

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

TAMMY DINGER, Individually and as	)	
Administratrix of the Estate of Darren Scott	)	
Dinger, Deceased,	)	No. 1:18-cv-08390
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	Hon. Andrea R. Wood
	)	
CANDACE M. WISHKENO,	)	
	)	
Defendant,	)	
	)	
vs.	)	
	)	JURY TRIAL DEMANDED
	)	
ST. PAUL FIRE AND MARINE INSURANCE	)	
COMPANY,	)	
	)	
Garnishee.	)	

**AMENDED ANSWER OF PLAINTIFF TAMMY DINGER TO COUNTERCLAIM OF  
GARNISHEE ST. PAUL FIRE AND MARINE INSURANCE COMPANY FOR  
DECLARATORY JUDGMENT AND AMENDED COUNTERCLAIM**

Plaintiff (Garnishor), Tammy Dinger, Individually and as Administratrix of the Estate of Darren Scott Dinger (hereafter “Dinger”), by and through her attorneys, Gary D. McCallister of McCALLISTER LAW GROUP, LLC and Eric I. Unrein of CAVANAUGH, BIGGS & LEMON, P.A., pursuant to F.R.C.P. 7(a)(3) and for her Amended Answer to the Counterclaim filed by the Garnishee, St. Paul Fire and Marine Insurance Company (hereafter “St. Paul”), states, alleges and denies as follows:

**NATURE OF THE ACTION**

1. St. Paul seeks a declaration pursuant to 28 U.S.C. Sec. 2201 that it has no obligation to pay any portion of the judgment upon which Dinger’s garnishment is based under

the policy of automobile insurance (“St. Paul Policy”) St. Paul issued to Wishkeno’s employer Kickapoo Tribe in Kansas, because the judgment defendant Candace M. Wishkeno (“Wishkeno”) was not an insured under that policy for the collision which resulted in the death of Dinger’s husband.

**ANSWER:** Dinger admits St. Paul seeks a declaration, pursuant to 28 U.S.C. Sec. 2201, that it has no obligation to pay any portion of the judgment upon which Dinger’s garnishment is based under the policy of automobile insurance (“St. Paul Policy”) St. Paul issued to Wishkeno’s employer, Kickapoo Tribe in Kansas, but Dinger denies “Wishkeno” was not an insured under that policy for the collision which resulted in the death of Darren Dinger and further alleges St. Paul’s request for declaratory relief is untimely.

### **PARTIES**

2. Plaintiff Dinger is a citizen of Texas.

**ANSWER:** Admitted.

3. Garnishee St. Paul is a Connecticut insurance corporation with its principal place of business located in Connecticut.

**ANSWER:** Admitted.

### **JURISDICTION AND VENUE**

4. Jurisdiction is proper in this Court, pursuant to 28 U.S.C. §1332(a), because the plaintiff and Garnishee are citizens of different states and the amount in controversy exceeds \$75,000 exclusive of interest and costs.

**ANSWER:** Admitted.

5. The Court has personal jurisdiction over the parties because each party has entered an appearance thereby submitting to the jurisdiction of the Court.

**ANSWER:** Admitted.

6. Venue is proper because certain acts relevant to the issues in this case happened in this district and the parties have agreed for this matter to be resolved here.

**ANSWER:** Admitted.

**UNDERLYING ACTION**

7. Dinger commenced the instant garnishment proceeding in the Circuit Court of Cook County, Illinois, Law Division, to recover on a judgment (“the Judgment”) entered in favor of Dinger in the District Court of Riley County, Kansas on July 8, 2014 in the total amount of \$1,662,628.39, in the case of *Dinger v. Wishkeno, et. al.*, No. 11 CV 150 (“Underlying Action”).

**ANSWER:** Admitted.

8. The Underlying Action was brought by Dinger against the Kickapoo Tribe in Kansas and Wishkeno for damages arising out of the death of Dinger’s husband in a collision on July 23, 2009.

**ANSWER:** Admitted. The action was brought against Wishkeno, an individual, and her employer, the Kickapoo Tribe in Kansas.

