IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TAMMY DINGER, individually and as Administratrix of the Estate of Darren Scott Dinger,	)	
Plaintiff/Counter-Defendant,	)	
v.	)	Case No. 1:18-cv-08390
CANDACE M. WISHKENO,	)	Judge Andrea R. Wood
Defendant,	)	
v.	)	
ST. PAUL FIRE AND MARINE INSURANCE COMPANY,	)	
Garnishee/Counter-Plaintiff.	)	

GARNISHEE/COUNTER-PLAINTIFF
ST. PAUL FIRE AND MARINE INSURANCE COMPANY'S
MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Garnishee/Counter-Plaintiff, St. Paul Fire and Marine Insurance Company ("St. Paul"), by and through its attorneys, Karbal, Cohen, Economou, Silk & Dunne, LLC, hereby submits this memorandum in support of its motion for summary judgment against Plaintiff/Counter-Defendant, Tammy Dinger, Individually and as Administratrix of the Estate of Darren Scott Dinger ("Dinger" or "Plaintiff"). For the reasons set forth below, St. Paul requests that this Court enter summary judgment in favor of St. Paul and against Dinger on St. Paul's counterclaim and on Dinger's counterclaims.

INTRODUCTION

Garnishee/Counter-Plaintiff St. Paul submits this memorandum in support of its motion for summary judgment. The undisputed facts establish that there is no coverage under the St. Paul

policy for the judgment in the underlying Kansas case on which Dinger instituted this garnishment proceeding. It is uncontroverted that Candace M. Wishkeno ("Wishkeno") was driving a car she owned at the time of the collision leading to the judgment. The St. Paul policy, which insured Wishkeno's employer, clearly stated that employees driving cars they own are not "protected persons" under the St. Paul policy.

Consequently, based on the law and the undisputed facts, St. Paul is entitled to summary judgment granting the declaratory judgment it seeks (Count I of its Counterclaim) with a finding that there is no coverage for the garnished judgment under its policy. Additionally, St. Paul is entitled to summary judgment on Dinger's counterclaim, because Dinger cannot establish breach of contract (Count I of Dinger Counterclaim) or negligent bad faith failure to defend (Count II of Dinger Counterclaim).

UNDISPUTED MATERIAL FACTS

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 (the "Underlying Action"). (Garnishee/Counter-Plaintiff's Statement of Material Facts As to Which There is No Genuine Issue In Support Of Its Motion For Summary Judgment ("SOF") Par. 6.)

Dinger brought the Underlying Action 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. (*Id.* Par. 7.) On the day of the collision, Wishkeno drove a vehicle she owned ("Wishkeno Vehicle") into the path of a motorcycle operated by Mr. Dinger. (*Id.* Par. 8.)

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. (*Id.* Par. 11.) Safeco Insurance Company ("Safeco"), Wishkeno's personal automobile insurer, provided Wishkeno with a defense in the Underlying Action. (*Id.*. Par. 10.)

St. Paul provided a defense to its insured, the Kickapoo Tribe in Kansas. 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 Policy did not provide coverage for Wishkeno, because she was not a "protected person" under the Policy. (*Id*. Par. 14.) The Kickapoo Tribe in Kansas' motion for summary judgment based on no liability due to sovereign immunity in the Underlying Action was granted on August 30, 2013. (*Id.* Par. 13.)

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. (*Id.* Par. 15.) Pursuant to that Agreement, Dinger agreed not to execute against Wishkeno's assets and to hold Wishkeno harmless with respect to any judgment entered in the Underlying Action. In February 2016, Dinger and Wishkeno entered into an Addendum to Settlement Agreement and Covenant Not to Execute which purported to assign to Dinger Wishkeno's claims, "contractual and non-contractual," under the St. Paul policy. (*Id.* Par. 16.)

