

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

K.S., Individually and as the Parent :
and Natural Guardian of S.M., a Minor, :
Plaintiff :

v. :

School District of Philadelphia, et al., :
Defendants :

**CIVIL ACTION
NO. 05-4916**

MEMORANDUM OPINION AND ORDER

RUFE, J.

November 22, 2005

This is a section 1983 action in which Plaintiff K.S., individually and as the parent and natural guardian of S.M., brings suit against Defendants School District of Philadelphia (the “School District”), Wayland Wilson (“Wilson”), Virginia Daniel (“Daniel”), and the Commonwealth of Pennsylvania Department of Education (the “Commonwealth”). This action comes to the Court by removal from the Court of Common Pleas of Philadelphia County. Presently before the Court is Plaintiff’s Motion for Remand.

I. FACTS & PROCEDURAL HISTORY

Plaintiff alleges that on March 8, 2005, S.M., a five-year-old female kindergarten student, was sexually assaulted while she was left unsupervised at the William H. Harrison Elementary School.

On March 18, 2005, Plaintiff commenced suit in the Court of Common Pleas of Philadelphia County by filing a Writ of Summons (the “Writ”). The Writ named the School District, Wilson, and the Commonwealth as defendants. On March 22, 2005, after service of the Writ and

the Civil Cover Sheet but before the filing of a complaint, the School District and Wilson filed a Notice of Removal in this Court.¹ At that time, Plaintiff had not yet served the Commonwealth, and the removing defendants had not sought the Commonwealth's consent to removal.

Upon removal to this Court, Plaintiff filed a motion to remand. The Court denied Plaintiff's motion, reasoning that jurisdiction over the case was proper since the Writ and Civil Cover Sheet referenced a section 1983 claim and the Commonwealth's consent to removal was unnecessary since it had not been served.²

Plaintiff then filed a motion to reconsider the Court's ruling on their remand motion. In support of reconsideration, Plaintiff demonstrated that the Commonwealth had been served with the Writ since the initial ruling. The Court granted Plaintiff's motion to reconsider and remanded the case to state court. It did so on the basis that there was new evidence that the Commonwealth had been served; that state law claims would be brought against the Commonwealth; and that removal statutes should be strictly constructed in favor of remand.³

On August 15, 2005, with the case now back in state court, Plaintiff served the School District, Wilson, the Commonwealth, and Virginia Daniel—a new defendant—with a complaint. The complaint alleged section 1983 claims against the School District, Wilson, and Daniel (Counts I-III, respectively) and state constitutional claims against the School District, Wilson, Daniel, and the Commonwealth (Counts IV-VII, respectively).

The School District and Wilson filed a second Notice of Removal in this Court on

¹ The removed case was docketed as K.S. v. School Dist. of Philadelphia, No. 05-1330.

² Order of May 10, 2005, No. 05-1330 [Doc. #4].

³ Order of June 14, 2005, No. 05-1330 [Doc. #9].

September 14, 2005. Unlike the previous notice, the second Notice included the Commonwealth's consent to removal.⁴ Moreover, although Daniel was initially omitted from the caption in this case, she has also consented to removal.⁵

On September 20, 2005, Plaintiff filed the second Motion to Remand, presently under consideration.

II. DISCUSSION

Defendants may remove a civil action commenced in state court to federal district court when the federal court has original jurisdiction over the matter.⁶ Once a case is removed, the federal court may also exercise supplemental jurisdiction over state law claims arising out of the same case or controversy as the federal claims.⁷

Here, Defendants have established a valid basis for removal. Plaintiff's complaint alleges section 1983 claims, of which federal district courts have original jurisdiction. Furthermore, the Court may exercise supplemental jurisdiction over Plaintiff's state constitutional claims because those claims arise out of the same factual controversy, i.e. the alleged sexual assault of S.M. at school.

Nonetheless, Plaintiff argues that this Court should remand the case to state court for two reasons: (1) Defendants' second removal is barred under the law of the case doctrine; and (2)

⁴ The consent appeared in the form of document signed by Kevin R. Bradford, Deputy Attorney General for the Commonwealth of Pennsylvania. See Not. of Removal, Ex. C [Doc. #1].

⁵ See Stip. of Sept. 20, 2005 [Doc. #4].

⁶ 28 U.S.C. § 1441 (2000).

