

Not intended for print publication.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

**CHARLESTON DIVISION**

DIANNA MAE SAVILLA,  
Administratrix of the Estate of  
LINDA SUE GOOD KANNAIRD,  
deceased,

Plaintiffs,

v.

CIVIL ACTION NO. 2:02-1004

SPEEDWAY SUPERAMERICA, LLC.,  
a Delaware corporation, dba Rich Oil Company,  
CITY OF CHARLESTON, a municipality,  
CHARLESTON FIRE DEPARTMENT,  
BRUCE GENTRY and ROB WARNER,

Defendants.

**MEMORANDUM OPINION AND ORDER**

Pending before the court is the plaintiff's motion to remand, in which the plaintiff contends that the defendants' notice of removal to this court was premature. [Docket 6]. The defendants argue that their notice of removal was timely, as it was filed in accordance with the language of 28 U.S.C. § 1446(b). Section 1446(b) allows removal within thirty days of a defendant's receipt of a document "from which it may first be ascertained that the case . . . has become removable." 28 U.S.C. § 1446(b) (2002). For the reasons discussed herein, the court **FINDS** that a case may not be removed pursuant to the second paragraph of § 1446(b) until a pleading giving rise to federal jurisdiction has been filed. As the defendants' notice of removal was filed upon the entry of a state

court order granting the plaintiff *leave* to amend her complaint to assert federal claims, rather than upon the *filing* of the amended complaint itself, the defendants' removal was premature. Accordingly, the court **GRANTS** the plaintiff's motion to remand.

## **I Background**

The plaintiff, Dianna Mae Savilla, filed her original complaint on April 11, 2000 in the Circuit Court of Kanawha County, West Virginia. The events giving rise to this case occurred on February 18, 2000, when flood waters in Sissonville, West Virginia resulted in the death of the plaintiff's decedent, Linda Kannaird. On that date, Kannaird, an employee of Speedway Superamerica d/b/a/ Rich's Oil (Speedway), was called into work to assist on-site employees in their efforts to move merchandise so that it would not be destroyed by rising flood waters. The employees were trapped inside the convenience store, and the City of Charleston fire department dispatched firemen in a boat to attempt a rescue. Ultimately, the boat capsized in the attempt to get the employees to dry land. Savilla now alleges that the actions of Speedway's agents requiring Kannaird to remain at work during rising flood waters was a violation of W. Va. Code § 21-3-1 (2002), which requires an employer to furnish its employees with a reasonably safe place of employment. The suit also asserts three causes of action against the City of Charleston and the two firemen who attempted the rescue. These claims allege that the firemen were negligent in performing the attempted rescue and that the City was negligent for failing to properly train its emergency personnel.

The facts relevant to the issue before this court stem from the plaintiff's filing on July 31, 2002 of a "Motion to Amend Complaint and Memorandum in Support Thereof" in state court. In this motion, Savilla sought permission to add causes of action against the City of Charleston for allegedly violating her federal constitutional rights. At the back of the motion, the plaintiff included

a proposed amended complaint that articulated these federal claims. On August 7, 2002, the state court entered a “Stipulated and Agreed Order Granting Leave to File a Second Amended Complaint.” This order stated that “[T]he parties [come now], by counsel, pursuant to the Plaintiff’s Motion to Amend Complaint, and advise the Court that there is no objection to the filing of the Motion . . . It is accordingly ORDERED that the plaintiff is granted leave to file a Second Amended Complaint . . . .” (State Court Order of 8/7/02 at 1). The amended complaint itself was never filed. The same day, the defendants jointly filed a notice of removal based on the federal claims asserted in Savilla’s proposed amended complaint attached to the motion to amend. On August 20, 2002, the plaintiff filed in this court a “Second Amended Complaint” asserting the same constitutional claims as those alleged in the initial proposed amendment; however, the plaintiff removed all references to federal law and instead asserted only violations of the West Virginia Constitution. On August 21, 2002, Savilla filed a motion to remand, contending that because she never actually filed the amended complaint asserting federal claims in state court, the defendants’ notice of removal was premature.

## **II Discussion**

The issue before the court is whether a state court’s entry of an order granting a plaintiff leave to amend her complaint to assert federal claims qualifies under § 1446(b) as a sufficient trigger to authorize a defendant’s removal. If the defendants are correct that the state court’s order granting leave to amend was enough to qualify under § 1446(b), then their removal was timely. If, however, the plaintiff is correct that without an actual filing of a complaint articulating federal claims there was no properly removable case, the defendants’ notice of removal was premature and this court must remand.

In order for removal to be proper, the claim asserted must be one that falls under the original jurisdiction of a federal district court. *Jefferson County v. Acker*, 527 U.S. 423, 430 (1999). District courts have original jurisdiction over “all civil actions under the Constitution, laws or treaties of the United States.” 28 U.S.C. § 1331 (2002). Civil actions filed in state courts over which district courts have original jurisdiction “may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending.” 28 U.S.C. § 1441 (2002). If a district court determines that it has no federal subject matter jurisdiction, the district court must remand the case to the state court from which it was removed. 28 U.S.C. § 1447(c) (2002). In addition, principles of comity dictate that removal statutes be strictly construed and that any doubts be resolved in favor of remand. *Able v. Upjohn Co.*, 829 F.2d 1330, 1332 (4th Cir. 1987).

