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# STATE OF MICHIGAN

# COURT OF APPEALS

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| CITIZENS INSURANCE CO. OF AMERICA, AMERISURE MUTUAL INSURANCE CO., and AUTO-OWNERS INSURANCE CO.,<br><br>Plaintiffs/Counterdefendants-Appellees, | FOR PUBLICATION<br>September 15, 2022<br>9:20 a.m. |
| v | No. 356294<br>Livingston Circuit Court<br>LC No. 2020-030701-CK |
| LIVINGSTON COUNTY ROAD COMMISSION,<br><br>Defendant/Counterplaintiff-Appellant. | |

Before: M. J. KELLY, P.J., and CAMERON and HOOD, JJ.

PER CURIAM.

In this interlocutory appeal, defendant/counterplaintiff, the Livingston County Road Commission (the Road Commission), appeals by leave granted[1] the trial court's January 9, 2021 order granting plaintiffs/counterdefendants' motion to compel the production of certain documents and the trial court's January 22, 2021 order denying the Road Commission's motion for summary disposition under MCR 2.116(C)(10). On appeal, the Road Commission contends that the documents it was ordered to produce are protected by the attorney-client privilege and that it did not waive that privilege by defending itself from plaintiffs' lawsuit. It also asserts that, although discovery was ongoing, summary disposition should have been granted because plaintiffs could not prove the existence of a binding settlement agreement. Specifically, the Road Commission asserts that the series of e-mails that plaintiffs claim are a settlement agreement are not binding because they do not satisfy the requirements of MCR 2.507(G). The Road Commission also argues

[1] This Court initially denied the Road Commission's application for leave to appeal. *Citizens Ins Co v Livingston Co Rd Comm*, unpublished order of the Court of Appeals, entered May 27, 2021 (Docket No. 356294). Thereafter, the Road Commission filed an application for leave to appeal in our Supreme Court. In lieu of granting leave, the Michigan Supreme Court remanded the case to this Court "for consideration as on leave granted." *Citizens Ins Co v Livingston Co Rd Comm*, 508 Mich 966 (2021).

that, as a public body that is subject to the Open Meetings Act (OMA), MCL 15.261 *et seq*., it could not approve the settlement agreement unless it did so at a public meeting. See MCL 15.263(2) ("All decisions of a public body must be made at a meeting open to the public."). The Road Commission concludes that because there was no public meeting ratifying the settlement agreement and because there is no evidence that it gave its lawyer prior special authority to settle, the settlement agreement cannot be binding. For the reasons stated in this opinion, we affirm, but remand for the trial court to conduct an *in camera* review of the documents that it ordered the Road Commission to produce.

## I. BASIC FACTS

This case arises out of an insurance-coverage dispute between the Road Commission and three of its insurers: plaintiffs, Citizens Insurance Company of America, Amerisure Mutual Insurance Company, and Auto-Owners Insurance Company. On June 11, 2019 and June 25, 2019, the parties engaged in pre-suit mediation, but were unable to reach a settlement agreement. Negotiations continued, however, via e-mail correspondence from the mediator to the lawyers for the parties and among the lawyers for the parties.

The e-mails with the mediator resulted in the parties reaching a conditional agreement on the settlement amount. Specifically, the mediator e-mailed the parties with a confidential settlement proposal on June 26, 2019. The lawyer for the Road Commission accepted the agreement without reservation, but the acceptance by plaintiffs' lawyers of the settlement amount was conditioned upon the Road Commission's agreement to certain release and indemnification provisions. After advising the parties that a settlement amount had been agreed upon, but that the settlement agreement would require release and indemnification terms, the mediator's involvement in the case ended.

The parties' lawyers continued negotiations related to the settlement agreement in a series of e-mails. The first such e-mail was sent on July 16, 2019, by the lawyer for Amerisure and Citizens, who stated:

> I've attached a proposed settlement agreement and release for your review and comment. Please circulate a red-lined version with any proposed edits.
>
> [Lawyer for Road Commission]—please confirm that the checks should be made payable only to [the Road Commission] and that we're not putting your or [another lawyer's] Firms on the checks. Also, we'll need a W-9 for [the Road Commission] in order to order the checks.
>
> [Lawyer for Auto-Owners]—in the release section, I've added a proposed mutual release between the three carriers. Let me know if Auto-Owners will agree to that.

