DA 21-0449

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 143

JOSEPH and SHARLENE LOENDORF;
ABRAM and KATHY STEVENS,

Plaintiffs and Appellees,

v.

EMPLOYERS MUTUAL CASUALTY COMPANY,
a foreign corporation,

Defendant and Appellant.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DV 20-0366
Honorable Gregory R. Todd, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

David C. Berkoff, Carey B.C. Schmidt, Schmidt Berkoff, PLLC, Missoula, Montana

For Appellees:

Carey Matovich, Ryan Gustafson, Matovich, Keller & Huso, P.C., Billings, Montana

Mark D. Parker, Parker, Heitz, Cosgrove, P.C., Billings, Montana
(for Helgeson)

Submitted on Briefs: March 30, 2022

Decided: July 19, 2022

Filed:

Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Employer's Mutual Casualty Company (EMC) appeals an order of the Thirteenth Judicial District Court denying summary judgment to EMC and granting partial summary judgment to Joseph and Sharlene Loendorf and Abraham and Kathy Stevens (collectively "Homeowners"), concluding a Commercial General Liability (CGL) policy issued by EMC provides coverage for Homeowners' claims against the insured, S.D. Helgeson, Inc., d/b/a Stan Helgeson Homes, and SRKM, Inc., d/b/a Helgeson Homes (collectively "Helgeson"). EMC also appeals the District Court's order awarding Homeowners' attorney fees, but because we reverse on coverage, we do not reach this issue. We address:

> *Did the District Court err in granting partial summary judgment to Homeowners by concluding EMC had a duty to provide coverage for Homeowners' claims under the Earth Movement Exclusion of the CGL Policy, which it determined to be ambiguous?*

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Helgeson built and sold homes in the Falcon Ridge subdivision in Billings; Homeowners purchased homes built by Helgeson. After moving in, Homeowners noticed small cracks in the homes' interior walls and foundation. Helgeson assured them the cracks were not indicative of a more serious problem, but the damage increased over the next several years. In 2017, Homeowners hired Krivonen Structural Consultants to inspect their properties. Krivonen found misaligned doors and windows, foundation movement issues, separation of exterior siding, and cracks in the foundation and drywall. Krivonen characterized the damage as functional-structural damage caused by settlement of the soil under and around the homes.

¶3 In the fall of 2018, Homeowners filed lawsuits (Underlying Lawsuits) in federal court against Helgeson, alleging negligent construction of their homes. The Underlying Lawsuits seek damages for the structural damage that resulted from the allegedly negligent construction and the settling of the surrounding soil around and underneath the homes. Homeowners assert Helgeson failed to install deep foundation systems, such as foundation piers, in an area with known sandy soils with "collapse potential." Helgeson has denied any negligence, and the Underlying Lawsuits' merits have not yet been tried.

¶4 EMC insured Helgeson with one-year term CGL policies from 2009 to 2016 (the Policy). The Policy insures Helgeson for "sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies," subject to applicable exclusions. By endorsement, the Policy included what was titled, "Exclusion—Injury or Damage from Earth Movement" ("Earth Movement Exclusion" or "the Exclusion"). The Exclusion explained that it modified the commercial general liability coverage of the policy, and further provided:

> 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.

¶5 EMC is defending Helgeson in the Underlying Lawsuits under a reservation of rights. On November 15, 2019, EMC filed a declaratory judgment action in federal court, naming Helgeson and seeking a declaration that, pursuant to the Earth Movement Exclusion, there is no coverage under the Policy for Homeowners' claims. Homeowners

requested to intervene in the action, but EMC objected.[1] Homeowners then initiated this declaratory judgment action in the Yellowstone County District Court, seeking a ruling that EMC "is obligated to fully indemnify Helgeson for [Homeowners'] claims within the applicable liability policy limits without further delay."

¶6 EMC moved for summary judgment, while Homeowners opposed EMC's motion and filed a cross-motion for partial summary judgment. EMC argued the Earth Movement Exclusion unambiguously barred coverage for the claims against Helgeson because earth movement—the settling of the soil around and underneath the homes—was alleged to have caused the claimed damages. Homeowners argued the Exclusion was ambiguous because it did not differentiate between natural and human-made earth movement causes.

¶7 The District Court denied EMC's motion and granted partial summary judgment to Homeowners, holding EMC "has a duty to provide coverage" for Homeowners' claims. Noting that "there is no disputing that the alleged injuries were caused by the actions of Helgeson," the District Court concluded the Earth Movement Exclusion, read in its entirety, applies when "the earth movements are the result of settling of the earth rather than earth movement as a result of the insured's actions," further reasoning that the Exclusion applies to "long-term earth movement that spanned years from expected earth

