STATE OF MICHIGAN

COURT OF APPEALS

JOYCE KOSS, Deceased, by the Personal Representative of the Estate of JOYCE KOSS, ROBERT KOSS,

Plaintiff,

v

AHEPA 371 II, INC.,

Defendant/Cross-Defendant-Appellee,

and

AMERICAN FIRST AID COMPANY, d/b/a CINTAS FIRE PROTECTION,

Defendant/Third-Party Plaintiff/Cross-Plaintiff-Appellant,

and

AHEPA NATIONAL HOUSING CORPORATION and AHEPA MANAGEMENT COMPANY,

Defendants-Appellees,

and

NATHALIE BOCHET,

Third-Party Defendant-Appellee.

UNPUBLISHED
March 15, 2012

No. 301203
Macomb Circuit Court
LC No. 2009-000866-NO

Before: O'CONNELL, P.J., and SAWYER and TALBOT, JJ.

PER CURIAM.

Defendant/third-party plaintiff/cross-plaintiff, American First Aid Company, d/b/a Cintas Fire Protection (Cintas), appeals by right an order granting summary disposition to defendant/cross-defendant, AHEPA 371 II, Inc. (AHEPA), and third-party defendant, Nathalie Bochet, and denying summary disposition to Cintas. We affirm.

Cintas first argues that the trial court erred in granting summary disposition to AHEPA regarding Cintas's cross-claim for indemnity because AHEPA's corporate representatives, Bochet and Denise Simmons, were authorized to bind AHEPA to an indemnity provision on the back of a work order and an invoice that Cintas presented for its fire alarm inspection services performed on October 9, 2008, and because AHEPA paid for Cintas's services without objection after receiving the documents. We disagree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Davenport v HSBC Bank*, 275 Mich App 344, 345; 739 NW2d 383 (2007). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). In addition, "[t]he existence and interpretation of a contract are questions of law reviewed de novo." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

As an initial matter, we note that it is appropriate to apply Michigan law rather than Ohio law in determining whether a contract exists. In general, parties to a contract may agree that all causes of action pertaining to a particular matter will be subject to the law of a particular jurisdiction. *Offerdahl v Silverstein*, 224 Mich App 417, 419; 569 NW2d 834 (1997). However, a court must first resolve the threshold issue whether a party is bound by a contract, and thus, by a choice-of-law provision in the purported agreement. *Id*. at 420. See also *Blackburne & Brown Mtg Co v Ziomek*, 264 Mich App 615, 622; 692 NW2d 388 (2004) (a Michigan court may determine whether a binding contract exists in order to determine whether a choice-of-law provision is enforceable). Here, although paragraph 15 of the terms and conditions on the back of Cintas's work order and invoice provides that Ohio law shall govern the parties' rights, the provision necessarily cannot apply unless it is part of a contract between the parties. Because, as discussed below, the terms and conditions do not constitute a contract, the choice-of-law provision is not part of a contract and does not govern the resolution of this case. We will therefore rely on Michigan law in addressing this issue.

"It is hornbook law that a valid contract requires a 'meeting of the minds' on all the essential terms. . . . 'Meeting of the minds' is a figure of speech for mutual assent." *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 548-549; 487 NW2d 499 (1992). "[W]hether such a meeting of the minds occurred is judged by an objective standard, looking to the express words of the parties and their visible acts. . . . A meeting of the minds can be found from performance and acquiescence in that performance." *Sanchez v Eagle Alloy, Inc*, 254 Mich App 651, 665-666; 658 NW2d 510 (2003) (internal quotations and citation omitted).

> Mere discussions and negotiation cannot be a substitute for the formal requirements of a contract. Before a contract can be completed, there must be an offer and acceptance. An offer is defined as "the manifestation of willingness to

> enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Acceptance must be unambiguous and in strict conformance with the offer. [*Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997) (citations omitted).]

"A contract is made when both parties have executed or accepted it, and not before." *Kamalnath*, 194 Mich App at 549. "The burden is on [the plaintiff] to show the existence of the contract sought to be enforced[.]" *Id*. (internal quotation and citation omitted).

"An agency relationship may arise when there is a manifestation by the principal that the agent may act on his account. The test of whether an agency has been created is whether the principal has a right to control the actions of the agent." *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992) (citations omitted). An agent's actual authority to bind a principal may be either express or implied from the circumstances surrounding the transaction. *Hertz Corp v Volvo Truck Corp*, 210 Mich App 243, 246; 533 NW2d 15 (1995); *Alar v Mercy Mem Hosp*, 208 Mich App 518, 528; 529 NW2d 318 (1995). "These circumstances must show that the principal actually intended the agent to possess the authority to enter into the transaction on behalf of the principal." *Hertz*, 210 Mich App at 246. "The authority of one person to contract for another must be determined from or by acts of his principal and cannot be proved by admissions or statements of the alleged agent." *Rohe Scientific Corp v Nat'l Bank of Detroit*, 133 Mich App 462, 469; 350 NW2d 280 (1984), mod on other grounds on reh 135 Mich App 777 (1984).

Here, Bochet's act of signing Cintas's work order fails to establish that AHEPA and Bochet mutually assented to the indemnity provision. Bochet lacked authority from AHEPA to agree to the terms and conditions set forth on the back of the work order. Cintas has failed to identify any acts of AHEPA establishing that Bochet's authority extended to entering indemnity contracts on AHEPA's behalf. AHEPA's purchasing and disbursement policy stated that Bochet could make purchases up to $249.99, and that she could inspect a contractor's work for quality, accuracy, and completion, for work up to $5,000. The policy is consistent with Bochet and Simmons's testimony regarding the extent of Bochet's authority. Bochet's testimony that she signed the work order to acknowledge that the work was completed, rather than to accept the terms and conditions on the back, conforms to the evidence regarding the extent of her authority. Further, no circumstances surrounding the transaction give rise to an implied authority of Bochet to enter indemnity agreements. *Hertz*, 210 Mich App at 246. In short, Cintas has failed to establish on the basis of any acts by AHEPA that Bochet possessed authority to contract for AHEPA regarding indemnity. *Rohe*, 133 Mich App at 469.

Moreover, setting aside the question of agency, mutual assent is lacking because the terms and conditions on the reverse sides of the work order and the invoice were presented only after the work was completed. In *Krupp PM Engineering, Inc v Honeywell, Inc*, 209 Mich App 104, 109; 530 NW2d 146 (1995), this Court held that warranty language on the back of an invoice was not conspicuous, in part because the language, "The Standard Terms and conditions on the reverse side are a part hereof," appeared in small, italicized print at the bottom of the front of the invoice, and this Court did not believe that a reasonable person should be held to have noticed the language. Although *Krupp* is not controlling because this case does not involve a

warranty, it is notable that here, unlike in *Krupp*, the front of the work order contained no language referring to the terms and conditions on the back of the work order.

The portion of *Krupp* most pertinent here is the *Krupp* Court's observation that "the argument could also be made that, because the language only appears on an invoice for goods and services, the limitation was not bargained for and did not become part of the bargain. However, the issue is not presented adequately in the parties' briefs and, consequently, we decline to address it." *Krupp*, 209 Mich App at 109 n 3. Here, there is no evidence that the terms and conditions were part of a bargain between the parties. Cintas presented the work order and the invoice only after the work had been completed. Cintas cites no authority establishing that a valid contract can be formed on the basis of terms and conditions presented *after* a contractor's work is completed.

To be sure, a contractual meeting of the minds can be proved from performance and acquiescence. *Sanchez*, 254 Mich App at 665. The evidence here establishes a meeting of the minds that AHEPA was to pay Cintas for its fire alarm maintenance services, given that Cintas performed its maintenance work and AHEPA acquiesced in that performance. Bochet signed the work order acknowledging the completion of the work. Cintas, however, does not seek to be paid for its work. Rather, what Cintas seeks is to insert *additional* contractual terms on the basis of terms and conditions on the back of documents presented only *after* the work was finished. In these circumstances, Cintas has failed to establish that the parties mutually assented to Cintas's additional terms and conditions, including the indemnity clause, on the back of the work order and invoice.

Cintas further contends, however, that even if Bochet's act of signing the work order did not establish a meeting of the minds, AHEPA nonetheless assented to the terms and conditions by paying for Cintas's work. In particular, Cintas argues that because Simmons received the work order and the invoice containing the terms and conditions, and then arranged for a check to be issued to Cintas paying for its services, AHEPA thereby accepted the terms and conditions.[1] It is true that Simmons acknowledged possessing authority to agree to terms and conditions, and that she caused a check to be issued paying for Cintas's work.

However, this evidence fails to establish mutual assent to adopt the indemnity provision. Even if AHEPA and Cintas had an ongoing relationship dating back to 2003 (the year Cintas apparently submitted a written proposal to provide annual maintenance and monitoring of the fire alarm system), the dispositive point is not whether a 2003 document constituted a formal contract. The dispositive point is that Cintas has failed to establish that Simmons's actions were anything more than a decision to pay for Cintas's annual services. Moreover, as discussed above, the 2008 work had already been performed when the terms and conditions were presented to Bochet and Simmons. Thus, Simmons's decision to pay for those annual services does not establish unambiguous acceptance of or assent to the after-the-fact terms and conditions that

[1] It should be noted that the check was issued by defendant, AHEPA Management Company. However, for the sake of simplicity and to avoid confusion, and because it does not affect the analysis, we will refer to AHEPA throughout the discussion of this issue.

Cintas printed on the back of the documents. *Eerdmans*, 226 Mich App at 364; *Krupp*, 209 Mich App at 109 n 3.

Accordingly, Cintas has failed to establish the existence of a contract adopting the terms and conditions on the reverse sides of the work order and the invoice. Because no such contract exists, it is unnecessary for this Court to address Cintas's arguments that are premised on the existence of a contract, i.e., that plaintiff's underlying claim fell within the scope of the indemnity clause, that AHEPA and Bochet waived the right to arbitration, and that the purported contract was not unconscionable.

Cintas's next argument on appeal is that even if Simmons and Bochet lacked actual authority to bind AHEPA to an indemnity contract, Bochet possessed apparent authority to do so. We disagree.

> The authority of an agent to bind a principal may be either actual or apparent. . . . 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. [*Alar*, 208 Mich App at 528 (citation omitted).]

In other words, the third person's belief in the agent's authority "must be generated by some act or neglect on the part of the principal sought to be charged." *VanStelle v Macaskill*, 255 Mich App 1, 10; 662 NW2d 41 (2003) (internal quotations and citation omitted). Also, "the person relying on the agent's authority must not be guilty of negligence." *Id*. (internal quotations and citation omitted). "In determining whether an agent possesses apparent authority to perform a particular act, the court must look to all surrounding facts and circumstances." *Meretta*, 195 Mich App at 699.

Here, Cintas has failed to present evidence of any act or neglect on the part of AHEPA that generated a reasonable belief by Cintas that Bochet possessed authority to enter indemnity agreements on AHEPA's behalf. It is true that AHEPA granted to Bochet, as the property manager for an apartment building, authority to make purchases under $249.99 and to inspect a contractor's work for quality, accuracy, and completion, for work up to $5,000. However, Bochet's authority to negotiate and supervise necessary maintenance contracts required owner and management approval. Thus, the limited grant of authority to Bochet regarding purchases and negotiating contracts did not generate a reasonable belief traceable to AHEPA that Bochet possessed authority to bind AHEPA to indemnity contracts.

Cintas suggests that Bochet's apparent authority to enter indemnity agreements was generated by her signature on an October 4, 2007, Cintas work order that contained on the reverse side the same terms and conditions, including the indemnity provision, that are at issue here. According to Cintas, AHEPA paid and honored the October 4, 2007, work order, thus establishing Bochet's apparent authority to enter indemnity agreements. Assuming without deciding that AHEPA paid the 2007 work order without objection, the work order fails to establish any act or neglect on the part of AHEPA that generated a reasonable belief that Bochet possessed authority to bind AHEPA to an indemnity contract. Cintas has offered no evidence regarding the facts and circumstances surrounding Bochet's signature on the October 4, 2007,

work order. In particular, Cintas has not shown that the terms and conditions on the back of the 2007 document were part of any bargain to which Cintas and AHEPA mutually assented. Thus, as with the 2008 documents, Cintas has failed to establish that the 2007 work order constituted a valid contract. Accordingly, Cintas's failure to present evidence regarding the circumstances in which Bochet signed the 2007 document renders it impossible to discern whether that document generated a reasonable belief that Bochet possessed authority to enter indemnity agreements. We therefore conclude that Cintas has failed to establish that AHEPA cloaked Bochet with apparent authority to bind AHEPA to an indemnity contract.

Cintas next argues that if Bochet lacked the requisite authority to bind AHEPA to an indemnity contract, she should be held personally liable to Cintas. We disagree.

In general, an agent who "acts within the bounds of authority conferred by a disclosed principal . . . does not thereby render himself personally liable on contracts made on behalf of his principal." *Brusslan v Larsen*, 6 Mich App 680, 686; 150 NW2d 525 (1967), citing *Hall v Encyclopaedia Britannica, Inc*, 325 Mich 35; 37 NW2d 702 (1949). See also *PM One, Ltd, v Dep't of Treasury*, 240 Mich App 255, 266-267; 611 NW2d 318 (2000) ("[A]n agent may work on behalf of a principal within the scope of the agency agreement as if the agent had stepped into the shoes of the principal without incurring any personal liability."). However, "where an agent undertakes to contract on behalf of another, and contracts in a manner which is not binding on his principal, he will be personally responsible, as he is presumed to know the exact extent of his authority." *Newberry v Slafter*, 98 Mich 468, 471; 57 NW 574 (1894); see also *Kaminskas v Litnianski*, 51 Mich App 40, 47; 214 NW2d 331 (1973) (citing *Newberry* for this proposition), and *Brusslan*, 6 Mich App at 686 (same). "To give a party a right of action against a professed agent, however, he must have been ignorant of the lack of authority and have acted upon the faith of the express or implied representations that the professed agent had the authority assumed." *Kaminskas*, 51 Mich App at 46 (internal quotations and citation omitted).

Here, Cintas has failed to present evidence that Bochet exceeded her authority. According to Cintas, Bochet admitted that she exceeded her authority because her affidavit stated that she lacked authority to enter into an agreement such as the one on the back of the work order, and yet she signed the work order anyway. However, Bochet's affidavit stated that she was told by a Cintas employee that she was signing the work order to acknowledge the completion of the work, and that she was unaware of the terms and conditions on the back when she signed it. Bochet's deposition testimony likewise reflects that she signed the work order to show that the work was completed and that she was not aware of or informed about the terms and conditions on the back when she signed it.

It is true that "one who signs an agreement, in the absence of coercion, mistake, or fraud, is presumed to know the nature of the document and to understand its contents, even if he or she has not read the agreement." *Lease Acceptance Corp v Adams*, 272 Mich App 209, 221; 724 NW2d 724 (2006). Here, the front of the work order that Bochet signed did not refer to the terms and conditions on the reverse side. Even assuming, however, that those terms and conditions comprised part of the document, and that Bochet is thus presumed to have understood them despite not having read them, the fact remains that Cintas presented its work order to Bochet only *after* completing its work. As discussed above, such an after-the-fact presentation of a work order does not by itself establish that an indemnity contract was entered. Accordingly,

Bochet did not enter an indemnity contract with Cintas, or purport to do so, and she thus did not exceed the scope of her authority by signing the work order.

For the same reasons, Cintas has also failed to establish that it acted on the faith of any express or implied representations that Bochet was authorized to bind AHEPA to an indemnity contract. There is no evidence that Bochet suggested in any way that she possessed such authority. Further, she signed the work order only *after* Cintas performed its fire alarm inspection services on October 9, 2008. Thus, Cintas did not act on the basis of any implied or express representations by Bochet that she possessed authority to enter indemnity agreements on AHEPA's behalf. Accordingly, Cintas has failed to present evidence that would support holding Bochet personally liable. *Kaminskas*, 51 Mich App at 46.

Cintas's final argument on appeal is that the trial court erred in denying Cintas's motion to compel discovery. We disagree. "A trial court's ruling on a discovery motion is reviewed for an abuse of discretion." *Truel v Dearborn*, 291 Mich App 125, 131; 804 NW2d 744 (2010). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Augustine v Allstate Ins Co*, 292 Mich App 408, 419; 807 NW2d 77 (2011).

> It is well settled that Michigan follows an open, broad discovery policy that permits liberal discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending case. This is true whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party. However, Michigan's commitment to open and far-reaching discovery does not encompass fishing expeditions. Allowing discovery on the basis of conjecture would amount to allowing an impermissible fishing expedition. [*Augustine*, 292 Mich App at 419-420 (internal quotations, punctuation, and citations omitted).]

In addition, "discovery may be circumscribed to prevent excessive, abusive, irrelevant, or unduly burdensome requests." *Hamed v Wayne Co*, 271 Mich App 106, 110; 719 NW2d 612 (2006).

"[S]ummary disposition is premature if granted before discovery on a disputed issue is complete. However, summary disposition is appropriate if there is no fair chance that further discovery will result in factual support for the party opposing the motion." *Mackey v Dep't of Corrections*, 205 Mich App 330, 333; 517 NW2d 303 (1994) (citation omitted). "If a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence." *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994).

Here, the trial court's declination to compel a third deposition of Simmons fell within the range of reasonable and principled outcomes. Cintas apparently wished to question Simmons further about why she did not produce emails transmitting the work order and invoice from Bochet to Simmons and then from Simmons to the corporate headquarters. However, Cintas has not explained how further questioning regarding the transmittal emails would stand a fair chance of providing factual support for Cintas's claim. The trial court correctly observed that AHEPA

and Bochet had conceded that Simmons received the work order and invoice containing the terms and conditions at issue, and it is thus unclear what information Cintas sought to obtain from the purported emails or from further questioning of Simmons. Accordingly, the trial court reached a reasonable and principled decision in declining to compel a third deposition of Simmons.

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ Michael J. Talbot