9. On the day of the collision, Wishkeno drove a vehicle she owned (“Wishkeno Vehicle”) into the path of a motorcycle operated by Mr. Dinger.

**ANSWER:** Admitted, except that the vehicle was owned by Wishkeno and her mother.

10. At the time of the collision, Wishkeno was an employee of the Kickapoo Tribe in Kansas transporting three people following a tour of a Job Corps facility in Manhattan, Kansas.

**ANSWER:** Admitted. Plaintiff further alleges Wishkeno was acting within the scope of her employment at the time of the collision.

11. St. Paul provided a defense to its insured, the Kickapoo Tribe in Kansas, which was found to have no liability due to sovereign immunity. The Tribe's motion for summary judgment in the Underlying Action was granted on August 30, 2013.

**ANSWER:** Dinger admits St. Paul provided a defense to the Kickapoo Tribe in Kansas which was found to have no liability due to sovereign immunity based upon the Riley County District Court's order dated August 30, 2013. St. Paul did not provide a defense to Wishkeno.

12. Safeco Insurance Company ("Safeco"), Wishkeno's personal automobile insurer, provided Wishkeno with a defense in the Underlying Action.

**ANSWER:** Dinger admits Safeco provided Wishkeno a defense in the Underlying Action up until the time the case was settled with Wishkeno's personal automobile insurer.

13. On November 4, 2011, the Kickapoo's Tribe's counsel wrote to Dinger's counsel advising that he had been informed by St. Paul that the St. Paul Policy did not provide coverage for Wishkeno, because she was not a "protected person" under the Policy.

**ANSWER:** Dinger admits that on November 4, 2011, counsel for the Kickapoo Tribe wrote to Dinger's counsel stating that St. Paul was then taking the position that it did not provide coverage for Wishkeno because she was not a "protected person" under the St. Paul policy. St. Paul did not inform Dinger or her counsel that it was denying coverage, and St. Paul previously stated that it would provide coverage if Dinger's claim under the Federal Tort Claims Act was denied. St. Paul has waived and is estopped from declining coverage based upon Wishkeno not being a "protected person" under the St. Paul Policy. K.S.A. 40-3107(i).

14. Effective July 10, 2012, Dinger and Wishkeno entered into a Settlement Agreement and Covenant Not to Execute whereby Wishkeno agreed to pay \$100,000, Safeco's

policy limit, in partial satisfaction of Dinger's claims, which was followed by an Addendum to Settlement Agreement and Covenant Not to Execute which purported to assign to Dinger Wishkeno's claims under the St. Paul Policy.

**ANSWER:** Dinger admits the allegations contained in paragraph 14, but Dinger further states that the Addendum to Settlement Agreement and Covenant Not to Execute was not only an assignment of Wishkeno's claims under the St. Paul Policy to Dinger, but it was also a complete reservation of Wishkeno's claims and causes of action she had against St. Paul pertaining to her being covered under the St. Paul Policy.

15. Following the settlement and assignment, Wishkeno had no further financial interest in the Underlying Action.

**ANSWER:** Dinger denies the allegations in paragraph 15 suggesting that Wishkeno's interests as a person covered under the St. Paul Policy did not continue after the settlement and assignment of Wishkeno's claims to Dinger pursuant to the Addendum to Settlement Agreement and Covenant Not to Execute.

16. Trial of the Underlying Action began on May 8, 2014.

**ANSWER:** Admitted.

#### **THE ST. PAUL POLICY**

17. St. Paul insured the Kickapoo Tribe in Kansas under Policy No. GP06302194 effective May 1, 2009.

**ANSWER:** Dinger admits the allegation contained in paragraph 17 and further asserts that the St. Paul Policy provides coverage for Wishkeno during its policy period for Auto Liability Protection and Umbrella Excess Liability Protection.

18. The St. Paul Policy contains an Auto Liability Protection with a limit of \$1,000,000 each accident. Under the Policy, St. Paul agrees to “pay amounts any protected person is legally required to pay as damages for covered bodily injury or property damage. . . .” See Exhibit A.<sup>1</sup>

**ANSWER:** Dinger admits the above quoted language contained in paragraph 18 and further asserts that St. Paul agreed to cover the negligent acts and omissions of Wishkeno under its Auto Liability Protection with a limit of \$1,000,00 for each accident, and its Umbrella Excess Liability Protection with an additional limit of \$1,000,000 for each accident, both of which provide coverage and indemnity obligations for Wishkeno who is admitted to be a “protected person” under the policy as it relates to Dinger’s bodily injury.

