No. 20-3166

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CHRISTINA TAYLOR and DONALD TAYLOR
Plaintiffs/Appellants

v.

LM INSURANCE CORPORATION
Defendant/Appellee

On Appeal from the United States District Court for the District of Kansas
The Honorable John W. Broomes
D.C. No. 6:19-cv-01030-JWB

APPELLEE LM INSURANCE CORPORATION'S BRIEF

Respectfully submitted,

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DEFENDANT/APPELLEE DOES NOT REQUEST ORAL ARGUMENT

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1(a) of the Federal Rules of Appellate Procedure, Defendant/Appellee LM Insurance Corporation makes the following disclosure: There are no publicly held corporations owning 10% or more of LM Insurance Corporation's stock. Liberty Mutual Holding Company Inc. owns 100% of the stock of LMHC Massachusetts Holdings Inc. LMHC Massachusetts Holdings Inc. owns 100% of the stock of Liberty Mutual Group Inc. Liberty Mutual Group Inc. owns 100% of the stock of Liberty Mutual Insurance Company. Liberty Mutual Insurance Company owns 100% of the stock of LM Insurance Corporation. There are no affiliates that have issued shares of LM Insurance Corporation to the public.

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STATEMENT OF RELATED OR PRIOR APPEALS

In accordance with 10th CIR. L. R. 28.2(C)(3), Defendant/Appellee LM Insurance Corporation states that there are no prior or related appeals of this lawsuit.

STATEMENT OF THE ISSUES

I. Whether the district court properly concluded that the Intentional Loss exclusion applies to bar coverage for Plaintiffs' claim.

II. Whether the district court properly found that the Intentional Loss exclusion was unambiguous.

III. Whether the district court properly found that the mortgage clause did not provide a basis for Plaintiffs to recover under the Policy.

IV. Whether the district court properly rejected Plaintiffs' negligent breach of contract claim based upon LM Insurance's alleged inadequate investigation.

V. Whether the district court properly enforced the plain language of the Intentional Loss exclusion as written despite alleged unfair consequences resulting therefrom.

STATEMENT OF THE CASE

The fire

On August 30, 2018, a home owned by Plaintiffs Christina Taylor and Donald Taylor (collectively, "Plaintiffs") was damaged by fire. (Aplt. App. Vol. I at 21, ¶ 1.) The fire began when Plaintiffs' adult daughter, Zoe, intentionally set fire to the bed spread of Plaintiffs' bed in the master bedroom. (Aplt. App. Vol. I at 21, ¶¶ 2–5.) Zoe started the fire after becoming angry with her father due to an argument they had earlier in the day. (Aplt. App. Vol. I at 21, ¶ 5.) Zoe used a lighter to ignite the bed spread in order to upset her father. (Aplt. App. Vol. I at 21, ¶ 5.)

After starting the fire, Zoe unsuccessfully attempted to extinguish it herself. (Aplt. App. Vol. I at 21, ¶ 6.) However, the fire ultimately spread from the top of the bed and caused damage to other portions of the home. (Aplt. App. Vol. I at 21, ¶ 3.) As the fire spread, Zoe went outside and called the fire department to respond to the scene. (Aplt. App. Vol. I at 21, ¶ 7.) Although initially denying it, Zoe later admitted that she started the fire in the home. (Aplt. App. Vol. I at 22, ¶ 8.)

The insurance claim

Plaintiffs made a claim for coverage under a homeowner's insurance policy, Policy No. H35-243-176345-50 (the "Policy"), that LM Insurance Corporation ("LM Insurance") issued to them. (Aplt. App. Vol. I at 22, ¶ 9–10.) The Policy

contains the following exclusion of coverage (hereinafter, the "Intentional Loss exclusion"):

> **1.** We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.
>
> . . .
>
> h. **Intentional Loss**, meaning any loss arising out of any act committed:
>
> (1) By or at the direction of an "insured"; and
>
> (2) With the intent to cause a loss.

(Aplt. App. Vol. I at 86–87.) After conducting its investigation, LM Insurance denied coverage based upon application of the Intentional Loss exclusion. (Aplt. App. Vol. I at 22, ¶ 13–14; *id.* at 119–21.) LM Insurance explained that Zoe met the Policy's definition of "insured" because she was Plaintiffs' relative and resided in Plaintiffs' household. (Aplt. App. Vol. I at 22, ¶ 12–14; *id.* at 119–21.) LM Insurance further indicated that its investigation revealed that Zoe set the fire to the bed spread in the master bedroom of the home, and that the Policy does not cover intentional loss by an insured. (Aplt. App. Vol. I at 22, ¶ 14; *id.* at 119–21.)

Procedural History

On January 13, 2019, Plaintiffs filed suit against LM Insurance[1] for breach of contract in the District Court of Butler County, Kansas. (Aplt. App. Vol. I at 10.) LM Insurance removed the action to the United States District Court for the District of Kansas on February 12, 2019. (Aplt. App. Vol. I at 2.) On January 8, 2020, based on stipulated facts, LM Insurance filed its Motion for Summary Judgment on the basis that the Intentional Loss exclusion of the Policy applied to bar coverage for Plaintiffs' claim. (Aplt. App. Vol. I at 33–54.) Plaintiffs opposed the motion, and filed a cross-motion for summary judgment. (Aplt. App. Vol. I at 55–76; *id.* at 157–58.) Plaintiffs sought summary judgment on the basis that the Intentional Loss exclusion did not apply or, alternatively, was ambiguous. (Aplt. App. Vol. I at 55–76; *id*. at 157–58.) Plaintiffs further argued that LM Insurance negligently breached the contract by performing an inadequate investigation of Plaintiffs' claim before issuing its denial of coverage. (Aplt. App. Vol. I at 71–72.)

On July 15, 2020, the district court granted LM Insurance's motion for summary judgment, and denied Plaintiffs' cross-motion for summary judgment. (Aplt App. Vol. I at 220–240.) The court found that the Intentional Loss exclusion

[1] Plaintiffs' lawsuit also named Liberty Mutual Insurance Company as a defendant. (Aplt. App. Vol. I at 10.) However, the parties stipulated to the dismissal of Liberty Mutual Insurance Company without prejudice on August 6, 2019. (Aplt. App. Vol. I at 3.) Accordingly, this brief refers only to LM Insurance as the Appellee.

was unambiguous and applied to bar coverage for the loss. (Aplt. App. Vol. I at 230–31.) The court noted that it was uncontroverted that Zoe "intentionally set fire to the bedspread to upset her father" and, therefore, "Zoe intentionally caused a loss." (Aplt. App. Vol. I at 230–31.)

The court rejected Plaintiffs' argument that the Intentional Loss exclusion was ambiguous. (Aplt. App. Vol. I at 225–227.) The court reasoned that "loss" was generally defined in the dictionary as "[a]n undesirable outcome of a risk; the disappearance or diminution of value, [usually] in an unexpected or relatively unpredictable way." (Aplt. App. Vol. I at 226.) Interpreting the Policy has a whole, the court concluded that the damage to the bedspread resulting from Zoe's intentional act of setting the fire constituted a "loss" within the ordinary meaning of that term. (Aplt. App. Vol. I at 230.) The court further noted that—even if Plaintiffs' interpretation were followed—coverage would still be excluded, as the bedspread that Zoe burned was covered property. (Aplt. App. Vol. I at 236.)

In finding that Zoe had the requisite "intent" to cause a loss, the court noted that Kansas courts have "consistently rejected a requirement that the insured have a specific intent to cause the injury that ultimately occurred from an intentional act." (Aplt. App. Vol. I at 229.) The court found that Zoe's intent to cause damage to the bedspread was all that was necessary for application of the Intentional Loss exclusion. (Aplt. App. Vol. I at 229.) Alternatively, the district court found that—

even if Zoe's intent were in dispute—intent may be inferred under the circumstances under Kansas law, because setting a fire inside of a home was an act that was likely to cause damage. (Aplt. App. Vol. I at 229, n.1.)

The court further rejected any contention that Zoe was "mentally ill" at the time of the subject fire such that she was incapable of forming intent. (Aplt. App. Vol. I at 230.) The court noted that Plaintiffs failed to put forth any evidence from which it could be found that Zoe lacked the requisite capacity. (Aplt. App. Vol. I at 230.) The court concluded that Plaintiffs failed to identify any specific evidence which would have been revealed by further investigation by LM Insurance that would have resulted in coverage. (Aplt. App. Vol. I at 234.)

Finally, the district court rejected Plaintiffs' reliance upon the Policy's mortgage clause to support their claim. (Aplt. App. Vol. I at 235–36.) The court pointed out that Plaintiffs did not allege or suggest that the mortgagee had made any claim resulting from the loss. (Aplt. App. Vol. I at 236.) Instead, because the evidence showed only that the mortgagee was still investigating the loss, Plaintiffs could not show that LM Insurance breached the mortgage clause under the Policy. (Aplt. App. Vol. I at 236.)

On July 15, 2020, based upon the reasons set forth in its Memorandum and Order, the district court entered its Judgment in favor of LM Insurance. (Aplt. App. Vol. I at 8, 237–38.) Plaintiffs now appeal.

