IN THE SUPREME COURT OF THE STATE OF OREGON

JOHN HARKNESS and SHERRI HARKNESS,	)	
	)	Washington County Circuit Court No. C092970CV
Plaintiffs-Appellants, Petitioners on Review,	)	
	)	CA A147439
v.	)	
	)	SC S063222
JACK R. PLATTEN,	)	
	)	
Defendant-Respondent, Respondent on Review.	)	

PETITIONERS' BRIEF ON THE MERITS

Petition for review of the decision of the Court of Appeals on appeal from a judgment of the Circuit Court for Washington County, Honorable Charles D. Bailey, Judge.

Opinion Filed: April 8, 2015

Author of Opinion: Hon. Rex Armstrong, Presiding Judge
Concurring Judges: Hon. Lynn R. Nakamoto and Hon. James C. Egan, Judges.

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Brief filed in October, 2015

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PETITIONERS' BRIEF ON THE MERITS

QUESTIONS PRESENTED ON REVIEW

First Question

In this legal malpractice and negligent misrepresentation case, did the trial court and the Court of Appeals err in holding that Defendant Platten was entitled to a directed verdict at the close of Plaintiffs' case on the ground that a loan officer, Joanne Kantor, lacked apparent authority to act for her successive employers, Sunset Mortgage Company and Directors Mortgage, Inc., defendants being sued in the underlying case (the *Kantor* lawsuit), when Kantor, operating out of the employers' offices, induced Plaintiffs to borrow money from the employers, secured by mortgages on their real property, so that she could then ostensibly lend the money to other persons on behalf of Plaintiffs?

Rule of Law Proposed to Be Established

Plaintiffs do not ask this Court to change the standard for determining apparent authority from that stated in *Badger v. Paulson Investment Company, Inc.*, 311 Or. 14, 803 P.2d 1178 (1991), and reaffirmed in *Eads v. Borman*, 351 Or. 729, 277 P.3d 503 (2012),[1] as well as in other longstanding

[1] The Appellants' Opening Brief in this case was filed in January 2012. Consequently, it did not cite *Eads*, which was not decided until April 2012.

case law. Plaintiffs contend, however, that the Court of Appeals and trial court seriously misstated and misapplied that standard. Particularly important are not only the parts of the standard which the Court of Appeals did acknowledge at page 11 of its slip opinion,[2] but the parts it did not acknowledge, especially that 1) liability based on the principle of apparent authority may be imposed not only for conduct that the principal did not authorize, but also may be imposed for conduct that the principal expressly forbade, and 2) liability based on the principle of apparent authority is not negated by the fact the agent had a secret or dishonest purpose to benefit herself. Also important is to correct the muddling of the standard for finding apparent authority that results from the Court of Appeals' holding that evidence of an agent's actual authority must be disregarded. *See* slip opinion, page 14, line 14, through page 15, line 3.[3]

Similarly, the trial court's error in conflating actual and apparent authority should be corrected. *See* ER 25, Tr. 948.[4]

Eads was briefly cited at page 14 of the Appellants' Reply Brief, filed in September 2012.

[2] *Harkness v. Platten*, 270 Or. App. 260, 269-70, 348 P.3d 1145, 1151 (2015).

[3] *Harkness v. Platten*, at 270 Or. App 272, 348 P.3d 1153.

[4] Plaintiffs are aware of the provisions of ORAP 16.50, encouraging the use of hyperlinks. However, this appeal was filed in 2011, and the transcript, exhibits, briefs and excerpt of record in the Court of Appeals were all filed

Second Question

Did the trial court err in holding that Defendant Platten was entitled to a directed verdict on the ground that Plaintiffs could not have prevailed on their theory that the employers were liable for Ms. Kantor's tortious conduct in the underlying case based on the doctrine of *respondeat superior*, and did the Court of Appeals err in refusing to address that issue?

Rule of Law Proposed to Be Established

Plaintiffs do not contend this Court should establish a standard for determining *respondeat superior* liability different from that stated in *Chesterman v. Barmon*, 305 Or. 439, 753 P.2d 404 (1988). Unlike the apparent authority question, the Court of Appeals did not explicitly decide the issue because of an opaque and mistaken holding in footnote 6 that Plaintiffs did not present an argument. *See* slip opinion, pages 12-13.[5] However, the rest of the decision discussed in terms relevant to *respondeat superior* liability most of the evidence in the record that Plaintiffs cited as establishing the doctrine's three elements. Thus, the decision on its face showed enough evidence to establish a jury question on all three of the elements. Consequently, in addition to erring in failing to address Plaintiffs'

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in 2011-12 in only hard copy form. Consequently, their contents cannot be hyperlinked.

