IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2011-CA-01093

KAYE HANKINS

Appellant/Plaintiff

vs.

MARYLAND CASUALTY COMPANY/ZURICH AMERICAN INSURANCE COMPANY

Appellee/Defendant/Garnishee

On Appeal from the Circuit Court of Madison County

REPLY BRIEF OF APPELLANT/PLAINTIFF KAYE HANKINS

ORAL ARGUMENT REQUESTED

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I. INTRODUCTORY STATEMENT

Kaye Hankins' (hereinafter sometimes referred to as "Hankins") dream home is in shambles because of the negligence of her builder, Elite Homes (hereinafter "Elite"). Hankins obtained a Judgment against Elite and thereafter filed a writ of garnishment against Elite's insurance carrier, Maryland Casualty Company/Zurich (hereinafter "Maryland"). Maryland defaulted and Hankins then took a Default Judgment against the Garnishee. Maryland filed a Declaration under *Miss. Code Ann.* §11-15-31 asking that the Court suspend the Judgment until the Court could resolve the question whether Maryland owed anything to Hankins under the Elite policy arguing that the "Earth Movement" exclusion under the Policy precluded any recovery. The issue was joined: Does the Earth Movement" exclusion preclude any recovery?

Any fair reading of the policy will conclusively demonstrate the Earth Movement clause is ambiguous and cannot preclude recovery. Furthermore, in response to a Motion for Summary Judgment filed by Maryland, Kaye Hankins filed affidavits of two highly qualified engineers. Maryland failed to file a motion to strike or oppose the affidavits in any manner. These experts found that the back of the house was placed almost on top of Yazoo clay when the standard of care required at least a 7 foot buffer. They found that the differential in height from the back to the front of the house was an astonishing 10 ½ feet. They further found that Elite was negligent in failing to compress the fill material placed in the front of the house. They concluded that as a direct proximate cause of this clear negligence the home of Hankins cracked, splintered and crumbled. (R.E. 17, 34) (Tr. 705, 722). These engineers also found that this was not caused by natural settlement or natural causes but caused by the actions of Elite and man-made. (R.E. 16, 35) (Tr. 705, 722). These affidavits were unopposed.

II. REPLY TO ARGUMENT

A. The Standard of Review is *De Novo*

Maryland begins its argument with the statement that a court's decision to set aside a default judgment should be reviewed under the abuse of discretion standard. But this is not a case in which a motion was made to set aside a default judgment and the lower court did so. Maryland filed a declaration to suspend execution so that the court could make a decision whether Maryland owed anything under the policy. It has nothing to do with a Rule 60, *MRCP*, or an attempt to open a default because of fraud misrepresentation or otherwise. The Court entered Summary Judgment for Maryland Holding the "Earth Movement" exclusion precluded recovery. It also entered summary judgment for Maryland. From this, the long established rule is that the Judgment of the lower court should be reviewed *de novo. Architex Association, Inc. v. Scottsdale Ins. Co.,* 27 So. 3d 1148 (Miss 2010); *Leffler v. Sharp,* 891 So. 2d 152, 156 (Miss. 2004).

B. The Law Is The Same in Construing Earth Movement Exclusions In Both Homeowners And CGL Insurance Policies

Maryland simply dismisses Kaye Hankins' entire Brief as being "illogical". (P. 18). It makes no attempt to distinguish the scores of cases cited by Hankins but argues that the Maryland Policy is a Commercial General Liability (CGL) policy and not a homeowner's policy and that this "distinction is critical". For this reason Maryland claims the homeowner cases are not helpful to Hankins and boldly asserts that "Maryland finds no opinion in which the insured's negligence negated a valid CGL policy exclusion (P. 19-20).

Kaye Hankins found just the opposite. Scores of cases construing CGL policies support her position that the "earth movement" exclusion is not applicable in this case. The exact same argument was made by the insurance company in *Nautilus Ins. Co. v. Vuk Builders, Inc.,* 406 F.

Supp. 2d 899 (N.D., Ill 2005). In *Nautilus* the insurance company, as here, attempted to distinguish the homeowner policy cases from third party CGL policies. As here, *Nautilus* could offer "no case law or academic publication to support such an argument." (*Id.* at 904). The Court found the "earth movement" exclusion which provided that "earth movement, including but not limited to landslide, mud flow, earth sinking, rising or shifting" (*Id.* at 902) to be ambiguous. In *Nautilus* the insured had been negligent in its excavation work and caused earth movement and damage. The Court concluded that earth movement exclusion clauses apply only to earth movement by natural causes which the Court is construing a CGL policy or a homeowner policy. The Court found that the great majority of jurisdiction which have considered this particular exclusion have found it to be ambiguous and "applied the doctrine of *ejusdem generis* to limit the definition of "earth movement" to causes of the same class as earthquake and landslide." [*Id.* at 903]

The Court further reasoned that the insurance company could have easily excluded earth movement if it had followed some of the State Farm cases that excluded "earth movement" regardless of cause. (*Id.* at 905). The Court found the earth movement was caused by the negligence of the insured and therefore was covered under the policy. The Court found the failure to expressly exclude earth movement "regardless of cause" to be an omission of special significance. (*Id.* at 905).

Furthermore *Nautilus* cites any number of other jurisdictions that have similarly limited earth movement exclusion cases in third party CGL policies. *Insurance Co. of State of Pennsylvania v. ALT Affordable Housing Services, Inc.*, 1999 WL 33290627 (W.D. Tex 1999) (earth movement exclusion in CGL policy limited to natural causes applying *ejusdem generic* principle); *American Mortorists Ins. Co. v. R & S Meats, Inc.*, 190 Wis. 2d 196, 526 N.W. 2d 791, 796 (1994) (in CGL Policy if the earth movement is due to human action, coverage is not

lost); *Henry Nelson Construction Co. v. Fireman's Fund American Life Ins. Co.*, 383 N.W. 2d 645, 653 (Minn. 1986) (construing earth movement in builder risk policy to apply only to widespread natural disasters not caused by human forces).

Similarly in *Willmar Development, LLC v. Illinois National Ins. Co.*, 726 F. Supp. 2d 1280 (D. Or 2010) the Court was concerned with a CGL policy where a builder had "built on substandard uncompacted fill" and movement in the soil under the house caused substantial damage. The insurance company argued that the "earth movement" exclusion precluded recovery. The Court held that *Nautilus, supra,* was persuasive and that the earth movement exclusion only excluded "damages arising out of earth movement resulting from natural events. Not human-caused events." (*Id.* at 1290).

More recently in a case decided last month, the Court in *North American Capacity Ins. Co. v. Spiess Construction Co. Inc.*, 2011WL 6012507 (CA. EDC), (Dec. 2011) the Court held it was not an error for the Court to rely upon cases that analyze earth movement exclusions found in first party all risk policies rather than those found in third party liability policies which was the case under consideration.

It is clear under the authorities across this county that the differences between a homeowner policy and a CGL policy cannot be dispositive. See *Federal Ins. Co. v. Olawuni,* 539 F. Supp. 2d 63, 68 (DDC 2008); *Wilshire Ins. Co. v. RJT Const., LLC,* 581 F. 3d 222 (5th Cir. 2009).

Maryland is simply mistaken when it infers that there are no courts interpreting third party CGL policies that support Kaye Hankins position. The opposite is true.

Furthermore, under Mississippi law the canons' interpretations are one and the same whether homeowners, general commercial liability, flood, fire, or any other type of insurance contracts are involved. The recent case of *Architex Association, Inc. v. Scottsdale Ins. Co.*, 27

So. 3d 1148, 1157, ¶21 (Miss. 1910) analyzed a CGL policy and held that the same familiar canons of interpretation as followed under Mississippi law. A policy must be considered as a whole, with all relevant clauses together. If a contract contains ambiguous or unclear language, then ambiguities must be resolved in favor of the non-drafting party. Ambiguities exist when a policy can be logically interpreted in two or more ways, where one logical interpretation provides for coverage. However, ambiguities do not exist simply because two parties disagree over the interpretation of a policy. Exclusions and limitations on coverage are also construed in favor of the insured. Language in exclusionary clauses must be "clear and unmistakable," as those clauses are strictly interpreted. Nevertheless, "a court must refrain from altering or changing a policy where terms are unambiguous, despite resulting hardship on the insured." The Scottsdale Court noted that under CGL policies the insuring agreement grants the insured broad coverage for property damage, which is then narrowed by exclusions. (*Id.* at 1155*)*. And, as noted in the quote, exclusions on coverage are construed in favor of the insured and that language in exclusionary clauses must be "clear and unmistakable" as those clauses are strictly construed. (*Id.* at 157 ¶21). See also, *Wilshire Ins. Co. v. RJT Construction, LLC*, 581 F. 2d 222 (5th Cir.2009).

