

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

LETITIA MALKMUS and GLEN MALKMUS,

Plaintiffs,

versus

DePUY ORTHOPAEDICS, INC. and TRP &
ASSOCIATES, LLC,

Defendants.

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* Civil Action No. _____
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* JUDGE
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* MAGISTRATE JUDGE
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NOTICE OF REMOVAL

Pursuant to 28 U.S.C. §§ 1332 and 1441, Defendants DePuy Orthopaedics, Inc. (“DePuy”) and TRP & Associates, LLC (“TRP”) through undersigned counsel, hereby remove the above-captioned action from the Circuit Court for the County of Kenosha, Wisconsin to the United States District Court for the Eastern District of Wisconsin, and state as follows:

BACKGROUND

1. On January 31, 2011, Plaintiffs Letitia and Glen Malkmus filed their Complaint in the Circuit Court for the County of Kenosha, Wisconsin (Case No. 11CV0288), against DePuy and Waymar Orthopedic and Spinal Technologies, Inc. (“Waymar”) for alleged personal injuries arising out of the implantation of a DePuy ASR™ artificial hip prosthesis in Plaintiff Letitia Malkmus (referred to as the “ASR Hip” in Plaintiffs’ Complaint).

2. Plaintiffs voluntarily dismissed Waymar from the case¹ and filed their First Amended Complaint on March 31, 2011, naming DePuy and TRP. Plaintiffs allege claims for

¹ The Court entered the dismissal order on April 1, 2011.

negligence and strict liability against DePuy, and negligence, strict liability, and misrepresentation against TRP. (*See generally* First Am. Compl.).

3. On December 3, 2010, the Judicial Panel on Multidistrict Litigation issued an order establishing MDL No. 2197, *In re: DePuy Orthopaedics Inc., ASR Hip Implant Products Liability Litigation*, before Judge David A. Katz of the United States District Court for the Northern District of Ohio, and more than 570 actions have now been transferred to the MDL court. DePuy and TRP intend to seek transfer of this action to that proceeding, and will shortly provide the MDL Panel with notice of this action as required under the “tag-along” procedure in the MDL Panel Rules.

4. As more fully set forth below, this case is properly removed to this Court pursuant to 28 U.S.C. § 1441 because DePuy and TRP have satisfied the procedural requirements for removal, and this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1332 and 1441.

I. DEPUY AND TRP HAVE SATISFIED THE PROCEDURAL REQUIREMENTS FOR REMOVAL.

4. Upon information and belief, the initial Complaint was served on Waymar on March 16, 2011. The initial Complaint was never served on DePuy.

5. The First Amended Complaint was served on TRP on April 4, 2011. DePuy has not been served with the First Amended Complaint.

6. Accordingly, this Notice of Removal is timely, as it is being filed and served on April 15, 2011, which is within 30 days after Waymar (the first served Defendant) was served with a copy of the initial pleading setting forth the claim for relief upon which this action is based. *See* 28 U.S.C. § 1446(b); Fed. R. Civ. P. 6(a)(1).

7. The Circuit Court for the County of Kenosha is located within the Eastern District of Wisconsin. Venue is thus proper pursuant to 28 U.S.C. § 130(a) because this is the “district and division embracing the place where such action is pending.” *See* 28 U.S.C. § 1441(a).

8. No previous application has been made for the relief requested herein.

9. This Notice of Removal is being filed on behalf of the only two named Defendants in the case, DePuy and TRP. Although fraudulently joined defendants need not consent to removal, both DePuy and TRP consent to this case being removed. *See, e.g., Eaglestar Intertrade Ltd. v. Dafin Asset Fin. Ltd.*, No. 06-C-953, 2006 U.S. Dist. LEXIS 86176, at *13 n.4 (E.D. Wis. Nov. 27, 2006) (“[T]he consent of an improperly served defendant is not required for removal.”) (citation omitted).

10. Pursuant to 28 U.S.C. § 1446(a), a copy of all process, pleadings and orders served upon the removing Defendants, which papers include the summonses and complaints, is attached as Exhibit A. Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being served on Plaintiffs’ counsel and a copy is being filed with the Circuit Court for the County of Kenosha, Wisconsin.

II. REMOVAL IS PROPER BECAUSE THIS COURT HAS SUBJECT MATTER JURISDICTION PURSUANT TO 28 U.S.C. §§ 1332 AND 1441.

9. Removal is proper under 28 U.S.C. § 1332 because: (a) all of the properly named Plaintiffs and Defendants are diverse; and (b) the named Plaintiffs’ claims put more than \$75,000 in controversy, exclusive of costs and interest.

