

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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| MARY BANKS and | § | |
| BETTY COLSTON, | § | |
| Plaintiffs | § | |
| | § | |
| v. | § | |
| | § | Case Number: 3:11-cv-00718-L |
| DEPUY ORTHOPAEDICS, INC., | § | |
| KELLY ORTHOPAEDIC SALES, LP, | § | |
| and KOS MANAGEMENT COMPANY, | § | |
| LLC, | § | |
| Defendants | § | |

**PLAINTIFFS’ REPLY TO DEFENDANTS’ RESPONSE TO
MOTION TO REMAND**

I. Proper Analysis is Rule 12(b)(6)

As set forth in Plaintiffs’ Opposed Motion for Remand and Incorporated Memorandum of Law, the appropriate analysis for a court to undertake in considering a motion for remand is a Rule 12(b)(6) type analysis. *Smallwood* at 573. Defendant DePuy Orthopaedics, Inc. (“DePuy”) itself states that this is the appropriate analysis at page 5 of its Response – only to spend the remainder of the Response completely ignoring this standard. Instead, Defendant DePuy argues that the elements of each cause of action are not met because of the Kelly Declaration that it filed in conjunction with its notice of removal. For example, with respect to the count against Defendant Kelly Orthopaedic Sales, LP for negligent misrepresentation, Defendant DePuy sets forth the elements of this cause of action and then asserts, “In light of the Kelly Declaration, the allegations in paragraph 105 do not meet element #3.” *See* Response, p. 16. This pattern repeats itself throughout the Response and is most certainly not a Rule 12(b)(6) type analysis.

In their motion for remand and this Reply, Plaintiffs have appropriately focused on whether the allegations of Plaintiffs’ Petition satisfy the elements of the stated causes of action

under Texas law in accordance with the *Smallwood* standard. Plaintiffs would respectfully request that this Court not be distracted by the extensive extraneous argument presented by Defendant and adopt the approach set forth in *Smallwood* instead.

Plaintiffs are cognizant that the *Smallwood* decision stated a district court may conduct a summary inquiry into discrete facts. *Smallwood* at 573-4. However, the Fifth Circuit was careful to note the types of discrete facts appropriate for 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. The Fifth Circuit warned that moving beyond inquiry into such discrete facts carried with it the risk of considering the merits of the action rather than limiting the court's analysis to jurisdiction. *Id.* at 574. Thus, proceeding too far into factual territory weighs in favor of granting remand. *Id.* ("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.") Having invited this Court to analyze jurisdiction herein by extensive reliance on the Kelly Declaration, Defendant DePuy reveals its inability to carry its heavy burden of proving improper joinder.

II. Plaintiffs' Factual Material Was Filed in Response to Kelly Declaration

Despite its heavy reliance on the Kelly Declaration, Defendant DePuy attacks the factual material incorporated by Plaintiffs in their Motion for Remand to counter the Declaration.¹ It is clear that Defendant DePuy is flustered by these materials and how they point out discrepancies

¹ Defendant also makes much of the fact that this same information appeared in a brief filed in Georgia—after being filed herein-- to which Plaintiffs can only respond that imitation is the sincerest form of flattery. *See* Response at p. 1-3. The materials filed in this case, once filed, became public record (perhaps to Defendant DePuy's chagrin) and Plaintiffs cannot control how others may use such information. Defendant additionally relies on the appearance of this material in Georgia to argue its motion to stay. *Id.* Plaintiffs would point out that such arguments are irrelevant to the motion for remand at issue.

in the Kelly Declaration because Defendant DePuy has no end of derogatory adjectives to describe them, including inappropriate, unsworn, fatal and “factual.” *See* Response at 6-7. Defendant argues that Plaintiffs’ decision to file factual material somehow shows that the allegations of the Petition were insufficient, when in fact such material was included in the Motion for Remand solely to counter the questionable affidavit filed by Defendant DePuy in support of removal. *See*, §III, *infra*. Perhaps Defendant feels that by raising a hoopla about Plaintiffs’ factual materials, this Court will be distracted to the point of missing the content of such materials, content which directly contradicts the affidavit relied on so heavily by Defendant DePuy.

Ultimately, Defendant would have this Court ignore the type of Rule 12(b)(6) analysis called for by the Fifth Circuit in *Smallwood*. Instead, Defendant DePuy seeks to have this Court determine whether Plaintiffs have stated a cause of action by looking not at the allegations of the Petition but rather at the Kelly Declaration. Standing the test set forth in *Smallwood* and other decisions on its head, Defendant would have this Court resolve all issues of fact in its favor. Because Defendant’s interpretation does not constitute the law of this Circuit, Plaintiffs doubt that this Court will be so led astray.

III. DePuy Continues to Rely on Kelly Declaration After Shown to be Untrue

Defendant DePuy filed and continues to rely upon a carefully crafted affidavit that is untrue. When Plaintiffs, using the medical records, pointed out a major misrepresentation in Kelly’s declaration, that is Kelly Orthopaedic Sales, LP’s sales representatives do indeed “scrub in” and did so on multiple occasions in the instant case alone, Defendant DePuy continued to

deny standard practice.² Defendant DePuy did this although the medical records, as pointed out by Plaintiffs, list the times that the sales representative entered the sterile field. That is the point of the entry of the time in the medical records to track the time that each of the participants in the surgery enter and exit the surgery. Defendant DePuy continues to deny the role played by its sales representatives despite the affidavits and other material filed in this matter, the authenticity of which Defendant DePuy never disputes.

IV. DePuy Claims that Kelly Orthopaedic Sales, LP Does Not Engage in Sales

Defendant DePuy argues that Kelly Orthopaedic Sales, LP was not a sales company at all, but in effect, a courier service.³ Defendant DePuy writes “Kelly’s role is so attenuated that it should not be considered a seller at all.”⁴ Again in its Response Defendant DePuy writes “Kelly is not a ‘seller’ as defined under either Section 82 or the Texas Business and Commercial Code. See TEX. CIV. PRAC. & REM. CODE § 82.001(3); TEX. BUS. & COM. CODE § 2.103(a)(4) (defining a seller as ‘a person who sells or contracts to sell goods’).”⁵

These are audacious claims in light of the fact that the applicable Texas law would clearly include Kelly Orthopaedic Sales, LP squarely in the definition of a seller. Tex. Civ. Prac. & Rem. Code § 82.001 states:

§ 82.001. Definitions

In this chapter:

* * *

(2) “Products liability action” means any action against a *manufacturer or seller* for recovery of damages arising out of personal injury, death, or property damage allegedly caused by a defective product *whether the action is based in strict tort liability, strict products liability, negligence, misrepresentation, breach of*

² See Defendants’ Response at p. 13.

³ And not even always that if the device was already at the hospital.

⁴ See Defendants’ Response at p. 3.

⁵ See Defendants’ Response at p. 20.

express or implied warranty, or any other theory or combination of theories.

(3) “*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.

(Emphasis added).

Defendant DePuy continues to cling to this position even when Plaintiffs presented multiple documents indicating that both Defendant DePuy and Kelly Orthopaedic Sales, LP described Kelly Orthopaedic Sales, LP to be a “sales office” and “distributor” for Defendant DePuy.

Moreover, the Kelly Declaration explicitly acknowledges that Kelly is the distributor for DePuy. “Kelly Orthopaedic’s role in the *distribution* of ASR™ hip prostheses ...”⁶ For Defendant DePuy to make statements in their Response to this the Court that Kelly is not a “seller” in light of Kelly’s own website, Defendant DePuy’s own website, the Kelly Declaration and the statutory definition of a “seller” in Tex. Civ. Prac. & Rem. Code § 82.001(3), is disingenuous at best, and more likely, just outright false.

