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,
CHAR LESTON FIRE DEPARTMENT,
BRUCE GENTRY and ROB WARNER,

Defendants.

ORDER

Pending before the court is the plaintiff's *Motion to Amend the Second Amended Complaint and to Remand*. [Docket 51]. For the reasons stated below, the court **GRANTS** the plaintiff's motion to amend and to remand [Docket 51] and **REMANDS** this case Circuit Court of Kanawha County, West Virginia. All other pending motions in this case are **DENIED AS MOOT**.

I Background

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.

The plaintiff, Dianna Mae Savilla, filed her original complaint on April 11, 2000 in the Circuit Court of Kanawha County, West Virginia. Savilla alleged that, by requiring Kannaird to remain at work during rising flood waters, Speedway's agents violated West Virginia Code § 21-3-1 (2002), which requires an employer to furnish its employees with a reasonably safe place of employment. The original complaint 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 in failing to train its emergency personnel properly.

On July 31, 2002, Savilla filed a *Motion to Amend Complaint and Memorandum in Support Thereof* in state court. Savilla sought permission to add causes of action against the City of Charleston for allegedly violating her constitutional rights. At the back of the motion, Savilla appended a proposed amended complaint articulating claims based on the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. On August 7, 2002, the state court entered an order granting Savilla leave to file the amended complaint. The same day, the defendants jointly filed a notice of removal based on the federal claims asserted in Savilla's proposed amended complaint. On August 20, 2002, Savilla filed with this court a proposed Second Amended Complaint in which all references to the United States Constitution were removed and

replaced by references to 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.

In a memorandum opinion and order dated November 2, 2002, this court granted Savilla's motion to remand. In doing so, the court held that the proposed complaint appended to Savilla's motion to amend was never properly filed and that the plaintiff had, therefore, never articulated a federal claim. *Savilla v. Speedway SuperAmerica, LLC*, No. Civ. A. 202-1004, 2002 WL 31487914 (S.D. W. Va. Nov. 7, 2002) (*Savilla I*). On appeal, the Fourth Circuit reversed this decision, finding that the proposed complaint was properly filed and that when the state court granted Savilla leave to file the First Amended Complaint, the order operated to amend the complaint in accordance with the proposed complaint appended to the motion. *Savilla v. Speedway SuperAmerica*, *LLC*, No. 02-2364, 2004 WL 98815 (4th Cir. Jan. 22, 2004) (*Savilla II*).

As held by the Fourth Circuit, this case was properly removed pursuant to 28 U.S.C. § 1446(b). The court presently has federal question jurisdiction over the constitutional claims pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367. In the motion before the court, the plaintiff seeks permission to amend the First Amended Complaint[1] so as to remove all claims arising under federal law. This amendment would eliminate the court's federal question jurisdiction, and the court's power to adjudicate this case would

[1] The court will refer to the complaint that came into effect on August 7, 2002, when the state court granted the plaintiff's motion to amend, as the "First Amended Complaint." Under the Fourth Circuit's reasoning in *Savilla II*, the document entitled "Second Amended Complaint" filed August 20, 2002 was an attempt to amend, without the court's permission, the First Amended Complaint. *Savilla II*, 2004 WL 98815 at *2. The "Second Amended Complaint" filed August 20, 2004 thus currently as no legal effect.

thereafter be based solely on supplemental jurisdiction. If the complaint is amended, the plaintiff further asks the court to exercise its discretion and remand the case to state court.

II Discussion

A. Motion to Amend

Federal Rule of Civil Procedure 15(a) provides in pertinent part that "[a] party may amend the party's pleading . . . by leave of the court . . . and leave shall be freely given when justice so requires." The Fourth Circuit reads Rule 15(a) as requiring that motions to amend be granted in the absence of a declared reason for denial, such as undue delay or undue prejudice to the opposing party. *See Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir. 1980); *Deasy v. Hill*, 833 F.2d 38, 40 (4th Cir. 1987). Further, in determining whether to grant a motion to amend, some courts have considered the extent to which the purpose of the amendment is to defeat federal jurisdiction. *See Gum v. Gen. Elec. Co.*, 5 F. Supp. 2d 412, 414 (S.D. W. Va. 1998).

