



Despite the fact that Kelly and both its general and limited partners are citizens of Texas, yesterday, April 7, 2011, Defendant DePuy filed a Notice of Removal removing this case from District Court for Dallas County to this Federal Court. DePuy claimed in its Notice of Removal that Kelly had been improperly joined, thus complete diversity jurisdiction existed, and removal to this Court was proper.

Disingenuous Affidavit of George Kelly

In an affidavit filed together with the notice of removal, Kelly's President, George Kelly, makes multiple disingenuous claims. All are efforts to minimize the role played by Defendant Kelly in the sale of the recalled DePuy hip replacements at issue in this case. In paragraph 9 of his affidavit, he claims:

At the hospital, a Kelly Orthopaedic representative delivers the ordered prosthesis to the operating room. The prosthesis is delivered to a circulating nurse in the sealed sterile package from the Kelly Orthopaedic representative. Kelly Orthopaedic representatives do not scrub-in, enter the sterile field, or assist the surgeon with the surgery.

However, in the medical records of Plaintiff Betty Colston, there is clear evidence to the contrary. Attached as Exhibit "2" are two pages of the operative record of the surgery to implant the subsequently recalled DePuy hip replacement in Ms. Colston's hip. The second page of the exhibit evidences that Glen Harrison, one of Defendant Kelly's sales representatives scrubbed-in and entered the surgery at 9:39 and left the surgery at 11:23. Next to "Role Performed" on the record is "Sales Representative." Likewise, attached as Exhibit "3" is a page of the operative report for the surgery to remove and replace the recalled DePuy hip replacement with a non-defective hip replacement. During that surgery, Mr. Harrison scrubbed-in and entered the surgery at approximately 13:20 and

left the surgery at 15:07. The “Role Performed” on the record for Mr. Harrison is again listed as “Sales Representative.”

Similarly, in the medical records of Plaintiff Mary Banks, there is also evidence of the involvement of Defendant Kelly’s sales representative, Matt Link, at surgery. Attached as Exhibit “4” is a page of the operative record of the surgery to implant the subsequently recalled DePuy hip replacement in Ms. Banks’s hip. Under “case staff” it lists “M. Link DePuy Rep” with his staff role as “vendor representative.” Likewise, attached as Exhibit “5” is a page of the operative report for the surgery to remove and replace Ms. Banks’ recalled DePuy hip replacement with a non-defective hip replacement. Under “case staff” it again lists “Matt Link Rep-DePuy.”

In paragraph 15 of his affidavit, Mr. Kelly states that Plaintiffs “are incorrect in alleging that Kelly Orthopedic was a seller of the ASR hip prosthesis or placed the ASR hip prosthesis into the stream of commerce for sale.” Both Defendants Kelly and DePuy’s own statements outside the context of this litigation show that claim to be false.

DePuy Describes Kelly as “Sales Office”

In 2007, the DePuy website included a “Sales Office Locator” page depicting a map of the United States and allowing a visitor to select the state in which they were interested in locating a sales office, shown below:

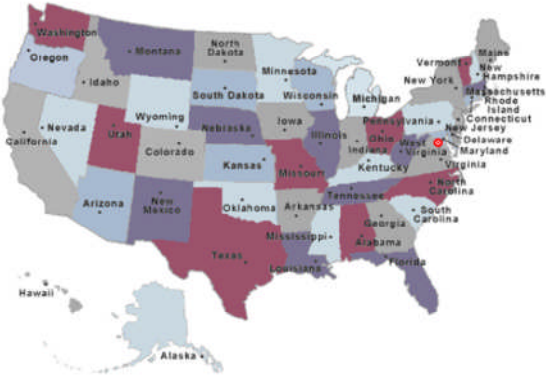
DePuy Orthopaedics Page 1 of 1

Search

HOME  
PHYSICIANS  
PATIENTS  
EDUCATIONAL OPPORTUNITIES  
MEDIA  
CAREER OPPORTUNITIES  
COMPANY CREDO


**SALES OFFICE LOCATOR**

Please select a state



-----Select State-----

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<http://web.archive.org/web/20070823132447/depuorthopaedics.com/worldwide/?requestid=286613> 9/24/2010

<http://web.archive.org/web/20070823132447/depuorthopaedics.com>, accessed on September 24, 2010 using the Internet Archive recording of the DePuy site as found in 2007.

Pulling down the “Select State” drop down to Texas yielded the below page:

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**HOME**  
**PHYSICIANS**  
**PATIENTS**  
**EDUCATIONAL OPPORTUNITIES**  
**MEDIA**  
**CAREER OPPORTUNITIES**  
**COMPANY CREDO**  
**SALES OFFICE LOCATOR**

[Go back to the main map](#)

## Texas

**Kelly Orthopaedic Sales**  
4310 Sunbelt Drive  
Addison, TX 75001  
**Phone:** (972) 248-1877  
**Fax:** (972) 248-7781

**DePuy South Texas**  
9300 Kirby Drive, Suite 500  
Houston, TX 77054  
**Phone:** (713) 668-0555  
**Fax:** (713) 668-0690

**DePuy-Colorado**  
(Serving Colorado, New Mexico, West Texas & Wyoming)  
17301 W. Colfax Ave., Suite 160  
Golden, CO 80401  
**Phone:** (303) 894-8835  
**Fax:** (303) 830-2195

**Starring and Associates**  
(Serving Louisiana & Texarkana)  
117 Clearview Parkway  
Metairie, LA 70001  
**Phone:** (504) 883-8117  
**Fax:** (504) 885-2239





