

STATE OF MICHIGAN
COURT OF APPEALS

AUTO-OWNERS INSURANCE COMPANY,

Plaintiff-Appellee/Cross-Appellant,

v

ROBERT E. MCGOWAN TRUST, by DIANE WIEGMANN, individually and as successor trustee, ROBERT MCGOWAN, JR., and DONNA GILLUND,

Defendants-Appellants/Cross-Appellees,

and

SAMUEL THOMAS and RHONDA THOMAS,

Defendants.

UNPUBLISHED

May 15, 2014

No. 314118

Berrien Circuit Court

LC No. 11-000274-CK

Before: MURPHY, C.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM.

Following a bench trial, the trial court entered declaratory judgment in favor of plaintiff Auto-Owners Insurance Company, determining that Auto-Owners did not have a duty to defend or indemnify defendants Diane Wiegmann (individually or as successor trustee of the Robert E. McGowan Trust), Robert McGowan, Jr., and Donna Gillund in their underlying lawsuit against Samuel and Rhonda Thomas. Wiegmann, Robert Jr., and Gillund (hereinafter "defendants") now appeal by right. We affirm the declaratory judgment.

I. FACTS AND PROCEDURAL HISTORY

Defendants are the adult children of Robert McGowan, Sr., who died in 2006. In 2002, Robert Sr. had purchased a homeowners policy on a seasonal property through the Don Young Insurance Agency, underwritten by Auto-Owners. In 2004, Robert Sr. placed the property in a trust. After Robert Sr.'s death, the property remained in trust for defendants. Defendants changed the billing address on the policy, paid the policy premiums, and filed two claims against the policy: one in 2006 and another in 2009. Defendants did not, however, change the named

insured on the policy to include themselves, nor did they notify Auto-Owners of Robert Sr.'s death. Auto-Owners continued to address policy communications to Robert McGowan and issued claims checks payable to Robert McGowan. Auto-Owners also continued to apply a "mature homeowner discount" to the policy premiums. Robert Sr. had qualified for this discount; defendants did not qualify for the discount.

In 2011, defendants filed another claim under the policy. As part of this claim, Auto-Owners received a copy of a complaint from a lawsuit against defendants involving Samuel and Rhonda Thomas. An Auto-Owners representative noted that the names in the complaint were not the same as the named insured on the policy. Auto-Owners informed defendants that it would provide a defense under a reservation of rights, pending an investigation into whether defendants were insured under the policy. Auto-Owners subsequently filed the present suit, seeking a declaration that it had no duty to defend or indemnify defendants. The trial court determined that defendants were not covered under the policy. On appeal, defendants assert that the trial court erred by failing to consider the doctrines of equitable estoppel and implied contract.¹

II. ANALYSIS

A. STANDARD OF REVIEW

This Court reviews the trial court's factual findings for clear error. MCR 2.613(C); *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Id.* at 456. The clear-error standard is deferential, *Jonkers v Summit Twp*, 278 Mich App 263, 265; 747 NW2d 901 (2008), particularly regarding "the trial court's superior ability to judge the credibility of the witnesses who appeared before it." *Ambs v Kalamazoo Co Rd Comm'n*, 255 Mich App 637, 652; 662 NW2d 424 (2003) (internal quotation omitted). In comparison, a trial court's conclusions of law in a bench trial are reviewed de novo, *Lamp v Reynolds*, 249 Mich App 591, 595; 645 NW2d 311 (2002), as are questions involving contract interpretation. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

B. EQUITABLE ESTOPPEL

Equitable estoppel is an "equitable defense that prevents one party to a contract from enforcing a specific provision contained in the contract." *Morales v Auto-Owners Ins Co*, 458

¹ In its opinion, the trial court did not expressly address the doctrines of equitable estoppel or implied contract. However, the record contains the facts necessary to analyze these issues, and no further explanation from the trial court is necessary to facilitate our review. Accordingly, we will resolve these issues on appeal. See *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995).

Mich 288, 295; 582 NW2d 776 (1998). For equitable estoppel to apply, the party seeking its application must establish that: (1) a party, by representations, admissions, or silence intentionally or negligently induced another party to believe facts, (2) the other party justifiably relied and acted on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts. *West Am Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 310; 583 NW2d 548 (1998). Equitable estoppel may not be employed to “bring into existence a contract not made by the parties, [or] to create a liability contrary to the express provisions of the contract the parties did make.” *Ruddock v Detroit Life Ins Co*, 209 Mich 638, 653; 177 NW 242 (1920). In other words: “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.” *Kirschner v Process Design Assoc, Inc*, 459 Mich 587, 593-594; 592 NW2d 707 (1999).

In this case, defendants’ proposed expansion of liability beyond the contract’s plain terms is not a valid application of the equitable estoppel doctrine. *Ruddock*, 209 Mich at 654. The record contains nothing to support an expansion of the policy coverage to include defendants as insureds. Robert Sr. and Auto-Owners contracted for coverage on the property, naming Robert Sr. as the insured; at no time did the contract’s plain terms provide coverage for defendants or the trust.