SUMMARY OF THE ARGUMENT

This case presents a straight-forward application of the Intentional Loss exclusion to the intentional acts of an insured, committed with the admitted intent to cause a loss. Plaintiffs' adult daughter, Zoe, intentionally set fire to the bedspread of Plaintiffs' bed, which subsequently spread out of control to other portions of the home. Plaintiffs argue that because Zoe only intended to cause damage to the bed, and did not possess the specific intent to cause damage to other portions of the home, coverage cannot be excluded pursuant to the Intentional Loss exclusion. However, Kansas law is clear that such exclusions apply to bar coverage if the insured intends for some damage to result from their act. Whether the act results in damage that is of a different character or magnitude than that originally intended is irrelevant.

The Intentional Loss exclusion is unambiguous and, therefore, must be enforced as written. Further, the exclusion cannot be rendered ambiguous by inserting additional language therein to create conflicting meanings. Nor can courts refuse to enforce the plain and unambiguous language based upon one party's perception that the result is unfair. Likewise, the perceived reasonableness of LM Insurance's investigation of the claim does not provide a valid basis to circumvent the plain language of the Intentional Loss exclusion. The district court properly entered judgment in favor of LM Insurance on Plaintiffs' breach of contract claims.

ARGUMENT

I. Standard of review applicable to all issues herein.

The district court properly granted summary judgment in favor of LM Insurance on the application of the Intentional Loss exclusion. Review of the court's grant of summary judgment is *de novo*, and the Court applies the same legal standard used by the district court under FED. R. CIV. P. 56(c). *Timmons v. White*, 314 F.3d 1229, 1232 (10th Cir. 2003). Summary judgment is appropriate "where the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there are no genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Kice Ind., Inc. v. AWC Coatings, Inc.*, 255 F.Supp.2d 1255, 1256 (D. Kan. 2003).

In deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the party opposing the motion. *Jenkins v. Wood*, 81 F.3d 988, 990 (10th Cir. 1996). However, in resisting a motion for summary judgment, the nonmoving party must go beyond the pleadings and designate specific facts to make a showing that there is a genuine issue of material fact for trial. *See Ford v. West*, 222 F.3d 767, 774 (10th Cir. 2000). The nonmoving party may not "rely on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial." *Messer v. Amway Corp.*, 210 F.Supp.2d 1217, 1226 (D. Kan. 2002) (internal

quotations omitted). "The mere existence of a scintilla of evidence in support of the nonmovant's position is insufficient to create a dispute of fact that is 'genuine'; an issue of material fact is genuine only if the nonmovant presents facts that a reasonable jury could find in favor of the nonmovant." *Lawmaster v. Ward*, 125 F.3d 1341, 1347 (10th Cir. 1997).

II. The district court properly found that the Intentional Loss exclusion of the Policy applied to bar coverage for Plaintiffs' claim.

The dispositive question in this case is whether the Intentional Loss exclusion applies to bar coverage for Plaintiffs' claim. The parties agree that Kansas law governs the substantive issues herein. Under Kansas law, the interpretation of the Policy is matter of law exclusively for the Court. *Fed. Land Bank of Wichita v. Krug*, 856 P.2d 111, 114 (Kan. 1993). Where the policy language is unambiguous, it must be taken in its plain, ordinary, and popular sense. *Id.* The claimant bears the initial burden of demonstrating that his claimed loss falls within the terms of the policy. *Cloud v. Trinity Cos. Trinity Universal Ins. Co.*, 617 P.2d 1277, 1279 (Kan. App. 1980). Where the claimant meets that initial burden, the burden shifts to the insurer to demonstrate that an exclusion applies to bar coverage. *Id.*

A. The Intentional Loss exclusion applies to bar coverage for Plaintiffs' claim under controlling Kansas Supreme Court precedent.

As an initial matter, there is no dispute that the loss falls within the general coverage-granting provisions of the Policy, which provides coverage for "direct loss

to property . . . if that loss is a physical loss to property" as well as "direct physical loss to the property" described in the Policy. (Aplt. App. Vol. I at 85.) However, the Intentional Loss exclusion clearly applies to bar coverage for Zoe's setting of a fire in Plaintiffs' home with the admitted intent to cause damage thereby. That exclusion provides:

> **SECTION I – EXCLUSIONS**
>
> **1.** We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.
>
> . . .
>
> h. **Intentional Loss**, meaning any loss arising out of any act committed:
>
> (1) By or at the direction of an "insured"; and
>
> (2) With the intent to cause a loss.

(Aplt. App. Vol. I at 86–87.)

Based upon this exclusion, coverage is barred if any person qualifying as an insured intended to cause a loss. *See Pink Cadillac Bar & Grill, Inc. v. U.S. Fidelity & Gaur. Co.*, 925 P.2d 452, 458 (Kan. App. 1996); *Catholic Diocese of Dodge City v. Raymer*, 825 P.2d 1144, 1148 (Kan. App. 1992), *aff'd at* 840 P.2d 456 (Kan. 1992). It is undisputed that Zoe qualifies as an "insured" under the Policy—as she is Plaintiffs' relative and resided in Plaintiffs' household. (Aplt. App. Vol. I at 22, ¶ 12.) Consequently, because an "insured" intentionally set fire in the home with

the intent to cause a loss, the Intentional Loss exclusion clearly excludes coverage for Plaintiffs' loss.

In *Thomas v. Benchmark Ins. Co.*, 179 P.3d 421 (Kan. 2008), the Kansas Supreme Court established the framework for determining the application of intentional loss exclusions in Kansas. There, the court made clear that such exclusions apply to bar coverage where the insured intends to commit the damage-producing act itself and intends to cause some damage or injury thereby. *Id.* at 427. In other words, the Intentional Loss exclusion applies to bar coverage if Zoe both: (1) intended to start the fire; and (2) intended to cause some type of damage. Further, the harm actually caused need not be "the same character and magnitude as that intended" for the exclusion to apply. *Id.* at 421. Accordingly, if Zoe intended to cause ***some*** damage when she started the fire, then the exclusion applies to bar coverage for ***all*** damage resulting therefrom.

Zoe's intent to cause damage can be determined in one of two ways, either one of which is sufficient to trigger the exclusion. Specifically, the requisite intent can be either: (a) actual, subjective intent; or (b) objective intent, inferred from the nature of the act itself. *Id.* at 431. In the latter scenario, intent will be objectively inferred "when the consequences are substantially certain to result from the act." *Id.* There, it is irrelevant whether the insured claims that she did not subjectively intend

to cause harm, as intent is inferred "as a matter of law." *Id.* In this case, it is clear that ***both*** avenues for demonstrating Zoe's intent to cause a loss are satisfied.

1. Zoe actually, subjectively intended to cause a loss.

It is undisputed that Zoe intended to start the fire (*i.e.*, intended the damage-producing act itself). Plaintiffs stipulated that the fire began when Zoe used a lighter to ignite the bed spread of Plaintiffs' bed in order to upset her father. (Aplt. App. Vol. I at 21, ¶ 5.) After she initially denied her involvement, Zoe ultimately admitted that she started the fire. (Aplt. App. Vol. I at 22, ¶ 8.) Consequently, the fire was clearly the result of Zoe's intentional action, and did not start by accident. *See Thomas*, 179 P.3d at 432 (finding that driver intentionally drove vehicle at excessive speed); *Shelter Mut. Ins. Co. v. Williams*, 804 P.2d 1374 (Kan. 1991) (insured found to have intended the act of shooting a gun in school).

Further, Plaintiffs readily admit that Zoe intended to cause some damage. Specifically, in their opposition to summary judgment, Plaintiffs conceded that Zoe "intended to burn blankets" on the bed and intended "to cause limited damage" in order to upset her father. (Aplt. App. Vol. I at 58, ¶ 17; *id.* at 63, 71.) Even on appeal, Plaintiffs admit that Zoe intended to cause damage by lighting the fire, arguing that Zoe "intended to make her dad mad by causing damage to his blanket." (Aplt. Br. at 12.) As the district court properly noted, "[i]t is undisputed that Zoe intended to cause damage to the bedspread by lighting it on fire." (Aplt. App. Vol.

I at 229.) These admissions alone are all that is required to trigger the Intentional Loss exclusion under *Thomas*, as Plaintiffs concede that Zoe had the actual, subjective intent to cause harm by her act of starting a fire.

Moreover, it is irrelevant whether the damage caused by Zoe's act was of a different character or magnitude than what Zoe initially intended. As the Kansas Supreme Court clearly stated, "[i]t is not essential, however, that the harm be of the same character and magnitude as that intended." *Thomas*, 179 P.3d at 431. In other words, the "exclusion precludes coverage even if the harm that occurs is different in character or magnitude from that intended by the insured." *Id.* (citing *Loveridge v. Chartier*, 468 N.W.2d 146 (Wisc. 1991)). Thus, Plaintiffs' insistence that Zoe "only intended to cause damage to a blanket" does nothing to aid their position. *See* (Aplt. Br. at 25). As Plaintiffs themselves acknowledge, Kansas law only "requires the insured to have intended to both act and cause ***some kind*** of injury or damage" for an intentional loss exclusion to apply. (Aplt. Br. at 14) (emphasis added).