After the assignment and settlement, Dinger recovered a judgment following a purported "trial" in the Underlying Action (to which the alleged tortfeasor Wishkeno was no longer an active party, having settled and assigned her rights) and registered the judgment here. (*Id.* Par. 17.).

St. Paul issued a policy to the named insured Kickapoo Tribe in Kansas under Policy No. GP06302194 effective May 1, 2009 (the "Policy"). The 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 . . .." (*Id.* Pars. 18, 19.)

The Policy provides in its Auto Coverage Summary that "Any Auto" is a "covered auto" under the Auto Liability Protection coverage of the Policy. (*Id.* Par. 21.)

The Policy further provides in the "Who Is Protected Under This Agreement" section that St. Paul "won't consider the following to be a protected person:

> 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."

(*Id*., Par. 22.)

The above provision is not contained in the section of the Policy entitled "Exclusions – What This Agreement Won't Cover". (*Id*. Par. 23.)

The Umbrella Excess Liability Protection coverage of the Policy, under which Dinger also claims, states that "[a]ny person or organization that's a protected person under your automobile Basic Insurance of the use of an auto is a protected person under this agreement. . . ." "Basic Insurance" includes Automobile Liability insurance. (*Id.* Par. 24.)

The Policy states: "The words you, your and yours mean the insured named here, which is a[n] Indian Tribe[,] Kickapoo Tribe of Kansas." (*Id.* Par. 25.)

ARGUMENT

Summary judgment is proper where there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed.

2d 202 (1986). The party seeking summary judgment has the burden of establishing the lack of any genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). In evaluating a motion for summary judgment, the Court will construe all facts in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of the nonmoving party. *Bell v. Taylor*, 827 F.3d 699, 704 (7th Cir. 2016). However, "[c]onclusory allegations alone cannot defeat a motion for summary judgment." *Thomas v. Christ Hosp. & Med. Ctr.*, 328 F.3d 890, 892-93 (7th Cir. 2003).

In this Court, "the interpretation of an insurance policy is a question of law appropriately resolved at the summary judgment stage." *Hartford Cas. Ins. Co. v. Hench Control Corp*., 2019 U.S. Dist. LEXIS 155425 (N.D. Ill. Sept. 12, 2019). *Accord, Twenhafel v. State Auto Prop. & Cas. Ins. Co.*, 581 F.3d 625, 628 (7th Cir. 2009) . ("Under Illinois law, the interpretation of an insurance policy is a question of law that is properly decided by way of summary judgment.

This Court applies Illinois choice of law rules in cases like this in which subject matter jurisdiction is based on diversity of citizenship. *McCoy v. Iberdrola Renewables, Inc.*, 760 F.3d 674, 684 (7th Cir. 2014) ("Federal courts hearing state law claims under diversity or supplemental jurisdiction apply the forum state's choice of law rules to select the applicable state substantive law."). The St. Paul policy was issued in Kansas to an Indian tribe based in Kansas. (St. Paul Counterclaim, ECF No. 22-1, Ex. A, at 1.) The tribe's operations and employees are located in Kansas. *See* Kan. Kickapoo Tribe, https://www.ktik-nsn.gov (last visited Apr. 15, 2019). In *Lapham-Hickey Steel Corp. v. Protection Mut. Ins. Co.*, 655 N.E.2d 842, 845 (Ill. 1995), the Illinois Supreme Court ruled that this test means that that construction of insurance policy provisions "are generally 'governed by the location of the subject matter, the place of delivery of the contract, the domicile of the insured or of the insurer, the place of the last act to give rise to a

valid contract, [and] the place of performance, or other place bearing a rational relationship to the general contract.'" In this case, to the extent there are any conflicts, Kansas law should govern matters of contract interpretation, i.e., in this case the issue of whether there is coverage for defense or indemnity under the St. Paul policy, since the policy was issued in Kansas to an insured domiciled in Kansas whose operations are centered in Kansas.

