

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

SUZANNE THORNHILL, INDIVIDUALLY AND	§	
AS GUARDIAN OF WILLIAM SCOTT	§	
THORNHILL, AN INCAPACITATED PERSON,	§	
<i>Plaintiff,</i>	§	
	§	
vs.	§	CIVIL ACTION H-08-0387
	§	
BOILER TUBE COMPANY OF AMERICA, <i>ET AL.</i> ,	§	
<i>Defendants.</i>	§	

**MEMORANDUM AND RECOMMENDATION**

This personal injury lawsuit is before the court on plaintiff’s motion to remand (Dkt. 3). Defendants filed an untimely response (Dkt. 15).<sup>1</sup> The court recommends that plaintiff’s motion to remand be granted.

**Background**

William Scott Thornhill, a truck driver assigned to pick up and transport a pre-loaded trailer from defendant Boiler Tube Company of America, was injured on September 18, 2006 when he fell from trailer. Plaintiff, Thornhill’s wife, sued defendants in Probate Court No. 1 for Harris County, Texas on December 6, 2007 asserting that defendants’ negligence and gross negligence in loading the trailer caused Thornhill’s injuries.<sup>2</sup> Plaintiff alleges that

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<sup>1</sup> Defendants filed a response on March 31, 2008, over 30 days late and only three days before the hearing on plaintiff’s motion. The court could consider the motion unopposed, *see* LOC. R. S.D. TEX. 7.3, 7.4. Nonetheless, the court has considered defendants’ response in making its remand recommendation.

<sup>2</sup> Plaintiff asserts for the first time in her reply (Dkt. 18) that defendants’ removal was untimely based on plaintiff’s original petition for pre-suit deposition filed in state probate court and served in May 2007. Plaintiff concedes that her petition asserting substantive

defendant Jude Aymond, an employee of Boiler Tube, was in charge of, and participated in, loading the trailer.

Defendants removed this case to federal court alleging subject matter jurisdiction based on diversity of citizenship. Defendants allege that plaintiff improperly joined Jude Aymond, a citizen of Texas, in order to defeat jurisdiction. Plaintiff has moved to remand on the grounds that complete diversity does not exist in this case.<sup>3</sup>

## **Analysis**

### **1. Legal Standards**

Federal jurisdiction is limited. The party invoking this court's removal jurisdiction bears the burden of establishing diversity jurisdiction. *See Manguno v. Prudential Property and Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002); *Miller v. Diamond Shamrock Co.*, 275 F.3d 414, 417 (5th Cir. 2001); *Frank v. Bear Stearns & Co.*, 128 F.3d 919, 921-22 (5th Cir. 1997) (citation omitted). The removal statute "is subject to strict construction because a defendant's use of that statute deprives a state court of a case properly before it and thereby implicates important federalism concerns." *Frank*, 128 F.3d at 922; *Manguno*, 276 F.3d at 723.

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causes of action was not filed until December 2007 and was on or after January 2, 2008. The time for removal runs from service of a complaint and summons. *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 354 (1999). The court considers defendants' removal timely under the circumstances.

<sup>3</sup> Plaintiff does not dispute that the amount in controversy requirement of diversity jurisdiction is met.

The Fifth Circuit has stressed that a removing party asserting fraudulent joinder bears a “heavy burden.” *Rodriguez v. Sabatino*, 120 F.3d 589, 591 (5th Cir. 1997). To prove that a non-diverse defendant has been improperly joined for the purpose of defeating diversity jurisdiction, the removing party must establish either “(1) actual fraud in the pleading of jurisdictional facts, or (2) the inability of the plaintiff to establish a cause of action against the non-diverse party in state court.” *Smallwood v. Illinois Cent. R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004). Only the second type of improper joinder is at issue here. In order to meet this standard, the removing defendant must show that “there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant.” *Id.*

In determining whether a plaintiff has a reasonable basis of recovery under state law, the court may conduct a Rule 12(b)(6) type analysis, looking initially at the allegations in the complaint to determine whether the plaintiff has stated a claim under state law. Generally, there is no improper joinder if the plaintiff has stated a claim against the in-state defendant. In exceptional cases, where the plaintiff may have omitted or misstated key facts, the court may conduct a summary judgment-type inquiry. *Id.*

## **2. Plaintiff’s claim against Jude Aymond**

Plaintiff has alleged that Jude Aymond, acting in his scope of employment with Boiler Tube, was negligent and/or grossly negligent in loading the trailer and that his negligence caused Thornhill’s injuries. Defendants contend in their notice of removal that “there is no

individual claim under Texas law against Jude Aymond, since all of his actions relevant to plaintiff's claims were performed in his capacity as an employee of Boiler Tube Company of America."<sup>4</sup> Defendants rely primarily on two cases, *Leitch v. Hornsby*, 935 S.W.2d 114 (Tex. 1996) and *Kingston v. Helm*, 82 S.W.3d 755 (Tex. App. – Corpus Christi 2002, pet. denied).

Defendants' reliance on *Leitch* and *Kingston* is misplaced. *Leitch* and *Kingston* clearly establish that an employee may be held individually liable for his own torts. *Leitch*, 935 S.W.2d at 117 ("A corporate officer or agent can be liable to others, including other company employees, for his own negligence. However individual liability arises only when the officer or agent owes an independent duty of reasonable care to the injured party apart from the employer's duty."); *Kingston*, 82 S.W.3d at 758 ("the longstanding rule in Texas is that '[a] corporation's employee is personally liable for tortious acts which he directs or participates in during his employment.'" (internal citation omitted)). As *Leitch* makes clear, an individual corporate agent is shielded for liability for his acts only where the employer owes the injured party a non-delegable duty. 935 S.W.2d at 118.

This case is analogous to the oft-cited example of a corporate agent who drives an automobile in the course and scope of his employment. In such circumstances, the corporate agent owes an independent duty of care to the general public to operate an automobile in a non-negligent manner, and thus will be liable if his negligence causes an accident. *Leitch*,

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<sup>4</sup> Notice of Removal (Dkt. 1), at 2, ¶ 5.

935 S.w.2d at 117; *Kingston*, 82 S.W.3d at 762. Aymond allegedly participated in loading the trailer, and most likely owed an independent duty to the general public (including Thornhill) to exercise reasonable care in performing this task. Defendants challenge the existence of such an independent duty under these particular facts, but cite no case which so held. Absent any Texas case law to the contrary, the court finds it reasonable to predict that Thornhill might be able to recover against Aymond based on the same duty of care to the general public applied in automobile negligence cases.

Although fact issues may exist as to Aymond's actual liability, the allegations of the complaint state a claim against Aymond.<sup>5</sup> The court concludes that Aymond was not fraudulently joined, and complete diversity of citizenship does not exist in this case.

### **Conclusion**

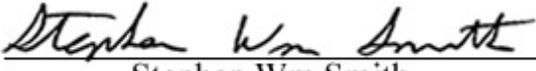
Because defendants have not met their burden to establish improper joinder, the court recommends that plaintiff's motion to remand (Dkt. 3) be granted and this case be ordered back to Probate Court No. 1 for Harris County, Texas.

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<sup>5</sup> Defendants submit an affidavit from Aymond attesting that securing the load was Thornhill's sole responsibility, and that Thornhill never complained about the condition of the trailer or the cargo. Defendants' response, Ex. B (Dkt. 15). Plaintiff has submitted an affidavit from William Scott Thornhill stating that Aymond gave directions to other employees regarding the load on the day Thornhill was injured. Plaintiff's reply, Ex. E (Dkt. 18). Defendants' object to Thornhill's competence to give affidavit testimony. The court does not consider either affidavit in reaching its decision because the allegations in the petition are sufficient to determine that plaintiff has stated a claim against Aymond. See *Smallwood*, 385 F.3d at 573.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* FED. R. CIV. P. 72.

Signed at Houston, Texas on April 3, 2008.

  
Stephen Wm Smith  
United States Magistrate Judge