STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals, Honorable Mark J. Cavanagh, Presiding Judge

SONG YU and SANG CHUNG,

Plaintiffs-Appellees,

v

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, a Michigan insurance company,

Defendant-Appellant.

Supreme Court No. 155811
Court of Appeals No. 331570
Ingham Circuit No. 14-1421-CK

DEFENDANT/APPELLANT FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

Respectfully submitted,

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STATEMENT OF THE BASIS OF JURISDICTION

On May 23, 2017, defendant-appellant Farm Bureau General Insurance Company of Michigan (Farm Bureau) timely applied for leave to appeal from the unpublished April 11, 2017 Court of Appeals opinion,[1] which in a split opinion reversed the trial court's January 28, 2016 order[2] granting Farm Bureau summary disposition and denying plaintiffs' motion for summary disposition. The transcript of the hearing on the motion is attached as Exhibit C.[3] Farm Bureau's grounds for appeal are based on MCR 7.303(B)(1) and MCR 7.305(B)(3) and (5)(a). This Court granted leave to appeal in its December 20, 2017 order. Therefore, jurisdiction is vested in this Court pursuant to MCR 7.303(B)(1).

[1] See Exhibit A, appendix 2A-10A.
[2] See Exhibit B, appendix 12A-13A.
[3] M Tr 11/9/11, appendix 15-A-32A.

STATEMENT OF QUESTIONS INVOLVED

In its December 20, 2017 order granting leave to appeal, this Court directed the parties to address the following issues:

I. Whether the plain language of the insurance policy precluded coverage?

Defendants/Appellants say: Yes.
Plaintiff/Appellee says: No.
Trial Court said: Yes.
Court of Appeals said: Majority did not answer, dissent said yes.

II. If so, whether and under what circumstances the doctrine of equitable estoppel may be applied to require an insurer to expand coverage that is contrary to the express terms of an insurance contract?

Defendants/Appellants say: only in situations pertaining to liability coverage when an insurer defends without a issuing a reservation of rights letter or filing a declaratory action that there is no coverage, but an insurer may later raise additional grounds for non-coverage if there is no unreasonable delay and no demonstrable prejudice to the insured.
Plaintiff/Appellee says: did not address.
Trial Court said: did not address.
Court of Appeals said: did not address.

III. Whether an equitable estoppel claim requires that (a) a party against whom the doctrine of equitable estoppel is to be applied has full knowledge of the facts and circumstances involved, and (b) justifiable reliance on the part of the party seeking to invoke it is shown?

Defendants/Appellants say: Yes.
Plaintiff/Appellee says: No.
Trial Court said: Yes.
Court of Appeals said: Majority said no. Dissent said yes..

IV. Whether the defendant-insurer should be equitably estopped from denying coverage in this case.?

Defendants/Appellants say: No.
Plaintiff/Appellee says: Yes.
Trial Court said: No.
Court of Appeals said: Majority said yes, dissent said no.

INTRODUCTION

The plain language of the insurance policy precluded coverage.

The plain language of the policy covered only the dwelling "where you reside" and excluded coverage for a dwelling "unoccupied beyond a period of six consecutive months." Occupied was defined as "being lived in with regular and continuous legal presence of human inhabitants." This Court's opinion in *Heniser, infra,* and the Court of Appeals opinion in *McGrath, infra,* establish that this language means that the insured must actually live at the property at the time of loss. A permanent residence elsewhere precludes a finding that the person actually lived at the property at the time of loss. Because the insureds in the instant case did not actually live at the property at the time of loss, and had not lived there for more than three years, the plain language of the policy precluded coverage.

Circumstances under which the doctrine of equitable estoppel may be applied to require an insurer to expand coverage that is contrary to the express terms of an insurance contract.

The only basis in which equitable estoppel may be applied to require an insurer to expand coverage that is contrary to the express terms of an insurance contract is when the insurer represents the insured without notifying the insured that it intends to dispute coverage. If the insurer provides timely notice to the insured that it disputes coverage, whether through a reservation of rights letter or through a declaratory action, there can be no estoppel. Moreover, an insurer may later raise grounds for non-coverage if there has been no unreasonable delay in doing so and if the insured cannot demonstrate prejudice as a result of the delay in raising the new grounds.

An equitable estoppel claim requires both that (a) a party against whom the doctrine of equitable estoppel is to be applied has full knowledge of the facts and circumstances involved, and (b) justifiable reliance on the part of the party seeking to invoke it is shown.

For nearly 100 years, Michigan jurisprudence has required the party against whom equitable estoppel is sought to have knowledge of the actual facts, and has declined to impose estoppel against a party that was not aware of the essential facts. This requisite knowledge must be made an essential element to invoke equitable estoppel.

Michigan jurisprudence has held that the person claiming equitable estoppel must not only be destitute of knowledge of the true facts but also destitute of the means to obtain the true facts. A party cannot claim justifiable reliance on incorrect facts if the party knows or has the means to obtain the true facts. Therefore, justifiable reliance is essential to an equitable estoppel claim and should be included as an element that the person seeking equitable estoppel must prove.

Farm Bureau should not be equitably estopped from denying coverage in this case.

When plaintiffs had in their possession facts that would have precluded coverage under the policy, and they withheld these facts from Farm Bureau, they should not be permitted to claim that they justifiably relied on Farm Bureau's actions so as to estop Farm Bureau from relying on its policy provisions precluding coverage.

STATEMENT OF FACTS

This case involves a water damage claim at the location of 1724 Forest Drive, in Portage, Michigan on December 25, 2013. Plaintiffs purchased and moved into the premises in late 2006.[4] They insured the house with a homeowners policy issued by Farm Bureau.[5] The insuring provision in the policy provided property protection coverage to the dwelling on the *residence premises*:

> SECTION I - PROPERTY COVERAGES
>
> We provide the following coverages only if such coverages appear, with a limit of liability, in the Declarations of this policy under Section I Property Coverage.
>
> COVERAGE A - DWELLING
>
> We cover:
>
> 1. the dwelling on the **residence premises**, including structures attached to the dwelling . . .[6]

It relevantly defined residence premises as "the one family dwelling, other structures, and grounds . . . *where you reside* and which is shown in the Declarations of this policy."[7]

To further underscore the requirement that the insured had to live in the dwelling listed in the declarations, the policy contained an "increase in hazard" provision that precluded coverage if the house was vacant more than 60 days, unoccupied more than 6 months, or, if designated "Location (Seasonal)," unoccupied more than 12 months:

> 14. Increase In Hazard.

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[4] Examination Under Oath (EUO) of Song Yu, 5/14/14, pp 6-7, attached as Exhibit B to Farm Bureau's Response to Plaintiffs' Summary Disposition Motion and Counter-Motion for Summary Disposition, attached to Farm Bureau's application for leave to appeal in this Court as Exhibit D. appendix 40A-41A.

[5] Policy, attached as Exhibit A to Bureau's Response to Plaintiffs' Summary Disposition Motion and Counter-Motion for Summary Disposition, attached to Farm Bureau's application for leave to appeal in this Court as Exhibit E, appendix 143A-172A.

[6] Policy, form GH 65 01 10 10c, pp 4 of 19, appendix 149A.

[7] Policy, form GH 65 01 10 10c, p 3 of 19, appendix 148A.

> Unless otherwise provided in writing, we will not be liable for loss occurring:
>
> a. while the hazard is increased by any means within your control or knowledge; or
>
> b. *while a described building*, whether intended for occupancy by owner or tenant, *is vacant beyond a period of 60 consecutive days or is unoccupied beyond a period of six consecutive months*. However, if "Location (Seasonal)" appears in the Declarations of this policy, we will not be liable for loss occurring while a described building is unoccupied beyond a period of 12 consecutive months.[8]

Plaintiffs' policy did not contain the "Location (Seasonal)" designation in the Declarations, which would have permitted the house to remain unoccupied for 12 months before coverage was lost.[9]

The policy provided property coverage only for the dwelling and buildings[10] on the residence premises, which was defined as "the one family dwelling, other structures, and grounds . . . where you reside and which is shown in the Declarations of this policy."[11] And an endorsement required the insured to state in the proof of loss any "changes in title or occupancy of the property during the term of the policy."[12]

In July 2010, plaintiffs moved to an apartment in Okemos, Michigan to be closer to Song Yu's new job.[13] Plaintiffs did not contact their agent at this time or any time before 2013 to advise of the home's vacancy or obtain the "Location (Seasonal)" designation in the Declarations.[14]

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[8] Policy, form GH 65 01 10 10c, p 4 of 19 (emphasis added), appendix 149A.
[9] Policy appendix 143A-144A, 149A.
[10] Policy, form GH 65 01 10 10c, pp 4-5 of 19, appendix 149A-150A.
[11] Policy, form GH 65 01 10 10c, p 3 of 19, appendix 148A.
[12] Policy, form GH 66 32 10 12, p 1 of 2, appendix 165A.
[13] EUO of Song Yu, p 6, appendix 40A; Song Yu affidavit ¶ 4, appendix 174A..
[14] See Affidavit of Song Yu, 11/11/15, ¶¶ 23-27, attached as Exhibit 1 to plaintiffs' appellant brief in the Court of Appeals, attached to Farm Bureau's application for leave to appeal in this Court as Exhibit F, appendix 176A-177A; EUO of Song Yu, p 102, appendix 136A; Examination Under Oath

In February 2013, Song Yu filed a claim for water damage to the subject property.[15] Farm Bureau adjuster Linda Ricks contacted Mr. Yu and scheduled a visit.[16] Mr. Yu informed Ms. Ricks that he was moving. Ms. Ricks assumed after visiting the subject property that plaintiffs were moving from the subject property to Lansing:

> [W]hen he told me he was moving and then when I did make the inspection it was evident that that was the case, there were boxes of goods boxed up and that I thought it was in the process of moving. There were doors laying on the living room floor, kitchen cabinets being painted, and he said that he had been doing some repairs to get ready to put it on the market. That seemed logical to me.[17]

Ms. Ricks noted in her activity log that plaintiffs were moving to Lansing, and the house was going on the market.[18] She testified that the insured "had told me they were going back and forth and doing repairs to prepare it to go on the market. And the doors laying on the living room floor being painted and the boxes made me feel like that was what was happening."[19] Mr. Yu averred that while he probably told Ms. Ricks that they were living in Lansing, he did not tell her they were moving from the subject property because they had actually moved to the Lansing area in 2010.

> 24. Though I also don't remember our February 8, 2013 conversation, it is quite probable that I told her that I was living in Lansing; that we were going back and forth [to our lake home] on weekends and that we were doing some repairs to prepare our lake home to go on the market (because these facts are correct).

(EUO) of Sang Chung, 5/14/14, p 23, attached as Exhibit E to Farm Bureau's response to plaintiffs' summary disposition motion and counter motion for summary disposition, attached to Farm Bureau's application for leave to appeal in this Court as Exhibit G, appendix 202A.

[15] Deposition of Linda Ricks, 5/21/15, pp 11-13, attached as Exhibit D to Farm Bureau's Response to Plaintiffs' Summary Disposition Motion and Counter-Motion for Summary Disposition, attached to Farm Bureau's application for leave to appeal in this Court as Exhibit H, appendix 237A-239A.

[16] Activity Log Report, Exhibit 5C to Plaintiff's Brief in Support of Summary Disposition, attached to Farm Bureau's application for leave to appeal in this Court as Exhibit I, appendix 294A-295A.

[17] Ricks Dep, pp 17-18, appendix 243A-244A.

