STATE OF MICHIGAN

IN THE SUPREME COURT

SONG YU and SANG CHUNG,

Plaintiffs-Appellees,

Supreme Court No. 155811
Court of Appeals No. 331570
Lower Court No. 2014-001421-CK

v.

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

Defendant-Appellant.

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MICHIGAN DEFENSE TRIAL COUNSEL'S *AMICUS CURIAE* BRIEF

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Other Authorities

INDEX OF EXHIBITS

STATEMENT OF INTEREST

Michigan Defense Trial Counsel (MDTC) is a statewide attorney association that primarily focuses on civil-defense representation. MDTC was established in 1979 to enhance and promote the civil-defense bar, and it accomplishes that goal by facilitating dialogue among and advancing the knowledge and skills of civil-defense lawyers. MDTC appears before this Court as a representative for Michigan's civil-defense lawyers and their clients, a significant portion of which could be affected by the issues involved in this case.[1]

[1] After reasonable investigation, MDTC believes that (a) no MDTC member who voted either in favor or against preparation of this brief, and no attorney in the law firm or corporation of such a MDTC member, represents a party to this litigation; (b) no MDTC member who is a representative of any party to this litigation participated in the authorship of this brief; and (c) no one other than MDTC, or its members who authored this brief and their law firms or employers, made a direct or indirect financial contribution to the preparation or submission of this brief.

ORDER APPEALED FROM AND JURISDICTIONAL STATEMENT

MDTC relies on both parties' Order Appealed From and Jurisdictional Statements in their briefs on appeal.

STATEMENT OF QUESTIONS PRESENTED

This Court asked plaintiffs Song Yu and Sang Chung and defendant Farm Bureau General Insurance Company of Michigan to address four issues:

- "whether the plain language of the insurance policy precluded coverage;"
- "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;"
- "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"
- "whether the defendant-insurer should be equitably estopped from denying coverage in this case."

STATEMENT OF FACTS

MDTC relies on both parties' Statements of Facts sections in their briefs on appeal.

STANDARD OF REVIEW

MDTC also relies on both parties' Standard of Review sections in their briefs on appeal.

ARGUMENT

When two parties enter into a contract, it is important that both know what contract they are actually entering into. And that is true for all types of contracts—even insurance policies. It is important because each party needs to know what they signed up for. Insureds need to know what their premium is, what losses are and what losses are not covered, and what other responsibilities they have. Insurers likewise need to know what premium the insureds are paying, what losses are and what losses are not covered, and what other responsibilities they have. If both parties to an insurance policy do not know those things, there simply is not a contract.[2]

There are, of course, some situations where contract provisions, even if agreed to, cannot be enforced. For example, "where an illegal contract is involved, the court will not enforce it…."[3] Another example is where a party is equitably estopped from enforcing a contractual provision. But those situations are—appropriately—rare. And even rarer than those situations should be situations where courts can create contractual provisions that otherwise do not exist. Allowing courts to create contractual duties between parties that

[2] *Int'l Transp Ass'n v Bylenga*, 254 Mich 236, 239; 236 NW2d 771 (1931) ("A meeting of the minds of the parties upon all essential points is necessary to constitute a valid contract.").
[3] *Kukla v Perry*, 361 Mich 311, 324; 105 NW2d 176 (1960).

never existed would be a very significant change in Michigan's jurisprudence. It is MDTC's view that such is change is not warranted, especially in a case like this.

A. The plain language of Farm Bureau's insurance policy precluded coverage.

"[I]nsurance policies are subject to the same contract construction principles that apply to any other species of contract."[4] Accordingly, courts "give the words used in the contract their plain and ordinary meaning that would be apparent to the reader of the instrument."[5] "[U]nless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written."[6] Stated differently, courts simply cannot modify an unambiguous contract or rebalance the contractual equities.[7]

Here, "**SECTION I – PROPERTY COVERAGES**" of the parties' insurance contract, a homeowner's-insurance policy, provides coverage for "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:

[4] *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005).
[5] *Fremont Ins Co v Izenbaard*, 493 Mich 859; 820 NW2d 902 (2012).
[6] *Rory*, 473 Mich at 461.
[7] *Id*. ("[T]he judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of 'reasonableness' as a basis upon which courts may refuse to enforce unambiguous contractual provisions.").

1. the dwelling on the **residence premises**, including structures attached to the dwelling….[8]

The "**DEFINITIONS**" section of the policy, in turn, defines "**residence premises**" as follows:

> 20. "**Residence premises**" means:
>
> a. the only family dwelling, other structures, and grounds;
>
> b. a two, three, or four family dwelling (where you reside in at least one of the family units), other structures, and grounds; or
>
> c. that part of any other building;
>
> where you reside and which is shown in the Declarations of this policy.[9]

The policy does not, however, define the phrase "where you reside." In such a circumstance, this Court turns to the dictionary.[10] Meriam-Webster's Collegiate Dictionary, as an example, defines the verb "reside" as "to dwell permanently or continuously[.]"[11] Michigan courts repeatedly rely on that or a practically identical definition.[12]

Here, the water damage to the Portage home occurred on December 25, 2013. But Mr. Yu made it clear—under oath—that he and his wife had not lived in the Portage home since July 2010:

> Q Okay. And where do you currently reside, sir?
>
> **A Currently I live in East Lansing?**
>
> Q Address?
>
> **A [Omitted] Cricket Lane, C-r-i-c-k-e-t L-a-n-e, East Lansing, Michigan ZIP 48823.**
>
> Q And how long have you lived there?
>
> **A Almost a year.**

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[8] Homeowners Policy, p 4.

[9] Homeowners Policy, p 3.

[10] See, e.g., *Fremont Ins Co v Izenbaard*, 493 Mich 859; 820 NW2d 902 (2012) ("Because the term 'premises' is undefined in the insurance contract at issue in this case, reference to dictionary definitions is appropriate.").

[11] *Meriam-Webster's Collegiate Dictionary* (2009), p 1060.

[12] See, e.g., *Kar v Nanda*, 291 Mich App 284, 288; 805 NW2d 609 (2011) ("*Random House Webster's College Dictionary* (1997) contains the following definition of 'reside': '[T]o dwell permanently or for some time; live.' ").

Q Okay.
A I believe I started to reside there in May of 2013.

* * *

Q And where did you live before [Omitted] Cricket Lane?
A I lived in Okemos, O-k-e-m-o-s, Michigan. The address would be [Omitted] Club Meridian. That's C-l-u-b M-e-r-i-d-i-a-n Drive.
Q Is there an apartment or anything?
A I believe it was [Omitted].
Q Okay. And how long did you live there?
A I moved over there from July -- about July of 2010 until I moved into Cricket Lane. So let me see, what is that?

* * *

Q And where did you live -- where did you reside before [Omitted] Club Meridian?
A [Omitted] Forest Drive, F-o-r-e-s-t, Portage, P-o-r-t-a-g-e, Michigan 49002, I believe.
Q And how long did you reside there?
A Since November of 2006.[13]

When an insured testifies under oath that he or she lived at one home between July 2010 and May 2013 and a second home from May 2013 to now, it cannot be said that insured also "dwell[ed] permanently or continuously" at a third home, too. Any other interpretation and application would be rewriting what the parties agreed to: Coverage for the dwelling on the place "where you reside," i.e., where you "dwell permanently or continuously." In this case, Mr. Yu's testimony happens to be a perfect example of that: He openly testified that he lived in Portage from November 2006 to July 2010, in Okemos from July 2010 to May 2013, and in East Lansing from May 2013 until now.[14] He should not be able to now say that, while living in Okemos or East Lansing, he also dwelled permanently or continuously in Portage.

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[13] Statement of Song Yu, D.O., pp 5-7 (attached as Exhibit D to Farm Bureau's Brief on Appeal).
[14] In fact, Mr. Yu's wife, Ms. Chung, testified that she had not slept at the Portage home for at least a year and a half. See Statement of Sang Chung, p 13 (attached as Exhibit G to Farm Bureau's Brief on Appeal).

