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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 REPLY BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

Respectfully submitted,

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REPLY LAW AND ARGUMENT

I. The equities do not support invoking estoppel against Farm Bureau.

Plaintiffs admit by omission (a) they never told Farm Bureau that they moved out of the subject house in 2010; (b) they never told Farm Bureau when they put the house up for sale in 2013; (c) they never told Farm Bureau that they "had moved" in 2013 after informing the adjuster that they "were moving"; and (d) they never asked Farm Bureau for a seasonal policy. Instead, they argue they did not have to disclose this information; *Farm Bureau* caused detrimental reliance because Farm Bureau "negligently" failed to ask the right questions in plaintiffs' "catch me if you can" game of subterfuge; and Farm Bureau cancelled the policy instead of offering plaintiffs a seasonal policy.

There is a reason why this Court in *Titan Ins Co v Hyten,* 491 Mich 547, 557, 570-571; 817 NW2d 562 (2012), struck down the "easily ascertainable rule" and noted that an insurer is under no duty to investigate or verify the assertions and representations made by its insured. Farm Bureau alone protects nearly 500,000 Michigan policyholders in Michigan.[1] Plaintiffs, on the other hand, had only one insurance policy on the subject house. The equities do not support invoking estoppel.

> "Should we hold that the mere occurrence of an accident is sufficient to place such a burden on the insurer with respect to each of its thousands of policy holders? Rather, is the insurer not entitled to give credence to its insured's honesty until it has actual notice that he is a scoundrel?" [*Id.* at 561, quoting *Keys v Pace*, 358 Mich 74, 84; 99 NW2d 547 (1959).]

Plaintiff's prevailing theme is that Farm Bureau induced them to believe they had coverage by (a) paying the February claim, (b) failing to determine that plaintiffs had moved, and (c) renewing the policy.[2] This was rebutted on pages 41 through 48 of Farm Bureau's brief.

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[1] <https://www.farmbureauinsurance-mi.com/About_Us/> (Accessed May 1, 2018).
[2] Appellee Brief, pp 6, 7, 8, 15, 16, 17, 18, 19, 26, 27, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 47, 48.

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Plaintiffs assert culpable negligence as the basis for asserting equitable estoppel against Farm Bureau. They cite five cases in this regard: In *Lichon v American Universal Ins Co,* 435 Mich 408, 416; 459 NW2d 288 (1990), this Court stated "This case does not present a situation where the doctrine of 'equitable estoppel,' strictly defined, applies"; in *Mate v Wolverine Mut Ins Co,* 233 Mich App 14, 22-23; 592 NW2d 379 (1998), the Court of Appeals held that it was the insured's failure to notify the agent of the facts that resulted in lack of coverage, and the agent's "silence" did not constitute culpable negligence or an intentional act required for equitable estoppel; in *Parmet Homes, Inc, supra*, 111 Mich App at 145, the Court of Appeals noted that an exception to the rule – that an insured is expected to read the policy – exists when a policy is replaced with one providing lesser coverage but no notice is given to the insured; in *Hetchler v American Life Ins Co,* 266 Mich 608; 254 NW 221 (1934), the life insurance company twice told the insured that the expiration on his policy was May 13, 1932, but after the insured died on April 13, 1932, the insurance company stated it miscalculated and the expiration date was March 15, 1932; in *Kole v Lampen*, 191 Mich 156; 157 NW 392 (1916), the plaintiff sold a horse in exchange for a promissory note, the purported signatory on the note was contacted on five separate occasions about the note and even testified in court in a different matter that he signed the note, but on the sixth contact several months later and after the horse died claimed that the signature was forged.

The instant case is not like *Parmet Homes, Hetchler,* or *Kole*. Plaintiffs did not tell Farm Bureau they moved out in 2010, did not ask Farm Bureau whether they needed different coverage, and did not ask Farm Bureau whether the subject house would still be covered despite the policy provisions. Farm Bureau made no misrepresentations regarding coverage under the policy. And Farm Bureau paid the February 2013 claim under the misconception that plaintiffs were in the

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process of moving from the subject home but had not yet done so. Of the five cases cited by plaintiffs, the one most like the instant case is *Mate*, and there, the Court of Appeals held that estoppel did not apply because the insured did not notify the insurer of essential facts.