[18] Activity Log Report, appendix 294A-295A.

[19] Ricks Dep, pp 39-40, appendix 265A-266A.

> 25. However, I am absolutely sure I did not tell her that we were moving from our lake home. This is because we had moved to the Lansing area more than 2-1/2 years earlier (in June of 2010).[20]

Because Ms. Ricks interpreted Mr. Yu's (less than clear) statements (because of Mr. Yu's prior failure to advise that plaintiffs had moved in 2010) in the context of what she observed at the subject property to mean that plaintiffs were in the process of moving from the subject property, she did not ask whether the house had been vacant for 60 days.[21] Because it did not appear to Ms. Ricks that the house had been vacant or unoccupied for the requisite length of time, Farm Bureau paid the February 2013 water damage claim;[22] Ms. Ricks did note in the activity log to send notice to underwriting that plaintiffs were getting ready to list their house and the house may be sitting empty, but she forgot to do so.[23]

In May 2013, the couple moved from their apartment in Okemos to their house on Cricket Lane in East Lansing.[24] Plaintiffs did not call to advise Farm Bureau of their move to East Lansing. They insured their East Lansing home through Citizens, not Farm Bureau, thus providing no notice whatsoever to Farm Bureau that they had actually moved.[25] In approximately June or July 2013, plaintiffs listed the subject property for sale for six months with a realtor.[26] They did not advise Farm Bureau that they listed the subject property for sale.

On December 8, 2013, the policy automatically renewed. As a result, two days later, on December 10, 2013, the agent received notification from the mortgage company that there were

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[20] Song Yu Affidavit, ¶¶ 24, 25, appendix 177A.
[21] Ricks Dep, p 44, appendix 270A.
[22] Ricks Dep, p 60, appendix 286A.
[23] Ricks Dep, p 37, appendix 263A.
[24] EUO of Song Yu, p 5, appendix 39A.
[25] EUO of Sang Chung, p 24, appendix 203A.

mismatched addresses for the house.[27] On December 11, 2013, Farm Bureau received notification that the billing address on the Portage house had changed.[28] That same day, the agent drove to the house, saw that it was vacant, and saw a for sale sign. He immediately notified underwriting of this newly discovered fact.[29] Upon receipt of this information, Farm Bureau underwriting sent a cancellation notice, dated December 16, 2013, giving plaintiffs 30 days' notice of cancelling the policy because the house was unoccupied and vacant as required by MCL 500.2123.[30]

On December 25, 2013, the water damage that led to the instant suit was discovered. While meeting with Ms. Ricks about the water claim, Song Yu informed Ricks that he had not been at the property for three months.[31] Both plaintiffs testified in their examinations under oath that they resided in East Lansing and had done so since May 2013.[32] By their own admissions, plaintiffs did not reside at the subject premises at the time of this loss.

In his EUO, Song Yu testified he was registered to vote in Lansing (as opposed to the insured location), that he received most of his mail in Lansing (except for some mail here and there such as the policy, which still contained the Portage mailing address), and that he only spent the night at the subject location one or two times during the entire year of 2013.[33] His wife Sang Chung testified that

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[26] EUO of Song Yu, p 19, 70, appendix 53A, 104A.
[27] Activity Roll Up Notes, Defendant Farm Bureau's Supplemental Exhibit A in Support of Motion for Summary Disposition/Oral Argument, attached to Farm Bureau's application for leave to appeal in this Court as Exhibit J, appendix 300A.
[28] *Id.*
[29] *Id.*
[30] Cancellation Letter, 12/16/13, attached as Exhibit 5E to Plaintiff's Brief in Support of Summary Disposition, attached to Farm Bureau's application for leave to appeal in this Court as Exhibit K, appendix 306A.
[31] Ricks Dep, p 48, appendix 274A.
[32] EUO of Song Yu, p 5, appendix 39A; EUO of Sang Chung, p 6, appendix 185A.
[33] EUO of Song Yu, p 38, appendix 72A; Policy, Declarations, appendix 143A.

the last time she spent the night at the house was in the summer of 2012.[34] Photos taken by the adjuster mere days after the December 25, 2013 loss showed a barren house with no furnishings.[35]

On June 20, 2014, Farm Bureau denied plaintiffs' December 2013 water damage claim because (a) plaintiffs did not reside at the subject property so the subject property was not a residence premises, and (b) under the increase in hazard condition of the policy, the house was vacant more than 60 days and unoccupied more than 6 months.[36]

On December 18, 2014, plaintiffs filed a declaratory action against Farm Bureau seeking a determination as to Farm Bureau's liability under the policy and alleging breach of contract. They alleged that Farm Bureau should be equitably estopped from denying coverage because at the time of the February 2013 loss claim (a) Farm Bureau should have known that they were using the subject property as a second residence, (b) Farm Bureau did not tell them that their claim was barred because the subject property was not plaintiffs' residence premises, and (c) Farm Bureau did not tell plaintiffs that their claim was barred under the increase in hazard provision in the policy.[37]

On November 11, 2015, plaintiffs moved for summary disposition, asserting that (a) the policy was in effect at the time of the December 25, 2013 loss, (b) plaintiffs occupied the subject property at the time of the loss as defined by the policy, (c) the subject property was not vacant at the time of the loss, and (d) Farm Bureau was equitably estopped from denying the claim.[38]

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[34] EUO of Sang Chung, p 13, appendix 192A.
[35] Adjuster Photos, attached as Exhibit C to Farm Bureau's Response to Plaintiffs' Summary Disposition Motion and Counter-Motion for Summary Disposition, attached to Farm Bureau's application for leave to appeal in this Court as Exhibit L, appendix 309A-312A.
[36] Denial letter, 6/20/14, attached as Exhibit 1I to plaintiffs' appellant brief, attached to Farm Bureau's application for leave to appeal in this Court as Exhibit M, appendix 314A.
[37] Complaint, 12/18/14.
[38] Plaintiffs' summary disposition motion, 11/11/15.

On December 30, 2015, Farm Bureau filed an answer to plaintiffs' motion and a counter-motion for summary disposition. In addition to the bases for its denial, Farm Bureau asserted that there was no basis for invoking equitable estoppel.[39]

A hearing on the motions was held January 6, 2016.[40] The trial court held that plaintiffs did not reside at the subject property.[41] It held that the subject property was both vacant and unoccupied.[42] The court then concluded that plaintiffs could not rely on equitable estoppel:

> I do think that the facts of this case show that Ms. Ricks had information, whether it was intentionally deceptive or not – again, I'm not making that determination, but had information that suggested that the house was being prepared for sale and, therefore, may become unoccupied at some particular point or may fall within the term – the policy term of vacant or unoccupied.
>
> As Mr. Willison points out, you could have a premises that even though is being prepared for sale and the homeowner is not actually there during that interim period, there is still a 60-day period that it could be vacant or six-month period it could be unoccupied.
>
> It really comes down to did the insurance company intentionally forego or abandon the policy coverage in paying that February claim such that the Plaintiffs could have relied on that to assume that they have had coverage? And the case law really is not, I would say, is not favorable to the – to the Plaintiffs in that regard because it is a requirement of intentionally abandoning.
>
> There is not enough evidence here that the Defendant intentionally abandoned the policy requirements of residency or the exclusions that would apply for vacancy or occupancy for longer than 60 days in the case of vacancy or occupancy for longer than 60 days in the case of vacancy and six months in the case of occupancy.
>
> So I do not find that the Plaintiffs can rely on the equitable estoppel argument.[43]

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[39] Farm Bureau's Response to Plaintiffs' Summary Disposition Motion and Counter-Motion for Summary Disposition, 12/30/15.
[40] M Tr 1/6/16, appendix 15A-32A.
[41] M Tr 1/6/16, p 53, appendix 29A.
[42] M Tr 1/6/16, p 56, appendix 30A.
[43] M Tr 1/6/16, pp 57-58, appendix 30A.

The written order was entered January 28, 2016. On February 16, 2016, plaintiffs appealed in the Court of Appeals, making essentially the same arguments made to the trial court, but asserting that they were not claiming waiver, only equitable estoppel. On April 11, 2017, the Court of Appeals, in a split, unpublished opinion, reversed the trial court's ruling and ordered the trial court to enter judgment in favor of plaintiffs. Relying solely on *Morales v Auto-Owners Ins Co,* 458 Mich 288, 296-297; 582 NW2d 776 (1998), the majority declined to consider whether Farm Bureau's policy precluded coverage but, rather, held that Farm Bureau was equitably estopped from denying coverage:

> [W]hat we find important is that *defendant was aware . . . in February 2013 that plaintiffs were "actively moving." It would therefore be logical to conclude that defendant understood that plaintiffs were no longer residing in the house and that it was unoccupied and vacant within defendant's proposed interpretation of those terms in the insurance policy.* And certainly defendant should have understood that 10 months later when defendant renewed the policy and accepted plaintiffs' premium payment.
>
> * * *
>
> In sum, *defendant knew, by its own admission, as early as February 2013 that the stated reasons for denying the subsequent claim already existed, or the existence of one or more of those reasons would soon exist*. Yet, *not only did defendant fail to inform plaintiffs* that they would need to obtain different coverage, *it renewed the policy several months later*, charging and retaining a premium for the time period during which the loss occurred. Accordingly, we conclude that defendant's actions and inaction reasonably led plaintiffs to believe that they were covered by the insurance policy issued by defendant and paid for by plaintiffs. [*slip op* at 4-5.][44]

[44] The majority also found significant the fact that Farm Bureau returned only the prorated portion of the post-cancellation premium. There are several errors with this. First, the argument was never raised by plaintiffs so it had not been fully briefed and preserved. Second, the majority was mixing two issues. The laws regarding *cancellation* based on not meeting underwriting guidelines require 30 days' notice to the insured and permit the insurance company to keep the premium through that 30th day. The *denial*, based on violating the existing and in-effect policy's "residence premises" requirement and "increase in hazard" clause, do not require any return of premium. To say the denial is invalid because the cancellation kept premium for the policy after the day of loss completely

Judge Servitto dissented. She noted that the clear and unambiguous language of the policy precluded coverage because the subject property had not been plaintiffs' residence premises since 2010. *Slip op* at 1-2. She disagreed that equitable estoppel applied.

> While I do agree . . . that this testimony reflects the adjuster's knowledge that plaintiffs were in the process of moving, I am not persuaded that the testimony requires a conclusion . . . that defendant understood that plaintiffs were no longer residing in the home. *Plans and intentions fall through and fail to come to fruition in many, many cases. The testimony supports the adjuster's belief that plaintiffs were in the process of moving and intended to put the Forest Drive property up for sale, but that neither event had yet occurred.* The adjuster testified that Song Yu had told her that plaintiffs were going back and forth between the homes. How often and what

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misses the mark. The majority may have been thinking of rescission, which requires return of the premium and return to status quo. However, there is a significant difference between rescission and reliance on a contractual provision.

> "To rescind a contract is not merely to terminate it, but to abrogate and undo it from the beginning; that is, not merely to release the parties from further obligation to each other in respect to the subject of the contract, but to annul the contract and restore the parties to the relative positions which they would have occupied if no such contract had ever been made. Rescission necessarily involves a repudiation of the contract and a refusal of the moving party to be further bound by it. But this by itself would constitute no more than a breach of the contract or a refusal of performance, while the idea of rescission involves the additional and distinguishing element of restoration of the status quo." 1 Black on Rescission and Cancellation (2d Ed.0, § 1).
>
> As contradistinguished from rescission, a suit founded on covenant seeks to affirmatively enforce the terms of the covenant by way of specific performance or by recovery of damages for a breach of the covenant by one who relies upon the covenant and asserts his rights thereunder. [*Wall v Zynda*, 283 Mich 260, 264-265; 278 NW 66 (1938).]

