IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARLENE A. SHULTIS, JERI SHULTIS,
MICHEL D. EMRICH, RALPH EMRICH,
LANA J. BOEHME and BILLY BOEHME,

OPINION and ORDER

Plaintiffs,

11-cv-24-bbc

v.

WOODSIDE RANCH, LLC,
ARCH INSURANCE COMPANY and
BRIAN SLETTEN,

Defendants,

and

GUNDERSEN LUTHERAN HEALTH PLAN, INC. and
HEALTH TRADITION HEALTH PLAN,

Subrogated Insurers.

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In December 2010, plaintiffs Marlene Shultis, Jeri Shultis, Michel Emrich, Ralph Emrich, Lana Boehme and Billy Boehme filed this action in the Circuit Court for Juneau County, Wisconsin, asserting negligence and other state law claims against defendant Woodside Ranch, LLC and its insurer, Arch Insurance Company. On January 13, 2011,

defendants removed the case to this court on the basis of diversity jurisdiction. On April 29, 2011, plaintiffs filed an amended complaint adding defendant Brian Sletten, a resident of Wisconsin, to the action. Dkt. #29. Because plaintiffs and defendant Sletten are residents of Wisconsin, the parties are no longer diverse.

Now before the court is defendants' motion to deny plaintiffs' joinder of Sletten, dkt. #40, plaintiffs' motion to strike defendants' motion to deny joinder, dkt. #46, and plaintiffs' motion to remand the case to state court pursuant to 28 U.S.C. § 1447(e), dkt. #49.

I am persuaded that joinder of defendant Sletten is proper and that his presence in the case will insure that all of plaintiffs' negligence claims are resolved in a single dispute. The interests of judicial efficiency outweighs defendants' desire to have this case tried in a federal court. Because complete diversity does not exist, this court lacks subject matter jurisdiction, making it necessary to remand the case. 28 U.S.C. § 1447(c). Accordingly, I will deny defendants' motion to deny joinder and grant plaintiffs' motion to remand the case. I will deny plaintiffs' motion to strike as moot.

In their amended complaint, plaintiffs allege the following facts.

ALLEGATIONS OF FACT

Defendant Woodside Ranch, LLC, a citizen of Florida and Arkansas, operates Woodside Ranch Resort and Conference Center in Juneau County, Wisconsin. One of the

activities offered at Woodside Ranch is a breakfast trail ride that combines horseback riding with an outdoor breakfast in the woods. Defendant Brian Sletten is the "head wrangler" at Woodside Ranch and is responsible for managing the horses, the other wranglers and the breakfast trail ride. He is a citizen and resident of Wisconsin. Defendant Arch Insurance Co., a Missouri corporation with its principal place of business in New York, insures Woodside Ranch.

On September 21, 2008, plaintiffs Marlene and Jeri Shultis, Michel and Ralph Emrich and Lana and Billy Boehme, all citizens and residents of Wisconsin, visited Woodside Ranch to participate in the breakfast trail ride. After breakfast, Woodside Ranch employees, under the direction of defendant Sletten, told plaintiffs to enter the horse corral and find and mount their horses. As plaintiffs and other guests were entering the corral, the horses stampeded out of the corral, trampling and injuring plaintiffs Marlene Shultis, Michel Emrich and Lana Boehme.

OPINION

When a plaintiff files suit in state court but could have invoked the original jurisdiction of the federal courts, the defendant may remove the action to federal court. 28 U.S.C. § 1441(a). The party seeking removal has the burden of establishing federal jurisdiction, and federal courts should interpret the removal statute narrowly, resolving any

doubt in favor of the plaintiff's choice of forum in state court. Doe v. Allied-Signal, Inc., 985 F.2d 908, 911 (7th Cir. 1993). This case does not involve any issues of federal law. Therefore, federal jurisdiction exists only if the parties are completely diverse. Defendants removed the case to federal court, properly invoking the court's diversity jurisdiction under 28 U.S.C. § 1332(a)(1) because plaintiffs are Wisconsin citizens and defendants are citizens of Florida, Arkansas, Missouri and New York. However, after removal occurred, plaintiffs joined defendant Brian Sletten, a Wisconsin citizen, and complete diversity was destroyed.

