

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 21-0449

On Appeal from the Montana 13th Judicial District Court, Yellowstone County,
The Honorable Gregory Todd, Presiding

JOSEPH AND SHARLENE LOENDORF; ABRAM AND KATHY
STEVENS,

Plaintiffs/Appellees,

v.

EMPLOYERS MUTUAL CASUALTY COMPANY,

Defendant/Appellant.

**PLAINTIFFS'/APPELLEES'
ANSWER BRIEF**

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ISSUES PRESENTED

1. Whether the District Court erred when it found that Employers Mutual Casualty Company's ("EMC") Commercial General Liability Policy's "Earth Movement Exclusion" was ambiguous as to human-caused events when the language does not specifically reference human causation.

2. Whether the District Court erred when it determined coverage for the Loendorfs' and Stevens' (collectively, "Homeowners") claims after all parties filed summary judgment motions asking for the District Court to make a coverage determination.

3. Whether the District Court abused its discretion when awarding Homeowners their attorneys' fees under the Uniform Declaratory Judgments Act.

STATEMENT OF THE CASE

Homeowners both own homes in the Falcon Ridge Subdivision located in Billings, Montana that were constructed by S.D. Helgeson Homes d/b/a Stan Helgeson Homes and SRKM Inc. d/b/a Helgeson Homes ("Helgeson"), EMC's insured. Throughout their ownership, Homeowners have discovered severe damage to their houses resulting from collapsing and shifting soils. In the fall of 2018, Homeowners initiated lawsuits against Helgeson alleging

that it negligently constructed their homes (the “Underlying Lawsuits”).

Dkt. 28, p. 4; Dkt. 30, p. 3

EMC is defending Helgeson in the Underlying Lawsuits under a reservation of rights. Dkt. 8, p. 3. If Helgeson is found liable for Homeowners’ damages, EMC has taken the position that there is no insurance coverage under the applicable Commercial General Liability Policies (“EMC’s Policy”). Dkt. 21.04, Ex. 1(B). Prior to the initiation of this case, EMC filed a declaratory judgment action in federal court, Cause No. DV-19-00129-SPW-TJC, seeking a determination that there was no coverage for damages to homes in the Falcon Ridge Subdivision (the “Federal Action”). Dkt. 27, Ex. A. Homeowners sought intervention in the Federal Action, but EMC objected to their intervention.¹ Dkt. 8, p. 4. As a result of EMC’s objection, Homeowners filed this lawsuit on March 10, 2020, under Mont. Code Ann. § 27-8-201, seeking a declaratory judgment “that EMC is obligated to fully indemnify Helgeson for [Homeowners’] claims within the applicable policy limits without further delay.” Dkt.1, p.3. The Complaint also seeks attorneys’ fees and interest. *Id.*

¹ EMC did, however, allow other similarly situated homeowners (Stephen and Marilyn Kramer) to intervene in the Federal Action but only after the Kramers filed a Motion to Intervene. Dkt. 52, p. 2.

Despite objecting to their intervention in the Federal Action, EMC removed this matter to federal court after the Complaint was filed. *See, e.g.*, Dkt. 9; Dkt. 52, p. 2. Homeowners filed a Motion to Remand on May 1, 2020, asserting that EMC's removal was improper. Dkt. 52, p. 2. In a complete reversal from its earlier position, EMC opposed the remand and argued that this case should be consolidated with the Federal Action. *Id.* The federal court denied EMC's efforts to consolidate and granted the remand on November 20, 2020. *Id.*²

EMC filed for summary judgment on March 23, 2021, and Homeowners responded with cross-motions. Dkts. 21.02, 21.04, 23, 29. The District Court denied EMC's motion and granted Homeowners' motion on August 18, 2021, finding that the Earth Movement Exclusion in EMC's Policy is ambiguous and, accordingly, must be construed against EMC. Dkt. 41, p. 8. Specifically, the District Court found that EMC's Earth Movement Exclusion applies to natural events and not events caused by humans. *Id.* The Court also rejected EMC's argument that Homeowners'

² Notably, the Federal Action has since been dismissed under the *Wilton/Brillhart* abstention doctrine, with the federal court deferring to the State District Court's determination on coverage. *See Employer's Mut. Cas. Comp. v. S.D. Helgeson, Inc.*, Cause No. CV-19-129-BLG-TJC, Dkt. 52 (D. Mont.).

claims did not occur within an applicable policy period and therefore were not covered. *Id.* EMC has abandoned the occurrence argument on appeal.

After prevailing on summary judgment, Homeowners filed a Motion for Attorneys' Fees with attached affidavits on November 7, 2021. Dkt. 44. The District Court granted the Motion for Attorneys' fees on November 20, 2021. Dkt. 56. EMC filed a Motion for Leave to File a Sur-reply the following day, but the District Court had already issued its Order. Dkt. 53.

STATEMENT OF FACTS

A. The Homes at Issue.

Homeowners purchased houses in the Falcon Ridge Subdivision in Billings, Montana. Dkt. 30, p. 1; Dkt. 28, P. 1. Both homes were built by Helgeson. *Id.* The Loendorfs purchased their home from Helgeson in 2010 for \$420,575.00. Dkt. 30, p. 2. The Stevens' home was completed in 2011, and they paid Helgeson \$375,000.00 for it. Dkt. 28, p. 2. EMC insured Helgeson from December 5, 2009 through December 5, 2016 under multiple policies issued by EMC. Dkt. 35, p. 2.

Homeowners noticed small cracks in the interior walls and foundation of their homes after they moved in. Dkt. 28, p. 3; Dkt. 30, p. 2. The Stevenses contacted Ryan Helgeson, who was involved in construction of their home, regarding cracks observed in the foundation and other areas of

the home. Mr. Helgeson assured the Stevenses that the cracks were nothing to worry about and covered them with concrete caulking material. Dkt. 28, p. 3.³ Despite these assurances, the damage to the homes continued to increase over the next several years. *Id.*; Dkt. 30, p. 2.