The general rules of procedure for removal are found in 28 U.S.C. § 1446. The second paragraph of § 1446(b) governs situations in which the originally filed case is not removable, but some subsequent change raises potential federal jurisdiction. That paragraph provides that for proper removal in such an instance, the defendant may file a notice of removal “within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable . . . .” 28 U.S.C. § 1446(b).

The defendants argue that the state court’s order granting Savilla leave to amend her complaint to assert federal claims was an “order or other paper from which it may first be ascertained that the case is one which . . . has become removable,” and thus triggered their ability to remove under § 1446(b). The defendants rely on *Yarnevic v. Brink’s, Inc.*, 102 F.3d 753 (4th Cir. 1996), for

their argument that the “motion, order or other paper” language of § 1446(b) is broad enough to include *any* information received by a defendant that puts the defendant on notice of potential federal jurisdiction. In *Yarnevich*, the defendant sought removal based on diversity jurisdiction. *Id.* at 755. In the plaintiff’s memorandum opposing removal, the plaintiff admitted that he had moved since filing the complaint to a state that would support diversity jurisdiction. *Id.* The *Yarnevich* court found that the plaintiff’s memorandum giving notice to the defendant that diversity existed qualified as “other paper” under § 1446(b) and was a sufficient trigger for removal. *Id.* The court stated that

[w]e do not think § 1446(b) requires that the “motion, order or other paper” be part of the state court record, especially in a case like this where diversity is created by a voluntary act of the plaintiff and the case has already been properly removed. The “motion, order or other paper” requirement is broad enough to include any information received by the defendant, “whether communicated in a formal or informal manner.”

*Id.* (quoting 14C Wright, Miller & Cooper, Federal Practice and Procedure § 3732 (2d ed. 1985)).

The key difference between *Yarnevich* and this case is that the document at issue here, the state court’s order granting Savilla leave to amend her complaint, does *not* indicate the existence of federal jurisdiction, whereas the document in *Yarnevich* did. In *Yarnevich*, a federal forum was available to the defendant as soon as the plaintiff changed his domicile. The plaintiff’s memorandum admitting his residency change simply made the defendant aware that diversity jurisdiction existed. In this case, federal question jurisdiction could become available only if and when a complaint containing a federal claim was filed in state court. The state court’s order granting leave to amend the complaint may have notified the defendant of the future possibility of federal question jurisdiction. That order could not, however, have informed the defendant that “the case is one which is or has become removable,” 28 U.S.C. § 1446(b), because a case is removable on the basis of federal question jurisdiction only when a federal claim has actually been filed in state court.

In order for a plaintiff to properly invoke federal question jurisdiction under 28 U.S.C. § 1331, her “well-pleaded complaint” must articulate a claim under the Constitution, laws, or treaties of the United States. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987). In order for this “well-pleaded complaint” to properly initiate a suit, the plaintiff must file it in a district court. Fed. R. Civ. Pro. 3 (2002) (“A civil action is commenced by filing a complaint with the court.”). West Virginia has an identical rule dictating that the filing of a complaint is the beginning point of a suit. W. Va. R. Civ. Pro. 3 (2002). Rule 5(e), entitled “Filing with the court defined,” states that

[t]he filing of papers with the court *as required by these rules* shall be made by filing them with the clerk of the court, who shall note thereon the filing date, . . . the notation by the clerk or the judge of the filing date on any such paper constitutes the filing of such paper, and such paper then becomes a part of the record in the action without any order of the court.

W. Va. R. Civ. Pro. 5(e) (2002) (emphasis added).

A cause of action invoking federal question jurisdiction cannot exist until it is properly filed. No complaint articulating a federal claim was ever filed in this case. Therefore, this case was not properly removable. Other district courts have come to the same conclusion that the appropriate trigger for removal under § 1446(b) is the filing of a complaint giving rise to federal jurisdiction. *See Bezy v. Floyd County Plan Comm’n*, 199 F.R.D. 308, 313 (S.D. Ind. 2001); *Miller v. Stauffer Chem. Co.*, 527 F. Supp. 775, 776 (D. Kan. 1981). In *Bezy*, the plaintiff contended that the thirty-day period for removal under § 1446(b) began when he served the defendants with a copy of his proposed amended complaint asserting federal claims. 199 F.R.D. at 313. The court disagreed, stating that “[u]ntil the amended complaint, containing properly pled federal claims, was filed, the controlling pleading was the initial complaint, which we have already determined did not trigger our jurisdiction.” *Id.* In *Miller*, on a motion to remand, the plaintiffs argued that removal was improper

as it was not accomplished within thirty days of the plaintiffs' motion to amend their complaint. 527 F. Supp. at 776. The court disagreed, stating that "the mere filing of a motion to amend . . . cannot make an action removable that was not removable under the original complaint" and "we decline to designate the date on which the state court grants leave to amend as the event which triggers the thirty-day removal period." *Id.* at 777.

### **III Conclusion**

The defendants' assertion that this case could be properly removed without a complaint raising federal claims ever being filed ignores basic principles of the law. **The court FINDS that the state court's entry of an order granting the plaintiff leave to amend her complaint did not render the case removable under § 1446(b).** The defendants' attempt to remove was therefore premature and the plaintiff's motion to remand is **GRANTED**. All other pending motions in this case are accordingly **DENIED AS MOOT**.

The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: November 7, 2002

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JOSEPH R. GOODWIN  
UNITED STATES DISTRICT JUDGE