IN THE SUPREME COURT OF FLORIDA

CARLOS FAYAD and DORIS FAYAD,

Petitioners,

v. Case No. SC03-1808

CLARENDON NATIONAL INSURANCE COMPANY,

Respondent.

_____/

Respondent's Answer Brief on the Merits

On review from the Third District Court of Appeal

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STATEMENT OF THE CASE AND OF THE FACTS

Clarendon issued an insurance policy for the Fayads' house and certain personal property. (S.R. 184-211.) The Fayads made a claim on this policy for loss to their house and personal property. (R. 12.) Clarendon denied this claim on several grounds, including the policy's exclusion for earth movement. (R. 14, 15, 18.) Later, Clarendon moved for summary judgment. (S.R. 12-19.)

An engineer submitted an affidavit in support of Clarendon's motion stating that blasting could not have caused sufficiently strong vibrations to cause the loss to the Fayads' house and personal property. (S.R. 25-26, 30, 34.) Under the procedural standards pertinent to summary judgment, both the trial court and the Third District disregarded this in light of the Fayads' contrary contentions. (R. 25-26, 38-39.)

At the hearing on Clarendon's summary judgment motion, counsel for Clarendon assumed for purposes of the motion that the facts vis-à-vis loss causation in this case were identical to the facts in *State Farm Fire & Cas. Co. v. Castillo*, 829 So. 2d 242, 243 (Fla. 3d DCA 2002), *review denied sub nom*. 846 So. 2d 1147 (Fla. 2003). (R. 55.) In *Castillo*, an umpire "determined that the damage to the Castillos' home was caused by earth movement from blasting in the general vicinity." 829 So. 2d at 243. Counsel

for the Fayads sought to distinguish *Castillo* from this case on the differences between the policies, (R. 62-63), but did not distinguish the cases vis-à-vis loss causation, *id*. Accordingly, the trial court and the Third District both assumed, without deciding, that off-site blasting caused earth movement, which in turn caused the loss to the Fayads' house and personal property. (Pet'rs' Initial Br. on the Merits ["Pet'rs' Br."] at 3-4); *Fayad v. Clarendon Nat'l Ins. Co.*, 857 So. 2d 293, 295 (Fla. 3d DCA 2003).

The trial court granted Clarendon's motion for summary judgment. (R. 49-51.) The Third District affirmed. *Fayad*, 857 So. 2d at 296.

The issue on appeal is whether the lower court erred in granting Clarendon's motion for summary judgment. The underlying question is, assuming that the loss was caused by earth movement from off-site blasting or explosions, whether the policy's earth movement exclusion precludes recovery.

The standard of review is *de novo*. *The Fla. Bar v. Cosnow*, 797 So. 2d 1255, 1258 (Fla. 2001). "[I]f a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the

record." *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999).

SUMMARY OF ARGUMENT

This case and the case cited by the Fayads in support of their jurisdictional petition are distinguishable. Specifically, that case relies on either the efficient proximate cause doctrine or the concurrent cause doctrine. Those doctrines do not apply to the policy at issue here. Because there is no express and direct conflict among the district courts on the same question of law, review was improvidently granted and this appeal should be dismissed accordingly.

For purposes of this appeal, the underlying loss to the Fayads' house and personal property was caused by earth movement. The insurance policy at issue unambiguously excludes loss caused by earth movement. This court consistently refuses to award insurance proceeds for excluded losses.

The policy's earth movement exclusion lists several illustrative examples of what constitutes earth movement, such as earthquakes, landslides, and mine subsidence. The Fayads claim

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that these phenomena are all examples of natural earth movement, and from this premise reason that the exclusion pertains to natural earth movement only. This is the pivotal issue in this appeal because the Fayads claim that the earth movement that damaged their house was caused by man, specifically, by off-site blasting.

The illustrative examples listed within the earth movement exclusion may be either natural or anthropogenic. One of the cases cited by the Fayads found that mine subsidence, one of the illustrative examples in the Clarendon exclusion, is exclusively anthropogenic. Accordingly, the earth movement exclusion pertains to both natural and anthropogenic earth movement. Other courts have recognized this.

