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

THE ESTATE OF BREYANNA KALK,
by its Personal Representative Randy Kalk,

Plaintiff,

v.

ORION FAMILY SERVICES, INC., et al.,

Defendants.

OPINION AND ORDER

18-cv-457-wmc

Breyanna Kalk was a juvenile resident at Orion Family Services' Spohn House when she took her own life. Her estate ("the Estate" or "plaintiff") brought this suit alleging federal constitutional violations under 42 U.S.C. § 1983, as well as state law claims for negligence and wrongful death, against Orion and three of its employees. After voluntarily dismissing two of Orion's employees, plaintiff now seeks leave to amend its complaint to re-assert claims against these same individuals. (Dkt. ##20, 25.) The current, remaining defendants oppose the motion, arguing undue delay and prejudice. (Dkt. #23.) For the reasons that follow, plaintiff's motion to amend will be granted.

BACKGROUND

On February 2, 2016, Breyanna Kalk was sentenced to reside at Spohn House, a group home for juveniles run by Orion under contract with the State of Wisconsin. (Compl. (dkt. #1) ¶¶ 10, 15.) Plaintiff alleges that due to the negligence of Spohn House staff, Breyanna managed to hang herself in her closet on August 5, 2016. (*Id.* at ¶¶ 41-50.) Plaintiff further alleges that a combination of Spohn House employees' inadequate response and failures to follow established policies caused Breyanna to suffer significant

conscious pain before she died. (*Id.* at ¶¶ 44-48.)

On June 15, 2018, the Estate filed the present lawsuit against Orion and its employees Kate Ristow, Younin Choi, and Kristi Buske, which asserts claims for deliberate indifference to a serious medical need under 42 U.S.C. § 1983, along with state law negligence and wrongful death claims. (*Id.* at ¶¶ 1-2.) Plaintiff voluntarily dismissed Younin Choi and Kristi Buske on August 14 and September 4, 2018, respectively, without objection and without prejudice.[1] (Aug. 14, 2018 dkt. Entry; Sept. 4, 2018 Order (dkt. #14).)

In the parties' Rule 26(f) report dated September 10, 2018, the Estate noted its plan to re-file claims against Choi and Buske. (Joint Prelim. Pretrial Report (dkt. #15) ¶ 4.) The preliminary pretrial conference order established November 9, 2018, as the deadline for amendments to the pleadings without leave of court. (Prelim. Pretrial Conf. Order (dkt. #16) 2.) Having missed that deadline, the Estate asked the remaining defendants on January 2, 2019, for consent to amend the complaint to add Choi and Buske back in as defendants and to allege that defendants may have been acting as either state or county actors. (Reply (dkt. #26) 7.) Defendants refused, resulting in the present motion. (Mot. to Amend Compl. (dkt. #20).)

OPINION

Following the expiration of a party's ability to amend as a matter of course, "a party

[1] Although the Estate sought to dismiss these parties under Rule 41(a), the Seventh Circuit limits application of that rule to the dismissal of *actions*, not individual *parties or claims*. The dismissal of parties or claims falls under Rule 15(a). *See Taylor v. Brown*, 787 F.3d 851, 857-58 (7th Cir. 2015).

may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(1)-(2). However, leave to amend should be "freely given when justice so requires." Fed. R. Civ. P. 15(a)(2). A court may, in its discretion, deny leave to amend for reasons such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Here, defendants oppose plaintiff's motion to amend primarily on the grounds of: (1) an unreasonable delay in seeking renewed claims against these defendants; (2) prejudice to these defendants by allowing an amendment at this point; and (3) futility and immateriality because the employees are neither state or county actors, nor subject to indemnification. (Opp'n (dkt. #23) 3.) The court will address each of these arguments in turn.

First, delay alone is typically not a sufficient reason to deny a motion to amend. *Soltys v. Costello*, 520 F.3d 737, 743 (7th Cir. 2008); *see also Select Creations Inc. v. Paliafito Am., Inc.*, 830 F. Supp. 1213, 1217 (E.D. Wis. 1993) (explaining that delay may be considered "undue" because of the burden on the judicial system). The longer the delay, however, the greater the presumption against granting leave to amend. *Soltys*, 520 F.3d at 743. (*See also* Prelim. Pretrial Conference Order (dkt. #16) 2 ("[T]he later a party seeks leave of the court to amend, the less likely it is that justice will require the amendment").) And eleventh-hour amendments are highly likely to be both prejudicial to the opposing party and burden the judicial system. *Soltys*, 520 F.3d at 743.

