# STATE OF MICHIGAN

# COURT OF APPEALS

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MERIDIAN MUTUAL INSURANCE COMPANY,

Plaintiff-Appellant/Cross-Appellee,

v

ROBERT L. CRAPO,

Defendant-Cross-Defendant-Cross-Plaintiff/Appellee-Cross-Appellee,

and

MARGARET CRAPO, ROBERT L. CRAPO TRUST, EQUITY INVESTMENT CORPORATION, LTD., THOMAS M. HORGAN, STATE MUTUAL INSURANCE COMPANY,

Defendant-Cross-Plaintiff/ Appellee-Cross-Appellant,

and

CRAPO AGENCY, INC. and WESTERN SURETY COMPANY,

Defendant-Cross-Defendant-Appellee-Cross-Appellee,

and

RUSSELL SPRAGUE, ALBERT HANNER, MICHIGAN MILLERS MUTUAL INSURANCE COMPANY, LAKE STATES INSURANCE COMPANY, HASTINGS MUTUAL INSURANCE COMPANY, FARM BUREAU INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, FARMERS

UNPUBLISHED
May 28, 2002

No. 226558
Isabella Circuit Court
LC No. 98-000513-CK

INSURANCE EXCHANGE, AMERICAN ECONOMY INSURANCE COMPANY, TRAVELERS PROPERTY CASUALTY INSURANCE COMPANY, MASB SEG PROPERTY CASUALTY POOL, INC., STATE FARM FIRE & CASUALTY COMPANY, MILDRED KENNEY, VIRGINIA SPAGNUOLO, AL SPAGNUOLO, VIRGINIA SPAGNUOLO TRUST, MICHAEL CLAUS, JEAN CLAUS d/b/a CLAUS ACE HARDWARE, C & M PROPERTIES, ERNEST L. WOLTERS d/b/a HOBBY SHOP, GARY NOVAK, DOROTHY JOHNSON, LISA SWINDLEHURST, AND RICHARD SWINDLEHURST d/b/a BRASS SALON,

Defendants.

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Before: Saad, P.J., and Owens and Cooper, JJ.

PER CURIAM.

Plaintiff Meridian Mutual Insurance Company appeals as of right the trial court's order granting defendants-appellees' ("defendants") motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff had sought a declaratory judgment of non-liability in regard to an insurable event.[1] We affirm in part, reverse in part and remand.

The trial court's opinion and order set forth the following facts, which are not disputed on appeal:

> This case results out of a fire that occurred on May 29, 1997. The fire began in a building located at 122 South Main Street, Mt. Pleasant, Michigan. Prior to May 28, 1997, the premises were owned by the Robert L. Crapo Trust u/a/d August 16, 1994. In the afternoon of May 28, 1997, Equity Investment Corporation Ltd. purchased those premises by land contract. The closing, at the suggestion of Mr. Robert Crapo, took place in his insurance sales office.
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> Mr. Robert Crapo was licensed by the State of Michigan to sell insurance and was an authorized agent of Meridian Mutual Insurance Company on May 28, 1997. At the time of the land contract closing, Mr. Robert Crapo attempted to sell Mr. Horgan, as president of Equity Investment Corporation Ltd., insurance to cover the property. Discussions ensued regarding the best policy and it was eventually

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[1] Defendants Horgan, Equity Investment and State Mutual also cross-appeal by leave granted; however, their issues are contingent on plaintiff prevailing on its primary issue.

agreed that Mr. Horgan would purchase a policy from Meridian Mutual Insurance Corporation. As this was the company that currently insured the property, Mr. Crapo, in the presence of Mr. Horgan, instructed office personnel of the Crapo Insurance Agency to prepare an assignment of his policy to Mr. Horgan. Debby Denton prepared the paperwork but did not transmit it to Meridian Mutual on May 28, 1997. Mr. Horgan asked if he needed to pay for the insurance and was assured that Equity Investment Corporation Ltd. would be billed by the agency. At least twice he asked Mr. Crapo if he was immediately covered by insurance and was assured that he was. Mr. Horgan has testified that he would never have closed without insurance coverage on the property. Mr. Horgan had other properties insured through another agent and could have simply called and asked to have this property added to the existing policy.

Mr. Thomas Horgan, the new owner of the property at 122 Main Street, requested Russell Sprague and Albert Hanner to perform various services at the newly acquired premises. The work began on the morning of May 29, 1997. In the course of performing those services a fire began which spread to adjoining structures, causing substantial damage to the structures, the contents thereof, and businesses therein. Upon learning of the fire, Mr. Horgan proceeded to the Crapo Agency office where he informed Mr. Michael Crapo of the fire.

After learning of the fire, Michael Crapo requested Debbie Denton delay in forwarding the request to assign the policy until he had a chance to speak with Mr. Jim DeCrane, Commercial Lines Manager at Meridian Insurance Company. Mr. Crapo spoke with Mr. DeCrane and explained that Crapo Insurance Agency had bound coverage the day before and now a fire had occurred. The fax was going to come through showing a request for the assignment effective May 28, 1997, and that although the fax would show a transmittal time after the start of the fire, the company had been bound by the Agency on May 28th, 1997. After speaking with Mr. DeCrane and being to [sic] told to go ahead with the fax, the request for assignment was transmitted to Meridian Mutual Insurance on May 29, 1997. On May 30, 1997, at the request of Crapo Insurance Agency, Mr. Horgan wrote a check payable to Meridian Mutual Insurance Company representing the premium due on the Meridian policy that had been assigned. Payment was forwarded to Meridian Mutual from the Crapo Insurance Agency. The check was received and deposited and applied to the premium due on the policy. To date the premium remains un-refunded.

Plaintiff brought a declaratory action seeking a determination that it had no liability under the policy, and contended that the agency lacked the authority to assign the policy. The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10), concluding that plaintiff could not escape liability under the relevant insurance policy. Specifically, the trial court found that the agency had the actual authority to bind plaintiff to the policy. Alternatively, the trial court also found that: (i) the agency had the apparent authority to bind plaintiff to the policy, and (ii) plaintiff's actions following the incident giving rise to the coverage dispute constituted a ratification of the policy. Consequently, plaintiff's declaratory judgment action was dismissed.

On appeal, plaintiff contends that the trial court erred by dismissing its lawsuit, specifically challenging the three alternative bases found by the trial court.[2] We review de novo a trial court's ruling on a motion for summary disposition. *Haliw v Sterling Heights*, 464 Mich 297, 301; 627 NW2d 581 (2001). In reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), we consider "the affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion." *Id.* at 302. "Summary disposition may be granted if the evidence demonstrates that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Id.*

Generally, a "question relating to the existence and scope of an agency relationship is a question of fact," which we review for clear error. *Hertz Corp v Volvo Truck Corp*, 210 Mich App 243, 246; 533 NW2d 15 (1995). "A finding of fact is clearly erroneous only if there is no evidence to support it or if the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been made." *Id.* As a question of law, however, we review de novo issues of contract interpretation, such as the construction of the agency agreement between plaintiff and the agency. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000).

Here, the agency's authority, if any, derived from the agency agreement between plaintiff and the agency. Section I of the agency agreement provides in pertinent part:

> The Agent [defendant Crapo Agency] . . . is authorized to:
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> > A. Solicit, receive and transmit to the Company [plaintiff] proposals for such insurance contracts as the Company is licensed to write and to bind the Company only on such classes or risks and to such limits as the Company may from time to time authorize by letter of instructions, underwriting guide, manual, or other written instruction[s.]

Thus, the agency was given actual authority as a matter of law to "bind" plaintiff to insurance contracts.

In fact, we have recognized the existence of certain insurance contracts called "binders," explaining that "'[a]n insurance binder is a contract of temporary insurance to be effective insurance coverage until a formal policy is drafted and issued.'" *State Auto Mut Ins Co v Babcock*, 54 Mich App 194, 204; 220 NW2d 717 (1974), quoting *Carideo v The Phoenix Assurance Co of New Y*ork, 317 F Supp 607, 610 (ED Pa, 1970), mod on other grounds 450 F2d 779 (1971). We noted that a "binder may be written or oral and founded upon words or deeds of an agent." *Babcock, supra* at 204.

Here, the undisputed facts reveal that the agency assured defendant Equity, through Horgan, that the property was covered as of May 28, 1997. In light of the agency agreement, the

[2] Plaintiff's brief concedes that "it was and is the position of Meridian Mutual Insurance Company that the sale of the premises had no effect whatsoever on the policy, that the policy continued exactly as it was written, and that the coverages did not change at all."

agency certainly had actual authority to make that assurance. Thus, regardless of the subsequent actions of the agency in attempting to effectuate the policy, we believe that, at the very least, an oral binder was issued by plaintiff, through its agent, providing property and liability insurance covering defendant Equity's interests with respect to the property. Therefore, we are not persuaded that the trial court erred in dismissing plaintiff's declaratory judgment action.[3]

Plaintiff also challenges the trial court's assessment of costs. Ordinarily, we review a trial court's taxation of costs for an abuse of discretion. *Portelli v IR Construction Product Co, Inc*, 218 Mich App 591, 604; 554 NW2d 591 (1996). However, during oral argument, defense counsel conceded that the costs for some depositions were erroneously included within the trial court's assessment of costs. Accordingly, we reverse the trial court's assessment of costs with respect to the depositions, and remand for further inquiry into which depositions, if any, may properly be taxed.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Donald S. Owens
/s/ Jessica R. Cooper

[3] In light of our ruling, we need not address whether the agency also had apparent authority, or whether plaintiff's actions following the events constituted a ratification of the policy. Similarly, our ruling renders the cross-appeal moot.