We recognize that, in considering whether equitable estoppel results in expanded liability beyond the express contract terms, the Court in *Kirschner* noted that coverage might be expanded if “the insurance company has misrepresented the terms of the policy to the insured or defended the insured without reserving the right to deny coverage.” *Kirschner*, 459 Mich at 594-595. However, the record in this case does not support expanded coverage. First, Auto-Owners reserved its right to deny coverage before agreeing to undertake any defense. Second, the trial court rejected defendants’ claims that Auto-Owners bore any responsibility for defendants’ failure to obtain the proper coverage, finding that Auto-Owners was not informed of Robert Sr.’s death. This factual finding was not clearly erroneous given the evidence presented at trial—namely, evidence that no one told Auto-Owners of Robert Sr.’s death. Coupled with this evidence was the plain language of the policy identifying Robert Sr. as the insured, the numerous documents Auto-Owners sent to Wiegmann that identified Robert Sr. as the insured, the continued “mature homeowner discount,” and the checks sent by Auto-Owners on earlier claims, which were payable to “Robert McGowan” in a manner consistent with the named insured. The record does not indicate that Auto-Owners misrepresented the policy’s terms. Accordingly, there is no basis for extending the policy coverage in this case.

Even if we viewed defendants’ equitable estoppel defense as an effort to prevent forfeiture rather than to expand liability, defendants would still not be entitled to relief. To invoke the doctrine of equitable estoppel, a party must demonstrate that the other party engaged in “culpable negligence or [an] intentional act.” *Mate v Wolverine Mut Ins Co*, 233 Mich App 14, 23; 592 NW2d 379 (1998); see also *Hetchler v Am Life Ins Co*, 266 Mich 608, 613; 254 NW 221 (1934). The record in this case does not show culpable negligence by Auto-Owners.

Defendants argue that their actions—such as changing the address on the policy, using checks with the trust’s name to pay premiums, and submitting claims against the policy—provided Auto-Owners with notice of the trust and of Robert Sr.’s death. This Court rejected a

similar argument in *McGrath v Allstate Ins Co*, 290 Mich App 434, 447; 802 NW2d 619 (2010). In *McGrath*, the Court noted that “a person may change a billing address for myriad reasons that would not raise a suspicion that residency has changed.” The Court further noted that “the children of an elderly person may decide to assume the responsibility for paying a parent’s bills . . .” *Id.* In this case, as in *McGrath*, defendants’ change to the billing address, payment of the premiums, and involvement with claims on the policy do not indicate that Auto-Owners had notice of any change regarding the named insured.² In sum, we find no clear error in the trial court’s conclusion that Auto-Owners had no liability to defendants under the policy.

C. CONTRACT IMPLIED IN FACT

Defendants contend that an implied in fact contract existed between themselves and Auto-Owners based on the parties’ course of conduct following Robert Sr.’s death. “A contract implied in fact arises under circumstances which, according to the ordinary course of dealing and common understanding . . . show a mutual intention to contract.” *Erickson v Goodell Oil Co*, 384 Mich 207, 211-12; 180 NW2d 798 (1970). To establish an implied in fact contract there must be: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Mallory v Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989). “In determining whether there is a contract implied in fact, the courts look to the acts and conduct of the parties to determine whether the essential elements of an express contract have been established.” *Lawrence v Ingham Co Health Dep’t Family Planning/Pre-Natal Clinic*, 160 Mich App 420, 422 n 1; 408 NW2d 461 (1987). Whether the parties have mutually assented to an agreement is judged from an objective standard, not the parties’ subjective states of mind. *Kamalath v Mercy Mem Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992).

In this case, no reasonable person could view Auto-Owners’ conduct as indicative of an intent to contract with defendants as named insureds. The record indicates that, consistent with the written agreement with Robert Sr., whom Auto-Owners believed to be living, Auto-Owners mailed documents to Robert Sr., paid claims in the name of Robert McGowan, applied a “mature homeowner discount,” and interacted with defendants with regard to the execution of its duty under its contract with Robert Sr. Viewed objectively, this conduct was not indicative of assent to a new contract. See generally *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990) (finding performance of a preexisting duty did not establish an implied in fact contract).

III. CONCLUSION

Having determined the trial court properly entered declaratory judgment in Auto-Owners’ favor, we need not consider Auto-Owners’ alternative arguments on cross-appeal.

² Defendants maintain that they informed the Don Young Agency of Robert Sr.’s death. After hearing the evidence, the trial court found that the Agency had not been informed of the death. We defer to the trial court’s assessment of the evidence on this credibility issue. *Amb*s, 255 Mich App at 652.

Affirmed.

/s/ William B. Murphy

/s/ Peter D. O'Connell

/s/ Kirsten Frank Kelly