The delay of a few months in this case is simply insufficient to warrant a denial of the motion to amend. While the Estate's request to amend came two months after the deadline to do so without leave of court, plaintiff represents that the request was made soon after the Estate's receipt of information through discovery that allowed it to locate Choi and Buske for service of the complaint. Additionally, the cutoffs for discovery and the deadline for dispositive motions are both still months away, and the legal and tactical issues for defense counsel should not change materially, nor will allowing the amendment burden the judicial system.

Second, as for defendants' claims of unfair prejudice by the proposed amendment, prejudice can appear in many forms, such as forcing parties to re-litigate a dispute on a new basis or incurring new rounds of additional and costly discovery. *Sanders v. Venture Stores, Inc.*, 56 F.3d 771, 774 (7th Cir. 1995). Here, defendants claim that they would be prejudiced because discovery is already under way and certain depositions have already taken place. (Opp'n (dkt. #23) 8.) As the Estate notes, however, defendants were aware of its intention to re-add both Choi and Buske from nearly the very beginning of this case until now, except arguably for a short window of approximately two months between November 9, 2018, the deadline for amendments without leave, and January 2, 2019, when defendants were asked to consent to their addition back into the lawsuit. Additionally, these two erstwhile defendants would likely need to be deposed even if they were not defendants because of their involvement in and familiarity with the underlying facts. As discovery is still in its early stages -- the discovery cutoff is not until September 27, 2019 -- and no dispute has yet been litigated, defendants will not be prejudiced by

amending the complaint to re-add Choi and Buske.

Defendants' third and final argument is that the proposed amendment would be futile because: (1) Wis. Stat. § 895.46 does not apply to the claims at issue; and (2) like Ristow, Choi and Buske were not employees of the State or Dane County. (Opp'n (dkt. #23) 6.) Section 895.46 requires the State or its political subdivision to indemnify defendants who are sued because of acts committed while carrying out their duties. Wis. Stat. § 895.46(1)(a). Plaintiff acknowledges that Ristow, Choi, and Buske were all employees of Orion, but also alleges that Orion contracted to provide the subject service with the State of Wisconsin. (Compl. (dkt. #1) ¶¶ 5-7, 15.) However, at this point, neither party cites to case law that is on point to help determine whether the individual defendants, as the employees of a state contractor, were acting as agents of the State or county.

As the Wisconsin Court of Appeals has noted, "[p]resumably the state does not assume liability for an individual under Wis. Stat. §894.26(1) as a state employee unless the state has the type of control over the individual that would constitute a master/servant relationship." *Lamoreux v. Oreck*, 2004 WI App 160, ¶ 22, 275 Wis. 2d 801, 686 N.W.2d 722. The Wisconsin Supreme Court has identified a number of factors that are relevant in determining if a master-servant relationship exists: the right to control, the place of work, time of employment, method of payment, nature of the business or occupation, furnishing of instrumentalities or tools, intent of parties to the contract, and the right to summarily discharge employees. *Pamperin v. Trinity Memorial Hosp.*, 144 Wis. 2d 188, 199, 423 N.W.2d 848 (1988). The right to control is the most important factor in finding a master-servant relationship. *Id.* Because this issue is more appropriately addressed at summary

judgment, with a more robust factual record, the court is not prepared to find an amendment to re-add Choi and Buske futile.[2]

ORDER

IT IS ORDERED that:

1) Plaintiff's motion for leave to amend its complaint (dkt. #20) is GRANTED.

2) Defendants may have until April 30, 2019, to answer or otherwise respond.

Entered this 15th day of April, 2019.

BY THE COURT:

/s/

_____

WILLIAM M. CONLEY
District Judge

[2] Even if this claim were futile as to these defendants, there is still the constitutional claim that they were acting under state law, so that the deliberate indifference claim would proceed past the pleading stage. *Payton v. Rush-Presbyterian-St. Luke's Med. Center*, 184 F.3d 623, 628 (7th Cir. 1999) (private entities may be held liable as government actors to the extent that (1) the government "effectively directs or controls the actions of the private party such that the state can be held responsible for the private party's decision"; or (2) the government "delegates a public function" to the private party).