

In the
United States Court of Appeals
for the Eighth Circuit

Kimberly Watso, individually and on behalf of
C.H. and C.P., her minor children, and Kaleen Dietrich,
Plaintiffs-Appellants,
v.

Emily Piper in her official capacity as Commissioner of the
Department of Human Services; Scott County;
Tribal Court of the Shakopee Mdewakanton Sioux (Dakota)
Community; and its Judge John E. Jacobson, in his official
capacity; Tribal Court of the Red Lake Band of Chippewa Indians;
and its Judge Mary Ringhand, in her official capacity,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA CIV. NO. 17-CV-00562 (ADM/KMM)
JUDGE ANN D. MONTGOMERY

BRIEF OF APPELLEE SCOTT COUNTY

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SUMMARY OF THE CASE

Appellee Scott County did not obtain custody of the children in question nor did it transfer the children in question. These facts are clear through Appellants' Complaint and the exhibits attached to it, Appellants' conclusory statements notwithstanding.

Nonetheless, even if Scott County did as Appellants' suggest, the Indian Child Welfare Manual promulgated by the State Department of Human Services does not conflict with federal law or violate Appellants' civil rights.

Accordingly, the district court should be affirmed in all respects.

TABLE OF CONTENTS

SUMMARY OF THE CASE.....	i
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE.....	1
I. Child protection is carried out by counties under the supervision of and pursuant to state policy, including the Indian Child Welfare Manual.....	1
II. Appellants’ facts in this appeal are incorrect.....	5
SUMMARY OF ARGUMENT AND ARGUMENT.....	10
I. No set of facts exist to allow relief against Scott County.....	10
II. Even if Scott County had transferred the children pursuant to the Indian Child Welfare Manual, it did not violate federal law by doing so.....	11
CONCLUSION.....	12
CERTIFICATE OF COMPLIANCE.....	13
CERTIFICATE OF SERVICE.....	14

TABLE OF AUTHORITIES

Cases

<i>Knieriem v. Group Health Plan, Inc.</i> , 434 F.3d 1058, 1060 (8th Cir. 2006), <i>cert. denied</i> , 548 U.S. 905 (2006)	10
<i>Monell v. Department of Social Services</i> , 436 U.S. 458, 690 (1978).....	9
<i>Monson v. Drug Enf't Admin.</i> , 589 F.3d 952, 961 (8th. Cir. 2009).....	10
<i>Wiles v. Capitol Indem. Corp.</i> , 280 F.3d 868, 870 (8th. Cir. 2002).....	10

Rules and Statutes

Minn. Rules 9560.0210-.0234.....	2
Minn. Stat. § 256.01, subd. 2.....	1,2
Minn. Stat. § 260C.175, subd. 1.....	6
Minn. Stat. § 260C.175, subd. 2.....	7
Minn. Stat. § 260C.178, subd. 1.....	8
Minn. Stat. § 393.07, subd. 1.....	8

STATEMENT OF THE CASE

I. CHILD PROTECTION IS CARRIED OUT BY COUNTIES UNDER THE SUPERVISION OF AND PURSUANT TO STATE POLICY, INCLUDING THE INDIAN CHILD WELFARE MANUAL.

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 states that:

[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 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 (quotations omitted)(emphasis supplied).

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.**

Id. (quotations omitted)(emphasis supplied). Accordingly, counties must carry out DHS edicts when it comes to delivery of human services, including child protection.

The DHS 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. This is undisputed by any party, and is the thrust of Appellants' argument.

Appellants' started this action with a 148 paragraph Complaint (Doc. 1, Appellants' App. 1) which brought about the Appellees' motions to dismiss, which was granted, leading to this appeal. The claims against Scott County in the

Complaint are fairly limited. In essence, Appellants' 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, Appellants complain that Scott County followed the Indian Child Welfare Manual, attached as Exhibit 1 to the Complaint, and referred the case to tribal court. Appellants do not contend that Scott County deviated from that Manual but, in fact, that its actions were in compliance with that Manual.

