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") REPLY BRIEF

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A. Homeowners' Reliance Upon *Murray* and Similar Property and All-Risk Policy Cases is Misplaced; the Court Should Follow the *Hankins* Analysis in this Case Because the Decision Directly Addresses the Exact Same Earth Movement Exclusion in the Context of CGL Coverage.

Homeowners dispute the concept that the type of insurance is relevant to whether a policy exclusion is ambiguous, claiming that this Court "has never actually conducted" such an analysis. (*See* Response Brief at 21-23.) Instead, Homeowners demand that this Court use a generic brush to analyze the EMC Earth Movement Exclusion without considering the type of insurance policy at issue.

Contrary to Homeowners' contention that insurance coverage is a one-size-fits-all analytical process, this Court has historically considered the type and purpose of the insurance policy in front of it when interpreting an exclusion. *See e.g., Ruckdaschel v. State Farm Mutual Automobile Insurance Co.* (Mont.1997), 285 Mont. 395, 948 P.2d 700 (coverage considerations in auto policy based upon whether coverage was optional or mandatory); *Mitchell v. State Farm Insurance Company*, 2003 MT 102, 315 Mont. 281, 68 P.3d 703 (finding anti-stacking and offset provisions in automobile UIM coverage provisions against public policy of protecting innocent victims of auto accidents); *Park Place Apartments, LLC v. Farmers Union Mut. Ins. Co.*, 2010 MT 270, 358 Mont. 394, 247 P.3d 236 (coverage determined in the context of the policy commercial property); *ALPS Prop. & Cas. Ins. Co. v. McLean & McLean, PLLP*, 2018 MT 190, ¶ 30, 392

Mont. 236, 247, 425 P.3d 651, 659 (examining coverage based upon policy being claims made rather than occurrence-based).[1] This Court's historical approach is logical because insurance coverage is not a one-size-fits-all world. Different policies have different coverage purposes. An exclusion in one type of policy might be ambiguous while unambiguous in another. Context matters.

The distinction between policy types becomes quite clear when reviewing specific earth movement exclusion cases. For instance, in the only Montana case involving an earth movement exclusion, *Parker v. Safeco Ins. Co. of America*, 2016 MT 173, 384 Mont. 125, 376 P.3d 114, this Court determined that the exclusion, which is many ways similar to the one in the EMC CGL Policy, was unambiguous and excluded the claim. Importantly, the policy in *Parker* was an "*all-risk" first party property* insurance policy intended to cover fortuitous losses to the insured's property no matter what the cause, unless clearly excluded. The Safeco earth movement exclusion included language barring coverage caused by both natural and human-caused events—which makes sense in the context of first party property policy since that type of "all-risk" policy covers a far broader range of loss events and causes than the CGL policy at issue. While this Court briefly discussed the debate over whether an exclusion must specifically preclude both

[1] On page 22 of its Response Brief, Homeowners complain that EMC failed to fully cite the *ALPS Prop. & Cas.* case. This was an inadvertent typographical error. The case was cited completely and discussed in prior district court pleadings. *See* Dkt 35.00 at 9; Dkt 36.00 at 4.

human and nature-caused earth movement events to be valid, the question was never answered since the Safeco exclusion in fact precluded both types.

The *Parker* Court also commented briefly upon the West Virginia Supreme Court's decision in *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1 (W.Va. 1998). Homeowners have seized on this Court's limited reference to advocate adoption of a rule in Montana that an earth movement exclusion must explicitly bar both human and nature-caused earth movement events no matter what the policy type. (*See* Response Brief at 16.) Homeowners further this argument by dismissing all contrary cases, including labeling the case that mirrors this one most precisely, *Hankins v. Maryland Casualty Co.*, 101 So.3d 645 (Miss. 2012) an "outlier".

Homeowners' reliance upon *Murray* fails to acknowledge that the type of policy being examined in the context of the earth movement exclusion matters. *Murray*, similar to *Parker,* involved coverage under a first party homeowner's "all-risk" policy. As in *Parker,* the *Murray* policy as well as the policies discussed in those cases cited to by the *Murray* Court, interpreted first-party property or "all-risk" policies which by their very nature cover a much broader range of fortuitous losses—including *both* human and natural caused events. *Murray* 509 S.E.2d at 7.[2]

[2] *Wyatt v. Northwestern Mut. Ins. Co. of Seattle*, 304 F. Supp. 781 (D. Minn., Fourth Dist. 1969) which the *Murray* Court called "seminal" involved coverage under a "all risk homeowner's policy".

The EMC Policy at issue is a CGL Policy. A CGL policy is different from an "all-risk" first party property policy because it provides much *narrower* coverage to the insured. A CGL policy generally provides coverage where the *insured's negligence causes* a covered loss. Thus, if a loss is solely the result of natural event, there is no coverage under the policy because it will not have resulted from an accidental "occurrence" caused by the insured. Absent coverage, the policy exclusions are not even relevant for consideration. Since wholly natural events unrelated to the insured's negligence would never be covered, there is no logical need to include language in a CGL earth movement exclusion that addresses nature-caused versus insured-caused events. Thus, the CGL exclusion need only address claims initially covered by the CGL policy—those events caused by the negligence of the insured.[3]

Far from being a decision fraught with anomalous reasoning, the Mississippi Supreme Court in *Hankins* understood and acknowledged the obvious distinction between broader property "all-risk" policies and narrower CGL policies. The *Hankins* Court specifically rejected the outdated idea that earth movement exclusions are automatically ambiguous (in the context of CGL policies) where

[3] Homeowners' reference to the EMC Policy's Fungi or Bacteria Exclusion fails to support their argument. (Response Brief at 19-21.) This appeal does not involve fungi or mold and the exclusion has never been raised in prior pleadings and should not be considered now. Homeowners' assertion that Fungi and Bacteria losses can only be natural rather than human-caused is simply speculative.

there is an absence of explicit language related to human and nature-caused earth movement events.

> For this Court to limit applicability of the "earth movement" exclusion in Maryland Casualty's CGL Policy to "nature-caused" or "natural forc[e]" earth movement would be nonsensical. Unlike first-party homeowners' policies, "which dra[w] on the relationship between perils that are either covered or excluded[,]" third-party CGL policies "insur[e] for personal liability, and agre[e] 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 (emphasis added), see also fn. 7.

Homeowners have provided no cogent reason for this Court to reject the Mississippi Supreme Court's *Hankins* reasoning other than to highlight that *Hankins* might be one of the few reported decisions that has pinpointed the specific distinction between "all-risk" and CGL policies, and what that distinction means in the context of earth movement exclusions. While Homeowners label the *Hankins* decision as an "outlier," it is without debate that the Mississippi Courts have far more experience than most jurisdictions, including Montana, interpreting earth movement exclusions. *See Mississippi Farm Bureau Cas. Ins. Co. v Smith*, 264 So.3d 737 (Miss. 2019); *Rhoden v. State Farm Fire & Casualty Company,* 32

F.Supp.2d 907 (S.D. Miss. 1998); *Eaker v. State Farm Fire & Cas. Ins. Co.*, 216 F.Supp.2d 606 (S.D. Miss. 2001); *Boteler v. State Farm Casualty Insurance Company,* 876 So.2d 1067 (Miss. App. 2004); *New Hampshire Insurance Company v. Robertson,* 352 So.2d 1307 (Miss.1977). That *Hankins* provides a fresher, and more well-reasoned, approach to an outdated generalized interpretive rule should not be the basis for dismissing the Mississippi Courts' forty-five-year history of working to fairly interpret these exclusions.

B. The EMC Earth Movement Exclusion's Inclusion of Broad Causation and All-Encompassing Language Plainly Excludes Human-Caused Earth Movement Events.

Homeowners attempt to dismiss the broad causation and all-inclusive language of the EMC Earth Movement Exclusion by claiming that the exclusion merely involves "natural disasters" and is "written in the passive voice" which "does not contemplate a situation where a human activity causes earth movement." *See* Response Brief at 17 (emphasis original). Neither argument possesses merit when looking at the plain language of the exclusion.

The EMC Earth Movement Exclusion provides a non-exclusive list of earth movement events all of which can be caused by human action.

> 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.

R at 21.03 and 21.05, EMC's Stevens and Loendorf MSJ Briefs, Ex. 1, Found. Aff., Ex. B, EMC CGL Policy.

Contrary to Homeowners' implied assertion, none of the earth movement activities described in the exclusion are *exclusively* natural-caused events. In fact, many of the described loss events—including caving in, subsidence, settling, slipping, falling away, shifting, rising and tilting—are more likely to be human-caused. Insured-caused liabilities are what a CGL policy is intended to cover. The Earth Movement Exclusion precludes coverage for those human-caused events.