[5] *Harkness v. Platten*, at 270 Or. App. 270-71, 348 P.3d 1151-52.

argument and reverse and remand this case based on the doctrine of *respondeat superior*, the Court of Appeals' decision risks creating confusion as to the elements of that doctrine. This Court should also correct the trial court's error in conflating the doctrine of *respondeat superior* into its flawed reasoning on the doctrine of apparent authority. *See See* ER 40-41, 43-47; Tr. 1002-03, 1006-10.

NATURE OF THE ACTION

This is a claim for legal malpractice and negligent misrepresentation brought by Plaintiffs, John and Sherri Harkness, against Defendant Jack R. Platten, who was one of the Harknesses' attorneys in litigation against Joanne Kantor, her successive employers Sunset Mortgage Company and Directors Mortgage, Inc., Fidelity National Title Company of Oregon, and control persons in Sunset and Directors. That litigation arose out of fraud and other misconduct by Ms. Kantor, a loan officer, in inducing the Harknesses to borrow money from Sunset and Directors, using their residence and a rental home as collateral, and then to invest the money by turning it over to Ms. Kantor to make ostensibly secured loans to other persons, including contractors, mostly for building and real estate projects.

Mr. and Mrs. Harkness allege that, as a result of Mr. Platten's negligence in representing them, they were persuaded to settle the

underlying litigation for substantially less than their damages, and that Mr. Platten at that time negligently misrepresented to them that they would retain viable claims against some of the borrowers.[6]

The trial court never reached the merits of those claims, although Plaintiffs presented evidence supporting them. The court instead granted Defendant's motion for directed verdict at the close of Plaintiffs' case. The motion was based solely on the grounds that there was insufficient evidence for a reasonable jury to find that, in the underlying case, Sunset and Directors were liable to Mr. and Mrs. Harkness for breach of contract because of Kantor's apparent authority or for Kantor's tortious conduct based on the doctrine of *respondeat superior*. The parties agreed that no other questions were involved in the appeal. The Court of Appeals affirmed the trial court's ruling and resulting judgment in favor of Mr. Platten. Mr. and Mrs. Harkness seek reversal and remand for a new trial.

RELIEF SOUGHT IN TRIAL COURT

The Harknesses allege that, as a result of Mr. Platten's negligence they suffered damages in excess of $500,000, which they sought to recover

[6] For the particular allegations of professional negligence and negligent misrepresentations by Platten *see* Second Amended Complaint, at ER-5 – ER 8.

in the trial court through claims for professional negligence and negligent misrepresentation.

NATURE OF THE TRIAL COURT JUDGMENT

The trial court entered a General Money Judgment dismissing Plaintiffs' claims following the allowance of Defendant's motion for a directed verdict after Plaintiffs rested their case in a trial to a jury.

FACTS MATERIAL TO DETERMINATION OF THE REVIEW[7]

In 2002, Plaintiff John Harkness, a Portland firefighter, and his wife, Sherri, wanted to use the equity in their home to make investments. Tr. 453-54. Neither of them had previous experience with real estate or other investments. Tr. 209-10, 451-52.

Through a co-worker, and through a flyer including a copy of her Sunset business card posted on a bulletin board at the fire station where he worked, Mr. Harkness learned of Joanne Kantor, a loan officer at Sunset Mortgage Company, who offered real estate loan and investment services.

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[7] In obedience to ORAP 9.17(2)(b)(ii)(B), this statement of facts will include only the facts relevant to the issues of apparent authority and *respondeat superior* in the underlying case. It will not include the evidence relating only to Mr. Platten's alleged negligence and negligent misrepresentations, which was also introduced at trial prior to his motion for directed verdict. Those facts were included in the Summary of Facts at pages 3 – 21 of the Appellants' Opening Brief, and in the Reply to Statement of Facts at pages 3 – 7 of the Appellants' Reply Brief.

