IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2011-CA-01093

KAYE HANKINS — APPELLANT/PLAINTIFF

VS. — CIVIL ACTION NO. CI-2009-0265-R

MARYLAND CASUALTY COMPANY/ZURICH AMERICAN INSURANCE COMPANY — APPELLEE/GARNISHEE

APPEAL FROM THE CIRCUIT COURT
OF MADISON COUNTY

BRIEF OF APPELLEE/GARNISHEE MARYLAND CASUALTY COMPANY/ZURICH AMERICAN INSURANCE COMPANY

ORAL ARGUMENT REQUESTED

TOM JULIAN - BAR NO [redacted]
tjulian@danielcoker.com
JASON H. STRONG - BAR [redacted]
jstrong@danielcoker.com
DANIEL COKER HORTON & BELL, P.A.
4400 OLD CANTON ROAD, SUITE 400
POST OFFICE BOX 1084
JACKSON, MISSISSIPPI 39215-1084
TELEPHONE: (601) 969-7607
FACSIMILE: (601) 969-1116

ATTORNEYS FOR APPELLEE/GARNISHEE
MARYLAND CASUALTY COMPANY/ZURICH
AMERICAN INSURANCE COMPANY

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Kaye Hankins, Appellant/Plaintiff
2. Alex A. Alston, Jr., Attorney for Appellant/Plaintiff
3. James H. Herring, Attorney for Appellant/Plaintiff
4. Herring, Long & Crews, P.C., Attorneys for Appellant/Plaintiff
5. Maryland Casualty Company/Zurich American Insurance Company, Appellee/Garnishee
6. Tom R. Julian, Attorney for Appellee/Garnishee
7. Jason H. Strong, Attorney for Appellee/Garnishee
8. Daniel Coker Horton & Bell, P.A., Attorneys for Appellee/Garnishee
9. Honorable John H. Emfinger, Madison County Circuit Judge

Tom Julian

TOM JULIAN, Attorney for Maryland Casualty Company/Zurich American Insurance Company

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STATEMENT REGARDING ORAL ARGUMENT

Appellee, Maryland Casualty Company/Zurich American Insurance Company ("Maryland"), submits that pursuant to Miss. R. App. P. 34, oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and record, and the decisional process will probably not be significantly aided by oral argument.

STATEMENT OF THE ISSUE

Whether the lower court correctly granted summary judgment in favor of Maryland based upon its findings that (1) earth movement was the cause of the damage to the home of Appellant, Kaye Hankins ("Hankins"), and (2) the Maryland Policy's Earth Movement exclusion unambiguously excludes coverage for earth movement.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This case is about whether a liability insurance policy issued by Maryland (the "Maryland Policy") to Elite Homes, Inc., the builder of Hankins' home, provides coverage for damage to Hankins' home. The Maryland Policy contains an "Earth Movement" exclusion, and Hankins' own experts agree that the damage to her home was caused by earth movement. The lower court correctly found that the Earth Movement exclusion precludes coverage for the damage to Hankins' home.

II. COURSE OF PROCEEDINGS IN THE COURT BELOW

Hankins filed this action against Elite on September 15, 2009. R. 9.[1] Elite failed to defend and on March 15, 2010, a default judgment was entered against Elite. R. 94. On May 17, 2010, the

[1]Citations to the record are denoted, "R." Citations to Appellee's Record Excerpts are denoted, "R.E." Citations to Appellant's Record Excerpts are denoted, "Appellant's R.E."

lower court entered a final judgment in favor of Hankins and against Elite in the amount of $645,200. R. 102.

On August 2010, Hankins filed a Writ of Garnishment against Maryland. R. 106. On October 4, 2010, a default judgment was entered against Maryland in the amount of $645,200. R. 117.

On October 14, 2010, before Hankins executed on the default judgment, Maryland filed a sworn declaration pursuant to Miss. Code Ann. § 11-35-31, stating that Maryland has no property or effects belonging to Elite, and moved the court to suspend execution of the default judgment. R. 120, 209.

Maryland's motion to suspend the default judgment came on for hearing on February 22, 2011, at which time the court ordered the parties to submit simultaneous briefs. R. 461. Maryland moved for summary judgment on March 15, 2011, and Hankins filed her Memorandum Brief that same date. R. 465, 483, 670. The matter was again brought on for hearing on June 17, 2011, at which time all counsel agreed that oral argument would be unnecessary and consented to the court ruling on the briefs.

On July 1, 2011, the lower court issued its order, finding that "the damages suffered by the Plaintiff are not covered by this policy of insurance" and that Maryland, as garnishee, "does not hold any funds of [Elite] that are subject to the Writ of Garnishment herein." R.E. 8. The lower court set aside the default judgment and entered summary judgment in favor of Maryland. *Id.* The court ordered Maryland to pay Hankins' reasonable attorney fees, as required by Miss. Code Ann. § 11-35-31, and Maryland has done so. R. 776. Hankins filed this appeal on June 27, 2011. R. 778.

III. STATEMENT OF THE FACTS[2]

Prior to July 13, 2001, Hankins and Elite entered into negotiations for the construction of a home located at Lot 45 in Canterbury Subdivision in Ridgeland, Mississippi. On July 13, 2001, Hankins and Elite entered into a contract for the construction of the home. R. 20.

A. The Engineers Report

Before beginning the construction of Hankins' home, on or about August 1, 2001, Elite hired Engineers Laboratories, Inc. to take soil borings from three locations at the home site in order to test the quality of the soil. R.E. 2. (the "Engineers Report"). Soil boring 1 found the presence of "bad soil having a relatively high shrink-swell potential" beginning at a depth of 5 feet. *Id.* at 5. This soil, classified as "CH," lay on top of the even poorer, notorious Yazoo Clay, present to a depth of at least 12 feet. *Id.* at 2. Soil borings 2 and 3 also found the presence of the CH/Yazoo clays from depths of 5 feet to at least 12 feet. *Id.* at 2.

