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

BRIEF OF APPELLANT/PLAINTIFF KAYE HANKINS

ORAL ARGUMENT REQUESTED

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ZURICH AMERICAN INSURANCE COMPANY — APPELLEE/GARNISHEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellant/Plaintiff, Kaye Hankins, certify that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Appellee/Plaintiff:

Kaye Hankins

Appellant/Garnishee:

Maryland Casualty Company/Zurich American Insurance Company

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STATEMENT REGARDING ORAL ARGUMENT

The Court should welcome oral argument in this case since the issues herein impact every homeowner in this state as it relates to their insurer's obligation under all-risk policies. It should be helpful to the Court to fully ventilate the public policy inherent in every insurance policy containing an "earth movement" exclusion as it impacts on losses by an insured homeowner.

STATEMENT OF THE ISSUES

The lower Court erred in holding that the "Earth Movement" exclusion in the Garnishee's policy precluded any recovery (1) regardless of the proximate cause of the "earth movement"; (2) regardless of whether the loss was man-made or a natural phenomenon; and (3) further erred in granting summary judgment for the garnishee insurance company.

STATEMENT OF THE CASE

A. Nature of the Case

This case is about a homeowner who contracted to build her dream house but immediately after moving in found that the walls and foundation were beginning to crack, large gaps appeared and her home was literally falling apart. The homeowner obtained a judgment against the builder and thereafter filed a garnishment against the builder's insurance company. Although the proximate cause of the loss was the builder's negligence and the loss was not a natural phenomenon the lower court found that the garnishee insurance company owed nothing because of the "Earth Movement" exclusion in the policy and thereupon issued summary judgment in favoring the insurance company.

B. The Course of the Proceedings in the Court Below

The long awaited home of Kaye Hankins (hereafter "Hankins") is in shambles because of the negligence of her builder, Elite Homes, Inc. (hereafter "Elite"). (R.E. 59) (Tr. 705, 722). To recover some of her damages, Hankins filed suit against Elite (Tr. 9) and subsequently obtained judgment. (R.E. 13) (Tr. 102). Hankins then had issued a Writ of Garnishment against Elite's insurance carrier, Maryland Casualty Company/Zurich American Insurance Company (hereafter "Maryland"). (Tr. 106). Since Maryland failed to timely answer, a Default Judgment was taken against Maryland on October 4, 2010. (R.E. 13)(Tr. 117). Before execution on the Default Judgment, Maryland filed a Declaration asking the Court to suspend the judgment against it claiming that it was not indebted to Hankins. (Tr. 120). Hankins filed her Traverse declaring that the Declaration was untrue and that the Maryland policy provided coverage under the

Complaint filed herein. (Tr. 122). On March 15, 2011, Maryland filed its Motion for Summary Judgment. (Tr. 483).

After Briefing, the lower court found that although the all-risk policy of Maryland was subject to garnishment, the endorsement to the policy entitled "Exclusive-Injury on Damage from Earth Movement" precluded any damages and issued summary judgment in favor of Maryland. (R.E. 9) (Tr. 763).

Hankins timely perfected this appeal to this Court on the grounds that the Lower Court erred in finding summary judgment for Maryland in that the "Earth Movement" exclusion was not applicable to the facts herein since the proximate cause of her loss was the negligence of the builder and that the losses were not caused by natural phenomena.

C. Statement of Facts

Hankins closed on her home at 109 Kenilworth Place, Ridgeland, Mississippi, on April 22, 2001. (Tr. 748). Almost immediately she saw it was a disaster. The foundation fell, cracked, crumbled and shattered. Within the first week cracks were running throughout every part of the house. The walls and floors were splitting and cracking and the structure was tearing apart. Although most cracks were clearly visible within two weeks after she moved into this house, all cracks and damages to the house were visible within one month of Hankins' purchase of and moving into this house. (R. E. 59)(Tr. 748).

