IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JERRY M. SKAGGS and NANCY J. SKAGGS,

Plaintiffs,

v.

KATHLEEN SEBELIUS,

Involuntary Plaintiff,

UNITED STATES OF AMERICA,
AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
SKILLE FAMILY INVESTMENTS,
ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY
and SECURITY HEALTH PLAN OF WISCONSIN, INC.,

Defendants.

OPINION AND ORDER

12-cv-845-bbc

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In this civil suit, plaintiffs Jerry Skaggs and Nancy Skaggs allege that the negligence of employees of defendant United States of America and defendant Skille Family Investments contributed to a motorcycle accident in March 2010 that caused physical and emotional injury to Jerry Skaggs. Nancy Skaggs was not involved in the accident, but brings a claim for loss of consortium.

Plaintiffs filed the lawsuit in state court and named the United States Census Bureau, Jessica Stensvold and Cindy Lubitz, among others, as defendants. Defendant United States of America removed the case to this court under 28 U.S.C. § 2679(d)(2) and 28 C.F.R. §

15.4 after the United States Attorney for the Western District of Wisconsin certified that Stensvold and Lubitz are federal employees who were acting within the scope of their employment at the time of the accident. (The United States cited 28 U.S.C. § 1442(a)(1) as another basis for removal, but the government did not identify a federal defense it was asserting, which is a requirement of that statute. Mesa v. California, 489 U.S. 121, 129 (1989).) Also in accordance with § 2679, I have substituted the United States of America for Stensvold, Lubitz and the bureau. Because plaintiffs are suing the federal officers and agency for negligence, plaintiffs' exclusive remedy is against the United States under the Federal Tort Claims Act. Jackson v. Kotter, 541 F.3d 688, 693 (7th Cir. 2008).

The government has filed a motion to dismiss on two grounds. First, it argues that plaintiffs did not exhaust their administrative remedies with respect to Lubitz's alleged negligence and with respect to any claim by Nancy Skaggs. Second, it argues that plaintiffs have not provided adequate notice of their claims as required by Fed. R. Civ. P. 8.

Since the government filed its motion, plaintiffs have filed an amended complaint. Dkt. #30. In response, the government has filed a new motion to dismiss, presumably because of the general rule that an amended complaint moots a motion to dismiss. However, plaintiffs' new pleading does not include any new allegations regarding their claims against the United States or its employees and the government's new motion is the same as its first, so I see no reason to delay consideration of the motion to allow additional briefing.

With respect to exhaustion, 28 U.S.C. § 2675 requires a plaintiff to "presen[t] the claim to the appropriate Federal agency" before filing a lawsuit, which means he must

"provid[e] written notification of an incident and reques[t] money damages in sum certain." Deloria v. Veterans Administration, 927 F.2d 1009, 1011 (7th Cir. 1991). A plaintiff has two years after the claim accrues to present his claim to the federal agency. 28 U.S.C. § 2401(b).

"The usual practice under the Federal Rules is to regard exhaustion as an affirmative defense." Jones v. Bock, 549 U.S. 199 (2007). However, in McNeil v. United States, 508 U.S. 106, 113 (1993), the Supreme Court upheld a decision of the Court of Appeals for the Seventh Circuit affirming the district court's decision to dismiss a tort claim action for lack of jurisdiction because the plaintiff had failed to satisfy the exhaustion requirement under the Federal Tort Claims Act. The court of appeals repeated its holding that the Act's exhaustion requirement is a jurisdictional prerequisite to a suit in Sullivan v. United States, 21 F.3d 198, 206 (7th Cir. 1994) (citing Deloria, 927 F.2d at 1011).

In this case, plaintiffs did not respond to the government's argument that they had failed to a file an administrative claim regarding Lubitz's alleged negligence and with respect to any claim by Nancy Skaggs. Further, plaintiffs did not include any additional allegations about exhaustion in their amended complaint, so I am dismissing the amended complaint with respect to these claims.

With respect to the requirements of Rule 8, plaintiffs allege that, on March 18, 2010, Stensvold "was the operator of a motor vehicle traveling westbound on County Highway A, when she negligently operated her motor vehicle and created an unsafe condition, causing the Plaintiff to take evasive action and collide with a tree, thereby causing the Plaintiff's

injuries and damages as hereafter described." Am. Cpt. ¶ 15, dkt. #30. No more is required for a simple negligence claim.

Plaintiffs' allegations are similar to those in Form 11 of the Federal Rules of Civil Procedure Forms: "On *date,* at *place*, the defendant negligently drove a motor vehicle against the plaintiff." Under Fed. R. Civ. P. 84, that allegation "suffice[s]" to satisfy Rule 8. What was previously Form 9 of the Federal Rules of Civil Procedure is similar: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway." In Walker v. Thompson, 288 F.3d 1005, 1011 n.2 (7th Cir. 2002), the court concluded that the allegation in Form 9 "suffices under Rule 8(a)(2)." See also Gil v. Reed, 381 F.3d 649, 658 (7th Cir. 2004) (allegation of "negligent medical care" sufficient for purposes of pleading negligence under Federal Tort Claims Act).

It is true that the court of appeals decided Walker and Gil before the Supreme Court decided Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009), in which the Court stated that a complaint must include more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." Although there may be some tension between cases such as Iqbal and the forms, as other courts have observed, the Supreme Court has not overruled Rule 84, which can be changed only through the amendment process. E.g., In re Bill of Lading Transmission and Processing System Patent Litigation, 681 F.3d 1323, 1334 (Fed. Cir. 2012); Hamilton v. Palm, 621 F.3d 816, 818 (8th Cir. 2010).

Further, the Court of Appeals for the Seventh Circuit has held that, even after Twombly and Iqbal, the specificity required in a complaint depends on context. McCauley v. City of Chicago, 671 F.3d 611, 617 (7th Cir. 2011); Swanson v. Citibank, N.A., 614 F.3d 400, 404-05 (7th Cir. 2010); Cooney v. Rossiter, 583 F.3d 967, 971 (7th Cir. 2009). If a claim is "straightforward" and "simple," less detail is necessary to put a defendant on notice than for a claim that is more complex. McCauley, 671 F.3d at 617. For example, in Swanson, 614 F.3d at 405, the court concluded that a plaintiff satisfied Rule 8 on her discrimination claim simply by alleging the type of discrimination, when it occurred and by whom. Because a car accident is the quintessential "simple" claim with respect to pleading, I see no reason to delay the case by requiring plaintiffs to plead more. If the government needs more details, it may obtain them through discovery.

One final matter requires attention. Plaintiffs have named Kathleen Sebelius, Secretary for the United States Department of Health and Human Services, as an "involuntary plaintiff" in each of their complaints. They include no allegations about Sebelius except that she is responsible for administering the Medicare program and that she is named "pursuant to Wis. Stat. § 803.03" because the "Program alleges to have paid out money on behalf of" Jerry Skaggs. Am. Cpt. ¶ 6, dkt. #30.

Now that the lawsuit is proceeding in federal court, Wisconsin rules of civil procedure no longer apply. The use of "involuntary plaintiffs" in federal court is governed by Fed. R. Civ. P. 19. Under Rule 19(a)(2), "[a] person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff." I have noted that "[t]he

use of Rule 19 in a federal case to join an involuntary plaintiff is rare." Elborough v. Evansville Community School District, 636 F. Supp. 2d 812, 826 (W.D. Wis. 2009). This is because a party who wishes to name an involuntary plaintiff must show that the absent party has refused to be joined as a plaintiff and is outside the court's jurisdiction. 7 Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure § 1606, at 73 (3d ed. 2001) ("A party may be made an involuntary plaintiff only if the person is beyond the jurisdiction of the court, and is notified of the action, but refuses to join."). See also Murray v. Mississippi Farm Bureau Casualty Insurance Co., 251 F.R.D. 361, 364 (W.D. Wis. 2008) ("Traditionally, a 'proper case' is one in which the involuntary plaintiff is outside the court's jurisdiction and is under some obligation to join the plaintiff's lawsuit but has refused to do so."). Otherwise, the absent party must be joined and served as a defendant and then realigned if necessary. 4 Moore's Federal Practice § 19.04[4][a] (3d ed. 2010) ("If the absentee is subject to personal jurisdiction, the court will order the absentee joined and served as a defendant.")(emphasis in original).

The situations in which parties may be made involuntary plaintiffs are limited under the rules out of fairness to the absent party:

> These limitations are necessary because the involuntary plaintiff procedure allows a person to be made a party to the action without service of process and permits the court to enter a judgment that has preclusive effect as to the involuntary plaintiff. There is no justification for resorting to it when the party actually is subject to the jurisdiction of the court.

Wright, supra, at 74–75. In other words, if a plaintiff is permitted to name anyone it wants as an involuntary plaintiff, without following a particular procedure, there is a danger that

the absent party will not have sufficient notice or an adequate opportunity to protect its rights.

In this case, plaintiffs have not shown either that Sebelius has refused to join the lawsuit or that she is outside the court's jurisdiction. Accordingly, I will give plaintiffs an opportunity to amend their complaint to join Sebelius as a plaintiff or to name her as a defendant and serve the complaint on her.

ORDER

IT IS ORDERED that

1. Defendant United States of America is SUBSTITUTED for United States Census Bureau, Jessica Stensvold and Cindy Lubitz.

2. Defendant United States of America's motion to dismiss, dkt. #5, and renewed motion to dismiss, dkt. # 35, are GRANTED IN PART. The amended complaint filed by plaintiffs Jerry Skaggs and Nancy Skaggs is DISMISSED as to plaintiff Nancy Skaggs's claim against defendant United States America and as to plaintiff Jerry Skaggs's claim that Cindy Lubitz was negligent. The motion is DENIED in all other respects.

3. Plaintiffs may have until February 25, 2013 to filed an amended complaint that: (1) names Kathleen Sebelius as a plaintiff (and is signed by counsel for Sebelius); or (2) names Sebelius as a defendant, accompanied by proof of service. If plaintiffs fail to respond

by February 25, I will dismiss Sebelius from the case.

Entered this 8th day of February, 2013.

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