

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

---

Susan Doxtator, Arlie Doxtator, and  
Sarah Wunderlich, as Special  
Administrators of the Estate of Jonathon  
C. Tubby,

Plaintiffs,

Case No. 19-CV-00137

v.

Erik O'Brien, Andrew Smith, Todd J.  
Delain, Heidi Michel, City of Green  
Bay, Brown County, Joseph P. Mleziva,  
Nathan K. Winisterfer, Thomas Zeigle,  
Bradley A. Dernbach, and John Does 1-5,

Defendants.

---

**BROWN COUNTY'S BRIEF IN SUPPORT OF MOTION TO DISMISS  
DEFENDANTS ERIK O'BRIEN, ANDREW SMITH  
AND CITY OF GREEN BAY'S CROSS-CLAIM**

---

Defendant Brown County, by its attorneys, Crivello Carlson, S.C., submits this Brief in Support of its Motion to Dismiss Defendants Erik O'Brien, Andrew Smith, and City Of Green Bay's (collectively "City Defendants") cross-claim, (ECF No. 41.) The cross-claim for state law indemnification and contribution claims against Brown County should be dismissed due to the City Defendants' failure to comply with the notice of claim requirements set forth in Wis. Stat. § 893.80.

## INTRODUCTION

This case stems from a shooting that occurred on October 19, 2018. Jonathon Tubby was shot by a Green Bay police officer while in the custody of the Green Bay Police Department in the “sally port” of the Brown County Jail. At the time of the shooting, there was no request for assistance from Brown County as contemplated by Wisconsin’s Mutual Aid statute and the City Defendants maintained concurrent jurisdiction while within the sally port of the Jail.

## FACTUAL BACKGROUND

Prior to the shooting, Mr. Tubby was stopped for a traffic violation by Officers Eric O’Brien and Colton Wernecke of the Green Bay Police Department. (City Defs.’ Cross-Clm. ¶ 2, ECF No. 41.) During the stop, the Officers arrested Mr. Tubby. (*Id.*) The Officers handcuffed Mr. Tubby and placed him in their patrol vehicle for transport to the Brown County Jail. (Am. Compl. ¶ 21, ECF No. 22.) Upon arrival at the jail Mr. Tubby initially refused to exit the police squad car. (*Id.* ¶ 22.) Ultimately, Officer O’Brien fired shots at Mr. Tubby, killing him. (*Id.* ¶ 25.)

On January 24, 2019, the personal representatives of Mr. Tubby’s estate commenced this action. (Compl., ECF No. 1.) On March 26, 2019, the Defendants Eric O’Brien, Andrew Smith, and City of Green Bay filed a cross-claim against Brown County for Indemnification and Contribution under Wis. Stat. § 895.46. (City Defs.’ Cross-Clm., ECF No. 41.) The cross-claim does not or allege that the City Defendants complied with Wis. Stat. § 893.80, *see generally (id.)*, which is a condition precedent to be satisfied before proceeding with this state-law claim.

Just the day before filing their cross-claim, the City Defendants served a Notice of Circumstances of Claim pursuant to Wis. Stat. § 893.80(1d)(a) seeking indemnification and a Notice of Claim pursuant to Wis. Stat. § 893.80(1d)(b) seeking indemnification on Brown County.

Brown County is still reviewing the claim and has not disallowed the claim. The 120-day deadline allowing for review has not expired.

### **MOTION TO DISMISS STANDARD**

A claim should be dismissed under Fed. R. Civ. P. 12(b)(6) when the allegations in the complaint, however true, could not raise a plausible claim of entitlement to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007). In ruling on a motion to dismiss, courts must construe all of the claimant’s factual allegations as true and draw all reasonable inferences in the claimant’s favor. *Savory v. Lyons*, 469 F.3d 667, 670 (7th Cir. 2006). However, courts are not required to accept as true a legal conclusion presented as a factual allegation. *Iqbal*, 556 U.S. at 677–79.

For claims based on Wisconsin law, Rule 12(b)(6) dismissal is appropriate if the claimant fails to satisfy Notice of Claim requirements of Wis. Stat. § 893.80. *Schwartz v. Milwaukee*, 43 Wis. 2d 119, 124, 168 N.W.2d 107 (1969); *Bernardi v. Klein*, 682 F. Supp. 2d 894, 906–07 (W.D. Wis. 2010) (citing *Schwartz*, 43 Wis. 2d at 128).

### **ARGUMENT**

#### **I. THE CITY DEFENDANTS’ STATE LAW CROSS-CLAIM SHOULD BE DISMISSED FOR FAILURE TO SATISFY NOTICE OF CLAIM REQUIREMENTS.**

The cross-claims for indemnification and contribution under Wis. Stats. §§ 66.0313 and 895.46 should be dismissed because the City Defendants failed to comply with the prerequisite notice of claim and disallowance of claim requirements set forth in Wis. Stat. § 893.80.

