No. 20-3166

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CHRISTINA TAYLOR and DONALD TAYLOR
Plaintiffs/Appellants

v.

LM INSURANCE CORPORATION
Defendant/Appellee

BRIEF OF APPELLANTS
CHRISTINA TAYLOR and DONALD TAYLOR

Appeal from the United States District Court
For the District of Kansas
Honorable John W. Broomes
District Court Case No. 19-1030-JWB

Kevin M. McMaster, #11903
McMaster & McMaster, LLC
P.O. Box 2684
Wichita, Kansas 67201-2684
(316) 263-4281
kmm@mcmasterlaw.com
Attorneys for Plaintiff/Appellant

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PRIOR OR RELATED APPEALS

Pursuant to Tenth Circuit Rule 28.2(c)(1), Appellants state that there are no prior or related appeals.

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I. JURISDICTIONAL STATEMENT

Subject matter jurisdiction is invoked under 28 U.S.C. § 1332, because the matter in controversy exceeded $75,000 and the parties were citizens of different states. Both parties submitted to the jurisdiction of the U.S. District Court for the District of Kansas. (Aplt. App. Vol. 1 at 20.) Plaintiffs are residents of the State of Kansas. Defendant is a foreign insurance company organized and existing under the laws of the State of Massachusetts with its principal place of business being in Boston Massachusetts. Complete diversity exists.

The Court of Appeals has jurisdiction pursuant to Rule 3 of the Federal Rules of Appellate Procedure 28 USC § 2107. This is an appeal from the District Court on a judgment entered by the Court following argument on competing summary judgment motions. The Notice of Appeal was filed in a timely manner.

The District Court entered judgment on behalf of Defendant against Plaintiffs on July 15, 2020. On August 14, 2020 the plaintiffs filed their Notice of Appeal to Tenth Circuit Court of Appeals Rule 4(a)(1)(A).

This appeal is from the final judgment that disposes of all the parties' claims.

II. STATEMENT OF ISSUES

A. Liberty Mutual's Motion For Summary Judgment should have been denied.

1. Liberty Mutual's Motion For Summary Judgment should have been denied because there was a dispute as to a material fact.

2. Liberty Mutual's Motion For Summary Judgment should have been denied because no reasonable prudent insured (ordinary person) would apply the intentional loss exclusion to the facts of this case.

3. Liberty Mutual's Motion For Summary Judgment should have been denied because the language used to restrict or limit coverage is not clear and is uncertain.

4. Liberty Mutual's Motion For Summary Judgment should have been denied because the language relied upon by Defendant is ambiguous.

5. Liberty Mutual's Motion For Summary Judgment should have been denied because the *Thomas* test does not apply to an exclusion for intentional loss.

B. Taylors' Motion For Summary Judgment should have been granted.

1. Taylors' Motion For Summary Judgment should have been granted because the language relied upon to limit or restrict coverage was not clear, not certain, and was ambiguous.

2. Taylors' Motion For Summary Judgment should have been granted because Liberty Mutual breached the contract.

3. Taylors' Motion For Summary Judgment should have been granted because Liberty Mutual breached its duty of good faith and fair dealing.

III. STATEMENT OF CASE

Christina and Donald Taylor (hereinafter "Taylors) owned a home at 301 S. Summit Street, El Dorado, Kansas. (Aplt. App. Vol. 1 at 21, ¶ 1.) The Taylors 18 year old daughter, Zoe, was living with her parents. (Aplt. App. Vol. 1 at 21, ¶ 4.)

Earlier in the day, August 30, 2018, Zoe argued with her father. When her parents were gone Zoe used a lighter to burn a blanket on her father's side of the bed. She did this to upset her father, not to cause a loss. Zoe stated that she did not intend to start a fire and before the fire damaged anything other than the blanket she believed she had extinguished the fire. (Aplt. App. Vol. 1 at 21, ¶s 1 and 5; p.123:7-8; p.150.)

Realizing a fire was spreading, Zoe went outside and called the fire department. Initially, Zoe denied starting the fire. (Aplt. App. Vol. 1 at 21-22, ¶s 7 and 8.) Later, Zoe admitted that "she wasn't planning on starting the fire and got scared once the fire got started." When Zoe was asked if she did it on purpose she said "she intended to burn the blanket on her dad's side of the bed for fun, because she was upset with him," then after putting the fire out and leaving the room she realized the fire was not out. (Aplt. App. Vol. 1 at 21, ¶s 1 and 5; p.123:7-8; p.150.)

As a result of the damage caused by the fire the Taylors made a claim for coverage under a homeowner's insurance policy issued by Defendant.[1] The policy issued was Policy No. H35-243-176345-40 with effective dates of October 16, 2017 through October 16, 2018. (Aplt. App. Vol. 1 at 222, ¶s 9 and 105.) A complete copy of the policy and declarations can be found at Aplt. App. Vol. 1 at 74 – 118.

The fire caused extensive damage to the Taylors' home. By letter dated September 20, 2018 sent to the El Dorado Police Department, Liberty Mutual admitted that the damage was $220,000. (Aplt. App. Vol. 1 at 136:12 – 140:13; p.141:14 – 19; p.156.)

Upon notice of the loss Liberty Mutual began adjusting the loss and advanced some funds to the Taylors. (Aplt. App. Vol. 1 at 22, ¶ 13.) During the adjustment process Liberty Mutual became aware of the following facts:

- Zoe had medical problems;
- Zoe was on Prozac or similar medication;
- Zoe was being treated with seizure medication related to a form of epilepsy;
- Zoe was taking mind-altering medication;
- Zoe had been hospitalized for 15 days the month before the fire started and

[1] Liberty Mutual Insurance Company and LM Insurance are separate legal entities. Liberty Mutual owns 100% of the stock of LM Insurance. Both companies use the trade name "Liberty Mutual." Defendant/Appellee will be referred to as "Liberty Mutual."

was taking new medications;

- the Taylors were concerned about Zoe's mental state; and,
- Donald did not believe Zoe's acts in starting the fire were intentional because of her mental illness.

(Aplt. App. Vol. 1 at 131:12 – 15; p.124:25 – 126:4; p.154 – 155; 124:25 – 126:4; p.152 -153; p.134:7 – 135:1; p.144:22 – 25; p.150.)

With the knowledge of Zoe's problems and without conducting any investigation into Zoe's mental state or reviewing any of Zoe's medical records, Liberty Mutual's representative called Christina Taylor on September 21, 2018 and told her the claim was being denied. (Aplt. App. Vol. 1 at 132:20 – 133:12; p.142:7 – 23.) The phone call was followed up with a letter dated September 28, 2018, stating that "the policy does not provided coverage" because of "an incendiary fire that was set by Zoe Taylor." The letter provided no facts to support Zoe intended to cause the insured loss. (Aplt. App. Vol. 1 at 119 – 121.)

Following the denial of the claim Liberty Mutual failed to complete the adjustment of the loss and did not fulfill its obligation pursuant to the "mortgage clause." (Aplt. App. Vol. 1 at 127:13 – 130:25; p.143:18 – 21.) As of August 21, 2019 the Liberty Mutual adjuster handling the claim had not done anything to settle the claim with the mortgage holder. (Aplt. App. Vol. 1 at 122:10 – 15 and p.143:18 – 21.)

A review of the pertinent and applicable provisions in the policy (Aplt. App. Vol. 1 at 75 – 118.) will show:

1. The "Named Insured" is identified as "Christina Taylor" and "Donald Taylor" for premises located at 301 S. Summit St, El Dorado, Kansas. "You" is defined in the policy as being the "named insured."

(Aplt. App. Vol. 1 at 75, 80, and 101.)

2. The definition of "Insured" includes residents of the household who are relatives of the named insureds. This includes children of any age.

(Aplt. App. Vol. 1 at 80.)

3. The policy provided broad coverage to a direct loss to the dwelling, other structures, and personal property by reason of fire unless excluded by the policy.

(Aplt. App. Vol. 1 at 85.)

4. The exclusion Liberty Mutual is relying upon in this case states:

> 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. 1 at 87.)

5. Liberty Mutual agrees to adjust all losses with the named insured when it sets out unequivocally:

10. Loss Payment. We will adjust all losses with you.

(Aplt. App. Vol. 1 at 89.)

6. The policy also contains a "Mortgage Clause." If Liberty Mutual denies the claim of the "Named Insured" it will not apply to a valid claim of a mortgagee and any payment will be made to the mortgagee and the named insured.

(Aplt. App. Vol. 1 at 89.)

7. The "Mortgagee" is identified as "Wells Fargo Bank."

(Aplt. App. Vol. 1 at 76.)

Following the entry of a pretrial conference order the parties filed motions for summary judgment. Following oral argument the Court ruled. (Aplt. App. Vol. 1 at 6 – 8.) On July 15, 2020 the court denied the Taylors' motion and granted Liberty Mutual's motion, entering judgment against the Taylors and in favor of Defendant. (Aplt. App. Vol. 1 at 220 – 237; also attached hereto.) The Taylors filed a timely Notice of Appeal. (Aplt. App. Vol. 1 at 238 – 239.) The issues being presented for review are those addressed in the competing motions for summary judgment.

IV. SUMMARY OF ARGUMENTS

The Taylors purchased a home for their family. They also purchased insurance for their home to protect them from financial devastation in the event their home suffered significate damage due to fire, tornado, lighting, hail, etc. Taylors' 18 year old daughter did something childish because she was mad at her father resulting in a fire that caused extensive damage to the Taylors' home.

Approximately 21 days after reporting the loss, Liberty Mutual denied the claim because Zoe started the fire. The denial was not based upon an "intentional acts" exclusion as previously addressed by the Kansas Supreme Court. The denial was based upon an "intentional loss" exclusion not previously addressed by the Kansas Supreme Court.