Hankins employed expert engineers who found that the foundation was negligently constructed by placing the back of the house within 2 ½ feet of expandable clay and failed to properly compress the fill placed in the front. (R.E. 17, 34)(Tr. 705, 722). The differential in height from the back corner to the front corner was an astonishing 10 ½ inches. (R.E. 17, 34)(Tr. 706, 722). The foundation fell, cracked, crumbled and shattered. Hankins' long awaited dream

house was a disaster. The contractor was negligent in constructing the foundation. (R.E. 17)(Tr. 706, 722). The standard of care requires fill material be placed a minimum of seven 7 feet above expandable clay. (R.E. 17, 34)(Tr. 706, 722). The standard of care further provides that fill must be compressed. (R.E. 17, 34)(Tr.706, 722). The builder failed in both respects. The Complaint specifically and repeatedly alleged negligence. (Tr. 9, 13, 14). The "front of the house has fallen approximately nine (9) inches", (¶ 5); the house was not "built in a workmanlike manner" (¶ 7); "Defendant was also negligent in the construction of the aforesaid house and in the preparation of the lot for construction upon which the house was built" (¶ 9); the damages would not have occurred "except for the negligence of Elite" (¶ 9). The proximate cause of the loss was the "negligence of defendant, Elite Homes, Inc."; "the soil preparation. . . .was defective and proximately caused" the loss. (¶ 11-d).

The two expert engineers filed uncontradicted affidavits that the damage to Hankins' home was caused by the negligence of the builder by placing as little as 2 ½ feet of buffer over the expansive clay when the standard of care requires a 7 foot buffer and that the builder was further negligent in failing to properly compact the fill used in the front of the residence. In the opinion of the experts the efficient proximate cause of the loss to Hankins' home was the negligence of the builder. (R.E. 17, 34)(Tr. 705, 722).

They further swore that the 10 ½ inch differential from the high point to low point at the subject residence exceeded any acceptable limits by a substantial margin. They opined that this differential is not natural and was man-made by the negligence of the builder and the result of human action. Such a differential is not to be expected, is highly unusual and exceeds any reasonable expectation. (R.E. 18, 34)(Tr. 705, 722).

The two experts concluded that the man-made activities of the builders in building the residence with an insufficiently thick buffer over expansive clay and failing to properly compact the fill placed beneath the home of Hankins was the efficient proximate cause of the movement of the soil causing the damages to the home of Ms. Hankins. But for this negligence of the builders, Hankins would not have suffered the damages she suffered in the damages to her home. This was not a natural loss caused by some natural settlement or by a natural disaster such as a mudflow or earthquake; this loss was caused by the activities of man failing to follow standards of care as required of all builders (R.E. 16, 35)(Tr. 705, 722). There was no rebuttal to Hankins' expert witnesses. No experts were submitted in opposition.

The insurance policy issued by Maryland (Commercial General Liability policy number SCP 32893134) names Elite as the named insured. Paragraph 1 provides coverage for all sums that the insured becomes legally obligated to pay for property damage to which the insurance applies (Tr. 610, 624). Under paragraph 2 the policy lists the Exclusions for which it will not pay. (Tr. 610). By endorsement, the Maryland policy contains an exclusion that reads as follows:

> **EXCLUSION-INJURY OR DAMAGE FF.OM EARTH MOVEMENT**
>
> This endorsement modified insurance provided under the following:
>
> COMMERCIAL GENERAL LIABILITY DOVERAGE 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, setting, slipping,

> falling away, shrinking, expansion, caving in, shifting, eroding, rising, tilting or any other movement of land, earth or mud.

This "Earth Movement" cause failed to include as a lead-in or elsewhere the familiar anti-concurrent-causation (ACC) clause that sometimes prevents recovery when damages occur as a proximate result of a covered clause and there is also earth movement. Notwithstanding, the undisputed facts that the loss was caused by the negligence of the builder and the loss was not caused by a natural force, but man-made and the result of human action, the court granted summary judgment in favor of the insurance company on the sole basis of this exclusion.

SUMMARY OF THE ARGUMENT

The "earth movement" exclusion is simply not applicable to the facts herein. The exclusion is ambiguous and must be construed most strongly against Maryland, the drafter of the exclusion, and in favor of the Appellant/Plaintiff. These clauses were inserted by insurance companies to relieve them of occasional major disasters that are almost impossible to predict such as earthquakes and mudslides. Under these circumstances an insurance company is unable to spread the risk. Damages, such as Hankins' single dwelling, are inherently different. Since the proximate cause of Hankins' loss was the negligence of the builder, under settled Mississippi law the exclusion is inapplicable. It is undisputed that the cause of any earth movement was the negligence of the builder. Furthermore, the law is clear that the "earth movement" clause is limited to earth movement resulting from natural forces. Under the facts of this case it is unrebutted that the 10 ½ differential between the high point to low point at the subject residence exceeds any acceptable limits by a substantial margin. This differential is not natural and was man-made and the result of human actions. Appellant/Plaintiff's loss was not caused by or a result of natural forces.

