IN 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,

vs.

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

Defendants.

Case No. 1:19-cv-00137-WCG

PLAINTIFFS' REPLY IN SUPPORT OF OBJECTIONS TO BROWN COUNTY DEFENDANTS' BILL OF COSTS

In their response to Plaintiffs' objection to their Bill of Costs, the Brown County Defendants do not dispute that costs in this action may be assessed *only* against the estate of Jonathon C. Tubby (the "Estate"), and not Plaintiffs in their personal capacities. Yet, the Brown County Defendants do not identify any assets of the Estate that are worth over $19,920.59 that could be used to pay the costs that they seek. Instead, the Brown County Defendants argue (1) that Plaintiffs have not met their burden to show indigency, primarily due to the prospect of a successful appeal by Plaintiffs of the very order that entitles the Brown County Defendants to costs in the first place, and (2) that the Court should not rely on the indigency exception because the issues were not "close" (even though the Brown County Defendants' argument on (1) relies primarily on a successful appeal of those same issues). These contradictory arguments should be rejected. The only course of action that is consistent for *the Court*, which dismissed the claims that are the primary assets of the Estate, is to decline to award costs against the Estate.

With respect to their first argument, the Brown County Defendants argue that Plaintiffs' declarations do not meet their burden to show the indigency of the Estate. The Brown County Defendants, however, ask too much. The Estate has no significant assets other than the causes of action asserted herein. Obviously, to prove a *lack* of assets is to prove a negative—an impossible task. Yet, Plaintiffs have submitted two declarations, one from a Special Administrator of the Estate and the other from probate counsel, detailing the search for assets and the few that do exist. The few assets that do exist—bereavement assistance and a car—do not amount to anywhere close to the $19,920.59 requested. With respect to the vehicle, the Brown County Defendants take issue with the citation to the Kelley Blue Book, but offer no rationale of their own for how or why a 1997 Pontiac Grand Am could be worth nearly $20,000.

The only other assets are the now-dismissed claims. On this point, the Brown County Defendants attempt to thread the needle. They argue that the U.S. Court of Appeals could reverse the dismissal of the claims against the "other Defendants," i.e., the Green Bay Defendants. ECF 185 at 2. Obviously, this is true, but by the same token the U.S. Court of Appeals could also reverse the dismissal of claims against the Brown County Defendants themselves, meaning that they would no longer be a prevailing party entitled to costs. Only in the limited circumstance that the appeal goes against the Green Bay Defendants, but in favor of the Brown County Defendants, would the Estate then have any assets that could be used to pay the Brown County Defendants. At this procedural stage, this is speculative.

Moreover, the Brown County Defendants' argument that the causes of action asserted in this case are valuable assets is a tacit admission that Plaintiffs' appeal will be successful—an admission that is directly contrary to the Brown County Defendants' argument that the Court should decline to exercise its discretion under the indigency exception because the issues were not

"close." As Brown County admits—a party cannot have it both ways. The Brown County Defendants cannot simultaneously argue that the issues were not "close" (including the issues related to the Green Bay Defendants, *see* ECF 185 at 6) while also asserting the prospect of Plaintiffs' success on appeal entitles the Brown County Defendants to a cost award against the Estate now. Obviously, each party believes that its own position will be meritorious on appeal. And, each party's assertion of merit creates some internal inconsistency. But, the parties' subjective beliefs as to the outcome of the appeal are immaterial. It is *the Court* that must decide whether to award costs, and the Court has already decided that Plaintiffs' claims should be dismissed. The only course of action that is internally consistent for *the Court* is to treat those claims as having little value, while also recognizing that the issues were close, and therefore declining to award costs based on the indigency exception.

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By */s/ Forrest Tahdooahnippah*

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