

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION**

LETITIA MALKMUS and
GLEN MALKMUS,

Plaintiffs,

v.

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

Defendants.

Case No. 2:11-cv-00365-AEG

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION TO REMAND THIS CASE TO THE
CIRCUIT COURT OF KENOSHA COUNTY, WISCONSIN
BECAUSE DIVERSITY JURISDICTION DOES NOT EXIST**

FACTUAL BACKGROUND

This case involves a complicated, medical-device, products liability action with two defendants – DePuy Orthopaedics, Inc. (“DePuy”) and TRP & Associates, LLC (“TRP”). Plaintiff Letitia Malkmus (“Letitia”), together with her husband, Glen Malkmus, alleges personal injury from exposure to a defective hip-replacement component part manufactured, sold and distributed by Defendants. Plaintiffs have asserted several theories of liability against both Defendants, including theories of strict liability, negligence and misrepresentation under Wisconsin law. Action was initiated in State Court and was venued in Kenosha County because the local distributor, TRP, is a Wisconsin corporation with an office located in Madison, Kenosha County, Wisconsin.

Defendants removed this action to federal court claiming Plaintiffs fraudulently joined TRP, the exclusive distributor of Defendant DePuy Orthopaedic Inc.'s prosthetic devices for the state of Wisconsin, even though Plaintiffs alleged, among other things, very specific and independent negligent conduct of TRP, including, but not limited to:

- (a) falsely representing the DePuy ASR hip is designed to reduce wear and provide higher function for all patients;
- (b) falsely representing the DePuy ASR hip is clinically proven to reduce wear;
- (c) falsely representing the DePuy ASR hip is based on a strong clinical history and reduces wear compared to the traditional hip replacement;
- (d) falsely representing the DePuy ASR hip is designed to be installed in younger and more active patients and will last longer than its competitors;
- (e) failing to disclose independent experts from around the world were warning that the design of the DePuy ASR hip was flawed;
- (f) failing to disclose the orthopedic experts were warning that the DePuy ASR hip cup was too thin and prone to deformation;
- (g) failing to disclose the clearance between the DePuy ASR hip cup and head is too small and patients could experience jamming of the component;
- (h) failing to disclose the treatment of the metal used for the DePuy ASR hip cup was prone to increased wear and caused excessive metal debris; and
- (i) failing to disclose by 2005 the DePuy ASR hip cup was shown in Australia to have a four-fold higher rate of revision than similar cups of competitors.

See, Plaintiffs' First Amended Complaint ¶¶ 69 and 70.

Defendants also contend that TRP was "fraudulently joined" even though Plaintiffs specifically allege TRP is strictly liable, pursuant to Wisconsin law, for marketing, distributing and selling the DePuy ASR hip prosthesis in a defective and unreasonably dangerous condition. *See*, Count IV of Plaintiffs' First Amended Complaint.

Finally, Defendants contend TRP was "fraudulently joined" even though Plaintiffs allege specific allegations that TRP made misrepresentations in violation of Wisconsin law, including, but not limited to, the following:

- (a) the Depuy ASR Hip is designed to reduce wear and provide higher function for all patients;
- (b) the DePuy ASR HIP is clinically proven to reduce wear;
- (c) the DePuy ASR hip is based on a strong clinical history and reduces wear compared to the traditional hip replacement; and
- (d) the DePuy ASR Hip is designed to be installed in younger and more active patients and will last longer.

See, Plaintiffs' First Amended Complaint, ¶84.

MEMORANDUM OF LAW

I. The Only Issue Before the Court is Whether this Court has Federal Diversity Jurisdiction, or Whether the Plaintiffs Properly Commenced the Case in State Court Based upon the Fact that the Seller and Distributor of the Defective Product is a Wisconsin Corporation and, Accordingly, There is No Diversity.

Plaintiffs are clearly Wisconsin residents as is stated in ¶1 of their First Amended Complaint. Defendant TRP is a Wisconsin corporation with its principal place of business at 33 E. Main Street, Suite 400, Madison, Wisconsin 53701. Federal diversity jurisdiction is determined in this case by examining the role of Defendant TRP, a Wisconsin corporation, with offices in Madison, Wisconsin, in the sale and distribution of the allegedly defective DePuy ASR hip prosthesis. *See*, Plaintiffs' First Amended Complaint, ¶3.