The reason why a homeowner's-insurance policy only provides coverage to the dwelling "where you reside," i.e., where you "dwell permanently or continuously," makes sense: It is more hazardous when someone is not there to keep an eye on the home.[15] What happened in this case illustrates the point. For example, had someone resided, i.e., dwelled permanently or continuously, at the Portage home, he or she could have either prevented the water damage or at least mitigated the water damage's consequences.

And that is also why the homeowner's-insurance policy at issue here included an increase-in-hazard provision:

> 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** 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.[16]

The policy defines "**vacant**" as "the absence of furnishings, utilities, and the amenities minimally necessary for human habitation."[17] Although the policy does not define "unoccupied," it does define the opposite: " '**Occupied**' means being lived in with

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[15] See, e.g., *McGrath v Allstate Ins Co*, 290 Mich App 434, 444; 802 NW2d 619 (2010) ("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….").

[16] Homeowners Policy, p 4 (attached as Exhibit E to Farm Bureau's Brief on Appeal). It is undisputed that the policy's declarations did not contain the "Location (Seasonal)" designation.

[17] *Id*. at p 3.

regular and continuous legal presence of human inhabitants."[18] So subparagraph b. of the increase-in-hazard precludes coverage in two distinct circumstances: (1) When there is "the absence of furnishings, utilities, and the amenities minimally necessary for human habitation" "beyond a period of 60 consecutive days" *or* (2) when the home is not "being lived in with regular and continuous legal presence of human inhabitants" for "a period of six consecutive months."

At a minimum, when an insured testifies under oath in May 2014 that he or she has not lived in a home since July 2010, the second circumstance is implicated. And it cannot be said that a person who admittedly does not live at the home still maintains a "regular and continuous legal presence" at that home. But that is the exact situation and timeline Mr. Yu provided in this case. He testified that, at best, "[i]n the summertime [he]'d probably be there at least once a month."[19] Outside of summer though, Mr. Yu explained, he only went to the Portage home "maybe … twice a season, just to clean up leaves."[20] And, after disagreeing with his wife's estimation that they only went to the Portage home only six times per year, he estimated that they would go approximately "ten times a year."[21]

In Michigan, practically all homeowner's-insurance policies provide coverage for dwellings "where you reside." Unsurprisingly, they usually do not provide the same for dwellings where you do not. Some include seasonal coverage for insureds who own homes that they only visit on occasion, e.g., a cottage up north. But the idea that an insured occupies a home that he or she denies living in, only visits "once a month" "[i]n the summertime" and "twice a season, just to clean up leaves," and, at best, "ten times a year" is

[18] *Id*.
[19] Statement of Song Yu, D.O., p 32.
[20] *Id*. at p 33.
[21] *Id*.

directly at odds with what the parties contracted for: Coverage for the dwelling on the place "where you reside," i.e., where you "dwell permanently or continuously." The policy at issue, and all similar policies, precludes coverage in a situation like this.[22]

B. The doctrine of equitable estoppel should not be applied to require an insurer to expand coverage that is contrary to the express terms of the insurance contract. But, if it should, it should only be applied in one very limited situation.

Equitable estoppel "is an equitable defense that prevents one party to a contract from enforcing a specific provision contained in the contract."[23] As this Court recognized nearly 150 years ago, the doctrine sounds in equity and is limited in application:

> The doctrine of estoppel rests upon a party having, directly or indirectly, made assertions, promises or assurances upon which another has acted under such circumstances that he would be seriously prejudiced if the assertions were suffered to be disproved, or the promises or assurances to be withdrawn. But as the doctrine, when applied, operates to take away legal rights, it is no more than common justice to require that the facts which are supposed to call for its application shall be unquestionable, and the wrong which is to be prevented shall be undoubted.[24]

American Jurisprudence describes the doctrine's limitations similarly, explaining that it

- "is to be applied rarely and only from necessity,"
- "should be applied cautiously,"
- "will not be invoked lightly but only in extraordinary circumstances,"
- "is not applied except where refusing it would be inequitable,"

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[22] This is precisely the analysis that Judge Servitto followed in her dissent. See *Yu v Farm Bureau*, unpublished per curiam opinion of the Court of Appeals, issued April 11, 2017 (Docket No. 331570) (SERVITTO, J., *dissenting*), pp 1-2 (attached as Exhibit A to Farm Bureau's Brief on Appeal).

[23] *Grosse Pointe Park v Mich Municipal Liability and Prop Pool*, 473 Mich 188, 203; 702 NW2d 106 (2005), quoting *Morales v Auto-Owners Ins Co*, 458 Mich 288, 295; 582 NW2d 776 (1998) (internal quotation marks omitted).

[24] *Maxwell v Bay City Bridge Co*, 41 Mich 453, 467-468; 2 NW2d 639 (1879).

- "should be resorted to solely as a means of preventing injustice,"
- "should not be permitted to defeat the administration of the law,"
- "should not be permitted … to accomplish a wrong or secure an undue advantage,"
- "should not be permitted … to extend beyond the requirements of the transactions in which they originate,"
- "should not be given effect beyond what is necessary to accomplish justice between the parties,"
- "cannot arise where the party claiming estoppel is equally negligent or at fault," and
- "cannot lie" "[w]here both parties can determine the law and have knowledge of the underlying facts."[25]

The list is lengthy for a reason: The doctrine "is a doctrine of last resort."[26]

And it is precisely these limitations that have led this Court to limit the doctrine's applicability in insurance disputes. For example, nearly 100 years ago in *Ruddock v Detroit Life Ins Co*, this Court made it clear that the insured's reliance on equitable estoppel was misplaced because the insurer was merely "insisting upon the contract itself…."[27] Relying on the Wisconsin Supreme Court's decision in *McCoy v Northwestern Mutual Benefit Ass'n*, it explained as follows:

> 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

[25] 28 Am Jur 2d Estoppel and Waiver § 3.
[26] *Id*.
[27] *Ruddock v Detroit Life Ins Co*, 209 Mich 638, 653-654; 177 NW 242 (1920).

> create a liability contrary to the express provisions of the contract the parties did make.[28]

Approximately 80 years later, in *Kirschner v Process Design Assoc, Inc*, this Court again made it clear that equitable estoppel "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."[29] It continued, "This is because an insurance company should not be required to pay for a loss for which it has charged no premium."[30] To support this conclusion, this Court relied on the exact same portion of its opinion in *Ruddock v Detroit Life Ins Co* that is quoted above.[31]

This Court did, however, recognize that, "[d]espite the limited applications of waiver and estoppel, in some instances, courts have applied the doctrines to bring within coverage risks not covered by the policy."[32] Specifically, it recognized two scenarios where the doctrine might come in to play: (1) "[S]ituations in which the insurance company has misrepresented the terms of the policy to the insured or" (2) "situations in which the insurance company has … defended the insured without reserving the right to deny coverage[.]"[33] But neither applied in that case.[34]

In light of *Ruddock v Detroit Life Ins Co* and *Kirschner v Process Design Assoc, Inc*, it appeared undisputed that, in Michigan, the doctrine of equitable estoppel could not be used

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[28] *Id*. at 654; see also *McCoy v Northwestern Mutual Ass'n*, 92 Wis 577; 66 NW 697 (1896) ("What is here sough is not to prevent a forfeiture, but to make a new contract; to radically change the terms of the certificate so as to cover death by suicide, when by its terms that is expressly excluded from the contract. We do not understand that the doctrine of estoppel or waiver goes that far.").
[29] *Kirschner v Process Design Assoc, Inc*, 459 Mich 587, 594; 592 NW2d 707 (1999).
[30] *Id*.
[31] *Id*.
[32] *Kirschner*, 459 Mich at 594.
[33] *Id*.
[34] *Id*. at 595.

to expand insurance coverage to cover a loss that was never contracted for or agreed to by the contracting parties except for in two very limited situations. Then came *Grosse Pointe Park v Mich Municipal Liability and Prop Pool*.[35]

