

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

SHANNON MCCONNELL,

Plaintiff,

v.

1:11-dp-22200-DAK

MARK DEBIASE, INC. et al,

Defendants.

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**MOTION FOR CLARIFICATION OF CASE MANAGEMENT ORDER NO. 11 OR IN  
THE ALTERNATIVE MOTION FOR RECONSIDERATION OF CASE  
MANAGEMENT ORDER NO. 11 AND INCORPORATED MEMORANDUM OF LAW**

COMES NOW the Plaintiff by and through her undersigned counsel and hereby seeks clarification of the Court's *Case Management Order No. 11*, or in the alternative, moves this Court to reconsider the application of its *Case Management Order No. 11* to the matter of Plaintiff's fully briefed and pending *Motion for Remand*.

**FACTUAL BACKGROUND**

Plaintiff SHANNON MCCONNELL filed this action in the Palm Beach County Circuit Court of the Fifteenth Judicial Circuit of Florida. Plaintiff's suit arises from the failure of a hip replacement manufactured by defendant DePuy International, Ltd. and distributed by Mark Debiase, Inc. d/b/a Joint Venture, Inc. ("Joint Venture"), a Florida company.

On June 6, 2011, Defendants DePuy Orthopaedics, Inc., DePuy, Inc., DePuy International, Ltd., DePuy Ireland, Ltd., Johnson & Johnson Medical, Ltd., Johnson & Johnson International, and Johnson & Johnson (“removing Defendants”) filed a notice removing this case from Palm Beach County Circuit Court to the United States District Court for the Southern District of Florida. The removing Defendants claimed in their *Notice of Removal* that Plaintiff fraudulently joined Defendant Joint Venture and as such, diversity jurisdiction exists, making removal of the case from state court proper.

However, it is clear that Defendant Joint Venture played a crucial role in the implanting of a defective hip replacement in Plaintiff’s body and the delay in diagnosing the failure of the defective hip replacement. Defendant Joint Venture sold and serviced DePuy Orthopaedics, Inc.’s orthopedic products in Florida, Defendant Joint Venture’s sales representatives promoted and sold orthopedic surgeons on using the product at issue in this case, and Joint Venture’s sales representatives were the very conduits by which information was conveyed from the removing Defendants to orthopedic surgeons and vice versa. Therefore, as Florida law applies the doctrine of strict liability to the entire chain of manufacturers, wholesalers, joint ventures, lessors and retailers, Defendant Joint Venture is liable. Furthermore, Defendant Joint Venture is also liable under negligence, breach of implied warranty, and Florida’s False Deceptive and Unfair Trade Practices Act.

Upon receipt of removing Defendants’ *Notice of Removal*, Plaintiff filed a *Motion for Remand* (Docket entry number 5), removing Defendants filed a response (Docket entry number 14), and Plaintiff filed a reply (Docket entry number 15). Thus, as of July 15, 2011, this matter was fully briefed and awaiting ruling.

On November 23, 2011, Defendants filed a pleading indicating that this Court's *Case Management Order No. 11*, entered on October 31, 2011, vacates Plaintiff's fully briefed and pending *Motion for Remand*.<sup>1</sup> If Defendants' interpretation of this Court's *Case Management Order No. 11* is correct, this Court's Order would greatly prejudice Plaintiff, even further delaying the return of her case to its proper state court forum. Rather than the expected imminent ruling on her pending *Motion for Remand*, Plaintiff would face re-filing a motion to remand and accompanying memorandum of law, have to await a response from Defendants, file a reply, and then await a ruling from this Court. Therefore, Plaintiff seeks clarification of whether this Court's *Case Management Order No. 11* indeed requires re-filing and re-briefing of Plaintiff's pending *Motion for Remand*.

If this Court's *Case Management Order No. 11* does not require such a result, Plaintiff respectfully requests that this Court immediately rule on her pending and fully briefed *Motion for Remand* and set in motion the return of her case to the Palm Beach County Circuit Court of the Fifteenth Judicial Circuit of Florida so that she may be allowed to pursue justice in this matter.

If this Court's *Case Management Order No. 11* indeed requires Plaintiff to re-file and re-brief her *Motion for Remand*, Plaintiff moves this Court to reconsider its order in light of the resulting substantial prejudice to Plaintiff. At this time, Plaintiff's ability to pursue her claim in this matter has been entirely halted for almost six months as the result of improper removal of her cause from its state court forum. Requiring re-filing and re-briefing of Plaintiff's *Motion for Remand* will add further delay. Re-filing and re-briefing of this matter would serve no purpose

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<sup>1</sup> A review of the docket in this proceeding provides no obvious explanation for the entry to this Court's *Case Management Order No. 11*. It appears to Plaintiff that the likely purpose of this Court's *Case Management Order No. 11* was to simply eliminate conflicts between orders entered by this Court and those entered by prior courts and to eliminate outstanding moot motions, something inapplicable to the instant issue.

as the issues in this matter remain identical to their posture in the Federal District Court for the Southern District of Florida prior to transfer to this Multi-District Litigation. Furthermore, such an effect of this Court's *Case Management Order No. 11* would contravene the limits on its ability to act absent jurisdiction over this matter. As this Court lacks jurisdiction over this matter, it may only remand the case back to its proper forum.