Tr. 453-54. The Harknesses set up an appointment with Kantor and they met with her at the Sunset offices in June 2002. Tr. 202-08, 455. They believed Kantor represented Sunset. Tr. 212.

Kantor told the Harknesses that if they initially borrowed approximately $637,000 from Sunset, using the equity in their home as collateral for the loan, she could then invest the funds on their behalf in short-term loans to various individuals, including developers and building contractors who needed the money for construction projects. Tr. 208-12, 224-33; Ex. 5, ¶ 11. Those loans would have annual interest rates of 11.5 to 12.5 percent, points of five percent, ten percent charges for late monthly payments, and loan fees to help pay the taxes on the Harknesses' real property. *Id.* Kantor explained that she and Sunset would be paid from the commission on the conventional loan to the Harknesses and from conventional construction loans Sunset would make to the builders. Tr. 211-12.

The Harknesses agreed to this proposal and understood from Kantor that the funds they borrowed were invested in that manner. Tr. 224-44; Ex. 5. Kantor did use the funds to make loans to several persons. *Id.* The Harknesses earned income from some of the loans. Kantor was compensated for her efforts and Sunset was compensated for the funds the Harknesses had

borrowed. *Id.* Kantor prepared documents regarding the loans on Sunset's letterhead. *See* Exs. 3a and 7. The first loan the Harknesses made through Kantor involved Mrs. Harkness making out a cashier's check to Sunset. Tr. 223.

Kantor left Sunset and became a loan officer for Directors in July 2003, continuing there until approximately November 2006. Tr. 256-59. While at Directors, she continued the same arrangement with the Harknesses. Tr. 459-62. Kantor told them the loans they made would be very safe, "cross-collateralized," and the Harknesses would always be in at least a second lien position. Tr. 263. The Harknesses borrowed an additional $196,800.00 from Directors, secured by a mortgage on a rental home they owned, and another $172,800.00 on an equity line of credit secured by their real property for Kantor to use in making loans on their behalf. Tr. 259-61, 273; Exs.13A and 13B.

The Harknesses, especially Mrs. Harkness, who handled most of these matters because her husband worked full time, met with and telephoned Kantor at Directors. Tr. 256-65, 459-62. Mrs. Harkness also dealt with Kantor's assistant at Directors, Ellen Tillotson. Tr. 263-65. She testified she believed she was dealing with Directors and would not otherwise have continued dealing with Kantor. Tr. 261-62, 272-73.

The borrowers' payments were sent to Kantor rather than to the Harknesses, and at least a number of them were sent to her at the Sunset and Directors offices. Tr. 250-51, 254, 279, 545. Kantor would then deposit the payments to the Harknesses' bank account so they could service their own loans, or were invested in new loans. Sometimes existing loans were rolled over. Tr. 262.

Kantor failed to timely record trust deeds for a number of the loans, failed to place the Harknesses in a first or second lien position, and misappropriated money, while borrowers failed to make many other payments. Tr. 297-302. The Harknesses were unable to recover on a number of the loans.

In one instance, an ostensible loan to John Berning, Kantor forged the loan documents and placed a false lien on Mr. Berning's property, resulting in the Harknesses being successfully sued by him. Tr. 281-97, 463-64; Exs. 17-20. Mrs. Harkness testified she had not known of Kantor's forgery prior to being sued and had accepted Kantor's explanation of a simple filing error when Berning's attorney contacted them. Tr. 430-36. She testified that a lawyer for Sunset or Directors helped defend against Berning's lawsuit. *Id.*

In December 2005, the Harknesses consulted attorney Thomas Flaherty to learn whether they had any legal remedy for their losses and

retained Flaherty after he studied the case and agreed to represent them. Tr. 301-04, 464-66, 516-20; Ex. 21. In March 2006, Flaherty filed a complaint on behalf of the Harknesses in Clackamas County Circuit Court, alleging claims for negligence, breach of contract, violations of state securities laws, fraud, breach of fiduciary duties, conversion, rescission, unjust enrichment, accounting, violation of state mortgage brokerage laws, and slander of title against Kantor, Sunset, Directors, and Fidelity National Title Company of Oregon (the "*Kantor* lawsuit"). Ex. 22. The allegations against Sunset and Directors included that, at all material times, Kantor was their agent and employee and was acting within the course and scope of her employment. *Id.*, ¶¶ 6 and 7. An Amended Complaint added a claim for violation of the Oregon RICO statute. Ex. 23. The claim against Fidelity National was for negligence in performing notarial duties that enabled Kantor's forgeries.