That case arose out of the decision by the insured, a city park, to discharge sewage into a nearby creek.[36] The insured's insurer refused to provide coverage when it was sued by local residents, relying on the policy's pollution-exclusion clause.[37] The insurance dispute eventually made it to this Court, and this Court held that the pollution-exclusion clause applied.[38] But the insured also argued that, even if the clause applied, the insurer should be "estopped from enforcing this clause because of its practice of covering sewage backup claims or because of the manner in which it provided a defense to the city."[39]

Although this Court unanimously agreed that the doctrine of equitable estoppel did not preclude the insurer from enforcing the clause, it was equally divided as to whether insurers could hypothetically ever be equitably estopped from enforcing exclusion clauses in such a scenario. The second opinion—authored by Justice Young and joined by Justices Taylor and Markman—concluded that Michigan law, including this Court's decisions in *Ruddock v Detroit Life Ins Co* and *Kirschner v Process Design Assoc, Inc*, does not allow equitable estoppel to expand a policy's coverage beyond what the policy provides:

> By asking this Court to hold that the Pool is equitably estopped from denying coverage…, the city is essentially requesting this Court to ignore the policy's pollution exclusion clause that the [insurer] specifically invoked in its reservation of rights letter. To do so, however, would be to alter fundamentally the nature of the bargain struck between the [insured] and

[35] *Grosse Pointe Park v Mich Municipal Liability and Prop Pool*, 473 Mich 188; 702 NW2d 106 (2005).
[36] *Grosse Pointe Park*, 473 Mich at 189 (CAVANAGH, J.).
[37] *Id*. at 189-190 (CAVANAGH, J.).
[38] *Id*. at 190, 196-203 (CAVANAGH, J.).
[39] *Id*. at 190 (CAVANAGH, J.).

> the [insurer] and to protect the [insured] against risks that were … expressly excluded from the policy. This Court explicitly rejected this argument in *Ruddock* and *Kirschner*. We do so again today. Equitable estoppel must not be applied to expand coverage beyond the scope originally contemplated by the parties *in the insurance policy as written*. A court must not bestow under the veil of equity that which the aggrieved party itself failed to achieve in negotiating the contract.[40]

The lead opinion—authored by Justice Cavanagh and joined by Justices Weaver and Kelly—disagreed: "We disagree with Justice Young's expansive reading of *Kirschner*, *supra*. Relying on that decision, Justice Young posits that even if [the insured] could prove all the elements for the application of estoppel, the [insured] will still be unprotected because estoppel can never be applied to extend coverage, period."[41] In the lead opinion's view, equitable estoppel can, albeit in relatively rare circumstances, be used to create coverage that otherwise never existed in the first place.[42]

Since this Court issued its opinion in *Grosse Pointe Park v Mich Municipal Liability and Prop Pool*, the Court of Appeals has not expressly chosen a side (so to speak) on the whether-estoppel-can-expand-coverage debate. In fact, it has avoided the issue all together in some cases by holding, much like this Court in *Grosse Pointe Park v Mich Municipal Liability and Prop Pool*, that equitable estoppel would not apply either way.[43] And, in others—like this one—it has not acknowledged that the debate even exists. It is MDTC's view that Justices Young, Taylor, and Markman got it right: Equitable estoppel should not

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[40] *Grosse Pointe Park*, 473 Mich at 223 (YOUNG, J.).
[41] *Grosse Pointe Park*, 473 Mich at 206 n 12 (CAVANAGH, J.).
[42] *Id*.
[43] See, e.g., *Williams v Home-Owners Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued December 20, 2011 (Docket No. 301158), p 10 n 4 ("However, we find it unnecessary to resolve the question whether equitable estoppel can be utilized so as to expand or broaden coverage, given that, as in *Grosse Pointe Park*, plaintiffs failed, as a matter of law, to establish all of the requisite elements of equitable estoppel for the reasons discussed below."). *Williams v Home-Owners Ins Co* is attached as **Exhibit A**.

be applied to expand coverage to cover losses beyond what the parties contracted for and agreed to.[44]

This Court appreciated the problem with expanding coverage to cover losses beyond what the parties contracted for and agreed to nearly 100 years ago, in *Ruddock v Detroit Life Ins Co*: "What is insisted upon is not really the waiver of a forfeiture, or an equitable estoppel against insisting upon a condition of the policy…. What is here sought is not to prevent a forfeiture, but to make a new contract; to radically change the terms of the certificate so as to cover [a specific loss], when by its terms that is expressly excluded from the contract."[45]

Stated more simply, courts would be reading something into a contract that is not there—and this Court has made it clear that courts cannot do that. For example, in *Cottrill v Mich Hosp Serv*, this Court was tasked with interpreting and applying the following insurance provision:

> Each member is entitled to hospital service for a maximum benefit period of thirty (30) days under this and prior contracts of the Service Association, for each period of hospital confinement, or for successive periods of hospital confinement separated by less than six (6) months. Such member will again be entitled to a maximum benefit period of third (30) days only when there

[44] As Farm Bureau correctly points out, many other states have refused to apply the doctrine of equitable estoppel in a way that expands coverage beyond what the parties contracted for. See Farm Bureau's Brief on Appeal, pp 26-27. MDTC wishes to point out that the list of states set forth by Farm Bureau only reflects a portion of the states refusing to do so. See, e.g., *Zarrella v Minn Mut Life Ins Co*, 824 A2d 1249, 1260 (R.I. 2003) (holding that, under Rhode Island law, "[t]he court, however, may not invoke the doctrine of equitable estoppel to expand the scope of coverage of an insurance policy"); *Capstone Bldg Corp v American Motorists Ins Co*, 308 Conn 760, 815; 67 A3d 961 (2013) (holding that, under Connecticut law, "hold[ing] otherwise would be to expand coverage by estoppel to claims for which the insurer owes no duties under the policy").

[45] *Ruddock*, 209 Mich at 654-655, quoting *McCoy*, 92 Wis at 577.

> has been a lapse of at least six (6) months between the date of last discharge from a hospital and the date of next admission.[46]

The insured was first hospitalized for 30 days in August and October of 1956, and the insurer paid benefits for that hospitalization.[47] The insured was again hospitalized in February and March of 1957, but the insurer did not pay benefits for that hospitalization "presumably [because] no request therefor was made" (likely because of the six-month limitation).[48] The insured was hospitalized for a third time in August and September of 1957, but, this time, she applied for benefits, and the insurer denied the claim.[49] Its reason for doing so was straightforward: There was not a lapse of at least six months between the February/March 1957 hospitalization and the August 1957 hospitalization.[50]

Before this Court, the insured "argue[d] in his brief that the concluding portion of the second sentence of the paragraph [from the policy that is quoted above] should be interpreted as reading 'between the date of last discharge from a hospital *for which a benefit was paid* and the date of next admission.' "[51] This Court rejected that argument because it could not read anything into the insurance policy that was not there: "Obviously the interpretation urged involves reading into the contract a provision not contained therein. This the Court may not do."[52]

That is precisely what courts would be doing if they used the doctrine of equitable estoppel to expand coverage to cover losses not contemplated by the parties, i.e., if they

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[46] *Cottrill v Mich Hosp Serv*, 359 Mich 472, 475; 102 NW2d 179 (1960) (internal quotation marks omitted).
[47] *Cottrill*, 359 Mich at 473.
[48] *Id*. at 474.
[49] *Id*.
[50] *Id*.
[51] *Cottrill*, 359 Mich at 476 (emphasis in original).
[52] *Id*.

used the doctrine of equitable estoppel to read coverage provisions into the policy that are not there. As this Court has recognized, this is something that courts "may not do." And if courts are prohibited from reading provisions into policies that are not there (which they are), courts should not be allowed to nevertheless do the same under the guise of equitable estoppel.

Finally, allowing equitable estoppel to expand coverage would completely revamp the definition of equitable estoppel. Again, equitable estoppel is a doctrine "that prevents one party to a contract *from enforcing a specific provision contained in the contract*."[53] But expanding a policy's coverage is not the same as preventing a party from enforcing a specific policy provision—it is adding an entirely new provision. To do so, equitable estoppel would have to be completely redefined. It would prevent a party from enforcing a policy provision *and* allow a party to add a specific policy provision based on equity, which this Court has repeatedly recognized that it cannot do.[54]

But if this Court decides that equitable estoppel can be applied to require an insurer to expand coverage that is contrary to the express terms of an insurance contract, it should make it clear that courts can only do so in one very limited circumstance: When an insurer has defended its insured without a reservation of rights. As Farm Bureau aptly points out in its brief on appeal, this Court has long recognized the application of equitable estoppel in

[53] *Grosse Pointe Park*, 473 Mich at 203-204 (citation and internal quotation marks omitted; emphasis added).

[54] See, e.g., *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 591; 702 NW2d 539 (2005) ("Indeed, if a court is free to cast aside, under the guise of equity, a plain statute … our system of government ceases to function as a representative democracy."); *Rory*, 473 Mich at 470 ("A mere judicial assessment of 'reasonableness' is an invalid basis upon which to refuse to enforce contractual provisions.").

that situation, i.e., the second exception identified by this Court in *Kirschner v Process Design Assoc, Inc* .[55] There is no reason to depart from that well-reasoned caselaw.

There is also no reason to apply equitable estoppel in a way that requires an insurer to expand coverage that is contrary to the express terms of an insurance contract in any other circumstance. As Farm Bureau points out, there is no need to do so when the insurer has misrepresented the policy's terms, i.e., the first exception identified by this Court in *Kirschner v Process Design Assoc, Inc*, because a misrepresentation- or fraud-based claim is readily available in such a situation.[56] And misrepresentation- and fraud-based claims provide a not-so-messy path for addressing an insurer's misrepresentation (as opposed to using equity to read a provision into a policy that is not there).

Plaintiffs' assertion on appeal that this Court and the Court of Appeals have applied equitable estoppel to expand coverage that is contrary to the express terms of an insurance contract "beyond the two enumerated *Kirschner* exceptions" in "a significant number of opinions" is wrong.[57] Some of the caselaw they cite to support that claim does not even involve equitable estoppel.[58] Some of the caselaw involves equitable estoppel generally but does not involve any attempt to expand coverage beyond a policy's terms.[59] None of the

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[55] Farm Bureau's Brief on Appeal, pp 31-35.
[56] *Id*. at p 31.
[57] Yu's Brief on Appeal, p 34 (emphasis, footnote, and internal quotation marks omitted).
[58] See, e.g., *Bonham v Northwestern Nat Ins Co*, 230 Mich 349; 202 NW2d 995 (1925) (holding that an insurer failed to demonstrate that the insured had forfeited coverage "either by vacancy or nonoccupancy of the property for the period of six months at any one time as prescribed by the policy"). The words "equitable" and "estoppel" are not mentioned in the opinion at all.
[59] See, e.g., *Pastucha v Roth*, 290 Mich 1; 287 NW2d 355 (1939) (holding that an insurer was equitably estopped from denying coverage based on nonpayment of premiums after its agent regularly accepted and retained late payments). *Pastucha v Roth* is nothing more than an ordinary example the application of equitable estoppel in the forfeiture context, which,

caselaw, however, involves recognizes additional exceptions beyond the two in *Kirschner v Process Design Assoc, Inc*.

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

At the outset, it appears that both parties in this case agree that an equitable estoppel claim requires justifiable reliance on the part of the party seeking to invoke it.[60] MDTC agrees as well. The parties disagree, however, whether a party against whom the doctrine of equitable estoppel is to be applied must have full knowledge of the facts and circumstances involved.

This Court has regularly, although perhaps not expressly, required full knowledge before applying equitable estoppel. For example, in *Ruddock v Detroit Life Ins Co*, it declined to apply equitable estoppel based on the insurer's lack of full 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."[61]

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as Farm Bureau points out, is well established. See Farm Bureau's Brief on Appeal, pp 28-30.

[60] Yu's Brief on Appeal, p 37 ("Application of the doctrine does, however, clearly require a showing of justifiable reliance on the party of the party seeking to apply it.") (emphasis and capitalization omitted); Farm Bureau's Brief on Appeal, p 38 ("An equitable estoppel claim requires justifiable reliance on the part of the party seeking to invoke it.") (emphasis omitted).

[61] *Lothian v Detroit*, 414 Mich 160, 177; 324 NW2d 9 (1982) (emphasis added); see also *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 270; 562 NW2d 648 (1997) ("One who seeks to invoke the doctrine [of equitable estoppel] must generally establish … *knowledge of the actual facts* on the part of the representing or concealing party.") (emphasis added).

Requiring mere access to knowledge, on the other hand, would be a direct departure from the principles that this Court has regularly enforced in insurance disputes. The best example of this is *Titan Ins Co v Hyten*.[62] In that case, the insured's mother sought and eventually obtained insurance from an insurer for the insured's car.[63] Unbeknownst to the insurer, the insured did not have a valid driver's license.[64] When the insured was later in a car accident and made an insurance claim, the insurer learned for the first time that the insured did not have a valid driver's license.[65] Then the insurer denied the claim on fraud grounds and filed a lawsuit, seeking a declaration that it was not responsible for insurance benefits.[66]

Both the trial court and the Court of Appeals held that the insurer could not avoid liability because the insured's fraud, i.e., her driver's-license status, was easily ascertainable through public records.[67] But this Court reversed.[68] In its analysis, which included discussion of estoppel, this Court made it clear "that an insurer has no duty to investigate or verify the representations of a potential insured."[69] In support of this rule, this Court quoted the following from its opinion in *Keys v Pace*:

> The short answer to the arguments of waiver and estoppel is that a litigant cannot be held estopped to assert a defense … 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.[70]

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[62] *Titan Ins Co v Hyten*, 491 Mich 547; 817 NW2d 562 (2012).
[63] *Id*. at 551.
[64] *Id*. at 551-552.
[65] *Id*. at 552.
[66] *Id*.
[67] *Titan Ins Co*, 491 Mich at 553.
[68] *Id*. at 572-573.
[69] *Id*. at 576.
[70] *Id*., quoting *Keys v Pace*, 358 Mich 74, 84-85; 99 NW2d 547 (1959).

Although *Titan Ins Co v Hyten* involved the application of a policy's fraud-exclusion provision, this Court's estoppel analysis applies just the same in other contexts: An insurance company should only be estopped when it has full knowledge of the facts and circumstances. An insurance company has "no duty to investigate or verify the representations of a potential insured"—and that should be true regardless of whether the insured made those representations fraudulently or in good faith. Requiring insurance companies to investigate every representation by an insured, or even just the good-faith ones, is virtually unworkable.

That unworkableness is reflected in this Court's reference to *Keys v Pace*: There is no purpose to imposing knowledge about the accuracy of an insured's representations, even when that accuracy might be easily ascertained. Otherwise, insurance companies are in the position of thoroughly investigating every single representation they have "access" to. Whether it is to determine if the insured has a valid driver's license or whether it is to determine if the insured lives in, is in the process of moving from, or has moved from his or her "residence premises," the insurance company will have to investigate the insureds' representations so long as it has "access" to do so. That is an impossible-to-meet standard.

In reality, the Court of Appeals' majority's analysis in this case is nothing more than a reinvention of the disavowed "easily ascertainable" rule. It looked at what Farm Bureau purportedly knew: "[T]hat plaintiffs were 'actively moving.' "[71] Taking that purported knowledge, and relying on what it deemed "logical," the majority "conclude[d] that [Farm Bureau] understood that plaintiffs were no longer residing in the house and that it was

[71] *Yu v Farm Bureau*, unpublished per curiam opinion of the Court of Appeals, issued April 11, 2017 (Docket No. 331570), p 4 (attached as Exhibit A to Farm Bureau's Brief on Appeal).

unoccupied and vacant…."[72] The assumption that " 'actively moving' from" is synonymous with "unoccupied and vacant" is a stretch in and of itself.

But the majority then stretched even further, using that purported knowledge and its own assumption to impute what Farm Bureau "should have understood," or, stated differently, could have easily ascertained: That actively moving in February means vacant for 60 consecutive days and unoccupied for six months in December.[73] As Judge Servitto explained, "the mere fact that [Farm Bureau's adjuster] 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."[74] The only way Farm Bureau could have determined when the moving process ended was to investigate. This Court has made it clear that such a duty does not exist.

