UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Americans for Tribal Court Equality, James Nguyen, individually and on behalf of his minor child A.N., and Michelle Steinhoff, individually and on behalf of her minor child T.J., Plaintiffs, vs. Emily Piper, in her official capacity as Commissioner of the Minnesota Department of Human Services, and Scott County, Defendants.	Case No. 17-cv-04597 (ADM/KMM) **DEFENDANT SCOTT COUNTY'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS**

INTRODUCTION

Plaintiffs have brought this case alleging their civil rights were violated because the Scott County Human Services Department, in a child protection case, followed the State of Minnesota's policy on the Indian Child Welfare Act ("ICWA").

Plaintiffs' claims have no merit in that the County, in following state policy, did not violate federal law or the Plaintiffs' civil rights.

Further, the County, in child protection matters such as this, is an arm of the state because it is mandated to follow the policies of the Minnesota Department of Human Services (whose head is Defendant Commissioner Emily Piper).

Finally, Plaintiffs can make no *Monell* claim because they cannot point to a policy or custom of Scott County that caused their alleged injury. Instead, they admit that the policy Scott County followed was that of the state. Because it was not a Scott County

policy that allegedly caused harm, under *Monell*, the case should be dismissed as against Scott County.

FACTS

The facts are taken from the Complaint and from public documents and laws that the Court may take judicial notice of.[1] Child protection is a duty of the state. Specifically, it is a duty of the Minnesota Department of Human Services ("DHS") Commissioner. Minn. Stat. § 256.01, subd. 2(c).

By state law, counties carry out much of DHS' functions, especially in the realm of child protection. Minn. Stat. § 393.07, subd. 1. It states:

> **Public child welfare program**. (a) *To assist in carrying out the child protection*, delinquency prevention and family assistance responsibilities of the state, the local social services agency *shall administer a program of social services and financial assistance to be known as the public child welfare program*. The public child welfare program *shall be supervised by the commissioner of human services and administered by the local social services agency in accordance with law and with rules of the commissioner*.

Accordingly, counties must carry out DHS edicts when it comes to delivery of human services, including child protection. Minn. Stat. § 256.01, subd. 2 states:

> [T]he commissioner of human services *shall* carry out the specific duties [listed below].
>
> (a) Administer and supervise all forms of public assistance provided for by state law and other welfare activities or services as are vested in the commissioner. Administration and supervision of human services activities or services includes, but is not limited to, assuring timely and accurate

[1] "In this circuit, Rule 12(b)(6) motions are not automatically converted into motions for summary judgment simply because one party submits additional matters in support of or opposition to the motion . . . . Some materials that are part of the public record or do not contradict the complaint may be considered by a court in deciding a Rule 12(b)(6) motion." *Nixon v. Coeur D'Alene Tribe,* 164 F.3d 1102, 1107 (8th Cir. 1999).

> distribution of benefits, completeness of service, and quality program management. In addition to administering and supervising human services activities vested by law in the department, the commissioner shall have the authority to:
>
> (1) *require county agency participation in training and technical assistance programs to promote compliance with statutes, rules, federal laws, regulations, and policies governing human services*;
>
> (2) monitor, on an ongoing basis, the performance of county agencies in the operation and administration of human services, *enforce compliance with statutes, rules, federal laws, regulations, and policies governing welfare services* and promote excellence of administration and program operation;
>
> ***
>
> (c) Administer and supervise all child welfare activities;

Minn. Stat. § 256.01, subd. 2 (emphasis added).

In exchange, counties receive substantial state dollars to carry out those functions. For 2017, the allocation for child protection to Scott County is $1,268,932. Affidavit of Pamela Selvig at ¶ 2.[2] Thus, Scott County is merely the local agency carrying out DHS functions, in this case, child protection.

Plaintiffs have provided an over 300 paragraph Complaint. However, the claims against Scott County are fairly limited. In essence, Plaintiffs complain that a child protection case should have been handled through its fruition by the State of Minnesota and Scott County under the state process and in state court. Instead, Plaintiffs complain

[2] Ms. Selvig's Affidavit was provided in an earlier case and is attached to the Affidavit of James R. Andreen.

that Scott County followed the Indian Child Welfare Manual, attached as Exhibit 1 to the Complaint, and referred the case to tribal court. Plaintiffs do not contend that Scott County deviated from that manual but, in fact, that its actions were in compliance with that manual.

PRESENT COMPLAINT

The present facts are taken from Plaintiffs' Complaint as required under a motion to dismiss.

