

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Baltimore Division)**

DONTAE RICO WALLACE, et al.,

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Plaintiffs

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v.

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Case No.: 1:07-CV-1140

KENNEDY KRIEGER INSTITUTE, INC., et al.

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Defendants

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**MEMORANDUM IN SUPPORT OF PLAINTIFFS' RESPONSE TO
DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO REMAND**

For Plaintiffs to specifically respond in kind to each of the straw-man arguments posited by the Defendants in opposition to remanding this matter would likely be of little value to the Court. It is more important, and hopefully more useful, for Plaintiffs to highlight the points raised within the Motion to Remand for which the Defendants can offer no response.

It is important to note that the Plaintiffs' Motion to Remand, and the Defendants' concomitant Opposition thereto must be viewed through a prism that places the burden to justify the removal from state court squarely upon the Defendants as the removing party. *See e.g. Winters v. Diamond Shamrock Chemical Co.*, 1195 F. Supp. 1195 (E.D. Tex. 1995) (Holding that a defendant bears the burden of establishing federal jurisdiction over a suit initiated in state court). And "...Courts strictly construe the removal statute and resolve all doubts in favor of remanding the case to state court." *Richardson v. Philip Morris Inc.*, 950 F. Supp. 700, 701 (D. Md. 1997).

The Defendants have failed to satisfy this stringent standard of proof and instead seek to

water-down their burden to fit the tepid arguments in favor of removal.

I. The Defendants are unwilling, or unable, to reconcile the conflicting sworn statements of Defendant Mark Farfel

The stark inconsistencies of Defendant Farfel's sworn affidavits from 2000 and 2007 regarding the level of control, *vel non*, of the Environmental Protection Agency, (EPA), were set forth within the Plaintiffs' Motion to Remand. More than seven years ago, in support of Defendant Kennedy Krieger Institute's Motion for Summary Judgment in the Circuit Court for Baltimore City, Mark Farfel submitted the following sworn testimony to the Circuit Court via affidavit:

As Director of the Division of Lead Poisoning Prevention at the Kennedy Krieger Institute, **I was the project manager responsible for the overall direction and coordination of the operations of the Lead Paint Abatement and Repair and Maintenance Study ("R&M Study").**

(2000, Affidavit of Mark Farfel, Sc.D, in *Higgins, et al., v. Polakoff, et al.*, Baltimore City Circuit Court Case No.: 24-C-95-066067, Exhibit 1)(Emphasis added). *See also*, Plaintiffs' Motion to Remand at 19. This affidavit, closer in time to the study, is therefore much more likely an accurate reflection of memory and fact without the overlay of artifice.

However, only now, more than seven years after the 2000 affidavit Farfel submits sworn testimony in support of the Notice of Removal that is irreconcilable with his prior testimony. In support of the Notice of Removal, Dr. Farfel swore to the following:

In my role as project director, [of the R&M study] I obtained first-hand knowledge regarding the activities of Batelle Memorial Institute ("Battelle) and the Environmental Protection Agency ("EPA") relating to the design and implementation of the R&M Study.

...

Based upon my personal involvement and observation of virtually all aspects of the design and implementation of the R&M study at Kennedy Krieger, there is no

question that the Federal Government through the EPA retained and exercised a very detailed level of control over every aspect of this Study. (April 26, 2007, Affidavit of Mark Farfel, Sc.D., Exhibit 2)(Emphasis added). *See also*, Plaintiffs' Motion to Remand at 19.

It is axiomatic that "[a]s a general proposition memory fades with time." *Lewis v. State*, 71 Md.App. 402, 419 Fn. 10. *A fortiori*, Farfel's recollection of the events surrounding the study was much better in 2000 than it is now nearly a decade later.

Despite the obvious fact that Farfel's sworn statement of 2000 in the *Higgins* case cuts at the heart of the argument the Defendants now seek to assert, the Defendants cannot muster even a passing explanation for the inconsistency. Instead the Defendants point to the reams of documents with which they have bombarded the Court and insist that all involved in this matter should divine some alternative explanation on their own or simply ignore the prior affidavit altogether. Neither this Court nor the Plaintiffs should be required to "plunge into a haystack to look for a needle. It would pile further insult upon injury to discover that, in fact, there was no needle." *John Crane, Inc. v. Puller*, 169 Md. App. 1, 81 (2006).