**A. Court Must First Determine its Jurisdiction**

The question of a court's jurisdiction over a proceeding is a fundamental one, going to the court's very power to act. "Without jurisdiction, the Court cannot proceed at all in any cause". *Sinochem International Co. Ltd. v. Malaysia International Shipping Corp.*, 549 U.S. 422, 431 (2007) quoting *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); *Accord Vacek v. U.S. Postal Service*, 447 F. 3d 1248, 1250 (9th Cir. 2006). 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. 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.')" (Emphasis supplied.)

**B. Jurisdiction is to be Decided First Per the Sixth Circuit**

The Sixth Circuit has a long-standing policy that jurisdictional issues are to be decided first.

Considering whether jurisdiction to hear a case exists is the “first and fundamental question presented by every case brought to the federal courts.” *Caudill v. N. Am. Media Corp.*, 200 F.3d 914, 916 (6th Cir.2000) (quoting *Douglas v. E.G. Baldwin & Assocs.*, 150 F.3d 604, 606 (6th Cir.1998)). This court “review[s] de novo questions of subject matter jurisdiction.” *Bauer v. RBX Indus.*, 368 F.3d 569, 578 (6th Cir.2004) (citing *Caudill*, 200 F.3d at 916).

The underlying principle delimiting the scope of federal jurisdiction is that “[f]ederal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute...” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). Consequently, “[i]t is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.” *Id.* (internal citation omitted).

*Metro Hydroelectric Co., LLC v. Metro Parks*, 541 F.3d 605, 610 (6th Cir. 2008). “In this Circuit, jurisdictional issues should be decided as soon as practicable.” *Sherwood v. Microsoft Corp.*, 91 F.Supp.2d 1196, 1199 (M.D. Tenn. 2000); citing *Franzel v. Kerr Mfg. Co.*, 959 F.2d 628, 629 (6th Cir. 1992). *Accord Strategic Assets v. Federal Express Corp.*, 190 F.Supp.2d 1065, 1066-7 (M.D. Tenn. 2001).

### **C. If No Jurisdiction, Court Must Remand Case**

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.*); *Covenant Media of North Carolina v. City of Monroe, North Carolina*, 285 Fed. Appx. 30, 34, 2008 WL 2780559, \*2 (4th Cir. 2008). *See also, Panhandle Eastern Pipe*

*Line Co. v. Federal Power Commission*, 343 F. 2d 905, 908 (8th Cir. 1965) (“A court without jurisdiction has no power to adjudicate but can only dismiss the proceeding for lack of jurisdiction.”) and *Scott Air Force Base Properties, LLC v. County of St. Clair, Illinois*, 548 F. 3d 516, 520 (7th Cir. 2008) (“Indeed, ‘[i]t is axiomatic that a federal court must assure itself that it possesses jurisdiction over the subject matter of an action before it can proceed to take *any action...*’”) (Emphasis supplied). Absent jurisdiction, a court may not act except to dismiss or remand the action before it.

**D. Both Procedural and Substantive Actions are Barred If Court Lacks Subject Matter Jurisdiction**

Notably, the decisions which set forth this fundamental principle do not speak in terms of procedural or substantive court action. No such distinction is embraced. Rather, these cases discuss a court’s power to act in absolute terms. Either a court has jurisdiction, and thus the power to preside over a case, or it does not. *See e.g., Steel Co.* at 94 (When jurisdiction ceases to exist, the *only function* remaining is to dismiss and the court *cannot proceed at all.*)

A federal court must satisfy its first and fundamental duty to determine if it has the power to adjudicate any issues once its subject matter jurisdiction is questioned. If a court determines that it lacks jurisdiction, then it may take no action. The only avenue available to a federal court if it lacks subject matter jurisdiction due to improper removal of a state court action is to remand the cause to the state court which does have jurisdiction. Federal courts have a fundamental duty to determine subject matter jurisdiction before taking any other action on a removed diversity jurisdiction case.

**CONCLUSION**

Plaintiff respectfully asks that this Court clarify whether *Case Management Order No. 11* requires her to re-file and re-brief her fully briefed *Motion for Remand* that had been pending

since July, 2011. If not, Plaintiff respectfully requests that this Court immediately rule on her pending and fully briefed *Motion for Remand* and return her case to the Palm Beach County Circuit Court of the Fifteenth Judicial Circuit of Florida so that she may be allowed to pursue justice in this matter.

If this Court's *Case Management Order No. 11* indeed requires Plaintiff to re-file and re-brief her *Motion for Remand*, Plaintiff moves this Court to reconsider its Order in light of the resulting substantial prejudice to Plaintiff. Plaintiff's ability to pursue the merits of her claim in this matter has been entirely halted for almost six months as the result of improper removal of her cause from its proper state court forum. Requiring re-filing and re-briefing of Plaintiff's *Motion for Remand* will add substantial further delay. Re-filing and re-briefing of this matter would serve no purpose as the issues in this matter remain identical to their posture in the Federal District Court for the Southern District of Florida prior to transfer. Furthermore, such an effect of this Court's *Case Management Order No. 11* would cause this Court to exceed the limits on its ability to act absent jurisdiction over this matter. Absent jurisdiction, this Court may only remand the case back to its proper forum and Plaintiff respectfully requests that the Court do so.

Respectfully submitted,

[/s/ Altom M. Maglio](#)

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**CERTIFICATE OF SERVICE**

It is hereby certified that a copy hereof was this 29th day of November, 2011 filed with the Clerk of the USDC using the CM/ECF filing system that will in turn send copies to all counsel of record.

[/s/ Altom M. Maglio](#)