A. Complete Diversity Of Citizenship Exists.

10. Plaintiffs allege in their Complaint that they are residents of Kenosha County, Wisconsin. (First Am. Compl. ¶ 1) Accordingly, upon information and belief, Plaintiffs are citizens of Wisconsin.

11. DePuy is a citizen of Indiana for purposes of determining diversity. (*Id.* ¶ 2).

12. There is complete diversity between Plaintiffs and Defendant DePuy, the only properly joined Defendant.

13. Although Defendant TRP is alleged to be a resident of Wisconsin (*see id.* ¶ 3), it is a fraudulently joined Defendant whose citizenship must be disregarded by the Court. *See Poulos v. NAAS Foods, Inc.*, 132 F.R.D. 513, 516 (E.D. Wis. 1990) (“A plaintiff cannot defeat a defendant’s right of removal on the basis of diversity of citizenship by the ‘fraudulent joinder’ of a nondiverse defendant against whom the plaintiff has no real cause of action.”).

14. Pursuant to the fraudulent joinder doctrine, a court should disregard the citizenship of in-state defendants where, as here, “there exists no reasonable possibility that a state court would rule against the [in-state] defendant.” *Schwartz v. State Farm Mut. Auto. Ins. Co.*, 174 F.3d 875, 878 (7th Cir. 1999) (internal quotation marks and citation omitted).

15. In determining whether a party has been fraudulently joined, the court may pierce the pleadings and consider summary judgment-type evidence, like a declaration or affidavit submitted by the moving party. *See, e.g., Faucett v. Ingersoll-Rand Mining & Mach. Co.*, 960 F.2d 653 (7th Cir. 1992) (finding uncontroverted affidavit sufficient to show fraudulent joinder and thus supported court’s assertion of jurisdiction over case). Thus, this Court should consider the Declaration of Todd Peterson (“Peterson Decl.”), which is attached as Exhibit B and incorporated herein.

16. In this case, based on the allegations made in the First Amended Complaint and Mr. Peterson’s Declaration, there is no reasonable basis to predict that Plaintiffs can prevail on their claims against TRP.

(1) Plaintiffs' Allegations Against TRP.

17. Plaintiffs claim that TRP served as an ASR™ product distributor for DePuy in Wisconsin and that, in that role, it:

utilized sales representatives that were responsible for educating Letitia's orthopedic surgeons regarding claimed advantages of the product, answering any questions Letitia's orthopedic surgeons had regarding the product, assisting Letitia's orthopedic surgeons regarding the product, providing scientific and medical literature to Letitia's orthopedic surgeons and selling the product to Letitia's orthopedic surgeons.

(First Am. Compl. ¶¶ 8, 34). They further allege that independent experts from around the world were warning that the design of the ASR™ hip was flawed, and that employees and agents of TRP were aware of these warnings and the known problems associated with the product, but did not convey this information to Letitia or her orthopedic surgeon. (*Id.* ¶ 19-26, 38). Plaintiffs therefore claim that TRP's actions make it liable to Plaintiffs for negligence, strict liability, and misrepresentation. (*See generally id.*).

18. More specifically, Plaintiffs' negligence claim arises out an alleged failure to warn Letitia and her surgeon about the failure rate and known problems with the ASR™ device, and its having sold the product at issue when it knew it was allegedly unsafe and dangerous. (*Id.* ¶¶ 61-68, 70). Plaintiffs also claim, as part of its negligence claim, and in a separate cause of action for misrepresentation, that TRP is liable for making misrepresentations about the use and quality of the ASR™ device to Letitia and her surgeon, without also disclosing the alleged known problems associated with the product. (*Id.* ¶¶ 69, 84-85). Given this alleged failure to warn Letitia and her treating physician, and an alleged "failure to test" the product (both of which are alleged to have made the product defective and unreasonably dangerous), Plaintiffs claim that TRP is liable to them under a strict liability theory. (*Id.* ¶¶ 75, 77-78, 80).

(2) TRP Has Been Fraudulently Joined to Defeat Diversity As There Is No Reasonable Possibility That Liability Would Be Imposed On TRP Under Any One of Plaintiffs' Theories.

19. There is no “reasonable possibility” that a state court would rule against TRP in this case, making them an improper party in this action whose citizenship should be ignored for purposes of diversity jurisdiction. *Schwartz*, 174 F.3d at 878.

