

EXHIBIT

FTCA COMPLAINT FILED 01/03/12

**UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF KANSAS**

TAMMY DINGER, surviving spouse and
heir-at-law of Darren Scott Dinger, and
TAMMY DINGER, as Administratrix of
the Estate of Darren Scott Dinger,
Plaintiffs,

V.

THE UNITED STATES,

Civil Action No. 12-4002-EFM/DJW

**COMPLAINT FOR DAMAGES
UNDER THE FEDERAL TORT CLAIMS ACT**

Tammy Dinger, surviving spouse and heir-at-law of Darren Scott Dinger, and Tammy Dinger, as Administratrix of the Estate of Darren Scott Dinger, Plaintiffs, by and through their attorney, Rodney C. Olsen of Morrison, Frost, Olsen, Irvine & Schartz, LLP, now come before this Court and for their complaint against the United States, allege as follows:

I.

Parties, Jurisdiction, Venue and Conditions Precedent

1. Plaintiffs are Tammy Dinger, an individual representing the heirs-at-law of Darren Scott Dinger, and Tammy Dinger, the duly appointed Administratrix of the Estate of Darren Scott Dinger. Tammy Dinger presently resides at 1619 Lookout Point, San Antonio, Texas, 78260.

2. At the time of the occurrence that gives rise to this action, Plaintiffs and the decedent, Darren Scott Dinger, were residents of Riley County, Kansas. The motor vehicle collision that resulted in the death of Darren Scott Dinger occurred in Riley County, Kansas, which is situated in the District of Kansas.

3. The claims herein are brought against the United States pursuant to the Federal Tort Claims Act (28 U.S.C. §2671 *et seq.*) and 28 U.S.C. §1346(b)(1), for money damages as compensation for personal injuries to and the wrongful death of Darren Scott Dinger that were caused by the negligent and wrongful acts and omissions of an employee or employees of the United States Government acting within the scope of their offices and employment, under circumstances where the United States, if a private person, would be liable to the Plaintiffs in accordance with the laws of the State of Kansas.

4. Venue is proper in that all of the acts and omissions forming the basis of Plaintiffs' claims occurred in the District of Kansas, and arose from negligence of Defendant's employees within the District of Kansas.

5. Plaintiffs have fully complied with the provisions of 28 U.S.C. §2675 of the Federal Tort Claims Act (hereinafter "FTCA").

6. This suit has been timely filed, in that Plaintiffs served notice of their claims on both the United States Department of Interior and the United States Department of Health and Human Services. The United States Department of Health and Human Services gave notice of its final determination on July 8, 2011, by denying Plaintiffs' claim.

II.

Events Forming the Basis of the Claims

7. On July 23, 2009, Darren Scott Dinger was operating a motorcycle on Kansas Highway 18 in Riley County, Kansas, when Candace Wishkeno (hereinafter “Wishkeno”) negligently drove her 2001 Dodge Durango into the pathway of Mr. Dinger’s motorcycle, which collided with the vehicle operated by Wishkeno.

8. As a result of Wishkeno’s conduct and the collision with Wishkeno’s vehicle, Darren Scott Dinger suffered severe, painful and fatal injuries.

9. Wishkeno operated the aforementioned vehicle on July 23, 2009 in a negligent manner. The acts and omissions of Wishkeno included, but were not necessarily limited to, the following:

- a. Failure to keep a proper lookout;
- b. Inattentive driving;
- c. Failure to yield to oncoming traffic;
- d. Failure to yield the right-of-way after stopping at a stop sign; and
- e. Driving her vehicle into the pathway of an oncoming vehicle that had the right-of-way.

Wishkeno’s conduct was the direct and proximate cause of the fatal injuries to Darren Scott Dinger.

10. As a direct result of the conduct of Candace M. Wishkeno, Darren Scott Dinger suffered fatal injuries, and he died on July 23, 2009.