There are many precedents where coverage was voided in accordance with the terms of the contract of insurance, without any ruling that premiums had to be returned. See, for example, *Brogdon v American Automobile Ins Co*, 290 Mich 130, 134; 287 NW 406 (1939). Cases reflect that coverage is rendered void upon settlement without the insurer's consent with no return of premium. *Tenneco, Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 468; 761 NW2d 846 (2008) (noting that the insurer need not show prejudice to void coverage under a provision prohibiting settlement without the insurer's consent). Insurance policies with named excluded drivers under MCL 500.3009(2), require the following statement: "Warning—when a named excluded person operates a vehicle all liability coverage is void—no one is insured." No premium refund is required. See, for example, *McMillan v Auto Club Ins Ass'n*, 450 Mich 557; 543 NW2d 920 (1995).

that meant, exactly, was not clear. The adjuster should undoubtedly have followed up to see when the home became vacant, but *the mere fact that she saw what appeared to be an event in progress does not mean that the house was unoccupied or vacant at the time of the February 2013 water event or that it would be so within any specific amount of time*.

In addition, while defendant did keep the insurance premium through the stated cancellation date of January 18, 2104, defendant issued its refund a check to plaintiffs on January 1, 2014 for a prorated (87.6%) portion of the $892 premium. *It was not until the sworn proof of loss statement dated April 2, 2014, that plaintiffs unequivocally and undisputedly informed defendant that they moved to Lansing in 2010 and it was not until June 20, 2014, that defendant denied the claim.* Plaintiffs initiated this lawsuit only six months later, arguably not giving defendant a reasonable opportunity to refund the remaining premium of $100.19.

Moreover, it is undisputed that plaintiffs had the homeowner's insurance policy in effect with defendant in 2006 when they first purchased, and again, undisputedly, resided in the Forest Drive home on a full time, year round basis. *In the addendum to plaintiff's policy, under Section I. Conditions, it is stated that plaintiffs' duties after loss include the duty to set forth in a sworn statement of proof of loss "changes in title or occupancy of the property during the term of the policy." There is no indication that after the February 2013 water incident that plaintiffs advised defendants in a sworn statement of proof of loss that the occupancy of the Forest Drive home had changed from full time, year round, to vacation home.*

* * *

Defendant's payment of the February 2013 water damage claim did not induce plaintiffs into believing that they would nonetheless have coverage given the clear language of the policy. It appears that plaintiffs were not forthright with the adjuster and defendant in an attempt to avoid the clear language of the policy. This is supported by the testimony that plaintiffs merely advised the adjuster that they were in the process of moving to a new home in February 2013 and not that they had moved to the Lansing area in 2010. It is also supported by the testimony that plaintiffs first advised defendant that they did not reside at the Forest Drive home as their "residence premise" in April of 2014. [*slip op* at 3.]

From the Court of Appeals ruling, Farm Bureau timely applied for leave to appeal in this Court. On December 20, 2017, this Court granted leave to appeal and directed the parties to address the following issues:

(1) whether the plain language of the insurance policy precluded coverage; (2) if so, whether and under what circumstances the doctrine of equitable estoppel may be applied to require an insurer to expand coverage that is contrary to the express

terms of an insurance contract; (3) whether an equitable estoppel claim requires that (a) a party against whom the doctrine of equitable estoppel is to be applied has full knowledge of the facts and circumstances involved, and (b) justifiable reliance on the part of the party seeking to invoke it is shown; and (4) whether the defendant-insurer should be equitably estopped from denying coverage in this case.

LAW AND ARGUMENT

I. The plain language of the insurance policy precluded coverage.

A. Standard of Review

This Court's review of a trial court's decision on a motion for summary disposition is *de novo*. *In re Bradley Estate,* 494 Mich 367, 376; 835 NW2d 545 (2013). Issues of contract construction are reviewed *de novo*. *Rory v Continental Ins Co,* 473 Mich 457, 464; 703 NW2d 23 (2005).

B. The policy only provided coverage for the house listed in the declarations if the insureds were living in it; the policy explicitly excluded coverage when the house was unoccupied for six months.

An insurance contract must be read as a whole and enforced in accordance with its terms. A court must not hold an insurance company liable for a risk that it did not assume. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353-354, 356, 596 NW2d 190 (1999). In the instant case, the homeowners policy provided property protection coverage to the dwelling and other structures on the *residence premises*:

> SECTION I - PROPERTY COVERAGES
>
> We provide the following coverages only if such coverages appear, with a limit of liability, in the Declarations of this policy under Section I Property Coverage.
>
> COVERAGE A - DWELLING
>
> We cover:
>
> 1. the dwelling on the **residence premises**, including structures attached to the dwelling . . . [45]

It relevantly defined residence premises as "the one family dwelling, other structures, and grounds . . . *where you reside* and which is shown in the Declarations of this policy."[46] "Reside" was

[45] Policy, form GH 65 01 10 10c, p 4 of 19, appendix 149A.

not defined in the policy, so turning to a dictionary for the definition is appropriate. *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420, 424; 864 NW2d 609, 612 (2014). "Reside" is defined in the American Heritage Dictionary as "to live in a place permanently or for an extended period." "Dwelling where you reside" means the insured has to live there. *McGrath v Allstate Ins Co*, 290 Mich App 434, 441-443; 802 NW2d 619, 623 (2010), discussing *Heniser v Frankenmuth Mut Ins Co,* 449 Mich 155; 534 NW2d 502 (1995).

To further underscore the requirement that the insured had to live in the dwelling listed in the declarations, the policy contained an "increase in hazard" provision that precluded coverage if the house was vacant more than 60 days, unoccupied more than 6 months, or, if designated "Location (Seasonal)," unoccupied more than 12 months:

> 14. Increase in Hazard.
>
> Unless otherwise provided in writing, we will not be liable for loss occurring:
>
> a. while the hazard is increased by any means within your control or knowledge; or
>
> b. *while a described building*, whether intended for occupancy by owner or tenant, *is vacant*[47] *beyond a period of 60 consecutive days or is unoccupied beyond a period of six consecutive months*. However, if "Location (Seasonal)" appears in the Declarations of this policy, we will not be liable for loss occurring while a described building is unoccupied beyond a period of 12 consecutive months.[48]

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[46] Policy, form GH 65 01 10 10c, p 3 of 19, appendix 148A.

[47] Vacant was defined as:

> [T]he absence of furnishings, utilities, and the amenities minimally necessary for human habitation. The building being reconstructed, remodeled, renovated, rehabilitated, restored, reconditioned, or repaired is considered vacant when there is no presence of furnishings and amenities minimally necessary for human habitation. [Policy, form GH 65 01 10 10c, p 3 of 19, appendix 148A.]

[48] Policy, form GH 65 01 10 10c, p 4 of 19, appendix 149A (emphasis added).

The prefix "un" means "not." *Random House Webster's College Dictionary*. Thus, unoccupied means not occupied. The policy defined "occupied" to mean "being lived in with regular and continuous legal presence of human inhabitants."[49] Live relevantly means reside or dwell. *Random House Webster's College Dictionary*. Dwell means "to live or stay as a permanent resident; reside." *Id.* "In" relevantly means inside or within. *Id.* Regular and continuous means more than a single or occasional event or an incidental use. See *Nernst Lamp Co v Conrad*, 165 Mich 604, 609 n 2; 131 NW 120, 122 (1911); *Long Mfg Co, Inc v Wright-Way Farm Serv, Inc*, 391 Mich 82, 94–95; 214 NW2d 816, 823 (1974); *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 225 n 16; 737 NW2d 670, 681 (2007). Legal presence means to be present legally. Cf. *State, Dept of Revenue v Andrade*, 23 P3d 58, 74 (Alas, 2001). See, also MCL 28.291(1) and (5); MCL55.275(1)(f); MCL 257.307(1). Inhabitant means a person "that inhabits a place, esp. as a permanent resident." *Random House Webster's College Dictionary*. "Inhabit" means "to live or dwell in." *Id.*

When these provisions are read as a whole, it is not possible to mistake their meaning. The insured must be continually and legally living within the dwelling listed in the declarations before the dwelling qualifies as a residence premises entitled to property protection coverage.[50] Such a reading is consistent with this Court's reasoning in *Heniser*.

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[49] Policy, form GH 65 01 10 10c, p 3 of 19, appendix 148A.

[50] When a contract supplies a definition for a term, it is inappropriate to consult a dictionary for the definition. Cf. *Cavalier Mfg Co v Employers Ins of Wausau (On Remand)*, 222 Mich App 89, 94; 564 NW2d 68 (1997). The *policy* defines "occupied" to mean "being lived in with regular and continuous legal presence of human inhabitants." Plaintiffs assert that the dictionary definition, "to reside in as an owner or tenant," somehow supports their position that *legal* presence does not mean *physical* presence. There is no basis for this conclusion. "Reside" is defined in the *American Heritage Dictionary* as "to live in a place permanently or for an extended period." "As an owner or

In *Heniser,* the insured sold property on a land contract but did not inform the insurer of the sale. *Id.* 449 Mich at 157. During the policy period, the property was destroyed by fire, and the insured filed a claim with the insurer. *Id.* The insurer denied coverage in part on the basis that the insured did not reside at the property as required by the insurance policy. *Id.* at 158. The trial court and Court of Appeals agreed with the insurer, and the insured applied for leave to appeal in this Court. This Court affirmed, stating, "[t]he policy . . . read as a whole, is unambiguous and does not cover the loss because the property was not a 'residence premises' at the time of the loss." *Id.* at 161.

The policy in *Heniser,* like the policy in the instant case, required the insured to notify the insurer of any changes in title or occupancy of the property before recovering for any loss.[51] This Court noted that the term "reside" could mean either actual physical presence or the equivalent of domicile. *Id.* at 163. However, this Court found that the insured did not meet either of these definitions; therefore, the property was not a residence premises. *Id.* at 163-164.

The *Heniser* Court was not faced with the situation in which the insured continued to retain the right to reside at the insured premises, and it declined to express an opinion on how it would resolve such a situation. *Id.* at 160 n 5. However, the Court of Appeals in *McGrath* was faced with this scenario and, following the reasoning in *Heniser,* it held that the insured had to actually live at

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tenant" indicates a legal right to be there, whether through deed or lease. Thus, the dictionary definition supplied by plaintiffs is consistent with the policy definition, which requires living in the place legally. Both elements are required. One cannot be a squatter and claim entitlement to coverage. Nor can one own but not live there and claim entitlement to coverage. There is no support for plaintiffs' proposition that they could "occupy" the house simply by owning it and without living there.

[51] *Heniser* at 162. Although plaintiffs asserted in the Court of Appeals that Farm Bureau's policy did not contain a notice requirement, Judge Servitto correctly noted that the endorsement in the policy that plaintiffs had the duty to set forth in the proof of loss any changes in title or occupancy during the policy term, thus requiring notification before recovering for any loss as in *Heniser*. See

the property at the time of the loss before there was coverage. In *McGrath,* the insured moved out of town to live with family members. *Id.* at 437. After she moved, the house was no longer used as a full-time residence, even though the insured left the majority of her belongings at the house, and she and family members would visit the house on occasion. *Id.* After pipes burst and caused substantial water damage, the insured filed a claim. The insurer paid for the initial cleanup but denied coverage after investigation on the basis that the property was not a dwelling as defined by the policy.