Several opinions from other jurisdictions hold that similar earth movement exclusions that list illustrative examples pertain to only natural earth movement. These opinions are premised on the assumption that the illustrative examples denote only natural earth movement, so therefore the general terms in the exclusion should be read accordingly. The assumption that the illustrative examples denote natural earth movement only is baseless. Because

this assumption is false, the conclusion that such exclusions pertain to only natural earth movement must also be false.

The Fayads claim that the earth movement exclusion must be strictly construed in their favor. However, this Court has consistently applied such construction only where the exclusion is still ambiguous after standard methods of contract construction prove inadequate. Even if the earth movement exclusion is facially ambiguous, standard construction techniques advocated by the Fayads demonstrate that the exclusion pertains to both natural and anthropogenic earth movement. Because construction resolves any assumed ambiguity, the exclusion must be applied as written.

The Fayads argue that because their personal property is insured against loss caused by explosion, their personal property is insured. However, the policy provisions governing personal property are subject to certain exclusions, including the earth movement exclusion. Accordingly, the analysis and result for the personal property loss is the same.

The court should find that review was improvidently granted and should therefore dismiss this appeal. Alternatively, because the plain language of the earth movement exclusion precludes

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recovery for the underlying loss to both the house and personal property, this Court should affirm the Third District's decision.

ARGUMENT

I. Review was improvidently granted

The Fayads rely on a purported conflict between the Third District's decision in this case and the Fourth District's decision in *Phoenix Ins. Co. v. Branch*, 234 So. 2d 396 (Fla. 4th DCA 1970), to invoke this Court's review under article V, section 3(b)(3) of the Florida Constitution. (Pet'rs' Br. at 1, 4-6.) That section provides in part that this court "may review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of

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appeal or of the supreme court on the same question of law." Art. V, § 3(b)(3), Fla. Const.

a. The Third District's decision in this case and *Phoenix Insurance* are materially distinguishable.

In *Phoenix Insurance*, the policy excluded loss caused by earth movement. 234 So. 2d at 398. The insurer argued that cracks in the insured's home were due to earth movement caused by off-site dredging and blasting, so the cracks were not covered under the policy. *Id.* The court in *Phoenix Insurance* rejected this argument, finding that the parties had tried by consent that the damage was due to blasting. *Id*. at 399. Because blasting was not an excluded cause of loss under the policy, the court found that the loss was covered. *Id.*

Conversely, the Third District held in this case that the insurance policy's earth movement exclusion precluded recovery. *Fayad*, 857 So. 2d at 297. The Fayads contend that these different results create sufficient conflict to justify asking this Court to grant review. (Pet'rs' Br. at 6.)

Construing the provision of Article V, section 3(b)(3) on which the Fayads rely, this Court has observed it will exercise its discretion to hear conflict cases only where two district

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court decisions "have arrived at different conclusions in two situations not materially distinguishable", thereby "produc[ing] a real embarrassing conflict in the law which the Constitution contemplates must be resolved by this Court." *Eskind v. City of Vero Beach*, 159 So. 2d 209, 210-211 (Fla. 1963) (citing section 3(b)(3)'s predecessor). Thus, if the situations of two cases are materially distinguishable, there is no embarrassing conflict and this Court will decline review. *See id.*

i. *Phoenix Insurance* rests on the efficient proximate cause doctrine

The court in *Phoenix Insurance* was presented with evidence that the loss was caused by both a covered peril (blasting) and an uncovered peril (earth movement). *See* 234 So. 2d at 398-99. A federal district court surveyed Florida law concerning "when a loss is caused by both a covered and an excluded peril." *Paulucci v. Liberty Mut. Fire Ins. Co.*, 190 F. Supp. 2d 1312, 1317 (M.D. Fla. 2002). The court found that two standards pertained, the "concurrent cause doctrine" and the "efficient proximate cause doctrine". *Id.* The court distinguished the two as follows:

> The concurrent cause doctrine and the efficient proximate cause doctrine are not mutually exclusive.

> Rather, they apply to distinct factual situations. The concurrent cause doctrine applies when multiple causes are independent. The efficient proximate cause doctrine applies when the perils are dependent. Causes are independent when they are unrelated, such as . . . a windstorm and wood rot. Causes are dependent when one peril instigates or sets in motion the other, such as an earthquake which breaks a gas main that starts a fire.

190 F. Supp. 2d at 1319. Under Florida law, "where there is a concurrence of different causes, the efficient cause - the one that sets others in motion - is the cause to which the loss is to be attributed . . . ." *Hartford Accident and Indem. Co. v. Phelps*, 294 So. 2d 362, 364 (Fla. 1st DCA 1974). Seen in this light, the *Phoenix Insurance* opinion is a straightforward application of the efficient proximate cause doctrine[1] – a covered peril instigated or set in motion an uncovered peril, and the court attributed the loss to the covered peril. 234 So. 2d at 399.

[1] Whether Florida still follows the efficient proximate cause doctrine is questionable. *Arawak Aviation v. Indem. Ins. Co. of N. Am.*, 285 F.3d 954, 957 (11th Cir. 2002) (expressing "concerns . . . regarding the applicability of the so-called efficient cause doctrine in Florida law"); *Paulucci*, 190 F. Supp. 2d at 1318 (finding "the concurrent clause doctrine is the prevailing standard under Florida law" where a loss is caused by both a covered and an excluded peril). However, because the exclusion supplants both the efficient proximate cause and the concurrent cause doctrine, the Court need not resolve this question.

ii. Clarendon's policy supplants the efficient proximate cause doctrine

"The efficient proximate cause doctrine is a default rule which gives way to the language of the contract." *Pioneer Chlor Alkali Co. v. Nat'l Union Fire Ins. Co.*, 863 F. Supp. 1226, 1232 (D. Nev. 1994) (citations omitted). This is important here because the exclusion at issue differs from the one at issue in *Phoenix Insurance* in several key respects. *Compare* 234 So. 2d at 398 *with Fayad*, 857 So. 2d at 295. The most pertinent difference is that the exclusion here excludes loss from earth movement "regardless of any other cause or event contributing concurrently or in any sequence to the loss. . . ." *Fayad*, 857 So. 2d at 295.

Faced with an earth movement exclusion that applied regardless of "whether other causes acted concurrently or in any sequence with the excluded event to produce the loss", *Chase v. State Farm Fire & Cas. Co.*, 780 A.2d 1123, 1130 (D.C. 2001), one court observed:

> [I]f earth movement was a contributing cause of the loss of [the insured's] property, the policy does not cover that loss – even if earth movement was not the (efficient) proximate cause and there were more dominant causes involving covered risks. The causation

> language in the introduction to the earth movement exclusion is clearly intended to supplant the efficient proximate cause doctrine.

Id. (parentheses in original) (citation omitted). The court allowed the policy to trump the efficient cause doctrine, noting that this was permissible because the District of Columbia has no statute or public policy requiring otherwise. *Id.* Likewise Florida. *See Arawak Aviation*, 285 F.3d at 958 ("[T]he efficient cause doctrine cannot be incorporated into an insurance policy if doing so would render part of the policy meaningless.") (citing *Premier Ins. Co. v. Adams*, 632 So. 2d 1054, 1057 (Fla. 5th DCA 1994) ("An interpretation which gives a reasonable meaning to all provisions of a contract is preferred to one which leaves a part useless or inexplicable.")); *see also Fla. Residential Prop & Cas. Joint Underwriting Ass'n v. Kron*, 721 So. 2d 825, 826 (Fla. 3d DCA 1998) (finding support for its decision of no coverage in "the plain language of the lead-in clause to the exclusionary provision, which clearly states that this type of water damage is excluded, 'regardless of any other cause or event contributing concurrently or in any sequence to the loss.'"). Accordingly,

the exclusion's lead-in provision supplants the efficient proximate cause doctrine.

b. There is no embarrassing conflict in the law

Because the policies at issue in this case and in *Phoenix Insurance* are so readily distinguishable, it makes sense that different results obtained. Thus, there is no reason why the Third District decision in this case and *Phoenix Insurance* cannot co-exist. Accordingly, this court should dismiss review of this case as improvidently granted. *See Abraham v. Abraham*, 775 So. 2d 937, 938 (Fla. 2000) (dismissing review after initially accepting review based on alleged express and direct conflict under article V, section 3(b)(3), of the Florida Constitution); *Strahan v. Gauldin*, 800 So. 2d 225 (Fla. 2001).

II. The policy does not cover the loss to the house

a. The earth movement exclusion is not ambiguous

The exclusion at issue provides:

> 1. We do not insure for loss caused directly 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. . . .
>
> b. Earth movement, meaning earthquake, including land shock waves or tremors before, during or after a volcanic eruption; landslide; mine subsidence; mudflow;

earth sinking, rising, or shifting; unless direct loss by:
(1) Fire;
(2) Explosion . . .

ensues and then we will pay only for the ensuing loss.