While plaintiffs cite these five cases mentioning culpable negligence, they make no effort to define culpable negligence. Other states have defined culpable negligence as follows:

> Culpable negligence "contemplates action or inaction which is more than mere inadvertence, mistake or ignorance" [*Fin Ctr Fed Credit Union v Brand*, 967 NE2d 1080, 1084 (Ind App, 2012).]
>
> The term "culpable negligence" means "willful and serious misconduct." . . . "Willful" means that the misconduct was done "purposely, with knowledge," or that the misconduct was "of such a character as to evince a reckless disregard of consequences." . . . To be culpable negligence, an act must be "intentional, unreasonable and taken in disregard of a known or obvious risk so great as to make it probable injury will follow." . . . It requires more than a finding of unreasonable conduct. . . . A finding of culpable negligence requires "an extreme departure from ordinary care in a situation where a high degree of danger is apparent." . . . [*Shepherd of Valley Care Ctr v Fulmer*, 269 P3d 432, 438 (Wy, 2012) (citations omitted).]
>
> [C]ulpable negligence is more than simple negligence and less than an intentional act – but on a sliding scale, culpable negligence is much closer to an intentional disregard of the employer's interests than it is to mere negligence (i.e., neglect of duty). [*Maxon v City of Grand Island*, 273 Neb 647, 655-656; 731 NW2d 882 (2007).]

Several courts have defined culpable negligence as behavior showing reckless disregard for others and an indifference to the consequences. See *Ross v Baker*, 632 So 2d 224, 226 (Fla App, 1994); *Warren v New York Tel Co*, 335 NYS2d 25, 28 (1972); and *Dunlap v Lee*, 257 NC 447, 449; 126 SE2d 62 (1962).

Plaintiffs next claim they "rightfully relied on Farm Bureau's actions," without making any attempt to define what is meant by "rightfully relies." Presumably, rightful reliance is the same standard as justifiable reliance, which is the cited standard in more than 240 Michigan cases. Justifiable reliance was discussed in Farm Bureau's brief on pages 38 to 40. Plaintiffs cannot claim

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justifiable reliance because (a) they had knowledge of all relevant facts, and (b) they induced Farm Bureau's actions on which they claim reliance by failing to disclose those relevant facts.

Plaintiffs next claim that Farm Bureau only needed "access" to full knowledge, not actual knowledge in order to be equitably estopped. So where was Farm Bureau supposed to obtain this knowledge if not forthcoming from plaintiffs? Was Farm Bureau supposed to have an employee sit outside the subject house and record comings and goings? Was Farm Bureau supposed to have an employee run title searches at the Ingham County register of deeds every day until plaintiffs' names showed up? Was Farm Bureau supposed to have an employee request records daily from the Secretary of State until plaintiffs changed the addresses on their licenses? As previously noted, Farm Bureau serves over 500,000 policyholders in Michigan. An insurer is entitled to rely on the representations of its insured until the insured proves to be a scoundrel.

II. Plaintiffs' continuous legal presence argument to invoke coverage lacks merit.

Plaintiffs assert they had a continuous legal presence because they continued to own and pay utilities on the subject house.[3] They cite no authority to support their assertion. Michigan case law in other contexts demonstrates that legal presence means to be present legally as asserted in Farm Bureau's brief on page 16.[4]

Although plaintiffs correctly assert that contracts must be read as a whole, they ignore a substantial portion of the policy language in two significant ways.

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[3] Appellee Brief, pp 2, 3 n 4, 5, 25, 29, 47, 48.

[4] See, also *People v Jones*, 279 Mich App 86, 93; 755 NW2d 224, 228 (2008) ("a canine sniff is not a search within the meaning of the Fourth Amendment as long as the sniffing canine is *legally present*"); *Sanchez v Eagle Alloy Inc*, 254 Mich App 651, 654; 658 NW2d 510, 512 (2003) ("Sanchez presented defendant with the false documentation and signed an employment application that contained the averment that he was *legally present* in the United States"); *People v Panknin*, 4 Mich App 19, 27; 143 NW2d 806, 810 (1966) ("if observed by the officers while *legally present*, would appear to be sufficient").

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A. Plaintiffs focus on the increase in hazard exclusion and essentially ignore both the insuring provision and binding interpretive precedent.

First, their argument focuses on the increase in hazard provision rather than the insuring provision. This ignores fundamental precepts of policy interpretation. When reading a policy, courts first must determine whether coverage exists; only when coverage exists do courts determine whether an exclusion precludes coverage. *Hunt v Drielick*, 496 Mich 366, 373; 852 NW2d 562, 565 (2014), citing *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 172; 534 NW2d 502 (1995).