A succinct, clear, and accurate statement of the arguments are:

A 1. Liberty Mutual's motion for summary judgment should have been denied because the facts of this case and reasonable inferences construed in the light most favorable to the Taylors are inconsistent with the District Court's finding that Zoe intended to case a loss. There exist facts to support a finding that Zoe did not intend to cause a loss.

A 2. Liberty Mutual's motion for summary judgment should have been denied because no ordinary person would understand that he purpose and intent of the Liberty Mutual homeowner's insurance 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 the home.

A 3. Liberty Mutual's motion for summary judgment should have been denied because no ordinary person would find the language used by Liberty Mutual in the "intentional loss" exclusion to clearly or certainly limit or restrict coverage when a child gets mad at a parent and does something foolish that results in fire damage to the home.

A 4. Liberty Mutual's motion for summary judgment should have been denied because the language used by Liberty Mutual in the "intentional loss" exclusion is ambiguous because without adding or inferring additional language ("covered property" and/or "insured") it is capable of unlimited and conflicting construction/interpretation. With the addition of the descriptive language the exclusion is capable of two distinctly different interpretations.

A 5. Liberty Mutual's motion for summary judgment should have been denied because the District Court's application of the test the Kansas Supreme Court used when addressing an "intentional acts" exclusions was not proper when addressing Liberty Mutual's "intentional loss" exclusion.

B 1. Taylors' motion for summary judgment on the coverage issue should have been granted because the "intentional loss" exclusion in the Liberty Mutual

policy contained language that was unclear, uncertain, and ambiguous in understanding and application by an ordinary person.

B 2. Taylors' motion for summary judgment on the breach of contract issue should have been granted because the undisputed facts show that Liberty Mutual breached its contractual obligation to provide coverage, conduct a good faith investigation by diligently searching for evidence which supports Taylors' claim, adjust the loss, and pay the mortgage holder.

B 3. Taylors' motion for summary judgment on the breach of contract issue should have been granted because the undisputed facts show that Liberty Mutual was negligent and such negligence was a breach its contractual obligations of good faith and fair dealing when it failed to conduct a good faith investigation by diligently searching for evidence which supports Taylors' claim, adjust the loss, and pay the mortgage holder.

V. ARGUMENTS AND AUTHORITIES

Standard of Review.

An appellate court reviews the grant of a motion for summary judgment de novo. *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The court is to construe all facts and make reasonable inferences in the light most favorable to the nonmoving party. *Mauldin v. Worldcom, Inc.*, 263 F.3d 1205, 1211 (10th Cir. 2001). The nonmoving party may not, however, rely solely on its pleadings but must set forth specific facts showing that there is a genuine issue for trial with regard to those dispositive matters for which it carries the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986).

A federal court sitting in diversity applies the substantive law of the forum state. *Commerce Bank, N.A. v. Chrysler Realty Corp.*, 244 F.3d 777, 780 (10th Cir. 2001). This Court's standard is to review this matter de novo applying Kansas law. *Mincin v. Vail Holdings, Inc.*, 308 F.3d 1105, 1108 (10th Cir. 2002) ("A federal court sitting in diversity applies the substantive law of the forum state."); see also 28 U.S.C. § 1652.

A. Liberty Mutual's Motion For Summary Judgment should have been denied.

1. Liberty Mutual's Motion For Summary Judgment should have been denied because there was a dispute as to a material fact.

This issue was raised Aplt. App. Vol. 1 at 58. This issue was ruled upon Aplt. App. Vol. 1 at 234.

The record shows that, when construing all facts and reasonable inferences in a light most favorable to the Taylors, Zoe did not intend to cause a loss. Zoe only intended to make her dad mad by causing damage to his blanket.

Fire is used each and every day in many different ways. Examples would be cooking, candles, fireplaces, tobacco, campfires, incineration, etc. For an insurance company, court, or attorney to determine that since fire was not used in a manner that they determine acceptable violates the requirement that all facts and reasonable inferences be construed in the light most favorable to the Taylors. *Mauldin* at 1211.

Instead of finding fire to be "inherently dangerous," the Court should have construed the facts in a manner that describes Zoe being upset and intending only to use lighter to burn a portion of a blanket, then she was negligent because she did not completely extinguishing the fire, resulting in damage to the Taylors' home. Whether Zoe intended to cause a loss is a question of fact for the jury.

To apply the Kansas Supreme Court's ruling regarding "intentional acts" leads to an incorrect result in this case. Liberty Mutual relies upon the holding in the case of *Thomas v. Benchmark Ins. Co.*, 285 Kan. 918, 179 P.3d 421 (2008). That case and holding involves an intentional acts exclusion, not an intentional loss exclusion. *Id*. at 921 ["**bodily injury** caused intentionally"].

The actions of the individuals involved in the *Thomas* case are significantly different than the actions of the individuals in the case at hand. In the *Thomas* case all three individuals, who were killed or seriously injured in the car accident, were involved in a fight, a shooting, and running from police. In *Thomas*, the portion of the policy exclusion at issue was with regard to liability coverages, where the policy specifically states a "bodily injury caused *intentionally* by you or any family member or at any family member's direction," is excluded. This language is significantly different from exclusionary language relied upon by Liberty Mutual in this case.

In its opinion in *Thomas*, the Kansas Supreme Court starts out its review with this statement: "Kansas public policy prohibits insurance coverage for intentional acts: "[A]n individual should not be exempt from the financial consequences of his own intentional injury to another." *Shelter Mut. Ins. Co. v. Williams*, 248 Kan. 17, 28, 804 P.2d 1374 (1991); see *Spruill Motors, Inc. v. Universal Underwriters Ins. Co.*, 212 Kan. 681, 696, 512 P.2d 403 (1973)." *Id*. at 922. In this case, Zoe is not attempting to recover for the financial consequences of her intentional acts. The severe financial consequences were caused to the Taylors, the named insureds, who had procured and paid for the insurance coverage. The Taylors obtained the coverage so that if they sustained a loss from a

fire, not intended by them to cause an insured loss, they would have the financial ability to repair their home.

The new test in *Thomas* was not correctly applied by the District Court. The test established in *Thomas* moved away from the "natural and probable consequences" test when evaluating intentional act exclusions in insurance policies. The new test was more in line with the majority and requires the insured to have intended to both act and cause some kind of injury or damage. If the intent to cause damage is inferred then the consequences must be substantially certain to result from the act. *Thomas* at 933.

The Kansas Supreme Court did not make this change in a vacuum. The Court described its purpose and provided information for the application of the test when it stated:

> This revised test for intentional injury also helps reduce some of the confusion associated with using "natural and probable consequences" in other contexts, e.g., determining proximate cause in simple negligence. It further helps to put "intentional" injury in its rightful place on the scale for measuring severity of conduct. See Comment b to Restatement (Second) of Torts § 8A ("**If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. As the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes mere recklessness**, as defined in § 500. As the probability decreases further, and amounts only to a risk that the result will follow, it becomes ordinary negligence, as defined in § 282."); cf. *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 127 S. Ct. 2201, 167 L.Ed.2d 1045 (2007) (recklessness, a lesser standard of conduct

> than intentional, requires running a risk substantially greater than the risk making the conduct merely negligent or careless, citing, inter alia, Restatement [Second] of Torts § 500, p. 587 [1963-1964])

Thomas at 934 (Emphasis added.). Clearly the Court intended the test to take into account both the ordinary person standard and the state of mind of actor. As more specifically described later in this brief the "ordinary person" is not a lawyer, judge, or insurance professional. The explanation by the Kansas Supreme Court advises "substantially certain" is to be applied to the actor and not in a vacuum.

There is a question of fact whether an ordinary person or Zoe would be "substantially certain" that damaging a blanket with fire and believing is was extinguished would result in extensive damage to the house.

2. Liberty Mutual's Motion For Summary Judgment should have been denied because no reasonable prudent insured (ordinary person) would apply the intentional loss exclusion to the facts of this case.

This issue was raised Aplt. App. Vol. 1 at 63. This issue was ruled upon Aplt. App. Vol. 1 at 225.

For many years, the Kansas Legislature, Kansas Case Law, and public policy have recognized that due to the nature of the insurance industry, policyholders/named insureds, require protection because of their inequitable bargaining position. *Spencer v. Aetna Life & Casualty Ins. Co.*, 227 Kan. 914, 611 P.2d 149, 926 (1980). As the named insureds the Taylors had no power whatsoever to negotiate the terms of their insurance contract.

There is no reason to believe that the Taylors, even after reading the insurance policy, would have had any idea that if one of their children started a fire in their home, that the insurance policy, upon which they had paid a premium for years, would not afford coverage.

In the case of *Geer v. Eby*, 309 Kan. 182, 432 P.3d 1001 (2019), the court has clearly set out the rules for construction of an insurance policy when it stated:

> This court applies the following rules of construction when interpreting the terms of an insurance policy.
>
> > The language of an insurance policy, like any other contract, must, if possible, be construed in such way as to give effect to the intention of the parties. In construing a policy of insurance, a court should consider the instrument as a whole and endeavor to ascertain the intention of the parties from the language used, taking into account the situation of the parties, the nature of the subject matter, and the **purpose to be accomplished**.
> >
> > Because the insurer prepares its own contracts, it has a duty to make the meaning clear. **If the insurer intends to restrict or limit coverage under the policy, it must use clear and unambiguous language; otherwise, the policy will be liberally construed in favor of the insured**. If an insurance policy's language is clear and unambiguous, it must be taken in its plain, ordinary, and popular sense. In such case, there is no need for judicial interpretation or the application of rules of liberal construction. The court shall not make another contract for the parties and must enforce the contract as made.
> >
> > However, **where the terms of an insurance policy are ambiguous or uncertain, conflicting, or susceptible of more than one construction, the**

> **construction most favorable to the insured must prevail.**
>
> To be ambiguous, a contract must contain provisions or language of doubtful or conflicting meaning, as gleaned from a natural and reasonable interpretation of its language. Ambiguity in a written contract does not appear until the application of pertinent rules of interpretation to the face of the instrument leaves it genuinely uncertain which one of two or more meanings is the proper meaning.
>
> Whether a written instrument is ambiguous is a question of law to be decided by the court. Courts shall not strain to create an ambiguity where, in common sense, there is not one. The test in determining whether an insurance contract is ambiguous is not what the insurer intends the language to mean, but what a reasonably prudent insured would understand the language to mean. [Citations omitted.] *American Family Mut. Ins. Co. v. Wilkins*, 285 Kan. 1054, 1058-59, 179 P.3d 1104 (2008) (quoting *O'Bryan v. Columbia Ins. Group*, 274 Kan. 572, 575-76, 56 P.3d 789 [2002]).

