UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

GREG LEWANDOWSKI, Plaintiff, vs. 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 DEFENDANT EMPLOYERS MUTUAL CASUALTY COMPANY'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (FRCP 56)

Defendant Employers Mutual Casualty Company ("Employers Mutual"), by and through its attorneys of record, hereby submits the following Brief in Support of Motion for Summary Judgment brought under FRCP 56.

BACKGROUND

This action involves the tragic deaths of Plaintiff's decedents, Travis and Tiffany Lewandowski. The children had been placed in temporary foster care in the home of Marlys Robertson on January 19, 2005. The morning of January 15, 2005, a fire broke out in the home. Travis and Tiffany died in the fire. Plaintiff brings this action pro se, seeking damages for those wrongful deaths.

For a period of time including January 15, 2005, Employers

Mutual provided liability coverage to Defendant SWST Fuel, Inc. Two policies were in effect on that date, one being a Comprehensive General Liability (CGL) policy; the other being an umbrella policy. Those policies are filed under the Affidavit of Cassandra Stevahn of Employers Mutual.

This Defendant brings its Motion for Summary Judgment on three alternate grounds, any of which would constitute grounds for dismissal of this action on its Motion:

1) The statute of limitations defense bars the claim. It is uncontroverted that the events forming the basis for Plaintiff's claims in this civil action occurred January 15, 2005. Although Plaintiff's Complaint is dated October 26, 2007, and filed with the Clerk of this Court on October 30, 2007, the Summons issued as to Employers Mutual is dated and filed April 16, 2008. Employers Mutual admitted service on April 21, 2008. Based on very clear South Dakota law, SDCL 21-5-3, a three year statute of limitations applies to wrongful death actions. No Summons issued, nor was there service until more than three months after the three-year statute of limitations expired.

2) Plaintiff attempts to bring a direct action against Employers Mutual, the liability carrier for SWST Fuel, Inc. Well settled law prohibits the bringing of a direct action against an insurer, in a third party liability type of claim.

3) Plaintiff has no standing to bring this action. He has

not been appointed as representative of the estate of either children. In fact, a civil action is pending in Tribal Court for the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, File No. 07-021-151. Thus, Plaintiff is prohibited from bringing this action in this Court.

All defenses relied on in this Motion have been properly pleaded. See Amended Separate Answer, ¶¶ 2, 3, 4, and 5.

1. Statute of Limitations.

It is uncontroverted that the tragic fire that claimed Travis and Tiffany Lewandowski occurred early the morning of January 15, 2005. It is likely uncontroverted that the Summons as to Defendant Employers Mutual was filed April 16, 2008. (Docket Index No. 13) Employers Mutual admitted service on April 21, 2008.

SDCL 21-5-3 provides that the statute of limitations in a wrongful death case in South Dakota is three years. Since the Summons as to Defendant Employers Mutual did not even issue until 90 days after the statute of limitations had expired, this Motion should be granted on that basis.

2. Direct Action.

Plaintiff does not seek any first party benefits against Employers Mutual, which had issued no policies insuring Plaintiff. Rather, based on the Affidavit of Cassandra Stevahn, an employee of Employers Mutual, this company had issued two

policies to SWST Fuel, Inc., another Defendant in this action, which policies were in effect January 15, 2005. Those policies were a Comprehensive General Liability (CGL) policy, and an umbrella policy. Both policies provided coverage for liability that might be found against its insured.

Few issues are so well settled in South Dakota law as is the premise that a direct action may not be pursued against a third party liability carrier. There is no statute in South Dakota which allows a direct action by an injured person against another's liability insurer absent a judgment having been first obtained against the tort-feasor. See SDCL 58-23-1 (direct action allowed when an execution on a judgment against the insured is returned unsatisfied). Based upon this foregoing authority, the South Dakota Supreme Court held in *Trouten v. Heritage Mut. Ins. Co.*, 632 N.W.2d 856, 862 (S.D. 2001), "that an insurer cannot be sued directly without first obtaining a judgment against the insured."

The South Dakota Supreme Court further noted that the legislative public policy of South Dakota prohibits a direct action against the insurer. It cited SDCL 58-23-1, which provides:

> All liability insurance policies issued in this state shall provide in substance that if an execution upon any final judgment in an action brought by the injured or by another person claiming, by, through, or under the injured, is returned unsatisfied, then an action may be maintained by the injured, or by such other person against the insurer under the terms of the policy for the amount of any judgment recovered in such

> action, not exceeding the amount of the policy, and every such policy shall be constituted to so provide, anything in such policy to the contrary notwithstanding. (Emphasis added.)

The 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*.

South Dakota is not alone in its prohibition of direct actions against insurers. In *Trouten*, the South Dakota Supreme Court relied on the Appellate Court of Illinois' decision in *Zegar v. Sears Roebuck and Co*., 211 Ill. App. 3d 1025, 570 N.E.2d 1176 (1991). In *Zegar*, a patron slipped and fell at a Sears store and attempted to bring a direct action against Sears' insurer to recover medical expenses under a general liability policy. Finding that the patron had no right to bring a direct action, the *Zegar* court stated that "nothing in the insurance policy states or strongly suggests that a claimant may maintain a direct action for medical expenses without regard to the resolution or of his or her potential claim against the insured for bodily injuries." *Zegar*, 570 N.W.2d at 1180.

