

BUY™

SELL™

SHOP™



Downloaded From
www.TextBookDiscrimination.com



SELL YOUR OWN SAMPLES

(help others get the justice that they deserve)



BUY™

SELL™

SHOP™

www.TextBookDiscrimination.com

Get ***Booked Up*** on Justice!

© TBD Corporation. All Rights Reserved.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

MAUREEN REED,

Plaintiff,

v.

ALLSTATE INSURANCE COMPANY
and JOHN DOE, Personal Representative
of the Estate of TODD AAKHUS, deceased,

Defendants.

03 DEC 12 PM 2:27

No.
CIV - 03 - 1420 RB RLP

NOTICE OF REMOVAL

Defendant Allstate Insurance Company ("Allstate"), hereby gives notice of the removal to this Court pursuant to 28 U.S.C. § 1441, of the above-captioned action, formerly pending in the District Court for the First Judicial District, County of Santa Fe, State of New Mexico as No. D-0101-CV-2003-1563. In support thereof, Allstate states as follows:

1. On August 27, 2003, Plaintiff Maureen Reed filed a document entitled Notice of Appeal Against Allstate Insurance Company and John Doe, Personal Representative of the Estate of Todd Aakhus, Deceased, in the First Judicial District Court for the State of New Mexico. True and correct copies of the documents served by Plaintiff in this matter are attached hereto as Group Exhibit A.
2. Subsequently, on August 28, 2003, Plaintiff Maureen Reed filed a civil complaint against Allstate Insurance Company and John Doe, Personal Representative of the Estate of Todd Aakhus, Deceased in the same action. See Group Exhibit A.
3. The complaint alleges that Defendant Allstate and decedent Todd Aakhus violated the New Mexico Human Rights Act and also asserts claims for intentional emotional distress.

prima facie tort, and punitive damages. Plaintiff prays for unspecified "damages in an amount to be proven at the time of trial, prejudgment interest, post-judgment interest, costs, attorney fees as allowed by NMSA 1978, § 28-1-13(D), and any other relief the Court deems just and proper." See Group Exhibit A.

4. This Court has jurisdiction pursuant to 28 U.S.C. § 1332 and 1441. There is complete diversity of the citizenship as to all parties and it is now clear that the amount in controversy exceeds the sum of \$75,000, exclusive of interest and costs.

5. Allstate has, pursuant to 28 U.S.C. ¶ 1446(a), attached hereto as Group Exhibit A, all the state court processes, pleadings and orders served on it. This notice of removal is filed within 30 days after receipt by Allstate of a copy of "an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which or has become removable" in compliance with 28 U.S.C. § 1446(b). See Plaintiff's Partial Answers and Responses to Allstate's First Interrogatories, Request for Production and Request for Admissions served on Plaintiff and Certificate of Service indicating document served November 24, 2003, attached hereto as Exhibit B.

Complete Diversity of Citizenship Exists Because Estate is Fraudulently Joined

6. Plaintiff Maureen Reed is a resident of Albuquerque, Bernalillo County, New Mexico. Complaint, ¶ 1.

7. Defendant Allstate is alleged to be a foreign corporation and is in fact an Illinois corporation, with its principal place of business in Illinois, and is a citizen of the State of Illinois for diversity purposes pursuant to 28 U.S.C. § 1332(c)(¶1). Complaint, ¶ 2.

8. Prior to his death, Todd Aakhus was a citizen of the State of New Mexico and a resident of Bernalillo County, New Mexico. Complaint ¶ 4. However, the citizenship of the

estate of Todd Aakhus is irrelevant because the estate has been fraudulently misjoined as a defendant in this case.

9. Specifically, Plaintiff's complaint alleges only an intentional tort against the decedent's estate, as well as a claim for intentional discrimination and retaliation under the New Mexico Human Rights Act. A claim against a defendant who dies prior to the institution of a lawsuit against him is governed by the New Mexico survival statute, §§ 37-2-1 NMSA 1978 *et seq.* *Littell v. Allstate Ins. and Todd Aakhus*, No. 03-493 MCA/RHS, Mem Op. (N.M. July 30, 2003). In this context, the claims against Todd Aakhus' Estate can be analyzed in the same manner as claims brought by a later-deceased plaintiff. In *Medina v. Pacheco*, No. 95-1004, Mem. Op. (N.M. June 6, 1996), *judg. aff'd*, 161 F.3d 18 (10th Cir. 1998), this Court discussed the survivability of claims under the federal civil rights statute, and found that they did not survive the death of the plaintiff. The Court explained its reasoning:

At common law, a cause of action based in tort generally did not survive the death of a plaintiff, unless property or contract rights were involved. ...

In 1976, the New Mexico Court of Appeals adopted a new common law allowing tort actions based upon negligence to survive the death of the plaintiff. *See Rodgers v. Ferguson*, 89 N.M. 688, 694 (Ct. App. 1976). However, the Court explicitly refused to rule on the survival of other actions under the common law. *Id.* ...

The New Mexico Court of Appeals has held that "absent specific justification, the [non-survival] rule should not apply to torts which did not exist when the rule developed." *Rodgers*, 89 N.M. at 691. A cause of action for an intentional tort is one of the oldest existing actions at common law. It was well known and often used during the period in which the non-survival rule evolved. Consequently, since intentional torts existed at the time the non-survival rule developed, this Court finds that non-survival rule applies to intentional torts. Therefore, all § 1983 claims on behalf of Joe Cisneros shall be dismissed.

