IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EFRAIN HILARIO AND GABINA MARTINEZ FLORES, As Surviving Parents of ERIK HILARIO, Deceased, and EFRAIN HILARIO, as Personal Representative of the Estate of ERIK HILARIO, Deceased, Plaintiffs, v. NEWELL RECYCLING OF ATLANTA, INC.; NEWELL EQUIPMENT LEASING, LLC; NEWELL RECOVERY, LLC; and NEWELL TRANSPORTATION, LLC; Defendants.	CIVIL ACTION FILE NO.: 1:12-CV-02948-WSD

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION TO REMAND

There is no valid basis for removal. The Court should grant Plaintiffs' motion and remand this case accordingly. Defendants removed a Georgia wrongful death tort case, despite the undisputed facts that Defendants are Georgia citizens and no part of Plaintiffs' claims depends on federal law. Defendants base their removal on a federal preemption defense. The law is well-established, however, that a preemption defense will not create federal jurisdiction. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 393, 107 S.Ct. 2425, 2430 (1987) ("it is now settled law that a case may *not* be removed…on the basis of a federal defense,

including…pre-emption, even if the defense is anticipated in the plaintiffs' complaint").

I. FACTUAL BACKGROUND

On January 6, 2011, Erik Hilario burned to death on Defendant Newell Recycling of Atlanta, Inc.'s premises. Erik was operating a loader to move scrap and debris across a paved area. Flammable material had collected in the area. Suddenly and without warning, the flammable material ignited, completely engulfing Erik in flames. Erik Hilario eventually died as a result of the fire and severe burns. Defendants are liable for their negligence in creating the dangerous conditions that led to the fire and death of Erik Hilario. (Doc. 2).

Plaintiffs filed this cause of action in Fulton County State Court. Plaintiffs' claims are entirely based on Georgia wrongful death and personal injury law. *See* O.C.G.A. § 51-4-1, *et seq*. There is no federal claim in Plaintiffs' complaint. (Doc. 1-1).[1] Nor does proof of any element of Plaintiffs' case depend on federal law.

Defendants filed their notice of removal on August 24, 2012. (Doc. 1). Because there is no legal basis for removal jurisdiction, as further established

[1] Plaintiffs filed an amended complaint to correct a typographical error regarding the name of one of the parties. (Doc. 2). The amendment did not change the substance of the claims and allegations.

below, Plaintiffs respectfully request this Court remand this case to the State Court of Fulton County.

II. LEGAL STANDARD FOR REMOVAL AND REMAND

For a case to be removable based on federal question jurisdiction, the action must be founded on a claim or right arising under federal law. *Rivet v. Regions Bank of La.,* 522 U.S. 470, 475, 118 S.Ct. 921, 925, 139 L.Ed.2d 912 (1998); 28 U.S.C. § 1441(b). A removing defendant has the burden of proving federal jurisdiction. *Tapscott v. MS Dealers Service Corp.*, 77 F.3d 1353 (11th Cir. 1996). There is a presumption against the exercise of federal jurisdiction, such that all uncertainties as to removal jurisdiction are to be resolved in favor of remand. *Russell Corporation v. American Home Assurance Company*, 264 F.3d 1040 (11th Cir. 2001).

III. ARGUMENT AND CITATION OF AUTHORITY

A. Defendants' Preemption Defense Does Not Create Federal Question Jurisdiction.

Defendants base removal on a defense that federal immigration law preempts Plaintiffs' Georgia law claims. Defendants intend argue that the Immigration Reform Control Act ("IRCA") should be read so broadly as to preempt Georgia (or any other state) from exercising its police powers to provide a tort recovery for wrongful death or injury to an undocumented worker. While

Plaintiffs disagree with Defendants' argument, now is not the time for a ruling on its merits.[2] For purposes of jurisdiction and remand, what matters is that the preemption defense – regardless of its merit or lack thereof -- does *not* transform Plaintiffs' state law allegations into a removable federal claim.