A. The Plain Language of the St. Paul Policy Demonstrates There Was No Coverage For Wishkeno For Defense or Indemnity of the Underlying Action Because She Was Driving a Car She Owned and Was Not a "Protected Person."

Under Kansas law "a person claiming coverage under an insurance policy has the initial burden to prove coverage." *State Farm Fire & Cas. Co. v. Hartman*, No. 12-2456-KHV, 2013 U.S. Dist. LEXIS 163334, at *9 (D. Kan. Nov. 18, 2013) (citing *Shelter Mut. Ins. Co. v. Williams*, 804 P.2d 1374, 1383 (Kan. 1991). Specifically, a party seeking coverage has "the burden of proving who is covered under the policy." *Kansas Farm Bureau Ins. Co. v. Reynolds*, 823 P.2d 216, 218 (Kan. Ct. App. 1991); accord *Certain Underwriters at Lloyd's London v. Garmin Int'l Inc.*, No. 11-cv-2426-EFM, 2013 U.S. Dist. LEXIS 98186, at *21, 26, 35, n. 52 (D. Kan. Jul. 15, 2013), *aff'd* 781 F.3d 1226 (10th Cir. 2015). Kansas law follows the "ultimate showing" test, pursuant to which "it must be shown that under the policy the defendant is in fact an insured, named or omnibus," before the duty to defend can be triggered. *Certain Underwriters*, 2013 U.S. Dist. LEXIS 98186, at *18-19 (quoting *Williams v. Community Drive-In Theatre, Inc.*, 595 P.2d 724, 726 (Kan. Ct. App. 1979)). That is, the insurer does not have a duty to defend a person based on mere allegations, which if true, would render that person an insured, but rather there must be actual proof that the person in question falls within the policy definition of an insured. *Certain Underwriters*, 2013 U.S. Dist. LEXIS 98186, at *18-19; *Williams*, 595 P.2d at 726. The party seeking coverage is responsible for presenting such ultimate proof showing that

the person is an insured under the policy. *Certain Underwriters*, 2013 U.S. Dist. LEXIS 98186, at *21, 26, 35, n. 52; *Kansas Farm Bureau*, 823 P.2d at 218.

Judgment should be entered in favor of St. Paul on its claim for declaratory judgment (St. Paul Counterclaim, ECF No. 22) and against Dinger in her breach of contract count (Count I of Dinger's Counterclaim), in which she claims that St. Paul had a duty to defend and indemnify Wishkeno for her collision with Darren Dinger. Specifically, Dinger cannot meet her burden of proving that Wishkeno was covered for the underlying collision, because the clear language of the policy shows that Wishkeno was not a "protected person" entitled to coverage. *Kansas Farm Bureau*, 823 P.2d at 218. The Policy states that St. Paul "won't consider the following to be a protected person:

> 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."

(SOF Par. 22.) It is undisputed that Wishkeno was driving a vehicle she owned in the collision. (Dinger Answer, ECF No. 52, ¶ 9.) Hence, the unambiguous language of the Policy shows that there was no coverage. Under Kansas law, "it is not the court's role to rewrite the policy in the absence of ambiguity; rather, the court shall enforce the contract as made." *Hall v. Shelter Mut. Ins. Co.*, 253 P.3d 377, 382 (Kan. App. 2011).

Because Dinger cannot meet her burden of making an "ultimate showing" that Wishkeno is a protected person under the Policy, there is no coverage. *Certain Underwriters*, 2013 U.S. Dist. LEXIS 98186, at *21, 26, 35, n. 52; *Kansas Farm Bureau*, 823 P.2d at 218. And even if this were not a situation where the "ultimate showing" test applies, there would still be no coverage under the "extrinsic evidence" test that Kansas law more generally applies under other scenarios in determining if there is a duty to defend. *Miller v. Westport Insurance Corp.*, 200 P.3d 419, 424-25