The Engineers Report recommended,

> In order to minimize the Yazoo Clay (CH) swell or heave potential to within limits tolerable to a strong slab foundation, the Yazoo Clay (CH) should be covered with a stabilizing blanket of natural silty clays (CL) and/or compacted select fill soils having a minimum 7-foot thickness.

R.E. 2 at 6.

Construction of the home began, and by April 22, 2002 the home was complete. A warranty deed was executed on April 22, 2002, conveying the home from Elite to Hankins. R. 31. The

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[2]Because Maryland was brought into this case as garnishee after a default judgment was entered against its insured, Elite, and no discovery was ever taken, the facts of this case are those alleged in the Complaint, including the exhibits thereto.

purchase price of the home was $267,000, plus $34,967.81 for extra items and improvements. R.E. 1, ¶ 4.B.

Although Hankins now contends that she noticed problems with her home "almost immediately" after moving in, the Complaint alleges that Hankins noticed the problems "during the first year" in her home. R.E. 1, ¶ 5. These problems included:

> [C]racks in the brick veneer on the north and south sides of the house; cracks in the ceiling of the master bedroom and breakfast room; leaks in the skylight; the patio door was very hard to open and close; the windows in the home office were hard to open and close; and cracks in the living room floors.

Id. at ¶ 5.

More than six years later, on December 23, 2008, Hankins first put Elite on notice of the damage to her home. R. 62.

B. The Rogers Report

More than six years after she supposedly discovered the damage to her home, Hankins also hired Gary Rogers, P.E., to inspect her home, which he did on October 28, 2008, and to report on the cause of the damage. R.E. 3 (the "Rogers Report"). The Rogers Report noted numerous defects in Hankins' home, including mortar separation in the brick veneer and cracks in the walls and ceilings. *Id.* at 2-3. The Rogers Report also noted a 10.5 inch differential in the relative floor elevations in the home, which exceeded "customarily acceptable limits by a substantial margin." *Id.* at 3-4.

Relying upon the Engineers Report, the Rogers Report concluded that the damage to Hankins' home was the result of "movement within the soil supporting the structure."

> It is our opinion that the floor level differential and cracks observed are the result of differential movement of the foundation. Differential movement such as is present at the subject structure results from

movement within the soil supporting the structure. Downward movement of the soil occurs as the soil consolidates under its own weight, the weight of the structure and any additional soil, such as fill, that is placed in the construction of the residence. Downward movement can also be the result of moisture content reduction if the soil is moderately or highly expansive. Another type of soil movement which produces downward movement occurs when clay soil exists with a sloped surface. This type of soil movement, called creep, is characterized by long term movement of a large soil mass in the downhill direction and it includes a horizontal movement component. Upward soil movement occurs if the soil is moderately or highly expansive and is subjected to an increase in moisture content. This swelling type soil movement is commonly referred to as heave. Upward soil movement can also occur in clay soils due to stress relief as a result of overburden removal, a phenomenon commonly referred to as rebound.

Clay soil with moderately to highly expansive properties are known to exist throughout the local area. To aid our evaluation we were provided a copy of a document dated August 1, 2001 prepared by Engineers Laboratories, Inc. The document contains soil boring logs, a boring location plan and a set of recommendations for site preparation for Lot 45 of Canterbury Subdivision which has been represented to us as the site of the subject residence. The documents show that expansive clay soil was revealed to be present at a depth of 5 feet below the ground surface on the date that the soil borings were made. We were also provided a copy of a document, also from Engineers Laboratories, dated November 8, 2001 which reports the results of four field density tests made at the finished grade level.

. . . .

Based on our observations, experience and knowledge, it is our opinion that the differential movement observed at the subject structure is most likely due to a combination of both upward and downward [soil] movements. In our opinion, upward soil movement has occurred in the rear portion of the residence footprint as a result of swelling of expansive clay. . . . It is our further opinion that downward soil movement has occurred in the front portion of the residence footprint as a result of consolidation. . . . It is our opinion that this combination of upward and downward movements has created the substantial floor level differential revealed in the floor level survey results.

R.E. 3 at 4-5 (emphasis added).

C. The Dennis Report

Hankins thereafter hired David Dennis, P.E., to perform a comprehensive geoforensic study of the home and to prepare a report on the cause of the damage. R.E. 4 (the "Dennis Report"). Three soil borings were taken, two from the exterior of the home and one from inside the residence. *Id.* at § 2.2. Like the prior Engineers Report, the borings revealed the presence of unstable Terrace Clays and Yazoo Clays, classified as "CH" clays. The Terrace Clays began at a depth of 5 feet at Boring 1 (adjacent to the front wall of the home), began at a depth of 2.5 feet at Boring 2 (adjacent to the back wall of the home), and began at a depth of 6.5 feet at Boring 3 (inside the master bedroom of the home). *Id.* at § 4.2 and Figures 3, 4 and 5. At each boring the unstable Terrace Clays were underlain by even more unstable Yazoo Clays. Both the Terrace Clays and the Yazoo Clays were described as "expansive with high shrink/swell potential." R.E. 4 at § 4.2

The Dennis Report concluded that the damage to Hankins' home was "primarily" caused by swelling of the highly expansive clay:

> In our opinion, the residence has experienced differential movement *primarily* as a result of swelling of the highly expansive clay (CH) soils due to an increase in moisture content. The thickness of the nonexpansive silty clay (CL) fill and natural soil buffer is not adequate to *minimize* differential movements due to seasonal changes in moisture content. In our opinion, the residence has also experienced heaving within areas where excavation was performed during earthwork construction to achieve final grades lower than original ground elevations. In our opinion, the silty clay (CL) fill materials were not placed during original earthwork construction to an acceptable degree of compaction which resulted in a more pervious and compressible fill material that experienced compression upon an increase in moisture content leading to settlement that contributed to the differential movement experienced by the residence.