In 2017, Krivonen Structural Consultants (“Krivonen”) was hired by Homeowners to inspect their respective properties. Dkt. 28, p. 3; Dkt. 30, p. 3. Krivonen found misaligned doors and window shutters, foundation movement issues, separation of exterior siding, and foundation wall and gypboard cracking. Dkt. 28, p. 3; Dkt. 30, pp. 2-3. Krivonen diagnosed the damage as functional-structural damage due to settlement. *Id.* To date, the Loendorfs have spent over \$160,000 for structural and restoration work to save their home. Dkt. 30, p. 3. Although Krivonen has recommended similar costly repairs for the Stevens’ home, the Stevenses cannot afford to make them without taking early distributions of their retirement accounts. Dkt. 28, p. 4.

B. Helgeson’s Construction of the Homes.

When Helgeson constructed the homes, it ignored multiple geotechnical surveys of the Falcon Ridge Subdivision, which warned about

³ EMC incorrectly alleges the Loendorfs instead of the Stevenses contacted Helgeson regarding observable damage to the home.

the presence of sandy soils that showed the high probability of collapse. Dkt. 28, p. 4. This includes three different geotechnical reports: a 2005 Terracon Consultant, Inc.'s Geotechnical Engineering Report for the Falcon Ridge Subdivision (the "2005 Terracon Report"), a 2004 Terracon Geotechnical Engineering Report (the "2004 Terracon Report"), and a 2007 Geotechnical Engineering Report by Rimrock Engineering (the "Rimrock Report"). *Id.*

The 2005 Terracon Report noted sandy soils as the "controlling subgrade soil" and showed "collapse potential." Dkt. 30, p. 2. The report recommended "extra care" in earthwork preparation and stated, "Frequently, structures built on these types of soils have suffered damaging settlements, sometimes many years after construction." *Id.* (emphasis added). The 2004 Terracon Report contained the same findings and warnings. *Id.* at 4.

Similarly, the 2007 Rimrock Report stated:

[l]ean clay and sandy soils were encountered at or near anticipated foundation elevations throughout the project site. Field and laboratory test results indicate that the site soils at the site are highly compressible and potentially collapsible with increased moisture . . . [t]hese low bearing strength soils will require particular attention in the design and construction of this project.

Id. at 4 (emphasis added). The Rimrock Report recommended deep foundation systems. *Id.* When Helgeson constructed the homes, he did not install deep foundation systems such as foundation piers. *Id.*

C. EMC’s Policy Language.

At all times during construction and for a significant time thereafter, Helgeson was insured under a policy issued by EMC. Dkt. 28, p. 5; Dkt. 30, p. 4. Section I – Coverages – Coverage A(1)(a) of EMC’s 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.” Dkt. 21.03, p. 5.

EMC’s Policy has an Earth Movement Exclusion, which reads as follows:

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 PART
PRODUCT/COMPLETE 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 p. 6. This language does not explicitly exclude human-caused events.

Id. EMC has not disputed that Homeowners' damages were caused by humans and not by natural events. *See, e.g.*, Dkts. 21.02, 21.03, 35, and 36.

When interpreting the Earth Movement Exclusion, the District Court found that the language was ambiguous as to earth movement caused by humans. Dkt.41, 7-8. According to the District Court, “[t]his type of exclusion, read in its entirety, without isolating single words, applies when the earth movements are the result of settling of the earth rather than earth movement as a result of the insured’s actions.” *Id.* Because the language did not specifically exclude both human and naturally caused earth movement, the District Court ruled that the Earth Movement Exclusion is ambiguous and must be construed against EMC. *Id.*

D. Attorneys’ Fees.

After prevailing on summary judgment, Homeowners sought their attorneys’ fees. Homeowners filed a Motion for Attorneys’ Fees and supporting affidavits within the required timeframe. Dkt. 44. EMC argued in its response brief that the Motion should be denied because Homeowners failed to identify the statutory or legal basis for their request. Dkt. 49, p. 2. The District Court disagreed, finding that Homeowners “have established that they have given Defendants ample notice of their plans to request

Attorneys' Fees." Dkt. 56, p. 3. EMC was on notice that Homeowners were seeking attorneys' fees under the Uniform Declaratory Judgment Act ("UDJA") since the very beginning of the case; the Complaint was brought solely under the UDJA and Homeowners requested attorneys' fees in the Complaint. Dkt. 1; Dkt. 56, p. 3. The District Court further found that under the UDJA, fees were "necessary and proper" after applying the "tangible parameters test." Dkt. 56, pp. 3-7.

The District Court did not grant EMC's Motion to File a Sur-reply and issued its Order before it was filed. Dkts. 54, 56. The proposed sur-reply brief, which EMC filed as an attachment, should be ignored because EMC was not granted leave to file it, and the District Court did not consider it when making its determination.

STANDARD OF REVIEW

The Court reviews a district court's grant or denial of summary judgment de novo, applying the same criteria as the lower court. *Fisher ex. rel. McCartney v. State Farm Mut. Auto. Ins. Co.*, 2013 MT 208, ¶ 11, 371 Mont. 147, 305 P.3d 861. "The District Court's interpretation of an insurance contract is a question of law this Court reviews de novo." *Id.* (citing *Stutzman v. Safeco Ins. Co. of Am.*, 284 Mont. 372, 376, 945 P.2d 32, 34 (1997)). When the standard of review is de novo, the Court will "review

the district court's conclusions of law to determine whether they are correct and its findings of fact to determine whether they are clearly erroneous.”

Revelation Industries, Inc. v. St. Paul Fire & Marine Ins. Co., 2009 MT 123, ¶ 13, 350 Mont. 184, 206 P.3d 919.

“This Court reviews for correctness a district court's conclusion regarding the existence of legal authority to award attorneys' fees.” *City of Helena v. Svec*, 2014 MT 311, ¶ 7, 337 Mont. 158, 339 P.3d 32 (citing *Hughes v. Ahigren*, 2011 MT 189, ¶ 10, 361 Mont. 319, 258 P.3d 439). If legal authority exists, the Court reviews a district court's order granting attorneys' fees for an abuse of discretion. *Id.*; *see also* *Kuhr v. City of Billings*, 2007 MT 201, ¶ 14, 338 Mont. 402, 168 P.3d 615.

SUMMARY OF ARGUMENT

The District Court correctly found that EMC's Earth Movement Exclusion is ambiguous as to human-caused events. In its decision, the District Court followed Montana precedent and the majority of case law from other states analyzing similar language. Although EMC wants this Court to interpret its exclusion as broadly as possible, exclusions to insurance policies are construed strictly and narrowly under Montana law. The District Court did just that.

Although it was a limited, one-paragraph argument below, EMC's main contention on appeal is that the broader purpose of a CGL policy should prevail over specific exclusionary language. EMC would have this Court ignore the express language in its Earth Movement Exclusion, which does not mention human-caused events, and instead apply a broad, policy-based interpretation to coverage. This argument is contrary to Montana law and contradicted by other sections of EMC's Policy. There is not a single Montana case where the Court applied the overall goal of an insurer's policy to overcome deficient language in an exclusion. Furthermore, EMC can only cite to one case from Mississippi where any court has done so. The District Court did not err when it concluded that the Earth Movement Exclusion was ambiguous; it interpreted the exclusion narrowly and strictly, as it was required to do.

While Homeowners agree that the District Court could not determine Helgeson's ultimate liability, it could and did determine coverage contingent upon that liability. The District Court correctly found that EMC's Policy provides coverage for Homeowners' damages if Helgeson is found liable in the Underlying Lawsuits. Yet, throughout its brief, EMC asserts that the District Court did not have authority to determine coverage. Framing the District Court's decision as one that only affirmed EMC's duty

to defend its insured, EMC ignores the actual decision and its own actions. EMC was the first to request a coverage decision when it filed the Federal Action. In this case, EMC was the first to file for summary judgment, asking the District Court to provide a decision on coverage. Now, EMC argues that Homeowners did not receive a coverage decision and that any request for it was premature. EMC waived this argument by asking the District Court to do exactly what it did – determine coverage for Homeowners’ damages.

Finally, the District Court’s decision regarding attorneys’ fees should be upheld. EMC consistently applies the wrong standard of review, asserting that the District Court erred when awarding attorneys’ fees. The correct standard of review is abuse of discretion, not clear error. There is not a single place in EMC’s brief where it analyzes the attorneys’ fee award under the abuse of discretion standard. For this reason alone, EMC’s argument is fatally deficient and should be rejected.

The attorneys’ fees decision should also be upheld because the District Court did not act arbitrarily when it applied the “tangible parameters” test to determine that fees were warranted. Balancing the equities, the District Court noted the economic disparity between the parties and EMC’s jurisdictional games. It further rejected EMC’s argument that

this case was not necessary or that it did not change the status quo. Homeowners received exactly what they asked for in this lawsuit – a coverage determination in their favor. The District Court did not abuse its discretion when it decided that Homeowners were entitled to attorneys’ fees after prevailing.

ARGUMENT

I. EMC’S EARTH MOVEMENT EXCLUSION IS AMBIGUOUS.

The District Court was correct when it determined that the Earth Movement Exclusion in EMC’s Policy was ambiguous. Specifically, the District Court found, “This type of exclusion, read in its entirety, without isolating single words, applies when the earth movements are the result of settlement of the earth rather than earth movement as a result of the insured’s actions.” Dkt. 41, pp. 7-8.⁴ Accordingly, it ultimately concluded that “[a]ctions of the insured are not covered under the Earth Movement Exclusion.” *Id.* at 8.

EMC bears the burden of establishing the application of its Earth Movement Exclusion. *Travelers Cas. And Surety Co. v. Ribl Immunochem Research Inc.*, 2005 MT 50, ¶ 29, 326 Mont. 174, 108 P.3d 469 (external

⁴ EMC’s argument focusing on the District Court’s use of the term “long-term earth movement” is a red herring. Length of time is not at issue here. The only question is whether the exclusion is ambiguous as to human-caused events.

citations omitted). “Exclusions from coverage are to be narrowly and strictly construed because they are contrary to the fundamental protective purpose of an insurance policy.” *Park Place Apartments, LLC v. Farmers Union Mut. Ins. Co.*, 2010 MT 270, ¶ 12, 358 Mont. 394, 247 P.3d 236.

When deciding whether an exclusion is ambiguous, it is determined from the viewpoint of a consumer with average intelligence who is not trained in the law or insurance business. *Modroo v. Nationwide Mut. Fire. Ins. Co.*, 2008 MT 275, ¶ 23, 345 Mont. 262, 191 P.3d 389. It is ambiguous if it is “reasonably subject to two different interpretations.” *Mitchell v. State Farm Ins. Co.*, 2003 MT 102, ¶ 26, 315 Mont. 281, 68 P.3d 703.

The preeminent case regarding the application of an earth movement exclusion in Montana is *Parker v. Safeco Insurance Co. of America*, 2016 MT 173, 384 Mont. 125, 376 P.3d 114. In that case, Parker’s home was damaged by a boulder that naturally detached from a bluff, tumbled down a steep embankment, and crashed into the side of the home. *Parker*, ¶¶ 3-5. The insurer denied coverage for Parker’s claim under the earth movement exclusion in the policy. *Id.* at ¶ 6. This Court concluded that the exclusion was not ambiguous and barred coverage for Parker’s damages. *Id.* at ¶ 22.

In its decision, this Court acknowledged that the event at issue was naturally caused, and its ruling was specific to natural earth movement

events. *Id.* at ¶ 25. However, and unlike the exclusion at issue here, the earth movement exclusion in *Parker* included the following language: “This exclusion applies whether the earth movement is caused by or resulting from human or animal forces of any act or nature.” *Id.* at ¶ 6. As part of its decision, this Court recognized the ongoing debate over earth movement exclusions that lack specific language regarding human-caused events:

While many states have considered whether “earth movement” coverage exclusions are ambiguous, the vast majority of those cases were decided in the context of disputes over whether the exclusion applied to human-caused events . . . the policy in this case applies the exclusion to earth movement regardless of cause, making the debate over human-caused events irrelevant.

Id. at ¶ 25.

In short, the express language of the exclusion in *Parker* barred damages from earth movement “caused by or resulting from human” forces, and it was, therefore, not an issue. The language was “clear and unequivocal” regarding human-caused events. *See, e.g., Winter v. State Farm Mut. Auto Ins. Co.*, 2014 MT 168, ¶ 13, 375 Mont. 351, 328 P.3d 665 (The rule of construction in Montana is that exclusion language must be “clear and unequivocal.”). Here, EMC’s Policy contains no similar clear and unequivocal language.