D. The defendant-insurer, Farm Bureau, should not be equitably estopped from denying coverage in this case.

Ultimately, insurers should only be equitably estopped from enforcing the insurance policies that they and the insureds agree to in a very limited set of circumstances. This case is not an example of the very limited set of circumstances. Although the parties dispute what Farm Bureau knew, what Farm Bureau should have known, and when Farm Bureau knew or should have known it, there is no dispute about what plaintiffs knew and when they knew it. It is their knowledge, regardless of Farm Bureau's, that prevents equitable estoppel from applying in this case.

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[72] *Id*.
[73] *Yu*, unpub op at 4.
[74] *Yu*, unpub op at 1-2 (SERVITTO, J., *dissenting*).

As this Court has explained time and time again, "[o]ne is presumed to have read the terms of his or her insurance policy[.]"[75] The policy at issue here provided for coverage for the dwelling where Mr. Yu and his wife permanently or continuously dwelled. They knew (or are at least presumed to have known) that. And it was plaintiffs—more than anyone else in the world—who knew where they lived. As Mr. Yu explained under oath, they lived in Portage from November 2006 to July 2010, in Okemos from July 2010 to May 2013, and in East Lansing from May 2013 to present. Stated simply, plaintiffs had full knowledge of everything at issue in this case.

As this Court has recognized for nearly a century, "a party cannot invoke the aid of the doctrine of equitable estoppel where it appears that the facts were known by both or that both had the same means of ascertaining the truth."[76] Here, plaintiffs knew (or are presumed to have known) what the policy said, and they knew where they lived. Even if this Court assumes that Farm Bureau knew the exact same, plaintiffs "cannot invoke the aid of the doctrine of equitable estoppel[.]"[77] So, regardless of whether the doctrine of equitable estoppel can expand coverage and whether full knowledge is required to apply it, equitable estoppel simply does not apply in this case.

CONCLUSION

For decades, this Court has recognized the importance of enforcing contracts—including insurance policies—according to what they say, not what seems fair in retrospect. The doctrine of equitable estoppel, by its very nature, does the opposite. Sometimes, in a very limited set of circumstances, that is both more important than

[75] *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 415; 751 NW2d 443 (2008).
[76] *Shean v US Fidelity & Guardian Co*, 263 Mich 535, 541; 248 NW2d 892 (1933).
[77] *Id*.

enforcing contracts according to what they say and necessary. But that does not mean that the doctrine can also create contractual provisions between parties that never existed, especially when one of those two contracting parties does not have full knowledge of all of the facts and circumstances involved. And it certainly does not mean an insured gets to ignore his or her own knowledge to try to get coverage the parties never bargained for in the first place.

For those reasons, this Court should reverse the Court of Appeals. In doing so, it should conclude that the policy's plain language precluded coverage, that equitable estoppel cannot be applied to require an insurer to expand coverage that is contrary to the express terms of an insurance contract (except for, perhaps, in one very limited circumstance), that equitable estoppel requires a party against whom the doctrine of equitable estoppel is to be applied has full knowledge of the facts and circumstances involved and justifiable reliance on the part of the party seeking to invoke it is shown, and that Farm Bureau is not equitably estopped from denying coverage in this case.

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Dated: May 8, 2018

STATE OF MICHIGAN

IN THE SUPREME COURT

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
Lower Court No. 2014-001421-CK

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CERTIFICATE OF SERVICE

Peter J. Tomasek states on he served a copy of Motion to Allow the Filing of Michigan Defendant Trial Counsel's *Amicus Curiae* Brief and Michigan Defense Trial Counsel's *Amicus Curiae* Brief on the attorneys of record on May 8, 2018, by the Court's e-filing system and U.S. Mail if not registered to receive electronic copies through this Court.

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Dated: May 8, 2018

EXHIBIT A

STATE OF MICHIGAN

COURT OF APPEALS

LAWRENCE WILLIAMS and LAURA WILLIAMS, Plaintiffs-Appellants, v HOME-OWNERS INSURANCE COMPANY, Defendant-Appellee.	UNPUBLISHED December 20, 2011 No. 301158 Oakland Circuit Court LC No. 2008-092944-CK

Before: MURPHY, C.J., and JANSEN and OWENS, JJ.

PER CURIAM.

Plaintiffs Lawrence and Laura Williams, husband and wife, appeal as of right the trial court's order granting summary disposition in favor of defendant Home-Owners Insurance Company (HOIC) under MCR 2.116(C)(10). This case arose out of plaintiffs' discovery of mold growing in their basement and their attempt to have the full cost of repair and remediation measures covered under a mold endorsement in a homeowners insurance policy issued to plaintiffs by HOIC. Plaintiffs argued that a policy limit of $38,000 applied relative to the mold damage, whereas HOIC contended that, while there was some coverage for mold losses, the applicable policy limit was $5,000, which was an amount far less than the approximately $33,000 in expenses allegedly incurred by plaintiffs. We affirm.

We will begin with a review of the pertinent provisions in the homeowners policy issued by HOIC. In Section I (Property Protection), under subsection 4 (Additional Coverages), a policy amendment in 2005 added the following "additional coverage:"

> Fungi, Wet Rot, Dry Rot and Bacteria
>
> (1) We will pay for accidental direct physical loss to covered property and fungi remediation cost as a result of fungi, wet rot, dry rot or bacteria if such loss follows prior accidental direct physical loss to covered property caused by any peril insured against other than fire or lightning.
>
> (2) We will pay no more than the least of the following for damage to covered property including fungi remediation cost:

> a) subject to (2)b) immediately below, we will pay no more than the limit of insurance shown in the Declarations under "Property Coverage Limitation for Fungi, Wet Rot, Dry Rot and Bacteria" for all accidental direct loss to covered property including fungi remediation cost.[1]
>
> b) when fungi, wet rot, dry rot or bacteria follows accidental direct physical loss to covered property resulting directly from covered water backup under 4. ADDITIONAL COVERAGES, p. Water Backup of Sewers or Drains, we will pay no more than the limit of insurance shown under 4. ADDITIONAL COVERAGES, p. Water Backup of Sewers or Drains for all accidental direct physical loss to covered property including fungi remediation cost.

We shall refer to this provision hereafter as the "mold endorsement," and HOIC relied on subsection (2)(b) as the basis for limiting the extent of coverage. Next, in Section I (Property Protection), under subsection 4 (Additional Coverages), paragraph p (Water Backup of Sewers or Drains), which was referenced in subsection (2)(b) of the mold endorsement quoted above, it provides:

> We cover risk of accidental direct physical loss to covered property described under Coverage A – Dwelling, Coverage B – Other Structures and Coverage C – Personal Property caused by:
>
> (1) water from outside the plumbing system that enters through sewers or drains; and
>
> (2) water which enters into and overflows from within a sump pump, sump pump well or any other system designed to remove subsurface water which is drained from the foundation area.
>
> Coverage does not apply to any loss caused by negligence of any insured. No loss shall be paid until the amount of loss exceeds $250. *The most we will pay in any one loss is $5,000*. . . . [Emphasis added.]

Hereafter, given the circumstances in this case, we shall refer to this provision as the "sump pump overflow endorsement," which provision, when considered in conjunction with subsection (2)(b) of the mold endorsement, formed the basis of HOIC's position that coverage was limited to $5,000. Finally, in Section I (Property Protection), under subsection 3 (Exclusions), a policy amendment in 2005 provided:

> a. Coverage A – Dwelling, Coverage B – Other Structures and Coverage C – Personal Property

[1] Although the e-record contains no copy of the Declarations, there appears to be no dispute that the coverage limit was $38,000.

> (1) We do not cover loss to covered property caused directly or indirectly by any of the following, whether or not any other cause or event contributes concurrently or in any sequence to the loss:
>
> * * *
>
> (b) Water damage, meaning:
>
> * * *
>
> 2) water or sewage from outside the plumbing system that enters through sewers or drains;
>
> 3) water which enters into and overflows from within a sump pump, sump pump well or any other system designed to remove subsurface water which is drained from the foundation area[.]