Id at 192-93. (Emphasis added.)

The Kansas Supreme Court has specifically said that "[t]he test to determine whether an insurance contract is ambiguous is not what the insurer intends the language to mean, but what a reasonably prudent insured would understand the language to mean." *Farm Bur. Mut. Ins. Co. v. Winters*, 248 Kan. 295, Syl. p 1, 806 P.2d 993 (1991). A reasonable prudent insured is not a lawyer, judge, or insurance professional. "A contract of insurance should not be construed through the magnifying eye of the technical lawyer but rather from the standpoint of what

an ordinary [person] would believe it to mean." *Wheeler v. Employer's Mutual Casualty Co.*, 211 Kan. 100, 104-05, 505 P.2d 768 (1973).

In general, a reasonably prudent insured (ordinary person) would understand the "intentional loss" provision in an insurance policy clearly means that an insured cannot intentionally cause damage to a home so that the insurance company will pay to upgrade the home, remodel the home, or pay off a delinquent loan secured by the home. Similarly, an ordinary person would not understand that if they had children or mentally challenged relatives being careless with fire, insurance coverage would be denied if the fire was not properly controlled or extinguished and caused extensive damage to their home.

The purpose to be accomplished by parents in having insurance for fire damage to their home is to protect themselves from the financial devastation if one of their children or a mentally challenged relatives make a mistake with fire. The number of ways children have caused fire damage to a home could fill volumes. Even the most loving, caring, and diligent parents are not able protect themselves without insurance.

The common sense reading of the policy, the purpose, terms, and intention of the parties would be to insure the named insured from all losses that were not intentionally caused by or as directed by the named insured and to protect the property from youthful inattention, ignorance, other unintended consequences of a

child's actions, or the actions of a mentally challenged relative. Only the technical eye of a lawyer, judge, or insurance professional would apply the language of the policy to exclude coverage when a child or a mentally challenged relative start a fire without the intention of causing damage to the home. Liberty Mutual admitted during oral argument that the language they have used in the intentional loss exclusion would exclude coverage if small children were playing with fire (a lighter) damaging personal property and innocently caused damage to the home. (Aplt. App. Vol. 1 at 261:1 – 263:4.)

In this particular case, the named insureds did nothing wrong. They allowed their 18 year old challenged daughter to live in their home. Yet, they are suffering extreme financial hardship due to the fact that their daughter, who did not intend to cause a loss, wanted to make her father mad because she was upset. Liberty Mutual has stipulated that Zoe's intention was to upset her father. After damaging the blanket she believed she extinguished the fire when Zoe realized her error, she called the fire department. Clearly this shows that Zoe did not intend to damage her parents' home.

The District Court in this case acknowledged that based upon the facts its ruling seemed unfair. (Aplt. App. Vol. 1 at 236.) The Kansas Supreme Court has previously construed language applicable to an insured's right to recover in a manner to prevent a "harsh" result. *Hephner v. Traders Ins. Co.*, 254 Kan. 226,

235, 864 P.2d 674 (1993). In *Hephner* the Kansas Supreme Court acknowledged that the language requiring an insured to prove an economic impact would prevent a recovery of benefits when the insured was fortunate enough to have loving, caring relatives preventing the economic impact and did not enforce the language. *Id*. Such a ruling exemplifies that we could expect the Kansas Supreme Court to find the purpose of home insurance is not for coverage to be excluded because of the mischief of the parents' children.

3. Liberty Mutual's Motion For Summary Judgment should have been denied because the language used to restrict or limit coverage is not clear and is uncertain.

This issue was raised Aplt. App. Vol. 1 at 63. This issue was ruled upon Aplt. App. Vol. 1 at 228.

As previously set out, if an insurer intends to restrict or limit coverage under a policy it must do so with clear language that is not uncertain to an ordinary person in its application. *Geer* at 192. Liberty Mutual admitted during oral argument that the language used in the intentional loss exclusion is not clear and is uncertain.

Liberty Mutual admitted during oral argument that the intentional loss exclusion is only applicable to covered property. (Aplt. App. Vol. 1 at 244:22 – 245:15.) The intentional loss exclusion does not clearly tell the ordinary person that the exclusion "any loss" is limited to covered property. If an ordinary person

needs to add language to understand the insurance companies attempt to limit or restrict coverage, then the language is not clear.

Liberty Mutual admitted during oral argument that the intentional loss exclusion's applicability is dependent upon whether you intend to cause a loss to other covered property when the property (a candle) is used for its intended purpose. (Aplt. App. Vol. 1 at 246:7 – 247:19.) Personal property is described in the policy as "personal property owned or used anywhere in the world." (Aplt. App. Vol. 1 at 81.) Therefore, personal property that is intended to be exposed to fire (i.e. food, tobacco products, firewood, candles, etc.) could be intentionally damaged by fire that spreads and cause unintended damage and the resulting damage would be covered. However, if the same personal property is not used for its intended purpose, the loss is excluded. (Aplt. App. Vol. 1 at 247:6 – 15 [light wrong end of candle].)

The intentional loss exclusion does not clearly tell the ordinary person that "any act" or "intent to cause a loss" is dependent on the character of the property or use of the property. If an ordinary person needs to infer the character of the property or use of the property to understand the insurance companies attempt to limit or restrict coverage, then the language is not clear and is uncertain.

Liberty Mutual admitted during oral argument that the application of the intentional loss exclusion is dependent upon the location of the covered property

the insured intends to damage. (Aplt. App. Vol. 1 at 248:22 – 249:6; p.252:9 – 15; p.253:8 – 22.) Liberty Mutual's admitted that if Zoe had burnt a portion of her father's blanket outside, negligently extinguished the blanket, and then taken the blanket inside resulting in the house fire/damage there would be coverage. Since Zoe burnt a portion of her father' blanket inside, negligently extinguished the blanket resulting in house fire/damage Liberty Mutual claims there is no coverage. This is neither clear nor certain from the language Liberty Mutual relies upon to limit or restrict coverage.

Liberty Mutual admitted during oral argument that the application of the intentional loss exclusion needs to include the words "any loss [to covered property]." (Aplt. App. Vol. 1 at 244:22 – 245:15.) This is an admission that Liberty Mutual's exclusion is not clear or certain.

The Taylors submit that when an insurance company needs to add language to the exclusion for an ordinary person to understand its meaning then the limitation/restriction fails because it is not clear and is uncertain.

4. Liberty Mutual's Motion For Summary Judgment should have been denied because the language relied upon by Defendant is ambiguous.

This issue was raised Aplt. App. Vol. 1 at 64. This issue was ruled upon Aplt. App. Vol. 1 at 230.

The intentional loss exclusion in the Liberty Mutual policy states:

> "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. 1 at 87.) The language in the Liberty Mutual policy does not limit its application to an insured loss. Instead it states, "any loss." Liberty Mutual has admitted that the overbroad language is intended to be limited to "insured property." (Aplt. App. Vol. 1 at 244:22 – 245:15.)

Since "loss" is not defined in the policy the word must be given its ordinary meaning. *Brumley v. Lee*, 265 Kan. 810, Syl. 6, 963 P.2d 1224 (1997) [Where the term is not defined in the policy, it must be interpreted in its usual, ordinary, and popular sense.]. "Loss" as applicable to this case means: the act of losing possession; decrease in amount, magnitude, or degree; destruction ruin; the amount of an insured's financial detriment by death or damage that the insurer becomes liable for. Merriam-Webster's Collegiate Dictionary 736 (11th ed. 2020).

The language in the Liberty Mutual policy does not require the act to be intentional. Instead it states, "any act." So "any act" [i.e. cooking, lighting a candle, burning wood in a fire place, placing flammable material on a hot surface, storing flammable liquid next to the furnace, etc.] resulting in "any loss" would meet the requirement of the first element if it was done by or at the direction of any insured. This overbroad statement is capable of limitless examples showing lack of clarity, uncertainness, and different interpretations.

Only the second element of the intentional loss exclusion requires "intent." To meet the second element of the exclusions the act must be committed "with the intent to cause a loss." As previously stated the word "loss" is not defined in the policy. With the admissions previously discussed (inference or insertion of language) there are two clear and distinctly different applications of the phrase "[w]ith intent to cause a loss."

One interpretation is "[w]ith intent to cause a loss *to insured property*." In such case any time an insured intended to damage, destroy, or decrease the value of insured property there would be no coverage. This interpretation would mean Zoe, intending to damage only the blanket, regardless of any other circumstance (where, how, or why) there is no coverage if other property is damaged. [where: anywhere in the world; how: fire, water, knife, gun, freezing; why: mad at father, exposed to disease, proper to incinerate (flag or religious article).

The second interpretation is "[w]ith intent to cause *an insured* loss," then an insured would have to intend to damage, destroy, or decrease the value of insured property greater than the policy deductible. An insured loss would be a loss that exceeds the policy deductible. (Aplt. App. Vol. 1 at 75 -76 [losses to dwelling and personal property are only covered if they exceed the $1,000.00 deductible].) This interpretation would mean, Zoe, intending only to damage blanket, with a value

less than the deductible, regardless of any other circumstance, there would be coverage.