[1] Other homeowners from the Falcon Ridge subdivision with lawsuits against Helgeson also moved to intervene in the federal action and were ultimately added as parties. *See generally Emplrs Mut. Cas. Co. v. S.D. Helgeson, Inc.*, No. CV 19-129-BLG-TJC, 2021 U.S. Dist. LEXIS 197445 (D. Mont. Oct. 13, 2021). In that proceeding, the U.S. District Court applied the *Brillhart/Wilton* abstention doctrine and dismissed the federal action because of this parallel litigation in state court. *Emplrs Mut. Cas. Co.*, 2021 U.S. Dist. LEXIS 197445, at *18 (citing *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 62 S. Ct. 1173 (1942); *Wilton v. Seven Falls Co.*, 515 U.S. 277, 115 S. Ct. 2137 (1995)).

movement, not movement caused by the insured." Thus, the Earth Movement Exclusion did not apply, and coverage was not excluded, because the "event at issue here was human caused." Despite this determinative interpretation favoring the Homeowners, the court further concluded that the Exclusion was ambiguous, and must be construed in favor of the Homeowners.[2] The District Court awarded attorney fees for the declaratory action to Homeowners under the Uniform Declaratory Judgment Act. Section 27-8-313, MCA.

STANDARDS OF REVIEW

¶8 We review an appeal from a summary judgment ruling de novo, applying the same criteria as the district court. *Pablo v. Moore*, 2000 MT 48, ¶ 11, 298 Mont. 393, 995 P.2d 460 (citation omitted). Summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. M. R. Civ. P. 56(c).

DISCUSSION

¶9 *Did the District Court err in granting partial summary judgment to Homeowners by concluding EMC had a duty to provide coverage for Homeowners' claims under the Earth Movement Exclusion of the CGL Policy, which it determined to be ambiguous?*

¶10 The interpretation of an insurance contract is a question of law we review for correctness. *Pablo*, ¶ 12 (citing *Wellcome v. Home Ins. Co.*, 257 Mont. 354, 356, 849 P.2d

[2] Homeowners acknowledge the District Court's determination did not constitute a finding of Helgeson's liability, which would be determined in the Underlying Lawsuits. The District Court's ruling was a determination of insurance coverage contingent upon a determination of Helgeson's liability. *State Farm Mut. Auto. Ins. Co. v. Freyer*, 2013 MT 301, ¶ 26, 372 Mont. 191, 312 P.3d 403 ("An insurer's duty to indemnify hinges not on the facts the claimant alleges and hopes to prove but instead on the facts, proven, stipulated or otherwise established that actually create the insured's liability.").

190, 192 (1993); *Steer, Inc. v. Dep't of Revenue*, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990)). The language of the policy governs if it is clear and explicit. *Truck Ins. Exchange v. Waller*, 252 Mont. 328, 331, 828 P.2d 1384, 1386 (1992) (citing § 28-3-40, MCA). If a policy is ambiguous, however, it is construed in favor of the insured with any doubts resolved in favor of extending coverage. *Park Place Apartments, L.L.C. v. Farmers Union Mut. Ins. Co.*, 2010 MT 270, ¶ 13, 358 Mont. 394, 247 P.3d 236 (citation omitted). Exclusions from coverage are narrowly and strictly construed "because they are contrary to the fundamental protective purpose of an insurance policy." *Park Place Apartments*, ¶ 12 (citation omitted); *see also Farmers Union Mut. Ins. Co. v. Oakland*, 251 Mont. 352, 356, 825 P.2d 554, 554 (1992). We interpret an insurance policy's terms "according to their usual, common sense meaning as viewed from the perspective of a reasonable consumer of insurance products." *Park Place Apartments*, ¶ 12 (citation omitted).

¶11 At issue in this case is whether the Earth Movement Exclusion precludes coverage for Helgeson's potential liability in the Underlying Lawsuits. We have not yet analyzed this type of exclusion in the context of a CGL policy, where the damage is alleged to have been caused by the insured's negligence but involves the movement of earth. EMC argues that the Exclusion's language "includes both long[-] and short-term events that have either a human or natural cause" and the District Court's conclusion is a "facially strained" reading of the language that "impermissibly [re-wrote] the [Policy]." Homeowners answer that the Exclusion's "express language . . . does not mention human-caused events." Instead, according to Homeowners, the Exclusion "lists a series of naturally occurring

events that are not covered" which an "objectively reasonable consumer" would assume excludes only naturally caused events, not "human-caused settling damage."

¶12 We agree with EMC that the District Court's conclusions that the Exclusion "applies [only] to long-term earth movement that spanned years from expected earth movement, not movement caused by the insured," and that the Exclusion is ambiguous, are incorrect. When the entirety of the EMC Policy, including its governing terms, is considered, *see Newbury v. State Farm Fire & Cas. Ins. Co.*, 2008 MT 156, ¶ 19, 343 Mont. 279, 184 P.3d 1021 ("[w]hen interpreting an insurance policy, we read the policy as a whole"), the meaning of the Exclusion is straightforward and is not ambiguous.

