

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

RALPH E. TIPTON, JR.,)	
)	
Plaintiff,)	
)	
v.)	Case No.: 04-2443-D/V
)	
NATURE’S BOUNTY, INC.,)	
WAL-MART STORES, INC.,)	
)	
Defendants.)	
)	

ORDER GRANTING MOTION TO REMAND

This matter is before the Court upon the motion of Ralph Tipton (“Plaintiff”) to remand this case to state court. Plaintiff filed suit against Nature’s Bounty and Wal-Mart Stores (“Defendants”) in the Shelby County Circuit Court. Defendant removed the action to this Court, pursuant to 28 U.S.C. § 1441(a), (b), and (c), which permits removal to a federal court when the district courts of the United States could maintain original jurisdiction over the case. Plaintiff filed a timely motion to remand. The Court heard arguments of the parties on August 3, 2004. Upon consideration of the motion, memorandum, response, and arguments of counsel, and upon the entire record, the Court now **GRANTS** Plaintiff’s motion.

I. BACKGROUND

On August 25, 2003, Plaintiff filed a complaint in the Shelby County Circuit Court, against Defendants. Plaintiff alleges that he suffered a stroke as a result of taking an ephedra-containing dietary supplement manufactured by Defendant Nature’s Bounty and sold by Defendant Wal-Mart

Stores. Plaintiff asserts a variety of claims, including products liability, negligence, deceptive advertising, fraud, and breach of warranty. Plaintiff requests compensatory damages “in an amount that will adequately compensate him for the injuries and damages sustained by him due to the wrongful conduct of the Defendants” and punitive damages. (Compl. at 7.) The Complaint does not specify the amount requested.

Defendants separately answered the Complaint on September 29, 2003. On or around October 30, 2003, Defendant Nature’s Bounty propounded its first set of interrogatories on Plaintiff. Plaintiff answered the interrogatories on December 18, 2003. Interrogatory Seven requested a list of all the health professionals who provided care to Plaintiff during his life. From the age of thirty-seven, Plaintiff has had nine health care providers. (Pl.’s Answers to Def., Nature Bounty, Inc.’s First Set of Interrogatories 5-6.) Next to each provider’s name, Plaintiff named the reason for treatment, including “stroke,” “paralysis,” and “therapy.” (*Id.*) Interrogatory Nineteen requested an itemization of damages sought, stating “if you are not yet able to itemize all such damages, please itemize all of which you are currently aware.” (*Id.* at 19.) Plaintiff answered, “[d]amages & injuries are ongoing an[d] cannot yet be determined. Will supplement.” (*Id.*) With his interrogatory answers, Plaintiff provided an authorization for release of his medical information to Defendant Nature Bounty’s counsel. (*Id.* at 23.)

On April 15, 2004, Defendant Nature’s Bounty requested in writing that Plaintiff admit that the amount in controversy, exclusive of interest and costs, exceeds \$75,000. Plaintiff did not respond. Accordingly, the request was deemed admitted on May 18, 2004, pursuant to Tennessee Rule of Civil Procedure 6.05.

On June 14, 2004, Defendants removed the action to this Court, arguing that this Court

possesses diversity jurisdiction. On July 9, 2004, Plaintiff filed the instant motion to remand, which includes a request for an award of attorneys' fees and costs incurred in connection with removal. Plaintiff agrees that grounds exist for diversity jurisdiction, but he argues that these grounds have existed since the advent of litigation, and therefore Defendants' removal was untimely.

II. LEGAL STANDARD

A defendant may remove a civil case over which the United States district courts would have original jurisdiction. *See* 28 U.S.C. § 1441(a) (2004). If this Court determines that it would not have had original subject matter jurisdiction over the case, it must remand to state court. *See* 28 U.S.C. § 1447 (2004). Courts should construe removal statutes strictly. *Alexander v. Elec. Data Sys. Corp.*, 13 F.3d 940, 949 (6th Cir. 1994). The defendant seeking removal bears the burden of establishing federal subject matter jurisdiction. *Ahearn v. Charter Township of Bloomfield*, 100 F.3d 451, 453-54 (6th Cir. 1996).

A federal district court has diversity jurisdiction over any civil action where the matter in controversy exceeds \$75,000, exclusive of interests and costs, and is between citizens of different states. *See* 28 U.S.C. 1332(a) (2004).

A defendant must remove within thirty days of receiving the complaint. If the complaint did not provide a basis for removal, a defendant may remove within thirty days of receiving "a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." *See* 28 U.S.C. § 1446(b) (2004). A case becomes removable if the plaintiff performs a voluntary act which effects a change, rendering a case subject to removal by the defendant, when the case had not been removable before the change. *DeBry. v. Transamerica Corp.*, 601 F.2d 480, 486-88 (10th Cir. 1979).

III. ANALYSIS

Congress developed the statutory right of removal as a solution to the situation of dual jurisdiction of state and federal courts. *McCraw v. Lyons*, 863 F. Supp. 430, 433 (W.D. Ky. 1994). Removal offers the defendant thirty days to determine if dual jurisdiction exists and to choose, as of right, which court will hear the case. For reasons of efficiency and comity, federal courts construe this time limitation strictly, in order to avoid encroachment on state court jurisdiction. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109 (1941). The time limitation “prevents a second bite at the jurisdictional apple if a defendant (belatedly) perceives that the case is proceeding other than to his liking.” *Gorman v. Abbott Lab.*, 629 F. Supp. 1196, 1199 (D. R.I. 1986). Additionally, the time limit minimizes the delay and waste of resources involved in starting a case over in federal court after substantial proceedings have taken place in state court. *Id.*

In the instant action, Defendants removed nearly one year after Plaintiff filed his Complaint in state court. Defendants recognize that they filed long past the thirty-day deadline. They argue that due to Plaintiff’s failure to specify damages in his state court complaint, this case was not removable until May 18, 2004. On that date, Tennessee Rules for Civil Procedure provided for Plaintiff’s default admission that the amount in controversy exceeded \$75,000.

When a defendant has missed the thirty-day deadline imposed by § 1446(b) and asserts that he is entitled to an extension, the relevant question becomes whether the defendant could have removed the case within the time limit. *McCraw*, 863 F. Supp. at 434 (citing *Keller v. Carr*, 534 F. Supp. 100, 103 (W.D. Ark. 1981); *Mielke v. Allstate Ins. Co.*, 472 F. Supp. 851, 853 (E.D. Mich. 1979)). When a plaintiff alleges a specific amount of damages in the complaint, that amount controls unless it appears to a legal certainty that the plaintiff in good faith cannot claim the

jurisdictional amount. *Klepper v. First Amer. Bank*, 916 F.2d 337, 340 (6th Cir. 1990) (citing *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-289 (1938)). If the plaintiff seeks to recover some unspecified amount of damages, the defendant may still remove by proving, by a preponderance of the evidence, that the plaintiff's claims meet the federal amount in controversy requirement. *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 158 (6th Cir. 1993). Thus, the defendant retains the burden, but it is a relatively light burden, which does not "require the defendant to research, state and prove the plaintiff's claim for damages." *Id.* at 159.

Under this framework, the Court looks to whether Defendants could have carried this burden of proving grounds for removal at the beginning of the suit. On a variety of facts, the Court of Appeals for the Sixth Circuit has found that defendants properly removed a state court complaint to federal court when the plaintiff did not specify damages. In *Gafford v. General Electric Company*, the defendant corporation carried its removal burden by presenting the testimony of a human resources staff member concerning the amount in controversy.¹ *Id.* at 160. At a pretrial hearing, the defendant presented proof that, should the plaintiff prevail on her claims, she would be entitled to a sum greater than the statutory minimum for backpay, as well as additional amounts for attorney fees and other damages. *Id.* at 161. The plaintiff failed to offer rebuttal proof, so the Sixth Circuit affirmed the district court's finding that the amount in controversy exceeded the statutory minimum, and the defendant had properly removed. *Id.*

In *Hayes v. Equitable Energy Resources Company*, 266 F.3d 560, 573 (6th Cir. 2001), the Sixth Circuit found that the defendant had carried his removal burden by merely attaching the

¹At the time of *Gafford's* removal to federal court, the statutory minimum for the amount in controversy was \$50,000.

plaintiffs' complaint. The Court held:

[w]e agree that a fair reading of the unspecified and unliquidated damages sought by Plaintiffs provided that more than \$75,000 was in controversy. Plaintiffs' initial complaint, attached to [the defendant's] petition for removal, sought, among other damages, royalties and gross values of minerals extracted from four separate wells, two of which dated back to 1941, as well as punitive damages.

In the instant case, Plaintiff asserts a variety of claims for relief based upon theories of products liability, negligence, deceptive advertising, fraud, and breach of warranty. Upon receipt of the Complaint on August 28 and 29, 2003, Defendants were aware of Plaintiff's legal claims and his allegations of suffering a stroke. Upon receipt of the interrogatory answers on December 18, 2003, Defendants were further aware that Plaintiff suffered a stroke requiring the service of nine health care providers, including a rehabilitation clinic, and had the authority to obtain Plaintiff's medical records.

Plaintiff's claims bear resemblance to the variety of situations where the Sixth Circuit has found a basis for removal, despite Plaintiff's failure to specify damages. Plaintiff's claims for compensatory damages alone could be within the realm of \$75,000. Plaintiff lists nine health care providers: a neurologist, orthopedist, hematologist, psychiatrist, two hospitals, two rehabilitation facilities, and a rehabilitation specialist. Defendants would not need a specification of damages to conclude that Plaintiff's medical bill would be substantial. Beyond compensatory damages, Plaintiff requests punitive damages, as the plaintiff requested in *Hayes*. Regardless of the merit of these claims, their nature and the relief demanded should have alerted Defendants that Plaintiff was seeking an amount in excess of the \$75,000 required to attain federal court jurisdiction. Based on the information available to Defendants at the advent of litigation and at receipt of the interrogatory

answers, the Court finds that Defendants could have removed the case.

Furthermore, because Defendant need only establish by a preponderance of the evidence that Plaintiff's claims meet the \$75,000 requirement, limiting Defendants' time to notice removal to thirty days after receipt of the Complaint, or possibly interrogatory answers, is appropriate. The preponderance standard is a moderate burden that balances the defendant's right to remove and the federal interest in limiting diversity jurisdiction. The standard requires only that Defendants allege facts sufficient to establish that Plaintiff would more likely than not recover more than the jurisdictional amount, assuming the failure of Defendants' affirmative defenses. *Garza v. Bettcher Indus., Inc.*, 752 F. Supp. 753, 763 (E.D. Mich. 1990). In this case, Defendants had adequate proof to petition for removal by the end of 2003. Defendants could have shown that if Plaintiff were successful in his multi-claim tort action, damages assessed for Plaintiff's medical expenses, when added to punitive damages, would more likely than not exceed \$75,000. Yet, Defendants did not remove until June 14, 2004.

State courts are well-equipped to handle diversity cases; no reason exists to allow a defendant additional time if grounds for removal are unambiguous given the defendant's knowledge and the claims made in the initial complaint. *Mielke*, 472 F. Supp. at 853. "[E]ven where the amount of damages is not specified, if the defendant is able to ascertain from a fair reading of the complaint or other papers filed that the minimum jurisdictional amount exists, he cannot 'sit idly by' while the statutory period runs." *Mc Craw*, 863 F. Supp. at 434 (citing *Keller*, 534 F. Supp. at 102-03).

Defense counsel stated to the Court during argument that its firm defends hundreds of actions against the manufacturers and marketers of ephedra-containing substances. Accordingly, the Court finds it even more likely that Defendants were aware of the actual amount in controversy and chose

not to remove. The Court hereby **REMANDS** this diversity case to the jurisdiction of the Shelby County Circuit Court.

Finally, Plaintiff requests attorneys' fees and costs incurred in removal and remand. "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c) (2004). An award of costs and fees is in this Court's discretion. *See Morris v. Bridgestone/Firestone, Inc.*, 985 F.2d 238, 240 (6th Cir. 1993). A finding of improper purpose or bad faith is not necessary. *See id.*

[A]n award of costs, including attorney fees, is inappropriate where the defendant's attempt to remove the action was "fairly supportable," or where there has not been at least *some* finding of fault with the defendant's decision to remove. By reverse implication, a court abuses its discretion by refusing to award fees where the defendant's argument for removal was devoid of even fair support.

Ahearn v. Charter Township of Bloomfield, No. 97-1187, 1998 WL 384558, at *2 (6th Cir. Jun. 18, 1998) (citations omitted) (reversing district court's decision not to award fees or costs as abuse of discretion because it was "crystal clear" that defendant's arguments did not support removal).

This Court has not found any fault with Defendants' decision to remove. It was not "crystal clear" from the outset that removal would be inappropriate. Additionally, the Court finds that Plaintiff's actions were not laudatory and in fact raise concerns for the Court. Plaintiff utterly failed to respond to Defendant's requested admission, thereby causing a further delay. Considering all the circumstances, the Court declines to reward Plaintiff's actions by awarding fees and costs. Accordingly, Plaintiff's motion for attorneys' fees and costs is **DENIED**.

IV. CONCLUSION

For the foregoing reasons, this Court **GRANTS** Plaintiff's motion to remand and **DENIES** Plaintiff's request for attorneys' fees and costs. The Clerk is directed to remand this case to the Shelby County Circuit Court for the Thirtieth Judicial District of Memphis.

IT IS SO ORDERED this _____ day of _____ 2004.

BERNICE BOUIE DONALD
UNITED STATES DISTRICT JUDGE