UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CASEY AND JARED DAVIS,

Plaintiffs,

v. **No. 4:22-cv-705-P**

ALLSTATE VEHICLE AND PROPERTY INSURANCE COMPANY AND PHILLIP BUTLER,

Defendants.

ORDER OF REMAND

A burst pipe damaged Plaintiffs Casey and Jared Davis's ("Plaintiffs") property. To recover payment for the damages, Plaintiffs sued their insurer, Allstate Vehicle Property and Insurance Company ("Allstate"), and adjuster, Phillip Butler ("Butler"), in state court. Allstate removed the case to this Court under diversity jurisdiction. But the Court, having *sua sponte* considered its jurisdiction, concludes that it lacks jurisdiction and thus must **REMAND**.

BACKGROUND

Plaintiffs are Texas citizens and owners of an Allstate homeowner's insurance policy. ECF No. 1, Ex. A. After a pipe burst in their home due to a severe winter storm, Plaintiffs sued Allstate in Butler in Texas state court for allegedly violating various provisions of the Texas Insurance Code. *Id.* In state court, Allstate elected to accept liability for Butler under Chapter 542A of the Texas Insurance Code and thus moved to dismiss Butler. ECF No. 1, Ex. A. Before the state court could rule on the motion to dismiss, Allstate removed this case to this Court under diversity jurisdiction. *Id.* Allstate is a citizen of Illinois. *Id.* But Butler and Plaintiffs are citizens of Texas. *Id.*

LEGAL STANDARD

A defendant may remove to federal court any civil action brought in state court over which the district court would have had original jurisdiction. 28 U.S.C. § 1441(a); *Mumfrey v. CVS Pharmacy, Inc.*, 719 F.3d 392, 397 (5th Cir. 2013). Original jurisdiction may be based on either diversity of citizenship or the existence of a federal question. *Halmekangas v. State Farm Fire & Cas. Co.*, 603 F.3d 290, 295 (5th Cir. 2010). Diversity jurisdiction exists if the amount in controversy exceeds $75,000 and all parties are completely diverse. 28 U.S.C. § 1332(a). Complete diversity requires that "all persons on one side of the controversy be citizens of different states than all persons on the other side." *McLaughlin v. Miss. Power Co.*, 376 F.3d 344, 353 (5th Cir. 2004). Citizenship for diversity purposes is determined by looking at the complaint when the notice for removal is filed. *Brown v. Sw. Bell Tel. Co.*, 901 F.2d 1250, 1254 (5th Cir. 1990); *Gebbia v. Wal-Mart Stores, Inc.*, 233 F.3d 880, 883 (5th Cir. 2000).

Generally, "an action nonremovable when commenced may become removable thereafter only by the voluntary act of the plaintiff." *Hoyt v. Lane Const. Corp.*, 927 F.3d 287, 295 (5th Cir. 2019) (quoting *Crockett v. R.J. Reynolds Tobacco Co.*, 436 F.3d 529, 532 (5th Cir. 2006)). The improper-joinder doctrine provides a narrow exception to this general rule and allows a court to disregard the citizenship of an improperly joined defendant. *Hoyt*, 927 F.3d at 295; *McDonal v. Abbott Labs.*, 408 F.3d 177, 183 (5th Cir. 2005). A "defendant has been improperly joined if the plaintiff has failed to state a claim against that defendant on which relief may be granted." *Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Grp., Ltd.*, 818 F.3d 193, 202 (5th Cir. 2016). The federal pleading standard is applied to make this determination. *Id.* at 208. Under the federal standard, pleadings must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

ANALYSIS

Allstate does not dispute that Plaintiffs and Butler are Texas citizens. Despite the lack of complete diversity, Allstate contends that removal is proper because (1) Butler is no longer a party to the case since it accepted liability for him, and (2) even if Butler is still a party to the case, he was improperly joined. ECF No. 1. Both arguments fail.