In *Moses v. Zimmer Holdings, Inc.*, 2007 WL 3036096 (S.D. Tex. 2007), the Court held that where it was conceded that the distributor delivered an artificial hip replacement product to the hospital where the claimant’s surgery occurred, that was sufficient to put the product into the stream of commerce and make the distributor a seller under the Texas Products Liability Act.⁷

To qualify as a seller, Texas law does not require that a defendant actually sell the product; placing it in the stream of commerce is sufficient. Tex. Civ. Prac. & Rem. Code Ann. § 82.001(3). See also *Gomez de Hernandez v. New Texas Auto Auction Services, L.P.*,

⁶ Kelly Declaration ¶ 4. (Emphasis added).

⁷ See Exhibit 10 to Plaintiff’s Motion to Remand (Document 5-10).

193 S.W.3d 220, 2006 WL 871010 at *4 (Tex.App.-Corpus Christi April 6, 2006, no pet.). If Zimmer Nagel delivered the artificial hip replacement product to the hospital, it put the product in the stream of commerce.

Id. at 5. In this case, the evidence before the Court shows that not only did the Kelly sales representatives deliver the subject hip replacement products to the hospital, the Kelly sales representatives were in the operating room assisting with the surgery.

V. DePuy Misstates Purpose of MDL

Defendant DePuy claims in its response that the MDL is the proper venue to determine lack of jurisdiction, stating:

The MDL Panel authorized the creation of MDL 2197, in part, so that one federal judge could decide similar jurisdictional issues consistently and efficiently. Accordingly, this Court should defer consideration of Plaintiffs' Motion to Remand pending transfer of this case to MDL 2197.⁸

Defendant DePuy would have this Court believe that the Judicial Panel on MultiDistrict Litigation ("JPML") created the MDL to deal with the issue of the improper removal of this case to federal court. However, the position of the JPML is inapposite. In a recent ruling relating to MDL 2197, *In Re DePuy Orthopaedics, Inc., ASR Hip Implant Prods. Liab. Lit.*, Transfer Order at 1 (J.P.M.L. Apr. 18, 2011), the JPML wrote:

Panel Rule 2.1(d) expressly provides that the pendency of a conditional transfer order does not in any way limit the pretrial jurisdiction of the court in which the subject action is pending. Between the date a **remand motion** is filed and the date that transfer of the action to the MDL is finalized, a court wishing to rule upon that motion (or any other motion) generally has adequate time in which to do so.

⁸ See Defendants' Response at p. 8.

Emphasis added. In Re: DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability Litigation, MDL No. 2197, Transfer Order, n. 1 (J.P.M.L. Apr. 18, 2011).

VI. This Court has a Constitutional Imperative to Consider Plaintiffs' Motion for Remand

Plaintiffs filed this action in state court setting forth state law claims against Defendants, including two in-state Defendants. Defendants removed the case to this Court claiming improper joinder. Plaintiffs then sought the remand of this case to state court for the reason that the joinder of the in-state defendants was proper, and thus, complete diversity of the parties does not exist to establish diversity jurisdiction. Both Plaintiffs and Defendants have raised the issue of the existence of diversity jurisdiction. Accordingly, the issue of whether this Court possesses subject matter jurisdiction over this action is squarely before the Court.

The question of a court's jurisdiction over a proceeding is a fundamental one, going to the court's very power to act. The United States Supreme Court has explained that "jurisdiction is the power to declare the law..." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998). As "[f]ederal courts are courts of limited jurisdiction, [t]hey possess only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). A court's power may not "be expanded by judicial decree." *Id.* Instead, a court is to presume that an action lies outside of its limited jurisdiction and answer the first and fundamental question in every case – that of jurisdiction -- even when it is not raised by the parties. *Steel Co.* at 94; *Kokkonen* at 377. *Accord Howery v. Allstate Ins. Co.*, 243 F. 3d 912, 916 (5th Cir. 2001); *Magnum Producing LP v. St. Paul Surplus Lines Ins. Co.*, 2010 WL 5342870 (S.D. Tex.). Thus, the United States Supreme Court has declared the requirement that jurisdiction be established as a threshold matter. *Steel Co.* at 94-5. (Finding that this

requirement “‘springs from the nature and limits of the judicial power of the United States’ and is ‘inflexible and without exception.’”)