The Eleventh Circuit and Supreme Court have directly addressed, and rejected, Defendants' preemption-based-removal argument. Rather than characterize the law, Plaintiffs will simply quote the Eleventh Circuit's explanation of the removal standard:

> When evaluating whether this case arises under federal law, we are guided by the "well-pleaded complaint" rule, which provides that the plaintiff's properly pleaded complaint governs the jurisdictional determination. *See Louisville & Nashville R.R. v. Mottley,* 211 U.S. 149, 152, 29 S.Ct. 42, 43, 53 L.Ed. 126 (1908). A case thus may be removed based on federal question jurisdiction "**only** when the **plaintiff's statement** of his own cause of action shows that it is **based**" on federal law. *Id.* The presence of a **federal defense** does **not make the case removable, even if the defense is preemption** and even if the validity of the preemption defense is the only issue to be resolved in the case. *See Caterpillar Inc. v. Williams,* 482 U.S. 386, 393, 107 S.Ct. 2425, 2430, 96 L.Ed.2d 318 (1987). In short, the **plaintiff is the "master of the claim"** and may prevent removal by

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[2] Plaintiffs note that other Courts, including the Georgia Court of Appeals, have considered and rejected this same IRCA preemption argument. *Continental PET Technologies, Inc. v. Palacias*, 269 Ga. App. 561, 564, 604 S.E.2d 627, 631 (2004) ("we hold that federal law does not preempt Georgia law on the question of whether or not an illegal alien may receive workers' compensation benefits"); *Madeira v. Affordable Housing Foundation, Inc.*, 469 F.3d 219 (2nd Cir. 2006)(holding that IRCA does not clearly preempt New York law allowing undocumented workers to recover lost earnings following personal injury).

> choosing not to plead an available federal claim. *Id.* at 392, 107 S.Ct. at 2429.
>
> Defendant argues that this case falls within an "independent corollary" to the well-pleaded complaint rule known as the "complete preemption" doctrine. *See id.* at 393, 107 S.Ct. at 2430. According to the Supreme Court, **complete preemption occurs when "the pre-emptive force of a statute is so 'extraordinary' that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule**." *Id.* (internal quotation marks and citation omitted). "Because they are recast as federal claims, state law claims that are held to be completely preempted give rise to 'federal question' jurisdiction and thus may provide a basis for removal." *McClelland v. Gronwaldt,* 155 F.3d 507, 512 (5th Cir.1998); *see also* Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition,* 76 Tex. L.Rev. 1781, 1794 (June 1998) (hereinafter "Miller") ("The stated rationale for this deviation from what is one of the fundamental cornerstones of federal subject matter jurisdiction is that, in these cases, federal law not only preempts a state law to some degree but also substitutes a federal cause of action for the state cause of action.")

Blab T.V. of Mobile, Inc. v. Comcast Cable Communications, Inc., 182 F.3d 851, 854-55 (11th Cir. 1999) (emphasis added).

To support removal based on preemption Defendants must show Congress intended IRCA to completely preempt the field of personal injury tort law as it relates to undocumented workers. *See id.* That is a high burden Defendants cannot meet, especially since damages for personal injury and wrongful death fall squarely within the traditional police powers reserved to the States. *See id.* ("although the Supreme Court recognizes the existence of the complete preemption

doctrine, the Court does so hesitatingly and displays no enthusiasm to extend the doctrine"); *Arizona v. United States*, 132 S.Ct. 2492, 2501 (2012) ("In preemption analysis, courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'"); *Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796, 803-04 (5th Cir. 2011) ("historic police powers …not to be superseded…unless that was the clear and manifest purpose of Congress…This assumption applies with 'particular force' when Congress legislates in a field traditionally occupied by state law")(internal citations omitted).

Defendants do not even attempt to articulate how or where Congress clearly manifested intent to completely preempt state tort law through IRCA. The recent Supreme Court decision dealing with Arizona's immigration law establishes that IRCA provides no basis for removal. *See Arizona v. United States*, 132 S. Ct. 2492, 2503 (2012). While the specific holdings of *Arizona* are not relevant here, the case did deal with IRCA preemption. What is important for the removal jurisdiction issue before this Court is that the Supreme Court analyzed IRCA preemption under ordinary "conflict" preemption principles. *See id.* ("The United States contends that the provision upsets the balance struck by the Immigration Reform and Control Act of 1986 (IRCA) and must be preempted as an obstacle to

the federal plan of regulation"). If IRCA completely preempted the field, there would have been no need to go through an exhaustive conflict preemption analysis. That should end the Court's inquiry on remand. Regardless of the merits of IRCA preemption as it relates to Plaintiffs' wrongful death claims, IRCA is not so extraordinary in its preemptive scope as to create federal jurisdiction.