The Court of Appeals, citing *Heniser,* stated that the phrase "where you reside" required the insured to reside at the premises at the time of the loss. *McGrath* at 441. The Court of Appeals noted this Court's discussion regarding the multiple meanings of the word reside, but concluded that the discussion was dicta and also noted that *Heniser* had rejected the more technical meaning of reside. *McGrath* at 443. It then held that "the term 'reside' requires that the insured actually live at the property." *Id.* The Court then concluded that because the insured had not physically lived at the house when the pipes froze and burst, or for two years before the loss, she did not reside in the house when the loss occurred. *Id.* at 444. It then pointed out that the actual residence requirement was designed to minimize the very type of loss that had occurred:

> The multiple risks assumed by an insurer in exchange for an insurance premium are tied to an understanding that the building structure covered is where the insured dwells either permanently or for a considerable period because the risks assumed are clearly affected by the presence of the insured in the dwelling and the associated activities stemming from this presence. Unoccupied or vacant homes, with no resident present to oversee security or maintenance, are at greater risk for break-ins, vandalism, fire, and water damage of exactly the kind that occurred in this case. [*Id.* at 444.]

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dissenting opinion at 3, appendix 9A; Policy, form GH 66 32 10 12, p 1 of 2, appendix 165A.

The Court then recognized that temporary absences from the property did not curtail coverage, but full-time residency at another location did:

> We recognize that an insured may be away from a property temporarily for travel or because of illness, and the policy clearly contemplates temporary absences, without curtailing coverage. * * * At issue here is undisputed evidence that Ms. McGrath lived full-time in an apartment in Farmington Hills for more than two years before the loss occurred. She traveled once to the property for a very brief visit during those years, and it is clear that the Farmington Hills apartment had become her fixed residence. Because Ms. McGrath did not reside at the Gaylord property, she failed to comply with the policy terms, and the trial court erred when it denied Allstate's motions for summary disposition. [*Id.* at 444-445.]

Plaintiffs assert that Farm Bureau's conclusion the house was vacant and unoccupied was rebutted by Song Yu's testimony on pages 29-33, 37-39 and photographs taken on December 27, 2013.[52] Even a casual review of the cited testimony dispels any conclusion that plaintiffs occupied the house under the standards of *Heniser*, and *McGrath*. Song Yu estimated that he visited the house 10 times a year, rarely spent the night, and spent the night only once or twice during the summer of 2013.[53] He further testified that most of his mail came to his East Lansing address, he was registered to vote in East Lansing, and he had no ties to Portage.[54] This Court in *Heniser* stated that it was the insured's burden to establish that his or her claim falls within the terms of the policy. *Heniser,* 449 Mich at 172, citing *Arco Industries Corp v American Motorists Ins Co*, 448 Mich 395; 531 NW2d 168 (1995); *Harvey Oil Co v Federated Mutual Ins Co*, 837 F Supp 242, 244 (WD Mich, 1993). Plaintiffs' argument that their sporadic and occasional use of the house was sufficient to constitute "being lived in with regular and continuous legal presence of human inhabitants" is unsuccessful.

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[52] Answer to application, pp 15-16, 26-27, 35-37.
[53] Song Yu EUO, 32-37, appendix 66A-71A.
[54] Song Yu EUO, pp 38-39, appendix 72A-73A.

Whether belongings packed in a garage and an air mattress kept in a closet are sufficient to conclude that the house was not vacant need not be decided because the increase in hazard provision lists vacancy and unoccupied in the disjunctive:

> [W]e will not be liable for loss occurring * * * while a described building . . . is vacant beyond a period of 60 consecutive days ***or*** is unoccupied beyond a period of six consecutive months.

When phrases are separated by the disjunctive "or," only one of the conditions must be met. *Badeen v PAR, Inc.*, 496 Mich 75, 84 n 17, 853 NW2d 303 (2014) (noting that, because the phrases in the statute defining a collection agency are separated by the disjunctive "or," "a person need only engage in *one* of the enumerated actions to satisfy the statutory definition").

Plaintiffs have attempted to distinguish *Heniser* on the basis that the policy in *Heniser* contained a provision requiring the insured to notify the insurer of any changes in title or occupancy. In making this argument, plaintiffs misread the significance of the notification provision in *Heniser*. In *Heniser*, the insured argued that this provision created an internal inconsistency in the policy. This Court not only disagreed with the insured's argument, it found the notice requirement insignificant to its analysis of whether the policy's definition of "residence premise" provided coverage for destruction of the building:

> The policy is not internally inconsistent. Although the conditions section of the policy requires the insured to notify the insurer of any "changes in title or occupancy of the property during the term of the policy" before recovering for any loss, this provision does not conflict with the definitions section mandate that the insured reside at the property. The requirement in the conditions section simply allows the insurance company to guarantee that the insured had an insurable interest in the property at the time of the loss or to coordinate coverage with other potential insurers. [*Id.* at 162.]

Thus, plaintiffs' distinction here is one without a difference.

Plaintiffs have attempted to distinguish *McGrath* on the basis that *McGrath* did not involve a claim of equitable estoppel. This distinction too is irrelevant. Farm Bureau cited *McGrath* for its interpretation of an identical contract provision, i.e., the definition and import of the phrase, "where you reside."[55] Plaintiffs make no attempt to explain how the presence or absence of an equitable estoppel claim would vary this interpretation.

In the instant case, there can be no question. The policy provided coverage only for the residence premises, and only if it was "being lived in with regular and continuous legal presence of human inhabitants." It precluded coverage for unoccupied or vacant property. Plaintiffs moved out of the house and regularly resided elsewhere for three years prior to the claimed loss that is the subject of this suit and appeal. The trial court and Court of Appeals dissent correctly concluded that the subject property did not qualify as a residence premises because plaintiffs did not actually live there, and Farm Bureau was properly entitled to deny coverage for the December 2013 claim on this basis.

II. Whether and under what circumstances the doctrine of equitable estoppel may be applied to require an insurer to expand coverage that is contrary to the express terms of an insurance contract.

A. Standard of Review

This Court's review of a trial court's decision on a motion for summary disposition is *de novo*. *In re Bradley Estate,* 494 Mich at 376. This Court reviews *de novo* a trial court's equitable decisions, including the application of equitable doctrines such as equitable estoppel. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005).

[55] Application for leave to appeal, p 25, 27-29.

B. The basic concepts of estoppel.

To answer this question fully, it is necessary to examine the meaning and purpose of equitable estoppel. Estoppel is a judicial doctrine sounding in equity. 28 Am. Jur. 2d Estoppel and Waiver § 1. The essence of an estoppel is that the party to be estopped has by false language or conduct led another to do that which he or she would not otherwise have done and as a result thereof he or she has suffered injury. 28 Am. Jur. 2d Estoppel and Waiver § 2. It "should be applied only where the facts are unquestionable and the wrong to be prevented undoubted." *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 552; 487 NW2d 499 (1992); see also *Tucker v Eaton*, 426 Mich 179, 188; 393 NW2d 827 (1986). Equitable estoppel should be resorted to solely as a means of preventing injustice and should not be permitted to defeat the administration of the law, or to accomplish a wrong or secure an undue advantage, or to extend beyond the requirements of the transactions in which they originate. 28 Am Jur 2d, Estoppel and Waiver, § 3.

C. Equitable estoppel versus the plain language of the policy.

In insurance cases, "[t]he application of waiver and estoppel is limited, and, usually, the doctrines will not be applied to broaden the coverage of a policy to protect the insured against risks that were not included in the policy or that were expressly excluded from the policy." *Kirschner v. Process Design Assocs., Inc*, 459 Mich. 587, 593-594; 592 NW2d 707 (1999). This is because "an insured is obligated to read his or her insurance policy and raise any questions about the coverage within a reasonable time after the policy is issued. Consistent with this obligation, if the insured has not read the policy, he or she is nevertheless charged with knowledge of the terms and conditions of the insurance policy" *Casey v Auto-Owners Ins Co,* 273 Mich App 388, 394-395; 729 NW2d 277 (2006). "[T]o allow [a] person to bind another to an obligation not covered by the contract as written

because the first person thought the other was bound to such an obligation is neither reasonable nor just." *Farm Bureau Mut Ins Co v Nikkel,* 460 Mich 558, 569; 596 NW2d 915 (1999).

D. This Court's opinions as to whether equitable estoppel may vary the plain language of the policy.

In *Ruddock v Detroit Life Ins Co,* 209 Mich 638, 653, 654-655; 177 NW 242 (1920), this Court held that estoppel and waiver could not be used to expand coverage because this would essentially make a new contract not agreed to by the parties. The Court first noted that the insurance company was asserting its rights under the policy, and that application of estoppel would create a liability contrary to the terms of the policy:

> To apply the doctrine of estoppel and waiver here would make this contract of insurance cover a loss it never covered by its terms, to create a liability not created by the contract and never assumed by the defendant under the terms of the policy. In other words, by invoking the doctrine of estoppel and waiver it is sought to bring into existence a contract not made by the parties, to create a liability contrary to the express provisions of the contract the parties did make. [*Ruddock* at 653-654.]

The Court then adopted the reasoning of the Wisconsin Supreme Court in *McCoy v Northwestern Mut Benefit Ass'n,* 92 Wis 577; 66 NW 697 (1896), and held that conduct that might estop an insurer from claiming a forfeiture, could not be used to broaden coverage under a policy:

> After a loss accrues, an insurance company may, by its conduct, waive a forfeiture; or by some act before such loss it may induce the insured to do or not to do some act contrary to the stipulations of the policy, and thereby be estopped from seeing up such violation as a forfeiture; *but such conduct, though in conflict with the terms of the contract of insurance and with the knowledge of the insured and relied upon by him will not have the effect to broaden out such contract so as to cover additional objects of insurance or causes of loss.* [*Ruddock* at 655, quoting *McCoy* at 699 (emphasis added).]

In *Kirschner v Process Design Assoc, Inc,* 459 Mich 587, 594; 592 NW2d 707 (1999), this Court held that an insurer was not estopped from enforcing an exclusion in its policy. In doing so, this Court quoted from its opinion in *Ruddock*:

> [A]pplying the doctrine of waiver and estoppel to broaden the coverage of a policy would make a contract of insurance
>
> "cover a loss it never covered by its terms, to create a liability not created by the contract and never assumed by the defendant under the terms of the policy. In other words, by invoking the doctrine of estoppel and waiver it is sought to bring into existence a contract not made by the parties, to create a liability contrary to the express provisions of the contract the parties did make." [*Kirschner* at 594, quoting *Ruddock* at 654.]

The Court recognized that some Michigan cases had applied waiver and estoppel to bring within coverage risks not covered by the policy if the inequity to the insurer as a result of broadened coverage is outweighed by the inequity suffered by the insured: (1) when the insurance company has misrepresented policy terms to the insured, and (2) when the insurance company has defended the insured without a reservation of rights. *Kirschner* at 594-595, citing *Lee v Evergreen Regency Coop,* 151 Mich App 281, 287; 390 NW2d 183 (1986), and *Smit v State Farm Mut Automobile Ins Co,* 207 Mich App 674, 682-683; 525 NW2d 528 (1994). The Court then decided the only issue before it, which was whether a defendant's insurance company could be estopped from enforcing policy exclusions against the *plaintiffs* when the insurance company had raised the policy exclusions in its reservation of rights letter to its insured, the defendant. The Court held that estoppel did not apply:

> [W]e have never held that waiver or estoppel can be applied to extend coverage beyond the terms of the policy when an insurer, who is not a party to the underlying litigation, fails to notify a plaintiff, who is not the insured, of a reservation of rights.
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> * * *
>
> [P]laintiffs, as judgment creditors, stand in no better position than that of the principal defendant . . . . Because [the insured] cannot apply the doctrine of waiver or estoppel to extend coverage beyond the terms of the policy, neither can the plaintiffs. [*Kirschner,* at 595-596.]