This case was commenced in state court based upon the foregoing allegations, seeking recovery under Wisconsin law related to theories of strict liability, negligence and misrepresentation. The case was removed *ex parte* by Defendants on the grounds that Plaintiffs' allegations relative to Defendant TRP were "fraudulent".

Fraudulent joinder occurs "when there is no possibility that a plaintiff can state a cause of action against non-diverse defendants." *Gottlieb v. Westin Hotel Co.*, 990 F.2d 323, 327 (7th Cir. 1993). The Seventh Circuit has stated that the defendant's burden to prove fraudulent joinder is a heavy one. *Poulos v. Naas Foods*, 959 F.2d 69, 73 (7th Cir. 1992). All of the issues of fact and

law are to be decided in the plaintiff's favor and then the court must determine whether there is "any reasonable possibility" that a state court could rule against the non-diverse defendant. *Id.*

II. It is the Obligation of Both Parties and the Court to Carefully Examine Diversity Claims at the Outset of Litigation, Under Penalty of the Court Lacking Jurisdiction and Any Actions Taken by the Court Being Determined to be a Nullity.

One need go no further than the Seventh Circuit decision in *Belleville Catering Co., et al. v. Champaign Catering Place, L.L.C.*, 350 F3d 691 (2003) to appreciate that assertions of diversity cannot be "assumed," but must be carefully examined by the Court and both counsel before proceeding with the case. In *Belleville*, the Court and counsel assumed diversity and tried the case to verdict by a jury, with final judgment being entered. Federal diversity jurisdiction was challenged on appeal only by the Seventh Circuit, which instituted its own diversity investigation. It was not challenged by the parties.

Upon determining there was no diversity, the Court declared that everything accomplished by the federal court below was a nullity because the Court was without jurisdiction. It remanded the case to state court, and as a sanction, ordered both counsel to re-try the case in state court and to do so without compensation.

In short, diversity issues mandate careful scrutiny in order to avoid a massive waste of time and avoidance of sanctions when scrutinizing is not undertaken. Even inappropriate concessions of diversity are meaningless if true diversity is not present.

III. Each Individual Party in the Chain of Distribution of a Defective and Unreasonably Dangerous Product in Wisconsin has Co-extensive Strict Liability to the Plaintiff.

Under Wisconsin product liability law applicable to strict liability, every party involved in the chain of distribution of the allegedly defective product shares co-extensive liability with respect to the plaintiff. *See, City of Franklin v. Badger Ford Truck Sales, Inc.*, 58 Wis.2d 641 (1973), at p. 657:

The judgment awarding damages to the plaintiff (City of Franklin) against the three defendants (Badger, Ford and Gunite) arising from the accident caused by the defendant will be affirmed . . .

To the extent a comparison of negligence among product defendants is required to determine contribution among them, that does not affect the joint liability to the plaintiff and the plaintiff need not participate in that trial.

Following the dictates of *City of Franklin, supra, Dippel v. Sciano*, 37 Wis.2d, 443, 155 N.W.2d 55 (1967), and Restatement Torts (Second) § 402A, the Wisconsin Supreme Court has confirmed co-extensive liability of all parties in the chain of distribution of a defective and unreasonably dangerous product, and determined that Wisconsin's 1995 amendment to § 895.045(1), Stats., did nothing to change that law. *Fuchsgruber v. Custom Accessories, Inc.*, 244 Wis.2d 758 (2001).

Fuchsgruber involved a negligence and strict liability claim against the manufacturer, distributor and retailer of an allegedly defective automobile jack. The only collectable entity was the intermediate distributor and its insurer, who contended that the 1995 modification of Wisconsin's comparative fault statute somehow changed the practice of comparing plaintiff's fault with "the product," and apportioning among those in the chain of distribution in a separate apportionment question, and only for purposes of contribution. The Court observed and held:

Custom Accessories contends that the new statute, as applicable to product liability cases, operates to protect from liability a defendant who is merely an "innocent member of the chain of distribution," who did nothing to cause or contribute to the defective condition of the product. We disagree.

Fuchsgruber, 244 Wis.2d at 766.

After analyzing strict liability in Wisconsin, the Court reaffirmed co-extensive liability of all parties in the chain of distribution in a primary comparison of “plaintiff versus product,” with a second, separate comparison among defendants for contribution purposes only.