ARGUMENT

1. Introduction

The opinion in this case is directly contrary to the law of this state and the construction of "earth movement" clauses in legions of cases across this country. These clauses have been inserted by insurance companies to relieve them from occasional major disasters that are almost impossible to predict and thus insure against. These are earthquakes and mud slides that wreck disaster to hundreds of homes at one time. When this happens, the very basis upon which insurance companies operate is said to be destroyed. Under these circumstances, an insurance company is no longer able to spread the risk. Damage to a single dwelling is inherently different. *Murray v. State Farm & Casualty Company*, 509 SE 2d 1, 10 (W. Va. 1998); *Powell v. Liberty Mutual Fire Insurance Co.*, 252 P. 3d 668 (Nev. 2011); *Peters Township School District v. Hartford Accident and Indemnity Co.*, 833 F. 2d 32, 35-36 (3d Cir. 1987).

Before looking specifically at this exclusion, some basic rules of construction must be applied. The interpretation of an insurance policy is one of law and this court applies a *de novo* standard of review. *Corban v. United Automobile Ass'n,* 20 So. 3d 601, 609 (Miss. 2009). Insurance contracts are constructed most strongly against the party drafting the contract, and most favorably for the policy holder. *State Farm Mutual Auto. Ins. Co. vs. Scitzs,* 394 So. 2d 1371, 1372-73 (Miss. 1981). The burden is on the insurance company to phrase their policies in clear and understandable language. *Burton v. Choctaw County,* 730 So. 2d 1, 9 (Miss 1997). On summary judgment the evidence must be viewed in the light most favorable to the non-moving party. *Palmer v. Anderson Infirmary Benevolent Ass'n.,* 656 So. 2d 790, 794 (Miss. 1995). Likewise, the Mississippi courts strictly construe exclusions in insurance policies against the

insurer and in favor of the insured. *Miss. Farm Bureau Mut. Ins. Co. v. Jones,* 754 So. 2d 1203 (Miss. 2000). All authorities, except for perhaps a few State Farm cases, have found the "earth movement" exclusion, regardless of the various iterations, to be ambiguous. *Robert L. Murray v. State Farm & Cas. Co.,* 203 W. VA 477, 509 SE 2d 1, 9 (W. VA 1998). At footnote 5 of this opinion the court noted that

> A provision in an insurance policy may be deemed to be ambiguous if courts in other jurisdictions have interpreted the provision in different ways. This rule is based on the understanding that "one cannot expect a mere layman to understand the meaning of a clause respecting the meaning of which fine judicial minds are at variance." C. Marvel, Division of Opinion Among Judges on Same Court or Among Other Courts or Jurisdictions Considering Same Question, as Evidence That Particular Clause of Insurance Policy is Ambiguous, 4 A.L.R. 4th 1253, §2[a] (1981).

Since it is obvious under the laws of this state that the court erred in holding that the "Earth Movement" exclusion precluded recovery, the default judgment taken against Maryland must stand. "When a judgment of default is entered, it is treated as a conclusive and final adjudication of the issues necessary to justify the relief awarded 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.*

The "Earth Movement" exclusion is inapplicable in this case for at least two reasons: (1) the loss to Hankins was man-made and not caused by natural forces and (2) the proximate cause of the loss was the negligence of the builder, Elite.

2. The loss to Hankins was man-made and not resulting from natural forces.

The only case decided by the Mississippi Supreme Court under a similar clause held that the "earth movement" exclusion must be limited to "earth movement" resulting from natural forces. *New Hampshire Ins. Co. v. Robertson*, 352 So. 2d 1307, 1310 (Miss. 1977). As in this

case the policy is an "all risk" policy that covers all losses to property except those specifically excluded.

Under clause (a) the *New Hampshire* contract excepted:

- Settling
- Cracking
- Shrinking
- Bulging
- Expansion

Under clause (b), the insurance policy excluded losses

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

The Maryland policy under consideration used the exact words of causation underlined above. Similarly, the Maryland policy uses the identical words "earthquake", "landslide", "or. . . other movement of . . . earth" as those enumerated in the *New Hampshire* policy.

The facts in *New Hampshire* show that the insured's home experienced an underground leak and water pressure was exerted from earth movement beneath the foundation. The court stated that the damages resulted from "earth movement" under the foundation which caused the floors, walls and patio to settle and crack. Even though all parties admitted "earth movement", the court held that the clause did not bar plaintiff's recovery. The court reasoned that since the provision excluding loss by any other earth movement appears in the context of a claim dealing with earthquakes and landslides, the clause must be limited to earth movement resulting from natural forces. The broken water pipe was not a natural force, just as was the negligence of the builder under consideration. The negligence of the contractor placing a foundation nearly on top of Yazoo Clay was not natural but caused by the act of man.

This is the rule applied in the vast majority of jurisdiction across the United States. *Couch on Insurance* specifically states that a majority of jurisdictions hold that earth movement

exclusions that do not explicitly define or limit the term "earth movement do not apply to earth movements that are non-natural in origin or source". L. Ross, T. Segalla, *11 Couch on Insurance, 3d*, §153:67 (2006). These jurisdictions often rely on the interpretive doctrine: *ejusdem generis*, a rule consistently followed in the decisions of the Mississippi courts. *e.g., Norville v. Miss. State Medical Ass'n*, 364 So. 2d 1084, 1088 (Miss 1978). Under this doctrine, where general words follow the enumeration of particular classes of persons or things, the general words will be considered as applicable only to persons or things of the same general nature or class as those enumerated. *Cole v. McDonald*, 109 So. 2d 628, 637 (Miss. 1959).

Typical of the legions of cases from other jurisdictions construing an "earth movement" clause is *Wyatt v. Northwestern Mutual Ins. Co. of Seattle*, 304 F. Supp. 781 (D. Minn. 1969), where excavation had taken place on adjacent property and plaintiff's property had suffered damages. The court reasoned that a similar clause to that under consideration excluded losses from natural causes and natural phenomenon, such as earthquakes, but if the loss was man-made the clause did not apply. It was designed for mass movements of the soil injuring multitudes of homes. The court reasoned that the earth movement clause was formulated to relieve the insurer from occasional major disasters, not loss to a single homeowner. This clause is simply not intended to cover "earth movement" occurred upon a single dwelling, due to human action. The court held that "earth movement" clause must be read to refer to phenomena resulting from natural, rather from man-made, forces. See also *Murray vs. State Farm Fire and Casualty Co.*, 203 W. Va. 477, 509 S.E. 2d 1 (W.Va. 1998).

A case frequently cited on this issue is *Winters v. Charter Oat Fire Ins. Co.*, 4 F. Supp. 2d 1288 (D.N.M. 1998). As in this case the policy was an "all risk" policy which created coverage for all risks, unless a specific provision expressly excludes the particular loss from

coverage. The court reasoned that the insurance company has the burden to prove the loss comes under a particular exclusion and that the rules of construction are particularly narrow where applied to exclusionary clauses. *(Id.* 1291). The "earth movement" clause in this contract defined it as "any earth movement (other than sinkhole collapse), such as an earthquake, mine subsidence, landslide, or earth sinking, rising or shifting." The court held that the earth movement clause did not bar the plaintiff from recovering the loss caused by excessive water causing the soil underneath the house to become soaked and shift. The court then recognized the doctrine of *ejusdem generis* and said it is apparent that the policy is intended to exclude only occasional major disasters rather than one caused by human action. The court looked to a New York decision that noted "deterioration of the fill below one house is certainly not large-scale earth movement." *Barash v Ins. Co. of North American,* 451 N.Y.S. 2d 603, 607 (N.Y. Sup. Ct. 1082).

The very recent case of *Powell v. Liberty Mut. Fire Ins. Co.*, 252 P. 3d 668 (Nev. 2011) brings all of this law up to date. The facts in Powell show that a water pipe exploded, flooding the basement causing earth movement shifting the foundation causing damage to Plaintiff's home. The earth movement exclusion provided:

> "We do not insure for loss caused diretly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss, . . . earth movement, meaning earthquake including land shock waves or tremor, before during or after a volcanic eruption; landslide; mud flow; earth sinking, rising or shifting."
> *(Id.* 670*).*

The policy also included a settling clause, which further excludes losses caused by "settling, shrinking, or expansion, including resistant cracking of pavements, patios, foundations, walls, floors, roofs or ceilings. (*Id.* 671).

The Court first found that the earth movement exclusion was ambiguous and ruled as would the Mississippi Court that when considering a motion for summary judgment, the court must view the evidence and every reasonable inference in the light most favorable to the nonmoving party (*Id.* 672) [*Palmer v. Anderson Infirmary Benevolent Ass'n*, 656 So. 2d 790, 794 (Miss. 1995); *City of Jackson v. Rebuild America, Inc.*, 2008-CA-02121-COA (2011)].

The court reasoned that to exclude damage caused by a ruptured pipe "then it would have had to clearly include that in the earth movement definition and show that the earth movement exclusion unmistakably applied to the damage here." *Id.* 672. The court explained that clauses excluding coverage must be "interpreted narrowly against the insurer." [*Id.* 672]. The court then reasoned that the earth movement clauses have been inserted to protect the insurer from major disaster and not losses failing on a single homeowner [*Id.* 673]. The court concluded that the earth movement clause refers only to naturally occurring events [*Id.* 673]. Accordingly, the court reversed the order of the district court in granting summary judgment for the insurer.

Some courts apply the doctrine of *noscitur a sociis* to reach the same conclusion in "earth movement" clauses identical or similar to the one under consideration. This doctrine holds that when general and specific words are grouped, the general words are limited by the specific and will be construed to embrace only objects similar in nature to those things identified by the specific words. *Sentinel Associates v. American Manufacturers Mutual Ins. Co.,* 804 F. Supp. 815, 818 (E.D. Va 1992). The court stated that under this clause, the general term "earth movement" must be read to refer to events similar in nature to "earthquakes, landslides, and earth sinking, rising or shifting" – all of which are natural phenomena. The parties disagreed as to the cause of the movement of the soil underneath the plaintiff's building. The court reasoned

that taking the earth movement clause in context, the clause must be read as referring only to phenomena resulting from natural, rather than man-made, forces.

A fair sampling of legions of cases across this nation supporting the position of Hankins would include any number of cases set forth and summarized in Exhibit A to *Murray v. State Farm Fire and Cas. Co.*, 203 W.Va. 477, 509 SE 2d 1 (1998) and quoted as follows:

> *Boston Company Real Estate Counsel, Inc. v. Homes Ins. Co., Inc., 887 F. Supp.* 369 (D. Mass. 1995) (before construction office building, engineers reported soil was unsuitable and would not support building; contractor continued to construct building, and building settled at a rate "exceeding expectations"; court held meaning of earth movement exclusion was confined "to its commonplace usage – referring only to sudden, cataclysmic event (*e.g.* earthquakes)"; gradual soil compression was therefore not earth movement as defined by exclusion);
>
> *American Motorist Ins. Co. v. R & S Meats, Inc.*, 190 Wis. 2d 196, 526 N.W. 2d 791 (1994) (city negligently constructed storm sewer; after heavy rain, water flowed beneath floor of policyholder's building and blast freezer; water froze under freezer floor, causing floor to heave upward damaging walls, pillars, and ceiling beams; court held that earth movement exclusion was not applicable to human action, and therefore did not bar coverage);
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> *Jones v. St. Paul Ins. Co.*, 725 S.W. 2d 291, 294 (Tex. Ct. App. 1986) (court found earth movement exclusion unambiguous, but concluded that settling of policyholder's house resulting from soil contracting as it dried was not "earth movement" as contemplated by the policy. The earth movement exclusion contemplates abnormally large movements such as the examples listed.);
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> *Mattis v. State Farm Fire & Cas. Co.*, 118 Ill. App. 3d 612, 73 Ill. Dec. 907, 454 N.E. 2d 1156 (1983) (policyholder's basement wall displaced by settling of backfill due to improper construction; court held earth movement exclusion was ambiguous, limited to same class as earthquake and landslide, and did not provide insurance company a basis for denial of coverage);
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> *Government Employees Ins. Co. v. DeJames*, 256 Md. 717, 261 A. 2d 747 (Md. App. 1970) (foundation of policyholder's house collapsed due to possible contractor negligence; Court held that under doctrine of *ejusdem generis*, term earth movement was

limited to "unusual movement" and not normal pressures and settling);

Wyatt v. Northwestern Mut. Ins. Co. of Seattle, 304 F. Supp. 781 (D. Minn. 1969) (contractor excavated property adjacent to policyholder's home removing lateral support and damaging home; insurance company denied coverage citing earth movement exclusion; court limited exclusion to "occasional major disasters which are almost impossible to predict and thus insure against" such as earthquakes and floods; exclusion did not apply to earth movement events involving human action).

In *Sentinel Associates v. American Manufacturing Mut. Ins. Co.,* 804 F. Supp. 815, Fn 2 (E.D. Va. 1992) the court noted: "Even the term 'earth movement' itself has been defined by reference to natural phenomena: 'differential movement of the earth is crust: elevation or subsidence of the land, diastrophism, faulting, folding." Webster's Third New Int'l Dictionary 715 (1971).

3. The efficient proximate cause of Hankins' loss was the negligence of the builder.

The proof stands uncontradicted that the loss of Kaye Hankins's home was caused by the negligence of the builder. Placing the foundation nearly on top of expandable clay in this area is clear negligence. (R.E. 17, 35)(Tr. 705, 722). The standard of care requires at least a 7 foot buffer from the clay to the foundation. (R.E. 17, 34)(Tr. 705, 722) Here it was little more than 2 feet. Furthermore, the soil was taken from the back yard and loosely placed in the front without compaction which is another serious violation of the standard of care for any builder. (R.E. 17, 34)(Tr. 705, 723)

These facts stand undisputed. The builder's negligence in building a foundation in Mississippi almost on top of expandable clay constitutes negligence. No one disputes that this set in motion the cracking and splitting of Hankins' home for which she seeks recovery. The builder's negligence is a peril insured under the policy and irrefutably the proximate cause of the

entire loss. The insurer's liability for such loss is summarized in L. Russ, T. Segalla, *II Couch on Insurance 3d*, §101.44 (2006) as follows:

> From the perspective of insurance law, when a peril insured against sets other causes in motion which, in an unbroken sequence between the causative act and the final injury, produce the final result for which the insured seeks recovery, the peril insured against will be regarded as the proximate cause of the entire loss. Under those circumstances, the insurer will be held liable for the entire loss within the parameters of the express policy limits.

The Mississippi law strongly supports this summary. It has long been the law of this state that the insured may recover if a covered loss (here negligence) is the proximate cause of the loss even though there may be exclusions (here earth movement) that may have contributed to the loss. For example, in *Evana Plantation, Inc. v. Yorkshire Ins Co.*, 214 Miss 321, 58 So. 2d 797, 798 (Miss 1952), the Mississippi Supreme Court stated the general rule that the insured may recover if a covered cause is the "dominant and efficient cause" of the loss even though other causes may have contributed to that loss. The court also quoted the familiar rule that it is a well-established "rule of construction that whenever there is any ambiguity in a policy of insurance, it is construed strictly against the insurance company which drafted the contract."

Similarly in *Providence Washington Ins. Co. v Weaver,* 241 Miss 141, 13 So. 2d 635 (1961), the court stated that "if the cause designated in the policy is the dominant and efficient cause of the loss, the right of the insured to recover will not be defeated because there were contributing causes" and, in short, "the proximate cause in which the loss is to be attributed may be the dominant or efficient cause, although other and incidental causes may be nearer in time to the result and operate more immediately in producing the loss." *Id.* at 637. The same reasoning can be found in *Glens Falls Ins. Co. v. Linwood Elevator,* 241 Miss 400, 130 So. 2d 262, 269-70 (1961), in which the court stated the general rule of insurance law is that only the proximate

cause of loss, and not the remote cause, is to be regarded in determining whether recovery may be had under a policy of insurance, and that the loss must be proximately caused by a peril insured against. The court cautioned that if the nearest efficient cause of the loss is not a peril insured against, recovery may nevertheless be had if the dominant cause is a risk of peril insured against..." The court also observed if the cause of the loss was an excluded peril, an insured may nevertheless recover if the excluded peril was caused by an event covered in the policy. The court noted a Pennsylvania case which held that where damage was caused by an explosion which in turn was caused by fire, the entire loss is to be regarded as a loss by fire regardless of an exception on the policy against loss by explosion.

