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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

Ingham County Circuit Court No. 14-1421-CK

AMICUS CURIAE BRIEF OF THE INSURANCE ALLIANCE OF MICHIGAN

PROOF OF SERVICE

GARAN LUCOW MILLER, P.C.
DANIEL S. SAYLOR (P37942)
Attorneys for Amicus Curiae,
Insurance Alliance of Michigan
1155 Brewery Park Boulevard, Ste. 200
Detroit, Michigan 48207-2641
(313) 446-5520
dsaylor@garanlucow.com

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STATEMENT OF THE QUESTIONS PRESENTED

1. Since equitable estoppel cannot operate to compel coverage of a loss the insurer's policy never covered by its terms, did the Court of Appeals err in applying the doctrine to render plaintiffs' property damage a covered loss?

   Amicus Curiae, Insurance Alliance of Michigan, answers, "Yes."

2. Does equitable estoppel require that the party against whom the doctrine is asserted have full knowledge of the facts and circumstances involved, and that there be justifiable reliance on the part of the party asserting it, such that the Court of Appeals erred in applying the doctrine since neither requirement was met?

   Amicus Curiae, Insurance Alliance of Michigan, answers, "Yes."

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INTEREST OF AMICUS CURIAE

On behalf of its member companies, the Insurance Alliance of Michigan ("IAM") is interested in the very significant issues raised in the case at bar. At issue, specifically, is whether, and under what circumstances, an insured can by application of equitable estoppel be held liable for a loss that under the insurance policy's terms would not be covered. This case, in particular, shines a spotlight on one of the well-established elements of equitable estoppel, i.e., that the party asserting estoppel must have justifiably relied and acted on the alleged misrepresentation or misconduct of the party being estopped.

IAM submits that the loose and expansive application of equitable estoppel employed by the Court of Appeals in the case at bar conflicts with well established precedent that places tighter limits on its use. At least in the insurance setting, it is important that this equitable device be contained within its traditional limits since the consequence of estoppel denies the predictability to operate efficiently and effectively in the insurance market, harming insurer and insured alike.

The IAM represents more than 90 property/casualty insurance companies and related organizations operating in Michigan. Its member companies provide insurance to approximately 90% of the property/casualty insurance market in Michigan. The issues presented in the case now before the Court are of importance and interest to the insurance industry in general, but in particular to issuers of homeowners insurance and Michigan's purchasers of such insurance, and, accordingly, to Amicus Curiae IAM.

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STATEMENT OF FACTS

Amicus Curiae, the INSURANCE ALLIANCE OF MICHIGAN ("IAM"), accepts and relies upon the Statement of Facts provided in Defendants-Appellants' Brief on Appeal.

ARGUMENT

I. EQUITABLE ESTOPPEL CANNOT OPERATE TO COMPEL COVERAGE OF A LOSS THE INSURER'S POLICY NEVER COVERED BY ITS TERMS, THUS THE COURT OF APPEALS ERRED IN APPLYING THE DOCTRINE TO RENDER PLAINTIFFS' PROPERTY DAMAGE A COVERED LOSS.

The Court of Appeals' opinion concludes with a remand directive for the trial court to "enter judgment in favor of plaintiff on the issue of coverage and proceed to determine damages." (Appendix 6A – slip op at 5). There was no finding that the terms of the insurance policy applied to provide coverage. Rather, the Court determined that it was unnecessary to address the applicability of the policy language since it accepted plaintiffs' equitable estoppel argument: "[W]e agree that, under the facts of this case, defendant is estopped from denying coverage." (Appendix 3A – slip op at 2). This holding is contrary to long-standing and well established Michigan law.