The insuring provision provided coverage only for the residence premises, which was relevantly defined as the dwelling "*where you reside*." "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*. Plaintiffs' attempts to distinguish *McGrath* and *Heniser* are unavailing. With respect to plaintiffs' first attempt to distinguish *Heniser*, on the basis that the policy in *Heniser* required the insured to notify the insurer of any changes in title and occupancy, this was rebutted in Farm Bureau's appellant brief on page 20.

Plaintiffs' next attempt to distinguish *Heniser*, on the basis that *Heniser* recognized two meanings for the term reside, is no more persuasive than their first. The quoted portion of *Heniser* on page 26 of plaintiff's brief establishes that both definitions in *Heniser* require actual physical presence. The *McGrath* Court, applying the second definition in *Heniser* held that "where you reside" required the insured to reside at the premises at the time of the loss. *McGrath* at 441. There is no question in the instant case. Plaintiffs were not physically present at the time of the loss.

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Plaintiffs' continued attempt to distinguish *McGrath* on the basis that *McGrath* did not involve a claim of estoppel still does not explain why this Court should not interpret the identical contractual term in the same manner as *McGrath.* Contract interpretation and equitable estoppel are two separate legal concepts that should not be conflated:

> The argument that the city is advancing is actually one of equitable estoppel, not contract interpretation. The city is attempting to rely on the Pool's payment of similar basement sewer backup claims as a way to require the Pool to cover the present claim. Accordingly, the city's argument sounds more in equity than in the law of contracts. [*City of Grosse Pointe Park v Michigan Municipal Liability & Property Pool*, 473 Mich 188, 216; 702 NW2d 106 (2005).]

See, also, *Morales v Auto-Owners Ins Co*, 458 Mich 288, 295; 582 NW2d 776, 779 (1998) ("The principle of estoppel is an equitable defense that prevents one party to a contract from enforcing a specific provision contained in the contract").

While plaintiffs assert that Farm Bureau omitted a portion of the *McGrath* opinion, a review of the omitted portion on plaintiffs' page 28 and the remainder of the paragraph on Farm Bureau's page 19 demonstrates that there was no variation in meaning, but merely distillation of the essence of the Court of Appeals reasoning: A temporary absence will not change whether a person resides somewhere; however, a fixed residence in one place, with only occasional visits to another location, precludes a finding of residence at the occasionally visited location. There is no question in the instant case. Since 2010, plaintiffs had a fixed residence at locations other than the subject property. This precludes a finding that they resided at the subject property after 2010.

Finally, on page 28 of their brief, plaintiffs quote a footnote in *McGrath*, and assert that because there was a policy renewal in the instant case, a different outcome from *McGrath* is required. In making this argument, plaintiffs misread the footnote. The footnote states that the Court

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declined to address the issue because *its holding resolved the matter*. Its holding was that "where you reside" required the insured to live at the premises at the time of the loss. *McGrath, supra,* 290 Mich App at 440-41. Thus, there is no basis to support plaintiffs' argument in the instant case.

B. Plaintiffs improperly parse language from the increase in hazard provision to the exclusion of the remaining language.

The second way plaintiffs fail to read the contract language as a whole is their parsing of single words to the exclusion of the remaining language. For instance, plaintiffs focus on the single word "legal" in the phrase, "being lived in with regular and continuous legal presence of human inhabitants." They ignore "lived in." They ignore "regular and continuous." They ignore "inhabitants." They ignore the previously mentioned "where you reside." As pointed out on page 16 of Farm Bureau's brief, when these provisions are read as a whole, it is not possible to mistake their meaning. The insured must continually and legally live within the dwelling listed in the declarations before the dwelling qualifies as a residence premises entitled to property protection coverage.

Plaintiffs' claim that the policy has different meaning because it says "legal presence" rather than "physical presence" merely asks this Court to contemplate the hypothetical insertion of a redundancy, then conclude that lack of redundancy somehow means the existing language is unclear. This violates three tenets of construction.

1. Adding the redundancy would create surplusage. It is unclear why the policy would need to require physical presence when it already required the house to be resided in and lived in regularly and continuously by human inhabitants. Moreover, plaintiffs' interpretation of the actual language used would render the hazard provision nugatory because *every* owner could assert legal presence by ownership and payment of utilities. "[C]ourts must ... give effect to every word, phrase, and clause

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in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Knight Enterprises, Inc v Fairlane Car Wash, Inc*, 482 Mich 1006; 756 NW2d 88 (2008), citing *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). 2. Courts will not extract a clause or word from the contract and construe it in isolation to defeat the purposes plainly expressed in the contract as a whole. See *Henderson v State Farm Fire and Casualty Co,* 460 Mich 348, 355-356; 596 NW2d 190 (1999)(warning that parsing a phrase word by word will often lead to an inaccurate interpretation and stating that courts must give meaning to a phrase through context). 3. It is unimportant if a contract could have been written more clearly, as long as the language that has been used is clear. See *Raska v Farm Bureau Mut Ins Co,* 412 Mich 355, 361-362, 314 NW2d 440 (1982).