20. Wisconsin has adopted the doctrine of strict liability set forth in Section 402A of the Restatement (Second of Torts). *See Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967). Under this rule, liability can be imposed on “manufacturers, distributors and sellers—those who place or maintain the product in the stream of commerce.” *Geboy v. TRL Inc.*, 159 F.3d 993, 997 (7th Cir. 1998) (citing *St. Clare Hosp. of Monroe, Wis. v. Schmidt, Garden, Erickson, Inc.*, 148 Wis. 2d 750, 437 N.W.2d 228, 231 (1989)) (internal quotation marks omitted). However, “a seller who does not place or maintain a product in the stream of commerce and who has neither created nor assumed the risk of harm for a defective product is not strictly liable.” *Id.* (citing *Westphal v. E.I. duPont de Nemours & Co., Inc.*, 192 Wis. 2d 347, 531 N.W.2d 386, 390 (1995)). These rules apply whether the product is new or used. *Id.* at 998. However, the rule is not absolute.

21. The Seventh Circuit, after conducting an analysis of Wisconsin strict liability law, identified several factors to be considered in determining if an entity in the chain of distribution can be strictly liable. The court looked at factors such as how many sales were made, the entity’s actual involvement in the transaction, whether the seller/broker ever had possession of the product or inspected it, the purpose for which the seller/broker took title of the product,

whether the seller/dealer of the used goods had any direct relationship with either the manufacturer or distributor through which information could be exchanged on possible dangerous defects; . . . whether any representation as to the safety of the used product was discussed or implied in its sale; and . . . whether the seller/dealer had the ability to identify any potential risk and to reduce the risk.

Geboy, 159 F.3d at 998-1000 (citing *Burrows v. Follett & Leach, Inc.*, 115 Wis. 2d 272, 340 N.W.2d 486 (1983) where court found seller of used farming equipment not strictly liable).

22. An entity which merely holds a product in its warehouse or who facilitates a transaction between two independent parties (a buyer and seller), or merely acts as a conduit, does not make the entity a “seller” under Wisconsin law such that strict liability can be imposed. *See, e.g., id.* at 998-1000.

23. In addition, to be strictly liable for a failure to warn claim, the seller or distributor must have known, or have had reason to know, that the product as supplied was dangerous for its intended use. *See, e.g., Flaminio v. Honda Motor Co.*, 733 F.2d 463, 466 (7th Cir. 1984) (citation omitted).

24. TRP should not be considered a seller or distributor for purposes of Wisconsin product liability law such that it could be held strictly liable to Plaintiffs, as its involvement in placement of the ASRTM hip prosthesis into the stream of commerce is remote and does not give rise to circumstances under which liability should be imposed.

25. TRP is a Wisconsin limited liability company that helps facilitate the delivery of various types of medical products in the States of Wisconsin and Michigan. (*See* Peterson Decl., ¶ 1). TRP contracts with five separate business entities which act as independent representatives for TRP. The majority of these independent contractor entities in turn contract with other independent business entities. (*Id.* ¶ 3).

26. TRP’s involvement in any transaction between DePuy and a buyer, generally a hospital or a physician, for the purchase of a DePuy’s ASRTM hip prosthesis, including the one at issue in this case, is very limited -- it does not take title to or an ownership interest in the product under any circumstance at any time before, during, or after the transaction, never pays monies to

DePuy for the product, never receives monies from a hospital or physician for the product, and is not a party to the contract for the sale of any product. (*Id.* ¶ 8).

27. TRP also plays no role in the design or manufacture of the ASRTM hip prosthesis identified in Plaintiff's First Amended Complaint. (*Id.* ¶ 4). TRP likewise has no role in the development or publishing of the package inserts or marketing materials accompanying the subject product, or which are disseminated to any health care providers. (*Id.* ¶ 5). TRP also plays no role in setting the price of the DePuy ASRTM hip prosthesis; instead, a hospital will order the prosthesis directly from DePuy, and DePuy will send the invoice directly to the hospital. (*Id.* ¶ 9). TRP does not offer or make any warranties on DePuy's sales of its products. (*Id.*).

28. When an order for a DePuy ASRTM hip prosthesis is placed, TRP and its independent representatives fill the hospital's or surgeon's order either by retrieving the DePuy ASRTM hip prosthesis from inventory maintained at the hospital or at a TRP facility, or by ordering the prosthesis from DePuy and delivering the sealed package to the hospital upon receipt. (*Id.* ¶ 6).

29. TRP does not have the opportunity inspect or examine the product. (*Id.* ¶ 7). Rather, all of the prostheses are delivered to the hospital or physician in sealed, sterile packages that have been labeled, packaged, and sealed by DePuy. (*Id.*).

30. TRP was not, and is not, involved in the regulatory or approval process for the ASRTM hip prosthesis. (*Id.* ¶ 10).

31. No one at TRP has ever had any direct dealings or communication with either of the Plaintiffs in this case. (*Id.* ¶ 10).

32. TRP's role in providing the subject product to Plaintiff was clearly tangential at best, and subjecting it to strict liability does not comport with Wisconsin law. If it did, every entity (or individual for that matter) in the chain of distribution would be strictly liable for a defective product, regardless of how peripheral its involvement. This is not what was intended by Wisconsin law.

33. For the same reasons a court could not find TRP strictly liable to Plaintiffs, a court could not find it liable under a negligence or misrepresentation theory.

34. Liability for negligence is premised on the failure to act. *See, e.g., Glassey v. Cont'l Ins. Co.*, 176 Wis. 2d 587, 600, 500 N.W.2d 295 (1993). Where an entity or person has not assembled, inspected, or used the product; was not involved in providing or preparing any warnings relating to the product; or had no knowledge of any dangerous condition existing with the product, liability for negligence cannot be imposed in Wisconsin. *See, e.g., Smalley v. Procter & Gamble Co.*, No. 06-C-0295-C, 2006 U.S. Dist. LEXIS 49419, at *3-4 (W.D. Wis. July 17, 2006) (finding the appropriate defendant for a negligent failure to warn claim to be the manufacturer where the named individual was not involved in the decision to not warn, was not responsible for testing or developing the product, did not know of any dangers associated with the product, and was not responsible for curing any problems or stopping the product distribution); *Geboy*, 159 F.3d at 1000-01 (finding several entities in the chain of distribution not negligent after considering whether they had assembled, inspected, or used the product; supplied a guaranty or warranty with the product; or had any notice of any dangerous condition with the product).

35. As noted above, TRP had no involvement in preparing any warnings or instructions with this product, or making any decisions relating to which warnings to include,

had no interaction with Plaintiffs, was not involved in the manufacture or testing of the product, did not inspect the product, did not see the product in its intended use, and had no reason to know that there was any dangerous condition (alleged or otherwise) that existed when it merely delivered the product to Letitia's surgeon. (*See generally* Peterson Decl.).

36. With regard to their misrepresentation claim, Plaintiffs do not specifically identify whether they are claiming TRP is liable for representations it made because the allegedly untrue representations were negligently or intentionally made, or because TRP should be strictly responsible for making them. *See* Wis. Civ. Jury Instruction 2401, 2402 and 2403. However, regardless of the theory, Plaintiffs will be unable to prove a misrepresentation claim because they have not sufficiently shown or alleged that TRP made any reckless or intentional misrepresentations with regard to the DePuy ASRTM hip prosthesis, or that any representations it may have made were based on its personal knowledge of the product, or that it made any misrepresentations to Plaintiffs upon which they ultimately relied.

37. Plaintiffs also have not sufficiently shown that any representations made to Plaintiff's surgeon were ultimately relied on by her surgeon or her when considering the use of the DePuy ASRTM hip prosthesis. Thus, Plaintiffs fail to allege a causal link between TRP and the decision by her physician or hospital to implant the subject hip device. *See, e.g., Johnson v. Parke-Davis*, 114 F. Supp. 2d 522, 524-25 (S.D. Miss. 2000). In *Johnson*, the plaintiffs brought suit against a pharmaceutical manufacturer and five sales representative defendants for injuries they allegedly sustained from taking the drug Rezulin. In addressing the plaintiffs' misrepresentation claims, the court stated:

Suffice it to say that Plaintiffs have no proof, and in fact do not argue in their motion to remand, that any of the named representatives made any representations directly to any of the Plaintiffs. Thus, none of the Plaintiffs was the "hearer" of any of

the sales representatives' alleged misrepresentations. Nor is there proof that any representations were made to any of the Plaintiffs' physicians. Again Plaintiffs have failed to establish any connection between themselves and the named sales representatives.

Id. at 525 (citation omitted). As in *Johnson*, Plaintiffs have not established any connection between TRP and Plaintiff's physician's use of the ASR device. Thus, Plaintiffs cannot prove that any alleged misrepresentations made or not made by TRP caused Plaintiffs' alleged injuries.

