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	UNPUBLISHED December 20, 2011 No. 301158 Oakland Circuit Court LC No. 2008-092944-CK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