

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

FLORENCE DIVISION

SHANTEZ S. FERGUSON, a minor under)
the age of fourteen (14) years, by her)
Guardian ad Litem, Carolyn P. Ferguson,)
Plaintiff,) C/A No.: 4:94-2696-22
v.)
WAL-MART STORES, INC.,) **ORDER**
Defendant.)
_____)

This matter is before the court on motion of Plaintiff to remand. The court has reviewed the record and the memoranda of counsel and heard argument of counsel in a telephone conference held on November 15, 1994. For the reasons set forth below, the court determines that remand is appropriate.

Plaintiff, a South Carolina citizen, sued Defendant, a foreign corporation, for personal injuries allegedly caused by a metal shelf that fell on Plaintiff. Plaintiff originally filed this action in the Court of Common Pleas, Horry County, South Carolina, on September 9, 1994. On October 4, 1994, Defendant removed the action based upon diversity jurisdiction. Plaintiff filed a motion to remand on October 24, 1994. With her motion to remand, Plaintiff also filed a stipulation that the amount in controversy, exclusive of interest and costs, does not exceed \$50,000.00.

The sole issue before the court is whether the \$50,000.00 amount in controversy requirement of diversity jurisdiction is met. Plaintiff asserts that her stipulation is determinative.

Defendant in its memorandum in opposition asserts that the amount in controversy must be determined at the time the action is commenced and that a post-removal stipulation regarding the amount in controversy cannot destroy diversity jurisdiction. Memo. in Opp., at 1-2 (citing St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938)).

The court notes that the removal statute is to be strictly construed and doubts resolved in favor of remanding the case to state court. Mulcahey v. Columbia Organic Chem Co., Inc., 29 F.3d 148, 151 (4th Cir. 1994); McGraw v. FD Services, Inc., 811 F.Supp. 222, 223 (D.S.C. 1993). The burden is on Defendant to prove a case was properly removed. Mulcahey, 29 F.3d at 151; Bennett v. Bally Mfg. Corp., 785 F.Supp. 559, 560 (D.S.C. 1992); Hinks v. Associated Press, 704 F.Supp. 638 D.S.C. 1988). Although the precise nature of Defendant's burden "is a subject of much controversy," Gafford v. General Electric Co., 997 F.2d 150, 155 (6th Cir. 1993), the court finds that it need not resolve this issue because under any standard of proof, the court is convinced that Plaintiff's stipulation reveals that the court lacks subject matter jurisdiction.

As a general rule, the amount in controversy in an action which is removed based on diversity of citizenship should be measured "at both the time of commencement [of the action in state court] and the time of removal." Sayers v. Sears, Roebuck and Co., 732 F.Supp. 654, 656 (W.D.Va.1990); Griffin v. Holmes, 843 F.Supp. 81, 87 (E.D.N.C. 1993). A corollary of this rule is that Plaintiff in such an action may not defeat diversity jurisdiction by filing a post-removal amendment of the complaint which reduces the amount of damages requested by the complaint below the amount in controversy required by 28 U.S.C. § 1332(a). St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 292 (1938).

The court finds that St. Paul is not controlling in this case. Defendant concedes Plaintiff

seeks "unspecified actual and punitive damages." Memo. in Opp., at 3. The court finds the reasoning of Cole v. Great Atlantic & Pacific Tea Co., 728 F.Supp. 1305 (E.D.Ky. 1990), a case with facts similar to the present one, to be persuasive:

Unlike the [Saint Paul] scenario, [the plaintiff's] subsequent stipulation did not have the effect of changing the information on which [the defendant] relied, but instead providing the information for the first time. The practical result is that when faced with a complaint effectively silent as to damages, the defendant should make an independent inquiry as to the extent of damages or run the risk of remand when the plaintiff, as here, provides that information.... This rule conforms with [Saint Paul] as it applies only when the complaint does not state a removable case, not when a plaintiff files an action that is removable and then changes the status of the case to defeat removal.

Id. at 1309.

Although the Fourth Circuit Court of Appeals has not addressed the issue, there are numerous decisions supporting the Cole decision. See Angus v. Shiley, Inc., 989 F.2d 142, 145 n.3 (3d Cir. 1993); Asociacion Nacional v. Dow Quimica, 988 F.2d 559, 565 (5th Cir. 1993), cert. denied, 114 S.Ct. 685 (1994); Griffin v. Holmes, 843 F.Supp. 81, 88 (E.D.N.C. 1993); Workman v. Kawasaki Motors Corp., 749 F.Supp. 1010 (W.D.Mo. 1990); Dirosa v. Grass, 1994 WL 583276 *1 (E.D.La. Oct. 19, 1994); but see In re Shell Oil Co., 970 F.2d 355, 356 (7th Cir. 1992).

The court finds itself in agreement with the decisions characterizing a post-removal stipulation regarding the amount in controversy as a clarification permitted, not forbidden, by Saint Paul. Applying the principle to the present case, the court accepts Plaintiff's stipulation that the total amount of compensatory and punitive damages sought by her complaint is less than \$50,000.00. Plaintiff's counsel agreed in the telephone conference held on the motion to remand that Plaintiff would not seek damages in excess of \$50,000.00. Therefore, the court finds that it lacks subject matter jurisdiction because the amount in controversy is insufficient.

Accordingly, the action is remanded to the Court of Common Pleas, Horry County, South Carolina. A certified copy of this order of remand shall be mailed by the clerk of this court to the clerk of the Court of Common Pleas, Horry County, South Carolina.

IT IS SO ORDERED.

CAMERON MCGOWAN CURRIE
UNITED STATES DISTRICT JUDGE

Florence, South Carolina

November ____, 1994