Neither Plaintiff is a resident of Scott County. (Plaintiffs' Complaint at ¶¶ 1, 3). Both Plaintiffs' children and the other parents of those children are members of the Shakopee Mdewakanton Sioux Community ("SMSC"). (*Id.* at 2, 90). There is no indication that any of these individuals lived in Scott County unless they lived within the SMSC boundaries. (*Id.* at 27). For example, Plaintiff Nguyen lived in Bloomington, Hennepin County (*Id.* at 45) or California (*Id.* at 60).

Plaintiff Nguyen does not allege any interaction whatsoever with Scott County. He is a Hennepin County resident or a California resident according to Plaintiffs' Complaint. (*Id.*)

Plaintiff Steinhoff is a resident of Dakota County. (*Id.* at 3). Ms. Steinhoff's only connection with Scott County is that a "official from Scott County child protection services came to Ms. Steinhoff's home . . ." (*Id.* at 98) and that Scott County would not open a duplicate case while an SMSC proceeding was going on. (*Id.* at 107).

In fact, prior to any involvement by Scott County, both children and parents had some proceeding going on in the SMSC tribal court or social services agency. (*Id.* at 76, 94).

While Plaintiffs' argument discusses the claim that a "referral" from Scott County and state district court to SMSC tribal court is improper, Plaintiffs also admit that no such referral has ever taken place. Compare Plaintiffs' Complaint at 180 with Plaintiffs' Complaint at 76, 94, and 107. Plaintiffs simply allege that "if" they were to make a report to Scott County, Scott County "would" refer to the SMSC, but not that Scott County actually did. (*Id.* at 262, 264).

Thus, Plaintiffs contend that Scott County simply followed the DHS' policies, enacted under Minnesota law requiring counties to act as the local service agency of the state.

STANDARD OF REVIEW

On a Rule 12 motion to dismiss, the Court must assume that well-pleaded factual allegations in the complaint are true and construe the complaint, and all reasonable inferences arising therefrom, most favorably to the pleader. *See Noble Sys. Corp. v. Alorica Cent., LLC*, 543 F.3d 978, 981 (8th Cir. 2008).

ARGUMENT

I. PLAINTIFFS CANNOT SHOW A *MONELL* CLAIM BECAUSE THE ONLY POLICY ALLEGEDLY CAUSING HARM IS THE STATE'S, NOT SCOTT COUNTY'S.

It is well known that in order to sue a municipality, such as a county, under 42 U.S.C. § 1983, a plaintiff must allege that a policy, custom or practice of the municipality

caused the injury. This was first discussed in *Monell v. Department of Social Services*, 436 U.S. 458, 690 (1978). The wording of *Monell* requires that the policy in question must have been promulgated by the municipalities' actors:

> Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision *officially adopted and promulgated by that body's officers.*

Id. (emphasis supplied).

In the present case, Plaintiffs admit that the policy in question is the Indian Child Welfare Manual which, by virtue of state law, the County must comply with. *See* Plaintiffs' Complaint at ¶¶ 20, 72, 116, 118, 129 and 171.

Thus, it is not a County policy that Plaintiffs complain about. Indeed, they are quite transparent in showing that the policy is that of the state, not the County. In the absence of a county policy, promulgated by a county policy maker, Plaintiffs have not presented a *Monell* claim.

Plaintiffs cannot avoid this analysis by stating that the County policy in question was a policy to follow the state policy. This was rejected by the Seventh Circuit.

> It is difficult to imagine a municipal policy more innocuous and constitutionally permissible, and whose causal connection to the alleged violation is more attenuated, than the "policy" of enforcing state law. If the language and standards from *Monell* are not to become a dead letter, such a "policy" simply cannot be sufficient to ground liability against a municipality.

Surplus Store & Exch., Inc. v. City of Delphi, 928 F.2d 788, 791–92 (7th Cir. 1991). Indeed, the court reemphasized that point a few years later, stating that this rule not only follows *Monell*, but provides consistency and comity between state and local officials.