(Kan. 2009). Under the more general "extrinsic evidence" approach to determining the duty to defend, the insurer must look to both the pleadings and any facts it could reasonably discover in determining whether it must defend. *Id*. The question is whether the pleadings and any reasonably discoverable facts give rise to a potential for coverage. *Id.* Under the extrinsic evidence test, there is likewise no coverage. The underlying Amended Petition alleged that Wishkeno "drove her vehicle" in the collision (SOF Par. 9) and facts readily available to St. Paul confirmed that Wishkeno owned this vehicle. Indeed, Dinger has admitted that Wishkeno owned the vehicle. (Dinger Answer, ECF No. 52, ¶ 9.) Hence, Wishkeno was not a "protected person" under the Policy, and St. Paul had no duty to defend Wishkeno because there was no potential for coverage.

Likewise, St. Paul had no duty to indemnify Wishkeno for the Underlying Action. Under Kansas law, the duty to defend is broader than the duty to indemnify. *Gilmore v. Beach House, Inc*., 174 P.3d 439, 443 (Kan. Ct. App. 2008). Thus, when there is no duty to defend, there is no duty to indemnify either. *ERA Franchise Sys., Inc. v. Northern Ins. Co.*, 32 F. Supp. 2d 1254, 1261 (D. Kan. 1998); *Triple M Fin. Co. v. Universal Underwriters Ins. Co.*, Case No. 04-2194-CM, 2005 U.S. Dist. LEXIS 8815, at *29 (D. Kan. Feb. 22, 2005), *aff'd* 164 Fed. Appx. 702 (10th Cir. 2006); see also *Gilmore*, 174 P.3d 439 at 954. Accordingly, St. Paul is entitled to a declaratory judgment on its Counterclaim, so stating that St. Paul has no duty to defend or indemnify.

B. <u>Dinger's Claim that The Policy Provision On "Protected Persons" Somehow Violates KSA § 40-3107(i) Is Incorrect For Multiple Reasons</u>.

Dinger alleges that the Policy provision regarding "protected persons" violates KSA § 40-3107(i). because the provision is not a "permissible exclusion" under that statute. (Dinger Amended Counterclaim, ECF No. 52, ¶ 24, Ex. 7) This contention misses the mark for a variety of reasons. By way of background, KSA § 40-3107(i) is a subsection of the Kansas

Automobile Injury Reparations Act ("KAIRA," KSA § 40-3101 *et seq.*). Dinger appears to allude to the fact that KAIRA requires certain automobile insurance policies issued in Kansas to provide a minimum of $25,000 in statutory coverage for damages with respect to vehicles that are covered under the policy and that the named insured owns. KSA § 40-3107(b),(e); KSA § 40-3104(a). However, nothing in KSA § 40-3107(i) prohibits St. Paul from enforcing the policy provision at issue.

To begin with, KSA § 40-3107(i), relied on by Dinger, is irrelevant because the "protected persons" provision is not an exclusion. It is contained in the section of the policy entitled "Who Is Protected Under This Agreement" (Counter-Def's Amended Answer Par. 20.), not in the section of the policy entitled "Exclusions – What This Agreement Won't Cover." An "exclusion" is "[a]n insurance-policy provision that excepts certain events or conditions from coverage" *Ruzak v. USAA Ins. Agency*, No. 274993, 2008 Mich. App. LEXIS 1318 (Ct. App. June 24, 2008) (unpublished) (quoting Black's Law Dictionary (7th Ed.)). In an analogous case, the Wisconsin Court of Appeals held that "definitional limits to coverage are not 'exclusions'" subject to a statutory limit on exclusions. *Damp v. Zabel*, 270 N.W.2d 434, 437, (Wis. App. 1978). Notably, Kansas law provides that provisions governing whether one is an insured are not exclusions, but rather pertain to the scope of the coverage grant. *Kansas Farm Bureau*, 823 P.2d at 218. The St. Paul provision does not except events or conditions from coverage, but rather defines which persons are protected by the coverage. (Counter-Def's Amended Answer, Ex. 2.)