In January 2007, Flaherty contacted Mr. Platten, the Defendant in this case, initially to use him as a securities law expert in the *Kantor* lawsuit. Tr. 308-12, 464-67, 523-24, 600-06. Platten shortly became full co-counsel with Flaherty.[8]

On or about April 10, 2007, Flaherty and Platten filed a Second Amended Complaint to join the control persons of Sunset and Directors

[8] For details of this, with record references, *see* Appellants' Opening Brief, pages 7-8.

(Todd Johnson and Debbie Weatherford as control persons of Sunset, and Mark Hanna as control person of Directors). *Id.*; Ex. 25. It alleged the Harknesses were owed a total of more than $1,000,000 for defaulted or incompletely paid loans, plus other damages. *See* Ex. 25, *e. g.* ¶¶ 24, 27, and prayer (there are some variations in the figures in those allegations).

Although there was no direct evidence that the owners of Sunset and Directors knew what Kantor was doing, she used their letterheads and forms, and the two companies received commissions from the Harknesses. Tr. 544-49, 582, 584. The main theory against them in the *Kantor* lawsuit was liability for failure to properly control, supervise, and train their employee Kantor, as required by federal and state securities laws. Tr. 584-85. Flaherty thought all the notes from the borrowers that Kantor prepared were forged. Tr. 583.

On August 17, 2007, Sunset and its control person Todd Johnson filed Sunset's Motions For Summary Judgment in the *Kantor* lawsuit. Tr. 533-38, 630-31; Exs. 26, 502-20, in this case. They asked for summary judgment on all of the claims alleged against those defendants, including the breach of contract claim against Sunset. Tr. 634-35. Among other points, Sunset's Motions For Summary Judgment asserted Sunset was a mortgage broker and lender in Lake Oswego, but only for federally regulated

mortgage loans and, although Kantor was employed as a loan officer, she had no authority to authorize loans. Ex. 26, Sunset's Motions For Summary Judgment, page 3. The motions asserted Sunset did not know about the loans Kantor made with the money she had advised the Harknesses to borrow from Sunset, Kantor did not process the loans through title and escrow or record the trust deeds they signed, and she funneled the proceeds through her personal checking account. Ex. 26, Sunset's Motions For Summary Judgment, pages 5, 16, 18, and 29. Sunset also asserted that, as a mortgage broker, giving investment advice was not part of its business. Ex. 26, Sunset's Motions For Summary Judgment, pages 7-8.

Sunset's Motions For Summary Judgment were supported by exhibits to the affidavit of their attorney, Hafez Daraee, which are also part of Exhibit 26 in this case. Exhibit A to Mr. Daraee's affidavit is the Declaration of Todd W. Johnson, Sunset's president and co-defendant. In addition to supporting the assertions summarized above, Johnson declared:

> "Not only did Kantor's off the books private loans for the Harknesses provide no benefit to Sunset, Kantor was essentially competing with Sunset by having the Harknesses make loans that Sunset might have made or brokered for profit on a conventional basis. I am not aware of any evidence that before borrowing money from the Harknesses any of the private borrowers were rejected in applying for conventional loans through Sunset or any other mortgage company. In fact, some of them, such as Drew Wiater and John Berning, did qualify for and receive other conventional loans from Sunset."

Id., ¶ 8.

Excerpts from Mr. Johnson's December 6, 2006, deposition are also part of Exhibit 26 in this case as Exhibit C to Mr. Daraee's affidavit. Mr. Johnson testified that Sunset was a "mortgage finance provider" and a "mortgage broker" that used both its own and others' money to make secured real estate loans, and Kantor was employed there on commission for eight years as a loan officer whose function was to originate loans. *Id.*, pages 5-8.

The response to Sunset's Motions For Summary Judgment (Ex. 27A) included as Exhibit B to Platten's supporting affidavit pages from the transcript of Mr. Johnson's deposition that were not included with Sunset's Motions. He testified that there could be "a time that a hard money loan [the sort of loans that Kantor told the Harknesses she was making with their funds] would be a benefit" as part of his "creative approach" to making loans. *Id.*, pages 33-35. Johnson further testified that, while this activity by Kantor was not part of her job at Sunset and she never told him about it, telling clients they could use the equity in their real property to make more money is something a good loan officer could do, and loan officers at Sunset were encouraged to go out and find business. *Id.*, pages 40-42, and 55.