A. Allstate's acceptance for Butler's liability does not make the case removable.

Allstate first argues that because it elected to accept liability for Butler under Chapter 542A of the Texas Insurance Code, Butler is no longer a party to the case. *Id.* ¶ 2–3. And thus, Allstate contends that Butler's Texas citizenship is irrelevant to whether there is complete diversity. *Id.* This argument is flawed for three reasons. *First*, Allstate cannot make an action removable by accepting liability for Butler because "an action nonremovable when commenced may become removable thereafter only by the voluntary act of the plaintiff." *Crockett v. R.J. Reynolds Tobacco Co.*, 436 F.3d 529, 532 (5th Cir. 2006). *Second*, the motion to dismiss Butler was not granted by the state court. Thus, under long-standing Texas law, Parks remains a party. *See Hoyt v. Lane Const. Corp.*, 927 F.3d 287, 300 (5th Cir. 2019); *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 205 (Tex. 2001), *overruled on other grounds by Industrial Specialists, LLC v. Blanchard Refining Company, LLC*, No. 20-0174, 2022 WL 2082236, at *2 (Tex. June 10, 2022). *Third*, even if the motion to dismiss Butler was granted by the state court, such an order is only interlocutory under Texas law and thus does "not terminate [a defendant's] status as a party to the case." *See Madison v. Williamson*, 241 S.W.3d 145, 156 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). Therefore, Butler remains a party to the case, and Allstate's acceptance of Butler's liability does not make the case removable.

B. Butler was not improperly joined.

Allstate then contends that removal is proper because Butler was improperly joined. Allstate argues that Butler was improperly joined because Plaintiffs' state-court petition does not adequately state a viable cause of action against Butler. ECF 1 ¶ 6. The Court disagrees. In its

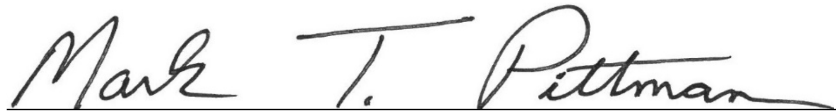
state court petition, Plaintiffs assert a claim against Butler for violating various provisions of Chapter 541 of the Texas Insurance Code. *Id.* at Ex. A. An insured Texan may undoubtedly maintain a claim against an insurance adjuster for the conduct that Plaintiffs complain of. *See Kessler v. Allstate Fire & Cas. Ins. Co.*, 541 F. Supp. 3d 718, 727 (N.D. Tex. 2021) (Pittman, J.); *Denley Group, LLC v. Safeco Ins. Co. of Ind.*, No. 3:15-CV-1183-B, 2015 WL 5836226, at *3 (N.D. Tex. Sept. 30, 2015) (Boyle, J.) ("Both the Texas Supreme Court and the Fifth Circuit have recognized that an insurance adjuster may be held individually liable for violating chapter 541 of the Insurance Code."). Having reviewed Plaintiffs' allegations in support of its claims against Butler, the Court finds that Plaintiffs' state-court petition sufficiently states a claim for relief against Butler under federal pleading standards.

To the extent Allstate argues that Plaintiffs no longer have a viable cause of action against Butler because they accepted liability for Butler, the Court disagrees. This Court has exhaustively examined this issue in several cases. *See e.g.*, *Morgan v. Chubb Lloyds Ins. Co.*, 551 F. Supp. 3d 754 (N.D. Tex. 2021); *Kessler*, 541 F. Supp. 3d 718. Rather than discussing the in-depth reasoning in those holdings here, the Court merely adopts them and incorporates them here. But in general, a non-diverse defendant that is properly joined may not become improperly joined by a voluntary act of the removing party. *See Morgan*, 551 F. Supp. 3d 754; *Kessler*, 541 F. Supp. 3d 718. Because Allstate has not shown that Butler was improperly joined when first joined to the suit, the Court finds that Butler was not improperly joined.[1]

[1]*See Smallwood v. Illinois Cent. R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004) ("[T]he purpose of the improper-joinder inquiry is to determine whether or not the in-state defendant was properly joined, the focus of the inquiry must be on the joinder, not on the merits of the plaintiff's case."); *River of Life Assembly of God v. Church Mut. Ins. Co.*, No. 1:19-cv-49-RP, 2019 WL 1767339, at *3 (W.D. Tex. Apr. 22, 2019) ("[Defendant's] argument that [the nondiverse party] is improperly joined based solely on its Section 542A.006 election misunderstands the doctrine of improper joinder, which is fundamentally about joinder. . . . The focus must remain on whether the nondiverse party was properly joined when joined."); *see also Stephens v. Ins. Co. of Ind.*, No. 4:18-CV-595, 2019 WL 109395, 2019 WL 109395, at *5 (E.D. Tex. Jan. 4, 2019) ("[T]he defendant is either a proper party when joined to suit or the defendant is an improper party when joined to the suit. . . . It does not follow that a non-diverse defendant that is initially properly joined may become initially improperly joined.").

Accordingly, the Court **ORDERS** that this case is **REMANDED** to the 43rd Judicial District Court in Parker County, Texas. The Clerk of this Court is **INSTRUCTED** to mail a certified copy of this Order to the District Court of Parker County, Texas.

SO ORDERED on this **22nd day** of **August 2022.**



Mark T. Pittman
UNITED STATES DISTRICT JUDGE