19. The St. Paul Policy provides in its Auto Coverage Summary that “Any Auto” is a “covered auto” under the Auto Liability Protection coverage of the Policy.

**ANSWER:** Dinger admits the allegations in paragraph 19. Dinger also admits the relevant definitions under the Auto Liability Protection are the same as defined under the Umbrella Excess Liability Protection. Dinger further alleges the Auto Coverage Summary also defines what “Any Auto” means and it includes “Non-owned autos” which are “owned by your employees....But only while such autos are being used in the conduct of your business.” Wishkeno is also be covered under St. Paul’s policy as a “permitted user” who is a “protected person...”

20. The St. Paul Policy further provides in the section of the Policy entitled “Who Is Protected Under This Agreement” that St. Paul “won’t consider the following to be a protected person:

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<sup>1</sup> The St. Paul Policy contains various coverages and is comprised of 367 pages. A certified copy has been provided to Dinger. The parties will file the entire policy if the Court so requests.

“An employee of yours or a member of an employee’s household if the covered auto is owned by that employee or member of that employee’s household.”

**ANSWER:** Dinger admits the above policy language contained in paragraph 20.

However, this Section of the policy is ambiguous and inconsistent with other policy provisions, such as the section entitled “Any permitted user” and the auto coverage summary sections “Any Auto”, “Non-owned autos” and “covered auto” of its policy. Dinger further asserts that the inconsistency and ambiguity of these policy provisions must be construed against St. Paul in favor of Wishkeno being covered under the St. Paul policy, and finally further asserts that the attempt to exclude Wishkeno as a “protected person” is not an authorized exclusion under Kansas law as defined KSA 40-3107(i). Finally, St. Paul has admitted Wishkeno is a “protected person.”

21. The above provision is not contained in the section of the Policy entitled “Exclusions – What This Agreement Won’t Cover”.

**ANSWER:** Dinger admits paragraph 21, but incorporates by reference its denial and allegations set forth in its answer to paragraph 20 herein.

22. The St. Paul Policy states: “The words you, your and yours mean the insured named here, which is a[n] Indian Tribe[,] Kickapoo Tribe of Kansas.”

**ANSWER:** Dinger admits the allegation in this paragraph, but also further asserts that the words “you”, “your” and “yours” also includes Wishkeno who is covered under the St. Paul Policy issued to the Kickapoo Tribe in Kansas.

### **COUNT I - DECLARATORY JUDGMENT**

23. Paragraphs 1 through 22 are hereby incorporated by reference as if fully set forth herein.

**ANSWER:** Dinger incorporates herein by reference her answers, denials and allegations in response to paragraphs 1 – 22 as though set forth fully herein.

24. St. Paul has no obligation under the St. Paul Policy to pay the Judgment against Wishkeno, because Wishkeno was not insured under the St. Paul Policy inasmuch as the Policy expressly states that Wishkeno, an employee of the Kickapoo Tribe in Kansas, was not considered a “protected person” under the Policy when she was driving a car she owned.

**ANSWER:** Denied. St. Paul has admitted Wishkeno is a “protected person.” Further, St. Paul’s effort to seek declaratory relief is untimely, and its rights have either been waived or it is estopped to assert these policy defenses at this time.

25. St. Paul has no obligation under the St. Paul Policy to pay the judgment against Wishkeno, because, as a result of her settlement with Dinger, Wishkeno was never “legally required to pay as damages” the amounts reflected in the Judgment.

**ANSWER:** Denied. See answer to paragraph 24.

WHEREFORE, Dinger respectfully requests that the Court deny the requested relief as stated by St. Paul in paragraphs A, B and C of its prayer for relief and award Dinger her costs and such other relief as the Court deems just and equitable.

**AMENDED COUNTERCLAIM**

NOW COMES Plaintiff, TAMMY DINGER, Individually and as Administratrix of the Estate of Darren Scott Dinger, deceased, (hereafter “Dinger”) by and through her attorneys, Gary D. McCallister of McCALLISTER LAW GROUP, LLC and Eric I. Unrein of CAVANAUGH, BIGGS & LEMON, P.A., pursuant to F.R.C.P. 7(a)(3) and for her Amended Counterclaim states and alleges as follows:



### **PARTIES**

1. Dinger is a citizen and resident of the state of Texas, and she is the duly appointed and acting Administratrix of the Estate of Darren Scott Dinger, deceased, by virtue of Letters of Administration issued by the District Court of Riley County, Kansas, Division 2, in Case No. 09 PR 72 on October 5, 2009. The Letters of Administration are attached as Exhibit 1.

2. The Defendant, St. Paul Fire and Marine Insurance Company (hereafter “St. Paul”) is a corporation incorporated in the state of Connecticut where it maintains its principal place of business, and, therefore, St. Paul is a citizen and resident of Connecticut.

### **JURISDICTION AND VENUE**

3. Subject matter jurisdiction is founded upon 28 U.S.C. §1332(a)(1). The matter in controversy exceeds the sum of \$75,000, exclusive of interest and costs, and complete diversity of citizenship exists between the parties.

4. The Court has personal jurisdiction over the parties because each party has entered an appearance thereby submitting to the jurisdiction of the Court.

5. Venue is proper because the parties have agreed for this matter to be resolved in this district.

### **GENERAL ALLEGATIONS**

6. On July 23, 2009, Darren Scott Dinger, deceased, was operating his 2002 Harley Davidson motorcycle eastbound on Kansas Highway 18 at Scenic Drive in Riley County, Kansas. At the same time and place, Candace M. Wishkeno (hereafter “Wishkeno”) was driving her 2001 Dodge Durango southbound on Scenic Drive. Wishkeno did not see Mr. Dinger approaching and drove her vehicle directly into the path of his travel causing the collision resulting in severe and ultimately fatal injuries to Mr. Dinger.

7. At the time of this occurrence, Wishkeno was employed by the Kickapoo Tribe in Kansas (hereafter “KTIK”) as the Native Employment Program Coordinator and Kickapoo Child Care Program Coordinator, and she was at all times acting within the scope of her employment with the KTIK.

8. At the time of the aforementioned occurrence on July 23, 2009, Wishkeno was driving her personal vehicle on business for the KTIK, with permission and consent of the KTIK, as was the KTIK’s custom and practice. She was transporting tribal youth to and from the Flint Hills Job Corps Center in Manhattan, Kansas for a visit and tour. And, she later was reimbursed by the KTIK for the use of her vehicle on KTIK business on that date.

9. On July 23, 2009, the KTIK had five vehicles leased from the General Services Administration (hereafter “GSA”) that were shared by approximately 40 tribal programs. On this date, and as she had before, Wishkeno, a program coordinator for the KTIK, utilized her privately owned vehicle, at the behest and on behalf of the KTIK, because none of the GSA vehicles from the KTIK motor pool were available for her to transport the tribal youth to the Flint Hills Job Corps Center in Manhattan, Kansas and be on time for their visit and tour. Consistent with its custom and practice, the KTIK treated Wishkeno’s use of her vehicle as its own, and reimbursed her for mileage expense for its use.

10. On the date of this occurrence and pursuant to its insurance policy, St. Paul had a duty to defend, cover and indemnify Wishkeno for her negligent acts and omissions in operating her motor vehicle.