¶13 The Policy here is a CGL policy that insures "the acts or omissions of the insured." *Nat'l Indem. Co. v. State*, 2021 MT 300, ¶ 73, 406 Mont. 288, 499 P.3d 516 (citing *Travelers Cas. & Sur. Co. v. Ribi Immunochem Research*, 2005 MT 50, ¶ 18, 326 Mont. 174, 108 P.3d 469). This must be the starting point, because coverage under a CGL policy "differs substantially from the coverage analysis in the [first-party] property insurance context, which draws on the relationship between perils that are either covered or excluded in the contract." *Hankins v. Md. Cas. Co./Zurich Am. Ins. Co.*, 101 So. 3d 645, 654 (Miss. 2012) (quoting *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 710 (Cal. 1989)).

¶14 Consistent with its purpose, the Policy's general insuring provision[3] states that EMC will pay sums that the insured, here Helgeson, is "*legally obligated to pay* as damages because of 'bodily injury' or 'property damage.'" (Emphasis added.) Thus, by its terms,

[3] Section I, Paragraph 1, of the Policy, entitled "Insuring Agreement."

the Policy's coverage is extended to personal or property damages Helgeson is found liable for—necessarily including the element of causation, i.e., for all damages that Helgeson caused. By insuring Helgeson's legally established obligations, the causation of personal and property damage necessary for coverage is incorporated in this "up front" general insuring provision of the Policy. Notably, and consistent with the purpose of a CGL policy, the insuring agreement provides no coverage for damages caused by purely natural events. *See Nat'l Indem. Co.*, ¶ 73 (CGL policies insure "the acts or omissions of the insured.").

¶15 Then, the Exclusion from coverage for "Injury Or Damage From Earth Movement" reads, in pertinent part:

> This insurance does not apply to . . . "property damage" [or] "personal 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.

¶16 Read with the general insuring provisions, this Exclusion eliminates or withdraws from the coverage for all personal or property damage *the insured is legally obligated to pay*, i.e., that the insured caused, which: arises from, is caused by, results from, is contributed to, is aggravated by, or is related to subsidence, settling, slipping, falling away, shrinking, expansion, shifting, eroding, rising, tilting "or any other movement of land, earth or mud." There is no ambiguity here; by its plain language, all damages Helgeson caused, and would be found liable for in the Underlying Lawsuits, which are "related to" any "movement of land, earth or mud," are excluded from EMC's initial agreement to insure Helgeson's liability.

¶17 Applying the Earth Movement Exclusion based on a perceived distinction between "natural" and "human-caused" earth movements is an erroneous framework that improperly injects further causation concepts into the Policy. While the Homeowners are correct that the Exclusion does not attempt to differentiate between natural and human-caused earth movement, that does not render it ambiguous, but rather encompassing, by design. The Exclusion broadly eliminates coverage for the insured's liability for damage that is related to any earth movements. To be sure, some earth movements listed in the Exclusion would have a natural cause, but damage could be inflicted in combination with a human cause, such as a failure to anticipate a natural cause, and thus be caused by a combination of the two, particularly within the broad category of "any other movement of land."[4] Homeowners characterize their damage as "human-caused settling damage," but whether solely human-caused or in combination with natural causes, this is nonetheless damage alleged to have been caused by Helgeson that clearly arises out of, results from, or is related to, "settling," which the Earth Movement Exclusion removes from the agreement to insure Helgeson's liability. Regardless of cause, a mudflow is a mudflow, settling is settling, and so forth. If the insured incurs liability for damages that have been contributed to, aggravated by, or related to any of these earth movements, coverage is broadly excluded.[5]

[4] Indeed, "any other movement of land" could be solely human caused.

[5] No argument is made here that the Exclusion is invalid for other reasons, such as illusory coverage or violations of public policy.

¶18 Homeowners analogize this case to *Parker v. Safeco Ins. Co. of Am.*, 2016 MT 173, 384 Mont. 125, 376 P.3d 114. There, under a homeowner's policy, Parker filed a *first-party claim* against his insurer, Safeco, after a boulder dislodged from a hillside and damaged his house. *Parker*, ¶ 3. The policy contained an earth movement exclusion, which specified the exclusion applied, "whether the earth movement is caused by or resulting from human or animal forces or any act of nature." *Parker*, ¶ 6. However, this provision of the exclusion was not at issue in *Parker*; rather, it was whether a tumbling boulder—a rock—constituted movement of *earth*. *Parker*, ¶ 17. We noted that the "the debate over human-caused events" was "irrelevant" under the facts because the policy at issue applied the exclusion "regardless of its cause." *Parker*, ¶ 25. We ultimately concluded that "a large boulder falling off a cliff, breaking upon impact, and then continuing downhill to hit the insured's house" constituted earth movement and was therefore covered by the exclusion. *Parker*, ¶ 28. Consequently, *Parker* has no bearing on whether an earth movement exclusion that does not contain an explicit provision applying it to both human and natural-caused events renders the provision ambiguous.