2. Zoe's intent is objectively inferred as a matter of law.

Even if Zoe did not have the actual, subjective intent to cause damage, her intent is nevertheless objectively inferred as a matter of law. "[A]n intentional-acts exclusion precludes insurance coverage where an intentional act is substantially certain to produce injury even if the insured asserts, honestly or dishonestly, that [they] did not intend any harm." *Thomas*, 179 P.3d at 430 (citation omitted). "[T]he

more likely harm is to result from certain intentional conduct, the more likely intent to harm may be inferred as a matter of law." *Id.* at 431. Because fire, by its very nature, causes damage to property with which it comes into direct contact, the mere act of setting a fire establishes the objective intent to cause harm.[2] *See, e.g., Troy v. Allstate Ins. Co.*, 789 F.Supp. 1134, 1136 (D. Kan. 1992) (inferring intent to cause harm as a matter of law where "to do the act is necessarily to do the harm").

Nevertheless, Plaintiffs argue that Zoe's intent could not have been inferred because that inference can only be made while considering "the state of mind of actor." *See* (Aplt. Br. at 13–15.) In other words, Plaintiffs assert that the Court—in order to objectively infer intent as a matter of law—must first find that Zoe ***subjectively*** believed that damage was substantially certain to result from her act of intentionally setting a fire. However, even aside from the fact that Plaintiffs have already admitted that Zoe subjectively intended to cause harm (which is sufficient in and of itself to trigger the exclusion), Plaintiffs' new argument ignores that an objective inference made from the circumstances—by its nature—is not dependent upon the actor's subjective state of mind.

In fact, *Thomas* made clear that such intent can be inferred as a matter of law, "even if the insured asserts, ***honestly*** or dishonestly, that [they] did not intend any

[2] *See Lachman v. Farmers Ins. of Columbus*, No. 96904, 2012 WL 112637, at *5 (Ohio App. Jan. 12, 2012) ("Fire by its very nature is harmful, destructive, and extremely difficult to control.").

harm." 179 P.3d at 430 (emphasis added). Consequently, contrary to Plaintiffs' conclusory assumptions, this Court is ***not*** required to make some independent inquiry as to what Zoe herself subjectively believed in order to objectively infer intent as a matter of law. *Id.* ("The practical application of this principle has meant that where a ***reasonable man in defendant's position*** would believe that a particular result was substantially certain to follow, he will be dealt with . . . as though he had intended it.") (Emphasis added) (Citations omitted). The very nature of the act itself requires the conclusion that the actor ***must have known*** that harm would result therefrom. *See Bell v. Tilton*, 674 P.2d 468, 469 (Kan. 1983) (affirming trial court's finding that actor "must be held to have known" that his BB gun would result in injury if shot indiscriminately).

In short, Zoe's act of setting a fire "is one which is recognized as an act so certain to cause a particular kind of harm it can be said" that Zoe intended the resulting harm, and Plaintiffs' "statement to the contrary does nothing to refute that rule of law." *Id.* at 477.[3]

[3] Regardless, even if Zoe's specific state of mind were relevant, her actions immediately following the setting of the fire establish that she clearly understood that damage was certain to result. Specifically, Zoe called the fire department for help after her attempts to extinguish the fire were unsuccessful. (Aplt. App. Vol. I at 21, ¶ 6–7.) These facts illustrate that Zoe clearly knew that damage was certain to result from her actions in starting the fire.

B. Plaintiffs provide no valid basis for deviating from Kansas Supreme Court precedent.

In an effort to avoid the impact of controlling Kansas law, Plaintiffs request the Court to ignore *Thomas* based upon a purported distinction between an intentional "acts" exclusion and an intentional "loss" exclusion. (Aplt. Br. at 26.) However, Plaintiffs make no attempt to explain how such exclusions are "distinctly different" as they summarily claim. (Aplt. Br. at 26.) Indeed, the Kansas Supreme Court made no such distinction in *Thomas*, and certainly did not hold that its analysis applied only to intentional "acts" exclusions. Instead, *Thomas* explained that such test applied to all exclusions involving both intentional "acts" and intentional "injury." 179 P.3d at 431 ("we conclude that the 'intentional act' or 'intentional injury' exclusion test in Kansas should be as follows: . . .").

Moreover, Plaintiffs make no attempt to provide any alternative test for the Court to apply. Thus, Plaintiffs' argument amounts to nothing more than a request for the Court to fashion a ***new*** test for determining when intentional loss exclusions apply in Kansas, despite *Thomas*'s clear pronouncement on the issue. The Court should decline Plaintiffs' unwarranted invitation, as federal courts sitting in diversity must defer to the decisions of the state's highest court. *Commonwealth Prop. Advocates, LLC v. Mortgage Electronic Registration Sys., Inc.*, 680 F.3d 1194, 1204 (10th Cir. 2011). The principles espoused in *Thomas* mandate that the Policy's

Intentional Loss exclusion applies to bar coverage for Plaintiffs' claim, and Plaintiffs provide no valid basis for deviating from that precedent.

C. Other jurisdictions applying principles similar to Kansas law are in accord.

Jurisdictions applying principles similar to *Thomas* to cases involving intentional loss exclusions are instructive. As the district court noted, other jurisdictions have applied such exclusions to deny coverage under very similar circumstances. (Aplt. App. Vol. I at 229–30); *see Auto-Owners Ins. Co. v. Taylor*, No. 1:17-CV-02632-JMC, 2018 WL 4078579, at *3, 5 (D.S.C. Aug. 24, 2018) (applying similar exclusion to bar coverage where insured's adult child intentionally set fire to home); *S.C. Farm Bureau Mut. Ins. Co. v. Kelly*, 547 S.E.2d 871 (S.C. App. 2001) (applying exclusion for loss cause by insured "with the intent to cause a loss" where adult son started fire in parents' bedroom); *see also Deeter v. Indiana Farmers Mut. Ins. Co.*, 999 N.E.2d 82 (Ind. App. 2013) (applying exclusion for "loss which results from an act committed by or at the direction of an 'insured' and with the intent to cause a loss" where insured wife intentionally started fire in living room); *Postell v. Am. Family Mu. Ins. Co.*, 823 N.W.2d 35 (Iowa 2012) (applying nearly identical exclusion to insured's intentional lighting of fire in home).

Even more on point is *Lachman v. Farmers Ins. of Columbus*, No. 96904, 2012 WL 112637 (Ohio App. Jan. 12, 2012). There, an insured intentionally set fire to a comforter of a bed in a misguided attempt to have her husband become a hero

in extinguishing the fire "before any damage beyond the loss of the comforter occurred." *Id.* at *1. However, the husband was unable to extinguish the fire, and it "went out of control" more quickly than anticipated. *Id.*

The court found that a similar exclusion applied to bar coverage, emphasizing a doctrine of inferred intent akin to Kansas law. *Id.* at *4. Specifically, the court echoed the trial court's reasoning that a person's mere act of setting a fire to a comforter, without taking proper precautions to prevent its spread, "is intrinsically tied with the resulting fire damage" and "there is no other conclusion at which to arrive." *Id.* at *2, 4. In other words, the act of setting fire to a bed spread "can only result in harm." *Id.* at *4. Likewise consistent with Kansas law, the *Lachman* court further concluded that "[w]hether [the insured] intended the fire to spread to the remainder of the home is irrelevant; the damage caused by a fire cannot be separated from the act of intentionally setting that fire." *Id.*

Because Zoe intentionally started a fire with the admitted intent to cause ***some*** damage thereby, all resulting loss is excluded from coverage, regardless of whether the loss is of a different character or magnitude as that intended. Consequently, the district court properly applied the Intentional Loss exclusion in granting summary judgment in favor of LM Insurance.

III. The district court did not err in finding the Intentional Loss exclusion to be unambiguous.

The district court likewise correctly held that the Intentional Loss exclusion was unambiguous. Because Plaintiffs' interpretation improperly requires the insertion of language into the Policy in contravention of Kansas law, the district court properly rejected Plaintiffs' invitation to construe the term "loss" to mean any "insured loss." The Intentional Loss exclusion is not so limited and, therefore, Plaintiffs may not unilaterally insert additional limitations or requirements into the exclusion to suit their position.

A. Plaintiffs' interpretation renders the exclusion illogical and nonsensical.

In an attempt to circumvent the plain language of the Policy, Plaintiffs request that the Court insert language into the Intentional Loss exclusion to limit its application. Specifically, Plaintiffs argue that the Court should replace the word "loss" with the phrase "insured loss." (Aplt. Br. at 24.) Under Plaintiffs' interpretation, the Intentional Loss exclusion would provide as follows:

> 1. We do not insure for [***insured***] loss caused directly or indirectly by any of the following. Such [***insured***] loss is excluded regardless of any other cause or event contributing concurrently or in any sequence of the [***insured***] loss.
>
> . . .
>
> h. **Intentional Loss**, meaning any [***insured***] loss arising out of any act committed:
>
> (1) By or at the direction of an "insured"; and

(2) With the intent to cause [***an insured***] loss.

(Aplt. App. Vol. I at 86–87) (Plaintiffs' suggested language bracketed and emphasized).