(S.R. 188, 201.) Dividing the several examples following "Earth movement" by their semicolons[2] reveals:

Earth movement, meaning

[·] earthquake, including land shock waves or tremors before, during or after a volcanic eruption;
[·] landslide;
[·] mine subsidence;
[·] mudflow;
[·] earth sinking, rising, or shifting;

Id. With the minor exception of whether "land shock waves or tremors [etc.]" modifies "earthquake" or is its own category, the Fayads seem to agree with this conception of the exclusion's structure. (Pet'rs' Br. at 16.)

The Supreme Court of Kansas was faced with a similar provision (albeit one without the lead-in clause):

[2] Semicolons should be used to separate items in a series if the series is complicated or contains internal commas. Richard C. Wydick, Plain English for Lawyers 96 (4th ed. 1998). Separating "earthquake" from "including land shock waves or tremors before, during or after a volcanic eruption" with an internal comma indicates that the latter phrase modifies "earthquake".

> This Company Shall Not Be Liable . . . for loss caused by, resulting from, contributed to or aggravated by any earth movement, including but not limited to earthquake, landslide, mud flow, earth sinking, rising or shifting, unless loss by fire or explosion ensues, and this Company shall then be liable only for such ensuing loss; . . . .”

Stewart v. Preferred Fire Ins. Co., 477 P.2d 966, 968 (Kan. 1970) (emphasis omitted). The court found that the term “‘earth movement,’ taken in its plain, ordinary and popular sense means any movement of the earth be it up, down or sideways.” *Id.* at 969. The court found further that the illustrative examples that followed (i.e., earthquake, landslide) “all refer to vertical or horizontal movements of earth or soil, wet and dry.” *Id.* The court concluded that it “fail[ed] to see how the exclusionary clause can be considered ambiguous. The words used may not reasonably be understood to have two or more possible meanings.” *Id.* This court should likewise find that the exclusion is not ambiguous. *See id.*; *see also Century Park East Homeowners Ass’n v. Northbrook Prop. & Cas. Ins. Co.*, 21 Fed. Appx. 708, 709 (9th Cir. 2001) (affirming summary judgment for insurer under earth movement exclusion; noting “it is pellucid that the unqualified phrase ‘any earth movement’ includes all types of movement, both

sudden and sluggish, and both natural and artificial movement.") (citations omitted); *Castillo*, 829 So. 2d at 243.

b. This Court consistently upholds denials of coverage premised on an unambiguous exclusion

Because the Fayads' loss is due to earth movement, and because the Fayad's insurance policy plainly excludes such losses, the Fayads cannot recover from Clarendon. *See Deni Assocs. v. State Farm Fire & Cas. Ins. Co*., 711 So. 2d 1135, 1141 (Fla. 1998) (affirming judgments denying coverage to insureds premised on plain language of policy exclusions).

c. The exclusion pertains to both natural and anthropogenic earth movement

i. Mine subsidence is solely anthropogenic

Despite this, the Fayads argue that this exclusion pertains only to natural, as opposed to anthropogenic, earth movement, or at least is ambiguous on the point and should therefore be construed in their favor. (Pet'rs' Br. at 7, 13-16.) In support, the Fayads contend that the illustrative examples listed in the exclusion (earthquakes through mudflow) are "natural". *Id.* at 16. Therefore, their argument continues, the final catch-all category of "earth sinking, rising or shifting" is limited to "natural" causes too. *Id.*

The Supreme Court of Kansas rejected this argument, but thought it was "ingenious". *Stewart*, 477 P.2d at 969. In this case, however, the argument is disingenuous - in a case the Fayads cite, (Pet'rs' Br. at 13), the court held that "mine subsidence" denotes anthropogenic earth movement. *Peters Township School Dist. v. Hartford Accident & Indemnity Co.*, 833 F.2d 32, 38 (3d Cir. 1987). The court reasoned that man's extraction of underground coal led ultimately to the subsidence, so the loss in that case was brought about by "other than natural causes". *Id.* Because the court had already determined that the earth movement exclusion at issue, which did not include mine subsidence, *id.* at 33, applied only to natural earth movement, *id.* at 36, the anthropogenic movement was a covered cause of loss, *id.* at 38.