¶19 Homeowners also cite *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1 (W. Va. 1998) as support for their assertion that alleged ambiguity surrounding the cause of earth movement renders a policy ambiguous. Critically, *Murray* did not address a CGL policy, but first-party claims under a pair of homeowners policies. *Murray*, 509 S.E.2d at 6. Further, the West Virginia court concluded the policies were ambiguous and the exclusions inapplicable in several ways not at issue here. A lead-in clause to one of the earth movement provisions stated the exclusion applied to events arising from "natural or

external forces." *Murray*, 509 S.E.2d at 13. The court interpreted this provision "as excluding from coverage natural risks arising from beyond or outside the property." *Murray*, 509 S.E.2d at 13. Such a provision, however, is absent from EMC's policy. Similarly, the *Murray* Court's analysis of "reasonable expectations of policyholders," was based upon that lead-in clause, not an interpretation based upon any ambiguity found in the exclusion itself. *Murray*, 509 S.E.2d at 15.

¶20 Rather, as EMC argues, *Hankins* is squarely on point. In *Hankins*, as here, a homeowner sued her home builder's CGL insurer after numerous leaks, cracks, and other property damage began appearing in her house. *Hankins*, 101 So. 3d at 647. The damage was caused by "excessive differential movement" of the foundation due to the composition of the original ground underneath the house and a negligently constructed foundation. *Hankins*, 101 So. 3d at 647-48, 653. Maryland Casualty argued that the policy's earth movement exclusion, which did not differentiate between human or natural caused earth movement, precluded coverage. The exclusion at issue, similar to the one here, read in relevant part:

> [T]his 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.
>
> With respect to . . . "property damage," this exclusion only applies to the "products-completed operations hazard."

Hankins, 101 So. 3d at 654–55. The Mississippi Supreme Court concluded it would be "nonsensical" to limit the earth movement exclusion's applicability to "nature-caused" or

"natural force" earth movement because the exclusion would serve no purpose in a third-party CGL policy that only covers "occurrence[s]" that cause "property damage" for which the insured is found liable. *Hankins*, 101 So. 3d at 655. The court concluded that the CGL policy "clearly and unambiguously" narrowed coverage for property damage "contributed to, aggravated by, or related to . . . shrinking, expansion . . . shifting, . . . rising, or tilting . . . of land, earth, or mud." *Hankins*, 101 So. 3d at 658. This was a clear, definite exclusion, and a determination of ambiguity would "impermissibly strip an unambiguous CGL policy exclusion of its effect." *Hankins*, 101 So. 3d at 658.

¶21 At times, Homeowners' arguments implicate the reasonable expectations doctrine. "The reasonable expectations doctrine provides that the objectively reasonable expectations of insurance purchasers regarding the terms of their policies should be honored notwithstanding the fact that a painstaking study of the policy would have negated those expectations." *Giacomelli v. Scottsdale Ins. Co.*, 2009 MT 418, ¶ 42, 354 Mont. 15, 221 P.3d 666 (quoting *Am. Family Mut. Ins. Co. v. Livengood*, 1998 MT 329, ¶ 32, 292 Mont. 244, 970 P.2d 1054). The reasonable expectations doctrine is not applicable "where the terms of the policy at issue clearly demonstrate an intent to exclude coverage, because expectations that are contrary to the clear exclusions are not objectively reasonable." *ALPS Prop. & Cas. Ins. Co. v. Keller, Reynolds, Drake, Johnson & Gillespie, P.C.*, 2021 MT 46, ¶ 25, 403 Mont. 307, 482 P.3d 638 (quoting *Meadow Brook, LLP v. First Am. Title Ins. Co.*, 2014 MT 190, ¶ 15, 375 Mont. 509, 329 P.3d 608). Here, Homeowners are not the purchasers of the Policy, but, in any event, the Exclusion is unambiguous and clearly displayed on its own page in the policy, not hidden in unrelated portions of the contract

which would require a "painstaking study" to find. As a clearly written and otherwise permissible exclusion, it is a policy provision for which the parties may "freely contract." *Goss v. USAA Cas. Ins. Co.*, 2021 MT 289, ¶ 18, 406 Mont. 215, 498 P.3d 187 (citation omitted).[6]

CONCLUSION

¶22 For the foregoing reasons, the District Court's August 11, 2021, order denying EMC's motion for summary judgment and granting Homeowners' cross-motion for partial summary judgment is reversed. Because the District Court's award of attorney fees to Homeowners was based upon its conclusion that coverage existed under the Policy, that order is likewise reversed. This matter is remanded to the District Court for entry of judgment in favor of EMC consistent with this Opinion.

/S/ JIM RICE

We concur:

/S/ BETH BAKER
/S/ LAURIE McKINNON
/S/ DIRK M. SANDEFUR

Justice Dirk Sandefur, concurring.

¶23 I concur with the Court's conclusion that the broad CGL policy exclusion at issue, broadly excluding coverage for property damage caused in whole or in part by "earth

[6] This Opinion resolves only the application of the Earth Movement Exclusion of the Policy. The issue of coverage for any claims alleging construction negligence unrelated to earth movement is not argued here and is beyond the scope of the Opinion.

movement" (i.e., unstable soil conditions) is not ambiguous in any regard. On the claim stated by Homeowners and the M. R. Civ. P. 56 factual record in this case, I thus concur in the Court's ultimate holding and reversal of the District Court's denial of EMC's motion for summary judgment, and accompanying grant of partial summary judgment to Homeowners, with remand for entry of summary judgment in favor of EMC.

