

In July of 2005, while in federal custody in Limestone County, he spent three weeks in the infirmary because of chest pains. He was sent to the Texas Department of Criminal Justice, Correctional Institutions Division in September of 2005. He suffered recurrent chest pains and an EKG was run at the Gurney Unit on September 5, 2005. On September 14, 2005, he was transferred to the Byrd Unit, where a doctor prescribed nitroglycerin. Another EKG was run and blood was drawn for further testing. He was later told that he had an irregular heartbeat. In 2009, Scott says, he learned that the Bextra had caused these symptoms, and that the medication had been taken off the market.

In his causes of action, Scott asserts that the defendants were negligent in failing to give warnings that Bextra could cause blood clots, heart attacks, or strokes, and by failing to warn either him or Dr. Tisdale of the dangerous propensities of Bextra, as well as the type and severity of the side effects. He says that Pfizer's failure to communicate the level of risk inherent in Bextra gives rise to liability under theories of strict liability, negligence, the Texas Deceptive Trade Practices Act, breaches of express and implied warranties, fraud, and misrepresentation.

Legal Standards and Analysis

Federal trial and appellate courts have the duty to examine the basis for their subject matter jurisdiction, doing so on their own motion if necessary. Torres v. Southern Peru Copper Corp., 113 F.3d 540, 542 (5th Cir. 1997); United States v. De Los Reyes, 842 F.2d 755, 757 (5th Cir. 1988). The party asserting federal court jurisdiction has the burden of proving that it exists. People's National Bank v. Office of the Comptroller of the Currency of the U.S., 362 F.3d 333, 336 (5th Cir. 2004).

In this case, the claims presented by Scott do not show that federal jurisdiction exists, and Scott has failed to meet his burden of proving that it does. A similar situation existed in the case of Terry Lee Scott v. Pfizer, Inc., et al., 182 Fed.Appx. 312, 20061488842 (5th Cir., May 23, 2006). In that case, the plaintiff Terry Scott, a federal prisoner in Beaumont, sued two corporations, the state university's medical branch, and physicians associated with the medical branch for products liability

and medical malpractice in connection with two hip replacement surgeries which preceded his incarceration. In affirming the dismissal of the case, the Fifth Circuit stated as follows:

Scott asserts that the district court erred in dismissing his claims against Pfizer and MTG [Corporation] for lack of subject matter jurisdiction. As Scott and several of the defendants were citizens of Texas, the district court did not have diversity jurisdiction over Scott's complaint. *See Whalen v. Carter*, 954 F.2d 1087, 1094 (5th Cir. 1992). Scott's assertion that he met the requirements for standing to bring his complaint is irrelevant; the presence of standing does not create jurisdiction in the absence of diversity or federal question jurisdiction. *See Sierra Club v. Peterson*, 185 F.3d 349, 362 n.15 (5th Cir. 1999) (noting that a party must establish both standing and subject matter jurisdiction). Scott has not shown that the district court had federal question jurisdiction under the Commerce Clause or because he was raising product liability claims. *See* U.S. Constitution, Art. 1, sec. 8; *People's National Bank v. Office of the Comptroller of the Currency of the U.S.*, 362 F.3d 333, 336 (5th Cir. 2004) (party asserting federal court jurisdiction has burden of proving that it exists).

Terry Lee Scott v. Pfizer Inc., et al., 182 Fed.Appx. at 315.

In the present case, the plaintiff Harril Scott has likewise failed to show any basis for subject matter jurisdiction. He and Dr. Tisdale are citizens of Texas, and so the district court lacks diversity jurisdiction. 28 U.S.C. §1332; *Stiftung v. Plains Marketing, L.P.*, 603 F.3d 295, 297 (5th Cir. 2010) (noting that "a federal court cannot exercise diversity jurisdiction if one of the plaintiffs shares the same citizenship as any one of the defendants."). Product liability claims against pharmaceutical companies are generally predicated upon diversity jurisdiction; there is no private cause of action for damages under the Commerce Clause, *see New Orleans & Gulf Coast Railway Co. v. Marinovich Barrois*, civil action no. A-06-0062, 2006 WL 2666303 (E.D.La., September 14, 2006), *citing Washington v. U.S. Tennis Ass'n, Inc.*, 290 F.Supp.2d 323, 329 (E.D.N.Y. 2003), nor under the Federal Food, Drug, and Cosmetic Act. *Merrill Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 806-07 (1986). Because Scott has shown no basis for subject matter jurisdiction, his lawsuit may be dismissed.

The Court notes that there is currently pending multi-district litigation concerning Bextra in the Northern District of California, cause no. 3:05-md-1699. However, the Court need not consider at this time whether the transfer of the present case to the Northern District of California would be appropriate, inasmuch as federal subject matter jurisdiction is lacking.

Conclusion

Rule 12(h)(3), Fed. R. Civ. P., provides that “if the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action.” In the present case, as in Terry Lee Scott v. Pfizer, Inc., complete diversity of citizenship is not present and Scott has not shown any other basis of federal jurisdiction, and so the Court lacks subject matter jurisdiction. Accordingly, the lawsuit should be dismissed.

RECOMMENDATION

It is accordingly recommended that the above-styled civil rights lawsuit be dismissed without prejudice for want of subject matter jurisdiction.

A party's failure to file objections to the findings, conclusions, and recommendations contained in this Report within 14 days after service with a copy thereof shall bar that party from *de novo* review by the district judge of those findings, conclusions, and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to proposed factual findings and legal conclusions accepted and adopted by the district court. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

So **ORDERED** and **SIGNED** this **5** day of **August, 2011**.



JUDITH K. GUTHRIE
UNITED STATES MAGISTRATE JUDGE