Medina v. Pacheco, attached hereto as Exhibit C. *See also Allred v. Solaray, Inc.*, 971 F.Supp. 1394, 1398 (D. Utah 1997) (ADA claim not one for “personal injury” so does not survive the plaintiff’s death). In the present case, Plaintiff alleges against Todd Aakhus only intentional state law torts and a claim of intentional discrimination and retaliation under the New Mexico Human Rights Act based on the same conduct. Because those claims did not survive his death, she cannot bring such claims against his estate and his joinder in this case cannot destroy this Court’s diversity jurisdiction. *See Miami Pipe Line Co. v. Panhandle Eastern Pipe Line Co.*, 384 F.2d 21, 27 (10th Cir. 1967) (because it was clear that plaintiff could not recover a judgment against a non-diverse defendant, joinder of that defendant was fraudulent and did not defeat removal jurisdiction); *Montanez v. Solstar Corp.*, 46 F. Supp.2d 101, 103 (D.P.R. 1999) (denying remand where plaintiffs established no cause of action against resident defendant who was, therefore, fraudulently joined); *Coughlin v. Nationwide Mutual Ins. Co.*, 776 F. Supp. 626, 628 (D. Mass. 1991) (“Fraudulent joinder exists when the complaint in effect at the time of removal states no claim against the non-diverse defendant”).

10. Thus, there is complete diversity of citizenship between all properly-joined parties hereto.

The Amount in Controversy Requirement is Satisfied

11. To confer subject matter jurisdiction on this Court based on diversity of citizenship, the amount in controversy must exceed the sum or value of \$75,000, exclusive of interest and costs. 28 U.S.C. § 1332(a), as amended. Where a complaint does not contain dispositive allegations of the amount in controversy, the jurisdictional amount is determined by the allegations in the underlying matter. *See, e.g. Laughlin v. K-Mart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995). Calculations of the amount in controversy include both compensatory and

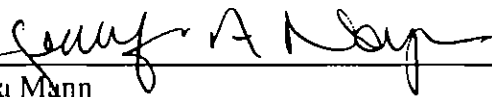
punitive damages. *See, e.g., Bell v. Preferred Life Assur. Soc. of Montgomery, Alabama*, 320 U.S. 238, 240 (1943); *Watson v. Blankenship*, 20 F.3d 383, 386 (10th Cir. 1994). The face of Plaintiff's complaint did not pray for a specific amount of damages. Since the filing of the complaint, however, Allstate has learned that Plaintiff claims that more than \$75,000 is in controversy in the present case. Specifically, Allstate served requests for admissions to which Plaintiff admitted that she was seeking more than \$75,000. *See* Exhibit B. Plaintiff's responses to the discovery are the "other paper from which it may first be ascertained" that the case is or has become removable. *See Akin v. Ashland Chemical Co.*, 156 F.3d 1030, 1035-36 (10th Cir. 1998) (interrogatory is "other paper" from which it may first be ascertained that the case is one which is or has become removable under 28 U.S.C. § 1446(b)).

12. Because the amount in controversy is plainly met here, and, as shown above, there is complete diversity of citizenship between the parties, and this notice is being filed within one year after the commencement of this action, removal of this case to this Court is appropriate. *See* 28 U.S.C. § 1446(b).

13. The fraudulently joined defendant, the personal representative of the estate of Todd Aakhus, consents to the removal of this case and has filed a consent to removal.

WHEREFORE, because there is complete diversity of citizenship between the parties and the amount in controversy exclusive of interest and costs is in excess of \$75,000, Defendant Allstate respectfully requests this Honorable Court to assume full jurisdiction over this action as provided by law.

MODRALL, SPERLING, ROEHL, HARRIS
& SISK, P.A.

By: 

Lisa Mann

Jennifer A. Noya
Attorneys for Defendant Allstate Insurance Company
Post Office Box 2168
Bank of America Centre
500 Fourth Street NW, Suite 1000
Albuquerque, New Mexico 87103-2168
Telephone: 505.848.1800

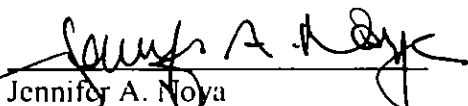
WE HEREBY CERTIFY that a true
and correct copy of the fore-
going Notice of Removal was mailed to:

Pierre Levy
P. O. Box 2084
Santa Fe, New Mexico 87504-2084

Timothy Hale
Riley, Shane & Hale, P.A.
4101 Indian School NE, #420
Albuquerque, New Mexico 87110-3993

this 12th day of December, 2003.

MODRALL, SPERLING, ROEHL, HARRIS
& SISK, P.A.

By: 

Jennifer A. Noya

W0343888.DOC

**THE EXHIBITS ATTACHED TO
THIS PLEADING ARE TOO
VOLUMINOUS TO SCAN. SAID
EXHIBITS ARE ATTACHED TO THE
ORIGINAL PLEADING IN THE CASE
FILE WHICH IS LOCATED IN THE
RECORDS DEPARTMENT, U.S.
DISTRICT COURT CLERK'S
OFFICE...**

BUY™

SELL™

SHOP™



Downloaded From
www.TextBookDiscrimination.com



SELL YOUR OWN SAMPLES

(help others get the justice that they deserve)



BUY™

SELL™

SHOP™

www.TextBookDiscrimination.com

Get ***Booked Up*** on Justice!

© TBD Corporation. All Rights Reserved.