Indeed, in strict product liability cases under *Dippel*, the jury is asked to apportion the extent to which the plaintiff’s injuries were attributable to his own contributory negligence as compared to the product’s defectiveness. *See*, Wis. II—Civil 3290. That is, the initial comparison is plaintiff-against-product, not plaintiff-against-defendants. An entirely separate question asks the jury to apportion liability for contribution among the various defendants – manufacturer, assembler, dealer, seller – responsible for placing the defective product in the stream of commerce. *Id.* The requirement of a separate verdict question on the issue of contribution among defendants was established by this court in the wake of *Dippel*, in *City of Franklin v. Badger Ford Truck Sales*, 58 Wis.2d 641, 207 N.W.2d 866 (1973).

Id. at 770-71.

Again:

We do not consider a seller who is liable under *Dippel* to be guilty of negligence at all. Despite the somewhat misleading language of the cases, jury instruction and special verdict form, the defective condition of the product does not constitute “negligence” on the part of the seller. There is no defendant “negligence” to be apportioned against the plaintiff in a strict product liability action, either separately or in the aggregate with other defendants. There may be contribution rights to be determined, but that is always a separate question and has no bearing on the plaintiff’s recovery, which is reduced only to the extent of his own negligent conduct.

In strict product liability actions, “[t]he ‘act’ to which [the seller’s] responsibility attaches is not an act of negligence. If indeed it is an act at all, it is simply the act of placing or maintaining a defective product in the stream of commerce. *Id.* at 757-58, 437 N.W.2d 228. Therefore, the comparison in strict product liability actions is not a comparison of one party’s conduct against another, but, rather, a comparison of the extent to which the plaintiff’s injuries were attributable to his own contributory negligence as against the product’s defective condition.

Id. at 772-73.

Continuing:

The Wisconsin Civil Jury Instructions Committee has reached essentially the same conclusion, and declined to adapt the jury instructions and special verdict form in the manner suggested by Custom Accessories:

In October 1998, the Committee reviewed this special verdict format suggested above to determine if any change was necessary due to the revision to Wis. Stat. § 895.045 which modified common law on joint and several liability. In particular, the Committee analyzed the language in the statute that the plaintiff's negligence "shall be measured separately" against each defendant. Some members of the Bar have suggested this new statutory language eliminates the traditional "person versus product" comparison on which this verdict is premised. The Committee believes that the plaintiff versus the product approach is still the proper approach in applying comparative negligence in a products liability case involving several defendants in the chain of distribution of the product. *See, City of Franklin v. Badger Ford Truck Sales*, 58 Wis.2d 641, 207 N.W.2d 866 (1973).

Based on the Committee's review of both subsections to § 895.045 and the clear holding in the *City of Franklin, supra*, decision as to the allocation of comparative negligence in a products liability case with multiple product sellers, the Committee concluded that the special verdict proposed above is correct and does not require revision.

Id., at 774-75.

In this case, TRP is the distributor and seller of the allegedly defective product that injured Plaintiff Letitia Malkmus.¹ Under Wisconsin law, TRP may be strictly liable to Plaintiffs regardless of whether the manufacturer is involved in the action or not. Consequently, TRP, a Wisconsin corporation, is a proper defendant and there is no basis for federal court jurisdiction.

¹ As a result of the defective nature of Depuy's ASR hip prosthesis that was installed in Plaintiff Letitia Malkmus, she had to have a revision surgery approximately fifteen months after the Depuy ASR hip was installed.

IV. Wisconsin Federal Courts have Rejected Similar Arguments of Fraudulent Joinder by Orthopedic Device Manufacturers Who Remove Cases to Federal Court When a Non-diverse Distributor is Also a Defendant in the Action.

There is no question that a non-diverse defendant is present in this case; therefore, this removal is not proper on its face. Defendant Depuy's only possible response to the undisputable fact that a non-diverse defendant is present is to argue that TRP has been fraudulently joined. However, as shown above, a distributor of a defective product is equally liable to a plaintiff in Wisconsin regardless of whether the manufacturer is joined in the action or not. Therefore, Defendants cannot meet the heavy burden upon them to prove fraudulent joinder. And, in fact, federal courts in Wisconsin have previously rejected fraudulent joinder arguments in nearly identical circumstances and held that the presence of a non-diverse distributor of an allegedly defective orthopedic device is cause for remand.