First, and perhaps most obviously, inserting the additional language that Plaintiffs request renders the exclusion entirely nonsensical. For example, under Plaintiffs' interpretation, the "Exclusions" section would begin by informing the insured that LM Insurance "do[es] not insure for ***insured*** loss" under specifically-delineated circumstances and that "[s]uch ***insured*** loss is excluded[.]" It should go without saying that an "insured" loss—by its very nature of being "insured"—could not possibly be "excluded" from coverage. Thus, any interpretation which requires a statement that a loss is both "insured" but also "excluded" is not only illogical, but it is directly conflicting. Thus, Plaintiffs' insertion of language into the exclusion could only serve to ***create*** an ambiguity where none exists. *See Pink Cadillac Bar & Grill, Inc.*, 925 P.2d at 456 (noting that policies must be interpreted according to the language used therein and that courts should not attempt to "create" ambiguity).

Moreover, not only is this interpretation facially illogical, Plaintiffs themselves admit that it would require even ***further*** qualification with respect to what "insured loss" actually means. Specifically, after inserting the additional language into the exclusion, Plaintiffs assert that it would then require the insured to intend to cause property damage in an amount greater than $1,000, because "[a]n

insured loss" could only be a loss "that exceeds the policy deductible." (Aplt. Br. at 24.) Plaintiffs then claim that "[s]ince it is reasonable to assume that the value of the blanket was less than the deductible," the Intentional Loss exclusion does not apply. (Aplt. Br. at 25.)

In other words, Plaintiffs assert that an ordinary insured would not only read the exclusion to refer to "any ***insured*** loss," but would also understand that phrase to actually refer to "any insured loss ***which exceeds the policy's $1,000 deductible***." Stated differently, Plaintiffs appear to envision a scenario in which Zoe—who was angry at her father and preparing to set a portion of his bed ablaze—stopped to consider that the blanket thereon might be worth less than the Policy's $1,000 deductible (assuming that she was even aware of the deductible or, for that matter, the Policy itself) and, therefore, she did not intend to cause an "insured" loss when she lit it on fire. This interpretation is patently absurd and cannot possibly form the basis for finding ambiguity, as ambiguity only arises under Kansas law from competing, ***reasonable*** interpretations of the policy. *See Brumley v. Lee*, 963 P.2d 1224, 1226–27 (Kan. 1998) (citation omitted).[4]

[4] Plaintiffs put forth the equally unreasonable interpretation that the exclusion does not require the "act" to be intentional, but only requires that the insured intend the resulting loss. *See* (Aplt. Br. at 23.) Plaintiffs envision a scenario in which the exclusion could only apply where someone accidentally commits an act, yet simultaneously intends to cause a loss by that accidental act. However, no reasonable insured could adopt such an interpretation. In fact, when given the

B. Plaintiffs' interpretation improperly inserts additional language into the Policy in violation of settled principles of Kansas contract law.

More fundamentally, Plaintiffs' proffered interpretation also contravenes well-settled principles of Kansas law regarding insurance contract construction. Specifically, Plaintiffs' interpretation requires the Court to improperly rewrite the parties' contract. However, as even Plaintiffs acknowledge, Kansas law is clear that courts "shall not make another contract for the parties and must enforce the contract as made." (Aplt. Br. at 16). In other words, courts are not permitted to insert language into a provision in order to create an ambiguity. *See Geer v. Eby*, 432 P.3d 1001, 1009 (Kan. 2019); *Pink Cadillac Bar & Grill, Inc.*, 925 P.2d at 456.

Yet, Plaintiffs ***expressly*** request the Court to do precisely that, arguing that "[w]ith the addition of" descriptive "language" into the exclusion, it becomes "capable of two distinctly different interpretations." (Aplt. Br. at 9.) Of course, this is the ***quintessential*** example of adding language to a policy in an effort to render it ambiguous (*i.e.*, "capable of two distinctly different interpretations"). Because Kansas law clearly prohibits any such attempt, the Court should summarily reject Plaintiffs' invitation to rewrite the parties' contract in order to create an ambiguity. *Pink Cadillac Bar & Grill, Inc.*, 925 P.2d at 456 (noting that courts are not to create

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opportunity during argument to provide the court with an example, Plaintiffs could not conceive of any such situation. *See* (Aplt. App. Vol. I at 267:13–269:18.)

ambiguity where, in common sense, there is none); *see, e.g.*, *Moon v. Tall Tree Administrators, LLC*, 814 Fed.Appx. 371, 375 (10th Cir. 2020) ("In sum, language would have to be added to the provision to counteract its natural reading in order to create the ambiguity Moon proposes. We do not, as a matter of interpretation, add language to a provision.").

As Plaintiffs concede, "[t]he language in the [Intentional Loss exclusion] does not limit its application to an insured loss." (Aplt. Br. at 23.) Therefore, the Court should not add language to the exclusion to accomplish precisely what Plaintiffs already admit the plain language does not itself explicitly accomplish.

C. The Intentional Loss exclusion contains no language requiring that the insured be motivated by collecting insurance proceeds.

Plaintiffs' insertion of language into the exclusion is nothing more than an attempt to impose an additional requirement—not contained anywhere within the exclusion—that Zoe's actions in setting the fire be motivated by a desire to collect insurance proceeds. However, if LM Insurance wanted to limit the exclusion to such situations, it could have done so, just as the insurer in *Lachman*, in which the policy excluded coverage where the insured caused a loss "to obtain insurance benefits[.]" 2012 WL 112637, at *2. Because the Policy here contains no such language, Plaintiffs may not unilaterally insert that requirement.

In rejecting a nearly identical argument, the South Carolina Court of Appeals reasoned:

> Kelly also contends Glenn's actions do not trigger the intentional loss section of the insurance policy because Glenn did not start the fires to obtain insurance benefits. We disagree. The policy exclusion for intentional losses states: "We do not insure for loss caused directly or indirectly ... out of any act committed by any insured with the intent to cause a loss." This policy language is clear and unambiguous, so we will not look outside the policy to determine its meaning. According to the language of the policy, Glenn's actions triggered the exclusion for intentional losses because Glenn acted with an intent to cause a loss. When asked why he started the fires, Glenn stated: "[T]here are just too many memories of my sister in that house and I couldn't stand to live there anymore." Glenn intended to burn the home to rid himself of his sister's memories. Viewed in the light most favorable to Kelly, Glenn's actions fall within the policy exclusion for intentional losses, and the circuit court properly granted summary judgment to Farm Bureau on this issue.

Kelly, 547 S.E.2d at 876 (citations omitted); *see also Deeter*, 999 N.E.2d at 85. Simply put, whether Zoe intended to gain financially from her actions is entirely irrelevant for purposes of determining application of the Intentional Loss exclusion.

D. It is irrelevant whether the exclusion applies in other endless scenarios.

Finally, Plaintiffs argue that there is an "unlimited number of fact scenarios that could be applied to the policy language" and, therefore, the Policy must be ambiguous. (Aplt. Br. at 37.) However, the question has never been whether the Policy exclusion might be found to be inapplicable to some other "fact scenario" that is not present in this case. Instead, the ***only*** question for the district court (and for this Court) is whether the Intentional Loss exclusion applies to the facts of ***this*** case. As LM Insurance made clear during argument, the Court's function is not to fashion some hypothetical scenario in which the exclusion might not apply, but is instead to

apply the plain language of the contract as it is written to the facts of the present case. *See, e.g.*, (Aplt. App. Vol. I at 285:20–286:5.); *see also Allied Mut. Ins. Co. v. U.S.*, 955 F.Supp. 1324, 1330 (D. Kan. 1997) ("The court need not contemplate how this exclusion would apply to other situations . . . Any ambiguities that arguably exist under these hypothetical situations do not create [ambiguity] under the facts here.").

Thus, Plaintiffs' emphasis on the fact that "[f]ire is used each and every day in many different ways," including in connection with "cooking, candles, fireplaces, tobacco, campfires, incineration, etc." does nothing to aid their position. *See* (Aplt. Br. at 12.) Although these instances might very well describe scenarios in which fire could ***accidentally*** cause damage, Plaintiffs fail to recognize that an "example" in which fire is ***not*** used "each and every day" is on top of a bedspread on someone's bed with the ***intent*** to cause damage to that property. Plaintiffs can point to all the potential uses of fire in the world and it still will not overcome the fact that Zoe intentionally set fire to a bedspread, on top of a bed, inside of a home, with an admitted intent to cause a loss to such property. Whether accidental damage could result from any other potential use of fire is irrelevant to this dispute.

E. The policy read as a whole unambiguously excludes coverage for Plaintiffs' claim.

Reading the Policy as a whole, it is clear that the Intentional Loss exclusion unambiguously excludes coverage in this case. In interpreting insurance policies,

Kansas courts are required to interpret each policy provision in harmony with all other provisions contained therein. *Am. Family Mut. Ins. Co. v. Wilkins*, 179 P.3d 1104, 1109 (Kan. 2008); *Zukel v. Great W. Managers, LLC*, 78 P.3d 480, 484 (Kan. App. 2003). Plaintiffs' argument ignores this settled principle entirely, improperly seeking to manufacture ambiguity based solely on an isolated reading of language without regard to the remainder of the Policy. However, the plain meaning of the term "loss" is gleaned by review of the Policy as a whole, and particularly the coverage parts that the exclusion directly limits.