In this case the undisputed facts and all reasonable inferences show that Zoe only intended to cause damage to a blanket. Since it is reasonable to assume that the value of the blanket was less than the deductible the intentional loss exclusion is not grounds to deny coverage to the Taylors.

The language used and arguments made by Liberty Mutual show that the words "any loss," "any act," and phase "[w]ith the intent to cause a loss" make Liberty Mutual capable of denying all claims for a loss to anything, whether intentional or unintentional, that results in any harm (because it can be inferred that all acts intend to cause some change that could arguably be defined as harm) would be grounds for excluding coverage based upon the intentional loss exclusion. This is not clear, certain, or capable of only one interpretation to the ordinary person and gives Liberty Mutual the sole discretion on what is excluded.

5. Liberty Mutual's Motion For Summary Judgment should have been denied because the *Thomas* test does not apply to an exclusion for intentional loss.

This issue was raised Aplt. App. Vol. 1 at 68. This issue was ruled upon Aplt. App. Vol. 1 at 228.

This argument is partially addressed in section A 1 of this brief and will not be repeated.

Application of the rule set out in the *Thomas* case is erroneous because that case deals with and "intentional acts" exclusion instead of the distinctly different "intentional loss" exclusion in the Liberty Mutual policy. The *Thomas* test applies to an exclusion that excludes coverage because of an insured's intention related to physical actions. The Liberty Mutual policy excludes coverage for an insured's intentions related to "a loss."

Intent is not defined in the policy so the word must be given its ordinary meaning. *Brumley* at Syl. 6. "Intent" as applicable to this case means: the act or fact of intending; purpose; the state of mind with which an act is done; clearly formulated or planned intention. Merriam-Webster's Collegiate Dictionary 651 (11th ed. 2020).

Liberty Mutual's exclusion specifically encompasses "any act" regardless of the intentions (careless, negligent, gross negligence, etc.) Therefore Zoe's state of mind regarding the act is not applicable. It is Zoe's state of mind regarding the loss. The first part of the *Thomas* test and "inferring a state of mind" without any other facts should not play any part in the analysis of the exclusion.

The application of the exclusion is Zoe's "intent to cause a loss." An ordinary person applying the ordinary meaning of the words means that Liberty Mutual does not limit "any act" therefore the nature of the act is not (and cannot)

be used to infer the intentions of the insured. Whether Zoe intended to cause a loss is a question of fact. Zoe's state of mind is a question of fact.

B. Taylors' Motion For Summary Judgment should have been granted.

1. Taylors' Motion For Summary Judgment should have been granted because the language relied upon to limit or restrict coverage was not clear, not certain, and was ambiguous.

This issue was raised Aplt. App. Vol. 1 at 63 and 64. This issue was ruled upon Aplt. App. Vol. 1 at 228 and 230.

Taylors incorporate by reference the arguments and authorities set out in previous sections A3 and A4.

When an insurance company does not provide clear, certain, and unambiguous exceptions or limitations to coverage the construction of the policy the court must apply is the one most favorable to the insured. *Geer* at 192 [Where the terms of an insurance policy are ambiguous or uncertain, conflicting, or susceptible of more than one construction, the construction most favorable to the insured must prevail.]. Therefore the Taylors should have been granted summary judgment with a finding that the policy provided coverage for the damage caused by the fire.

2. Taylors' Motion For Summary Judgment should have been granted because Liberty Mutual breached the contract.

This issue was raised Aplt. App. Vol. 1 at 69. This issue was ruled upon Aplt. App. Vol. 1 at 231.

Liberty Mutual has a contractual obligation to fully investigate a claim before refusing to pay. (Aplt. App. Vol. 1 at 89 [We will adjust all losses with you.].) Included in the contractual duty to adjust a claim is "… a duty to make a good-faith investigation of the facts before refusing to pay. Good faith on the part of the insurer implies honesty, fair dealing and **adequate information**. [Citation omitted.]" (Emphasis added.) *Foster v. Stonebridge Life Ins. Co.*, 50 Kan. App. 2d 1, 28-29, 327 P.3d 1014 (2012).

> Implicit in the duty to investigate is the requirement that the investigation be adequate and fair. Adequacy and fairness means the insurer has a duty to **diligently search for evidence which supports insured's claim** and not merely seek evidence upholding its own interests. 14 Couch on Insurance § 207:25, p. 207-41 (3rd ed. 2005).

Id. (Emphasis added.)

In this case the insurance adjuster handling the claim for Liberty Mutual was made aware of facts regarding Zoe's medical problems, medication that included mind-altering medicines, recent treatment, and mental health concerns. Despite having this information, Liberty Mutual did not undertake any investigation whatsoever to determine Zoe's mental state, state of mind, or whether or not she would have had the state of mind necessary to "intend" for a loss to occur based on her actions.

The undisputed facts and all reasonable inferences support a finding that Liberty Mutual was on notice that any alleged "presumption" may be overcome by the facts disclosed in a diligent search for evidence which supported Taylors' claim. Clearly Liberty Mutual failed to conduct an adequate or fair investigation because it did not "search for evidence which supports insured's claim." *Id*. Instead, Liberty Mutual "merely [sought] evidence upholding its own interests. *Id*.

The District Court imposed an obligation on the Taylors to obtain and provide Liberty Mutual Zoe's medical records. In doing so, the Court overlooked the fact that Zoe was 18 years old and the Taylors had no better access to the records than Liberty Mutual. The only reasonable inference to be drawn from the failure of the Taylors to provide medical records was that Christina or the Liberty Mutual adjuster were mistaken in believing Christina had full access to Zoe's medical records[2] and the Taylors were not able to obtain the cooperation of Zoe before the claim was denied. The claim was denied only 14 days after the discussion regarding Zoe's medical records. (Aplt. App. Vol. 1 at 152.)

The law in the State of Kansas is clear, when an insurer seeks to avoid liability under its policy on the ground that the circumstances fall within an exception set out in the policy, the burden is on the insurer to establish the facts

[2] A person is no longer a minor in Kansas at the age of 18. K.S.A. 38-101. As such the person's parents are no longer authorized to access their child's medical records. K.S.A. 60-427; K.S.A. 74-5323; 42 U.S.C. § 1320d-6.

which bring the case within the specified exception. *Pacific Indem. Co. v. Berge*, 205 Kan. 755, 473 P.2d 48 (1970). Liberty Mutual breached the contract because it failed to conduct any investigation into the Zoe's state of mind regarding her intent to cause the loss. Whether a contract has been breached is an issue of fact and question for the jury. *City of Topeka v. Watertower Place Development Group*, 265 Kan. 148, 153, 959 P.2d 894 (1998). *Gregory v. Harrison*, 191 Kan. 481, 382 P.2d 470 (1963).

The policy issued to the Taylors contained a mortgage clause. Liberty Mutual breached the mortgage clause provision of the policy because of its failure and refusal to resolve the matter pursuant to the mortgage clause. The mortgage clause obligates Liberty Mutual to pay any loss payable under Coverage A [dwelling] even if the claim is denied to the Taylors. (Aplt. App. Vol. 1 at 89.) The general purpose of a mortgage clause is for there to be funds available to repair the property and protect both the mortgagor and mortgagee. See *Robinson v. Breuniger*, 152 Kan. 644, 107 P.2d 688 (1940).

Based upon the language in the mortgage clause it could be argued that Liberty Mutual is obligated to make the payment to both the mortgage holder and the Taylors as named insured. Regardless, it is clear that Liberty Mutual had a contractual obligation to pay funds to the mortgage holder. Liberty Mutual clearly

breached the contract by failing to pay the mortgage holder which caused damage to the Taylors (delay in repairing home and increased living costs).

The occurrence of the breach is an undisputable fact because the insurer has an obligation to initiate settlement of claims and make good faith efforts to resolve claims for the benefit of its insured. See *Smith v. Blackwell*, 14 Kan. App. 2d 158, 163, 791 P.2d 1343 (1989) citing *Rector v. Husted*, 214 Kan. 230, 519 P.2d 634 (1974). Liberty Mutual breached its contractual obligation when it made no attempt to settle the claim between September 21, 2018 (date of denial) and August 21, 2019 (date of adjuster's deposition). The duty exists to prevent insurer from hiding, delaying, or claiming that they can wait until a claim is presented despite knowledge that the money is owed.

A close examination of the mortgage clause will show that Liberty Mutual's obligation to pay is not contingent on any obligation of the insured or mortgage holder to act with the exception of: 1) notice – which was not applicable; 2) pay premium – which was not applicable; or, 3) submit a proof of loss – which was not applicable. (Aplt. App. Vol. 1 at 89.) The proof of loss matter was not applicable because the requirement for the Taylors to submit a proof of loss was waived by Liberty Mutual. *Winchel v. The National Fire Insurance Company*, 129 Kan. 225, 229, 282 P. 571 (1929) [When an insurance company denies a loss they waive the requirement that a proof of loss be submitted.]. Since Liberty Mutual

denied the claim on September 21, 2019 and never requested a proof of loss from the Taylors it would not be appropriate for Liberty Mutual to notify the mortgage holder that the Taylors failed to submit a proof of loss.

Liberty Mutual knew that they denied the claim September 21, 2018 and did absolutely nothing to pay the mortgage claim through August 21, 2019. There existed no contractual obligation for the Taylors to act or the mortgage holder to act. There existed a clear contractual obligation for Liberty Mutual to pay.

3. Taylors' Motion For Summary Judgment should have been granted because Liberty Mutual breached its duty of good faith and fair dealing.