Id. at § 5.0 (emphasis added).

Hankins filed this action on September 15, 2009, specifically alleging that the damage to her home was caused by "the movement of the soil underneath the house . . . ." R.E. 1, ¶ 4. The Rogers Report and the Dennis Report were attached to and relied upon in the Complaint. R.E. 1, Exhs. "B" and "E."

D. The Maryland Policy

Elite is the Named Insured on a Commercial General Liability ("CGL") insurance policy issued by Maryland with a relevant policy period of April 3, 2002 to April 3, 2003. R.E. 5 (the "Maryland Policy").[3] On June 27, 2002, a little more than two months after Hankins purchased her home on April 22, 2002, Elite cancelled the Maryland Policy because Elite was no longer in business. R.E. 6. Thus Maryland was only "on the risk" for any damage to Hankins' from the time that Hankins purchased the home to the time the Maryland Policy was cancelled, a period of 66 days. *Id.*

The Maryland Policy has an "each occurrence" liability limit of $300,000. R.E. 5. The Maryland Policy states in pertinent part,

> **1. Insuring Agreement**
>
> a. We 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. . . .
>
> b. This insurance applies to "bodily injury" and "property damage" only if:

[3]Although the Maryland Policy contains other coverage forms, only the CGL coverage is at issue. Therefore only the Maryland Policy's CGL coverage is included in Appellee's Record Excerpt 5. A complete copy of the Maryland Policy can be found in the Record, beginning on page 546.

> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and
>
> (2) The "bodily injury" or "property damage" occurs during the policy period.

R.E. 5.

The Maryland Policy's Earth Movement exclusion states,

> **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" 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.
>
> With respect to "bodily injury" and "property damage", this exclusion only applies to the "products-completed operations hazard".

R.E. 7 (emphasis added).

SUMMARY OF THE ARGUMENT

According to Hankins' own experts, the damage to her home was caused by the natural shrinking and swelling of highly expansive soils beneath her home. The Maryland Policy contains an Earth Movement exclusion which precludes coverage for property damage caused by or contributed to by shrinking, expansion, shifting, rising or "any other movement of land, earth or

mud." The lower court correctly found that earth movement was the cause of the property damage to Hankins' home and that the Earth Movement exclusion unambiguously precludes coverage.

Hankins' argument that the builder's own negligence, and not natural forces, was the efficient proximate cause of the damage to her home is factually incorrect. According to her own experts, the natural forces of earth movement were the cause of the damage. Elite merely failed to take sufficient measures to minimize or prevent the effects of the earth movement. Earth movement was the efficient proximate cause of the damage to Hankins' home.

Further, Hankins' argument that the insured's own negligence should negate the Earth Movement is illogical. Because the Maryland Policy is a liability insurance policy, some negligence or fault by the insured will always trigger coverage, but coverage is subject to exclusions. The fact remains that the Maryland Policy excludes coverage for property damage due to earth movement, the primary cause of the damage to Hankins' home.

This Court should affirm the lower court's entry of summary judgment in favor of Maryland.

ARGUMENT

I. Standard of Review

The lower court's decision to set aside the default judgment should be reviewed under an abuse of discretion standard. *Stanford v. Parker*, 822 So. 2d 886, ¶ 6 (Miss. 2002).[4] The lower

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[4]Hankins has not challenged the lower court's procedural decision to set aside or suspend execution on the default judgment pursuant to Miss. Code Ann. § 11-35-31 in order to allow Maryland to contest the merits of the writ of garnishment. Therefore Maryland will not address this issue, except to say that the trial court acted properly because Maryland filed its sworn declaration before execution on the default judgment. *See First Miss. Nat'l Bank v. KLH Indus., Inc.*, 457 So. 2d 1333, 1334 (Miss. 1984) ("We today hold that such a garnishee, even though the subject of an otherwise valid default judgment following service of the writ of garnishment and failure to answer, may nevertheless suspend execution and enforcement of that judgment at any time before completion of the execution of enforcement process thereon."); *Bechtel Power Corp. v. MMC Materials, Inc.*, 830 So. 2d 672, 674 (Miss. Ct. App. 2002).

court's grant of summary judgment in favor of Maryland should be reviewed *de novo*. *J.R. v. Malley*, 62 So. 3d 902, ¶ 10 (Miss. 2011).

II. The Maryland Policy's "Earth Movement" exclusion unambiguously excludes coverage.

The damage to Hankins' home was caused by the movement of unstable clays or soils under her home. This cannot legitimately be disputed because Hankins' own experts opined that soil movement was the primary cause of the damage. Mr. Rogers described the earth movement as "movement within the soil supporting the structure" and "a combination of both upward and downward [soil] movements." R.E. 3, p. 5. Mr. Rogers concluded "that this combination of upward and downward [soil] movements has created the substantial floor level differential revealed in the floor level survey results." *Id.* at p. 5.

Mr. Dennis similarly opined that "the residence has experienced differential movement ***primarily*** as a result of swelling of the highly expansive clay (CH) soils due to an increase in moisture content." R.E. 4 at § 5.0 (emphasis added).

The Maryland Policy's Earth Movement exclusion specifically precludes coverage for such property damage:

> This insurance does not apply to . . . "property damage" . . . 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.E. 7 (emphasis added).

Where an exclusion in an insurance policy is clear and unambiguous, it will be enforced. *Corban v. United Servs. Auto. Ass'n*, 20 So. 3d 601, 609 (Miss. 2009); *Lewis v. Allstate Ins. Co.*, 730 So. 2d 65, 68 (Miss. 1998).

> [Insurance policies] are contracts, and as such, they are to be enforced according to their provisions. When parties to a contract make mutual promises (barring some defense or condition which excuses performance), they are entitled to the benefit of their bargain. Thus, insurance companies must be able to rely on their statements of coverage, exclusions, disclaimers, definitions, and other provisions, in order to receive the benefit of their bargain and to ensure that rates have been properly calculated.