In reaching its conclusion that Farm Bureau "is estopped from denying coverage," the Court of Appeals relied exclusively on *Morales v Auto-Owners Ins Co*, 458 Mich 288; 582 NW2d 776 (1998). Yet *Morales* manifestly does not support the proposition that the doctrines of estoppel or waiver ever apply to expand the scope of an insurance policy's coverage or create insurance coverage that, under the policy's terms, would not exist in the

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first place. As the opinion in *Morales* highlights, the principle of estoppel "is an equitable *defense*," which a party to an insurance contract might assert against the other as a means of avoiding the adverse consequences of a failure to comply with some condition or procedural requirement of the contract. 458 Mich at 295-296 (emphasis added).

Morales involved a claim for no-fault insurance benefits. Under the terms of the policy, the claim unquestionably would have been covered. The issue concerned whether the policy itself had lapsed six days before the accident because of the plaintiff's failure to pay his renewal premium on time. By its terms, the policy would be renewed automatically unless the policyholder failed to pay the renewal premium by the expiration date. The insurer denied the claim on grounds that the policy had expired; and *as a defense* to this assertion of lapsed coverage, the claimant raised estoppel. He argued that the insurer should be estopped from relying on the nonrenewal provision due to its pattern of repeatedly overlooking this requirement and accepting late payments with no lapses in coverage, and the Supreme Court agreed: "Plaintiff was justified in believing that defendant would accept his late premiums, and, consistent with its prior practice, defendant would then renew the contract for another six-month term." *Morales*, 458 Mich at 298.

Thus while the opinion in *Morales* holds that equitable estoppel can apply to "bar [the insurer] from enforcing the automatic nonrenewal provision of the insurance contract," 458 Mich at 295, it provides no support whatsoever for the notion that a policy's terms of coverage can be altered to expand coverage over a loss to which the contract would not otherwise apply. Indeed this very distinction is made by the *Morales* majority in its response to the dissenting opinion, where the majority affirmatively *rejects* the proposition that

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estoppel might ever be used to "'creat[e] a new contract so that plaintiff may receive ... benefits.'" 458 Mich at 298 (quoting *id*., at 307, Taylor, J., dissenting).

In submitting a claim for benefits, insurance claimants generally are required under their contract to meet certain conditions or to satisfy certain procedural requirements at the risk of forfeiting an otherwise valid claim. Certainly such requirements can, under particular circumstances, be waived by the insurer; that is, the insurer can be "estopped" from asserting the forfeiture. *Fenton v National Fire Ins Co*, 235 Mich 147, 150; 209 NW 42 (1926) (furnishing timely proofs of loss was a condition precedent to the insurer's liability that could be waived by the insurer); *Dahrooge v Rochester-German Ins Co*, 177 Mich 442, 451-452; 143 NW 608 (1913) ("[I]n insurance cases the terms[, waiver and estoppel,] are freely used interchangeably, and it is sometimes expressed waiver by estoppel"). It is one thing for an insurer to waive, or be estopped from asserting, a *defense* to coverage; it is quite another to suggest that an insurer might "waive" insurance coverage into existence.

The estoppel doctrine can apply, in other words, where a claimant *would* have coverage under the policy but has failed to comply with some procedural condition or claim requirement. In that event, if the insurer represents or implies through its conduct that the claimant's technical failure is not being asserted as a forfeiture, a waiver of the defense might occur. But where the extent of coverage under the policy is itself the ultimate issue, estoppel simply does not apply.

This distinction is well illustrated, and its rationale well explained, in *McCoy v Northwestern Mut Relief Ass'n*, 92 Wis 577; 66 NW 697 (1896), which was cited with approval and quoted at length by the Michigan Supreme Court in both *Ruddock v Detroit Life*

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Ins Co, 209 Mich 638, 654-655; 177 NW 242 (1920), and *Munro v Boston Ins Co*, 370 Mich 604, 611; 122 NW2d 654 (1963). By its terms, the life insurance policy in *McCoy* did not provide coverage where the death occurred by suicide. The insured did commit suicide; but the claimant asserted that the insurer, by its acts, was estopped from asserting this exclusion as a defense. The Wisconsin Supreme Court rejected this claim of estoppel:

