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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ANA MARIA VICENTE, et al.	)	
	)	
Plaintiffs,	)	Case No. 05-CV-00157-JMR
	)	
v.	)	Defendants' Reply on Motion to
	)	Dismiss Counts 3-8 for Want of
ROGER BARNETT, et al.	)	Jurisdiction
	)	
Defendants.	)	

Pursuant to Rule 12(b)(1), Defendants hereby reply to Plaintiffs' Response on this motion.

Respectfully submitted this 2d day of July, 2007

s/David T. Hardy
Attorney for Defendants

MEMORANDUM OF POINTS AND AUTHORITIES

The parties appear to agree that (1) claims cannot be aggregated to reach the jurisdictional amount; (2) if one Plaintiff does reach it, the others can be brought in via supplemental jurisdiction; and (3) the Plaintiff with the highest potential recovery would be Ana Maria Vicente. Our analysis can thus be narrowly focused.

Plaintiffs do not dispute that their disclosures, two years into the litigation, have never specified how the claimed damages are computed. Nor do they deny that they have no medicals and no lost income, that the alleged wrongful arrest would likely draw nominal damages, or that the alleged kick left not even a reddening of the skin when Border Patrol agents examined her leg. The question is how we get to $75,000 from here.

Defendants initially contend that the sum claimed by Plaintiffs controls, if made in good faith. The caselaw makes it clear, however, that "good faith" here means objective good faith, which is more along the lines of reasonableness than of genuine if mistaken belief.[1] Rather, once a defendant has raised substantial questions as to the jurisdictional amount, plaintiff bears the burden of producing evidence to justify that its position can be held in objective good faith.

> A party invoking the jurisdiction of the federal court has the burden of proving that it appears to a "reasonable probability" that the claim is in excess

[1] *Tongkook America Inc. v. Shipton Sportswear Co.*, 14 F.3d 781 (2d Cir.1994) ("A plaintiff's subjective belief, alone, cannot be the controlling factor where, pre-trial, there is "[a] showing that, as a legal certainty, [the] plaintiff cannot recover the jurisdictional amount."") The law often has an unpleasant habit of redefining terms: "actual malice" has nothing to do with malice, and "medical certainty" means a simple preponderance.

> of the statutory jurisdictional amount. *See Moore v. Betit*, 511 F.2d 1004, 1006 (2d Cir. 1975). This is so because when a party chooses to proceed in federal court, "[the party] knows or should know whether [the] claim is within the statutory requirement as to amount." *St. Paul Mercury*, 303 U.S. at 290.

Tongkook America Inc. v. Shipton Sportswear Co., 14 F.3d 781, 784 (2d Cir. 1994). *See also Anthony v. Security Pacific Financial Services*, 75 F.3d 311, 315 (7th Cir. 1996) ("Where, as here, a defendant challenges the plaintiff's allegations of the amount in controversy, the plaintiff must support its assertion with "competent proof." Competent proof means 'proof to a reasonable probability that jurisdiction exists.'"); *ZeoCrystal Industries v. Fox Broadcasting*, 923 F. Supp. 132, 135 (N.D. Ill. 1996) ("some reasonable good faith predicate must be shown").

In making this inquiry, we are not limited to the face of the pleadings. *St. Paul Mercury Indemnity v. Red Cab,* 303 U.S. 283, 289 (1938) (issue can be determined from face of the pleadings or from the proofs); *Gill v. Allstate Insurance Co.*, 458 F.2d 577 (6th Cir. 1972) (considering discovery and medical records; alleged emotional distress consisting of nervous spells, dizziness and insomnia would not meet jurisdictional amount); *Nenoff v. Thompson*, 480 F.2d 1221 (6th Cir. 1973) (dismissing a wrongful death action for consortium, where recovery would be limited to two hours' loss of consortium).

The Third Circuit, for instance, has indicated that the process involves the trial court assessing, based on medical reports, discovery and disclosure, what would be a permissible upper limit of recovery, and whether that bears a reasonable relationship to the jurisdictional amount. *Nelson v. Keeper*, 451 F.3d 289, 296 (3d Cir. 1971). *Cf. Lee v. Edwards*, 101 F.3d 805 (2d Cir. 1996) (ordering remittitur to $75,000

where an officer beat a driver unconscious, requiring hospitalization, then filed false charges of assault on an officer). *See also Burns v. Anderson*, 502 F.2d 970 (5th Cir. 1974) (dismissing case under the then-$10,000 limit, where worst injury consisted of a broken thumb) *cited in Christensen v. Northwest Airlines*, 633 F.2d 529 (9th Cir. 1980).

In our motion, we compared this case to reported cases that mention damages, to recent reported verdicts, and to settlement offers made. All indicated that likely recovery, should Plaintiffs win, would be a fraction of the jurisdictional amount.[2]

A. Reported Cases.

Plaintiffs contend first that *Puz v. McDonald*, 140 Ariz. 77, 680 P.2d 213 (App. 1984), resembles the present case, because a gun was involved in an assault. *Putz* involved an armed robbery of a pharmacy owner, apparently by persons seeking his narcotics,[3] and ending in a gunfight (which defendants lost). This matter involves an alleged citizen's arrest of persons then in the breach of the law, and an allegation Roger waved a gun in their general direction.