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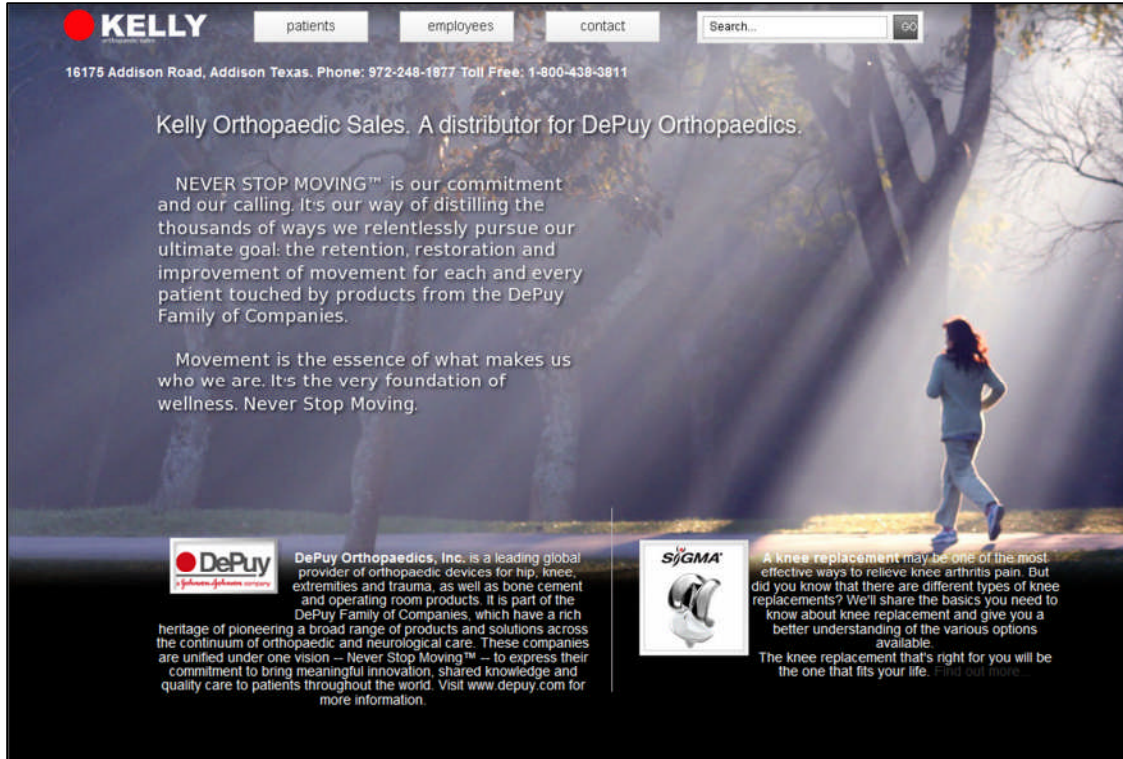
http://web.archive.org/web/20061023215515/www.depuyorthopaedics, accessed on September 24, 2010 using the Internet Archive recording of the DePuy site as found in 2006. Likewise, selecting Oklahoma from the drop down list called up the below listing for Defendant Kelly's headquarters at the time:



http://web.archive.org/web/20061023215231/www.depuyorthopaedics, accessed on September 24, 2010 using the Internet Archive recording of the DePuy site as found in 2006.

Defendant Kelly Describes Itself as a DePuy Distributor

Kelly’s website similarly describes the relationship between DePuy and Kelly, stating “Kelly Orthopaedic Sales. A distributor for DePuy Orthopaedics.” Below is a screen capture of the home page of the Kelly website describing the company:



<http://www.kosortho.com>, as accessed on February 23, 2011. The “Contact Us” page of Kelly’s website lists offices in Northern Texas and Oklahoma.

### Role of Sales Representative in Hip Replacement Surgery

That fact that Defendant Kelly’s employees scrubbed-in to assist with the surgeries on Plaintiff Betty Colston and also assisted with the surgeries on Plaintiff Mary Banks was not unusual. Defendant DePuy contracted with Defendant Kelly to promote, sell, distribute, and service DePuy’s hip replacements in Northern Texas and Oklahoma. Kelly in turn employed and contracted with individual sales representatives to accomplish that task. Orthopedic sales representatives typically play a crucial role in hip replacement surgeries. The Medical Sales College of Englewood, Colorado, trains sales representatives for hip replacement manufacturers generally and DePuy and its distributors in particular. In its *2010-2011 Course Catalog*, the Medical Sales College describes the typical role of a sales representative in a joint replacement surgery:

The highly technical side of the job often comes in the servicing after the sale, usually around the aspects of a case. Whether it is templating x-rays with a surgeon to determine the proper implants, or guiding a surgical team during surgery in the proper use of instrumentation and implant, the role of a sales rep in being the voice-of-the-manufacturer is critical. In many instances, a rep will have seen more of a particular surgery, and certainly have seen it in more different situations, than anybody on the surgical team, including the surgeon.

Page 11 of the *2010-2011 Course Catalog* of the Medical Sales College of Englewood, Colorado, attached hereto as Exhibit "6".

#### Role of the DePuy Sales Representatives

DePuy sales representatives are charged with the role of serving as the principal conduit by which surgeons receive information about DePuy hip replacements. The sales representative is trained to educate the surgeon about DePuy's hip replacements, and how they compare to competitors' products. DePuy sales representatives also instruct the surgeon on the proper use of DePuy's hip replacements. In addition to providing information, the DePuy representative is responsible for assisting the orthopedic surgeon in the implantation of the hip replacements.