This Court later split with regard to whether precedent established that estoppel may be used to vary the terms of the policy. In *Grosse Pointe Park v Michigan Municipal Liability and Property*

Pool, 473 Mich 188; 702 NW2d 106 (2005), although this Court found there was no equitable estoppel, it was equally divided[56] on whether the insurer could theoretically be equitably estopped from enforcing its exclusion. The main point of contention between the two opinions was the extent and meaning of *Kirschner*.

The lead opinion by Justice Cavanagh[57] found that it was theoretically possible for equitable estoppel to preclude an insurer from enforcing a policy exclusion, but that equitable estoppel was not warranted under the circumstances before the Court. It further opined that while *Kirschner* provided examples of when estoppel could bring within coverage risks not covered by the policy, the list was not exhaustive. *Id.* at 117, n 12.

The concurring and dissenting opinion by Justice Young[58] would have held that "[e]quitable estoppel *must not* be applied to expand coverage beyond the scope originally contemplated by the parties in the insurance policy as written" (emphasis added). This is consistent with a long line of cases stating that contracts will be enforced *as written* unless compelling evidence to the contrary is offered. See *Schmalfeldt v. North Pointe Ins. Co.,* 469 Mich. 422, 428, 670 N.W.2d 651 (2003); *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003); *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003); *Rednour v Hastings Mut Ins Co,* 468 Mich 241, 251, 661 NW2d 562 (2003); *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 566-568; 596 NW2d 915 (1999); *Cruz v State Farm Mut Automobile Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002).

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[56] Justice Corrigan did not participate.
[57] Joined by Justices Weaver and Marilyn Kelly.
[58] Joined by Justice Taylor and then-Justice Markman.

E. Foreign authority pertaining to whether equitable estoppel may vary the plain language of the policy.

Justice Young's position, which follows the holding in *Ruddock,* is reflected in the opinions of the state appellate courts across the country: Wisconsin,[59] Indiana,[60] Maryland,[61] Texas,[62] Iowa,[63] Massachusetts,[64] Missouri,[65] Alabama,[66] Pennsylvania,[67] Oregon,[68] Wyoming,[69] North Carolina,[70]

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[59] *Maxwell v Hartford Union High School Distr,* 341 Wis 2d 238, 255; 814 NW2d 484 (2012) ("Waiver and estoppel cannot be used to supply coverage from the insurer to protect the insured against risks not included in the policy or expressly excluded therefrom, for that would force the insurer to pay a loss for which it has not charged a premium").

[60] *Kentucky Central Life & Accident Ins Co v White,* 106 Ind App 530; 19 NE2d 872, 875 (1939) ("If Instruction No. 7 correctly states the law, its effect is not to prevent a forfeiture but to make a new contract and to radically change the terms of the policy so as to cover [something] that is expressly excluded from the contract. We do not understand that the doctrine of estoppel or waiver goes that far").

[61] *Prudential Ins Co of America v Brookman,* 167 Md 616; 175 A 838, 840 (1934) ("while there might be a waiver of the prerequisite to the performance of the insurer's undertaking, a new, extended undertaking could be brought about only by a new contract * * * if the loss was not within the coverage of the policy contract, it cannot be brought within that coverage by invoking the principle of waiver or estoppel").

[62] *Ulico Cas Co v Allied Pilots Assoc,* 262 SW3d 773, 775 (Texas, 2008) ("if an insurer's actions prejudice its insured, the insurer may be estopped from denying benefits that would be payable under its policy as if the risk had been covered, but the doctrines of waiver and estoppel cannot be used to re-write the contract of insurance and provide contractual coverage for risks not insured"); *Washington Nat Ins Co v Craddock,* 130 Tex 251, 254; 109 SW2d 165 (1937) ("such conduct . . . will not have the effect to broaden out such contract so as to cover additional objects of insurance or causes of loss")

[63] *Randolph v Fireman's Fund Ins Co,* 255 Iowa 943, 950; 124 NW2d 528 (1963) ("The rule is well established that the doctrines of implied waiver and of estoppel, based upon the conduct or action of the insurer, are not available to bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded therefrom, and the application of the doctrine in this respect is therefore to be distinguished from the waiver of, or estoppel to assert, grounds of forfeiture")

[64] *Palumbo v Metropolitan Life Ins Co,* 293 Mass 35, 37-38; 199 NE 335 (1935) ("whatever may be the scope of waiver in the law of insurance, it does not extend to the broadening of coverage, so as to make the policy cover a risk not within its terms").

[65] *Newell v Aetna Life Ins Co of Hartford, Connecticut,* 214 Mo App 67; 258 SW 26, 28 (1923) ("to permit the doctrine to be applied in this case would be to create a liability not created by the contract,

California,[71] New York,[72] Colorado,[73] Arkansas,[74] and New Hampshire.[75] As noted in 1 ALR 3d 1139, 1144:

> [T]he courts of most jurisdictions agree that [waiver and estoppel] are not available to broaden the coverage of a policy so as to protect the insured against risks not included therein or expressly excluded therefrom. The theory underlying this rule

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and one which the defendant never assumed").

[66] *Fidelity Phenix Fire Ins Co of New York v Raper,* 242 Ala 440, ; 6 So 2d 513 (1941) ("coverage cannot be enlarged by waiver or estoppel");

[67] *Donovan v New York Cas Co*, 373 Pa 145, 149; 94 A2d 570, 572 (1953) ("The doctrine of waiver or estoppel cannot apply to or create a contract where none existed").

[68] *Day-Towne v Progressive Halcyon Ins Co*, 214 Or App 372, 382; 164 P3d 1205 (2007) ("estoppel cannot be used to expand the scope of an insurance contract").

[69] *St Paul Fire & Marine Ins Co v Albany Co Sch Dist No 1*, 763 P2d 1255, 1261 (Wy 1988) ("The doctrine of implied waiver or estoppel is not available to bring within the coverage of an insurance policy risks that are not covered by its terms or that are expressly excluded therefrom").

[70] *Hunter v Jefferson Standard Life Ins Co*, 241 NC 593, 596; 86 SE2d 78, 80 (1955) ("waiver or estoppel cannot create a contract of insurance or so apply as to bring within the coverage of the policy property, or a loss or risk, which by the terms of the policy is expressly excepted or otherwise excluded").

[71] *Dollinger DeAnza Assoc v Chicago Title Ins Co*, 199 Cal App 4th 1132, 1154; 131 Cal Rptr 3d 596 (2011) ("[I]t is the general and quite well settled rule of law that the principles of estoppel and implied waiver do not operate to extend the coverage of an insurance policy after the liability has been incurred or the loss sustained").

[72] *Progressive Ins Co v Dillon*, 68 AD3d 448; 889 NYS2d 583, 584 (New York, 2009) ("estoppel cannot be used to create coverage where none exists, regardless of whether the insurance company timely issued its disclaimer").

[73] *Compass Ins Co v City of Littleton*, 48 ERC 2058; 984 P2d 606, 620 (Colo 1999) ("the doctrine of waiver cannot be invoked to create a primary liability and bring within the coverage of the policy risks not included or contemplated by its terms").

[74] *Johnson v Encompass Ins Co*, 355 Ark 1, 10; 130 SW3d 553, 559 (2003) ("conditions going to the coverage or scope of the policy, as distinguished from those furnishing a ground for forfeiture, may not be waived by implication from conduct or action, without an express agreement to that effect supported by a new consideration")

[75] *Farm Bureau Mut Ins Co v Geer*, 107 NH 452, 455; 224 A2d 580, 583 (1966) (the doctrines of waiver and estoppel cannot be used to bring within the coverage of the policy risks not included within its terms").

> seems to be that the company should not be required by waiver and estoppel to pay a loss for which it charged no premium. And the principle has been announced in scores of cases involving almost every conceivable type of policy or coverage provision thereof.

While the vast majority of states recognize the general rule, some also recognize the two exceptions identified in *Kirschner*; however, the undersigned found very few opinions recognizing estoppel expansion of the policy beyond the two enumerated *Kirschner* exceptions, which will be discussed. There is no basis for recognizing unnamed and undiscovered exceptions to the general rule of non-expansion. Michigan courts have long decried the practice of allowing an exception to swallow the rule. Cf. *People v Spillman,* 399 Mich 313, 324; 249 NW2d 73 (1976) ("We are not the first Court to caution against allowing exceptions to swallow this important rule").

F. Forfeiture of a condition versus expansion of coverage.

Both Michigan case law and foreign case law indicate a clear delineation between a policy condition, which an insured may forfeit, but which forfeiture an insurer may waive by estoppel; and a coverage term, which generally may not waived or expanded by estoppel. When the difference between a coverage term and a policy condition is examined, it is clear that the insuring provision and the increase in hazard provision are coverage terms that generally may not be affected by estoppel.

The location of a clause in a policy does not necessarily restrict its purpose. In *Farm Bureau Mut Ins Co of Michigan v Nikkel*, 460 Mich 558; 596 NW2d 915 (1999), the policy defined the term "non-owned automobile" in a manner that excluded the accident vehicle from liability coverage. Both the trial court and the Court of Appeals concluded that because the exclusion was contained in the definitions section of the policy, the policy was ambiguous, and the insurer could not avoid coverage. This Court disagreed, stating:

> Nor does the location of the clause in the definition section of the policy render it ambiguous. "An insurer is free to define or limit the scope of coverage as long as the policy language fairly leads to only one reasonable interpretation and is not in contravention of public policy." * * * We reject the *Powers* plurality's conclusion that placing the clause in the definition section of the policy is deceptive and confusing. [*Id.* at 568, citing *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 161; 534 NW2d 502 (1995).]

Thus, it is the purpose of the provision that must be examined, not its placement in the policy so long as the meaning of the provision is clear. The difference between a coverage term and a policy condition has been analogized as the difference between a substantive and a procedural law:

> An insured presenting a claim for insurance coverage must satisfy two types of requirements established by the subject insurance policy. First, the claim must satisfy the *terms* of coverage; that is, the claim must fall within the policy's coverage grant and not within an exclusion. Whether the claim satisfies such coverage terms is determined by the circumstances of the loss or underlying liability claim, and not by any action or inaction of the insured after the loss or claim.
>
> Second, all insurance policies impose certain *conditions* on the parties. In contrast to what might be termed the "substantive" coverage terms described above, policy conditions do not purport to define the scope of coverage afforded by the policy. Instead, conditions impose "procedural" duties on the contracting parties. Most of those duties, and those that are the subject of this chapter, require the insured to take certain steps *after* the insured event occurs to perfect the coverage claim.[76]

The International Risk Management Institute defines policy conditions as: "The section of an insurance policy that identifies general requirements of an insured and the insurer on matters such as loss reporting and settlement, property valuation, other insurance, subrogation rights, and cancellation and nonrenewal."[77] The National Association of Insurance Commissioners has

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[76] Franklin D. Cordell, Conditions and Insured's Duties – New Appleman on Insurance Law Library Edition, Chapter 20, (emphasis in original) attached as Exhibit N, appendix 316A. <https://www.lexisnexis.com/legalnewsroom/insurance/b/applemaninsurance/archive/2010/08/11/conditions-and-insured-s-duties-new-appleman-on-insurance-law-library-edition-chapter-20.aspx?Redirected=true> accessed February 28, 2018.