In order to prove a strict products liability claim against TRP, Plaintiffs must prove the product was defective upon leaving the seller's control, the product was unreasonably dangerous, the defect caused the Plaintiff's injuries, the seller engaged in the business of selling the product and the product was one which the seller expected to and did reach the user without substantial change. *Dippel v. Sciano*, 155 N.W.2d 55, 63 (Wis. 1967).

Here, there is no question that Plaintiffs have a reasonable possibility of meeting these elements of strict liability against TRP. Assuming the facts in Plaintiffs' First Amended Complaint are true, as the Court must do here, TRP was the distributor of a defective product that caused Plaintiff Letitia Malkmus to need a second surgery to replace the original Depuy ASR hip prosthesis. Defendant TRP, through its sales representatives, provided information to Letitia's surgeons regarding the defective device and actually sold the device to the surgeons. Given the co-extensive liability of manufacturers and sellers in Wisconsin, TRP could certainly

be found liable to Plaintiffs on a product liability theory in the event Plaintiffs prove the product was defective, unreasonably dangerous and caused Letitia's injuries.

Defendants' argument of fraudulent joinder of a medical product distributor was rejected in a very similar case before another Wisconsin District Court. In *Leair v. Zimmer, et al.*, 03-C-690-S, the plaintiff filed an action against the manufacturer and the distributor of an allegedly defective knee prosthesis. The manufacturer was an out-of-state defendant, however, the distributor, like TRP, was a Wisconsin corporation with its principal place of business in Wisconsin and was the exclusive distributor of the manufacturer's orthopedic devices in Wisconsin. Despite the presence of the non-diverse distributor, the manufacturer removed the case to federal court arguing the distributor of the prosthesis was fraudulently joined. However, the court granted plaintiff's request for remand back to state court. In so holding, the court found that, under Wisconsin law, there was a "reasonable possibility" that a Wisconsin court could rule against the distributor, therefore, the distributor was not fraudulently joined and the action had to be remanded to state court. *See*, Order of Judge John Shabaz in *Leair v. Zimmer, et al.*, attached as **Exhibit 1**.

Likewise here, the presence of the non-diverse distributor of the allegedly defective orthopedic device requires remanding this action back to state court. Plaintiffs have a "reasonable possibility" of stating a cause of action against TRP; therefore, the removal was improper.

V. Defendants' Notice of Removal is in Effect a Disguised Motion for Summary Judgment Relying on a Disingenuous Affidavit of Todd Peterson to Claim TRP is Not Liable.

A. Disingenuous Affidavit of Todd Peterson

In an affidavit filed together with the notice of removal, TRP's sole member, Todd Peterson, makes multiple disingenuous claims. All are efforts to minimize the role played by TRP in the sale of the recalled DePuy ASR hip prosthesis at issue in this case. In paragraph 7 of his affidavit, he claims:

The prostheses are delivered to the hospital and the physician in sealed, sterile packages that have been labeled, packaged and sealed by DePuy. Neither TRP & Associates, LLC nor its independent representatives, inspect or examine the implants contained therein. The independent representatives simply deliver the sealed packages to the hospital and the physician.

However, in the medical records of Plaintiff Letitia Malkmus, there is clear evidence to the contrary. Attached as **Exhibit 2** is a page from the operative record of the surgery to implant the subsequently recalled DePuy ASR hip prosthesis in Mrs. Malkmus' hip. Exhibit 2 evidences that Tim Netherly, one of TRP's sales representatives, scrubbed-in and was present during the surgery. Next to his name on the record is "DePuy Rep". Likewise, attached as **Exhibit 3** is a page of the operative report for the surgery removing and replacing the recalled DePuy ASR hip prosthesis with a non-defective hip prosthesis. During that surgery, Thomas Nezerling, a TRP sales representative, scrubbed-in and was present during the surgery. Next to his name in the record is "DePuy Rep".

Relying exclusively on *Geboy v. TRL, Inc.*, 159 F.3rd 993 (7th Cir. 1993), Defendants argue that Plaintiffs cannot establish a cause of action against TRP under Wisconsin law because TRP is merely a company that facilitates the delivery of the product. *See*, Defendants' Notice of Removal, paragraph 25. If the representatives only delivered the product to the doctor, there

would be no reason for them to scrub-in and attend the surgery. It is well-known (and is discussed below) that sales representatives are present during the surgery to assist the surgeon and answer any questions he or she may have. They are not merely a delivery service like UPS and Federal Express.