> We are unable to see how the settled rules under which it is held that a forfeiture or condition of forfeiture may be waived applies here. What is insisted upon is not really the waiver of a forfeiture, or an equitable estoppel against insisting upon a condition of the policy, the violation of which would otherwise work a forfeiture. ***It is a misuse of the term*** **to so speak of the loss of benefits under the certificate in question. 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 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***. After a loss accrues, an insurance company may, by its conduct, waive a forfeiture; or by some act before such loss it may induce the insured to do or not to do some act contrary to the stipulations of the policy, and thereby be estopped from setting up such violations as a forfeiture; but such conduct, though in conflict with the terms of the contract of insurance and with knowledge of the insured and relied upon by him, will not have the effect to broaden out such contract so as to cover additional objects of insurance or causes of loss."

McCoy, 92 Wis at 584-585 (emphasis added).

Michigan law is now, and long has been, in accord with the above. *Kirschner v Process Design Assoc, Inc*, 459 Mich 587, 594; 592 NW2d 707 (1999); *Henne v Glens Falls Ins Co*, 245 Mich 378, 384; 222 NW 731 (1929) (a contract of insurance contrary to the express terms of the policy cannot be created by estoppel); *Ruddock v Detroit Life Ins Co*, 209 Mich at 653-654 ("[H]ere the defendant makes no claim of forfeiture of the contract; on

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the contrary it is insisting upon the contract itself and insisting that by its terms it did not insure the deceased when engaged in military services in time of war. 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."); *South Macomb Disposal Authority v American Ins Co*, 225 Mich App 635, 695; 572 NW2d 686 (1997) ("the doctrine may not be used to broaden policy coverage to protect an insured against risks not included in the policy or expressly excluded from the policy"); *Lee v Evergreen Regency Co-op & Mgmt Systems, Inc*, 151 Mich App 281, 285-288; 390 NW2d 183 (1986) (insurer denied coverage based on lack of timely notice under the contract, then later sought to defend on grounds that the policy specifically excluded coverage; the trial court disallowed the later defense, but was reversed by the Court of Appeals since the waiver/estoppel doctrine does not apply to bar a no-coverage defense).[1]

Quite simply, equitable estoppel does not create rights; it precludes another from asserting rights. Unless one already possesses rights against another as a matter of law, it takes a contract–or the equivalent recognized under contract law–affirmatively to confer rights and duties between parties. *Huhtala v Travelers Ins Co*, 401 Mich 118, 130-132; 257 NW2d 640 (1977) (distinguishing the nature of an insured owner-driver's liability, imposed by law, from the liability of an insurer and its claim manager who ostensibly extended a

[1] On this point, Michigan law is in line with prevailing majority rule. "It is a rule of general application in most jurisdictions that the doctrines of waiver and estoppel are not available to bring within the coverage of an insurance policy risks not covered by its terms, or expressly excluded therefrom." 1 ALR 3d 1139, *3 (2018 West Group); see Defendant-Appellant Farm Bureau's Brief on Appeal, pp. 26-28.

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promise, on which the claimant relied, to resolve the underlying claim). Thus while equitable estoppel does not affirmatively create rights, *promissory estoppel*, which is a doctrine of contract law, can do so:

> Equitable estoppel is essentially a doctrine of waiver. When operative, it serves[, for instance,] to extend the applicable statute of limitations -- by precluding the defendant from raising the bar of the statute -- but has no effect on the determination of the applicable statute. **Promissory estoppel, in contrast with equitable estoppel, does not establish waiver but, rather, substitutes for consideration in a case where there are no mutual promises, enabling the promisee to assert a separate claim against the promisor**[.]

Huhtala, 401 Mich at 132-133 (emphasis added).

In other words, as stated by the United States Court of Appeals for the Ninth Circuit, "promissory estoppel is used to create a cause of action, whereas equitable estoppel is used to bar a party from raising a defense or objection it otherwise would have, or from instituting an action which it is [otherwise] entitled to institute." *Jablon v United States*, 657 F2d 1064, 1068 (CA 9, 1981). Ultimately, "**[p]romissory estoppel is a sword, and equitable estoppel is a shield**." *Id*. (emphasis added).

Thus while equitable estoppel operates to preclude the assertion of a defense to a claim, such as the statute of limitations or an unmet procedural condition that would bar an otherwise valid claim under the policy contract, it does not affirmatively create substantive rights in favor of the party asserting the estoppel. To bring substantive rights into existence against the other party, one needs a contract – or the sword of promissory estoppel. Yet it is clear that *promissory* estoppel is unavailable under the circumstances of the instant insurance claim.

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"Promissory estoppel is a judicially created doctrine that was developed as an equitable remedy applicable in common-law contract actions." *Crown Tech Park v D&N Bank, FSB*, 242 Mich App 538, 548 n 4; 619 NW2d 66 (2000). A party seeking to invoke the doctrine must show the existence of a promise, that the promisor should have reasonably expected that the promise would induce the promissee to act, that the promisee relied on the promise, and that the promise must be enforced to avoid injustice. *Id*. at 548-549; *State Bank of Standish v Curry*, 442 Mich 76, 83-84; 500 NW2d 104 (1993). "In order to justify reliance and thus supply the predicate for an estoppel theory, a promise must be 'actual, clear, and definite.'" *Gore v Flagstar Bank, FSB*, 474 Mich 1075; 711 NW2d 330 (2006) (Taylor, C.J., concurring) (quotation marks and citation omitted); see also *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 41; 761 NW2d 151 (2008) ("The promise must be definite and clear[.]").

In the case at bar, of course, there is no suggestion of any "promise" made to the plaintiffs by Farm Bureau to provide coverage for their house while it was vacant, unoccupied, or otherwise not being used as their residence premises. And even if there had been such a promise, the terms of their insurance contract explicitly dictate that there would be no coverage under such circumstances, and "no action for promissory estoppel may lie when an oral promise expressly contradicts the language of a binding contract." *Zaremba Equip, Inc*, 280 Mich App at 41.

In short, the Court of Appeals in this case appears to have conflated the doctrine of promissory estoppel, which can affirmatively create rights under contract law, with the doctrine of equitable estoppel, which, while not so constrained in its application, cannot

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create a substantive right of recovery but only precludes the other party from raising a bar to an otherwise valid claim.

One long recognized exception to the rule that equitable estoppel cannot confer coverage that would not otherwise exist under the terms of the insurance contract arises in the entirely different context of liability policies. Where an insurer provides a defense to its insured in a claim brought by a third person against the insured without a timely indication that it disputes coverage for the claim under the insurance policy, whether by an express reservation of rights or a concurrent declaratory judgment action challenging coverage, the insurer is equitably estopped from disputing coverage when indemnity is thereafter sought for a resulting liability for damages. *Meirthew v Last*, 376 Mich 33; 135 NW2d 353 (1965); *Kirschner*, 459 Mich at 594-595. These circumstances are distinguishable and entirely inapplicable to a first-party claim for benefits brought by a policyholder against its own insured.[2]

Thus the notion that an insurer can, by operation of equitable estoppel, be compelled to provide coverage for a loss that the policy never covered by its terms is contrary to both longstanding Michigan precedent and the basic law of contracts. Additionally, however, by

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[2] A liability insurer's act of providing a defense to its insured, in light of its duty to defend stated in the liability insurance policy, is tantamount to the substantive benefits of the policy already being voluntarily provided. It is essentially the equivalent of an insurer, in the context of responding to a direct, first-party claim for benefits, voluntarily paying the claim despite having knowledge that the loss was not covered. In this regard, while one might regard the insurer as having thus waived "non-coverage," an arguably more direct analysis of the situation would be that the insurer simply would have no viable claim for reimbursement of money paid under mistake of fact, see *Hofmann v Auto Club Ins Assoc*, 211 Mich App 55, 116; 535 NW2d 529 (1995); *Adams v Auto Club Ins Assoc*, 154 Mich App 186, 196; 397 NW2d 262 (1986), because the requisite showing of a *mistaken* payment could not be established.

