UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

GREG LEWANDOWSKI, Plaintiff, S.W.S.T. FUEL, INC.; SISSETON WAHPETON OYATE CHILD PROTECTION PROGRAM; EMPLOYERS MUTUAL CASUALTY COMPANY; AND AUTO-OWNER'S INSURANCE COMPANY, Defendants.	Civ. 07-4159 **BRIEF IN SUPPORT OF DEFENDANT AUTO-OWNERS INSURANCE COMPANY'S MOTION TO DISMISS**

COMES NOW Defendant, Auto-Owners Insurance Company ("Auto-Owners"), and submits this brief in support of its motion to dismiss. In addition to the argument in this brief, Auto-Owners joins in the argument in the brief (Doc. 22) submitted by Defendant Employer's Mutual Casualty Company ("Employer's Mutual") in support of Employer's Mutual's motion for summary judgment, particularly insofar as it discusses direct actions against insurers.

PROCEDURAL AND FACTUAL BACKGROUND

The plaintiff, Greg Alan Lewandowski ("Lewandowski"), *pro se*, filed a Complaint on October 30, 2007. He also moved for leave to proceed *in forma pauperis* at that time. (Doc. 3) The Court authorized Lewandowski to proceed *in forma pauperis* on April 3, 2008 (Doc. 9), and summonses were thereafter issued to the following defendants: SWST Fuel, Inc. ("SWST Fuel"), the

Sisseton-Wahpeton Oyate Child Protection Program ("Child Protection Program"), Employer's Mutual, and Auto-Owners. A summons was served upon Auto-Owners on May 9, 2008. (Doc. 23)

According to his Complaint, Lewandowski claims that his children died as a result of a faulty propane fuel/heater, and the "SWST Oyate Childrens Program should pay out $750,000 a piece for Travis and Tiffany Lewandowski . . ." Lewandowski asks the Court to order the defendants "[t]o pay the monetary amount of equitable relief, according to the policy amounts, no discussion and no denial . . ." Presumably, since he names Auto-Owners as a defendant, he also claims that he is entitled to sue Auto-Owners directly for these damages in this Court.

Auto-Owners, by and through its attorneys, now moves the Court to dismiss the Complaint as to Auto-Owners pursuant to Fed. R. Civ. P. 12(b)(6), as it fails to state a claim upon which relief can be granted. While there are a number of reasons why Lewandowski's Complaint fails to state a claim against this and every other defendant to this suit[1], Auto-Owners seeks to have the claims against it dismissed for the following reasons: (1) Lewandowski is not entitled to bring a direct action against Auto-Owners under the circumstances of this case; (2) Lewandowski

[1] Pursuant to the terms of Fed. R. Civ. P. 12(b), Auto-Owners does not waive any other defenses it may have available under Fed. R. Civ. P. 12(b) and specifically reserves the right to assert such defenses if, and when, it is required to file and serve an Answer to the Complaint.

lacks standing to bring the action; (3) there is no cognizable claim against Auto-Owners under the Federal Tort Claims Act; and (4) there is no cognizable claim against Auto-Owners under 42 U.S.C. § 1983.

LEGAL ARGUMENT

A. STANDARD ON MOTION TO DISMISS

The District Court must accept the allegations of the Complaint as true when considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Hafley v. Lohman, 90 F.3d 264, 266 (8th Cir. 1996), cert. denied, 519 U.S. 1149, 117 S.Ct. 1081, 137 L.Ed.2d 216 (1997). Dismissal under Rule 12(b)(6) is appropriate when it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. Dover Elevator Co. v. Arkansas State Univ., 64 F.3d 442, 445 (8th Cir. 1995).

B. PLAINTIFF'S DIRECT ACTION AGAINST AUTO-OWNERS IS NOT AUTHORIZED BY SOUTH DAKOTA LAW.

As indicated in the Complaint, Lewandowski's action against Auto-Owners is a direct action against the liability insurer for the Child Protection Program. "As a general rule there is no privity between an injured person and the tort-feasor's liability insurer, and the injured person has no right of action at law against the insurer." 44 AM. JUR. 2d *Insurance* § 1445 (1982). "Since, in its inception, liability insurance was intended solely for the benefit and protection of the insured,

which is to say the tort-feasor, it followed that the injured plaintiff, who was not a party to the contract, had at common law no direct remedy against the insurance company." Prosser on Torts, § 82 at 544 (4th ed. 1971).

The South Dakota Supreme Court has clearly rejected such direct claims:

> As a general rule there is no privity between an injured person and the tortfeasor's liability insurer, and the injured person has no right of action at law against the insurer. (Internal citation omitted). However, there are exceptions to this rule where a statute authorizes such suits or where the injured person is considered to be a third party beneficiary of the contract.

Trouten v. Heritage Mut. Ins. Co., 632 N.W.2d 856, 858 (S.D. 2001). The supreme court therefore concluded:

> Until the legislature enacts a statute, which permits direct action against an insurer, this Court declines to participate in judicially legislating such a public policy. By allowing this action to proceed would, in essence, provide for a potential for multiplicity of lawsuits, i.e., a direct claim against the insurer and a tort claim against the insured, which both arise out of the same incident.

Id.[2]

Unfortunately for Lewandowski, "[t]here is no statute which allows a direct action by an injured person against another's liability insurer absent a judgment having been first obtained against the tortfeasor." Id. Nor is there a statute

[2] Authority from other jurisdictions, as cited in Employer's Mutual's brief, serially precludes injured parties from bringing suit directly against tortfeasors' liability insurers, except where authorized by statute.

that would allow a wrongful death action to be brought directly against an insurer. As is evident from the pleadings, no judgment has been obtained. See SDCL 58-23-1 (specifically providing that a direct action may be maintained by the injured person when an execution on a final judgment has been returned unsatisfied).

