STATE OF MICHIGAN

COURT OF APPEALS

GREGORY DURHAM and LYNNE DURHAM, Plaintiffs-Appellants,	UNPUBLISHED December 13, 2016
v	No. 329667 Berrien Circuit Court
AUTO CLUB GROUP INSURANCE COMPANY, Defendant-Appellant.	LC No. 14-000109-CK

Before: SAWYER, P.J., and MARKEY and O'BRIEN, JJ.

PER CURIAM.

In this action on a claim under a homeowners insurance policy for a fire loss, plaintiff appeals by right the trial court's order granting defendant summary disposition under MCR 2.116(C)(10) for the reasons set forth on the record. Defendant contends that the loss is not covered because the property was not at the time of the loss being used by plaintiff as their residence; plaintiffs contend that defendant waived this defense by not asserting it in their first letter denying coverage. The trial court ruled that "there is no material factual dispute that the insured's [sic] were not living in the residence. They had relocated, new jobs, new living quarters." Therefore, the trial court granted defendant summary disposition. Plaintiffs appeal by right. We reverse and remand for further proceedings consistent with this opinion.

I. STANDARDS OF REVIEW

"This Court reviews de novo a trial court's ruling on a motion for summary disposition." *Anzaldua v Neogen Corp*, 292 Mich App 626, 629; 808 NW2d 804 (2011). When considering a motion brought under MCR 2.116(C)(10), the trial court must view the evidence offered by the parties in the light most favorable to the party opposing the motion. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 443; 761 NW2d 846 (2008). The motion tests the factual sufficiency of a claim and should be granted when there is no genuine issue of material fact, and a party is entitled to judgment as a matter of law. *Id.*; *Anzaldua*, 292 Mich App at 630. "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).

This case presents a legal question regarding the application of a unique equitable doctrine in the context of the denial of an insurance claim. The trial court's application of an

equitable doctrine is reviewed de novo on appeal. *Tenneco*, 281 Mich App at 444; *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 309; 583 NW2d 548 (1998). The trial court's factual findings are reviewed for clear error. *Tenneco*, 281 Mich App at 444; *West American Ins Co*, 230 Mich App at 309. Because the court on a motion for summary disposition may not make findings of fact or weigh credibility, *Anzaldua*, 292 Mich App at 637, review of this issue in light of the insurance contract is strictly de novo, *Tenneco*, 281 Mich App at 444.

To properly determine the issue of summary disposition and the application of estoppel, we are required to interpret the insurance contract at issue. This Court reviews de novo the interpretation of a contract and the legal effect of its terms. *Auto-Owners Ins Co v Seils*, 310 Mich App 132, 145; 871 NW2d 530 (2015).

II. DISCUSSION

A. WAIVER OR ESTOPPEL OF DEFENSES

We conclude that the trial court erred by granting summary disposition to defendant because a genuine question of material fact remains and because the doctrine of estoppel or waiver of defenses applies to this case. Consequently, we must reverse and remand for trial on the issue of whether, despite not actually occupying the insured dwelling at the time of the fire, plaintiffs still, as a matter of fact, "used [the insured dwelling] principally as a private residence." We reach this result by applying the estoppel doctrine but also by requiring plaintiffs to sustain their burden of proving coverage. See *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 172; 534 NW2d 502 (1995) (holding that the insured has the burden to establish that his claim falls within the terms of the policy). Defendant may contest coverage under the exception to the rule of estoppel. See *Kirschner v Process Design Assoc, Inc*, 459 Mich 587, 593-594; 592 NW2d 707 (1999) (holding that "the doctrines [of estoppel and waiver] 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.").

The doctrine of estoppel at issue in this case has long-standing, common-law origins. In the federal system it acquired the name of "mend the hold," a "nineteenth-century wrestling term, meaning to get a better grip (hold) on your opponent." *Harbor Ins Co v Continental Bank Corp*, 922 F2d 357, 362 (CA 7, 1990). It first was used in a case against a railroad company alleging the negligent delay in shipment caused damage to the plaintiff's cattle. *Railway Co v McCarthy*, 96 US (6 Otto) 258; 24 L Ed (1877). The railway company first explained the delay by contending that enough cars were not available at a particular point on the route where the delay occurred. Then, at trial, it contended that the delay was also caused by West Virginia's Sunday laws. *Id*. at 265, 267. The Court affirmed the trial court's ruling not to instruct the jury on the latter claim, opining:

> Where a party gives a reason for his conduct and decision touching any thing [sic] involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law. [*Id*. at 267-268.]

Michigan has also followed and applied this doctrine in contract cases. See *C E Tackels v Fantin*, 341 Mich 119, 124; 67 NW2d 71 (1954) (an action on a construction contract).

The doctrine has quite frequently been applied to cases, like this one, of an insurance company denying coverage for a loss after a fire has occurred. In *Castner v Farmers' Mut Fire Ins Co*, 50 Mich 273, 275; 15 NW 452 (1883), the insurance company based its denial of coverage on two grounds, and the Court held "the company [was] not at liberty thereafter to vary their ground and offer new or additional objections." Plaintiffs primarily rely on *Smith v Grange Mut Fire Ins Co*, 234 Mich 119; 208 NW 145 (1926), which also is an action against an insurance company on a denied claim after a fire loss. In *Smith*, the plaintiff was originally charged with but then acquitted of arson. *Smith*, 234 Mich at 121. After the acquittal, Smith's counsel communicated with the insurance company and followed its procedures for adjusting the claim; the company did not assert a valid policy had not been issued but at trial moved for directed verdict on that basis. *Id*. at 122. The *Smith* Court affirmed the trial court, citing *Castner* as one of three cases supporting the pertinent rule of estoppel, which it stated as follows:

> This court has many times held, and it must be accepted as the settled law of this State, that, when a loss under an insurance policy has occurred and payment refused for reasons stated good faith requires that the company shall fully apprise the insured of all of the defenses it intends to rely upon, and its failure to do so is, in legal effect, a waiver, and estops it from maintaining any defenses to an action on the policy other than those of which it has thus given notice. [*Smith*, 234 Mich at 122-123.]

On its face, defendant's October 22, 2013, letter to plaintiffs' purporting to rescind the insurance policy as of the date of its last renewal on November 9, 2012, on the basis of fraud and concealment, does not refer to the residency defense based on the policy definition of "residence premises" that defendant later asserts in its motion for summary disposition. Defendant argues that its letter included the residency defense because it "clearly identified" that defendant's decision to rescind the policy and to deny coverage for the claim was based on the fact that plaintiffs did not occupy the insured property at the time of the loss. We find this argument inaccurate and inadequate to preclude application of the estoppel rule at issue. The October 22, 2013 rescission letter, in fact, alleges misrepresentation at the time the policy was "accepted" or renewed on November 9, 2012, not the condition of the residence at the time of the loss. The part of the policy that defendant relied on to rescind the policy was General Policy Condition No. 4, Fraud and Concealment. The trial court ruled there was no evidence to support that plaintiffs committed fraud or concealed material facts. While the rescission letter concerns whether the property was "owner-occupied," the only time frame stated in the letter referenced when the policy was accepted or renewed on November 9, 2012, not the date of fire. Consequently, absent an exception or other valid reason, because the October 22, 2013 rescission letter does not notify plaintiffs of the residency defense, the general rule of estoppel would preclude defendant from asserting this unstated defense to an action on the policy. See *Smit v Kaechele*, 207 Mich App 674, 679-680; 525 NW2d 528 (1994) ("The general rule is that once an insurance company has denied coverage to an insured and stated its defenses, the company has waived or is estopped from raising new defenses.").

Defendant also argues that its residency defense was saved by its letter of October 24, 2013, that actually denied plaintiffs' claim on the basis that the policy had been rescinded as stated in the October 22, 2013 letter. This letter contained a blanket "reservation of rights" stating that defendant "does not waive any rights and/or defenses which the company may have under said insurance policy and law, all of which rights and defenses are hereby expressly reserved." Plaintiffs assert this boilerplate language has no legal effect because it gives no notice to the insured and because contracts incorporate existing law that provides unstated defenses are waived, the reservation does nothing. Defendant argues that plaintiffs do not support their position with precedential authority, and the reservation of rights is effective because it shows defendant did not knowingly waive its residency defense. Both parties fail to cite precedential legal authority to support their respective positions, so it could be said as to each that their respective arguments are abandoned. See *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999) ("[W]here a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned.").