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expanding a policy's scope of coverage to apply to risks not contractually assumed by the insurer–creating, in other words, "coverage-by-estoppel," a court effectively re-writes the insurance policy. This Court's endorsement of such a doctrine of estoppel would generate uncertainty in the insurance arena. Insurers write their policies with precision to avoid uncertainty that is anathema to the cornerstone of insurance underwriting: evaluating the risks and calculating the premiums accordingly.

The analysis employed by the Court of Appeals and advocated by plaintiffs here is dangerous because it adds a "heaping measure of uncertainty where certainty is essential." *Travelers Ins Co v Budget Rent-A-Car Sys, Inc*, 901 F2d 765, 768-769 (CA 9, 1990). As the court observed:

> Insurance companies, like other commercial actors, need predictability; they write their contracts in precise language for that reason and they calculate their premiums accordingly.

Id. Altering contractual terms creates uncertainty affecting the ability of the insurer to calculate risk:

> When insurance contracts no longer mean what they say, it becomes exceedingly difficult to calculate risks.

Id. at 768-769. Importantly, such uncertainty works to the detriment of insurers *and policyholders* alike, since increased uncertainty "through judicial meddling" only raises the cost of insurance and those costs inevitably are passed on to the consumers. *Id*. at 769.

Thus by imposing coverage that is not otherwise found in the terms of the insurance contract, a court unavoidably creates the very uncertainty that disrupts the insurance arena by judicial fiat:

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> The primary basis of contract law is to provide certainty to the contracting parties. Court decisions eliminating this certainty do not aid insureds or insurers. Neither party can be sure that express, plain terms will be enforced. If either party can convince the fact-finder that the intent was something other than what the plain terms suggest, these plain terms will be ignored. This is the opposite of insurance.

Tavella, *Are Insurance Policies Still Contracts?* 42 Creighton L Rev 157, 170 (2009).

For all these reasons, and those well presented in Defendant-Appellant Farm Bureau's Brief on Appeal, the Court should reject the proposition that equitable estoppel–a shield, not a sword–may be applied to require an insurer to expand coverage beyond what is provided by the express terms of the insurance contract.

II. EQUITABLE ESTOPPEL REQUIRES THAT THE PARTY AGAINST WHOM THE DOCTRINE IS ASSERTED HAVE FULL KNOWLEDGE OF THE FACTS AND CIRCUMSTANCES INVOLVED, AND THAT THERE BE JUSTIFIABLE RELIANCE ON THE PART OF THE PARTY ASSERTING IT; THUS THE COURT OF APPEALS ERRED IN APPLYING THE DOCTRINE HERE SINCE NEITHER REQUIREMENT WAS MET.

The Court has asked, in its order granting leave to appeal, 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[.]" (Order, No. 155811, December 20, 2017). The answer to both questions is "yes."

That the party to be estopped must first be shown to have possessed actual knowledge of the facts and circumstances involved stems from the very nature of the equitable estoppel remedy. The doctrine of estoppel arises from equity and has its origins in "the promotion of

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common honesty, and the prevention of fraud," as this Court explained nearly 100 years ago in its discussion of the policy reasons for an estoppel:

> It has its origin in moral duty and public policy; and its chief purpose is the promotion of common honesty, and the prevention of fraud. Where a fact has been asserted, or an admission made, through which an advantage has been derived from another, or upon the faith of which another has been induced to act to his prejudice, so that a denial of such assertion or omission would be a breach of good faith, the law precludes the party from repudiating such representation, or afterwards denying the truth of such admission.