Id. at 609.

Here, Maryland and Elite entered into a contract whereby the parties agreed that Maryland would not provide coverage for any property damage caused by or contributed to by earth movement. If the language of the Earth Movement exclusion has any meaning, then it precludes coverage for the damage to Hankins' home.

While Hankins asserts that the Earth Movement exclusion is ambiguous, she fails to explain *how* it supposedly is ambiguous. The mere fact that Hankins and Maryland may disagree over the interpretation of the Earth Movement exclusion does not render the Earth Movement exclusion ambiguous. *U.S. Fid. & Guar. Co. v. Martin*, 998 So. 2d 956, 963 (Miss. 2008). Under Mississippi law an ambiguity exists only if a provision "can be logically interpreted in two or more ways." *Id.*

There is nothing ambiguous about the terms of the Earth Movement exclusion. The terms have plain and commonly understood meanings which they must be given. *See Corban*, 20 So. 3d at 609 (Miss. 2009) (Language of an insurance policy must be given its "ordinary and popular meaning.") (quoting *Noxubee County Sch. Dist. v. Nat'l Ins. Co.*, 883 So. 2d 1159, 1165 (Miss. 2004)).

Similar earth movement exclusions were enforced in the cases of *Rhoden v. State Farm Fire & Cas. Co.*, 32 F. Supp. 2d 907 (S.D. Miss. 1998) and *Boteler v. State Farm Cas. Ins. Co.*, 876 So. 2d 1067 (Miss. Ct. App. 2004), the two cases which the lower court relied upon. R.E. 8.[5]

In *Rhoden*, 32 F. Supp. 2d at 910, Rhoden's home had experienced significant structural damage caused by the following:

> placement of fill associated with the construction of the Rhoden residence has had a detrimental effect on the stability of the slope and the site, and that the original slope may have been only marginally stable prior to construction in its natural state. . . construction of the Rhoden residence aggravated the stability of the subject slope resulting in a progressive formation of a slickensided failure surface, and in the initiation of slope movements.

Id. at 910.

The State Farm homeowners policy excluded coverage for property damage caused by "Earth Movement, meaning the sinking, rising, shifting, expanding or contracting of earth, all whether combined with water or not. Earth movement includes but is not limited to earthquake, landslide, mudflow, sinkhole, subsidence and erosion." *Id.* at 911.

Judge Barbour found that the earth movement exclusion clearly and unambiguously excluded coverage for the damage to Rhoden's home. *Id.* at 912 ("[T]he policy is not ambiguous as to the extent and meaning of the 'earth movement' exclusion.") According to Judge Barbour, the parties' different characterizations of the earth movement were "distinctions without a difference," because

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[5]These cases involved homeowners insurance policies. As discussed *infra*, the Maryland Policy is a third-party CGL policy which should be viewed differently than a homeowners ("all risk") policy. However, the Mississippi earth movement cases are instructive because the courts held that the exclusions, which are similar to the Maryland Policy's Earth Movement exclusion, unambiguously precluded coverage for property damage caused by or contributed to by earth movement.

"all are manifestations of 'the sinking, rising, shifting, expanding or contracting of earth.'" *Id.* at n.3 (emphasis added).

Judge Barbour granted summary judgment in favor of State Farm, stating,

> It is undisputed that, whether caused by the negligence of Plaintiffs' contractor in its placement of fill soil in the construction of Plaintiffs' home or by some other condition, Plaintiffs' damages are a result of earth movement underneath the residence. As such, they fall within the "earth movement" exclusion of the policy and are not covered damages. Because as a matter of law, Plaintiffs' damages are not covered under the policy, Defendant is entitled to summary judgment.

Id. at 913 (emphasis added) (footnote omitted).[6]

Rhoden was relied upon by the Mississippi Court of Appeals in *Boteler*, 876 So. 2d at 1068. As in this case, the foundation of Boteler's home had shifted due to "the unpredictable shrinking and swelling movements of clay." The homeowners policy issued by State Farm excluded coverage for damage caused by "[e]arth movement, meaning the sinking, rising, shifting, expanding or contracting of earth, all whether combined with water or not." *Id.* at 1069. The trial court had granted summary judgment in favor of State Farm based upon the earth movement exclusion, finding that "there was no liability for damages regardless of whether nature-caused or human-source earth shifting was the reason for the damage." *Id.* at ¶ 12.

On appeal, the Mississippi Court of Appeals affirmed, finding that the "clear language" of the earth movement exclusion was enforceable:

> Unambiguous language of exclusion was used by State Farm in the present case. The circuit judge found that there was no liability for damages regardless of whether nature-caused or human-source earth

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[6]The U.S. Court of Appeals for the Fifth Circuit affirmed *Rhoden*, 200 F.3d 815 (5th Cir. 1999), and has cited *Rhoden* with approval in the cases of *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346 (5th Cir. 2007), and *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419 (5th Cir. 2007) (cert. denied, 2008 U.S. LEXIS 3106 (2008)).

> shifting was the reason for the damage. We agree. Summary judgment was proper.

Id. at 1069-70.

As in *Boteler* and *Rhoden*, the Maryland Policy's Earth Movement exclusion unambiguously precludes coverage for property damage caused by or contributed to by earth movement. As in *Boteler* and *Rhoden*, the damage to Hankins' home was caused by earth movement. The trial court correctly determined that earth movement was the cause of the damage to Hankins' home (as Hankins' experts opined) and granted summary judgment in favor of Maryland.

III. Natural forces were the efficient proximate cause of the damage to Hankins' home.

Hankins' primary argument is that in order for the Earth Movement exclusion to apply, the damage to her home must have been primarily caused by natural rather than man-made forces. Hankins argues that the dominant or efficient proximate cause of the damage to her home was the negligence of Elite, not the natural movement of soil under her home. Hankins' argument regarding the efficient proximate cause doctrine is legally flawed based it is based upon cases involving first-party insurance policies, as discussed *infra*.

Hankins' argument is also factually incorrect, because natural forces were indeed the efficient proximate cause of the damage to her home. Hankins fails to distinguish between an event which causes damage and a negligent failure to prevent such damage. Both the Rogers Report and the Dennis Report unequivocally state that earth movement ***caused*** the damage to Hankins' home, and that Elite merely failed to take sufficient measures to ***prevent*** the damage. According to Mr. Rogers, "The load bearing function of the foundation system is affected in that the system is incapable of ***resisting the loads imposed by soil movements*** without the occurrence of damage within the supported structure." R.E. 3 at p. 6 (emphasis added).

According to Mr. Dennis, the bottom of Hankins' foundation should have been separated from the highly expansive Yazoo clays by a buffer of at least seven feet of nonexpansive soils. R.E. 4 at § 5.0. The purpose of the soil buffer is "to ***minimize*** differential movements caused by seasonal shrinking and swelling of the expansive clays (CH)." *Id.* at § 5.0 (emphasis added). Mr. Dennis concluded that the buffer used by Elite had not ***caused*** the earth movement, but that the buffer was "not adequate to ***minimize differential movements*** due to seasonal changes in moisture content." *Id.* at 5.0 (emphasis added).[7]

Thus the movement of the soil beneath Hankins' home was the efficient proximate cause of the damage:

> The efficient proximate cause of loss [is] "the fundamental, efficient moving cause, i.e., the cause that is responsible for setting any and all other causes in motion. . . . The efficient proximate cause rule permits recovery under the insurance policy for a loss caused by a combination of a covered risk and an excluded risk only if the covered risk. . . . is one that sets the other causes in motion that, in an unbroken sequence, produced the result for which recovery is sought."

Leonard v. Nationwide Mut. Ins. Co., 499 F.3d 419, n.5 (5th Cir. 2007) (emphasis added) (quoting 7 STEVEN PLITT ET AL., COUCH ON INSURANCE § 101:45, § 101:55 (3d ed. 2006)); *see also* Appleman on Insurance § 16.09 ("The efficient proximate cause doctrine applies only when a subsequent peril acts on a condition created by the first peril to cause loss--that is, when the perils are dependent. A court that applies the efficient proximate cause doctrine is seeking the origin of

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[7]To further illustrate the point, suppose that an individual drives his vehicle into a brick wall at 60 miles per hour and his vehicle's airbag fails to deploy. Obviously the act of driving the vehicle into a brick wall set in motion the chain of events which led to any resulting injuries. The airbag's failure to deploy did not set in motion the chain of events but merely failed to ***prevent*** or ***minimize*** the injuries. Similarly, the inadequate buffer used by Elite did not cause the earth movement, but was "not adequate to minimize differential [soil] movements . . ." R.E. 4 at § 5.0.

a continuous chain of events leading to the loss") (emphasis added); *Evana Plantation, Inc. v. Yorkshire Ins. Co.*, 58 So. 2d 797, 798 (Miss. 1952) (The insured peril must be the "dominant and efficient cause of the loss" for coverage to exist.)

Hankins cites the case of *New Hampshire Ins. Co. v. Robertson*, 352 So. 2d 1307 (Miss. 1977), but *Robertson* is fundamentally different from the present case and does not support her argument. Robertson had "noticed water bubbling up through a crack" in the floor of her home. *Id.* at 1308. It was undisputed that "the water was from an underground leak caused by separation of a hot water line." *Id.* at 1308. This leak was the cause of the earth movement:

> It was stipulated by the parties that the damage resulted from water pressure exerted upon the foundation or slab of the house and ultimately upon the floors and walls or from earth movement beneath the foundation of the house, or a combination, all of which was caused by the underground leak.

Id. at 1308 (emphasis added). Thus the damage in *Robertson* was caused not by the natural forces of shrinking and swelling soils, as in the present case, but by a leaking underground pipe.

Robertson's homeowners policy contained two pertinent exclusions. The first exclusion excepted property damage:

> [caused] by wear and tear, deterioration, rust, mold, wet or dry rot, contamination, smog, smoke from agricultural smudging or industrial operations, mechanical breakdown; settling, cracking, shrinking, bulging or expansion of pavements, patios, foundations, walls, floors, roofs or ceilings.

Id. at 1309.

As to this "wear and tear" exclusion, the Mississippi Supreme Court found as follows:

> The provision excluding loss by settling and cracking of floors, walls, etc. appears in the context of a clause excluding loss by wear and tear, deterioration, rust, mold, wet or dry rot, contamination, smog, mechanical breakdown, etc. In this context, it would appear to exclude loss by settling and cracking due to *ordinary* swelling,

> expansion, settling or cracking as opposed to settling or cracking caused by some other external agent (here the water leak).

Id. at 1310 (italics in original, underlining added).

Thus the Court found that this exclusion *would* indeed apply to damage caused by ***ordinary*** swelling or expansion, which is exactly what caused the damage to Hankins' home, but would not apply to swelling or expansion "caused by some other external agent," such as the leaking pipe. Here no external agent caused the damage to Hankins' home.

The second exclusion in *Robertson* excepted property damage:

> caused by, resulting from, contributed to or aggravated by earthquake, volcanic eruption, landslide, or any other earth movement.

Id. at 1309.

As to this exclusion, the Court found as follows:

> The provision excluding loss by any other earth movement appears in the context of a clause dealing with earthquakes, volcanic eruption, and landslides. In this context, it would appear to be limited to "earth movement" resulting from natural forces (as opposed to earth movement resulting from the water leak).

Id. at 1310 (emphasis added).

Thus the reason that the "earth movement" exclusion in *Robertson* was found to be inapplicable was because the damage was caused not by natural forces but by the water leak. If the natural swelling and shrinking of soil had caused the damage in *Robertson*, as in the present case, the exclusion would have applied.

