

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ELAINE FOSBENNER and	:	CIVIL ACTION
RICHARD FOSBENNER, h/w	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
WAL-MART STORES, INC.	:	
	:	
Defendant.	:	NO. 01-3358

Reed, S.J.

October 12, 2001

MEMORANDUM

Plaintiffs Elaine Fosbenner (“Ms. Fosbenner”) and Richard Fosbenner (“Mr. Fosbenner”), collectively referred to as “the Fosbenners”) filed this action in the Court of Common Pleas of Philadelphia County, Pennsylvania, claiming various injuries as the result of a slip and fall due to the alleged carelessness and negligence of defendant Wal-Mart Stores, Inc. (“Wal-Mart”) in maintaining their premises located at the Franklin Mills Mall, in Philadelphia, Pennsylvania. Wal-Mart removed the case to federal court after plaintiffs refused to sign a stipulation limiting damages to less than \$75,000. The Fosbenners’ motion now seeks an order remanding the case (Document No. 4) on the grounds that the defendant filed its Petition for Removal beyond the 30-day time limitation found in 28 U.S.C. § 1446 (b), and that the amount in controversy in this case is less than \$75,000, the amount required for a federal court to exercise jurisdiction in a diversity case. See 28 U.S.C. § 1332 (a). For the reasons set forth below, the motion will be granted.

The complaint alleges the following. Ms. Fosbenner slipped and fell on the Wal-Mart premises on or about June 5, 1999. (Id. ¶ 1.) An unsafe condition within Wal-Mart’s control caused this fall, and Wal-Mart breached its duty of care to Ms. Fosbenner by failing to maintain

its premises properly. (Id. ¶¶ 3, 4.) As a result of this fall, Ms. Fosbenner “sustained serious, permanent and severe injuries . . . in the nature of acute cervical strain and sprain, lumbar sprain and strain, lumbar radiculopathy, right knee strain and sprain, right ankle strain and sprain, together with a severe and permanent shock to her nervous system.” (Id. ¶ 5.) She also required medical treatment and was unable to attend to her usual occupations and duties, which has or will require her to sustain lost wages. (Id. ¶¶ 6, 7.) The complaint also asserts a loss of consortium claim on behalf of Mr. Fosbenner. (Id. ¶ 10.)

The complaint’s *ad damnum* clause states that “each plaintiff demands damages from the defendant on each count in an amount not in excess of \$50,000.00 with interest and costs of suit.” Though the complaint does not indicate a specific dollar demand, the Civil Cover Sheet filed in the State Court indicates that the amount in controversy is \$50,000 or less.

The Notice of Removal alleges that on June 7, 2001, attorneys for Wal-Mart sent to counsel for plaintiffs a Stipulation Limiting Damages to \$75,000, and defense counsel was informed on June 28, 2001 that counsel for plaintiffs was not willing to stipulate to damages of less than \$75,000. (Id. ¶¶ 6, 7.) This refusal of counsel to stipulate to the amount of damages, along with plaintiffs’ allegations of “severe” and “permanent” injuries serve as the basis for defendants’ assertion of jurisdiction. (Id. ¶ 8.)

Upon review of the Notice of Removal of the Defendant, this Court ordered the defendant to show cause, no later than July 18, 2001, why this matter should not be remanded to the state court. This Court received no response to its Order to Show Cause. Rather, plaintiffs filed this motion to remand.

An action removed to federal court may be remanded to state court “[i]f at any time

before final judgement it appears that the district court lacks subject matter jurisdiction. . . .” 28 U.S.C. § 1447 (c). Removal statutes are to be strictly construed, and all doubts are resolved in favor of remand. See Angus v. Shiley Inc., 989 F.2d 142, 143 (3d Cir. 1993). Plaintiffs first attack the timeliness of the removal petition. Assuming, however, that defendant has filed a timely petition, for the following reasons, this court agrees with plaintiffs’ second argument that remand is appropriate because defendant has failed to show that this action meets the jurisdictional amount required in diversity cases.

Jurisdiction under 28 U.S.C. § 1332(a) rests not only on diversity of citizenship, which is not in doubt here, but also in meeting the requisite amount in controversy. In prior cases, I have held that the defendant must establish the amount in controversy by a preponderance of the evidence, and I reaffirm that conclusion today. See Antonetz v. Royal Insurance Co., Civ. A. No. 99-6414, 2000 WL 962838, at *2 (E.D. Pa. July 5, 2000); Irving v. Allstate Indem. Co., 97 F. Supp. 2d 653, 654 (E.D. Pa. 2000); Mangano v. Halina, Civ. A. No. 97-1678, 1997 WL 697952, at *1 (E.D. Pa. Nov. 3, 1997); Mercante v. Preston Trucking Co., Inc., Civ. A. No. 96-5904, 1997 WL 230826, at *2 (E.D. Pa. May 1, 1997).

In order to determine whether the burden of proof as to the amount in controversy has been met, the court may rely on the pleadings, see Packard v. Provident Nat’l Bank, 994 F.2d 1039, 1045-46 (3d Cir. 1993), stipulations and discovery evidence such as affidavits, depositions, and other documents relevant to the value of the claims, see Meritcare Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214, 222 (3d Cir. 1999), and the Court’s judgement as to the reasonable value of the rights being litigated. See Angus, 989 F.2d at 146. See also, Charles Alan Wright, *et al*, 14B Federal Practice and Procedure, § 3702, at 57 (3d ed. 1998). While the general federal rule

is to decide the amount in controversy from the complaint itself, when the complaint does not limit its request for damages to a precise monetary amount, the district court properly makes an independent appraisal of the value of the claim. See Angus, 989 F.2d at 145.

In their complaint, plaintiffs make two claims: one for bodily injury of Ms. Fosbenner, and the other for loss of consortium on behalf of Mr. Fosbenner. The *ad damnum* clause seeks damages from the defendant on each count in an amount not in excess of \$50,000 with interest and costs of suit. The *ad damnum* clause in the complaint is the usual and customary reference point to determine the amount in controversy. See Meritcare, 166 F.3d at 217. However, the rules in many state courts place limits on the amounts that may be cited in *ad damnum* clauses. See id. In this case, for example, the complaint was originally filed as an arbitration matter with the Court of Common Pleas. In Pennsylvania, arbitration matters are limited to a maximum of \$50,000. See 42 Pa. C.S.A. § 7361(b). In cases where the amount in controversy has been stated as an open-ended claim of a certain amount, “the amount in controversy is not measured by the low end of an open-ended claim, but rather by a reasonable reading of the value of the rights being litigated.” Angus, 989 F.2d at 146 (citations omitted).

Having thoroughly reviewed the parties’ submissions, I conclude, for the reasons which follow, that Was-Mart has not satisfied its burden of showing by a preponderance of the evidence that the amount in controversy exceeds \$75,000.

Wal-Mart has produced no evidence beyond the pleadings and plaintiffs’ failure to agree to sign an affidavit to support defendant’s contention that the jurisdictional threshold has been reached. Wal-Mart’s argument rests on the assumption that plaintiffs’ refusal to sign the

affidavit is an admission that the value of the claim exceeds \$75,000.¹ The defendant also notes that plaintiffs have claimed serious, permanent and severe injuries, (Compl. ¶ 5), and that these injuries, with attendant medical bills, suggest that the damages, if proven, will exceed \$75,000. An allegation of severe and serious injuries, however, does not automatically translate into the likelihood that the damages will be more than \$75,000. See Penn v. Wal-Mart Stores, Inc., 116 F.Supp.2d 557, 567-568 (D.N.J. 2000) (collecting cases). While Wal-Mart need not assume the task of proving the entire extent of plaintiffs' damages, it must give the Court something more than tenuous inferences and assumptions if it hopes to sustain its burden of proof. Wal-Mart has simply failed to show that it is more likely than not that Ms. Fosbenner's negligence claim, Mr. Fosbenner's loss of consortium claim, or even the aggregation of the two claims exceed \$75,000. Without the actual extent of plaintiffs' injuries being known, or at least the extent of the out of pocket expenses such as medical bills, lost wages and future medical treatment, this Court is unwilling to draw the conclusion that the jurisdictional threshold has been reached. Ms. Fosbenner alleges soft tissue injury, not the types of injuries which immediately demonstrate that the amount in controversy exceeds \$75,000. "If this Court has to guess, defendant has not proved its point." See Irving, 97 F. Supp. 2d at 656.

"Burdens of proof are meaningful elements of legal analysis, and occasionally, where the

¹ In support, defendant relies on Johnson v. Costco Wholesale, Civ. A. No. 99-CV-3576, 1999 WL 740690 (E.D.Pa. Sept. 22, 1999), in which the court determined in a defamation suit that the defendant had met its burden in demonstrating the requisite jurisdictional amount. The court, in part, relied on the fact that plaintiffs had refused to sign a stipulation. See id., at *3. However, this was only one factor in the court's decision. The court also concluded an independent assessment that the jurisdictional amount had been met. See id., at *4.

Similarly, defendant turns to Kobaissi v. American Country Ins. Co., 80 F. Supp. 2d 488 (E.D. Pa. 2000), to support its position that plaintiffs cannot commit artful pleading by artificially minimizing damages to prevent federal jurisdiction while still being able to obtain higher damages in state court. See id. at 490. While it appears that plaintiffs have been less than candid, the defendant still bears the burden of demonstrating that the action likely meets the jurisdictional amount of \$75,000.

evidentiary record is wanting, the burden of proof will determine the outcome of a motion.”

Simon v. Ward, 80 F. Supp. 2d 464, 472 (E.D. Pa. 2000). Such is the case here. I therefore conclude that Wal-Mart has not carried its burden of proof and will grant the motion for remand.

An appropriate Order follows.

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RICHARD FOSBENNER, h/w	:	
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Plaintiffs,	:	
	:	
v.	:	
	:	
WAL-MART STORES, INC.	:	
	:	
Defendant.	:	NO. 01-3358

ORDER

AND NOW this 12th day of October, 2001, upon consideration of the motion of plaintiffs Elaine Fosbenner and Richard Fosbenner to remand this action to the Court of Common Pleas of Philadelphia County, Pennsylvania (Document No. 4), and having concluded, for the reasons stated in the foregoing memorandum, that defendant Wal-Mart has not carried its burden of establishing that the amount in controversy in this case meets the requisite amount in controversy set forth in 28 U.S.C. § 1332(a), it is hereby **ORDERED** that the action is hereby **REMANDED** to the Court of Common Pleas of Philadelphia County, Pennsylvania, Civil Action No. 01-092581, for lack of subject matter jurisdiction.

The clerk of Court shall forthwith return the record to the Prothonotary of the Court of Common Pleas of Philadelphia County and close this file.

LOWELL A. REED, JR., S.J.