¶24 For completeness, however, I also concur with the Dissent's secondary assertion, an assertion not made by Homeowners here, that the earth movement exclusion would not exclude coverage for a theoretical homeowner claim, on sufficient proof, that the insured contractor negligently constructed the subject home in a manner inadequate to withstand the inherently unstable building site soil conditions, thereby causing pecuniary loss, either in the form of diminution of value/marketability or the cost necessary to preventively correct/remediate the substandard construction, but not including any damage caused in whole or in part by unstable soil conditions at the building site. Dictum recognition that the exclusion would not apply to such a theoretical claim would not change the bottom line in this case, however, given that the claimed damages at issue are for property damage caused by the combination of the alleged negligent construction and the inevitable earth movement that ultimately occurred.

/S/ DIRK M. SANDEFUR

Justice James Jeremiah Shea, concurring in part and dissenting in part.

¶25 When an insurance policy is ambiguous, it is to be interpreted most strongly in favor of the insured and any doubts as to coverage are to be resolved in favor of extending coverage for the insured. An ambiguity exists

> where the insurance contract, taken as a whole, is reasonably subject to two different interpretations.

Park Place Apartments, ¶ 13 (emphasis added) (citing *Mitchell v. State Farm Ins. Co*., 2003 MT 102, ¶ 26, 315 Mont. 281, 68 P.3d 703). For decades, this doctrine has protected insurance consumers in this state from the legalistic "sleight of pen" that appears to grant the consumer the coverage for which they have paid premiums but then pulls the rug out when a claim is made. Critical to this doctrine is that we take the insurance contract "as a whole" when determining whether an ambiguity exists.

¶26 I dissent from the majority Opinion because, when considering the insurance policy in this case as a whole, I would hold that the District Court correctly determined the Earth Movement Exclusion is ambiguous and must be construed in favor of coverage. While I would affirm the District Court's determination of coverage based on the policy's ambiguous language, and therefore dissent, I concur with the majority's conclusion that the exclusion does not foreclose all coverage, as EMC would argue, because the Earth Movement Exclusion cannot entirely absolve EMC of its coverage obligations for Helgeson's alleged negligence unrelated to earth movement. Opinion, ¶ 21 n.6. If, as Homeowners allege, Helgeson's construction of their homes was negligent, that negligent construction requires remediation independent and exclusive of damage that may have resulted, in part, from earth movement.

¶27 The majority correctly notes that Homeowners did not argue the exclusion violated public policy, Opinion, ¶ 17 n.5. Because that issue is not before us, I do not dissent on that basis. Nevertheless, the issue warrants further discussion for future reference,

particularly as it pertains to CGL policies and exclusions that would violate homeowners' reasonable expectations as the intended beneficiaries of a CGL policy and the consequences of such a position.

When Taken as a Whole, the Policy is Ambiguous

¶28 The majority adopts the reasoning employed by the Mississippi Supreme Court in *Hankins v. Maryland Casualty Co./Zurich American Insurance Co.*, 101 So. 3d 645 (Miss. 2012), where nearly identical language in a CGL policy's "earth movement" exclusion resulted in the preclusion of coverage. The court in *Hankins* highlighted the difference between expected coverage in a general property insurance context that "draws on the relationship between perils that are either covered or excluded in the contract," and a third-party CGL insurance policy, where coverage draws on "traditional tort concepts of fault, proximate cause and duty." *Hankins*, 101 So. 3d at 654 (quoting *Garvey*, 770 P.2d at 710 ("In liability insurance, by insuring for personal liability, and agreeing to cover the insured for his own negligence, the insurer agrees to cover the insured for a broader spectrum of risks.")).

¶29 Homeowners urge this Court to adopt the District Court's reasoning that because this exclusion does not specify the cause of the earth movement, in that it does not differentiate between natural and human-made causes, the exclusion is ambiguous. Homeowners cite *Parker*, in which we noted many state courts have discussed whether "earth movement" exclusions are ambiguous. *Parker*, ¶ 25 (citing to *Murray*, 509 S.E.2d 1 app. A). In *Murray*, the Supreme Court of Appeals of West Virginia cited thirty decisions in which other state courts found "earth movement" exclusions ambiguous. *See Murray*,

509 S.E.2d 1 app. A. Although *Murray* involved a first-party "all-risk" homeowner's insurance coverage dispute where the plaintiffs alleged the negligent creation and maintenance of a highwall resulted in rocks falling and damaging the property, the facts of *Murray* are otherwise similar to the case before us. *Murray*, 590 S.E.2d at 9. The court in *Murray* noted the policy as written would cover the damages caused by the negligence of a third party, but not damage caused by movement of the earth. *Murray*, 590 S.E.2d at 9. But because the damages the plaintiffs alleged could have been caused by negligence, by natural events, or "by *both man and nature* over a period of time, such as landslides, mudflows, or the earth sinking, shifting or settling," the *Murray* court concluded the "earth movement" exclusion was ambiguous. *Murray*, 590 S.E.2d at 9.