Since *Geboy*, however, the Wisconsin Supreme Court has clarified that “strict products liability imposes liability without regard to negligence and its attendant factors of duty of care and foreseeability”. *Green v. Smith and Nephew AHP, Inc.*, 245 Wis. 2d 772, 812, 629 N.W.2d 727, 746 (2001). Pursuant to *Dippel v. Sciano*, a plaintiff alleging a claim for strict product liability under Wisconsin law must prove the following five elements:

- (1) the product was in defective condition when it left the possession or control of the seller,
- (2) it was unreasonably dangerous to the user or consumer,
- (3) the defect was a cause (a substantial factor) of the plaintiff’s injuries or damages,
- (4) the seller engaged in the business of selling such product or, put negatively, that this is not an isolated or infrequent transaction not related to the principal business of the seller, and
- (5) the product was one which the seller expected to and did reach the user or consumer without substantial change in the condition it was when he sold it.

37 Wis. 2d 443, 460, 155 N.W.2d, 63 (Wis. 1967) (interpreting Restatement (Second) Torts § 402(A) (1965)). In a case decided after *Geboy*, the Wisconsin Supreme Court reasoned that “plaintiff has the burden of proving the *Dippel* elements, and if he does, all sellers in the chain of distribution—manufacturer, distributor, retailer—are strictly liable to the plaintiff, although they may have contribution rights against each other.” *Fuchsgruber v. Custom Accessories, Inc.*, 2001 WI 81, ¶15, 244 Wis. 2d 758, 768, 628 N.W.2d 833., 838-39; *see also*, Restatement (Second) Torts § 402(A) cmt. f [clarifying that § 402(A) “applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant”]; and WIS JI-Civil 3260 cmt. (2002) (observing that “anyone in the ‘chain of distribution’ may be

liable under strict liability ... even when the seller never has possession of the product, nor participates in the design, construction, manufacture, use, or directions for use of the product”).

Defendants contend TRP played no role in the development of publishing the DePuy ASR Hip prosthesis package inserts or marketing materials accompanying the prosthesis. *See*, paragraph 5 of Todd Peterson’s Affidavit. Furthermore, in paragraph 8 of his affidavit, he states that TRP did not take title or ownership interest in the prosthesis, never paid money to DePuy and never received money from a hospital for the prosthesis. Defendants argue that TRP cannot be held liable under strict liability or negligence theories because it never took title of the alleged defective prosthesis. *See*, Defendants’ Notice of Removal, paragraphs 21 and 26.

In *Sedbrook v. Zimmerman Design Group*, the Wisconsin Court of Appeals considered “whether a distributor with only a minimal connection to the product may be subject to suit on strict-liability principles.” 190 Wis. 2d 14, 18, 526 N.W.2d 758, 759 (Wis. Ct. App. 1994). Similar to TRP, the distributor in *Sedbrook* claimed it had acted as a mere broker or “conduit” in arranging the sale of the product and directing the product’s shipment from the manufacturer to the customer and never retained title or ownership of the product. However, the Court observed that the distributor was the only company in the area selling the products, was the manufacturer’s representative in the product, displayed the manufacturer’s name on its advertising materials and routinely contacted customers to urge them to use the manufacturer’s products. *Id.* at 28-30, 526 N.W.2d at 764. The Court distinguished the distributor’s active role in placing the product into the stream of commerce from the more passive roles played by parties that had been held not to be liable as distributors in other jurisdictions. *Id.* at 28-30, 526 N.W.2d at 764 (distinguishing *Lyons v. Premo Pharm. Labs, Inc.*, 406 A.2d 185 (N.J. Super. Ct. App. Div. 1979)). The Court found the distributor to have played a sufficiently active role in placing the product into the

stream of commerce to defeat its summary judgment motion. *Id.* at 30, 526 N.W.2d at 764; *see also, Id.* at 26 n.5, 526 N.W.2d at 763 n.5 (collecting sources).

