . . . authority to issue advisory opinions," Citizens for a Better Environment v. Steel Co., 230 F.3d 923, 927 (7th Cir. 2000), a determination of the indemnification question will have to wait until the question of Vitense's liability is resolved.

This conclusion is consistent with Wisconsin law, which requires a court to resolve questions of liability before determining questions of indemnification of any party for such liability. General Casualty Co. v. Hills, 209 Wis. 2d 167, 176 n.11, 561 N.W.2d 718, 722 n.11 (1997) (citing Newhouse v. Citizens Security Mutual Insurance Co., 176 Wis. 2d 824, 834-36, 501 N.W.2d 1 (1993)). In fact, in each of the cases the state cites in support of its indemnification argument, the court determined the application of Wis. Stat. § 895.46 after the court or the jury determined liability. Olson v. Connerly, 156 Wis. 2d 488, 457 N.W.2d 479 (1990); School Board of Pardeeville Area School District v. Bomber, 214 Wis. 2d 397, 571 N.W.2d 189 (Ct. App. 1997); Block v. Gomez, 201 Wis. 2d 795, 549 N.W.2d 783 (Ct. App. 1996). In some cases, the indemnification issue was determined in a separate lawsuit. Horace Mann Insurance Co. v. Wauwatosa Board of Education, 88 Wis. 2d 385, 276 N.W.2d 761 (1979); Thuermer v. Village of Mishicot, 86 Wis.2d 374, 272 N.W.2d

409 (Ct. App. 1978).

The state briefly mentions that it is seeking a ruling that it is "not responsible for [Vitense's] legal defense in this action," dft.'s br., dkt #50, at 2, but that is a nonissue. Section 895.46 does not impose a duty to defend on the state under *any* circumstances. The statute says only that the state must pay the employee reasonable attorney fees after "the results of the litigation" if the court or jury determines that the employee is acting within the scope of employment. Thus, this will be a question that needs resolution only if defendant Vitense seeks reimbursement for any attorney fees she incurs at the close of this case.

ORDER

IT IS ORDERED that defendant State of Wisconsin's motion for partial summary judgment is GRANTED with respect to plaintiff Dennis Strong's claims for medical malpractice and sexual battery. The complaint is DISMISSED with respect to those claims against defendant State of Wisconsin on the ground of sovereign immunity. The state's motion is DENIED as unripe with respect to the question whether the state must indemnify

defendant Kelly Vitense.

Entered this 20th day of September, 2007.

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