Specifically, the insuring agreement for the Policy's dwelling coverage part states that coverage is provided for the risk of "direct loss to property . . . only if that loss is a physical loss to property." (Aplt. App. Vol. I at 85.) Likewise, for personal property coverage, the Policy states that coverage is provided for "direct physical loss to property[.]" (Aplt. App. Vol. I at 85.) Thus, at the very outset, the Policy makes clear to the insured that the "loss" to which it refers for purposes of coverage in the first instance is direct, physical loss to property—unless that loss is excluded. (Aplt. App. Vol. I at 85.)

Consequently, because exclusionary clauses must necessarily be read in light of the coverage-granting provisions to which they directly relate, the "Exclusions" section of the Policy must be read through that lens. In other words, an exclusion can only affect coverage for something that otherwise falls within the Policy's

coverage-granting provisions. After all, an exclusion to coverage cannot even become relevant in the first instance unless and until the coverage-granting provisions are satisfied. *See Harris v. Richards*, 867 P.2d 325, 328 (Kan. 1994); *Magmus, Inc. v. Diamond State Ins. Co.*, 101 F.Supp.3d 1046, 1054 (D. Kan. 2015).

Applied here, the Intentional Loss exclusion ***could only*** bar coverage for "loss" that otherwise falls within the Policy's coverage-granting provisions. Those provisions require that such "loss" be direct, physical loss to property. For this reason alone, Plaintiffs' misguided assertion that LM Insurance "admitted during oral argument that the intentional loss exclusion is only applicable to covered property" misses the point entirely. (Aplt. Br. at 20.) If the loss does not involve covered property, then there is no need to determine whether an exclusion applies, as coverage would be denied for failing to fall within the Policy's initial coverage-granting provisions. *Harris*, 867 P.2d at 328 (Kan. 1994).

In reading the Policy as a whole, and because exclusions must be read in light of the coverage-granting provisions to which they directly relate, the Intentional Loss exclusion clearly and unambiguously excludes coverage for loss that otherwise falls within the scope of coverage. Because Zoe admittedly intended to cause direct physical loss to property when she intentionally set her parents' bedding on fire, Zoe clearly "intended to cause a loss" within the plain meaning of the exclusion. Thus, the Intentional Loss exclusion clearly and unambiguously excludes coverage for

Plaintiffs' loss, just as multiple other courts have expressly found under similar circumstances and policy language. *See Taylor*, 2018 WL 4078579, at *3 (finding that phrase "intent to cause a loss" unambiguously applied to adult son of insured intentionally setting fire to home); *Kelly*, 547 S.E.2d at 876 (finding exclusion unambiguous where it provided that "[W]e do not insure for loss caused directly or indirectly ... out of any act committed by any insured with the intent to cause a loss."); *see also Auto-Owners Ins. Co. v. Hamin*, 629 S.E.2d 683, 685–86 (S.C. 2006) (finding no ambiguity in similar language addressing "intent to cause a loss"); *Postell*, 823 N.W.2d 35.

Finally, even if the meaning of "loss" were determined solely based upon its ordinary meaning as expressed in dictionary definitions, without regard to the coverage-granting provisions' qualification of the term, Plaintiffs' claim is still excluded from coverage. As the district court noted, it has interpreted "loss" as "[a]n undesirable outcome of a risk; the disappearance or diminution of value, [usually] in an unexpected or relatively unpredictable way." (Aplt. App. Vol. I at 226); *B.S.C. Holding, Inc. v. Lexington Ins. Co.*, No. 11-CV-2252-EFM, 2014 WL 2207966, at *6 (D. Kan. May 28, 2014), *aff'd at* 625 F.App'x 906 (10th Cir. 2015. In other words, according to the district court, a loss is "the disappearance or diminution of value." (Aplt. App. Vol. I at 226.)

Here, Zoe set fire to the blanket with the intended purpose of causing damage thereto. Clearly, damaging an item could only result in reduction in its value. *See* MERRIAM-WEBSTER ONLINE DICTIONARY, "diminution," *available at* https://www.merriam-webster.com/dictionary/diminution (last visited Sept. 7, 2021) (defining "diminution" as "the act, process, or an instance of diminishing"). Further, Zoe's setting the blanket on fire resulted in a direct diminution or diminishment of the physical makeup or physical characteristics of the blanket itself. Consequently, Zoe's acts of diminishing either the value or the character of the property was a "loss" under that term's plain and ordinary meaning.

Based on the foregoing, the district court properly found that the Intentional Loss exclusion was unambiguous, and clearly excluded coverage for Plaintiffs' claim.

IV. The district court properly rejected Plaintiffs' reliance on the Policy's mortgage clause to support their claim.

The Court should likewise dispose of Plaintiffs' claim that LM Insurance breached the contract "because of its failure and refusal to resolve the matter pursuant to the mortgage clause." (Aplt. Br. at 30.) In alleging that LM Insurance has "not done anything to settle the claim with the mortgage holder," Plaintiffs fail to identify "the claim" to which they are referring. *See* (Aplt. Br. at 5.) That failure is for good reason, because the mortgage holder did ***not*** assert any claim for which

LM Insurance could "settle."[5] And, as Plaintiffs themselves acknowledge, the mortgage clause could only be triggered where there is a "claim" made by the mortgage holder. *See* (Aplt. Br. at 7) ("[i]f [LM Insurance] denies the claim of the 'Named Insured' it will not apply to a valid ***claim*** of a mortgagee . . .") (emphasis added).

Plaintiffs argue that under Kansas law, "the insurer has an obligation to initiate settlement of claims and make good faith efforts to resolve claims for the benefit of its insured." (Aplt. Br. at 31.) Plaintiffs fail to mention that the "settlement of claims" to which they refer is the settlement of ***third-party claims asserted against the insureds***, whom the insurers had a duty to defend. *See Smith v. Blackwell*, 791 P.2d 1343, 1346 (Kan. App. 1989) ("In settling and defending actions against an insured, an insurer must act in the best interests of its insured."); *see also Rector v. Husted*, 519 P.2d 634, 638–41 (Kan. 1974) ("It is universally recognized that the insurer owes a duty to its insured when considering a settlement or compromise of a claim against the insured."). Plaintiffs have made no allegation that a claim has ever been asserted against them arising from the loss. Consequently, an insurer's duty to

[5] In fact, the very record authority that Plaintiffs cite for support indicates that LM Insurance was "not aware of a claim being presented by the mortgagee." *See* (Aplt. Br. at 5) (citing Aplt. App. Vol. I at 143:18–21.) Further, Christina Taylor testified that the mortgage holder was still investigating a potential claim and that "they couldn't do anything with the claim with LM until after the lawsuit." (Aplt. App. Vol. I at 197:16—198:9.)

defend and resolve third-party claims asserted against an insured is wholly irrelevant and immaterial to this dispute.

Further, even if the mortgage holder ***had*** made a claim under the Policy, Plaintiffs mischaracterize what the mortgage clause requires of LM Insurance. Specifically, Plaintiffs claim that, "[b]ased upon the language in the mortgage clause, it could be argued that [LM Insurance] is obligated to make the payment to both the mortgage holder and [Plaintiffs] as named insured." (Aplt. Br. at 30.) However, to make that argument, Plaintiffs have to ignore the actual policy language itself.

The mortgage clause provides:

> If a mortgagee is named in this policy, any loss payable under Coverage A or B will be paid to the mortgagee and you, as interests appear . . .
>
> ***If we deny your claim, that denial will not apply to a valid claim of the mortgagee***, . . .
>
> . . .
>
> If we pay the mortgagee for any loss ***and deny payment to you***:
>
> a. We are subrogated to all the rights of the mortgagee granted under the mortgage on the property; or
> b. At our option, we may pay to the mortgagee the whole principal on the mortgage plus any accrued interest. . . .

(Aplt. App. Vol. I. at 89) (emphasis added). As is readily apparent from the above-quoted, a joint payment obligation exists only where coverage is afforded under the Policy. (Aplt. App. Vol. I. at 89) ("any loss ***payable*** under Coverage A or B will be

paid to the mortgagee and you, as interests appear.") (Emphasis added). By contrast, where coverage is excluded for Plaintiffs' claim, payment is to the mortgagee alone. *See* (Aplt. App. Vol. I. at 89) ("If we pay the mortgagee for any loss ***and deny payment to you***") (emphasis added). Consequently, whether a mortgage holder makes a valid claim under the Policy is irrelevant as to whether coverage is afforded for Plaintiffs' claim.

In short, Plaintiffs cannot support a claim for breach of contract based solely upon a naked mischaracterization of the language of the Policy and LM Insurance's obligations thereunder.[6]

V. The district court properly rejected Plaintiffs' attempt to transform their breach of contract claim into one of negligence.