This principle was illustrated in *Great Am. Ins. Co. v. Smith*, 252 Miss 62, 172 So. 2d 558 (Miss. 1965). In that case there was an explosion in the insured's property (excluded clause) and a fire that consumed the property (covered clause). The court held that "there is no doubt that the explosion was one of the causes of the destruction of the property" but found that the "dominant and efficient cause of the destruction of the property was fire" [*Id.* Miss. 560] and thus affirmed a judgment for the insured.

In *Grain Dealers Mut. Ins. Co. v Belk*, 269 So. 2d 637 (Miss. 1972), the court cited the familiar rule of this state that "if the nearest cause of the loss is not a peril insured against, recover may nevertheless be had if the dominant cause is a risk or peril insured against," citing *Glenns Falls Ins. Co. v Linwood Elevator*, 241 Miss 400, 421, 130 So 2d 262, 270 (1961). Similarly, the court reiterated the established law that "the general rule is that, if the cause designated in the policy is a dominant and efficient cause of the loss the right of the insured to recover will not be defeated by the fact that there may be contributing causes." [*Id.* 639]. See

also *Providence Washington Ins. Co. v. Weaver*, 242 Miss. 146, 131 So 2d 635, 638 (Miss. 1961) citing the same familiar rule.

Perhaps closer in point are the legions of cases from other jurisdictions which hold that when a loss is proximately caused by improper construction which may cause ground movement, and the policy includes an exclusion that exempts ground movement, the policy nevertheless provides coverage. In *Villella v. Public Employees Mut. Ins. Co.,* 725 P. 2d 957 (Wash 1986), the plaintiff claimed negligence of the contractor. The policy included the familiar "earth movement" exclusion. The court specifically found that the contractor's negligence set in motion a continuous process of soil destabilization that caused one side of the foundation of the house to drop 8 inches. The insurance company argued that there was no coverage because this was earth movement under the policy and expressly excluded from coverage. The court held that where a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produce the result for which recovery is sought, the insured peril is regarded as the proximate cause of the entire loss and the policy would cover the loss. This case was followed in *Safeco Ins. Co. v. Hirschmann*, 773 P. 2d 413 (Wash. 1989).

In *Garvey v. State Farm and Casualty Co.,* 770 P. 2d 704 (Calif. 1989), the insured noticed that a house addition began to pull away from the main structure. The insured sought damages under his all-risk homeowner's policy. State Farm defended under its "earth movement" exclusion. Losses excluded by this portion of the policy included those "caused by, resulting from, contributed to or aggravated by any earth movement, including but not limited to earthquake, volcanic eruption, landslide, mudflow, earth sinking, rising or shifting," and losses cause "by...settling, cracking shrinkage, bulging or expansion of pavements, patios, foundations,

wall, floors, roofs or ceilings...." After a careful analysis the court held that when a loss is partially caused or realized by earth movement but the proximate cause of the loss is improper construction, and improper construction is not an excluded peril, then the policy provides coverage.

Similarly, in *Murray v. State Farm*, 509 S.E. 2d 1 (W. Va. 1998), the same argument was made. Plaintiff argued negligent construction or upkeep and the insurance company argued the "earth movement" clause. The court found that when negligent construction comes under the coverage of the policy and though earth movement may have been a concurring or contributing cause of a loss, the courts should find for the policyholder if the proximate cause of the loss was an event insured by the policy. For the same holding see *Vormelker v. Oleksinski*, 199 N.W. 2d 287 (Mich. App 1972).

The Court of Appeals for the Fifth Circuit is analyzing the wind-water dichotomy in insurance policies after Katrina consistently recognized the prevailing Mississippi rule that the insured may recover if a covered peril was the "dominant and efficient" cause of the loss. In *Leonard v. Nationwide Mut. Ins. Co.*, 499 F. 3d 419, 431 (5th Cir. 2007) the court cited *Evona Plantation Inc. v Yorkshire Ins. Co.*, 214 Miss 321, 58 So 2d 797, 798 (1952): "the default causation rule in Mississippi regarding damages caused concurrently by a covered and an excluded peril under an insurance policy is that the insured may recover if the covered peril was a 'dominant and efficient cause' of the loss." The Fifth Circuit in *Tuepker v. State Farm Fire & Cas. Co.*, 507 F. 3d 346, 356 (5th Cir. 2007) stated that under the proximate cause doctrine in Mississippi, when a loss is caused by the combination of both covered and excluded perils, the loss is fully covered by the insurance policy if the covered risk proximately caused the loss.[1]

[1] Although recognizing this Mississippi rule of law the Fifth Circuit held that the anti-concurrent-causation clause (ACC) on the State Farm policies overrides this settled common law rule. This conclusion was questioned by this

Here the facts are settled. Two expert engineers testified that Hankins's loss was caused by the negligence of the builder. This is the efficient proximate cause of Hankins' loss. This is a covered loss that is not excluded under the "earth movement" clause of the subject policy.