⁷ 28 U.S.C. § 1367 (2000).

this Court lacks subject matter jurisdiction over the removed action because the Commonwealth is immune from suit in federal court. The Court finds both arguments unpersuasive.

A. Law of the Case Doctrine

Plaintiff argues that the Court must remand this action because Defendants' second attempt to remove is barred by the law of the case doctrine. The law of the case doctrine "limits relitigation of an issue once it has been decided" at an earlier stage of the same action.⁸ Relitigation of a previously decided issue may, however, be appropriate in certain circumstances, including when "(1) new evidence is available; (2) a supervening new law has been announced; or (3) the earlier decision was clearly erroneous and would create manifest injustice."⁹ Plaintiff asserts that no new operative facts have arisen since the remand issue was last litigated, and therefore, under the law of the case doctrine, the Court must reaffirm its decision to remand.

Defendants reply with three arguments. First, the law of the case doctrine does not bar removal here because there is "material, new evidence in the record."¹⁰ Specifically, Defendants point to their timely and unanimous consent to removal, the filing of a complaint, and the presence

⁸ See In re Continental Airlines, Inc., 279 F.3d 226, 323-33 (3d Cir. 2002).

⁹ In re City of Philadelphia Litig., 158 F.3d 711, 718 (3d Cir. 1998). The first exception—for new evidence—is based on the rationale that in such circumstances the issue before the court "has not really been decided earlier and is posed for the first time." Bridge v. United States Parole Comm'n, 981 F.2d 97, 103 (3d Cir. 1992).

¹⁰ Defendants also cite Doe v. Am. Red Cross, 14 F.3d 196 (3d Cir. 1993), for the proposition that a case once remanded may be re-removed. In Doe, the district court originally remanded the case because it found that defendant Red Cross's congressional charter did not confer original jurisdiction on the federal courts. A subsequent Supreme Court decision in another case held to the contrary, thus providing the defendants in Doe a jurisdictional basis to re-remove the case. Plaintiff, however, argued that re-removal was prohibited under 28 U.S.C. § 1447(d), which provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." Ultimately, the Third Circuit upheld the removal, rejecting plaintiffs' interpretation of section 1447(d) that "a case once remanded may never be removed." Doe, 14 F.3d at 199-203. Keeping in mind that the Third Circuit expressly narrowed its holding in Doe, see id. at 202, the Court understands Defendants' reliance on Doe to merely answer the unremarkable threshold question of whether a second removal after remand is *ever* permissible. That said, Defendants must still overcome Plaintiff's law of the case doctrine argument and prove that re-removal is permissible based on the circumstances of *this case*.

of a new defendant. Second, based on the Third Circuit’s recent decision in Sikirica v. Nationwide Insurance Co.,¹¹ Defendants’ initial removal was premature and removal did not become timely until after Plaintiff filed their complaint in state court. Third, Daniel is entitled to exercise her right of removal, with the consent of all other defendants, since Plaintiff added her as a defendant after the initial removal and remand.

The Court agrees with Defendants that the law of the case doctrine does not bar removal. First, the “new evidence” exception to the law of the case doctrine applies here because all Defendants now consent to removal and a complaint setting forth Plaintiff’s precise allegations is now available. In the absence of such evidence at the time of Plaintiff’s first motion to remand, the Court resolved any uncertainty consistent with the Third Circuit’s requirement that removal statutes “are to be strictly construed against removal and all doubts should be resolved in favor of remand.”¹² Now, having the benefit of new evidence, the Court views the remand issue as if it “has not really been decided earlier and is posed for the first time.”¹³

Second, the law of the case doctrine does not necessitate remand because a new defendant, Daniel, has been added to the case *after* the Court’s initial decision to remand. Under the later-served defendant rule—which has been consistently applied by other district courts in this Circuit but never adopted by the Third Circuit—a defendant later added to the case is entitled to her

¹¹ 416 F.3d 214, 223 (3d Cir. 2005) (holding that a writ of summons does not trigger the thirty-day window for removal).

¹² Steel Valley Auth. v. Union Switch & Sig. Div., 809 F.2d 1006, 1010 (3d Cir. 1987).