11. At the time of this occurrence, Wishkeno was a “protected person” operating a “covered auto” under the terms of the Auto Liability Protection and Umbrella Excess Liability Protection issued by St. Paul, namely Policy No. GP0630214, insuring the KTIK, its agents,

servants and employees for their negligent acts and omissions. A copy of the relevant portions of the St. Paul Auto Liability Protection and Umbrella Excess Liability Protection is attached as Exhibit 2.<sup>2</sup>

12. Prior to the time of the occurrence, Wishkeno, while acting within the scope of her employment with the KTIK, had driven her personal vehicle for purposes of her employment, such as transporting tribal youth, when the vehicles in the GSA fleet that would normally have been used for those purposes, were otherwise unavailable. This was the common custom and practice of the KTIK. In these instances, the KTIK reimbursed Wishkeno for mileage expenses incidental to the use and operation of her personal vehicle in the normal course of her employment with the KTIK, and the KTIK established a pattern and practice that implicitly, if not expressly, approved of her use of her private vehicle for tribal purposes. At all times, the KTIK encouraged and authorized Wishkeno's use of her vehicle in furtherance of her employment.

13. As such and as stated above, under the terms of the St. Paul policy (Exhibit 2), Wishkeno was a "protected person" for whom coverage was provided when she was driving a covered "Non-owned auto" as a "permitted user" in pursuit of her employment.

14. In a letter dated January 21, 2010, written by Thomas Wright, on behalf of St. Paul, in response to the tender of the Dinger claim by Safeco Insurance Company of America on December 29, 2009 relating to the occurrence of July 23, 2009, St. Paul confirmed that it would not provide a defense to Wishkeno, coverage or indemnity for this claim under its policy, No. GP0630214. A copy of this letter is attached and incorporated by reference as Exhibit 3. St. Paul's coverage decision was, as stated in this letter, as follows:

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<sup>2</sup> Due to the size of the insurance policy, the complete policy has not been attached. A certified copy of the complete policy will be filed with the Court if it so requests.

“...Ms. Wishkeno would normally be provided excess or umbrella coverage under the Kickapoo Tribe’s insurance policy and would be considered a “protected person” under the policy, but for the fact this matter involves a 638 Contract with the Federal Government and this requires that any claim be brought under the Federal Tort Claims Act protections.” (Exhibit 3 at p. 2)

15. St. Paul went on to deny coverage in reliance upon endorsement form D0115

(10/03) which is quoted in the letter as follows:

“PUBLIC SECTOR SERVICES  
INDIAN TRIBES – FEDERAL TORT CLAIMS ACT LIMITATION  
ENDORSEMENT

This endorsement changes your policy

How Coverage Is Changed

The following is added to the What This Agreement Covers section of each liability insuring agreement in your policy. This change limits coverage.

*We won’t apply this agreement to the tort liability of any protected person that results from the performance of, or failure to perform, duties within the scope of a contract or agreement authorized by the Indian Self-Determination and Education Assistance Act, or any of its amendments, if the protected person:*

- is subject to protection from such tort liability under the Federal Tort Claims Act, or any of its amendments; or
- would have been subject to protection from such liability under the Federal Tort Claims Act, or any of its amendments, but isn’t only because the procedural requirements for that protection under the Act weren’t fulfilled.

The Indian Self-Determination and Education Assistance Act begins at Section 450 of Title 25 of the United States Code. The Federal Tort Claims Act is located at Sections 1346(b), 2401 and 2671-2680 of Title 28 of the United States Code.

*Tort liability* means liability that would be imposed by law without any contract or agreement.”

Finally, the letter states:

“The D0115 (10/03) endorsement finds application to this claim in that Ms. Wishkeno was operating her personal vehicle on behalf of the Kickapoo Tribe of Kansas in the administration or operation of the Flint Hills Job Corps Project, a federally funded project, and which involves a 638 Contract. And as such, the Kickapoo Tribe of Kansas is to be defended by the United States of America under the Federal Tort Claim Act, §§§ 1346(b), 2404 and 2671-2680 of Title 28 of the United State Code.” (Exhibit 3 at 3)

St. Paul concluded that its FTCA endorsement essentially placed the duty of defense and indemnity on the United States. (Exhibit 3 at 3), but St. Paul never reserved its rights with regard to its duty to defend and indemnify Wishkeno.

16. St. Paul’s decision to decline coverage in January 2010 was known to be unjustified as early as February 18, 2011 and later as a result of the decision of the United States District Court for the District of Kansas determining that a Federal Tort Claims Act case did not exist. There were insufficient facts to establish that Wishkeno was a covered employee subject to liability under the FTCA. See *Dinger v. The United States*, 2013 U.S. Dist. Lexis 34518 (USDC KS, March 13, 2013).

17. On March 25, 2011, Dinger’s counsel wrote to Thomas Wright of St. Paul enclosing a letter written by Dinger’s counsel to counsel for Safeco, Wishkeno’s primary insurance carrier, making policy limit demands for all insurance policies providing coverage for the occurrence of July 23, 2009. (See Exhibit 4 attached hereto and incorporated herein by reference.)

18. On April 20, 2011, Mr. Wright, on behalf of St. Paul, acknowledged receipt of Dinger’s counsel’s letter dated March 25, 2011 and admitted that if Wishkeno is ultimately determined to not be entitled to protection of the Federal Tort Claims Act, that the Dinger family will, of course, look to Travelers (St. Paul) to satisfy their claim that is in excess of the Safeco

policy limits. St. Paul, having admitted Wishkeno was a “protected person” thereby had an indemnity obligation to Dinger in the event the claim was not covered by the Federal Tort Claims Act, which it was not. This letter is attached and incorporated herein by reference as Exhibit 5.

19. On November 4, 2011, St. Paul attempted to change its unjustified reason for denying coverage and defense obligations under its policy, notwithstanding its prior admission that Wishkeno was a “protected person” by virtue of a letter written to Dinger’s counsel by counsel for the KTIK wherein St. Paul described the denial of coverage for a different reason. This letter is attached hereto and incorporated herein marked as Exhibit 6. In relevant part, the letter states as follows:

“As I advised, Tom Wright had informed me that Candace Wishkeno is not insured for the operation of her motor vehicle at the time of the accident involving your client. The policy provides auto liability coverage for a “protected person” from claims for bodily injury or property damage that result from the “ownership, maintenance, use, loading or unloading of a covered auto.” “Covered auto” is defined as the “type or types of autos shown in the Coverage Summary and described in the Which Autos Are Covered section.” (Page 2 of 9). The auto coverage summary lists “any auto” as covered autos under the auto liability protection. Any auto is defined as “any owned, rented, leased or borrowed auto. It includes hired, nonowned, newly acquired, replacement and temporary substitute autos.” This accident involved a “nonowned auto.” The insuring agreement only insures “any protected person.” Executive officers and directors of the Tribe are protected persons but Ms. Wishkeno is not an executive officer or director of the Tribe. “Any protected person” also includes any permitted user of a “covered auto you own, rent, lease, hire or borrow.” The vehicle driven by Ms. Wishkeno was not such a vehicle. Form 44449 REV 12-93 expressly excludes from coverage for a permitted user: “An employee of yours or a member of an employee’s household if the covered auto is owned by that employee or member of that employee’s household.” See Form 44449 REV 12-93, page 5 of 9. Consequently, Candace Wishkeno has no coverage under Travelers’ automobile liability coverage for this accident which occurred while she was operating an auto owned by her.”

20. St. Paul is bound by its initial unjustified denial of coverage, and it is not now able to substitute a secondary reason for denying coverage and defense. As a result, St. Paul has admitted Wishkeno is a “protected person” and has waived its denial of coverage after its initial unjustified reason for denying coverage and defense. In addition, St. Paul is estopped to assert any additional defenses for the denial of coverage and indemnity other than its initial coverage decision as set forth in Mr. Wright’s letter dated January 21, 2010.

21 St. Paul’s waiver and estoppel further arise because it never sought to defend the underlying action subject to a reservation of rights or to legally determine coverage by the filing of a declaratory judgment action in a timely manner, particularly given St. Paul had admitted Wishkeno was a “protected person.”

22. Kansas law and public policy requires that the automobile being driven by Wishkeno be covered for liability purposes by the insurance policy.

23. Further, the provisions within the St. Paul policy with regard to what constitutes a “covered auto” “Any auto”, “Nonowned autos”, “Any permitted user,” and “protected person” are inconsistent, ambiguous and are to be construed in favor of the insured and against St. Paul.