In her December 6, 2006, deposition that is Exhibit G to Mr. Daraee's affidavit, Mrs. Harkness testified she made her checks payable to Kantor on Kantor's instructions, rather than to the borrowers, but she did not find out until the Berning lawsuit that Kantor was depositing them to her private account. *Id.*, pages 202-04, 374-75. She testified Kantor told her "Sunset, that they're the ones that told her how to do the loans." *Id.*, pages 221-24, 373.

The only loans that originated while Kantor was at Directors rather than at Sunset were those to the Walls, who Mrs. Harkness later learned were actually Kantor's parents. A number of the other loans were renewed after Kantor moved there from Sunset. *Id.*, pages 259-61, 291.

The exhibits to Sunset's Motions For Summary Judgment included documentation, principally trust deeds prepared by Kantor for the loans Kantor ostensibly made with the Harknesses' funds, and some of those trust deeds include instructions that they are to be returned to Sunset Mortgage after recording. *See* Exhibits H through N to the Affidavit of Hafez Daraee that is part of Exhibit 26 in this case.

Kantor testified that the loans made with the Harknesses' funds "were not Sunset Mortgage or Directors Mortgage loans," but were "done during my course of employment at Directors or Sunset." *See* page 206 of the

excerpts from the December 5, 2006, deposition of Joanne Kantor that is Exhibit O to the Affidavit of Hafez Daraee that is part of Exhibit 26. She also testified, however, that her dealings with the Harknesses were not part of her job at Directors because she had since learned that Directors' owner, Mark Hanna, did not allow loan officers to engage in such transactions. *Id.*, pages 233-35.

On September 26, 2007, Clackamas County Circuit Judge Van Dyk ruled on Sunset's Motions For Summary Judgment in the *Kantor* lawsuit, denying most of them but granting three, including the motion against the breach of contract claim, holding there was no evidence to support that claim. Tr. 658-61; Ex. 28. Judge Van Dyk testified as a defense witness in this case. Tr. 751, 766. He testified that he did not find evidence of a contract between the Harknesses and Sunset, but this was not to say there was no contract between the Harknesses and Kantor. Tr. 762-63. He testified he found no evidence Kantor had actual authority to enter into such a contract on behalf of Sunset, but did not reach the issue of apparent authority. Tr. 764-65, 772-73, 780. He further testified in response to questions from defense counsel that whether Kantor's dealings with the Harknesses were in "the scope of her employment" with Sunset or provided

any benefit to Sunset was not important because he did not find there was a contract. Tr. 777-81.

At the trial in this case, Platten testified to issues that he thought created problems for the breach of contract claim against Sunset and Directors. Tr. 623-27, 689-95. He admitted, however, that the Harknesses' breach of contract claim against Kantor was not disputed and the only question was whether they could also show a contract with Sunset and Directors. Tr. 689. Platten and Flaherty testified that Mrs. Harkness said she did not rely on such authority in dealing with Kantor. Tr. 551, 722-25.

Mrs. Harkness testified that she and her husband believed Kantor represented Sunset when they started working with her (Tr. 212) and later believed she represented Directors and otherwise would not have continued dealing with her (Tr. 262, 272-73).

The underlying case was settled following a two-day mediation session held during the week before trial was scheduled to start. The outcome of the mediation was that Mr. and Mrs. Harkness accepted $600,000 in settlement. At the trial in this case, they presented evidence that their actual damages were far in excess of that figure and they accepted it only because of facts giving rise to the negligence and negligent

misrepresentation claims against Mr. Platten and Mr. Flaherty. Platten and Flaherty disputed this.[9]

SUMMARY OF ARGUMENT

The trial court erred in its colloquy with counsel that is the only explanation in the record of the grounds on which it granted the Defendant's motion for a directed verdict at the close of Plaintiffs' case. *See* ER 30-32, Tr. 965-67; ER 43-48, Tr. 1006-11. *See generally*, Tr. 941-1005. That court conflated and confused the doctrines of actual authority, apparent authority and *respondeat superior* as applied to the underlying case. In affirming that judgment, the Court of Appeals erred in holding as a matter of law that Mr. and Mrs. Harkness should have known that the investment scheme Joanne Kantor counseled them to undertake was outside of her job as a loan officer and that she therefore lacked apparent authority from her employers. That court also erred in refusing to address the application of the doctrine of *respondeat superior* to the tort theories in the underlying case.