Relevant excerpts from the Complaint are as follows:

Despite clear federal law, the Scott County child protection agency, following written state policy in contravention to Public Law 280, transferred Ms. Watso's minor children to the Shakopee Mdewakanton Sioux (Dakota) Community in violation of federal law. (Introduction at 2, Appellants' App. 2).

20. However, pursuant to Minnesota's Indian Child Welfare Manual and, without initiating proceedings in state court, Scott County referred C.P. and C.H. to the Shakopee Mdewakanton Sioux Community (SMSC) social services for proceedings in SMSC tribal court which took jurisdiction over the C.P. and C.H. child custody proceedings. (Appellants' App. 9-10).

72. The Minnesota Indian Child Welfare Manual reflects the Department of Human Services policies that both county and private entities are to apply and follow regarding Indian children and the transfer of those children to tribal jurisdiction:

"This manual applies to both county social service agencies and private child-placing agencies." Indian Child Welfare Manual at 5; Ex. 1. (Appellants' App. 20).

116. Similarly, Minnesota's policy reflected in the Minnesota Indian Children Welfare Manual, would undo the Indian Children Welfare Act's statutory and historical framework in Minnesota and immediately vest exclusive jurisdiction in the Public Law 280 tribes by requiring county social service agencies such as Scott County, prior to initiating state court proceedings, to refer and transfer the child custody matters to tribal social services to initiate tribal proceedings. (Appellants' App. 30-31).

118. After Scott County's 72 hour administrative hold on C.P. and C.H., Scott County followed the Minnesota Department of Human Services' policy and custom to refer C.P. and C.H. as Indian minor children, prior to initiating any proceeding in state court, to the tribal social services agency for child custody proceedings in tribal court. (Appellants' App. 31).

129. Despite the limitations provided on the County's Notice provided to Ms. Watso, during the 72 hour administrative hold, on or about February 25, 2015, Scott County referred and transferred the C.H. and C.P. matters to SMSC's social service agency for tribal court proceedings pursuant to the policy of the Minnesota Indian Child Welfare Manual where "prior to initiating any such proceeding in [state] court" the "local social service agency shall refer any proposed child custody proceeding involving an Indian child to the tribal social services agency for appropriate proceedings in tribal court." (Appellants' App. 33).

171. DHS' and Scott County's policies and customs are to administratively transfer child custody proceedings involving children of Public Law 280 tribes in violation of Appellants' constitutionally protected rights and their rights under the Indian Child Welfare Act. (Appellants' App. 43).

Thus, Appellants 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 by referring a child custody proceeding to SMSC:

[A] local social service agency shall refer any proposed Indian child custody proceeding involving an Indian child to the tribal social service agency for appropriate proceedings in tribal court. (Appellants' Brief at 10, quoting the Indian Child Welfare Manual,

Appellants' Addendum 36-37).

II. APPELLANTS' FACTS IN THIS APPEAL ARE INCORRECT.

However, Appellants' core contention as it relates to Scott County is incorrect, as shown by its reference to the attachments in the Complaint. Scott County never had custody of the children in question, and never transferred them to the Shakopee Mdewakanton Sioux Community (SMSC). In addition, there was never a "proceeding" in state court, because that proceeding had already begun in Tribal Court. Accordingly, Scott County did not need to provide any notice to Appellants of some sort of proceeding. The only notice Appellants' deserved was given to them by the Shakopee Police officer, who initiated the 72 hour hold.

The concept that Scott County initiated a 72 hour hold and transferred the children is at the core of Appellants' briefing:

On or about February 24, 2015, Scott County, working with local law enforcement, put a 72 hour administrative hold on C.H. due to an alleged head injury—a 72 hour administrative hold which eventually also included C.P. Appellant's Brief at 10-11.¹

¹ This statement has the curious citation of "Id. at ¶ 8." However, the previous citation is to the Minnesota Department of Human Services manual, not any type of factual statement. It can, however, also be found in the Complaint at ¶ 124 (Appellants' App. 32).

The Complaint attaches a copy of the 72-hour hold. (Complaint at ¶ 125, Appellants’ App. 33). Exhibit 3 to the Complaint is the 72-hour hold. (Appellants’ App. 117). On it, the initiating agency is the Shakopee Police Department (“Shakopee PD”). (Appellants’ App. 117). It shows a police officer from the Shakopee PD, Badge No. 49. *Id.* Scott County never took possession of the children and did not place the 72-hour hold.

Therefore, the very next statement: “Scott County acted according to court rule in taking possession of CH and CP for up to 72 hours,” is simply wrong. (Appellants’ Brief at 11).

This is because state law makes it the job of law enforcement, not social service agencies, to place a hold on endangered children. Simply put, a county social service agency is unable to place the 72-hour hold. Only a police officer may do this under Minnesota statutes, which is exactly what occurred here. Minn. Stat. § 260C.175, subd. 1, states how a child may be taken into immediate custody. It only allows a peace officer or a probation or parole officer to place a child into immediate custody. Otherwise, an order must be issued by the court, in what is commonly referred to as a CHIPS (“Child in Need of Protective Services”) proceeding. Appellants’ admit – in fact the thrust of their entire case – that there was no proceeding. This is clear by a plain reading of Appellants’ Complaint and the exhibits therein.

Moreover, Appellants' received notice of this hold pursuant to the above-mentioned statute given the fact they were given the 72-hour hold document. (Exhibit 3 to Appellants' Complaint, Appellants' App. 117). *See* Minn. Stat. § 260C.175, subd. 2, requiring "a peace officer" to provide notice and a list of and contact information of "social service agencies that offer child welfare services". Perhaps this is how Appellants' got the belief that somehow Scott County was involved.

By the time of the hearing, this matter was cleared up. The district court did not repeat Appellants' error, and did not assume that the 72-hour police and health safety hold created custody by Scott County or that Scott County transferred custody. Instead, the district court correctly stated that there was an existing proceeding in the tribal court, and that the tribal court initiated the transfer of custody, not Scott County. (District court order at 3, Appellants' Addendum 3).² In fact, documents produced prior to the hearing showed that the SMSC tribal

² "A detective with the Shakopee Police Department issued a Notice of 72-Hour Police Health and Safety Hold, notifying the parents that C.P. and C.H. would be held at Children's Hospital in St. Paul, Minnesota.

On February 25, 2015, the SMSC Court received an Emergency Ex Parte Motion to Transfer Legal and Physical Custody of the children. This motion was brought in the context of preexisting child welfare proceedings initiated on January 22, 2015. Although filed ex parte, Watso was notified of the motion and she objected to the SMSC Court's exercise of jurisdiction."

(District court order at 3, Appellants' Addendum 3).

court had obtained jurisdiction over these children by at least January 2015. (SMSC Tribal Court transcript dated January 24, 2015, Appellees' App. 634).

Thus, the plain facts of this case show that the children were never in custody of Scott County, nor was any proceeding transferred despite the statement in Appellants' Brief of the following: "Scott County acted according to a court rule in taking possession of CH and CP for up to 72 hours." (Appellants' Brief at 15).

Tellingly, there is no citation to this conclusion that somehow Scott County had taken custody of the child. In fact, it was the Shakopee Police Department that took custody of the child.

If Scott County somehow wanted to gain custody of the children and increase the hold beyond 72 hours, it was required to provide a CHIPS petition pursuant to Minn. Stat. § 260C.178, subd. 1. Scott County did not do this as Appellants' point out – as it is the thrust of their argument.

Accordingly, there is also no support in the record that "Scott County officials, pursuant to the Manual, transferred CP and CH to SMSC's social service agency." (Appellants' Brief at 11). That did not happen because SMSC already had a case open on these children, and the next day there was not a transfer of custody by Scott County to SMSC but, instead, the *SMSC tribal court* transferred "legal and physical custody" of the children to the SMSC Family and Children Services Department. This was presumably performed in protection of the

children. The order showing this, Exhibit 4 to the Complaint, (Appellants App. 119-121) shows that the only persons involved were the attorneys for the SMSC, the SMSC child welfare officer, director of family services, and the guardian ad litem already appointed by the SMSC.

