

April 8, 2010

Via Overnight Delivery

Honorable Justices
The Supreme Court of Texas
201 W. 14th Street, Room 104
Austin, Texas 78701

Re: Cause No. 09-0048; *MCI Sales and Service, Inc., f/k/a Hausman Bus Sales, Inc. and Motor Coach Industries Mexico, S.A. de C.V., f/k/a Dina Autobuses, S.A. de C.V. v. James Hinton, Individually and as Representative of the Estate of Dolores Hinton, Deceased, et al.*; In the Supreme Court of Texas.

To the Honorable Justices of the Supreme Court of Texas:

As counsel for Petitioners MCI et al., I feel obliged to answer the charge leveled in Justice Enoch's letter to the Court dated March 30, 2010 in which he says I gave the Court "an inaccurate representation of the record." What I said to the Court regarding the settling person issue was this: under the "Litigation Plan" created by the Hinton plaintiffs, the plaintiffs "not only had the right to get the money at any time, they were limited—they could not get more than 10% more than the mediator found, so it's not like one of them could get all the money and the rest of them would be gone." The Litigation Plan confirms the accuracy of those statements. (*See* 84 CR 20053) No one of the Hinton plaintiffs could have received all of the money because of the 110% limitation. As it turned out, only one claimant (Robert Kuryla), with minor injuries, received less from the "Litigation Plan" than the mediator's number. But he did receive something—approximately \$7,000. (84 CR 20043; 85 CR 20267) He agreed to this number when he and his fellow passengers moved the bankruptcy court to adopt the findings of the "Special Judge." (84 CR 20026) None of that even addresses, much less refutes, what I told the Court. Robert Kuryla and the other Hinton claimants received something of value before the trial of the state court action—the setting aside of the money and the Litigation Plan itself was something of value.

Justice Enoch points to MCI's opportunity to join Central Texas as a responsible third party. The Hintons' argument is essentially that there is no need to consider someone a settling person if they could be joined (or under the amended statute, designated) as a responsible third party. The statute should be interpreted according to its plain language, which does not make "settling person" and "responsible third party" exclusive categories.

The final point on this issue is that MCI is not arguing for a result that whenever an insurer pays money into the registry of a bankruptcy court, the bankrupt insured is a settling person. Such a broad ruling would not be necessary in this case.

Changing to the topic of preemption, during argument Chief Justice Jefferson inquired about the ultimate results in the three federal district court cases that relied on *O'Hara—Spruell*, *Burns*, and *McCracken*. Here is their subsequent history:

- In *Spruell v. Ford Motor Co.*, the court denied a motion for summary judgment on preemption grounds. No. 07-2058, 2008 U.S. Dist. LEXIS 26834 (W.D. Ark. 2008). But shortly after the court issued its opinion, the lawsuit was dismissed with prejudice by agreement. The court's ruling on preemption was never appealed.
- In *Burns v. Ford Motor Co.*, the court denied the preemption-based motion for summary judgment. No. 06-5201, 2008 U.S. Dist. LEXIS 5625 (W.D. Ark. 2008). Then the case was tried to a defense verdict and the preemption issue was never appealed.
- Lastly, in *McCracken v. Ford Motor Co.*, the defendant argued preemption in a motion to dismiss, which was denied. The court subsequently dismissed the case for lack of diversity jurisdiction. The preemption issue was never appealed. 588 F. Supp. 2d 635 (E.D. Pa. 2008), *dismissed*, No. 07-CV-2018, 2009 U.S. Dist. LEXIS 37020 (E.D. Pa. 2009).

The final orders on these cases are attached.

Finally, Justice O'Neill asked opposing counsel whether it was necessary to rule on the glazing preemption claim if the Court held the seat-belt claim was not preempted. If the Court sustains the Court of Appeals' ruling on Chapter 33, for the sake of efficiency in the judicial system and guidance to the trial court, the Court should address the preemption claims on both seat belts and glazing—even if the Court finds the seat belt claim not preempted. Clearly, if the Court does not rule on the glazing issue, glazing will figure prominently in any retrial. The issue is before this Court now, the issue is

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ripe, and by ruling on the glazing issue, this Court could streamline the trial issues and provide guidance to the trial court and parties. In addition, it would prevent the inefficiencies created in the event of a second appeal to the court of appeals and to this Court on the glazing issue after retrial. This also is an issue in the companion case that is stayed pending the outcome of this case, and it is an issue in other cases that are pending around the State. *See Edinburg Hosp. Auth. v. Trevino*, 941 S.W.2d 76, 81 (Tex. 1997) (“Although resolution of this issue is not essential to our disposition of this case, we address it to provide the trial court with guidance in the retrial . . .”).

We thank the Court for its patience in considering this response.

Very truly yours,

/S/

Thomas C. Wright

TCW:dmb

Enclosures

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

KYLE SPRUELL

PLAINTIFF

v.

Civil No. 07-2058

FORD MOTOR COMPANY

DEFENDANT

ORDER

Before the Court is Plaintiff's Motion to Dismiss With Prejudice (Doc. 23) filed April 9, 2008. Plaintiff moves pursuant to Rule 41(a) of the Federal Rules of Civil Procedure to voluntarily dismiss this action. The parties stipulate to the dismissal with prejudice.

Accordingly, the above-styled case is hereby **DISMISSED WITH PREJUDICE.**

IT IS SO ORDERED this 9th day of April, 2008.

/s/ Robert T. Dawson
Honorable Robert T. Dawson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

HOLLY BURNS

PLAINTIFF

v.

Civil No. 06-5201

FORD MOTOR COMPANY

DEFENDANT

J U D G M E N T

On the 11th day of February, 2008, this matter came on for trial. A jury of twelve was duly empaneled, and heard the evidence, the instructions of the Court, and the arguments of counsel, then retired to deliberate. On February 20, 2008, the jury returned its verdict, finding no liability on the part of the defendant.

IT IS THEREFORE ORDERED that plaintiff's claims herein are denied, and this matter is **dismissed with prejudice**.

IT IS SO ORDERED, this 21st day of February, 2008.

/s/ Jimm Larry Hendren
JIMM LARRY HENDREN
UNITED STATES DISTRICT JUDGE



LEXSEE 2009 US DIST LEXIS 37020

TED MCCRACKEN, Plaintiff, v. FORD MOTOR CO. et al., Defendants.

CIVIL ACTION NO. 07-CV-2018

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2009 U.S. Dist. LEXIS 37020

May 1, 2009, Filed

PRIOR HISTORY: McCracken v. Ford Motor Co., 588 F. Supp. 2d 635, 2008 U.S. Dist. LEXIS 91425 (E.D. Pa., 2008)

COUNSEL: [*1] For TED A. MCCRACKEN, Plaintiff: TED AARON MCCRACKEN, NORTH WALES, PA.

For FORD MOTOR COMPANY, Defendant: TIFFANY M. ALEXANDER, CAMPBELL CAMPBELL EDWARDS & CONROY, WAYNE, PA.

For EILEEN HOTTE, Movant: LINDSAY D. LIEBMAN, ARGOLIS EDELSTEIN, PHILADELPHIA, PA.

For LARRY CHANG, D.E.P., Movant: KENNETH A. GELBURD, LEAD ATTORNEY, PENNSYLVANIA DEPT OF ENVIRONMENTAL, PROTECTION, S.E. OC, PA DEP, SEOCC, NORRISTOWN, PA.

JUDGES: ANITA B. BRODY, United States District Judge.

OPINION BY: ANITA B. BRODY

OPINION

MEMORANDUM

Plaintiff Ted McCracken, proceeding *pro se*, filed

suit against Defendant Ford Motor Company ("Ford") for state law claims, alleging that he was injured by a defective design in Ford automobiles. He asserted jurisdiction under 28 U.S.C. § 1332 based on diversity of citizenship. Because McCracken failed to allege the essential elements of diversity of citizenship in the complaint, this action is dismissed for lack of jurisdiction.