The standard of review on appeal from the grant of a directed verdict is that this Court views the facts in the light most favorable to the plaintiffs, drawing every reasonable inference from the evidence in their favor. *E.g. Trees v. Ordonez*, 354 Or. 197, 200, 311 P.3d 848, 850 (2013).

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[9] Details, with references to the record, are found at pages 16-21 of the Appellants' Opening Brief.

In this case, the evidence amply supports the Harkness's claims based on the doctrines of apparent authority and *respondeat superior* in the underlying case. They learned of Kantor through her advertisement as a loan officer at Sunset Mortgage Company who offered real estate loan and investment services. They met and dealt with her at and through her offices at Sunset and Directors successively, including dealing with her staff at Directors. She used the letterheads and forms of those companies in preparing documents involved in her fraudulent scheme. A number of the payments from third party borrowers were made to Kantor at those offices and recorded documents were returned there. Based on Kantor's representations, Mr. and Mrs. Harkness believed they were dealing with those companies and borrowed substantial amounts of money from them through Kantor to use in making the loans. Although the third party, or "hard money," loans were in fact not part of Kantor's job at either company, Sunset's president testified that there could be a time when making such loans could properly be a part of his "creative approach" to making loans, that telling clients they could use the equity in their real property to make more money is something a good loan officer could do and that loan officers were encouraged to find business.

That evidence strongly supports the Harkness's claims based on the doctrine of apparent authority under the standard stated by this Court in *Badger v. Paulson Investment Company, Inc.*, 311 Or. 14, 803 P.2d 1178 (1991), as well as other authorities. That evidence, including the fact that the mortgage and home equity loans totaling more than a million dollars Kantor persuaded the Harknesses to take out from Sunset and Directors in order to finance the "hard money" loans financially benefited those companies, also strongly supports the Harkness's claims based on the doctrine of *respondeat superior* under the standard stated by this Court in *Chesterman v. Barmon*, 305 Or. 439, 753 P.2d 404 (1988).

This Court should reverse the trial court and Court of Appeals' decisions and remand this case for a new trial in order to correct the misapplication and undermining of the *Badger* and *Chesterman* standards, especially by the Court of Appeals' published decision. It should also do so in order to correct the weakening of protections against fraud for lay investors that are likely to be a practical consequence of the lower court decisions in this case.

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ARGUMENT

Plaintiffs were entitled to a jury determination of whether they should have prevailed in the underlying case on their breach of contract claims based on Kantor's apparent authority.

There was no dispute in this case that a contractual relationship existed between the Harknesses and Joanne Kantor or that the Harknesses performed their part of that contract. Platten testified that the contract claim against Kantor was not disputed and that the question was whether the Harknesses could show a contract with Sunset and Directors. Tr. 689. The trial court, in colloquy with counsel, expressed essentially the same view. Tr. 946. This was correct. Oregon follows the objective theory of contracts, under which a contract is most commonly formed by an offer, an acceptance of that offer and an exchange of consideration. *See, e.g.*, *Moro v. State*, 357 Or. 167, 196, 351 P.3d 1, 20 (2015); *Homestyle Direct v. Department of Human Services*, 354 Or. 253, 262, 311 P.3d 487, 492-93 (2013).

The Harknesses' trial counsel, Mr. Krages, pithily stated the contracts in this case at least twice in colloquies with the court:

> "MR. KRAGES: The commission portion pertains to the consideration. The offer that was made was through Joanne Kantor, Sunset's employee, was, you take out a mortgage through us, we'll invest the money in a way that's going to make you a lot more money on the equity of your house. That's – that's the contract."
> Tr. 853.

> "MR. KRAGES: The contract was, you take out a conventional mortgage through us and we will act as your, call it investment advisor, whatever, and place the proceeds of that into these private money loans, and you're going to make a lot of money from that because we're going to invest them only under certain conditions to ensure that these loans are safe."
> Tr. 957-58.