Moreover, the Kansas Supreme Court recently held that KSA § 40-3107(i) does not restrict policy "provisions" that are not exclusions. *Geer v. Eby*, 432 P.3d 1001, 1015 (Kan. 2019). *Geer* interpreted existing Kansas law to provide that KSA § 40-3107 prohibits garage-shop exclusions, but not other types of policy provisions. *Id.* Accordingly, *Geer* found that KSA § 40-3107 did not

restrict an insurer's right to deny coverage based on violation of a policy notice provision. *Id.* Similarly, KSA § 40-3107(i) does not undermine an insurer's right to use the provision at issue that defines who qualifies as a protected person. *Id.*

To put a point on it, if Dinger were correct that the "protected persons" provision is an exclusion, then insurers would be powerless to limit the group of people protected under a Kansas automobile insurance policy, because such limitations are not listed in KSA § 40-3107(i). "[J]udicial interpretation of a statute should avoid absurd or unreasonable results." *Hays v. Ruther,* 313 P.3d 782, 786 (Kan. 2013). In this case, the plain language of KSA § 40-3107(i), as well as application of common sense, dictate that Dinger's incorrect interpretation of that statute be rejected.

In addition, KSA § 40-3107 does not apply to vehicles that the Named Insured does not own. See KSA § 40-3104(a). The version of KSA § 40-3107 in effect in 2009 stated it applies to a "policy of motor vehicle liability insurance issued by an insurer *to an owner* residing in this state…." KSA § 40-3107(a) (emphasis added). A related provision, KSA § 40-3104(a), only requires an "owner" to "provide motor liability insurance coverage in accordance with the provisions of this act for every motor vehicle *owned* by such person…." (emphasis added). It is undisputed that the policy was issued to the Kickapoo Tribe in Kansas and that the Kickapoo Tribe in Kansas did not own the subject vehicle. (Dinger Answer, ECF No. 52, ¶¶ 9, 11,17.) Thus, the requirements of KSA § 40-3107 do not apply.

Furthermore, KSA § 40-3107(i) does not apply to an excess carrier when another carrier has already paid the $25,000 in statutory minimum coverage. *Burt v. Schrubba,* 967 P.2d 344, 346, 347-48 (Kan. Ct. App 1998). By way of illustration, in *Burt,* a car leasing company, which was self-insured, agreed to provide a driver with the statutory minimum in coverage. *Id.* at 346.

An injured party obtained a $100,000 judgment against the insured driver. *Id.* at 345. The court found the self-insured company was responsible for paying the $25,000 minimum in statutorily required coverage, and that the company's carrier (whose coverage was excess over any other collectible insurance) was not responsible for making any payment. *Id.* at 348. Applying *Burt* to this case, St. Paul cannot owe any duty to defend or indemnify Wishkeno. In this case, the St. Paul policy is "primary insurance for covered autos you own and excess insurance for those you don't own." (Dinger Answer, ECF No. 52, Ex. 2, at 12.) It is undisputed that the Named Insured did not own the subject vehicle. (Dinger Answer, ¶ 9.) Thus, even if St. Paul could be considered Wishkeno's insurer, which St. Paul is not, St. Paul would be an excess carrier. (Dinger Answer, Ex. 2, at 12.) Indeed, Wishkeno's personal automobile insurer Safeco Insurance Company provided Wishkeno with a defense in the underlying suit and paid its $100,000 limit. (Dinger Answer ¶¶ 12,14.) Under *Burt*, St. Paul has no obligations to Dinger or Wishkeno because Wishkeno's primary carrier has already paid Dinger more than the $25,000 in statutory minimum coverage. *Burt*, 967 P.2d at 347-48.