We shall refer to this provision hereafter as the "general water damage exclusion."

Before addressing plaintiffs' specific appellate arguments, we shall set forth our interpretation of the policy language quoted above.[2] As an "additional coverage" under the policy, plaintiffs were covered by the mold endorsement for physical losses, including remediation costs, associated with mold growth if such losses followed prior accidental direct physical loss to covered property caused by a peril other than fire or lightning. Here, we are addressing water intrusion losses that occurred prior to, or precipitated, the mold growth, as caused by a storm peril.[3] Although the general water damage exclusion in the policy precluded coverage with respect to losses caused by "water which enters into and overflows from within a sump pump [or] sump pump well," plaintiffs had a policy that provided "additional coverage" in the form of the sump pump overflow endorsement, so there was some coverage. Therefore, the mold endorsement was effective because the mold losses followed accidental direct physical loss to covered property (water-damaged property due to sump pump failure) caused by a storm peril. However, the sump pump overflow endorsement had the $5,000 limit, and as indicated in the mold endorsement, that same $5,000 limit applied to mold property losses and remediation costs, instead of the standard $38,000 limit, given that the mold was caused by a sump pump overflow. In summation, where the mold was caused by water intrusion from an overflow of the sump pump, the most benefits to which plaintiffs would be entitled was $5,000. Plaintiffs argue on appeal that the evidence was lacking with regard to establishing a sump pump failure, to showing that any assumed sump pump failure actually caused the water intrusion, and to establishing that any assumed water intrusion caused by a sump pump failure actually resulted in the particular mold growth. Plaintiffs also argue that, assuming a sump pump failure caused a water overflow

[2] For purposes of our interpretation, and given that we are affirming the trial court's ruling, we are proceeding on the basis that a sump pump overflow occurred and caused the mold damage.

[3] Evidently, HOIC did not believe that lightning played a role in the causation chain.

and then the mold growth, wind was ultimately the root cause of the power outage and sump pump failure, and property damage caused by wind was a covered peril.

On cross-motions for summary disposition, the trial court issued a written opinion and order granting HOIC's motion for summary disposition under MCR 2.116(C)(10) while denying plaintiffs' competing motion. The trial court found that a power outage caused plaintiffs' sump pump to fail, which in turn caused the water intrusion in the basement and later the mold damages. Therefore, the $5,000 policy limit on mold losses applied.

On appeal, plaintiffs first argue that there was a factual dispute with respect to whether a sump pump failure caused water to saturate their basement, which necessarily means that there was a genuine issue of material fact regarding the cause of the mold losses. Plaintiffs maintain that HOIC's conclusion that the water intrusion was caused by a sump pump problem was based solely on plaintiffs' speculation that the sump pump may have failed when the power outage occurred. According to plaintiffs, all of HOIC's documents indicating a sump pump failure as the cause of the water intrusion and resulting mold were predicated on plaintiffs' speculation and assumptions, as no one actually inspected the sump pump to determine if it failed. Plaintiffs also argue that their "testimony establishes that the basement was wet *before* the power went out and that they had had no problems with the sump pump after the power turned back on." Plaintiffs contend that the affidavit of Greig Powell, who investigated the insurance claim on behalf of HOIC, averring a sump pump failure was conclusory, absent any supporting facts, and that conclusory allegations in an affidavit are insufficient to support a party's burden for purposes of MCR 2.116(C)(10). Plaintiffs further argue that, even if the sump pump failed and caused a water overflow, there was a dearth of evidence linking that failure and particular water intrusion to the mold that was observed nearly a month later. Indeed, the mold could have been caused by something other than the speculated sump pump failure or the storm. In summation, plaintiffs assert: "(1) no one knows whether the sump pump failed or not; (2) no one knows if water entered the basement due to a sump pump failure; [and] (3) no one knows if water that entered as a result of a speculated sump pump failure caused the mold plaintiffs found in their basement[.]"

MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). Initially, the moving party has the burden of supporting its position with documentary evidence, and, if so supported, the burden then shifts to the opposing party to establish the existence of a genuine issue of disputed fact. *Quinto*, 451 Mich at 362; see also MCR 2.116(G)(3) and (4). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in [the] pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto*, 451 Mich at 362. Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468

(2003). For purposes of a motion for summary disposition under MCR 2.116(C)(10), including motions entailing causation matters, "the court's task is to review the record evidence, and all reasonable inferences therefrom, and decide whether a genuine issue of any material fact exists to warrant a trial." *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

An insurance policy is subject to the same contract interpretation principles applicable to any other species of contract. *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Except where an insurance policy provision violates the law or succumbs to a defense traditionally applicable under general contract law, courts "must construe and apply unambiguous contract provisions as written." *Id.* "In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Id.* at 464. A court cannot hold an insurance company liable for a risk that it did not assume. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). When its provisions are capable of conflicting interpretations, an insurance contract is properly considered ambiguous. *Farm Bureau Mut Ins Co of Michigan v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999).

"A generally recognized principle of insurance law is that the burden of proof lies with the insured to show that the policy covered the damage suffered." *Solomon v Royal Maccabees Life Ins Co*, 243 Mich App 375, 379; 622 NW2d 101 (2000), citing 10 Couch, Insurance, 3d, § 147:29, p 146-147, and *Williams v Detroit Fire & Marine Ins Co*, 280 Mich 215, 218; 273 NW 452 (1937). While the burden of proving coverage is on the insured, it is incumbent upon the insurer to prove that an exclusion to coverage is applicable. *Heniser v Frankenmuth Mut Ins*, 449 Mich 155, 161 n 6; 534 NW2d 502 (1995).

There is no dispute that there was some level of coverage for the mold damage sustained by plaintiffs. The question is whether there was an issue of fact regarding the triggering or applicability of the sump pump overflow endorsement, with its $5,000 policy limit, as incorporated into subsection (2)(b) of the mold endorsement as a limit on the recovery of benefits for mold damage. We first note that while plaintiffs discount the sump pump theory proffered by HOIC, they did not and do not provide any arguments or evidence of an alternate theory with respect to what actually caused the water intrusion and mold growth. In regard to evidence supporting the sump pump theory, the insurance claims form, in the "Remarks" section, indicated that Mr. Williams called to report water damage to furniture and drywall from the storm after the electricity went out for a short time, which caused the sump pump to stop working, resulting in the water damage. This report did not reflect any hesitancy or speculation on Mr. Williams's part with respect to a conclusion that a sump pump failure caused the damage, although we acknowledge that the wording in the form was a HOIC employee's summary and interpretation of Mr. Williams' comments made over the phone.

Furthermore, in a letter from TEK Environmental & Consulting Services, Inc. (TEK), to Mr. Williams, the following background statement was made:

> The water intrusion incident happened during a power outage from a heavy rain storm event, causing water to immediately saturate the floors. *According to Mr. Williams*, they discovered that water was saturating the entire basement floor, as well as, the contents during a tornado warning while they were in the basement seeking safety. *According to the homeowner*, visible water was accumulating on the basement floor surface shortly *after* the power outage occurred. [Emphasis added.]

This letter is consistent with the sump pump theory of causation and indicated that Mr. Williams himself tied the water intrusion to the power outage. As with the claims form, the TEK letter reflected another person's paraphrasing of comments made by Mr. Williams. However, Mr. Williams, in his deposition, said nothing that would contradict the comments he apparently made to TEK and HOIC personnel, which either indicated or strongly suggested that a sump pump failure caused the water intrusion and damages. Although he testified that he made no attempt to discover the source of the water intrusion, the information he provided to HOIC and TEK reflected that he had come to the conclusion that the water came from the sump pump after it failed due to a power outage. Mr. Williams vaguely testified that he and his wife were watching television, the power went out, they went to bed, the power came back on sometime during the night, and when he awoke the following morning and went to the basement, he discovered that the carpet was wet. Mr. Williams never testified that the basement was wet before the power outage, nor did he suggest any possible alternative means of causation. Indeed, his testimony was more consistent with the position that the basement became wet after the power outage.

