

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

SHANNON McCONNELL,

Plaintiff,

v.

MARK DEBIASE, INC., et al.,

Defendants.

Case No.: 1:11-cv-22025-AJ

**MOTION FOR REMAND AND INCORPORATED
MEMORANDUM OF LAW**

Plaintiff, Shannon McConnell, by and through her undersigned counsel, pursuant to 28 U.S.C. § 1447 and 28 U.S.C. § 1332, moves this Court to remand this case to the Fifteenth Judicial Circuit Court in and for Palm Beach County, Florida, and for an award of attorneys' fees incurred as a result of the improper removal of this suit.

I. INTRODUCTION

This suit was filed in Palm Beach County Circuit Court of the Fifteenth Judicial Circuit. Palm Beach County is the residence of the Plaintiff and the location of all events relevant to this matter. 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").¹

In its *Answer to Complaint, Separate Defenses, and Jury Demand of Defendant Mark Debiase, Inc. D/B/A Joint Venture* dated May 26, 2011, Defendant Joint Venture answered Plaintiff's complaint. A copy of Defendant Joint Venture's answer is attached hereto as Exhibit

¹ Despite Defendants' statements that the device in this matter was manufactured by DePuy Orthopaedics, Inc., it appears that it was actually manufactured by DePuy International, Ltd. and transferred through the other Defendants to DePuy Orthopaedics, Inc. for sale in the United States.

“A”.² 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.”³

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.⁴ 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.

Plaintiff, as of yet, has received no discovery in this matter. However, other than the affidavit of Mark Debiase, all information obtained by Plaintiff indicates that Defendant Joint

² A copy of the May 26, 2011, answer was not attached to the notice of removal and was not previously filed with this Court. This is contrary to what is claimed in paragraph 8 of the notice of removal and as such the removing Defendants failed to comply with the requirements of 28 U.S.C. § 1446(a).

³ 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 below, Defendant Joint Venture is entirely liable whether it both sold and distributed the product or just distributed the product.

⁴ Oddly, in *Defendants Notice of Removal*, Defendants Johnson & Johnson International, Johnson & Johnson Medical, Ltd., Johnson & Johnson, DePuy, Inc., DePuy International, Ltd., and DePuy Ireland Ltd. claim that they “are not proper parties to this litigation and are appearing specially herein with full reservation of all rights and defenses, including their lack-of-personal jurisdiction defenses.” However, in an answer dated June 2, 2011, these same defendants answered Plaintiff’s complaint. A copy of the June 2, 2011 answer of Defendants Johnson & Johnson International, Johnson & Johnson Medical, Ltd., Johnson & Johnson, DePuy, Inc., DePuy International, Ltd., and DePuy Ireland Ltd. is attached hereto as Exhibit “B”. A copy of the June 2, 2011 answer was not attached to the notice of removal and has not previously been filed with this Court, contrary to the requirements of 28 U.S.C. § 1446(a).

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 believes that she will be able to prove that Defendant Joint Venture sold and serviced DePuy Orthopaedics, Inc.'s orthopedic products in Florida. Defendant Joint Ventures' sales representatives promoted and sold orthopedic surgeons on using the product at issue in this case. Joint Ventures 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. As a result, Defendant Joint Venture was not fraudulently joined and this matter must be immediately remanded back to the Palm Beach County Circuit Court of the Fifteenth Judicial Circuit.

II. STRICT LIABILITY OF JOINT VENTURE UNDER FLORIDA LAW

Florida, like other jurisdictions, has expanded the doctrine of strict liability to the entire chain of manufacturers, wholesalers, joint ventures, lessors and retailers. *Samuel Friedland Family Enterprises v. Amoroso*, 630 So.2d 1067 (Fla.1994) (lessor); *Mobley v. South Florida Beverage Corp.*, 500 So.2d 292 (Fla. 3d DCA 1986) (retailers), *review denied*, 509 So.2d 1117 (Fla.1987); *Visnoski v. J.C. Penney Co.*, 477 So.2d 29 (Fla. 2d DCA 1985) (joint ventures); *Perry v. Luby Chevrolet, Inc.*, 446 So.2d 1150 (Fla. 3d DCA 1984) (retailers); *Adobe Bldg. Centers, Inc. v. Reynolds*, 403 So.2d 1033 (Fla. 4th DCA) (retailers and wholesalers), *review dismissed*, 411 So.2d 380 (Fla.1981).

The Florida Supreme Court decision in the case of *Samuel Friedland Family Enterprises v. Amoroso*, 630 So.2d 1067 (Fla.1994), is insightful in the instant case. A hotel leased a small portion of its premises to a boat stand operator and marketed the boats to its guests, but had no ownership interest in the boats or boat business. *Id.* A hotel guest sustained injuries on an allegedly defective boat she rented from the stand and brought a products liability action against the boat stand operator and the hotel. In analyzing the case, the Florida Supreme Court stated:

The underlying basis for the doctrine of strict liability is that those entities within a product's distributive chain "who profit from the sale or distribution of [the product] to the public, rather than an innocent person injured by it, should bear the financial burden of even an undetectable product defect." *North Miami General Hosp., Inc. v. Goldberg*, 520 So.2d 650, 651 (Fla. 3d DCA 1988). Those entities are in a better position to ensure the safety of the products they market, to insure against defects in those products, and to spread the cost of any injuries resulting from a defect.

Id. at 1068. The Court then applied the doctrine of strict products liability to both the boat stand operator and to the hotel. *Id.* at 1071.

Defendant Joint Venture was clearly part of the distributive chain and derived a profit from the product at issue in this case. The affidavit of Mark Debiase does not and cannot show otherwise. In Paragraph 24 of her complaint, Plaintiff alleged that in 2005, DePuy "began an intensive national campaign to promote the use of ASR Hips by orthopedic surgeons, and MARK [Joint Venture] began a corresponding campaign in Florida." Nothing in the affidavit of Mark Debiase disputes this fact. Paragraph 32 of Plaintiff's complaint states:

In its role as distributor of product at issue in this matter, Defendant MARK [Joint Venture] utilized sales representatives that were responsible for educating Plaintiffs orthopedic surgeons regarding claimed advantages of the product, answering any questions Plaintiffs orthopedic surgeons had regarding the product, assisting Plaintiffs orthopedic surgeons at surgery regarding the product, and selling the product to Plaintiffs orthopedic surgeons.

Nothing in Mark Debiase's affidavit disputes the above allegations.

Furthermore, in its *Answer to Complaint, Separate Defenses, and Jury Demand of Defendant Mark Debiase, Inc. D/B/A Joint Venture* dated May 26, 2011, Defendant Joint

Venture admitted that it was the distributor of the product. A copy of Defendant Joint Venture's answer is attached hereto as Exhibit "A". Joint Venture admitted in paragraph 3 of its answer 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 82 of its answer admitted that Defendant Joint Venture "is an independent contractor distributor of DePuy Orthopaedics, Inc. medical devices in the state of Florida."⁵

Under the Florida Supreme Court's analysis delineated in *Samuel Friedland*, there is no question that Defendant Joint Venture was part of the distributive chain of the product at issue in this matter. The same principles applied in *Samuel Friedland* have been applied in other jurisdictions for purposes of strict products liability. For instance, in *Bittler v. White and Co., Inc.*, 560 N.E.2d 979 (Ill. App. Ct. 1990), an authorized sales representative was found to be subject to strict liability. The sales representative argued that it was outside the chain of distribution and merely acted as a liaison between the manufacturer/seller and the purchaser. The court disagreed because the sales representative was bound by contract to promote the manufacturer's products and through that relationship derived a commission from the transaction. *Id.* at 982. The court found that this "participatory connection" with the defective product was sufficient to make it subject to strict liability. *Id.* The court explained its reasoning as follows:

The public policy rationale which justifies imposing strict liability on manufacturers as well as sellers, wholesalers, joint ventures, and even lessors, is based on the fact that these entities, as part of the chain of distribution, are involved in and reap a profit from placement of the allegedly defective product into the stream of commerce. *Even parties who are not within the actual chain of distribution, but who play an integral role in the marketing enterprise of an allegedly defective product and participate in the profits derived from placing the product into the stream of commerce, are held liable under the*

⁵ 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 below, Defendant Joint Venture is entirely liable whether it sold the product or distributed the product.

doctrine of strict liability.... Consequently it appears that the imposition of strict liability hinges on whether the party in question has any participatory connection, for personal profit or other benefit, with the injury-causing product and with the enterprise that created consumer demand for and reliance upon the product.

Id. at 981, *emphasis added and internal citations removed.* Defendant Joint Venture similarly marketed DePuy Orthopaedics, Inc.'s products in its territory and participated in the profits derived from placing the product at issue into the stream of commerce.

III. JOINT VENTURE SOLD AND DISTRIBUTED THE PRODUCT

DePuy Orthopaedics, Inc. Describes Joint Venture as “Sales Office”

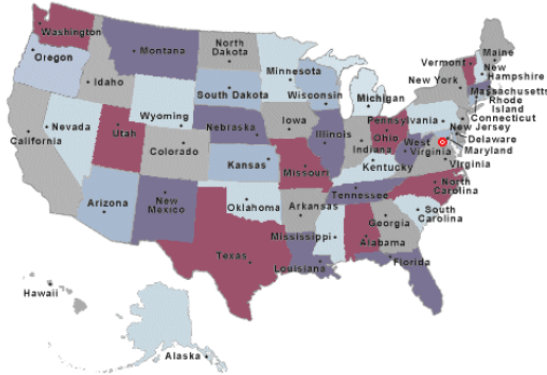
Despite claiming in its notice of removal that Defendant Joint Venture did not engage in sales, in 2007 the DePuy Orthopaedics, Inc. website included a “Sales Office Locator” page depicting a map of the United States and allowing a visitor to select the state in which they were interested in locating a sales office, shown below:

Search

- HOME
- PHYSICIANS
- PATIENTS
- EDUCATIONAL OPPORTUNITIES
- MEDIA
- CAREER OPPORTUNITIES
- COMPANY CREDO

SALES OFFICE LOCATOR

Please select a state



-----Select State-----



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http://web.archive.org/web/20070823132447/depuorthopaedics.com, accessed on September 24, 2010 using the Internet Archive recording of the DePuy site as found in 2007.

Pulling down the “Select State” drop down to Florida yielded the below page:

Search

- [HOME](#)
- [PHYSICIANS](#)
- [PATIENTS](#)
- [EDUCATIONAL OPPORTUNITIES](#)
- [MEDIA](#)
- [CAREER OPPORTUNITIES](#)
- [COMPANY CREDO](#)
- [SALES OFFICE LOCATOR](#)

[Go back to the main map](#)

Florida

DePuy - Southwest Florida
 (Serving southwestern Florida)
 18480-B1 Paulson Drive
 Port Charlotte, FL 33954-1023
Phone: (941) 766-8181
Fax: (941) 766-8222

Joint Venture
 (Serving southeastern, eastern & northern Florida)
 1525A The Greens Way
 Jacksonville Beach, FL 32250
Phone: (904) 280-6973
Fax: (904) 280-6977



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<http://web.archive.org/web/20061023215523/www.depuyorthopaedics.com/worldwide/detail.jhtml?state=fl>, accessed on September 24, 2010 using the Internet Archive recording of the DePuy site as found in 2006. As seen above, the “Sales Office Locator” pulldown from the DePuy Orthopaedics, Inc. website for Florida lists Defendant Joint Venture as “serving southeastern, eastern, and northern Florida.”

Joint Venture Sales Representatives’ Descriptions of Role

Contrary to the almost non-existent role that the notice of removal claims is played by Defendant Joint Venture and its sales representatives, the description of the role of a current sales representative of Defendant Joint Venture on the business social networking site LinkedIn

appears to be more accurate. Below is a screen capture of yesterday of the profile of Defendant Joint Venture sales representative Megan Kontol from the LinkedIn website:



The image is a screenshot of a LinkedIn profile for Megan Kontol. At the top left is the LinkedIn logo. To the right of the logo is a profile picture of a woman with blonde hair, smiling. To the right of the profile picture is the name 'Megan Kontol' and her current position 'Medical Devices at DePuy Orthopaedics' in the 'Jacksonville, Florida Area'. Below this is a summary of her experience, categorized into 'Current', 'Past', 'Education', 'Connections', and 'Websites'. The 'Current' section lists her as a 'Medical Device Professional at DePuy Orthopaedics, a division of Johnson&Johnson'. The 'Past' section lists three roles: 'Field Market Manager - North Florida at The Hive Strategic Marketing', 'Promotional Marketing Specialist at The Hive', and 'Internship at Breast Care Specialists'. The 'Education' section lists 'Florida State University'. The 'Connections' section shows '134 connections'. The 'Websites' section lists 'Company Website'. Below the summary is a section titled 'Megan Kontol's Experience' with a sub-section for 'Medical Device Professional' at 'DePuy Orthopaedics, a division of Johnson&Johnson'. This section includes a description of her role, a list of responsibilities, and a paragraph about her current employer. At the bottom of this section, it lists 'Total Joints, Trauma, Sports Medicine, Foot & Ankle'.

<http://www.linkedin.com/in/megankontol> accessed on June 13, 2011. Ms. Kontol describes her role as a sales representative at Defendant Joint Venture as participating with the orthopedic surgeon in planning surgery, selecting the components of the medical device to be utilized,

providing on-site product expertise and consultation to orthopedic surgeons in the operating room, developing physician relationships to help expand territory growth, and servicing and managing hospital accounts with revenues in excess of \$8,000,000 annually. *Id.* She describes the above as leading to “top tier sales success.” *Id.* This description is a far cry from the self-serving description of the role of Defendant Joint Venture put forth in the notice of removal.

Likewise, Defendant Joint Venture sales representative Ben Neff holds a more expansive view of the role played by he and his employer. Mr. Neff is a sales representative out of Joint Venture’s Boyton Beach, Florida office. Below is a screen capture of yesterday of the profile of the Joint Venture sales representative from the LinkedIn website:



Ben Neff
Sales Representative at DePuy Orthopaedics
United States | Medical Devices

Current	• Sales Representative at DePuy Orthopaedics
Past	• Sales Associate at DePuy Mitek • Outside Sales Representative at Cbeyond Corporation
Education	• University of Florida
Connections	17 connections

Ben Neff's Experience

Sales Representative

DePuy Orthopaedics

Public Company; 1001-5000 employees; Medical Devices industry
December 2009 – Present (1 year 7 months)

Recruited based on ability to sell to surgeons, build and maintain relationships, and master knowledge of the human anatomy. Secure new business and maintain existing base within an \$8.5 million territory, with full responsibility for a \$1.5 million quota. Cover surgeries, delegating between surgeons and hospitals, and taking calls on the weekend for emergency orthopedic trauma surgeries. Template upcoming cases, sell at the scrub sink, place bulk orders with materials management, and negotiate new product purchases/approvals with hospital administration.

Challenges: Address and overcome obstacles with competition, logistics, and inventory. Create a much larger presence in key accounts previously overlooked.

KEY CONTRIBUTIONS AND ACCOMPLISHMENTS:

* Surpassed million-dollar quota by over 35%; increased territory trauma number annually by 45%. Leveraged extensive knowledge and advanced selling skills to exceed expectations.

* Serviced and grew relationships with 20 orthopedic surgeons across a broad range of specialty areas. Set up multiple consignment agreements with hospitals, established relationships with non-using surgeons, and maintained contact with over 14 hospitals and surgery centers.

* Recognized as an effective liaison between DePuy and hospital administration as well as medical business managers.

<http://www.linkedin.com/pub/ben-neff/30/11/977> accessed on June 13, 2011. Mr. Neff describes his responsibilities as “[t]emplate upcoming cases, sell at the scrub sink, place bulk orders with materials management, and negotiate new product purchases/approvals with hospital administration.” *Id.* His description goes on to state “[le]veraged extensive knowledge and

advanced selling skills to exceed expectations.” *Id.* Like Ms. Kontol, Mr. Neff’s description of the role of Defendant Joint Venture and his role as sales representative for Defendant Joint Venture is much different than that claimed in the notice of removal.

Role of Sales Representative in Hip Replacement Surgery Generally

As shown in the Joint Venture sales representatives’ descriptions of their jobs above, orthopedic sales representatives 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 Orthopaedics, Inc. 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 “C”.

Role of Joint Venture’s Sales Representatives

Joint Venture’s sales representatives are charged with the role of serving as the principal conduit by which surgeons receive information about DePuy Orthopaedics, Inc.’s hip replacements. Sales representatives are trained to educate the surgeon about DePuy Orthopaedics, Inc.’s hip replacements and how they compare to competitors’ products. Joint Venture sales representatives also instruct the surgeon on the proper use of DePuy Orthopaedics,

Inc.'s hip replacements. In addition to providing information, Joint Venture's sales representatives are 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 "D".

By contract with its distributors, DePuy Orthopaedics, Inc. requires that sales representatives receive training on how to provide the above information to orthopedic surgeons and what information to provide. See the 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 "E". Newly hired sales representatives are required to undergo a six day course on DePuy Orthopaedics, Inc. joint replacement products at DePuy Orthopaedics, Inc. 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 “F”. 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. Sales representatives are then trained 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 Orthopaedics, Inc. distributor from 2005 through 2010 confirms that the training objectives of

the DePuy Learning Programs were employed by its orthopedic sales representatives. *See* the

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, attached hereto as Exhibit “E”. Ms. Davis testifies that sales representatives hold meetings with surgeons to discuss DePuy Orthopaedics, Inc. orthopedic products and their benefits compared to competitor’s products. *See* Exhibit “E”, ¶¶ 6, 16 and 17. Sales representatives also accompany surgeons to cadaver labs to convince them of the advantages of DePuy Orthopaedics, Inc. products. *See* Exhibit “E” 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 “E”, ¶ 10. (Emphasis supplied.)

In sum, distributors such as Defendant Joint Ventures play a pivotal role in promoting, distributing, selling, and servicing DePuy Orthopaedics, Inc.’s hip replacements.⁶

Letter from Mark J. Debiase to Halifax Medical Center

Another document that is contrary to the claims in the notice of removal and the affidavit of Mark Debiase is an August 19, 2008, letter of Mark J. Debiase to Halifax Medical Center, attached hereto as Exhibit “G.” The letter is signed by Mark J. Debiase as President of Joint Venture “representing DePuy a Johnson & Johnson Company.”⁷ The letter discusses renewal of a pricing contract between DePuy Orthopaedics, Inc. and Halifax Medical Center. The letter states “...the term of your current orthopedic implant pricing agreement is due to expire. I have

⁶ In paragraph 17 of the notice of removal, the removing Defendants cite to three decisions holding that the naming of in-state pharmaceutical field representatives as defendants constituted fraudulent joinder. One of those cases was brought in Pennsylvania and the other two were brought in Alabama. It is unclear as to how these cases could be relevant to the instant case as they involve entirely different factual scenarios and entirely different state law.

⁷ The “representing DePuy” appears at the bottom of the first page of the letter and is part of the Joint Venture letterhead.

reviewed these terms and would like to offer another two year contract...”⁸ This hardly is the work of a simple delivery service. Instead, it is clear that Defendant Joint Venture is responsible for negotiating pricing and contracts on behalf of DePuy Orthopaedics, Inc.

IV. NEGLIGENCE OF DEFENDANT JOINT VENTURE

In the instant case, the removing Defendants claim in paragraph 25 of their notice of removal that “Joint Venture was not in the business of and did not gain profits from distributing or disposing of the ASR™ *through the stream of commerce.*” *Emphasis in the original.*

Apparently, the removing Defendants wish this Court to believe that Joint Venture did not profit from the promoting and selling of DePuy Orthopaedics, Inc.’s products. Presupposing the contract between the DePuy Orthopaedics, Inc. and Defendant Joint Venture resemble the typical contracts entered into by DePuy Orthopaedics, Inc. with its distributors, Defendant Joint Venture receives a commission on sales of DePuy Orthopaedic, Inc. products, including the one at issue in this instant case. Therefore, Defendant Joint Venture did gain a profit from distributing the product in the instant case.

In paragraph 25 of the notice of removal, the removing Defendants claim: “Plaintiff, however, has not even pleaded that Joint Venture had either actual or constructive knowledge of a defective in the ASR™.”⁹ However, in paragraph 69 of her complaint, Plaintiff states exactly that:

The failure of the DePuy ASR Hip implanted in the body of Plaintiff was a direct result of the defective design of the DePuy ASR Hip warned of by orthopedic experts in 2005, and of which MARK was aware at the time that MARK sold the DePuy ASR Hip to Plaintiff.

⁸ This letter also seems to contradict the statement made in Paragraph 7 of the affidavit of Mark Debiase that “Joint Venture has no authority to enter into any transaction between any hospital and DePuy.”

⁹ Paragraph 20 of the notice of removal claims that “Plaintiff does not identify any of her treating physicians...or the hospital where the surgery took place.” However, paragraph 52 of her complaint does exactly that.

Plaintiff has pled a valid cause of action against Defendant Joint Venture and Defendant Joint Venture has filed an answer to that cause of action dated May 26, 2011.

V. BREACH OF IMPLIED WARRANTY OF DEFENDANT JOINT VENTURE

The removing Defendants claim in paragraphs 28-29 of their notice of removal that Plaintiff cannot establish privity between Plaintiff and Defendant Joint Venture. However, as shown above, Plaintiff has produced evidence indicating that in fact Defendant Joint Venture did sell the removing Defendant products and as a result, privity is present.

VI. FDUPTA CLAIM AGAINST DEFENDANT JOINT VENTURE

The removing Defendants claim in paragraphs 31-32 of their notice of removal that the learned intermediary doctrine bars her False Deceptive and Unfair Trade Practices Act Claim. Removing Defendants state that Plaintiff's claims "are all ultimately based upon Joint Venture's alleged failure to warn of the risks of the device, and so the learned intermediary doctrine bars her FDUPTA claim." *Internal quotations omitted.* In support of this proposition, removing Defendants cite the case of *Beale v. Biomet, Inc.*, 492 F. Supp. 2d 1360 (S.D. Florida 2007). However, in so doing, they misconstrue *Beale*. The Court in *Beale* does not reach the holding claimed by the removing Defendants. Instead, the Court in *Beale* stated:

Pursuant to the doctrine, a manufacturer has a duty to give a physician adequate warning of the risks associated with a prescription drug. *Buckner v. Allergan Pharmaceuticals, Inc.*, 400 So.2d 820, 822 (Fla. 5th DCA 1981). However, "failure of the manufacturer to provide the physician with an adequate warning of the risks associated with a prescription product is not the proximate cause of a patient's injury if the prescribing physician had independent knowledge of the risk that the adequate warning should have communicated." *Christopher v. Cutter Labs.*, 53 F.3d 1184, 1192 (11th Cir.1995). "Thus, the causal link between a patient's injury and the alleged failure to warn is broken when the prescribing physician had 'substantially the same' knowledge as an adequate warning from the manufacturer should have communicated to him." FN8 *Id.*

Beale v. Biomet, Inc., 492 F. Supp. 2d 1360, 1365 (S.D. Florida 2007). In the instant case, Plaintiff has alleged and the evidence will show that Defendant Joint Venture had information unavailable to the Plaintiff's orthopedic surgeon showing that the product at issue was defective.

The removing Defendants also claim in paragraph 32 of the notice of removal that "Plaintiff lacks any possibility of success on her FDUTPA claim because she seeks damages for personal injuries." However, Plaintiff did not make a claim for damages for personal injuries resulting from violation of FDUPTA. Instead, Plaintiff seeks damages for violation of FDUPTA with the following damages clause following Count Four of her complaint:

WHEREFORE Plaintiff demands judgment against the Defendants, for the difference in value between the DePuy ASR Hip Replacement System advertised and promoted by Defendant MARK and the hip replacement system actually delivered by Defendant MARK together with reasonable attorneys' fees and costs of suit pursuant to Florida Statutes Section 501.211(2), and for any further relief that the court deems just and proper.

Plaintiff has pled a valid cause of action against Defendant Joint Venture for breach of the False Deceptive and Unfair Trade Practices Act Claim and, in fact, Defendant Joint Venture filed an answer to that cause of action dated May 26, 2011.

VII. HEAVY BURDEN RESTS ON REMOVING PARTIES

It is axiomatic that federal courts are courts of limited jurisdiction and are "empowered to hear only those cases within the judicial power of the United States as defined by Article III of the Constitution." *University of South Alabama v. American Tobacco Co.*, 168 F.3d 405, 409 (11th Cir.1999). Title 28 U.S.C. § 1447(c) provides in the relevant part "the case *shall* be remanded [if] it appears that the district court lacks subject matter jurisdiction." (emphasis supplied). The removal statute must be strictly construed against removal. *See Crowe v. Coleman*, 113 F.3d 1536, 1538 (11th Cir. 1998); *Samuel-Bassett Motors v. KIA Motors America, Inc.*, 357 F.3d 392, 396 (3d Cir. 2004) (citing *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 111

(3d Cir. 1990); *Bromwell v. Mich. Mut. Ins. Co.*, 115 F.3d 208, 212 (3d Cir. 1997)(citing *Int'l Primate Prot. League v. Admin'rs of Tulane Educ. Fund*, 500 U.S. 72, 87 (1991)); *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 217 (3d Cir. 1999).

There is a persuasive policy argument behind the directive to resolve questionable jurisdictional matters in favor of the remanding party. The United States District Court in the Middle District of Florida spoke to this very point in *Seminole County v. Pinter Enterprises, Inc.* stating that:

Any close questions regarding the propriety of removal are resolved in favor of remanding the case to the state court. A presumption in favor of remand is necessary because if a federal court addresses the merits of a pending motion in a removed case where the subject matter jurisdiction does not exist, the federal court deprives the state court from its Constitutional right to resolve controversies in its own courts.

Seminole County v. Pinter Enterprises, Inc., 184 F. Supp. 2d 1203, 1207 (M.D. Fla. 2000).

Where a removing defendant asserts federal subject matter jurisdiction pursuant to 28 U.S.C. § 1332, the defendant must show that every plaintiff is diverse from every defendant. *Triggs v. John Crum Toyota, Inc.*, 154 F.3d 1284, 1287 (11th Cir. 1998). If there is any doubt as to whether a plaintiff has stated a claim against the non-diverse defendant, the joinder is not fraudulent. *Parks v. New York Times Co.*, 308 F.2d 474 (5th Cir. 1962), *cert. denied*, 376 U.S. 949 (1964). All questions of fact, controlling law and jurisdiction should be resolved in favor of remand to state court and against removal. *Shamrock Oil & Gas v. Sheets*, 313 U.S. 100, 108-109 (1941); *American Tobacco Co.*, 168 F.3d at 411.

“[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.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994); *see also Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1373 (11th Cir. 1998); *Samuel-Bassett Motors*, 357 F.3d at 396. “The burden of the removing

party is a ‘heavy one.’” *Crowe*, 113 F.3d at 1538; *see also Boyer*, 913 F.2d at 111. A claim of fraudulent joinder must be supported by clear and convincing evidence, and proven with certainty by the party seeking to establish federal jurisdiction. *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921); *Parks v. New York Times Co.*, 308 F.2d 474, 478 (5th Cir. 1962). “If there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that the joinder was proper and remand the case to the state court.” *Coker v. Amoco Oil Co.*, 709 F.2d 1433, 1440-41 (11th Cir. 1983); *see also Laughlin v. Prudential Ins. Co.*, 882 F.2d 187, 190 (5th Cir. 1989) and *Abels v. State Farm Ins. & Cas. Co.*, 770 F.2d 26, 32 (3d Cir. 1985).

Plaintiff only needs to have a possibility of stating a valid cause of action in order for the joinder to be legitimate. *Triggs*, 154 F.3d 1284, 1287-1288; *Crowe*, 113 F.3d at 1541 (states Plaintiff need not be able to survive a motion for summary judgment for the court to find that a reasonable basis exists for predicting that state law might impose liability on the non-diverse defendant).

Furthermore, there is also a very practical rationale for the strict construction of removal. The Eleventh Circuit enunciated that rationale in *Crowe v. Coleman*, 113 F. 3d 1536, 1538 (11th Cir. 1997), stating:

The strict construction of removal statutes also prevents exposing the plaintiff to the possibility that he will win a final judgment in federal court, only to have it determined that the court lacked jurisdiction on removal, a result that is costly not just for the plaintiff, but for all the parties and for society when the case must be relitigated.

Id.

In the case of *Bryant v. Zimmer, Inc.*, Case No. 6:06-cv-844-Orl-31DAB, United States District Judge Gregory A. Presnell of the United States District Court for the Middle District of Florida dealt with the issue of whether an in-state distributor for a competing hip replacement

manufacturer had been fraudulently joined. The only claim alleged against the distributor by plaintiffs was a claim for spoliation. In his August 14, 2006, Order remanding the case back to state court, Judge Presnell wrote:

[W]hen the district court must assess an allegedly fraudulent joinder, “the question is whether there is arguably a reasonable basis for predicting that the state law might impose liability on the facts involved. If that possibility exists, a good faith assertion of such an expectancy in a state court is not a sham, is not colorable and is not fraudulent in fact or in law.” Crowe v. Coleman, 113 F.3d 1536, 1540 (11th Cir. 1997) quoting Bobby Jones Garden Apartments v. Suleski, 391 F.2d 172, 176-77 (5th Cir.1968)).

The August 14, 2006, Order of Judge Presnell is attached hereto as Exhibit “H”.

In a case even more analogous to the instant case, United States District Judge William J. Zloch of the Southern District of Florida sua sponte remanded the case of *Hughes v. Howmedica Osteonics Corporation*, Case No. 07-61721-CIV-ZLOCH to state court. A copy of Judge Zloch’s *Final Order of Remand* is attached hereto as Exhibit “I”. The plaintiff had brought suit in Broward County against orthopedic joint replacement manufacturer Howmedica and a company plaintiff alleged was its in-state distributor. *Id.* Howmedica removed the case to the Southern District claiming that the alleged distributor had been fraudulently joined. *Id.* In support of their notice of removal, Howmedica included the affidavit of the President and CEO of the alleged distributor stating that his company had never been a distributor for Howmedica. *Id.* at page 2. Judge Zloch analyzed the limited information available to him in the record, stating:

Howmedica is seeking a ruling from the Court on the merits of Plaintiff’s claim against Orthopedic. Specifically, Howmedica seeks a finding that Orthopedic is not liable to Plaintiff because it did not distribute the product alleged to have injured her. This is based on the allegations to that effect in Frank Russo’s Affidavit. DE 1, Ex. A. The Court cannot make such a finding in Orthopedic’s favor by one self-serving Affidavit.

Id. at page 3. Judge Zloch then went on:

Indeed, Howmedica’s argument in the Notice Of Removal “requires searching investigation of matters outside the complaint and shifts the district court from the task of determining whether . . . [P]laintiff[] “possibly” allege[s] a claim for relief against [Defendants] to the task of determining whether . . . [P]laintiff[] will prevail and whether . . . [D]efendants enjoy a complete defense. But the district court’s job is not to resolve the dispute or even to adjudicate the merits of claims and defenses; the district court’s job is merely to ascertain whether . . . [P]laintiff[] “possibly” allege[s] a legally cognizable claim.” *Jones v. Honeywell Int’l, Inc.*, 385 F. Supp. 2d 1268, 1271-72 (M.D. Fla. 2005).

Id. The Court then sua sponte remanded the case to the Seventeenth Judicial Circuit, Broward County. *Id.* at page 4.

VIII. FEDERAL DISTRICT COURTS HAVE REMANDED DEPUY ASR CASES WHERE DEPUY ALLEGED IN-STATE DISTRIBUTOR FRAUDULENTLY JOINED

In at least two cases, Federal District Courts have remanded back to state court cases alleging that DePuy ASR hip replacements were defective and that named the in-state distributor as a defendant. In *Malkmus v. DePuy Orthopaedics, Inc.*, Case No. 11-C-365, the United States District Court for the Eastern District of Wisconsin yesterday ruled that contrary to the claims of DePuy Orthopaedics, Inc., the distributor had not been fraudulently joined. A copy of the June 13, 2011 decision of the United States District Court for the Eastern District of Wisconsin is attached hereto as Exhibit “J”.

In *Malkmus*, like the instant case, the defendants claimed that the distributor was not involved in the sale of the ASR hip and thus plaintiffs’ claims must fail. *Id.* at page 4. However, the Court did not buy defendants’ arguments, holding “[t]he record presented to this court demonstrates that TRP was at least as involved in the distribution of the allegedly defective product...” *Id.* at page 5. The Court then granted Plaintiffs’ motion to remand. *Id.*

The United States District Court for the Northern District of Illinois in the case of *Kopitke v. DePuy Orthopaedics, Inc.*, Case No. 11-cv-912, faced the same issue. A copy of the March 8, 2011 decision of the United States District Court for the Northern District of Illinois is

attached hereto as Exhibit “K”. In *Kopitke*, the plaintiff filed suit in state court alleging that she suffered permanent injuries as the result of a defective ASR hip replacement manufactured by DePuy Orthopaedics, Inc. and distributed by an in-state company. *Id.* at page 1. DePuy Orthopaedics, Inc. removed the case from state court to Federal District Court claiming that the in-state distributor had been fraudulently joined. *Id.* In the *Kopitke* case DePuy Orthopaedics, Inc. claimed that the distributor was an “innocent seller” under Illinois law, thus plaintiff did not have a valid claim against the distributor, and as a result the distributor had been fraudulently joined. *Id.* at page 4. However, the Federal District Court found to the contrary, holding that “[a]s alleged in Kopitke's complaint, Premier is not an innocent distributor.” *Id.* at page 5. The Court then remanded the case back to state court.

IX. PLAINTIFF IS ENTITLED TO HER 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, the removing Defendants removed this case from state court to this Court claiming improper joinder with no

factual or legal basis. As a result, Plaintiff is entitled to award of her attorneys' fees and costs in seeking and obtaining remand.

X. CONCLUSION

Removing Defendants have in no way met their burden of showing that the in-state distributor, Joint Venture, was fraudulently joined. The affidavit of the President and owner of Defendant Joint Venture fails to counter the allegations in Plaintiff's complaint. The evidence presented by Plaintiff above calls in question the very veracity of the affidavit filed in support of the notice of removal. As Joint Venture was not fraudulently joined, there is not complete diversity and the Federal Court lacks subject matter jurisdiction. As this Court lacks subject matter jurisdiction, this case must be remanded back to the Fifteenth Judicial Circuit Court in and for Palm Beach County, Florida. Furthermore, as this action was improperly removed by Defendants, Defendants are responsible for Plaintiff's attorneys' fees incurred in obtaining the remand of this case back to state court