Furthermore, KSA § 40-3107 does not impose any statutory duty on an insurer to defend. *Overbaugh v. Strange*, 867 P.2d 1016, 1022 (Kan. 1994). Rather, KSA § 40-3017 merely pertains to a $25,000 statutory minimum in coverage for "loss from the liability imposed by law for damages…." *Id.*; KSA § 40-3107(b),(d). Thus, irrespective of whether KSA § 40-3107 could somehow restrict St. Paul's right to enforce the provision at issue, the statute does not create any statutory duty to defend or mandate that an insurer issue a policy providing defense coverage. *Overbaugh*, 867 P.2d at 1022. This is yet another reason that St. Paul does not owe any duty to defend Wishkeno.

C. Wishkeno's Purported Assignment Has No Effect Because The Assignment Was Executed After She Had Settled Dinger's Claim Against Her and She Therefore Had No Remaining Interest to Assign.

On July 10, 2012, the Kansas trial court in the Underlying Action approved the settlement between Dinger and Wishkeno whereby Wishkeno's carrier, Safeco, agreed to pay Dinger its $100,000 limit and Dinger agreed to hold Wishkeno harmless and not to execute against Wishkeno's assets for any judgment in the Underlying Action. (SOF Par. 15.) At that point, Wishkeno had no further potential financial liability to Dinger for the collision. Consequently, she had no assignable interest in the Policy with respect to the Underlying Action because she was not potentially liable for any "'damages' for any covered 'bodily injury'" under the terms of the Policy.

Four years later, in the 2016 "Addendum," Wishkeno purported to assign to Dinger Wishkeno's claims, contractual and non-contractual" under the Policy. (SOF Par. 16.) That attempted assignment was ineffective, because, as explained above, Wishkeno had nothing left to assign.

While the 2012 settlement agreement recites that nothing in the agreement is "intended to or shall preclude or prevent Plaintiff from . . . seeking damages and enforcing judgment against settling Defendant's employer, The Kickapoo Tribe in Kansas, or its insurance carrier . . .." (Notice of Removal, ECF No. 1-1, Exhibit C.) Dinger and Wishkeno could not create by fiat rights which they intentionally and unequivocally extinguished by the hold harmless and covenant not to execute in exchange for the $100,000 payment. Once Dinger covenanted not to execute, Wishkeno had no rights against St. Paul, if any existed in the first instance, she could assign.

Hence, Dinger's claims for breach of contract (Count I) and bad faith (Count II) must fail because she can allege those claims only as an assignee of Wishkeno, the policyholder, and the assignment was of no effect.

D. The Doctrines of Waiver and Estoppel Are Inapplicable.

Dinger avers in her Counterclaim that St. Paul has waived the "protected persons" provision and is estopped from relying upon it in declining coverage. (Dinger Counterclaim, ECF No. 52, ¶ 20.)

Dinger contends that waiver and estoppel apply, because before invoking the "protected persons" provision, St. Paul had invoked a different reason for declining coverage. (Dinger Answer, ECF No. 52, ¶ 20.) However, under Kansas law, waiver and estoppel do not apply to create coverage where an insurer did not assert a basis for non-coverage in initial correspondence. *Ashton v. Nat'l Farmers Union Prop. & Cas. Co.,* No. 11-4002-SAC, 2012 U.S. Dist. LEXIS 94683, at *27 (D. Kan. July 10, 2012)("an insured's failure to comply with a policy condition may be waived, but generally waiver and estoppel will not expand a policy's coverage.") (citation omitted); *Long v. St. Paul Fire and Marine Ins. Co.,* 423 F. Supp. 2d 1219, 1224 (D. Kan. 2006) (". . . Kansas law prevents the use of the doctrine of estoppel to expand coverage under an insurance agreement beyond explicit exclusions.").