Hassberger v General Builders' Supply Co, 213 Mich 489, 492-493; 182 NW 27 (1921) (quotation marks and citation omitted). The "essential and central element" in the doctrine of estoppel is fraud. *Lansing Township v City of Lansing*, 356 Mich 338, 354; 97 NW2d 128 (1959) (quoting 3 Pomeroy's Equity Jurisdiction (5th ed), §821, p 258); *Colonial Theatrical Enterprises v Sage*, 255 Mich 160, 171; 237 NW 529 (1931) ("The basis of estoppel is fraud.").

A key ingredient in the justification of estoppel, then, is dishonesty. Absent proof of "conduct clearly designed to induce" the plaintiff from taking a certain course of action, *Lothian v City of Detroit*, 414 Mich 160, 177; 324 NW2d 9 (1982), estoppel is inapplicable. There must be "knowledge of the actual facts on the part of the representing or concealing party." *Id.*; *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 270; 562 NW2d 648 (1997) (same).

For equity thus to justify application of estoppel to preclude a party from relying on its legal rights as they would otherwise exist, that party must at a minimum be guilty of some demonstrable dishonesty–which cannot exist without knowledge of the pertinent facts. Must

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a party against whom estoppel is to be applied, then, be shown to have actual knowledge of the facts and circumstances involved? The answer is yes – sufficient to be able to conclude that the party is at fault, is in fact *culpable*, for misleading the other party. If a party–in this case an insurer–acts, or fails to act, without knowledge of the material information that would render such action or inaction fraudulent (i.e., demonstrably dishonest), it is impossible to characterize such conduct as culpable; there is no equitable basis for depriving the party of its existing rights or defenses to a claim.

The Court of Appeals in this case did not conclude that defendant Farm Bureau had actual knowledge of plaintiffs' extended absence from the insured premises when it renewed the homeowners policy. Rather, the Court relied on what Farm Bureau knew in February of 2013: that plaintiffs were in the process of moving and were preparing the house to be put on the market (Appendix 5A – slip op at 4). Based on this premise, the Court held that, when the policy renewal was issued 10 months later, "defendant should have understood" that plaintiffs were no longer residing in the house and it had been vacant and unoccupied for several months (*id*.).

The Court, in other words, concluded that Farm Bureau possessed enough information in February 2013 (when plaintiffs were understood as still being in possession of the premises) to infer *in November 2013* that plaintiffs by now were undoubtedly gone and had been gone for at least three or four months. Yet unless the plaintiffs actually informed Farm Bureau that they had *moved out* of the house and were now residing elsewhere, Farm Bureau could not possibly have known this for certain; nor would it have been appropriate for Farm

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Bureau merely *to assume*–without any indication from the policyholders–that they did not, after all, still want and need this insurance.

Thus on the issue of defendant's requisite knowledge for estoppel to apply, the Court of Appeals concluded that Farm Bureau "knew" in February 2013 that the circumstances for denying coverage "*would soon exist*." (Appendix 6A – slip op at 5) (emphasis added). In fact, however, since plaintiffs (as far as Farm Bureau knew) had not *yet* vacated the premises or put the house up for sale, it would be imminently reasonable for the insurer to assume, and rely on the expectation, that plaintiffs would contact the insurer and *cancel the policy* if and when they actually moved out. The onus, in other words, must be on the policyholder to know and apprise the insurer of its circumstances; the insurer has no duty to ascertain them on its own. See *Titan Ins Co v Hyten*, 491 Mich 547, 561-562; 817 NW2d 562 (2017), quoting *Keys v Pace*, 358 Mich 74, 84-85; 99 NW2d 547 (1959).

Even where a party does have full knowledge of all the relevant facts and circumstances at the time it is claimed to have misled the other party, there still can be no equitable estoppel without justifiable reliance on the part of the party seeking to invoke it. Plaintiffs do not dispute this point,[3] and it is well established in Michigan precedent. *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140-141; 602 NW2d 390 (1999) (equitable estoppel does not arise unless "the other party justifiably relies and acts on [the] belief" allegedly induced by the party to be estopped); *City of Grosse Pointe Park v Mich Mun Liability & Prop Pool*, 473 Mich 188, 225; 702 NW2d 106 (2005) (Young, J.,

[3] See Plaintiff-Appellees' Brief on Appeal, p. v -- Counter-Statement of Questions Involved, No. III; and *id*. p. 37, Argument III point-heading -- "APPLICATION OF THE [EQUITABLE ESTOPPEL] DOCTRINE DOES, HOWEVER, CLEARLY REQUIRE A SHOWING OF JUSTIFIABLE RELIANCE ON THE PART OF THE PARTY SEEKING TO APPLY IT."

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concurring) (no need to inquire whether party asserting estoppel suffered prejudice since, absent justifiable reliance, the estoppel claim fails as a matter of law); *Moore v First Security Casualty Co*, 224 Mich App 370, 376; 568 NW2d 841 (1997) (same); *Soltis v First of Am Bank-Muskegon*, 203 Mich App 435, 444; 513 NW2d 148 (1994) (same).

In reaching its conclusion that plaintiffs successfully established an estoppel in this case, the Court of Appeals acknowledged that plaintiffs were *not* justified in relying on Farm Bureau's payment of the February 2013 water damage claim as a basis for believing that the December 2013 claim would likewise be covered (Appendix 4A – slip op at 3). Rather, the stated basis for plaintiffs' justifiable reliance was the fact that Farm Bureau, ostensibly knowing that the insured home was no longer occupied, accepted plaintiffs' renewal of the policy while "fail[ing] to inform plaintiffs that they would need to obtain different coverage" (Appendix 6A – slip op at 5).

In the Court's view, in other words, plaintiffs were *justified* in believing that the insurance policy they renewed would protect their house even if left vacant and unoccupied for months. There are two significant problems with this conclusion. First, it is inherently *unjustifiable* for an insured to infer from the insurer's actions or inactions that there is coverage for a particular risk when, according to the policy's actual terms of coverage and exclusions, there clearly is no such coverage; and second, there can be no "fail[ure]" on the part of an insurer to advise the policyholder that it needs a different type of coverage when the law imposes no such duty to advise.

Under Michigan law, parties to a contract of insurance, as with any other contract, are deemed to know the actual terms of their agreement. Even if an insured has not read the

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policy, he or she is charged with knowledge of its terms. *Komraus Plumbing & Heating, Inc v Cadillac Sands Motel, Inc*, 387 Mich 285, 290; 195 NW2d 865 (1972); *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 395; 729 NW2d 277 (2006). Therefore, insureds' claims that they "have reasonably relied on misrepresentations that clearly contradict the terms of their insurance policies must fail." *Cooper v Auto Club Ins Assoc*, 481 Mich 399, 415; 751 NW2d 443 (2008); *accord*, *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 567; 596 NW2d 915 (1999), quoting *Komraus*, *supra* ("'[O]ne who signs a contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in its terms'").

In the case at bar, therefore, plaintiffs are conclusively unable to establish the requisite "justifiable reliance" for a claim of equitable estoppel to succeed. This is because they *knew* (under the law they are deemed to have known) that their policy would not protect a dwelling which was not their "residence premises," or one left vacant or "unoccupied" for several months; and they *knew* that the listed house, in fact, had long ceased to be their "residence premises" and had been left vacant and unoccupied for months.

Nor can plaintiffs be held to have justifiably relied on a purported "fail[ure]" on the part of Farm Bureau "to inform [them] that they would need to obtain different coverage[.]" The Court of Appeals' analysis falsely presumes that the insurer was subject to an actionable duty to ensure that the policy willingly purchased by plaintiffs provided the insurance they need. Michigan law imposes no such duty.