Moreover, the EMC Earth Movement Exclusion includes causation lead-in language "contributed to, aggravated by, or related to" which broadens the exclusion's reach by contemplating that an earth movement event might have a claimed *concurrent* cause. The exclusion's catch-all language makes it clear that "<u>any other</u> movement of land, earth or mud" is precluded from coverage. Adding "any" unambiguously broadens the reach of the exclusion; "any" means any.

Other courts interpreting exclusions similar to the one at bar have determined that earth movement exclusions which do not differentiate between human and nature-caused earth movement losses but do include broad causation and "catch all" verbiage are unambiguous. *See Home-Owners Ins. Co. v. Dominic F. Andriacchi,* 2017 WL 2491886 (Mich. App. 2017) (("[T]he earth-movement

exclusion plainly excluded coverage for loss caused by 'any' earth movement, and there is no material factual dispute that [the] loss was caused by earth movement"); *One Place Condominium, LLC et al. v. Travelers Property Casualty Company of America*, 2014 WL 4977331 (N.D. Ill. October 6, 2014) ("Review of the many cases construing earth movement exclusionary clauses does not change this Court's view that the language in the One Place Policy is unambiguous and, as it states, applies to 'any' earth movement, 'including but not limited to' the types of movement listed in the clause which includes 'earth sinking, rising or shifting.'").

While Homeowners may not like that EMC's insurance policy language is written in the passive tense (which is commonplace in the insurance industry and acknowledges the fact that coverage is provided for past events), the meaning of "any" is without reasonable debate. "Any" means "every" and "all." The English language would be strained beyond recognition to come to a different conclusion.

Finally, Homeowners posit the idea that had Helgeson "dumped a load of dirt on someone's adjacent house with its excavator" EMC would still be claiming that the Earth Movement Exclusion bars coverage. (*See* Response Brief at 17.) Homeowners' hypothetical lacks context and relevancy. This case is not about hypotheticals. This case is not about Helgeson dumping dirt on the Homeowners' properties. The Homeowners' underlying lawsuits allege damages caused by earth movement underneath and beside their respective homes that resulted from

Helgeson's alleged negligence. The question on appeal is whether, *assuming Homeowners' allegations to be true*, the EMC Earth Movement Exclusion bars coverage. It is the facts of *this case,* rather than an unsupported wild hypothetical, which matter.

The EMC Earth Movement Exclusion broadly encompasses multiple causation theories, includes a non-exclusive list of human-caused earth movement events, and ends with the language informing the insured that "any other" type of earth movement loss is excluded. The EMC exclusion is unambiguous as applied. The district court erred and should be reversed.

C. The District Court's Implied Ruling that Helgeson Must Indemnify Homeowners' Claims Before Establishing Liability Was Clear Error.

On page 27 the Response Brief, Homeowners contend that while the district court did not have jurisdiction to determine Helgeson's ultimate liability in the underlying case, it was appropriate for the district court to rule that EMC had a duty to indemnify the Homeowners claims for damages. Homeowners further argue that EMC has waived any objection to the district court's duty to indemnify conclusion because EMC also sought a coverage determination encompassing *both* the duty to defend and duty to indemnify. Homeowners' argument fails to recognize that when underlying liability is disputed, the district court's authority to render a decision on the duty to indemnify depends upon whether the insurer or another party succeeds.

In Montana, an insurer has two basic duties to an insured—the broad duty to defend and the far narrower duty to indemnify. In the context of a declaratory judgment coverage lawsuit like this one, any party in interest can ask the district court to look at the facts set forth in the underlying complaint and interpret whether the claims trigger coverage under the policy. However, whether a court's "coverage" determination involves just the duty to defend or both the duty to defend and duty to indemnify depends on *which party succeeds*.

If the insurer is successful in its coverage action, two legal issues can be fully resolved as a matter of law—the insurer's duty to defend *and* the insurer's future obligation to indemnify the insured. This is true even in cases where liability in the underlying action has never been established because where there is no duty to defend, there is no duty to indemnify as a matter of law. *Farmers Insurance Exchange v. Wessell*, 2020 MT 319, ¶¶ 24-25, 402 Mont. 348, 477 P.3d 1101. Thus, when a court finds that the claims alleged do not fall within the terms of the policy, the "coverage" decision resolves *both* the insurer's duty to defend and obligation to indemnify.

The same two-issue conclusion cannot occur where the court finds that the underlying claims fall within the scope of the insurer's policy, but the insured's underling liability is still disputed. In such a situation (as is the case here) the district court may only conclude that the claims fall within the terms of the policy's

coverage—which is, in substance, confirmation of the insurer's duty to defend because the duty to indemnify cannot be imposed and is not "established" *until* the insured's underlying liability is proven. *State Farm Mut. Auto. Ins. Co. v. Freyer*, 2013 MT 301, ¶26, 372 Mont. 191, 312 P.3d 403 ("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, "[a]n 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."), citing to 43 Am.Jur.2d, *Insurance* § 676 (West 2013) (emphasis added).

In this case, underlying liability and causation are disputed. Thus, the district court lacked jurisdiction to make any ruling regarding EMC's duty to indemnify, which is what the Homeowners demanded in their Complaint against EMC. *See* R at 1, Prayer for Relief. The ruling is clear error and must be reversed.

D. The District Court's Conclusion that Underlying Causation Is Undisputed Constitutes Clear Error.

The district court's order stated that "[t]here is no disputing that the alleged injuries were caused by the actions of Helgeson." R at 41 at 8. EMC objected to this finding on appeal as improper as a matter of law. In response, Homeowners

contend that "[t]here appears to be consensus among the parties that the damages were not caused by mother nature" and that EMC "has never argued that Homeowners' damages were caused by naturally occurring events." (Response Brief at 30.) Homeowners further claim that "it was necessary [for the district court] to establish whether the damages were caused by natural events or human events." *Id.* These assertions are inaccurate.

EMC's briefing has never conceded that the Homeowners' damages were caused by human events, let alone by Helgeson. EMC's briefing in this case merely adopts as true the Homeowners' underlying allegations *for the purpose of determining coverage*. *See e.g., Draggin' Y Cattle Company v. Junkermier, Clark, Campanella, Stevens, P.C.*, 2019 MT 97, ¶44, 395 Mont. 316, 439 P.3d 935 ("Unless the terms of the policy clearly and unequivocally exclude coverage, the duty to defend arises immediately upon tender of a third-party claim alleging facts, which if taken as true, qualify all or part of the claim(s) for coverage under the terms of the policy.") EMC's adoption of the allegation of Homeowners' claims for the purpose of determining coverage is not a concession that Helgeson caused the underlying claimed damages or that the cause was wholly natural.

Furthermore, Helgeson completely disputes causation and liability. Helgeson's Answer to both of Homeowners' lawsuits denies any role in causing

Homeowners' damages and specifically asserts that any damages were caused by either natural acts or the negligence of others.

> 9. Helgeson denies the allegations stated in paragraph 10 that it was negligent in the cause of the settlement that the home has experienced. Helgeson affirmatively alleges that its construction and/or design of the home did not cause any settlement and any settlement the home has experienced has been cause by the conduct of other persons or entities.
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>
> **Affirmative Defenses**
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> ***
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> 10. Plaintiff's alleged damages were the result of unanticipated acts of God and forces of nature due to the intrusion of water into the home from storm events and/or rising water table which break the chain of causation that may have existed and prevent any liability against Helgeson.

See e.g., **Appendix 1**, Helgeson Answer at 2-3, 5 (5/02/2019) (emphasis added).

The district court's order declaring Helgeson's negligence as the undisputed cause of Homeowners' damages was clear error. Homeowners' similar claims are untrue. Helgeson denies liability and causation. Causation may only be determined by the jury in the cases below. The district court's conclusion must be reversed.

E. The District Court Abused Its Discretion When It Awarded Attorney Fees to Homeowners; the Fee Award Must Be Reversed.

1. EMC Addressed the Proper Appellate Standard.

Homeowners contend that EMC's entire fee appeal should be summarily denied because EMC raised the improper standard of review by arguing that the

district court's award of fees was "'clearly erroneous,' 'incorrect' or 'in error'" (Response Brief at 31.) Homeowners' argument lacks merit.

EMC's Opening Brief at Section D, page 10, identifies the correct standard of review for addressing an award of attorney fees. Moreover, pages 26 through 36 of EMC's Opening Brief discusses in detail many of the applicable cases addressing the award of attorney fees under the "necessary and proper" and "tangible parameters" tests. That EMC's Opening Brief urges this Court to agree that the district court's award of fees—after applying the proper legal standard—is "erroneous," "in error" and "incorrect" is of no significance.

2. Homeowners' Equitable Consideration Arguments Are Without Merit.

Homeowners argue that EMC's "tactical maneuvers" constituted "bad faith" and that because the "Homeowners cannot afford the repairs on their homes" "equitable considerations" exist to justify the award of fees. Homeowners' claims and accusations lack factual merit.