The written testimony of Peter D. Coffaro, DePuy Orthopaedics, Inc.'s Territory General Manager for Central and Northern California filed by DePuy Orthopaedics, Inc. on October 12, 2007, in the case of *Mahoney v. DePuy Orthopaedics, Inc.* before the United States District Court for the Eastern District of California, states:

DePuy's sales representatives are DePuy's primary point of contact with the physicians and hospitals that use DePuy's products. DePuy's sales representatives play a vital role in DePuy's business. They educate customers about product features, assist customers in understanding the proper use

of the products, and often observe surgeries first hand to ensure that the products are being used appropriately.

Paragraph 7 of the declaration of Peter D. Coffaro, Territory General Manager for Central and Northern California for DePuy Orthopaedics, Inc., attached hereto as Exhibit “7”.

By contract with its distributors, DePuy requires that sales representatives receive training on how to provide the above information to orthopedic surgeons and what information to provide. *See* the Declaration of Pamela Davis filed on March 24, 2011, in the case of *Garris v. DePuy Orthopaedics, Inc. and Commonwealth Surgical Solutions*, in the United States District Court for the Eastern District of Virginia, ¶ 4, attached hereto as Exhibit 8. Newly hired DePuy sales representatives are required to undergo a six day course on DePuy’s joint replacement products at DePuy headquarters in Warsaw, Indiana. Pursuant to the *DePuy Certification Learning Program Curriculum Guide*:

At the end of the primary reconstructive program, the participant should be able to:

- Identify anatomical landmarks as they relate to total joint replacement
- Describe the movements of the body
- Discuss the key rationale points of each core product offering
- ***Compare and contrast the DePuy reconstructive product line to that of our major competitors***
- ***Demonstrate how to implant each core product***

*Emphasis added.* Page 11 of the *DePuy Certification Learning Program Curriculum Guide* attached hereto as Exhibit “9”. The *Curriculum Guide* goes on to state:

Primary School is designed to address the needs of new associates to DePuy. The program highlights a variety of topics including product design rationale, surgical technique tips for implanting products, and an overview of competitive product offerings.

...

Bioskills workshops are conducted for all major product lines. Bioskills or Sawbones workshops enable the student to work through a variety of scenarios involving our instrumentation packages. Instructors assist students to learn the basic steps and procedures for implanting our reconstructive products. ***Skills learned during these workshops are intended to give the participants the necessary skills to enable them to verbally assist their surgeons, nursing staff and other hospital-based customers during surgical procedures.***

*Emphasis added. Id.* at pages 11 to 12. DePuy then trains the sales representatives in providing more advanced assistance to orthopedic surgeons. The “learning objectives” of the “Advanced Reconstructive Sales Associate Learning Centers – Length of course 1-2 days” in the *DePuy Certification Learning Program Curriculum Guide* include:

- Discuss details relating to pre-op planning of simple and complex surgical cases
- Identify competitive advantages within the DePuy product portfolio
- Demonstrate how to template, plan and consult on product options for primary and revision scenarios
- Explain concepts relative to soft tissue balancing, biomechanics of the hip and knee

...

The advanced program is intended to enhance skills of the sales associate in the area of surgical techniques, pre-op planning, and basic decision-making regarding primary and revision surgical procedures.

*Id.* at page 15.

The written testimony of Pamela Davis, an orthopedic sales representative for a DePuy distributor from 2005 through 2010 confirms that the training objectives of the DePuy Learning Programs were employed by its orthopedic sales representatives. *See* the Declaration of Pamela Davis filed on March 24, 2011, in the case of *Garris v. DePuy Orthopaedics, Inc. and Commonwealth Surgical Solutions*, in the United States District Court for the Eastern District of Virginia, attached hereto as Exhibit 8. Ms. Davis

testifies that sales representatives hold meetings with surgeons to discuss DePuy orthopedic products and their benefits compared to competitor's products. *See* Exhibit 8, ¶ 6, 16 and 17. Sales representatives also accompany surgeons to cadaver labs to convince them of the advantages of DePuy products. *See* Exhibit 8 at ¶ 7 and 16. Indeed, the bulk of a sales representative's time, according to Ms. Davis, is spent assisting with implant surgeries:

My daily routine was to travel to the hospital in which I was assigned, cover the surgeries which were posted several weeks or days prior, with hospital scheduling personnel, *organize instruments to be used for surgery; bring implants being used to the hospital if they were not there and make sure proper implants were brought into the surgical suite* for the nurse to open.

*See* Exhibit 8, ¶ 10. (Emphasis supplied.)

In sum, DePuy sales representatives play a pivotal role in promoting, distributing, selling, and servicing DePuy hip replacements.

#### Disguised Motion for Summary Judgment

Defendant DePuy's Notice of Removal is in effect a disguised motion for complete summary judgment in favor of Defendant Kelly. By its Notice of Removal, DePuy is attempting to obtain the dismissal of Kelly from this action when Plaintiffs have had absolutely no opportunity for discovery, and thus, a constrained ability to dispute the alleged facts contained in DePuy's Notice of Removal and supporting affidavit. Discovery will almost certainly show unequivocally that Defendant Kelly played a crucial role in the promotion, distribution, sale, and servicing of the DePuy hip replacements at issue in this case.

