

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE**

Sharon C. Bigg, m/n/f of
Samuel J.P. Bigg;
Sharon C. Bigg;
Peter Bigg

v.

Civil No. 97-19-SD

Meadow Green-Wildcat Corp.

O R D E R

Plaintiff parents¹ move for reconsideration of the court's order of May 28, 1997 (document 17), and request oral argument on their motion (document 18). Defendant objects in part (document 19).²

1. Background

This is a diversity action wherein damages are sought for injuries allegedly sustained by the minor plaintiff, Samuel J.P. Bigg, while on the premises of defendant. The complaint seeks recovery of damages not only for the minor plaintiff but also for his parents.

Defendant has counterclaimed for contribution from plaintiff parents. When their motion to dismiss the counterclaim was denied, plaintiff parents moved to dismiss their own claims without prejudice and sought appointment of a guardian ad litem

¹Plaintiff parents are Sharon C. Bigg and Peter Bigg.

²Defendant does not object to the request for oral argument, but does object to the motion for reconsideration.

in their place and stead. The court also denied this motion on the ground that the relief sought conflicted with the provisions of Rule 41(a)(2), Fed. R. Civ. P.³

Citing the statutory procedural provisions of New Hampshire Revised Statutes Annotated (RSA) 507:7-g, IV(c),⁴ the parents point out that compliance with its requirement of consent to an action for contribution gives rise to a conflict with the cooperation requirements of plaintiffs' insurance coverage. They also indicate that possible agreements between plaintiffs and their insurers could be jeopardized if the action were required to proceed in its present form.

2. Discussion

The counterclaim filed by defendant in this action is a compulsory counterclaim. Rule 13(a), Fed. R. Civ. P.⁵ Under

³Rule 41(a)(2), Fed. R. Civ. P., governs dismissal of actions in cases where an answer has been filed and the parties have not stipulated to such dismissal. In relevant part, it provides, "If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court."

⁴RSA 407:7-g governs the procedure for the recovery of contribution among tortfeasors in New Hampshire. In pertinent part, subsection IV(c) provides: "If and only if the plaintiff in the principal action agrees, a defendant seeking contribution may bring an action in contribution prior to the resolution of the plaintiff's principal action, and such action shall be consolidated for all purposes with the principal action."

⁵Rule 13(a), Fed. R. Civ. P., provides in pertinent part:

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that

federal procedure, the failure to assert such claim in the instant action would bar any subsequent attempt by the defendant to do so. 3 MOORE'S FEDERAL PRACTICE § 13.14[1], at 13-35 to -40 (Matthew Bender 1997). Obviously, the rule is in conflict with the requirements of RSA 507:7-g.

It is elemental that a federal court presiding over a diversity case operates under uniform rules of procedure. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); Hanna v. Plumer, 390 U.S. 460 (1965). And in a diversity suit with a conflict between a state procedural rule and a federal rule, the federal rule prevails. Karakas v. McKeown, 783 F. Supp. 1028, 1033-34 (E.D. Mich. 1992) (citations omitted).

It follows that the motion for reconsideration must be and it is accordingly herewith denied.⁶

SO ORDERED.

Shane Devine, Senior Judge
United States District Court

June 12, 1997

cc: David J. KillKelley, Esq.
Debra Weiss Ford, Esq.
Joseph M. McDonough III, Esq.

is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

⁶As the issue before the court is necessarily decided on applicable rules of law, the court finds that the proposed oral argument concerning the relation of plaintiffs with their insurers would not be of assistance to it in resolving the issue and therefore denies the request for oral argument.