

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA**

JANINE BARNES, et al.,

Plaintiffs,

Case No.: 8:11-cv-02827-JSM-EAJ

v.

BAYSIDE ORTHOPAEDICS, INC., et al.,

Defendants.

**PLAINTIFFS' REPLY IN SUPPORT OF THEIR EMERGENCY MOTION FOR REMAND FOR
LACK OF JURISDICTION**

Plaintiffs, Janine Barnes and Julie Fournier, by and through their undersigned counsel, pursuant to the January 13, 2012, Order of this Court, hereby file this reply in support of their motion for remand and state:

I. Emergent Nature of Motion

Footnote 1 of Defendants' response lists approximately 80 cases where the DePuy ASR MDL court has not ruled on motions for remand.¹ This is the very basis for Plaintiffs' request for an emergent ruling on this matter. If this Court does not expeditiously rule on Plaintiffs' remand motion, this case will automatically be transferred to the MDL and Plaintiffs will join the extremely long list of cases waiting for the MDL court to determine whether it possesses subject matter jurisdiction over the case.²

II. Defendants Oppose the MDL Court Hearing Remand Motions

If this Court fails to rule on Plaintiffs' remand motion and the case is transferred to the MDL, the Defendants will then oppose the MDL court's consideration of pending remand motions, instead suggesting to the MDL Court that it has more important issues to consider. In a remand

¹ Based on the title and the attorney signature block it appears that the response to the remand motion was filed on behalf of all Defendants, including Bayside.

² As pointed out in both Footnote 3 and page 7 of Defendants' response, approximately six months ago the MDL court did find time to deny remand in identical orders in five Alabama cases brought by the same law firm. However, a flood of cases have been filed in the MDL since that time and there is no indication that the MDL court will be able to turn to remand motions any time soon.

motion currently pending before the MDL court, Defendants recently argued to the Court that: “The delays associated with deciding motions for remand early could well frustrate the purpose of MDLs, which is to promote just and efficient conduct of actions involving common questions of fact.” *Internal and external citations omitted. Docket entry number 21, page number 4, McConnell v. Mark DeBiase, Inc., et al.*, case number 1:11-dp-22200-DAK.

III. JPML Does Not Consider Remand Arguments

In Footnote 6 of the Response, Defendants claim that “Plaintiffs will have the opportunity to present their arguments to the MDL panel.” Defendants are well aware that is simply not true. The Judicial Panel on Multidistrict Litigation will only assess whether the case involves a DePuy ASR hip replacement and, if so, transfer the case to the MDL. No further analysis will be conducted. The JPML has repeatedly stated that it will not consider remand issues. Furthermore, as Defendants are well aware, the JPML has not permitted oral argument in the DePuy ASR MDL.

IV. JPML Does NOT Encourage Courts to Defer Ruling on Remand Motions

Defendants claim that “the MDL Panel *encourages* transferor courts to defer ruling on pending remand motions in cases tagged for MDL transfer to ensure uniform treatment of recurring jurisdictional issues.” Page 8 of Defendants’ response. This is simply not true. *See* Rule 2.1(d), R.J.P.M.L. (“The pendency of a...conditional transfer order...does not affect or suspend ...pretrial proceedings in any pending federal district court action and does not limit the pretrial jurisdiction of that court.”) Similarly, the Manual for Complex Litigation, Fourth, § 20-131 (2004) at 220-221, states:

The transferor court should not automatically stay discovery ...Nor should the court automatically postpone rulings on pending motions, or generally suspend further proceedings... [M]atters such as motions to dismiss or to remand, raising issues unique to the particular case, may be particularly appropriate for resolution before the Panel acts on the motion to transfer.

The JPML recently emphasized that a district court can rule on motions to remand prior to the transfer of an action to MDL # 2197, stating:

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.

In Re: DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability Litigation, MDL No. 2197, Transfer Order, n. 1 (J.P.M.L. April 18, 2011), attached as Exhibit “1”.

The foregoing Rule and ruling make it clear that the JPML does not encourage courts to defer ruling on motions to remand pending transfer to an MDL.