Plaintiffs next attempt to transform their breach of contract claim into one for negligence, purporting to allege a claim for "negligent breach of contract." Plaintiffs assert that LM Insurance failed to conduct a reasonable investigation before denying

[6] Plaintiffs' erroneously rely on *Robinson v. Breuninger*, 107 P.2d 688 (Kan. 1940) for support, stating that "[t]he general purpose of a mortgage clause is for there to be funds available to repair the property and protect both the mortgagor and mortgagee." (Aplt. Br. at 30.) However, nothing about *Robinson* imposes an obligation upon LM Insurance to make payment ***to Plaintiffs*** as they suggest. Instead, *Robinson* stands only for the unremarkable proposition that a mortgage holder has an equitable lien upon policy proceeds for the property where the policy "is not assigned to or made payable to the mortgagee." 107 P.2d at 691. Here, the mortgage holder ***is*** listed on the Policy as a payee and, therefore, payment would be made directly to that mortgage holder if it had made a valid claim under the Policy. *See* (Aplt. App. Vol. I at 76) (listing Wells Fargo Bank).

their claim, and that such supposed failure amounts to actionable negligence, somehow automatically entitling Plaintiffs to full coverage for their loss. However, Plaintiffs' attempted negligence claim is wholly subsumed by their claim for breach of contract. In other words, any alleged duties owed to Plaintiffs arise solely from the contractual obligations expressly set forth in the Policy. Regardless, Plaintiffs' assertion that LM Insurance negligently breached any of its contractual obligations is without merit, as LM Insurance does not owe Plaintiffs the extensive affirmative duties that they claim.

A. Zoe had capacity to form intent and Plaintiffs adduced no evidence to the contrary.

First, Plaintiffs claim that LM Insurance had some affirmative duty to investigate to determine "whether or not [Zoe] would have had the state of mind necessary to 'intend' for a loss to occur[.]" (Aplt. Br. at 28.) Plaintiffs assert that "[i]f [LM Insurance] had fulfilled its duty to conduct a good faith investigation it would have looked at Zoe's medical history and interviewed Zoe." (Aplt. Br. at 34.) Plaintiffs argue that, before denying coverage based upon the plain application of the Intentional Loss exclusion, LM Insurance had the burden to prove that Zoe had the mental capacity necessary to form intent. Plaintiffs' argument fails for multiple independent reasons.

1. Zoe is presumed to have the requisite capacity under Kansas law.

Under Kansas law, an actor's sanity, competency, and capacity to form intent are all presumed as a matter of law, unless and until the party asserting otherwise has demonstrated the contrary. This presumption of sanity and competency "cuts a path through many areas of the law." *Matter of Estate of Hendrickson*, 805 P.2d 20, 24 (Kan. 1991). For example, Kansas courts presume that a person is mentally capable of contracting a marriage, "and the burden is on the party alleging mental incapacity to prove it." *Id.* Likewise, "[t]here is a presumption of sanity in a criminal proceeding that may be relied upon by the prosecution to establish a prima facie case." *Id.*

This presumption exists even where LM Insurance has the burden of proving intent. As the Kansas Supreme Court has explained in the criminal context:

> [T]he state is not required in the first instance to introduce evidence to prove sanity, for the law presumes that all persons are sane, and this presumption of sanity takes the place of evidence in the first instance. It answers for evidence of sanity on the part of the state.

State v. Harkness, 847 P.2d 1191, 1200 (Kan. 1993). Of course, there are "sound practical reasons for the presumption of sanity, competency, and capacity," as the court has further explained:

> A high percentage of all litigation involves attempts to hold persons accountable for alleged wrongful acts or omissions. If the party seeking such accountability had to prove in his or her case in chief that the other party was sane, competent, or had capacity (depending on the type of litigation involved), the burden would be insurmountable.

Hendrickson, 805 P.2d at 24. Thus, "[a] person is presumed to be competent" and such presumption is overcome only where "the evidence establishes that the person is incapacitated." *Id.*; *see Scott v. Farrow*, 391 P.2d 47, 52 (Kan. 1964) ("the infirmities of a contract are required to be proved by the party asserting such infirmities").

Because Zoe is presumed under the law to have the capacity to form intent, it was Plaintiffs' burden to prove the contrary—not the other way around. Kansas law simply does not impose upon insurers an affirmative duty to prove the mental capacity of the actor. In fact, as explained in detail above, *Thomas* made clear that intent can be ***objectively inferred*** as a matter of law with respect to intentional loss exclusions, solely by reference to the nature of the act itself.

Consequently, the Court should reject Plaintiffs' suggestion that LM Insurance was required to prove that Zoe was of the requisite mental capacity to form intent before denying coverage pursuant to the Intentional Loss exclusion.

2. Plaintiffs adduced no evidence to overcome the presumption of capacity.

Plaintiffs made no attempt to overcome the presumption of capacity. Instead, Plaintiffs that "any alleged 'presumption' may be overcome by the facts disclosed in a diligent search for evidence which supported [Plaintiffs'] claim." (Aplt. Br. at 29.) Yet, Plaintiffs make no effort to identify precisely ***what*** evidence would have

been uncovered by this "diligent search" or ***how*** it would have changed the outcome of LM Insurance's investigation. Thus, Plaintiffs' argument is nothing more than an attempt to rely on speculation or conjecture to cast doubt on the validity of LM Insurance's proper denial of coverage. *See Messer*, 210 F.Supp.2d at 1226 (noting that nonmoving party may not "rely on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial.").

Despite being given multiple opportunities to provide LM Insurance with Zoe's medical records and having "full access" thereto, Plaintiffs failed to do so. (Aplt. App. Vol. I at 152.) In fact, the district court pointed out that Plaintiffs had affirmatively represented to LM Insurance that they would provide Zoe's medical records for review. (Aplt. App. Vol. I at 234 n.3.) However, Plaintiffs never produced any such records as promised. (Aplt. App. Vol. I at 234 n.3.) Thus, Plaintiffs cannot now be heard to complain that LM Insurance "failed to review" medical records that were never produced in the first instance.[7]

[7] Plaintiffs argue that "Zoe was 18 years old and [Plaintiffs] had no better access to the records than Liberty Mutual." (Aplt. Br. at 29.) However, the record is clear that Plaintiffs had "full access" to Zoe's medical records and, in fact, represented to LM Insurance that they were securing such records for LM Insurance to review. (Aplt. App. Vol. I at 152.) Of course, no such records were ever produced. (Aplt. App. Vol. I at 142:9–12.) By contrast, there is no evidence that LM Insurance was ever provided with any authorization for release of records so that LM Insurance could obtain them independently. Further, Plaintiffs fail to explain how LM

As the district court properly found, "Plaintiffs have set forth no evidence of Zoe's diagnosed mental condition that would affect her mental capacity." (Aplt. App. Vol. I at 234.) Consequently, the Court should reject as unsupported any suggestion that Zoe was "mentally ill" at the time she intentionally set her parents' bed on fire.

3. Plaintiffs' admit that Zoe had the capacity to form intent.

Regardless, Plaintiffs have repeatedly admitted that Zoe had the capacity to form intent. Specifically, as set forth above, Plaintiffs have conceded that Zoe "intended to burn blankets" on the bed and intended "to cause limited damage" in order to upset her father. (Aplt. App. Vol. I at 58, ¶ 17; *id.* at 63, 71.) Likewise, Plaintiffs admit that Zoe "intended to make her dad mad by causing damage to his blanket." (Aplt. Br. at 12.) Thus, even Plaintiffs believe that Zoe is capable of forming intent.

Plaintiffs may not have it both ways, simply picking and choosing when Zoe has capacity and when she does not. Because Zoe clearly understood the nature and quality of her actions, as is evidenced by her conduct immediately after the fire in unsuccessfully attempting to extinguish the fire and fleeing the home, Zoe clearly had the requisite capacity to form intent. *See, e.g.*, *Williams*, 804 P.2d at 1374 syl.

Insurance possibly would have "obtain[ed] the cooperation of Zoe" if Plaintiffs themselves purportedly could not. *See* (Aplt. Br. at 29.)

¶ 1 (finding purportedly mentally ill student to have intended school shooting where he "understood the nature and quality of his acts").

B. Kansas law does not support Plaintiffs' attempts to transform an unsuccessful breach of contract claim into a tort claim for negligence.

Regardless, Plaintiffs' "negligent breach of contract" claim is simply an improper attempt to transform an unsuccessful breach of contract claim into a tort claim. However, any duties that LM Insurance owes to Plaintiffs arise only from the terms of the contract, and any failure to fulfill those duties is actionable as a breach of contract only. The Kansas Supreme Court explained the distinction between contractual and tort duties as follows:

> A breach of contract may be said to be a material failure of performance of a duty arising under or imposed by agreement. A tort, on the other hand, is a violation of a duty imposed by law, a wrong independent of contract. Torts can, of course, be committed by parties to a contract. The question to be determined here is whether the actions or omissions complained of constitute a violation of duties imposed by law, or of duties arising by virtue of the alleged express agreement between the parties.

Malone v Univ. of Kan. Med. Ctr., 552 P.2d 885, 888 (Kan. 1976). In short, a tort may only arise where the duty violated is one which is imposed by law. Plaintiffs summarily claim that LM Insurance's duty to "investigate, settle, and pay" sound in tort. (Aplt. Br. at 33.) The most obvious problem with this assertion, however, is that it is directly contrary to the Kansas Supreme Court's conclusion on the issue.