Dinger also avers incorrectly that waiver and estoppel arise because St. Paul did not defend Wishkeno under a reservation of rights or commence a declaratory judgment action. (Dinger Answer ¶ 21.) Putting aside the undisputed fact that Safeco was defending Wishkeno and St. Paul had no defense obligation[1]. Under Kansas law, even a wrongful failure to defend does not estop the insurer from invoking its coverage defenses. *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.,* 104 P.3d 997, 1005 (Kan. Ct. App. 2005) ("[A] breach of the duty to defend does not deprive the insurer of coverage defenses, whatever their nature."). Moreover, Dinger concedes that Wishkeno was defended by her personal automobile insurer Safeco, so Wishkeno was not damaged by

[1] Pursuant to the other insurance clause, the Policy is excess for vehicles not owned by the Kickapoo Tribe.

St. Paul's failure to defend. The Kansas courts hold that "where two insurance companies have issued general liability insurance policies to the same insured and each is obligated to defend, if one company affords a defense, the insured is not damaged because of the failure of the other to defend." *Southgate State Bank & Trust Co. v. United Pacific Ins. Co.,* 588 P.2d 486, 488 (Kan. Ct. App. 1979).

In short, application of well-settled legal principles shows that St. Paul did not waive the right to invoke the "protected persons" provision of the Policy and cannot be estopped from relying on the provision as a basis for denying coverage.

E. St. Paul Is Not Liable for Bad Faith.

Dinger pleads claims for "Negligent Bad Faith Failure to Defend" (Count II). Dinger's listing of the alleged conduct constituting "bad faith" includes St. Paul's making an allegedly erroneous coverage decision, its failure to defend Wishkeno, and its failure to settle within the St. Paul policy limits. (Dinger Counterclaim, ECF No. 52, ¶ 40, at 18-19.) As explained above, the "protected persons" provision of the Policy eliminates coverage for Wishkeno, so there is no coverage, and accordingly, there cannot be any bad faith.

Even assuming *arguendo* that there is somehow coverage for Wishkeno under the Policy (which St. Paul disputes), St. Paul is still entitled to judgment on Count II of Wishkeno's Counterclaim. As to the allegedly negligent, erroneous coverage decision, Dinger is limited to her claim for breach of contract, because "the tort of bad faith is not recognized in Kansas." *State Farm Fire and Cas. Co. v. Liggett,* 689 P. 2d 1187 (1984).[2] The failure to settle within policy limits is also not actionable, because Dinger purports to claim under the St. Paul Umbrella Coverage, which provides limits in excess of the judgment in the Underlying Action. So, there is

[2] Similarly, under Illinois law, there is no claim for bad faith absent independently tortious conduct which is not alleged here. *Cramer v. Ins. Exch. Agency.* 675 N.E. 2d 897 (Ill. 1996).

no valid claim for a judgment in excess of limits, because the judgment was within the policy's limits.

CONCLUSION

The Court should grant St. Paul's motion for summary judgment, declaring pursuant to St. Paul's counterclaim that St. Paul has no liability for the judgment which is being garnished and dismissing all counts of Dinger's counterclaim with prejudice.

Dated: October 21, 2019

Respectfully submitted,

By: s/ Roderick T. Dunne

Roderick T. Dunne
Alan M. Posner
KARBAL, COHEN, ECONOMOU, SILK & DUNNE, LLC
150 South Wacker Drive, Suite 1700
Chicago, Illinois 60606
rdunne@karballaw.com / aposner@karballaw.com
(312) 431-3700 / Fax: (312) 431-3670

Attorneys for Garnishee/Counter-Plaintiff, St. Paul Fire and Marine Insurance Company

CERTIFICATE OF SERVICE

I, Roderick T. Dunne, an attorney of record in this matter, hereby state that I electronically filed the foregoing GARNISHEE/COUNTER-PLAINTIFF, ST. PAUL FIRE AND MARINE INSURANCE COMPANY'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT, using the CM/ECF SYSTEM, which will send notification to all attorneys of record on this the 21st day of October, 2019.

s:/ Roderick T. Dunne
One of the Attorneys for Garnishee,
St. Paul Fire and Marine Insurance Company