On July 24, 2019, at 9:44 a.m., the lawyer for Auto-Owners made some "red line revisions" and sent an e-mail with an attachment of the revised settlement agreement. Thereafter, on August 22, 2019, at 10:24 a.m., the Road Commission's lawyer e-mailed plaintiffs' lawyers, stating:

> Following up on our discussion, attached are proposed edits from [the Road Commission.]

On August 26, 2019, at 11:58 a.m. the lawyer for Amerisure and Citizens e-mailed the lawyer for the Road Commission (and cc'd the lawyer for Auto-Owners), as follows:

> Thanks [lawyer for Road Commission]—I'm waiting to hear back from my client on the changes. One issue that came up is the settlement check. Apparently Citizens has a character limit for the payee line and, even shortening it to LCRC, there is a concern that [the other lawyer's] name will get cut off. Are you and he ok if we don't include him on the payee line?[2]

The Road Commission's lawyer replied on August 26, 2019, at 4:55 p.m.:

> Should not be a problem if you can't fit his name on the check.

On August 26, 2019, at 5:00 p.m. the lawyer from Amerisure and Citizens responded:

> Perfect—thanks. Can you send me your and LCRC's W-9's, and I'll get the checks ordered now.

Thereafter, on August 28, 2019, at 10:34 a.m., the lawyer for Auto-Owners e-mailed that Auto-Owners had no objection to the revisions, stating:

> We (AO and me) are okay with the revisions, so we just need the tax related stuff and word that Amerisure is on board and a final agreement and I can get a check and signature.

Finally, on August 30, 2019, at 7:30 p.m., the lawyer from Amerisure and Citizens sent the following e-mail:

> Both of my carriers are fine with the proposed changes. I've incorporated them, have amended the payee name to match what [the Road Commission's lawyer] and I discussed (i.e. shortening it to fit on Citizens' check), and have removed the notary blocks for the signature (Citizens doesn't have a notary available). I've attached a final version of the agreement. Given the 15-day payment window, I'm going to have my carriers hold off on signing until they've ordered the checks. Just send me [the Road Commission's] W9 when you have it and we'll get that taken care of.
>
> Thanks and enjoy your holiday weekend!

The record reflects that the drafts and final version of the settlement agreement referenced in the above e-mails were, in fact, attached where indicated. Further, no party proposed any additional changes or revisions to the settlement agreement. Instead, the subsequent e-mail correspondence

[2] The record reflects LCRC is an initialism used to refer to the Road Commission.

reflected ongoing delays related to the Road Commission's approval of the settlement agreement purportedly reflected in the e-mail correspondence.

The delays continued until November 2019, when the matter was finally discussed during a closed session of the Road Commission's Board. Following the close session, the Road Commission's Board entered the following resolution at a public meeting:

> WHEREAS, the Board of County Road Commissioners of the County of Livingston agreed to enter into a mediation session that occurred on June 25, 2019, with Citizens Insurance Company of America (Citizens), Amerisure Mutual Insurance Company (Amerisure), and Auto-Owners Insurance Company (Auto-Owners), and
>
> WHEREAS, a Settlement Agreement, Release of Claims and Indemnity Agreement was finalized as a result of the above-referenced mediation session, and
>
> WHEREAS, the Board of County Road Commissioners of the County of Livingston has reviewed the settlement documents, now therefore be it
>
> RESOLVED, that the Board of County Road Commissioners of the County of Livingston hereby potentially accepts the Full and Final Settlement Agreement, Release of Claims and Indemnity Agreement with Citizens, Amerisure, and Auto-Owners, and be it further
>
> RESOLVED, that the Board of County Road Commissioners of the County of Livingston hereby authorizes the Managing Director to sign the above-referenced document on behalf of the Board pending consultation with legal counsel.

Then, on December 9, 2019, acting through a new lawyer, the Road Commission informed plaintiffs that the settlement agreement would not be approved by the Road Commission's Board.