In *Glenn v. Fleming*, 799 P.2d 79, 88 (Kan. 1990), the court expressly held that a claim against an insurer for alleged negligent handling of an insurance claim is a ***contract claim***, because it necessarily arises from the contractual relationship of the parties and the terms of the policy itself. Specifically, *Glenn* noted that it has previously "***rejected*** the idea that any insurance contract duties, whether the duty to defend, the duty to settle, or otherwise, are duties 'imposed by law.'" *Id.* at 90 (emphasis added). Instead, "***all such duties*** are duties 'arising under or imposed by agreement,' and, if breached, the action lies in contract." *Id.* (emphasis added); *see also Guarantee Abstract & Title Co., Inc. v. Interstate Fire & Cas. Co., Inc.*, 652 P.2d 665, 669 (Kan. 1982) ("a claim that an insurer acted negligently in performing its contractual duty to defend on behalf of the insured does not create a tort action or alter the measure of damages which may be recovered.").

In other words, there are no degrees of breach of contract. *See Marshel Investments, Inc. v. Cohen*, 634 P.2d 133, 142 (Kan. App. 1981) ("Despite all too familiar usage of the term 'negligent breach of contract,' if there is a breach of contract, whether because of intentional conduct, inability to perform, accident, negligence, or whatever. It is inappropriate to denominate the available contract cause of action as one for negligent breach of contract."). Either it is a breach of contract, or it is not. Likewise, either there is coverage, or there is not. Here, Plaintiffs' argument that LM Insurance was negligent in failing to pay their claim is

already included, and subsumed by, Plaintiffs' unsuccessful claim for breach of contract. *See Isaac v. Reliance Ins. Co.*, 440 P.2d 600 (Kan. 1968) (finding no claim for "negligent breach of contract" where allegations were identical to, and dependent upon, the same allegations which constituted breach of contract).

C. Plaintiffs' negligence claim nevertheless fails.

Even if Plaintiffs could assert some separate claim premised upon theories of negligence, Plaintiffs' claim still fails. In order to establish a negligence claim, Plaintiffs must show "the existence of a duty, breach of that duty, an injury, and proximate cause[.]" *Carpenter v. Bolz*, 234 P.3d 866, 2010 WL 2977937, at *7 (Kan. App. July 23, 2010). Plaintiffs do nothing to support their negligence claim, other than to state the unremarkable principle that a party to a contract, of course, ***can*** also commit negligence. *See David v. Hett*, 270 P.3d 1102 (Kan. 2011). However, simply stating that one ***can*** be liable for negligence is not the same as establishing the required elements of the claim. *See* (Aplt. Br. at 32–33.)

First, Plaintiffs fail to explain what independent legal duty LM Insurance owes to Plaintiffs that are not imposed by the contract terms itself. *See David*, 270 P.3d at 1115 ("we cannot determine with appropriate certainty from the appellate record whether the Davids supported their negligence claims by citing to the district court any independent duty allegedly owed by Hett that was breached, aside from

Hett's obligations under the agreement"). Thus, Plaintiffs' negligence claim fails for that reason alone.

Second, even if they could point to some independent duty imposed by law, Plaintiffs cannot establish that they suffered any damages as a proximate result of any alleged breach thereof. *See Baker v. City of Garden City*, 731 P.2d 278, 279 syl. ¶ 5 (Kan. 1987) ("In order to recover in a negligence action, the breach of duty must be the actual and proximate cause of the injury."). Plaintiffs allege that "[t]he breach of the duty of good faith and due care renders an insurer liable for the full amount of the insured's loss." (Aplt. Br. at 33–34.) However, aside from the fact that the "duty of good faith and due care" is a ***contractual*** duty, Plaintiffs nevertheless fail to establish how any alleged breach of that duty ***caused*** any alleged loss—proximately or otherwise.

Specifically, Plaintiffs' alleged "loss" or "damage" in this case is the claimed amount of policy proceeds necessary to "repair their home." (Aplt. Br. at 14.) However, as explained above, none of those claimed damages are covered or payable under the terms of the Policy, as a result of the Intentional Loss exclusion. If the Policy provides no coverage in the first instance—and, therefore, there is no breach of contract—there cannot possibly be damages as a result of a "negligent breach of contract." *See Union Pacific R. Co. v. U.S. ex rel. U.S. Army Corps. of Engineers*, 591 F.3d 1311, 1315 (10th Cir. 2010) ("If there is no breach of contract, there is no

tort.") In other words, "[o]ne cannot say that a contracting party has committed the tort of negligent breach of contract by failing to perform a particular act if the contract, properly construed, does not require the party to perform that act." *Id.*

The Intentional Loss exclusion either applies or it does not, and Plaintiffs' perceived reasonableness of LM Insurance's investigation has no bearing on that question. *See Sec. Ins. Co. of Hartford v. Wilson*, 800 F.2d 232, 235 (10th Cir. 1986) ("Where the claim, as submitted, is excluded by clear and unambiguous language in the policy, the insurer has no duty to investigate the claim further."); *Wichita Firemen's Relief Ass'n v. Kansas City Life Ins. Co.*, 237 F.Supp.3d 1134, 1141 (D. Kan. 2017), *aff'd*, 737 F.App'x 865 (10th Cir. 2018) (where the facts are the same as they were at time of denial, "[t]his case is, therefore, not about a failure to perform an adequate fact investigation.").

As is clear from the foregoing, Plaintiffs' argument that LM Insurance conducted an inadequate investigation is nothing more than a futile attempt to obtain a windfall recovery, and receive full coverage for their loss, despite the plain and unambiguous language of the Intentional Loss exclusion. This conclusion becomes even further apparent when considering the third-party bad faith cases upon which Plaintiffs rely. For instance, Plaintiffs argue that a breach of the duty of good faith renders the insurer "liable for the full amount" of the insured's loss. (Aplt. Br. at 34). However, all of the authority upon which Plaintiffs rely involved an insurer's

alleged bad faith in fulfilling its duty to defend or settle ***third-party liability claims*** asserted against the insured. *See Bollinger v. Nuss*, 449 P.2d 502 (Kan. 1960), *Smith*, 791 P.2d 1343; *Covill v. Phillips*, 542 F.Supp. 224 (D. Kan. 1978). However, no such bad faith claim is recognized in first-party insurance claims such as is present here. *Spencer v. Aetna Life & Cas. Ins. Co.*, 611 P.2d 149, 158 (Kan. 1980). Instead, Plaintiffs are limited solely to maintaining "an action on the contract for [their] policy benefits, with costs, interest and attorneys' fees under arbitrary circumstances." *Id.* As a result, this Court should reject Plaintiffs' attempts to assert an unrecognized first-party bad faith claim, disguised as a claim for negligence.

Finally, the Court should reject Plaintiffs' attempts to invoke the Kansas Uniform Trade Practices Act ("KUTPA"), as Plaintiffs themselves concede that "the KUTPA does not create a private cause of action." (Aplt. Br. at 36.) The KUTPA is clear that Plaintiffs are conferred no legally-protected interest thereby. Instead, any power vested thereunder lies with the Commissioner of Insurance. *See Janke v. Blue Cross & Blue Shield of Kan., Inc.*, 353 P.3d 455, 465–67 (Kan. App. 2015). Accordingly, Plaintiffs' ***sole*** remedy is "a suit for breach of the insurance contract." *Id.* at 466. And because the Policy clearly and unambiguously excludes coverage for Plaintiffs' claim, their sole remedy against LM Insurance fails as a matter of law.

VI. The district court properly enforced the plain language as written in the Policy despite Plaintiffs' assertion that an exclusion of coverage results in unfair consequences.

Finally, Plaintiffs assert that they are unfairly suffering the consequences of Zoe's acts. At the outset, it is important to correct a fundamental mischaracterization that Plaintiffs make in an attempt to support their claim. Specifically, Plaintiffs argue that no reasonable insured would understand that the "purpose and intent" of the Policy "would be to exclude coverage when a child gets mad at a parent and does something foolish/childish that results in fire damage to a home." (Aplt. Br. at 8–9.) They further argue that an ordinary person "would not understand that if they had children . . . being careless with fire, insurance coverage would be denied[.]" (Aplt. Br. at 18.)

To be very clear, Zoe was not a "child" when she intentionally started a fire inside the home. On the contrary, Zoe was at all times ***an adult***.[8] An adult who admittedly ***intended*** to cause damage by her actions. Thus, it makes no difference that the Intentional Loss exclusion does not contain reference to "foolishness," "childishness," or "carelessness," because that is not what the Policy excludes.

[8] In fact, Plaintiffs explicitly argue that the district court should not have expected them to obtain Zoe's medical records because it "overlooked the fact that Zoe was 18 years old" and "[a] person is no longer a minor in Kansas at the age of 18." (Aplt. Br. at 29, n.2.) Plaintiffs cannot have it both ways, criticizing the district court for overlooking the fact that Zoe was an adult, while simultaneously ignoring that same fact when it purportedly suits their position.