Nevertheless, because the circumstances establish a prima facie case for the application of the doctrine of estoppel of policy defenses, the burden of persuasion that the doctrine should not apply must rest with defendant. Moreover, the doctrine is based on the dual legs of providing fair notice to the insured of possible policy defenses, *Smith*, 234 Mich at 122-123, and knowledge on the part of the insurance company of available defenses at the time it denies a claim. See *Martinek v Firemen's Ins Co*, 247 Mich 188, 191; 225 NW 527 (1929) ("Waiver and estoppel are founded upon knowledge of facts."). In the present case, defendant denied the claim after a full investigation, so it had knowledge of all necessary facts to assert its residency defense when it denied plaintiffs' claim. Therefore, it can be said that defendant's failure to assert the residency defense was a knowing waiver. Further, the blanket reservation of rights provided absolutely no notice to plaintiffs of the later asserted defense. See *Meirthew v Last*, 376 Mich 33, 38; 135 NW2d 353 (1965) (holding the insurance company's blanket reservation of rights when it undertook defense of a liability claim against the insured held "legally insufficient", "was vague and uncertain," and "smacks of bad faith for want of specific reference to that clause of the policy" relied on). Finally, to give effect to a blanket reservation of rights in these circumstances would render meaningless a common-law doctrine two centuries old. Consequently, we conclude that the blanket reservation under these circumstances has no effect.

Finally, defendant asserts that even if the denial letter does not include the policy's residency requirement, plaintiffs cannot expand the policy's coverage through the doctrines of waiver or estoppel. Depending on the coverage provided by the policy at issue, there may be merit to this argument. In *Ruddock v Detroit Life Ins Co*, 209 Mich 638, 654; 177 NW 242 (1920), the plaintiff brought an action on a life insurance policy where the insured had died during World War I after being inducted into military service; the policy excluded coverage while the insured was in the "naval or military service in time of war." The plaintiff asserted the defendant had waived this provision by initially taking steps to process the claim. *Id*. at 652-653. The Court suggested that the defendant likely did not have knowledge of the insured's military service but declined to rest its holding on that ground. *Id*. at 653. Rather, the Court held that waiver and estoppel could not be used to create a new contract. Specifically, the Court opined:

> To apply the doctrine of estoppel and waiver here would make this contract of insurance cover a loss it never covered by its terms, to create a liability

> not created by the contract and never assumed by the defendant under the terms of the policy. In other words, by invoking the doctrine of estoppel and waiver it is sought to bring into existence a contract not made by the parties, to create a liability contrary to the express provisions of the contract the parties did make. [*Ruddock*, 209 Mich at 654.]

The *Ruddock* exception was restated in *Kirschner*, 459 Mich at 593-594: "The application of waiver and estoppel is limited, and, usually, the doctrines will not be applied to broaden the coverage of a policy to protect the insured against risks that were not included in the policy or that were expressly excluded from the policy." The Court also noted an exception to the exception, which does not appear to apply in this case, "when the inequity to the insurer as a result of the broadened coverage is outweighed by the inequity suffered by the insured." *Id*. at 594-595, citing *Smit,* 207 Mich App at 682-683, and *Lee v Evergreen Regency Cooperative,* 151 Mich App 281, 287; 390 N W2d 183 (1986).