C. The Earth Movement Exclusion In The Maryland Policy Is Ambiguous

The first question to ask: is there coverage. Obviously there is coverage and surely Maryland agrees. Maryland agrees that this coverage falls under the "Products Completed Operations Hazard" that includes "property damage" occurring away from premises you [Elite] own. . ." This coverage operates to cover, not exclude, damages arising out of insured [Elite's] work away from Elite's own premises. (Garnishee Record Excerpt 624); *Williams Development, LLC v. Illinois Nat. Ins. Co.,* 726 F. Supp. 2d 1280, 1287 (D. Or 2010). No one denies that Elite

was negligent in placing the foundation nearly on top of Yazoo clay and failing to compact the soil. (R.E. 16, 33). Damages are admitted during the coverage period.

Turning to the exclusions, the only one Maryland claims is applicable is the "earth movement" exclusion. Maryland states that this clause if not ambiguous in the face of literally hundreds of cases across this country that have specifically found the "Earth Removal" clause almost identical to the one in this case to be ambiguous.

The law of Mississippi is clear. "If a contract contains ambiguous or unclear language, then ambiguities must be resolved in favor of the non-drafting party." And also "ambiguities exist when a policy can be logically interpreted in two or more ways, where one logical interpretation provides for coverage." Moreover, exclusions are always "construed in favor of the insured" and also the language of such clauses must be clear and unmistakable "as those clauses are strictly construed." *Architex Association, Inc. v. Scottsdale Ins. Co.,* 27 So. 3d 1148, 1157 (Miss. 2010).

Of course, reasonable minds can logically construe the "earth movement" exclusion here in two ways. All courts except possibly a few State Farm cases, have held this exclusion to be ambiguous. This clause is inserted by insurance companies to relieve them from occasional major disasters that are almost impossible to predict and insure against. When this happens, the very basis upon which insurance companies operate is sure to be destroyed. Under these circumstances, an insurance company is no longer able to spread the risk. Damage, such as this case, to a single dwelling is inherently different. *Murray v. State Farm Fire and Cas. Co.,* 203 W. Va. 477, 505 S.E. 2d 1 (1998) and the scores of cases collected in Exhibit A of that case to the cases cited in the Brief of Kaye Hankins.

Looking at the exclusion a reasonable logical person can easily interpret the clause to be ambiguous as almost all courts have done. The clause fails to clearly state that it would not

apply to an action for negligence, or whether the cause of the loss was man-made. Maryland could have easily excluded any cause that was man-made or caused by the negligence of the insured or others. The earth movement clause can be reasonably construed to read to refer only to phenomena resulting from natural, rather than man-made forces. *Wyatt v. Northwestern Mutual Ins. Co. of Seattle*, 304 F. Supp. 781 (D.N.M 1969). Many of these cases have applied the doctrine of *ejusdem generis* to exclude only major disasters rather than one caused by human actions. *Winters v. Charter Oak Fire Ins. Co.*, 4 F. Supp. 2d 1288 (D.N.M 1998).

The examples given in the "Earth Movement" clause here - "earthquake, landslide, mudflow, - settling, slipping, falling away, shrinking, expansion, caving in, shifting, eroding, rising or tilting" – define the type of earth movement, not the cause. Surely here the cause is ambiguous. It does not exclude man-made causes or damages from the negligent act of the insured. Negligent acts of the insured are expressly covered. The Mississippi law is clear that an exclusion must be "clear and unmistakable" as such clauses are strictly construed. *Architex Association, Inc. v. Scottsdale Ins. Co.,* 27 So. 3d 1148, 1157 (Miss. 2010).

Furthermore, it is reasonable to believe that the "earth movement" exclusion herein would apply to natural causes, unique hazards which a construction company such as Elite is generally not subject, and therefore properly excluded from a CGL policy. On the other hand, the coverage in a third party liability insurance context draws on traditional tort concepts of fault, proximate cause and duty. *North American Capacity Ins. Co. v. Spiess Construction Co., Inc.,* 2011 WL 6012507 (E.D. Calif. Dec. 2011). Here the actions of Elite constitute negligence proximately causing the damages alleged. The "Earth Movement" clause here is ambiguous.

The only two cases cited by Maryland in an attempt to support its position are *Rhoden v. State Farm Cas. Co.,* 32 F. Supp. 2d 907 (SD Miss 1994) and *Boteler v. State Farm Cas. Ins. Co.*, 876 So. 2d 1067 (Miss Ct. App. 2004). In Hankins' original Brief it was shown that these

The case of *Titan Indemnity Co. v. Estes,* 825 So. 2d 651 (Miss 2002) is inapposite. No one claimed the exclusion was ambiguous. Here a fire truck while speeding caused an accident killing plaintiffs' beneficiaries. The exclusion excluded bodily injury arising out of the "ownership/maintenance, use or entrustment" of the fire truck. [*Id.* at 655]. No one argued this exclusion was ambiguous, and the exclusion was valid.

Similarly, the case of *Lincoln County School District v. Doe*, 749 So. 2d 943 (Miss 1999) offers Maryland no support. Again it has nothing to do with property damage or a "earth movement" exclusion. In that case a young girl was molested at school and her mother brought the action. The policy in question excluding "actual or threatened abuse or molestation by anyone" [*Id.* at 945 ¶10]. The mother did not argue that this exclusion did not apply (*Id.* at 946 ¶12). The Court held that summary judgment was proper.

Professor Jackson summarizes the rule in this state citing both accident and homeowner cases as follows:

> Essentially, loss certainly will be covered as long as a covered cause or peril contributes significantly, as opposed to trivially, to the result. Where a covered cause contributes less significantly than other causes, the loss may still be covered if the covered cause is not trivial and is immediate to the loss. Covered causes that do not contribute significantly to a loss, and that are distant in time and in the chain of causation, may be treated as remote and, therefore, not leading to coverage. Of course, the dominant or significant cause differs from the trivial one only by degree. The difference between the immediate and the remote cause also may be conceptualized along a continuum.

Jeffrey Jackson, Mississippi Insurance Law & Practice (2001).

For example, in *Dixie Pine Products Co. v. Maryland Casualty Co.,* 13 F. 2d 583 (5th Cir. 1943), applying Mississippi law, the Court was concerned with a policy covering losses resulting from accidents, but excluded losses from an accident caused by fire, covered losses caused by an explosion that resulted from fire.

The first affidavit was made by Gary J. Rogers, a highly skilled licensed Professional Engineer qualified in the structural engineering discipline and has practiced in this area for over 30 years [R.E. 705 and CV at 20]. The other expert affidavit is that of W. David Dennis, Jr., a highly skilled licensed Professional Engineer specializing in the field of geotechnical engineering and having over 40 years of practice in this specialty. [R.E. 722 and CV at 36].

These experts were engaged by Hankins to inform her what was causing her home to crack and crumble. Mr. Rogers visited the home on October 28, 2008, and first observed a "differential of about 10.5 inches" from the right rear to the front corner of Kaye Hankins' home [R.E. 53], and noted sever cracks and separations throughout the house [R.E. 51]. His almost obvious opinion was that there had been a movement of the foundation [R.E. 54] and that there had been both upward and downward movements and that soil movement had occurred in the front because of consolidation [R.E.54]. He made substantial recommendations to attempt to salvage these obvious defects [R.E.56]. The next affidavit was made by W. David Dennis, Jr. who prepared a geoforensic study of Kaye Hankins' home and attached this report as a part of his affidavit. He actually drilled holes 12 feet deep around the house and one inside the house to determine the characteristics of the underground soil. He reported fully on his tests and the general soil conditions [R.E. 70]. His borings documented expansive clay at depths of 2.5 feet below the surface [R.E. 71]. He opined that he typically recommends that the bottom of the slab be separated from expansive clay by not less than 7 feet of low permeability non-expansive soil [R.E. 573] and that the fill material be compacted in accordance with standards [R.E. 74]. It was his opinion that the "residence had experienced differential movements primarily as a result of swelling of the highly expansive clay. . ." [R.E. 74].

Obviously, these reports reflected soil movement and no one denies that soil movement took place. As this matter approached a hearing and Maryland had filed a motion for summary

judgment the question asked these engineers was obviously what caused the foundation to move. After carefully stating their studied observations they testified that the insured, Elite, violated standards of care in placing the foundation nearly on top of Yazoo clay and they also violated the same standards by failing to compact the fill placed in the front. They concluded that the efficient proximate cause of Hankins' loss was the negligence of Elite and that the loss was not a natural loss but man-made. They also testified that but for Elite's negligence, however, would not have suffered the damages to her house. [R,E. 706, 723]. This is the customary manner in which expert opinions are structured.

These affidavits were not opposed by Maryland. No motion to strike nor other objection was made to these affidavits. Our court has long held that when a party wishes to attack an affidavit "he must file in the trial court a motion to strike the affidavits." Failure to do so constitutes "a waiver of any objection to the affidavit." *Continental Ins. Co. v. Transamerican Rental Finance Corp.,* 748 So. 2d 725, 731 ¶26 (Miss 1998). If Maryland failed to contest the affidavits in the trial court, it "may not contest it for the first time on appeal." *Buckel v. Chaney,* 47 So. 3d 148, 154 (¶13-14) (Miss 2010).

Maryland cites *Miss Power and Light Co. v. Cook,* 832 So. 2d 474 (Miss 2002) which offers it no support. In *Cook* the Plaintiff tried to call on Administration Law Judge to tell the jury how she would rule. Of course, this was not admissible and properly held so by the lower court and on appeal. In *Redhead v. Entergy Mississippi, Inc.,* 828 So. 2d 801 (Miss. Ct. App. 2001) the lower court failed "to tell the jury how to find."

In *Jenkins v. CST Timber Co.,* 761 So. 2d 177 ¶ 18 (Miss 2000) cited by Maryland, the Court held that an opinion that is not helpful to the trial of fact should not be admitted. The Court cautioned, however, that the "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided of the error of

fact." [*Id.* at 181]. Rule 704, *M.R.C.P.*, makes it clear that "Testifying in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

The affidavits were before the Court without objection and clearly admissible. This Court has long held that no Court may ignore uncontradicted evidence". *Lucedale Veneer Co. v. Rogers,* 211 Miss 613, 53 So. 2d 69, 75 (1951). A court cannot reject or ignore such evidence or it will lead to arbitrary results *Tarver v. Lindsey,* 161 Miss 379, 137 So. 93, 96 (1931). Undisputed testimony cannot be ignored. *Holmes v. Holmes,* 154 Miss 719, 123 So. 865, 866-67 (1929).

III. DOCTRINE OF JUDICIAL ESTOPPEL DOES NOT BAR THIS COURT FROM CONSIDERING HANKINS' AFFIDAVITS

Kaye Hankins nor her engineers have ever denied that earth movement was involved in this case. Their reports are made part and parcel of their affidavits. Their affidavits refer to their reports because both document their personal inspection and observation of her home. (R.E. 26 ¶ 5-7). It is from their visit and the generation of their reports that they observed a 10 ½ inch differential from the front to the back of Kaye Hankins' home. Standard of care is reported in both reports (R.E. 25, 33).

When asked for purposes of trial what was the cause of the soil movement both engineers found it was the negligence of the engineers in placing the foundation almost on top of Yazoo clay and failing to sufficiently pack the landfill, (R.E. 17, 18, 34, 35) In no way is this inconsistent with their earlier reports when they were asked why her house was cracking. The first criterion as stated by Maryland has not been met. *Kirk v. Pope,* 975 So. 2d 981, ¶ 31-32 (Miss 2007). Similarly, the second criterion for judicial estoppel cannot possibly be made. This criterion is that "the Court must have accepted the previous position." There is no evidence that

the Court ever read these reports and in all likelihood he did not and certainly did not "accept" or "rely" on them.

There is no judicial estoppel and no facts or law support Maryland on this point

IV. WHEN THE COURT HOLDS THE EARTH MOVEMENT EXCLUSION INAPPLICABLE, THE DEFAULT JUDGMENT AGAINST ELITE STANDS

A. Default Judgment

Maryland seems to forget that a default judgment has been taken against it. We are not here on the questions of whether a default judgment should be set aside. The question is whether Maryland owes anything to Kaye Hankins.

A default judgment was taken against Maryland because it failed to timely answer Hankins' writ of garnishment issued against it [R.E. 13]. Fortunately for Maryland, §11-35-31, *Miss. Code Ann.*, provides that before execution it can file a declaration swearing it owes nothing and if so, after hearing, the garnishee limits its liability to that owed, if any. This, Maryland did. When this Court holds that the "Earth Movement" exclusion in Maryland's policy is inapplicable the default judgment remains fixed in place. The sole question under §11-35-31 is how much is owed. Whether the Court resolves this by reversing the summary judgment or otherwise the result must be the same.

The default judgment is treated as conclusive and is "given the same effect as a judgment rendered after a trial on the merits." *Rush v. North American Van Lines, Inc.*, 608 So. 2d 1205, 1209 (Miss. 1992). See official comment to Rule 55, *Miss. R. Civ. P.*

B. The Maryland Policy Period

The Court should not be involved with the alleged issue. A default has been entered against Maryland. The only issue is whether the "Earth Movement" exclusion precludes any recovery.

Nevertheless, the property damage for Kaye Hankins falls squarely within the policy period. Hankins agrees that she purchased her home on April 22, 2002. Kaye Hankins has filed her affidavit in this case. Almost immediately she witnessed the foundation falling, cracks appearing and her dream home was crumbling and shattering. Within a week cracks were throughout her house and the structure was tearing apart. All cracks and damages were visible within one month of her purchase and moving into her home. This is all set forth in her affidavit [R. E. 59]. There was no motion to strike or otherwise oppose this affidavit. Under the law of this state, Kaye Hankins' testifying through her affidavit must be taken as conclusive. *Continental Ins. Co. v. Transamerica Rental Finance Corp.,* 748 So. 2d 725 ¶26 (Miss. 1995); *Buckel v. Chaney,* 47 So. 3d 148, 154 ¶13-14 (Miss. 2010). All damages occurred within the policy limits.

C. The Policy Limit

Any reasonable and logical person reading the Maryland policy would readily conclude that the $600,000 limit is the applicable policy provision. Under Section III – Limits of Insurance, the policy reads under paragraph 2:

> 2. The General Aggregate Limit is the most we will pay for the sum of:
>
> XXXXXXX
>
> b. Damages under coverage A, <u>except</u> damages because of . . . "property damage included in the product completed operations hazard." [Emphasis added]
>
> 3. The Products-Completed Operations Aggregate is the most Will pay under Coverage A. . . .included in the "products Completed operations hazard."

[See Garnishee Ex. 5]

The word "except" under 2 b. above must mean something. What was expected was the "product-completed operations hazards". The damages here fall within the definition of the contract's "Products Completed Operations Hazard" which includes all property damage "occurring away from" the builder's own premises [¶ 16 Policy].

Furthermore, in an endorsement entitled "designated Construct Project(s) General Aggregate Limit" under which Hankins' home falls, the policy states:

> A. For all sums which the insured becomes legally obligated to pay for damages. . . . caused by occurrences under Coverage A. . . . which can be attributed only to ongoing operations at a single designed construction project. . . .
>
> 1. A separate Designed Construction Project General Aggregate Limit applies to each designated construction project *, and that limit is equal to the amount of the General Aggregate Limit shown in the Declaration. [Emphasis added] [Tr. 610, Exclusions, "Designated Construction Projects"]

This may be logically and reasonably considered to mean that the $600,000 limit for the Hankins' project is the applicable limit.

At the very least the policy that covenants to pay all "sums that the insured becomes legally obligated to pay as damages. . . ." [Policy Sec. 1, Cov. A] as well as the definition of "products completed operation hazard under ¶16 which "includes all. . . . property damage" "occurring away from premises you (Elite) own or rent. . ." when juxtaposed with the limit provision of the policy as set forth above are ambiguous. Reasonable minds can differ. These limits read with the broad coverage provisions creates an ambiguity. It is well established that insurance policies are to be construed against the drafting party and in favor of the insured. e.g., *Crum v. Johnson,* 809 So. 2d 663, 666 ¶8 (Miss. 2002). This Court can make its own

* Hankins' home is a designated construction project under the policy which describes such project as "EACH CONSTRUCTION PROJECT".

determination of this issue, as the interpretation of an insurance policy is one of law and this Court applies a *de novo* standard of review. *e.g., Corban v. United Services Automobile Ass.*, 20 So. 3d 601, 609 (Miss. 2009).

V. CONCLUSION

Kaye Hankins prays that this Court reverse and render in favor of the Plaintiff. A default judgment was entered against Maryland. The lower court held that Maryland owed nothing under the policy and therefore entered summary judgment. This is obviously wrong since it is uncontradicted that the contractor, Elite, was negligent and that the loss was man-made and not a natural phenomenon. Accordingly, Kaye Hankins prays that this Court holding that the lower court erred in finding that Maryland owed nothing and reinstate the default judgment entered against Maryland.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Alexander A. Alston, Jr., attorney for appellant, Kaye Hankins, certify that I have this day caused to be delivered by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing Reply Brief of Appellant to the following persons at these addresses:

Hon. John H. Emfinger
Circuit Court Judge
P. O. Box 1885
Brandon, Mississippi 39043

Tom Julian
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Jackson, Mississippi 39215-1084

This the 23 day of January 20, 2012.

ALEXANDER A. ALSTON, JR.,
ATTORNEY FOR APPELLANT