¹³ Bridge, 981 F.2d at 103.

own thirty-day window for removal.¹⁴ For example, in Zollner v. Swan, a defendant was made party to the case when plaintiff filed an amended complaint. Although thirty days had passed since the original defendants had been served, the court permitted the newer defendant to file for removal with the original defendants' consent, even though their own thirty-day window for removal had expired.¹⁵ Applying the principles underlying Zollner and the later-served defendant rule here, Daniel has an independent right to remove this case because she was not party to the suit when the Court previously remanded it. Accordingly, Daniel's presence in the suit materially alters the issue posed by Plaintiff's first motion for remand, and thus the law of the case doctrine does not prevent reconsideration of removal here.

Finally, the Court declines to assess the merits of Defendants' argument that its initial attempt to remove was untimely under Sikirica. Whether Sikirica can be read to permit re-removal in such a situation is a question unnecessary to the Court's resolution of the instant Motion.

B. Jurisdiction over the Commonwealth

Having established that the Court is not bound by its previous decision to remand, the Court turns to Plaintiff's second argument. Plaintiff argues that the Court lacks subject-matter jurisdiction over this case because the Commonwealth is immune from suit in federal court under the Eleventh Amendment, and such immunity has not been validly waived here.¹⁶ Specifically,

¹⁴ See, e.g., Zollner v. Swan, No. 03-1110, 2003 U.S. Dist. LEXIS 9766, at *4-5 (E.D. Pa. May 13, 2003) ("The 'later-served defendant' rule provides that 'each defendant to an action is entitled to thirty days after service to remove an otherwise removable action and . . . all defendants can consent to that removal, even if their own thirty-day periods have expired.'"); Harper v. Westfield Apartments, No. 04-2231, 2005 U.S. Dist. LEXIS 5311, at *3-5 (E.D. Pa. Mar. 30, 2005) (holding that each defendant is entitled to his or her own thirty-day window for removal).

¹⁵ See Zollner, 2003 U.S. Dist. LEXIS 9766, at *4-5.

¹⁶ The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State." U.S. Cons. amend. XI. The Supreme Court has held that the

Plaintiff suggests that only the Pennsylvania General Assembly can waive the Commonwealth's Eleventh Amendment immunity, and therefore the Pennsylvania attorney general lacks the authority to subject the Commonwealth to suit via removal.¹⁷ Plaintiff thus seeks remand under 28 U.S.C. § 1447(c) for lack of subject-matter jurisdiction.¹⁸

The issue presented by Plaintiff—whether the Commonwealth's attorney general is authorized to subject the Commonwealth to suit in federal court via removal where the state legislature has not otherwise waived Eleventh Amendment immunity—is one of first impression in this Circuit. Although the narrow issue presented is novel, the Supreme Court's recent decision in Lapides v. Board of Regents of the University System of Georgia¹⁹ significantly informs the Court's consideration of this issue.

In Lapides, the plaintiff brought suit in state court alleging state tort claims and section 1983 claims against the State of Georgia and state officials in their personal and professional capacities. The defendants removed to federal court and sought dismissal on Eleventh Amendment immunity grounds. The State argued that, although the State legislature had waived sovereign immunity on the state tort claims, it retained immunity from suit in federal court under the Eleventh Amendment.²⁰

Eleventh Amendment immunizes an unconsenting state from suit in federal court. See, Alden v. Maine, 527 U.S. 706, 713 (1999).

¹⁷ See 1 Pa. Cons. Stat. § 2310 (2005) (providing that the Commonwealth “shall continue to enjoy sovereign immunity from suit except as the General Assembly shall specifically waive the immunity”).

¹⁸ Section 1447(c) provides if “at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.”

¹⁹ 535 U.S. 613 (2002).

²⁰ Id. at 616-17.

The district court refused to dismiss, holding that by removing from state to federal court, the State had waived its Eleventh Amendment immunity.²¹ The circuit court reversed. It held that state law was unclear as to whether the State’s attorney general had authority to waive the State’s Eleventh Amendment immunity, and therefore the State retained the legal right to assert such immunity after removal.²² The circuit court relied on Ford Motor Co. v. Department of Treasury of Indiana, which held that an attorney general lacks authority to waive the state’s immunity where the state has not specifically provided such authority by its constitution, statutes, or judicial decisions.²³

The Supreme Court reversed, holding that “removal is a form of voluntary invocation of a federal court’s jurisdiction sufficient to waive the State’s otherwise valid objection to litigation of a matter . . . in a federal forum.”²⁴ In reaching this result, the Supreme Court applied the well-established principle that a state may waive its Eleventh Amendment immunity by voluntarily invoking federal court jurisdiction through affirmative litigation conduct.²⁵

The Supreme Court, however, did not squarely address the issue of the attorney general’s authority to waive Eleventh Amendment immunity. The State of Georgia argued that its state law, which broadly authorized the attorney general to “to represent the state in all civil actions

²¹ Id. at 617.