Similar to *Sedbrook*, the present case involves an exclusive distributor of the DePuy ASR hip prosthesis whose sole business is the selling, marketing, distribution and servicing of DePuy products to the medical community in Wisconsin. Plaintiffs have sufficiently pled TRP's specific negligent conduct in both Counts III and IV of their First Amended Complaint. This Court need only predict that there is a reasonable possibility that a Wisconsin court would rule against TRP. In light of Plaintiffs' allegations that TRP was an active participant in the chain of distribution, including advertising, marketing, promoting, selling and servicing the DePuy ASR hip prosthesis, a reasonable possibility exists that a Wisconsin court would find against TRP on Plaintiffs' theories of strict liability, negligence and misrepresentation. The United States District Court for the Western District of Wisconsin previously came to a similar conclusion in an almost identical situation involving a defective orthopedic prosthesis in a claim against a Wisconsin distributor. *See*, Exhibit 1.

B. Role of Sales Representative in Hip Replacement Surgery in General is Significant

The fact that TRP's employees scrubbed-in to assist with the surgeries on Plaintiff Letitia Malkmus was not unusual. Defendant DePuy contracted with TRP to promote, sell, distribute, and service DePuy's ASR hip prosthesis in Wisconsin. TRP 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 4**.

C. Role of the DePuy Sales Representatives Specifically is Significant

DePuy sales representatives are charged with the role of serving as the principal conduit by which surgeons receive information about DePuy ASR hip prosthesis. The sales representative is trained to educate the surgeon about DePuy ASR hip prosthesis and how they compare to competitors' products. DePuy sales representatives also instruct the surgeon on the proper use of DePuy ASR hip prosthesis. 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 5**.

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*, 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 6**. 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 7**. 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 the training objectives of the DePuy Learning Programs were employed by its orthopedic sales representatives. *See*, Declaration of Pamela Davis filed on March 24, 2011, in *Garris*, attached hereto as **Exhibit 6**. Ms. Davis testified that sales representatives hold meetings with surgeons to discuss DePuy orthopedic products and their benefits compared to competitor’s products. *See*, Exhibit 6, ¶6, 16 and 17. Sales representatives also accompany surgeons to cadaver labs to convince them of the advantages of DePuy products. *See*, Exhibit 6 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 6, ¶10. (Emphasis supplied.)

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

D. Disguised Motion for Summary Judgment

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

VI. Plaintiffs are Entitled to 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, Defendants 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.

VII. Conclusion

Defendant TRP was clearly not fraudulently joined. Thus, there is not "complete diversity" and this Court lacks subject matter jurisdiction, thus this case must be remanded to the Circuit Court of Kenosha County, Wisconsin. Furthermore, as this action was improperly removed by Defendants, Defendants are responsible for Plaintiffs' attorneys' fees incurred in obtain the remand of this case back to state court.

GODIN, GERAGHTY & PUNTILLO

By: / s / Thomas A. Camilli, Jr.

Thomas A. Camilli, Jr. WI#1035756

tcamilli@wi.rr.com

Phillip R. Godin WI #10185922

philgodin@wi.rr.com

6301 Green Bay Road
Kenosha, WI 53142-2971
(262) 657-3500
FAX: (262) 657-1690

NASH & FRANCISKATO LAW FIRM

Brian S. Franciskato MO #41634

(Pro Hac Vice admission requested)

bfranciskato@nashfranciskato.com

Two Pershing Square
2300 Main Street, Suite 170
Kansas City, Missouri 64108
(816) 221-6600
FAX: (816) 221-6612

MAGLIO CHRISTOPHER & TOALE, PA

Altom M. Maglio FL #88005

(Pro Hac Vice admission requested)

amm@mctplaw.com

1751 Mound Street, 2nd Floor

Sarasota, FL 34236

(941) 952-5242

Fax (941) 952-5042

ATTORNEYS FOR PLAINTIFFS

Signature of this document certifies that a copy was served to the persons named below on the date and in the manner indicated:

<u>Person Served</u>	<u>Party</u>	<u>Date</u>	<u>Method</u>
David B. Bartel davidbartel@quarles.com Catherine A. Faught catherine.faught@quarles.com Quarles & Brady, LLP 411 East Wisconsin Avenue, #2040 Milwaukee, WI 53202 (414) 277.5369 FAX: (414) 271.3552	Defendants DePuy Orthopaedics, Inc. and TRP & Associates, LLC	Wednesday, April 20, 2011	Electronic