Thus, not only did Scott County not have custody of the children, it did not transfer the children either. Accordingly, the factual basis for Appellants' arguments that somehow Scott County took custody of the children and then should have started a proceeding is simply false. There was, in fact, no taking of the children by Scott County nor was there a proceeding ever initiated nor should have there been a proceeding initiated.

Nonetheless, had any of that occurred, it is Scott County's position that following the Indian Child Welfare Manual was compulsory, as it is required to follow the edicts of the Minnesota Department of Human Services.³

More importantly, Scott County agrees with Commissioner Piper that the Manual does not violate Appellants' civil rights in any fashion.

³ Accordingly, no *Monell* claim could be made against Scott County. Scott County also moved the district court for dismissal that Appellants' failure to identify a policy, custom, or practice that was the moving force behind any deprivation. *See Monell v. Department of Social Services*, 436 U.S. 458, 690 (1978). (Appellees' App. at 657-660). The district court did not reach this argument raised in these motions to dismiss. (Report and Recommendation, Appellants' Addendum at 34).

SUMMARY OF THE ARGUMENT AND ARGUMENT

I. NO SET OF FACTS EXIST TO ALLOW RELIEF AGAINST SCOTT COUNTY.

Scott County did not take custody of or transfer the children in question, despite Appellants' unsupported contention to the contrary. This Court, "like the district court, are free to 'ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations.'" *Monson v. Drug Enf't Admin.*, 589 F.3d 952, 961 (8th Cir. 2009) (quoting *Wiles v. Capitol Indem. Corp.*, 280 F.3d 868, 870 (8th Cir. 2002)). On a motion to dismiss, dismissal is proper "if it appears beyond doubt that the plaintiff can prove no set of facts to warrant a grant of relief." *Knieriem v. Group Health Plan, Inc.*, 434 F.3d 1058, 1060 (8th Cir. 2006), *cert. denied*, 548 U.S. 905 (2006).

Here, the district court came to the same conclusion, although it was not necessarily stated in its ruling.

"A detective with the Shakopee Police Department issued a Notice of 72-Hour Police Health and Safety Hold, notifying the parents that C.P. and C.H. would be held at Children's Hospital in St. Paul, Minnesota.

On February 25, 2015, the SMSC Court received an Emergency Ex Parte Motion to Transfer Legal and Physical Custody of the children. This motion was brought in the context of preexisting child welfare proceedings initiated on January 22, 2015. Although filed ex parte, Watso was notified of the motion and she objected to the SMSC Court's exercise of jurisdiction."

(District court order at 3, Appellants' Addendum 3) (citations omitted).

Therefore, because the facts as fleshed out by the time the district court made its ruling show that Scott County had no role in the transfer of the children in question to the SMSC Tribal Court, and, in fact, the Tribal Court already had jurisdiction, there is no "transfer" to premise the balance of Appellants' argument.

On this ground alone, the district court's order should be affirmed as to Scott County.

II. EVEN IF SCOTT COUNTY HAD TRANSFERRED THE CHILDREN PURSUANT TO THE INDIAN CHILD WELFARE MANUAL, IT DID NOT VIOLATE FEDERAL LAW BY DOING SO.

The Complaint simply accuses Scott County of following state policy – specifically the Indian Child Welfare Manual – an alleged contravention of Appellants' civil rights. An examination of the Manual's consistency with federal law is necessary to show that it does not violate Appellants civil rights.

Fortunately, Commissioner Piper, in her Brief, has eloquently discussed why the Manual does not violate Appellants' civil rights. Rather than repeat that discussion here, that portion of Commissioner Piper's Brief will stand as Scott County's argument on this issue.

CONCLUSION

For the reasons set forth by Commissioner Piper and above, Scott County respectfully requests this Court affirm the district court in all respects.

Dated: June 28, 2018

Respectfully submitted,

s/James R. Andreen

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(i). This documents contains 3038 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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Dated: June 28, 2018

s/James R. Andreen
James R. Andreen
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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of June, 2018, I electronically filed the foregoing **BRIEF OF APPELLEE SCOTT COUNTY** with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Dated: June 28, 2018

s/James R. Andreen
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