[77] International Risk Management Institute, Glossary of Insurance and Risk Management Terms, <https://www.irmi.com/online/insurance-glossary/terms/p/policy-conditions.aspx> Accessed

identified common policy conditions as "the requirement to file a proof of loss with the company, to protect property after a loss, and to cooperate during the company's investigation or defense of a liability lawsuit."[78]

Coverage terms, on the other hand, identify those risks that an insurer agrees to assume and those risks that an insurer explicitly declines to assume. The very concept of insurance is the agreement to transfer the risk of a fortuity to an insurer in exchange for a premium. See *Auto Club Group Ins Co v Marzonie,* 447 Mich 624, 646; 527 NW2d 760 (1994) (Griffin, J., concurring in part and dissenting in part). "Coverage" is defined in dictionaries as the "[e]xtent of protection afforded by an insurance policy [or the] amount of funds reserved to meet liabilities," *Webster's II New College Dictionary* (1995), as "protection against a risk or risks specified in an insurance policy," *Random House Webster's Dictionary* (2001), as "the risks within the scope of an insurance policy," *Black's Law Dictionary* (7th ed.), and as the "amount and extent of risk covered by insurer," *Black's Law Dictionary* (5th ed.). Thus, a provision that affects the coverage afforded under a policy is a coverage term, not a condition whose forfeiture may be waived.

Here, the insuring provision defines what is covered (the dwelling "where you reside"), while the increase in hazard provision dovetails to define what is not covered (a dwelling "unoccupied beyond a period of six consecutive months"). These provisions define the risk that the insurer agrees to accept. As noted by the Court of Appeals in *McGrath,* unoccupied houses increase the risk:

> The multiple risks assumed by an insurer in exchange for an insurance premium are tied to an understanding that the building structure covered is where the

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February 28, 2018.

[78] National Association of Insurance Commissioners (NAIC), Consumer Alert, <https://scc.virginia.gov/boi/pubs/naic_und_plcy.pdf> Accessed February 28, 2018, attached as Exhibit O, appendix 320A.

> insured dwells either permanently or for a considerable period because the risks assumed are clearly affected by the presence of the insured in the dwelling and the associated activities stemming from this presence. Unoccupied or vacant homes, with no resident present to oversee security or maintenance, are at greater risk for break-ins, vandalism, fire, and water damage of exactly the kind that occurred in this case. [*Id.* at 444.]

Therefore, these coverage terms may not be waived or expanded by estoppel.

G. The *Kirschner* Exceptions.

As previously noted, the *Kirschner* Court recognized that some Michigan cases had applied waiver and estoppel to bring within coverage risks not covered by the policy if the inequity to the insurer as a result of broadened coverage is outweighed by the inequity suffered by the insured: (1) when the insurance company has misrepresented policy terms to the insured, and (2) when the insurance company has defended the insured without a reservation of rights. *Kirschner* at 594-595, citing *Lee, supra,* 151 Mich App 281, and *Smit, supra,* 207 Mich App 674.

However, if an insurance company has misrepresented policy terms to an insured, the insured's cause of action against the insurance company would logically be a claim of misrepresentation or fraud. Cf. *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 409; 751 NW2d 443, 449 (2008); *Hearn v. Rickenbacker,* 428 Mich 32, 39, 400 NW2d 90 (1987); *Drouillard v. Metropolitan Life Ins. Co.,* 107 Mich App 608, 621, 310 NW2d 15 (1981). When there is an adequate legal remedy for economic injuries, it is unnecessary and inappropriate to grant equitable relief. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 10; 753 NW2d 595 (2008). Thus, there is no need to apply equitable estoppel when the insured claims fraud or misrepresentation.

The sole remaining basis for permitting a claim of equitable estoppel to expand coverage terms is when the insurance company has defended the insured without a reservation of rights. This

ground pertains only to liability coverage, and is not applicable in the instant case. However, it is addressed to the extent it falls within the purview of the issue as framed by the Court.

This doctrine is at least as old as *Ruddock.* In *Sargent Mfg Co v Travelers' Ins Co,* 165 Mich 87; 130 NW 211 (1911), the insured employed an underage worker who was injured on the job and sued the insured. When the insured tendered the suit to the insurer, the insurer promptly notified the insured that there was no coverage for injuries arising from illegal employment. However, the insurer appointed counsel to represent the insured. When the insurer refused to pay the eventual judgment in favor of the underage worker, the insured filed suit against the insurer. The trial court held that the insurer was liable on the basis that by defending the underlying action, the insurer affirmed coverage. This Court disagreed. It declined to follow a Minnesota case in which the insurer had defended without a reservation of rights and was later estopped to deny coverage:

> Relying upon such course of conduct, respondent changed his attitude in respect to the case, and, instead of reserving to himself the right to select his own counsel, conduct a trial, or make settlement, he turned over to appellant the entire matter.

from the case before it:

> Plaintiff herein was seasonably advised of the position of the insurer upon the question of liability. It was not misled by any act of the insurer into surrendering control of the litigation or refusing to make a settlement of the claim. It had ample opportunity to do either after receipt of defendant's letter defining its position. [*Id.* at 93-94.]

This Court found that estoppel applied in *Fidelity & Cas Co of New York v Schoolcraft Coi Bd of Rd Comm'rs,* 267 Mich 193, 200-201; 255 NW 284 (1934) on the basis that the insured relied on the indemnity and defense provisions in the policy; had the insured been informed that the insurer intended to rely on a lack of notice defense, the insured would have hired its own attorney to protect itself from liability. In reaching this conclusion, this Court stated:

> [W]hen an insurer, although obligated to defend under the terms of its policy, with knowledge of or means of ascertaining fact which, if established, will relieve it from liability at the suit of the insured, undertakes and prosecutes the defense, without giving reasonable notice to the insured that it does not consider itself liable to it under the policy, it is estopped to deny its liability. But if notice be given that in the event of certain facts being established it will disclaim liability and the insured, after such notice, makes no objection to its further defense of the action or proceeding, no estoppel can be based thereon. [*Id.* at 198.]

In *Meirthew v Last,* 376 Mich 33; 135 NW2d 353 (1965), counsel for the insurer represented the insured in a lawsuit from October 1, 1959 through judgment entered October 11, 1962. It was not until February 27, 2962, that the insurer disclaimed liability. And it was not until the garnishee disclosure was filed that the insurer identified the rented vehicle exclusion in the policy as its basis for nonliability. The same counsel who had represented the insured at trial then represented the insurer in the garnishment proceedings. This Court first noted that the insurer's actions denied the insured a fair and timely opportunity to protect his rights:

> (a) by a before-trial suit for declaration of rights against his insurer, or (b) independent negotiation of settlement with plaintiff at some figure less than the jury's substantial verdict, or (c) submission at trial of possibly available evidence that his motor vehicle was not being operated, at the time of this collision, in violation of the "Risks Excluded" clause.

The Court condemned the inherent conflict of interest that arises when the insurer appoints its own counsel to represent an insured with a view toward developing a policy defense.

> The insurer must fulfill its policy-contracted obligation with utmost loyalty to its insured; not for the purpose of developing, secretly or otherwise, a policy defense. When a conflict of interest—even a mere possibility thereof—arises, the law suggests (if it does not require) that the insurer act promptly and openly, on peril of estoppel, preferably upon a record made in the pending case (if pending as here) with the court fully apprised of all necessary details; also that the insurer act thus on time for arms' length actions which may protect the respective rights of both parties to the contract of insurance. [*Meirthew v Last*, 376 Mich 33, 38; 135 NW2d 353 (1965).]

A reservation of rights letter and the hiring of independent counsel, however, dispel the conflict of interest:

> An insurance company may tender a defense under a reservation of rights and retain independent counsel to represent its insured. *Frankenmuth Mutual Ins. Co., Inc v Eurich,* 152 Mich App 683, 688; 394 NW2d 70 (1986). No attorney-client relationship exists between an insurance company and the attorney representing the insurance company's insured. The attorney's sole loyalty and duty is owed to the client, not the insurer. *Atlanta Int'l Ins Co v Bell,* 181 Mich App 272, 274; 448 NW2d 804 (1989), aff'd in part and rev'd in part 438 Mich 512 (1991); *American Employers' Ins Co v Med Protective Co.,* 165 Mich App 657, 660; 419 NW2d 447 (1988). In the absence of any record showing by [the insured] that the law firm in fact acted against the interests of [the insured], we will not presume that the firm had failed or would fail to carry out its responsibilities to its client. [*Michigan Millers Mut Ins Co v Bronson Plating Co,* 197 Mich App 482, 491-492; 496 NW2d 373 (1992), aff'd 445 Mich. 558 (1994), overruled in part on other grounds in *Wilkie v Auto-Owners Ins Co,* 469 Mich 41, 63; 664 NW2d 776 (2003) (Footnote omitted).]

Moreover, a ground for denying coverage, though not raised in an initial reservation of rights letter, may still be raised at a later date if there was no unreasonable delay by the insurer, and the insured has suffered no prejudice from the delay. *Allstate v Keillor,* 450 Mich 412, 416 n 2; 537 NW2d 589 (1995):

> The defendant makes much of the fact that this reservation of rights letter did not mention plaintiff's reliance on the motor vehicle exclusion. The defendant claims that because the automobile exclusion was not raised in Allstate's reservation of rights letter, Allstate should be estopped from raising it. It should be noted, however, that Allstate did assert the exclusion in its second amended complaint. We hold that Allstate is not estopped from raising the motor vehicle exclusion because Allstate did not delay unreasonably in asserting the exclusion and the defendant has suffered no prejudice from the short delay. [*Id.*]

In lieu of a reservation of rights letter, the insurer may also file a declaratory action, which is sufficient to provide notice to its insured that it disputes coverage. *Security Ins Co of Hartford v Daniels,* 70 Mich App 100, 116; 245 NW2d 418 (1976); *Riverside Ins Co v Kolonich*, 122 Mich App

51, 58; 329 NW2d 528, 531 (1982). Cf. *Group Ins Co of Michigan v Morelli*, 111 Mich App 510, 514; 314 NW2d 672, 674 (1981).

III. An equitable estoppel claim requires that (a) a party against whom the doctrine of equitable estoppel is to be applied has full knowledge of the facts and circumstances involved, and (b) justifiable reliance on the part of the party seeking to invoke it.

A. Standard of Review

This Court reviews *de novo* a trial court's equitable decisions, including the application of equitable doctrines such as equitable estoppel. *Blackhawk Dev Corp, supra*, 473 Mich at 40. Issues of law are reviewed *de novo*. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998).

B. The party against whom the doctrine of equitable estoppel is to be applied must have full knowledge of the facts and circumstances involved.

When the party against whom estoppel is sought has no knowledge of the facts and circumstances because not told of those facts and circumstances by the very party seeking to invoke estoppel, to permit estoppel would misuse equity to obtain an inequitable result. For nearly 100 years, this Court has required the party against whom equitable estoppel is sought to have actual knowledge of the true facts before imposing equitable estoppel. In *Ruddock v Detroit Life Ins Co,* 209 Mich 638, 653, 654-655; 177 NW 242 (1920), this Court declined to impose equitable estoppel against an insurer that was unaware of a disqualification from coverage before sending a proof of loss:

> It is quite doubtful that plaintiff's case, if it is one where waiver and estoppel may be invoked, is within the cases where the doctrine has been applied. Defendant sent the blanks for proof of loss and made the suggestion that an administrator be appointed *before it had any notice or knowledge* that the insured was in the military service of his country at the time of his death. *It surely should not be estopped* by those acts from making a defense of *which it then had no knowledge or notice*. [*Id.* at 653.]

In 1982 and 1997, this Court affirmed the requirement that the party to be estopped must have knowledge of the actual facts: "Generally, to justify the application of estoppel, one must establish that there has been a false representation or concealment of material fact, coupled with an expectation that the other party will rely upon this conduct, *and knowledge of the actual facts* on the part of the representing or concealing party." *Lothian v City of Detroit*, 414 Mich 160, 177; 324 NW2d 9, 18 (1982), citing 28 Am Jur 2d, Estoppel and Waiver, § 35, p 640. In *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 270; 562 NW2d 648 (1997), this Court likewise stated that the party against whom equitable estoppel is imposed must have knowledge of the actual facts:

> One who seeks to invoke the doctrine [of equitable estoppel] generally must establish that there has been (1) a false representation or concealment of a material fact, (2) an expectation that the other party will rely on the misconduct, and (3) *knowledge of the actual facts* on the part of the representing or concealing party.

See also *Genesee Co Drain Comm'r v Genesee Co,* 309 Mich App 317, 333; 869 NW2d 635 (2015), and *McNeel v Farm Bureau Gen Ins Co of Michigan,* 289 Mich App 76, 117; 795 NW2d 205 (2010), in which the Court of Appeals, citing *Cincinnati,* required knowledge of the actual facts by the party sought to be estopped before imposing estoppel.

As it did in *Ruddock,* this Court in 1959 again declined to impose estoppel against an insurer that had no knowledge of misrepresentations made by the insured:

> The short answer to the arguments of waiver and estoppel is that a litigant *cannot be held estopped* to assert a defense, or to have waived his right thereto, *because of facts he does not know*, unless, as a matter of judicial policy, we are ready to say he 'should' know them. This we can always do, of course, but there is nothing before us as a matter of fact or of sound policy, to warrant imposition of such knowledge. This is not to say, of course, that one may wilfully close his eyes to that which others clearly see. But nothing of the sort is here before us. In fact, when actual knowledge was gained, the insurer was not slow to act, cancelling the policy ab initio and withdrawing its legal representation of the insured. Such action was well

> justified. [*Keys v Pace*, 358 Mich 74, 84–85; 99 NW2d 547, 552–53 (1959) (emphasis added).]

In *Morales v Auto-Owners Ins Co,* 458 Mich 288, 296-297; 582 NW2d 776 (1998), this Court did not list knowledge by the party against whom estoppel was sought in the enumerated elements of estoppel. However, this Court imposed estoppel on the insurer because of the insurer's actual knowledge of its insured's long history of failing to timely pay premiums, and its practice of reinstating coverage when the insured paid during the 30-day cancellation period. Thus, the insurer's knowledge of the actual facts played a significant part in this Court's ruling. In doing so, this Court analogized estoppel to waiver:

> The principle of estoppel is an equitable defense that prevents one party to a contract from enforcing a specific provision contained in the contract. With regard to payment provisions of an insurance policy, it is generally recognized that "[b]ecause provisions for forfeiture, lapse, or suspension for nonpayment of premiums, assessments, or dues are for the benefit of the insurer, the insurer may *waive*, or *may be estopped to assert*, such a provision through its conduct or words." [*Id.* at 295.]

Other opinions from this Court have equated equitable estoppel to waiver. "Equitable estoppel is essentially a doctrine of waiver." *Huhtala v Travelers Ins Co*, 401 Mich 118, 132; 257 NW2d 640, 647 (1977). And waiver has long been defined as an "intentional relinquishment of a known right." *Book Furniture Co v Chance*, 352 Mich 521, 526; 90 NW2d 651 (1958). Thus, even though the *Morales* Court did not list knowledge of the actual facts by the party to be estopped as an element of equitable estoppel, the Court in fact found that there was knowledge of the actual facts.

In *Mate v Wolverine Mut Ins Co,* 233 Mich App 14, 21-23; 592 NW2d 379 (1998), the Court of Appeals rejected the appellant's equitable estoppel argument. The decedent son was not covered under his mother's ex-husband's auto policy. The mother argued that the insurer was equitably estopped from denying coverage. She argued that the agent's silence regarding the lack of coverage

for her son satisfied the "acts, representations, or omissions" element of equitable estoppel. The Court of Appeals disagreed. It first noted that the mother admitted she had not inquired regarding the type of coverage that her son would receive, but merely assumed that he would be covered under the policy. *Id.* at 22. It also noted that the mother presented no evidence that the insurer was aware that the son was living with her. *Id.* The Court then held it was an insured's responsibility to read the policy and raise questions concerning coverage, and it was therefore the mother's failure to notify that resulted in the lack of coverage. *Id.* at 23.

Michigan jurisprudence is clear: the party against whom the doctrine of equitable estoppel is to be applied must have full knowledge of the actual facts and circumstances involved before equitable estoppel may be invoked. Given the long line of authority that requires knowledge of the actual facts, knowledge of the actual facts should be considered an element that the invoking party must establish before equitable estoppel may be imposed.

C. An equitable estoppel claim requires justifiable reliance on the part of the party seeking to invoke it.

"In the absence of evidence that a party was misled by another's conduct or that the party significantly and justifiably relied on that conduct to its disadvantage, an essential element of estoppel is lacking." 28 Am Jur 2d, Estoppel and Waiver, § 2.

It makes sense that the party against whom estoppel is sought must have actual knowledge of the facts and circumstances before being subjected to estoppel, particularly when the party seeking to invoke estoppel has actual knowledge of the facts and circumstances. Estoppel is an equitable remedy, *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 551; 487 NW2d 499, 504 (1992), of a wrong akin to fraud, *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 590 n 64; 702 NW2d 539,

556 (2005), and the doors of equity are closed "to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief." *Mudge v Macomb Co*, 458 Mich 87, 109 n 23; 580 NW2d 845, 856 (1998).

A party cannot claim justifiable reliance on incorrect facts if the party knows the true facts. Michigan jurisprudence has long held that a party cannot invoke equitable estoppel if the party has knowledge of or access to the true facts contrary to those on which the party claims to rely. An estoppel argument is meritless if the claimant had access to the same set of facts as the insurer. *Sisk-Rathburn v Farm Bureau Gen Ins Co*, 279 Mich App 425, 428-430; 760 NW2d 878 (2008), citing *Cudahy Bros Co v West Michigan Dock & Market Corp*, 285 Mich 18, 26-27, 280 NW 93 (1938) ("One who is cognizant of all the material facts can claim nothing by estoppel"), and *Sheffield Car Co v Constantine Hydraulic Co*, 171 Mich 423, 450-451, 137 NW 305 (1912) (it is essential to the application of the principle of equitable estoppel that the party claiming to have been influenced by the conduct or declarations of another, to his injury, was himself not only destitute of knowledge of the state of the facts, but was also destitute of any convenient and available means of acquiring such knowledge; and that, where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel"). See, also *Rix v O'Neil*, 366 Mich 35, 42; 113 NW2d 884 (1962).

In similar fashion, this Court, in discussing reasonable reliance, noted that there can be no reasonable reliance when the representations by the insurer clearly contradict the terms of the policy: "insureds' claims that they have reasonably relied on misrepresentations that clearly contradict the terms of their insurance policies must fail." *Cooper v Auto Club Ins Ass'n,* 481 Mich 399, 415; 751

NW2d 443 (2008). This is because knowledge of the terms of a policy is imputed to an insured, even if the insured claims to have not read the policy.

A party to a contract has the "duty to examine the contract, to know what he signed." *Liska v. Lodge,* 112 Mich 635, 637-638; 71 NW 171 (1897). Like all parties to a contract, insurance policy holders are obligated to read their policies. *House v Billman,* 340 Mich 621, 627; 66 NW2d 213 (1954). "[A]n insured is obligated to . . . raise any questions about the coverage within a reasonable time after the policy is issued." *Casey v Auto-Owners Ins Co,* 273 Mich App 388, 394-395; 729 NW2d 277 (2006). Even if the insureds have not read the policy, they are charged with knowledge of its terms. *Komraus Plumbing & Heating, Inc. v Cadillac Sands Motel, Inc.,* 387 Mich 285, 290; 195 NW2d 865 (1972).

Thus, justifiable reliance is an essential element of equitable estoppel. A party cannot claim justifiable reliance if the party has knowledge or the means to obtain knowledge of the true facts. And a party who has his or her policy has knowledge or the means to obtain knowledge of the true facts with respect to coverage. Therefore, a party who has his or her policy cannot invoke equitable estoppel to force an insurer to provide coverage broader than what the policy provides.

IV. The defendant-insurer should not be equitably estopped from denying coverage in this case.

A. Standard of Review

This Court reviews *de novo* a trial court's equitable decisions, including the application of equitable doctrines such as equitable estoppel. *Blackhawk Dev Corp, supra*, 473 Mich at 40.

B. Equitable estoppel may not be invoked by a party who (a) has full knowledge of the facts, and (b) manufactures the purported circumstances for invoking equitable estoppel.

A party who seeks equitable relief must do equity. *Bonninghausen v Hansen*, 305 Mich 595, 607; 9 NW2d 856 (1943). To obtain equitable relief, a party must come to the court with clean hands. See, e.g., *Attorney General v PowerPick Players' Club of Mich, LLC*, 287 Mich App 13, 52; 783 NW2d 515 (2010).

> The maxim that a party who comes into equity must come with clean hands is an elementary and fundamental concept of equity jurisprudence. The clean-hands doctrine closes the doors of equity to one tainted with inequitableness or bad faith relative to the matter in which he or she seeks relief, regardless of the improper behavior of the defendant. If there are indications of unfairness or overreaching on an equity plaintiffs part, the court will refuse to grant him or her equitable relief. [*Richards v Tibaldi,* 272 Mich App 522, 537; 726 NW2d 770 (2006) (citations omitted).]

The clean hands doctrine "is rooted in the historical concept of the court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abettor of iniquity.'" *Stachnik v Winkel*, 394 Mich 375, 382; 230 NW2d 529, 534 (1975), citing *Precision Instrument Mfg Co v Automotive Maintenance Machinery Co*, 324 US 806, 814; 65 SCt 993; 89 L Ed 1381 (1944).

When one party with all the facts induces another party to act a certain way, the first party cannot then claim that the second party is estopped from asserting a position. The doctrine of estoppel against estoppel may be invoked to prevent the first party from invoking estoppel against the second party. *Shean v US Fid & Guar Co*, 263 Mich 535, 540; 248 NW 892 (1933):

> The doctrine known as estoppel against estoppel is that two estoppels may destroy each other, or, as otherwise expressed, one estoppel may set another at large. So, estoppels by deed may neutralize each other, and an estoppel in pais may operate to prevent the setting up of an estoppel by deed and vice versa.

