

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

**JOANNE FREY, MINOR, BY AND
THROUGH HER LEGAL GUARDIAN,
PATRICK MANGAN,**

Plaintiff,

v.

**Case No. 2:09-CV-557
MAGISTRATE JUDGE KING**

USA TRUCK, INC., et al.,

Defendants.

OPINION AND ORDER

Joanne Frey, a minor, brings this action through her legal guardian, Patrick Mangan [“Plaintiff”], seeking redress for injuries she sustained as a result of a motor vehicle accident. The action was originally filed in the Common Pleas Court for Guernsey County, Ohio, and was removed to this Court on the basis of diversity jurisdiction. 28 U.S.C. §§ 1332, 1441. The minor and her guardian are both identified as residents of Ohio. *See Notice of Removal*, Doc. No. 2. The *Complaint*, Doc. No. 3, names as Defendants USA Truck, Inc., a Delaware corporation, Robert Paul Young, a resident of the State of Michigan, and Ed Frey, the father of Joanne Frey and a resident of the State of Ohio. Defendants USA Truck, Inc. and Young filed a *Motion for Summary Judgment*. Doc. No. 41. In the response to the motion, Doc. No. 49, Plaintiff argues for the first time that the action was improperly removed to this Court because complete diversity is lacking. This Court agrees and, for that reason, orders the remand of the

action to the state court.¹

The accident that is the subject of this action occurred on June 25, 2005. At that time, the minor was eleven years old. *Deposition of Ed Frey*, Doc. No. 39, at 34. Mr. Frey was driving a truck in which his daughter was a passenger. *Id.* at 53. Mr. Frey parked his truck along I-70, *Id.* at 99, exited the truck and crossed to the median to look for an object that he had seen fall from an overhead roadway. *Id.* at 52-53. Mr. Frey left his daughter inside the truck.

At about the time that Mr. Frey reached the median, a semi tractor trailer owned by Defendant USA Truck, Inc., and operated by Defendant Young was traveling eastbound in the right lane of I-70.² *Deposition of Robert Paul Young*, Doc. No. 43, at 44-47. According to Mr. Young, the cruise control on the semi was set to approximately 56 mph. *Id.* at 96. Mr. Young noticed a parked truck, *id.* at 49, and then observed the minor, suddenly and unexpectedly, run from in front of the parked truck onto the interstate with her head down. *Id.* at 55-56. Mr. Young initiated the truck's air horn and pulled the tractor trailer sharply left. *Id.* at 57-58. According to Mr. Young, the child continued running and the semi struck her.³

Jill Bonifant, who was traveling east on I-70 ahead of the semi operated by Defendant Young, witnessed the accident. Ms. Bonifant had set the cruise control function on her vehicle at 65 mph. *Deposition of Jill Bonifant*, Doc. No. 42, at 22. She testified on deposition that she

¹With the consent of the parties, *see* Doc. Nos. 7, 8, the matter has been referred to the undersigned for disposition pursuant to 28 U.S.C. §636(c).

²The semi was traveling through the State of Ohio to a destination in Bethel, Pennsylvania. *Deposition of Robert Paul Young* at 152. The semi was loaded and weighed approximately 74,000 pounds. *Id.* at 46. Mr. Young's girlfriend, Victoria Marcin, was a passenger in this vehicle. *Deposition of Victoria Marcin*, Doc. No. 38, at 19.

³It is unclear why the child left the truck. She testified on deposition that she has no recollection of the events leading to the accident. *Deposition of Joanne Frey*, Doc. No. 40, at 63-64.

saw Defendant Frey's truck on the side of the road and Defendant Frey in the median. *Id.* at 35. After passing Defendant Frey's truck, Ms. Bonifant looked in her rear view mirror and observed the semi strike the minor. *Id.* at 35-37, 64.

The accident was investigated by the Ohio State Highway Patrol. Officer Shaun Baskerville concluded that Defendant Young was not at fault because the child had "improperly crossed the interstate." *Deposition of Shaun Baskerville*, Doc. No. 43, at 61-62.

Among the claims asserted in the *Complaint* is a claim of negligence against Defendant Frey. *Complaint*, Doc. No. 3, at 3-4. The *Complaint* also asserts claims of negligence against Defendants Young and USA Truck, Inc., *id.* at 4-5, 7, as well as claims based on various violations of Ohio statutory law, *id.* at 5-9.

Defendants Young and USA Truck, Inc. moved for summary judgment on the claims asserted against them. In the *Memorandum contra*, Doc. No. 49, Plaintiff made substantive response to the *Motion for Summary Judgment*, but also argued that this Court lacks subject matter jurisdiction over this action. *Memorandum contra*, at 14-17.

The *Notice of Removal*, Doc. No. 2, was filed on behalf of only Defendants Young and USA Truck, Inc., and invoked the Court's diversity jurisdiction, 28 U.S.C. §1332. Recognizing that the presence of Defendant Frey, a resident of Ohio, would destroy complete diversity, the removing parties argued that the child's father "should not have been named a Defendant in this case, as he is the father of the minor Plaintiff and was added merely as a nominal party to this action in an attempt to destroy federal diversity jurisdiction." *Id.* at ¶8. The removing parties characterized the joinder of Defendant Frey as "fraudulent," *id.* at ¶ 9, and took the position that his joinder should be overlooked in determining that diversity jurisdiction existed.

“‘[F]raudulent joinder of non-diverse defendants will not defeat removal on diversity grounds.’” *Saginaw Housing Com’n v. Bannum, Inc.*, 576 F.3d 620, 624 (6th Cir. 2009), quoting *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 493 (6th Cir. 1999). “The primary purpose of fraudulent joinder is to ensure that plaintiffs do not avoid diversity jurisdiction by pleading illegitimate claims involving non-diverse parties.” *Taco Bell Corp. v. Dairy Farmers of America, Inc.*, 727 F.Supp.2d 604, 607 (W.D. Ky. 2010). The notion of fraudulent joinder applies only where the plaintiff “joins a party against whom there is no colorable cause of action.” *Jerome-Duncan, Inc., v. Auto-By-Tel, L.L.C.*, 176 F.3d 904, 907 (6th Cir. 1999). The burden of proving fraudulent joinder falls upon the party that invokes the federal court’s diversity jurisdiction. *Coyne*, 183 F.3d at 493; *accord Jerome-Duncan*, 176 F.3d at 907.

In this case, Plaintiff argues that the removing Defendants have failed to carry their burden of establishing that Defendant Frey was fraudulently joined. The removing Defendants do not respond to the substance of Plaintiff’s argument for remand, but contend only that Plaintiff’s failure to raise this issue earlier in the action is “nothing short of disingenuous.” *Reply Memorandum* at 9.

It is clear that parties cannot consent to subject matter jurisdiction and that this Court is obligated to examine jurisdiction “on [its] own initiative.” *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999). This Court also cannot overlook jurisdictional deficiencies to reach the merits. *Sprowles v. Oakwood Mobile Homes, Inc.*, 119 F.Supp.2d 694, 695 (W.D. Ky. 2000), citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998). Furthermore, principles of estoppel cannot be used to confer subject matter jurisdiction on a court that otherwise lacks such jurisdiction. *See Franzel v. Kerr Mfg. Co.*, 959 F.2d 628, 630 (6th Cir.

1992), citing *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951). Moreover, the statutes governing removal make clear that jurisdictional defects may be raised at any time. “If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.” 28 U.S.C. §1447(c). The Court must therefore consider the issue of its own jurisdiction even at this late stage of the proceedings.

The United States Court of Appeals for the Sixth Circuit has articulated the appropriate analysis to be followed when a case has been removed on the basis of diversity jurisdiction despite the presence of a non-diverse party.

To prove fraudulent joinder, the removing party must present sufficient evidence that a plaintiff could not have established a cause of action against non-diverse defendants under state law. However, if there is a colorable basis for predicting that a plaintiff may recover against non-diverse defendants, this Court must remand the action to state court. The district court must resolve all disputed questions of fact and ambiguities in the controlling . . . state law in favor of the non removing party. All doubts as to the propriety of removal are resolved in favor of remand.

Coyne, at 493 (quotations omitted).

In this case, the *Complaint* asserts a claim of negligence against Defendant Frey. Ohio law no longer confers on a parent immunity from liability on a claim asserted by a child against the parent. *Kirchner v. Crystal*, 115 Ohio St.3d 326 (1984). Under these circumstances, it would appear that the *Complaint* has asserted a colorable claim of negligence against Defendant Frey under Ohio law. It follows, then, that Defendant Frey was not fraudulently joined in this action.

Because the presence of Defendant Frey destroys complete diversity, this Court lacks subject matter jurisdiction. The action must therefore be remanded to the Court of Common Pleas for Guernsey County, Ohio. Resolution of the *Motion for Summary Judgment* filed on behalf of Defendants Young and USA Truck, Inc., must await consideration by that court.

For the foregoing reasons, this Court concludes that complete diversity is lacking and that the action was improperly removed to this Court. This action is hereby **REMANDED** to the Court of Common Pleas for Guernsey County, Ohio.

s/ Norah McCann King
NORAH McCANN KING
UNITED STATES MAGISTRATE JUDGE

February 16, 2011