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 REPLY BRIEF IN SUPPORT OF ITS 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., respectfully submits this Reply 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.)

ARGUMENT

I. THE CITY DEFENDANTS' CROSS-CLAIM IS NOT EXEMPT FROM THE NOTICE REQUIREMENTS OF WIS. STAT. § 893.80.

In arguing that its state-law claim against the County is not subject to the notice requirements of Wis. Stat. § 893.80, the City Defendants categorize their cross-claim as a negligence-based claim for common-law contribution, like the one at issue in *Dixson ex rel. Nikolay v. Wisconsin Health Org. Ins. Corp.*, 2000 WI 95, 237 Wis. 2d 149, 612 N.W.2d 721.

(City Defs.' Br. Opp. Mot. Dismiss at 3, ECF No. 56.) However, the City Defendants' comparison of their claim to the one in *Dixson* oversimplifies and misconstrues the nature of their allegations against the County because the City Defendants' cross-claim is not one for negligence-based contribution.

In *Dixson*, the plaintiffs sued their landlord for negligence when the then-two-year-old plaintiff was injured as a result of ingesting lead-based paint in their apartment. *Dixson*, 2000 WI 95, ¶ 1. The landlord impleaded the local municipality for contribution, alleging that the municipality negligently performed a federally regulated lead-based paint inspection. *Id.* ¶¶ 1–2. The Wisconsin Supreme Court held that the landlord's third-party claim against the municipality was exempt from the notice requirements of Wis. Stat. § 893.80 because the time-limit requirements built into the statute made compliance impractical due to the contingent nature of negligence-based contribution claims. *Id.* ¶¶ 12–16. The court further reasoned that, had the Wisconsin legislature intended for the notice requirements to apply to contingent contribution claims, it could have so specified, as it did in the notice of claim statute applying to claims against state officers. *Id.* ¶¶ 17–19.

Here, by contrast, the City Defendants' cross-claim is not a contingent, negligence-based claim for contribution. The City Defendants do not allege that they may be entitled to contribution based on potential payment of more than their fair share of joint tort liability, as might be expected based on the references to negligence-based contribution in their brief. (City Defs.' Br. Opp. Mot. Summ. J. at 2–3) (citing *State Farm Mut. Auto. Ins. Co. v. Schara*, 56 Wis. 2d 262, 201 N.W.2d 758 (1972)). Rather, the City Defendants premise their cross-claim entirely on the allegation that the officer allegedly involved in the subject shooting was an employee of the Brown County Sheriff's Department. (City Defs.' Cross-Claim ¶¶ 7–8, ECF No. 41); (Am.

Compl. ¶¶ 9–10, 25, ECF No. 22.) To that end, the City Defendants allege, "Green Bay Police Officer O'Brien was assisting and under the jurisdiction, direction, supervision and control of Lt. Zeigle and the Brown County Sheriff's Department, [such that he] is deemed by law under Wis. Stat. § 66.0313 to be an employee of Brown County for purposes of Wis. Stat. § 895.46." (City Defs.' Cross-Claim ¶¶ 7–8, ECF No. 41); (Am. Compl. ¶¶ 9–10, 25, ECF No. 22.)

Based on that allegation, the City Defendants claim that "Brown County is **legally required to indemnify the City of Green Bay under Wis. Stat[.] § 895.46** and will be responsible for all **attorney fees and costs incurred in the defense** of the City of Green Bay Defendants from the point in time where Brown County Sheriff Officer Lt. Zeigle took command of the incident involving Mr. Tubby, until after the scene was cleared." (City Defs.' Cross-Claim ¶ 10, ECF No. 41) (emphasis added). There are no allegations of potential joint-liability in tort between the City Defendants and the County Defendants, even though parties seeking negligence-based contribution "must plead and prove[,] among the other necessary allegations[, their] own negligence, the negligence of the other tort-feasors, and their common liability." *Farmers Mut. Auto. Ins. Co. v. Milwaukee Augo. Ins. Co.*, 8 Wis. 2d 512, 519, 99 N.W.2d 746 (1959). Indeed, the City Defendants do not allege that the County Defendants acted negligently or improperly, or that the City Defendants' contribution rights arise from such negligence. As such, the relief sought in the City Defendants' cross-claim is not contingent on a jury's apportionment of negligence, as would have been the case with the contribution claim in *Dixson*.

Thus, the City Defendants' cross-claim is not premised on the theory that the City Defendants are entitled to contribution in the event they are required to pay more than their fair share as joint-constitutional-tortfeasors. Instead, their cross-claim is premised on the theory that

they bear no statutory defense or indemnification responsibilities under Wis. Stat. § 895.46 to Officer O'Brien because he was effectively an employee of the Brown County Sheriff's Department by way of Wis. Stat. § 66.0313. *See* (City Defs.' Cross-Claim ¶¶ 7–10, ECF No. 41.) The City Defendants' cross-claim is therefore closer in substance to an insurer's declaratory action seeking a ruling on its defense and indemnification obligations to an insured. *Dixson* is silent as to whether such an action is exempt from the notice requirements of Wis. Sat. § 893.80, and the City Defendants have not provided the Court with legal authority for carving out a new exception.

Further, by arguing that their cross-claim is nothing more than a common-law claim for contribution, the City Defendants not only ignore the substance of the allegations in their cross-claim, but they also necessarily ignore a substantial consensus among federal courts that state-law contribution claims are not cognizable among co-defendants in 42 U.S.C. § 1983 actions. *See, e.g.*, *Perks v. County of Shelby*, No. 09-3154, 2009 WL 2985859, at *3 (C.D. Ill. Sep. 15, 2009); *Estate of Carlock ex rel. Andreatta-Carlock v. Williamson*, No. 08-3075, 2009 WL 1708088, at *4 (C.D. Ill. June 12, 2009); *Burris v. Cullinan*, No. 09-3116, 2009 WL 3575420 , at *8–9 (C.D. Ill. Oct. 23, 2009); *Mathis v. United Homes, LLC*, 607 F. Supp. 2d 411, 423–33 (E.D.N.Y. 2009); *Hoa v. Riley*, 78 F. Supp. 3d 1138, 1145–48 (N.D. Cal. 2015); *Hepburn ex rel. Hepburn v. Athelas Institute, Inc.*, 324 F. Supp. 2d 752, 755–60 (D. Md. 2004); *Woodson v. City of Richmond, Va.*, 2 F. Supp. 3d 804, 810–13 (E.D. Va. 2014).[1] This body of law and the City Defendants' failure to address it crystalizes the substantive disconnect between the allegations in

[1] *See also* Martin A. Schwartz, *Section 1983 Litigation Claims & Defenses* § 16:15 (4th ed.) (collecting cases) ("Many lower federal courts have found the rationale of *Northwest Airlines*[, *Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77 (1981), which held that there is no right of contribution in Title VII and Equal Pact Act actions,] applicable to § 1983 actions and, on this basis, have denied a right of contribution. To the extent that these decisions hold that there is no right to contribution under federal law in § 1983 cases, this appears to be the correct result.").

the cross-claim and the City Defendants' quick repackaging of those allegations in response to the County's motion to dismiss in an apparent effort to seek cover under *Dixson*.

In sum, the City Defendants' cross-claim seeks a legal determination as to which municipal entity is responsible for defense and indemnity obligations to Officer O'Brien and the other individual City Defendants in this case. Such a determination requires an evaluation of the allegations and facts, and an application of Wis. Stat. §§ 66.0313 and 895.46. Importantly, the allegations in the City Defendants' cross-claim do not seek to preserve their rights relating to overpayment for their own joint negligence, as was the case in *Dixson*, making that case inapplicable and uninstructive here. The City Defendants have not provided the Court with any other legal authority showing that the Court should carve out an exception to the notice requirements of Wis. Stat. § 893.80. Accordingly, prior to filing its cross-claim against the County, the City Defendants were required to comply with the notice requirements of Wis. Stat. § 893.80.

II. THE CITY DEFENDANTS CONCEDE THEY HAVE NOT COMPLIED WITH THE NOTICE REQUIREMENTS OF WIS. STAT. § 893.80.

Content believing that they are not bound by the notice requirements of Wis. Stat. § 893.80, the City Defendants do not dispute that they did not wait until the expiration of 120 days or a denial of their notice of claim before filing their cross-claim. (City Defs.' Br. Opp. Mot. Dismiss at 3–4, ECF No. 56); *see Colby v. Columbia Cnty.*, 202 Wis. 2d 342, 357–58, 550 N.W.2d 124 (1996). Wis. Stat. § 893.80(1)(b) "requires . . . either a denial of such a claim by the county, or the expiration of the 120-day disallowance period, prior to the filing" of the cross-claim. *Colby*, 202 Wis. 2d at 357–58.

The City Defendants do not assert that the County denied their notice of claim, nor that the 120-day disallowance period has expired, and they do not cite any allegations in the

pleadings or other admissible evidence showing compliance with the statute. Instead, they vaguely refer to their answers to the Complaint and Amended Complaint, and alleged correspondence sent to counsel, as sources of actual notice of the claim they bring against the County. (City Defs.' Br. Opp. Mot. Dismiss at 3–4, ECF No. 56.) However, these cursory references are insufficient to satisfy the City Defendants' burden of showing that the County (1) had actual notice of the City Defendants' claim, and (2) that, in light of such notice, the County was not prejudiced by the untimely filing of the cross-claim. *See E-Z Roll Off, LLC v. County of Oneida*, 2011 WI 71, ¶¶ 17–18, 335 Wis. 2d 720, 800 N.W.2d 421.

Neither of the City Defendants' answers to Plaintiffs' Complaint or Amended Complaint refer to the City Defendants' intent to seek negligence-based "contribution" from the County. *See* (City Defs.' Affirm. Defens. to Compl. ¶ 15, ECF No. 16); (City Defs.' Affirm. Defens. to Am. Compl. ¶ 10, ECF No. 35.) Their affirmative defenses refer to the theory of shifting defense and indemnity responsibilities from the City to the County under Wis. Stat. § 895.46—not to contribution arising out of joint tort liability. (*Id.*) Thus, the City Defendants have not shown that the County had actual notice of any negligence-based contribution claims against it, or that there is a lack of prejudice. The City Defendants' lack of proof is particularly important where, as here, their theory of liability has morphed from asserting a shift in statutory defense and indemnity obligations into asserting negligence-based contribution, the existence of which is highly questionable in Section 1983 cases. *See* n.1, *supra*. Because the theory of liability underlying the City Defendants' cross-claim has been presented as a moving target, the Court should require more than conclusory allegations of actual notice before permitting the City Defendants' intentional noncompliance with Wis. Stat. § 893.80's notice requirements.

Thus, the City Defendants have not shown that, prior to filing their cross-claim, the County had actual notice that the City Defendants sought negligence-based contribution, nor that the County was not prejudiced in light of such actual notice. Accordingly, because the City Defendants concede that they have not complied with the notice requirements of Wis. Stat. § 893.80, the Court should dismiss their cross-claim against the County.

CONCLUSION

Based on the foregoing, Brown County respectfully requests that the Court dismiss the City Defendants' cross-claim for noncompliance with Wis. Stat. § 893.80.

Dated this 14th day of May, 2019.

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