

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS

A.W., a Minor, by and through her  
mother and next friend, HEATHER  
TURNER,

Plaintiff,

vs.

GRANITE CITY ILLINOIS  
HOSPITAL COMPANY, LLC,  
SOUTHERN ILLINOIS  
HEALTHCARE FOUNDATION, INC.,  
and MELVIN MERRITT,

Defendants.

Case No. 3:20-cv-01302-GCS

MEMORANDUM & ORDER

SISON, Magistrate Judge:

INTRODUCTION AND BACKGROUND

On September 2, 2020, minor Plaintiff A.W. filed a complaint against Defendants Dr. Melvin Merritt and Southern Illinois Healthcare Foundation, Inc. ("SIHF"), by and through her mother and Next Friend, Heather Turner. (Doc. 1, Exh. A). In her complaint, Plaintiff alleges medical malpractice and negligence against both defendants. Specifically, Plaintiff states that, as an employee and agent of SIHF, Defendant Merritt negligently employed a vacuum procedure to induce A.W.'s labor even though A.W.'s large size made such a procedure dangerous. *See* (Doc. 1, Exh. A). As a result of the dangerous procedure, A.W. was deprived of oxygen and suffered hypoxia and brain injuries at birth. (Doc. 1, Exh. A, Counts I & II). Plaintiff seeks monetary damages from

both defendants for A.W.'s extensive medical care and treatment, physical and mental pain and suffering, and the deprivation of A.W.'s normal enjoyments of life. (Doc. 1, Exh. A, Count III).

Plaintiff initially brought this claim in the Third Judicial Circuit of Madison County, Illinois. (Doc. 3). However, on or before January 1, 2015, the Associate Administrator, Bureau of Primary Health Care, Health Resources and Services Administration, Department of Health and Human Services deemed Defendant SIHF a Public Health Service employee under 42 U.S.C. § 233(g). (Doc. 1, Exh. B). Since that date and pursuant to the Federally Supported Health Centers Assistance Act ("FSHCAA"), SIHF was covered by Federal Tort Claims Act malpractice coverage; as an employee or contractor of SIHF, Defendant Merritt was also covered. (Doc. 1, Exh. B).<sup>1</sup> On December 7, 2020, Defendants removed the case to this Court pursuant to 42 U.S.C. § 233(c). (Doc. 1). At the same time, and on behalf of the defendants, the United States of America moved to dismiss the defendants with prejudice and to substitute the United States as a defendant. (Doc. 3).

On January 7, 2021, Plaintiff filed a motion to remand the case back to the Third Judicial Circuit of Madison County, Illinois, alleging that Defendants' motion to remove lacked the evidence required by the statutory language of 42 U.S.C. § 233(g)(2)(5)(B). (Doc. 16). Shortly thereafter, on January 15, 2021, Plaintiff filed a motion for an extension of time to respond to Defendants' motion to substitute and for limited discovery, arguing

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<sup>1</sup> Plaintiff rejects this contention of fact, alleging that Defendant Merritt may not meet the criteria required by § 233 to qualify for coverage and substitution. (Doc. 23, p. 2). For the reasons outlined below, the Court finds that Defendant Merritt is qualified for coverage under § 233.

that limited discovery was necessary to determine whether Defendant Merritt was a contractor or employee of SIHF, though Plaintiff conceded that SIHF itself was covered by § 233. (Doc. 20).<sup>2</sup> All three motions before the Court involve the same argument regarding Defendant Merritt's status as an employee or a contractor. As such, the Court proceeds to consider Defendants' motion to substitute (Doc. 3), Plaintiff's motion to remand (Doc. 16), and Plaintiff's motion for limited discovery. (Doc. 20).

For the following reasons, Defendants' motion to substitute is **GRANTED**. Plaintiff's motion for limited discovery and Plaintiff's motion to remand are **DENIED**.