Because Defendants cannot prove complete preemption to support removal, Defendants may argue that their federal defense is so "novel" or important that it raises a "substantial" federal question that this Court should keep the case to decide. The Supreme Court has already considered, and rejected, that approach to federal jurisdiction:

> Petitioner emphasizes…**a special reason for having a federal court answer the novel federal question** …**We reject this argument**. We do not believe the question whether a particular claim arises under federal law depends on the novelty of the federal issue. Although it is true that federal jurisdiction cannot be based on a frivolous or insubstantial federal question, "the interrelation of federal and state authority and the proper management of the federal judicial system," *Franchise Tax Board,* 463 U.S., at 8, 103 S.Ct., at 2846, would be ill served by a rule that made the existence of federal-question jurisdiction depend on the district court's case-by-case appraisal of the novelty of the federal question asserted as an element of the state tort. **The novelty of an…issue is not sufficient to give it status as a federal cause of action**…

Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 816-17, 106 S. Ct. 3229, 3236, 92 L. Ed. 2d 650 (1986) (emphasis added).[3]

An IRCA preemption defense does not raise a federal question to support removal. Therefore, Defendants' removal was improper and the Court should remand this case.

B. This case is not removable based on diversity of citizenship because Defendants are Georgia citizens.

This case is not removable based on diversity of citizenship because one or more Defendants is a Georgia citizen. *See* 28 U.S.C. § 1441(b). Defendants' notice of removal is calculated to mislead on this point. Defendants assert that the Court has "original jurisdiction" based on "diversity of citizenship," but Defendants conspicuously omit mentioning that they are *Georgia* citizens such that the case is *not* removable based on diversity under 28 U.S.C. § 1441(b). *See* Doc. 1, p. 3. Plaintiffs attach as Exhibit A proof from the Georgia Secretary of State's website that Defendants are Georgia citizens, both because several of them are organized under the laws of Georgia and because their principal place(s) of business are in Georgia. Simply applying the black letter law of § 1441(b), this

[3] It is noteworthy that the Court in *Thompson* rejected federal jurisdiction even though an element of Plaintiffs' cause of action alleged violation of a federal statute. This case is more clear cut, as there is no mention of, or reliance on, federal law for any element of Plaintiffs' claim.

case is not removable based on diversity. *See id.* (removal based on diversity of citizenship allowed "only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought").

C. The Court Should Award Attorney Fees and Expenses Under § 1447(c) Because the Removal is Contrary to Established Law.

The remand statute specifically provides for an award of "just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). In the hopes of avoiding unnecessary motions practice, Plaintiffs wrote to Defendants before filing this motion. Plaintiffs cited the legal authority discussed in this brief and requested that Defendants withdraw their removal and consent to remand. *See* Exh. B (Correspondence Between Counsel). Defendants refused. *See id.* Because the removal is contrary to established precedent, and because Defendants refused to withdraw it even when confronted with the governing law, Plaintiffs request that the Court award fees and expenses in addition to remanding this case to the State Court of Fulton County.[4]

[4] Plaintiffs have incurred substantial time researching and responding to Defendants' notice of removal. If the Court awards attorney fees, Plaintiffs will promptly file an affidavit to support a specific award of fees and costs recoverable under 28 U.S.C. § 1447(c).

IV. CONCLUSION

Plaintiffs respectfully request that the Court grant this motion and remand this action promptly to the State Court of Fulton County. Plaintiffs further submit that an award of fees and expenses to Plaintiffs is appropriate as Defendants knew from the governing law that there is no basis for removal.

Respectfully submitted,

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v.	)
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CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the foregoing ***Plaintiffs' Brief in Support of Motion to Remand*** using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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This 30th day of August, 2012.

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