Plaintiffs similarly focus on the word "consecutive," without analyzing in context the word "unoccupied" or "occupied." They make a leap of logic to conclude that because they occasionally visited the subject house, it was not consecutively unoccupied and therefore resided-in.[5] Under plaintiffs' logic, even one visit would break the six consecutive months of unoccupancy. Inserting the definition of (not) occupied into the increase in hazard provision demonstrates the fallacy of plaintiffs' position. The increase in hazard provision states there is no coverage when the house is "unoccupied beyond a period of 6 consecutive months."[6] "Occupied" is defined as "being lived in with regular and continuous legal presence of human inhabitants." Substituting the definition for the word unoccupied makes clear that an occasional visit will not suffice because an occasional visit is not regular and continuous or lived in.

[5] Appellee Brief, pp 24, 29.
[6] Appellee Brief, pp 3, 4, 24, 47, 48.

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> Unless otherwise provided in writing, we will not be liable for loss occurring:
>
> * * *
>
> b. while a described building . . . is [not being lived in with regular and continuous legal presence of human inhabitants] beyond a period of six consecutive months.

Plaintiffs had not regularly and continuously lived in the subject house since 2010.

III. Plaintiffs fail to establish any circumstances in 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 beyond the circumstances recognized in *Kirschner*.

In its grant order, this Court directed the parties to address 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. Plaintiffs assert there are a significant number of opinions recognizing estoppel expansion of the policy beyond the two exceptions recognized in *Kirschner v Process Design Assocs, Inc*, 459 Mich 587; 592 NW2d 707 (1999). A review of plaintiffs' cited cases demonstrates that this assertion is not accurate.

The cases cited by plaintiffs either (a) do not involve equitable estoppel at all;[7] (b) involve misrepresentation of policy terms, the first exception mentioned in *Kirschner* at 594-595;[8] (c) pertain to a waiver of a condition of forfeiture rather than an expansion of policy terms as recognized in *Ruddock v Detroit Life Ins Co*, 209 Mich 638, 653-655; 177 NW 242 (1920);[9] and/or (d) are Court of Appeals opinions issued both before November 1, 1990 and *Kirschner*, and therefore are not

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[7] *Bonham v Northwestern Nat'l Ins Co*, 230 Mich 349; 202 NW 995 (1925); *Michigan Twp Participating Plan v Fed Ins Co*, 233 Mich App 422; 592 NW2d 760 (1999).

[8] *Hetchler v American Life Ins Co*, 266 Mich 608; 254 NW 221 (1934), *Industro Motive Corp v Morris Agency, Inc*, 76 Mich App 390; 256 NW2d 607 (1977), *Parmet Homes, Inc v Republic Ins Co*, 111 Mich App 140; 314 NW2d 453 (1981)

[9] *Pastucha v Roth*, 290 Mich 1; 287 NW 355 (1938); *Allstate Ins Co v Snarski*, 174 Mich App 148; 435 NW2d 408 (1988).

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binding.[10] MCR 7.215(J)(1); *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13; 678 NW2d 619 (2004) (a Court of Appeals opinion is not binding on the Supreme Court); *Paige v Sterling Hts*, 476 Mich 495, 524; 720 NW2d 219 (2006) ("[O]nly [the Supreme] Court has the authority to overrule one of its prior decisions. Until [it] does so, all lower courts . . . must follow it"); *Phillips v Phillips*, 29 Mich App 127, 130; 185 NW2d 168, 170 (1970) ("There are statements in those cases . . . that support his contention but they have been overruled Sub silentio by more recent pronouncements of our Supreme Court"). Thus, there is no basis to conclude that equitable estoppel may be applied to require an insurer to expand coverage that is contrary to the express terms of an insurance contract beyond the *Kirschner* exceptions referenced in Farm Bureau's brief.

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.

[10] *Gardner v League Life Ins Co*, 48 Mich App 574; 210 NW2d 897 (1973); *Snarski, supra*; *Industro Motive Corp, supra*; *Parmet Homes, Inc, supra*.

Respectfully submitted,

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