38. For all of the above reasons, there is no basis to predict that Plaintiffs can prevail on any of the claims asserted in the First Amended Complaint against TRP. Thus, TRP has been fraudulently joined and its citizenship must be disregarded for jurisdictional purposes.

B. The Amount-In-Controversy Requirement Is Satisfied.

39. Based on Plaintiffs' allegations and the damages sought, it is apparent from the First Amended Complaint that the amount in controversy exceeds \$75,000. For instance, Plaintiffs allege that, as a result of the use and implantation of the ASRTM hip prosthetic, Plaintiff Letitia Malkmus "suffered severe physical distress and injury, emotional distress and injury; incurred medical and other expenses; lost wages and income; suffered shame, humiliation and the inability to lead a normal life; and has suffered loss or enjoyment of life." (First Am. Compl. ¶¶ 50, 59, 72, 81, 90). Plaintiffs further allege that these injuries are permanent and that Letitia will "continue to suffer such losses in the future." (*Id.*).

40. Plaintiffs further allege that Plaintiff Glen Malkmus suffered pecuniary and economic loss related to his wife's medical care expenses, as well as "the loss of his consortium, comfort, aid, society and companionship, and was caused to suffer pecuniary and economic loss, including loss of earnings and support from his wife, Letitia." (*Id.* ¶ 93).

41. In addition to allegations regarding their claimed compensatory damages, Plaintiffs allege that DePuy and TRP acted with “intentional disregard of the rights of the Plaintiff” such that they are entitled to punitive damages to “punish and/or deter such conduct” on the part of both DePuy and TRP. (*Id.* ¶ 51, 60, 73, 82).

42. Given these claims, DePuy and TRP have a good faith basis for arguing that the amount in controversy has been met. *See, e.g., Oshana v. Coca-Cola Co.*, 472 F. 3d 506, 511 (7th Cir. 2006) (noting that a “good faith estimate” is acceptable to establish the amount in controversy if plausible and supported by a preponderance of the evidence).

43. Wisconsin courts also routinely uphold awards far in excess of \$75,000 for personal injuries in product liability actions. *See, e.g., Green v. Smith & Nephew AHP, Inc.*, 2001 WI 109, ¶ 19, 245 Wis. 2d 772, 629 N.W.2d 727 (2001) (award of \$1,000,000 in damages to health care worker who sued latex glove manufacturer for injuries she sustained from wearing the defendant’s gloves); *Sharp v. Case Corp.*, No. 96-2559, 1997 Wisc. App. LEXIS 1434 (Wis. Ct. App. Dec. 10, 1997), *aff’d* 227 Wis. 2d 1, 595 N.W.2d 380 (1999) (award of compensatory damages exceeding \$6 million in product liability case in which minor was injured by a tractor manufactured by the defendant).

44. Moreover, similar allegations in analogous pharmaceutical/personal injury cases have been held to establish, on their face, that the amount in controversy exceeds the jurisdictional requirement. *See, e.g., Easterling v. SmithKline Beecham Corp.*, No. 2:05CV35 KS-JMR, 2006 WL 1581322 (S.D. Miss. June 2, 2006) (finding it was facially apparent from face of pharmaceutical/personal injury complaint that damage allegations exceeded jurisdictional threshold of court where plaintiff alleged serious and permanent injuries, mental anguish, medical expenses, loss of earnings and future earnings, pain and suffering, and sued for

compensatory and punitive damages); accord *Randle v. SmithKline Beecham Corp.*, 338 F. Supp. 2d 704, 709-12 (S.D. Miss. 2004); see also *Gebbia v. Wal-Mart Stores, Inc.*, 233, F.3d 880, 883 (5th Cir. 2000) (finding it facially apparent that amount in controversy was met where plaintiff sought medical expenses, pain and suffering, mental anguish, loss of enjoyment of life, lost wage and earning capacity, permanent disability, and disfigurement).

45. Given Plaintiffs' claim that they have suffered permanent damages, that they will suffer additional damages in the future and that punitive damages should be awarded, it is evident that the amount of recovery sought by Plaintiffs clearly exceeds \$75,000. Thus, the jurisdictional minimum amount in controversy set forth in 28 U.S.C. § 1332 has been met.

WHEREFORE, Defendants DePuy and TRP respectfully remove this action from the Circuit Court for the County of Kenosha, Wisconsin, bearing Case No. 11CV0288, to this Court pursuant to 28 U.S.C. §§ 1332 and 1441.

Dated: April 15, 2011.

Respectfully submitted,

s/CATHERINE A. FAUGHT

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