In sum, the exclusion at issue excludes loss caused by earth movement, and one of the illustrative examples in that exclusion is mine subsidence. (S.R. 188, 201.) The Fayads argue that the entire exclusion pertains only to natural earth movement because the specifically listed phenomena in that exclusion, including mine subsidence, are exclusively natural. (Pet'rs' Br. at 13-16.) In support of this, the Fayads cite *Peters Township. Id.*

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at 13. *Peters Township* specifically holds mine subsidence is **not** natural earth movement. 833 F.2d at 38.

ii. The other illustrative examples can be either natural or anthropogenic

The Fayads also note that several opinions involving earth movement exclusions that list illustrative examples of such movement hold that such exclusions pertain to natural earth movement only. (Pet'rs' Br. at 12-14) (citations omitted). The common thread between these opinions is the assumption that the illustrative examples denote natural phenomena only. *See, e.g., Fayad*, 857 So. 2d at 296; *Cox v. State Farm Fire & Cas. Co*., 459 S.E.2d 446, 447 (Ga. Ct. App. 1995). These assumptions are not well-founded, as every phenomenon listed in the exclusion can be (in the case of mine subsidence, is exclusively) anthropogenic. *Peters Township*, 833 F.2d at 38; Wilgus B. Creath, Home Buyers' Guide to Geologic Hazards 9 (Am. Inst. of Professional Geologists 1996) (observing the most common form of subsidence is "the collapse of natural and man-made voids"); National Research Council, Board on Earth Sciences and Resources, Solid Earth Sciences & Society 195 (National Academy Press 1993) ("Subsidence can have human-induced or natural causes; both are costly. In

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the United States at least 44,000 km^2 of land has been affected by subsidence attributed to human activity, and the figure is probably higher."); Glossary of Geology 624 (2d ed. 1980) (noting subsidence "may be caused by natural geologic processes . . . or by man's activity"); George Gates, Earthquake Hazards, in Geologic Hazards and Public Problems 19, 19 (Robert A. Olson et al. eds., 1969) ("earthquake hazards are in part natural phenomena and in part man-made."); Edward B. Nuhfer et al., The Citizens Guide to Geologic Hazards 40 (Am. Inst. of Professional Geologists 1993) ("minor earthquakes have been produced by human activities . . . ."); *id.* at 77 (noting under heading "Landslides and Avalanches" that "[p]eople are very capable of causing catastrophic slope failures"); Glossary of Geology 349 (defining "landslide" to include "mudflow").

Courts have recognized that these phenomena can be caused by man. *Chase*, 780 A.2d at 1129 ("Nor is it true that the examples of earth movement set forth in the exclusion are necessarily all natural events. Except, perhaps, for earthquakes, all of them may result from 'non-natural' human activities as well as natural causes."); *Stewart*, 477 P.2d at 970 ("[W]e cannot agree that landslides, mudflows, earth sinking, rising or shifting are

natural phenomena or 'acts of God.' . . . For the most part the events enumerated in the exclusionary clause originate from the negligence or carelessness of man . . . ."). This Court should likewise reject the false assumptions underpinning the opinions cited by the Fayads and find that the exclusion here is not ambiguous and excludes loss from both natural and anthropogenic earth movement. *Stewart*, 477 P.2d at 969; *Century Park East*, 21 Fed. Appx. at 709 ("Of course, we recognize that when a policy provision is 'capable of two or more constructions, both of which are reasonable,' it will be deemed ambiguous . . . However, that certainly does not mean that a provision is ambiguous simply because a court, somewhere, has deemed it so.") (citations omitted).

iii. The canons of construction do not apply to this unambiguous exclusion

The Third District used the canon of construction *expressio unius est exclusio alterius*. *Fayad*, 857 So. 2d at 296. The petitioners argue that this Court should not use this canon, (Pet'rs' Br. at 14), and should instead use the canons *ejudem generis* and *noscitur a sociis*, (*id.* at 15).