¶30 The gravamen of Homeowners' position is that, but for the negligent construction of their homes, naturally occurring earth movement would not have resulted in functional and structural damage—both the insured's negligence and earth movement caused the damages as alleged. The Court relies on the broad language used in the exclusion including the tail end "catch all" language, "any other movement of land, earth or mud," stating that the plain and broad language clearly covers any movement of earth. Opinion, ¶¶ 16-17. It further distinguishes *Murray* because the exclusion language is not identical. Opinion, ¶ 19. But the crux of the issue in *Murray* and the present case is identical: if the damages were caused solely by negligence, they are covered; if they were caused solely by earth movement, they are not. Where damages are caused by *both* negligence and earth movement, a policy's applicability becomes ambiguous. The Policy in this case, while broadly describing the *types* of earth movement it excludes, does not differentiate between

the *causes* of earth movement. As Montana law requires that "language of limitation or exclusion must be clear and unequivocal," *Winter v. State Farm Mut. Auto. Ins. Co.*, 2014 MT 168, ¶ 13, 375 Mont. 351, 328 P.3d 665 (citation omitted), when applying the exclusion to a situation where both natural and human-made causes resulted in the damages alleged, the exclusion's applicability is ambiguous.

¶31 The Court also fails to incorporate the analysis of causation in determining whether the exclusion applies, but rather asserts this would "improperly inject[] further causation concepts into the Policy." Opinion, ¶ 17. We rejected this argument in *Pablo*, ¶¶ 21-22 ("[The insurer] asserts that requiring insurers to list all possible theories of tort liability which are excluded under exclusionary clauses is in fact an impossible requirement, given that new theories of tort liability are adopted as the law develops. [The insurer's] approach, however, effectively resolves ambiguity in favor of the insurer which drafted the language."). Ignoring our precedent in *Pablo* and *National Indemnity Co.*, the majority hangs its hat on the type of policy and the types of earth movements described, rather than considering the ambiguity raised by the theory of liability Homeowners allege. The result is that the majority resolves the ambiguity in favor of the insurer—a "result [that] is inconsistent with the general rules in Montana on interpretation of ambiguities in insurance contracts." *Pablo*, ¶ 22.

¶32 A commercial liability insurance policy at issue in *Pablo* contained an exclusion for damages "arising out of . . . [t]he transportation of 'mobile equipment' by an 'auto'" operated by the insured. *Pablo*, ¶ 7. This Court concluded the policy provided coverage for damages stemming from an automobile accident allegedly caused by the insured's

negligence when its employee, while transporting a landscaping tractor, rear-ended the plaintiffs. *Pablo*, ¶¶ 1, 3-4. The insurer argued the exclusion unambiguously applied, and that interpreting exclusions "according to a tort theory of liability as opposed to the factual cause of injuries is contrary to Montana's policy of interpreting insurance policies in accordance with reasonable consumer expectations." *Pablo*, ¶ 21. We rejected that argument because it "resolves ambiguity in favor of the insurer," the drafting party responsible for creating the ambiguity. *Pablo*, ¶ 22.

¶33 When interpreting language in an exclusion, "coverage will still be found if the theory of liability establishes negligence *independent* of the [exclusion], which negligence is covered under the policy." *Pablo*, ¶ 23 (emphasis added) (quoting *Marquis v. State Farm Fire & Cas. Co.*, 961 P.2d 1213, 1221 (Kan. 1998)). Stated another way, when the basis of a claim sounds in a theory of liability clearly covered by the policy, and the policy's exclusions do not unambiguously exclude coverage for that theory of liability, the exclusion will not preclude coverage.

¶34 In *Pablo*, where the cause of the damage involved the transportation of mobile equipment in an automobile, but the theories of liability included "[n]egligent hiring, training, and supervision and negligent failure to warn," the insured's alleged negligence *independently* established a basis for coverage. *Pablo*, ¶ 24. Similarly, Homeowners' claim in this case is based on Helgeson's allegedly negligent construction. The Earth Movement Exclusion in the Policy does not reference earth movement that would result in damage only in the presence of human negligence, nor damage due to negligent construction—negligence *independent* of the ensuing settling of the soil under and around

the homes. EMC failed to "clearly and unambiguously exclude coverage for the theories of liability pled by the plaintiffs." *Pablo*, ¶ 24.[1] Rather than being "encompassing," Opinion, ¶ 17, the Exclusion is limited in its applicability as to theories of liability.