24. Finally, St. Paul’s attempt to gain an advantage by taking an impermissible second bite at declining its coverage and defense obligations apple was contrary to existing Kansas statutes in effect at the time of the occurrence covered by the effective date of St. Paul’s policy, namely KSA 40-3107(i), as the exclusion described in the KTIK attorney’s letter dated November 4, 2011 was not a permissible exclusion under KSA 40-3107(i). K.S.A. 40-3107(i) is attached as Exhibit 7 and is incorporated herein by reference.

25. On July 10, 2012, Dinger and Wishkeno entered into a Settlement Agreement and Covenant Not to Execute which was followed by an Addendum to Settlement Agreement and

Covenant Not to Execute which assigned Wishkeno's claims under St. Paul's insurance policy, No. GP06302194, to Dinger. The Settlement Agreement and Addendum is attached hereto and incorporated herein by reference as Exhibit 8.

26. As a result of St. Paul's failure to defend Wishkeno, a Memorandum of Decision and Journal Entry of Judgment was entered in favor of Dinger in the District Court of Riley County, Kansas on July 8, 2014, resulting in a judgment against Wishkeno in the total amount of \$1,662,628.39. (See Memorandum of Decision and Journal Entry of Judgment dated July 8, 2014 attached here as Exhibit 9 and incorporated herein.)

27. The direct and proximate result of St. Paul's failure to provide coverage file a timely declaratory judgment action, defend Wishkeno under a reservation of rights letter, and settle the Dinger claim within its policy limits, was an excess judgment in the total amount of \$1,662,628.39.

28. On August 17, 2018, the Kansas judgment was registered as a foreign judgment in the state of Illinois. The registered foreign judgment is attached hereto and incorporated herein by reference as Exhibit 10.

### **COUNT I – BREACH OF CONTRACT**

29. Plaintiff incorporates herein by reference the allegations contained in paragraphs 1-28, inclusive of this Amended Counterclaim as though fully set forth herein.

30. On July 23, 2009, St. Paul had in effect its Auto Liability Protection and Umbrella Excess Liability Protection policy, No. GP06302194, in the combined total amount of \$2 million insuring the KTIK, its agents, servants and employees for any of their negligent acts or omissions, including those of Wishkeno.



31. Wishkeno was involved in an automobile/motorcycle collision resulting in the death of Dinger while she was acting within the scope of her employment for KTIK and while she was a “protected person” operating a “covered auto” under the St. Paul insurance policy.

32. That pursuant to its insurance policy, St. Paul had a duty to defend, cover and indemnify Wishkeno for her negligent acts and omissions in operating her motor vehicle on the date of the occurrence.

33. St. Paul breached its above described duties and its policy of insurance by failing to defend, cover and indemnify Wishkeno for any and all damages resulting from Wishkeno’s negligent acts and omissions on July 23, 2009.

34. That as a direct result of St. Paul’s breach of its contract of insurance, a judgment was entered against Wishkeno in the amount of \$1,662,628.39 for damages caused to Dinger as a result of the occurrence of July 23, 2009.

35. That as a direct and proximate result of St. Paul’s breach of its insurance contract, it is liable to Dinger for the full policy limits of \$2 million, post-judgment interest and costs.

WHEREFORE, Plaintiff prays for damages in the amount of \$1,662,628.39 against St. Paul for its breach of its policy of insurance, including post-judgment interest and costs of this action, together with any and all such other and further relief to which the Court deems just and equitable in the premises.

**COUNT II – CLAIM FOR NEGLIGENT BAD FAITH FAILURE TO DEFEND**

36. Plaintiff incorporates herein by reference the allegations contained in paragraphs 1-28, inclusive of this Amended Counterclaim as though fully set forth herein.

37. On or about July 23, 2009, St. Paul had in effect its Auto Liability Protection and Umbrella Excess Liability Protection policy, No. GP06302194, insuring the KTIK, its agents,

servants and employees, including the negligent acts and omissions of Wishkeno who was involved in an automobile/motorcycle collision resulting in the death of Dinger while she was driving a “covered auto” as a “protected person” under said insurance policy.

38. That at all times relevant, St. Paul owed a duty of reasonable care to Wishkeno to defend, cover and indemnify her for the claims made against her in Case No. 11-cv-150 filed in the District Court of Riley County, Kansas, entitled *Tammy Dinger, Individually and as Administrator of the Estate of Darren Scott Dinger, Deceased, Plaintiff v. Candace M. Wishkeno*, Case No. 11-cv-150.

39. St. Paul breached its duty of reasonable care by failing to defend, cover and indemnify Wishkeno, and thereby acted in bad faith by refusing to defend its insured, to settle the underlying case within the policy limits of \$2 million, and by further failing to appropriately take into consideration the personal interests of Wishkeno rather than its own financial interests.

40. St. Paul’s negligent and bad faith acts and omissions in failing to defend, cover and settle the underlying case against Wishkeno within its policy limits include, but are not limited to, the following:

- a. By making an erroneous coverage decision in denying its defense and indemnity coverage obligations under Policy No. GP06302194;
- b. By unreasonably and negligently failing to settle Dinger’s claim against Wishkeno within the limits of the St. Paul policy of \$2 million so as to avoid personal exposure to Wishkeno over and above the policy limits;
- c. By unreasonably and negligently subjecting Dinger to protracted litigation in the federal court in Kansas and later in Riley County, Kansas by asserting, as its basis for denying coverage and defense, that Wishkeno was excluded from coverage by virtue of the PSS Indian Tribe – Federal Tort Claims Act Limitation Endorsement D0115 (10/03) because Wishkeno was performing her job duties under a “638” grant which, in turn, was claimed by St. Paul to

trigger the FTCA exclusion in the policy. The United States District Court for the District of Kansas ruled Wishkeno was not a federal employee, and, therefore, the Federal Tort Claim Act did not apply;

- d. That at all times St. Paul was denying coverage and failing to supply a defense to Wishkeno, it recognized and admitted that there would be coverage under the KTIK policy for Wishkeno if she was not acting under a “638” contract because Wishkeno was an agent of the KTIK, and the policy would have covered KTIK and its agents, servants and employees acting within the scope of their employment;
- e. St. Paul knew or reasonably should have known, based upon Wishkeno’s recorded statement that Wishkeno admitted her negligence in causing injuries and the ultimate wrongful death of Dinger which clearly exposed her to damages in excess of St. Paul’s policy limit; and
- f. St. Paul’s unreasonable failure to defend pursuant to a reservation of rights and/or timely seek a declaratory judgment as to its coverage and defense obligations.

41. As a direct and proximate result of St. Paul’s negligent acts and omissions which constitute bad faith under the facts and circumstances of this case, and based upon the assignment of Wishkeno’s claims and causes of action relating to St. Paul’s negligence and bad faith, Dinger is entitled to recover damages in the total amount of \$1,662,628.39, attorney’s fees, post-judgment interest, costs and other consequential damages suffered by her.

WHEREFORE, the Plaintiff prays for judgment in the amount of \$1,662,628.39 together with attorney’s fees, post-judgment interest, costs and consequential damages and such other and further relief as the Court deems just and equitable in the premises.

Dated: September 27, 2019

Respectfully submitted,

McCALLISTER LAW GROUP, LLC

By: /s/Gary D. McCallister  
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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

TAMMY DINGER, Individually and as	)	
Administratrix of the Estate of Darren Scott	)	
Dinger, Deceased,	)	No. 1:18-cv-08390
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	Hon. Andrea R. Wood
	)	
CANDACE M. WISHKENO,	)	
	)	
Defendant,	)	
	)	
vs.	)	
	)	
	)	JURY TRIAL DEMANDED
ST. PAUL FIRE AND MARINE INSURANCE	)	
COMPANY,	)	
	)	
Garnishee.	)	

**DEMAND FOR JURY TRIAL**

COMES NOW the Plaintiff and makes demand for a trial by jury for all issues of facts triable by a jury in this case.

Dated: September 27th, 2019

Respectfully submitted,

McCALLISTER LAW GROUP, LLC

By: /s/Gary D. McCallister  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 27th day of September, 2019, a true and correct copy of the foregoing documents were electronically served on counsel for all parties properly registered to receive notice via the Court's CM/ECF system.

/s/Gary D. McCallister

Gary D. McCallister