In *Harts v Farmers Ins Exchange*, 461 Mich 1; 597 NW2d 47 (1999), the Court reiterated and confirmed the rule that an insurance agent "owes no duty to advise a potential

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insured about any coverage. Such an agent's job is to merely present the product of his principal and take such orders as can be secured from those who want to purchase the coverage offered." 461 Mich at 8. Rather, it remains "*the insured*'s obligation" to read the insurance policy it purchases and raise any questions about coverage within a reasonable time after the policy is issued. *Id*. at 8 n. 4; *Casey*, 273 Mich App at 394-395; *VanDyke v League General Ins Co*, 184 Mich App 271, 275; 457 NW2d 141 (1990). The Court in *Harts* expressly declined the plaintiff's invitation to impose a general duty to advise concerning the purchase of insurance, stating that it should not take upon itself the legislative role of deciding whether to impose a duty on insurers' agents to advise their customers about the insurance they should be purchasing. *Harts*, 461 Mich at 11-12.

In short, both predicates of the Court of Appeals' determination that plaintiffs in this case established "justifiable reliance" are invalid. Regardless of what they might have inferred from Farm Bureau's conduct, Plaintiffs could not be *justified* in their belief that their vacant, unoccupied house would be protected under their insurance policy when its explicit terms disclaimed such coverage; nor can Farm Bureau be held to have "fail[ed] to inform plaintiffs that they would need to obtain different coverage" because the law imposes no actionable duty to so advise.

The judgment of the Court of Appeals thus should be reversed. Fundamentally, even if the elements of equitable estoppel were otherwise established, the Court erred in applying the doctrine to expand an insurance policy's substantive terms of coverage and thus "bring into existence a contract not made by the parties, to create a liability contrary to the express provisions of the contract the parties did make." *Ruddock*, 209 Mich at 654. And separately,

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the Court erred in permitting equitable estoppel to be asserted against a party that lacked actual knowledge of facts and circumstances sufficient to find the party to have fraudulently misled the other party, and in holding that plaintiffs were *justified* in believing they had coverage when the terms of their policy stated otherwise.

CONCLUSION

For all these reasons, Amicus Curiae IAM submits that the Court of Appeals' opinion in this case must be reversed. In so ruling, the Court is urged to hold, first, that in the context of a first-party claim for insurance benefits, the doctrine of equitable estoppel may not be applied to require the insurer to expand coverage contrary to the express terms of the insurance contract; and second, that a claim of equitable estoppel requires that the party against whom the doctrine is to be applied have full knowledge of the facts and circumstances involved, and that justifiable reliance on the part of the party seeking to invoke estoppel be shown.

Respectfully submitted,

GARAN LUCOW MILLER, P.C.

By: /s/ Daniel S. Saylor
DANIEL S. SAYLOR (P37942)
Attorneys for Amicus Curiae,
Insurance Alliance of Michigan
1155 Brewery Park Boulevard, Ste. 200
Detroit, Michigan 48207-2641
(313) 446-5520

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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

Ingham County Circuit Court No. 14-1421-CK

PROOF OF SERVICE

DANIEL S. SAYLOR certifies that he is associated with the law firm of GARAN LUCOW MILLER, P.C., attorneys for Amicus Curiae, INSURANCE ALLIANCE OF MICHIGAN, and that on June 19, 2018, he served the **Amicus Curiae Brief of the Insurance Alliance of Michigan**, and this **Proof of Service**, upon the parties by directing the Court's *TrueFiling* system to deliver true copies via "e-Service" to:

Plaintiffs-Appellees' attorney **John L. Noud, Esq.**, Noud & Noud, PLC, 155 W. Maple St., P.O. Box 316, Mason, Michigan 48856, to john@noudandnoud.com; and,

Defendant-Appellant's attorneys **Kimberly A. Hillock, Esq.**, Willingham & Coté, P.C., 333 Albert Ave., Ste. 500, East Lansing, Michigan 48823, to Khillock@willinghamcote.com, and **Stephen P. Willison, Esq.**, Willison & Hellman, P.C., 4670 East Fulton St., Ste. 103, Ada, Michigan, 49301-8409, to swillison@willisonhellman.com.

/s/ Daniel S. Saylor
DANIEL S. SAYLOR