11. By reason of the wrongful death of Darren Scott Dinger, Plaintiff Tammy Dinger, spouse and heir-at-law of Darren Scott Dinger, and the children of Darren Scott Dinger, have

suffered and will continue to suffer pecuniary and non-pecuniary losses as set forth in K.S.A. 60-1901 *et seq.*. Their losses, both past and future, include, but are not necessarily limited to mental anguish, suffering, bereavement, loss of society, comfort, protection, attention, counsel, filial care, support, nurturing, advice, companionship, love, affection, counseling and guidance, and other damages. Plaintiffs have also incurred funeral, burial and other expenses. As a surviving spouse and heir-at-law of Darren Scott Dinger, Tammy Dinger is entitled to damages as set forth in K.S.A. 60-1901 *et seq.*

12. At all times pertinent hereto, Candace Wishkeno was a member of the Kickapoo Tribe in Kansas (hereinafter “KTIK”), and was employed by the KTIK.

13. At the time of the above-referenced collision on July 23, 2009, Wishkeno was transporting KTIK youth, including her younger brother, in a vehicle that was privately owned by Wishkeno and her mother, to the Flint Hills Job Corps Center in Manhattan, Kansas for a visit and tour.

14. On July 23, 2009, the KTIK had five vehicles leased from the General Services Administration (hereinafter “GSA”) that were shared by approximately 40 tribal Programs. On this date, Wishkeno was a program coordinator for the KTIK, and she utilized her privately owned vehicle because she did not wait for the GSA vehicle that she had expected to use for the trip.

15. Upon information and belief, at the time of the occurrence, KTIK had entered into self-determination contracts with the Secretary of the Interior to plan, conduct, and administer programs for the benefit of Indians pursuant to 25 U.S.C. §450f, and KTIK had in effect on July 23, 2009 a liability insurance policy issued in accordance with 25 U.S.C. §450f(c) with a

provision waiving KTIK's right to sovereign immunity within the limits and coverage of the policy.

16. Upon information and belief, Wishkeno, and the vehicle that she was operating, were covered by KTIK's liability insurance policy on July 23, 2009, the date of the occurrence.

17. Upon information and belief, on July 23, 2009, Wishkeno was deemed an employee of the United States for purposes of this FTCA claim based upon her performance of duties as a program coordinator for the KTIK in support of programs under the Indian Self-Determination and Education and Assistance Act (hereinafter "IDEA").

III.

FTCA Claim

18. Plaintiffs incorporate the allegations set forth in paragraphs 1 through 17 above.

19. The acts and events set forth above constitute negligence, and support Plaintiffs' claims for damages under the laws of the State of Kansas. The aforementioned acts and omissions by Wishkeno were committed while she was acting on behalf of the KTIK in furtherance of the tribe's IDEA programs, and was covered by a liability insurance policy issued in accordance with 25 U.S.C. §450f(c); therefore, Plaintiffs' claims are against the United States under the FTCA.

IV.

Damages

20. As a result of the negligence of Defendant, Plaintiffs have suffered have suffered

and will continue to suffer pecuniary and non-pecuniary losses as set forth in K.S.A. 60-1901 *et seq.*. Their losses, both past and future, include, but are not necessarily limited to mental anguish, suffering, bereavement, loss of society, comfort, protection, attention, counsel, filial care, support, nurturing, advice, companionship, love, affection, counseling and guidance, and other damages. Plaintiffs have also incurred funeral, burial and other expenses. As a surviving spouse and heir-at-law of Darren Scott Dinger, Tammy Dinger is entitled to damages as set forth in K.S.A. 60-1901 *et seq.*.

21. Plaintiffs claim damages in the sum of \$1,473,873.30.

V.

Prayer For Relief

WHEREFORE, Plaintiffs pray for judgment against the Defendant as follows:

- A. For the sum of \$1,473,873.30 for damages as set forth in K.S.A. 60-1901, *et seq.*;
- B. For their costs in this action; and
- C. For such other and further relief as the Court deems just and proper.

Date: January 3, 2012

s/ Rodney C. Olsen
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Plaintiffs respectfully designate the place of the trial as Topeka, Kansas.