#### ANALYSIS

When a Public Health Service's employee or officer's performance of medical functions causes damages, including personal injury or death, the only available remedy is a Federal Torts Claims Act lawsuit against the United States. *See* 42 U.S.C. § 233(a). However, the Secretary of Health and Human Services, or the Secretary's designee (the "Secretary"), may provide liability insurance for any officer or employee of a Public Health Service acting within the scope of their employment. *See* 42 U.S.C. § 233(f). The Secretary may deem an entity a Public Health Service and may deem an individual to be a covered employee of that Public Health Service if certain conditions are met. *See* 42 U.S.C. § 233(g).

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<sup>2</sup> Although the United States asserts that it provided Plaintiff with limited discovery pertaining to Defendant Merritt's employment status with SIHF shortly after Plaintiff's motion for discovery (Doc. 21, 3), Plaintiff still alleges that further discovery is necessary to determine whether Defendant Merritt is a contractor for, rather than an employee of, SIHF. (Doc. 24, p. 2).

If a plaintiff files suit against a covered employee or Public Health Service in state court, upon certification by the Attorney General that the defendants acted within the scope of their employment during the incident in question, the proceeding must be removed to the United States district court covering the area where the suit was initially pending. *See* 42 U.S.C. § 233(c). That proceeding is also “deemed a tort action brought against the United States under the provisions of Title 28 and all references thereto.” *Id.* After removal, the court must dismiss the certified parties from the case and substitute the United States; the case then proceeds under the Federal Tort Claims Act (commonly referred to as the “Westfall Act”). *See* 28 U.S.C. § 2679(d)(2); *Alexander v. Mount Sinai Hosp. Med. Ctr.*, 484 F.3d 889, 891 (7th Cir. 2007). Such certification also extends to employees of the certified federally-funded public health center. *See Helms v. Atrium Health Care, et al.*, No. 10-547-GPM, 2010 WL 3937606, at \*2 (S.D. Ill. Oct. 5, 2010).

Though similar, the FSHCAA is in addition to and distinct from the Westfall Act, which provides a limited waiver of the sovereign immunity of the United States in cases concerning federal employees. Whereas the FSHCAA provides specific protections for covered public health service employees, the Westfall Act provides broader coverage for covered “government employees.” 28 U.S.C. § 2679(b)(1). Just as in the FSHCAA, the Attorney General may deem a defendant employee of a federal agency a “government employee;” that defendant would then be substituted with the United States in pending litigation. *See generally*, 28 U.S.C. § 2679.

Plaintiff correctly points out that the Westfall Act explicitly excludes contractors from coverage. (Doc. 23, p. 2, citing 28 U.S.C. § 2671). However, unlike the Westfall Act,

the FSHCAA specifically includes contractors as individuals that qualify for potential protection. For instance, Section 233 provides that the “deeming of any entity or officer, governing board member, employee, or *contractor* of the entity to be an employee of the Public Health Service for purposes of this section shall apply with respect to services provided . . .” 42 U.S.C. § 233(g)(1)(B) (emphasis added). Subsection (D) of that same section further states that the government “may not . . . deem an entity or an officer, governing board member, employee, or *contractor* of the entity” for coverage unless that party first appropriately applies for such coverage. 42 U.S.C. § 233(g)(1)(D) (emphasis added). Finally, subsection (E) mandates that the government’s determination that “an entity or an officer, governing board member, employee, or *contractor* of the entity is deemed to be an employee of the Public Health Service for purposes of this section shall apply for the period specified by the Secretary under subparagraph (A).” 42 U.S.C. § 233(g)(1)(E) (emphasis added).

Defendants removed this case from the Third Judicial Circuit to this Court pursuant to certification under 42 U.S.C. § 233(c). (Doc. 1). Furthermore, the Chief of the Civil Division for the United States Attorney’s Office for the Southern District of Illinois<sup>3</sup> has certified that SIHF and Defendant Merritt are “deemed” to be federal employees acting within the scope of their employment at the time of the incident giving rise to Plaintiff’s complaint. *See* (Doc. 1, Exh. C). Accordingly, the only remedy available to

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<sup>3</sup> A United States Attorney is permitted to issue such certification in lieu of the Attorney General, or to delegate that authority. *See* 28 C.F.R. § 15.4(a). Here, a United States Attorney delegated that authority to the Chief of the Civil Division for the United States Attorney’s Office for the Southern District of Illinois. (Doc. 3, p. 2).

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