IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ALFRED THOMAS, JR. ET AL. PLAINTIFFS

V. NO. 2:00CV34-B-B

ILLINOIS CENTRAL RAILROAD, ET AL. DEFENDANTS

MEMORANDUM OPINION

This cause comes before the court on the plaintiffs' motion to remand. The court has duly considered the parties' memoranda and exhibits and is ready to rule.

The plaintiffs brought this action in state court[1] against Illinois Central Railroad Company [Illinois Central], Dale Givens, the train engineer, and Joey Friend, the train conductor, for negligence resulting in the collision between an Illinois Central train and the plaintiffs' vehicle. The defendants removed this cause on the ground of diversity jurisdiction. The notice of removal alleges that Givens and Friend, nondiverse defendants, were fraudulently joined. Absent fraudulent joinder, the individual defendants' Mississippi citizenship defeats diversity jurisdiction[2] and precludes removal of this cause under 28 U.S.C. § 1441(b) (a diversity action "shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought").[3]

If fraudulently joined, Givens and Friend's citizenship is not considered in determining whether diversity of citizenship exists. Rodriguez v. Sabatino, 120 F.3d 589, 592 (5th Cir. 1997), cert. denied, 523 U.S. 1072, 140 L. Ed. 2d 665 (1998); Jernigan v. Ashland Oil, Inc., 989 F.2d 812, 817 (5th Cir.), cert. denied, 510 U.S. 868, 126 L. Ed. 2d 150 (1993). The removing party carries a heavy

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[1]Two actions were filed in state court for personal injuries and wrongful death and consolidated after removal to this court.

[2]The plaintiffs are Mississippi citizens.

[3]The plaintiffs do not specifically raise this removal defect.

burden in establishing fraudulent joinder and must demonstrate it by clear and convincing evidence. Jernigan, 989 F.2d at 815; B., Inc. v. Miller Brewing Co., 663 F.2d 545, 549 (5th Cir. 1981). Fraudulent joinder may be established by showing outright fraud in the plaintiff's pleading of jurisdictional facts. Jernigan, 989 F.2d at 815; B., Inc., 663 F.2d at 549. In addition, "a joinder is fraudulent if the facts asserted with respect to the resident defendant are shown to be so clearly false as to demonstrate that no factual basis existed for any honest belief on the part of the plaintiff that there was joint liability." Bolivar v. R & H Oil & Gas Co., 789 F. Supp. 1374, 1376-77 (S.D. Miss. 1991). Fraudulent joinder may also be established as follows:

> To prove their allegation of fraudulent joinder [the removing parties] must demonstrate that there is no possibility that [the plaintiff] would be able to establish a cause of action against [the nondiverse defendants] in state court. In evaluating fraudulent joinder claims, we must initially resolve all disputed questions of fact and all ambiguities in the controlling state law in favor of the non-removing party. We are then to determine whether that party has any possibility of recovery against the party whose joinder is questioned.

Dodson v. Spiliada Maritime Corp., 951 F.2d 40, 42 (5th Cir. 1992), cited in Burden v. General Dynamics Corp., 60 F.3d 213, 216 (5th Cir. 1995). If "there is no possibility that the state court would recognize a valid cause of action against the non-diverse defendants . . . then those defendants have been fraudulently joined." Burden, 60 F.3d at 217-18. See Laughlin v. Prudential Ins. Co., 882 F.2d 187, 190 (5th Cir. 1989) ("the court may find fraudulent joinder only if it concludes that the plaintiff has no possibility of establishing a valid cause of action against the in-state defendant"). The Fifth Circuit has stated:

> Mindful of our obligation to exercise diversity jurisdiction only in cases of complete diversity, we will not authorize removal on the basis of fraudulent joinder unless there is *no possibility* that the plaintiff could state a cause of action against the non-diverse defendants.

Sid Richardson Carbon & Gasoline Co. v. Interenergy Resources, LTD., 99 F.3d 746, 751-52 (5th Cir. 1996) (citing B, Inc., 663 F.2d at 549).

The plaintiffs filed the affidavit of Jimmy Scott, a railroad operations consultant, as an exhibit to the motion to remand. The defendants move to strike Scott's affidavit in part for failure to cooperate in discovery and noncompliance with a discovery order issued by the United States Magistrate Judge on July 18, 2000. Scott failed to produce certain requested documents at his deposition, and on the defendants' motion, the magistrate judge extended the discovery period for purposes of the remand issue through August 15, 2000 and directed that the plaintiffs "as soon as possible arrange for the re-taking of Jim Scott's deposition at a date and time **convenient for him and counsel for the parties**." (Emphasis added). On July 20, 2000 defense counsel faxed a letter to the plaintiffs' counsel advising that he would be unavailable until August 1. On July 24, 2000, the plaintiffs' counsel faxed a letter to Scott requesting possible deposition dates, along with a copy of defense counsel's letter. In a letter dated July 27, 2000 the plaintiffs' counsel advised defense counsel that Scott would be available on August 22, 24 or 25, 2000. The next day defense counsel faxed a response proposing alternative dates of August 1, 2, 3, 4, 7 or 8 and asserting that Scott's deposition "is suppose [sic] to be taken before August 15." On August 8, the plaintiffs' counsel faxed defense counsel a letter proposing August 9. On the same day, defense counsel faxed a response, stating in part:

> I cannot take Scott's deposition on August 9. I have been working on a Response to the Motion to Remand and I plan to file it without making any further efforts to depose Mr. Scott again.

The defendants move to strike Scott's opinions "on the issue of the location of the train when the horn began sounding on its approach to the crossing prior to the accident and on whether the train horn was sounded for the distance required by law." The defendants contend that they "made every effort" to reschedule Scott's deposition and that the plaintiffs "made no reasonable efforts to comply" with the magistrate judge's order. The court rejects the defendants' argument that the plaintiffs' counsel failed to cooperate; it is the defense counsel who eliminated any possible date before August 1 and after August 8. Since the defense counsel was granted an extension of one month after the discovery deadline to respond to the motion to remand and declined to make "any further efforts to depose Mr.

Scott again," the court finds that the plaintiffs' reliance on Scott's affidavit is not prejudicial for purposes of the motion to remand. Although Scott was not re-deposed, defense counsel had deposed Scott for three hours and cites his deposition testimony in opposition to the motion to remand. Accordingly, the court finds that the defendants' motion to strike Scott's affidavit in part is not well taken and should be denied.

The complaints allege that Givens and Friend were negligent in failing to maintain a proper lookout, sound an adequate audible warning, sound the signals required by Miss. Code Ann. § 77-9-225 and timely apply the brakes under the circumstances. The accident report states that approximately 25 boxcars were parked on the northwest sidetrack near the crossing blocking plaintiff Alfred Thomas' view of the approaching southbound train; the plaintiffs' vehicle was eastbound. The lead unit of the train struck the plaintiffs' vehicle in the railroad crossing. Scott states in his affidavit that Givens and Friend, under the conditions of the crossing, failed to use the horn within the required distance and warn the plaintiffs within the required time. Givens and Friend testified in their depositions that a crossing horn pattern was sounded as the train approached the crossing. The defendants submitted two reports of Professor Robert A. MacRae, stating that the event recorder data demonstrates that the train whistle was sounding in excess of the 900 feet required by law. According to Scott's interpretation of the event recorder data, the train's horn was sounded for a distance in excess of 800 feet but less than 900 feet in advance of the crossing. Plaintiff Elnora Thomas, a passenger in the plaintiffs' vehicle at the time of the collision, testified in her deposition that she did not hear the sounding of the horn, bell or whistle.

The defendants challenged Scott's knowledge regarding the particular activation device for the horn. In rebuttal, the plaintiffs submitted the affidavit of Richard Beall, stating that Givens and Friend "failed to properly warn the plaintiffs within the required time under the given circumstances" and to "sound the whistle long and loud." The defendants move to strike Beall's affidavit on the ground that they received the affidavit after the August 15 deadline to complete discovery related to the remand issue. The plaintiffs assert that they submitted Beall's affidavit in rebuttal to MacRae's reports which

were not exhibits to the notice of removal and

had not been produced before the plaintiffs moved to remand. The court notes that MacRae's reports were first produced as exhibits to the defendants' response dated August 16 after the discovery deadline. The court finds that Beall's affidavit which corroborates Scott's opinion is not prejudicial to the defendants for purposes of determining possible liability on the part of the nondiverse defendants. Accordingly, the court finds that the defendants' motion to strike Beall's affidavit is not well taken and should be denied.[4]

The evidence before the court reflects genuine issues of material fact and does not preclude a possible right of recovery against the individual defendants for negligent operation of the train, e.g., failing to take the visual obstruction of the boxcars into consideration as they approached the crossing. Givens and Friend arguably should have foreseen that the boxcars would obstruct a motorist's view of an approaching train and that the use of signals even beyond the statutory requirement would be necessary, under the circumstances, to give sufficient warning of the train's entry into the crossing. A "peculiar environment" exists if

> the conditions and circumstances were such that the employees knew, or in the exercise of reasonable care and caution should have known, that a person driving upon the street at a reasonable rate of speed in an automobile properly equipped with lights, and carefully operated, **could not see or might not be able to see the cars in time to avoid a collision therewith .**

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[4]After the plaintiffs filed a reply along with exhibits on August 28, the defendants filed a motion for leave to file a rebuttal brief if necessary. After the plaintiffs submitted a rebuttal brief on September 11, the defendants again moved for leave to file an additional brief in order to controvert plaintiff Elnora Thomas' deposition testimony; the defendants acknowledge that their objection to Beall's affidavit is before the court. The defendants contend that they will "demonstrate that pursuant to law and due to the presence of admittedly 'accurate and reliable' event recorder data, the deposition testimony of Elnora Thomas does not constitute facts warranting any remand of this matter." Since Elnora Thomas was deposed on May 10, 2000, more than three months before the defendants responded to the motion to remand, and since the court has duly considered the defendants' objection to Beall's affidavit, the court finds that the defendants' motions for leave to file a rebuttal/additional brief are not well taken and should be denied.

Gulf, M. & N. R. Co. v. Holifield, 120 So. 750, 751 (Miss. 1929) (emphasis added). *See Spilman v. Gulf & S.I.R.Co.*, 163 So. 445, 445-46 (Miss. 1935) ("the peculiar environment . . . means some peculiar condition of hazard which reasonable prudence should have reasonably foreseen would likely lead to a collision, notwithstanding ordinary care on the part of the driver of the motor car"). The court finds that the defendants have failed to show by clear and convincing evidence that, under Mississippi law, there is no possibility of a negligence claim against Givens or Friend. Therefore, the individual defendants' Mississippi citizenship defeats diversity jurisdiction. An order granting the motion to remand for lack of subject matter jurisdiction will issue accordingly.

The plaintiffs seek an award of costs and expenses, including attorney fees, incurred as a result of the removal. The decision whether to award costs and expenses is discretionary under 28 U.S.C. § 1447(c) ("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."). "[T]he imposition of expenses including attorney's fees is usually reserved for cases in which the removal was effected in bad faith or where the non-removability of the action was obvious from the face of the pleadings themselves even if removal was effected in good faith." *J. R. Laughead, Inc. v. Air Dayco Corp.*, 942 F. Supp. 339, 342 (S.D. Tex. 1996). *See Miranti v. Lee*, 3 F.3d 925, 928 (5th Cir. 1993) ("the propriety of the defendant's removal continues to be central in determining whether to impose fees"). Since the issue of fraudulent joinder of Givens and Friend is fact-based and the defendants relied on interrogatory answers in removing this cause, the court, in its discretion, declines to award costs and expenses to the plaintiffs.

THIS, the ____ day of February, 2001.

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NEAL B. BIGGERS, JR.
SENIOR U.S. DISTRICT JUDGE