Homeowners' decision to file this action was not the result of EMC's "tactical maneuvers." Homeowners filed this claim against EMC, not the other way around. In actuality, Homeowners filed this lawsuit to compete with the federal *Kramer* coverage lawsuit filed by EMC nearly a half year earlier. As discussed in further detail below, EMC objected to Homeowners becoming involved in the *Kramer* case because Homeowners' claims involved different facts and claims and

policy considerations. EMC's objection to a dozen Homeowners being involved in a lawsuit that did not pertain directly to their particular interests is hardly evidence of bad faith by EMC.

In the center of page 35 of the Response Brief, Homeowners highlight a list of unsupported and argumentative allegations contained in their own underlying fees brief (R at 52 at 5) and attempt to pass those arguments off as the district court's words. This is misleading. Nowhere in the district court's order on fees did the court indicate that EMC engaged in "tactical maneuvers" or that EMC's actions created equitable considerations supporting the award of fees. The district court simply concluded, without citation or foundation, that the "natural disparity between individual Plaintiffs and a large international corporate defendant" established an equitable consideration. However, even assuming there is a financial disparity between the parties, the Homeowners' decision to file this lawsuit in the normal course of events does not give rise to equitable considerations.

Homeowners' further assertion that because they cannot "afford repairs on their homes" equitable considerations exist is not supported by the record. Homeowners have admitted to this Court that the Loendorfs have completed more than $160,000 in repairs on their home. (Response Brief at 5.) Moreover, although Homeowners claim that the Rimrock Class Action is "irrelevant" to this case, both apparently concede that they have received significant funds from that settlement.

Even if the Homeowners were completely destitute, which they clearly are not, Homeowners cannot establish equitable considerations worthy of departure from the American Rule especially where underlying liability has not even been established. EMC is not an insurer refusing to pay a judgment against its insured. It is simply an insurance company defending a coverage action filed by third parties who have yet to establish underlying liability. No equitable considerations exist.

3. Homeowners Have Not Received What Was Sought in Their Complaint.

Homeowners generically argue that because the district court sided with their position on coverage they have "sought and received what EMC possessed." The claim does not hold water.

Homeowners' complaint did not seek a generic "coverage" determination. Instead, Homeowners demanded that the district court rule that EMC was obligated to indemnify Homeowners and *pay policy limits*—without further delay—before establishing Helgeson's liability or Homeowners' actual damages. The Homeowners' Complaint in this action bears this out.

Paragraph 11 of the Homeowners' Complaint alleges that EMC's coverage position is incorrect, and that EMC is wrongfully refusing to tender available limits. R at 1, Complaint ¶11 (emphasis added). Homeowners' Prayer for Relief does not seek a simple coverage determination. Instead, Homeowners demand that

the district court order EMC to fully indemnify Homeowners and pay all policy limits before establishing Helgeson's liability or Homeowners' actual damages.

> WHEREFORE, Plaintiffs respectfully requests the Court's declaratory judgment that EMC is obligated to fully indemnify Helgeson for Plaintiffs' claims within the applicable liability policy limits without further delay.

R at 1, Complaint, Prayer for Relief (emphasis added).[4]

As discussed above, the district court lacked authority to order EMC to indemnify Helgeson. Underlying causation and liability have never been established. Even if this Court affirms the district court's decision regarding the Earth Movement Exclusion, Homeowners are no better off now than they were before they voluntarily chose to file this case. EMC was and is defending Helgeson under a reservation of rights and will continue to do so. Homeowners are entitled to nothing from EMC unless and until they can establish Helgeson's liability in the underlying actions. Because liability has not been established, Homeowners' assertion that they "sought and received what EMC possessed" is entirely speculative. A fee award against EMC that is premised upon Helgeson's unresolved potential future liability violates this Court's policy against allowing district courts to make decisions on non-justiciable matters. *See e.g., Skinner v. Allstate Ins. Co.*, 2005 MT 323, 329 Mont. 511, 127 P.3d 359.

[4] The Complaint does not specify any causes of action or counts.

4. Homeowners' Instant Lawsuit Was Not Necessary.

Homeowners assert that the *Kramer* lawsuit required that they "either participate to protect their rights [in federal court] or [] file their own case." Homeowners further speculate that had EMC been successful in the *Kramer* case, EMC would have claimed *res judicata* in this case and any other subsequent coverage action involving Helgeson. *See* Response Brief at 38. Homeowners go on to blame EMC for refusing their request to participate in the *Kramer* action. Homeowners' arguments lack both legal and factual merit.