The *Ruddock* exception to waiver or estoppel of defenses saves defendant's residency defense only if the policy does not provide coverage for a fire loss unless, at the time of loss, the insureds occupy the insured dwelling. Because, as discussed more fully in Part B, the policy does not require that the insureds occupy the insured premises at the time of the loss, and in fact, explicitly grants permission to the insureds that "[t]he **residence premises** may be vacant or unoccupied without limit of time, except where this policy specifies otherwise[,]" applying the doctrine of estoppel or waiver to defendant's residency defense does not "broaden the coverage of a policy to protect the insured against risks that were not included in the policy . . . ." *Kirschner*, 459 Mich at 593-594. Nevertheless, in an action on an insurance policy, the insureds have the burden of establishing that the policy covers the loss. *Heniser*, 449 Mich at 172 ("It is the insured's burden to establish that his claim falls within the terms of the policy."). In this case, despite not occupying the insured dwelling at the time of the fire, the plaintiffs must establish, as a matter of fact, that they continued to use the insured dwelling "principally as a private residence." Defendants may contest, at trial, that under the circumstances of this case, plaintiffs were no longer principally using the insured dwelling as a private residence, and therefore, the loss is not covered. However, under the rule of waiver of unstated policy defenses, *Smith*, 234 Mich at 122-123, defendant is estopped to assert any policy defenses other than fraud and concealment as set forth in its denial of coverage, but the trial court ruled no evidence supported this defense.

B. THE INSURANCE POLICY

1. LEGAL STANDARDS

This Court reviews de novo the interpretation of an insurance contract and the legal effect of its terms. *Seils*, 310 Mich App at 145. "The primary goal in the interpretation of an insurance policy is to honor the intent of the parties." *Tenneco*, 281 Mich App at 444. An insurance contract is construed in the same manner as other contracts, giving undefined terms their plain and ordinary meaning and consulting a dictionary to do so if necessary. *McGrath v Allstate Ins Co*, 290 Mich App 434, 439; 802 NW2d 619 (2010). Where the policy language is clear, courts are bound to enforce the policy as written. *Heniser*, 449 Mich at 160. But a "court must look at the contract as a whole and give meaning to all terms." *Auto-Owners Ins Co v Churchman*, 440

Mich 560, 566; 489 NW2d 431 (1992). "A contract is ambiguous when, after considering the entire contract, its words may reasonably be understood in different ways." *Seils*, 310 Mich App at 145. "An ambiguous provision in an insurance contract is construed against the insurer and in favor of coverage." *Id*. at 146. But it is always "the insured's burden to establish that his claim falls within the terms of the policy." *Heniser*, 449 Mich at 172.

2. DISCUSSION

Reading the insurance policy in this case as a whole, we conclude that it clearly extends coverage for the insured premises stated in the declarations sheet while the insureds use it "principally as a private residence." The policy explicitly grants permission to the insureds to allow the "residence premises [to] be vacant or unoccupied without limit of time . . . ." Although extended vacancy may affect certain coverages, such as for vandalism, theft, or freezing pipes, the clear and plain language of policy extends coverage for Part I Property Insurance Coverage, including fire damage, while the insureds are not occupying the insured premises. Defendant admits that "the policy contemplates that a named insured may be away from the property for some period of time (i.e., wintering in Florida or taking an extended vacation)" and still maintain coverage.

But rather than basing its argument that plaintiffs were required to be living in the insured home at the time of the loss for the fire damage to be covered under the language of the insurance policy at issue, defendant relies almost exclusively on the cases of *Heniser* and *McGrath*, which interpret different policy language and involve different facts than those at hand. Plaintiffs correctly argue that both *Heniser* and *McGrath* are readily distinguishable from this case.

In *Heniser*, the plaintiff sold the insured premises in November 1988 on a land contract, and in January 1989 it was destroyed by fire. *Heniser*, 449 Mich at 157. Under its definitions, the policy in *Heniser* insured "the residence premises" meaning "*where you reside* and which is shown as the 'residence premises' in the Declarations." *Id*. at 158 n 1 (emphasis added). The Court found that this language was unambiguous and that the plaintiff could not establish coverage under it because the word "reside" requires "actual physical presence." Additionally, the plaintiff admitted that he did not live at the property after selling it and had no intention of returning to live there in the future. *Id*. at 161-163. Thus, the Court held that because the plaintiff "did not 'reside' at the insured property at the time of the loss, the property is not a 'residence premises,' as defined by the policy, and the policy does not cover the loss." *Id*. at 163-164. Throughout its opinion, however, the *Heniser* Court distinguished other cases with different policy language and noted that the exact language of the pertinent policy was critical to its analysis. *Id*. at 167 ("It is crucial, however, to closely examine the exact policy language and context in which the language is used."). The policy in the present case does not require that the plaintiffs "reside" at the insured premises; it only requires that the insured premises be "used as a private residence by you." Moreover, unlike in *Heniser*, defendant's policy specifically grants permission to the insureds to be absent from the "residence premises," which "may be vacant or unoccupied without limit of time, except where this policy specifies otherwise . . . ." Further, in contrast to *Heniser*, plaintiffs averred that they intended to continue using the insured premises in the future as a private residence. While the policy states that the insured premises "must be used principally as a private residence," it does not state that the insured premises must the

