

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

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AMBER DEGRAFF and  
MICHAEL DEGRAFF,

Plaintiffs,

v.

JEFFREY S. SKATRUD,  
JACOB R. SCHOOF,  
DIANE K. TERTIN,  
DANNY DOUGLAS MITCHELL II,  
GREEN COUNTY, and  
WISCONSIN COUNTY MUTUAL  
INSURANCE CORPORATION,

Defendants.

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ORDER

15-cv-690-jdp

This case began in Wisconsin state court, when plaintiffs Amber and Michael DeGraff, husband and wife, sued several state officials to recover damages for the wrongful death of Kyle Poetter, Amber's son and Michael's step-son. Defendants removed the case to this court on October 27, 2015. Dkt. 1. None of the parties have questioned whether defendants properly removed this case, but "federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). After reviewing defendants' notice of removal, the court is not persuaded that they have adequately articulated a basis for this court's exercise of subject matter jurisdiction. The court will therefore order defendants to show cause why this case should not be remanded to state court.

Kyle died on January 30, 2013, while in a county jail under the custody of the Green County Sheriff. Toxicology reports indicated that he had one or more drugs in his system for

which he did not have a prescription. In their second amended complaint, plaintiffs allege that defendants contributed to Kyle's death by:

- Holding Kyle, a minor, in an adult jail;
- Failing to properly strip search another inmate, defendant Danny Douglas Mitchell II, who smuggled in the drugs that led to Kyle's death; and
- Housing Kyle in the same cell as Mitchell, despite the fact that Mitchell was a "known predator."

*See generally* Dkt. 1-4. Defendants contend that this court has subject matter jurisdiction because plaintiffs' second amended complaint alleges: (1) deliberate indifference to a known risk of housing minors in the same cell as known predators; and (2) deliberate indifference for failing to develop a policy to protect minors housed in adult jails. Dkt. 1, ¶ 6.

Defendants purport to remove this case pursuant to 28 U.S.C. §§ 1441(a) and 1443, contending that "the matter here in controversy presents a federal question." *Id.* ¶ 7. As the removing parties, defendants bear the burden of establishing that this court has subject matter jurisdiction, and the court must resolve any doubts in favor of plaintiffs' choice of forum in state court. *Schur v. L.A. Weight Loss Ctrs., Inc.*, 577 F.3d 752, 758 (7th Cir. 2009). At this point, defendants have not demonstrated that either § 1441 or § 1443 supplies a basis for removing plaintiffs' case to federal court.

To determine whether removal is proper under § 1441, "federal courts may look only to the well-pleaded complaint, and not to any possible or anticipated defenses, to determine if the case arises under federal law." *Vorhees v. Naper Aero Club, Inc.*, 272 F.3d 398, 402 (7th Cir. 2001). Here, the complaint contains the phrase "deliberate indifference," which is a standard of fault often used in cases alleging violations of the Eighth Amendment. *See Helling v. McKinney*, 509 U.S. 25, 32 (1993). But a fair reading of plaintiffs' complaint suggests that

they are proceeding against defendants with only state law tort claims for wrongful death, rather than with claims for constitutionally inadequate conditions of confinement. The complaint does not invoke the U.S. Constitution or allege that defendants violated Kyle or plaintiffs' constitutional rights. Although a complaint need not plead specific legal theories, plaintiffs—who are represented by counsel—likely would have at least mentioned a constitutional provision or right if they were indeed alleging a constitutional tort. Thus, plaintiffs' complaint appears to arise under only state law, and defendants have not demonstrated that they were entitled to remove the case to federal court pursuant to § 1441.

The second statute that defendants identify is § 1443, which provides that:

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

This case does not fall within either of the two types of civil actions described in § 1443. The first prong of the statute does not authorize removal in this case because defendants—the parties *against* whom plaintiffs brought this action—do not contend that they are being denied any civil rights that have been expressed in terms of racial equality. *See Fenton v. Dudley*, 761 F.3d 770, 773-74 (7th Cir. 2014). And the second prong is likewise inapplicable because “this subsection of the removal statute is available only to federal officers and to

persons assisting such officers in the performance of their official duties.” *City of Greenwood v. Peacock*, 384 U.S. 808, 815 (1966). Plaintiffs do not allege—and defendants do not contend—that defendants are federal officers or that they were acting to assist federal officers when the acts or omissions at issue in this case occurred.

Because the court is acting on its own initiative, defendants may have an opportunity to show cause why this case should not be remanded to state court for lack of subject matter jurisdiction. If defendants determine that they have improperly removed the case to federal court, then the parties should promptly file a stipulation to remand.

#### ORDER

IT IS ORDERED that:

1. Defendants Jeffrey Skatrud, Jacob Schoof, Diane Tertin, Green County, and Wisconsin County Mutual Insurance Corporation must show cause by November 18, 2015, why this case should not be remanded to state court.
2. If defendants fail to meet this deadline, then the court will remand this case for lack of subject matter jurisdiction.

Entered November 4, 2015.

BY THE COURT:

/s/

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JAMES D. PETERSON  
District Judge