Mrs. Williams was also deposed, and she testified that on August 24, 2007, she and her husband went down to the basement of their home because of a tornado warning. They sat in the basement watching television and eating their dinner during the tornado warning. At some point, Mrs. Williams noticed that her slippers were getting wet. She testified that the power went out and that she and her husband then immediately went back upstairs, given the lack of any alternative basement lighting. The transcript is simply not clear whether Mrs. Williams noticed her slippers becoming wet before or after the power went out, which is relevant to whether the power outage caused a sump pump failure, which in turn caused a water overflow and subsequently the mold growth. At one point she testified, "And so we were trying to pick up our plates of food . . ., and I noticed my slippers were getting wet so we went upstairs. There was, you know, nothing we could do because the lights were out." This testimony suggests that the power outage occurred prior to Mrs. Williams noticing her wet slippers, as they ostensibly were picking up their plates to go upstairs in light of the power outage when she felt the water on her slippers. But then she testified that the edge of her slippers had already been getting damp when the couple went upstairs with their dishes. The following colloquy next occurred during the deposition:

> *Q.* Had the power been out and back on earlier than that [slippers becoming wet]?
>
> *A.* No.

This testimony is not helpful, where the question posed did not ask whether the power was out prior to the slippers becoming wet, but rather whether the power was out "and back on" before the slippers were soaked – the power did not come back on until sometime during the night while plaintiffs were sleeping. She also testified that she was never able to determine the source of the water intrusion. We find that the testimony by Mrs. Williams was conflicting at best and of no value on the issue regarding whether the water began overflowing before or after the power outage.

Plaintiffs complain that HOIC's documentary evidence in support of the sump pump theory was predicated on speculation and assumptions proffered by plaintiffs to HOIC personnel and others, but HOIC never actually inspected the sump pump to determine if it failed. Based on the claims information provided to HOIC by Mr. Williams, and given the surrounding circumstances, it appears that all were operating on the belief that a sump pump failure caused the water intrusion and resulting mold damage, thereby making an investigation and inspection unnecessary. Again, the uncontradicted information provided by Mr. Williams to TEK and HOIC did not reflect that he was speculating or making assumptions when communicating that water accumulated after the power outage and that a sump pump failure caused the water damage. We note that plaintiffs themselves never had the sump pump inspected or the matter investigated, where clearly they had the ability to do so. There is no indication in the record whether plaintiffs' sump pump had a backup power system (battery) in case of power outages, but plaintiffs would certainly have offered such evidence if it existed, considering their retreat from the sump pump causation theory.

Plaintiffs apparently are demanding, prior to any entitlement by HOIC to summary disposition, conclusive documentary evidence that the sump pump failed, that water entered the basement due to a sump pump failure, and that the mold growth was caused by water intrusion resulting from a sump pump failure, all without accurately pointing to any documentary evidence to the contrary. Again, for purposes of summary disposition, "the court's task is to review the record evidence, and all reasonable inferences therefrom, and decide whether a genuine issue of any material fact exists to warrant a trial." *Skinner*, 445 Mich at 161. Here, we have evidence that Mr. Williams provided information to TEK and HOIC that directly supported the sump pump causation theory, and Mr. Williams never testified any differently. Furthermore, reasonable inferences arising from the evidence are that the sump pump failed, that water entered the basement due to the sump pump failure, and that the mold growth was caused by water intrusion resulting from the sump pump failure. These inferences are reasonable where there was evidence that stormy conditions existed, plaintiffs went down to their basement, with no initial indication of moisture or water, a power outage then occurred, water began accumulating or intruding, plaintiffs discovered that the basement carpet was saturated and other floor areas were wet, the sump pump worked after the power was restored, as claimed in plaintiffs' own brief, and about a month later mold was found growing on drywall in the basement. Aside from the argument that plaintiffs' "testimony establishes that the basement was wet *before* the power went out," which claim is not supported by the record, plaintiffs provided no documentary evidence suggesting a different source of the water intrusion or different cause of the mold growth.

On the basis of the documentary evidence presented, we hold that there is no genuine issue of material fact that the sump pump failed, that water entered the basement due to the sump

pump failure, and that the mold growth was caused by water intrusion resulting from the sump pump failure. Accordingly, under the plain language of the insurance policy, the benefit limit relative to mold damage was $5,000.

In an argument related to the causation issue discussed above, plaintiffs contend that we must reverse the trial court's summary disposition ruling and enter judgment in favor of plaintiffs where the parties agreed that wind caused plaintiffs' mold damage and that wind damage was a covered loss under the policy. Plaintiffs argue that HOIC acknowledged that the mold damage was first caused by wind that knocked out the power to the house, which in turn caused the sump pump failure and resulting water intrusion and mold. And because wind damage was covered under the policy, the sump pump overflow endorsement and general water damage exclusion were inapplicable, resulting in $38,000 in coverage under the mold endorsement. In support of this argument, plaintiffs cite *Spece v Erie Ins Group*, 850 A2d 679 (Pa Super, 2004).

Plaintiffs rely entirely on the testimony of Dusty Jordan, a field claims representative for HOIC, with respect to wind causation, but Jordan's testimony suggests that she was merely assuming that wind caused the power outage. There was no evidence directly establishing the cause of the power outage. Regardless, assuming that wind caused the outage, plaintiffs fail to cite any provision in the policy that would overcome the mold endorsement's policy limitation of $5,000, as reflected in subsection (2)(b) of the mold endorsement, "when fungi, wet rot, dry rot or bacteria follows accidental direct physical loss to covered property resulting *directly* from covered water backup under" the sump pump overflow endorsement. (Emphasis added.) Thus, as long as the mold resulted directly from the overflow of the sump pump, and we have no evidence to the contrary, it is irrelevant that wind may have caused the power outage which then caused the sump pump failure. The mold endorsement's policy limitation under subsection (2)(b) does not indicate or suggest in any manner whatsoever that it is inapplicable when wind caused the water backup or sump pump failure. Jordan's testimony that wind or wind damage was a covered peril under the policy was clearly in relationship to subsection (1) of the mold endorsement, which spoke of fire and lightning not being covered perils, but there was no dispute that plaintiffs already satisfied subsection (1) and were entitled to some level of coverage. The issue was the amount of coverage available under subsection (2) of the mold endorsement, and the question whether wind played a role in the water backup and sump pump failure was immaterial.

With respect to the Pennsylvania case relied on by plaintiffs, *Spece*, 850 A2d 679, it is distinguishable because we simply have different policy language that is being construed and that language is plain and unambiguous; there are no conflicting provisions as in *Spece*. Moreover, applying *Spece* would conflict with binding Michigan precedent. In *Vanguard Ins Co v Clarke*, 438 Mich 463, 465-466; 475 NW2d 48 (1991), overruled on other grounds in *Wilkie v Auto-Owners Ins Co*, 469 Mich 41; 664 NW2d 776 (2003), our Supreme Court stated:

> The sole issue presented concerns whether this Court should adopt the theory of dual or concurrent causation in the context of insurance liability. The problem of concurrent causation arises "when an insured cause joins with one or more additional causes, which may be uninsured . . . ." The question in such cases is whether the convergence of causes should defeat an insurance policy exclusion.

> A minority of courts in foreign jurisdictions have applied the concurrent causation theory to impose insurance liability notwithstanding an explicit policy exclusion. These cases involve the convergence of two or more causes of an indivisible injury to the insured and one of the causes falls within coverage of the insurance policy. The Court of Appeals applied the minority rule of concurrent causation to reverse summary disposition for the plaintiff insurer in this declaratory judgment action.
>
> Whatever the merits of dual causality in the tort law context, an issue not before us today, we do not discern a compelling legal or policy basis as to why that doctrine should nullify an unambiguous insurance policy exclusion for auto-related injuries in a homeowner's policy. Accordingly, we reverse the decision of the Court of Appeals. [Citations omitted.]

The policy here, under subsection (2)(b) of the mold endorsement, clearly limits the recovery of benefits to $5,000 for mold losses, which result from a sump pump overflow, and even though a windstorm conceivably was a dual cause of the mold losses, the clear and unambiguous language in subsection (2)(b) must be enforced as written. Reversal is unwarranted on this issue.

