Order

Michigan Supreme Court
Lansing, Michigan

May 3, 2024

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

164951

CITIZENS INSURANCE CO. OF AMERICA, AMERISURE MUTUAL INSURANCE CO., and AUTO-OWNERS INSURANCE CO.,
Plaintiffs/Counterdefendants-Appellees,

v

SC: 164951
COA: 356294
Livingston CC: 2020-030701-CK

LIVINGSTON COUNTY ROAD COMMISSION,
Defendant/Counterplaintiff-Appellant.
_____/

On March 14, 2024, the Court heard oral argument on the application for leave to appeal the September 15, 2022 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we REVERSE Part III of the judgment of the Court of Appeals, VACATE Part II of the judgment of the Court of Appeals, and REMAND this case to the Livingston Circuit Court for proceedings not inconsistent with this order.

The parties did not enter into a binding settlement agreement. The e-mails between the attorneys indicate that everyone understood that the settlement agreement was subject to the approval of the Livingston County Road Commission Board. The Board's November 25, 2019 resolution did not unequivocally accept the settlement agreement. Instead, it "potentially accept[ed]" the agreement and it "authorize[d] the Managing Director to sign the [agreement] on behalf of the Board pending consultation with legal counsel." Even the e-mail sent by the defendant's former attorney on December 10, 2019, relied on heavily by the plaintiffs, only stated that the Board approved the settlement amount and that the "settlement agreement would be presented to [the Board] for approval and signature." Therefore, it is clear that the Board never approved the settlement agreement and the defendant's former attorney never indicated that the Board approved the settlement agreement.

Moreover, the defendant's former attorney consistently advised the plaintiffs that the settlement agreement was subject to board approval. Thus, even assuming that the defendant's former attorney had the authority to settle claims on the defendant's behalf, it is clear that he did not exercise that authority, but instead deferred to the Board by telling

the plaintiffs' attorneys that he would forward the settlement agreement to the Board for its approval.[1]

Given that these facts are clear on the face of the pertinent e-mails and there is no allegation that there were other communications that gave rise to a binding settlement agreement, there is not a fair likelihood that further discovery would yield information relevant to the summary-disposition issue. See *Ousley v Phelps Towing, Inc*, 509 Mich 875, 875 (2022), citing *Kern v Kern-Koskela*, 320 Mich App 212, 227 (2017). Accordingly, the trial court should have granted the defendant's motions for summary disposition and to quash the subpoena and denied the plaintiffs' motion to compel.

We do not retain jurisdiction.

ZAHRA, J. (*concurring*).

I agree with the majority that "[t]he parties did not enter into a binding settlement agreement." The majority notes that, "[i]n light of this finding, we need not address whether the defendant's former attorney had the authority to compromise and settle claims on behalf of the [Livingston County Road Commission] Board, nor whether attorneys can even have such authority without authorization from the Board that complies with the requirements of the Open Meetings Act, MCL 15.261 *et seq*." This question, in my opinion, was resolved by the Court of Appeals' decision in *Presnell v Wayne Bd of Co Rd Comm'rs*,[2] which held:

> [W]e 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

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[1] In light of this finding, we need not address whether the defendant's former attorney had the authority to compromise and settle claims on behalf of the Board, nor whether attorneys can even have such authority without authorization from the Board that complies with the requirements of the Open Meetings Act, MCL 15.261 *et seq*.

[2] *Presnell v Wayne Bd of Co Rd Comm'rs*, 105 Mich App 362 (1981).

> 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.[3]

In my view, the Open Meetings Act, MCL 15.261 *et seq*., plainly requires that a public body must expressly authorize by public resolution any decision that delegates its power to enter into a binding agreement. As discussed during oral argument, the board's decisions are not binding when made behind closed doors. The act plainly requires a public hearing and resolution by the board, and the Court should clearly hold that informal agreements with a public body are not enforceable unless made public. The plain language of the OMA requires as much and reasonably aligns with the Legislature's intent when it enacted and repeatedly amended the OMA.[4]

WELCH, J., joins the statement of ZAHRA, J.

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[3] *Id*. at 368-369 (third emphasis added).

[4] The purpose of the OMA is "to promote governmental accountability by facilitating public access to official decision making and to provide a means through which the general public may better understand issues and decisions of public concern." *Vermilya v Delta College Bd of Trustees*, 325 Mich App 416, 419 (2018) (quotation marks and citation omitted). Under the OMA, "[*a*]*ll* decisions of a public body must be made at a meeting open to the public." MCL 15.263(2) (emphasis added). However, a public body may hold a closed session in limited circumstances, including, as relevant here, "[t]o consult with its attorney regarding trial or settlement *strategy* in connection with specific pending litigation, but *only if* an open meeting would have a detrimental financial effect on the litigating or settlement position of the public body." MCL 15.268(1)(e) (emphasis added). Nowhere in the act does it permit a public body to grant its attorney sole authority to settle a claim behind closed doors. As related to a public body's communications with its attorney, a closed session is permitted to the extent that it relates to discussing strategy, and even this is qualified with the requirement that the matter have detrimental financial implications to the public body. Thus, while *deliberations* about a settlement strategy can occur in a closed session, the actual *decision* to settle a claim must be made in an open meeting.

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I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 3, 2024

Clerk

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