Courts in various jurisdictions have serially denied the right to maintain a direct action against an insurer, either severally or jointly with the insured, before the recovery of a

judgment against the insured, or a determination of the liability of the insured by an agreement between the insurer, the insured, and the injured person. See e.g. *Severson v. Severson's Estate*, 627 P.2d 649 (Alaska 1981); *Mel H. Binning, Inc. v. Safeco Ins. Co.*, 74 Cal. App. 3d 615, 141 Cal. Rptr. 547 (1st Dist. 1977); *Sullivan v. Midlothian Park Dist.*, 51 Ill. 2d 274, 281 N.E. 2d 659 (1972); *Manukas v. American Ins. Co.*, 98 N.J. Super. 552, 237 A.2d 898 (App. Div. 1968); *Major v. National Indem. Co.*, 267 S.C. 517, 229 S.E. 2d 849 (1976); *Washington Metropolitan Area Transit Authority v. Queen*, 324 Md. 326, 597 A.2d 423 (1991); *Mendez v. Brites*, 849 A.2d 329, 333 (R.I. 2004); *Olokele Sugar Co. v. McCabe, Hamilton & Renny Co..*, 53 Haw. 69, 487 P.2d 769 (1971); *Padgett v. Long*, 453 S.W.2d 272 (Ky. 1970); *Burks v. Federal Ins. Co.*, 883 A.2d 1086 (Pa. Super. 2005). Where direct actions against insurers have been allowed, they have been expressly authorized by statute. See e.g. La.Rev.Stat.Ann. 22:655; Wis.Stat. § 803.04(2).

Likewise, a direct action against Employers Mutual cannot stand. Plaintiff is pursuing a tort claim against the claimed tort-feasors while at the same time pursuing a direct action against Employers Mutual. This is precisely the "multiplicity" of lawsuits which the South Dakota Supreme Court sought to prevent in its ruling in *Trouten*. Myriad other courts, as cited above, have reached the same conclusion that direct actions

should not be permitted.

In fact, several cases underscore this legal principle, and make it clear that even an off-hand reference to insurance coverage is grounds for a mistrial. See *Hoffman v. Royer*, 359 N.W.2d 387 (S.D. 1984). In that case, at the pre-trial conference, Plaintiff's counsel advised the Court that as part of the voir dire questioning, they expected to inquire whether any juror had interests in insurance. The Trial Court denied the Motion. The South Dakota Supreme Court affirmed. At page 391 of the opinion, the Court set forth the manner in which voir dire questioning could be brought, to inquire whether any juror had any interest in insurance matters. The Court required that, first, counsel for a party could ask the panel if anyone is an officer, director, employee, agent, or stockholder in any corporation. If there were no affirmative responses, there would be no further questioning. If there was an affirmative response, counsel would be permitted to inquire regarding the nature of the relationship and the name of the corporation. However, the subject of insurance could not simply be thrown in the face of the prospective panel. Naming a liability carrier as a party Defendant in an action such as this is a direct attempt to circumvent the holding in *Hoffman*,

The extent to which South Dakota courts have adhered to this principle is magnified in *Lowe v. Steele Construction Co.*, 368

N.W.2d 610 (S.D. 1985). In that civil case, during voir dire examination of the first jury panel, Plaintiff's counsel made a remark that included the statement that "insurance companies are always the Defendants in these kinds of cases," 368 N.W.2d at 611. Counsel for the Defendant made a Motion for a mistrial, which was immediately granted.

Because another panel was available, the second panel was called that afternoon. Defendant's counsel asked the Court to admonish both counsel and their respective witnesses not to discuss the matter of insurance before the new jury. Plaintiff's counsel agreed, and assured the Court he had already instructed his witnesses. The second jury was seated without incident. Plaintiff was the first witness. In response to a general question, he began talking about liability insurance in narrative form. Defendant's counsel moved for another mistrial, which was granted. The South Dakota Supreme Court affirmed the granting of that mistrial.

Finally, in *L.D.L. Cattle Company, Inc. v. Guetner*, 544 N.W.2d 523 (S.D. 1996), the South Dakota Supreme Court discussed the issue of non-disclosure of insurance coverage, in the context of a party seeking to circumvent the general rule, by claiming evidence of insurance collaterally attacked an issue. The South Dakota Supreme Court affirmed the Trial Court's refusal to permit evidence as to insurance, even in that circumstance.

Based on this well settled law in this jurisdiction on the issue of a direct action against an insurer, the Motion for Summary Judgment should be granted.

3. Plaintiff Lacks Standing to Bring this action.

In his Complaint, Plaintiff has failed to allege any representative capacity in which he might have been appointed. In addition, in the referenced action pending in Tribal Court, one Jason Campbell was appointed Personal Representative of the estates of Travis and Tiffany. See the Affidavit of Douglas M. Deibert, setting forth those routine matters relating to that appointment, and the action pending in Tribal Court. Plaintiff thus has no standing to bring this second action for the same matters set forth in the Tribal Court proceeding.

SUMMARY AND CONCLUSION

Based on one, all, or any combination of the three grounds set forth, Employers Mutual is entitled to dismissal of Plaintiff's claims against it, on Employers Mutual's Motion for Summary Judgment.

Dated at Sioux Falls, South Dakota, this 8th day of May, 2008.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing Defendant Employers Mutual Casualty Company's Brief in Support of Motion for Summary Judgment (FRCP 56) was mailed to:

Greg Alan Lewandowski # 46032
South Dakota State Penitentiary
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Sioux Falls, SD 57117-5911

by U.S. mail, postage prepaid this 8th day of May, 2008.

s/Douglas M. Deibert
Douglas M. Deibert