Defendants invoke *Mitchell v. Dillard Department Stores, Inc.*, 197 Ariz. 209, 3 P.3d 1129 (App. 2000). First, the plaintiff was utterly innocent of any offense. Second, there was nothing approaching probable cause: "There is no evidence that even remotely supports Hipp's decision to take Mitchell into custody."

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[2] Defendants also contend that attorneys' fees count toward the limit. This is correct, but if the Federal claims are dismissed, the fees claim goes with them: in Arizona one cannot recover attorney's fees for a State law tort claim.

[3] The opinion mentions defendants' assets, which were substantial; there was no reason to rob for money.

Third, plaintiff there was handcuffed and in that state marched through the store (twice, in fact), presumably exposed to the view of all its customers.

As to the remaining cases which we cite, all of which involved verdicts for a fraction of the jurisdictional amount, Plaintiffs make a most interesting argument, for which we may presume to say we have a most interesting response.

Plaintiffs point out that if one allows for inflation since those verdicts, many in the 1980s, in several their present value would be considerably over the jurisdictional limit.

This piqued counsel's interest. Counsel does mostly plaintiffs' work, and the constant refrain of others in that field locally is that juries have become unspeakably parsimonious over the decade or so, and have been awarding little more than the specials. A bit of research showed that the complaints have a solid basis. Verdicts, far from keeping up with inflation, have plummeted, locally and nationwide, over the last decades. We attach as Exhibit B a study, by the Department of Justice's Bureau of Justice Statistics, of tort verdicts in the 75 largest American counties. It notes that "In tort jury trials the overall median damage awards have declined 56% from $64,000 in 1992 to $28,000 in 2001." *Id.* at 1.[4]

That this is applicable to Southern Arizona, and more recently, is documented in Exhibit A, copies of studies ("Arizona Civil Verdicts") which appeared in the Arizona Lawyer, May 2005, May 2006 and May 2007.[5] Median and average

[4] Online at: http://www.ojp.usdoj.gov/bjs/pub/pdf/ttvlc01.pdf.
[5] We can find no such articles prior to the 2005 one, giving results for 2004. The results are not comparable to the DoJ study, since these ones included commercial

verdicts are at best stable, and medians are tending to decline:

Year	2004	2005	2006
Median statewide	(not given)	70,000	50,000
Median Maricopa	"	60,209	70,879
Median Pima	"	50,000	25,000
Average statewide	483,012	992,509	775,947
Average Maricopa	459,167	969,294	775,947
Average Pima	294,730	569,965	128,323

It is noteworthy that southern Arizona verdicts were noticeably lower than those for Maricopa County, and that medians declined, especially in Pima County.

It is thus incorrect to compare earlier verdicts with the present day simply by compensating for the Consumer Price Index, and assuming a $20,000 case then would result in a $100,000 verdict today. If anything, it is the other way around.

B. Local Verdicts.

We noted that verdicts reported on appeal would likely have been biased toward larger awards, and we thus researched the Trial Reporter for the past five years (April 2002-April 2007), seeking verdicts in Pima County assault and battery cases. With the exception of one case that included tens of thousands in medicals plus permanent disability and lost income, no assault and battery verdict over the

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litigation (theft of customer lists, etc.) and inverse eminent domain, which contributed quite a few multi-million dollar verdicts.

last five years in Pima County came close to the jurisdictional amount, and most came in at a few hundred to a thousand dollars. Plaintiffs make no response.

C. Settlement values.

Plaintiffs do not dispute that another consideration relevant to valuing a diversity case is settlement offers made, or that their first offer was for $300,000 total, about $18,750 each, or 25% of the jurisdictional amount. Plaintiffs themselves do not consider this a $75,000 case, nor anything close to it.

Plaintiffs respond first that their offer ignored punitive damages. An offer is obviously calculated on what a party hopes to win, however it is allocated.

Second, they contend that Ana Maria Vicente might have gotten a larger portion than the average. Plaintiffs, however, produce no documentation that there was an agreement to divide the settlement unequally. Any such agreement is of course within their possession and control.

Third, they contend that Plaintiffs' primary settlement object was to stop Defendants from engaging in their allegedly illegal conspiracy. How that could have benefited Plaintiffs is far from clear: none of them were within hundreds of miles of Sierra Vista at the time.[6]

CONCLUSION

In their complaint, Plaintiffs claim ambiguously something over $75,000. After two years of litigation, how they calculate that or any other sum has yet to be explained in disclosure. They have no medicals and no lost income. The only alleged

[6] Plaintiffs lastly argue (Response at 14) that the amount requested (we assume meaning the total) was well above the jurisdictional limit. As we demonstrated, a group of plaintiffs cannot aggregate their demands in order to meet the limit.

injury is something that left no mark on the skin.

However we objectively value the case, it does not approach the jurisdictional amount.

Judged by 35 years of appellate opinions mentioning awards in similar cases, this case is about 12-25% of the jurisdictional amount;

Judged by the past five years of local jury awards in similar cases, it is about 1-2% of that amount;

Even judged by Plaintiffs' settlement offer, it is still only 25% of the jurisdictional requirement.

The diversity claims should be dismissed.

Respectfully submitted this 2d day of July, 2007

s/David T. Hardy
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2007, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

David Urias
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Respectfully submitted this 2d day of July, 2007

s/David T. Hardy