Citing a “long and venerable line of cases,” the Supreme Court has instructed that jurisdiction defines the bounds of authorized judicial action:

Without jurisdiction the court cannot proceed *at all* in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the *only* function remaining to the court is that of announcing the fact and dismissing the cause.

Id. at 94. Accord *National Association for the Advancement of Colored People v. City of Kyle, Texas*, 626 F. 3d 233, 237 (5th Cir. 2010) (Emphasis supplied in same manner as emphasis added in *NAACP v. Kyle*.) Absent jurisdiction, a court may not act except to dismiss or remand the action before it. The Supreme Court has announced this precept to be a fundamental principle of separation of powers. *Steel Co.* at 94. The Fifth Circuit has likewise emphasized the importance of this axiom to comity with the states:

Where a federal court proceeds in a matter without first establishing that the dispute is within the province of controversies assigned to it by the Constitution and statute, the federal tribunal poaches upon the territory of a coordinate judicial system, and its decisions, opinions, and orders are of no effect.

Howery at 916, n. 6. (Citations omitted.)

So well established is the foregoing that the United States Claims Court referred to it as “an age-old rule” when finding it had no authority to impose Rule 11 sanctions where subject matter jurisdiction was lacking. *Schiff v. U.S.*, 24 Cl. Ct. 249, 254 (1991). Referring to Supreme Court precedent, the Schiff court explained:

[W]here the court has no jurisdiction, it has no power to do anything but strike the case from its docket, the matter being *coram non judice*.

Thus, when jurisdiction is lacking, as it is here, we cannot address any issue relating to the merits, *even if it would be in the best interests of justice to do so.*

Id. (Emphasis original in first paragraph, supplied in second.)

As this Court's subject matter jurisdiction has been brought into question, it must satisfy its first and fundamental duty to determine if it has the power to adjudicate any issues in this case. If this Court determines that it lacks jurisdiction, then it must remand this cause to the state court which does have jurisdiction.

VII. Attorney's fees

A federal court has full authority to order payment of costs, expenses and attorney fees incurred if the court determines that the removal was unreasonable or improper. 28 U.S.C. §1447(c); *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005); *see* FRCP 11(c)(1); *Garcia v. Amfels, Inc.*, 254 F.3d 585, 587 (5th Cir. 2001). Stated another way, the test is whether the defendant had objectively reasonable grounds to believe removal was legally proper. In this case, where Plaintiffs, using documents known to Defendant DePuy, clearly established that Kelly Orthopaedic Sales, LP was the distributor, and thus, a seller by definition under the Texas Products Liability Act⁹ of the defective products, and further, has carefully plead facts that create liability as a nonmanufacturing seller of the defective products, Defendant DePuy's removal was not made on an objectively reasonable basis. Under the circumstances, Plaintiffs are entitled to an award for fees and costs associated with opposing the removal and seeking a remand, and any other expenses incurred because of the improper removal. *Avitts v. Amoco Prod.*, 111 F.3d 30, 32 (5th Cir. 1997); *see also Simenz v. Amerihome Mortg. Co.*, 544 F.Supp.2d 743, 746 (E.D.Wis. 2008).

⁹ Tex. Civ. Prac. & Rem. Code §82.001, et seq.

VIII. Conclusion and Prayer

Kelly Orthopaedic Sales, LP is a Texas corporation. It sells and distributes DePuy Orthopaedics, Inc. implants, and its employees observe and assist with the technical aspects of the surgical implantation and subsequent servicing of the DePuy Orthopedics, Inc. products, including in Plaintiffs Mary Banks and Betty Colston. Plaintiffs have viable claims against Kelly Orthopaedic Sales, LP. To the extent Defendant DePuy places before this Court evidence contrary to Plaintiffs' evidence, all inconsistencies are resolved in Plaintiffs' favor, meaning in favor of remand.

Therefore, Plaintiffs respectfully request that their Motion to Remand be Granted, that Plaintiffs be awarded costs and for such other relief, at law or in equity, to which they have shown themselves to be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 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:

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