In the instant case, plaintiffs, the only parties with all the facts, essentially manufactured their equitable estoppel claim against Farm Bureau out of whole cloth. They had access to their policy, which not only stated that coverage was limited to the residence in which plaintiffs lived permanently, it also explicitly excluded coverage for a residence in which the plaintiffs did not live permanently for more than six months. It is undisputed that plaintiffs had not lived permanently in the subject house since July, 2010, more than three years before the December 2013 loss in question. Plaintiffs did not advise Farm Bureau in July 2010 that they had moved from the subject house to an apartment in Okemos. Plaintiffs did not change the address on their policy with their agent when they moved to Okemos.

While the policy did not contain a requirement that plaintiffs notify Farm Bureau of the move at the time of the move, it did contain the increase in hazard provision and the residence premises provision. Plaintiffs were obligated to read their policy and are held to know its terms. A party to a contract has the "duty to examine the contract, to know what he signed, and complainants cannot be made to suffer for this neglect upon his part." *Liska v Lodge,* 112 Mich 635, 637–638; 71 NW 171 (1897). Like all parties to a contract, insurance policy holders are obligated to read their policies. *House v Billman,* 340 Mich 621, 627; 66 NW2d 213 (1954). Even if the insureds have not read the policy, they are charged with knowledge of its terms. *Komraus Plumbing & Heating, Inc v Cadillac Sands Motel, Inc,* 387 Mich 285, 290; 195 NW2d 865 (1972). Thus, even if plaintiffs were not required by the policy's terms to notify Farm Bureau at the time of the 2010 move that they had moved, they were certainly on notice that they had no coverage for the house six months after they moved out.

In February 2013, when plaintiffs filed their first water loss damage claim with respect to the subject house, they did not inform the adjuster that they had moved from the house 2 ½ years prior. Instead, they informed the adjuster that they "were moving." Song Yu stated that they left everything behind in 2010, and almost all furnishings were in the house when they moved to East Lansing in 2013.[79] He stated that they moved the furnishings to the garage after the realtor told them to in order to sell the house in July 2013.[80] He further testified that he met with the realtor about the time that the February 2013 leak was discovered, and the house was first listed for sale about June 2013.[81] Thus, at the time Farm Bureau's adjuster visited the house, there would have been no reason to conclude that plaintiffs were moving from anywhere *but* that home. Without knowledge of the previous move in 2010, it was logical for the adjuster to assume that plaintiffs were in the process of moving from the subject house but had not yet done so.

While plaintiffs had moved out in 2010, this is not what they told Farm Bureau's adjuster in February 2013. They said they were moving. A statement of future intent, i.e., we are moving, does not constitute an existing fact, i.e. we have moved out. This concept has been stated several times in different contexts. For instance, in *Forge v Smith*, 458 Mich 198, 212; 580 NW2d 876 (1998), this Court held that a plaintiff must establish that the defendant made a representation regarding a past or existing fact in order to establish misrepresentation, and a promise regarding the future was insufficient. It is worth noting that from 2010 and throughout 2013, plaintiffs allowed information about this policy to be one of the only categories of mail that was *not* forwarded to the Okemos or East Lansing address.

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[79] Song Yu EUO, pp 29-30, appendix 63A-64A.
[80] Song Yu EUO, p 30, appendix 64A.

Thus, "knowledge" of a party's contingent future event does not constitute knowledge of a past or existing fact. If the agreement is conditioned on the happening of a future event that, through no fault of the parties, never happens, liability does not attach. *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 359; 320 NW2d 836 (1982). A claim is not ripe if it is based upon a contingent future event. *King v Michigan State Police Dep't*, 303 Mich App 162, 188; 841 NW2d 914 (2013). In general, an action for fraud cannot be based on the failure of future events to transpire as represented or predicted. See *Foreman v Foreman*, 266 Mich App 132, 143; 701 NW2d 167 (2005); *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 444; 505 NW2d 275 (1993); *Cerabono v Price*, 7 AD3d 479, 480 (2nd Dept 2004). Thus, the appellate courts have clearly stated that a future event, such as "we are moving" is not something a party can rely on and therefore cannot be the sole basis for later concluding that the party has knowledge. This makes sense. If it were the rule that insurers could cancel upon learning of a contemplated future event, the result would be gaps in coverage while the moving process was unfolding. And such a result is not beneficial to Michigan homeowners.

In May 2013, the couple moved from their apartment in Okemos to their house on Cricket Lane in East Lansing.[82] Plaintiffs did not call to advise Farm Bureau of their move to East Lansing. They insured their East Lansing home through Citizens, not Farm Bureau, thus providing no notice whatsoever to Farm Bureau that they had actually moved.[83] While most mail was changed to their new address, the Farm Bureau insurance information including billings continued to go to the subject property address. The only rational explanation for this mail going to the subject property is that

[81] Song Yu EUO, pp 19, 40-41, appendix 53A, 74A-75A.
[82] EUO of Song Yu, p 5, appendix 39A.

plaintiffs were hiding the change of residence. In approximately June or July 2013, plaintiffs listed the subject property for sale for six months with a realtor.[84] They did not advise Farm Bureau that they listed the subject property for sale.

As soon as Farm Bureau received notice in December 2013 from the mortgagee that it had a different address for Song Yu, the agent was dispatched to the subject property to investigate. Within days of discovering that the house was vacant and had a for sale sign, Farm Bureau issued a cancellation of the policy. Thus, once Farm Bureau was aware of all the facts, it did not sit on its rights but, rather, notified plaintiffs that it was exercising those rights.

Plaintiffs claimed, and the Court of Appeals majority found, reliance on the fact that the February 2013 claim was paid and the fact that the policy was renewed in December 2013. However, it was plaintiffs' failure to notify Farm Bureau in February 2013 that they had moved out in 2010, which led to Farm Bureau paying the February 2013 claim and renewing the policy in December. Farm Bureau was under no obligation to investigate the veracity of plaintiffs' February 2013 statements. *Titan Ins Co v Hyten*, 491 Mich at 570. Farm Bureau's actions, premised on incorrect facts, when the correct facts were known to plaintiffs, cannot be the basis for establishing reasonable reliance. *Tenneco Inc,* 281 Mich App at 446.

Presumably, the Court of Appeals majority found prejudice to plaintiffs on the basis that Farm Bureau failed to inform plaintiffs that they would need to obtain different coverage. An insurer's duty to an insured is governed by the insurance policy, and an insurer has no duty to advise the insured regarding the adequacy of insurance coverage absent a special relationship. *Harts v*

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[83] EUO of Sang Chung, p 24, appendix 203A.
[84] EUO of Song Yu, p 19, 70, appendix 53A, 104A.

Farmers Ins Exch, 461 Mich 1, 7; 597 NW2d 47, 50 (1999). See also, *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 312–13; 583 NW2d 548, 551 (1998) (Because insurance company was under no duty to advise about any inaccuracies in, or subsequent changes to, the information contained in the certificate of insurance, the trial court erred in applying the doctrine of equitable estoppel to prevent the insurance company from asserting a lack of coverage).

Payment of claims cannot be the basis for an equitable estoppel claim. In *Sisk-Rathburn v Farm Bureau Gen Ins Co of Michigan*, 279 Mich App 425, 426; 760 NW2d 878 (2008), the plaintiff was injured while driving a rental car. She was listed as an insured driver under her husband's business policy, but the policy did not provide personal protection insurance benefits for rental vehicles. *Id*. at 428. The husband's insurer paid some of the plaintiff's claims for benefits, but later terminated benefits. *Id*. at 429. Plaintiff argued the insurer was estopped from cancelling benefits because she had refrained from filing a claim with another insurer in reliance on the husband's insurer's payment of benefits, and she could no longer file a claim with the other insurer because of MCL 500.3145(1)'s one-year-back rule. *Sisk-Rathburn, supra*. The Court of Appeals disagreed:

> [A] party who is actually "cognizant" of all material facts can claim nothing by estoppel . . . Critically here, the prejudiced party had the same access to the true facts as the party to be estopped; in other words, where the plaintiff had a feasible means to discover the truth, she cannot contend that she was influenced by the defendant. [*Id*. (internal citations omitted, emphasis in original).]

The recurring theme of plaintiffs' argument is that Farm Bureau should have to pay them benefits not provided by the policy but through estoppel because (a) Farm Bureau did not ask the magic question, i.e., were plaintiffs moving from *that* house; (b) Farm Bureau, unknowingly operating on only the partial facts conveyed by plaintiffs, paid their first water damage claim (which itself would not have been paid had plaintiffs disclosed that they had not occupied the house for three

years); and, (c) Farm Bureau, with no actual knowledge that plaintiffs had moved, automatically renewed their policy (yet, less than a month later issued a cancellation upon learning that plaintiffs no longer occupied the house, thus indicating no intent to waive policy provisions).[85]

If estoppel should apply to anyone, it should apply to plaintiffs. (a) They had *actual knowledge* of all the facts (particularly that they had moved from the house in 2010, and that their policy did not cover unoccupied houses). *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 270; 562 NW2d 648 (1997). (b) They falsely represented or concealed the fact that they had moved from the house in 2010 when they informed the adjuster that they *were moving*. *Id.* (After all, if they did not intend to falsely convey that they were moving from *that* house, why did they even mention that they were moving when the adjuster visited?) (c) They expected Farm Bureau to rely on these representations when they advised that they were in the process of moving. *Id.* (While plaintiffs assert that they had no motive to mislead the adjuster, they most certainly did because they wanted their February claim paid). (d) Plaintiffs' misrepresentations induced Farm Bureau to believe that coverage was owed for the February claim on the basis that that house had not been unoccupied for more than six months. *Morales v Auto-Owners Ins Co,* 458 Mich 288, 296-297; 582 NW2d 776 (1998). (Their statement that they were moving clearly conveyed that *that* house had recently been occupied). (e) Farm Bureau justifiably relied on plaintiffs' misrepresentations when it paid plaintiffs' February loss claim. *Id.* (f) Farm Bureau was prejudiced because it was first bamboozled into paying the February loss claim and is now being forced to pay the December loss claim contrary to the express terms of its policy. Plaintiffs' argument that they were not required to report the 2010

[85] Answer to the application, pp 1, 4, 6, 17, 20-21, 25, 29, 31-32, 36, 39.

move amounts to nothing more than "I was allowed to prevaricate at will because the policy did not tell me I could not."

Plaintiffs should not be permitted to invoke equity to obtain an inequitable result. Equitable estoppel should not apply in this case to broaden the scope of coverage beyond the policy's explicit terms. They should be equitably estopped from claiming equitable estoppel.

CONCLUSION AND RELIEF REQUESTED

Farm Bureau requests that this Court reverse the Court of Appeals opinion, reinstate the trial court's grant of summary disposition to Farm Bureau, and issue an opinion that clarifies:

(a) The plain language of the insurance policy issued by Farm Bureau precluded coverage.

(b) The only basis in which equitable estoppel may be applied to require an insurer to expand coverage that is contrary to the express terms of an insurance contract is when the insurer represents the insured without notifying the insured that it intends to dispute coverage. If the insurer provides timely notice to the insured that it disputes coverage, whether through a reservation of rights letter or through a declaratory action, there can be no estoppel.

(c) A person seeking to invoke equitable estoppel must establish as part of the required elements both that (a) a party against whom the doctrine of equitable estoppel is to be applied has full knowledge of the facts and circumstances involved, and (b) justifiable reliance on the part of the party seeking to invoke it is shown.

(d) Equitable estoppel may not be invoked by the person who has in his or her possession facts unknown by the party against whom equitable estoppel is sought, which if known, would have resulted in the party exercising the very rights now sought to be estopped.

Respectfully submitted,

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