Failure of Defendant Kelly to Join in Notice of Removal Renders it Defective

In addition to the above, Defendant DePuy improperly removed this matter to this Court as Defendant Kelly failed to join in the Notice of Removal and no formal consent on behalf of Defendant Kelly has been filed. For this reason alone, pursuant to 28 United States Code §1446, removal is defective and this matter must be remanded back to state court.

WHEREFORE, for the foregoing reasons, Plaintiffs respectfully request that this Court remand the case back to the District Court for Dallas County, Texas, award Plaintiffs' attorneys' fees, and for any other relief as this Court deems proper.

MEMORANDUM OF LAW

**I. DePuy must demonstrate that there is no possibility that Plaintiffs can recover against Kelly.**

Defendant DePuy alleges Plaintiffs improperly joined Defendant Kelly. DePuy thus has the burden of proving that there is NO possibility that Plaintiffs can establish a cause of action against Kelly, a citizen of the State of Texas. In its 2004 decision in *Smallwood v. Illinois Cent. R. Co.*, the United States Court of Appeals for the Fifth Circuit, sitting en banc, stated:

[W]e have recognized two ways to establish improper joinder: “(1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court.” Only the second way is before us today, and we explained in *Travis v. Irby* that the test for fraudulent joinder is whether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant, which stated differently means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant. To reduce

possible confusion, *we adopt this phrasing of the required proof and reject all others, whether the others appear to describe the same standard or not.*

*Emphasis added. Smallwood v. Illinois Cent. R. Co.*, 385 F. 3d 568, 573 (5th Cir. 2004).

The Fifth Circuit emphasized that the burden of satisfying the improper joinder test lies with the removing defendant, explaining:

When a defendant removes a case to federal court on a claim of improper joinder, the district court's first inquiry is whether the removing party has carried its heavy burden of proving that the joinder was improper.

*Id.* at 576. Accordingly, DePuy in this case bears the burden of demonstrating that Plaintiff does not even have a *possibility* of recovering against the in-state defendant, Kelly.

## **II. All doubts or ambiguities are to be resolved in favor of remand.**

Any doubt regarding the removability of the case is resolved in favor of remand.

As stated by the United States Supreme Court in the case of *Shamrock Oil & Gas Corp.*

*v. Sheets*:

Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'

*Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-109 (1941). The Fifth Circuit embraced this policy in its 2007 decision in *Gash v. Hartford Accident & Indemnity Company*, holding: “As ‘the effect of removal is to deprive the state court of an action properly before it, removal raises significant federalism concerns.’ The removal statute is therefore to be strictly construed, and any doubt about the propriety of removal must be resolved in favor of remand.” *Internal citations removed. Gash v. Hartford Accident & Indemnity Company*, 491 F.3d 278, 281-282 (5th Cir. 2007) (Vacating, remanding, and holding that a claims adjuster was not improperly joined as he could be held individually liable for violations of the insurance code.)

Reflective of these federalism concerns, the Fifth Circuit has explained that in applying the improper joinder test, “the district court is ‘obligated to resolve any contested issues of material fact, and any ambiguity or uncertainty in the controlling state law, in [the plaintiff’s] favor.’” *Rico v. Flores*, 481 F.3d 234 (5th Cir. 2007) (Reversing and remanding to state court as railroad did not meet burden for demonstrating improper joinder of non-diverse employees.) For these reasons, to establish improper joinder, DePuy must overcome both the presumption in favor of remand and the resolution of all issues of fact and law in Plaintiffs’ favor.

**III. Rule 12(b)(6) analysis shows Plaintiffs each have a valid cause of action against Kelly.**

DePuy claims that there is absolutely no possibility that Plaintiffs will be able to recover against Kelly. Kelly, however, has filed an answer to the Petition and has not challenged the sufficiency of the pleading. It is difficult to accept DePuy’s attacks on the sufficiency of the pleadings against Kelly when Kelly has not seen fit to do so itself.

Employing the Rule 12(b)(6)-type analysis adopted by the Fifth Circuit in *Smallwood*, this Court will find that Plaintiffs can assert a valid cause of action against Kelly.<sup>1</sup> In *Smallwood*, the Fifth Circuit, sitting en banc, stated:

There has also been some uncertainty over the proper means for predicting whether a plaintiff has a reasonable basis of recovery under state law. A court may resolve the issue in one of two ways. The court may conduct a Rule 12(b)(6)-type analysis, looking initially at the allegations of the complaint to determine whether the complaint states a claim under state law against the in-state defendant. Ordinarily, if a plaintiff can survive a Rule 12(b)(6) challenge, there is no improper joinder. That said, there are cases, hopefully few in number, in which a plaintiff has stated a claim, but has misstated or omitted discrete facts that would determine the propriety of joinder. In such cases, the district court may, in its discretion, pierce the pleadings and conduct a summary inquiry.

*Smallwood* at 573. Plaintiffs have pled valid causes of action against Kelly and are confident that they will be able to recover against the in-state defendant.

Plaintiffs' Petition sets forth a claim for negligence which is more than sufficient to withstand the Fifth Circuit's test of showing the possibility of a right to recovery. To state a claim for negligence under Texas law, a plaintiff must allege: (1) that the defendant owed a legal duty to the plaintiff; (2) the defendant breached that duty; and (3) that the defendant's breach of that duty proximately caused the plaintiff's injury. See, *Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401, 404 Tex. 2009); *Western Invs. v. Urena*, 162 S.W.3d 547, 500 (Tex. 2005).

In their Petition, Plaintiffs set forth allegations of negligence against Kelly in their Seventh Claim for Relief. Plaintiffs' Seventh Claim states, in part:

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<sup>1</sup> Plaintiffs have set forth four separate claims against Kelly: Negligence, Negligent Undertaking, Deceptive Trade Practices Act Violation, and Gross Negligence and/or Malice. As the improper joinder test requires only a showing of a possibility of a single cause of action against the in-state Defendant, Plaintiff has briefed only the claim most relevant to the issues raised by Defendants – that of negligence.

101. Defendant KELLY, as the promoter, seller, distributor, and servicer of the DePuy ASR Hip, owed a duty to Plaintiffs to provide accurate information to both Plaintiffs and their orthopedic surgeons.

102. As the seller of the DePuy ASR Hip, prior to selling the DePuy ASR Hip, Defendant KELLY owed a duty to Plaintiffs to inform Plaintiffs' orthopedic surgeons of the significant problems being experienced with the DePuy ASR Hip.

103. Defendant KELLY failed to warn the Plaintiffs or their orthopedic surgeons of the significant problems being experienced with the DePuy ASR Hip and as a result the DePuy ASR Hip was implanted in the bodies of both Plaintiffs where it failed catastrophically.

\* \* \* \*

106. As the servicer of the DePuy ASR Hip, following the sale of the DePuy ASR Hip, Defendant KELLY owed a duty to Plaintiffs to inform Plaintiffs' orthopedic surgeons of the excessive rate of failure of the DePuy ASR Hip.

107. The failure of Defendant KELLY to provide accurate information to Plaintiff's orthopedic surgeons regarding the excessive rate of failure of the DePuy ASR Hip resulted in the failure of the Plaintiffs' DePuy ASR Hips going undiagnosed for greatly extended periods of time, resulting in the Plaintiffs experiencing unnecessary pain, weakness, and destruction of the bones comprising their hip joints.

108. Defendant KELLY in breach of the duties described above, negligently and carelessly promoted, distributed, sold, and serviced the DePuy ASR Hip implanted in Plaintiffs.

109. As a direct and proximate result of the conduct of Defendant KELLY, Plaintiffs experienced unnecessary pain, weakness, and destruction of the bones comprising their hip joints.

110. As a direct and proximate cause result of this breach, Plaintiffs suffered severe physical distress and injury; emotional distress and injury; incurred medical and other expenses; suffered shame, humiliation and the inability to

lead a normal life; and have suffered loss of enjoyment of life. The injuries and losses of Plaintiffs are permanent in nature and Plaintiffs will continue to suffer such losses in the future.

Plaintiffs' allegations would withstand a Rule 12(b)(6) type analysis under Texas law and are certainly sufficient to state a claim of negligence. As Plaintiffs' claim for negligence can survive a 12(b)(6) challenge, it is reasonable for this Court to predict that Plaintiffs might be able to recover against Defendant Kelly. Accordingly, pursuant to *Smallwood*, there is no improper joinder in the present action. *Smallwood* at 573.

**IV. The affirmative defense of the innocent seller doctrine does not preclude Plaintiff from possessing a possible right of recovery against Defendant Kelly.**

DePuy alleges that Kelly was an "innocent seller" under Texas product liability law and thus argue that a valid cause of action cannot be asserted against Kelly. *See* Notice of Removal, ¶ 22. DePuy's reliance on the innocent seller doctrine in this case is misplaced for two reasons. First, the innocent seller doctrine, as codified in the Texas Civil Practice and Remedies Code, provides a defense to liability for nonmanufacturing sellers in certain circumstances. As an affirmative defense to Plaintiffs' claims, consideration of the innocent seller doctrine exceeds the improper joinder analysis prescribed by the Fifth Circuit in *Smallwood*. Second, in both law and fact, Kelly was hardly innocent and therefore, cannot avail itself of the protections of the innocent seller defense.

**A. The improper joinder test does not include analysis of the affirmative defenses which Defendants may raise in the course of litigation.**

The innocent seller defense is just that – a *defense* under Texas state law to claims of product liability, including claims of negligence as related to a product. *Tex. Civ. Prac. & Rem. Code Ann. §82.001(2)*. In fact, that is precisely how Defendants have invoked Texas’s Product Liability Act in this case – as their Twenty-First Affirmative Defense. *See* Defendant DePuy Orthopaedics, Inc.’s Answer and Defenses to Plaintiffs’ Original Petition with Attached Discovery, ¶ 21; Defendant Kelly Orthopaedic Sales, LP and KOS Management Company, LLC’s Answer and Defenses to Plaintiffs’ Original Petition with Attached Discovery, ¶ 21.

In *Smallwood*, the Fifth Circuit explained that to determine if joinder was improper, the district court is to conduct a Rule 12(b)(6)-type analysis. *Smallwood v. Illinois Central Railroad Co.*, 385 F.3d 568, 573 (5th Cir. 2004). *See also, Shields v. Bridgestone Firestone North America Tire, LLC*, 502 F. Supp. 2d 497, 501 (W.D. Tex. 2005); *Norris v. Bombardier Recreational Products, Inc.*, 2009 WL 94531, \*4 (E.D. Tex. 2009). Such analysis is limited to a review of whether the complaint or petition states a claim under state law against the in-state defendant. *Smallwood* at 573. It should not extend to an analysis of affirmative defenses, which is more akin to the consideration of a motion for summary judgment.