There is no dispute in this case that Joanne Kantor made those representations to the Harknesses and thereby persuaded them to borrow money from her successive employers, Sunset and Directors, using their home and rental property as collateral, and then to turn the money over to her for the purpose of lending it to others. There is also no dispute that Ms. Kantor personally profited from these dealings, and so did Sunset and Directors. Thus, there is no dispute as to the contract elements of offer, acceptance, and consideration, or as to whether the Harknesses performed their part of the bargain. The record establishes Kantor's liability for breach of contract.

The only dispute is over whether Kantor had authority to bind Sunset and Directors to the contracts, and therefore to liability for her breaches when she did not invest the Harknesses' money as she promised. Plaintiffs contend that she did, based on the doctrine of apparent authority.

This Court defined apparent authority in detail in *Badger v. Paulson Investment Co.*, 311 Or. 14, 803 P.2d 1178 (1991). That case was an action

against multiple defendants for damages arising from the sale to the plaintiffs of unregistered securities that proved to be valueless. Plaintiffs' three claims were for sale of unregistered securities and securities fraud, both based on then ORS 59.115(1), and common law fraud, including a request for punitive damages. The defendant whose liability was at issue in this Court, Paulson, was a corporation engaged in the sale of securities as both a broker-dealer and an investment adviser. Two of Paulson's "registered representatives," Lambo and Kennedy, allegedly sold the securities to plaintiffs through fraudulent practices. The plaintiffs sought to hold Paulson liable for the acts of Lambo and Kennedy on an agency theory. The jury returned a verdict for the plaintiffs against all defendants on all claims, including for punitive damages, and made special findings including that "Kennedy and/or Lambo were acting within their apparent authority in selling the securities." The trial judge granted a judgment notwithstanding the verdict to Paulson. *Badger v. Paulson Investment Co.*, at 311 Or. 17-18, 803 P.2d 1179-80. The Court of Appeals reinstated the jury's verdict as to Paulson. This Court granted Paulson's petition for review.

This Court's opinion addressed at length the issue that is relevant to this case: Was the evidence of an apparent agency relationship between Paulson and Kennedy and Lambo sufficient to impose liability on Paulson

for the securities claims? *Id.*, at 311 Or. 23, 803 P.2d 1183. The opinion quoted the applicable rule from the plaintiffs' brief:

> "Where a principal has, by his voluntary acts, placed an agent in such a situation that a person of ordinary prudence is justified in assuming that such agent has authority to perform a particular act and deals with the agent upon that assumption, the law does not permit the principal to claim that the agent was not authorized or even was prohibited from performing the act." *Id.*

The court explained that this principle, "applicable when an agent acts in excess of his or her actual authority but with the appearance of authority, is commonly referred to as 'apparent authority.'" Id., at 311 Or. 24, 803 P.2d 1183. The opinion further explained, quoting Oregon precedent and citing the Restatement (Second) of Agency § 27 (1958), that "[a]pparent authority is created 'only by some conduct of the principal which, when reasonably interpreted, causes a third party to believe that the principal consents to have the apparent agent act for him on that matter,'" and "'[t]he third party must also rely on that belief.'" *Id.* (citations omitted).

The opinion then explained the difference between apparent authority and implied authority:

> " . . . Implied authority arises when an agent, to whom the principal has given direct authorization to complete a particular act on behalf of the principal, performs acts incidental to the authorized endeavor, and the authority to perform those incidental acts is inferred from the original grant of authority. . . .
>
> "Apparent authority, on the other hand, arises when the agent

> does not possess the actual or implied authority to act for the principal in the matter, but 'the principal has clothed the agent with apparent authority to act for the principal in that particular. In other words, the principal permits the agent to appear to have the authority to bind the principal.' . . . Either of these agency relationships can bind the principal, creating liability for the acts of the agent." *Id.*, at 311 Or. 24-25, 803 P.2d 1184 (citations omitted).

Based on those principles, the opinion summarized that, in order for Paulson to be bound by Kennedy's and Lambo's conduct toward the plaintiffs on the theory of apparent authority, it needed to be shown that:

> "1. Paulson provided information to the plaintiffs that was either intended to cause the plaintiffs to believe that Kennedy and Lambo were authorized to act for Paulson, or Paulson should have realized that its conduct was likely to create such belief; and
>
> "2. From information provided by Paulson, or from the conduct of Paulson, the plaintiffs reasonably believed that Kennedy and Lambo were authorized to act for Paulson."
> *Id.*, at 311 Or. 25, 803 P.2d 1184.