¶35 In *National Indemnity Co.*, we considered a pollution exclusion that the district court found ambiguous. *Nat'l Indemnity Co.*, ¶ 61. The insurer argued the policy distinguished between coverage for an insured that actively caused pollution and for an insured that "becomes liable for damages caused by a third-party active polluter." *Nat'l Indemnity Co.*, ¶ 61. The exclusion unambiguously carved out damages arising from "sudden and accidental" pollution. *Nat'l Indemnity Co.*, ¶ 62. This Court, construing the exclusion "narrowly and strictly," held that the insurer's "plain reading" interpretation of the exclusion created a "coverage distinction" between discharges that are "knowing and intentional" by a third-party polluter versus those that are "sudden and accidental." *Nat'l Indemnity Co.*, ¶¶ 61-62. Notably, these are distinctions between *causes* of pollution, not types. We went on to hold this interpretation "leads to an absurd or nonsensical coverage result: the insured would be covered for liability arising from a failure to warn [i.e., theory of liability] of a 'sudden and accidental' discharge—a seeming impossibility, . . . but would *not* be covered for liability arising from a failure to warn of an ongoing, intentional discharge." *Nat'l Indemnity Co.*, ¶ 62.

[1] If EMC had intended to clearly exclude all damages that involve earth movement regardless of its cause, it could have included language to that effect as it did in the Policy's "Fungi or Bacteria Exclusion": "regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage."

¶36 The majority's Opinion acknowledges that the issue of coverage for claims alleging construction negligence unrelated to earth movement remains unresolved by this Opinion. Opinion, ¶ 21 n.6. As I have noted below, to what extent Homeowners' damages may be discretely attributed to Helgeson's negligence, as opposed to the subsequent earth movement, remains the unenviable task of the fact-finder in the underlying claims. But to the extent that the damages attributable to Helgeson's negligence may be inextricably intertwined with damages attributable to any subsequent earth movement, I would submit this illustrates the inherent ambiguity of a policy that would purport to provide coverage for Helgeson's negligence while at the same time abrogating coverage for some of the most expensive and direct consequences of that negligence.

Public Policy Supports Homeowners' Reasonable Expectations of Coverage

¶37 Homeowners have not made an express public policy argument in the matter before us; therefore, the issue of whether an exclusion such as the one before us violates public policy remains unresolved. For future reference, though, it bears discussion as to whether our longstanding rule of construing even unambiguous insurance contracts in line with the reasonable expectations of consumers, and the intended beneficiaries of an insurance policy, would support extending coverage in a situation such as this. We adopted the reasonable expectations doctrine in *Transamerica Insurance Co. v. Royle*: "The objectively reasonable expectations of applicants *and intended beneficiaries* regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." *Transamerica Ins. Co. v. Royle*, 202 Mont. 173,

180-81, 656 P.2d 820, 824 (1983) (quoting Robert E. Keeton, *Insurance Rights at Variance with Policy Provisions*, 83 Harv. L. Rev. 961, 967 (1970) (emphasis added)).

> The genesis of this doctrine is the judicial recognition that most insurance contracts, rather than being the result of anything resembling equal bargaining between the parties, are truly contracts of adhesion in which many insureds face two options: (1) accept the standard insurance policy offered by the insurer, or (2) go without insurance.

Meadow Brook, ¶ 15 (citing *Giacomelli*, ¶ 42). "[I]f a third-party can show a promise in a contract creates a duty in the promisor to an intended beneficiary to perform the promise, then the intended beneficiary may enforce the duty." *ALPS Prop. & Cas. Ins. Co.*, ¶ 40 (citing *Harmon v. MIA Serv. Contracts*, 260 Mont. 67, 72, 858 P.2d 19, 22-23 (1993); Restatement (Second) of Contracts § 304 (Am. Law Inst. 1981)).

¶38 Helgeson paid a premium for liability insurance, including coverage for bodily injury or property damage stemming from accidents or negligence in its business as a construction company. The unambiguous intended beneficiaries of that policy are the homeowners who hire Helgeson to construct their homes. Homeowners in this case, although not "purchasers of the Policy," Opinion, ¶ 21, entered into a contractual relationship with Helgeson to build their homes with the understanding Helgeson was insured for any negligence in the construction of their homes. The majority attempts to narrow the reasonable expectations doctrine's applicability as applied to Homeowners by drawing a distinction between first-party and third-party claims, Opinion, ¶¶ 18-19; but that distinction is entirely inconsequential when the third-party is an intended beneficiary of the policy. The reasonable expectations of third-party *intended beneficiaries* have been recognized in this state since the doctrine's inception. *See Transamerica Ins. Co.*, 202

Mont. at 180-81, 656 P.2d at 824; *Meadow Brook*, ¶ 15. Homeowners, the intended beneficiaries for any damages for which Helgeson becomes liable, filed the Underlying Lawsuits alleging Helgeson negligently constructed their homes; this is the exact type of liability a reasonable consumer and the intended beneficiaries of liability insurance would expect to be covered. Without clear and unambiguous language as to the *cause* of the broad types of earth movement listed in its exclusion, it is objectively reasonable that Homeowners would expect that claims of negligent construction would be covered by the Policy.