As the matter stands, Lewandowski is attempting to pursue a wrongful death claim against the Child Protection Program while at the same time pursuing a direct action for the same reasons against Auto-Owners. This is precisely the "multiplicity" of lawsuits which the South Dakota Supreme Court sought to prevent in their ruling in Trouten. As to Auto-Owners, Lewandowski's Complaint should be dismissed.

C. PLAINTIFF LACKS STANDING TO BRING THIS WRONGFUL DEATH SUIT.

Lewandowksi claims damages as a result of the death of his children, yet he has not alleged that he is a personal representative for either Travis or Tiffany Lewandowski. In South Dakota, a wrongful death cause of action is brought in the name of the decedent's personal representative and seeks compensation for the decedent's next of kin for their pecuniary injury. SDCL 21-5-5 provides:

> Every action for wrongful death shall be for the exclusive benefit of the wife or husband and children, or if there be neither of them, then of the parents and next of kin of the person whose death shall be so caused; and it shall be brought in the name of the personal representative of the deceased person.

(Emphasis added.)

The South Dakota Supreme Court clarified precisely whom is allowed to bring a wrongful death suit under 21-5-5 when it decided In Re Estate of Howe, 2004 SD 118, ¶ 25, 689 N.W.2d 22, 29. Specifically, the supreme court noted that "[t]he plain language of the statute requires that the action be filed by the personal representative or the regular or special administrator." Id. It went on to note that each statutory beneficiary under SDCL 21-5-5 is not permitted to file their own action for wrongful death. Id.

Because Lewandowski has not asserted that he is the personal representative or the regular or special administrator, he fails to state a claim upon which relief can be granted under South Dakota law.

D. PLAINTIFF FAILS TO STATE A CLAIM AGAINST AUTO-OWNERS BASED UPON THE FEDERAL TORT CLAIMS ACT.

To the extent the Court reads Lewandowski's Complaint as somehow relating to a claim under the Federal Tort Claims Act ("FTCA"), there is yet another reason to dismiss the Complaint as to Auto-Owners.

A November 5, 1990, amendment to the Indian Self-Determination Education Assistance Act ("Self-Determination Act") provides:

> With respect to claims resulting from the performance of functions . . . under a contract, grant agreement, or cooperative agreement authorized by the Indian

> Self-Determination and Education Assistance Act . . . an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior . . . while carrying out any such contract or agreement and its employees are deemed employees of the Bureau . . . while acting within the scope of their employment in carrying out the contract or agreement: Provided, That after September 30, 1990, any civil action or proceeding involving such claims brought hereafter against any tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act . . .

Pub.L. No. 101-512, Title III, § 314, 104 Stat. 1915, 1959 (codified at 25 U.S.C. § 450f notes)(hereinafter "1990 Amendment") (Emphasis added).

Auto-Owners insures the Child Protection Program, and Auto-Owners' provision of insurance coverage appears to be the sole reason it was named as a defendant in this lawsuit. Auto-Owners is not responsible for defending actions against the United States or indemnifying the United States for its losses. To the extent that the liability of the Child Protection Program is subsumed by the Self-Determination Act and the burden is on the Attorney General to defend this action, the vitality of the lawsuit against Auto-Owners is also extinguished.

E. PLAINTIFF FAILS TO STATE A CLAIM AGAINST AUTO-OWNERS BASED UPON 42 U.S.C. § 1983.

To the extent the Court reads Lewandowski's Complaint as a cause of action pursuant to 42 U.S.C. § 1983, Auto-Owners

must be dismissed. Auto-Owners is a corporation that transacts business in the insurance industry; it is not a state actor. See e.g. Parker v. Boyer, 93 F.3d 445, 448 (8th Cir. 1996) (§ 1983 redresses only injuries caused by exercise of some right or privilege created by state, by rule of conduct imposed by state, or by person for whom state is responsible).

CONCLUSION

Accepting all allegations of Lewandowski's Complaint as true, there is simply no basis by which Lewandowski can secure relief from Defendant Auto-Owners in this suit. For all of the foregoing reasons, the plaintiff's Complaint fails to state a claim against Auto-Owners upon which relief can be granted, and Auto-Owners respectfully urges the Court to grant its motion to dismiss.

Respectfully submitted this 27th day of May, 2008.

RICHARDSON, WYLY, WISE, SAUCK & HIEB, LLP

By /s/ Jack H. Hieb
Attorneys for Defendant Auto-Owners Insurance Company

One Court Street
Post Office Box 1030
Aberdeen, SD 57402-1030
Telephone No. 605-225-6310
Facsimile No. 605-225-2743
email: jhieb@rwwsh.com

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for defendant Auto-Owners Insurance Company, hereby certifies that on the 27th day of May, 2008, a true and correct copy of **BRIEF IN SUPPORT OF DEFENDANT AUTO-OWNERS INSURANCE COMPANY'S MOTION TO DISMISS** was served electronically by the clerk's office on:

Mr. Douglas M. Deibert
Cadwell Sanford Deibert & Garry, LLP
Attorneys at Law
Post Office Box 2498
Sioux Falls, SD 57101

and that a true and correct copy of the same was mailed by first-class mail to:

Mr. Greg Lewandowski (#46032)
South Dakota State Penitentiary
Post Office Box 5911
Sioux Falls, SD 57117-5911

/s/ Jack H. Hieb