Finally, plaintiffs argue that the trial court erred in rejecting their estoppel argument, given that there was an issue of fact with respect to whether HOIC should be estopped from limiting coverage under the circumstances, and considering that application of estoppel principles would not expand plaintiffs' rightful coverage under the policy. Plaintiffs contend that, as reflected in their deposition testimony, Powell, as HOIC's agent, represented that the mold damages were completely covered by the policy, which induced them to engage in repairs and remediation. According to plaintiffs, Powell directed them to take immediate corrective measures, and he never informed them of the possibility that coverage might be lacking until much later. Plaintiffs maintain that had they known that there was little coverage, "they may have chosen a different route, such as selling their house in the current state or choosing a different, less costly, means of remediation." Moreover, applying the doctrine of estoppel would not broaden or expand plaintiffs' coverage beyond the policy or require HOIC to pay a type of claim for which it did not receive premium payments; plaintiffs had paid HOIC for mold damage coverage. Summarizing their argument, plaintiffs state that Powell, and thus HOIC, led them to believe that they were fully covered, that plaintiffs justifiably relied on Powell's representation and entered into expensive repair and remediation contracts, and that they incurred significant costs to their detriment.

Equitable estoppel, as opposed to promissory estoppel, is not a cause of action. *American Federation of State, Co & Muni Employees v Bank One, NA*, 267 Mich App 281, 292-293 n 3; 705 NW2d 355 (2005). "[E]quitable estoppel is . . . a defense to be applied only when a party justifiably relies and acts on the belief that misrepresented facts are true." *Id.* In the context of equitable estoppel as examined in an insurance setting, our Supreme Court in *City of Grosse Pointe Park v Michigan Muni Liability & Prop Pool*, 473 Mich 188, 204; 702 NW2d 106 (2005) (opinion by CAVANAGH, J.), observed:

> Having concluded that the discharges fall under the pollution exclusion clause, we must next decide whether the pool is nonetheless estopped from enforcing the clause. "The principle of estoppel is an equitable defense that prevents one party to a contract from enforcing a specific provision contained in the contract." For equitable estoppel to apply, the city must establish that (1) the pool's acts or representations induced the city to believe that the pollution exclusion clause would not be enforced and that coverage would be provided, (2) the city justifiably relied on this belief, and (3) the city was prejudiced as a result of its reliance on its belief that the clause would not be enforced and coverage would be provided. [Citations omitted.][4]

Here, plaintiffs are relying on equitable estoppel in an attempt to preclude HOIC from invoking the $5,000 policy limitation in subsection (2)(b) of the mold endorsement. Given the conflicting evidence as between plaintiffs' deposition testimony and Powell's affidavit, there is a factual dispute regarding whether Powell intentionally or negligently induced plaintiffs to believe that their losses were fully covered by the insurance policy. While there was a question of fact on the first element of equitable estoppel, the record does not support a conclusion that issues of fact exist with regard to element two (reliance and action on Powell's promises) and element three (prejudice to plaintiffs). HOIC challenges detrimental reliance, arguing that plaintiffs contacted Maximum Restoration, LLC (Maximum), the company which performed the repair and remediation work, before plaintiffs' claim was presented to HOIC on September 13, 2007, and then plaintiffs executed a work authorization with Maximum on September 14, yet Powell did not inspect the loss and make the alleged promise of full coverage until September 19, 2007. The fact that plaintiffs contacted Maximum before the claim was filed is irrelevant. However, the record contains a Maximum work authorization form signed by plaintiffs on September 14, 2007, which stated that plaintiffs authorized and directed Maximum "to provide all labor, equipment and materials required to repair the specified contents or structure[.]" The record only contains the first page of the authorization form, and it is clear from the first page that there was at least a second page if not more which made up the entire form. In a reply brief, plaintiffs indicate that the authorization form did not encompass all the work that plaintiffs authorized Maximum to perform, as additional work was later authorized. However, there is no

[4] In *Grosse Pointe Park*, three Justices, led by JUSTICE CAVANAGH, found that equitable estoppel, while not factually established in the case under the applicable elements, could potentially be invoked to expand coverage outside the limits of an insurance policy, but three other Justices, led by now CHIEF JUSTICE YOUNG, found that equitable estoppel could never "be applied to broaden coverage beyond the particular risks specifically covered by the policy itself." *Id.* at 225. JUSTICE CORRIGAN did not participate. Here, despite plaintiffs' argument to the contrary, the effect of applying equitable estoppel would broaden the coverage and exposure to liability by effectively extending the policy limit to an amount not contemplated by HOIC. However, we find it unnecessary to resolve the question whether equitable estoppel can be utilized so as to expand or broaden coverage, given that, as in *Grosse Pointe Park*, plaintiffs failed, as a matter of law, to establish all of the requisite elements of equitable estoppel for the reasons discussed below.

documentary evidence supporting plaintiffs' argument, nor is any evidence cited. Plaintiffs maintain that they testified that they only contracted for the massive remediation work after Powell informed them that the work was fully covered by insurance. We find no such testimony in the record, nor are any transcript pages cited by plaintiffs.

The Maximum bill totaled $21,554, but Mrs. Williams testified with respect to other costs associated with the repairs and restoration that totaled an additional $12,569 (TEK bill, duct work, cabinets replaced, purchase of storage pods, gas generator, installation of gas line). A letter from TEK indicated that an employee conducted an investigation on September 19, 2007, which was the same day Powell did his inspection and supposedly stated that everything would be covered, but the record does not reveal whether TEK was called and hired that very same day *after* Powell allegedly signed off on the project. Mrs. Williams testified that TEK was contacted at Maximum's suggestion, and Maximum had been contacted prior to Powell's inspection, and considering that TEK showed up the same day as Powell, it seems likely that TEK was hired before Powell allegedly indicated that there was full coverage. Even on the other bills referenced by Mrs. Williams, there was no testimony or evidence regarding when they were incurred in relationship to Powell's coverage promises. We also note that in plaintiffs' motion for summary disposition, they argued that Powell did not indicate that he was mistaken about the coverage until $21,000 in remediation work had been completed, which is a dollar amount that most closely matches the Maximum bill of $21,554, of which the only evidence of a contractual obligation showed a date preceding Powell's inspection.

As indicated above, plaintiffs maintain that had they known that there was little to no coverage, "they may have chosen a different route, such as selling their house in the current state or choosing a different, less costly, means of remediation." The problem with this argument is that there was no testimony or evidence supporting the proposition. On this record, it appears that plaintiffs made the decision to incur the various repair and remediation costs regardless of any coverage limit determination made by HOIC. Plaintiffs certainly did not establish a fact question showing that they relied and acted on Powell's promises and were prejudiced by his alleged unfulfilled promises by way of incurring costs or becoming contractually obligated for costs *after* Powell made the promise of full coverage. Plaintiffs simply did not build the necessary record to support their equitable estoppel argument, and reversal is unwarranted.

In conclusion, under subsection (2)(b) of the mold endorsement, the limit of the policy for mold losses was $5,000 if the losses were caused by a sump pump overflow. There is no genuine issue of material fact that the water intrusion and mold damages were caused by a failure of plaintiffs' sump pump during the power outage. Furthermore, while perhaps wind was an underlying cause of the sump pump failure and wind damage was generally a covered peril under the policy, the sump pump overflow endorsement, as incorporated into subsection (2)(b) of the mold endorsement as a policy limitation, was unaffected by the possibility that wind caused the sump pump failure, and the limitation's clear and unambiguous language must be enforced as written. Finally, with respect to equitable estoppel, assuming that estoppel could be employed to extend and broaden the policy limit beyond the contract and amount contemplated by HOIC, plaintiffs failed, as a matter of law, to establish the requisite elements of equitable estoppel. While there was a genuine issue of material fact regarding whether Powell induced plaintiffs to believe that they were afforded full coverage under the mold endorsement, the documentary

evidence failed to create an issue of fact regarding whether plaintiffs actually relied and acted upon Powell's promises and were prejudiced.

Affirmed. Having prevailed in full, taxable costs are awarded to HOIC under MCR 7.219.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Donald S. Owens