¶39 The majority declares the reasonable expectations doctrine inapplicable in this case because the Policy is unambiguous, Opinion, ¶ 21, but that is precisely the point. The reasonable expectations doctrine provides that even unambiguous policies may be invalid as a matter of public policy when limits or exclusions contradict the objectively reasonable expectations of the insured or the policy's intended beneficiaries. *Meadow Brook*, ¶ 16 ("If the reasonable expectations doctrine only applied when a provision was ambiguous, there would be no need for the doctrine, as Montana law independently construes ambiguous provisions against the insurer and in favor of coverage.") (quoting *Fisher v. State Farm Mut. Auto. Ins. Co.*, 2013 MT 208, ¶ 19, 371 Mont. 147, 305 P.3d 861).

¶40 Just as we do not require an insured to comb through a CGL policy to discern the myriad situations that could apply to every exclusion where coverage is reasonably expected, it defies logic to require an identified intended beneficiary to do so. After confirming that Helgeson had a CGL policy in place to cover its liabilities related to the

negligent construction of their new homes, Homeowners' expectations that the Policy would cover damages resulting from Helgeson's negligence were objectively reasonable.

¶41 For most of us, home ownership is the bedrock of the American dream. It will be by far the single biggest investment, and the most consequential purchase, of most people's lives. It goes without saying that the construction of our family home is not an act taken lightly and it is not something most, if not all, homeowners would entrust to a builder who was not insured. The idea that claims for significant damage caused, even in part, by a homebuilder's negligent construction could be outright precluded by an exclusion in a CGL policy, the precise purpose of which is to provide coverage for any negligent construction by the homebuilder, is patently untenable. Simply stated, this Court should "not allow policy limitations and exclusions to defeat the precise purpose for which the insurance is purchased." *Hardy v. Progressive Specialty Ins. Co.*, 2003 MT 85, ¶ 48, 315 Mont. 107, 67 P.3d 892 (Rice, J., concurring in part and dissenting in part) (citation omitted).

The Exclusion Does Not Absolve EMC of All Coverage

¶42 Although I would affirm the District Court's conclusion that the Earth Movement Exclusion is invalid because of its ambiguity, I concur with the majority's conclusion that, even if not ambiguous, the Earth Movement Exclusion cannot absolve EMC for damages caused by Helgeson's negligence that are independent of any earth movement. Homeowners allege hundreds of thousands of dollars of damage to their homes attributable to Helgeson's negligence. While some of that damage may be the result of multiple factors that includes earth movement—such as misaligned doors and window shutters, foundation

movement issues, separation of exterior siding, and foundation wall and gypsum board cracking—other alleged damages are wholly independent of the earth movement itself.

¶43 Homeowners allege Helgeson negligently constructed their homes. If that is true, Helgeson's negligent construction was present upon completion, before any subsequent earth movement occurred and manifested the visible damage that alerted Homeowners to Helgeson's alleged negligence. In that regard, Homeowners allege, among other claims, that Helgeson ignored geotechnical reports that found the presence of sandy soil with the high probability of collapse requiring "extra care" and "deep foundation systems"—systems not installed by Helgeson. The remediation of Helgeson's alleged negligence that was present before any earth movement occurred obviously must be unrelated to any earth movement and therefore cannot fall under the exclusion. For example, if Homeowners decided to sell their homes shortly after construction was complete, and before any earth movement either occurred or caused any damage, and a home inspection revealed Helgeson's alleged negligence required remediation in order to make the homes marketable, it would be beyond question that the Earth Movement Exclusion could not apply since no earth movement had yet caused any damage. It would be a cruel and ironic interpretation of the exclusion in this case to hold that because Helgeson's alleged negligence, *combined* with the subsequent earth movement, caused additional damage to Homeowners' homes, that the *additional* damage foreclosed coverage for damages that would have otherwise not been subject to the exclusion.

¶44 Exclusions from coverage are narrowly and strictly construed "because they are contrary to the fundamental protective purpose of an insurance policy." *Park Place*

Apartments, ¶ 12. Following that principle, even if, as the majority holds, the Earth Movement Exclusion is unambiguous, it unambiguously applies *only* to those damages related to earth movement. It cannot apply to damages caused by Helgeson's negligence that may be recoverable independent of any earth movement. What those damages may be, and to what extent they may be segregated from the damages that are attributable to earth movement, remains a question for a fact-finder to decide in the Underlying Lawsuits. It is not susceptible to summary disposition in this declaratory judgment action.

Conclusion

¶45 I would hold that the District Court correctly found the Earth Movement Exclusion ambiguous and, consistent with our long-standing precedent interpreting ambiguous provisions in favor of coverage, all of Homeowners' alleged damages are not subject to the exclusion; thus, I dissent from the majority Opinion on that point. I concur with the majority's conclusion that, even if not ambiguous, the Earth Movement Exclusion cannot absolve EMC for damages caused by Helgeson's negligence if the fact-finder in the underlying action determines those damages are independent of any earth movement.

/S/ JAMES JEREMIAH SHEA

Chief Justice Mike McGrath and Justice Ingrid Gustafson join the Concurrence and Dissent of Justice James Jeremiah Shea.

/S/ MIKE McGRATH
/S/ INGRID GUSTAFSON