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/Counter-Defendant	)	
vs.	)	Hon. Andrea R. Wood
CANDACE M. WISHKENO,	)	
Defendant,	)	
vs.	)	JURY TRIAL DEMANDED
ST. PAUL FIRE AND MARINE INSURANCE COMPANY,	)	
Garnishee/Counter-Plaintiff.	)	

PLAINTIFF (GARNISHOR)/COUNTER-DEFENDANT TAMMY DINGER'S REPLY MEMORANDUM IN SUPPORT OF HER MOTION FOR SUMMARY JUDGMENT

Plaintiff (Garnishor)/Counter-Defendant, Tammy Dinger ("Dinger"), by and through her undersigned attorneys, hereby submits this reply memorandum in support of her motion for summary judgment against Garnishee/Counter-Plaintiff, St. Paul Fire and Marine Insurance Company ("St. Paul"). For the reasons set forth below, Dinger requests that this Court enter summary judgment (1) in Dinger's favor, and against St. Paul, on her garnishment and counterclaim (ECF No. 1, Ex. A and ECF No. 23), and (2) in her favor, and against St. Paul, on St. Paul's counterclaim (ECF No. 22).

A. Wishkeno Has Coverage Under the Policy St. Paul Issued to the KTIK.

Only two courts have interpreted St. Paul's policy, and both have held the policy to be ambiguous and ruled in favor of coverage under facts similar, if not identical, to ours. *See Dinger's Memo. In Support*, pp. 18-21 (ECF No. 74).

St. Paul does not cite a single case questioning these two courts' conclusion that its policy is ambiguous. *See St. Paul's Memo. In Opp*., pp. 2-4 (ECF No. 88). Indeed, although St. Paul claims that "courts across the country have held that the St. Paul policy language at issue here is clear and unambiguous," *see St. Paul's Memo. In Opp*., p. 2 (ECF No. 88), the four cases upon which it relies involve different policy language from different types of policies issued by different insurers and present different facts than those involved here, *see St. Paul's Memo. In Opp*., pp. 2-3 (ECF No. 88).

Despite its statement regarding the position taken by "courts across the country," St. Paul simply does not cite a single case interpreting the St. Paul policy before the court, much less that interpret this policy to deny coverage under facts like ours. *See St. Paul's Memo. In Opp*., pp. 2-4 (ECF No. 88).

This point cannot be over-emphasized: St. Paul does not come forward with one case interpreting its ***own*** policy language in a manner that contradicts the cases Dinger cites. *See St. Paul's Memo. In Opp*., pp. 2-4 (ECF No. 88). ***Not one case***; ***not from any jurisdiction anywhere***. If such a case existed, published or unpublished, Dinger can only assume St. Paul would have presented it to the court, as St. Paul is uniquely well-positioned to know of such a case.

The fact that St. Paul has not pointed the court to the existence of such a case is telling. As is the fact that the only authority before the court interpreting the St. Paul policy are the two cases Dinger cites in her memorandum in support her motion for summary judgment: *Gilmore v. St. Paul*

Fire and Marine Ins. Co., 708 So.2d 679 (Fla.Dist.Ct.App. 1998); *Pennsylvania Nat. Mut. Cas. Ins. Co. v. Travelers Ins. Co.*, 592 A.2d 51 (Pa.Super. 1991). St. Paul fails to distinguish either of these cases. *See St. Paul's Memo. In Opp*., p. 3 (ECF No. 88).

At best, St. Paul's inapposite authority simply demonstrates a conflict among courts, establishing that the policy language is susceptible to more than one interpretation, and, under Kansas law, further demonstrating the policy's ambiguity. *See Dinger's Memo. In Support*, p. 13 (ECF No. 74).

Furthermore, St. Paul's designated representative, Mr. Tom Wright, was charged with the responsibility to evaluate whether Wishkeno had coverage under the policy St. Paul issued to the KTIK. *See Dinger's Memo. In Support*, pp. 4-11 (ECF No. 74). Mr. Wright unequivocally determined that she had coverage under the policy issued to the KTIK ***because*** she was a "protected person."

That is, St. Paul's ***own*** seasoned and trusted "2 VP" of Complex Claims, analyzing the very same facts now before the court, and evaluating these facts under the terms of the St. Paul policy, determined that Wishkeno had coverage. *See Dinger's Memo. In Support*, pp. 4-11 (ECF No. 74). However, St. Paul has taken a contradictory view for the purposes of this litigation. This contradiction is irreconcilable and only further illustrates the policy's ambiguity: if St. Paul cannot even interpret its own policy consistently, how can it contend in good faith that the policy is clear and unambiguous?

Notwithstanding Mr. Wright's unequivocal interpretation, and notwithstanding Dinger's counsel's reliance on that interpretation, St. Paul asks the court to ignore its own interpretation of its own policy. *See St. Paul's Memo. In Opp*., pp. 4-6 (Doc. No. 88). Indeed, it not only suggests that its interpretation "is a conclusion of law" and, therefore, not an admission, but it also seems

to suggest that its determination is irrelevant to the court's resolution of the parties' cross-motions for summary judgment. *See St. Paul's Memo. In Opp*., pp. 4-6 (Doc. No. 88). This is a novel position, and not surprisingly, without support in any of the cases St. Paul cites in its brief. *See St. Paul's Memo. In Opp*., pp. 4-6 (Doc. No. 88). St. Paul's interpretation of its own policy is plainly relevant to the questions before the court. *See* Fed. R. Evid. 401, 402.

Finally, St. Paul rather cursorily contests Dinger's contention that St. Paul's own interpretation of the policy produces an absurd result. *See St. Paul's Memo. In Opp.*, p. 4 (ECF No. 88). In this regard, St. Paul argues only that the KTIK "did not own, rent, lease, hire, or borrow" Wishkeno's auto, but, instead, simply allowed her to use her auto for certain purposes during her employment. *See St. Paul's Memo. In Opp.*, p. 4 (ECF No. 88).

This argument flatly contradicts the undisputed facts that the KTIK maintained a policy by which the KTIK allowed its employees to use their personal vehicles for tribal business when other tribal vehicles were unavailable. *See St. Paul's Response to Dinger's SOF*, pp. 7-9 (ECF No. 89). Under this policy, the KTIK compensated its employees for their use of their personal vehicles, and, perhaps more importantly, the KTIK compensated Wishkeno for her use of her personal vehicle even after it knew of the fatal collision. *See St. Paul's Response to Dinger's SOF*, pp. 7-9 (ECF No. 89).

Consistent with these undisputed facts, the KTIK did "rent, lease, hire, or borrow" Wishkeno's vehicle. *See St. Paul's Memo. In Opp.*, p. 4 (ECF No. 88). The record establishes, clearly and without dispute, that the KTIK used its employees' personal vehicles as its own whenever it deemed necessary or appropriate to perform tribal business. *See St. Paul's Response to Dinger's SOF*, pp. 7-9 (ECF No. 89). And, further, the record establishes that the KTIK compensated its

employees when they used their personal vehicles for tribal purposes. *See St. Paul's Response to Dinger's SOF*, pp. 7-9 (ECF No. 89).

B. St. Paul's Interpretation of its Own Policy is Relevant and Constitutes an Admission.

As discussed above, *supra* Sec. A, during the protracted process in which it evaluated whether its policy covered Dinger's claim against Wishkeno, it unequivocally took the position that Wishkeno was a "protected person," and, therefore, was entitled to coverage but for the fact, later determined to be incorrect, that she was performing services under a "638 Contract." *See Dinger's Memo. In Support*, pp. 4-12 (ECF No. 74).