To pursue claims against a governmental body or officer, the party must first serve written notice of the circumstances of the claim within 120 days after the happening of the event giving rise to the claim. Wis. Stat. § 893.80(1d)(a). The notice must be served in accordance

with Wis. Stat. § 801.11 and “presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant [ ] agency.” Wis. Stat. § 893.80(1d)(a) and (b).

Section 893.80(1) applies to all claims. *DNR v. City of Waukesha*, 184 Wis. 2d 178, 515 N.W.2d 888 (1994) (holding Wis. Stat. § 893.80 applies to all causes of action, not just those in tort and not just those for money damages); *see also Nesbitt Farms v. Madison*, 2003 WI App 122, n.2, 265 Wis. 2d 422, 665 N.W.2d 379 (“continu[ing] to read *DNR v. City of Waukesha* as stating a general rule that the Wis. Stat. § 893.80(1) notice requirement applies to all actions against a municipality except for certain statutory actions excepted from the rule”).

To substantially comply with statutory requirement of notice of claims against government bodies, a notice must satisfy two related but distinct notice requirements: (1) a notice of injury requirement of written notice of the circumstances of the claim signed by the party, agent or attorney, served on the governmental body in question within 120 days after the event causing the injury; and (2) a notice of claim requirement that requires notice of the claimant’s identity and address, along with an itemized statement of relief sought, to the proper person at the governmental body and subsequent denial. Wis. Stat. § 893.80(1d)(a) and (b).

Compliance with both of these two distinct provisions is mandatory in order to avoid dismissal of an action. *Vanstone v. Town of Delafield*, 191 Wis. 2d 587, 530 N.W.2d 16 (Ct. App. 1995). “The notice of injury and notice of claim provisions of § 893.80(1) are unambiguously stated in the conjunctive; therefore, both provisions must be satisfied before the claimant may commence an action against a governmental agency.” *Snopek v. Lakeland Med. Ctr.*, 223 Wis. 2d 288, 301, 588 N.W.2d 19 (1999). “Failure to comply with this statute constitutes grounds for dismissal of the action.” *Casteel v. Baade*, 167 Wis. 2d 1, 10, 481 N.W.2d 277 (1992).

“[T]here is a clear rationale for requiring that a notice of claim be filed before suit is commenced against a local government: A notice gives the local government an opportunity to investigate the claim and resolve the dispute before becoming enmeshed in costly litigation.” *Willow Creek Ranch v. Town of Shelby*, 2000 WI 56, ¶ 82, 235 Wis. 2d 409, 611 N.W.2d 693; *see also Thorp v. Town of Lebanon*, 2000 WI 60, ¶ 28, 235 Wis. 2d 610, 612 N.W.2d 59 (confirming the notice of injury provision allows governmental entities to investigate and evaluate potential claims and the notice of claim provision affords a municipality the opportunity to compromise and settle a claim).

Here, the City Defendants’ failure to comply with the notice requirements before filing the cross-claim is jurisdictional. Written notices must be served and disallowed before a claim may be brought. *See Colby v. Columbia Cnty.*, 202 Wis. 2d 342, 357–58, 550 N.W.2d 124 (1996) (holding “Section 893.80(1)(b) requires that the plaintiff first provide the county with a notice of claim, followed by either a denial of such claim by the county, or the expiration of the 120-day disallowance period, prior to the filing of a summons and complaint”). Compliance with § 893.80(1)(b) is a necessary prerequisite to all actions brought against the entities listed in the statute whether brought as an initial claim, counterclaim, or cross-claim. *City of Racine v. Waste Facility Siting Bd.*, 216 Wis. 2d 616, 620, 575 N.W.2d 712 (1998).

The City Defendants initiated this cross-claim before receiving a disallowance of claim from Brown County and the 120-day disallowance period has yet to expire under Wis. Stat. § 893.80. Accordingly, the City Defendants’ is statutorily defective and must be dismissed.

## CONCLUSION

Based on the foregoing, the City Defendants' cross-claim must be dismissed for noncompliance with Wis. Stat. § 893.80. Brown County respectfully requests dismissal of the City Defendants' cross-claim.

Dated this 16th day of April, 2019.

CRIVELLO CARLSON, S.C.

Attorneys for Defendants Todd J. Delain, Heidi Michel,  
Brown County, Joseph P. Mleziva, Nathan K. Winisterfer,  
Thomas Zeigle, and Bradley A. Dernbach

BY: s/ Benjamin A. Sparks  
SAMUEL C. HALL, JR.  
State Bar No. 1045476  
BENJAMIN A. SPARKS  
State Bar No. 1092405

### **PO ADDRESS:**

710 N. Plankinton Avenue, Suite 500  
Milwaukee, WI 53203  
Phone: 414-271-7722  
Fax: 414-271-4438  
Email: [shall@crivellocarlson.com](mailto:shall@crivellocarlson.com)  
Email: [bsparks@crivellocarlson.com](mailto:bsparks@crivellocarlson.com)  
Email: [kzellner@crivellocarlson.com](mailto:kzellner@crivellocarlson.com)