There has been no undue delay or prejudice in this case. In response to Savilla's first motion to amend, the defendants stipulated to an agreed order allowing Savilla to file the First Amended Complaint, which added equal protection and due process claims under the United States Constitution. *Plaintiff's Motion to Remand, Exhibit A, Docket 6.* Thirteen days after the state court entered the order granting Savilla leave to amend, she filed the proposed Second Amended Complaint which asserted equal protection and due process claims under the West Virginia State Constitution. The defendants apparently believed the similar federal constitutional claims to be timely when filed, and they have since had two years to prepare a defense to the state constitutional claims. Accordingly, a finding of prejudice is simply not warranted.

It would be naive to believe that forum manipulation is not a purpose for this amendment, however, it is not the primary purpose. Savilla asserts that she filed the proposed Second Amended Complaint because she believes that the West Virginia Constitution affords stronger protections than the United States Constitution. *Plaintiff's Motion to Amend Second Amended Complaint and Remand to State Court,* Docket 51, notes 4 and 5. Denial of the motion to amend could unjustly deprive Savilla of the state constitutional protections to which she is entitled. Further, even if Savilla were to amend the complaint so as to assert both federal and state constitutional claims, the court's interest in avoiding the unnecessary decision of federal constitutional issues would likely render the federal constitutional claims nugatory.

Considering the liberal amendment policy and the lack of prejudice, the court finds amendment appropriate in this case and accordingly **GRANTS** the plaintiff's motion to amend [Docket 51]. The proposed Second Amended Complaint [Docket 5] was stamped as **"FILED"** by the Clerk for the United States District Court for the Southern District of West Virginia on August 20, 2002. Further, the record reflects that the proposed Second Amended Complaint was timely served on opposing counsel. Previously this court found that an *ultra vires* complaint such as the proposed Second Amended Complaint has no legal effect, and that the perfection of amendment requires both the issuance of a court order authorizing amendment and the subsequent filing of an amended complaint. *Savilla I*, 2002 WL 31687914. The Fourth Circuit's holding in *Savilla II*, however, stands for the proposition that a court order authorizing amendment operates automatically to amend the complaint in accordance with any proposed amendment filed with the court and served on opposing counsel. *Savilla II*, 2004 WL 98815. Applying the Fourth Circuit's reasoning, the

proposed Second Amended Complaint has been filed and served, the court has granted the motion to amend, and the Second Amended Complaint is now legally effective and controlling.

B. Motion to Remand

The Second Amended Complaint does not contain a federal claim, and the court no longer has federal subject matter jurisdiction over this action. The question of remand turns on whether the exercise of supplemental jurisdiction is appropriate. In *Brown v. Eastern States Corporation*, the Fourth Circuit held that a case "is not to be remanded if it was properly removable upon the record as it stood at the time that the petition for removal was filed." 181 F.2d 26, 28-29 (4th Cir. 1950). District courts in the Fourth Circuit, however, have recognized that the United States Supreme Court overruled *Brown* in *United Mine Workers of America v. Gibbs,* 383 U.S. 715 (1966).[2] *See Fleeman v. Toyota Motor Sales*, 288 F.Supp.2d 726 (S.D. W. Va. 2003); *Kimsey v. Snap-On Tools Corp.*, 752 F.Supp. 693 (W.D.N.C. 1990). In *Gibbs*, the Supreme Court emphasized that pendant jurisdiction is a doctrine of discretion and urged courts to consider the values of judicial economy, convenience, fairness, and comity in the exercise of that discretion. *Gibbs*, 383 U.S. at 726-27. Further, the *Gibbs* court stated that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *Id.* The Court later expanded *Gibbs* in *Carnegie-Melon* by holding that courts have an inherent power to remand removed State claims when the federal claims drop out of the case.[3] *Carnegie-Mellon*

[2] In *Binkley v. Loughran*, 940 F.2d 651 (4th Cir. 1991) the Fourth Circuit suggested that *Brown* may still be good law. As noted by Chief Judge Faber in *Fleeman*, however, this unpublished opinion is non-binding. 288 F. Supp. 2d at 729 n. 2. Moreover, *Binkley* is procedurally distinguishable from the present case in that federal question jurisdiction existed over the plaintiff's claims under the doctrine of complete preemption. *Binkley*, 940 F.2d 651 (4th Cir. 1991).