This issue was raised Aplt. App. Vol. 1 at 69. This issue was ruled upon Aplt. App. Vol. 1 at 235.

A breach of contract claim arises from the failure to perform a duty arising from or imposed by an agreement. A tort is a violation of a duty imposed by law. *David v. Hett*, 293 Kan. 679, Syl. 4, 270 P.3d 1102 (2011). When you have contractual obligation imposed by law, as opposed to the specific terms of the contract, the claims sound in negligence. The Kansas Supreme Court adopted a test derived from a decision by the Washington Supreme Court. The test is:

> When an act complained of is a breach of specific terms of the contract, without any reference to the legal duties imposed by law upon the relationship created thereby, the action is in contract, but where there is a contract for services which places the parties in such a relation to each other that, in attempting to perform the promised service, a duty imposed by law as a result of the contractual relationship between the parties is violated through an act which

> incidentally prevents the performance of the contract, then the gravamen of the action is a breach of the legal duty, and not of the contract itself.

Malone v. University of Kansas Medical Center, 220 Kan. 371, 375-76, 552 P.2d 885 (1976); *David v. Hett*, 293 Kan. 679, 270 P.3d 1102 (2011) (breach of contract is a failure to perform a duty arising by agreement and a tort is a violation of a duty imposed by law); citing *Tamarac Dev. Co. v. Delamater, Freund & Assocs.*, 234 Kan. 618, 619-20, 675 P.2d 361 (1984); *Pancake House, Inc. v. Redmond*, 239 Kan. 83, 85, 716 P.2d 575 (1986); *KPERS v. Reimer & Koger Assocs., Inc.*, 262 Kan. 110, 113, 936 P.2d 714 (1997). In this case Liberty Mutual's breach of good faith and fair dealing (investigate, settle, and pay) can sound in tort. Therefore, negligence can be a breach. Whether a duty has been breached is a question of fact for the jury. *Lay v. Kansas Dept. of Transportation*, 23 Kan.App.2d 211, 215, 928 P.2d 920 (1996), *rev. denied* 261 Kan. 1085 (1997).

Liberty Mutual's claim that an insurance company's "negligence" cannot be a breach of contract is without merit. As previously set out, an insurance company has a contractual obligation to fully investigate a claim before refusing to pay. That includes a duty to make a good faith investigation of the facts before refusing to pay. *Foster* at 28-29. Liberty Mutual's failure to conduct any investigation into Zoe's "intent to cause a loss" is also a breach of its obligation of good faith and fair dealing. No reasonable consideration of the undisputed facts and reasonable

inferences can conclude that the failure to speak to Zoe or review any medical information fulfilled the obligation to search for evidence to support the Taylors' claim. Pursuant to the Kansas Supreme Court, "[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." *Covill v. Phillips*, 542 F.Supp. 224, 226 (D.Kan.1978); *Bollinger v. Nuss*, 202 Kan. 326, 332, 449 P.2d 502 (1960); *Smith v. Blackwell*, 14 Kan. App. 2d 158, 791 P.2d 1343 (1989).

As previously set out, Liberty Mutual had the duty to have evidence proving the exclusion applied before refusing to pay the claim. In this case, the investigation Liberty Mutual did conduct only showed that Zoe was simply a disgruntled 18 year old daughter, who out of anger used a lighter to cause limited damage to her father's blanket. If Liberty Mutual had fulfilled its duty to conduct a good faith investigation it would have looked at Zoe's medical history and interviewed Zoe. A good faith investigation was necessary to acquire adequate information to obtain the necessary facts to prove Zoe intended to cause an insured loss. A good faith investigation would have revealed that Zoe did not have the necessary intent or state of mind to form the "intent to cause a loss" as set out in the insurance policy.

Liberty Mutual can set out no evidence in its possession, prior to denying the claim, of Zoe's "intent to cause a loss." The mere assumption, presumption, or

hope that evidence can be acquired if the insured brings suit is not fulfilling its duty. See *Smith* at 163 – 164 [All the good faith and settlement offers in the world after suit is filed will not immunize a company from the consequences of an unjustified refusal to pay which made the suit necessary.] citing *Sloan v. Employers Casualty Ins. Co.*, 214 Kan. 443, 444, 521 P.2d 249 (1974).

This duty of good faith and fair dealing includes the Liberty Mutual's duty to settle. The breach was specifically described in the previous section. This was also a breach of the duty of good faith and due care. The breach of the duty of good faith and due care renders an insurer liable for the full amount of the insured's loss. *Covill* at 226.

There is further support that the duties described in this section exist and are questions of fact. The Kansas Uniform Trade Practices Act (KUTPA) imposes duties upon an insurance company in connection with fulfilling its contractual obligations that are consistent with the duties previously set out herein. Specifically, K.S.A. 40-2404(9)(a)-(g) sets out the obligations. The undisputed facts and reasonable inferenced from the facts show that specific unfair claim settlement practices referenced in the statute that were violated by Liberty Mutual are: (a) misrepresentation of the applicability of the exclusion and existence of a legal opinion, (c) failing to adopt and implement standards for prompt and complete investigations, (d) refusing to pay a claim without a reasonable

investigation, and, (f) not attempting to effectuate prompt, fair, and equitable settlement. *Id*. This is further support that Liberty Mutual has duties, if not fulfilled (negligently or intentionally), support the breaches previously argued by the Taylors.

The Taylors acknowledge that the KUTPA does not create a private cause of action. However the KUTPA is evidence of the minimum industry standards that, if not fulfilled, would be a breach of contract. See *Pullen v. West*, 278 Kan. 183, 92 P.3d 584 (2004). These duties are further support of the Taylors claim that Liberty Mutual's negligence in performing its duties are grounds for relief because they are breaches of the contract.

VI. CONCLUSION

Based upon the undisputed facts, arguments, authorities, and oral argument, Christina and Donald Taylor request that this Court reverse the District Courts grant of judgment in favor of Liberty Mutual, find that the policy does provided coverage to the Taylors, find that Liberty Mutual has breached the contract, and remand this matter to the District Court for further proceedings.

VII. REQUEST FOR ORAL ARGUMENT

Plaintiffs, Christina Taylor and Donald Taylor respectfully request oral argument in this matter because as was made clear from the oral argument before

the District Court, the lack of clarity, uncertainty, and ambiguous nature of Liberty Mutual's "intentional loss" exclusion is best shown by the Court's opportunity to ask questions of counsel on both sides. Additionally because of the unlimited number of fact scenarios that could be applied to the policy language it would be best for counsel to have the opportunity to answer questions. Allowing oral argument will ensure an appropriate disposition of this case.

Respectfully submitted,

s/ Kevin M. McMaster
Kevin M. McMaster, #11903
Attorneys for Plaintiffs/Appellants
McMaster & McMaster LLC
P.O. Box 2684
Wichita, Kansas 67201-2684
(316) 263-4281
kmm@mcmasterlaw.com

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief exceeds 30 pages but as no more than 13,000 words. The brief contains 8,563 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in the proportionally spaced typeface using Microsoft Word 2013 (15.0.537.1000) MSO (15.0.537.1001) 32 bit Part of Microsoft Office 365 ProPlus, in 14-point type, Times New Roman.

s/ Kevin M. McMaster
Kevin M. McMaster, #11903
McMaster & McMaster LLC
Attorneys for Plaintiffs/Appellants
P.O. Box 2684
Wichita, Kansas 67201-2684
kmm@mcmasterlaw.com
(316) 263-4281

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of July, 2021, I filed the forgoing Brief of Appellant using the CM/ECF system with will send a notice of electronic filing to the following:

Bruce A. Moothart, Esq.
SEYFERTH BLUMENTHAL & HARRIS L.L.C.
4801 Main Street, Suite 310
Kansas City, Missouri 64112
Attorneys for Appellee

I hereby certify that on the 9th day of July, 2021, I mailed or served the forgoing Brief of Appellant by first class mail, postage pre-paid to the following:

Not applicable.

July 9, 2021

s/ Kevin M. McMaster

Kevin McMaster
McMaster & McMaster LLC
Attorneys for Plaintiffs/Appellants
P.O. Box 2684
Wichita, Kansas 67201-2684
kmm@mcmasterlaw.com
(316) 263-4281

Attachment No. 1

MEMORANDUM AND ORDER

ECF. 76
Filed July 15, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CHRISTINA TAYLOR and
DONALD TAYLOR,

Plaintiffs,

v. Case No. 19-1030-JWB

LM INSURANCE CORPORATION,

Defendant.

MEMORANDUM AND ORDER

This case comes before the court on the parties' motions for summary judgment. (Docs. 56, 64.) The motions have been fully briefed and are ripe for decision. (Docs. 57, 63, 67, 70.) The court held oral argument on the motions on June 25, 2020. Defendant's motion is GRANTED and Plaintiffs' motion is DENIED for the reasons stated herein.

I. Uncontroverted Facts

Plaintiffs Christina and Donald Taylor own a home located at 301 S. Summit Street, El Dorado, Kansas ("the property"). Plaintiffs purchased a homeowner's insurance policy ("the policy") from Defendant LM Insurance Corporation for the property and were the named insureds under the policy. Under the terms of the insurance policy, an insured includes members of the family of the named insureds residing at the property. Plaintiffs' daughter, Zoe, was living at the property with Plaintiffs. Zoe was an insured under the policy.

The policy has two sections. Section one covers property and section two includes liability coverages. In section one, there are four types of coverages: 1) coverage for the dwelling ("coverage A"); 2) coverage for other structures ("coverage B"); 3) coverage for personal property ("coverage C"); and 4) coverage for loss of use ("coverage D"). (Doc. 28, Exh. 1.) With respect

to coverages A and B, the policy states that Defendant "insure[s] against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to property." (*Id.* at 6 of 16.) With respect to coverage C, the policy states that Defendant "insure[s] for direct physical loss to the property described in Coverage C caused by a peril listed below unless the loss is excluded…." (*Id.*) The policy contains an exclusion for intentional loss.