V. Jurisdiction Must be Decided First

The U. S. Supreme Court has declared the requirement that jurisdiction must be established as a threshold matter. The question of a court’s jurisdiction over a proceeding is fundamental, going to the court’s very power to act. Citing a “long and venerable line of cases,” the Supreme Court explained:

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.

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). 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. *Steel Co.* at 94; *Kokkonen* at 377. Accordingly, this Court satisfies its fundamental duty by determining the jurisdictional issues raised in plaintiffs’ remand motion.

VI. *McConnell v. Mark Debiase, Inc.* - Different Distributor and Different Evidence

On pages 2, 4, 9, and 20 of their response, Defendants argue that allowing the MDL court to decide the instant remand motion together with *McConnell v. Mark Debiase, Inc.* would ensure

uniform decisions. *McConnell* was removed to the United States Federal District Court for the Southern District of Florida and subsequently transferred to the MDL. *See*, the *McConnell* plaintiff's motion for remand attached to the instant Defendants' response as Exhibit "H". However, the *McConnell* case involves a different DePuy distributor and was in a significantly different posture. *Id.* Unlike the instant case which was litigated for over six months before filing of an amended complaint and removal, *McConnell* initially named DePuy Orthopaedics, Inc. and other out of state defendants and was immediately removed. *Id.* Thus, prior to removal, the plaintiff in *McConnell* was unable to do discovery regarding the distributor. Absent the extensive discovery obtained in this case, the evidence available in *McConnell* to dispute the defendants' claims of fraudulent joinder of the distributor differ significantly from the evidence available in the instant case.

On page 18 of the response, Defendants claim that this Court should follow the approach of the Southern District of Florida in *McConnell* and decide not to rule on the remand motion. However, in *McConnell*, following the filing of plaintiff's remand motion, Judge Adalberto Jordon of the Southern District vacated a stay that he had previously entered in the matter. He held: "Because Mr. McConnell's motion contests this court's jurisdiction over the case, I decline to stay these proceedings pending a decision from the JPML. Accordingly, the defendants shall file a response to Mr. McConnell's motion to remand by July 15, 2011." A copy of the July 1, 2011 order of Judge Jordon is attached hereto as Exhibit "2". However, before Judge Jordon ruled on plaintiff's remand motion, the case was transferred to the MDL.

VII. Removing Defendants Have Not Made Any Showing of Fraudulent Joinder

Defendant Bayside took an active role in selling the instant products. Because Bayside distributed and profited from the distribution of these products, they are clearly liable under Florida law.

On Page 17 of their response, Defendants misstate the declaration of Matthew Brower, stating “unsupported allegations are not enough at this stage, especially in the face of the Brower Declaration confirming that Bayside had no role in labeling and *marketing statements*.” *Emphasis added*. It appears that Defendants would have this Court believe that all Bayside’s sales representatives did was to hand orthopedic surgeons literature regarding the ASR. However, in his declaration, Mr. Brower did not claim that Bayside had no role in “marketing statements.” Instead he stated that Bayside had no role in “the development or publishing of...marketing materials disseminated to healthcare providers.” ¶4 of Brower Declaration. Indeed, Mr. Brower could not claim that Bayside had no role in “marketing statements” without committing clear perjury, as that was Bayside’s very job. Bayside’s role was to sell the ASR. They did this by making marketing statements concerning the ASR to orthopedic surgeons, including Plaintiffs’ orthopedic surgeons, together with giving them literature. At his deposition, Ronald Todd Cook, co-owner of Bayside Orthopaedics, Inc., testified as follows:

Q Do your sales representatives, and by you, I mean Bayside Orthopaedics, also inform doctors about products verbally?

A Yes.

Q On an ongoing basis?

A Yes.

Page 15 of the deposition of Ronald Todd Cook taken in this matter on September 1, 2011, which in its entirety is attached hereto as Exhibit “3”.³

As discussed by Plaintiffs in their remand motion, Bayside sales representatives are provided with significant training on how to sell products and to answer questions from orthopedic surgeons regarding products. In 2007, when concerns regarding the safety of the ASR became a widespread concern in the orthopedic community, Bayside sales representatives were provided

³ On page 14 of their response, Defendants take issue with the Plaintiffs citing but not filing the deposition of Mr. Brower. To accommodate Defendants, Plaintiffs hereby attach the November 16, 2011 deposition of Mr. Brower as Exhibit “7”.

with an *Objection Handling Guide* to assist in answering surgeon questions regarding the safety of the ASR. A copy of the *Objection Handling Guide* is attached hereto as Exhibit “4”.⁴ See, pages 106-107 of the Cook deposition attached as Exhibit “3” testifying that the *Objection Handling Guide* was provided to Bayside sales representatives to assist them in addressing the safety concerns of orthopedic surgeons.