When joinder of a nondiverse party would destroy subject matter jurisdiction, 28 U.S.C. § 1447(e) applies and provides the district court two options: (1) deny joinder; or (2) permit joinder and remand the action to state court. Shur v. L.A. Weight Loss Centers, Inc., 577 F.3d 752, 758 (7th Cir. 2009); Jass v. Prudential Health Care Plan, Inc., 88 F.3d 1482, 1486 (7th Cir. 1996). These are the only options; the district court may not permit joinder of a nondiverse defendant and retain jurisdiction. Shur, 577 F.3d at 758. A district court has discretion to permit or deny post-removal joinder of a nondiverse party, and the court should balance the equities to make the determination. Id. The Court of Appeals for the Seventh Circuit applies four factors for determining whether post-removal joinder of a nondiverse party is appropriate: (1) the plaintiff's motive for seeking joinder, particularly whether the purpose is to defeat federal jurisdiction; (2) the timeliness of the request to amend; (3) whether the plaintiff will be significantly injured if joinder is not allowed; and (4)

any other relevant equitable considerations. Id. If joinder of defendant Sletten is proper, this matter must be remanded for lack of subject matter jurisdiction. 28 U.S.C. § 1447(c).

Defendants' primary argument in opposition to the joinder of defendant Sletten falls under the first factor of the post-removal joinder analysis. In particular, defendants rely on the fraudulent joinder doctrine, under which a plaintiff may not join a nondiverse defendant simply to destroy diversity jurisdiction. Schwartz v. State Farm Mutual Auto. Insurance Co., 174 F.3d 875, 878 (7th Cir. 1999); Gottlieb v. Westin Hotel Co., 990 F.2d 323, 327 (7th Cir. 1993). However, the fraudulent joinder doctrine applies differently in post-removal situations. Shur, 577 F.3d at 764. In the post-removal context, "the fraudulent joinder doctrine is not *dispositive* of whether joinder is improper;" it is simply one relevant factor for determining whether to permit joinder under § 1447(e). Id. (emphasis in original).

A party asserting fraudulent joinder has a "heavy burden." Id. It must demonstrate that, "after resolving all issues of fact *and law* in favor of the plaintiff, the plaintiff cannot establish a cause of action against the in-state defendant." Id. (emphasis in original) (citing Poulos v. Naas Foods, Inc., 959 F.2d 69, 73 (7th Cir. 1992)); see also Gottlieb, 990 F.2d at 327. Framed a different way, the court must ask whether there is "any reasonable possibility" that plaintiffs could prevail against defendant Sletten. Poulos, 959 F.2d at 73. In conducting this analysis, I must turn to Wisconsin law to determine whether plaintiffs have any reasonable possibility of success in their negligence claim against Sletten.

A successful negligence claim under Wisconsin law requires a plaintiff to show (1) a duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury. Behrendt v. Gulf Underwriters Insurance Co., 2009 WI 71, ¶ 14, 318 Wis. 2d 622, 633, 768 N.W.2d 568, 573. Defendants contend that plaintiffs have no probability of success on their negligence claim against defendant Sletten for two reasons.

First, they contend that Sletten owed no independent duty of care to plaintiffs. However, Wisconsin follows the view that "everyone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others." Behrendt, 2009 WI 71, ¶ 17 (quoting Palsgraf v. Long Island Railroad Co., 248 N.Y. 339, 350, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting)); see also Gritzner v. Michael R., 2000 WI 68, ¶ 20, 235 Wis. 2d 781, 791, 611 N.W.2d 906, 912 ("a duty of care is established under Wisconsin law whenever it [i]s foreseeable . . . that [an] act or omission to act might cause harm to some other person.") (citations omitted). In addition, an employee may be liable "for harm proximately caused by his own negligent conduct." Casper v. American International South Insurance Co., 2010 WI App 2, ¶ 70, 323 Wis. 2d 80, 122, 779 N.W. 2d 444, 465 (quotation and citation omitted). Thus, although "an employer can be held vicariously liable for the negligent acts of his employees while they are acting within the scope of their employment . . . [t]he additional liability of the employer . . . does not shield

the negligent employee from his own personal liability." Casper, 2009 WI 71, ¶ 70 (holding that corporate officer may be liable for negligently approving trucking route that could not be completed within time allotted by federal regulations without raising safety concerns). See also Oxmans' Erwin Meat Co. v. Blacketer, 86 Wis. 2d 683, 692, 273 N.W.2d 285, 289 (1979) ("An individual is personally responsible for his own tortious conduct. A corporate agent cannot shield himself from personal liability for a tort he personally commits or participates in by hiding behind the corporate entity.").

In this case, plaintiffs contend that defendant Sletten owed them a duty of care because he was the head wrangler, was responsible for managing and controlling the breakfast ride, the horses and the other employees and was present at the scene of the accident. Defendants have cited no Wisconsin cases suggesting that Sletten would not owe plaintiffs a duty of care under such circumstances. Thus, I cannot conclude that plaintiffs have no possibility of establishing a cause of action against Sletten. Shur, 577 F.3d at 764.