On August 30, 2018, the property suffered significant damage due to a fire which originated from the bedspread in Plaintiffs' bedroom. The fire spread from the bed and caused damage to other areas of the property. Zoe was inside the property at the time the fire began. Zoe was angry with her father due to an argument they had earlier in the day. Because she wanted to upset her father, Zoe used a lighter to ignite the bedspread. Zoe attempted to put the fire out but was unable to do so. Zoe went outside and called the fire department. Although Zoe initially denied starting the fire, she later admitted her involvement. On September 5, 2018, Zoe told Detective Sergeant Sam Humig of the El Dorado Police Department that she intended to burn the blankets and she got scared once the fire started. (Doc. 63 at 4; Exh. 4.)

Plaintiffs made a claim for coverage under the policy. After receiving notice of the loss, Defendant began adjusting the loss and advanced funds to Plaintiffs. On September 5, Donald Taylor informed Defendant's adjuster, Sandra Reiser, that Zoe was taking Prozac and seizure medicine. On September 7, Christina Taylor advised Reiser that Zoe was on medication for seizures, had previously been hospitalized in July 2018 for seizures, was taking new medication, and that Zoe was going to undergo a psychological evaluation. (Doc. 63 at 4-5.) Donald Taylor had also told Defendant's investigator that he believed Zoe's actions were unintentional due to her mental illness. (Doc. 63, Exh. 3 at p. 71.) On September 21, Reiser advised Christina Taylor by phone that Defendant was denying the claim. At that time, Defendant had not spoken with Zoe or

reviewed her medical records. On September 28, Defendant issued a letter stating that coverage for the loss was denied on the basis that the policy excludes coverage for intentional loss and Defendant determined that Zoe set the fire to the bedspread in the master bedroom.

Plaintiffs filed this action against Defendant asserting that Defendant breached its agreement to provide coverage for the loss. Both parties have now moved for summary judgment.

II. Summary Judgment Standards

Summary judgment is appropriate if the moving party demonstrates that there is no genuine dispute as to any material fact, and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A fact is "material" when it is essential to the claim, and the issues of fact are "genuine" if the proffered evidence permits a reasonable jury to decide the issue in either party's favor. *Haynes v. Level 3 Commc'ns*, 456 F.3d 1215, 1219 (10th Cir. 2006). The movant bears the initial burden of proof and must show the lack of evidence on an essential element of the claim. *Thom v. Bristol—Myers Squibb Co.*, 353 F.3d 848, 851 (10th Cir. 2004) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986)). The nonmovant must then bring forth specific facts showing a genuine issue for trial. *Garrison v. Gambro, Inc.*, 428 F.3d 933, 935 (10th Cir. 2005). Conclusory allegations are not sufficient to create a dispute as to an issue of material fact. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). The court views all evidence and reasonable inferences in the light most favorable to the nonmoving party. *LifeWise Master Funding v. Telebank*, 374 F.3d 917, 927 (10th Cir. 2004).

III. Analysis

Plaintiffs claim that Defendant breached its agreement to insure Plaintiffs by failing to pay the claim and failing to reasonably investigate the claim. Plaintiffs and Defendant have both moved for summary judgment. Defendant moves for summary judgment on the basis that

Plaintiffs cannot recover under the policy because the undisputed facts show that Zoe intentionally started the fire and, as a result, the claim is excluded under the intentional loss provision in the policy. Plaintiffs move for summary judgment on the basis that the intentional loss provision does not exclude the claim and that Defendant failed to reasonably investigate the claim by not investigating Zoe's mental health.

The parties agree that the policy and Kansas law govern this action. In this case, the parties present conflicting positions on the interpretation of the terms in the policy. The interpretation of the policy is a question of law for this court. *See First Fin. Ins. Co. v. Bugg*, 265 Kan. 690, 694, 962 P.2d 515, 519 (1998). In construing the policy, the court should consider the policy as a whole and construe it in a way that will give effect to the parties' intent. *Am. Family Mut. Ins. Co. v. Wilkins*, 285 Kan. 1054, 1058, 179 P.3d 1104, 1109 (2008) (citation omitted). If the policy language is unambiguous, the court must take the unambiguous language "in its plain, ordinary, and popular sense." *Id.* If language in the policy is ambiguous, the court construes the terms in favor of the insured. *Id.* "The test in determining whether an insurance contract is ambiguous is not what the insurer intends the language to mean, but what a reasonably prudent insured would understand the language to mean." *Id.* at 1110. "Ambiguity in a written contract does not appear until the application of pertinent rules of interpretation to the face of the instrument leaves it genuinely uncertain which one of two or more meanings is the proper meaning." *Gerdes v. Am. Family Mut. Ins. Co.*, 713 F. Supp.2d 1290, 1296 (D. Kan. 2010) (citing *Catholic Diocese of Dodge City v. Raymer*, 251 Kan. 689, 693, 840 P.2d 456 (Kan. 1992)).

In determining whether the claim is covered under the policy, the insured bears the burden of proving that the claim falls within the policy. *Magnus, Inc. v. Diamond State Ins. Co.*, 101 F. Supp.3d 1046, 1054 (D. Kan. 2015). The insurer then has the burden to prove that an exclusion in

the policy precludes coverage of the claim. *Id.* "Generally, exceptions, limitations, and exclusions to insurance policies require narrow construction on the theory that the insurer, having affirmatively expressed coverage through broad promises, assumes the duty to define any limitations on that coverage in clear and explicit terms." *Miller v. Westport Ins. Corp*., 288 Kan. 27, 37, 200 P.3d 419, 426 (2009) (citation omitted).

A. Intentional Loss Exclusion

In this case, there is no dispute that the policy provides coverage for property damage due to fire. (Doc. 28, Exh. 1, policy at p. 6 of 16.) Property damage is covered under section one of the policy. The policy also includes exclusions under section one. Defendant denied coverage on the basis that the intentional loss provision under section one excluded coverage for the claim. That provision stated the following:

> 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.

Id. at 8 of 16.

Defendant argues that this provision excludes the property loss claim by Plaintiffs because it is undisputed that Zoe is an insured and that she intended to set fire to the bedspread. Plaintiffs argue that the intentional loss provision is ambiguous.

Initially, Plaintiffs assert that a 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." (Doc. 63 at 9.) Plaintiffs argue that a reasonable person would not assume that coverage would be denied if a child set fire to the home. This court is required to interpret the policy according to its terms. "Insured" is defined in the policy as you (the named insureds) and members of the household who are relatives of the named insureds. (Doc. 28, Exh. 1, policy at p. 1 of 16.) It is undisputed that Zoe is an insured. The term "insured" is not ambiguous and Plaintiffs offer no authority to support their position that an intentional acts provision is only applicable to the named insureds.

Next, the parties spend a majority of time interpreting the second part of the exclusion, the "intent to cause a loss." Plaintiffs argue that the term "loss" is ambiguous, and that the intention of the parties was for the language to mean the "intent to cause an [*insured*] loss." (Doc. 63 at 12) (emphasis supplied). Plaintiffs argue that this reading is a common sense reading of the policy because otherwise the exclusion would bar someone who burned down their home after disposing of leaves in a burn barrel. Plaintiffs also argue that a Kansas Supreme Court case regarding intentional acts, *Thomas v. Benchmark Ins. Co.*, 285 Kan. 918, 933, 179 P.3d 421, 431 (2008), is not applicable to this action. Defendant asserts that Plaintiffs' interpretation is not found anywhere in the policy and that the term "loss" means a physical loss to covered property. (Doc. 67 at 14.) During oral argument, defense counsel stated that loss and damage were interchangeable so that physical loss to covered property also means physical damage to covered property.

What is a loss under the policy?

The term loss is not defined in this policy. "[T]he fact that an insurance policy does not define each term within it does not somehow make an undefined term ambiguous; ambiguity arises only if language at issue is subject to two or more reasonable interpretations and its proper meaning is uncertain." *Newcap Ins. Co. v. Employers Reinsurance Corp.*, 295 F. Supp. 2d 1229, 1240 (D.

Kan. 2003) (citing *Harmon v. Safeco Ins. Co.*, 24 Kan. App.2d 810, 816, 954 P.2d 7, 11 (1998)). Although Defendant suggests that loss means physical loss to property, quoting from the policy, Defendant's proposed definition includes the very term that it is defining. The issue is whether the word "loss" is ambiguous in the policy. It is only ambiguous if it is subject to more than one definition. The parties' proposed definitions do not define the word "loss" in two or more reasonable interpretations. Rather, they are defining "loss" by modifying the word "loss." During the hearing, defense counsel further suggested that loss and damage are interchangeable. Reviewing the policy, it is clear that there are different categories or types of losses. The policy refers to loss of property, loss by theft, loss of use, physical loss, direct loss to property described, and several other references to a loss. (*See* Doc. 28, Exh. 1.) The policy also refers to loss in discussing a loss that is not covered by the policy. For example, the policy covers smoke damage but "does not include loss caused by smoke from agricultural smudging or industrial operations." (*Id*. at 5 of 16.) There are also several references to a loss that is not covered even though the peril identified is typically covered. *See id.*

This court has previously interpreted the term "loss" in the context of an insurance policy. In doing so, the court turned to Black's Law Dictionary. Black's defines the term "loss" as "[a]n undesirable outcome of a risk; the disappearance or diminution of value, [usually] in an unexpected or relatively unpredictable way." *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*, 625 F. App'x 906 (10th Cir. 2015) (citing BLACK'S LAW DICTIONARY, loss (elec. 9th ed.2009)). This definition is reasonable in reading the policy as a whole. A loss is the disappearance or diminution of value. The parties' suggestions in their briefs as to the definition of loss do not actually define the term loss but are incorporating that term into another meaning. Moreover, the parties' suggested definitions do not

result in an ambiguity in the policy. The term "loss" in the policy means that an insured has incurred a disappearance or diminution of value in property covered under the policy. A "loss" would then occur when there has been damage to that covered property as the value of the property is diminished when it has been damaged. Absent any competing reasonable construction of the term "loss," the court cannot conclude that the policy is ambiguous. *See Gerdes*, 713 F. Supp. 2d at 1296.

