IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

MARK WATSON AND KAREN WATSON **PLAINTIFFS**

VS. **CIVIL ACTION NO: 1:08CV669-LTS-RHW**

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, FLETCHER SONGE AGENCY, FLETCHER SONGE AND WARREN GOFF, INDIVIDUALLY **DEFENDANTS**

MEMORANDUM IN SUPPORT OF MOTION TO REMAND AND SANCTIONS

Plaintiffs bring this motion to remand in good faith and with no intent to delay. Defendants removed this case to Federal Court on an allegation of fraudulent joinder on behalf of the Plaintiffs. This is a case regarding an insurance policy which was presented to and purchased by Plaintiffs upon recommendation through Nationwide and Fletcher Songe Agency's agent, Warren Goff. Defendant, Goff and Fletcher Songe and Fletcher Songe Agency are citizens of the State of Mississippi and, therefore, diversity does not exist. There was no intent or purpose on behalf of the Plaintiffs to manipulate the process by fraudulently joining these defendants as causes of action were pled in the notice complaint filed in state court. Nationwide is denying coverage on the basis of water damages which they contend is not covered under the policy that its agents, Goff and Songe, sold; however, since the Watsons detrimentally relied on Nationwide's agents statements that they would take care of getting flood coverage and they had full coverage. Since there is no diversity of citizenship this Court lacks subject matter jurisdiction and this case should be remanded to state court.

There is an abundance of case law in support of this motion to remand with a large amount of those cases involving Nationwide's wrongful removal of Katrina state court cases for the purposes of delay to this Court. Nationwide will later take the position that pre-judgment interest should not be allowed, thus saving thousands of dollars. One of the latest remand cases is

West v Nationwide, 543F Supp. 2nd 587 (Feb.22, 2009) in which this Court granted the remand on the very same issues presented in this case. (See Exhibit "1" attached hereto). Some other examples where Nationwide has wrongfully removed cases to this Court are Tuepker v. Nationwide Fire and Casualty, Civ. Action No. 1:05-cv-559 (S.D. Miss., May 24, 2006); Dastugue v. Nationwide Fire and Cas. Co. and Felecia Craft-Robinson, Civ. Action No. 1:05-cv-687(S.D.Miss. July 26, 2006); Gurrisi v. Nationwide Fire & Cas. Co. 440 F.Supp.2d 534, 536 (S.D.Miss.,2006); and Mangano v. Nationwide Fire & Cas. Co., Civ. Action No. 1:06-cv-724 (S.D.Miss. Nov. 30, 2006). To this end, it is clear that the Defendants have removed this action for the sole purpose of delay. The Defendants are well aware of the rule of law on removal, but more specifically the rule of law as it applies to them under these exact circumstances.

FACTS

Plaintiffs requested flood insurance from the Defendant, Nationwide's, agents prior to Hurricane Katrina in which they were initially told they were not in the flood zone. Upon additional requests, Warren Goff told them he would get it. Nationwide, by and through its agents, expressly and impliedly represented to Plaintiffs that they would have full and comprehensive coverage for any and all accidental direct physical losses, including those resulting from hurricanes, including but not limited to damage caused by hurricane driven winds.

Based upon these representations made by Nationwide through its agents, the Plaintiffs relied upon said representations and purchased the subject policy from Nationwide with a reasonable expectation and understanding that Nationwide would pay for such losses. Plaintiffs further relied on the agents in selling and stating that they would also have flood insurance to take care of the backups that had occurred as results of what appeared to be improper drainage. Plaintiffs reasonably and detrimentally relied upon the representations made by the agents and

purchased and paid the premium. See the affidavit of Karen Watson attached hereto as Exhibit "2".

ANALYSIS

Pursuant to U.S.C.A. section 1332(a) and 1441(a), where the removing party, here the Defendants, alleges diversity of citizenship on the basis of fraudulent joinder, the removing party has the burden of proving fraud. The reviewing court must construe the statute, "narrowly in order to limit federal jurisdiction and avoid undue encroachment on a state's right to adjudicate a case filed in one of its courts." See Gober v. Allstate Ins. Co., 855 F. Supp. 158 (S.D. 1994), at 160. Our District Court has concluded that, "a district court should resolve doubt in favor on non-removal...[and] '[s]tatutes providing for removal on the grounds of diversity of citizenship are given strict construction in favor of the jurisdiction of the state court'." Id.

The standard in the Fifth Circuit for determining whether there has been improper joinder has been set forth in Travis v. Irby, 326 F. 3d 624, 646-647 (5th Cir. 2003), where the Court stated: To establish improper joinder, the removing party must prove: (1) that there was actual fraud in the plaintiff's pleading of the jurisdictional facts or (2) that the plaintiff has no possibility of establishing a cause of action against the non-diverse defendant in state court. See also Carriere v. Sears, Roebuck & Co., 893 F. 3d 98, 100 (5th Cir. 1990), cert. denied, 498 U.S. 817, 111 S. Ct 60, 112 L. Ed. 2d 35 (1990). The Fifth Circuit has undisputedly adopted a bright line test on the issue of improper joinder, ruling that:

> the test for fraudulent joinder is whether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant, which stated differently means 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. Smallwood v. Illinois Cent. R. Co., 385 F.3d 568, 573 (5th Cir.2004)(citing Travis v. Irby, 326 F. 3d 624, 648). *Griggs v. State Farm Lloyds*, 181 F.3d 694, 699 (5th Cir. 1990); *Cavallini v. State Farm Mutual Auto Ins. Co.*, 44 F.3d 256, 259 (5th Cir. 1995).

If the district court, after finding all disputed issues in favor of the non-moving party, finds there is even arguably a reasonable basis that state law might impose liability upon the non-diverse party, then there is no fraudulent joinder and no basis for asserting diversity jurisdiction.

In the present case, Defendants have not met this burden. They simply have not come forth with any evidence to defeat the fact that Plaintiffs have a valid cause of action against the state defendants, Goff and Fletcher Songe. Case law shows that an agent can be liable, individually, for misrepresentations. Under Mississippi law, allegations that, the insurance agent, in response to an insured's inquiry, affirmatively represented that such coverage would exist under the homeowners' insurance policy in the event of hurricane and that insured did not need to obtain further coverage under a wind pool insurance policy stated a claim for negligent representation on behalf of the agent. Furthermore, Defendant is aware of this law, as this Court in *Pamela West vs. Nationwide Mutual Insurance Company, et al*., 543 F. Supp. 2d 587 (2008) held that (1) allegations against an agent could state a claim for negligent misrepresentation and (2) the non-diverse agent was not fraudulently joined, given the set of facts under which the insured might recover against the agent. The case was remanded. See said case attached hereto as Exhibit "1".

Under Mississippi law, in order to state a cause of action for negligent misrepresentation, the plaintiff must prove, (1) there was a misrepresentation of fact, (2) the misrepresentation was material or significant, (3) the misrepresentation was the product of negligence in that the person making the representation acted without reasonable care, (4) the person to whom the representation was made reasonably relied upon the representation, and (5) the person to whom the representation was made suffered damages as a direct and proximate result of that reasonable reliance. West *Id*. at 590. This court reasoned that because the accuracy and truthfulness of the

allegation is directly in dispute that this was enough reason to remand the case back to state court for the fact finder. The defense had not proven that the plaintiff had no cause of action against the non-diverse agent; therefore, if the plaintiff could prove her facts to be the truth, then a cause of action would lie against the agent, the non-diverse party.

The party who invokes removal to the federal court, "must always bear the burden of demonstrating that the case is one which is properly before the federal tribunal." B. Inc. v. Miller Brewing Co., 663 F.2d 545, 549 (5th Cir 1981). The burden is a heavy one. Travis v. Irby, 326 F.3d 644, 649 (5th Cir. 2003). Green v. Amerada Hess Corp., 707 F. 2d 201, 205 (5th Cir. 1983) cert. denied 464 U.S. 1039 (1994). Therefore, the district court is not to decide whether the Plaintiffs will actually, or even probably prevail on the merits of their claims against resident Defendants, Dodson v. Spiliada Marine Corp., 951 F. 2d 40.42 (5th Cir. 1992), but only to look to whether there is a reasonable basis to conclude that the plaintiffs may recover against this in-state defendant. Irby , 366 F.3d 624, 648 (5th Cir. 2003). A claim of improper joinder must be "pleaded with particularity and supported by clear and convincing evidence," and proven with certainty. MOORE'S § 107.149[2][c][iv]; Parks v. New York Times Company, 308 F.2d 474, 478 (5th Cir. 1962), cert denied, 376 U.S. 949, 84 S. Ct. 964, 11 L. Ed. 2d 969 (1964); WRIGHT, MILLER & COOPER, Federal Practice and Procedure, § 3732. Therefore, there can be no improper joinder, "unless there clearly can be no recovery under the state law on the alleged cause of action or on the facts as they exist when the Motion to Remand is heard." MOORE'S , § 107.14[2][c][iv].

All facts set forth in the Complaint are assumed true, and all uncertainties as to state substantive law are resolved against the defendants. Id.; Gober, 855 F. Supp. at 160 ("The burden

to 'affirmatively' establish 'by competent proof' federal [diversity] jurisdiction...lies with the removing party.")

Misrepresentations by Agent Goff and the Songe Agency regarding the coverage to the policy were made to the plaintiffs Mark and Karen Watson. The Watsons reasonably relied on these representations, believing the agent would be exercising reasonable care, and this reliance was the direct cause of the damages suffered by the plaintiffs.

Under the general rule in tort, an agent "whose conduct has rendered his principal liable, has individual liability to the plaintiff." *Leathers v. Aetna Cas. & Sur. Co.*, 500 So.2d 451, 453 (Miss. 1986); *Moore v. Interstate Fire Insurance Co.*, 717 F.Supp. 1193, 1196 (S.D.Miss. 1989). This same court later held that where there remains any uncertainty or ambiguities as to current substantive law they are to be resolved in the light most favorable to the plaintiff. *Newsome v. Shelter General Ins. Co*., 792 F.Supp. 1022, 1024 (S.D.Miss. 1991).

Mississippi law has held that, "an individual may be held jointly liable with a corporation for a tort he commits as an agent of the corporation." American Fire Protection, Inc. v. Lewis, 653 So.2d 1387, 1391 (Miss.,1995). Applying these principles, the federal courts have long held that:

> Under Mississippi law, the negligence of an employee is imputed to the employer if such acts occur within the scope of employment, but the fact that a judgment may be entered against an employer does not absolve the employee of liability for his acts; but rather, the doctrine of respondeat superior operates to establish a joint and several liability between both employer and employee. Wheeler v. Frito-Lay, Inc., 743 F.Supp. 483,486 S.D.Miss.,1990).

The federal courts in Mississippi, in applying Mississippi law have held that, "The officer or agent may be held personally liable when he 'directly participates in or authorizes the commission of a tort.'" Christmon v. Allstate Ins. Co., 57 F.Supp.2d 380, 382

(S.D.Miss.,1999)(citing Mississippi Printing Co., Inc. v. Maris, West & Baker, Inc., 492 So.2d 977, 978 (Miss.1986)).

The Defendant Nationwide also includes as a basis for removal, a claim that federal question applies, as this case relates to federal laws and regulations regarding flood insurance. First and foremost, the well pleaded complaint rule, "provides that the plaintiff's properly pleaded complaint governs the jurisdictional determination, and if, on its face, such a complaint contains no issue of federal law, then there is no federal question jurisdiction." Aaron v. National Union Fire Ins. Co. of Pittsburg, Pa., 876 F.2d 1157, 1161 (5th Cir. 1989). The Aaron Court went on to re-state black letter law, ruling that, "The fact that a federal defense may be raised to the plaintiff's action-even if both sides concede that the only real question at issue is created by a federal defense-will not suffice to create federal question jurisdiction." Id. Furthermore, in cases involving the very same questions of law and the very same defendants, this Court has noted that:

> ***Recent cases have drawn a distinction between claims based on the failure to procure flood insurance coverage, which are outside the scope of exclusive federal jurisdiction, and claims based on the administration or adjustment of claims under existing flood insurance policies which are within the scope of exclusive federal jurisdiction. Hopkins v. Brewer, Civ. Action No. 1:06CV0048 (S. D. Miss. Nov. 30, 2007).***

First and foremost, the well-pleaded complaint rule applies in this instance because the Plaintiff has pled the Complaint under state law. The Defendants do not cite any law for the proposition that the Plaintiff's' claims against Goff for his negligent handling of the Plaintiffs' insurance needs (including flood insurance) is completely pre-empted by federal law and therefore subject to remand. In addition, this Court has already distinguished between the case *sub judice* where the claim is based upon the agent's failure to procure the flood insurance and

cases where the flood insurance claim was improperly adjusted or managed. Nevertheless, the Defendants insist on seeking removal despite having actual knowledge of the law. Therefore, to the extent that the Defendants seek removal based on federal questions, the Plaintiff seeks cost associated with this Motion to Remand under 28 U.S.C. § 1447. The defendants have established a pattern of Katrina cases where they intentionally charge wrongful joinder, remove it to this Court and after much delay this Court has to remand it back to the state court. The defendant has a duty to revaluate its position and where the circumstances require it to change it position, it must do so in a timely fashion. This Court has time and again ruled for remand in cases similar to this one. Yet the defendants continue to refuse remand the case voluntary. It has been over sixteen months since the West decision, and still they have not re-assessed their position or chosen to have this case remanded. Sanctions should be imposed for the wrongful removal and their failure to re-assess their position under Rule 37 FRCP and Statute.

CONCLUSION

It is clear in the case *sub judice* and for the reasons submitted herein and in the Motion to Remand and for Sanctions, the Plaintiffs respectfully moves this Court to remand this matter to the state court in which it commenced and to impose sanctions including attorney fees for the wrongful removal and failure to re-assess it position when this Court has on numerous times ruled on this similar issue.

Respectfully submitted,
MARK AND KAREN WATSON, Plaintiffs

BY: /s/ Chuck McRae, MSB #2804

CERTIFCATE OF SERVICE

I, Chuck McRae, do hereby certify that I have this day electronically filed the foregoing Memorandum in Support of Motion to Remand and Sanctions using the Court's ECF System which sent electronic notification of such filing to all counsels of record including the following:

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THIS 10th day of June, 2009.

/s/ CHUCK McRAE, MSB #2804

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