

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

LISA COOPER, Individually,
and GARY COOPER,
Individually,

Plaintiffs,

OPINION AND
ORDER
99-C-722-C

v.

EAGLE RIVER MEMORIAL
HOSPITAL, INC. and WISCONSIN
PATIENTS COMPENSATION FUND,

Defendants.

In this civil action for monetary relief, plaintiff Lisa Cooper, as Independent Administrator of the Estate of Matthew Patrick Cooper, brought a claim of medical malpractice under Wisconsin law against defendants Eagle River Memorial Hospital, Inc. and Wisconsin Patients Compensation Fund. In the final pretrial conference order entered on September 6, 2000, I held that the estate of Matthew Cooper could not assert a claim for loss of society and companionship under Wisconsin law, that the estate could not recover for things such as funeral expenses because there was no proof that the estate had expended any money on behalf of Matthew and that the estate could not recover for Matthew's pain and suffering without the

benefit of expert testimony on the issue. In that same order, I allowed plaintiff to amend its complaint to assert a loss of society and companionship claim by Matthew's parents, Lisa and Gary Cooper, reconsidering the order entered on September 5, 2000, in which I denied plaintiff's request for leave to file an amended complaint to add the Coopers. In light of the ruling that the estate could not recover any damages, I decided that allowing plaintiff to amend its complaint to add Matthew's parents was necessary under Rule 15(a)'s mandate that leave to file amendments "shall be freely given when justice so requires." Pursuant to my order of September 6, 2000, plaintiffs filed an amended complaint on September 11, 2000, in which they named Lisa Cooper and Gary Cooper as plaintiffs.

Presently before the court are defendants' motion to dismiss plaintiffs' claim for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6) and 12(h)(3), motion in limine to preclude plaintiffs from introducing any evidence as to damages unrelated to plaintiffs Lisa and Gary Cooper's claim for loss of society and companionship and motion to strike plaintiffs' claim for funeral expenses and any claims on behalf of the estate against defendants. Because I cannot determine to a "legal certainty" that plaintiffs' claim does not meet the jurisdictional amount, defendants' motion to dismiss will be denied. Defendants' motion in limine and motion to strike will be granted because plaintiffs have been granted leave to amend their complaint for the sole purpose of asserting Lisa and Gary Cooper's claim of loss

of society and companionship, which does not include a claim for emotional distress or funeral expenses.

I. MOTION TO DISMISS

Defendants contend that this court lacks subject matter jurisdiction over plaintiffs' claim because the amount in controversy does not meet the jurisdictional amount required for diversity jurisdiction under 28 U.S.C. § 1332(a). 28 U.S.C. § 1332(a) states in relevant part: "The district courts shall have original jurisdiction in all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interests and costs." Rule 12(h)(3) requires a court to dismiss the action "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter." In determining whether the amount in controversy meets the statutory minimum, "the relevant time for establishing the amount in controversy is at the commencement of the action." Moore's Federal Practice, § 102.104(1), at 102-167 (Matthew Bender 3d ed. 2000). Whether the case meets the jurisdictional minimum is an issue that "may be raised by either party at any time, and if not raised by the parties, it is to be raised by the court on its own initiative." Id. "Once the propriety of the amount in controversy is challenged, the party seeking to invoke the subject matter jurisdiction of the federal courts has the burden of proving its existence . . . by showing

that it does not appear to a legal certainty that the claim for relief is less than the statutorily prescribed jurisdictional amount.” Wright et al., Federal Practice and Procedure § 3702, at 32-34 (3d ed. 1998); Target Market Publishing, Inc. v. Advo, Inc., 136 F.3d 1139, 1142 (7th Cir. 1998) (stating that if the defendant challenges the sufficiency of the amount in controversy, “plaintiff must support its assertion with 'competent proof,' which means 'proof to a reasonable probability that jurisdiction exists'”) (internal citations omitted).