Further, the second *Robertson* exclusion is more limited than the Maryland Policy's Earth Movement exclusion. Whereas the exclusion in *Robertson* applied only to damage caused by "earthquake, volcanic eruption, landslide, or any other earth movement," the Maryland Policy's Earth Movement exclusion specifically applies to "subsidence, settling, slipping, falling away,

shrinking, expansion, caving in, shifting, eroding, rising, tilting or any other movement of land, earth or mud." R.E. 7.

In sum, the lower court correctly found that earth movement was the efficient proximate cause of the damage to Hankins' home.

IV. Because the Maryland Policy is a liability insurance policy, it would be illogical to allow the builder's own negligence to trump a valid policy exclusion.

In addition to being factually incorrect, Hankins' argument that the builder's own negligence was the efficient proximate cause of the damage to her home is illogical. The authorities upon which Hankins relies involve homeowners policies or other first-party insurance contracts. The Maryland Policy is a third-party Commercial General Liability ("CGL") policy. This distinction is critical.

A homeowners policy is an "all risk" policy which provides coverage for any damage to an insured residence as long as the cause of the damage is not excluded under the policy. On the other hand, a CGL policy provides coverage only for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." R. 610 (emphasis added). Unlike a first party ("all risk") insurance policy, a CGL policy never provides coverage for a loss caused solely by natural perils. There must always be some negligence or fault by the insured in order to trigger coverage under a CGL policy, but subject to exclusions. Thus a ruling that an insured's negligence negates all valid CGL policy exclusions would effectively nullify CGL exclusions, thereby rewriting Mississippi law with respect to liability insurance. This has never been the law in Mississippi.

To the contrary, Mississippi state and federal courts have simply applied the plain language of CGL policy exclusions without engaging in the efficient proximate causation analysis which Hankins advocates. In *Titan Indem. Co. v. Estes*, 825 So. 2d 651 (Miss. 2002), the City of Natchez

was sued after a fire truck ran a red light and collided with another vehicle, killing Hailey Estes. The CGL policy issued by Titan contained an exclusion for bodily injury arising out of the use of an automobile. *Id.* at 655. The trial court had denied Titan's motion for summary judgment. On appeal, Estes argued that there were "other proximate causes of Hailey's death which are not excluded under the auto exclusion," such as the City's negligent failure to train and supervise the driver of the fire truck. *Id.* at ¶ 16.

This Court was not concerned with whether the City's negligence was the efficient proximate cause of the accident. Instead, this Court stated,

> Although the Estes family argues that the other proximate causes asserted are not so intertwined with the use or maintenance of the fire engine to fall within the auto exclusion, we disagree. Coverage under the CGL policy should not vary depending upon the theories of liability asserted. This Court will not recognize a strained interpretation of a policy. *Allstate Ins. Co. v. Moulton*, 464 So. 2d 507, 510 (Miss. 1985); *Warren v. United States Fid. & Guar. Co.*, 797 So. 2d 1043, 1045 (Miss. Ct. App. 2001) (quoting Love v. McDonough, 758 F. Supp. 397, 402 (S.D. Miss.), aff'd mem., 947 F.2d 1486 (5th Cir. 1991)).
>
> The Estes family would not have been damaged but for the collision between the fire engine and Hailey's vehicle. Therefore, given the clear and unambiguous language of the auto exclusion, the Court finds that the auto exclusion forecloses coverage under the CGL policy. Accordingly, the trial court erred in finding that the CGL policy applied.

Id. at 656 (emphasis added). As in *Estes*, Hankins' home would not have been damaged but for the movement of soil beneath her home, which damage is excluded.

In *South Carolina Ins. Co. v. Keymon*, 974 So. 2d 226 (Miss. 2008), Stateline, a convenience store, was sued after it sold alcohol to a minor who was later involved in a fatal automobile accident. Stateline's CGL policy contained an exclusion for bodily injury caused by selling alcohol to a minor.

Id. at 229. This Court was not concerned with whether Stateline's own negligence was the efficient proximate cause of the accident. Rather, this Court entered judgment in favor of the insurer, stating,

> [T]he sale of the beer to Waldon was the proximate cause of the Keymons' injuries, no matter what duty the Keymons allege that Stateline breached, including negligent supervision and training. Thus, the policy clearly and unequivocally excluded injuries caused by the sale of alcohol to a minor, and it does not matter what cause of action the Keymons allege because the damages are the same, whether negligence, an intentional tort, or an illegal act. Therefore, since this policy provision is unambiguous, we must construe the provision according to the plain language.

Id. at 231 (emphasis added) (footnotes omitted).

In *Lincoln County School Dist. v. Doe*, 749 So. 2d 943 (Miss. 1999), a minor was allegedly raped by another student. The defendant school district's CGL policy contained a molestation exclusion. This Court held that "the molestation exclusion . . . serves to exclude from coverage all classifications of damages arising out of incidents of molestation." *Id.* at 945. Again, this Court was not concerned with whether the school district's own negligent failure to prevent the rape was the efficient proximate cause of the incident.

In *Nautilus Ins. Co. v. Country Oaks Apartments Ltd.*, 566 F.3d 452 (5th Cir. 2009), Country Oaks Apartments was sued after one of its workers had negligently blocked a furnace vent, causing trapped carbon dioxide to be dispersed into the apartment of the plaintiff. The CGL policy issued by Nautilus excluded coverage for the discharge of pollutants. The Fifth Circuit was not concerned with whether the negligent act of blocking the furnace vent was the efficient proximate cause of the discharge of the pollutants. The Fifth Circuit applied the plain language of the exclusion, finding that the alleged injuries were the result of the discharge of a pollutant. *Id.* at 458.

There are numerous opinions analyzing CGL policy exclusions under Mississippi law. Maryland finds no opinion in which the insured's own negligence negated a valid CGL policy

exclusion. Hankins has not cited any persuasive authority from any other jurisdiction. As stated *supra*, all of the cases cited by Hankins involve homeowners policies or other first-party property insurance policies. Hankins has not cited a single case from any jurisdiction in which a court held that the insured's negligence overrode an earth movement exclusion (or any other exclusion) in a CGL policy.

