

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

TIMOTHY S. McDOWELL, Personal
Representative of the Estate of
SUSAN K. McDOWELL, Deceased,

CV 16-67-BMM-JTJ

Plaintiff,

vs.

**FINDINGS AND
RECOMMENDATION OF
UNITED STATES MAGISTRATE
JUDGE**

BURLINGTON NORTHERN
SANTA FE RAILWAY COMPANY,
a Delaware for Profit Corporation;
BURLINGTON NORTHERN
RAILROAD COMPANY, a
Delaware for Profit Corporation;
GREAT NORTHERN RAILWAY
COMPANY, a Corporation for Profit;
ROBINSON INSULATION
COMPANY, a Montana Corporation;
STATE OF MONTANA, a
Governmental Entity; LIBBY
SCHOOL DISTRICT #4, ASA
WOOD ELEMENTARY SCHOOL;
and DOES A-Z, Inclusive;

Defendants.

I. Synopsis

Defendants filed a Notice of Removal claiming the Court has jurisdiction over this matter because there is complete diversity between the Plaintiff and all

properly joined defendants. Plaintiff disagrees. The crux of the issue is whether the Court may ignore the State of Montana for diversity purposes because the State was improperly joined, fraudulently joined, or is a nominal defendant. Defendants have failed to meet their heavy burden to prove removal is proper. Defendants have not shown that the claims against the State would not survive a motion to dismiss for failure to state a claim as fraudulent joinder requires. Nor have the defendants shown that the State has no stake in the outcome of the case as the nominal defendant rule requires. Therefore, Plaintiff is entitled to remand.

II. Jurisdiction

Defendants removed this case pursuant to 28 U.S.C. §§ 1441(a) and 1446. If this court has subject matter jurisdiction, it must arise from U.S.C. § 1332, on the basis of diversity of parties. But, as discussed below, the parties dispute diversity. Defendant has not asserted any other basis for federal jurisdiction. No party disputes personal jurisdiction.

III. Status

Plaintiff filed its Complaint in Montana's Eighth Judicial District, Cascade County. Defendants removed asserting diversity jurisdiction. (Doc. 1.) Plaintiff filed a Motion to Remand. (Doc. 13.) The parties have fully brief the Motion. (Doc. 14, 18, 19.)

IV. Standards

There is a strong presumption against federal jurisdiction over cases removed from state courts. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). The party seeking removal has the burden to establish removal is proper. *Id.* Courts must strictly construe the removal statute. *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1244 (9th Cir. 2009). If there is any doubt that removal is proper, courts must remand. *Id.*

Removal in this case is proper only if there is complete diversity of citizenship—meaning each of the plaintiffs is a citizen of a different state than each of the properly joined defendants. 28 U.S.C. § 1332; *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001). A plaintiff may properly join multiple defendants in a single action if the plaintiff’s claims against them arise from the “same transaction, occurrence, or series of transactions or occurrences” or share a common question of law or fact. Fed. R. Civ. P. 20. This liberal joinder standard promotes trial convenience and judicial economy without affecting the substantive rights of the parties. *Wheat v. Safeway Stores, Inc.*, 146 Mont. 105, 112, 404 P.2d 317, 321 (1965).

The State of Montana is a party in this action. A State has no citizenship and therefore cannot have diverse citizenship for purposes of diversity jurisdiction.

Morongo Band of Mission Indians v. California State Board of Equalization, 858 F.2d 1376, 1381 (9th Cir. 1988). But, there is an exception for situations where “the state actor is a nominal party with no real interest in the dispute.” *Reinhardt v. Montana Human Rights Bureau*, No. CV-10-27-H-CCL, 2010 WL 5391280, at *2 (D. Mont. Dec. 17, 2010). Courts must ignore “nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy.” *Navarro Sav. Ass’n v. Lee*, 446 U.S. 458, 461 (1980). If a party has a substantial stake in the outcome of a case, the party is a “real party in interest,” and the nominal defendant rule is inapplicable. *Bates v. Mortgage Elec. Reg. Sys. Inc.*, 694 F.3d 1076, 1080 (9th Cir. 2012).

Courts may also ignore defendants who are fraudulently joined. Fraudulent joinder is a term of art; joinder of a resident defendant is fraudulent if the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the rules of the state. *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998). To establish fraudulent joinder, the defendant must demonstrate that the plaintiff failed to assert a valid state law claim against the resident defendant. *Id.* If there is a possibility that a state court would find that the complaint states a cause of action against the resident defendant, the federal court

must find that the joinder was proper and remand the case to state court. *Hunter v. Phillip Morris USA*, 582 F.3d 1039, 1046 (9th Cir. 2009).

Although the defendants argue that the newfangled concept of “fraudulent misjoinder” would allow the Court to ignore the State of Montana’s presence in this action, the Ninth Circuit, like the vast majority of circuits, has not adopted fraudulent misjoinder as a basis to create federal jurisdiction. Therefore the Court’s analysis will only focus on permissive joinder, fraudulent joinder and the nominal defendant rule to determine if removal is proper.