Defendants contend that there are two reasons why this court lacks subject matter jurisdiction in this case. First, defendants make a half-hearted argument that this court lacks jurisdiction because plaintiffs' original complaint pleaded damages in excess of \$50,000, rather than \$75,000. Plaintiffs' error is not fatal. 28 U.S.C. § 1653 allows “[d]efective allegations of jurisdiction [to be] amended” if jurisdiction in the case does exist. Defendants' central argument is that the amount at issue does not meet the jurisdictional minimum because the court ruled that the sole named plaintiff in the original complaint could not recover any damages from defendants as the case was originally filed. From this, defendants reason that this court lacked jurisdiction to enter an order allowing plaintiff to amend its complaint to add Matthew Cooper's parents. I am not persuaded that this court lost jurisdiction *at the moment* I held that the estate could not recover any damages against defendants and as a result, lacked jurisdiction to allow plaintiff to amend its complaint.

It is well-settled that satisfaction of the § 1332(a) diversity requirement is determined as of the date plaintiff filed the complaint. See Grinnell Mutual Reinsurance Co. v. Shierk, 121 F.3d 1114, 1116 (7th Cir. 1997). “[I]f the amount in controversy exceeds the jurisdictional amount when a suit is filed in federal court, the fact that subsequent events reduce the total amount in controversy will not divest the court of diversity jurisdiction.” Id. (citing St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 289-90 (1938)). Therefore, defendants' argument that this court lost jurisdiction at the moment I held that the estate could not recover any damages is inconsistent with the rule that “diversity jurisdiction is not lost by post-filing events that change or disturb the state of affairs on which diversity was properly laid at the outset.” Wolde-Meskel v. Vocational Instruction Project, 166 F.3d 59, 62 (2d Cir. 1999); see also Rosado v. Wyman, 397 U.S. 397, 405 n.6 (1970) (stating “a federal court does not lose jurisdiction over a diversity action which was well founded at the outset even though one of the parties may later change domicile or the amount recovered falls short of [the statutory minimum]”). Defendants are mistaken in their contention that diversity jurisdiction vanished *after* I held that the estate could not recover any damages and *before* I granted plaintiff leave to amend its complaint. Subject matter jurisdiction does not come and go with each event in a case; rather it attaches at the time of filing the original complaint.

Defendants' reliance on Rosenboro v. Kim, 994 F.2d 13 (D.C. Cir. 1993), Goldman v.

Northwest Airlines, Inc., 775 F. Supp. 1214 (D. Minn. 1991) and Engel by Engel v. Trustees of Berwick Academy, 807 F. Supp. 9 (D. Me. 1992), is misplaced for two reasons: none of the cases cited is binding precedent on this court and none presents a factual situation analogous to this case. In Rosenboro, 994 F.2d at 17, the Court of Appeals for the District of Columbia held that the district court had properly dismissed the case for lack of jurisdiction because the plaintiff had failed to show to a legal certainty that her claim for injuries resulting from a car accident met the jurisdictional requirement. The court noted that the plaintiff had “submitted *no* medical evidence showing that she had a permanent back ailment and at one point expressly *denied* having any permanent injury that prevented her from performing normal physical activities.” Id. As a result, the court held that the “inconsistencies in [plaintiff’s] own accounts of her condition, and, more importantly, the total lack of medical findings showing that she has a continuing or permanent injury convince us to a legal certainty that her claim does not satisfy the amount in controversy requirement.” Id. See also Engel by Engel, 807 F. Supp. 9 (holding that personal injury plaintiffs failed to present admissible evidence to show jurisdictional minimum was met because they were precluded from presenting medical testimony as a result of discovery sanctions); Goldman, 775 F. Supp. at 1215 (holding that broad, conclusory assertions of physical injury did not justify damage claim in excess of jurisdictional amount).