> The plaintiff who wants a judgment against the municipality under that statute must be able to trace the action of the employees who actually injured him to a policy or other action of the municipality itself. When the municipality is acting under compulsion of state or federal law, it is the policy contained in that state or federal law, rather than anything devised or adopted by the municipality, that is responsible for the injury. *Apart from this rather formalistic point, our position has the virtue of minimizing the occasions on which federal constitutional law, enforced through section 1983, puts local government at war with state government.*

Bethesda Lutheran Homes & Servs., Inc. v. Leean, 154 F.3d 716, 718 (7th Cir. 1998) (emphasis supplied). *See also Doby v. DeCrescenzo*, 171 F.3d 858, 868 (3d Cir. 1999) ("The question remains, however, whether the defendants' method of processing petitions truly can be considered a county, rather than a state, policy because when a county is merely enforcing state law, without adopting any particular policy of its own, it cannot be held liable under the *Monell* line of cases."); *Echols v. Parker*, 909 F.2d 795, 801 (5th Cir. 1990) ("A county official pursues his duties as a state agent when he is enforcing state law or policy. He acts as a county agent when he is enforcing county law or policy. It may be possible for the officer to wear both state and county hats at the same time, but when a state statute directs the actions of an official, as here, the officer, be the state or local, is acting as a state official."); *Bockes v. Fields*, 999 F.2d 788, 791 (4th Cir. 1993) (holding that county board did not act in a policy-making capacity when it fired plaintiff because termination procedures and criteria were prescribed by the state although the state procedures allowed the county board some discretion); *Whitesel v. Sengenberger*,

222 F.3d 861, 872 (10th Cir. 2000) (stating that it was not clear whether policies of state entity authorized certain actions but "emphasiz[ing] that the [municipal entity] cannot be liable for merely implementing a policy created by the state [entity]").

The rationale for these decisions is that if the county is unable – by virtue of mandatory state policy – to make a conscious choice to follow it or not, then there is no county policy and thus, no *Monell* claim. *See Vives v. City of N.Y.*, 524 F.3d 346, 353 (2d Cir. 2008).[3]

In this case, Plaintiffs allege that the County was merely following a mandated policy, the Indian Child Welfare Manual. The Minnesota Department of Human Services instructs and forces counties to follow its policies. Thus, Scott County did not create a custom or policy when it followed the Indian Child Welfare Manual. Accordingly, no *Monell* claim exists here and Plaintiffs' Complaint should be dismissed as against Scott County.

II. SCOTT COUNTY DID NOT VIOLATE PLAINTIFFS' CIVIL RIGHTS BY FOLLOWING THE INDIAN CHILD WELFARE MANUAL OR STATE POLICY.

Even if the Minnesota DHS' Indian Child Welfare Manual somehow becomes Scott County's policy, it does not violate Plaintiffs' civil rights. Because the Complaint simply accuses Scott County of following state policy – specifically the Indian Child Welfare Manual – an alleged contravention of Plaintiffs' civil rights, an examination of the Manual's consistency with federal law is necessary. Fortunately, Commissioner

[3] We are unaware of any Eighth Circuit case discussing this issue. *See Slaven v. Engstrom*, 710 F.3d 772, 781 n. 4 (8th Cir. 2013).

Piper, in her Memorandum of Law, has eloquently discussed why the Manual does not violate Plaintiffs' civil rights. Rather than repeat that discussion here, that portion of the State's Memorandum is hereby incorporated by reference. *See* Memorandum of Law in Support of Commissioner of the Minnesota Department of Human Services' Motion to Dismiss Plaintiffs' First Amended Complaint, §§ I and III, Doc. 15 ("Piper Memo") at 8-13 and 14-16.

In addition, Commissioner Piper correctly points out that there was never actually a referral from Scott County to the SCMC. Thus, Plaintiffs' argument that the ICWM, and Scott County's adherence to it, caused a "referral" to SCMC, is improper. Thus Scott County adopts Commissioner Piper's argument with respect to that. *See* Piper Memo § II at 13-15.

Because Scott County properly enforced a state policy in the Indian Child Welfare Manual and that policy does not contravene the Plaintiffs' civil rights, Plaintiffs' Complaint as against Scott County should be dismissed.

III. SCOTT COUNTY IS AN ARM OF THE STATE AND, THEREFORE, IMMUNE TO A SUIT FOR DAMAGES.

Commissioner Piper has accurately discussed the Eleventh Amendment immunity provided to the state for a monetary claim in federal court for damages. Piper Memo at 6.

Scott County acts as an "arm of the state" and, thus, may share in that immunity. This is because Scott County is merely the local entity operating under direction of the DHS carrying out DHS policy, most notably here, the Indian Child Welfare Manual.

That DHS and Commissioner Piper may direct the County in these endeavors is spelled out clearly under Minnesota state law:

> **Public child welfare program**. (a) *To assist in carrying out the child protection*, delinquency prevention and family assistance responsibilities of the state, the local social services agency *shall administer a program of social services and financial assistance to be known as the public child welfare program*. The public child welfare program *shall be supervised by the commissioner of human services and administered by the local social services agency in accordance with law and with rules of the commissioner*.