4. Lower Court Opinion

Without any analysis of the facts and a failure to determine the proximate cause of the loss or whether the loss resulted from natural phenomena or was man-made, the lower court simply found for the insurance company holding that the "earth movement" exclusion bars recovery. For its sole support the lower court cites *Boteler v. State Farm Casualty Ins. Co.*, 876 So. 2d 1067 (Miss. App. 2004) and *Rhoden v. State Farm Fire and Casualty Co.*, 32 F. Supp 2d 907 (S.D. Miss 1998).

Obviously, these cases offer no support to Maryland under the "earth movement" claim in this case and the familiar law of this state. It should be noted that neither of these are Mississippi Supreme Court cases, one being an appellate court case *(Boteler)* and the other a single federal judge case *(Rhoden)*. The only Mississippi Supreme Court case on an "Earth Movement" clause is *New Hampshire Ins. Co. v. Robertson,* 352 So. 2d 1307 (Miss 1977) discussed in detail earlier in this brief. *Robertson* was a foundation case in which cracked and caused damages to plaintiff's residence. Unquestionably, there was earth movement and the policy had an exclusion for earth movement very similar to the one in this case. The court quickly found for the plaintiff, holding that the "earth movement" exclusion only applied to natural losses and not man-made losses.

But *a fortiori,* these State Farm cases are clearly inapposite and so recognized by all courts that have examined these distinctive "earth movement" clauses. The lead-in clause of the

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court on *Corban v. United Sates Automobile Ass'n*, 20 So. 3d 601 (Miss 2009). Under any event this is immaterial because the subject Maryland policy does not contain the infamous ACC clause.

earth movement exclusion in the State Farm policies provides: "We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involved isolated or widespread damages, arises from natural or external forces, or occurs as a result of any combination of these."

As the federal judge noted in *Rhoden*, it just doesn't matter what causes the loss if there is earth movement. It doesn't matter if the loss is natural or unnatural, whether man-made or not, whether involving a large area or not, or for any other reason. The court held that there is no coverage under this clause in a State Farm policy if earth movement combines in a way to cause loss. The court noted that this qualifying clause was not present in the policy in *Robertson,* nor is this clause present in the Maryland policy under consideration here.

The court in *Winters v. Charter Oak Fire Insurance Co.*, 4 F. Supp. 2d 1288, 1292 (D.N.M. 1998), noted that State Farm adopted language peculiar to itself, and had attempted to push earth movement as broadly as they can. *Boteler* also noted that this State Farm clause would preclude any recovery regardless of the cause of the excluded event and whether other causes acted concurrently or in any sequence with the excluded event to produce the loss.... See also *Murray v. State Farm and Cas. Co.*, 203 W. V. 477, 529 S.E. 2d 1, 13 (1998). The *Boteler* court concluded by quoting this lead-in clause as making it strikingly clear that the insurance company would not insure for damages resulting from earth movement whether the movement was the result of natural causes or from any other causes. Obviously, these State Farm cases are

not applicable in this case. The Maryland contract under consideration has no such lead-in clause.

This State Farm clause or ACC clause has been around for a long time. Certainly if Maryland wished to not insure for damages resulting from earth movement that was caused by a covered cause it could have easily adopted the State Farm ACC lead-in clause or drafted a specific exclusion. *Powell v. Liberty Mut. Ins. Co.,* 127 Nev. 14, 252 P. 3d 668, 674 (Nev 2011). This Maryland failed to do.

Clearly the contractor was negligent in building the foundation. This is a covered loss. It is immaterial if movement of the earth may have contributed to this loss. The proximate and efficient cause of Hankins' loss was the negligence of the contractor.

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 will reverse the decision of the lower court and render judgment in favor of the Plaintiff, Kaye Hankins.

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 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
Daniel Coker Horton & Bell, P.A.
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This the 7th day of December, 2011.

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