Pursuant to *Smallwood*, there are very few cases in which a court may go further than a 12(b)(6) analysis and pierce the pleadings to conduct a summary inquiry. *Id.* The *Smallwood* decision cautioned “that a summary inquiry is appropriate only to identify the presence of discrete and undisputed facts that would preclude plaintiff’s recovery against

the in-state defendant.” *Id.* at 573-4. Further, the Fifth Circuit listed the type of facts subject to summary inquiry:

For example, the in-state doctor defendant did not treat the plaintiff patient, the in-state pharmacist defendant did not fill a prescription for the plaintiff patient, a party’s residence was not as alleged, or any other fact that easily can be disproved if not true.

*Id.* at 574, n. 12. (*Citations omitted.*) Thus, the analysis set forth in *Smallwood* does not permit inquiry into the removing parties’ defenses. *See id.* at 575-6 (Finding the application of the improper joinder doctrine did not allow circumvention of the well pleaded complaint rule where defendant attempted to remove the action based on a defense.) *See also Norris v. Bombardier Recreational Products, Inc.*, 2009 WL 94531 at \*6 (“Mor[e]over, it appears that Bombardier’s allegations of improper joinder are substantially based on arguments regarding the merits of Triple L’s defense and not the legal basis for Triple L’s joinder. Accordingly, conducting a summary judgment-like inquiry and considering conflicting evidence at this juncture would be inappropriate.”) (*Citations omitted.*)

As DePuy herein seeks to assert a defense as the basis for their argument that Plaintiffs have no possibility of recovering on their claims, it has asked this Court to conduct a summary inquiry into the merits of Plaintiffs’ case rather than the those discrete facts relative to joinder. Such an inquiry would exceed the analysis prescribed by the Fifth Circuit in *Smallwood* and would result in an improper piercing of the Petition for the purpose of resolving the merits of this matter. The Fifth Circuit warned against such an undertaking in *Smallwood*, finding:

Attempting to proceed beyond this summary process carries a heavy risk of moving the court beyond jurisdiction and into a resolution of the merits, as distinguished from an analysis of the court's diversity jurisdiction by a simple and quick exposure of the chances of the claim against the in-state defendant alleged to be improperly joined. Indeed, the inability to make the requisite decision in a summary manner itself points to an inability of the removing party to carry its burden.

*Smallwood* at 574. Accordingly, this Court should decline DePuy's invitation to exceed the limits of analysis set forth in *Smallwood*.

**B. Kelly was not an innocent seller and the defense of the innocent seller doctrine is not available to it.**

Applying the test set forth in *Smallwood* appropriately, it is apparent that Plaintiffs' Petition makes sufficient allegations to show the possibility of a right to recovery against Kelly despite the innocent seller doctrine.

Section 82.003 of the Texas Civil Practice and Remedies Code *generally* exempts nonmanufacturing sellers from product liability. *Shields* at 501; *Norris* at \*5. However, the statute provides that the exemption is inapplicable under certain circumstances. *Id.* Thus, the statute contains a list of circumstances under which a nonmanufacturing seller remains subject to liability. *Id.* The relevant portions of § 82.003, titled "Liability of Nonmanufacturing Sellers" (2009) read:

(a) A seller that did not manufacture a product is not liable for harm caused to the claimant by that product unless the claimant proves:

\* \* \* \*

(4) that:

(A) the seller exercised substantial control over the content of a warning or instruction that accompanied the product;

(B) the warning or instruction was inadequate; and

(C) the claimant's harm resulted from the inadequacy of the warning or instruction;

(5) that:

(A) the seller made an express factual representation about an aspect of the product;

(B) the representation was incorrect;

(C) the claimant relied on the representation in obtaining or using the product; and

(D) if the aspect of the product had been as represented, the claimant would not have been harmed by the product or would not have suffered the same degree of harm;

(6) that:

(A) the seller actually knew of a defect to the product at the time the seller supplied the product; and

(B) the claimant's harm resulted from the defect; or

\* \* \* \*

The allegations contained in Plaintiffs' Petition allege at least these three exceptions to the innocent seller doctrine.

With respect to subsection 6, the exception which the courts in *Shields* and *Norris* focused on, Plaintiffs repeatedly alleged that Defendant Kelly actually knew of a defect in the product at the time that it sold the product and that Plaintiffs' harm resulted from the defect. *See* paragraphs 33, 45, 55, 64, 65, 66, 67, 77, 103, 107 and 121 of Plaintiffs' Petition. For example, in paragraph 33 of the Petition, Plaintiffs allege:

The employees and agents of Defendant KELLY were aware of the problems with the design of the ASR Hip, and also aware of excessive failures necessitating revision of the DePuy ASR Hip at the time of the sale of the DePuy ASR Hip to each of the Plaintiffs, but failed to convey this information to the Plaintiffs' orthopedic surgeons and instead continued to strongly promote the DePuy ASR Hip.

Further, in the last paragraphs of the general allegations, Plaintiffs' pleadings met this exception, in stating:

66. The defective DePuy ASR Hips implanted in the bodies of the Plaintiffs caused harm and injury to the Plaintiffs.
67. The failure of the DePuy ASR Hip implanted in the bodies of the PLAINTIFFS was a direct result of the defective design of the DePuy ASR Hip warned of by orthopedic experts in 2005, and of which KELLY was aware at the time that KELLY sold the DePuy ASR Hip to PLAINTIFFS.