V. Facts

Plaintiff, Timothy McDowell, is the surviving spouse of Susan McDowell and acts as personal representative of her estate. Mrs. McDowell lived and attended school in Libby, Montana. Plaintiff alleges that she was exposed to hazardous quantities of asbestos-contaminated vermiculite that was discarded from railcars as BNSF transported the material from a mine near Libby, through the community, and on to various destinations throughout the United States. (Doc. 5 at 6.) Plaintiff alleges that one of the locations where Mrs. McDowell came into contact with asbestos-contaminated vermiculite was at her school, Asa Wood Elementary School. (Doc. 5 at 39.) Plaintiff alleges that all of the asbestos-contaminated vermiculite that Mrs. McDowell was allegedly exposed to originated

from the mine located near Libby. The State of Montana began conducting inspections of the mine in the 1950's. Plaintiff alleges that in the course of these inspections, the State determined the vermiculite contained hazardous levels of asbestos yet took no meaningful action to correct the hazard or warn the townspeople of Libby. (Doc. 5 at 8, 11-17.) On May 6, 2011, doctors diagnosed Mrs. McDowell with mesothelioma, a rare cancer most often caused by exposure to asbestos. Eighteen months later, Mrs. McDowell succumbed to the disease. Plaintiff filed this Complaint against BNSF and other defendants, including the State of Montana and the Libby School District, alleging each committed torts that led to his wife's death.

VI. Analysis

Defendants argue that the Court should disregard the State of Montana's presence in this matter because (1) Plaintiff and the State have reached a settlement agreement; (2) Plaintiff improperly joined the state in this action; (3) regardless of whether properly joined, the state is a nominal defendant with no real stake in the outcome in this action; and (4) the state is "fraudulently misjoined." The Court disagrees with arguments 1–3. The Court likewise declines to sever the plaintiff's claims against the State under the theory of "fraudulent misjoinder" because the theory is not recognized by the Ninth Circuit.

1. The State of Montana is a party in this action.

Defendants allege in their Notice of Removal that Plaintiff and the State of Montana have reached a settlement agreement. (Doc. 1 at 8.) Defendants provide no support for this statement. Under Montana law, a state district court must approve any settlement of a claim against the State. Mont. Code Ann. § 2-9-303. Given that there is no indication that a Montana State District Court has approved a settlement of the claims against the State, the State of Montana remains a party to this action, and the Court must consider its presence when determining whether complete diversity exists.

2. Permissive joinder

Defendants argue that, in the name of judicial economy, the Court should sever Plaintiff's claims against the State of Montana because the State is an unnecessary and dispensable party under Rule 19 of the Federal Rules of Civil Procedure. Defendants also argue that the claims against the State do not arise out of the same transaction or occurrence as Rule 20 of the Federal Rules of Civil Procedure requires. (Doc. 18 at 15.) Given the strong presumption against federal jurisdiction over cases removed from state court, the Court finds the question of whether the claims between the State of Montana and the other defendants are best answered by the state district court. If the state district court finds that the State is

not properly joined and chooses to sever the claims, Defendants are free to seek removal at that time.

3. The nominal defendant rule

Defendants also argue that the State of Montana is a nominal party with no real interest in the outcome of this case. As discussed above, when analyzing diversity of parties courts must disregard nominal or formal parties. When a state's only interest in a matter is enforcing compliance with its laws, the state is a nominal party. *Reinhardt*, 2010 WL 5391280, at *2-3.

In this case, the State of Montana is not present merely to protect its interests in enforcing compliance with its laws. Plaintiffs allege that the State committed torts that, along with the conduct of the co-defendants, caused Mrs. McDowell's death. Accordingly, The Court finds that the State of Montana has a substantial interest in the outcome of this litigation and is not nominal defendant that may be ignored for diversity purposes.

4. Fraudulent joinder

As discussed above, fraudulent joinder requires Defendants to show that Plaintiff has failed to state a valid claim against a resident defendant. Here, Plaintiff alleges that the State of Montana negligently failed to protect Mrs. McDowell and the other townspeople of Libby from exposure to toxic asbestos

dust. (Doc. 5.) The defendants do not assert that the negligence claim against the State is invalid on its face as fraudulent joinder requires. Therefore, the Court finds the State is not fraudulently joined in this matter.

VII. Conclusion

Defendants have the burden of overcoming the strong presumption against federal jurisdiction over cases removed from state courts. Defendants have failed to show that the State of Montana is not a party to this action. Defendants have not provided any evidence that the plaintiff has reached a settlement agreement with the State. Nor have the defendants shown that the State was fraudulently joined or has no real stake in the outcome of the case. Accordingly, the Court finds that it may not ignore the presence of the State for diversity purposes. Given that the State has no citizenship for diversity purposes, complete diversity of the parties does not exist. Therefore, Plaintiff is entitled to remand.

This court **FINDS:**

1. Plaintiff is citizen of the State of Montana.
2. Plaintiff has stated a valid claim against the State of Montana
3. The State of Montana has a substantial interest in the outcome of this litigation.
4. The State of Montana has no citizenship for diversity purposes.

5. Complete diversity does not exist between the parties.
6. The United States District Court does not have jurisdiction over this case.

This court **RECOMMENDS:**

1. The District Court should grant Plaintiffs' Motion to Remand. (Doc. 13.)
2. The Clerk of Court should be directed to remand this case to the Eighth Judicial District of the State of Montana.

Dated the 3rd day of October, 2016.



John Johnston
United States Magistrate Judge