COURT OF APPEALS
DECISION
DATED AND FILED

February 21, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0031 **Cir. Ct. No. 99-CV-2644**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

KAREN HEREK, ULYSSES PARISH, AND HELEN V. HAGIE,

PLAINTIFFS-APPELLANTS,

V.

STATE OF WISCONSIN, TOMMY THOMPSON, JOE LEEAN, AND PEGGY BARTELS,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed*.

Before Dykman, Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Karen Herek, Ulysses Parish, and Helen Hagie appeal a judgment dismissing their complaint against the State and several state

officials. The dispositive issues are whether the plaintiffs failed to file a notice of claim under WIS. STAT. § 893.82(3) (1999-2000),[1] whether the complaint fails to state a claim, and whether the State is immune under the doctrine of sovereign immunity. We affirm the dismissal of the complaint.

¶2 The plaintiffs' complaint makes the following allegations. The plaintiffs are persons who received treatment for smoking-related illnesses, and such treatment was paid for in whole or in part under Wisconsin's Medical Assistance Program, also known as Medicaid. *See* WIS. STAT. §§ 49.43 to 49.497. The State sued tobacco companies to recover for, among other things, monies the State spent treating Medicaid recipients for smoking-related illnesses and to recover future Medicaid expenses for treating such illnesses. The State settled this suit as part of a "master settlement agreement" under which the State will receive payments of approximately $5.9 billion over twenty-five years, and these payments are in substantial part designed to reimburse Wisconsin for past and future tobacco-related Medicaid costs.

¶3 The plaintiffs further allege that Medicaid recipients in Wisconsin automatically assign to the State all of the recipients' rights to recover for past or future medical expenses from a third party. *See* WIS. STAT. § 49.89(3). The plaintiffs claim that if the State collects money from a third party under such an assignment, federal and state statutes require the State to retain such funds as are necessary to reimburse it for medical assistance payments made on the recipient's behalf, and then to pay to the recipient any remainder from the amount collected.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

See 42 U.S.C. § 1396k(b) (2001) and § 49.89(5). They contend that the money to be collected by the State under the settlement agreement will "far exceed" the expenses the State has incurred to pay for the recipients' medical care. The plaintiffs also allege that the individual defendants, acting under color of state law, are failing to comply with the federal and state statutes that require the State to pay a portion of the settlement to the Medicaid recipients, including the plaintiffs. As a supplement or alternative to that legal theory, the plaintiffs also allege a contract theory that they are third-party beneficiaries to the settlement agreement and the defendants have repudiated the plaintiffs' rights to receive that portion of the settlement that they are entitled to under the terms of the settlement.

¶4 The plaintiffs seek two forms of relief: (1) an injunction directing the defendants to deposit the settlement payments into an escrow account maintained by the court, until the court determines what portion of the settlement belongs to the plaintiffs; and (2) a declaratory judgment requiring the defendants to adhere to federal and state law requiring them to pay any remainder of the settlement money to the plaintiffs. The plaintiffs also sought certification as a class action.

¶5 The defendants moved to dismiss all claims against all defendants, and the circuit court granted the motion. The plaintiffs appeal.

¶6 The defendants argue that the claims against the individual defendants must be dismissed because the plaintiffs did not file a notice of claim under WIS. STAT. § 893.82(3). If a complaint fails to plead compliance with the notice statute, it fails to state a claim upon which relief can be granted for state law claims against individual state defendants. ***Yotvat v. Roth***, 95 Wis. 2d 357, 360-61, 290 N.W.2d 524 (Ct. App. 1980). For the purpose of testing whether a claim

has been stated pursuant to a motion to dismiss, the facts pleaded must be taken as admitted. ***Morgan v. Pennsylvania Gen. Ins. Co.***, 87 Wis. 2d 723, 731, 275 N.W.2d 660 (1979).

¶7 The plaintiffs reply that a notice of claim need not be filed in a suit for injunctive and declaratory relief brought under 42 U.S.C. § 1983, and that their complaint seeks only injunctive and declaratory relief under that section. Specifically, they argue that this suit seeks only a declaration of the plaintiffs' legal rights and an order directing the defendants to pay money to the plaintiffs in the future, to the extent the law requires. We are not persuaded that this is different from a state law action for money damages. The end result sought by the plaintiffs is payments from the State to them. If the tobacco companies were paying the settlement amount as a lump sum, it would be apparent that plaintiffs seek to be paid a portion of that amount. We do not believe this changes simply because the settlement will be paid in installments over a period of years. Therefore, a notice of claim was required, and we affirm the dismissal of the claims against the individual defendants to the extent the claims are premised on state law.