²² Id.

²³ 323 U.S. 459, 467 (1945).

²⁴ Lapides, 535 U.S. at 624.

²⁵ Id. at 620-21 (citing Clark v. Barnard, 108 U.S. 436, 447 (1883); Gardner v. New Jersey, 329 U.S. 565, 574 (1947); Gunter v. Atlantic Coast Line R. Co., 200 U.S. 273, 284 (1906)). The Court explained: “In this case, the State was brought voluntarily into the case as a defendant in the original state-court proceedings. But the State then voluntarily agreed to remove the case to federal court. In doing so, it voluntarily invoked the federal court’s jurisdiction. And unless we are to abandon the general principle just stated, or unless there is something special about removal or about this case, the general legal principle requiring waiver ought to apply. We see no reason to abandon the general principle.” Id. at 620 (internal citations omitted).

tried in any court,” did not specifically authorize the attorney general to waive Eleventh Amendment immunity.²⁶ The State cited Ford for the proposition that the attorney general’s consent to removal could not waive the State’s immunity absent some more specific authorization.²⁷ In response, the Court stated that it “consistently has found a waiver when a State’s attorney general, authorized (as here) to bring a case in federal court, has voluntarily invoked that court’s jurisdiction.”²⁸ The Court thus expressly overruled Ford as inconsistent with its line of cases finding waiver of immunity through voluntary invocation of federal jurisdiction.²⁹

Lapides thus appears to have recognized that an attorney general may waive a state’s Eleventh Amendment immunity regardless of his specific authority under state law, so long as the attorney general is vested with a general grant of authority to prosecute and defend suits in federal court. This reading of the case is further supported by the Supreme Court’s statement that “it is easy enough to presume that an attorney general authorized to represent the State can bind it to the jurisdiction of the federal court (for Eleventh Amendment purposes) by the consent to removal.”³⁰ In other words, Lapides stands for the unremarkable proposition that an attorney general broadly empowered to represent a state in civil actions may make the tactical decision as to where—state court or federal court—such representation should occur.

Based on this Court’s reading of Lapides, Plaintiff’s argument for remand fails. Here,

²⁶ Id. at 621-22 (quoting Ga. Code. Ann. § 45-15-3(6) (1990)).

²⁷ Id. at 622.

²⁸ Id.

²⁹ Id. at 623.

³⁰ Id. at 624 (quoting Wisc. Dep’t of Corrections v. Schact, 524 U.S. 381, 397 (1998) (Kennedy, J., concurring)).

as in Lapides, the Pennsylvania General Assembly has broadly authorized the attorney general to represent the Commonwealth in any civil action. By statute, “[t]he Attorney General shall represent the Commonwealth and all Commonwealth agencies . . . in any action brought by or against the Commonwealth or its agencies.”³¹ Accordingly, even without more specific authorization, the attorney general may bind the Commonwealth to federal jurisdiction by consenting to removal. Therefore, since the attorney general did validly consent to removal here, the Eleventh Amendment does not impose an obstacle to the Court’s exercise of subject matter jurisdiction over this case, and the case is properly removed.

III. CONCLUSION

For the foregoing reasons, neither the law of the case doctrine nor Eleventh Amendment immunity bars removal and requires remand in this case. Therefore, the Court denies Plaintiff’s Motion to Remand. An appropriate Order follows.

³¹ 71 Pa. Stat. Ann. § 732-204(c) (2005) (enacted as part of the Commonwealth Attorney’s Act of 1981).

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	:	NO. 05-4916
School District of Philadelphia, et al.,	:	
Defendants	:	
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ORDER

AND NOW, this 22nd day of November 2005, upon consideration of Plaintiff's Motion for Remand [Doc. #3], the Response of Defendants School District of Pennsylvania, Wayland Wilson, and Virginia Daniel [Doc. #10], and the Response of Defendant Pennsylvania Department of Education [Doc. #11], and for the reasons set forth in the attached Memorandum Opinion, it is hereby **ORDERED** that the Motion is **DENIED**.

It is so **ORDERED**.

BY THE COURT:

CYNTHIA M. RUFÉ, J.