STATE OF MICHIGAN

COURT OF APPEALS

MFC FIRST NATIONAL BANK formerly known as IRON RIVER NATIONAL BANK,

Plaintiff-Appellee/Cross-Appellant,

v

POLICH DISTRIBUTING, INC., and GEORGE POLICH,

Defendants-Appellants/Cross-Appellees,

and

STUFF SOURCE, INC.,

Defendant-Appellant,

and

GLEN POLICH,

Defendant.

UNPUBLISHED
June 25, 1999

No. 209939
Iron Circuit Court
LC No. 95-005386 CK

Before: Whitbeck, P.J., and Markman and O'Connell, JJ.

PER CURIAM.

In this commercial contract action, defendants, Polich Distributing, Inc., George Polich and Stuff Source, Inc., appeal as of right a judgment for plaintiff. Plaintiff cross-appeals as of right the judgment's failure to include an assessment of attorney fees and costs against defendants. We affirm.

Defendant Polich Distributing, incorporated on April 16, 1990, was a Michigan corporation. According to a May 24, 1990 Certificate of Incorporators Action in Polich Distributing's corporate

record book, defendant George Polich, as the corporation's sole incorporator, elected himself and his son, Glen Polich, to the board of directors. George Polich was also appointed president of the corporation and Glen Polich was appointed secretary/treasurer.

James F. Gibula, president of MFC First National Bank ("MFC"), testified that in March 1991, George Polich requested a line of credit for Polich Distributing. As a result, on March 20, 1991, MFC, at that time known as Iron River National Bank, and Polich Distributing entered into a business loan agreement for a $50,000 line of credit. The agreement was signed by George Polich and contained a promissory note with a March 20, 1992 maturity date. In conjunction with the agreement, George Polich also signed a personal guarantee as collateral for the line of credit. Gibula further testified that the language of the guarantee provided that the guarantee was unlimited, in that it would continue throughout Polich Distributing's dealings with the bank. Pursuant to a July 1990 corporate resolution, George Polich and his wife, Jean Polich, were the only persons authorized to sign the checking account for Polich Distributing.

Shortly after receiving the initial $50,000 line of credit, George Polich personally approached MFC and requested an increase in the line to $75,000. MFC granted the increase on May 8, 1991, with a maturity date of May 8, 1992. The business agreement in conjunction with the increased line of credit referred to a commercial promissory note and a commercial guarantee, which Gibula testified meant George Polich's guarantee. The agreement itself and the promissory note were signed by Glen Polich as secretary of Polich Distributing. Gibula testified that the bank's documentation package on the May promissory note contained a second corporate resolution authorizing Glen Polich to sign loan documents for the corporation. Defendants alleged that the authenticity of the second resolution was in doubt and that it appeared Glen Polich's name had been merely added to the original resolution-- which authorized only George and Jean Polich to sign loan documents for the corporation-- by a typewriter used by plaintiff.

In addition, Gibula testified that the initial $50,000 line of credit was not secured by a collateral security agreement, but only by George Polich's personal guarantee, and that in its previous dealings with George Polich, MFC had not required any security other than George's personal guarantee. Otherwise, the May agreement contained language similar to the agreement for the initial line of credit, to the effect that the bank had to be notified regarding any changes to Polich Distributing's corporate structure. The promissory notes on both lines of credit also provided that the makers were responsible for paying any costs and attorney fees expended in enforcing the terms of the notes.

Gibula testified that the corporation immediately began accessing the $75,000 line of credit, and that George and Jean Polich remained as the only authorized signators until December 1991, when Glen Polich became authorized to do so. By the time Glen Polich began signing the checks, Gibula asserted, the entire $75,000 line had already been accessed by checks signed only by either George Polich or Jean Polich. Several of the checks signed by George or Jean Polich on this line of credit went toward payment of interest on the increased line of credit.

Glen Polich testified that, somewhat contemporaneously with the increased line of credit, George and Glen Polich were working out an agreement allowing Glen to take control and ownership of

Polich Distributing. Pursuant to this agreement, Glen was to arrange financing for the corporation and pay off the balance of the $50,000 note; George would subsequently turn over the stock shares to Glen. In April 1992, Glen Polich requested an extension of the credit line to $125,000. The bank denied the additional loan. Gibula further testified that George Polich was not involved in this loan request and that at that time he was advised by Glen Polich that George Polich was no longer involved in the business. The bank, however, did extend the maturity date of the $75,000 line. Nonetheless, the corporation did not pay off the line by the time of the new maturity date and, on October 1, 1992, Gibula sent a letter notifying the corporation of its default on the loan.

On October 13, 1992, Jerald Bugby, a bank vice-president, met with George and Glen Polich and worked out a repayment plan for the corporation's matured line of credit. In spite of the plan, MFC was forced to begin sending collection letters to the corporation in February 1993. In March 1994, MFC met with Glen Polich, and George Polich's representative in an attempt to resolve the defaulted line of credit, and this resulted in the bank renewing the line of credit as a term note. Another of George Polich's corporations, defendant The Stuff Source, also pledged its assets as security on the term note. The business loan agreement surrounding the March 1994 resolution of the debt showed that the bank took a March 20, 1991 commercial promissory note, a May 8, 1991 commercial security agreement, a March 20, 1991 guarantee and a March 31, 1994 guarantee as security on the loan. Glen Polich signed the agreement as president of the corporation. The commercial promissory note recited a principal amount of $52,903.40 to be paid in eleven installments of $500 and bore interest. The note also contained language requiring the borrower, listed as Polich Distributing, to pay all costs of the lender in connection with enforcing the terms of the note. While some payments on the note were made, by the time of the trial, the principal amount remaining on the note was $51,678.57. This lawsuit was brought to recover on the note and for the attorney fees and expenses.

Defendants first allege several evidentiary errors with regard to the admission of *copies* of loan documents, a personal guarantee, and the second corporate resolution. The Michigan Rules of Evidence, with certain exceptions not applicable here, govern proceedings in the courts of Michigan. MRE 101, MRE 1101.[1] Pursuant to these Rules, the documents in controversy were properly admitted into evidence. First, with regard to the loan documents, representatives of MFC testified that the documents were loan documents and that they had authorized the creation of the documents in conjunction with George Polich's request for a $50,000 line of credit. They also testified that it was a standard practice of MFC to prepare such documents. Therefore, barring contrary evidence that the documents were untrustworthy, the loan documents were properly authenticated and fell within the business records exception to the hearsay rule of MRE 803(6).

MRE 1002 requires that an original writing be used to prove the contents of the writing, unless provided otherwise by the Michigan Rules of Evidence or by statute. MRE 1003 states that a "duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." MRE 1004 permits other evidence of the contents of a writing to be submitted instead of an original if, among other things, the original is lost or destroyed, unless the proponent lost or destroyed the writings in bad faith. MRE 1004(1). Further, MRE 901 requires that, prior to admission, evidence

must be authenticated by a showing "that the matter in question is what its proponent claims." MRE 901 additionally states that, among other methods, testimony of a witness with knowledge that the matter is what it is claimed to be, satisfies the authentication requirement.

Defendants' argument that the documents were untrustworthy rests primarily on the fact that the documents were copies. However, copies of documents are not *per se* inadmissible but may be offered if the original document is lost or destroyed. MRE 1004(1). Here, Gibula testified that it was MFC's standard procedure to return the originals of these documents to the customer when the account had been paid by renewal, and that the $50,000 line of credit in this case had been paid by renewal. There was no evidence that plaintiff lost or destroyed the originals in bad faith. Therefore, the copies were properly admitted pursuant to MRE 1004(1). Further, while defendants seemingly argue that the use of copies inherently rendered the documents untrustworthy, this is at odds with the express language of the Rules. MRE 1002-04. The decision to admit evidence is within the discretion of the trial court and is reviewed by this Court for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Accordingly, we conclude that the trial court did not abuse its discretion by admitting copies of the loan documents into evidence.

The same analysis applies with regard to the personal guarantee of defendant George Polich. Gibula testified that it was standard procedure for the bank to prepare and keep a personal guarantee in conjunction with a loan. He had personal knowledge that the original of the guarantee existed, but indicated that MFC could not locate it after a diligent search. Because the original was lost, and there was no evidence of bad faith by MFC in causing this to occur, a copy of the guarantee was properly admitted pursuant to MRE 1004(1). Moreover, for the same reasons that the other loan documents were properly authenticated and were submitted with a proper foundation, the guarantee was likewise admissible pursuant to MRE 901 and MRE 803(6). Lastly, there was no evidence presented that the copy of the guarantee was untrustworthy. Therefore, the trial court did not abuse its discretion in admitting a copy of George Polich's personal guarantee.

The third document defendants assert was improperly admitted is a copy of the second corporate resolution that provides authorization for Glen Polich to sign loan documents on behalf of the corporation. Even if this document was not properly admissible, its admission was harmless error because bank representatives testified independently about the information contained in the original document, specifically noting that it authorized Glen Polich to sign loan documents on behalf of the corporation. See *Price v Long Realty, Inc*. 199 Mich App 461, 468; 502 NW2d 337 (1993). Further, in its findings of fact, the trial court noted the "mysteriousness" surrounding Glen Polich's signature on the copy of the second corporate resolution and did not rely solely on that resolution in determining that Glen Polich's signatures on various loan documents bound the corporation. Rather, the trial court found that Glen Polich's authority to sign loan documents also derived from George Polich's ratification of Glen's authority. Reversal, therefore, again is not required.[2]

Defendants next argue that the trial court's findings were against the great weight of the evidence, and, thus the court erred in failing to grant defendants' motion for new trial. This Court applies an abuse of discretion standard to a lower court's ruling on a motion for a new trial on the ground that the verdict was against the great weight of the evidence. *Arrington v Detroit Osteopathic*

Hospital Corp (On Remand), 196 Mich App 544, 551; 493 NW2d 492 (1992). There was no abuse of discretion in this case, in our judgment. With regard to the second corporate resolution, even if the clear weight of the evidence concerning this one document suggested that the document was unreliable, the trial court did not base its decision on this document alone. The evidence supported the trial court's determination that George Polich remained as president of the corporation, and that he had ratified Glen's Polich's authority to sign loan documents on behalf of the corporation. There was also significant evidence that George Polich's guarantee was a continuing one; namely, the language of the guarantee itself.

Defendants next assert that the trial court improperly denied its motion for summary disposition. On appeal, an order deciding a motion for summary disposition is reviewed de novo. The record must be reviewed to determine whether the successful party was entitled to judgment as a matter of law. *Adkins v Thomas Solvent Co*, 440 Mich 293, 302; 487 NW2d 715 (1992).

Defendants argue that Glen Polich had no authority to sign loan documents and bind the corporation because the first corporate resolution authorized only George Polich to enter into such agreements.[3] If any evidence regarding the existence of an agency relationship is presented, issues regarding the scope and existence of an agency relationship involve a question of fact. *Michigan National Bank v Kellam*, 107 Mich App 669, 678; 309 NW2d 700 (1981). In *Alar v Mercy Memorial Hospital*, 208 Mich App 518, 528; 529 NW2d 318 (1995), this Court stated

> The authority of an agent to bind a principal may be either actual or apparent. *Meretta v Peach*, 195 Mich App 695, 698; 491 NW2d 278 (1992). . . . Apparent authority arises where the acts and appearances lead a third person reasonably to believe that an agency relationship exists. However, apparent authority must be traceable to the principal and cannot be established only by the acts and conduct of the agent. *Id.*, pp 698-699.

Further, where a principal has clothed a party with apparent authority to perform an act, the principal is estopped from subsequently denying the apparent agent's authority to perform the act. *Grossman v Langer*, 269 Mich 506, 510; 257 NW 875 (1934).

Plaintiff here presented evidence that George Polich requested the increase in the line of credit to $75,000, and Glen Polich subsequently signed the requested loan documents as secretary of the corporation to demonstrate that Glen Polich had apparent authority to sign the documents. We conclude that the evidence was sufficient to at least raise a question of fact regarding whether an apparent agency relationship existed and the trial court properly denied summary disposition on this basis. Accordingly, we need not address the other bases on which plaintiff asserts there was a factual dispute regarding Glen's authority.

Finally, on cross-appeal, plaintiff alleges error in the trial court's failure to award attorney fees and costs. However, plaintiff failed to properly preserve this issue and this Court will not review an unpreserved issue unless failure to consider it would result in a miscarriage of justice. *Petrus v Dickinson Co Bd of Comm'rs*, 184 Mich App 282, 288; 457 NW2d 359 (1990). No miscarriage of

justice will result here because plaintiff failed to carry its burden of proof with regard to proving reasonable attorney fees at trial. We therefore decline to address this issue.

Affirmed.

/s/ William C. Whitbeck
/s/ Stephen J. Markman
/s/ Peter D. O'Connell

[1] MRE 101 provides that "[t]hese rules govern proceedings in the courts of this state to the extent and with the exceptions stated in Rule 1101. A statutory rule of evidence not in conflict with these rules or other rules adopted by the Supreme Court is effective until superseded by rule or decision of the Supreme Court." MRE 1101 further provides, with some inapplicable exceptions, that "these rules apply to all actions and proceedings in the courts of this state." The authority for MRE 101 and MRE 1101 is contained in Const 1963, art 6, § 5 which provides: "The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state."

[2] Defendants' assertion that copies of the documents in controversy were inadmissible because the substance of the documents were each "material" to this dispute misreads the Rules. The reference in MRE 1004(4) to documents "not closely related to a controlling issue" merely describes the conditions under which there is not even a presumption that an original document must be submitted rather than a copy of such document. Although we do not dispute that the documents here are "material," we nevertheless believe that plaintiff has overcome his burdens under MRE 1003 in admitting copies of these documents.

[3] At the time this motion was heard, the second corporate resolution, which purportedly authorized Glen Polich to sign for the corporation, had not been discovered. On the first day of trial, plaintiff first presented the newly-discovered second corporate resolution authorizing Glen Polich to sign loan documents for the corporation. As a result, discovery was reopened and the trial was rescheduled.