

June 16, 2005

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 04-31003

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TAMMY PHILIBERT; RUDOLPH PHILIBERT,

Plaintiffs-Appellants,

versus

ETHICON, INC., A Subsidiary of  
Johnson & Johnson; ET AL,

Defendants,

ETHICON, INC., A Subsidiary of  
Johnson & Johnson,

Defendant-Appellee.

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Appeal from the United States District Court  
For the Eastern District of Louisiana

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( )

Before JOLLY, HIGGINBOTHAM, and JONES, Circuit Judges.

PER CURIAM:\*

We granted leave to appeal the district court's denial of Philibert's motion for voluntary dismissal filed under Rule 41(a)(2), Fed. R. Civ. P. The district court denied the motion, concluding that dismissal would subject Ethicon to clear legal prejudice. As the district court put it, "The question is whether

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\* Pursuant to 5<sup>TH</sup> CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5<sup>TH</sup> CIR. R. 47.5.4.

there is any legal prejudice with regard to moving it to Florida." The district court explained that suit had been filed in Florida against the same defendant, as well as another defendant who was Florida based, giving rise to choice of law issues should he order the case transferred to Florida.

Subsequent to our grant of leave to appeal, the district court in Florida transferred the litigation pending there to the court below in Louisiana. We are persuaded to vacate our grant of leave to appeal in that these subsequent events have fundamentally changed the issues before the district court and on appeal.

The leave to appeal is VACATED, and the case is REMANDED to the district court for further proceedings.