Both the Third District and the Fayads miss the mark, as canons of construction are brought to bear only where the statute or contract to be construed is ambiguous. *Jacobo v. Bd. of Trustees*, 788 So. 2d 362, 364 (Fla. 3d DCA 2001) ("The doctrine of *ejusdem generis* is applicable only where there is some ambiguity or inconsistency . . . ."); *Hayes-Sammons Chem. Co. v. United States*, 55 C.C.P.A. 69, 75-76 (C.C.P.A. 1968) ("Only in situations of ambiguity requiring resort to principles of statutory construction may resort be had to the rule of *noscitur a sociis*.") (citation omitted); *State v. Story*, 75 P.3d 137, 141 (Ariz. Ct. App. 2003) (finding "no need to resort to a rule of construction such as *expressio unius*" where statutes were not ambiguous when read together). Stated differently, the canons exist to resolve ambiguity, not create it. *Dvorken Family Ltd. Partnership v. Martin Marietta Materials, Inc.*, No. SA-03-CA-0031 FB; 2004 U.S. Dist. LEXIS 422, *28 (W.D. Tex. Jan. 6, 2004) (rejecting attempt to use *ejusdem generis* and *expressio unius* "to create an ambiguity where none exists.") (citation omitted). Because the exclusion at issue is not ambiguous, *see* discussion *supra* at II.a, it would be inappropriate to use any canon of construction.

iv. Because the exclusion is not ambiguous, this Court's precedent precludes its strict interpretation

The Fayads contend that policy exclusions must be read strictly. (Pet'rs' Br. at 10.) This ignores the "repeated admonitions of the Florida Supreme Court that 'only when a genuine inconsistency, uncertainty, or ambiguity in meaning remains after resort to the ordinary rules of construction is [this] rule apposite.'" *Arawak Aviation*, 285 F.3d at 956 (citing *State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So. 2d 1245, 1248 (Fla. 1986) (quoting *Excelsior Ins. Co. v. Pomona Park Bar & Package Store*, 369 So. 2d 938, 942 (Fla. 1979)); *accord Deni Assocs.*, 711 So. 2d at 1138. In keeping with these admonitions, this Court should decline to read this unambiguous exclusion strictly.

v. If the canons of construction apply, then the exclusion's general terms embrace both natural and anthropogenic earth movement

Assuming that the exclusion is ambiguous, this Court must exhaust the ordinary rules of construction before giving up and construing the exclusion in favor of the Fayads. *Deni Assocs.*, 711 So. 2d at 1138 (finding such construction justified "only when a genuine inconsistency, uncertainty, or ambiguity in

meaning remains **after resort to the ordinary rules of construction**") (citations omitted) (emphasis added). Thus, as the Fayads argue, this court should use the canons of construction *ejudem generis* and *noscitur a sociis* in construing the policy, (Pet'rs' Br. at 15), before finding the exclusion is hopelessly ambiguous, *Deni Assocs*., 711 So. 2d at 1138. Under these rules, the general term "earth sinking, rising, or shifting" will be interpreted in line with the listed illustrative examples, e.g., earthquakes, mine subsidence, etc. (Petr's' Br. at 15.) Because these illustrative examples are caused by both nature and man, *supra* at II.c.i and II.c.ii, the general term should be construed accordingly. *State Farm Mut. Auto. Ins. Co. v. Beck*, 734 P.2d 398, 400 (Or. Ct. App. 1987).

vi. Cases involving State Farm policies are instructive

Where an insured's house sustained cracking damage caused by earth movement from nearby blasting, the Third District found that State Farm's earth movement exclusion precluded recovery. *Castillo*, 829 So. 2d at 247. In an effort to blunt the persuasive force of *Castillo*, the Fayads argue that cases involving State Farm policies are inapposite. (Pet'rs' Br. at

18-20.) It is true that the State Farm exclusion provides that earth movement is excluded "regardless of . . . the cause of the excluded event . . . [or] whether the event . . . arises from natural or external forces," *Castillo*, 829 So. 2d at 243. It is also true that the Clarendon exclusion has no such provisions. (S.R. 188, 201.) However, this makes no difference here.

The Fayads contend that the State Farm exclusion is "unique", (Pet'rs' Br. at 19), by which they imply that cases involving the State Farm exclusion, like *Castillo*, have no bearing here. In *Chase*, one of the cases the Fayads cite, *id.*, the court observed that other courts had noted that the State Farm exclusion is unique, 780 A.2d at 1129 n.3 (citations omitted). The court cautioned that because its decision of no coverage was predicated on the precise language of the exclusion, the court "might reach different conclusions" if another company's policy was at issue, 780 A.2d at 1129 n.3.