Dr. Farfel's prior affidavit dooms the Defendants' argument. As he himself stated, "he was the project manager responsible for the overall direction and coordination of the [R & M study]."

II. The Defendants failed to identify within their Notice of Removal the federal officer they allege exercised direct and detailed control over the R&M study requires that this matter be remanded.

Plaintiffs illustrated within their Motion to Remand how the affidavits and arguments proffered by the Defendants were insufficient to sustain removal. It is insufficient as a matter of law for the Defendants to assert, as they did within their notice, that they were acting at the

direction of "the EPA." *See Good v. Armstrong World Industries, Inc.*, 914 F. Supp 1125 (E.D. Pa. 1996). There can be no dispute that the Defendants did not identify the Federal Officer whom they allege exercised the direct and detailed level of control required by 28 U.S.C. § 1442(a)(1). Instead, they attempt to use "the EPA" as a term for all seasons.

None of the Defendants' vagaries within the Notice of Removal are sufficient to sustain jurisdiction in this Court. Removal is not a game of pitch-until-you-win and the Defendants are stuck with the Notice of Removal that was filed. *See e.g. Barnhill v. Insurance Co. of North America*, 130 F.R.D. 46, 49 (D.S.C. 1990).

III. The Defendants are unable or unwilling to address the language within the contracts which demonstrate that removal is not available to them.

If there is a needle buried within the haystack of documents the Defendants have served, it is the multiple statements within the contracts and sub-contracts that defeat the Defendants' attempts at removal. The Defendants' straw-man argument that sub-contractors are entitled to assert the government contractor defense, a required element of removal under the statute, suffers from at least two fatal flaws.

First, assuming *arguendo* that a government sub-contractor may be entitled to assert the government contractor defense, the status as a sub-contractor to the government is only a necessary part of the defense not a sufficient one. Put another way, the analysis does not come to an abrupt halt simply because the Defendant was a government sub-contractor.

The Defendants offer up no credible explanation for the following statements contained within the very documents they have attached to their notice of removal:

ARTICLE XVII
PRIME CONTRACTOR DIRECTION

Under no circumstance will the Subcontractor [KKI] act upon directions given to it by representatives of Battelle's prime contract sponsor [the EPA].

...
These procedures confirm that the contractual relationship is between Batelle and the Subcontractor [KKI]. There is no privity of contract between the Subcontractor [KKI] and the sponsor of Batelle's prime contract [the EPA].

...
ARTICLE XXVII

SUBCONTRACTOR/BATELLE RELATIONSHIP

Battelle does not have, claim to have, nor will it exercise any right to control or direct the subcontractor/consultant [KKI] in the means or methods by which the advisory service being purchased with this subcontract is to be performed.

(1990 Subcontract W-8300 (1566)-1628, pages 10 & 13, Exhibit 3)(Emphasis added). The Defendants' argument, to wit that they were subject to direct and detailed control by the "EPA" is directly contradicted by the contract to which Defendant KKI was a party.

The Defendants border upon being disingenuous when they state within their Opposition that:

Moreover, the EPA, through the Contract and the QAPjP, directed whether and to what extent [KKI] repaired the Study participants' residences by determining the levels of lead remediation to implement in the study homes.

Id. at 13, internal citations omitted.

As clearly set forth within the 1992 subcontract, the "precise specifications" of the repairs to be employed in the R&M study were hardly precise and were the sole responsibility of KKI and Farfel:

3. The subcontractor [KKI] shall continue R&M interventions. While the actual conduct of the R&M interventions is outside the scope of the statement of work, the subcontractor [KKI] shall be responsible for ensuring the eligibility of potential R&M dwellings, reviewing R&M work proposals to ensure that they meet study specifications for R&M work, providing documentation that R&M

work was conducted by the contractors according to plan, and recording and analyzing data on R&M intervention costs for each home receiving R&M.

(Unpaginated excerpt from 1992 Subcontract 31713(2253)-2108, Exhibit 4)(Emphasis added).

Both of these contract provisions were quoted and attached to Plaintiffs' Motion to Remand. *Id.* at 24-25. Neither have been adequately addressed by the Defendants.

Secondly, the Defendants assert within their opposition that sub-contractors are entitled to assert the government contractor defense based upon the opinions of at least two State appellate courts. Defendants' Opposition at 8. Apparently, the Defendants are of the opinion that state courts are only capable of interpreting the defense in other states. Put another way, given the obvious infirmities of the Defendants' bases for removal, remand to the Maryland courts in this matter is appropriate and will continue to provide the Defendants a forum in which to assert their defenses.

IV. Other than attempting to portray the Maryland Court of Appeals as a rogue hotbed of judicial activism, the Defendants offer no explanation as to why their litigation of the *Grimes* cases did not constitute waiver of any grounds for remand.

The Defendants were/are unhappy with the decision of the Maryland Court of Appeals; that much is self-evident. However, the Defendants offer no refutation that their calculated decision to vigorously litigate the *Grimes* cases in State court effected a waiver of their ability to seek removal now for claims that flow from a virtually identical set of operative facts regarding the exact same research study.

In *American Fire and Casualty Co. v. Finn*, 341 U.S. 6 (1951), The United States Supreme Court held "that where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent cause of

action under 28 U.S.C. § 1441(c).” “*Finn* therefore established a single occurrence test by noting that the determinative factors are whether the damage comes from a single incident and the allegations involve substantially the same facts and transactions.” *Blue Ox Corp., v. Murphy Oil Corp.*, 524 F.Supp. 1019, 1021 (D.C. Montana 1981).

Extension of the Finn doctrine to circumstances involving plaintiffs who have initiated separate though related lawsuits in state court was done in *Layden v. Zantop*, 265 F.Supp. 743 (N.D.Ill.1967). In Layden a wrongful death action and a property damage action arising out of the same airplane crash were separately filed by different plaintiffs against the same defendant in the same state court. When filed, both cases were federally cognizable and removable. The defendant elected not to remove the first filed wrongful death action, opting instead to proceed in the state forum. When the property damage suit was subsequently initiated, the defendant filed a timely petition to remove that action to federal court. Applying the single occurrence test espoused in Finn, supra, the federal district court held that the defendants, having elected to proceed with the wrongful death controversy in the state court, had waived their right to remove the related property damage controversy. The court in Layden reasoned that since the two cases would have been consolidated under state court practice and the first case could not have been removed as of the time the second case was filed, the issue of the removability of the second case was turned upon whether the second case presented a separate and independent claim or cause of action within the meaning of s 1441(c). The court in Layden reinforced its novel extension of the Finn rationale with its recognition that sound judicial economy mandated such remand, in light of the fact that retention of federal jurisdiction would result in two courts of competent jurisdiction entertaining basically the same lawsuit.

Blue Ox Corp., v. Murphy Oil Corp., Id.

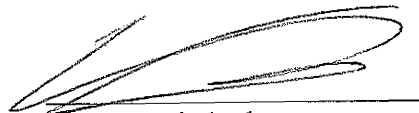
Where this lawsuit pending in the state Court at the same time as the *Higgins* and *Grimes* cases it would have been subject to consolidation pursuant to Maryland Rule 2-212(a). “Rule 2-212(a) permits plaintiffs to join in a suit if they assert a right to relief arising out of the same transaction, occurrence or series of transactions or occurrences and there is a question of law or fact common to all persons in the action.” *John A. Lynch, Jr. and Richard W. Bourne*, Modern Maryland Civil Procedure, Second Edition, § 4.3.

The Defendants in this matter cannot and have not disputed that they successfully obtained summary judgment from the Baltimore City Circuit Court in the *Higgins* and *Grimes* cases regarding the R&M study nor do they dispute that they continued to litigate those cases on appeal before Maryland's highest Court. Nor can Defendants KKI, Farfel or Hendrix seriously contend that the subject of this lawsuit and that of the prior cases differs in any marked degree.

The Defendants' waived the opportunity to assert their stated bases for removal several years ago. "To allow the defendant[s] to 'test the water' in state court and now come before this court with essentially the same action is contrary to the principles of judicial economy and comity." *Blue Ox Corp., v. Murphy Oil Corp.*, 524 F.Supp. at 1022.

Wherefore, Plaintiffs respectfully requests that this Court grant the Plaintiffs' Motion to Remand this matter back to the Circuit Court for Baltimore City.

Respectfully submitted,



Evan K. Thalenberg
(Federal Bar No. 06619)
Nicholas A. Szokoly
(Federal Bar No. 28157)
Law Offices of Evan K. Thalenberg, P.A.
216 East Lexington Street
Baltimore, Maryland 21202
(410) 625-9100

*Attorneys for Plaintiffs Dontae Wallace and
Searra Wallace*