Of the cases cited by Hankins, the two involving the negligence of a contractor are *Villella v. Public Employees Mut. Ins. Co.*, 106 Wash. 2d 806 (Wash. 1986) and *Murray v. State Farm Fire & Cas. Co.*, 203 W. Va. 477 (W. Va. 1998). Both cases involve homeowers policies, and in both cases the negligence of the contractor actually caused the earth to move. In *Villella*, the contractor allegedly "negligently failed to install a proper drainage system, [which] set in motion a continuous process of soil destabilization which eventually resulted in the inability of the soil under his house to sustain the foundation or the house itself." 106 Wash. 2d at 808-09. The Court held that the builder's negligence was the efficient proximate cause of the damage to the home. *Id.* at 819.

In *Murray*, Murray's home was damaged by large boulders which fell from a man-made highwall above the home, and Murray's homeowners policy excluded coverage for landslides. The evidence showed that a builder's negligent construction of the highwall had caused the rockfall. 203 W. Va. at 481-82. The Court held that whether the builder's negligence was the efficient proximate cause of the rockfall was a jury question. *Id.* at 488-89.

In the present case, there simply is no evidence that Elite caused the earth to move. To the contrary, the movement resulted from the very nature of the soil itself, which is "expansive with high shrink/swell potential" (R.E. 4 at § 4.2), and has "moderately to highly expansive properties" (R.E. 3, p. 4). The shrinking and swelling was "caused by ***seasonal*** shrinking and swelling of the

expansive clays (CH)." R.E. 4 at § 5.0 (emphasis added). Damage from this naturally occurring event is specifically excluded by the Earth Movement exclusion.

V. The lower court correctly placed no weight upon the conclusory affidavits of Mr. Dennis and Mr. Rogers.

More than a year and a half after this suit was filed, both Mr. Dennis and Mr. Rogers signed off on nearly identical affidavits in which they contradicted their prior reports and opine in conclusory legalese that "the efficient proximate cause of the loss to Ms. Hankins' home was the negligence of the builder." Appellant's R.E. 16, 33. Mississippi law is clear that it was not proper for Mr. Rogers and Mr. Dennis to instruct the lower court on the efficient proximate cause of the damage to Hankins' home. Therefore the lower court correctly gave no weight to the affidavits.

In *Redhead v. Entergy Mississippi, Inc.*, 828 So. 2d 801, ¶ 34 (Miss. Ct. App. 2001), the trial court had prevented the plaintiff's expert from answering the question, "Do you have an opinion as to whether Entergy was negligent . . . ?" On appeal, the Mississippi Court of Appeals affirmed, stating,

> [T]he Mississippi Supreme Court has held that "questions which simply allow the witness to tell the jury what result to reach are impermissible as are questions asking the witness for a legal conclusion." *Alexander v. State*, 610 So. 2d 320, 334 (Miss. 1992). The question of whether or not Entergy was negligent is a question for the jury, and, by asking this question, Redhead was trying to get his witness to tell the jury how to find. This is not allowed, and the trial court was correct in sustaining the objection. Therefore, we affirm as to this issue.

Id. at ¶ 34 (emphasis added).

In *Mississippi Power & Light Co. v. Cook*, 832 So. 2d 474 (Miss. 2002), Cook filed suit against MP&L for bad faith failure to pay workers' compensation benefits. MP&L attempted to call a former Mississippi Workers' Compensation Commission administrative law judge to testify as to

"how she would have ruled on a particular case such as this one." *Id.* at 483. The trial court refused to allow this testimony. On appeal, this Court affirmed, stating that "it was not for [the expert witness] to testify to the ultimate issue." *Id.* at 483. *See also Jenkins v. CST Timber Co.*, 761 So. 2d 177, ¶ 18 (Miss. 2000) ("The trial court wisely concluded that it would not be helpful to the trier of fact for an expert to place a 'fraud' label on certain transactions."); *Smith v. Parkerson Lumber, Inc.*, 888 So. 2d 1197, ¶ 24 (Miss. Ct. App. 2004) ("[A]ny testimony regarding whether Parkerson's conduct was 'reckless' or 'willful' was inadmissible as it was not helpful to the trier of fact.")

Before submitting their conclusory affidavits, Mr. Dennis and Mr. Rogers had submitted lengthy and detailed expert reports regarding their opinions on the cause of the damage to Hankins' home. Hankins is bound by those reports because they were attached as exhibits to her Complaint and incorporated by reference therein, as shown *infra*. The experts' submission of the conclusory affidavits regarding the "efficient proximate cause" of the damage were a transparent attempt to wrap their opinions in the language of legal causation in order to tell the lower court what result to reach. The lower court correctly placed no weight upon the affidavits.

VI. The doctrine of judicial estoppel bars Hankins' argument that Elite's negligence was the efficient proximate cause of the damage.

Both the Rogers Report and the Dennis Report clearly opined that earth movement was the primary, triggering event which caused the damage to Hankins' home. R.E. 3; R.E. 4. The Rogers Report and the Dennis Report were attached to the Complaint and incorporated by reference therein. R.E. 1, ¶ 5 and Exhibits "E" and "H." Indeed, relying upon the Rogers Report, the Complaint specifically alleged that "the movement of the soil underneath the house of the plaintiff [caused] foundation problems . . . ." *Id.* at ¶ 5. Accordingly, Hankins' argument that the negligence of Elite was the primary cause of the damage to her home is barred by the doctrine of judicial estoppel:

> Judicial estoppel is designed to protect the judicial system and applies where "intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice." *Browning Mfg. v. Mims*, 179 F.3d 197, 205 (5th Cir. 1999) (quoting *Scarano v. Central RR. Co.*, 203 F.2d 510, 513 (3d Cir. 1953)). In order to protect the integrity of the judiciary, judicial estoppel "must be invoked in the Court in which the apparent self-serving contradiction occurred and in which the defense is first asserted. . . ."
>
> The Fifth Circuit has stated three requirements for judicial estoppel: "(1) the party is judicially estopped only if its position is clearly inconsistent with the previous one; (2) the court must have accepted the previous position; and (3) the non-disclosure must not have been inadvertent."

