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NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 2019AP488
(L.C. No. 2013CV2875)

STATE OF WISCONSIN IN SUPREME COURT

Kemper Independence Insurance Company,

Plaintiff-Respondent,

v.

Ismet Islami,
Defendant-Appellant-Petitioner.

REBECCA GRASSL BRADLEY, J., delivered the majority opinion of the Court, in which ZIEGLER, C.J., ROGGENSACK, and HAGEDORN, JJ., joined. KAROFSKY, J., filed a dissenting opinion in which ANN WALSH BRADLEY and DALLET, JJ., joined.

(Filed Jun. 8, 2021)

REVIEW of a decision of the Court of Appeals. *Affirmed*.

¶1 REBECCA GRASSL BRADLEY, J. Ismet Islami seeks review of the court of appeals decision[1] affirming the Waukesha County Circuit Court's grant of summary judgment in favor of Kemper Independence Insurance Company (Kemper) denying coverage to Ismet for the loss of her home.[2] Ydbi Islami, from whom Ismet is legally separated, intentionally set fire to the home. All parties stipulated that Ydbi concealed facts from Kemper about his involvement in the fire with the intent to deceive, and Kemper relied upon Ydbi's concealment and fraud to its detriment. The circuit court ruled the "concealment or fraud" condition in Kemper's insurance policy covering the home ("the Policy") barred coverage for Ismet's claims. The court of appeals agreed that the Policy did not provide coverage as a result of Ydbi's conduct and affirmed the circuit court's decision.

¶2 Ismet raises three arguments. First, Ismet contends that, given her legal separation from Ydbi, Ydbi is not her spouse and therefore not an "insured" for purposes of the Policy. Second, Ismet argues the Policy's "concealment or fraud" condition is ambiguous, conflicts with the Policy's "intentional loss" exclusion, and therefore does not bar coverage. Third, Ismet asserts she is an innocent insured and the victim of domestic abuse, thereby requiring Kemper to provide coverage under Wis. Stat. § 631.95(2)(f)'s domestic

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[1] Kemper Indep. Ins. Co. v. Islami, 2020 WI App 38, 392 Wis. 2d 866, 946 N.W.2d 231.

[2] The Honorable Judge William J. Domina, Waukesha County Circuit Court, presided.

abuse exception to a property insurer's intentional act exclusion.

¶3 We hold: (1) Ydbi is an insured under the terms of the Policy, both under the plain language of the insurance contract and because Wisconsin's marriage laws recognize Ydbi as Ismet's spouse; (2) the Policy's "concealment or fraud" condition precludes coverage for Ismet – a conclusion unaffected by the Policy's "intentional loss" exclusion; and (3) Wis. Stat. § 631.95(2)(f) does not apply because the record lacks any evidence showing Ydbi's arson constituted "domestic abuse" against Ismet, as statutorily defined. Accordingly, we affirm the decision of the court of appeals.

I. BACKGROUND

¶4 Ismet and Ydbi married in 1978. In 1988, Ydbi was convicted of a number of crimes, including stalking and sexual assault of a minor, involving victims other than Ismet. Following these incidents, Ismet initially sought a divorce from Ydbi but, for religious reasons, obtained a legal separation instead. As part of the separation, which occurred in 1998, both parties entered into a Marital Settlement Agreement, under which Ismet received sole ownership of their home in Oconomowoc, although Ismet and Ydbi continued to live in the home together. Neither party proceeded with a divorce.

¶5 In 2012, Kemper issued a "Package Plus" home and automobile insurance policy covering

Ismet's Oconomowoc home and listed automobiles. Under the Policy, Ismet is listed as the "Named Insured." However, the introduction to the Policy reads: "Throughout the policy, 'you' and 'your' mean the person shown as the 'Named Insured' in the Declarations. It also means the spouse if a resident of the same household." The Policy further states that "insured" means "you and residents of your household who are . . . [y]our relatives." Additionally, both Ismet and Ydbi are listed in the vehicle coverage section as "Operator 1" and "Operator 2," respectively. Both parties also marked their marital status as "Married."

¶6 The Policy also contains a "concealment or fraud" condition. As relevant to this dispute, the provision bars coverage for "all insureds" if "an insured" concealed or misrepresented a material fact, with intent to deceive and on which Kemper relied. In full, the provision reads:

> Under Section 1 – Property Coverages, with respect to all "insureds" covered under this policy, we provide coverage to no "insureds" for loss under Section 1 – Property Coverages if, whether before or after a loss, an "insured" has:
>
> 1) Concealed or misrepresented any fact upon which we rely, and that concealment or misrepresentation is material and made with intent to deceive; or

> 2) Concealed or misrepresented any fact and the fact misrepresented contributes to the loss.

¶7 Importantly for purposes of Ismet's argument, the Policy also contains an "intentional loss" exclusion. That provision bars recovery for "an insured" who "commits or conspires to commit an act with the intent to cause a loss." As material to Ismet's argument, the provision provides as follows:

> 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.
>
> . . . .
>
> 1h. Intentional Loss.
>
> Intentional Loss means any loss arising out of any act an "insured" commits or conspires to commit with the intent to cause a loss.
>
> This exclusion only applies to an "insured" who commits or conspires to commit an act with the intent to cause a loss.

¶8 In June 2013, a fire occurred at the Oconomowoc home, damaging the property and its contents and rendering the home a total loss. Per the Policy, Kemper sent Ismet and Ydbi a "Sworn Statement in Proof of Loss." In the signed statement, both Ismet and Ydbi attested that the "the cause and

origin" of the fire was "unknown."[3] They also represented to Kemper in the statement that they were each "insureds" under the Policy. Kemper later conducted a formal examination of Ismet and Ydbi with both answering questions under oath (hereinafter "Examination Under Oath"). In response to questions during that examination, both Ismet and Ydbi swore they were not aware the house burned down until after receiving notice of the incident.[4]

¶9 Despite these attestations, further investigation revealed that Ydbi had started the fire. The fire occurred while Ismet was vacationing overseas in North Macedonia – a fact indisputably known by Ydbi. In a separate criminal proceeding, the State eventually charged Ydbi with arson, for which he was convicted.

¶10 Relying on the Policy's "concealment or fraud" condition (among other provisions), Kemper denied coverage for the loss of the home. After its denial of the claim, Kemper commenced a declaratory judgment action seeking a judicial determination of its rights and obligations under the Policy. In particular, Kemper sought, inter alia, a declaration that the "concealment or fraud" condition barred coverage for both Ismet and Ydbi.

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[3] More specifically, Ismet and Ydbi attested: "A Fire Loss occurred about 10:30 o'clock P.M., on the 10th day of June 2013. The cause and origin of said loss was unknown."

[4] According to Ismet, she first learned about the fire during a phone call from her niece approximately seven hours after the fire. According to Ydbi, he learned about the fire while at a Milwaukee casino from a man he could not remember.

¶11 Both parties eventually filed motions for summary judgment on stipulated facts. Specifically, all parties stipulated to the following: (1) Ydbi committed arson to destroy the Oconomowoc home; (2) if Ydbi is found to be an "insured" under the Policy, "Ydbi . . . was a resident of Ismet['s] . . . household"; (3) "Ydbi . . . engaged in concealment and fraud in his statement[s] to Kemper" about his involvement in the fire "with the intent to deceive Kemper, and Kemper relied upon Ydbi's concealment and fraud to its detriment"; (4) "the fire was not a result of Ismet committing or conspiring to commit any act with the intention of damaging the property . . . "; and (5) Ismet is an "innocent insured" under the Policy.

¶12 Ultimately, the circuit court granted Kemper's motion for summary judgment, finding that Ydbi was an "insured" under the Policy, and Ismet's and Ydbi's legal separation in 1998 did not alter Ydbi's status. The circuit court further found that, because Ydbi was an "insured," the "concealment or fraud" condition barred recovery for Ismet. Lastly, the circuit court determined that, because the record was devoid of any evidence of domestic abuse, Wis. Stat. § 631.95(2)(f) did not preclude Kemper from denying coverage. Ismet appealed the decision to the court of appeals, which affirmed the circuit court's ruling. We granted Ismet's petition for review.

II. STANDARD OF REVIEW

¶13 This case comes before us as a review of a grant of summary judgment. "Summary judgment is appropriate when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law." Talley v. Mustafa Mustafa, 2018 WI 47, ¶12, 381 Wis. 2d 393, 911 N.W.2d 55 (citing Wis. Stat. § 802.08(2)). "We independently review a grant of summary judgment using the same methodology of the circuit court and the court of appeals." Id. (citation omitted); see also Romero v. West Bend Mut. Ins. Co., 2016 WI App 59, ¶17, 371 Wis. 2d 478, 885 N.W.2d 591.

III. DISCUSSION

A. Ydbi is an "insured" under the Policy.

¶14 Ismet contends Ydbi is not her spouse because they are legally separated; therefore, according to Ismet, Ydbi is not an "insured" under the Policy. We disagree.

¶15 Whether Ydbi is Ismet's "spouse" for purposes of insurance coverage is governed by the terms of the insurance contract. The Policy definitions answer this question: "Throughout the policy, 'you' and 'your' mean the person shown as the 'Named Insured' in the Declarations. It also means the spouse if a resident of the same household." (Emphasis added.) The Policy defines "insured" as "you and residents of your household who are . . . [y]our relatives." (Emphasis added.) Ydbi may be an "insured" under the policy

if he is either Ismet's spouse or relative, provided he resides in Ismet's household. There is no dispute Ismet and Ydbi were residents of the same household.

¶16 We interpret the provisions of an insurance policy using the same principles applicable to contracts generally. "[I]nsurance policies are contracts to which courts apply the same rules of law applicable to other contracts." Talley, 381 Wis. 2d 393, ¶35, 911 N.W.2d 55; see also McPhee v. Am. Motorists Ins. Co., 57 Wis. 2d 669, 673, 205 N.W.2d 152 (1973) ("Contracts of insurance rest upon and are controlled by the same principles of law that are applicable to other contracts[.]"). Applying the plain language of the Policy, we conclude that Ismet and Ydbi are "spouses" for purposes of the contract. "[T]he language of a contract must be understood to mean what it clearly expresses, and the courts may not depart from the plain meaning of a contract when it is free from ambiguities." Matter of Watertown Tractor & Equip. Co., Inc., 94 Wis. 2d 622, 637, 289 N.W.2d 288 (1980) (quoted source omitted). In the Policy's listed vehicle coverage section, Ismet and Ydbi are listed as "Operator 1" and "Operator 2," respectively. The contract then explicitly indicates the marital status of both Ismet and Ydbi as "Married." Because the Policy expressly designates Ismet and Ydbi as spouses, Ydbi meets the definition of "you" under the Policy, which makes Ydbi an "insured."

¶17 Additionally, both Ismet and Ydbi represented to Kemper that they were each "insureds" under the insurance contract. In determining whether a named insured's spouse is covered under a policy,

courts may look to the "expectations of the parties," considering, among other factors, whether a couple "liv[es] under the same roof," whether they have a "close, intimate, and informal relationship," and "where the intended duration is likely to be substantial, where it is consistent with the informality of the relationship, . . . it is reasonable to conclude that the parties would consider the relationship . . . in contracting about such matters as insurance or in their conduct in reliance thereon." Belling v. Harn, 65 Wis. 2d 108, 113, 221 N.W.2d 888 (1974). All of these factors are satisfied here. Ismet and Ydbi lived under the same roof of the Oconomowoc home; they are in a relationship recognized as marital under Wisconsin law, albeit legally separated; and they each considered their relationship when contracting with Kemper, as demonstrated by listing their status as "Married." Critically, both Ismet and Ydbi also stated in their "Sworn Statement in Proof of Loss" that they were each "insureds" under the contract. With this understanding, Kemper conducted an Examination Under Oath of both Ismet and Ydbi, during which Ismet repeatedly stated for the record that Ydbi was her "husband." Giving effect to the expectations of the parties, and applying the plain language of the contract, Ismet and Ydbi are "spouses" and therefore insureds under the Policy.

¶18 Although Ismet and Ydbi are also "spouses" under Wisconsin's marriage laws, Ismet argues that their legal separation alters their status as spouses under the law and therefore under the Policy. We disagree. Wisconsin law plainly distinguishes between

a divorce and a legal separation. Pursuant to Wis. Stat. § 767.001(1f),[5] "divorce" is defined as "the dissolution of the marriage relationship." Once a judgment of divorce is entered, parties are free to remarry another individual, so long as it has been six months since the date of judgment. Wis. Stat. § 765.03(2). In contrast, a judgment of legal separation does not terminate a marriage. As this court has previously noted, "there are . . . rights and obligations remaining in the marriage after a legal separation." Herbst v. Hansen, 46 Wis. 2d 697, 706, 176 N.W.2d 380 (1970) (emphasis added). For example, legally separated couples may reconcile after a judgment for legal separation without having to get remarried. Wis. Stat. § 767.35(4). Additionally, because they are still recognized as "married" under the law, legally separated couples are also precluded from marrying other individuals until six months after they obtain a judgment of divorce. See § 765.03(2). Indeed, as the Wisconsin Court System's own guidance to the public instructs, "legal separation does not end a marriage" – only divorce proceedings do.[6]

¶19 Given that Ismet and Ydbi never initiated divorce proceedings but instead received a judgment of legal separation, they remained married under Wisconsin law. Ydbi is Ismet's "spouse" under the Policy as

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[5] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise indicated.

[6] https://www.wicourts.gov/formdisplay/FA-4100V_instructions.pdf?formNumber=FA-4100V&formType=Instructions&formatId=2&language=en.

well. Both parties stipulated that Ydbi was "a resident of the same household" as Ismet. Because Ydbi is Ismet's spouse who resided in Ismet's household, Ydbi is an "insured" under the Policy. These conclusions are consistent with the expectations of both Ismet and Ydbi, as reflected in their representations to Kemper regarding their marital status and their status as "insureds" under the contract.

¶20 Despite the clear language in Wis. Stat. ch. 767, Ismet argues Wis. Stat. ch. 766, the Marital Property Act, controls Ismet's and Ydbi's status as "spouses" under Wisconsin law. Because Chapter 766 contemplates that the "dissolution" of a marriage may involve a judgment of legal separation, Ismet argues that once she and Ydbi entered into a judgment of legal separation, they were no longer spouses. See Wis. Stat. § 766.01(7). This argument misunderstands the nature and scope of Chapter 766. The Marital Property Act "provides rules which govern the ownership as well as management and control of property owned by married persons during their marriage . . . [and] at death." Kuhlman v. Kuhlman, 146 Wis. 2d 588, 592, 432 N.W.2d 295 (1988) (emphasis added) (quoted source omitted). Chapter 767, on the other hand, contains Wisconsin's "divorce rules and policies." Id. at 593. That is, while Chapter 766 pertains to the control and management of marital property, Chapter 767 governs the actual legal status of married persons. The "substantial differences between [Chapter 766 and Chapter 767] . . . did not come about by chance; they were deliberately drawn by the legislature to achieve

different goals." Id. Indeed, Chapter 766 "was not intended to change the law of divorce or other forms of dissolution." Id. (quoted source omitted). Chapter 767 controls the dissolution of marriage and under its provisions, Ismet and Ydbi were still "spouses" by law as well as under the Policy. As spouses who resided in the same household, both Ismet and Ydbi were "insureds" under the terms of the Policy.

B. The "concealment or fraud" condition bars coverage for Ismet under the Policy.

¶21 Ismet next contends the "concealment or fraud" condition does not bar coverage for Ismet, because, according to her argument, its language is ambiguous and conflicts with the Policy's "intentional loss" exclusion. Ismet relies on Hedtcke v. Sentry Insurance Co., 109 Wis. 2d 461, 326 N.W.2d 727 (1982), to support her position. We are not persuaded.

¶22 Principles of contract interpretation control the resolution of this issue as well. "Contracts of insurance rest upon and are controlled by the same principles of law that are applicable to other contracts, and parties to an insurance contract may provide such provisions as they deem proper so long as the contract does not contravene law or public policy." McPhee, 57 Wis. 2d at 673. "[U]nambiguous contract language controls contract interpretation." Tufail v. Midwest Hosp., LLC, 2013 WI 62, ¶25, 348 Wis. 2d 631, 833 N.W.2d 586 (quoted source omitted). "When the terms of a contract are plain and unambiguous, we

will construe the contract as it stands." Kernz v. J.L. French Corp., 2003 WI App 140, ¶9, 266 Wis. 2d 124, 667 N.W.2d 751 (quoted source omitted); see also Folkman v. Quamme, 2003 WI 116, ¶13, 264 Wis. 2d 617, 665 N.W.2d 857 ("If there is no ambiguity in the language of an insurance policy, it is enforced as written[.]") (citation omitted).

¶23 In this case, the Policy terms are plain and unambiguous, including the "concealment or fraud" condition. That provision states, in relevant part: "with respect to all 'insureds' covered under this policy, [Kemper] provide[s] coverage to no 'insureds' for loss" due to concealment or misrepresentation of (1) a material fact with the intent to deceive, which is relied upon by Kemper, or (2) any fact where the misrepresentation "contribut[ed] to the loss." (Emphasis added.) This language plainly excludes coverage for all insureds if any insured conceals or misrepresents a material fact, with the intent to deceive and on which Kemper relies.

¶24 Because both Ismet and Ydbi are insureds under the Policy, if either so concealed or misrepresented a material fact on which Kemper relied, neither individual can recover. All parties stipulated that "Ydbi . . . engaged in concealment and fraud in his statement[s] to Kemper" about his involvement in the fire "with the intent to deceive Kemper, and Kemper relied upon Ydbi's concealment and fraud to its detriment." Applying the unambiguous language of the "concealment or fraud" condition to these agreed-upon facts, we conclude that Ydbi – an insured – satisfied

each element of the Policy's "concealment or fraud" condition, thereby precluding coverage for Ismet.

¶25 Ismet argues that the Policy's "intentional loss" exclusion conflicts with the "concealment or fraud" condition, rendering the latter ambiguous. We disagree. As defined under the Policy, "intentional loss" means "any act 'an insured' commits or conspires to commit with the intent to cause a loss." Ydbi's act of arson, which caused the loss of the Oconomowoc home, meets this definition. Unlike the "concealment or fraud" condition, "this exclusion only applies to 'an insured' who commits or conspires to commit an act with the intent to cause a loss." (Emphasis added.) Accordingly, Ismet does not lose coverage under the "intentional loss" exclusion. In contrast, the "concealment or fraud" condition eliminates coverage not only for the insured who commits the intentional act causing loss, but for all insureds.

¶26 There is nothing conflicting about these provisions of the Policy. Each provision simply applies in different circumstances. In the presence of fraud, no insured can recover by operation of the "concealment or fraud" condition. When there is only "intentional loss" without any fraud, the Policy allows "innocent insureds" to recover by operation of the "intentional loss" exclusion. It is the role of courts to "construe and enforce such agreements as made and not make new contracts for the parties." McPhee, 57 Wis. 2d at 673. "A construction that gives meaning to every provision of a contract is preferable to an interpretation that leaves part of the policy without meaning." Romero,

371 Wis. 2d 478, ¶18; see also 1325 N. Van Buren, LLC v. T-3 Grp., Ltd., 2006 WI 94, ¶56, 293 Wis. 2d 410, 716 N.W.2d 822. In order to give effect to every provision of the Policy, both the "intentional loss" exclusion and the "concealment or fraud" condition must be read in harmony. Neither Policy provision renders the other superfluous or ambiguous. The provisions mean what they say, and it is the job of this court to apply them. See Folkmann, 264 Wis. 2d 617, ¶17 ("As a general rule, the language in an insurance contract is given its common, ordinary meaning, that is, what the reasonable person in the position of the insured would have understood the words to mean.") (internal quotations and citations omitted). Ydbi committed arson, lied to Kemper in his "Sworn Statement in Proof of Loss" and Examination Under Oath, and induced Kemper to rely upon his lies. Under the "concealment or fraud" condition, the Policy provides coverage for "no insureds" – including Ismet.

¶27 Contrary to Ismet's argument, this court's prior decision in Hedtcke does not alter this conclusion. According to Hedtcke, when an exclusion is ambiguous and does not state "whether the obligations of the insured are joint or several," public policy dictates allowing innocent insureds to recover. Hedtcke, 109 Wis. 2d at 487-88. In other words, when a provision is unclear as to whether an insured's obligations are "joint" or "several," courts should assume they are "several." Id. The Hedtcke court declared this rule necessary to "effectuate the public policy that guilty

persons must not profit from their own wrongdoing." Id. at 488.

¶28 Hedtcke's rule applies when a coverage exclusion is ambiguous. See id. at 487-88. In this case, the "concealment or fraud" condition, unlike the contractual provision at issue in Hedtcke, does specify that the obligations of the insureds are "joint": "with respect to all 'insureds' covered under this policy, [Kemper] provide[s] coverage to no 'insureds' for loss" in the event of concealment or fraud. (Emphasis added.)

¶29 We apply the plain language of the "concealment or fraud" condition consistent with Wisconsin precedent. In Taryn E.F. by Grunewald v. Joshua M.C., 178 Wis. 2d 719, 505 N.W.2d 418 (Ct. App. 1993), the court of appeals gave full effect to the plain language of a "joint" exclusion, which provided: "insurance . . . shall not apply to any damages . . . attributable to . . . any outrageous conduct on the part of any 'insured' consisting of any intentional, wanton, [or] malicious acts[.]" Id. at 724. The court held that "[t]his language unambiguously denies coverage for all liability incurred by each and any insured." Id. Likewise, in State Farm Fire & Cas. Ins. Co. v. Walker, 157 Wis. 2d 459, 459 N.W.2d 605 (Ct. App. 1990), the court of appeals applied the plain meaning of a "concealment or fraud" clause, which provided as follows: "If you or any other insured under this policy has intentionally concealed or misrepresented any material facts . . . , then this policy is void as to you and any other insured." Id. at 466. According to the Walker court,

the policy provision meant what it said: "the concealment clause unambiguously denies recovery to an innocent insured when another insured breaches the concealment clause." Id. at 467. The Walker court determined Hedtcke had no bearing on the case because a "court must not modify clear and unambiguous language" when a provision plainly expresses a "joint" exclusion. Id. at 471. "When the terms of a policy are plain on their face, the policy should not be rewritten by construction to bind the insurer to a risk it was unwilling to cover, and for which it was not paid." Id. at 471-72 (citations omitted).

¶30 Just like in Taryn E.F. and Walker, Hedtcke has no bearing on the insurance contract before us. Because the language of the "concealment or fraud" condition is plain and unambiguous, this court must enforce it and public policy considerations may not rewrite the contract. Ismet lost coverage because "no insured" may recover when any insured engages in concealment or fraud under the Policy, as Ydbi did in this case.[7]

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[7] Ismet also argues that Ydbi's untruthful statements and omissions to Kemper, including during his Examination Under Oath and in his "Sworn Statement in Proof of Loss," collectively constitute a breach of a promissory warranty. "Condition G" of the Policy reads: "[N]o breach of a promissory warranty affects [Kemper's] obligations under this policy unless . . . the breach exists at the time of loss and either: (a) increases the risk at the time of loss; or (b) contribute[s] to the loss." According to Ismet, pursuant to "Condition G," Kemper cannot deny her coverage under the "concealment or fraud" condition because Ydbi's

C. Wis. Stat. § 631.95(2)(f) does not support Ismet's claim.

¶31 As a final matter, Ismet asserts that Wis. Stat. § 631.95(2)(f), a statute which may allow "innocent insureds" to retain coverage that might otherwise be excluded due to intentional loss resulting from acts or patterns of domestic abuse, preserves coverage for her loss notwithstanding the "concealment or fraud" condition. Based on the record before us, this statute does not apply.

¶32 In relevant part, Wisconsin Stat. § 631.95(2)(f) reads:

> An insurer may not[,] . . . [u]nder property insurance coverage that excludes coverage for loss or damage to property resulting from intentional acts, deny payment to an insured for a claim based on property loss or damage

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concealments occurred after the property loss and therefore did not increase the risk "at the time of loss" or contribute to the loss.

We disagree. "Condition G" does not apply. Under Wisconsin law, a promissory warranty is "[a] warranty that facts will continue to be as stated throughout the policy period[.]" Fox v. Catholic Knights Ins. Soc., 2003 WI 87, ¶29, 263 Wis. 2d 207, 665 N.W.2d 181 (quoted source omitted). In essence, promissory warranties are generally commitments by an insured designed to minimize the risk of loss, such as a promise that an insured will not store flammables on insured property. See id., ¶27. Such risk minimization can occur only before the loss. In this case, the "concealment or fraud" by Ydbi occurred after the loss. Ydbi's concealment of his act of arson could not constitute a promissory warranty because it was not a representation designed to minimize the risk of loss but rather a fraud on Kemper after the arson caused the loss.

> resulting from an act, or pattern, of abuse or domestic abuse if that insured did not cooperate in or contribute to the creation of the loss or damage and if the person who committed the act or acts that caused the loss or damage is criminally prosecuted for the act or acts.

¶33 Under this statute, "'[d]omestic abuse' has the meaning given in [Wis. Stat.] § 968.075(1)(a)." Wis. Stat. § 631.95(1)(c). Under § 968.075(1)(a), "domestic abuse" is defined as any of four separate actions "engaged in by an adult person against his or her spouse or former spouse." The four actions are as follows:

> 1. Intentional infliction of physical pain, physical injury or illness.
>
> 2. Intentional impairment of physical condition.
>
> 3. A violation of s. 940.225(1), (2), or (3).[8]
>
> 4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2., or 3.

§ 968.075(1)(a).

¶34 Ismet does not claim that Ydbi engaged in any acts meeting the first three definitions of domestic abuse. Instead, Ismet contends that Ydbi's act of arson,

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[8] All three of these subsections of Wis. Stat. § 940.225 involve sexual assault.

in and of itself, constitutes "a physical act that may cause [her] reasonably to fear imminent engagement in the conduct described" in the preceding three clauses. While an act of arson may qualify as a "physical act" under the fourth definition of "domestic abuse," Ismet fails to identify any evidence in the record establishing that she "reasonably . . . fear[ed] imminent engagement" in the sort of bodily harm described in this statute. In particular, there is no evidence that Ydbi started the fire to harm Ismet; in fact, Ismet was overseas in North Macedonia when the arson occurred – a fact indisputably known by Ydbi.

¶35 Ismet does not point to any evidence in the record that she reasonably feared for her safety. Her affidavit contains no statements of fact related to any fears regarding Ydbi, or any past or ongoing instances of physical or sexual abuse by Ydbi. Instead, Ismet mentions only Ydbi's past criminal actions over 25 years ago against other individuals. Wisconsin Stat. § 631.95(2)(f) says the property loss must "result" from an act of domestic abuse, as it is defined in that statute. (Emphasis added.) In the absence of evidence sufficient to satisfy that definition, the statute cannot apply to restore coverage. When opposing a motion for summary judgment, the party "is obligated to submit materials . . . to counter the submissions of the moving party. It is not enough to simply claim that the moving party's submission should be disbelieved or discounted." Dawson v. Goldammer, 2006 WI App 158, ¶31, 295 Wis. 2d 728, 722 N.W.2d 106 (internal quotations omitted). Pursuant to § 631.95(2)(f) and

our well-settled standard for summary judgment, Ismet was required to present at least some evidence connecting the arson and resulting property loss to her fear of imminent bodily harm. See Bd. of Regents of Univ. of Wisconsin Sys. v. Mussallem, 94 Wis. 2d 657, 673, 289 N.W.2d 801 (1980) ("[T]he party in opposition to the motion [of summary judgment] may not rest upon the mere allegations or denials of the pleadings, but must, by affidavits or other statutory means, set forth specific facts showing that there exists a genuine issue[.]"). Her failure to do so defeats the application of § 631.95(2)(f), and the "concealment or fraud" condition precludes coverage.

IV. CONCLUSION

¶36 We conclude the circuit court properly granted Kemper's motion for summary judgment. Ydbi is an insured under the terms of the Policy and because he "concealed or misrepresented" a material fact, "with intent to deceive" and upon which Kemper relied, the Policy's "concealment or fraud" condition precludes coverage for Ismet. Wisconsin Stat. § 631.95(2)(f) does not override the operation of that condition because the record lacks any evidence to establish that Ydbi's arson constituted "domestic abuse" against Ismet, as statutorily defined. Accordingly, we affirm the decision of the court of appeals.

By the Court. – The decision of the court of appeals is affirmed.

¶37 JILL J. KAROFSKY, J. (*dissenting*). "If we are to fight discrimination and injustice against women we must start from the home for if a woman cannot be safe in her own house then she cannot be expected to feel safe anywhere."[1] First and foremost, this case is about domestic abuse. The majority errs in concluding the record in this case "lacks any evidence showing Ydbi's arson constituted 'domestic abuse' against Ismet, as statutorily defined." Majority op., ¶3. This erroneous determination – that there is no genuine issue of material fact regarding whether Ydbi's actions constitute domestic abuse – is based on a misreading of the plain statutory language of Wis. Stat. § 968.075(1)(a)4.

¶38 In misconstruing Wis. Stat. § 968.075(1)(a)4., the majority creates four new hurdles for domestic violence victims seeking recovery under their insurance policies, pursuant to Wis. Stat. § 631.95, for property destroyed by their abusers. According to the majority's analysis, in order to establish domestic abuse, a victim must: (1) show her fear; (2) disclose past or ongoing instances of physical or sexual abuse; (3) prove her abuser's motive; and (4) be physically present at the crime scene when the crime occurs. These requirements have no basis in the statutory language of § 968.075(1)(a)4., and by failing to follow the statutory text, the majority denies Ismet – an "innocent insured" – the very insurance coverage § 631.95 was created to protect. Because the majority

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[1] Aysha Taryam, http://raptreveries.blogspot.com/2015/10/its-time-for-law-against-domestic.html (last visited June 2, 2021).

misreads the statute and creates new requirements in order for victims to receive insurance coverage, I must dissent.[2]

¶39 I begin this dissent with a succinct discussion of the relevant facts. Next, I analyze the plain and unambiguous language of Wis. Stat. § 631.95(2)(f), which prohibits insurance companies from discriminating against victims of domestic abuse, and Wis. Stat. § 968.075(1)(a), which defines domestic abuse. I also summarize the context in which the legislature drafted these statutes. I conclude by addressing the majority's failed analysis.

I. FACTUAL BACKGROUND

¶40 Ismet and Ydbi Islami were married in 1978. Approximately ten years later, Ydbi was convicted of stalking and second-degree sexual assault of a child, for which a judge sentenced him to three years in prison and ordered him to register as a sex offender. Ismet's distress over Ydbi's criminal conduct led her to file for a legal separation in 1998.

¶41 Under the terms of the legal separation, Ismet became the sole title owner of the Islamis' Oconomowoc home and the sole named insured in a homeowner's policy issued by Kemper Insurance. The homeowner's policy contained exclusions if an insured intentionally engaged in "fraud or concealment" by

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[2] This dissent only reaches the domestic abuse issue raised by Ismet since that issue is dispositive.

conspiring or committing the act that caused the loss, or by concealing or misrepresenting any fact upon which Kemper could rely to address a claim.

¶42 On June 10, 2013, while Ismet was in North Macedonia, Ydbi burned her house to the ground, destroying all that was inside. Ydbi then lied to Kemper, denying any knowledge about the arson. Ultimately, an investigation revealed that Ydbi was solely responsible. Ydbi was charged and convicted of arson, and sentenced to prison.

¶43 Kemper denied coverage to Ismet for her house and belongings damaged in the fire because Ydbi violated the "concealment or fraud" provision of the insurance policy when he lied about the arson. The circuit court granted summary judgment to Kemper, concluding there was no genuine issue of material fact regarding the applicability of Wis. Stat. § 631.95(2)(f), and the court of appeals affirmed.

II. WISCONSIN STAT. §§ 631.95(2)(f) AND 968.075(1)(a)

¶44 Ismet's situation is not unique. In 1982, this court recognized how the suffering of domestic abuse victims is compounded when their property is destroyed through arson and yet insurance companies deny their claims. See Hedtcke v. Sentry Ins. Co., 109 Wis. 2d 461, 488, 326 N.W.2d 727 (1982) ("An absolute bar to recovery by an innocent insured is particularly harsh in a case in which the arson appears to be retribution against the innocent insured. Having lost

the property, the innocent insured is victimized once again by the denial of the proceeds forthcoming under the fire insurance policy.").[3]

¶45 Insurance companies were engaging in these types of practices in increasing numbers by the mid-to-late 1990s. As a result, domestic violence victims were left without homes or any means to be financially compensated for their losses. "The immediate impact of this discrimination is to deny battered women and their families the life necessities that only insurance can provide." Terry L. Fromson & Nancy Durborow, Insurance Discrimination Against Victims

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[3] Strikingly, it is not uncommon for perpetrators of domestic violence to commit arson. See, e.g., Garrison v. State, 409 P.3d 1209 (Wyo. 2018) (jury convicted defendant on a charge of first-degree arson for setting fire to his estranged wife's trailer home); Icenhour v. Cont'l Ins. Co., 365 F.Supp.2d 743 (S.D. W. Va. 2004) (woman, who was victim of long-term domestic abuse by her husband, was told her by husband that if she took a trip he would violate a protection order and burn the family home down – when she left town on the trip, he did just that); State v. Goodman, 108 Wash.App. 355, 30 P.3d 516 (2001) (husband, released on bail, returned to his wife's home and burned it down, killing her dog); Calhoun v. State, 820 P.2d 819 (Okla. Crim. App. 1991) (husband, who was prohibited by a restraining order from coming near his estranged wife, set fire to her dwelling); Moore v. Oklahoma, 736 P.2d 996 (Okla. Crim. App. 1987) (man convicted for the arson of his estranged wife's residence). There are also a significant number of legal writings discussing this issue. See, e.g., Brent R. Lindahl, Insurance Coverage for an Innocent Co-Insured Spouse, 23 Wm. Mitchell L. Rev. 433, 455-56 (1997) ("When a spouse burns down the marital home, it is often an act of domestic violence or part of an ongoing pattern of domestic violence, where the arson is simply the abuser's current weapon of choice. Domestic violence largely is motivated by the abusive spouse's desire to control and dominate the other spouse.").

of Domestic Violence 4, 5 (National Health Resource Center on Domestic Violence, 2019). To combat this discrimination, state legislatures, including Wisconsin's, passed laws to protect domestic violence victims.

¶46 Wisconsin's response to the discriminatory practices of insurance companies against victims of domestic abuse was 1999 Wis. Act 95. Codified as Wis. Stat. § 631.95(2)(f), the statute restricts insurers from denying coverage for property damage committed as an act of domestic abuse, and is the cornerstone of this case. Specifically, the statute says:

> [A]n insurer may not[,] . . . [u]nder property insurance coverage that excludes coverage for loss or damage to property resulting from intentional acts, deny payment to an insured for a claim based on property loss or damage resulting from an act, or pattern, of abuse or domestic abuse if that insured did not cooperate in or contribute to the creation of the loss or damage and if the person who committed the act or acts that caused the loss or damage is criminally prosecuted for the act or acts.

§ 631.95(2)(f).

¶47 Pursuant to Wis. Stat. § 631.95(2)(f), insurers must grant coverage when:

- the claim is for property loss or damage;
- the property loss or damage resulted from an act, or pattern, of abuse or domestic abuse;

- the insured did not cooperate or contribute to creation of the loss or damage; and
- the person who committed the act that caused loss or damage is criminally prosecuted.

Relevant to this case is the second prong – whether the "property loss or damage resulted from an act, or pattern, of abuse or domestic abuse." The statute allows recovery for a loss or damage resulting from a single act of domestic abuse, such as an arson, or from a pattern of domestic abuse. For the definition of domestic abuse we look to Wis. Stat. § 968.075(1)(a).

¶48 Wisconsin Stat. § 968.075, Wisconsin's mandatory-arrest statute, was enacted in 1987 in response to the "public perception of the serious consequences of domestic violence to society and to individual victims. . . ." 1987 Wis. Act 346, § 1. The legislature passed this law to ensure that "[t]he official response to cases of domestic violence stress the enforcement of the laws, protect the victim and communicate the attitude that violent behavior is neither excused nor tolerated." Id. The stated purpose of this law was "to recognize domestic violence as involving serious criminal offenses and to provide increased protection for the victims of domestic violence." Id.

¶49 Wisconsin Stat. § 968.075(1)(a) states that "'[d]omestic abuse' means any of the following engaged in by an adult person against his or her spouse or former spouse[:]"

1. Intentional infliction of physical pain, physical injury or illness.

2. Intentional impairment of physical condition.

3. A violation of s. 940.225 (1), (2) or (3).

4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3.

The first three definitions of domestic abuse are not at issue in this case. We are concerned solely with whether Ydbi's arson constituted domestic abuse under subd. 4.

¶50 There is no dispute that the arson was "a physical act." This case is focused on whether, at summary judgment, there was a genuine issue of material fact as to whether Ydbi's arson was an act that may have caused Ismet to reasonably fear imminent engagement of bodily harm.

¶51 Of import to our analysis, the legislature used the words "may" and "reasonably" in Wis. Stat. § 968.075(1)(a)4. to establish an objective standard. "The word 'reasonable' has a well-established meaning when used in a legal context. It generally connotes a 'reasonable-person standard,' a standard that 'has been relied upon in all branches of the law for generations.'" State v. Nelson, 2006 WI App 124, ¶20, 294 Wis. 2d 578, 718 N.W.2d 168 (quoting City of Madison v. Baumann, 162 Wis. 2d 660, 677-78, 470

N.W.2d 296 (1991)); see Id. (quoting State v. Ruesch, 214 Wis. 2d 548, 563, 571 N.W.2d 898 (Ct. App. 1997)) ("Significantly, 'reasonable,' or the 'reasonable person standard,' establishes an objective standard for evaluating conduct.").

¶52 Further establishing an objective standard is the word "may" in Wis. Stat. § 968.075(1)(a)4., which is an expression of possibility. "May" is synonymous with "might." See Black's Law Dictionary 1172 (11th ed. 2019) (defining "may" as "[t]o be permitted to" and "[t]o be a possibility").[4]

¶53 In addition to establishing an objective standard, the legislature used the word "imminent" to qualify "engagement of bodily harm." Imminent means "impending" or "threatening." See Black's Law Dictionary 898 (defining "imminent" as "threatening to occur immediately; dangerously impending"). Importantly, the word "imminent" does not mean "immediate." Black's Law Dictionary defines "immediate" as "[o]ccurring without delay; instant." Id. at 897.

¶54 Reviewing Wis. Stat. § 968.075(1)(a)4. in context further proves that the two terms are not synonymous. In the same statute, the legislature used

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[4] This objective standard is also an important component of domestic abuse statutes because "[i]t can be difficult for someone to admit that they've been or are being abused. They may feel that they've done something wrong, that they deserve the abuse, or that experiencing abuse is a sign of weakness." https://www.thehotline.org/support-others/why-people-stay/. In other words, it can be re-traumatizing for victims to explicitly say, "I am afraid."

the words "immediate" and "immediately." See Wis. Stat. § 968.075(2m), (4), (5)(a)1., and (6). See State ex rel. Kalal v. Circuit Court for Dane Cnty., 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 ("[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes. . . ."). This context shows us that the legislature knew how to use the word "immediate." "When the legislature uses different terms in a statute – particularly in the same section – we presume it intended the terms to have distinct meanings." Johnson v. City of Edgerton, 207 Wis. 2d 343, 351, 558 N.W.2d 653 (Ct. App. 1996).

III. THE MAJORITY'S FAILED ANALYSIS

¶55 With these statutes, and their purpose of ensuring financial recovery for innocent domestic abuse victims, in mind, I turn to the majority's analysis. The majority incorrectly concludes that "the record lacks any evidence showing Ydbi's arson constituted 'domestic abuse' against Ismet, as statutorily defined." Majority op., ¶3. In reaching this conclusion, the majority creates four new hurdles for Ismet and other domestic violence victims seeking recovery under their insurance policies for property destroyed by their abusers. According to the majority's analysis, in order to establish domestic abuse, a victim must:

1. Show actual fear for his or her safety. Majority op., ¶¶34-35;

2. Disclose past or ongoing instances of physical or sexual abuse. Id., ¶35;

3. Prove the motive of his or her abuser. Id., ¶34;

4. Be present at the scene of the crime when the crime occurs. Id.

I address each new requirement in turn.

¶56 The majority creates its first hurdle for victims by determining that a domestic violence victim must show actual fear in order to establish domestic abuse. According to the majority, Ismet fails to "identify any evidence in the record establishing that she 'reasonably . . . fear[ed] imminent engagement' in the sort of bodily harm described in [Wis. Stat. § 968.075]." Majority op., ¶34. The majority asserts that a domestic violence victim must present evidence to demonstrate that she actually feared imminent engagement of bodily harm. Section 968.075(1)(a)4. plainly does not require a victim to so prove. It is important to repeat, and dispositive here, that in using the language "may cause the other person reasonably to fear," the legislature wrote the statute with an objective standard. The use of the word "may" indicates that the act must be of a kind that the result of reasonable fear is possible; it does not require that fear to be realized, much less proven. In addition, "imminent" means forthcoming or threatening. So the question is, "Might [or may] arson cause a person in Ismet's position to reasonably fear harm was forthcoming?"

¶57 What matters here is whether the arson was an act that could have caused Ismet to reasonably experience fear. The focus of this statutory text is the nature of the abuser's arson, not the victim's actual response subsequent to that act. To hold otherwise is to create two classes of innocent insured domestic-abuse victims: those whose abusers were, in fact, successful at terrorizing their victims, who may recover; and those whose abusers' violent or destructive acts may not have yielded some factual indicia of their victims' fear, who are denied recovery. Had the legislature wanted to limit recovery solely to innocent insureds whose abusers actually caused fear, it certainly could have done so. State v. Shirley E., 2006 WI 129, ¶44, 298 Wis. 2d 1, 724 N.W.2d 623; see also United America, LLC v. Wisconsin Dept. of Transp., 2021 WI 44, ¶31, 397 Wis. 2d 42, 959 N.W.2d 317 (Rebecca Grassl Bradley, J., dissenting) ("Had the legislature wanted to limit the meaning of "damages" solely to 'structural damages,' . . . it certainly could have.").

¶58 When we apply the correct objective standard to this case, it is clear that there is enough in the record for the question of whether the arson may have caused a person in Ismet's position to reasonably fear imminent harm to go before a jury. The record shows that in 1989, Ydbi was convicted of sexual assault and stalking. As a result of these convictions, a judge sentenced him to prison and ordered him to register as a sex offender. These facts alone "may cause a person to reasonably fear imminent harm." Certainly the

State was concerned about Ydbi's conduct; the judge sentenced him to prison and ordered him to comply with the sex-offender registry. And the record indicates that because of Ydbi's violent criminal history, Ismet sought a divorce – but for religious reasons, she obtained a legal separation instead – in an attempt to begin extricating her life from Ydbi's. The record further establishes that Ydbi continued engaging in criminal conduct when he burned down Ismet's house, destroying not only her home but all the belongings, keepsakes, and memories inside. In summary, the arson combined with Ydbi's past criminal record is more than enough evidence for the question of whether a reasonable person in Ismet's position would reasonably fear imminent harm to go to a jury.

¶59 The majority places a second hurdle in front of domestic violence victims by requiring an averment about "any past or ongoing instances of physical or sexual abuse by [an abuser]." Majority op., ¶35. As noted above, Wis. Stat. § 968.075(1)(a)4. does not require a subjective assessment. In this instance, Ismet does not have to aver instances of physical or sexual abuse because the statute is satisfied once she establishes that Ydbi's actions may cause a person in her position to reasonably fear imminent harm.

¶60 Additionally, forcing victims to disclose violence only perpetuates the isolation, shame, and fear many domestic violence victims experience. Often, victims are reluctant to share their experiences of abuse even with those closest to them. See Sarah M. Buel, Fifty Obstacles to Leaving, A.K.A., Why Abuse

Victims Stay, 28 Colo. Law. 19 (1999) ("Shame and embarrassment about the abuse may prevent the victim from disclosing it or may cause her to deny that any problem exists when questioned by well-intentioned friends, family, co-workers, or professionals.").

¶61 The majority's third hurdle for domestic violence victims is the new requirement that they must prove the motive of their abusers. The majority asserts that Ismet did not establish that she was the victim of domestic abuse because she failed to show that there was "evidence that Ydbi started the fire to harm Ismet." Majority op., ¶34. This is an inexplicable requirement for two reasons. First, the majority fails to cite any legal basis for the proposition that a victim must prove the motive of her abuser. Second, the majority sets for Ismet the impossible task of proving by direct evidence what was in Ydbi's mind.

¶62 The final hurdle which the majority sets for domestic violence victims is the requirement that a domestic violence victim must be physically present at the scene of the crime when it occurs in order to establish domestic abuse. The majority concludes that Ismet was not a domestic violence victim because she was in North Macedonia, rather than Oconomowoc, when Ydbi committed the arson. Id. According to the majority's flawed reasoning, victims cannot reasonably fear imminent harm if they are not in close proximity to the crime scene at the time the crime occurs.

¶63 As explained above, Wis. Stat. § 968.075(1)(a)4. does not require actual bodily harm or that the victim actually be physically present at the crime scene. Additionally, the majority conflates the words "imminent" and "immediate" despite the terms having different meanings. As discussed above, the word "imminent" means "threatening to occur immediately; dangerously impending." This meaning is consistent with the legislature's use of the word "may" in the statute; the requisite act is one that carries with it the possibility of future abuse. The majority fails to explain how geographical distance means someone might not reasonably fear imminent harm.[5]

¶64 In conclusion, the majority creates new hurdles for domestic violence victims. It requires that a victim must: show her fear; disclose past or ongoing instances of physical or sexual abuse; prove her abuser's motive; and be physically present when the crime against her is committed. The majority places formalistic requirements on the actions and behavior of domestic abuse victims in the wake of their abuse that have no basis in the language of Wis. Stat. § 968.075(1)(a). And in doing so, it concludes that because Ismet: (1) did not say, "I am afraid;" (2) did not state, "I am the victim of physical or sexual abuse;" (3) did not prove Ydbi's motive; and (4) was not home when

[5] At what point Ismet learned that Ydbi committed the arson, and whether it may have been reasonable for her to fear Ydbi at that time, are determinations for a fact-finder.

Ydbi set fire to her home, she must not be a victim at all.[6]

¶65 In erroneously and inexplicably concluding that the record lacks any evidence showing Ydbi's act constituted domestic abuse, and affirming the circuit court's grant of summary judgment to Kemper, the majority "implicitly imputes the guilt of the arsonist to the innocent insured." Hedtcke, 109 Wis. 2d at 488.

¶66 For the foregoing reasons, I must dissent.

¶67 I am authorized to state that Justices ANN WALSH BRADLEY and REBECCA FRANK DALLET join this dissent.

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[6] What if, instead of viewing people who've been abused as weak, we began to celebrate the strength it takes to persevere while overcoming the harm that was placed on them by someone who was supposed to love and care for them? What if, instead of accepting the myth that there's something wrong with people who were abused, we place full responsibility and accountability for the abuse on the people who perpetrate it?

Christine E. Murray, Triumph over Abuse: Healing, Recovery, and Purpose after an Abusive Relationship (2020).

COURT OF APPEALS DECISION DATED AND FILED

May 27, 2020

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2019AP488 Cir. Ct. No. 2013CV2875

STATE OF WISCONSIN IN COURT OF APPEALS DISTRICT II

KEMPER INDEPENDENCE INSURANCE COMPANY,

PLAINTIFF-RESPONDENT,

v.

ISMET ISLAMI,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: WILLIAM DOMINA, Judge. *Affirmed.*

Before Reilly, P.J., Gundrum and Davis, JJ.

¶1 DAVIS, J. Ismet Islami (Ismet) appeals a summary judgment order in favor of Kemper

Insurance Company (Kemper) denying coverage for loss of her home stemming from a fire intentionally set by Ydbi Islami (Ydbi), from whom Ismet is legally separated. The trial court ruled that coverage to Ismet was barred under a "concealment or fraud" condition of her policy, which provides that "no" insured has coverage if "an" insured, whether before or after the loss, conceals or misrepresents any fact upon which the insurer relies or which contributes to the loss.

¶2 The above policy provision is in play because Ydbi, in addition to setting the fire, lied about his misdeeds in sworn post-loss statements to Kemper. Ismet, who indisputably had nothing to do with the arson or Ydbi's false denial, seeks to avoid what would otherwise be the coverage-defeating consequences of Ydbi's lies, on three grounds. These are: (1) WIS. STAT. § 631.95 (2017-18)[1] prevents denial of coverage to a domestic abuse victim based on acts of the abuser that cause, or instill fear of causing, physical harm to the victim; (2) because of their legal separation, Ydbi is not Ismet's "spouse," and therefore is not an "insured" to whom the "concealment or fraud" provision applies; (3) the policy is "several," so under the principles articulated in ***Hedtcke v. Sentry Insurance Co.***, 109 Wis. 2d 461, 326 N.W.2d 727 (1982), Ydbi's violation of the "concealment or fraud" condition cannot be imputed to an "innocent insured" such as Ismet. The trial court

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

rejected these arguments and granted summary judgment in favor of Kemper. We affirm.

FACTUAL BACKGROUND

¶3 Ismet and Ydbi married in 1978.[2] In 1998, Ismet obtained a legal separation from Ydbi. *See* WIS. STAT. § 737.35. As part of the separation, the parties entered into a Marital Settlement Agreement, in which they agreed that Ismet would have sole title to the home. Nonetheless, Ismet and Ydbi continued to live in the home together.[3]

¶4 For the one-year period beginning July 25, 2012, Kemper insured Ismet's home, as well as listed automobiles and typical homeowner liability risks, through a "Package Plus" combination home and automobile policy issued to Ismet. The policy lists Ismet as the "Named Insured" in the declarations but also states:

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[2] The facts relevant to this appeal are taken from joint stipulations and other undisputed summary judgment submissions.

[3] Ismet submitted an affidavit and gave sworn testimony in an Examination Under Oath conducted by Kemper's attorney, in which she stated that she initially sought a divorce from Ydbi after his 1988 conviction for sexual assault but that he would not consent to the divorce. According to Ismet, for religious reasons this prevented her from obtaining a divorce, and she ultimately pursued the alternative path of legal separation. Since Ismet and Ydbi continued to live in the same residence, the separation may have been a financial decision (and some of Ismet's statements indicate that this was the primary consideration). Resolving the purpose behind the separation is not relevant to the issues on this appeal, however, and we express no opinion on this point.

> Throughout the policy, "you" and "yam." means the person shown as the "Named Insured" in the Declarations. It also means the spouse if a resident of the same household.

¶5 On June 10, 2013, a fire destroyed Ismet's home while she was vacationing in Europe. Kemper began an investigation to adjust the loss. Pursuant to a provision in the policy, Kemper conducted an Examination Under Oath (EUO) of both Ydbi and Ismet. Ismet and Ydbi also signed a document titled "Sworn Statement in Proof of Loss," in which they attested that the fire was of "unknown" origin. Kemper then denied coverage for the loss, citing among other reasons a violation of the following provision, which was set forth in the "Conditions" section of Ismet's policy:[4]

> 2. Concealment or Fraud.
>
> a. Under Section 1—Property Coverages, with respect to all "insureds" covered under this policy, we provide coverage to no "insureds" for loss under Section I—Property Coverages if,

[4] Ismet's policy contains two "concealment or fraud" provisions, one in the main policy and the second in the Wisconsin Endorsement. The trial court determined that the provision in the Wisconsin Endorsement controls. Although Ismet notes the differences between the two provisions, claiming that Kemper "without amending its Complaint . . . strategically switched from reliance" from the main policy version to the version in the Wisconsin Endorsement, she develops no argument as to why the trial court might have erred in ruling that the Wisconsin Endorsement was controlling. Therefore, our decision rests only on an analysis of the "concealment or fraud" provision in the Wisconsin Endorsement, which is quoted above.

> whether before or after a loss, an "insured" has:
>
> 1) Concealed or misrepresented any fact upon which we rely, and that concealment or misrepresentation is material and made with intent to deceive; or
>
> 2) Concealed or misrepresented any fact and the fact misrepresented contributes to the loss.

Kemper also sued, seeking a declaration of no coverage; Ismet counterclaimed.

¶6 A lengthy procedural path, which need not be recounted here, ensued. Both parties ultimately filed motions for summary judgment on stipulated facts. The parties agreed that Ydbi set the fire (by that point Ydbi had been criminally prosecuted for the arson). The parties further stipulated that Ydbi knowingly lied in his earlier statements as to his involvement in and knowledge of the cause of the fire, that he did so with the intent to deceive Kemper, and that Kemper relied on his concealment and fraud to its detriment. The parties also agreed that Ismet did not conspire with Ydbi, knew nothing about Ydbi's actions, and did not engage in fraud or concealment in any statements to Kemper. In three separate summary judgment hearings, the trial court granted Kemper's motion and denied Ismet's, resulting in a declaration of no coverage and the dismissal of Ismet's claims. Ismet now appeals.

DISCUSSION

¶7 Because this case was decided on summary judgment our goal is to ascertain whether the trial court correctly found that there was no genuine issue of material fact so as to entitle Kemper to judgment as a matter of law. *See* WIS. STAT. § 802.08(2). In conducting this inquiry we owe no deference to the trial court; although its analysis may be helpful, we apply a de novo standard of review. ***Summers v. Touchpoint Health Plan, Inc.***, 2006 WI App 217, ¶7, 296 Wis. 2d 566, 723 N.W.2d 784.

WISCONSIN STAT. § 631.95 Does Not Apply to the Loss in Question Because There is No Evidence That the Property Damage at Issue Resulted From "Domestic Abuse," as That Term is Defined in the Relevant Statute

¶8 Although Ismet claims that Ydbi should not be considered her "spouse," any such status is irrelevant if she is correct in her contention that WIS. STAT. § 631.95 applies to the loss in question. Consequently, we start with this issue. Broadly speaking, § 631.95 contains provisions that maintain insurance coverage that might otherwise be excluded due to the intentional act of an insured, where the loss was due to acts of abuse or domestic abuse. Property insurance policies are expressly among the types of insurance coverages falling within the scope of the statute. Specifically, § 631.95(2)(t) provides that an insurer may not

> [u]nder property insurance coverage that excludes coverage for loss or damage to property resulting from intentional acts, deny payment

> to an insured for a claim based on property loss or damage resulting from an act, or pattern, of abuse or domestic abuse if that insured did not cooperate in or contribute to the creation of the loss or damage and if the person who committed the act or acts that caused the loss or damage is criminally prosecuted for the act or acts.

As relevant here, "domestic abuse" is defined as any of four separate actions "engaged in by an adult person against his or her spouse or former spouse." WIS. STAT. §§ 631.95(1)(c), 968.075(1)(a).[5] These actions are:

> 1. Intentional infliction of physical pain, physical injury or illness.
>
> 2. Intentional impairment of physical condition.
>
> 3. A violation of [WIS. STAT. §] 940.225(1), (2) or (3).
>
> 4. A physical act that may cause the other person to fear imminent engagement in the conduct described [above].

Sec. 968.075(1)(a).[6]

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[5] WISCONSIN STAT. § 631.95(2)(f) applies where there is "abuse or domestic abuse." "Abuse" has "the meaning given in [WIS. STAT. §] 813.122(1)(a)." That statutory section, in turn, deals with child abuse restraining orders and injunctions and is not relevant to our analysis.

[6] WISCONSIN STAT. § 940.225 deals with various forms of sexual assault.

¶9 The record does not support Ismet's claim that this statute applies. Nowhere in her summary judgment submissions does Ismet suggest that Ydbi has ever committed any act of physical violence or sexual assault against her, or committed any "physical act" that would reasonably cause fear of such conduct, let alone that any such act resulted in the loss in question. Instead, Ismet claims that Ydbi's "arson, in and of itself is the egregious act of domestic abuse in this case." The relevant definitions, however, belie this contention. The statute requires physical harm, impairment of physical condition or sexual assault, or, barring that, some "physical act" that would reasonably instill fear of one of those things.

¶10 Although it is certainly possible that arson could be tied to physical harm or a fear of harm—say, if it were committed while the arsonist believed the insured were in or near the structure—there is no evidence of that here. In fact, there is no evidence as to Ydbi's motive at all and no evidence that Ismet was ever in fear of him. There are any number of reasons why a party might commit arson. To suggest, without more, that Ydbi's arson was tied to a threat of physical harm to Ismet would require complete speculation (especially since Ismet was in Europe when the arson occurred). Ismet was required on summary judgment to present some evidence linking the arson to physical harm or, at the very least, showing that the arson reasonably led her to fear such harm. The lack of such a

showing causes her argument under WIS. STAT. § 631.95(f) to fail.[7]

Ydbi Was Ismet's "Spouse" at the Time of the Loss

¶11 Ismet next argues that in light of her and Ydbi's legal separation, Ydbi was not her "spouse" and therefore not an "insured" under the policy, such that any concealment or fraud on his part has no bearing on her coverage. The parties have not cited us to, and we have not found, Wisconsin authority on the question of whether parties who are legally separated are considered "spouses" under an insurance policy—or, for that matter, under any other contract employing that term. Wisconsin law, however, does consider a legal separation as something less than terminating a marriage. *Compare* WIS. STAT. § 767.35(1)(b)1., *with* § 767.35(1)(b)2.; *see also §* 767.35(3)-(5). Parties to a legal separation cannot remarry and can reconcile without having to get remarried. Sec. 767.35(4). As our supreme court has noted, "there are more rights and obligations remaining in the marriage after a legal separation than following an absolute divorce." ***Herbst v. Hansen***, 46 Wis. 2d 697, 706, 176 N.W.2d 380 (1970).

¶12 Ultimately, however, we do not base our decision on this fine point of Wisconsin family law.

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[7] Because we find that WIS. STAT. § 631.95 does not apply to the loss in question, we need not consider whether the statute would excuse an abuser's violation of the "concealment or fraud" provision, which of course was the basis for denying coverage in this case.

Rather, like the trial court, we view this as a matter of contract interpretation, since it is an insurance policy that uses the term "spouse." Our role is to determine the meaning of this contractual term and the intent of the parties as objectively manifested. *See* ***Langer v. Stegerwald Lumber Co.***, 262 Wis. 383, 388, 55 N.W.2d 389 (1952) ("It has been affirmed over and over again that secret intentions of the parties to a contract are wholly immaterial. It is not what the parties secretly intended, but it is what they manifested to each other by words or conduct that determines their rights." (citation omitted)).

¶13 In this case the contract—the insurance policy at issue—expressly characterizes Ydbi as Ismet's spouse, and in fact his vehicle was named in the declarations as a covered automobile. This is not at all surprising, since Ydbi continued to live in the household. Ismet suggests that Ydbi's status was simply a label unilaterally placed in the policy by Kemper, but she produces no evidence, such as her application or other correspondence, to support her tacit suggestion that we should reform the policy to alter its otherwise clear import: that Ydbi was intended to be an "insured." To the contrary, both Ismet and Ydbi signed the Sworn Statement in Proof of Loss, which was submitted to Kemper and which identified each of them as an "Insured." It is well settled that such "course of performance" evidence is relevant to contract construction. ***Pure Milk Prods. Coop v. National Farmers Org.***, 90 Wis. 2d 781, 793 n.8, 280 N.W.2d 691 (1979) ("In cases so numerous as to be impossible of full citation

here, the courts have held that evidence of practical interpretation and construction by the parties is admissible to aid in choosing the meaning to which legal effect will be given." (citation omitted)). Indeed, in other contexts the status of a legally separated party as an insured spouse works to the insurer's detriment (and to the benefit of insureds)—here, for example, there can be little doubt that Ydbi generally was covered under the policy for liability risks. The trial court did not err in finding that Ydbi was a "spouse" and therefore an "insured" under the policy.

The Policy's "Concealment or Fraud" Provision is "Joint," Not "Several," and Therefore Applies To "Innocent Co-Insureds"

¶14 Ismet's final argument is that Ydbi's conceded violation of the "concealment or fraud" provision should not be imputed to her. She claims that to do so would violate the public policy rationale of ***Hedtcke***, 109 Wis. 2d 461. She further claims that such a result is warranted by the policy language. We disagree.

¶15 We begin with a discussion of ***Hedtcke***. In that case, Judith Hedtcke and her estranged husband were named insureds under a property policy covering a home they jointly owned. ***Id.*** at 479-81. Her husband intentionally set fire to the home. ***Id.*** at 480-81. Hedtcke sought coverage despite a provision of the policy barring coverage "if [the loss] was 'caused, directly or indirectly, by . . . neglect of the insured to use all reasonable means to save and preserve the property at

and after a loss' or if 'the hazard is increased by any means within the control or knowledge of the insured." ***Id.*** at 480 (footnote omitted). Our supreme court noted that prior Wisconsin case law had denied recovery to "innocent co-insureds" in this scenario; the court also noted, however, that the "modern rule" was to allow for recovery. ***Id.*** at 479, 485. Important to our analysis is the fact that these modern courts—and ***Hedtcke***—*based* this shift on a recognition that the language of the insurance policy, rather than property law concepts, should control. ***Id.*** at 485 ("Courts adopting the modern rule focus on the contract of insurance rather than the interests and obligations arising from the nature of the property ownership." (footnote omitted)). The ***Hedtcke*** court then determined that the policy was ambiguous as to whether the obligations of the insureds were "joint" (so as to allow a breach to void coverage for other insureds) or "several" (such that any breach by one insured would not affect coverage for another). ***Id.*** at 487. For that reason, the court found that the obligations were several. ***Id.*** at 488.

¶16 To be sure, the result in ***Hedtcke*** was clearly influenced by the public policy rationale underlying the contractual analysis, and the court went to some lengths to note that its decision was consistent with, if not driven by, that rationale. ***Id.*** at 488-89. That public policy rationale, of course, is that innocent co-insureds should not be denied the contractual benefits of the insurance policies they purchase by the acts of another insured in intentionally causing the loss; to find otherwise is "[c]ontrary to our basic notions of fair play and

justice." ***Id.*** at 488. Having emphasized insurance policy language over property law principles in assessing joint versus several responsibility for complying with policy obligations, and finding the obligations several based on the ambiguities in the policy before it, the court concluded that it "need not and do[es] not decide whether an insurer may make the obligations of the insureds joint." ***Id.***

¶17 If ***Hedtcke*** were the only available case law, perhaps we could at least consider a different result here, given ***Hedtcke***'s heavy emphasis on public policy and its expressed uncertainty as to when a policy imposes "joint" or "several" obligations. But ***Hedtcke*** is not the only case to guide us. In ***Northwestern National Insurance Co. v. Nemetz***, 135 Wis. 2d 245, 400 N.W.2d 33 (Ct. App. 1986), we were confronted with a factual scenario facially similar to that in ***Hedtcke***—Walter Nemetz deliberately burned down a building jointly owned with his wife Hazel—except that the fire spread to the building next door, leading to a lawsuit and the question of liability coverage for Hazel. ***Nemetz***, 135 Wis. 2d at 250-52. Although Hazel was eventually absolved of liability for starting the fire, the policy at issue contained an intentional acts exclusion that barred coverage for liability "expected or intended by an insured." ***Id.*** at 253. Importantly, the policy also contained a "severability of interest" clause stating that the policy "applies separately to each insured person against whom a claim or suit is brought." ***Id.*** at 255-56.

¶18 We noted that ***Hedtcke*** had relied on language limiting application of the condition at issue to "*the* insured," thereby suggesting severability, while the Nemetz's liability policy employed exclusionary language based on acts done by "an insured." ***Nemetz***, 135 Wis. 2d at 255-56. We concluded that use of the term "an" amounted to an "attempt[] to join the insureds' obligations." ***Id.*** at 256. We also concluded, however, that the severability clause rendered the nature of the exclusionary language as joint or several ambiguous. ***Id.*** Construing such ambiguities against the insurer, as required by black letter insurance law principles, we concluded that the exclusion did not bar liability coverage to Hazel. ***Id.***

¶19 The grammatically-focused inquiry that drove the result in ***Nemetz*** (and arguably ***Hedtcke***) continued with our decision in ***Taryn E.F. v. Joshua M.C.***, 178 Wis. 2d 719, 505 N.W.2d 418 (Ct. App. 1993). ***Taryn E.F.*** involved a minor's allegations of sexual abuse against her babysitter. ***Id.*** at 721. The minor sued the babysitter, his parents, and their insurer. ***Id.*** The policy contained a sexual abuse exclusion, which barred coverage based on "*any damages . . . attributable to . . .* any outrageous conduct on the part of *any* 'insured.'" *Id.* at 723-24. Even though the policy also contained a severability clause, we concluded that the difference between "an" and "any" was sufficient to alter the result in ***Taryn E.F.***, finding that "[t]his language unambiguously denies coverage for all liability incurred by each and any insured as a result of certain

conduct by any of the persons insured by the policy." ***Id.*** at 724.

¶20 These cases remain good law and have been relied on over the past several decades to determine the fate of coverage for "innocent co-insureds." *See*, *e.g.*, ***J.G. v. Wangard***, 2008 WI 99, 7133, 41-50, 313 Wis. 2d 329, 753 N.W.2d 475; ***Jessica M.F. v. Liberty Mut. Fire Ins. Co.***, 209 Wis. 2d 42, 52, 58-60, 561 N.W.2d 787 (Ct. App. 1997). And any doubt as to whether this case law applies to a "concealment or fraud" clause is dispelled by ***State Farm Fire & Casualty Insurance Co. v. Walker***, 157 Wis. 2d 459, 459 N.W.2d 605 (Ct. App. 1990).

¶21 In ***Walker***, this court addressed yet another situation where one of two insureds, Jimmy Walker, was suspected, and later found, to have intentionally caused a fire loss, allegedly without the knowledge of the other insured, Joan Mosby. ***Id.*** *at* 463-64. In the course of a post-fire investigation, it was learned that Walker was subject to an outstanding warrant in Colorado on homicide charges, and he was arrested. ***Id.*** at 463. At Walker's EUO (taken while he was in jail), Walker refused to answer certain questions, including whether Walker was his real name, on Fifth Amendment grounds. ***Id.*** at 463-64. The insurer denied coverage to both Walker and Mosby due to Walker's breach of the "concealment or fraud" clause, which stated "[i]f *you or any other insured* under this policy has intentionally concealed or misrepresented any material fact or circumstance relating to this insurance, whether before or after a loss, then this policy is void as to you and

any other *insured*." ***Id.*** at 466. Citing ***Nemetz***, this court affirmed the trial court's ruling that the clause, by its express terms, voided coverage not only to Walker but also to Mosby. ***Walker***, 157 Wis. 2d at 470-71. Furthermore, this court expressly declined to hold that the concealment clause violates public policy, noting that to do so "would be to upset long-established rules of insurance contract interpretation." ***Id.*** at 471.

¶22 ***Walker*** largely controls the present case. The clause at issue states that Kemper "provide[s] coverage to no 'insureds' for loss under Section I—Property Coverages if, whether before or after a loss, an 'insured' has" concealed or misrepresented a material fact on which Kemper relies and which is made with intent to deceive. Ismet claims that use of the word "an" as opposed to "any" puts this case within the holding of ***Nemetz*** and takes it out of the holding of ***Taryn E.F.***, where the an/any distinction, combined with a severability of insureds provision, became dispositive in the context of an intentional acts exclusion. *See* ***Nemetz***, 135 Wis. 2d at 256; ***Taryn E.F.***, 178 Wis. 2d at 724. This argument misses the mark. Here we are not dealing with an exclusion that bars coverage to "an" or "any" insured (or "the insured" for that matter), but rather a provision that provides coverage to "*no* insured" if an insured breaches the provision. Of at least equal importance, the policy in this case contains no severability clause that formed a critical part of the analysis in ***Nemetz***. *See* ***Nemetz***, 135 Wis. 2d at 255-56. Consequently, this case falls squarely within the holding of those cases, including ***Taryn E.F.*** and

Walker, finding an insured's obligation to be joint. *See*, *e.g.*, ***Walker***, 157 Wis. 2d at 470-71. Under the terms of the policy, Ybdi's breach of the "concealment or fraud" provision voided coverage to all insureds.

¶23 Ismet makes one additional argument. She claims that the language of the "concealment or fraud" provision is a "promissory warranty" and therefore subject to other policy provisions in the Wisconsin Endorsement that prevent breach of a promissory warranty from affecting Kemper's obligations unless the breach "exist[s] at the time of loss and either . . . increase[s] the risk at the time of loss . . . or . . . contribute[s] to the loss." Ismet argues that this language effectively makes it impossible for a breach of the "concealment or fraud" provision to void coverage because post-loss statements cannot exist at the time of the loss, increase the risk, or contribute to the loss.

¶24 This argument, which would in effect rewrite the terms of the "concealment or fraud" provision to eliminate the "or after a loss" language, misconstrues the meaning of "promissory warranty." The Wisconsin endorsement containing the language referenced by Ismet was presumably issued to conform the policy to WIS. STAT. § 631.11, which contains a nearly identical statutory requirement with respect to "promissory warrant[ies]." The term "promissory warranty" is generally understood to mean "[a] warranty that facts will *continue* to be as stated throughout the policy period, *such that a failure of the warranty provides the insurer with a defense to a claim under the policy"* or a "*continuing warranty.*" ***Fox v. Catholic Knights Ins. Soc'y***,

2003 WI 87, ¶29, 263 Wis. 2d 207, 665 N.W.2d 181 (citation omitted). Promissory warranties in insurance policies generally pertain to commitments by insureds designed to minimize the risk of loss, such as a commitment that no inflammables will be stored on the insured premises or that the insured will maintain a night watchman. *See* ***id.***, ¶27. Obviously, minimizing a *risk* of loss can only occur prior to the loss. It is nonsensical to suggest that provisions dealing with post-loss adjustment fall into such a category.

¶25 In short, Ismet correctly notes that "promissory warranty" is a term of art in insurance parlance and correctly defines the term, but is incorrect in describing its application to this case. The portion of the "concealment or fraud" provision at issue here does not involve any "continuing warranty" throughout the policy period.[8] Rather, it is an obligation to be truthful with the insurer about the cause of loss that arises at

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[8] For the sake of completeness, we note that the concealment provision obligates the insured not to conceal facts "*before or after a* loss." Concealment that occurs before a loss will typically pertain to representations made in a policy application. Such representations are most properly characterized as "affirmative warranties" as opposed to "promissory warranties." *See* ***Fox v. Catholic Knights Ins. Soc'y***, 2003 WI 87, ¶29, 263 Wis. 2d 207, 665 N.W.2d 181, citing BLACK'S LAW DICTIONARY (7th ed. 1999) (defining "affirmative warranty" as "[a] warranty—express or implied—that facts are as stated at the beginning of the policy period. *An affirmative warranty is usu[ally] a condition precedent to the policy taking effect.*"). In any case, the concealment provision cannot be characterized as involving a promissory warranty, particularly as it pertains solely to post-loss conduct.

a specific point after inception of the policy, namely at the time of loss. It is enforceable per its terms.

¶26 Although our decision results in a loss of coverage to one who the parties agree—and we have no reason to doubt—is an innocent insured, this court is not authorized to rewrite the terms of the agreed-upon policy. Nor, as we stated in ***Walker***, is it the role of this court to "announce a public policy that has the effect of overturning long-established rules of insurance contract jurisprudence," even if we felt such a policy were appropriate. *See* ***Walker***, 157 Wis. 2d at 472. Rather, "[s]uch a step can be taken only by the state supreme court" or the legislature. ***Id.*** Accordingly, we affirm the trial court's grant of summary judgment to Kemper.

By the Court.—Order affirmed.

Recommended for publication in the official reports.

[SEAL] This document is a true and correct copy of the document on file in my office.

/s/ [Illegible]
Clerk of Supreme Court/
Court of Appeals, State of Wisconsin

5-27-2020
Date

DATE SIGNED: January 29. 2019

Electronically signed by William J. Domina
Circuit Court Judge

STATE OF WISCONSIN	CIRCUIT COURT BRANCH 11	WAUKESHA COUNTY

KEMPER INDEPENDENCE INSURANCE COMPANY,

Plaintiff,

-vs-

YDBI ISLAMI and ISMET ISLAMI,

Defendants.

Case No. 2013-CV-002875
Case Code 30701

ORDER FROM 1/17/19 HEARING

(Filed Jan. 29, 2019)

This matter having come before the Court, the Honorable William J. Domina presiding, on January 17, 2019, with regard to cross-motions for summary judgment, and the plaintiff Kemper Independence Insurance Company ("Kemper") appearing by attorneys James M. Fredericks and Alison E. Kliner, and the defendant Ismet Islami appearing by attorneys Joseph F. Owens and Debra Kay Riedel, and the Court being advised of the premises and having offered the opportunity for additional comment by counsel,

IT IS HEREBY ORDERED AS FOLLOWS:

1. For the reasons stated by the Court, there is no genuine issue of material fact and therefore summary judgment is appropriate.

2. For the reasons stated by the Court, Kemper's motion for summary judgment is granted and Ismet Islami's motion for summary judgment is denied.

3. For the reasons stated by the Court, Kemper's Insurance Policy provides no coverage to Ismet Islami due to her husband Ydbi Islami's breach of the "Concealment or Fraud" Condition of its Policy,

4. For the reasons stated by the Court, this case is dismissed with taxable costs awarded to Kemper.

5. Pursuant to WIS. STAT. § 808.03(1), this order is a final order for purposes of appeal, as this order disposes of the entire matter in litigation as to all parties.

STATE OF WISCONSIN	CIRCUIT COURT BR. 11	WAUKESHA COUNTY

KEMPER INDEPENDENCE INSURANCE COMPANY,

Plaintiff,

-vs-

ISMET ISLAMI,

Defendant.

CASE NO. 13-CV-2875

ORAL RULING

(Filed Apr. 1, 2019)

Proceedings held in the above-entitled matter on the 17th day of January, 2019, before the Honorable WILLIAM J. DOMINA, Circuit Court Judge presiding in Circuit Court Branch 11, Waukesha County Courthouse, Waukesha, Wisconsin.

APPEARANCES: BORGELT, POWELL, PETERSON & FRAUEN, S.C.,
735 North Water Street,
Milwaukee, Wisconsin 53202,
by James M. Fredericks and
Alison E. Kliner, appearing on behalf of the plaintiff.

LAW OFFICES OF JOSEPH R. OWENS, LLC,
2665 South Moorland Road,
Suite 200,
New Berlin, Wisconsin 53151,
by Joseph F. Owens and Debra Kay Riedel, appearing on behalf of the defendant.

Transcript of Proceedings

Cindy K. Baumeister
Official Court Reporter

[2] THE COURT: Court will call the matter of Kemper Insurance Company versus Ismet Islami, 13-CV-2875. Appearances, please.

MR. FREDERICKS: Jim Fredericks and Alison Kliner, Borgelt, Powell, Peterson & Frauen, for the plaintiff Kemper.

MR. OWENS: Ismet Islami appears by her attorneys Joseph Owens and Debra Riedel.

THE COURT: Court has received competing requests for summary judgment, briefs in support. I've reviewed the most recent filings from Kemper on the 4th, from the defense on the 14th of January, and a reply from Kemper on the 16th in addition to earlier materials that were filed. I have a focus on the issues in this case.

This case has been briefed several times as we've sort of honed in on the relevance of relevant issues, and I am prepared to rule based upon my review of the material. I'm not inviting additional argument today. I will allow comment by either side if they feel there's something new they need to say specifically, but I think I've seen quite a bit. From Kemper, is there anything that you need to say for the record?

MR. FREDERICKS: No, sir.

[3] THE COURT: And from the defense?

MR. OWENS: No, judge.

THE COURT: All right. Well, this case began with a fire obviously back on June 10th of 2013 and has a fairly lengthy and tortured history in the court system. It's lasted quite a length of time. I do want to thank both counsel. I think that both counsel have gone above and beyond in terms of trying to find focus on issues in a complicated setting in light of the competing litigation, the criminal prosecution and other challenges that this case presented. The briefs are very well written and certainly were of interest to me in trying to reach conclusion.

So this fire occurred in June of 2013, and a claim was filed with Kemper. Ismet, the defendant remaining, is the named insured under the insurance policy with Kemper for the property at issue, the home and personal belongings. I have concluded based upon an earlier ruling that Ybdi was an additional insured under the policy in that I concluded that Ismet and Ybdi held themselves out as married, which was reflected in the terms of the policy as an example, the auto insurance portion of the policy which reflected coverage for motor vehicles for both Ismet [4] and Ybdi and both indicating that they were in fact married. Regardless, that conclusion led to a conclusion that Ybdi was an additional insured under the policy.

Kemper from the claim that was filed denied the claim by correspondence dated December 19th, 2013. Kemper started this action, this declaratory action

seeking a declaration that it had no responsibility to cover the loss. We all know that Ybdi was charged and convicted of arson and is currently serving a prison sentence, and by affidavit filed on October 2nd, 2018, Ybdi disclaimed any interest in any of the insurance proceeds which led to his dismissal as a party in this action.

The parties did submit a document entitled joint supplementary stipulations on December 18, 2018, and that document signed by both sides agreed to the following facts: One, on June 10, 2013, the fire on that day was a result of Ybdi Islami committing or conspiring to commit an act with the intention of damaging the property that was subject to the insurance policy that located at 145 Montessori – Monastery, excuse me, M-O-N-A-S-T-E-R-Y, Drive, Oconomowoc, Wisconsin, which was insured by Kemper against loss by fire.

[5] Secondly, the June 10th of 2013 fire was not a result of Ismet Islami committing or conspiring to commit any action with the intention of damaging the property at that same address. Thirdly, Ybdi engaged in concealment and fraud in his statement to Kemper at his examinations under oath and in his sworn statements of proof of loss as to his involvement and knowledge of the cause and origin of the June 10th, 2013, fire, and that he did so with the intent to deceive Kemper and that Kemper relied upon his concealment and fraud to his detriment – to its detriment.

Fourth, that Ismet Islami did not engage in concealment and fraud in her statements to Kemper at her examination under oath, in her sworn statements of proof of loss, and at any other relevant – at any other time relevant in this action. Five, Kemper agreed or concedes that Ismet is a, quote, innocent insured, end quote, for all purposes in this matter. Six, Kemper dismissed claims for neglect alleged at Paragraphs 18 and 19 in the complaint. Kemper also dismissed claim for overvaluation alleged at Paragraph 16 to 17 of its complaint.

Kemper dismissed its claim for actual attorneys fees, and Ismet dismissed her second [6] counterclaim as alleged in her answer and counterclaim any claim that she could bring or did bring for punitive damages and any claim for actual attorneys fees that she could have or did bring in this action. The Court did receive that stipulation and reviewed the motion and the insurance policy in light of the facts that were agreed to by both sides.

As I've indicated, both sides have moved for summary judgment. Summary judgment is a well known standard under 802.08 of the Wisconsin Statutes and permits a grant of judgment if there is no genuine issue as to any material fact and a moving party is entitled to judgment as a matter of law. When both sides file summary judgment, it is tacitly agreement that the matter is ripe for determination, but the Court still needs to go through the process of insuring that there is no genuine issue as to any material fact.

This case really involves a construction of the insurance policy firstly, and there are certain rules that I will recognize that apply to the review of the policy at issue in this case. Insurance policies are governed by the same general rules of construction that contracts are, and the purpose of any review of a contract, including an insurance policy, is to construe them to give effect to [7] the intent of the parties as expressed in the language of the policy. The established framework for determining whether coverage exists requires first an examination as to whether or not the policy makes an initial grant of coverage. In this case there's no dispute that this insurance policy covered losses related to fire and that that was part of the initial grant of coverage for Kemper related to the property that's the subject of this action.

Then the Court is required to examine the various exclusions to determine whether or not they preclude coverage, and if there is an exclusion that's applicable the Court should review whether there's any exception to the exclusion which would reinstate coverage. The courts of this state have recognized of primary importance is that the language of an insurance policy should be interpreted to mean what a reasonable person in the position of an insured would have understood the words to mean.

If a word or phrase is susceptible to more than one reasonable interpretation, it is ambiguous because the insurer is in a position to write its insurance contracts with the exact language it chooses as long as the language conforms to statutory and administrative law.

Ambiguity in the language is [8] construed in favor of an insured seeking coverage. Further a court – while a court must read the insurance policy from the standpoint of a reasonable insured, it should not interpret a policy to provide coverage for risks that the insured did not contemplate or underwrite and for which it has not received a premium. Court notes those general rules contained in the case of Advanced Waste Services v. United Milwaukee Scrap, LLC, 361 Wis. 2d 723 from the court of appeals in 2015.

Turning to the insurance policy, I've indicated there is no dispute regarding the initial scope of coverage for fire loss, which is not a surprise given the nature of the policy that was issued. The Court would reference the affidavit – Mr. Fredericks, you filed the insurance policy as an attachment to an affidavit during the course of the litigation. It's Exhibit A and I've had a copy of it for some time, but what I don't have is the filing date of the affidavit. I'm trying to make a clear record for – as to what I'm referencing. Can you provide me with the filing date?

MR. FREDERICKS: 11-28-18.

THE COURT: Thank you.

MR. OWENS: Correct, your Honor.

[9] THE COURT: Court referencing that affidavit which attaches Exhibit A, the insurance policy itself, that is the policy the Court reviewed. As I indicated, Kemper did decline coverage, decline payment on two grounds. That letter dated December 19th,

2013, Mr. Owens, I think this was attached to your affidavit.

MR. OWENS: It was, judge.

THE COURT: What was the date of your affidavit, sir?

MR. OWENS: November 8th, and it was Exhibit D, although that may have been cut off in this process.

THE COURT: But it's attached to the affidavit of November 8?

MR. OWENS: Correct.

THE COURT: All right. That contained the stated grounds for denial first referencing the exclusion under Paragraph (lh), intentional loss, and quoting the language from Page 3 of 5 of the Kemper package plus endorsement. Court notes that that endorsement has a title at the top of Page 3 of 5 homechanges to your policy to the State of Wisconsin, language quoted, intentional loss means any loss arising out of any act an insured commits or conspires [10] to commit with intent to cause a loss and further providing that the exclusion only applies to an insured who commits or conspires to commit an act with intent to cause a loss.

As a secondary ground for denial, Kemper cited to the condition related to concealment or fraud. In their denial letter, they reference Page 20 of 37 of the original policy under Section 1 and 2 conditions and quote

verbatim from that section in the denial letter of December 19, 2013. That quotation provided that Kemper did not provide coverage if whether before or after a loss an insured has, (a) intentionally concealed or misrepresented any material fact or circumstances, (b) engaged in fraudulent conduct, or (c) made false statements representing to this insurance.

The Court notes and Kemper has argued that despite the language quoted in the denial letter of December 19th, 2013, that under the terms of the policy at Pages 4 of 5 of the Kemper package plus endorsement with the same heading home-changes to your policy to the State of Wisconsin, the quoted language in the letter of December 19, 2013, was replaced with language reflected at Page 4 of 5 of that endorsement which provided as a condition under Section 1 and 2 of [11] the policy that Kemper would provide coverage to no insureds for loss under Section 1 if whether before or after a loss an insured has, one, concealed or misrepresented any fact upon which Kemper relies and that concealment or misrepresentation is material and made with intent to deceive, or secondly an insured has concealed or misrepresented any fact and that fact misrepresented contributes to the loss.

Court is being fairly detailed about quoting the different sections into the record because there's a great deal of argument between the parties, and there has been an argument made by the defense that Kemper has waived its right to rely upon any language in the replacement endorsement on Page 4 of 5 because of the language that was quoted in the denial letter

and also the language that was referenced in the summons and complaint that was filed in this case.

I will observe that the exclusion language regarding intentional acts appears not to be in play at this moment given the conclusion regarding Ybdi's status in this case. When originally denied and this case was filed, Ybdi was a party and Ybdi was still viewed as making a claim for proceeds under the policy. I note that that intentional act language limits itself or is self limiting to the acts by an [12] insured or by that insured engaged in the intentional acts.

So the Court is not going to spend a great deal of time on the issue of the denial based upon the exclusion, I simply will note that an exclusion exists. I think the real focal point in this case is the condition that I have now quoted the original policy language and the endorsement language that under the subcontract replaced the language for insureds in Wisconsin, and there has been some discussion as to what are conditions compared to exclusions.

Based upon my review of the case law, I conclude that conditions in an insurance policy set forth the responsibility of the parties, including the insureds, and if those responsibilities are not followed or the obligations that are expected as part of the condition established under the policy it may result in limits on the obligation of an insurer to make payment.

They are certainly contractual provisions. They have been reviewed by courts in other cases. The two cases that I will reference at this juncture are State

Farm and Casualty Insurance v. Walker, 157 Wis. 2d 459, Ct App 1990, and Tempelis,

* * *

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(Filed Jun. 28, 2021)

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14 W. Mifflin St., Suite 207
Madison, WI 53703

The court has entered the following order:

District: 2
Appeal No. 2019AP000488

Kemper Independence Insurance Company v. lsmet Islami

Date: July 16, 2021

Circuit Court Case No. 2013CV002875

The court having considered the **Motion for Reconsideration** filed in the above matter,

IT IS ORDERED that the Motion for Reconsideration is denied, with $50.00 costs.

Sheila T. Reiff
Clerk of Supreme Court

STATE OF WISCONSIN

SUPREME COURT

NO. 2019AP488

KEMPER INDEPENDENCE INSURANCE COMPANY,

Plaintiff-Respondent,

-v-

ISMET ISLAMI,

Defendant-Appellant-Petitioner.

Review Of Decision Of The Court Of Appeals, 392 Wis.2d 866,946 N.W.2d 231, PDC No. 2020 WI App 38 (Published).

Appeal initiated from Waukesha County Circuit Court Case No. 13-CV-002875, the Honorable William J. Domina, presiding.

MOTION TO RECONSIDER DECISION AND ORDER OF THE SUPREME COURT DATED JUNE 8, 2021

(Filed Jun. 28, 2021)

NOW COMES the Defendant-Appellant-Petitioner, Ismet Islami, by her attorneys, Joseph F. Owens, of the Law Offices of Joseph F. Owens, LLC, and Debra K. Riedel, of the Law Offices of Debra K. Riedel, and pursuant to *Wis. Stat. §§ 809.64* and *809.14* and Wis. S. Ct.

IOP III. J., moves the Court to reconsider its Decision and Order dated June 8, 2021 in the above-entitled action on the following bases, which are addressed more particularly in the Memorandum In Support Of Motion For Reconsideration filed herewith:

A. The majority opinion displaces 34 years of legislative enactment and important existing public policy considerations contained in Chapter 766, the Wisconsin Marital Property Act, with respect to the marital status of parties to a judgment of legal separation, including without limitation, their property and inheritance rights, tax obligations, contract rights and support obligations.

B. The majority opinion divests the rights and protections conferred by Wisconsin Chapter 766 upon all persons in Wisconsin who in the exercise of religious convictions prohibiting divorce, rely upon the provisions of Chapter 766 governing dissolution of their legal status from being "married" for civil law purposes. The majority opinion thereby violates Section 1 of the Fourteenth Amendment to the Constitution of the United States by abridging the privileges and immunities of citizens of the United States and depriving all such persons of liberty or property without due process and of equal protection of the laws.

C. The majority opinion displaces longstanding precedent in judicial construction of insurance contracts which contain separate discrete but patently contradictory exclusionary clauses.

WHEREFORE, the Defendant-Appellant-Petitioner, Ismet Islami, requests the following relief:

1. That this Court reconsider the majority decision and reverse and overrule the holding by the Court of Appeals in its published decision here appealed from, that a judgment of legal separation is ineffective to dissolve the marriage of the parties.

2. In the alternative, at a minimum, this Court should hold in abeyance the majority opinion on the legal effect of a judgment of legal separation on marital status and order additional briefing, including an invitation of *amicus* briefs from the Wisconsin Institute of Certified Public Accountants, the Wisconsin Banker's Association and the Wisconsin Academy of Matrimonial Lawyers.

3. That this Court reconsider the majority decision and apply longstanding rules of strict judicial construction of the language of exclusionary clauses contained in insurance contracts which resolve any conflict in primacy between such clauses in favor of coverage.

Dated this 28th day of June, 2021

Attorneys for Defendant-Appellant-Petitioner, Ismet Islami:

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STATE OF WISCONSIN
SUPREME COURT

NO. 2019AP488

KEMPER INDEPENDENCE INSURANCE COMPANY,
Plaintiff-Respondent,

-v-

ISMET ISLAMI,
Defendant-Appellant-Petitioner.

Review Of Decision Of The Court Of Appeals, 392 Wis.2d 866, 946 N.W.2d 231, PDC No. 2020 WI App 38 (Published).

Appeal initiated from Waukesha County Circuit Court Case No. 13-CV-002875, the Honorable William J. Domina, presiding.

MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER DECISION AND ORDER OF THE SUPREME COURT DATED JUNE 8, 2021

I. INTRODUCTION

A. The Wisconsin Marital Property Act (Chapter 766, Stats.)

This is a contract action - not an "action affecting the family." The majority opinion in its present form

represents judicial preemption of the legislature's enactment of the Wisconsin Marital Property Act, effective January 1, 1986. For more than 34 years, *Wis. Stat. Ch. 766* has governed all property and contract rights arising by virtue of the status of being married.

Chapter 767, when enacted in 1975, did not contemplate the adoption of community property into the law in Wisconsin 11 years later. *Chapter 767* is statutorily limited in scope to "actions affecting the family." *Wis. Stat. §767.005* entitled, "**Scope**" explicitly states: "This chapter applies to actions affecting the family." The term "actions affecting the family" is statutorily limited to those proceedings enumerated in *Wis. Stat. §767.001(1)(a)* through *(m)*. That list does not include civil contract actions.

This fundamental flaw in the majority opinion in its present form has far reaching implications for all persons in Wisconsin who obtained a judgment of legal separation since January 1, 1986. Those persons have relied upon the unequivocal legislative provision in *Wis. Stat. §766.01(7)* that:

> (7) *"Dissolution" means termination of a marriage by a decree of dissolution, divorce, annulment or declaration of invalidity or entry of a decree of legal separation . . .".*
>
> [emphasis added]

Wis. Stat. §766.01(8) specifically defines the term "During marriage" as follows:

> (8) *"During marriage" means a period in which both spouses are domiciled in this state that begins at the determination date and ends at dissolution or at the death of a spouse.*
>
> [emphasis added]

Indeed, *Wis. Stat. §766.75,* which specifically references property rights and the status of the parties following a judicial decree entered upon dissolution, refers to the parties "after dissolution" as "former spouses."

The majority opinion, in holding as a matter of law that a judgment of legal separation does not terminate "marriage" (maj. op. pgs. 10-11), effectively renders a judgment of legal separation a nullity; and the parties are therefore subject to all the obligations and rights of being "married," including the complexities of community property law, inheritance, probate, paternity, and taxation. It renders void the estate plans of all propertied persons who have for religious reasons or otherwise obtained a judgment of legal separation since 1986. The effect of the majority opinion is to divest these people of a legislatively bestowed right to judicial dissolution of the civil bonds arising by virtue of being another person's spouse. This holding, if not withdrawn, deprives them of "privileges and immunities" enjoyed by citizens of the United States; and "due process" and "equal protection" of the law per the Fourteenth Amendment to the U.S. Constitution.

B. Overlapping Exclusionary Clauses In Homeowners Insurance Polices

In addition to the foregoing fundamental disastrous impact of the majority opinion on property and constitutional rights of persons who have obtained judgments of legal separation, the majority opinion fails to address the obvious internal conflict between two discrete exclusionary clauses of the subject homeowner's policy. The wording of only one clause is addressed, that being the "Concealment or Fraud" clause. Assuming *arguendo* that the wording of each exclusionary clause at issue in this case is clear and unambiguous, the two clauses overlap each other in application to an "innocent injured" such as Ismet Islami. The same act of intentional deceit by Ydbi which the insurer relies upon to deny overage to all insureds, *via* its "Concealment or Fraud "clause, at the same time satisfies the criteria of the "Intentional Loss" exclusion language - which clause expressly preserves an innocent spouse's recovery rights. During oral argument before this Court the insurer readily conceded that its "Intentional Loss" clause requires payment to the innocent insured. Accordingly, the majority opinion, if allowed to stand unmodified, violates the fundamental rights of all persons insured by homeowners insurance policies in Wisconsin to judicial construction in favor of coverage in the event of conflict between overlapping exclusionary clauses, one of which requires payment to an innocent insured and the other rejects such payment.

II. ARGUMENT

A. The Majority Opinion Nullifies Essential Provisions Of Chapter 766 Stats., The Wisconsin Marital Property Act.

1. The Right To Dissolve The Marriage By A Decree Of Legal Separation Is Expressly Granted By The Wisconsin Marital Property Act.

Marital partners who seek a decree of legal separation fall into two categories:

a) Individuals who intend to completely terminate their marital relationship, but for religious reasons cannot divorce; and

b) Propertied individuals who for financial reasons need to avoid the community property complexities of the Wisconsin Marital Property Act, but do not require a judgment of divorce (e.g. for remarriage).

The technical complexities of the Wisconsin Marital Property Act [WMPA] placed upon all married persons in Wisconsin include income taxation, inheritance and debt liability. The "opt-out" provisions in WMPA are short-term and technically complex.

Traditional common law concepts of title to property are completely displaced by WMPA. A "Marital Property Agreement" is effective between the spouses themselves but is not effective to bind any third party creditor who does not have actual notice of all the

terms of their Marital Property Agreement, and only after the creditor has received actual notice.

Accordingly, propertied individuals faced with enormous unanticipated hospital expenses generated by treatment of a spouse cannot file bankruptcy, and as a practical matter, cannot personally deliver a copy of an exculpatory Marital Property Agreement - if they have one, in advance to all medical providers involved. The same is true in the case of wealthy married couples if one of the spouses is a business person who by the nature of his or her business (i.e., commercial real estate developer; investment fund manager, etc.) is subject to potential enormous personal liability exposure. The Wisconsin Marital Property Act provides those persons, and persons whose religious beliefs do not allow them to divorce, with an alternative to a full blown divorce. That alternative is a "decree of legal separation." Entry of that judgment effects "dissolution" of the marriage; and all the legal attributions of marriage for tax, contract and other financial purposes are thereby prospectively eliminated. The judgment of legal separation is equal to a judgment of divorce or annulment and is effective notice to the world that the former spouses and their assets are no longer subject to prospective liability exposure for the acts and debts of the other former spouse and the property awarded to each of them is their separate property. The majority opinion does not appear to comprehend that it is taking away from the public, the legislative intentionally provided right to avoid all of the impacts of the

Wisconsin Marital Property Act where they do not need nor want a divorce.

2. The Majority Opinion Violates The Fourteenth Amendment To the Constitution Of The United States.

It is elemental that the right to freely exercise freedom of religion is explicitly identified as a fundamental right guaranteed by the First Amendment to the Constitution of the United States. The Fourteenth Amendment to the Constitution of the United States prohibits the States from enforcing any law abridging the privileges and immunities of the citizenry. In addition, no State may deprive any person of life, liberty or property without due process of law nor deny any person of equal protection of the laws.

The Fourteenth Amendment was ratified by the State of Wisconsin on February 7, 1867 and became the supreme law of the land on July 9, 1868 when the Secretary of State certified its ratification by 28 of the 37 states had occurred.

The majority opinion in this case goes beyond any of the decisions in the courts below because it, for the first time, unequivocally disentitles all persons who, in the exercise of their religious beliefs against divorce, from the right granted to them by the Wisconsin legislature in the Wisconsin Marital Property Act to avoid the ramifications of the Wisconsin Marital Property Act by obtaining a judicial decree of legal separation. State power over domestic relations is not without

constitutional limits. The Due Process Clause requires a showing of justification "*when the government intrudes on choices concerning family living arrangements*" in a manner which is contrary to deeply rooted traditions. *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 499, 503-504, 97 S.Ct. 1932, 1936, 1937-1939, 52 L.Ed.2d 531 (1977) (plurality opinion). Cf. *Smith v. Organization of Foster Families*, 431 U.S. 816, 842-847,97 S.Ct. 2094, 2109-2112, 53 L.Ed.2d 14 (1977).

This issue was not directly presented by the decisions below of the circuit court or court of appeals. The majority opinion constitutes an unwarranted intrusion by the judiciary into the province of the legislature by writing out of existence a statutory provision which preserved the fundamental religious liberty and property interests of those persons. It also denies them equal protection of the law. This group of persons includes strict Roman Catholics, strict Orthodox Jews, Muslims, and some fundamental Christian sects. "*This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment*." *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640, 94 S.Ct. 791, 796, 39 L.Ed.2d 52 (1974).

Similarly, the majority opinion denies the right to utilize a judgment of legal separation to persons who choose to do so, without divorcing, in the interest of protecting and preserving their property from vicarious liability for the acts and obligations of their spouses otherwise imposed by the Wisconsin Marital

Property Act. *Zablocki v. Redhail*, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618, 24 Fed.R.Serv.2d 1313 (1978). This is a legitimate right conferred upon them by the legislature which allows spouses to dissolve the marriage and completely revert back to their rights and obligations as single persons. The only substantial difference between obtaining a judgment of legal separation and obtaining a judgment of divorce is the inability to remarry unless and until one converts the judgment of legal separation to one of divorce after 1 year and wait 6 months.

3. The Ramifications Of The Majority Opinion Nullifying The Legal Effect Of A Judgment Of Legal Separation Unsettle Numerous Areas Of The Law.

The majority opinion unequivocally holds as a matter of law on p. 10 that, " . . . *a judgment of legal separation does not terminate marriage*." On page 11. the majority opinion repeats that holding: "*Given that Ismet and Ydbi never initiated divorce proceedings but instead received a judgment of legal separation, they remained married under Wisconsin law*." On page 12. the majority opinion states again: "*Chapter 767 controls the dissolution of marriage and under its provisions, Ismet and Ydbi were still "spouses" by law as well as under the Policy*." This holding nullifies the specific provisions of WMPA cited *infra* which state exactly the opposite.

The effect of this holding on all persons who have obtained judgments of legal separation is potentially disastrous financially. If a person continues to be "married," all property is marital property except property specifically classified as individual property or left unclassified. [*Wis. Stats. §766.03(2)* and *Wis. Stat. §766.31(1)*]. "Property" is defined expansively in *Wis. Stat. § 766.01(15)* to include "an interest, present or future, legal or equitable, vested or contingent in real or personal property." Each spouse has a present equal undivided interest in each item of marital property, [*Wis.Stat.§ 766.31(3)* and *(4)*] including all income of each spouse. [*Wis. Stats. § 766.01(10)*] All property of spouses is presumed to be marital property [*Wis.Stat.§ 766.31(2)*]. In general, a spouse may transfer only his or her half interest in all marital property at death. [*Wis. Stat. § 861.01(1)*.] A surviving spouse has the right to elect against the Will of a deceased spouse so as to obtain an amount equal to half of the augmented deferred marital property estate per *Wis. Stat. § 861.02*.

If still "married," despite entry of a judgment of legal separation, the non-incurring party's property continues to be subject to liability to creditors of the incurring "spouse" per *Wis. Stat. §766.55*; *§766.56 and §766.565*.

If one of the parties dies intestate following a judgment of legal separation, according to the majority opinion, the survivor continues to be a "spouse" for purposes of intestate succession. If a female marital partner becomes pregnant years after entry of the judgment of legal separation, the majority opinion

would place the presumption of paternity on the male partner because the parties continue to be "married." *Wis. Stat. §891.39* and *§891.40*.

If the parties are "married" despite a decree of legal separation, they must file tax returns as "married" persons either "jointly" or "separately." If they file jointly they become subject to liability in the event of tax fraud or deceit by the other. If they file "married filing separately" they must each claim one-half the other party's income and are exposed to tax liability if the other party has underwithheld. Notwithstanding entry of a judgment of legal separation the majority opinion identifies that all persons are "married." Accordingly, either party can mortgage, pledge or encumber that parties' one-half interest in all the parties marital property.

With respect to medical expenses, under the majority opinion, not withstanding entry of a judgment of legal separation, each marital partner continues to be liable under the common law "doctrine of necessaries" for the other "spouse's" potentially disastrous medical expenses; and also subjects invalid "spouses" to the exhaustion of assets rules under Medicare in order for Title 19 coverage to be available for infirm "spouses."

The foregoing examples illustrate only some of the numerous untoward consequences of the majority opinion's myopic rejection of the exhaustively negotiated legislative construct of Chapter 766 since 1986.

B. The Majority Opinion Fails To Follow Settled Rules Of Judicial Construction Of Exclusionary Clauses In Insurance Contracts

The majority opinion fails to perceive that the language of the "Intentional Loss" clause applies equally to the acts constituting "Misrepresentation or Fraud." The majority Opinion on p. 14. correctly recites the subject homeowner's policy "Intentional Loss" clause which states:

> *Intentional loss means any loss arising out of any act an "insured" commits or conspires to commit with the intent to cause a loss*."

The majority opinion fails to perceive that the stipulated facts of Ydbi's fraudulent acts of misrepresentation satisfy all the elements of this "Intentional Loss" provision.

Ydbi's fraudulent misrepresentations qualify as "any act," done by "an insured" which he "committed" or conspired to commit "with the intent to cause a loss." These are the stated elements of the "Intentional Loss" clause, Ydbi's misrepresentation conduct is "any act" intended by him to mislead the insurer and cause a loss. It satisfies each and every requirement of the language of the "Intentional Loss" clause. The majority opinion correctly observes that the policy states that an innocent insured is entitled to coverage under the "Intentional Loss" clause. The majority opinion, however, fails to perceive that the same facts also satisfy the "Misrepresentation or Fraud" clause but with an opposite coverage result for an innocent insured, which

creates an issue of internal ambiguity between two discrete clauses. The majority opinion never addresses or resolves this issue of inherent contextual ambiguity between two discrete clauses both of which apply.

The settled rules of insurance contract construction with respect to exclusionary clauses are explicitly set forth by the Supreme Court in *Kaun v. Industrial Fire & Casualty Insurance Co.,* 148 Wis.2d 662, 436 N.W.2d 321 at 324 (1989):

> *In the case of an insurance contract, the words are to be construed in accordance with the principle that* ***the test is not what the insurer intended the words to mean but what a reasonable person in the position of an insured would have understood the words to mean****. Id. quoting Garriguenc v. Love, 67 Wis.2d 130, 134-35, 226 N.W.2d 414 (1975).* ***Ambiguities in coverage are to be construed in favor of coverage, while exclusions are narrowly construed against the insurer.*** *Vidmar, 104 Wis.2d at 365, 312 N.W.2d at 129, citing Davison v. Wilson, 71 Wis.2d 630, 635-36, 239 N.W.2d 38* (1976). (emphasis added).

The settled law of Wisconsin defines "ambiguity" as follows:

> *An ambiguity exists when the policy is reasonably susceptible to more than one construction from the viewpoint of a reasonable person of ordinary intelligence in the position of the insured." Schroeder v. Blue Cross & Blue Shield, 153 Wis.2d 165, 174, 450 N.W.2d 470 (Ct. App.*

1989); *Cieslewicz v. Mut. Services Cas. Ins. Co., 84 Wis.2d 91, 97-98, 267 N.W.2d 595 (1978).*

Put succinctly, in the drafting of insurance policies, insurance companies are required to say what they mean and mean what they say. In this case two exclusionary clauses drafted by the insurer apply to the same set of facts with directly contradictory results for an innocent insured. The majority opinion fails to follow the most basic settled rules of judicial construction for exclusionary clauses in insurance policies and overturns more than 50 years of precedent.

The public policy of the State of Wisconsin disfavors assigning vicarious liability to an innocent insured and will not do so unless an insurer's contractual language is crystal clear. Under any view of the language in this policy, the two clauses in question when applied to a culpable insured's acts of misrepresentation result in "ambiguity."

CONCLUSION

In the interest of all persons in the State of Wisconsin who have obtained a judgment of legal separation since January 1, 1986; all persons whose religious convictions do not allow them to obtain a divorce; and all married persons whose financial well-being is best served by utilizing the legal separation provisions of the Wisconsin Marital Property Act, this Court should reverse and overrule the published opinion of the Court of Appeals herein which denied the legal efficacy

of a judgment of legal separation to dissolve the status of being married.

Also, in the interest of all innocent persons insured under homeowners insurance policies in the State of Wisconsin, reverse the Court of Appeals decision denying coverage to Ismet Islami in that under well settled rules of judicial construction of exclusionary clauses in insurance contracts, the existence of conflicting exclusionary clauses constitutes contextual ambiguity.

Respectfully submitted this 28th day of June, 2021

Attorneys for Defendant-Appellant-Petitioner, Ismet Islami:

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STATE OF WISCONSIN	CIRCUIT COURT	WAUKESHA COUNTY

KEMPER INDEPENDENCE INSURANCE COMPANY,

Plaintiff,

vs. Case No. 13-CV-02875

YDBI ISLAMI and ISMET ISLAMI

Defendants.

JOINT SUPPLEMENTARY STIPULATIONS

(Filed Dec. 18, 2018)

NOW COME the Plaintiff, Kemper Independence Insurance Company, through its attorneys, Borgelt, Powell, Peterson & Frauen SC, by Attorney James M. Fredericks; the Defendant, Ismet Islami, through her attorneys, Law Offices of Joseph F. Owens, LLC, by Attorney Joseph F. Owens, and hereby file the following Joint Supplementary Stipulations which adopt the Stipulations previously filed with the court in the Joint Report of Counsel on December 7, 2018 and supplement those Stipulations. The *pro se* Defendant, Ydbi Islami, did not participate in any of these Stipulations.

A. Stipulations

It is hereby stipulated and agreed by and between the Plaintiff, Kemper Independence Insurance Company and the Defendant, Ismet Islami as follows:

1. The 6/10/13 fire was a result of the Ydbi Islami committing or conspiring to commit an act with the intention of damaging the property at 145 Monastery Drive, Oconomowoc, Wisconsin, which was insured by Kemper against loss by fire.

2. The 6/10/13 fire was not a result of Ismet Islami committing or conspiring to commit any act with the intention of damaging the property at 145 Monastery Drive, Oconomowoc, Wisconsin.

3. Ydbi Islami engaged in concealment and fraud in his statement to Kemper, at his Examinations Under Oath, and in his Sworn Statements of Proof of loss as to his involvement and knowledge of the cause and origin of the 6/10/13 fire, that he did so with the intent to deceive Kemper, and that Kemper relied on his concealment and fraud to its detriment.

4. Ismet Islami did not engage in concealment and fraud in her statement to Kemper, at her Examination Under Oath, in her Sworn Statements of Proof of Loss and at any other time relevant to the above-entitled action.

5. Kemper concedes that Ismet Islami is an "innocent insured" for all purposes in the above-entitled action.

6. Kemper hereby dismisses with prejudice its entire claim for "Neglect" as alleged in paragraphs 18-19 of its Complaint.

7. Kemper hereby dismisses with prejudice its entire claim for "Overvaluation" as alleged in paragraphs 16-17 of its Complaint.

8. Kemper hereby dismisses with prejudice its entire claim for actual attorney's fees.

9. Ismet Islami hereby dismisses with prejudice her entire "Second Counterclaim" as alleged in her Answer and Counterclaim, any claim for punitive damages in its entirety, and the entirety of any claim for actual attorney's fees in the above-entitled action.

It is the intent of the parties to this Stipulation that the court may proceed to decide as a matter of law whether there is coverage for the subject fire loss provided to Ismet Islami under the homeowners insurance policy issued to Ismet Islami by Kemper Independence Insurance Company. Determination of all issues relating to damages are deferred until after the coverage issues are decided by the court.

Dated this 18th day of December, 2018.

Borgelt, Powell, Peterson & Frauen SC Attorneys for plaintiff, Kemper Independence Insurance Company	Law Offices of Joseph F. Owens, LLC Attorneys for defendant, Ismet Islami

Electronically signed by James M. Fredericks	*Electronically signed by Joseph F. Owens*
By: James M. Fredericks, SBN No. 1014015	By: Joseph F. Owens, SBN No. 1016240

DATE SIGNED: December 13. 2018

Electronically signed by William J. Domina
Circuit Court Judge

STATE OF WISCONSIN	CIRCUIT COURT BRANCH 11	WAUKESHA COUNTY

KEMPER INDEPENDENCE INSURANCE COMPANY,

Plaintiff,

-vs-

YDBI ISLAMI and ISMET ISLAMI,

Defendants.

Case No. 2013-CV-002875
Case Code 30701

ORDER

(Filed Dec. 13, 2018)

This matter having come before the Court, the Honorable William J. Domina presiding, on several motions on December 11, 2018, and plaintiff Kemper Independence Insurance Company ("Kemper") appearing by attorneys James M. Fredericks and Alison E. Miner, defendant Ismet Islami appearing by attorneys Joseph F. Owens and Debra Kay Riedel, and defendant Ydbi Islami appearing *pro se* by telephone from prison via court-sworn interpreter Asan Xhaferi who was present in court, and the Court being advised of the premises and having entertained comment by counsel,

IT IS HEREBY ORDERED AS FOLLOWS:

1. For the reasons stated by the Court, there is no genuine issue of material fact that Ydbi Islami and Ismet Islami are husband and wife and are spouses of each other for purposes of the subject Kemper policy. Ydbi Islami is therefore an insured under the Kemper policy. Ismet Islami's Motion with respect to this issue is denied and Kemper's Cross-Motion with respect to this issue is granted.

2. For the reasons stated by the Court, Kemper's Motion in Limine with respect to Kemper's proposed admission of other acts evidence as it relates to other fires, is denied.

3. Ybdi Islami, by affidavit dated October 1, 2018 and filed with the Court on October 2, 2018 has waived any claim to insurance proceeds under the Kemper policy "arising from the fire loss that forms the basis of this lawsuit." However, he remains a party to this action so long as Kemper maintains its subrogation claim against him seeking recovery for the costs of its investigation and any amount that it was required to pay First Bank Financial Centre as mortgagee. The Court will discuss Ydbi's status with the parties at the next court hearing.

4. Other Motions and issues will be further discussed on December 19, 2018 at 2:00 p.m.

STATE OF WISCONSIN	CIRCUIT COURT BR. 11	WAUKESHA COUNTY

KEMPER INDEPENDENCE INSURANCE COMPANY,

Plaintiff,

-vs-

YDBI ISLAMI and ISMET ISLAMI,

Defendants.

CASE NO. 13-CV-2875

MOTIONS IN LIMINE

Proceedings held in the above-entitled matter on the 11th day of December, 2018, before the Honorable WILLIAM J. DOMINA, Circuit Court Judge presiding in Circuit Court Branch 11, Waukesha County Courthouse, Waukesha, Wisconsin.

APPEARANCES: BORGELT, POWELL, PETERSON & FRAUEN, S.C.,
735 North Water Street,
Milwaukee, Wisconsin 53202,
by James M. Fredericks and Alison E. Kliner, appearing on behalf of the plaintiff.

LAW OFFICES OF JOSEPH R. OWENS, LLC,
2665 South Moorland Road,
Suite 200,
New Berlin, Wisconsin 53151,
by Joseph F. Owens and Debra Kay Riedel, appearing on behalf of the Ismet Islami.

The defendant Ydbi Islami appears by video.

Transcript of Proceedings

Cindy K. Baumeister
Official Court Reporter

[2] THE COURT: Let me call the case of Kemper Independence Insurance Company versus Ydbi Islami, et al, Case 13-CV-2875. Could I have the appearances, please.

MR. FREDERICKS: For the plaintiff, Attorney Jim Fredericks and Attorney Alison Kliner. Good morning.

MR. OWENS: Your Honor, for the defendant Ismet Islami attorney Joseph Owens and co-counsel Attorney Debra Riedel.

THE INTERPRETER: And the interpreter Asan Xhaferi.

THE COURT: Thank you. Mr. Interpreter, could you stand, please, and be sworn.

(Interpreter sworn)

THE COURT: All right. The Court has on its docket today several motions related to a trial scheduled for two weeks in January. There are competing motions for summary judgment brought by the parties, plaintiff and the defendant Ismet Islami. There are motions in limine that have been filed by the plaintiff, and there's a motion to produce Ydbi Islami for purposes of trial.

The Court has spent a considerable amount of time reviewing this file. This file is not [3] simple. Its complexity is somewhat complicated or enhanced by the passage of time and the filings that have been made over the course of time. I tried to reset the deck by having the parties re-submit previously posited positions so that I can at least get clear in my mind the parties' positions with respect to what I think are key issues in this case. So I've been up this morning since five o'clock re-reviewing material, and I may have some questions and then I certainly have some view as to some of the key issues in this case.

This is a little reversed because Kemper has brought an affirmative declaratory action against its insured. Its insured, the named insured under the policy, is Ismet Islami. Kemper has argued that Ydbi Islami is also an insured by definition in the definition section. Kemper has argued that Ydbi Islami is also an insured because Kemper's view is that Ydbi is the husband or is married to Ismet.

The defense, Ismet, indicates that Ydbi is not her husband because there was the filing of a legal separation in Waukesha County Circuit Court back in the late 1990s and that legal separation was approved by court order, and Ismet argues under Chapter 766 of the Wisconsin Statutes that the [4] definition of dissolution of marriage includes a legal separation and therefore proffers the argument that there is no marriage in this case because the marriage was dissolved by legal separation.

I spent a lot of time reading 766, 767, and trying to get a handle on the interaction between what was the and is the divorce process under 767 and the legal separation and dissolution of marriage recognition under 766 that dealt with the Wisconsin Marital Property Act when that was adopted.

It struck me at about six o'clock this morning that that effort may have been unnecessary. As I reviewed the policy in this case which I find to be unambiguous in its relevant terms and the affidavit of Ismet Islami that was submitted by Mr. Owens, I reached certain conclusion outside of the Wisconsin Statutes and inside of the contract that was issued by Kemper.

Now, summary judgment is appropriate when there is no material or genuine a issue of fact as to – excuse me – that there's no genuine issue as to any material fact. A material fact is one that is of consequence to the merits of the litigation. A factual issue is genuine if the evidence is such that a reasonable trier of fact could return a verdict in [5] favor of a non-moving party. Where there is no issue of fact that should be tried or where there are issues of law that can be determined so as to conclude an issue or all issues, summary judgment should be utilized since in these cases it provides a procedure for the speediest and least expensive disposition in the case.

The parties here have filed competing motions for summary judgment which the Courts have recognized in essence as a stipulation that it is appropriate for the Court to consider the issue on summary judgment,

however I still must be satisfied that there are no material issues of fact that are present.

As to the issue of marriage and whether or not Ydbi and Ismet are married, this Court concludes that there is no genuine issue as to any material fact so far as the Kemper Insurance contract is concerned that Ydbi and Ismet are considered husband and wife for purposes of the contract that they entered into with Kemper.

Ismet filed an affidavit indicating that she sought a legal separation because of concerns related to financial concerns in her marriage but that given her faith as a Muslim she views herself as [6] married in the eyes of God. It is very clear that that perspective entered into her relevant behavior pattern, her undisputed behavior pattern so far as the interaction with Kemper was concerned.

The insurance policy clearly insures property including automobiles and in those contractual agreements that exist between Kemper and the defendants the contractual indication, the basis upon which Kemper insured, was based upon the position of Ismet and Ydbi being husband and wife. It's represented expressly in the contract. That's consistent with – That's consistent with Ismet's declaration of her belief as to the continuing spiritual recognition of her marital relationship to Ydbi.

This Court concludes that there's no genuine issue of material fact regarding the fact that for purposes of the contract and the contract itself was based upon

these two individuals being married. It is irrelevant in this Court's view whether or not under the law of Wisconsin they were in fact married. It is relevant in this Court's view that based upon the undisputed terms of the contract based upon the interaction between the defendants and Kemper they represented themselves and Kemper accepted their representation as an insured interest based upon their [7] marriage.

Marital status has relevancy in terms of consideration by insurance companies as to the rating that's provided for purposes of insuring an interest such as automobiles. The Court read the insurance contract, and it very clearly indicates an indication that they are in fact married to each other. So I think that the contract controls in this case, and Chapter 766 and 767 while an interesting travel for me does not require me to declare in this case and I decline to declare in this case its effect as to their marriage in the community, but I believe they're bound by that expression in terms of the contract that they entered with Kemper, and that's my conclusion and therefore Ydbi based upon the recognition of marriage for purposes of contract with Kemper is an insured by definition under the contract.

The parties have stipulated or expressed in their joint report, and I say parties, Ismet and Kemper, Ismet is the – Let me make this finding for purposes of 766. It's clear from the legal separation that Ismet received the interest in the real estate in this case, Mr. Owens; is that accurate?

MR. OWENS: Absolutely, judge.

THE COURT: And so the house coverage, the [8] insured interest for the real estate for the home is Ismet's interest, Mr. Fredericks; do you agree with that?

MR. FREDERICKS: She is the named insured, yes.

THE COURT: All right. For purposes of the house; right?

MR. FREDERICKS: Yes.

MR. OWENS: And the contents, judge.

THE COURT: And the contents of the house. Thank you. Paragraph 6 of the joint report that was submitted by the parties electronically on December 7th states both Kemper and Ismet Islami agree that the 6-10-13 fire was incendiary in origin, i.e.; caused by arson, and then they indicate we do not know whether Ydbi Islami will stipulate he was involved in or had knowledge of the arson, and then they say if he will it will greatly shorten the trial. Ismet Islami denies any involvement in or knowledge of a plan to commit arson.

Mr. Owens, based upon my conclusion regarding the contractual marital status of Ismet and Ydbi, the insurance policy appears to impute to all insureds if an arson is committed by one of the insureds in terms of coverage. Now, I recognize that [9] you have an argument regarding an innocent spouse exception and I want to deal with that in substance, but I also want to

understand if but for the innocent spouse language contained in the case that you've cited the contractual language itself is express. Do you agree or disagree with that?

MR. OWENS: Disagree, judge, and I will tell you why.

THE COURT: Tell me I can't.

MR. OWENS: There are two provision. One is the exclusion language, and in the brief filed by Kemper they admit that that language says that it – for intentional destruction the intentional loss provision by an insured only applies to the actor. That's in both of our briefs and it's quoted, and they concede that. In other words, the coverage is several for intentional destruction.

THE COURT: I'm sorry. The first thing you said it's in what section?

MR. OWENS: The intentional destruction provision which is identified as an exclusion, and it's in the Wisconsin rider. It's also in the main policy, but both sides quote it in their briefs, judge, and it's very clear that the second part says this only applies to an insured who actually does the – the

* * *

STATE OF WISCONSIN	CIRCUIT COURT	WAUKESHA COUNTY

KEMPER INDEPENDENCE INSURANCE COMPANY,

Plaintiff,

Case No. 13-CV-02875

-and-

YDBI ISLAMI and ISMET ISLAMI

Defendants.

-and-

FIRST BANK FINANCIAL CENTRE

Involuntary Defendant.

SUPPLEMENTAL AFFIDAVIT OF ISMET ISLAMI IN SUPPORT OF HER MOTION FOR SUMMARY JUDGMENT

STATE OF WISCONSIN)
) SS.
COUNTY OF WAUKESHA)

(Filed May 21, 2015)

NOW COMES Ismet Islami, being first duly sworn on oath, and deposes and states the following:

1. I emigrated legally from the former county of Yugoslavia, province of Macedonia to the United States of America in 1977 as a single person.

2. In Yugoslavia I had received what would be the equivalent of an elementary school education in the United States. My schooling did not include English classes and I have no other education.

3. I did not learn to speak English until emigrating to the United States. As a result I have only a working vocabulary and can communicate verbally in English on a basic conversational level. However, I cannot write in English at all, and can read English only to a limited degree.

4. A number of years into my marriage to Ydbi Islami, he became a convicted sex offender and was later incarcerated for violating his probation terms in significant ways.

5. As a result, I wanted a divorce but Ydbi Islami would not consent to granting me a divorce.

6. I am a Moslem woman, and I was taught and believe according to my religion that a woman cannot divorce her husband without his consent.

7. Ydbi Islami would not consent to a divorce but after consulting a lawyer, he agreed to consent to legal proceedings denominated "Legal Separation."

8. I undertook obtaining the Judgment of Legal Separation under which I could own property in my own name free from any property right claim by Ydbi Islami and free from liability for any acts committed by Ydbi Islami.

9. It is my understanding and belief that for civil legal purposes, my marriage to Ydbi Islami was dissolved by the Judgment of Legal Separation entered between Ydbi Islami and myself in 1998, but before God we are still married.

10. It is my habit to simply describe Ydbi Islami as my husband in conformity with my religious beliefs rather than attempt to explain that I am a Moslem and that he is my husband for religious purposes only, but not for civil law purposes.

11. During the Examination Under Oath of me conducted by the attorney for Kemper Insurance Company, Kemper's attorney told me he was fully aware of the Judgment of Legal Separation and understood its legal effect.

12. I have no understanding whatsoever of federal and state income tax rules or tax return preparation, and their content has no meaning to me. I would not recognize or understand such documents if shown to me.

13. As I stated in my Examination Under Oath, I am familiar only with my family household finances. I did not state that I was familiar with financial aspects of the businesses owned with my brother, Bajram Iljazi, or Ydbi Islami's business affairs.

14. In January of 2013, my brother, Bajram Iljazi, and I sold the "Around the Lakes Restaurant" which we owned together and which resulted in the application of approximately $625,000 of sale proceeds to

the commercial loan note to First Bank Financial Centre last signed by my brother in December of 2012, which payment arithmetically reduced the loan balance of approximately $1.3 million dollars to approximately $775,000.

15. At that time, my residence was entirely debt free and worth approximately $1,000,000 according to Kemper Independence Insurance Company's insurance valuation.

16. First Bank Financial Centre then requested that I and my brother join in paying down the remaining balance on the commercial note by $400,000 through First Mortgage Loans on each of our residences which were otherwise debt free.

17. This was accomplished in February of 2013, reducing the commercial note balance down to approximately $375,000, and is currently identified by the Bank in this lawsuit as carrying a remaining balance of $376,922.88 as shown to me by my lawyer.

18. I recognize a copy of the Loan Closing Statement for my $295,000 loan (attached as Exhibit A) which I am informed was produced in the underlying documents relied upon by Kemper Insurance Company's CPA which shows $200,000 of this loan being applied to reduce principal on my brother's commercial note and one-half of the interest due to that point. The Loan Closing Statement also shows the Bank escrowing 18 months of principal and interest in advance on my loan (i.e., $29,464.02); plus another 5 months of interest escrowed in advance on my loan (i.e., $15,000);

plus escrowing the second half of 2012 real estate taxes on my house coming due in July of 2013 (i.e., $6,957); plus all of 2013 anticipated real estate taxes on my house – not due until 2014 (i.e., $14,924).

19. As a result, my understanding was that as of February 2013, I had over $700,000 in equity remaining in my residence. The Around the Lakes Restaurant had been sold. My real estate taxes were prepaid until 2014 and my mortgage payments were prepaid for approximately 23 months in advance. In addition, I had $18,471.88 in undisbursed loan proceeds available to me to draw on.

20. I was also aware that two other commercial properties secured the commercial note and which properties generate approximately $7,500 per month in rent, which sum exceeded the bank loan payment requirements under the commercial note by at least $3,000 per month.

21. During my examination under oath, I also informed Kemper's legal counsel that I had accumulated a personal reserve of $30,000 in cash over a number of years which I kept in a bank safety deposit box.

22. In June of 2013, and prior to the time my house was destroyed by fire, I did not perceive myself to be under any financial pressure and I had gone to Europe on vacation for several weeks to visit my family.

23. There is absolutely no rational reason that I would have had anything to do with arson destruction

of my house. If I had wanted the equity out of my house, I would have sold it and paid 5% real estate commission at most. The holding costs were prepaid for approximately 2 years. I had $30,000 in reserve and $18,000 of available funds to draw on from my bank loan proceeds on my home mortgage. There was also some available positive cash flow from the monthly rental income of the two other commercial buildings securing my brother's commercial loan note.

/s/ Ismet Islami
Ismet Islami, Affiant

Subscribed and sworn to before me
this 20th day of May, 2015

/s/ Kauser K. Razyi [SEAL]
Notary Public, State of Wisconsin
My Commission ~~Expires:~~ is permanent.

UNITED STATES OF AMERICA

STATE OF WISCONSIN, WAUKESHA COUNTY

(Filed Nov. 8, 2018)

OFFICE OF THE CLERK OF THE CIRCUIT COURT.

I, Carolyn T. Evenson, Clerk of the Circuit Court of the County of Waukesha, in the State of Wisconsin, the said Circuit Court being a court of record and having a seal, do hereby certify that the annexed has been compared by me with the original IN RE THE MARRIAGE OF ISMET ISLAMI AND YDBI ISLAMI CASE NO. 97 FA 961 CERTIFICATION OF PORTION OF JUDGMENT AFFECTING TITLE TO REAL ESTATE and that the same is a true copy of the original and of the whole thereof, as the same now remains on file and of record in my custody in said Circuit Court,

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Circuit Court at the City of Waukesha, in said county and state. this 17th day of December, A. D. 19 99

By /s/ Dianel Crowley
Deputy Clerk.

STATE OF WISCONSIN	CIRCUIT COURT	WAUKESHA COUNTY

In Re the Marriage of:

ISMET ISLAMI
145 Monastery Hill Drive
Oconomowoc, WI 53066

Joint petitioner,

-and-

CASE NO. 97 PA 961

YDBI ISLAMI
Jackson Correctional Institute
Black River Falls, WI 54615

Joint Petitioner.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT OF LEGAL SEPARATION

(Filed Mar. 25, 1998)

TRIAL

Judicial Officer:	Honorable Patrick L. Snyder, Circuit Court Judge
Date:	February 25, 1998
Appearances:	Ismet Islami in person and by Attorney Robert A. Cross
	Ydbi Islami by Attorney Joseph F. Owens

I, the Judicial Officer before whom this action was tried, do hereby make these Findings of Fact, Conclusions of Law and-Judgment of Legal Separation:

FINDINGS OF FACT

1. For at least six (6) months before the commencement of this action Ismet Islami, Joint-Petitioner, was a continuous resident of the State of Wisconsin, and of this County for at least 30 days prior to such commencement; further, that all parties have been duly served, that 120 days have lapsed since the commencement of this action.

2. Joint-Petitioner: Ismet Islami
Residence: 145 Monastery Hill Drive,
Oconomowoc, WI 53066
Birthdate: 06/23/58
Social Security Number: 336-66-4526
Occupation: Restaurant Operator
Income: Earnings/month: $7,000.00 Net

3. Joint-Petitioner: Ydbi Islami
Residence: Jackson Correctional Institute,
Black River Falls, WI 54615
Birthdate: 01/06/56
Social Security Number: 328-54-1894
Occupation: Construction and Management
of Real Property in Restaurant
Field
Income: Earnings/month: $ -0-

4. The parties were married-on January 15, 1978 in Chicago, Illinois.

5. (a) The following adult emancipated child was born to the parties: Albert Islami [d/o/b 10/22/78].

(b) The wife is not pregnant.

6. (a) Neither party has begun any other action for divorce, legal separation or annulment anywhere:

(b) Neither party has been previously married.

7. The marriage is broken as defined-in *Wis. Slats. §767.07(2)(b)* and *§767.12(3)*.

8. The assets of the parties, their interests therein, the values thereof, and their encumbrances and debts are found to be as set forth in the joint financial disclosure statement of the parties which is on file herein and is placed under seal.

9. The Marital Settlement Agreement which was entered into by the parties, was fully addressed on the record, is found to be fair and reasonable, is approved in its entirety, and is incorporated herein by reference as an integral part of the Judgment of this Court as if set forth with full particularity herein.

CONCLUSIONS OF LAW AND JUDGMENT

10. Legal Separation.

The parties are adjudicated to be legally separated as of February 25, 1998, and pursuant to *§767.09*, *Wis. Stats.* the parties are informed that in the event of a reconciliation at any time after the granting of this Judgment of Legal Separation, the parties may apply for a revocation of the Judgment. Upon such application, the court shall make such orders as may be just and reasonable.

The parties are further advised that by stipulation of both of them or upon Motion of either party not earlier than one (1) year after the entry of a decree of legal separation, the Court shall convert the decree to a decree of divorce.

11. Attorney's Fees

Each party shall be responsible for his/her own attorney's fees incurred in connection with this legal separation.

12. Non-Compliance

Disobedience of the Court orders and this Judgment is punishable under Ch. 785 by commitment to the county jail or House of Correction until such judgment and/or Order is complied with and the costs and expenses of the proceedings are paid or until the party committed is otherwise discharged, according to law.

JUDGMENT IS HEREBY RENDERED AND THE CLERK IS ORDERED TO ENTER THIS JUDGMENT.

By the Court:

/s/ Patrick L. Snyder
Hon. Patrick L. Snyder,
Circuit Court Judge

JUDGMENT ENTERED THIS 24 *DAY OF* March *1998*

_____
Clerk of Courts

By: _____
Deputy Clerk

Approved as to form:

/s/ Robert A. Cross
Attorney Robert A. Cross
State Bar No. 1026210