Instead, as is clear from its plain language, the Policy excludes coverage for any act committed by an insured "[w]ith the ***intent*** to cause a loss." (Aplt. App. Vol. I at 87) (emphasis added). Zoe certainly did not simply do "something foolish/childish" or "careless" which merely "resulted in" fire damage as Plaintiffs imply. On the contrary, Zoe ***intended*** that fire damage would occur. Thus, despite Plaintiffs' attempted mischaracterization, the "purpose and intent" of the exclusion was to exclude the very intentionally-damaging conduct which Plaintiffs have admitted took place.

In short, this is not a case in which a "child" made a "mistake" with fire. (Aplt. Br. at 18.) Nor is it a case in which property damage resulted from "youthful inattention." (Aplt. Br. at 18.) Zoe accomplished precisely what she intended to do—causing damage to her father's bedspread with a fire that she intentionally set in order to make him upset. That the fire subsequently spread out of control beyond what she originally intended is entirely irrelevant to the question of coverage under Kansas law. *See Thomas*, 179 P.3d at 431. Regardless, even if Zoe were a "child," Kansas courts routinely apply insurance policy exclusions where children's conduct is at issue. *See, e.g. Bell*, 674 P.2d 468 (excluding coverage where 11-year-old boy intentionally shot BB gun); *see also Williams*, 804 P.2d 1374 (excluding coverage where 14-year-old boy intentionally shot gun in school).

A. The Intentional Loss exclusion is not limited to intentional acts of a "named insured" as Plaintiffs claim.

Plaintiffs further allege that they are innocent co-insureds and, therefore, should be entitled to recover. Plaintiffs argue that they are unfairly suffering the consequences of Zoe's acts and that "the named insureds did nothing wrong." (Aplt. Br. at 13, 19.) From this, Plaintiffs argue that the "common sense reading" of the Policy "would be to insure the named insured from all losses that were not intentionally caused by or as directed by ***the named insured***[.]" (Aplt. Br. at 18) (emphasis added).

Of course, as with Plaintiffs' other arguments, this assertion again requires the Court to insert language into the exclusion that is contained nowhere therein. Specifically, the Intentional Loss exclusion does not limit its application to only the "named insured." Instead, it plainly applies to bar coverage where "an insured" acts with the intent to cause a loss. (Aplt. App. Vol. I at 87.) Plaintiffs readily admit that Zoe qualifies as an "insured" under the Policy. Therefore, the Intentional Loss exclusion plainly applies to Zoe—not just "named insureds" as Plaintiffs would prefer. This Court should decline Plaintiffs' invitation to effectively eliminate the Policy's definition of "insured" in derogation of settled principles of contract interpretation. *See Mid-Continent Cas. Com. v. Greater Midwest Builders, Ltd.*, 794 Fed.Appx. 757, 763 (10th Cir. 2019) ("If a term within an insurance policy is clearly defined, the contract definition controls.").

Plaintiffs' argument is an improper attempt to apply the "innocent co-insured" doctrine to this dispute. However, that doctrine is wholly inapposite, as Kansas courts have held that the phrases "an insured" or "any insured" refer to "any and all insureds under the policy." *See Raymer*, 825 P.2d at 1148, *aff'd* at 840 P.2d 456; *Pink Cadillac Bar & Grill, Inc.*, 925 P.2d at 458. If the loss is intentionally caused by ***any*** "insured" under the Policy, coverage is excluded for ***all*** insureds thereunder. Because Zoe indisputably qualifies as an "insured," her intentionally causing a loss triggers the exclusion for all loss resulting therefrom. Plaintiffs may not unilaterally alter the language of the exclusion after-the-fact in order to create coverage that is different than that explicitly defined by the plain terms of the Policy itself. *See Roskell v. Prudential Ins. Co. of Am.*, 529 F.2d 1, 3 (10th Cir. 1976) ("We will not rewrite the policy to permit recovery.").

B. That Plaintiffs perceive the exclusion to result in a "harsh" outcome does not provide a basis for coverage.

Plaintiffs further argue that excluding coverage in this case results in a "harsh" outcome and, therefore, the Court should construe the Policy to provide coverage. (Aplt. Br. at 19–20.) However, the plain language of the Policy may not be simply rewritten to provide coverage at the request of a party simply because that party perceives the application of the contract's plain terms to be unfair in a particular circumstance.

Plaintiffs rely on *Hephner v. Traders Ins. Co.*, 864 P.2d 674 (Kan. 1993) for the proposition that courts should construe policy language to "prevent a 'harsh' result." (Aplt. Br. at 19–20.) Plaintiffs mischaracterize the import of *Hephner*, as that court did not refuse to enforce language to avoid an unfair result as Plaintiffs imply. On the contrary, the *Hephner* court allowed coverage based upon the way in which the provision would otherwise be applied ***differently*** to poor individuals than it would be applied to the more affluent. *Id.* at 680. If the insurer's interpretation were followed, a person with sufficient funds to pay for substitution services would be entitled to insurance benefits. *Id.* However, a person who had insufficient funds—but was fortunate enough to have family to provide such services for no charge—would ***not*** receive such benefits. *Id.* It was this inequitable and disparate treatment of insureds, based solely on fortuity, which warranted coverage—not some generalized notion of "harsh consequences." *See id.* at 678.

Here, the Policy does not operate to provide coverage to ***some*** insureds who intentionally cause a loss, while simultaneously excluding coverage for others. The Intentional Loss exclusion applies to all insureds if any one of them intentionally causes a loss. Thus, this is not a situation in which the exclusion applies to one insured solely because they have "loving parents," but does not apply to a similarly situated insured who does not. Consequently, *Hephner* is inapposite and provides

no support for Plaintiffs' suggestion that courts are authorized to arbitrarily refuse to enforce clear policy language because one party claims the result is unfair.

Simply put, coverage cannot be dictated solely on the basis that the plain terms of the exclusion might result in harsh consequences. That is true of ***all*** denials of coverage and has no impact on the interpretation of the Policy's plain language. *See Bramlett v. State Farm Mut. Ins. Co.*, 468 P.2d 157, 159 (Kan. 1970) ("Policies must be construed according to the sense and meaning of the terms used, and if the language is clear and unambiguous, it must be taken in its plain, ordinary and popular sense."). Here, there are many circumstances under which the Policy would provide coverage to Plaintiffs. Unfortunately, this simply is not one of those circumstances. Consequently, whether Plaintiffs perceive the denial of coverage to be unfair is not a basis for reversing the district court's grant of summary judgment based on the plain and unambiguous language of the Policy.[9]

In any event, Plaintiffs fail to explain how it would be any more "fair" for LM Insurance to be required to indemnify a risk for which it never agreed to provide coverage—and, in fact, expressly ***excluded*** from coverage. Here, the very risk from which LM Insurance sought to protect itself occurred. An insured intentionally

[9] If Plaintiffs believed that the policy language was unfair, they were under no obligation to purchase a policy which contained such language. *See Ridgway v. Shelter Ins. Cos.*, 913 P.2d 1231, 1235 (Kan. App. 1996) ("Kansas has long held it to be the duty of every contracting party to learn and know the contents of a contract before he signs and delivers it.").

started a fire in the home with the intent to cause a loss. That risk is clearly and unambiguously excluded from coverage under the plain terms of the Policy. As the Kansas Supreme Court has noted, the scope of coverage available to Plaintiffs "is purely a matter of contract." *Liggatt v. Employers Mut. Cas. Co.*, 46 P.3d 1120, 1126 (Kan. 2002).

Zoe "literally played with fire" and "although the resulting harm was far beyond what [she] expected, the harm was controlled by [her], as the insured, and insurance companies should not be forced to insure against such harm." *See Am. Family Mut. Ins. Co. v. Guzik*, 941 N.E.2d 936, 940 (Ill. App. 2010).

CONCLUSION

The district court properly concluded that the Intentional Loss exclusion unambiguously applied to bar coverage for Plaintiffs' claim emanating from Zoe's intentional setting of a fire inside Plaintiffs' home with the intent to cause a loss. The district court did not err in rejecting Plaintiffs' attempt to transform their unsuccessful breach of contract claim into one for negligence. Accordingly, this Court should affirm the district court's grant of summary judgment in favor of LM Insurance and should affirm the district court's judgment in favor of LM Insurance on Plaintiffs' claims for breach of contract.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the type-volume limitations of FED.R.APP.P. 32(a)(7)(B) as it contains 12,567 words, exclusive of items excluded from the length computation by FED.R.APP.P. 32(f). I relied on my word processor to obtain the count and it is Word Version 2013. The undersigned further certifies that the foregoing brief complies with the typeface and type style requirements of FED.R.APP.P. 32(a)(5)–(6) as it contains a proportionally spaced typeface using Times New Roman font size 14.

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CERTIFICATE OF DIGITAL SUBMISSION & PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing Appellee's Brief, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document to be filed with the Clerk and has been scanned for viruses with AV Defender, and, according to the program, is free of viruses. In addition, I certify that all required privacy redactions have been made.

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I hereby certify that on this 8th day of September, 2021, I electronically filed the foregoing with the Clerk of the Tenth Circuit Court of Appeals using the CM/ECF system, which generated notice to all counsel of record, including:

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