Kirk v. Pope, 973 So. 2d 981, ¶¶ 31-32 (Miss. 2007) (quoting *Superior Crewboats, Inc. v. Primary P & I Underwriters*, 374 F.3d 330, 335 (5th Cir. 2004)).

Hankins' argument that the damage to her home was caused by man-made forces and not natural forces is clearly inconsistent with her prior position expressed in the Rogers Report, the Dennis Report, and the allegations of her own Complaint. Hankins' prior position was accepted by the lower court when the $645,200 judgment was entered against Elite. Lastly, attaching the Rogers Report and the Dennis Report as exhibits to her Complaint clearly was not an inadvertent act.

Therefore Hankins' argument that the damage to her home was primarily caused by man-made forces and not natural forces is barred by the doctrine of judicial estoppel.

VII. Should this Court find that the Earth Movement exclusion is inapplicable, the lower court would need to resolve issues involving the policy period and liability limit.

Because the lower court granted summary judgment in favor of Maryland, the court did not address whether the damage to Hankins' home fell within the Maryland Policy period or its liability limit. There is similarly no need for this Court to address these issues because the lower court correctly granted summary judgment. However, should this Court find that the damage to Hankins'

home is not excluded by the Earth Movement exclusion, the policy period and liability limit would need to be resolved by the lower court.

A. The Maryland Policy Period

The Maryland policy provides coverage only for property damage which "occurs during the policy period." R.E. 5 (emphasis added). The relevant Maryland Policy period was April 3, 2002, to April 3, 2003. *Id.* Elite cancelled the Maryland policy on June 27, 2002, because it was no longer in business. R.E. 6. Hankins purchased her home on or about April 22, 2002. R. 31.

Therefore any property damage potentially covered by the Maryland Policy must have occurred between the date that Hankins purchased her home on April 22, 2002 and the date the Maryland Policy was cancelled on June 27, 2002. Because damage to a home's foundation is inherently a slow and gradual process, it is highly unlikely that all of the damage to Hankins' home occurred during the 66 days that the Maryland Policy was in effect. Indeed, Hankins alleged in her Complaint that the damage to her home was "latent." R. 13, ¶ 8. She waited more than six years before putting Elite on notice of the damage and hiring Mr. Rogers and Mr. Dennis. R. 62; R.E. 3; R.E. 4.

In sum, if the lower court's ruling is reversed, the lower court would need to determine the amount of property damage, if any, which occurred during the Maryland Policy period.

B. The Liability Limit

The October 4, 2010 judgment entered against Maryland was in the amount of $645,200. R. 118. However, the Maryland Policy has an "each occurrence" liability limit of $300,000. R.E. 5. The Maryland Policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.*

Hankins contends that the "Products/Completed Operations Aggregate" limit of $600,000 applies. However, Hankins fails to appreciate the difference between an each occurrence limit and an aggregate limit. The Maryland Policy clearly states that the "each occurrence" limit is the most Maryland will pay for property damage arising out of any one "occurrence." R.E. 5. The Complaint only alleges one occurrence, and Hankins does not contend otherwise. The Products/Completed Operations Aggregate limit would only come into play if there were multiple occurrences after the insured's operations were complete. Since that is not the case, the applicable liability limit is $300,000, not $600,000.

CONCLUSION

The facts of this case are not in dispute. Hankins' home was built atop naturally unstable soils. The unstable soils shrank and swelled, as such soils are known to do. The soil movement caused the foundation of Hankins' home to shift, thereby causing damage to her home. That Elite negligently failed to provide a sufficient buffer to minimize the effects of the soil movement is not in dispute, but the fact remains that earth movement was the primary, triggering event which caused the damage to Hankins' home.

Elite's business was construction, and Elite and Maryland had entered into an insurance contract which excluded coverage for property damage caused by earth movement. The only reasonable construction of the Earth Movement exclusion is that the parties agreed that Maryland would not provide coverage for the risk of earth movement, regardless of whether Elite might have negligently failed to minimize or prevent the effects of the earth movement. Any other interpretation, including the interpretation urged by Hankins, would effectively eliminate the Earth Movement exclusion altogether.

The lower court's ruling was correct. Maryland respectfully requests that this Court affirm that ruling.

Respectfully submitted,

MARYLAND CASUALTY COMPANY/ZURICH AMERICAN INSURANCE COMPANY

BY: _____
OF COUNSEL

TOM JULIAN - BAR #[redacted]
tjulian@danielcoker.com
JASON H. STRONG - BAR #[redacted]
jstrong@danielcoker.com
DANIEL COKER HORTON AND BELL, P.A.
4400 OLD CANTON ROAD, SUITE 400
POST OFFICE BOX 1084
JACKSON, MISSISSIPPI 39215-1084
TELEPHONE: (601) 969-7607
FACSIMILE: (601) 969-1116

CERTIFICATE

I, Tom Julian, of counsel for Maryland Casualty Company/Zurich American Insurance Company, do hereby certify that I have this day served by United States mail a true and correct copy of the above and foregoing pleading to:

Honorable John H. Emfinger
Madison County Circuit Judge
P.O. Box 1885
Brandon, MS 39043

Alexander A. Alston, Jr., Esq.
Attorney at Law
1304 Poplar Boulevard
Jackson, MS 39202-2111

James H. Herring, Esq.
Herring Long & Crews
P. O. Box 344
Canton, MS 39046-0344

THIS, the 6th day of January, 2012.

TOM JULIAN

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