Federal courts "are without power to adjudicate the substantive claims in a lawsuit, absent a firm bedrock of jurisdiction." *Carlsberg Resources Corp. v. Cambria Sav. And Loan Ass'n*, 554 F.2d 1254, 1256 (3d Cir. 1977). Even if neither party to the litigation has raised the issue of jurisdiction, [*2] a federal court has an obligation to address the question of whether jurisdiction exists *sua sponte*. See *id.* ("When the foundation of federal authority is, in a particular instance, open to question, it is incumbent upon the courts to resolve such doubts, one way or the other, before proceeding to a disposition on the merits."); *Thomas v. Board of Trustees*, 195 U.S. 207, 211, 25 S. Ct. 24, 49 L. Ed. 160 (1904).

McCracken asserts that this court has jurisdiction based on diversity of citizenship pursuant to 28 U.S.C.A. § 1332(a)(1). ¹ 28 U.S.C. § 1332(a)(1) provides that the district courts shall have original jurisdiction where the amount in controversy exceeds a value \$ 75,000 and the matter is between "citizens of different States." 28 U.S.C. § 1332(a)(1). Complete diversity of citizenship is required for this court to exercise jurisdiction under §

1332(a)(1), which means that "no plaintiff can be a citizen of the same state as any of the defendants." *Midlantic Nat. Bank v. Hansen*, 48 F.3d 693, 696 (3d Cir. 1995).

1 A *pro se* plaintiff is "entitled to liberal construction of his pleading." *John v. New York*, No. 08-3419, 315 Fed. Appx. 394, 2009 U.S. App. LEXIS 4150, 2009 WL 524726, at *1 (3d Cir. Mar. 3, 2009).

For the purposes of determining citizenship under [*3] section 1332, corporations are "deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." 28 U.S.C. § 1332(c)(1). A natural person is deemed to be a citizen of the state where he or she is domiciled. *Swiger v. Allegheny Energy, Inc.*, 540 F.3d 179, 182 (3d Cir. 2008). Domicile is established "by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989). Allegations of state residence do not satisfy the jurisdictional requirement. *Robertson v. Cease*, 97 U.S. 646, 24 L. Ed. 1057, (1878) ("Citizenship and residence, as often declared by this court, are not synonymous terms.").

Diversity jurisdiction cannot be exercised, "unless there has been a *definitive* determination that diversity of citizenship is present." *Carlsberg Resources Corp.*, 554 F.2d at 1257 (emphasis added). See also *Thomas v. Board of Trustees*, 195 U.S. 207, 211, 25 S. Ct. 24, 49 L. Ed. 160 (1904) ("[T]he absence of sufficient averments or of facts in the record showing such required diversity of citizenship is fatal and cannot be overlooked by the court, even if the [*4] parties fail to call attention to the defect,

or consent that it may be waived."); *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382, 4 S. Ct. 510, 28 L. Ed. 462 (1884) ("[T]he jurisdiction of the circuit court fails, unless the necessary citizenship affirmatively appears in the pleadings or elsewhere in the record."). Whether diversity jurisdiction exists is determined by examining the citizenship of the parties at the time the complaint is filed. *Id.* See also *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478, 123 S. Ct. 1655, 155 L. Ed. 2d 643 (2003) (holding that federal diversity jurisdiction "depends on the citizenship of the parties at the time suit is filed."). The burden is on the plaintiff to affirmatively allege the essential elements of diversity jurisdiction. See *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 188-89, 56 S. Ct. 780, 80 L. Ed. 1135 (1936).

McCracken alleges that the Ford is incorporated in Delaware and headquartered in Michigan. Thus, Ford is considered a citizen of both Delaware and Michigan. The plaintiff alleges that he is a citizen of the United States, but does not make any allegation as to his state citizenship. He alleges that he has resided principally in Pennsylvania, New York and Delaware over the past ten years. These allegations [*5] do not establish McCracken's state citizenship.

Since the plaintiff has failed to allege the citizenship of one of the parties to this action, he has not affirmatively alleged the essential elements of diversity jurisdiction. Accordingly, the court is deprived of jurisdiction and this action is dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction.

/s/ Anita B. Brody

ANITA B. BRODY, J.