In the original complaint, plaintiff sought damages for the pain and suffering Matthew

had endured during his eight days of life. Defendants do not challenge whether plaintiff's original claim for pain and suffering would have met the \$75,000 jurisdictional amount. Rather, defendant's argument is that the estate's failure to name an expert to prove Matthew's pain and suffering resulted in its inability to recover any sum of money, reducing the jurisdictional amount to zero and depriving this court of diversity jurisdiction. However, I am not persuaded that plaintiff's failure to name an expert after the original complaint was filed divests this court of subject matter jurisdiction pursuant to § 1332. I cannot conclude that at the time the complaint was filed, it “appeared to a legal certainty that the claim for relief [was] less than the statutorily prescribed jurisdictional amount.” Wright, Federal Practice and Procedure § 3702.

In plaintiffs' amended complaint, they have pleaded damages in excess of \$75,000 for their loss of society and companionship claim. In order to dismiss the case for lack of jurisdiction, “[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.” St. Paul Mercury, 303 U.S. at 288-89. “Only three situations clearly meet the legal-certainty standard for purposes of defeating the court's subject matter jurisdiction: 1) when the terms of a contract limit the plaintiff's possible recovery; 2) when a specific rule of substantive law or measure of damages limits the amount of money recoverable by the plaintiff; and 3) when independent facts show that the amount of damages

was claimed by the plaintiff merely to obtain federal court jurisdiction.” Wright, Federal Practice and Procedure § 3702, at 98-101. I cannot say to a legal certainty that the amount of plaintiffs' claim for loss of society and companionship does not satisfy the requisite amount of \$75,000 under § 1332(a). Accordingly, defendants' motion to dismiss will be denied.

II. MOTION IN LIMINE

Defendants have moved to preclude plaintiffs from introducing any evidence that plaintiffs Lisa and Gary Cooper suffered any damages other than loss of society and companionship, such as emotional distress and expenses relating to Matthew's birth and death. In the order entered on September 6, 2000, I allowed the estate to amend its complaint for the sole purpose of allowing plaintiffs Lisa and Gary Cooper to bring a claim for loss of society and companionship. Therefore, plaintiff Lisa and Gary Cooper may not seek damages for any claim other than loss of society and companionship, including funeral expenses.

Defendants contend that a claim for loss of society and companionship does not include a claim of emotional distress. Defendants point to the standard jury instructions in Wisconsin for parents' claims of loss of society and companionship following the death of a child. Wis. JI-Civil 1895 states that “[s]ociety and companionship includes the love, affection, care, protection, and guidance the parents would have received from their child had he continued

to live. It does not include the loss of monetary support from the child or the *grief and mental suffering* caused by the child's death.” (Emphasis added.) I am persuaded that a claim for loss of society and companionship does not include damages for emotional distress. Accordingly, defendants' motion in limine will be granted.

III. MOTION TO STRIKE

Defendants have moved to strike plaintiffs' claims for funeral expenses and any claims on behalf of the estate against defendants. As stated previously, plaintiffs cannot bring a claim on behalf of the estate of Matthew Cooper for pain and suffering because plaintiffs failed to name an expert to testify whether Matthew suffered during the eight days of his life or for Matthew's expenses, including funeral expenses, because there is no proof that the estate paid for any such expenses. As a result, Lisa Cooper as the independent administrator of Matthew Cooper's estate should have been deleted from the amended complaint and plaintiffs Lisa and Gary Cooper should have been the only named plaintiffs.

Although plaintiffs Lisa and Gary Cooper may have incurred expenses related to Matthew's birth and death, I did not allow plaintiff to amend its complaint to assert a claim for such expenses. Therefore, defendants' motion to strike will be granted.

ORDER

IT IS ORDERED that the motion of defendants Eagle River Memorial Hospital, Inc. and Wisconsin Patients Compensation Fund to dismiss the medical malpractice claim of plaintiffs Lisa Cooper and Gary Cooper for lack of subject matter jurisdiction is DENIED. FURTHER, IT IS ORDERED that defendants' motion in limine to preclude plaintiffs from introducing any evidence as to damages unrelated to loss of society and companionship is GRANTED and defendants' motion to strike plaintiffs' claims for funeral expenses and any claims on behalf of the estate against defendants is GRANTED.

Entered this 25th day of September, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge