STATE OF MICHIGAN

COURT OF APPEALS

COLLENE K. CORCORAN Chapter 7 Trustee for STEPHANIE JACKSON, Plaintiff, v SPARTAN BARRICADING & TRAFFIC CONTROL, INC., Defendant/Third-Party Plaintiff-Appellant, and ALLMAND BROTHERS, INC., Defendant, and W. H. CANON, INC., Third-Party Defendant-Appellee.	UNPUBLISHED November 27, 2018 No. 341009 Wayne Circuit Court LC No. 15-015510-NO

Before: O'BRIEN, P.J., and TUKEL and LETICA, JJ.

PER CURIAM.

Spartan Barricading & Traffic Control, Inc. (Spartan) appeals as of right the order denying its motion for summary disposition and granting summary disposition to W.H. Canon, Inc. (Canon) under MCR 2.116(C)(10). We reverse the trial court's grant of summary disposition to Canon and remand for further proceedings.

This case arose after an "arrow board" traffic control device[1] malfunctioned and injured plaintiff. Plaintiff's employer, Canon, had leased the arrow board from Spartan. Plaintiff brought a negligence action against Spartan, who in turn filed a third-party complaint against Canon for contractual indemnity.

At issue on appeal is Spartan's claim against Canon. Spartan based its claim on a "Customer Leasing Contract" (the leasing contract) that was signed by a Spartan employee and George Guyor, an employee of Canon. In early June 2015, Canon sent Guyor to pick up the arrow board from Spartan. Before allowing Guyor to take possession of the arrow board, Spartan required Guyor to sign the leasing contract, which contained the following:

> Contract Agreement: Customer agrees, by receipt of the equipment listed above, that *he/she is in agreement with the terms and conditions, as set forth on the back of this Leasing Contract*. Customer further agrees that equipment was received in acceptable, good condition and that customer will be responsible for any lost, damaged or stolen items. [Emphasis added.]

On the back of the leasing contract was an indemnity clause, stating:

> **Customer agrees** to defend, indemnify and hold [Spartan and] . . . its agents, employees and equipment manufacturers, harmless from all claims for bodily injury and property damage that may arise from the selection, location, use, placement or inability to use the product in the Customer's care, custody and control. Customer further agrees to comply with all state, federal and local laws and safety construction site regulations, in performing its contract.

At his deposition, Guyor confirmed that he signed the agreement on behalf of Canon, but testified that he did not read it. Other Canon employees confirmed that Canon routinely sent workers to pick up equipment from Spartan, and, according to those workers who testified, the workers always signed—but generally did not read—a document before taking possession of the equipment. The workers believed that the document they signed was to confirm Canon's taking possession of the equipment.

Spartan moved for summary disposition under MCR 2.116(C)(10), arguing primarily that plaintiff's claim was within the scope of the indemnity clause and that Guyor was authorized to bind Canon to the terms and conditions of the agreement under a theory of actual or apparent authority. Canon filed a cross-motion for summary disposition under MCR 2.116(C)(10) and MCR 2.116(I)(2), contending, among other things, that Guyor lacked actual and apparent authority to bind Canon to the indemnification provision, and that the indemnity agreement was unenforceable because there was no mutual assent to that term in the leasing contract.

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[1] An "arrow board" is a sign with many individual bulbs that, when lit, form an arrow. Arrow boards are commonly seen on the sides of roads and highways, and are generally used to direct traffic into a different lane.

At the hearing on the parties' motions, the trial court agreed with Canon's arguments. The trial court reasoned that no one that picked up equipment for Canon "acted on behalf of Canan [sic] to expressly contract to indemnify." Instead, all of Canon's employees believed the form they signed was "proof of picking up the equipment," even though they never read over the form. The trial court concluded that this could not amount "to an expressed contract to indemnify with negotiated terms." The trial court also agreed with Canon's argument that Guyor "lacked the authority to bind" Canon to an agreement, and concluded that there was no evidence that Canon agreed to be bound by the indemnification clause. In summing up its ruling, the trial court stated that without a "meeting of the minds" or evidence that Canon agreed to be bound by the terms of the leasing contract, the leasing contract was "not a contract." The trial court thereafter denied Spartan's dispositive motion and granted summary disposition to Canon, effectively dismissing Canon from the case while plaintiff's claim against Spartan continued.

Spartan filed an application for leave to appeal, which this Court denied.[2] Plaintiff and Spartan eventually settled, and the trial court entered a stipulated order dismissing plaintiff's claim against Spartan with prejudice. Spartan then filed this appeal, arguing that the trial court erred by denying its motion for summary disposition and granting Canon's dispositive motion.

Appellate courts review a trial court's grant of summary disposition de novo. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). Both parties filed for summary disposition under MCR 2.116(C)(10). In *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999), our Supreme Court explained the standard for a motion under MCR 2.116(C)(10) as follows:

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.

A genuine issue of material fact exists when, after viewing the evidence in a light most favorable to the nonmoving party, reasonable minds could differ on the issue. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

Initially, we note our disagreement with the trial court that there was no mutuality of assent, or "meeting of the minds." "[M]utuality is the centerpiece to forming any contract." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364; 666 NW2d 251 (2003). In *Quality Products*, our Supreme Court explained that the mutuality requirement is satisfied where there is proof of an express written agreement. *Id*. at 373. Here, if the parties validly entered into the leasing contract, then the mutuality requirement was satisfied because it was an express written agreement. This is true regardless of whether Canon's employees signed

[2] *Jackson v Spartan Barricading & Traffic Control*, unpublished order of the Court of Appeals, entered November 2, 2017 (Docket No. 338925).

the leasing contract without reading it. See *Farm Bureau Mut Ins Co of Mich v Nikkel*, 460 Mich 558, 567-568; 596 NW2d 915 (1999).

This brings us to the more central issue on appeal, which is a question of agency: namely, could Guyor bind Canon to the leasing contract? "An agency relationship may arise when there is a manifestation by the principal that the agent may act on his account." *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992). "The test of whether an agency has been created is whether the principal has a right to control the actions of the agent." *Id*. "The authority of an agent to bind the principal may be either actual or apparent." *Id*. at 698.

It is undisputed that Guyor was Canon's agent; Guyor was a Canon employee and performing his duties in that capacity when he took delivery of the arrow board. See *Blair v Checker Cab Co*, 219 Mich App 667, 674; 558 NW2d 439 (1996) (explaining that employees are agents of their employers when acting within the scope of their employment). We first address whether Guyor, as Canon's agent, had apparent authority to sign the leasing contract on Canon's behalf. See *Michael v Kircher*, 335 Mich 566, 570; 56 NW2d 269 (1953) (explaining that whether an agent "had specific actual authority" to do an act "for the defendants is immaterial, where he had been cloaked by the defendants with apparent authority to" do the act). We conclude that he did not.

Apparent authority is to be determined by all of the facts and circumstances. *Atl Die Casting Co v Whiting Tubular Products, Inc*, 337 Mich 414, 422; 60 NW2d 174 (1953). The standard by which we judge whether a person's belief in an agent's authority was justified is that of "a person of ordinary prudence, conversant with business usages and the nature of the particular business." *Maryland Cas Co v Moon*, 231 Mich 56, 62; 203 NW 885 (1925) (quotation marks and citation omitted). A known agent is generally presumed to be acting within the scope of his or her authority. *Id*. But this presumption generally does not extend to an agent's ability to bind his or her principal to indemnity agreements. *Hearst Pub Co v Litsky*, 339 Mich 642, 645; 64 NW2d 687 (1954) ("Authority to bind the principal by a contract of guaranty or suretyship is not ordinarily to be implied from the existence of a general agency.") (Quotation marks and citation omitted); *In re Union City Milk Co*, 329 Mich 506, 513; 46 NW2d 361 (1951). But see *Constantine v Kalamazoo Beet Sugar Co*, 132 Mich 480, 488; 93 NW 1088 (1903) (holding that agent entering principal into indemnity contract was within agent's apparent authority because "such reasonable contracts" were necessary for the business to operate). A principal can only be liable for the apparent authority that is traceable to the principal; apparent authority cannot be established by the acts and conduct of the agent. *Maryland Cas Co*, 231 Mich at 62. "One dealing with an agent is bound to inquire into the extent of his authority, not from the agent, in the absence of written evidence thereof, but from the principal, if accessible[.]" *Cutler v Grinnell Bros*, 325 Mich 370, 376; 38 NW2d 893 (1949) (quotation marks and citation omitted).

Although Spartan was generally entitled to presume that Guyor was acting within the scope of his authority when he picked up the arrow board, that general presumption did not extend to Guyor's ability to bind Canon to an indemnity agreement with Spartan. See *Hearst Pub Co*, 339 Mich at 645. According to the witnesses deposed, Spartan and Canon always negotiated the terms of their agreements—the price and quantity of the arrow board(s) that Canon was to lease—over the phone, and then Canon generally sent an employee to pick up the

equipment. While negotiating their agreements, Spartan never mentioned the indemnity clause or the need to have someone sign the leasing contract. Canon never allowed Guyor to negotiate the terms of its agreements with Spartan; Guyor's only involvement with Spartan was picking up the equipment after negotiations ended. Guyor testified that when he would pick up equipment, he had "virtually no conversation at all" with anyone, "[i]t was just strictly business," and he would sign for the equipment and "was gone." Spartan never asked Guyor whether he was authorized to bind Canon to an indemnification contract. More importantly, Spartan never made this inquiry to Canon, as the principal, despite that Canon's management was accessible by phone. See *Cutler*, 325 Mich at 376.

On this record, Spartan failed to inquire from Canon whether Guyor could sign the leasing contract on Canon's behalf, see *id*., and there is simply no way to interpret Canon's conduct as authorizing Guyor to contract on Canon's behalf, see *Maryland Cas Co*, 231 Mich at 62 (explaining that the apparent authority of an agent must be traceable to acts of the principal). As far as Spartan could reasonably believe, Guyor's authority was to pick up equipment for Canon, and "a person of ordinary prudence, conversant with business usages and the nature of the particular business" could not reasonably believe that Guyor had the authority to commit Canon to the terms of the leasing contract. *Id*. In other words, based on the undisputed facts, Guyor did not have apparent authority to sign the leasing contract for Canon.

Turning to the question of whether Guyor had actual authority to contract on Canon's behalf, we reach the opposite conclusion. "Actual authority may be express or implied." *Meretta*, 195 Mich App at 698. In *Field v Jack & Jill Ranch*, 343 Mich 273, 279; 72 NW2d 26 (1955), our Supreme Court explained:

> Clear it is also, on plainest principles of agency, that the authority of an agent includes not only those things he is expressly told to do, but those things the principal knowingly acquiesces in his doing. The principal is liable in such case not on any principle of estoppel or apparent authority but because the agent is exercising authority that is as real and actual as though expressed in words.

Patricia McNeilly, a Spartan employee, testified that, with the help of an attorney, she drafted the leasing contract that Spartan used when leasing equipment, and that the leasing contract had been used by Spartan for "probably eight or nine years." Everyone agreed that Spartan and Canon had done business for years. Guyor and David Harpst, a project manager for Canon, both testified that they had picked up equipment from Spartan before and that they had to sign documents to do so. Both admitted to not always reading the documents. McNeilly never expressly testified that a Canon employee previously signed a leasing contract like the one at issue, but she explained that Canon employees picking up equipment would generally sign the same form that Guyor signed; that the document was a "triplicate" with a pink, white, and yellow copy; and that the pink copy would be sent with the person picking up the equipment and Spartan would retain the other copies.[3] John Ropek, a purchasing agent for Canon during the

[3] At one point in its brief, Canon states that Spartan "discovered" that it never "signed any indemnification agreements" with Canon, and attributes this assertion to McNeilly. There is

relevant events, testified that he received a document every time someone from Canon picked up equipment from Spartan, but he "just looked at it to see what it was" and "did not read the whole document." While we do not have the parties' deposition exhibits on appeal, Ropek testified that a document he was shown during his deposition was the form he would see each time Canon rented equipment from Spartan, that typically the forms he received were signed by a Canon employee, and that the forms had terms and conditions on the back. Ropek also testified that he was in a managerial position at Canon and would negotiate the terms of at least some of Canon's agreements with Spartan. Yet no one from Canon testified that Canon disagreed with the terms in the documents it received from Spartan and conveyed those objections to Spartan.

Based on this evidence, there is a question of fact whether Canon employees previously signed leasing contracts like the one in this case, and viewing the evidence in the light most favorable to Spartan, we conclude that they had.[4] So, Canon employees picking up equipment from Spartan previously signed leasing contracts with Spartan on Canon's behalf, Canon's management knew or should have known about this because the employees handed those contracts to management, and yet no one from Canon ever objected or attempted to stop this practice. On these facts, we conclude that there exists a question whether Canon knowingly acquiesced to Guyor—or any employee that Canon sent to pick up equipment from Spartan—signing the leasing contract on Canon's behalf.[5] See *Field*, 343 Mich at 279. And if so, Guyor

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frankly no way to interpret any portion of McNeilly's testimony as supporting this assertion. In the portion of McNeilly's deposition that Canon cites to, she states that she was unsure if any customer "always signed the back" of the leasing contract. But whether someone signed the back of the leasing contract is irrelevant because the front states that the signatory agrees to "the terms and conditions, as set forth on the back of this Leasing Contract."

[4] We acknowledge that Canon attached numerous prior leasing contracts signed by its employees to its brief on appeal—which appears to resolve this factual dispute, albeit not in Canon's favor—but we decline to consider those contracts. They were not attached to any of the parties' dispositive motions or otherwise before the trial court when it issued its ruling, and this Court's review is limited to the evidence that was actually presented to the trial court at the time the motion was decided. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009). Neither Canon nor Spartan moved to expand the record on appeal on this issue, and "[t]his Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal." *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002).

[5] We recognize that Ropek was a purchasing agent at the time of the relevant events, and it is unclear what his authority and responsibilities were in that position, i.e., whether his actions could amount to Canon knowingly acquiescing to certain of its employees contracting on its behalf. Because the record is so underdeveloped at this time, we leave this question unresolved.

had actual authority to sign the leasing contract for Canon, and Canon is bound to the indemnity agreement. See *id*.[6]

For similar reasons, we conclude that, regardless of whether Guyor exceeded his authority by signing the leasing contract, there is a question of fact whether Canon ratified the leasing contract. "When an agent purporting to act for his principal exceeds his actual or apparent authority, the act of the agent still may bind the principal if he ratifies it." *David v Serges*, 373 Mich 442, 443-444; 129 NW2d 882 (1964). In *David*, 373 Mich at 444, the Michigan Supreme Court recited the doctrine of ratification as set forth in the Restatement of Agency 2d, § 82, which defines ratification as "the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." "Affirmance" may occur either by (1) "a manifestation of an election by one on whose account an unauthorized act has been done to treat the act as authorized," or (2) "conduct by him justifiable only if there were such an election." *David*, 373 Mich at 444 (quotation marks and citation omitted). In *Sullivan v Bennett*, 261 Mich 232, 237-238; 246 NW 90 (1933), the Michigan Supreme Court explained:

> The general relationship of principal and agent, with its reciprocal incidents of good faith, candor, and confidence . . . make it a reasonable rule that the acts of an agent shall be deemed ratified by the principal, unless repudiated by him within a reasonable time after knowledge of the departure.

On the same day that Guyor took delivery of the arrow board, he presented the signed leasing contract to Ropek. Two days later, the arrow board injured plaintiff. Canon clearly repudiated the contract at some point, or this matter would not be before this Court. Whether Canon should have repudiated the leasing contract within that two day period after Guyor gave it

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[6] Spartan argues that, for the same reasons that Guyor may have had actual authority to sign the leasing contract, he may also have had apparent authority to do so. Essentially, Spartan argues that Canon's failure to prevent its employees from signing earlier leasing contracts is an act attributable to Canon, see *Maryland Cas Co*, 231 Mich at 62, that cloaked Guyor with the apparent authority to sign the leasing contract. We reject this argument because *Field*, 343 Mich at 279, clearly states that knowing acquiescence is not based "on any principle of estoppel or apparent authority," but on "real and actual" authority.

Even if we consider Canon's "neglect" in failing to prevent its employees from signing earlier leasing contracts, see *Grewe v Mt Clemens Gen Hosp*, 404 Mich 240, 253; 273 NW2d 429 (1978), we would not conclude that this gave Guyor apparent authority. For Guyor to have apparent authority to sign the contract on Canon's behalf, Spartan had to reasonably believe that he could. Nothing suggests that Spartan knew that Guyor was giving the leasing contracts to management, and if Spartan reasonably believed that Guyor had authority to bind Canon to the leasing contracts, then Spartan would have no reason to assume that Guyor would give the leasing contract to management for review. In short, Spartan did not know of Canon's "neglect" and had no reason to assume that it was happening, so that "neglect" could not have affected what Spartan believed and whether that belief was reasonable.

to Ropek, or at any time before it eventually did, depends on facts that are underdeveloped in the record, e.g., the date that Canon repudiated the leasing contract, the standard practice in the industry, Canon and Spartan's course of dealing, and any facts that might otherwise develop what constitutes a reasonable time to express objection to the terms of the agreement. In short, when viewing the evidence in a light most favorable to Spartan, there is a question whether Canon ratified the leasing contract by not repudiating it within a reasonable time after Guyor presented it to Ropek.[7] See *Sullivan*, 261 Mich at 237-238.

Because summary disposition to Canon was not warranted under the facts as they now stand, we reverse the trial court's grant of summary disposition to Canon and remand for further proceedings.[8] We do not retain jurisdiction. No taxable costs, neither party having prevailed in full.

/s/ Colleen A. O'Brien
/s/ Jonathan Tukel
/s/ Anica Letica

[7] Canon contends that it is entitled to summary disposition on other grounds that it argued in the trial court but the trial court rejected. It first contends that it is entitled to summary disposition because the parties' leasing agreement fell under the Uniform Commercial Code (UCC) for Leases, MCL 440.2801 *et seq*., and Spartan breached the leasing contract's implied warranty of fitness for a particular purpose, MCL 440.2863, and its implied warrant of merchantability, MCL 440.2862. Canon's argument fails, however, because its remedy under the UCC for Leases for a breach of warranty is damages, MCL 440.2969(4).

Alternatively, Canon argues that it is entitled to summary disposition because, under MCL 691.991(1), the indemnity clause in the parties' leasing contract is void and unenforceable. But, by its plain terms, that statute does not apply to the equipment leasing contract at issue. See MCL 691.991(1) ("In a contract for the design, construction, alteration, repair, or maintenance of a building, a structure, an appurtenance, an appliance, a highway, road, bridge, water line, sewer line, or other infrastructure, or any other improvement to real property, including moving, demolition, and excavating connected therewith . . . .").

[8] We reject Spartan's argument that the trial court should have granted its motion for summary disposition because of the factual questions identified in this opinion.