Furthermore, Bayside sales representatives assisted orthopedic surgeons in the planning of ASR surgeries. On page 17 of his deposition, Mr. Cook testified:

Q Does a Bayside sales rep play any role in the determination of the size of the components to be used?

A They will template the cases with the surgeons.

Q Can you explain how that works?

A Templating is an exercise that we use clear replicas of the implant sizes and you overlay them on to x-rays and that will determine a guesstimate anyway, a preoperative guesstimate on what size you may use during the surgery.

Cook Deposition attached as Exhibit “3”.

The self-serving Brower declaration does not even refute the relevant allegations regarding Bayside in the amended complaint.⁵ Plaintiffs alleged: (1) Bayside promoted the ASR – ¶6; Bayside marketed the ASR – ¶6; (3) Bayside distributed the ASR – ¶6; (4) Bayside supplied the ASR – ¶6; (5) Bayside sold the ASR – ¶6; (6) Bayside serviced the ASR – ¶6; (7) Bayside educated orthopedic surgeons regarding the ASR – ¶7; and (8) Bayside sales representatives assisted in ASR surgeries – ¶7. In contrast, the Brower declaration makes a number of irrelevant claims, for example that Bayside did not engage in the “regulatory or approval process” for the ASR, that in no way counter Plaintiffs’ allegations. ¶9 of the Brower Declaration. Based upon

⁴ Defendant Bayside Orthopaedics, Inc. agreed to withdraw the designation of the *Objection Handling Guide* as a “protected document” subject to the protective order entered in this case by letter dated January 10, 2012.

⁵ In the event that the Court was to deny the motion for remand, the company owned by Matthew Brower, Bayside Orthopaedics, Inc. would be dismissed from this case. Therefore, his declaration is that of an extremely interested party and clearly “self-serving.”

the uncontroverted allegations of the amended complaint, Bayside was in the chain of distribution and clearly liable under Florida law.⁶

VIII. *Devore v. Howmedica Osteonics Corp.* - Plaintiff Sued the Wrong Distributor

Defendants repeatedly cite the case of *Devore v. Howmedica Osteonics Corp.*, 658 F. Supp. 2d 1372, 1379 (M.D. Fla. Sept. 2009) in support of their response. However, in *Devore* the Plaintiff sued the wrong Florida distributor. *Id.* Ms. Devore sued the manufacturer of a hip replacement, Howmedica Osteonics Corp., a New Jersey corporation, and Orthopedic Solutions, Inc., a Florida corporation. *Id.* at 1373. The defendants filed affidavits and extensive other evidence showing that Orthopedic Solutions, Inc.’s territory covered only South Florida, not St. John’s County where Ms. Devore’s hip replacement was implanted. *Id.* at 1375.

In the instant case there is no question that Bayside was the distributor of the ASR hip replacements at issue in this matter. If Bayside had not been the distributor of Plaintiffs’ hip replacements, it certainly would have moved to dismiss Plaintiffs’ complaint during the eight months that it was the sole defendant in this matter. Instead, Bayside has admitted that it was the distributor for the Plaintiffs’ ASR devices. *See*, Defendants’ responses to Plaintiffs’ requests for admissions (quoted on pages 6-7 of Plaintiffs’ remand motion and attached hereto as composite Exhibit “5”).

IX. *Martin v. Medtronic, Inc.* and *Hughes v. Howmedica Osteonics Corp.* - On Point

In Footnote 10 of their response, Defendants attempt to attack the 2011 holding of United States District Judge Richard Smoak of the Northern District of Florida in the *Martin v. Medtronic, Inc.*, 2011 WL 2473318, at *1 (N.D. Fla. June 22, 2011), stating “the trial court—without citing any authority—drew an artificial distinction between prescription drug cases and

⁶ On Page 11 of their response, Defendants make the claim that Bayside was not in a position to “control the risk of harm” of the ASR. However, the uncontroverted allegations of Plaintiffs’ complaint clearly show Bayside was in a vastly superior position to control the risk of harm than the Plaintiffs.

