

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

GARNICE ROBERTSON,

Plaintiff,

v.

**BIG BLUE HEALTHCARE, INC., doing
business as RIVERBEND POST-ACUTE
REHABILITATION, et al.,**

Defendants.

Case No. 2:20-cv-02561-HLT-TJJ

MEMORANDUM AND ORDER

Plaintiff Garnice Robertson is the surviving child of Georgia Clardy, who was a resident at a care facility where she contracted and died of COVID-19. Plaintiff filed this wrongful-death action against Defendants¹—the owners and operators of the care facility—alleging that they were negligent in failing to protect against COVID-19 infections. Defendants removed this case from state court where it was initially filed, arguing that the Public Readiness and Emergency Preparedness Act, 42 U.S.C. § 247d-6d (“PREP Act”), provides for “complete preemption” and presents a federal question, which would give this Court jurisdiction. In turn, Plaintiff moves for remand, arguing that the allegations arise solely under state law and the PREP Act does not apply.

In keeping with a series of prior rulings regarding similar claims, the Court agrees with Plaintiff that the PREP Act’s provisions regarding the administration or use of covered countermeasures are not applicable to the allegations in this case, which allege negligence stemming from a failure to follow certain policies, procedures, and guidelines regarding COVID-

¹ The named defendants in this case are Big Blue Healthcare, Inc.; Gateway Healthcare, Inc.; Golden Oaks Healthcare, Inc.; Little Blue Health Holdings, LLC; The Ensign Group, Inc.; Ryan Leiker; and Ensign Services, Inc. For purposes of this order, the Court refers to these Defendants collectively while acknowledging that their interests might not be aligned beyond this order.

19. The Court also finds that Plaintiff's claims do not present an embedded federal question. Accordingly, this Court lacks subject-matter jurisdiction and remands this case to state court.

I. BACKGROUND

Plaintiff, who is the surviving child of Georgia Clardy, filed this lawsuit in the Wyandotte County District Court in Wyandotte County, Kansas. The petition alleges that Clardy was a resident at Riverbend Post-Acute Rehabilitation, where she was exposed to and contracted COVID-19, and which caused her death. Plaintiff sued Defendants for wrongful death.

The petition alleges that Clardy was admitted to Riverbend in 2017 because she was incapable of caring for herself. On March 21, 2020, Clardy began complaining of knee pain. An x-ray showed a femur fracture that had occurred while staff were repositioning her. Clardy was taken to the hospital, where she was treated for five days, before returning to Riverbend.

By March 13, 2020, Plaintiff alleges Riverbend knew of the risks associated with COVID-19 and the importance of preventing its spread throughout the facility. However, in late March, a Riverbend staff member began showing symptoms of COVID-19 and was allowed to work while the staff member had a cough or fever, and without using personal protective equipment. The staff member was tested on March 29, and the results came back positive for COVID-19 on March 30. Despite this, Riverbend residents were still allowed to congregate in common areas after March 29.

By April 1, Riverbend reported to government officials that it had positive COVID-19 cases. By April 3, seventeen residents and two staff members at Riverbend had tested positive. Clardy was diagnosed as COVID-19 positive in late March or early April and died from COVID-19 on April 15. Plaintiff claims that Defendants breached their duty of care and were negligent and careless by failing to:

- follow proper infection control protocols;
- ensure workers were not working with COVID-19 symptoms;
- provide personal protective equipment (“PPE”) to staff;
- separate those with symptoms from those without;
- adhere to social-distancing guidelines;
- respond to the presence of COVID-19 in the facility;
- timely request additional staff and assistance from public health entities;
- supervise, monitor, assess, and document Clardy’s condition;
- implement and carry out safe transfer and repositioning processes, and provide a care plan for Clardy’s increased risk of falls;
- implement a care plan to address Clardy’s risk of contracting COVID-19;
- protect Clardy from physical harm or injury;
- properly supervise and train staff;
- provide adequate staffing and nursing;
- follow standing orders, instructions, guidelines, and protocol regarding COVID-19; and
- provide adequate interventions.

Plaintiff alleges that this negligence by Defendants caused Clardy’s death.