Minn. Stat. § 393.07, subd. 1 (emphasis supplied).

Commissioner Piper promulgates extensive rules on how Scott County may operate its Department of Human Services, especially in the areas of child protection. *See generally* Minn. Stat. § 256.01, subd. 2 and Minn. Rules 9560.0210-.0234. More specifically to this case, the Commissioner requires its local agencies to follow the Indian Child Welfare Manual. Affidavit of Pamela Selvig at ¶ 5. The State then allocates monies to counties to provide services. In the case of child protection, that allocation is $1,268,932 for Scott County this year.

While counties are generally not considered the state for Eleventh Amendment purposes, *see Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979), there is case law that extends those immunities to an "arm of the state*." See Northern Ins. Co. of N.Y. v. Chatham Cty., Ga.,* 547 U.S. 189, 193 (2006) "[T]he County is subject to suit unless it was acting as an arm of the State.") *See generally* "What Constitutes the State for Eleventh Amendment Purposes," 13 *Fed. Prac. & Proc. Juris*. § 3524.2 (3d ed. 2017).

To be an arm of the state, the County must show two things: the amount of state control over the entity and whether state money would pay for any judgment. The Eighth Circuit discussed this with respect to the State of Missouri and a school retirement system. "First, we consider the Systems' independence from the State of Missouri." *Pub. Sch. Ret. Sys. of Missouri v. State St. Bank & Trust Co*., 640 F.3d 821, 827 (8th Cir. 2011) *citing Thomas v. St. Louis Bd. of Police Comm'rs*, 447 F.3d 1082, 1084 (8th Cir. 2006); (noting that the arm-of-a-state test considers an entity's "degree of autonomy and control over its own affairs") and *Gorman v. Easley*, 257 F.3d 738, 743 (8th Cir. 2001) (noting that we also consider an entity's "powers and characteristics under state law"). "Second, we consider how a money judgment in litigation involving the Retirement Systems could affect the State of Missouri's treasury." *Id.*, citing *Gorman*, 257 F.3d at 743 (indicating that, when the entity is a defendant, "we consider whether a money judgment against the entity could flow from the state treasury").

Here Scott County, under state law, must follow the edicts of the DHS – specifically, and as urged by the Complaint, the Indian Child Welfare Manual. In child protection matters, it has virtually no autonomy at all. Second, it receives substantial state funds to do this, funds that could go to pay a judgment. See Affidavit of Pamela Selvig at ¶¶ 2-4.

Indeed, the Supreme Court has recognized the unfairness in this type of situation where the state is immune but the county is not.

> We have held that the Eleventh Amendment does not apply to "counties and similar municipal corporations." *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 280 (1977); *see Lincoln County v. Luning*, 133 U.S.

> 529, 530 (1890). At the same time, we have applied the Amendment to bar relief against county officials "in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself." *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979). *See, e.g., Edelman v. Jordan,* [415 U.S. 651 (1974] (Eleventh Amendment bars suit against state and county officials for retroactive award of welfare benefits). The Courts of Appeals are in general agreement that a suit against officials of a county or other governmental entity is barred if the relief obtained runs against the State. [Cases omitted]. Given that the actions of the county commissioners and mental-health administrators are dependent on funding from the State, it may be that relief granted against these county officials, when exercising their functions under the MH/MR Act, effectively runs against the State.

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 124 n. 34 (1984). *See also Powell v. Department of Human Resources of State of Ga*., 918 F. Supp. 1575 (S.D. Ga. 1996), aff'd, 114 F.3d 1074 (11th Cir. 1997). (County Departments of Family and Children Services (DFCS) were created by state law to administer state programs, and so were arms of the state, which rendered their employees immune from suit in their official capacities).

Thus, under the arm of the state analysis, Scott County should be allowed to share in the State of Minnesota's Eleventh Amendment immunity and no monetary damages should be allowed against it.

CONCLUSION

For the reasons set forth above, Plaintiffs' Complaint should be dismissed as against Scott County. The Court should also dismiss any claim against Scott County seeking money damages.

ERSTAD & RIEMER, P.A.

By: s/James R. Andreen
James R. Andreen, #174373
8009 - 34th Avenue South, Suite 200
Minneapolis, MN 55425
Direct Phone: 952-837-3249
Direct Fax: 952-767-7449
E-Mail: jandreen@erstad.com

Attorneys for Defendant
Scott County