The filing of this lawsuit was not *legally necessitated* by EMC's filing of the *Kramer* action six months earlier because a declaratory judgment is not enforceable against a **non-party** as a matter of law. MCA § 27-8-301 ("When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding…) (emphasis added); *St. Paul Fire & Marine Ins. Co. v. Cuminskey*, 204 Mont. 350, 358, 665 P.2d 223, 227 (Mont. 1983). Any coverage decision rendered in the *Kramer* case (had it been allowed to go forward unimpeded in federal court) would have had no *res judicata* affect upon Homeowners' claims under the EMC policy. Homeowners filed this competing lawsuit simply to race EMC to a "coverage" determination in what they

considered to be the more favorable venue. Homeowners' own tactical maneuvers do not equate to necessity.

Moreover, EMC is not to blame for Homeowners' decision to file a separate coverage action. EMC filed the *Kramer* action because the Kramers' claims presented multiple coverage issues not seen in this case, including a significant dispositive issue on whether the Kramers' alleged damages occurred during the policy period as required. The Kramers allege damages against Helgeson related to *their* own property, and the Kramers' lawsuit differs in that they specifically allege that their claims arose two years after EMC ceased insuring Helgeson. The factual disparities between the underlying claims (at the time the Homeowners' filed this lawsuit there were a dozen plaintiffs involved) and the *Kramer* case was a major reason EMC objected to the Homeowners' joinder in the *Kramer* action. It simply made no sense for EMC to agree to joinder of a large group of third parties with no interest in the Kramers' specific claims.

Homeowners' filing of this competing coverage case was a tactical decision aimed to compete with EMC's earlier-filed federal *Kramer* action. This Court has "never determined that equity supported an attorney's fees award for an insurer who makes a 'tactical decision' to file a declaratory judgment action in the normal course of assuming its duty to defend." *Horace Mann Ins. Co. v. Hanke*, 2013 MT 320, ¶¶ 37-38, 372 Mont. 350, 312 P.3d 429. This same rule must apply to third-

party claimants who have yet to prove liability and instead file a tactical declaratory judgment action against an insurer who is defending its insured.

5. The Status Quo Has Not Changed.

Homeowners' "status quo" arguments mirror those discussed in Paragraph E(3) of this Reply Brief and EMC's reply will not be repeated here. Notwithstanding, EMC reminds this Court that long before Homeowners filed this case, EMC was defending Helgeson in the Homeowners' underlying lawsuits. Even if this Court affirms the district court's coverage determination the status quo will not have substantially changed. EMC will continue its defense and Homeowners will continue to receive nothing of material value from EMC because Helgeson's liability is very much disputed and has not been proven.

Homeowners are complete strangers to Helgeson's insurance contract with EMC. Fees in this situation may only be awarded under the equitable exception standard. *Mountain West Farm Bureau Mt. Ins. Co. v. Brewer*, 2003 MT 98, 3315 Mont. 231, 69 P.3d 652. If this Court decides that in the context of the fees exception rule that change in the "status quo" includes consideration of unknown future determinations related to the duty to indemnify, this Court will be adopting a new equitable fee rule completely inconsistent with its long-standing policy against consideration of non-justiciable issues in declaratory judgment actions. If disputed liability renders an insurer's duty to indemnify non-justiciable in the context of a

declaratory action lawsuit, the possibility that an insurer *might* be required to indemnify the insured in the future should not be a "status quo" consideration under the equitable exception fee rule. *See e.g., Skinner*, ¶¶19-22. The fee award must be reversed.

CONCLUSION

The district court erroneously found that the EMC CGL Policy's Earth Movement Exclusion was ambiguous. The district court further erred in 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 Earth Movement Exclusion, the district court nonetheless abused its discretion when it awarded fees. No equitable circumstances supporting the fee award exist, and the tangible parameters cannot be met. This case presents a garden variety declaratory action for which fees should never be granted. The award of attorney fees must be reversed.

DATED this 4th day of February

By: /s/ David C. Berkoff
Attorneys for Defendant/Appellant

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 4,923, excluding the caption, the certificate of service, the certificate of compliance, the table of contents and the table of authorities.

DATED this 4th day of February 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 Reply to the following on 02-04-2022:

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