Contrary to St. Paul's arguments in its reply, *see St. Paul's Memo. In Opp.*, pp. 4-6 (ECF No. 88), St. Paul's interpretation of its own policy is an admission of fact, not a conclusion of law. The three cases St. Paul cites, *see St. Paul's Memo. In Opp*., pp. 4-5 (ECF No. 88), simply do not apply to a situation where, as here, an insurance company has interpreted its own policy during its coverage evaluation process in a manner that flatly contradicts its litigation position.[1]

In this regard, Mr. Wright's coverage analysis, which he based on the facts he describes in his letter to Mr. Tom Doofe, led him to conclude, without qualification, that Wishkeno was a "protected person" who normally would have been entitled to coverage and a defense under the policy *See Dinger's Memo. In Support*, pp. 4-12 (ECF No. 74). More specifically, Mr. Wright unequivocally stated as follows:

[1] For instance, in *State v. Schooler*, 419 P.3d 1164, 1176 (Kan. 2018), the Kansas Supreme Court analyzed a motion to suppress evidence under the Fourth Amendment and the question was whether a deputy sheriff tricked a suspect into giving consent for a vehicle search. Similarly, neither *Kawasaki Kisen Kaisha, LTD v. Plano Molding Co.*, No. 07 C 567, 2013 WL 3781609 (N.D. Ill. July 19, 2013) nor *Cincinnati Ins. Co. v. Blue Cab Co.*, No. 11 C 2055, 2015 WL 1538825 (N.D.Ill. March 31, 2015), involve issues related to an insurer's interpretation of its own policy. Although *Cincinnati Ins. Co*. involves a dispute with an insurance company, the question was the significance of a party's "imprecise language" in its complaint.

> 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 Claim Act protections.

See Dinger's Memo In Support, p. 6 (ECF No. 74) (emphasis added). In representing that, "but for" the endorsement, Wishkeno would be both a "protected person" and covered for excess or umbrella benefits under the policy, Wright also explicitly acknowledged that she was driving her ***personal*** vehicle at the time of the collision. *Id*.

Although Mr. Wright sent this letter to Mr. Doofe, as St. Paul acknowledges in its brief, *see St. Paul's Memo. In Opp*., pp. 4-6, the record demonstrates that Dinger's counsel was provided a copy of the letter and it formed the basis of his communications with Mr. Wright regarding St. Paul's obligation to provide coverage for Dinger's claim against Wishkeno, *see St. Paul's Response to Dinger's SOF*, pp. 12-15, paras. 41-43, 47-49 (ECF No. 89); *cf. Dinger's Memo. In Support*, pp. 4-11 (ECF No. 74).

Dinger's counsel plainly relied on Mr. Wright's repeated representations that Wishkeno would have coverage as a "protected person" but for the fact Mr. Wright mistakenly believed she was performing under a "638 Contract." St. Paul's statement in its brief that Dinger does not claim that her counsel relied on Mr. Wright's representation is simply incorrect—the undisputed facts demonstrate St. Paul induced Dinger's counsel to file an administrative claim under the Federal Tort Claims Act, and, ultimately, to commence a federal lawsuit to resolve the question whether Wishkeno was performing under a "638 Contract," and that he did so in reliance on Mr. Wright's coverage determination.[2] *See St. Paul's Response to Dinger's SOF*, p. 13-15, paras 42-43, 45, 47-

[2] It is undisputed that on February 18, 2011, the KTIK notified St. Paul that Wishkeno was not working under a "638 Contract." *See St. Paul's Response to Dinger's SOF*, pp. 13, para. 43 (ECF No. 89). St. Paul failed to notify Dinger's counsel of this fact, even though it knew Dinger's

49 (ECF No. 89); *see also Dinger's Memo. In Support*, pp. 7-12 (ECF No. 74); *Dinger's Memo. In Opp.*, 3-20 (ECF No. 70).