In their brief, Plaintiffs argue that the ambiguity is clear because the exclusion would apply to a home fire loss if a homeowner was intentionally burning leaves outside and the fire spread resulting in accidental property damage to the home. Plaintiffs argue that the homeowner's loss would be excluded because of the intentional act of harming the leaves. The court's interpretation of loss, however, would not result in an ambiguity. Leaves are not property that is covered under the policy. Moreover, a loss does not occur when a homeowner burns leaves because the homeowner has not suffered a disappearance or diminution of value in property when he burns leaves. Therefore, under such a scenario, the homeowner did not intend to cause a loss as the term has been interpreted by the court. During oral argument, in response to several scenarios, defense counsel argued that any intentional act of setting fire to personal property, not leaves or other items that are intended to be burned such as a candle, would fall under the exclusion. Defense counsel reasoned that the burning of personal property is a loss under the policy because the personal property has been damaged as a result of the intentional burning.

Reading the policy as a whole, a loss under the exclusion is a disappearance or diminution of value in the insured's property. The interpretation is not unreasonable.

What is required to show that Zoe *intended* to cause a loss?

The Kansas Supreme Court has set forth the standard to evaluate an intentional act exclusion in an insurance policy in *Thomas v. Benchmark Ins. Co.*, 285 Kan. 918, 933, 179 P.3d 421, 431 (2008). The court held that "the 'intentional act' or 'intentional injury' exclusion test in Kansas should be as follows: The insured must have intended both the act and to cause some kind of injury or damage. Intent to cause the injury or damage can be actual or it can be inferred from the nature of the act when the consequences are substantially certain to result from the act." *Id.* Notably, the court also indicated that "it is not essential [] that the harm be of the same character and magnitude as that intended." *Id.* (citations omitted).

Plaintiffs argue that *Thomas* is inapplicable as it was a case involving an intentional injury, not property damage. During oral argument, Plaintiffs' counsel argued that an intentional loss provision is different from an intentional injury or intentional act provision. Plaintiffs, however, provide no authority that would support that the interpretation of "intent" is different in an insurance policy that excludes coverage due to an intentional loss. *Thomas* expressly held that the new test was applied to intentional acts or intentional injury. 179 P.3d at 431. Although there does not appear to be a Kansas case interpreting this type of intentional loss provision, other jurisdictions have utilized the standard applicable to intentional acts and/or injury in interpreting what is necessary to determine whether an insurer acted with intent. *See Postell v. Am. Family Mut. Ins. Co.*, 823 N.W.2d 35, 42–43 (Iowa 2012) (interpreting same provision at issue here after an intentional fire and stating that the "intent of an individual to cause an injury may be 'actual or may be inferred by the nature of the act and the accompanying reasonable foreseeability of harm.'") (citation omitted)). Moreover, although the provision at issue is titled intentional loss, the provision is applicable to intentional acts that result in an intentional loss. As such, it is an

exclusion based on an intentional act. *See id.* (discussing the intentional loss provision as an intentional act provision).

Besides arguing that *Thomas* is inapplicable, Plaintiffs do not suggest another test to determine intent. Kansas has consistently rejected a requirement that the insured have a specific intent to cause the injury that ultimately occurred from an intentional act. *See Spivey v. Safeco Ins. Co.*, 254 Kan. 237, 245, 865 P.2d 182, 187 (1993), *holding modified by Thomas*, 179 P.3d 421.

Therefore, the court finds that the test in *Thomas* is applicable to the policy in this case which excludes coverage for an intentional loss arising out of any act by an insured with the intent to cause the loss. It is undisputed that Zoe intended to cause damage to the bedspread by lighting it on fire. Zoe's actions in lighting the fire were intentional as she wanted to make her father upset. Zoe also admitted to the investigator that she intended to burn the bedspread and did it for fun.[1] Contrary to Plaintiffs' contention, Kansas law does not require Defendant to prove that Zoe intended to burn down the house. All that is required is the intent to cause some damage (or, as applied to the policy, a loss). *Thomas*, 179 P.3d at 431. The policy then excludes any loss, which would include the damages to the house, because Zoe, an insured, intended to cause a loss. Other jurisdictions applying the exclusion have upheld the denial of coverage. *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) (finding no ambiguity in "intent to cause a loss" and holding that an insured "must simply have intended to set the fire, regardless of whether he intended the house to burn down," when interpreting the provision "intent to cause loss."); *S.C. Farm Bureau Mut. Ins. Co. v. Kelly*, 345 S.C. 232, 241, 547

[1] Even if intent was in dispute, intent may be inferred by the circumstances. *Thomas*, 179 P.3d at 431. Zoe was upset and wanted to make her father upset by setting fire to the bed in the property. Setting a fire in a home, without that fire being controlled in a fireplace or controlled by some other method, is likely to cause damage to the home. Therefore, in the alternative, faced with the undisputed facts before the court, Zoe's intent to cause damage by starting the fire can be inferred.

S.E.2d 871, 876 (Ct. App. 2001); *Deeter v. Indiana Farmers Mut. Ins. Co.*, 999 N.E.2d 82, 85 (Ind. Ct. App. 2013); *Smith v. Am. Family Mut. Ins. Co.*, 2007 WL 2728277, ¶¶ 26-29, 740 N.W.2d 901 (Wisc. Ct. App. Sept. 20, 2007) (finding the provision unambiguous and holding that the "intentional loss exclusion applies if Antoinette intended the act that caused the loss, i.e., setting fire to the curtains, regardless of whether Antoinette intended to cause the total loss of the home.")

Plaintiffs make several references to Zoe's mental health and argue that she was unable to form the requisite intent. The uncontroverted facts, however, are that Zoe intended to burn the blankets. Moreover, "[i]n Kansas, sanity is also presumed until the contrary is established." *Shelter Mut. Ins. Co. v. Williams By & Through Williams*, 248 Kan. 17, 29, 804 P.2d 1374, 1383 (1991), *holding modified by Thomas*, 179 P.3d 421 (citing *Miller v. Hudspeth*, 164 Kan. 688, Syl. ¶ 8, 192 P.2d 147 (1948)). Plaintiffs have the burden of proof to rebut the presumption of sanity and intent by introducing evidence to show that Zoe's mental condition prevented her from forming the necessary intent. *Id.* Plaintiffs have not done so. The facts only establish that Zoe was on medication, she had been hospitalized for seizures, and she was going to be evaluated. Plaintiffs have not attempted to introduce any facts that she was unable to form intent. Therefore, Plaintiffs have not rebutted the presumption of sanity.

B. Application of Intentional Loss Provision

The court finds that the intentional loss provision is unambiguous. That provision precludes coverage for any loss if that loss arises out of any act committed by an insured with the intent to cause a loss. Zoe is an insured under the policy. Based on the undisputed facts, Zoe intentionally set fire to the bedspread to upset her father.[2] As a loss has been interpreted to mean a disappearance or diminution of value, the court finds that the damage to the bedspread is a loss.

[2] Plaintiffs assert that intent is disputed. However, Plaintiffs' proposed facts state that "Zoe admitted to the investigating officer that she intended to burn blankets on her dad's side of the bed." (Doc. 63 at 4.)

Therefore, Zoe intentionally caused a loss. The resulting loss of approximately $200,000 to other parts of the property arose out of the fire set to the bedspread. Accordingly, that loss is excluded under the policy. Because the policy excludes any loss that arises of out an act committed by "an insured," the policy does not permit Plaintiffs to recover under the policy. *See Pink Cadillac*, 925 P.2d at 458 ("The parties cite numerous cases on whether an innocent coinsured is entitled to coverage. In *Catholic Diocese of Dodge City v. Raymer*, 16 Kan. App.2d 488, 493, 825 P.2d 1144, *aff'd* 251 Kan. 689, 840 P.2d 456 (1992), this court concluded that '[a]n insured' or 'any insured' refers to any and all insureds under the policy. Accordingly, since Staab was an insured under the policy and the language of the concealment clause refers to 'an insured,' Pink Cadillac and Quan are precluded from coverage.") Therefore, Defendant is entitled to summary judgment on the claim of breach of contract for failing to pay on the claim. Plaintiffs' motion for summary judgment on this claim is denied.

C. Severability Clause

Plaintiffs argue that even if the intentional loss provision is not ambiguous by its terms, the severability clause in the policy creates an ambiguity. Defendant argues that the severability clause only applies to personal injury coverage and not to property damage.

In the policy, there are two sections. Section one includes property coverages and section two includes liability coverages. Section two includes coverage for personal liability and medical payments to others. Both sections have subsections setting forth exclusions. In section two's exclusions, the policy states as follows: "2. Severability of Insurance. This insurance applies separately to each 'insured.' This condition will not increase our limit of liability for any one 'occurrence.'" (Doc. 28, Exh. 1 at 14 of 16.) Plaintiffs assert that the presence of the severability clause renders the language "an insured," contained in the intentional loss provision, ambiguous.

Therefore, Plaintiffs contend that the intentional loss provision must be applied separately to each insured allowing Plaintiffs to recover under the policy.