Defendants removed the case to federal court. Removal is based on federal-question jurisdiction. Defendants contend that, under the PREP Act, the claims in this case are completely preempted, which gives this Court subject-matter jurisdiction. Shortly after removal, Plaintiff filed a motion to remand this case back to state court.²

II. STANDARD

Under 28 U.S.C. § 1447(c), a district court must remand a case “[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction.” Federal courts are courts of limited jurisdiction, so the presumption is one of no jurisdiction until an adequate showing of jurisdiction is made. *Dutcher v. Matheson*, 733 F.3d 980, 985 (10th Cir. 2013). When

² Defendants have also moved to dismiss Plaintiff’s case, Docs. 16, 24, 45, and filed counterclaims seeking declaratory judgment regarding the applicability of the PREP Act, Docs. 19, 25, 46. Plaintiff has moved to dismiss Defendants’ counterclaims. Docs. 31, 50. Given this ruling remanding the case to state court for lack of subject-matter jurisdiction, the Court does not reach the motions to dismiss or address the propriety of any counterclaims.

a party removes a case to federal court, the burden is on that party to establish that federal jurisdiction exists. *Id.*; *Christensen v. BNSF Ry. Co.*, 242 F. Supp. 3d 1186, 1189 (D. Kan. 2017). “Doubtful cases must be resolved in favor of remand.” *Thurkill v. The Menninger Clinic, Inc.*, 72 F. Supp. 2d 1232, 1234 (D. Kan. 1999).

III. ANALYSIS

A. The surreply and supplemental authorities have been considered.

Defendants filed a motion for leave to file a surreply. Doc. 53.³ Defendants contend that a surreply is necessary to respond to arguments raised for the first time in Plaintiff’s reply. Plaintiff has not filed any response opposing Defendants’ motion. Surreplies are not permitted without leave of court. *See Patterson v. Lansing*, 2001 WL 946181, at *2 (D. Kan. 2001). But given the issues at stake and the procedural posture of the case, and given that no opposition was filed, the Court will permit Defendants’ proposed surreply (Doc. 53-1). It has been considered in deciding the motion to remand.

Defendants have also filed three letters identifying supplemental authorities in support of their opposition to the motion to remand in accordance with D. Kan. Rule 7.1(f). Docs. 54, 57, 59. The supplemental authorities have also been considered in deciding the motion to remand.

B. For purposes of federal-question jurisdiction, the general rule is that a plaintiff’s complaint dictates whether state or federal law is invoked.

Plaintiff first argues that removal was not proper because the petition does not present a federal question. Defendants removed this case to federal court on grounds that Plaintiff’s state-

³ Defendant Ensign Services, Inc. was apparently served at a different time than the other defendants. As a result, Plaintiff filed a separate motion to remand as to Defendant Ensign Services, Inc. Doc. 49. That motion wholly incorporates all arguments in the motion to remand filed as to the other defendants, Doc. 33. Likewise, Defendant Ensign Services, Inc. has filed a notice joining in both the other defendants’ response to the motion to remand and the motion for leave to file a surreply. Doc. 56 Accordingly, the Court considers the motion to remand as to all Defendants.

court petition asserts a claim “arising under” federal law, within the meaning of 28 U.S.C. § 1331. Specifically, Defendants contend that Plaintiff alleges misconduct by a covered person in the administration of a covered countermeasure under the PREP Act. But Plaintiff’s petition does not—on its face—assert a federal claim, under the PREP Act or otherwise. Plaintiff alleges negligence and wrongful death under Kansas law.

In the absence of diversity, federal courts have jurisdiction over civil actions “arising under the Constitution, laws, or treaties of the United States.” *See* 28 U.S.C. § 1331. Whether a claim “arises under” federal law generally turns on the “well-pleaded” allegations of the complaint. *Dutcher*, 733 F.3d at 985; *Devon Energy Prod. Co. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1202 (10th Cir. 2012). Federal-question jurisdiction exists only if the plaintiff’s claims are based on federal law. *Devon Energy Prod.*, 693 F.3d at 1202. By omitting federal-law claims from a complaint, a plaintiff can effectively avoid removal. *Id.* Potential affirmative defenses are not considered, including defenses based on preemption. *Id.*; *Christensen*, 242 F. Supp. 3d at 1190.

Here, Plaintiff has alleged a negligence and wrongful-death claim under state law. Under the well-pleaded complaint rule, then, there is no federal-question jurisdiction unless Defendants can establish subject-matter jurisdiction under an exception to the well-pleaded complaint rule.

C. Defendants argue the PREP Act invokes the doctrine of complete preemption or presents an embedded federal question.

Defendants’ response to the motion to remand suggests that federal jurisdiction can be found in two ways. Both depend on the PREP Act applying to this case. First, Defendants argue that the doctrine of complete preemption applies, as it operates through the PREP Act. Second, Defendants argue that the PREP Act presents an embedded federal question under the standard in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308

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