insureds' principal or only private residence. Comparing the specific language of the instant policy to that in *Heniser*, and reading the policy at issue in this case as a whole, leads to the inescapable conclusion that holding of *Heniser* has no application to the instant case.

Similarly, *McGrath* is readily distinguishable from the present case. In *McGrath*, the insured because of age and illness, could no longer live in the insured property, and, although hoping to return, had not lived in there for two years. *McGrath*, 290 Mich App at 437-438, 444. The policy language in *McGrath*, unlike this case, provided coverage for "[**y**]**our dwelling**" defined as "a one, two, three or four family **building structure**, identified as the insured property on the Policy Declarations *where you reside* and which is principally used as a private residence." *McGrath*, 290 Mich App at 440 (italics added). *McGrath*, found "critical . . . the phrase 'where you reside'" and this language "precludes coverage because of [the plaintiff's] extended absence from the insured property." *Id*. Further, like *Heniser*, *McGrath* does not discuss an insurance policy that grants the insured permission to be absent from the insured premises for an unlimited time. Thus, for the same reasons that *Heniser* has no application to the instant case, *McGrath* is also distinguishable from the present case and has no application.

Defendant does, however, cite an unpublished opinion that supports its position and interprets policy language like that in the instant case. *Banks v Auto Club Group Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued June 18, 2015 (Docket No. 320985). The policy language in *Banks* appears to be identical to that in this case, at least with respect to defining "residence premises" as requiring that it be "described on the Declaration Certificate, used as a private residence by you . . . ." *Id*., slip op at 2. But the issue in *Banks* was not whether the insured premises was occupied; the insured's son occupied the residence and, in fact, was convicted of arson of a dwelling. *Id*., slip op at 1. Rather, the issue was whether the burned dwelling was used by the insured as his private residence when he admitted living with his mother 95% of the time. Following the reasoning of *McGrath* and *Heniser*, the *Banks* Court held that the insureds did not use the burned dwelling "as their private residence where the evidence showed that they lived in Detroit at the time of the fire." *Banks*, unpub op at 4-5.

We find that *Banks* does not change the analysis in this case. First, an unpublished opinion of this Court "is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1); *Gorman v American Honda Motor Co*, 302 Mich App 113, 130; 839 NW2d 223 (2013). While an unpublished opinion may be considered if its reasoning is instructive or persuasive, *In re Kanjia*, 308 Mich App 660, 668 n 6; 866 NW2d 862 (2014), because the facts in *Banks* are different, its reasoning is neither instructive or nor persuasive to us in this case. *Banks* did not concern the absence of the insured who left the insured dwelling vacant; the residence in *Banks* was occupied by its arsonist. Further, *Banks* does not discuss the effect of permission granted to the insured to be absent from the insured residence and that it may remain "vacant or unoccupied without limit of time . . .." Consequently, *Banks* is not persuasive or applicable here and does not affect the analysis in this case.

In summary, we find the case law that defendant relies on is distinguishable on the basis of differing policy language and differing facts. Because the policy language in this case covers the residence premises stated in the declarations, "used as a private residence by you," and grants permission to the insureds to leave the premises "unoccupied without limit of time," a genuine question of material fact remains for a jury to decide whether plaintiffs continued to "use[] [the

Benton Township home] principally as a private residence" at the time of the fire loss at issue. Therefore, the trial court erred by granting summary disposition to defendant. We reverse and remand for trial at which defendant's defenses are limited as discussed in Part A.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, plaintiffs may tax their costs pursuant to MCR 7.219.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Colleen A. O'Brien