Plaintiffs sought clarification from the original lawyer. In particular, in two e-mails sent on December 10, 2019, he purported that the Road Commission's Board had approved the settlement agreement referenced in the above e-mails and that he had e-mails showing that approval. He specifically identified that he had e-mails showing that the Road Commission's Board had approved the settlement amount during a closed session and that he had discussed the edits to the settlement agreement without lawyers that represented the Road Commission.

On March 9, 2020, plaintiffs filed a complaint for declaratory judgment enforcing the settlement agreement or, alternatively, declaring that the Road Commission was not entitled to insurance coverage on the underlying dispute.[3] On April 3, 2020, the Road Commission filed its

[3] Only Count I of plaintiffs' complaint is at issue in this appeal.

answer to the complaint and its affirmative defenses.[4] The Road Commission denied that "it breached a confidential settlement agreement because no such agreement exists." The Commission admitted that they agreed to facilitation with a mediator, but denied that a "representative with settlement authority attended in person." In several additional paragraphs, the Road Commission denied "that the parties reached a legally enforceable settlement." In particular, the Road Commission denied "that any attorney had authority to approve a settlement." Finally, in its affirmative defenses, the Road Commission alleged that the settlement was not binding for several reasons, including that:

> Plaintiffs' claims that there is a settlement between the parties are based on actions of persons who did not have capacity or authority to bind Defendant in the manner alleged and Plaintiffs' knew, or should have known, of that lack of capacity and/or authority.

Relevant to the issues raised on appeal, on September 2, 2020, plaintiffs subpoenaed the Road Commission's former lawyer, seeking production of documents related to his settlement authority. The Road Commission filed a motion for a protective order quashing that subpoena, arguing that each of the requested documents were protected by the attorney-client privilege and that it had not waived that privilege by denying the existence of a settlement agreement. Plaintiffs responded by asserting that the Road Commission had waived it attorney-client privilege by asserting in its affirmative defenses that its former lawyer lacked the authority to settle the claim on the Road Commission's behalf. Additionally, plaintiffs filed a motion to compel the Road Commission to answer certain discovery requests relating to plaintiffs' first set of interrogatories and requests for production of documents. Plaintiffs argued that, although the Road Commission had objected to the discovery requests on the basis that the requested information was protected by attorney-client privilege, the Road Commission had waived that privilege.

On December 8, 2020, the trial court granted in part and denied in part the motion for a protective order, clarifying:

> The subpoena shall not be quashed, but it shall be modified so that Request 4 is stricken and Request 3 is limited so as to prevent disclosure of documentation that is covered by the attorney work-product doctrine.

The Road Commission moved for reconsideration, but the trial court denied that motion.

On December 18, 2020, the Road Commission filed a motion for summary disposition. The Road Commission argues that Count I of plaintiffs' complaint should be dismissed because there was no settlement agreement. The trial court denied the motion, stating that "[a]s discovery in this matter is ongoing the Court declines to issue a ruling as to whether the parties entered into a valid and enforceable Final Settlement Agreement and as to whether special authority to settle

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[4] The Road Commission also filed a counterclaim. However, that claim does not raise any issues implicating the attorney-client privilege, nor is it relevant to the issues raised in the Road Commission's motion for summary disposition. Accordingly, we will not address it further.

this matter was giving to former counsel for Defendant/Counter-Plaintiff by the Livingston County Road Commission." Thereafter, on February 11, 2021, the court entered an order on plaintiffs' motion to compel. Consistent with its earlier finding that the Road Commission had waived attorney-client privilege, the court ordered the production of certain documents relating to the former lawyer's authority to settle. This appeal by leave granted follows.

## II. WAIVER OF ATTORNEY-CLIENT PRIVILEGE

### A. STANDARD OF REVIEW

The Road Commission argues that the documents it was ordered to produce are protected by attorney-client privilege and it did not waive that privilege. "Whether the attorney-client privilege applies to a communication is a question of law that we review de novo." *Nash Estate v Grand Haven*, 321 Mich App 587, 592; 909 NW2d 862 (2017) (quotation marks and citation omitted). Likewise,"[w]hether a party has waived a privilege is also a question of law that this Court reviews de novo." *Augustine v Allstate Ins Co*, 292 Mich App 408, 419; 807 NW2d 77 (2011). "Once we determine whether the privilege is applicable, this Court then reviews whether the trial court's order was an abuse of discretion." *Id.* "An abuse of discretion is not simply a matter of difference in judicial opinion, rather it occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Id.*

### B. ANALYSIS

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co v United States*, 449 US 383, 389; 101 S Ct 677; 66 L Ed 2d 584 (1981). "Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* "[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Id.* at 390. Generally, a party in a civil lawsuit is not entitled to discovery of documents that are protected by the attorney-client privilege. MCR 2.302(B)(1). "The attorney-client privilege is personal to the client, and only the client can waive it." *Leibel v General Motors Corp*, 250 Mich App 229, 240; 646 NW2d 179 (2002). When analyzing whether a privilege has been waived, "a court should begin its analysis with a presumption in favor of preserving the privilege." *Howe v Detroit Free Press*, 440 Mich 203, 221-222; 487 NW2d 374 (1992).

In *Howe*, our Supreme Court adopted a balancing approach to determining whether a privilege was waived by the privilege holder. *Id.* at 223. "[T]he burden of establishing a waiver under the balancing approach rests on the party seeking discovery." *Id.* To show waiver under the balancing test, the party seeking waiver must demonstrate that the material to be discovered is relevant and that the party's assertion of the privilege seriously undermined the other party's

position. *Id*. at 225–226.[5] The *Howe* Court added that "a privilege can be waived through conduct that would make it unfair for the holder to insist on the privilege thereafter." *Id*. at 214. Thus, a waiver may be found when the privilege holder's conduct "places the claimant in such a position, with reference to the evidence that it would be unfair and inconsistent to permit the retention of the privilege." *Id*. at 214-215, quoting 8 Wigmore, Evidence (McNaughton rev), § 2388(3). p 855. "It is not to be both a sword and a shield." *Id*. However, if the court permits discovery of the privileged material, it "should be narrowly limited to those portions of the privileged material that bear directly on the issues at hand." *Howe*, 440 Mich at 223. The *Howe* Court cautioned that "the need to pierce the veil of confidentiality does not mean that defendants should receive wholesale access to the confidential records of others." *Id*. at 223-224.

On appeal, the Road Commission suggests that the trial court's ruling essentially is that a defendant can waive its attorney-client privilege "by simply defending a plaintiff's claim, and/or filing a counterclaim, without more." We agree that there is no automatic-waiver rule in Michigan under these circumstances. See *Howe*, 440 Mich at 224 (expressly rejecting an automatic-waiver rule). However, based on our review of the trial court's actual order, it is clear that the court did not find waiver solely because the Road Commission denied the existence of the contract. Rather, the trial court properly focused on the specific assertion by the Road Commission—raised in its affirmative defenses—that its former lawyer lacked the authority to settle the claim on behalf of the Road Commission. Considering that affirmative defense, the trial applied the balancing test that was actually adopted in *Howe*, and did not apply an automatic-waiver rule.

In doing so the court did not abuse its discretion. The record shows that the Road Commission raised attorney-client privilege in furtherance of its affirmative defenses. Specifically, it asserted that no binding settlement agreement existed because its former lawyer lacked the authority to settle the case on the Road Commission's behalf. In doing so, the Road Commission placed its lawyer's settlement authority at issue. In response, however, plaintiffs offered evidence that the Road Commission's former lawyer represented in two e-mails that the Road Commission had approved the settlement agreement. Those e-mails allow for a reasonable

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[5] The party seeking waiver in *Howe* was a plaintiff who had commenced a defamation lawsuit against a defendant newspaper. *Howe*, 440 Mich at 217-218. The Court's analysis, therefore, balanced the plaintiff's affirmative conduct in bringing the lawsuit and using the statutory privilege as both a sword and a shield against the need of the defendant to acquire the privileged material in order to defend against plaintiffs case. *Id*. at 223-224. The Court, however, did not state that the balancing test could not be applied to defendants. Instead, the Court referenced the decision in *Hearn v Rhay*, 68 FRD 574 (ED Wash, 1975), a case where a defendant asserted attorney-client privilege in furtherance of an affirmative defense. *Howe*, 440 Mich at 219-223. Although the *Howe* Court did not adopt the three-part test set forth in *Hearn*, this Court should determine that the underlying premise *Hearn*—i.e., that a defendant raising a privilege in furtherance of an affirmative defense can waive that privilege—is also applicable to the balancing test adopted by our Supreme Court in *Howe*. See also *Sheena v Issa*, unpublished per curiam opinion of the Court of Appeals, issued April 14, 2016 (Docket No. 326400); unpub op at 4-5 (applying *Howe*'s balancing test in a case where a defendant asserted the privilege to protect attorney-client communications concerning a promissory note).

inference that he had authority to settle the case in accordance with the settlement agreement as it was already approved by the Road Commission's Board prior to him communicating it to plaintiffs' lawyers via e-mail on August 22, 2019. If the former lawyer had prior special authority from the Board to settle the case, then, under *Presnell*, the Road Commission would be bound by the settlement agreement. See *Presnell*, 105 Mich App at 369. In light of the fact that the communications between the Road Commission and its former lawyer are relevant to the issue of whether he had authority to settle based on the Board's prior approval of the settlement agreement, and given that there, in the absence of those communications, plaintiffs' ability to dispute that affirmative defense would be severely undermined, we conclude that the trial court did not abuse its discretion by finding that the attorney-client privilege was waived.

The trial court order limited the discovery of privileged documents to those related to the lawyer's authority to settle. However, given that "discovery allowed under these circumstances should be narrowly confined," *Howe*, 440 Mich at 227, we remand to the trial court to examine the documentation *in camera*. It should excise any portions of those documents that do not bear directly on the issue of the former lawyer's authority to settle on behalf of the Road Commission.

## III. SUMMARY DISPOSITION

### A. STANDARD OF REVIEW

The Road Commission argues that the trial court erred by denying its motion for summary disposition. The Road Commission asserts that, although discovery is not complete, plaintiffs cannot possibly show (1) that there is a settlement agreement in writing subscribed by the parties as required under MCR 2.507(G) because no signed settlement agreement exists. It further contends that because there is no binding agreement because there is no evidence that the Road Commission's Board either affirmatively voted at a public meeting to give Stapleton prior authority to settle or affirmatively voted at a public meeting to unconditionally ratify the settlement agreement as required by OMA. We review de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering*, *Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). "An agreement to settle a pending lawsuit is a contract, governed by the legal rules applicable to the construction and interpretation of other contracts." *Clark v Al-Amin*, 309 Mich App 387, 394; 872 NW2d 730 (2015) (quotation marks and citation omitted). "The 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).

### B. ANALYSIS

The Road Commission first contends that plaintiffs cannot prevail on their claim for declaratory relief because the settlement agreement is not in a writing subscribed by a party as required by MCR 2.507(G). We disagree. "A contract for the settlement of pending litigation that fulfills the requirements of contract principles will not be enforced unless the agreement also satisfies the requirements of [MCR 2.507(G)[6]]." *Kloian*, 273 Mich App at 456. MCR 2.507(G) "is in the nature of a statute of fraud." *Kloian*, 273 Mich App at 456. "A court cannot force

[6] Formally MCR 2.507(H).

settlements upon parties or enter an order pursuant to the consent of the parties which deviates in any material respect from the agreement of the parties." *Id*. at 461. However, in its argument, the Road Commission ignores that MCR 2.507(G) expressly provides that a writing may be subscribed by either a party or by that party's lawyer. In full, MCR 2.507(G), provides:

> An agreement or consent between the parties or their attorneys respecting the proceedings in an action is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered *or by that party's attorney*. [Emphasis added.]

" 'Subscribe' means 'to append, as one's signature, *at the bottom of a document* or the like; sign.' " *Kloian*, 273 Mich App at 459, quoting *Random House Webster's College Dictionary* (2001). In *Kloian*, this Court concluded that a lawyer's name at the end of an e-mail message containing a settlement offer was subscribed because the lawyer's name appeared at the end of the e-mail message. *Id*.

In their complaint, plaintiffs allege that e-mails exchanged among the parties show the existence of a settlement agreement. The Road Commission's former lawyer subscribed his name at the end of each e-mail that he sent that pertained to the settlement agreement. Likewise, the e-mails from the plaintiffs' lawyers pertaining to the settlement agreement are also subscribed by their lawyers because their names appeared at the end of their e-mail messages. As a result, there is no merit to the Road Commission's argument that the settlement agreements are invalid because they are not in a writing subscribed by a party or that party's lawyer.

The Road Commission also asserts—without citation to legal authority—that the e-mails between its former lawyer and plaintiffs' lawyers cannot be "cobbled together to create a binding settlement agreement." The Road Commission argues that plaintiffs and the trial court asserted no authority for that position because such authority "simply does not exist." However, in *Kloian*, this Court held that the parties entered into a binding settlement agreement that was set forth in a series of e-mail messages that were exchanged between the lawyers for the parties. *Kloian*, 273 Mich App at 451, 453-455. Accordingly, the Road Commission's position is without merit.

The Road Commission also proclaims that "there is no written agreement conforming to . . . contract principles." The Road Commission proffers no further legal or factual analysis to support this conclusory statement. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). This Court should, therefore, conclude that this issue has been abandoned on appeal.

Next, the Road Commission directs this Court to several later e-mails from its lawyer indicating that the settlement agreement would be presented to the Road Commissioner's Board for a "signature" and for "approval." The record, however, reflects that the essential terms were

already agreed upon and all that remained was for the Board to officially approve the settlement agreement that it had presented—through its lawyer—in the August 22, 2019 e-mail.[7]

The Road Commission also asserts that the settlement agreement cannot be binding because its Board did not approve the settlement agreement at a public meeting. In support, the Road Commission points to MCL 15.263(2), which provides that "[a]ll decisions of a public body must be made at a meeting open to the public." "Decision" is defined as "a determination, action, vote, or disposition upon a proposal, recommendation, resolution, order, ordinance, bill, or measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy." MCL 15.270(2) provides that "[a] decision made by a public body may be invalidated if the public body has not complied with the requirements of [MCL 15.263(2)] in making the decision . . ."

The Road Commission relies on *Presnell*, 105 Mich App 362, for the proposition that it cannot be bound by the settlement agreement in this case. *Presnell*, however, stands for the opposite conclusion. In that case, the defendant road commission was sued for breach of contract by the estate of a woman who was injured on a sidewalk. *Id*. at 363-364. On the date set for trial, and following a settlement conference, the parties entered into a settlement agreement in open court. *Id*. at 364. At that time, the lawyer for the road commission represented that he had authority to settle. *Id*. However, when the settlement was brought before the county road commission's board, the board refused to ratify the agreement. *Id*. The plaintiff brought a motion in the trial court to enforce the settlement agreement. *Id*. At the hearing, the Board argued that its lawyer "was without authority to enter into the settlement agreement and since the defendant Board had refused to ratify the agreement, the agreement was not binding." *Id*. The trial court recalled that the defense lawyer had represented to the court that he had the authority to settle for the amount of the settlement. *Id*. In response, the defense lawyer represented that he had received authorization from the managing director, but that because he needed the entire Board's authorization, the authorization he received was invalid as a matter of law. *Id*. at 364-365. The trial court concluded that the agreement was binding. *Id*. at 365. The defendant appealed to this Court. *Id*. This Court reversed, concluding:

> we are of the opinion that the trial court erred in entering the consent judgment after the Wayne County Board of County Road Commissioners failed to ratify the tentative settlement that had been placed on the record in open court. By statute, the board is given the authority to sue and be sued and, by implication, to compromise and settle actions. Even then, to be binding, the settlement must be ratified by the whole board, sitting together as an entity. There is no indication on the record that Mr. O'Rourke, the board's managing director, had the authority, either by statute or by resolution of the board, to compromise and settle claims. Likewise, there is no indication that Mr. O'Boyle, the board's attorney, had such authority. In short, the action of defendant's employee, Mr. O'Rourke, in making a representation that plaintiff's claim could be settled for $5,000, has not been

[7] The record reflects that the actual settlement agreement—with all of the essential terms set forth—was attached to the August 22, 2019 e-mail from the Road Commission's lawyer.

> "shown to have been authorized by the defendant commission and was, therefore, not binding on it." *Kleiman v Wayne Bd of Co Road Comm'rs*, 336 Mich 602, 605; 58 NW2d 816 (1953). In addition to a lack of evidence to support a finding that Mr. O'Rourke had the actual authority, express or implied, to bind the board, plaintiff has presented no evidence from which we could conclude Mr. O'Rourke had the apparent authority to do so. [*Id*. at 368-369.]

Thus, *Presnell* stands for the proposition that a local government unit can be bound by a settlement agreement entered into by the unit's lawyer if either (1) the government unit later ratifies the settlement agreement or (2) the lawyer had some prior special authority to settle the claim. *Id*. at 368-369. See also *City of Detroit v Gorno Steel & Processing Co*, 157 Mich App 294, 306-308; 403 NW2d 538 (1987) (holding that a lawyer may bind his or her client to a settlement agreement if that lawyer had "some precedent special authority" to enter into such a settlement on behalf of his or her client, even if that client is a governmental unit). Although *Presnell* and *Gorno* are not binding on this Court because they were decided prior to November 1, 1990, see MCR 7.215(J)(1), they can be considered persuasive. Moreover, they are both consistent with binding caselaw that holds that a lawyer must have specific authority to bind a client to a settlement agreement. See *Nelson v Consumer Powers Co*, 198 Mich App 82, 85; 497 NW2d 205 (1993). Accordingly, if the ongoing discovery related to whether the Road Commission's lawyer had authority from the Road Commission to settle the case on their behalf, then, notwithstanding that there was no public meeting ratifying the agreement, the Road Commission would be bound by the settlement agreement.

Therefore, because there is a reasonable likelihood that further discovery could yield information relevant to the summary disposition issue, see *Kern v Kern-Koskela*, 320 Mich App 212, 227; 905 NW2d 453 (2017), the trial court did not err by determining that summary disposition was premature.[8]

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[8] On appeal, plaintiffs argue that summary disposition was also not warranted because there was a question of fact related to whether the Road Commission's former lawyer had apparent authority to bind the Road Commission to the settlement agreement. In *Nelson*, this Court held that "an attorney has no authority by virtue of his general retainer to settle a lawsuit on behalf of his client." *Nelson*, 198 Mich App at 205. Nevertheless, the *Nelson* Court also held that a party's lawyer can bind the party to a settlement or consent even if the party does not give the lawyer the actual authority to do so if the lawyer has "apparent authority" to do so. *Id*. at 88-90. The Court reasoned that "when a client hires an attorney and holds him out as a counsel representing him in a matter, the client clothes the attorney with apparent authority to settle claims connected with the matter." *Id*. at 89-90 (quotation marks and citation omitted). Thus, an opposing party "is generally entitled to enforcement of the settlement agreement even if the attorney was acting contrary to the client's express instructions . . . unless [the opposing party] has reason to believe that the attorney has no authority to negotiate a settlement." *Id*. at 90 (quotation marks and citation omitted). Under such circumstances the injured client's remedy is not against the opposing party but against his or her attorney in malpractice. *Id*.

Affirmed, but remanded for the trial court to conduct an *in camera* review of the documents that it ordered the Road Commission to produce in its December 8, 2019 order and its February 11, 2021 order and to excise any portions of those documents that do not directly bear on the issues at hand. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Thomas C. Cameron
/s/ Noah P. Hood

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Given that the trial court properly denied the motion for summary disposition as premature due to the ongoing discovery related to the former lawyer's authority to settle, we decline to consider whether summary disposition would have been properly denied on the basis of there being a question of fact related to the former lawyer's apparent authority.