In fact, EMC’s Earth Movement Exclusion does not mention “humans” at all. Instead, it lists a series of naturally occurring events that are not covered, including:

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.

Dkt. 21.03, p. 6. There is no clear exclusion for damage caused by human intervention as opposed to damage caused by mother nature. An objectively reasonable consumer would review the language and assume it excluded any naturally caused earth movement. However, a layperson would not think it excludes human-caused settling damage to their house.

In support of the distinction between natural and human-caused events, the *Parker* Court cited *Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 509 S.E.2d 1, 8 (Sup. Ct. App. W. Va. 1998). *Id.* at ¶ 25. Specifically, this Court referenced “Appendix A in *Murray*” when noting that many courts have determined earth movement exclusions are ambiguous in the context of human-caused events. *Id.* In *Murray*, the Supreme Court of Appeals of West Virginia cited thirty decisions holding that earth movement exclusions without language specifically excluding human-caused events are ambiguous and only exclude naturally occurring events. *Murray*, 509 S.E.2d at 17-20 (Appendix A). The District Court did not err

when it concluded the same here: EMC's Earth Movement Exclusion is ambiguous regarding human causation. The District Court simply followed the logic applied in the vast majority of cases that have concluded the same when analyzing similar language.

Arguing below that its exclusion is somehow broader than the one in *Parker*, EMC focused on the language "any other movement of land, earth or mud," which appears in the Earth Movement Exclusion after a long list of natural disasters. Dkt. 35, pp. 13-14. EMC makes the same argument on appeal, stating "any" means "every" and "all," including human-created movement. Appellant's Br., p. 18. However, the language is written in the passive voice for a reason – it does not contemplate a situation where a human actively causes earth movement. If EMC's interpretation is correct, then Helgeson could have accidentally dumped a load of dirt on someone's adjacent house with its excavator, and it still would not be a covered event because there was "earth movement." Appellant's Br., p. 18. EMC could have written its policy to read like the one in *Parker*, barring earth movement "caused by or resulting from humans." It did not, and the District Court was correct when it concluded that EMC's Earth Movement Exclusion is ambiguous as a matter of law.

II. THE COURT CANNOT FIX EMC'S AMBIGUOUS LANGUAGE.

A. The Exclusion Must be Strictly Construed.

In EMC's second argument, it makes the exact opposite assertion of its first – that “any” means only human-caused events. Although this was a one-paragraph, throwaway argument without any legal citations in EMC's briefing below, it is EMC's predominate argument on appeal. *See* Dkt. 35, pp. 23-35; Dkt. 36, pp. 18-19. According to EMC, the Court should find that the Earth Movement Exclusion only applies to human-caused events because the purpose of a CGL policy would be moot if it applies to natural events. While EMC acknowledges that “this Court has never specifically stated that the type of insurance policy should be addressed in a coverage analysis,” it asks the Court to do just that – interpret an exclusion based solely on the type of insurance at issue and not on the actual language of the exclusion. Appellant's Br., p. 15.

EMC's argument goes against legal precedent. Coverage exclusions must be “narrowly and strictly construed.” *Park Place, LLC*, ¶ 12. Instead of narrowly and strictly construing the actual language of the Earth Movement Exclusion, EMC wants the Court to interpret it by applying the broader purpose of a CGL policy. Interpreting language according to EMC's overarching policy scheme is the exact opposite of narrow.

Further, as discussed above, ambiguity is determined from the viewpoint of a consumer with average intelligence, but not trained in the law or insurance business. *Modroo*, ¶ 23. A consumer with average intelligence would likely not even grasp the point that EMC is attempting to make. According to EMC, this Court should require a layperson to review every carefully crafted exclusion in an insurance policy while ignoring the actual language and, instead, apply the insurer's broader policy purpose. Of course, that would require a layperson to understand the insurer's broader policy purpose, and here it is not explicitly stated anywhere in EMC's Policy. There is not a single place in EMC's Policy where it states, "This policy only applies to human-caused events." *See, e.g.*, Dkt. 21.03, Ex. B.

Even if the policy included such explicit language, EMC's interpretation would require the Court to stretch it to cover an exemption found somewhere else in the policy that does not include the same explicit warning about human-caused events. In short, EMC's argument is at least three-steps removed from the actual language in the Earth Movement Exclusion.

B. Other Language in EMC's Policy Contradicts its Argument.

Other exclusions in EMC's Policy also undermine its argument. For example, there is a "Fungi or Bacteria Exclusion" in EMC's Policy. Dkt.

21.03, Ex. B, p. 30.⁵ The Fungi or Bacteria Exclusion excludes bodily injury and property damage from:

the actual, alleged, or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any “fungi” or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.

Id. Obviously, this exclusion does not apply only to human-caused fungi or bacteria simply because the policy is a CGL policy. It excludes injuries where any cause “contributed concurrently or in any sequence” through an event, material, or product. *Id.* The latter two, materials and products, clearly relate to human-caused issues. However, it is also written to explicitly cover injuries arising out of the mere “existence” or “presence” of fungi or bacteria, a situation that would have nothing to do with humans.

Id. If EMC’s assertion is correct, however, then this exclusion must be read as only applying to fungi and bacteria injuries caused by humans. Such a reading would make the exclusion nonsensical and most of the language obsolete.

The same is true about the Earth Movement Exclusion. Reading it as only applicable to human-caused earth movement is nonsensical. The

⁵ The Fungi or Bacteria Exclusion appears on the fourth page after the main policy and on page 30 of the exhibit. Unfortunately, the exhibit was not date-stamped, and there are no consecutive page numbers.

events listed in the Earth Movement Exclusion are all naturally occurring events, including earthquakes, mudflows, landslides, and erosion. Dkt. 21.03, p. 5. The Earth Movement Exclusion does not, like in *Parker*, include language also barring damages caused by humans. That’s the exact problem; unlike the Fungi or Bacteria Exclusion, the Earth Movement Exclusion is not written to explicitly exclude both natural and human-caused events. EMC’s argument that exclusions should be interpreted according to the larger purpose of a CGL policy is not even supported by other sections of its own policy.

C. Montana has Never Applied a Broader Policy Goal to Negate Explicit Language.

The new cases cited by EMC are also unavailing. After acknowledging that this Court has never actually conducted the analysis EMC requests, it still argues that the type of insurance “has been an obvious consideration many times.” Appellant’s Br., p. 15. Yet, EMC’s citations do not support its statement. For example, the Court has acknowledged that the intent of a CGL policy 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*.” *Ribi*, ¶ 18 (emphasis in original) (quoting *Northwestern Nat. Cas. Co. v. Phalen*, 182 Mont. 448, 455, 597 P.2d 720, 724 (1979)). The *Ribi* Court did not,

however, apply the policy’s general intent to fix an insurer’s poorly written language in an express exclusion. *Id.* What EMC wants the Court to do – ignore the actual language in the exclusion and instead apply an overall policy theme to its interpretation – has not been done in any Montana case interpreting exclusionary language in an insurance contract.

EMC attempts to cite to a case entitled “*ALPS Property & Casualty Company*” but does not have the full citation anywhere in its brief.

Appellant’s Br., P. 15. Homeowners are uncertain what case EMC is referencing, but the quote appears to note the general time limits on claims found in “claims-made” and “claims-made and reported” policies. *Id.* The Earth Movement Exclusion in EMC’s Policy has nothing to do with a limitation on when claims can be made. Of course, a “claims-made and reported” policy includes very specific language stating the same, that there is a temporal limitation on coverage and insureds must make claims within the exact timeframe. Without such explicit language, no court would impose an unexplained time limit on claims simply because someone labelled it a “claims-made and reported policy.” In short, even “claims-made and reported” policies need clear language explaining the limitation.⁶

⁶ In *Park Place Apartments, LLC*, the Court conducted a similar analysis, examining the definition of “covered property” by reviewing the specific language

Here, the limiting language is found in the Earth Movement Exclusion. That language does not cover human-caused damages. The Court cannot ignore the specific language in favor of a general policy goal.

In summary, Homeowners agree that a CGL policy is “designed to cover an insured’s tort liability . . .” Appellant’s Br., p. 19 (quoting 7A Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 103.19 (3d ed. 2009)). That is exactly what Homeowners hoped to obtain when it filed this case – coverage for the liability of EMC’s insured. EMC, however, is responsible for crafting exclusions if there is an area of tort liability that they will not cover. Here, EMC attempted to do that with the Earth Movement Exclusion. It failed. The Court cannot fix the fact that EMC drafted and included ambiguous language in its policies. Insurance policies are construed “strictly against the insurer and in favor of the insureds.” *Ribi*, ¶ 17. They are not construed in the broadest manner possible, favoring the insurer by giving more weight to the general purpose of the policy over the actual language in an exclusion.

in the definition and not the overall policy purpose. *Park Place Apartments, LLC*, ¶ 20.

D. *Hankins* is a Single Outlier and Should be Ignored.

Contrary to EMC's argument, *Hankins v. Maryland Casualty Comp.*, 101 So.3d 645 (Miss. 2012) is an outlier. Although EMC is correct that other courts have found that earth movement exclusions in CGL policies applied to human-caused events, the courts did not make those findings because the policies were CGL policies. Instead, the analyses were based upon the explicit language in the earth movement exclusions.

In *Federal Insurance Co. v. Olawuni*, 539 F.Supp.2d 63, 65 (D.D.C. 2008)⁷, which EMC cites in favor of its position, the earth movement exclusion stated that the insurance did not apply to damages “arising from, attributable or contributed to or aggravated by any movement of land whether caused by or resulting from natural forces or contributed to, in any way, by any work or operations performed by you or any contractor or subcontractor.” (emphasis added). Based purely on a review of this language, the *Olawuni* court found that the earth movement exclusion was not ambiguous as to human-caused damages. *Olawuni*, 539 F.Supp.2d at 67. There is not a single sentence in *Olawuni* where the court suggested that the general purpose of a CGL policy guided its analysis.

⁷ EMC cites *Olawuni* incorrectly throughout its brief as 539 F.Supp.2d 633.

EMC does not have similar language in its Earth Movement Exclusion. There is nothing in EMC's language that states the exclusion applies whether caused by, resulting from, or contributed to "by any work or operations performed by you or any contractor or subcontractor." If there was, it would not be ambiguous as to human-caused events, just like the *Olawuni* policy was unambiguous.

Similarly, the earth movement exclusion in *The North River Insurance Company v. H.K. Construction Corporation*, Cause No. 19-cv-00199-DKW-KJM, expressly stated, "Such loss or damage is excluded regardless of any other cause or event, including any product, work or operation provided or performed by or on behalf of the insured, that contributes concurrently or in any sequence to the loss or damage." Appellant's Appx., at 4 (p. 2-3 of Order) (emphasis added). The language was not ambiguous and explicitly excluded coverage for human-caused earth movement. *Id.* Again, there was no analysis of the broader purpose of CGL policies in *The North River Insurance Company*. *Id.* The court simply analyzed the language in the exclusion.

Olawuni and *The North River Insurance Company* rebut EMC's argument for multiple reasons. First, if EMC had the same explicit language about human-caused events in EMC's Policy, then the District

Court would not have found that the Earth Movement Exclusion was ambiguous. Second, if EMC is correct and the broader policy is all that matters (not the explicit language), then the language in *Olawuni* and *The North River Insurance Company* would have been irrelevant to the courts' decisions, not the focus of their analyses.

Hankins is the only case where a court's analysis of an earth movement exclusion incorporated the general purpose of a CGL policy and was not based solely on the language in the exclusion. This Court should reject EMC's attempt to argue precedence based upon one outlier case from Mississippi. The District Court was correct when it found ambiguity based upon the actual language in the Earth Movement Exclusion.

E. The Class Action is Irrelevant

EMC references in its "Statement of Facts" section of its brief a class action involving Homeowners against two engineering firms. While EMC's brief offers little explanation as to why this fact is relevant, the class action has no bearing on the coverage dispute at issue here. Homeowners have alleged Helgeson ignored multiple geotechnical reports that warned of collapsible soils when constructing their homes. Whether Homeowners were members of a peripheral class action against one or more geotechnical entities is entirely irrelevant.

III. THE DISTRICT COURT DID NOT DETERMINE UNDERLYING LIABILITY.

A. The District Court Exercised Its Authority to Determine Coverage.

As an initial matter, Homeowners agree that the District Court did not have jurisdiction to determine Helgeson's ultimate liability. Helgeson's liability for Homeowners' damages is the subject of the Underlying Lawsuits. This case was brought under the UDJA, and the District Court's decision is limited to a determination of coverage. The District Court correctly found that EMC's Policy does not exclude Homeowners' damages if Helgeson, EMC's insured, is found liable.

However, EMC is incorrect that the District Court's decision can "only confirm based upon the allegations of the [Underlying Lawsuits], EMC has a duty to defend Helgeson." Appellants' Br., p. 26. This case has nothing to do with EMC's duty to defend its insured. It was brought to determine whether there was coverage for Homeowner's damages if EMC's insured is found liable for those damages. Homeowners alleged that there is "coverage or duty to indemnify Helgeson under the EMC policies" and sought a coverage determination as to their damages. Dkt. 1, ¶ 9 (emphasis added). Notably, EMC's "duty to defend" is not found anywhere in Homeowners' Complaint, other than an acknowledgment that EMC is

providing a defense to EMC for the Underlying Lawsuits. Dkt. 1, ¶ 7. Helgeson is not a plaintiff in this lawsuit (it is a defendant), and EMC is already defending Helgeson in the Underlying Lawsuits. *Id.*

Homeowners understand why EMC wants to wedge the District Court's decision into a duty to defend determination as opposed to a coverage decision; it supports EMC's attorneys' fees argument if it can pretend that Homeowners did not change the status quo. However, EMC's actions bely its argument. Prior to this lawsuit, EMC brought the Federal Action under the UDJA, denying coverage for Homeowner's damages if Helgeson is found liable. Dkt. 27, Ex. A; Dkt. 8, p. 4. EMC asked for the same thing in the Federal Action that Homeowners requested in this lawsuit – a coverage determination as to homes Helgeson built in the Falcon Ridge Subdivision. Dkt. 27, Ex. A. And, just like it did in this case, EMC asserted in the Federal Action that there is no coverage for claims made against Helgeson by Homeowners. *Id.*

Specifically, in the Federal Action Complaint, EMC stated that it sought “declaratory judgment from this Court that there is no insurance coverage under EMC's insurance policies issued to Helgeson for the claims being asserted against Helgeson in [the Underlying Lawsuits].” Dkt. 27, Ex. A, ¶. 8. EMC knows this case is not about its duty to defend Helgeson.

Like the Federal Action, this case is about coverage which includes its duty to indemnify Helgeson for Homeowners' damages if liability is proven.

It is perplexing that EMC is now arguing on appeal, for the first time, that the District Court could not determine coverage under EMC's Policy. Both of EMC's summary judgment motions state that EMC "respectfully submits this Motion for Summary Judgment on Coverage" for Homeowners' claims. Dkt. 21.02, 21.04. Notably, EMC was first to file for summary judgment. *Id.* In its supporting briefs, EMC argued that "the Earth Movement Exclusion clearly and unambiguously bars coverage." Dkt. 21.04, p.7; Dkt. 21.05, p. 7 (emphasis added). EMC did not file summary judgment briefs on its duty to defend; it would have made no sense for it to do since that's not the subject of this lawsuit. Yet, after asking for judgment from the District Court that its policy barred coverage, EMC now argues on appeal that "the only thing the district court was authorized to proclaim by way of this declaratory judgment action is that the duty to defend exists . . ." Appellant's Br., pp. 25-26.

Obviously, EMC has waived any argument that the District Court did not have authority to determine coverage. EMC itself asked the District Court to do so. It did not once request that the case to be stayed until the Underlying Lawsuits were determined or argue that summary judgment was

premature.⁸ All parties agreed that the District Court had authority to determine coverage and all parties asked it to do so. EMC cannot change its theory on appeal, contradicting its own motions and briefs below, simply because it lost. The District Court's determination was correct and should be upheld.

B. The District Court Correctly Acknowledged that the Damages were Caused by Humans.

As part of the District Court's analysis, it was necessary to establish whether the damages were caused by natural events or human events. Importantly, EMC has never argued that Homeowners' damages were caused by naturally occurring events. Instead, EMC has maintained that its insured did not cause the damages. There appears to be consensus among the parties that the damages were not caused by mother nature.

The District Court was correct when it acknowledged human causation as part of its decision. Homeowners' entire argument was based upon the fact that the language in the Earth Movement Exclusion was ambiguous as to human-caused events. *See, e.g.*, Dkt; 28, pp. 8-14; Dkt. 30, pp. 14-20. EMC never once asserted that the District Court was prohibited from

⁸ In fact, EMC also filed a summary judgment motion in the Federal Case asking for the same thing – a determination on coverage. *See S.D. Helgeson, Inc.*, Cause No. CV-19-129-BLG-TJC, at Dkt. 30.

determining coverage because liability had not been established in the Underlying Lawsuits or because the damages were naturally caused. *See* Dkts. 21.03, 21.05, 35, 36. In fact, as noted above, EMC was the first to file for summary judgment on coverage. Dkts. 21.02, 21.02.

EMC fully understood that the District Court had to make a coverage determination as to human-caused earth movement events, and it did not object to the District Court's jurisdiction to do so. Accordingly, while the District Court could not determine Helgeson's underlying liability, EMC has waived any argument that Homeowners' damages were not caused by humans just as it has waived its argument that the District Court had no authority to determine coverage.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT AWARDED ATTORNEYS' FEES.

The District Court did not abuse its discretion by awarding Homeowners their attorneys' fees, and EMC does not argue it did. EMC consistently applies the wrong standard of review to its attorneys' fees argument. Asserting that the District Court's findings regarding attorneys' fees were "clearly erroneous," "incorrect," or "in error," EMC is apparently arguing under a clear error standard. *See, e.g.,* Appellant's Br., pp. 31, 32, 34, 35. The only aspect that this Court reviews for correctness is the District Court's conclusion regarding the existence of authority for

attorneys' fees. *Svee*, ¶ 7. EMC does not challenge the District Court's conclusion that it could award fees, conceding that "section 27-8-313 of the UDJA grants the district court discretion to award supplemental relief in the form of attorneys' fees 'when necessary and proper.'" Appellant's Br., p. 26.

Since EMC agrees that legal authority exists, the Court reviews the District Court's order granting attorneys' fees for an abuse of discretion. *Svee*, 7; *see also* *Kuhr*, ¶ 14. The only time EMC asserts that the District Court abused its discretion is in a one-sentence conclusion at the end of its analysis. Appellant's Br., p. 36. "The party seeking to reverse a ruling carries the burden to demonstrate the abuse of discretion." *Larchick v. Diocese of Great Falls-Billings*, 2009 MT 175, ¶ 39, 350 Mont. 538, 208 P.3d 836. EMC has not met this burden. Its appeal of this decision should be denied based solely on the fact that it applies an incorrect, lower standard.

"A district court abuses its discretion when it acts arbitrarily, without employment of conscientious judgment, or in excess of the bounds of reason resulting in substantial injustice." *Kuhr*, ¶ 14 (citing *Pumphrey v. Empire Lath and Plaster*, 2006 MT 255, ¶ 9, 334 Mont. 102, 144 P.3d 813). There is not a single sentence where EMC argues that the District Court's award of

attorneys' fees meets any of these elements. It does not. The award was well within the District Court's discretion.

A. The District Court Did Not Act Arbitrarily When it Found Equitable Considerations Supported the Award.

As the District Court found in its order, the UDJA includes an avenue by which third parties may collect an award of attorney fees under Mont. Code Ann. § 27-8-313. Dkt. 56, p. 4. However, such fees must be “necessary and proper.” *Id.* (citing *Mountain West Farm Bureau Mut. Ins. Co. v. Brewer*, 2003 MT 98, ¶ 42, 315 Mont. 231, 169 P.3d 652).

Acknowledging that the scope of an award under the UDJA is “narrow and serves as an exception to the general rule,” the District Court still found an attorneys' fees award to be necessary and proper. *Id.* (citing *Davis v. Jefferson Cnty. Election Off.*, 2018 MT 32, 412 P.3d 1048, 390 Mont. 280).

Before applying the “tangible parameters” test to determine whether the award was “necessary and proper,” the District Court determined whether equitable considerations supported the award. Dkt. 56, p. 5 (citing *Abbey/Land, LLC v. Glacier Constr. Partners, LLC*, 2019 MT 19, ¶ 66, 394 Mont. 135, 433 P.3d 1230). EMC does not argue that the District Court applied the wrong law, just that the District Court “incorrectly found that the parties' economic disparity constituted an ‘equitable consideration.’” Appellant's Br., p. 30. According to EMC, the District Court could only

award fees if it would have constituted an “unfair result[] absent the award of fees, or bad faith conduct on the part of the losing party.” *Id.* at 28.

EMC has essentially created a new legal standard and retroactively applied it to the District Court’s analysis.

EMC is incorrect about the law, and it is incorrect about the District Court’s findings. This Court has never laid out a specific test for balancing the equities, but it has noted that if the parties are similarly situated, then equitable considerations do not support an award of attorneys’ fees. *United Nat. Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 2009 MT 269, ¶ 39, 352 Mont. 105, 214 P.3d 1260; *Svee*, ¶ 20 (noting that attorney fees are denied when parties are similarly situated and on equal footing). There is no requirement that there be an “unfair result” absent attorneys’ fees or “bad faith” on the part of EMC. After reviewing the equitable considerations, the District Court found that “there is naturally a disparity between individual Plaintiffs and a large international corporate defendant, and that this has been established plainly in Plaintiffs Motion.” Dkt. 56, p. 5 (emphasis added).

The record supports the District Court’s finding that there is a disparity between the parties. Furthermore, although it is not a requirement, it also shows that EMC did act in bad faith. As Homeowners asserted,

Homeowners “cannot afford the repairs to their homes or have been forced to withdraw money from their retirement accounts to complete the repairs.”

Dkt. 52, pp.4-5. In contrast, EMC “is a multibillion-dollar insurance company” that has made a number of “tactical maneuvers to delay and obstruct the process in order to avoid coverage.” *Id.* at 5. Specifically,

EMC’s actions include:

- (1) opposing [Homeowners’] request to intervene in the Federal Action,
- (2) forcing [Homeowners] to file this state action because it would not allow intervention in the Federal Action,
- (3) removing this case to federal court after denying intervention in the Federal Action,
- (4) losing its request to consolidate this case into the Federal Action,
- and (5) ultimately losing on summary judgment.

Id. at 5. The District Court noted these same tactical games in its Order.

Dkt. 56, p. 6. It was not an abuse of discretion for the District Court to find, based upon the record, that equities supported an award of fees because of the disparity between the parties. Further, even if EMC is correct that “bad faith” is a necessary requirement for equitable considerations, its actions certainly meet that requirement.

B. Homeowners Sought and Received what EMC Possessed.

The District Court applied the first element of the “tangible parameters” test, finding that EMC possessed what Homeowners sought – a coverage decision for their claims against Helgeson. Dkt. 56, pp. 5-6;

Abbey/Land, ¶ 67. Asserting that the District Court’s analysis was

“erroneously determined,” EMC again makes its bizarre argument that Homeowners could not and did not receive a coverage decision in their favor. Appellant’s Br., p. 32. According to EMC, an order requiring it to fully indemnify Helgeson for Homeowners’ damage if Helgeson is found liable is somehow not favorable to Homeowners. *Id.* at 32-33.

Again, Homeowners agree that the coverage finding is contingent upon Helgeson’s ultimately liability. Yet, EMC’s stance prior to this case was that it owed no obligation to indemnify Helgeson for Homeowners’ damages even if Helgeson is found liable. And, importantly, EMC filed the Federal Action to obtain just that – a declaration that it is not required to indemnify any property owners for Helgeson’s actions if liability is established. Dkt. 27, Ex. A. EMC’s continued insistence that either the District Court did not have the ability to determine coverage or that Homeowners did not obtain a coverage decision is fully contradicted by EMC’s own actions.

As the District Court noted, EMC’s argument that the District Court’s summary judgment order “only affirms EMCs duty to defend seems to mischaracterize the outcome of that action.” Dkt. 56, p. 6. The District Court did not abuse its discretion when it found that “EMC’s refusal to cover the Plaintiffs claims amounts to an insurance company possessing

what plaintiffs sought in the declaratory relief action.” Dkt. 56, p. 5 (internal quotations omitted). Homeowners sought a declaratory judgment that EMC is required to fully indemnify Helgeson for Homeowners’ damages. Dkt. 1, p.3. Prior the District Court’s decision, EMC denied that it had any requirement to do so. Now, Homeowners have a ruling that EMC must cover their damages if its insured is found liable.

C. It was Necessary for Plaintiffs to File this Declaratory Judgment Action.

Applying the second element of the “tangible parameters” test, the District Court found it was necessary for Homeowners to seek declaratory judgment on coverage. Dkt. 56, p. 6; *Abbey/Land*, ¶ 67. The District Court further found EMC’s arguments, the same that they make on appeal, to be “unconvincing and not clear.” Dkt. 56, P.6. EMC asserts that it was not necessary for Homeowners to bring a coverage action at this time, and they should have waited for liability to be determined in the Underlying Lawsuits. EMC’s own actions are, once more, fatal to its argument.

EMC filed the Federal Action prior to this case, requesting declaratory judgment that it had no duty to indemnify Helgeson for damages to homes in the Falcon Ridge Subdivision. Dkt. 27, Ex. A. EMC sought “declaratory judgment from [the federal court] that there is no insurance coverage under EMC’s insurance policies issued to Helgeson for the claims being asserted

against Helgeson in [the Underlying Lawsuits].” Dkt. 27, Ex. A, ¶. 8. EMC argues that it was not necessary for Homeowners to seek a coverage determination, but apparently it was necessary for EMC to seek one. It is absurd for EMC to assert that Homeowners “put the coverage cart before the liability horse” when EMC was the party who chose to do so.

To be clear, what EMC wanted was for Homeowners to be excluded from any coverage case. As the District Court outlined in its order, EMC filed its Federal Action, and then denied Homeowners’ request for intervention. Dkt. 56, p. 6. If Homeowners had not filed this case when they did, then EMC would have proceeded with the Federal Action without Homeowners. EMC was simply hoping that the Federal Action would be decided before Homeowners could find a way to participate. And EMC is now pretending that if it had received a decision in the Federal Action, issue preclusion would not have barred subsequent coverage lawsuits. This pretense – that Homeowners could have still brought a coverage case after underlying liability was determined – is transparent and unavailing.

Homeowners did not make a “tactical decision to have a court determine coverage before liability . . .” Appellant’s Br., p. 35. EMC did. As soon as EMC brought its coverage case in federal court, Homeowners had to either participate to protect their rights or they had to bring their own case. EMC

made that decision for them when it refused to allow intervention. Dkt. 56, p. 6.

This case was necessary for the same reason EMC believed the Federal Action was necessary – to determine whether EMC had a duty to cover Helgeson’s liability. That is exactly what the District Court found when it reiterated EMC’s tactical games in its order before finding that “it was necessary to seek a declaration showing the Plaintiffs were entitled to the relief sought.” Dkt. 56, p. 6. The District Court’s finding on necessity was not an abuse of discretion and should be upheld.

D. Homeowners Changed the Status Quo When They Prevailed on Summary Judgment.

After analyzing the third tangible parameter, the District Court found that Homeowners’ actions changed the status quo. Dkt. 56, p. 6; *Abbey/Land*, ¶ 67. In the same tired argument, EMC contends that the status quo was not changed because the District Court only established EMC’s duty to defend. For the same reasons already asserted numerous times, EMC is simply wrong. Prior to the District Court’s decision, EMC’s position was that it did not have a duty to indemnify Helgeson for Homeowners’ damages. It filed the Federal Action for this exact reason, attempting to obtain a judgment regarding its duty to indemnify Helgeson. Dkt. 27, Ex. A. The District Court’s decision determined that EMC’s “duty

shifted from solely being concerned with defending insureds under a reservation of rights to owing the Plaintiffs the coverage they sought in addition.” Dkt. 56, p. 6

This determination was not an abuse of discretion. Despite EMC’s numerous attempts to paint this as a duty to defend lawsuit, it is a coverage case. While Homeowners acknowledge that ultimate coverage is contingent upon Helgeson’s liability, EMC’s stance prior to the District Court’s decision was that it owed no coverage regardless of liability. Now, if Helgeson is found liable, Homeowners are entitled to coverage for their claims. Although EMC attempts to differentiate between its duty to indemnify Helgeson and its duty to cover Homeowners’ claims, they are the same thing. If Helgeson’s liability is established, EMC will have to cover Homeowners’ damages under EMC’s Policy. That determination is what Homeowners sought, and it is exactly what they received. The District Court did not act arbitrarily when it found that Homeowners changed the status quo.

CONCLUSION

The District Court did not err when it found that EMC’s Earth Movement Exclusion is ambiguous as to human-caused events. It followed Montana law and the majority of cases from other states in its decision.

Although EMC wants the Court to ignore the specific language in that exclusion and apply a broader policy goal to its analysis, the Court cannot fix EMC's poorly drafted language. Montana law does not support EMC's theory of interpretation; exclusions in insurance contracts must be construed strictly and narrowly.

Throughout its brief, EMC attempts to frame this case as something other than a coverage case. The pleadings on record and EMC's own actions show that this is not a duty to defend case. EMC asked the District Court to do exactly what it did – determine coverage. Now that coverage has been decided in Homeowners' favor, EMC argues that the District Court had no authority to make a coverage decision. EMC waived this argument numerous times below, and the Court should reject it on appeal. The District Court's summary judgment decision should be upheld.

Finally, it was not an abuse of discretion for the District Court to award attorneys' fees when Homeowners prevailed. EMC acknowledged that the District Court had the authority to do so under the UDJA. However, after consistently applying the wrong standard of review, EMC argues that the District Court's analysis was erroneous. The District Court did not act arbitrarily or in excess of the bound of reason when it analyzed and applied the "tangible parameters" test, finding that Homeowners' were entitled to

attorneys' fees. The District Court's decision on attorneys' fees should be upheld.

DATED this 21st day of January, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced, except for quoted and indented material; and the word count calculated by Microsoft Word is 8,939 words, excluding table of contents, table of authorities, caption, certificate of service and certificate of compliance.

/s/ Ryan Gustafson _____

Ryan Gustafson

CERTIFICATE OF SERVICE

I, Ryan James Gustafson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 01-21-2022:

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