In *Raymer*, the Kansas Supreme Court addressed the question of whether a severability clause, which stated that "this insurance applies separately to each insured," rendered the language of "an insured" in the intentional acts provision ambiguous. 840 P.2d at 459. The court held that the "insertion into the policy of a severability of interests clause made ambiguous the otherwise unambiguous language of the exclusion for intentional acts by an insured." *Id.* at 462. In this case, Plaintiffs assert that the severability clause renders the intentional loss provision ambiguous. The severability clause, however, is contained in section two. Defendant argues that the clause is only applicable to the coverages in section two and does not apply to the coverages and exclusions in section one.

In support of Plaintiffs' position, Plaintiffs point to *Pink Cadillac Bar & Grill, Inc. v. U.S. Fid. & Guar. Co.*, 22 Kan. App. 2d 944, 950, 925 P.2d 452, 457 (1996). In that case, the court held that a severability clause that was contained in the general liability section did not apply to actions to enforce property coverage. In so holding, the court looked at the language in the policy, including language immediately preceding and following the severability clause. Plaintiffs argue that *Pink Cadillac* is distinguishable from this case because there is "no language from which a reasonable insured could be expected to understand that the severability clause was limited to liability coverage." (Doc. 63 at 14.) The court disagrees.

Reading the policy as a whole, it is clear that the severability clause is only applicable to the coverages contained in section two. First, the severability clause is contained within a section titled "Section II - Conditions." (Doc. 28, Exh. 1, at 14 of 16.) The heading clearly distinguishes the conditions as being applicable to section two. Moreover, section one has its own subsection

titled "Section I - Conditions." There is also a section titled "Sections I and II - Conditions" that, by its heading, is applicable to the coverages in both sections one and two. (*Id.* at 15.) Next, the language in the first paragraph of the conditions for section two is titled "Limit of Liability." (*Id.* at 14.) Reviewing the language in that paragraph, it is only applicable to the coverages under section two by its terms. This paragraph discusses limits for liability under coverage E (personal liability) and coverage F (medical payments to others). Turning to the language in the severability of insurance provision, it limits the condition by stating that this will not increase the limit of liability for any one "occurrence." (*Id.*) The use of the term "occurrence" is significant because "occurrence" is used in the policy when referring to the coverage under section two. Specifically, there is coverage for bodily injury or property damage "caused by an occurrence." (*Id.* at 11.) The term "occurrence" does not occur in section one. Finally, the subsection immediately following the severability of insurance discusses the insured's "Duties After Loss." It begins by saying, "in case of an accident or 'occurrence,' the insured" has to undertake certain steps. (*Id.* at 14.) This paragraph is notable for a couple of reasons. First, it refers to an "occurrence" instead of loss. Second, a similar paragraph is contained under "Section I - Conditions." That paragraph notes that an insured has certain duties in "case of a loss to covered property." (*Id.* at 8.)

Reading the policy as a whole, it a clear that the section two conditions, which include the severability clause, are only applicable to the coverages in section two. *See Pink Cadillac Bar & Grill, Inc.*, 925 P.2d at 457. Therefore, the severability clause cannot create an ambiguity in the intentional loss provision that is contained in the section one exclusions.

D. Duty to Investigate

Plaintiffs also contend that Defendant breached the contract by failing to investigate the claim in good faith. Defendant asserts that Plaintiffs cannot succeed on this claim as the policy

does not provide coverage under the intentional loss provision and that Defendant does not owe any additional duties under the contract. Under Kansas law, an insurer is required to act in good faith in investigating the claim. *Foster v. Stonebridge Life Ins. Co.*, 50 Kan. App. 2d 1, 27, 327 P.3d 1014, 1032 (2012). In determining whether the insurer acted in good faith, the court is to look at the circumstances when the claim is denied. *Id.* At the time of the denial, Defendant had been informed by Plaintiffs that they believed that their daughter did not intentionally start the fire because of her mental condition. Defendant was also told she was on medication and had been hospitalized for seizures. Defendant was also provided with the record from the investigator detailing his interviews with Zoe. As set forth in the facts, Zoe told the investigator that she intended to burn the bedspread because she was mad at her father.

As stated previously, although an insurer has the burden to show that an exclusion applies, Plaintiffs have the burden to rebut the presumption of sanity. *Williams*, 804 P.2d at 1383. As discussed above, the evidence submitted does not support a finding that Zoe did not act with the requisite intent. Plaintiffs have set forth no evidence of Zoe's diagnosed mental condition that would affect her mental capacity.[3] "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." *Sec. Ins. Co. of Hartford v. Wilson*, 800 F.2d 232, 235 (10th Cir. 1986). Importantly, Plaintiffs have failed to identify any facts that would be discovered through investigation that would have resulted in a determination that Zoe was unable to form intent. Rather, the facts presented are the same facts that were already disclosed to Defendant during the pendency of the claim, which included the fact that Zoe intended to burn the bedspread to upset her father. "This case is, therefore, not

[3] In review of the claim notes, the record states that Plaintiffs were going to provide medical information to Defendant within a week of September 7, 2018. (Doc. 63, Exh. 5.) The claim records do not indicate that medical records and/or additional information were received or reviewed by Defendant and Sandra Reiser testified in her deposition that they did not receive medical records. (Doc. 63, Exh. 3 at 89.)

about a failure to perform an adequate fact investigation." *See Wichita Firemen's Relief Ass'n v. Kansas City Life Ins. Co*., 237 F. Supp.3d 1135, 1141 (D. Kan. 2017), *aff'd*, 737 F. App'x 865 (10th Cir. 2018) (facts are the same as they were at the time of the denial of the claim) (citing *Farm Bureau Insurance Co. v. Carr*, 215 Kan. 591, 598, 528 P.2d 134, 140 (1974)).

E. Negligent Breach

Plaintiffs also assert that Defendant was negligent in investigating the claim and assert this as a claim for negligent breach of contract. Plaintiffs do not cite any authority for the proposition that Kansas law provides for a claim of negligent breach of contract. There is no separate action for "negligent breach of contract." *Marshel Investments, Inc. v. Cohen*, 6 Kan. App.2d 672, 683, 634 P.2d 133, 142 (1981). "[I]f there is a breach of contract, 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." *Id.*

The court has already determined that Defendant did not breach the contract; therefore, Defendant's motion for summary judgment on Plaintiffs' claim for negligent breach of contract is granted.

F. Mortgage Claim

Plaintiffs also contend that Defendant breached the contract by failing to resolve the matter pursuant to the mortgage clause. Under that clause, a denial of a claim does not apply to a valid claim of the mortgagee. The policy states as follows:

> If we deny your claim, that denial will not apply to a valid claim of the mortgagee, if the mortgagee:
>
> a. Notifies us of any change in ownership, occupancy or substantial change in risk of which the mortgagee is aware;

> b. Pays any premium due under this policy on demand if you have neglected to pay the premium; and
> c. Submits a signed, sworn statement of loss within 60 days after receiving notice from us of your failure to do so. Policy conditions relating to Appraisal, Suit Against Us and Loss Payment apply to the Mortgagee.

(Doc. 28, Exh. 1 at 10 of 16.)

Although Plaintiffs argue that Defendant breached this provision in the policy by failing to pay the loss to the mortgagee or effectuating a prompt settlement, Plaintiffs have not suggested that the mortgagee made a claim as required under the policy. Rather, Plaintiffs' statement of facts merely identifies Wells Fargo as the mortgagee. Defendant cites to Plaintiffs' depositions which suggest that Wells Fargo was still investigating and presumably waiting for the outcome of the litigation. (Doc. 67 at 27.) Because Plaintiffs have not established that Wells Fargo submitted a claim as required by the policy, Plaintiffs cannot show that Defendant breached this provision.

IV. Conclusion

This is a difficult case because, in many ways, the outcome seems unfair. Plaintiffs are undisputedly innocent insureds. Plaintiffs have been paying their insurance premiums and, as any insured, would expect that a fire loss would be covered under a policy. The circumstances of this case make the loss all the more bitter because it was caused by Plaintiffs' own child. However, in order to allow this case to proceed to trial, the court would have to be able to instruct a jury that the intentional loss provision must be interpreted in a manner that might allow the jury to find for Plaintiffs under the facts of this case. Plaintiffs argue that the exclusion only applies if Zoe intended to cause an insured loss, (Doc. 63 at 11-12), but that interpretation would still require a defense verdict because the bedspread was clearly personal property covered under coverage C of the policy; thus, under Plaintiffs' proposed interpretation, the undisputed facts still show that Zoe intended to cause an insured loss thereby barring coverage under the exclusion. Accordingly, in

order to allow this case to go to a jury, the court would have to interpret the exclusion as requiring Defendant to show that Zoe acted with the intent to cause Defendant to pay out money for a covered loss under the policy. The court concludes that the language of the exclusion simply cannot be stretched that far. The court is required to enforce the policy according to its terms, and under Kansas law those terms compel the result reached herein.

Defendant's motion for summary judgment (Doc. 56) is therefore GRANTED and Plaintiffs' motion (Doc. 64) is DENIED. The clerk is directed to enter judgment in favor of Defendant.

IT IS SO ORDERED this 15th day of July, 2020.

s/ John W. Broomes
JOHN W. BROOMES
UNITED STATES DISTRICT JUDGE

Attachment No. 2

JUDGMENT

ECF. 77
Filed July 15, 2020

United States District Court

---------- DISTRICT OF KANSAS----------

CHRISTINA TAYLOR,
DONALD TAYLOR,

Plaintiff,

v. **Case No: 19-1030-JWB**

LM INSURANCE CORPORATION,

Defendant,

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a jury trial. The issues have been tried and the jury has rendered its verdict.

☒ Decision by the Court. This action came before the Court. The issues have been considered and a decision has been rendered.

Pursuant to the Memorandum and Order filed on July 15, 2020, judgment is granted in favor of Defendant.

July 15, 2020
Date

TIMOTHY M. O'BRIEN
CLERK OF THE DISTRICT COURT

by: s/ Joyce Roach
Deputy Clerk