‘the traditional medical device line of strict liability cases.’” A copy of the 2011 holding of Judge Smoak is attached hereto as Exhibit “6”.

However, the reasoning of Judge Smoak in *Martin* is clear and well supported. Ms. Martin filed suit against Medtronic, Inc. and its Florida distributor alleging she was sold a defective insulin pump. *Id.* at *1. Medtronic removed the case to the Northern District of Florida claiming that the Florida distributor had been fraudulently joined as it had “absolutely no involvement in the design, testing, manufacture, sale, advertising, marketing, promotion, labeling, or distribution” of the product, but admitted that it took the order for the insulin pump and collected payment for the product. *Id.* Like the instant Defendants, Medtronic attempted to analogize the role of the distributor to that of a pharmacist rather than a distributor of a medical device. *Id.* Judge Smoak rejected that analogy, holding that it was part of the “distributive chain,” therefore a strict products liability claim could be maintained, and remanded the case back to the Circuit Court of Bay County, Florida. *Id.* at *1-2.

Martin is directly on point in countering the Defendants’ attempts to analogize the role of Bayside to that of a pharmacist. Pharmacists dispense medications. Medical device distributors, particularly in the instant circumstances, have a much greater role. *See*, §VI of Plaintiffs’ motion to remand.

Defendants also attempt to distinguish the 2007 decision of United States District Judge William J. Zloch of the Southern District of Florida in *Hughes v. Howmedica Osteonics Corp.*, Case No. 07-61721-CIV-ZLOCH (S.D. Fla. Dec. 18. 2007), stating “unlike *Hughes*, which required a ‘searching investigation of matters outside the complaint’ to ascertain removability, this Court can determine the fraudulent joinder issue on nothing more than the Amended Complaint and the summary judgment-type evidence appropriately attached to the Notice of Removal.” Page 19 of Defendants’ response. Defendants are correct that the Court in the instant

case need only to look at the amended complaint and attachments to the notice of removal to decide this matter – to remand this case back to state court. Such a review shows that Defendants’ claims of fraudulent joinder are groundless. As shown in Section III of this reply, the self-serving Brower declaration does not contradict the allegations against Bayside contained in the amended complaint.

In *Hughes*, like in the instant case, the owner of the alleged distributor executed a self-serving affidavit. Page 2 of Judge Zloch’s *Final Order of Remand*, attached as Exhibit “F” to plaintiffs’ motion to remand. However, the owner of the distributor in *Hughes* went even further than Matthew Brower, denying that his company had ever distributed products for Howmedica. *Id.* Judge Zloch held that he could not rule that the distributor was not liable to the plaintiff on the basis of “one self-serving Affidavit,” sua sponte remanding the case to Florida state court.

Id. at pages 3-4.

X. Documents Filed Under Seal Show Bayside Responsible for Selling ASR, Creating Invoice for Plaintiff Barnes’ ASR, Negotiating Pricing for ASR, Determining Whether to Bring ASR or Less Expensive Hip Replacement to Surgery, for Paying for Missing ASR Hips, and Responding to Concerns of Surgeons Regarding ASR

Under seal pursuant to the local rules and the Order of this Court, Plaintiffs are simultaneously filing documents designated “protected” by Defendants pursuant to the confidentiality order entered in this case under seal. BAYS000026240- BAYS000026263 show Bayside was responsible for selling products on behalf of DePuy Orthopaedics, Inc., with the recitals contained on Bate BAYS000026240 outlining Bayside’s role. BAYS000029446 is the invoice for the ASR sold for implantation in Plaintiff Janine Barnes listing territory 223 (Bayside’s territory) and completed by Bayside Orthopedics, Inc. employee Colleen Lally.⁷ BAYS000000014- BAYS000000015 and BAYS000000010- BAYS000000012 are e-mail strings

⁷ For more information about Ms. Lally, see Page 26 of the deposition of Matthew Brower attached hereto as Exhibit “7”.