Defendants' second argument is that even if defendant Sletten owed a duty of care to plaintiffs, the allegations in the amended complaint fail to meet the requirements of Fed. R. Civ. P. 8 because the complaint fails to identify what Sletten did wrong or what he should have done differently. In other words, plaintiffs do not provide sufficient details to imply that Sletten breached his duty of care. I disagree. Under Wisconsin law, a person breaches his or her duty of care by failing to exercise the care a reasonable person would use in similar

circumstances. Behrendt, 2009 WI 71, ¶ 43. According to plaintiffs' amended complaint, defendant Sletten breached his duty of care by failing to take appropriate actions and precautions that could have prevented plaintiffs' injuries. In particular, plaintiffs allege that defendant Woodside's employees, acting under the direction of Sletten, instructed plaintiffs to enter the horse corral and retrieve their horses. However, Sletten failed to properly "organize, manage, direct, supervise, oversee and control" this activity. Plts.' Am. Cpt., dkt. #29, ¶¶ 22-23. As a result, the horses stampeded out of the corral and trampled plaintiffs. Id. ¶¶ 8-9. Although plaintiffs do not describe in detail what Sletten could or should have done to prevent the stampede from happening, the amended complaint provides enough details about the event to state a plausible negligence claim and provide defendants sufficient notice of the nature of plaintiffs' claim against Sletten. Swanson v. Citibank, N.A., 614 F.3d 400, 404-06 (7th Cir. 2010) (complaint must provide defendant fair notice of what claim is and grounds upon which it rests).

If plaintiffs prove their allegations, a reasonable jury could conclude that Sletten owed a duty of care to plaintiffs, that he breached the duty by failing to insure plaintiffs' safety and that Sletten's negligence caused plaintiffs' injuries. Accordingly, I cannot conclude that plaintiffs have "no reasonable possibility" of success on their negligence claim against defendant Sletten. Because plaintiffs have a possibility of success against Sletten, I cannot say that plaintiffs' sole motivation for joining him was to defeat diversity jurisdiction. The

fraudulent joinder doctrine does not apply.

Additionally, I conclude that the other factors relevant to the analysis of post-removal joinder of a non-diverse party suggest that joinder and remand are appropriate in this case. With respect to the timeliness of plaintiffs' amended complaint, this case is still at its early stages and plaintiffs amended their complaint before the deadline for amendments to pleadings set out in the pretrial conference order, dkt. #28. Moreover, the procedural history of the case does not suggest that plaintiffs added defendant Sletten solely to destroy diversity. Plaintiffs allege that they anticipated adding one or more of defendant Woodside Ranch's employees as a defendant before the case was removed. When they filed their original complaint in December 2010, they served interrogatories on defendants seeking the identity of persons who were involved in the accident, in part to assist plaintiffs in identifying persons who might be added to the lawsuit as defendants. Shortly after the case was removed, plaintiffs notified defendants and the magistrate judge that they anticipated joining additional defendants, some of whom might be nondiverse. After deposing the individuals identified in defendants' responses to their interrogatories, plaintiffs filed an amended complaint adding Sletten as a defendant.

The joinder of defendant Sletten will not unduly prejudice defendants. None of the parties will suffer great hardship if the complaint is amended to include all potentially liable parties and all related claims. Although the new allegations will require remand to the

Circuit Court for Juneau County, that is not undue prejudice, particularly because Juneau County is where the events in this case occurred and where many of the parties and witnesses are located. The underlying dispute in this case is based entirely on Wisconsin law and defendants have suggested no reason why a state court is not competent to resolve this action. Finally, considerations of judicial economy and consistent verdicts favor allowing plaintiffs to amend their complaint to include defendant Sletton. If joinder is denied, plaintiffs would be required to file a second action in state court to pursue their claim against Sletton. Two different courts would be evaluating the same set of facts in two separate lawsuits. Not only would this be a wasteful duplication of efforts, but it could lead to contradictory results.

Because I find plaintiffs' joinder of defendant Sletton to be proper, the parties of this case are no longer completely diverse. Therefore, I will remand for lack of subject matter jurisdiction. 28 U.S.C. § 1447(c).

ORDER

IT IS ORDERED that

1. The motion to deny joinder, dkt. #40, filed by defendants Woodside Ranch, LLC, Brian Sletten and Arch Insurance Company is DENIED.

2. The motion to strike, #46, filed by plaintiffs Marlene Shultis, Jeri Shultis, Michel

Emrich, Ralph Emrich, Lana Boehme and Billy Boehme is DENIED as moot.

3. Plaintiff's motion for remand, dkt. #49, is GRANTED and this case is REMANDED to the Circuit Court of Juneau County for lack of subject matter jurisdiction. The clerk of court is directed to transmit the file to the Circuit Court of Juneau County.

Entered this 24th day of June, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge