

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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CAITLYNN HARRIS by her guardian  
ad litem THOMAS E. GREENWALD,  
SUSAN HARRIS and KIM HARRIS,

Plaintiffs,

v.

MEMORANDUM AND ORDER  
05-C-164-S

HOME DEPOT U.S.A., Inc. a/k/a  
THE HOME DEPOT, INC., d/b/a  
HOME DEPOT, PHYSICIANS PLUS  
INSURANCE CORPORATION, WEST  
BEND MUTUAL INSURANCE COMPANY  
and CORESOURCE, INC.

Defendants.

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Plaintiffs Caitlynn Harris, by her guardian ad litem Thomas E. Greenwald, Susan Harris and Kim Harris commenced this civil action in the Circuit Court for Dane County, Wisconsin against defendants Home Depot U.S.A., Inc. and Physicians Plus Insurance Corporation. The complaint was later amended to add claims against defendants West Bend Mutual Insurance Company and Coresource, Inc. Defendant Home Depot removed citing diversity jurisdiction, 28 U.S.C. § 1332, as the basis for removal. Presently before the Court is plaintiffs' motion to remand. The following facts are undisputed.

BACKGROUND

On April 28, 2001 three-year-old Caitlynn Harris was injured when a wall cabinet fell on top of her during a visit to a Janesville, Wisconsin Home Depot store with her parents Susan and

Kim Harris. On March 19, 2004 plaintiffs commenced the present action against Home Depot in the Circuit Court for Dane County, Wisconsin. Caitlynn, Sue and Kim Harris are Wisconsin citizens. Home Depot is a Delaware corporation with its principal place of business in Georgia. In addition to Home Depot, plaintiffs named Caitlynn's insurer Physicians Plus Insurance Corporation as a defendant because it has asserted a subrogation interest. Physicians Plus is a Wisconsin corporation.\* The complaint does not state an amount in controversy.

On April 19, 2004 Home Depot filed its answer. Home Depot's answer included the affirmative defense that Caitlynn's injuries were "caused in whole or in part by the fault of other persons or entities over whom this answering defendant had no control, or right of control, and for whose conduct this answering defendant is not liable." On April 22, 2004 Home Depot served plaintiffs with a request to admit that their claimed damages exceeded \$75,000, exclusive of interest and costs.

On May 6, 2004 plaintiffs filed an amended complaint naming additional defendants Coresource, Inc. and West Bend Mutual Insurance Company. Plaintiffs named Coresource as a defendant because, like Physicians Plus, it has asserted a subrogation interest. Coresource is an Illinois corporation.\* Pursuant to

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\*. Neither the complaint, the amended complaint, nor the removal petition alleges the principal places of business of defendants Physicians Plus and Coresource.

Wisconsin's direct-action statute, Wis. Stat. § 803.04(2), plaintiffs named Susan and Kim Harris's insurer West Bend Mutual as a defendant in response to Home Depot's affirmative defense that suggested the fault of "other persons" present at the time of the accident. Susan and Kim Harris were the only other persons present at the time of the accident. The claim against West Bend Mutual alleges in relevant part as follows:

in the event that the trier of fact does find, as alleged in the said affirmative defense of The Home Depot, that the injuries sustained by Caitlynn Harris . . . were caused, in whole or in part, by the negligence of either Susan Harris or Kim Harris . . . West Bend is directly liable to the Plaintiff, Caitlynn Harris, for the damages she sustained as a result of such negligence.

West Bend Mutual is a Wisconsin corporation with its principal place of business in Wisconsin.

On May 11, 2004 Physicians Plus filed an amended answer with cross-claims against Home Depot and West Bend Mutual. On May 25, 2004 Home Depot's request to admit that plaintiffs' claimed damages exceeded \$75,000 was deemed admitted pursuant to Wis. Stat. § 804.11(1)(b). On June 8, 2004 West Bend Mutual filed its answer to plaintiffs' amended complaint and Physicians Plus's cross-claim. On June 17, 2004 Coresource filed its answer to plaintiffs' amended complaint with a counterclaim which alleged that Caitlynn's injuries were the result of the negligence of Susan and Kim Harris. Coresource's answer also included cross-claims against Home Depot and West Bend Mutual.

On March 3, 2005 West Bend Mutual filed a motion to dismiss for failure to state a claim. On March 8, 2005 Home Depot filed an amended answer to plaintiffs' amended complaint. In its amended answer, Home Depot withdrew its affirmative defense that had suggested the possible fault of Susan and Kim Harris. On March 17, 2005 defendant Home Depot U.S.A., Inc. filed its notice of removal.

#### MEMORANDUM

Plaintiffs have filed a timely motion to remand this matter to the Circuit Court for Dane County, Wisconsin. Generally, removal is appropriate only if a federal district court has original jurisdiction over the action. Doe v. Allied-Signal, Inc., 985 F.2d 908, 911 (7th Cir. 1993). As the party seeking removal, Home Depot bears the burden to establish federal jurisdiction. Removal statutes are construed narrowly. Any doubt regarding jurisdiction is resolved in favor of remand.

Home Depot alleges diversity of citizenship, 28 U.S.C. § 1332, as the basis for removal. It filed its notice of removal 363 days after the present action was commenced in state court. Defendant argues that the action initially was not removable because the complaint did not state an amount in controversy. Home Depot served plaintiffs with a request to admit that the amount in controversy exceeded the \$75,000 jurisdictional requirement. By

the time this request was deemed admitted, however, plaintiffs had filed an amended complaint joining defendant West Bend Mutual. West Bend Mutual, like plaintiffs, is a Wisconsin citizen. Consequently, its joinder destroyed the "complete diversity" needed to establish diversity jurisdiction. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

Home Depot agrees that West Bend Mutual was properly joined as a defendant. Otherwise, the action became removable on May 25, 2004 and its March 17, 2005 notice of removal was untimely. 28 U.S.C. § 1446(a). Home Depot suggests that West Bend Mutual was a proper party until March 1, 2005, at which time its joinder became fraudulent.

Between February 25, 2005 and March 1, 2005 Home Depot, Physicians Plus, Coresource and West Bend Mutual prepared and signed a document entitled "Stipulation and Order for Dismissal" in which they offered to consent to the dismissal of "all claims against Susan Harris, Kim Harris and West Bend Mutual Insurance Company, whether or not pleaded . . . with prejudice." This document was presented to plaintiffs' attorney, but he did not accept their offer. He did not sign the stipulation. Nor was the stipulation approved by the state court. Consequently, the purported stipulation has no legal effect. See, e.g., Wis. Stat. § 807.05.

Nevertheless, Home Depot argues that upon the "execution" of this stipulation (i.e., its signing by Home Depot, Physicians Plus, Coresource and West Bend Mutual), Caitlynn's claim against West Bend Mutual "evaporated," that this document "eliminated" or "abandoned" with prejudice the basis for Caitlynn's claim against West Bend Mutual, and that defendants have now "expressly foregone" any claim that Susan and Kim Harris are liable for their daughter's injuries. Consequently, Home Depot argues that plaintiffs' amended complaint no longer states a claim against West Bend Mutual upon which relief can be granted because no party will argue that Susan Harris, Kim Harris, or West Bend Mutual is liable for Caitlynn's injuries.

Home Depot's argument is unpersuasive. Still pending in this action are Coresource's counterclaim that Caitlynn's injuries were the result of the negligence of Susan and Kim Harris and its cross-claim against West Bend Mutual, Physicians Plus's cross-claim against West Bend Mutual, and plaintiffs' claim against West Bend Mutual. Home Depot concedes that these claims, counterclaims and cross-claims were proper when they were initially pleaded. They have not been properly dismissed. Consequently, West Bend Mutual is still a proper party to this litigation. It is a Wisconsin citizen. Plaintiffs Caitlynn, Sue and Kim Harris are also Wisconsin citizens. There is not complete diversity of

citizenship. Accordingly, the matter will be remanded to the Circuit Court for Dane County, Wisconsin.

ORDER

IT IS ORDERED that this matter is remanded to the Circuit Court for Dane County, Wisconsin with costs.

Entered this 13th day of May, 2005.

BY THE COURT:

/s/

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JOHN C. SHABAZ  
District Judge