Finally, St. Paul continues to argue that waiver and estoppel cannot be used to expand coverage under an otherwise explicit and unambiguous policy. *See St. Paul's Memo In Opp.*, pp. 5-6 (ECF No. 88).[3] However, as Dinger has demonstrated, the policy is ambiguous, not explicit and unambiguous. *See supra*, Sec. A; *see also Dinger's Memo. In Support*, pp. 3-21 (ECF No. 74); *Dinger's Memo. In Opp.*, 3-20 (ECF No. 70). And, it seems increasingly desperate for St. Paul to insist that its policy is explicit and unambiguous when the only cases interpreting it have concluded that it is ambiguous, and, in fact, when St. Paul itself has not been able to interpret the policy consistently, much less in a manner that is consistent with its litigation position.

C. Dinger Has Established a Claim for Bad Faith Under Kansas Law.

St. Paul continues to misperceive Kansas law. *See St. Paul's Memo. In Opp.*, pp. 6-7 (ECF No. 88). Under Kansas law, even though an insurer's duties to its insured are contractually based, breach of these duties is determined by a tort standard of care. *See, e.g., Roberts v. Printup*, 595 F.3d 1181, 1186 (10th Cir. 2010). Kansas courts use negligence, due care, and other tort concepts

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counsel was acting in reliance on its representations. *St. Paul's Response to Dinger's SOF*, pp. 12-13, paras. 41-42 (ECF No. 89). Acting in reliance on St. Paul's uncorrected representations, Dinger's counsel filed a FTCA administrative claim with HHS in March, 2011 which was denied on July 8, 2011. Still, without the benefit of the information St. Paul chose to withhold regarding its erroneous "638 Contract" determination, Dinger's counsel commenced a FTCA lawsuit on January 3, 2012. *St. Paul's Response to Dinger's SOF*, pp. 12-15, paras. 41-43, 47-49 (ECF No. 89) and prosecuted the case to conclusion by its dismissal on March 13, 2013. *Id.*

[3] St. Paul criticizes Dinger for citing an unpublished Kansas Court of Appeals decision. *See St. Paul's Memo In Opp.*, p. 5 (ECF No. 88). As is clear from the parenthetical to that citation, which appears at page 24 of Dinger's memorandum in opposition, the citation was simply to demonstrate the appellate court's observation that the Kansas Supreme Court has never applied the rule St. Paul continue to recite to this court. Tellingly, St. Paul does not point to an instance in which the Kansas Supreme Court has applied the rule. Regardless, Rule 7.04(g) does not prohibit citation of unpublished opinions—it is far less restrictive than St. Paul seems to suggest, see Rule 7.04(g)(2)(B)(i-ii).

to describe the substance of the duty. *Id*. Consequently, either a negligent breach of contract or a bad faith breach of contract is enough to render an insurer liable.

St. Paul breached its duties by, for example, failing to provide a defense and by refusing to settle in response to Dinger's counsel's repeated demands. *See, e.g., MGM v. Liberty Mut. Ins. Co.*, 253 Kan. 198, 855 P.2d 77 (1993) (an insurer has a duty to provide a defense if there is any potential for coverage, meaning the duty to defend is broader than the duty to indemnify).

Even though St. Paul interpreted its own policy to provide coverage to Wishkeno as a "protected person," it denied coverage only because it mistakenly considered her to have been performing her duties for the KTIK under a "638 Contract." It is undisputed that St. Paul knew it was mistaken about the "638 Contract" issue as early as February 8, 2011, *see St. Paul's Response to Dinger's SOF*, p. 13, para. 43 (ECF No. 89), well before July 8, 2014, the date judgment was taken against Wishkeno in the District Court for Riley County, Kansas, *see St. Paul's Response to Dinger's SOF*, p. 5, para. 15 (ECF No. 89). Nevertheless, it never informed Dinger's counsel that its sole basis for denying coverage was clearly in error, choosing to continue to deny coverage based upon a factual determination it knew to be erroneous.

Based upon the facts in the record, particularly as to Wishkeno's status as a "protected person," St. Paul's assertions that there was a good faith question as to the existence of coverage is simply unsupported. While it is plain that St. Paul's litigation position differs from its position when it actually evaluated Dinger's demand, St. Paul's own inability to avoid internal inconsistency is not enough to establish the existence of a "good faith question" as to the existence of coverage. That question was resolved, once and for all, long before judgment was entered against Wishkeno.