[3] *Carnegie-Mellon* was decided prior to the codification of pendant jurisdiction in 28 U.S.C. § 1367. Regardless, the Fourth Circuit has found that *Carnegie-Mellon* continues to "inform the (continued...)

University v. Cohill, 484 U.S. 343 (1988); *Hinson v. Norwest Financial South Carolina, Inc.*, 239 F.3d 611, 616 (2001). Thus, a district court has the discretion not only to dismiss claims over which it has supplemental jurisdiction, but also to remand such claims. *See id.*

Section 1367(c) provides that, in determining whether to exercise supplemental jurisdiction, district courts should consider the following factors: (1) whether the state claims raise complex or novel issues of state law, (2) whether state claims substantially predominate over the claims for which the court has original jurisdiction, (3) whether the court has dismissed all claims over which it has original jurisdiction, and (4) whether there are other compelling reasons for declining jurisdiction. 28 U.S.C. § 1367(c). When the exercise of discretion includes the additional issue of whether to remand the case to state court, a district court should also consider "principles of economy, convenience, fairness, and comity" as described in *Carnegie-Mellon*. 484 U.S. at 351.

In the present case, these factors suggest that remand is appropriate. State law claims clearly predominate. The Second Amended Complaint does not contain a single claim over which this court would have federal question jurisdiction, and the requirements of diversity are not satisfied. Further, the petition to certify questions to the West Virginia Supreme Court of Appeals filed by the plaintiff suggests that this case may contain novel issues of state law best decided by a West Virginia state court. Considerations of judicial economy would also favor remand. While this case has been in the federal system for some time, the sole issue litigated in federal court thus far is jurisdiction. Prior to removal, the state trial court dealt with this case for nearly two and one half years and undoubtably

proper interpretation of § 1367(c), which authorizes a district court in its discretion to 'decline to exercise supplemental jurisdiction over a pendant state claim.'" *Hinson*, 239 F.3d at 616.

resolved many issues this court would be called upon to consider a second time if jurisdiction were retained.

The defendants argue that remand is inappropriate because one of the reasons for the amendment is the plaintiff's desire to litigate this matter in state court. The defendants do not wear this argument well. The plaintiff, master of the complaint, filed state claims in state court against non-diverse defendants. Over two years later, the plaintiff filed a motion to amend the complaint and the motion was granted. The plaintiff apparently believed, as this court found in its initial opinion, that after the state court granted the motion to amend, a filing would be required to perfect amendment. The plaintiff was mistaken; a complaint appended to the motion containing federal claims was automatically operative, and the defendant removed the same day. Thirteen days later, the plaintiff filed the proposed Second Amended Complaint omitting all federal claims. It has long been clear that the plaintiff's citation to the United States Constitution in the First Amended Complaint was an error and that the plaintiff does not intend to press a federal claim. There being no diversity and no federal question, the defendants do not have a legitimate need to adjudicate this matter in federal court. Nevertheless, the defendants have, to this point, successfully exploited the plaintiff's error, delaying the proceedings for two years in a jurisdictional quagmire and draining the resources of this court and of the parties.

III Conclusion

The court has granted the plaintiff's motion to amend the complaint and thus the court no longer has federal question jurisdiction over this action. The court **FINDS** that the values of fairness, comity, and judicial economy counsel against the exercise of supplemental jurisdiction, and

accordingly, the court **GRANTS** the plaintiff's motion to remand [Docket 51]. All other pending motions in this case are **DENIED AS MOOT**. The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party, and **DIRECTS** the Clerk to post this unpublished opinion at http://www.wvsd.uscourts.gov.

ENTER: August 25, 2004

JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE

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