

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

SHANNON MCCONNELL,

Plaintiff,

v.

1:11-dp-22200-DAK

DEPUY ORTHOPAEDICS, INC. et al,

Defendants.

**MOTION FOR RECONSIDERATION REGARDING AMENDED CASE
MANAGEMENT ORDER NUMBER 5 PENDING REMAND TO STATE COURT
AND INCORPORATED MEMORANDUM OF LAW**

COMES NOW the Plaintiff by and through her undersigned counsel and hereby moves this Court to reconsider the application of its *Amended Case Management Order Number 5* to the instant matter as this case was improperly removed from Florida State Court and as such this Court has no jurisdiction over the matter and must immediately grant Plaintiff’s pending *Motion to Remand*.

I. 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.

In its *Answer to Complaint, Separate Defenses, and Jury Demand of Defendant Mark Debiase, Inc. D/B/A Joint Venture*, Defendant Joint Venture answered Plaintiff's complaint. In its answer, Joint Venture admitted in paragraph 3 that it is "an independent contractor distributor of medical devices in the state of Florida," and in paragraphs 29, 30, 31, 32, 63, 71, 72, and 81 of its answer admitted that Defendant Joint Venture "is an independent contractor distributor of DePuy Orthopaedics, Inc. medical devices in the state of Florida."¹

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 this Court. The removing Defendants claim 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. In support of their notice of removal, the removing Defendants attach the *Declaration of Mark Debiase*, the President and owner of Defendant Joint Venture. In his affidavit, Mark Debiase attempts to claim that Defendant Joint Venture is nothing more than a delivery company that facilitates orders for DePuy Orthopaedics, Inc.

Contrary to the affidavit of Mark Debiase, all other information obtained by Plaintiff indicates that Defendant Joint Venture played a crucial role in the implanting of a defective hip replacement in her body and the defective hip replacement remaining in her body. Plaintiff is certain that she will be able to prove that Defendant Joint Venture sold and serviced DePuy

¹ Throughout its answer, Defendant Joint Venture admits that it distributes the product, but denies that it sells the product. Under Florida product liability law, this is a distinction without a difference, and as shown in Plaintiff's *Motion to Remand* (Docket entry number 5) and her reply (Docket entry number 15), Defendant Joint Venture is entirely liable whether it both sold and distributed the product or just distributed the product.

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. Joint Venture's sales representatives are the very conduits by which information is conveyed from the removing Defendants to orthopedic surgeons and vice versa.

Under Florida law, Defendant Joint Venture need not take title to or be a seller of the device at issue in order to be held liable. Florida applies the doctrine of strict liability to the entire chain of manufacturers, wholesalers, joint ventures, lessors and retailers. Furthermore, Defendant Joint Venture is 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 to Remand* (Docket entry number 5), removing Defendants filed a response (Docket entry number 14), and Plaintiff filed a reply (Docket entry number 15). The matter has been fully briefed and awaits ruling by this Court.

Since a Florida corporation was not fraudulently joined as a defendant, this Court lacks jurisdiction over this matter, and this matter must be immediately remanded back to the Palm Beach County Circuit Court of the Fifteenth Judicial Circuit of Florida. This Court's *Amended Case Management Order Number 5* would require Plaintiff to affirmatively participate in this proceeding despite the fact that this Court has no jurisdiction over her cause and therefore Plaintiff moves this Court to reconsider its Order, grant her pending *Motion for Remand*, and remand this matter to the proper court.

II. ARGUMENT

Before the Court Can Impose its Power it 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. The United States Supreme Court has explained that "jurisdiction is the power to declare the law..." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998). As "[f]ederal courts are courts of limited jurisdiction,... [t]hey possess only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994); *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; *Vacek* at 1250; *Accord Howery v. Allstate Ins. Co.*, 243 F. 3d 912, 916 (5th Cir. 2001); *Illinois Municipal Retirement Fund v. Citigroup Inc.*, 391 F. 3d 844, 851 (7th Cir. 2004). 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.)

If No Jurisdiction, Court May Take No Action Other Than to 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. The Supreme Court has announced this precept to be a fundamental principle of the separation of powers. *Steel Co.* at 94. So well established is the foregoing that the United States Claims Court referred to it as “an age-old rule” when finding it had no authority to impose Rule 11 sanctions where subject matter jurisdiction was lacking. *Schiff v. U.S.*, 24 Cl. Ct. 249, 254 (1991).

Referring to Supreme Court precedent, the *Schiff* court explained:

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

Id.

Both Procedural and Substantive Actions Are Barred If Jurisdiction Absent

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 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.

III. CONCLUSION

As this matter was improperly removed from Palm Beach County Circuit Court of the Fifteenth Judicial Circuit of Florida, this Court lacks jurisdiction over this matter, and this matter must be immediately remanded back to the state court. This Court's *Amended Case Management Order Number 5* would require Plaintiff to affirmatively participate in this proceeding despite the fact that this Court has no jurisdiction over her action and therefore Plaintiff moves this Court to reconsider its Order, grant her pending *Motion for Remand*, and remand this matter to Palm Beach County Circuit Court of the Fifteenth Judicial Circuit of Florida.

Respectfully submitted,

/s/ Altom M. Maglio

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CERTIFICATE OF SERVICE

It is hereby certified that a copy hereof was this 8th 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