Under its instructive two-step analysis, the court would have reached the same result if the Clarendon policy was at issue. *Chase*, 780 A.2d at 1129-30. First, the court determined whether the earth movement exclusion governed the loss[3]. 780 A.2d at

[3] A burst pipe caused earth movement, which in turn caused the loss. *Chase*, 780 A.2d at 1126.

1129. The court found it did, because (a) the listed examples did not refer to only natural earth movement and (b) the exclusion expressly applied to earth movement regardless of the cause. *Id.* Either (a) or (b) would have sufficed; the court's recital of both may best be seen as legal lily-gilding. Having determined that the exclusion did govern the loss, the court next determined w-hether the efficient proximate cause doctrine permitted the insureds to recover anyway. *Id.* The court found it did not because the exclusion foreclosed application of that doctrine. *Id.* at 1130.

This court should engage in the same two-step analysis as the court in *Chase*. First, the Court should determine that the Clarendon exclusion governs the Fayads' loss. While this exclusion is not identical to the one at issue in *Chase*, the two exclusions are close enough for *Chase* to be instructive. Specifically, both exclusions list illustrative examples of phenomena that can result from both natural and human activity. *Compare Chase*, 780 A.2d at 1129 *with* S.R. 188 and 201. Having satisfied itself that the exclusion does govern the loss, this Court should then determine whether the efficient proximate cause doctrine permits recovery anyway. As with the State Farm

exclusion, 780 A.2d at 1130, the Clarendon exclusion supplants that doctrine, (S.R. 188, 201). Following the same analysis as *Chase*, this Court should reach the same result as *Chase*. 780 A.2d at 1125 (holding the policy unambiguously excludes coverage for the insured's loss).

III. The policy does not cover the loss to personal property

The provisions of the policy pertinent to the Fayads' house constitute a so-called[4] "all risk" policy, by which all losses are covered unless they are specifically excepted or excluded. *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 710 (Cal. 1989). Conversely, the provisions of the policy pertinent to the Fayads' personal property is a "named peril" policy, by which only those risks specifically insured against fall within the basic grant of coverage. *Id.* The Fayads recognize this dual approach to coverage. (Pet'rs' Br. at 20 n.7.)

As with all risk policies, named peril policies may be subject to exclusions. *New Hampshire Ins. Co. v. Carter*, 359 So. 2d 52, 53 (Fla. 1st DCA 1978) (noting policy insured against loss to personal property "by the following perils as defined and

[4] Several courts have noted over the years that the term "all risk" is a misnomer and is not synonymous with "all loss". *Intermetal Mexicana, S.A. v. Ins. Co. of N. Am.*, 866 F.3d 71, 75 (3d Cir. 1989) (citations omitted).

limited, except as otherwise excluded"); *Admiral Ins. Co. v. Am. Nat'l Saving Bank, F.S.B.*, 918 F. Supp. 150, 152 (D. Mary. 1996) ("the policy covered against loss due to specific named perils, and also subject to certain exclusions.").

The provisions of the policy pertinent to the Fayads' personal property covers loss caused by explosions, "unless the loss is excluded in SECTION I – EXCLUSIONS." (S.R. 200) (emphasis in original). The earth movement exclusion is part of Section I – Exclusions. (S.R. 188, 201); *see also Fayad*, 857 So. 2d at 297 ("Although 'explosion' is a listed peril . . . it is nevertheless expressly limited by the policy's exclusions."). Because their personal property loss was caused by earth movement, *supra* at 1-2, the Fayads cannot recover for their personal property loss. *Supra* at II.

IV. Conclusion

The Third District's decision is consistent with the precedents of this Court and the other District Courts of Appeal. Accordingly, this Court should find that review was improvidently granted and dismiss this appeal.

The trial court correctly found that the earth movement exclusion was not ambiguous and applied to both real and personal

property. This Court has consistently found that where a loss falls within the ambit of an unambiguous exclusion, the insured cannot recover. For the reasons set forth in this brief, this Court should affirm summary judgment in favor of Clarendon.

DATED this ___ day of June, 2004.

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CERTIFICATE OF COMPLIANCE

I certify that this brief is in 12 point Courier New font and complies with the font requirements of Fla. R. App. P. 9.210(A)(2).

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