¶8 As to the federal claim under 42 U.S.C. § 1396k(b), we conclude it was properly dismissed on the merits. In this claim, the plaintiffs asserted that § 1396k(b) entitled them to receive whatever portion of the settlement was for medical assistance that exceeded what the State had already paid for treatment of the recipients. This allegation fails to state a claim because in Wisconsin, the medical assistance recipient does not assign to the State any claim that exceeds what the State pays for treatment of the recipient. ***Ellsworth v. Schelbrock***, 2000 WI 63, ¶21, 235 Wis. 2d 678, 611 N.W.2d 764. The plaintiffs assert that ***Ellsworth*** was wrongly decided because it is inconsistent with the federal statute,

but they also acknowledge that we are bound by it. Therefore, we conclude that in settling the tobacco claims, the State cannot be recovering, on behalf of the plaintiffs, more than it paid in medical expenses, because the plaintiffs have not assigned to the State the right to make such a recovery. Accordingly, there can be no excess amount that the plaintiffs would be entitled to receive under 42 U.S.C. § 1396k(b). This analysis was also followed in ***Floyd v. Thompson***, 227 F.3d 1029, 1036-37 (7th Cir. 2000), and it is amplified in more detail in that opinion, which we find persuasive.

¶9 In addition, the court in ***Floyd*** concluded that the settlement agreement itself makes it clear that the State was not settling for any recipient's potential claims beyond what the State had been assigned by the recipient. ***Id***. at 1037. That provision of the settlement agreement, the definition of "Releasing Parties," is quoted in the plaintiffs' complaint. We agree with ***Floyd***'s analysis of this provision, and therefore we conclude that any federal claim must be dismissed for this reason, as well.

¶10 As to the claims against the State, itself, the defendants moved to dismiss on the ground that the suit is barred by the State's sovereign immunity under the Wisconsin Constitution, art. IV, § 27. They renew this argument on appeal. Consent to suit must be expressly granted by the legislature, and if the legislature has not done so, then sovereign immunity, if properly raised, deprives the court of personal jurisdiction over the State and its agencies. ***Brown v. State***, 230 Wis. 2d 355, 363, 602 N.W.2d 79 (Ct. App. 1999), *review denied*, 2000 WI 21, 233 Wis. 2d 85, 609 N.W.2d 474.

¶11 The plaintiffs contend that the State waived its immunity by providing in the settlement agreement that the state court has jurisdiction to

implement and enforce the agreement, and plaintiffs argue that they are attempting to enforce their rights under the settlement agreement in this case.

¶12 The first problem with this argument is the state of the record. The plaintiffs assert that we can take judicial notice of this provision in the settlement agreement, and they quote from it in their brief, but they do not provide us with a copy. The defendants have given us a partial copy of the settlement agreement, but that copy includes only part of the provision cited by the plaintiffs. Neither party informs us where this portion of the settlement agreement can be found in the record itself. Because we have not been given a copy of the provision in question, and because the provision may not have been before the circuit court, we are not inclined to rely on it.

¶13 However, even if the settlement agreement provides as the plaintiffs claim, we reject the argument. This action does not seek to enforce plaintiffs' rights under the settlement agreement as alleged third-party beneficiaries of that agreement. Rather, it seeks to enforce what plaintiffs believe are their rights under federal and state statutes.

¶14 The plaintiffs also argue that the State waived its immunity and consented to the jurisdiction of the court when it filed the underlying suit against the tobacco companies. This argument is based on certain federal case law, but the plaintiffs do not explain why these federal cases are relevant to a claim of sovereign immunity under the state constitution. Moreover, they have not shown that the State's suit against the tobacco companies would waive sovereign immunity in regard to a suit by anyone other than the defendants in the State's own suit.

¶15 Finally, the plaintiffs argue that the State is not immune because the plaintiffs are seeking only declaratory relief, and not a money judgment. As we already discussed above, we reject the notion that this suit is brought only for declaratory relief. Accordingly, we conclude that all claims against the State were properly dismissed.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.