D. Wishkeno's Assignment to Dinger is Valid.

St. Paul's argument not only ignores, but it contradicts, the plain language of the instruments through which Wishkeno assigned to Dinger all her claims against St. Paul. *See St. Paul's Memo In Opp.*, pp. 7-8 (ECF No. 88). Indeed, St. Paul does not even attempt to analyze the instruments, choosing, instead, to rely on an Illinois case that is inapplicable to a question arising under Kansas law. *See St. Paul's Memo In Opp.*, pp. 7-8 (ECF No. 88).

When one reviews the instruments, considering the relevant Kansas law,[4] it is clear that the assignment was valid. *See Dinger's Memo. In Opp.*, pp. 21-24 (ECF No. 70). As Dinger explained in her memorandum in opposition, the Covenant in this case was subject to review and approval by the Kansas court, and it could only become effective after it was approved by the court. *See Dinger's Memo. In Opp.*, pp. 23-24 (ECF No. 70). The Covenant did not conclude the wrongful death litigation, and it did not limit liability under any insurance policy providing coverage to Wishkeno in excess of the amount paid by her personal insurer. *See Dinger's Memo. In Opp.*, pp. 23-24 (ECF No. 70).

The Covenant expressly states the parties' intent to preserve Dinger's rights to enforce any judgment entered in the continuing wrongful death action against any insurance policy providing coverage to Wishkeno in excess of the $100,000 paid by her personal insurer. More specifically, the Covenant reads as follows:

> **It is the intent of this covenant that Settling Defendant shall not have personal financial responsibility beyond the consideration expressed in this Agreement**, by reason of the Lawsuit, any claim or cause of action that is, was, or could have been stated in the Lawsuit, or any judgment rendered in the Lawsuit or in any later claim or cause of action filed by Plaintiff

[4] The Covenant provides that it "shall be governed by and construed in accordance with the laws of the State of Kansas (excluding its choice-of-law rules) in effect as of the Effective Date." *See* (ECF No. 60), p. 4, (Notice of Removal, Ex. A, pp. 3-4, ¶ 4); *see also Dinger's Memo. In Opp.*, p. 21, n. 9 (ECF No. 70).

> relating to the Accident or to Decedent's death – **except to the extent that there is an insurance policy providing coverage to Settling Defendant in excess of the Settlement Amount**. **Nothing in this Agreement is intended to or shall preclude or prevent Plaintiff from enforcing judgment against the proceeds of any insurance policy that provided coverage to Settling Defendant in excess of the Settlement Amount on the date of the Accident,** seeking damages and enforcing judgment against Settling Defendant's employer, The Kickapoo Tribe in Kansas, or its insurance carrier, or seeking damages and enforcing judgment against the United States pursuant to the Federal Tort Claims Act.

See Dinger's Memo. In Opp., pp. 23-24 (ECF No. 70).

CONCLUSION

For the reasons set forth above, the Court should grant Dinger's motion for summary judgment. Specifically, the Court should enter summary judgment (1) in Dinger's favor, and against St. Paul, on her garnishment and counterclaim (ECF No. 1, Ex. A and ECF No. 23), and (2) in her favor, and against St. Paul, on St. Paul's counterclaim (ECF No. 22).

Dated: February 10, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gary D. McCallister, an attorney of record in this matter, hereby certify that on the 10th day of February 10, 2020, a true and correct copy of the foregoing document, **PLAINTIFF (GARNISHOR)/COUNTER-DEFENDANT TAMMY DINGER'S REPY MEMORANDUM IN SUPPORT OF HER MOTION FOR SUMMARY JUDGMENT,** was electronically filed with this Court and served on counsel for all parties properly registered to receive notice via the Court's CM/ECF system.

/s/ Gary D. McCallister
One of the Attorneys for Plaintiff (Garnishor)/ Counter-Defendant, Tammy Dinger