*See* paragraphs 66-7 of Plaintiffs' Petition. Taking these allegations of Plaintiffs' Petition as true and construing them in the light most favorable to Plaintiffs, Plaintiffs have pleaded the requirements of section 82.003(a)(6). *Shields* at 501-2; *Norris* at \*5. *See also Moses v. Zimmer Holdings, Inc.*, 2007 WL 3036096, \*6-7 (S.D. Tex. 2007) (Plaintiff had a possibility of recovery against distributor of Zimmer artificial hip under section 82.003(a)(6) where Plaintiff pleaded distributor had received reports of problems with hip implant and where additional evidence showed individual sales representative analyzed x-rays of failed parts.)

Plaintiffs additionally allege that Defendant Kelly exercised substantial control over the content of the warning and instruction that accompanied the product and that Plaintiffs' harm resulted from the inadequate warning and instruction. *See* paragraphs 13, 14, 15, 16, 17, 31, 32, 33, 61, 64, 65, 67, 103, 104, 107, 109 and 110 of Plaintiffs' Petition. These allegations are more than sufficient to plead the requirements of section

82.003(a)(4). In *Norris*, the court found that allegations that “[a]dequate warnings were not provided with the product to ensure safety” and “[a]s a direct result of Defendants’ failure to warn, this defective and unreasonably dangerous product caused harm and injuries to Plaintiff” satisfied section 82.003(a)(4) for purposes of analysis for improper joinder. *Norris* at \*5.

In the present case, Plaintiffs specifically pleaded:

Defendant KELLY exercised substantial control over the content of the warning and instruction that accompanied the product; the warning and instruction was inadequate; and the Plaintiffs’ harm resulted from the inadequacy of the warning or instruction.

*See* paragraph 104 of Plaintiffs’ Petition. Thus, Plaintiffs’ allegations raise the possibility of a recovery against Kelly under the exception to the innocent seller doctrine stated in §82.003(a)(4).

Finally, Plaintiffs have pleaded the exception contained in § 82.003(a)(5).

Plaintiffs have alleged that Kelly made incorrect express factual representations regarding the product which Plaintiffs and their agents relied upon in purchasing the product, and if the product had been as represented, Plaintiffs would not have been harmed by the product. *See* paragraphs 31, 32, 33, 45, 55, 64, 65, 67, 103, 105, 107, 109 and 121 of Plaintiffs’ Petition. Plaintiffs directly alleged the applicability of this exception to the innocent seller doctrine in paragraph 105, in which they stated:

Defendant KELLY made express factual representations about the DePuy ASR Hip, including that it was less prone to the generation of excessive metal debris; the representation was incorrect; the Plaintiffs relied on the representation in obtaining and using the DePuy ASR Hip; and if the DePuy ASR Hip had been as represented, the Plaintiffs would not have been harmed by the product or would not have suffered the same degree of harm.

Thus, under a Rule 12(b)(6) type analysis, the requirements of §82.003(a)(5) have been met.

Because Plaintiffs' Petition pleads the applicability of exceptions to the innocent seller doctrine, this Court must conclude that Plaintiffs possess at least the possibility of a right to recover against the Selling Defendants under Texas state law. *See Shields* at 502 (“Taking Shields’s complaint as true and drawing all inferences in the light most favorable to her, the Court is of the opinion that there is more than a theoretical possibility that Shields could recover under state law against Perez.”); *Norris* at \*5 (“Construing these allegations in the light most favorable to the plaintiff, the court concludes that Norris could conceivably recover against the in-state retailer pursuant to Tex. Civ. Prac. & Rem. Code § 82.003(a)(4) and (6).”)

**C. Defendant Kelly was a seller as defined in the innocent seller statute and thus, subject to liability pursuant to Texas product liability law.**

DePuy asserts an additional argument under the Texas product liability statute, Texas Civ. Prac. & Rem. Code § 82.001, et seq., claiming that Kelly does not meet the statutory definition of “seller” and thus, Plaintiffs have no possibility of recovery against Kelly. Given Texas law on this subject and the facts of the instant case, this assertion must fail.

Pursuant to the Texas product liability statute, seller “means a person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof.” *See* Texas Civ. Prac. & Rem. Code §82.001(3). DePuy is stretching the limits

of credence in claiming that Kelly is not a seller as defined by the statute. Kelly itself has not only admitted that it is a distributor of DePuy products but has proudly proclaimed such on its website. It is difficult to comprehend how DePuy could argue that Kelly is not a seller, which term is defined to include businesses which distribute a product, when Kelly broadcasts to the world that it is indeed a distributor, and DePuy listed Kelly as a “sales office.”

Moreover, the United States District Court for the Southern District of Texas recently decided an analogous case involving a competing hip replacement manufacturer. In *Moses v. Zimmer, Holdings, Inc.*, a hip replacement manufacturer based in Indiana removed a lawsuit alleging that a hip replacement was defective from Texas state court to the United States District Court for the Southern District of Texas. *Moses v. Zimmer Holdings, Inc.*, 2007 WL 3036096, (S.D.Tex.), attached hereto as Exhibit “10”. To overcome the presence in the case of an in-state defendant, Zimmer and its distributor attempted to make an argument identical to that asserted in the instant case. *Id.* Zimmer claimed that its distributor was a mere “service provider” which was did not qualify as a seller under the statute. *Id.* at \*4.

The Southern District of Texas rejected the arguments of Zimmer and its distributor, Zimmer Nagel. *Id.* The court found that the distributor was not a mere “service provider,” in part, because the distributor *delivered* the artificial hip to the hospital, which the court concluded, met the statutory definition of placing the product in the stream of commerce. *Id.* at \*5. The court went on to find that a reasonable basis existed to predict the plaintiff could establish that the distributor was a seller as defined in the statute, stating:

Defendants' argument that Zimmer Nagel does not qualify as a seller under the Act faces two additional problems. First, defendants concede that they sometimes refer to Zimmer Nagel as a "distributor" of Zimmer Holdings, Inc.'s medical devices. This makes unpersuasive defendants' argument that Zimmer Nagel is not in the business of distributing the artificial hip replacement product in the stream of commerce. (Footnote omitted.)

Second, although defendants admit that Zimmer Nagel representatives are sometimes present at surgery to deliver a medical device, they do not explain why a Zimmer Nagel representative has to deliver the medical device to the surgeon *at the surgery* when the usual method of delivery was simply shipping the medical devices to hospitals. Having a representative of Zimmer Nagel present at surgery creates a fact issue with respect to the representative's role during the surgery.

*Id.* The Court then remanded the case against Zimmer and its distributor back to state court. *Id.*

Plaintiffs' Petition contains ample allegations of Defendant Kelly's acts as the distributor of the DePuy ASR Hip which qualify them as sellers pursuant to Texas Civ. Prac. & Rem. Code § 82.001(3). Plaintiffs affirmatively state that Kelly distributed the DePuy ASR Hip and placed the product in the stream of commerce. *See* paragraphs 9, 10, 11 and 60 of Plaintiffs' Petition. Accordingly, Plaintiffs have pleaded the elements necessary to show that Kelly was a seller as that term is defined in Texas product liability law. Thus, there exists the possibility that Plaintiffs may recover against Kelly as the seller of the defective hip implants.

As shown above, Kelly was not an innocent seller, and as a result, Plaintiffs are able to pursue their claims against Kelly. Plaintiffs have pled valid causes of action against Kelly and are confident that they will be able to recover against the in-state Defendant. Resolving all issues of fact and law in favor of Plaintiffs and in favor of

remand, there can be no doubt that, at very least, Plaintiffs possess a possibility of a right to recovery under Texas law. For this reason, the doctrine of fraudulent joinder is not applicable to this action, removal is improper, and remand should be granted.

**V. Plaintiffs are entitled to their attorneys' fees.**

The federal removal statute permits the award of costs and actual expenses incurred in connection with a remand. 28 U.S.C. §1447(c). In its 2005 decision in *Martin v. Franklin Capital Corp*, the United States Supreme Court discussed Congress' concerns in providing for such fee shifting:

...Congress thought fee shifting appropriate in some cases. The process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources. Assessing costs and fees on remand reduces the attractiveness of removal as a method for delaying litigation and imposing costs on the plaintiff. The appropriate test for awarding fees under § 1447(c) should recognize the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied.

*Martin v. Franklin Capital Corp.*, 546 U.S. 132, 104 (2005). In the instant case, DePuy removed this case from state court to this Court claiming improper joinder with no factual or legal basis. As a result, Plaintiffs are entitled to award of their attorneys' fees and costs in seeking and obtaining remand.

Conclusion

Defendant Kelly was clearly not fraudulently joined. Thus, there is not "complete diversity" and the federal courts lack subject matter jurisdiction. As this Court lacks

subject matter jurisdiction, this case must be remanded back to the 298<sup>th</sup> District Court for Dallas County, Texas. Furthermore, as this action was improperly removed by DePuy, DePuy is responsible for Plaintiffs' attorneys' fees incurred in obtaining the remand of this case back to state court.

Respectfully submitted,

**THE ASHMORE LAW FIRM, P.C.**

By: //s// Hutton W. Sentell  
Hutton W. Sentell  
State Bar No. 24026655  
3636 Maple Avenue  
Dallas, Texas 75219-3908  
214.559.7202 (Telephone)  
214.520.1550 (Telecopy)

and

Altom M. Maglio (pro hac vice admission requested)  
**MAGLIO CHRISTOPHER & TOALE, PA**  
1751 Mound Street, Second Floor  
Sarasota, FL 34236  
Phone 941-952-5242  
Fax 941-952-5042  
E-mail: amm@mctplaw.com

and

Brian F'ranciskato (pro hac vice admission requested)  
**NASH & FRANCISKATOLAW FIRM**  
2300 Main Street  
Kansas City MO 641 08  
Phone 816-221-6600  
Fax 816-524-5821  
E-mail: bfranciskato@nashfranciskato.com

**CERTIFICATE OF CONFERENCE**

I hereby certify that on April 8, 2011, I conferred with opposing counsel, Kathleen A. Frazier, about the contents of this motion, and the parties have been unable to reach an agreement with respect to the issues presented in the motion.

By:     //s// Hutton W. Sentell      
Hutton W. Sentell

**CERTIFICATE OF SERVICE**

I hereby certify that on April 8, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

GENE M. WILLIAMS, SBN: 21535300  
E-Mail: [gmwilliams@shb.com](mailto:gmwilliams@shb.com)  
KATHLEEN A. FRAZIER, SBN: 24043663  
E-Mail: [kfrazier@shb.com](mailto:kfrazier@shb.com)  
SHOOK, HARDY & BACON L.L.P.  
JP Morgan Chase Tower  
600 Travis, Suite 1600  
Houston, TX 77002-2992  
Telephone: 713/227-8008  
Telefax: 713/227-9508

ATTORNEYS FOR DEFENDANT  
DEPUY ORTHOPAEDICS, INC.

By:     //s// Hutton W. Sentell      
Hutton W. Sentell