IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RANDALL SPENCE and
ROBERTA SPENCE,

and

STATE FARM MUTUAL AUTOMOBILE
INSURANCE CO.,

Plaintiffs,

OPINION AND ORDER

04-C-0756-C

v.

REGIONS HOSPITAL,

Defendant.

- -

This is a declaratory action for determination of the proper payout of insurance proceeds. It was begun in Wisconsin state court and removed to this court by defendant Regions Hospital on the ground of diversity. It is before the court on plaintiffs Randall Spence and Roberta Spence's motion to remand to state court.

The case arises out of an unfortunate automobile accident that resulted in the death of the Spences' adult daughter, but not until after she had been treated unsuccessfully for her injuries by defendant Regions. Plaintiff State Farm Mutual Automobile Insurance Co.

is willing to pay the Spences the full amount of the policy insuring the tortfeasor, Ryan Foley, but before it does so, it wants a judicial determination that it has no obligation to pay defendant Regions more than $120,000 for the care and treatment it provided the Spences' daughter before she died. In an effort to obtain such a determination, State Farm began an action in state court, together with the Spences. Defendant Regions removed the case to this court, pursuant to 28 U.S.C. § 1332 (diversity jurisdiction). In their remand motion, the Spences contend that the parties are not diverse and that removal was improper. They argue that under 28 U.S.C. § 1332(c)(1), an insurance company is a citizen of the state of which its insured is a citizen when a claim held by a third party against the insured is identical to the one asserted against the insurance company; they have a claim against State Farm's insured for the wrongful death of their daughter; that claim is identical to the one asserted against State Farm, which stands in the shoes of its insured under Wisconsin's direct action statute; therefore, State Farm is a citizen of Minnesota, the state of which its insured is a citizen. With State Farm a citizen of Minnesota and defendant Regions a citizen of the same state, complete diversity is not possible. (Section 1332(c)(1) deems every corporation a citizen of any state by which it has been incorporated and of the state in which it has its principal place of business, *except that* "in any direct action against the insurer of a policy or contract of liability insurance . . . to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a

citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business").

Unfortunately for the Spences, the Supreme Court held in Northbrook National Ins. Co. v. Brewer, 493 U.S. 6, 7 (1989), that the direct action exception in § 1332(c)(1) applies only to direct actions brought against liability insurers, not to actions in which the insurer is the plaintiff bringing the action. "The language of the proviso could not be more clear. It applies only to actions *against* insurers; it does not mention actions *by* insurers." Id. at 9. The Spences acknowledge Northbrook, but argue that their underlying claim for the wrongful death of their daughter and defendant Regions' claim of lien have been asserted against the policy of liability insurance that State Farm issued to its insured and that these claims constitute a direct action. They maintain that Northbrook is limited to its facts and has only a narrow application and they cite cases that they contend support their view of the case.

My own review of the cited cases does not support the Spences' position. In Searles v. Cincinnati Ins. Co., 998 F.2d 728 (9th Cir. 1993), for example, the court of appeals held that § 1332(c)(1)'s exception does not apply to bad faith actions brought by an insured against her own insurer and denied the insured's request for a remand to state court. In its opinion, the court of appeals repudiated another case cited by the Spences, Chavarria v. Allstate Ins. Co., 749 F. Supp. 220 (C.D. Cal. 1990), in which the district court had held

that bad faith actions were covered by the exemption. The Ohio federal district court cases that the Spences cite have been overruled by the Court of Appeals for the Sixth Circuit. In Lee-Lipstreu v. Chubb Group of Ins. Cos., 329 F.3d 898 (6th Cir. 2003), the court held that suits brought by employees of corporations against their employers' insurance carriers to recover uninsured motorist benefits were not "direct actions" subject to the exception for direct actions in § 1332(c)(1), with the result that the defendant insurance carrier are not considered citizens of the same state and the employee can litigate in federal court under the court's diversity jurisdiction, unless of course the parties have the same citizenship for reasons other than the direct action exception. Finally, in Metropolitan Life Ins. Co. v. Estate of Cammon, 929 F.2d 1220 (7th Cir. 1991), the Court of Appeals for the Seventh Circuit noted that § 1332(c)(1) applies only to actions brought against the insurer. In this case, the insurer is bringing the case.

I conclude that § 1332(c)(1) is not applicable to this action in which State Farm is a plaintiff and not the entity being sued.

The Spences have another argument: that the insured is a real party in interest under Fed. R. Civ. P. 17(a) and that if he is added to the suit as a plaintiff, as he should be, his Minnesota citizenship will defeat diversity. The Spences did not raise this argument until they filed their reply brief. As a general rule, arguments not raised until the reply brief are deemed waived. Carter v. Tennant Co., 383 F.3d 673, 679 (7th Cir. 2004) (arguments

presented for first time in reply brief are deemed waived) (citing APS Sports Collectibles, Inc. v. Sports Time, Inc., 299 F.3d 624, 631 (7th Cir. 2002)). However, the argument would not succeed even if it had been raised properly. The insured's interest in the outcome of this suit is not "real" as that term is used in the law. He has no right that can be enforced in this suit: he has no right to require defendant Regions to withdraw its claim to the insurance proceeds or to prohibit State Farm from pursuing a declaratory action against defendant. True, he will probably be better off if defendant Regions does not prevail in this suit because then all of the insurance proceeds will be paid to the Spences, as their daughter's heir, and they have indicated they will not pursue a suit against the insured if this happens. However, they are not legally bound to refrain from suing him for damages in excess of his insurance policy.

I conclude that the Spences have shown no reason why their motion to remand could be granted.

ORDER

IT IS ORDERED that the motion for remand filed by plaintiffs Randall Spence and

Roberta Spence is DENIED.

Entered this 5th day of January, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge