IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Case No. DA 21-0449

JOSEPH AND SHARLENE LOENDORF; ABRAHAM AND KATHY STEVENS,

Plaintiffs/Appellee
v.

EMPLOYERS MUTUAL CASUALTY COMPANY, a foreign corporation,

Defendant/Appellant.

From the Montana Thirteenth Judicial District Court, Yellowstone County
DV-20-0366
Honorable Gregory R. Todd, presiding.

APPELLANT/DEFENDANT EMPLOYERS MUTUAL CASUALTY COMPANY'S ("EMC") OPENING BRIEF

David C. Berkoff
Carey B.C. Schmidt
SCHMIDT BERKOFF, PLLC
1917 S. Higgins Avenue
Missoula, MT 59801
Attorneys for Appellant/Defendant Employers Mutual Casualty Company

Carey Matovich
Ryan Gustason
Matovich, Keller & Huso, P.C.
2812 First Avenue North, Suite 225
P.O. Box 1098
Billings, MT 59103-1098
Attorneys for Appellees/Plaintiffs

Mark D. Parker
Parker, Heitz & Cosgrove, P.C.
401 North 31st Street, #805
Billings, MT 59101
Attorneys for Appellee/Defendant Helgeson

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A. STATEMENT OF ISSUES

1. Did the District Court err when it found the EMC Commercial General Liability ("CGL") Policy's "Earth Movement Exclusion" ambiguous because it did not differentiate between natural and human-caused events?

2. Did the District Court err when it concluded that underlying causation was undisputed and implied that EMC had a duty to indemnify the Appellees' underlying claims?

3. Did the District Court err when it awarded attorney fees to Appellees pursuant to the Uniform Declaratory Judgments Act?

B. STATEMENT OF THE CASE

In 2018, Appellees Loendorf and Stevens filed separate underlying lawsuits entitled *Joseph and Sharlene Loendorf v. S.D. Helgeson, Inc. d/b/a Stan Helgeson Homes, and SRKM, Inc. d/b/a Helgeson Homes, and DOES 1-5*, Cause No. DV-18-1191 (Mont. 13th Jud. Dist.), and *Abram M. Stevens and Kathy S. Stevens v. S.D. Helgeson, Inc. d/b/a Stan Helgeson Homes, and SRKM, Inc. d/b/a Helgeson Homes, and DOES 1-5*, Cause No. DV-18-1235 (Mont. 13th Jud. Dist.) ("Underlying Lawsuits"). The Underlying Lawsuits seek damages from EMC's insureds, S.D. Helgeson, Inc. and SRKM, Inc. ("Helgeson"), resulting from differential movement caused by the settlement of soils under or beside their homes after Helgeson allegedly failed to utilize higher standard foundations.

Helgeson has denied any wrongdoing in those Underlying Lawsuits.[1] EMC is defending Helgeson under reservations of rights in both Underlying Lawsuits pursuant to this Court's admonition in *Farmers Union Mut. Ins. Co. v. Staples*, 2004 MT 108, 321 Mont. 99, 90 P.3d 381.

Appellees filed this instant declaratory judgment action on March 10, 2020. Appellees' Complaint sought declaratory judgment "that EMC is obligated to fully indemnify Helgeson for Plaintiffs' claims within the applicable policy limits without further delay" as well as "attorney's fees" and interest. (District Court Record at 1 (Complaint (3/10/2020) at 3).)[2]

The parties filed and fully briefed Cross-Motions for Summary Judgment. On August 18, 2021, the district court denied EMC's Motion and granted the Appellees' Motion. (R at 41.) The district court's Order on Summary Judgment found that the EMC Earth Movement exclusion was ambiguous because it did not differentiate between natural and human-caused earth movement. The district court further held that "[t]here is no disputing that the alleged injuries [claimed in the Underlying Lawsuits] were caused by Helgeson" and therefore "EMC has a duty to

[1] This Court should take judicial notice of the fact that Helgeson has denied all liability in the Answers filed by Helgeson in the Underlying Lawsuits pursuant to M.R. Evid. 201. (*See* **Appendix 1**, Helgeson Answer to Underlying Loendorf Complaint (5/02/2019), Helgeson Answer to Underlying Loendorf Amended Complaint (10/13/2021); **Appendix 2**, Helgeson Answer to Underlying Stevens Complaint (5/02/2019); Helgeson Answer to Underlying Stevens Amended Complaint (10/13/2021).) It is noted Helgeson's most recent Answers were filed after Notice of Appeal was filed in this case.

[2] The District Court record ("R") is included as **Appendix 3**.

provide coverage for the Plaintiffs' claims." (R at 41, at 8.) Appellees filed Notice of Entry of Judgment on August 23, 2021. EMC filed Notice of Appeal on September 14, 2021.

On September 7, 2021, Appellees filed a Motion for Attorney Fees but did not submit a supporting brief. (R at 44.) EMC opposed Appellees' Motion for Attorney Fees on September 27, 2021. (R at 49.) Appellees submitted a Reply Brief in Support of their Motion for Attorney Fees on October 20, 2021, raising substantive arguments under the Uniform Declaratory Judgment Action ("UDJA") for the first time. (R at 52.) On October 21, 2021, EMC moved the district court for Leave to File a Sur-Reply Brief to address the legal arguments raised by Appellees in their Reply Brief. (R at 53, 54.) The district court did not consider EMC's Sur-Reply Brief because it issued an Order Granting Appellees' Motion for Attorney Fees on October 20, 2021. (R at 56.) These pleadings appear to have crossed in the mail. Nonetheless, the proposed Sur-Reply Brief is included in the district court's supplemental record. The district court's Order on Attorney Fees concluded that "equitable considerations" existed and the three "tangible parameters" for an award of attorney fees had been met. (R at 56.)

EMC filed an Amended Notice of Appeal on November 4, 2021. EMC's Amended Notice of Appeal provides notice that EMC is appealing the district court's Order on Summary Judgment and its Order on Attorney Fees.

C. STATEMENT OF FACTS

Appellant/Defendant, EMC, is an Iowa Corporation with its principal place of business in Des Moines, Iowa. (R at 1, Complaint ¶5 (3/10/2020); R at 8, Answer of EMC ¶5 (4/27/2020).) Appellees/Defendants, S.D. Helgeson, Inc. and SRKM, Inc. are Montana Corporations licensed to do business in the State of Montana. (R at 5, Answer of Helgeson at ¶4 (4/17/2020).) Appellees/Plaintiffs, Joseph and Sharlene Loendorf and Abram Stevens and Kathy Stevens, reside in the Falcon Ridge subdivision in Billings, Montana. (R at 1, ¶3.)

EMC insured Helgeson under annual Commercial General Liability ("CGL") policies over seven policy periods beginning December 5, 2009. The final CGL policy possessed a policy period beginning December 5, 2015 and ending on December 5, 2016. (R at 21.3 and 21.5, EMC's Stevens and Loendorf MSJ Briefs, Ex. 1, Found. Aff., Ex. B, EMC CGL Policy ("EMC CGL Policy").)

The EMC CGL Policy insured Helgeson's liability subject to the policy's conditions, limits, and exclusions. Section I – Coverages – Coverage A(1)(a) of the 2015-2016 EMC CGL Policy provides that EMC "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily

injury' or 'property damage' to which this insurance does not apply." (*Id.*, Ex. B, at Form CG 00 01 04 13 at page 1 of 16.)

The EMC CGL Policy includes an "Injury or Damage from Earth Movement" endorsement ("Earth Movement Exclusion"), which broadly precludes insurance coverage for "property damage" and "bodily injury" claims arising from any settlement or earth movement. It reads:

> THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.
>
> **EXCLUSION – INJURY OR DAMAGE FROM EARTH MOVEMENT**
>
> This endorsement modifies insurance provided under the following:
>
> COMMERCIAL GENERAL LIABILITY COVERAGE PART
>
> OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
>
> PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
>
> This insurance does not apply to "bodily injury," "property damage," "personal injury" and "advertising injury" (or "personal and advertising injury" if defined as such in your policy) arising out of, caused by, resulting from, contributed to, aggravated by, or related to earthquake, landslide, mudflow, subsidence, settling, slipping, falling away, shrinking, expansion, caving in, shifting, eroding, rising, tilting or any other movement of land, earth or mud.

Id. at Form CG7422(8-00).

There is no dispute that the Appellees' Underlying Lawsuits and related record allege that settling and movement of soils under and around the Appellees' homes caused the claimed property damage.

The Loendorfs' underlying Amended Complaint seeks damages for property damage resulting from the settlement of unstable soils next to and under their home. The Loendorfs contend that there were minor issues with their $420,575.00 home located at 3126 Golden Acres Drive in Billings, Montana shortly after closing in 2010, and that those problems were repaired without issue by Helgeson. (R at 21.5, Ex. 1, Found. Aff., Ex. A, ¶¶ 5-6; R at 30, Loendorf Aff., ¶¶2-3.) However, in June of 2018, the Loendorfs assert that their home "essentially exploded with cracks in the interior of the home, along with separation of trim and siding on the exterior." (R at 21.5, Ex. 1, Ex. A, ¶7.) The Loendorfs claim that "inspection of [their home] has confirmed that the home is experiencing movement of the soils below and adjacent to the home, which is causing cracks and other issues." (*Id.*, ¶7.) The Loendorfs further assert "that the soil beneath and adjacent to the home sold to the Loendorfs was not stable and as a result, the home has settled and moved, causing damage to the home" and "saturation of soils around [their] home has resulted in soil movement causing substantial structural damage to the home." (*Id.*, ¶¶13, 38.)

Similarly, the Stevenses' Underlying Lawsuit seeks damages for property damage and bodily injury resulting from the settlement of unstable soils next to and under their home. The Stevenses purchased their $375,000.00 home located at 3133 Golden Acres Drive in Billings, Montana on April 16, 2012, and experienced minor settlement which became worse over time. (R at 21.3, Found. Aff., Ex. A, ¶¶ 5-9; R at 25, Stevens Aff. ¶¶ 2-5.) The Stevenses claim that an inspection of their home "confirmed that the home is experiencing movement of the soils below and adjacent to the home, which is causing the cracks and other issues." (R at 21.3, Found. Aff., Ex. A, ¶9; see also R at 25, ¶¶ 5-9.)

The Loendorfs and Stevenses were members of a $3 million Class Action settlement against two engineering firms who were alleged to have negligently investigated the soils in the Falcon Ridge subdivision and recommended that Helgeson and other local builders utilize standard rather than reinforced foundation systems. *Sonnes v. Rimrock Engineering, Inc. et al.*, DV-19-0575 (Mont. 13th Jud. Dist., Order Approving Class Settlement (5/6/2020).) Class counsel represented in pleadings that the homes owned by the Loendorfs and Stevenses suffered property damage resulting from soil settlement.

> The soils on the West End of Billings, specifically along the slopes below the rimrocks (where these subdivisions are located), exhibit characteristics that indicate a potential for collapse upon becoming wet. Frequently, structures built with conventional footings on these types of soils have suffered damaging settlements, sometimes many years after construction.

* * *

> The undersigned, along with co-counsel, represent the Sones [sic]and 35 different groups of homeowners, all of whom own a home that was constructed upon Defendants' foundation design recommendations. Almost all of these homeowners have experienced actual settling damages to their homes as a result of water reaching the soils under their foundation, causing those soils to collapse, and resulting in differential movement of their homes…

R at 21.3 and 21.5, EMC's Loendorf and Stevens MSJ Briefs at 4, citing *Sonnes* Brief (12/18/2019) (internal citations omitted, emphasis added).

Helgeson has denied any wrongdoing in the underlying Stevens and Loendorf lawsuits and has filed crossclaims against other potentially responsible parties. (*See* Appendix 1 and 2.) Neither Underlying Lawsuit has been tried to a factfinder. EMC has been defending Helgeson in the underlying Stevens and Loendorf lawsuits under reservations of rights.

The parties filed cross-motions for summary judgment seeking declaratory judgment. In pertinent part EMC argued that the policies unambiguously barred coverage for the claims against Helgeson because the claims were all caused by earth movement. (R at 21, 35, 36.) Appellees claimed that the earth movement exclusion was ambiguous because it did not differentiate between natural and man-made earth movement causes. (R at 28, 30, 39, 40.)

On August 18, 2021, the district court denied EMC's Motion and granted the Motions of Loendorf and Stevens. (R at 41.) In its Order, the district court

determined that the EMC Earth Movement exclusion was ambiguous as applied and that "[t]his type of exclusion, as read, applies to long-term earth movement that spanned years from expected earth movement, not movement caused by the insured." (R at 41, at 8.) The district court further held that "[t]here is no disputing that the alleged injuries [claimed in the underlying lawsuits] were caused by Helgeson" and therefore "EMC has a duty to provide coverage for the Plaintiffs' claims." (R at 41, at 8.)

Notice of Entry of Judgment was filed by Appellees on August 23, 2021 (R at 43) and Notice of Appeal was filed by EMC on September 14, 2021. (R at 46.) On September 7, 2021, Appellees moved for attorney fees but did not submit a supporting brief. (R at 44.) EMC opposed Appellees' Motion for Attorney Fees on September 27, 2021. (R at 49.) Appellees filed a Brief in Support of their Motion for Attorney Fees on October 20, 2021, raising substantive UDJA arguments for an award of fees for the first time. (R at 52.) On October 21, 2021, EMC moved the district court for Leave to File a Sur-Reply Brief to address the legal arguments raised by Appellees in their Reply Brief. (R at 53, 54.) The district court did not consider EMC's Sur-Reply Brief because it issued an Order Granting Appellees' Motion for Attorney Fees on October 20, 2021. (R at 56.) The district court's Order on fees concluded that "equitable considerations" existed and the three "tangible parameters" for an award of attorney fees was met.

EMC filed a Notice of Amended Appeal on November 4, 2021. EMC appeals the district court's Summary Judgment Order and the Order awarding attorney's fees pursuant to the UDJA.

D. STANDARD OF REVIEW

The interpretation of an insurance policy presents a question of law, and this Court reviews a district court's legal conclusion for correctness. *Employers Mutual Cas. Co. v. Fisher Builders, Inc.*, 2016 MT 91, ¶9, 383 Mont. 187, 371 P.3d 375. A district court's findings of fact are reviewed to determine whether they were clearly erroneous. *Revelation Industries, Inc. v. St. Paul Fire & Marine Ins. Co.*, 2009 MT 123, ¶13, 350 Mont. 184, 2206 P.3d 919. The standard of review for appeals from summary judgment rulings is de novo. *Fisher Builders, Inc.*, ¶10.

A district court's decision to award attorney fees is reviewed for an abuse of discretion. *United Nat. Ins. Co. v. St. Paul Fire & Marine Inc. Co.*, 2009 MT 269, ¶13, 352 Mont. 105, 214 P.3d 1260. However, judicial discretion must be guided by the rules and principles of law; thus, the appellate standard of review is plenary to the extent a discretionary ruling is based upon a conclusion of law. *Jacobson v. Allstate Ins. Co.,* 009 MT 248, ¶17, 351 Mont. 464, 215 P.3d 649, citing *State v. Mackrill,* 2008 MT 297, ¶ 37, 345 Mont. 469, 191 P.3d 451.

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E. SUMMARY OF ARGUMENT

The district court held that the EMC CGL Policy Earth Movement Exclusion was ambiguous because it did not differentiate between natural and human-caused events. The district court further found that the exclusion only "applies to long-term earth movement that spanned years" rather than human-caused events. The district court was in error for three reasons.

One, the actual language of the Earth Movement Exclusion includes both long and short-term events that have either a human or natural cause including subsidence, settling, slipping, expansion, caving in, eroding, rising, tilting, or falling away. The idea that the exclusion is limited to only *long-term natural* events and not human-caused earth movement events is a facially strained reading of the contract language. It is a conclusion that is only reached by impermissibly re-writing the insurance contract and thrusting upon EMC a risk for which it collected no premium.

Two, the exclusion's lead in causation and catch-all "any other" earth movement language quite naturally indicates an intention to preclude coverage for a broad range of earth movement events and causal nexuses; any means any.

Three, the district court's ambiguity conclusion ignores the fact that the EMC CGL Policy by its very nature does not cover naturally occurring losses for which Helgeson would not be liable. Rather, only claims arising from Helgeson's

negligent (and obviously human-caused) acts present the potential for liability that could fall within coverage. There would be no purpose in excluding claims based upon natural events because those would never be covered in the first place. The EMC CGL Policy Earth Movement Exclusion clearly and unambiguously precludes coverage for the claims against Helgeson. The district court's interpretation was in error and must be reversed.

Further, the district court's factual finding that it is undisputed that Helgeson caused Appellees' damages and the court's implied conclusion that EMC is obligated to indemnify Appellees' claims is both factually and legally erroneous.

There is nothing in the record definitively indicating that Helgeson caused Appellees' damages. Helgeson has denied any wrongdoing in the Underlying Lawsuits and a fact finder has yet to decide Helgeson's liability. Furthermore, the district court's causation conclusion invades both the province of the jury and the jurisdiction of the courts in the Underlying Lawsuits.

The district court's implied conclusion that EMC is obligated to indemnify Appellees' claims against Helgeson confuses the broader concept of "coverage" as to an insurer's duty to defend and the concept of "establishing coverage" in the context of the duty to indemnify. Absent establishment of Helgeson's liability, the district court's coverage determination was limited to a declaration that EMC was obligated to defend based upon the allegation of the Appellees' underlying claims.

During the pendency of the underlying liability claims, the district court was not authorized to make any declaration that coverage has been established or that EMC is obligated to indemnify Appellees' claims. The district court's causation and implied indemnity conclusions were erroneous and must be reversed.

Finally, even assuming *arguendo* that the district did not err in its interpretation of the Earth Movement Exclusion, the district court's award of attorney's fees pursuant to the UDJA was an erroneous abuse of discretion because the court failed to properly address the equitable considerations factor and the tangible parameters elements.

The district court's conclusion that equitable considerations existed simply because EMC may have greater overall wealth than the Appellees was improper. Relative wealth without evidence that the moving party is destitute or unfairly burdened is insufficient to establish equitable circumstances. Furthermore, Appellees brought this action in the normal course of a coverage dispute. Equitable considerations did not exist, and the district court should be reversed.

The district court also abused its discretion in applying the three tangible parameters. One, Appellees have not received anything from EMC that it requested in its declaratory judgment complaint. EMC was defending Helgeson under a reservation. Appellees demanded judgment in this case that EMC was obligated to *indemnify*. The district court's coverage determination as to the application of the

Earth Movement Exclusion (assuming this part of the decision is affirmed) cannot as a matter of law obligate EMC to indemnify Appellees because Helgeson's liability has not been established. A finding of "coverage" at this stage only affirms EMC's duty to defend which is not what Appellees sought and is what EMC was already doing in the Underlying Lawsuits. Two, Appellees' declaratory judgment action was not needed. Appellees sought a declaratory order of indemnity. However, because Helgeson's liability has not been established, an indemnity order is simply premature. The "coverage" order, if affirmed, gives Appellees nothing and substantively changes nothing because EMC was already defending Helgeson in the Underlying Lawsuits. Third, the declaratory relief sought was not necessary to change the status quo. Appellees filed this lawsuit to obtain a declaratory judgment that EMC was obligated to *indemnify.* Appellees' demanded relief in this case was clearly premature because liability is in dispute and has not been adjudicated in the Underlying Lawsuits. The status quo is not changed even if the district court's analysis of the Earth Movement Exclusion is affirmed because EMC was already defending Helgeson in the Underlying Lawsuits. This case constitutes a garden variety declaratory action with no equitable considerations favoring fees. The district court must be reversed.

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F. ARGUMENT

1. The District Court Erred by Reading an Ambiguity into the Earth Movement Exclusion Where None Exists.

The interpretation of an insurance contract is a question of law. *Meadow Brook, LLP v. First Am. Title Ins. Co.*, 2014 MT 190, ¶ 14, 375 Mont. 509, 329 P.3d 608. When interpreting an insurance policy, this Court reads the policy as a whole and, if possible, reconciles its various parts to give each one meaning and effect. *Newbury v. State Farm Fire & Cas. Ins. Co. of Bloomington, Ill.*, 2008 MT 156, ¶19, 343 Mont. 279, 184 P.3d 1021. Other courts "take into account the type of insurance purchased, the nature of the risks involved, and the overall purpose of the contract" when considering an insurance contract's meaning. *Travelers Ins. Co. v. Eljer Mfg., Inc.*, 757 N.E.2d 481, 491 (Ill. 2001). While this Court has never specifically stated that the type of insurance policy should be addressed in a coverage analysis, prior case law shows that this factor has been an obvious consideration many times. *Travelers Cas. & Sur. Co. v. Ribi Immunochem Research, Inc.*, 2005 MT 50, ¶18, 326 Mont. 174, 108 P.3d 469 ("The CGL policy's intent is 'to insure the acts or omissions of the insured, including his intentional acts, excluding only those in which the resulting *injury* is either expected or intended from *the insured's standpoint.*'"), internal citations omitted, emphasis original; *ALPS Property & Casualty Company*, ¶15 (Noting that claims-made and claims-made and reported policies "were specifically developed to limit

the insurer's risk by placing a temporal limitation on coverage."); *Park Place Apartments, LLC v. Farmers Union Mut. Ins. Co.*, 2010 MT 270, ¶20, 358 Mont. 394, 247 P.3d 236 (In context of property policy, the "initial inquiry concerns whether the carport is logically included in the definition of the insured premises.")

This Court uses the following approach to interpret insurance contracts.

> General rules of contract law apply to insurance policies and we construe them strictly against the insurer and in favor of the insured. Courts give the terms and words used in an insurance contract their usual meaning and construe them using common sense. Any ambiguity in an insurance policy must be construed in favor of the insured and in favor of extending coverage. An ambiguity exists where the contract, when taken as a whole, reasonably is subject to two different interpretations. Courts should not, however, seize upon certain and definite covenants expressed in plain English with violent hands, and distort them so as to include a risk clearly excluded by the insurance contract.

Mecca v. Farmers Ins, Exch., 2005 MT 260, ¶ 9, 329 Mont. 73, 122 P.3d 1190 (quoting *Travelers Cas. and Sur. Co. v. Ribi Immunochem Research, Inc.*, 2005 MT 50, ¶ 17, 326 Mont. 174, 108 P.3d 469).

Furthermore, "simply because a party claims a contract provision is ambiguous or disagrees with the meaning of a provision does not make it so." *Kilby Butte Colony, Inc. v. State Farm Mut. Auto. Ins. Co.*, 2017 MT 246, ¶11, 389 Mont. 48, 403 P.3d 664. "Courts will not distort the language of a contract provision to create an ambiguity that does not exist. *Id.*

The district court found the EMC Earth Movement exclusion ambiguous because it did not differentiate between natural and human-caused events and concluded that "[t]his type of exclusion, as read, applies to long-term earth movement that spanned years from expected earth movement, not movement caused by the insured." The district court's interpretation of the EMC CGL Policy's Earth Movement Exclusion was in error for three reasons.

First, the district court's conclusion that the Earth Movement Exclusion only applied to "*long-term earth movement that spanned years*" to the exclusion of human-caused events is simply unsupported by the plain language of the exclusion. Not only does the exclusion bar coverage for rapidly occurring earth movement events such as earthquakes, landslides, mudflows, cave in and falling away events, the exclusion also clearly bars coverage for both long-term and short-term potentially human-caused events including subsidence, settling, slipping, expansion, caving in, eroding, rising, tilting, or falling away. The idea that the exclusion is limited to only *long-term natural* events and not human-caused earth movement events is a facially strained reading of the clear contract language.

Second, the lead in and end "catch-all" language of the exclusion indicates an intention to preclude coverage for a broad range of earth movement events including where multiple causes result in the earth movement. The exclusion's lead in causation language—"arising out of, caused by, resulting from, contributed to,

aggravated by, or related to"—plainly provides that the exclusion precludes coverage for earth movement claims where a contributory causal nexus is alleged. Thus, in the context of the underlying claims, it makes no difference that Appellees claim that Helgeson's negligent construction decisions were a cause of the eventual subsidence of their homes. Subsidence, settling, slipping, shrinking, expansion, shifting, eroding, rising, and tilting are, at the very least, a "contributing" or "related" cause of the claimed property damage. The underlying property damage would not have occurred but for the earth movement under the Appellees' homes.

Likewise, the tail end "catch all" language "*any other movement of land, earth or mud*" further evidences the exclusion's broad intent to exclude all earth movement related claims from coverage. "Any" has the common meaning of "every" and "all." *See e.g.,* *https://www.merriam-webster.coom/dictionary/any*. "Other" possesses the common meaning of "a different or additional one." *See e.g.,* *https://www.merriam-webster.coom/dictionary/other*. Simply put, "any" means any. The district court erred when it ignored the plain and broad language of the EMC Earth Movement Exclusion.

Finally, the district court's conclusion that an Earth Movement Exclusion must differentiate between natural and human-caused events are excluded to be unambiguous ignores the fact that the EMC Policy is a CGL policy that by its very nature does not cover purely natural events.

The bulk of the cases cited by Appellees in briefing before the district court involved first-party property loss or "all risk" coverage claims. The reason those types of policies are generally thought to require language excluding both natural and human-caused earth movement events to avoid ambiguity is that those policies provide coverage for property damage caused by natural events. For instance, unlike CGL policies, property policies typically cover the insured's property from all risks unless the risk is excluded. Generally speaking, coverage under a typical property insurance policy only requires that a first-party policy holder suffer a covered loss and that the property lost is listed on the schedule of covered property. *See e.g., Park Place Apartments, LLC*, ¶¶ 20-23. Because property policies include coverage for losses caused by both natural and human-caused events, exclusionary language must be more specific. This extends to earth movement exclusions in first-party "all risk" property policies. *See e.g., Parker v. Safeco Ins. Co. of America*, 2016 MT 173, 384 Mont. 125, 376 P.3d 114 (first-party insured's property policy which excluded natural and human-caused earth movement events unambiguous).

On the other hand, CGL policies, like the one at bar, "are designed to cover an insured's tort liability…", 7A Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 103:19 (3d ed. 2009). Intrinsic to CGL coverage is a third party's contention that the insured's conduct resulted in a covered occurrence. Absent an

allegation that the insured is at fault and legally obligated to pay damages, coverage under the policy is not triggered. Thus, purely naturally caused property damage events will never be covered under a standard CGL policy. It would make no logical sense to exclude a naturally caused peril since it would not be covered in the first place.

The exact same earth movement exclusion as the one at bar was examined by the Mississippi Supreme Court in *Hankins v. Maryland Cas. Co./Zurich American Ins. Co.*, 101 So.3d 645 (Miss. 2012) under strikingly similar underlying factual circumstances. Hankins brought a negligent construction claim against homebuilder Elite Homes after Hankins' home began to experience numerous cracks, leaks, and window and door alignment issues. Like this case, there was no disputing that the property damage being claimed resulted from earth movement under and around Hankins' house. *Hankins*, ¶17; *supra* at 7-9. Hankins alleged that Elite's negligent failure to adequately buffer and compact clay soils around the foundation led to soil collapse and destruction of the home's foundation. *Hankins*, ¶12. Like Appellees here, Hankins claimed that but for her builder's negligence, the property damage to her home would not have occurred. *Id.* Hankins secured a default judgment against Elite and sought to enforce the judgment against Elite's insurer, Maryland Casualty. *Hankins*, ¶2. Maryland Casualty asserted that it was not liable for the default judgment based upon the policy's earth movement

exclusion. The circuit court granted Maryland Casualty's coverage motion and Hankins appealed. *Id.*

The Mississippi Supreme Court started its analysis by dismissing the legal argument proffered by Appellees and accepted by the district court in this case—that a CGL earth movement exclusion is inherently ambiguous if language barring both natural and human-caused losses is absent. The Mississippi Supreme Court pointed out that because a CGL policy only covers claims arising from the *insured's liability*, it logically makes no sense to interpret the exclusion to mean that only naturally caused earth movement events are excluded since purely natural claims would not be covered in the first place.

> Preliminarily, this Court notes that "a construction leading to an absurd, harsh or unreasonable result in a contract should be avoided unless the terms are express and free of doubt." For this Court to limit applicability of the "earth movement" exclusion in Maryland Casualty's CGL Policy to "nature-caused" or "natural force" earth movement would be nonsensical. Unlike first-party homeowners' policies, "which draw on the relationship between perils that are either covered or excluded," third-party CGL policies "insure for personal liability, and agree to cover the insured for his own *negligence*." For a third-party CGL policy, under which an "occurrence" (i.e., "an accident") that causes "bodily injury" or "property damage" is a prerequisite to coverage, what would be the purpose of an "earth movement" exclusion limited to nature-caused or natural-force earth movement? Unlike the dissent, we decline to erroneously conflate first-party homeowners' policies pertaining to property damage and third-party CGL policies in this regard.

Hankins, ¶21 (internal citations omitted, emphasis added).

Hankins is not an outlier. Other jurisdictions examining similarly worded earth movement exclusions in the context of CGL coverage forms have determined that earth movement losses caused in part by the insured are unambiguously not covered. *Federal Ins. Co. v. Olawuni*, 539 S.Supp.2d 633 (D.D.C. 2008) (CGL earth movement exclusion without distinction between natural and human-caused losses barred collapse claim caused by insured); *The North River Ins. Co. v. HK Construction Corp.*, Case No. 19-CV-00199-DKW-KJM (D. Hawaii, Order on SJ (5/22/2020), *aff'd* 853 Fed.Appx 191 (9th 2021) (similarly-worded CGL earth movement exclusion unambiguously barred coverage for landslide damage caused by insured's negligence).[3]

Unlike a first-party property policy, the EMC CGL Policy is a third-party liability policy which only covers claims resulting from Helgeson's established liability. Purely nature-caused losses are not covered by the EMC CGL Policy because coverage is contingent on Helgeson being at fault. Thus, as in *Hankins*, it would be nonsensical for the EMC Earth Movement Exclusion to distinguish between natural and insured-caused losses since purely natural earth movement events would never be covered under the policy's liability terms. To interpret the Earth Movement Exclusion as ambiguous because it fails to reference a loss type that would not be covered in the first place distorts the common-sense limitations

[3] Copy provided as **Appendix 4** for the Court's convenience.

of the EMC CGL policy. As in *Hankins*, Appellees claim that Helgeson's negligence led to earth movement and corresponding property damage. *Hankins* is a logical and sound decision, and this Court should reach the same result. The EMC Earth Movement Exclusion, which excludes coverage for any earth movement, plainly and unambiguously bars coverage in this case. The district court's coverage determination was clearly in error and must be reversed.

2. The District Court Erred When It Concluded Causation Was Undisputed.

The district court's Summary Judgment Order concludes that "[t]here is no disputing that the alleged injuries [in the underlying lawsuits] were caused by Helgeson." (R 41 at 8.) This conclusion is both factually and legally erroneous.

a. The District Court's Causation Conclusion Is Factually Erroneous.

There is nothing in the factual record remotely indicating that causation in the underlying liability cases was undisputed. Appellees provided no evidence establishing liability, and the issue of liability was never discussed in any of the briefing submitted by any party in this case. In fact, liability in the underlying Stevens and Loendorf lawsuits is hotly contested. Helgeson's Answers to Appellees' underlying Amended Complaints filed on October 13, 2021 (a week after Notice of Appeal was filed) completely deny any liability in the Underlying Lawsuits. (*See* Appendix 1 and 2.) The district court's causation conclusion is factually erroneous and must be reversed.

b. The District Court's Causation Conclusion Is Legally Erroneous.

The district court's conclusions that causation was undisputed is legally erroneous for at least two reasons. First, the district court's causation conclusion goes well beyond the scope of the contractual interpretive powers authorized by Montana Code Annotated § 27-8-201. The district court's power to determine the meaning of a contract does not permit the court to render determinations of disputed material fact. That right is left exclusively to the trier of fact. *See Morton v. M-W-W, Inc.*, 263 Mont. 245, 251, 868 P.22d 576, 580 (1994) ("Where the record shows genuine issues of fact… the trier of fact must resolve those issues…").

Second, the district court's causation judgment also invades the jurisdiction of the two district courts presiding over the Appellants' Underlying Lawsuits. Causation and damages are disputed in both of those cases and the jurisdiction to resolve those disputed liability issues lies solely with those two courts. The district court's conclusion that underlying causation has been established must be reversed.

3. The District Court's Implied Conclusion that EMC Has the Duty to Indemnify Appellees Confuses the Duty to Defend with the Duty to Indemnify.

The district court's Summary Judgment Order held that "EMC has a duty to provide coverage for the Plaintiffs' claims." (R 41 at 8.) Combined with the facts that Appellees' Complaint only seeks declaratory judgment that EMC has a duty to

indemnify and the district court's conclusion that causation is undisputed, the court's imprecise reference to "coverage" implies that EMC has a duty to indemnify Appellees' claims against Helgeson. This conclusion is in error and appears to confuse the potential for coverage necessary to support a duty to defend with coverage being "actually established" in the context of the duty to indemnify.

In *State Farm Mut. Auto. Ins. Co. v. Freyer*, 2013 MT 301, ¶226, 372 Mont. 191, 312 P.33d 403, this Court more clearly delineated the distinction between coverage triggering the duty to defend and *establishment* of coverage leading to an insurer's duty to indemnify.

> "Unlike an insurer's duty to defend, which arises when a complaint against an insured *alleges facts, which if proven,* would result in coverage an insurer's duty to indemnify arises only if coverage under the policy is actually established. Put another way, while an insurer's duty to defend is triggered by allegations, [of the complaint] an insurer's duty to indemnify hinges not on the facts the claimant alleges and hopes to prove but instead on the facts, proven, stipulated or otherwise established that actually create the insured's liability."

State Farm Mut. Auto. Ins. Co. v. Freyer, 2013 MT 301, ¶26, 372 Mont. 191, 312 P.33d 403 (internal citations omitted, italics original, emphasis added).

Pursuant to *Freyer* "coverage" is not *established* until liability is proven or stipulated. And without establishment of coverage, the only thing the district court was authorized to proclaim by way of this declaratory judgment action is that the

duty to defend exists based upon the asserted, yet unproven, allegations of the Underlying Lawsuit complaints and related documents in the record. *Freyer*, ¶26.

Even assuming this Court affirms the district court's finding that the Earth Movement Exclusion is ambiguous, the district court's *coverage* determination goes too far because it insinuates that EMC has a duty to indemnify Appellees' claims against Helgeson. Appellees have not established causation or Helgeson's underlying fault. Helgeson completely denies any liability to the Appellees. (*See* Appendix 1 and 2.) The district court's summary judgment findings can therefore only confirm that based upon the allegations of Appellees' underlying complaints, EMC has a duty to defend Helgeson. The district court cannot make any determination that EMC has an obligation to indemnify because Helgeson's liability has not been established. Because coverage has not been established, the district court's Order, to the extent that it implies any obligation by EMC to indemnify, must be reversed.

4. The District Court Failed to Properly Apply the "Necessary and Proper" Standard When it Awarded Appellees' UDJA Fees.

This Court's decision in *Trustees of Indiana University v. Buxbaum*, 2003 MT 97, ¶ 45, 315 Mont. 210, 69 P.3d 663 determined that section 27-8-313 of the UDJA grants the district court discretion to award supplemental relief in the form of attorney fees "whenever necessary or proper". A court may award attorney fees only if two conjunctive elements are satisfied: (1) an award is warranted by

"equitable considerations" under the particular facts and circumstances of the case; and (2) the award is "necessary and proper" pursuant to the three-part "tangible parameters test." *Davis v. Jefferson County Election Office*, 2018 MT 32, ¶ 13, 390 Mont. 280, 390 P.3d 1048. Only after finding equitable considerations may the district court address the tangible parameters test. *Horace Mann Ins. Co. v. Hanke*, 2013 MT 320, ¶ 34, 372 Mont. 350, 312 P.3d 429. Under the tangible parameters test, fees are "necessary and proper" only if: (1) the other party "possesses" what the party filing the declaratory judgment sought in the litigation; (2) the party filing the declaratory judgment action needed to seek a declaration showing that it is entitled to the relief sought; and (3) the declaratory relief sought was necessary in order to change the status quo. *Buxbaum*, ¶ 45.

The scope of an award of attorney fees under § 27-8-313 MCA is very narrow, as the UDJA's supplemental relief provision serves as an exception to the general rule that each party pay its own attorney fees. *Davis*, ¶ 12. Thus, to avoid "eviscerat[ing] the American Rule," an award of attorney fees under the UDJA is not justified "in every garden variety declaratory judgment action." *Western Partnership Tradition, Inc. v. Attorney General of State*, 2012 MT 271, ¶11, 367 Mont. 112, 291 P.3d 545. Merely prevailing "cannot qualify as a sufficiently compelling reason to justify an award of attorney fees under § 27-8-313, MCA." *JRN Holdings, LLC v. Dearborn Meadows Land Owners Association, Inc.*, 2021

MT 2204, ¶57, 405 Mont. 2200, 493 P.3d 340. Moreover, a party's tactical decision to file a declaratory judgment in the normal course of events does not give rise to equitable considerations warranting a fee award. *See Hanke*, ¶¶ 37-38; *Buxbaum*, ¶45.

In the twenty years since the *Buxbaum* decision, this Court has only approved an award of UDJA fees four times in published decisions. All four of these cases involved unique situations including obviously unfair results absent the award of fees, or bad faith conduct on the part of the losing party.

In *Renville v. Farmers Ins. Exch.,* 2004 MT 366, 324 Mont. 509, 105 P.3d 280, the district court's award of UDJA fees was affirmed because Renville's fees exceeded the monetary damages award she was seeking to enforce in her declaratory judgment action. Similarly, in *City of Helena v. Svee*, 2014 MT 311, 377 Mont. 158, 339 P.3d 32, this Court reversed the district court's denial of fees where the prevailing defendant was indigent and was required to defend legally baseless civil and criminal claims filed by the City of Helena. In *Abbey/Land, LLC v. Glacier Construction Partners, LLC*, 2019 MT 19, 394 Mont. 135, 433 P.3d 1230, the district court's award of UDJA attorney fees was affirmed where the claimants colluded and abused the legal process to inflate a confessed judgment that was eventually set aside. Finally, in *Public Land/Water Access Ass'n v. Jones*, 2015 MT 299, 381 Mont. 267, 358 P.3d 899, this Court affirmed an award of

UDJA fees where the defendant acted with malice when he purposely removed a bridge to prevent access to vast areas of public land near the Sun River, Montana.

This Court has consistently declined to award or has reversed the award of fees in garden variety declaratory judgment actions with no circumstances requiring the application of equity. *Hanke*, ¶ 38 (insurer's tactical decision to file UDJA claim does not warrant fees); *United Nat. Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 2009 MT 269, 352 Mont. 105, 214 P.3d 1260 (reversing award of fees where similarly situated parties were merely disputing the meaning of an insurance contract); *Hughes v. Ahlgren*, 2011 MT 189, 361 Mont. 319, 258 P.3d 439 (reversing fee award where parties were similarly situated and there was an absence of bad faith); *Mungas v. Great Falls Clinic, LLP*, 2009 MT 426, 354 Mont. 550, 221 P.3d 1230 (denying fees upon remand for trial where parties were similarly situated and disputed meaning of contract); *JRN Holdings, LLC*, ¶¶ 60-62 (reversing award of fees where prevailing HOA did not have significantly less resources to pursue litigation and there was an absence of bad faith); *Martin v. SAIF Corp*., 2007 MT 234, 339 Mont. 167, 339 P.3d 916 (fee award reversed where insurer's lawsuit was not necessary); *Citizens for a Better Flathead v. Board of County Commissioners of Flathead County by and through Dupont*, 2016 MT 325, 385 Mont. 505, 386 P.3d 567 (reversing fee award where action constituted garden variety declaratory action); *Associated Management Services, Inc. v. Ruff*,

2018 MT 182, 392 Mont. 139, 4224 P.33d 71 (affirming denial of fees where UDJA action was not filed in bad faith); see also, *American Reliable Insurance Company v. Lockhard*, 2018 WL 6436920 (D. Mont., Missoula Division, December 7, 2018) (Third-party claimant not entitled to fees in successful UDJA claim against insurer despite claim of financial disparity).

The district court incorrectly found that the parties' economic disparity constituted an "equitable consideration" and misapplied the "tangible parameter" test. The district court's award of fees must be reversed.

a. Reversal of the Coverage Determination Must Include Reversal of the Fee Award as a Matter of Course.

The UDJA supplemental relief provisions only allow recovery of discretionary attorney fees to a prevailing party. *Montana Immigrant Justice Alliance v. Bullock*, 2016 MT 104, ¶ 48, 383 Mont. 318, 371 P.3d 430. UDJA fees are not appropriate where a party only partially prevails. *Johnson v. Federated Rural Electric Insurance Exchange*, 2017 WL 1497879 at *1-2 (D. Mont., Butte Div., April 6, 2017. If this Court reverses any part of the district court's decision, Plaintiffs will cease to be prevailing parties. The Court must therefore reverse the award of fees as a matter of course without addressing whether fees were "necessary and proper."

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b. The District Court Erroneously Concluded that the Parties' Economic Disparity Was Sufficient to Establish an "Equitable Consideration."

The district court concluded that the economic disparity between EMC and Appellees automatically established an "equitable consideration" sufficient to satisfy the first element of the "necessary and proper" test. (R at 56, at 5.) The district court's findings and conclusions in this regard are clearly erroneous.

Firstly, there is no evidence in the record supporting the contention that the parties were on unequal financial footing to such a degree that an inequity resulted. This Court has reversed the award of fees where the district court simply speculates that the parties' respective wealth created an inequity worthy of a fee award. *JRN Holdings, LLC*, ¶ 60. Absent evidence that Plaintiffs lacked sufficient assets to pursue this action, either through affidavit or properly founded evidence, EMC's alleged greater wealth is irrelevant. *Lockhard,* 2018 WL 6436920 at *3.

Secondly, even assuming EMC is "naturally" more affluent that the totality of the underlying Plaintiffs, there is again nothing in the record indicating that they are destitute, or that their lack of wealth created an unfair financial hardship in this lawsuit. Only once, in *Svee*, has this Court awarded UDJA fees based in part upon the equitable consideration of wealth disparity. In *Svee*, wealth disparity *mattered under the circumstances* because the Svees were poor and were facing both criminal and civil proceedings based upon an invalid City ordinance. To the contrary, the nineteen original Plaintiffs in underlying litigation own eleven higher-

end properties overlooking Billings, Montana, each of which have values around $400,000—or $4.5 million in total value—when the properties were purchased about a decade ago. (*See e.g.,* Appendix 1, *Loendorf Complaint*, ¶4 (home purchased for $420,575 in 2010); Appendix 2, *Stevens Complaint*, ¶5 (home purchased for $375,000 in 2012).) Appellees appear wealthy and chose to file this UDJA claim before establishing that EMC's insured, Helgeson, is liable for their alleged damages. Appellees' decision to seek declaratory judgment prior to establishing liability was simply tactical. *United Nat. Ins. Co.,* ¶ 37. Financial disparity does not rise to the level of an equitable consideration supporting a fee award under the circumstances of this case. The district court must be reversed.

c. Tangible Parameter #1: The District Court Erroneously Determined Appellees Sought and Received What EMC Possessed.

The first "tangible parameter" requires that the Appellees sought what EMC possesses. *United Nat. Ins. Co.*, ¶ 37. The district court concluded that its determination that the EMC CGL Policy covers the claims against Helgeson asserted in Appellees' underlying lawsuits satisfies this first element. (R at 41, at 5.) The district court's analysis is incorrect for at least two reasons.

First, the Appellees' Complaint did not seek a coverage determination in their favor. Rather, Appellees' Complaint only sought declaratory judgment that EMC was required to *indemnify*. (R at 1, at 3) ("Plaintiffs respectfully requests [sic] the Court's declaratory judgment that EMC is obligated to fully indemnify

Helgeson for Plaintiffs' claims… without further delay.") (emphasis added). In *Freyer*, this Court affirmed the principle that an insurer's obligation to indemnify will not occur until the insured's liability is established. *Freyer*, ¶26. Appellees have never established Helgeson's liability. Helgeson denies any liability in the underlying lawsuits. Because Appellees were not permitted to seek indemnity from EMC in this action and could not receive declaratory judgment from the district court that EMC must indemnify Helgeson while the underlying actions remain unresolved, the first element of the tangible parameters test cannot be met.

Second, the district court's determination that the Appellees' claims against Helgeson fall within the coverage terms of EMC's policy does not provide Appellees with anything they did not already have before they decided to file their UDJA action.. This is because absent the establishment of Helgeson's liability in the Underlying Lawsuits, the district court's determination does not "*actually establish coverage." Freyer*, ¶26. Coverage is *actually established* when both the duty to defend (allegations pled fall within the policy coverage) and the insured's liability are proven, and where that liability is shown to be covered under the policy. *Id.* Helgeson's liability is still unproven; thus, coverage cannot be established pursuant to Montana law. The district court's order is limited at this point to the duty to defend. However, EMC is and was defending Helgeson since the outset of the Underlying Lawsuits under reservations of rights to which

Helgeson consented. Appellees have not sought or received anything from EMC that they previously lacked. The first element has not been met.

d. Tangible Parameter #2: The District Court Erroneously Determined that it Was Necessary for Appellees to Seek Declaration Showing that they Are Entitled to the Relief Sought.

The second tangible parameter requires that the claimant prove the declaratory judgment action was needed to seek a declaration showing entitlement to the relief sought. *Renville* ¶ 27. The district court concluded that because EMC denied coverage, it was necessary for the Appellees to file this case. The district court's analysis is erroneous for two reasons.

One, as discussed above, Appellees' Complaint sought declaratory judgment regarding *indemnity*. Appellees cannot receive the relief they sought at this juncture as a matter of law. *Freyer*, ¶ 26. What Appellees received is a coverage order affirming EMC's duty to defend Helgeson. Any potential duty to indemnify is not ripe and cannot be established until Appellees prove their claims against Helgeson. Thus, Appellees' claim for declaratory relief on the duty to indemnify was both premature and unnecessary.

Second, EMC did not initiate any UDJA claims against the Appellees. It was Appellees that pursued EMC. Appellees could have litigated their claims against Helgeson through trial to establish Helgeson's liability and damages before filing this action. Instead, Appellees made a tactical decision to put the coverage cart

before the liability horse. Appellees' tactical decision to have a court determine coverage before liability does not render this action "necessary" *Hanke*, ¶ 38.

e. The District Court Erroneously Determined that Appellees' Action Changed the Status Quo.

The third tangible parameter requires that the filing of the declaratory judgment action must be necessary and that the status quo changes as a result. *Compare Abbey/Land, LLC*, ¶ 68 ("The declaratory judgment was necessary to change the status quo and to protect James River" from a fraudulently inflated confessed judgment.), and *SAIF Corp.*, ¶ 227 ("[I] was not necessary for SAIF to seek a declaration from the Montana court to change the status quo. The Board already had issued an order directing Martin to distribute $12,222.22 to SAIF as its proper share of Martin's third-party settlement with Crossroads.")

The district court concluded that the third element was met because Appellees "state that they needed to file for declaratory relief to change the status quo" and the ruling shifted from EMC's defense under a reservation to "owing the Plaintiffs the coverage they sought." The district court was again in error.

First, the Appellees' claim that their UDJA suit was "necessary" is simply a self-serving contention to which the district court agreed without further analysis. As noted above, EMC was not pursuing declaratory judgments against the Appellees. Appellees filed this declaratory judgment action as a unilateral tactical decision. Tactics do not render this lawsuit necessary.

Second, the district court's analysis of the status quo misses the point. A coverage decision without establishment of an insured's liability is limited to a declaration of EMC's duty to defend. However, EMC has no duty to indemnify Appellees' claims against Helgeson *unless and until* liability, damages, and coverage for the same are established. These events have not occurred. Thus, the status quo has not changed in any meaningful way. EMC is still defending Helgeson in the Underlying Lawsuits, as it was prior to Appellees' initiation of this action. The third element has not been proven. Reversal of the fee award for abuse of discretion is warranted.

CONCLUSION

The district court erroneously found that the EMC CGL Policy's Earth Movement Exclusion was ambiguous. The district court further erred as a matter of fact and law when it concluded that causation was undisputed and implied that EMC has a duty to indemnify Appellees' underlying claims. The district court's summary judgment Order must be reversed.

To the extent that this Court does not reverse the trial court's decision regarding the application of the Earth Movement Exclusion, the district court nonetheless abused its discretion when it awarded fees pursuant to the UDJA. No equitable circumstances supporting the fee award exist, and the three tangible parameters cannot be met. This case presents a garden variety

declaratory action for which fees should not be granted. The district court's Order granting Appellees' attorney fees must be reversed.

DATED this 15th day of November

By: /s/ David C. Berkoff
Attorneys for Plaintiff/Appellee

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e), Montana Rules of Appellate Procedure, I certify that this Appellee's Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word for Windows is 8,532, excluding the caption, the certificate of service, the certificate of compliance, the table of contents and the table of authorities.

DATED this 15th day of November, 2021.

By: /s/ David C. Berkoff

CERTIFICATE OF SERVICE

I, David C. Berkoff, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 11-17-2021:

Carey E. Matovich (Attorney)
2812 1st Ave N., Suite 225
P.O. Box 1098
Billings MT 59101
Representing: Stevens Abram, Joseph Loendorf, Sharlene Loendorf, Kathy Stevens
Service Method: eService

Ryan James Gustafson (Attorney)
2812 1st Ave. N., Suite 225
Suite 225
Billings MT 59101
Representing: Stevens Abram, Joseph Loendorf, Sharlene Loendorf, Kathy Stevens
Service Method: eService

Electronically signed by Derek Long on behalf of David C. Berkoff
Dated: 11-17-2021