The *Badger* opinion concluded the plaintiffs had made those showings, reasoning as follows:

> "There is sufficient evidence to support a finding that Kennedy and Lambo were acting within the apparent authority of Paulson. Paulson is a broker-dealer and investment adviser selling securities in Oregon. Kennedy and Lambo were employed by Paulson as registered representatives. Kennedy and Lambo previously were employed by another securities firm, T.E. Slanker, which went out of business. When Kennedy went to work for Paulson, it sent its customers letters announcing Kennedy's association with Paulson. A second letter was sent a short time later to announce the assignment of Kennedy to several ongoing customer accounts. With these announcements, Paulson, who did not inform its customers of any limitations on Kennedy's authority to act for Paulson, conferred on Kennedy the

authority to represent Paulson in securities sales and investment transactions.

"Following the announcements, conduct evincing a grant of authority continued. Kennedy's written communications with the plaintiffs concerning the securities were on Paulson's stationery, signed by Kennedy, and mailed by Lambo. Information regarding the securities was often enclosed by Lambo in these communications, along with information on securities approved by Paulson.

"Sales presentations touting the securities involved in this case were made by Kennedy and Lambo. The sales presentations occurred on Paulson's premises, and on at least one occasion, during normal business hours. Furthermore, both Kennedy and Lambo received calls regarding the securities at Paulson's place of business.

"At no time were any of the plaintiffs notified that the sale of the securities had not been approved by Paulson or that Kennedy and Lambo were acting solely on their own behalf. There is evidence that Paulson provided information intended to cause third persons to believe that Kennedy and Lambo were authorized to act for it in matters pertaining to the sale of securities, including meeting with customers, making sales presentations, sending mailings and handling paperwork. Although Paulson may have forbade its sales representatives to present or sell nonapproved securities, liability based on the agency principle of apparent authority may be imposed even though the principal expressly forbade the conduct in question.

"There is also evidence that from the information provided to them by Paulson, the plaintiffs reasonably believed that Kennedy and Lambo were authorized to act for Paulson concerning the securities sold by Kennedy and Lambo to the plaintiffs. The investors testified to their reliance on this apparent authority.

"The evidence is sufficient to support the jury's verdict that Kennedy and Lambo conducted the illegal sales with the apparent authority of Paulson. Paulson, therefore, is liable as a principal for the plaintiffs' damages."
Id., at 311 Or. 25-27, 803 P.2d 1184-85 (citation omitted).

The rule that the principal's liability for the conduct of an agent acting within the agent's apparent authority is not eliminated by the fact that the agent had a secret or dishonest purpose to benefit himself by engaging in misconduct that the principal did not actually authorize has long been recognized in English and American law, although not in vocabulary identical to that used in the Restatement (Second) of Agency. *See, e. g.*, *Gleason v. Seaboard Air Line Ry. Co.*, 278 U. S. 349, 49 S. Ct. 161 (1929), and precedents cited therein.

This Court, in the context of a negligence claim, has reaffirmed the test for apparent authority from *Badger v. Paulson Investment Co.*, at least as to cases such as this in which the existence of an agency relationship is undisputed. *See Eads v. Borman*, 351 Or. 729, 735-37, 277 P.3d 503, 508-09 (2012).

Applying the standards from *Badger*, *Eads*, and *Gleason*, the record in this case contains extensive evidence that Kantor had apparent authority from Sunset and Directors in her dealings with the Harknesses. The Harknesses learned of Kantor through her advertisement as a loan officer at Sunset Mortgage Company, which offered real estate loan and investment services. Tr. 453-54. They then met with her at the Sunset offices and believed she represented Sunset. Tr. 202-08, 212, 455. On Kantor's advice,

the Harknesses borrowed approximately $637,000 from Sunset, using the equity in their residence as collateral, and then turned this money over to her to make short term loans on their behalf. Tr. 208-12, 224-33; Ex. 5. Kantor prepared documents regarding the loans on Sunset's letterhead. *See* Exs. 3a and 7. The very first loan the Harknesses made through Kantor involved Mrs. Harkness making out a cashier's check to Sunset. Tr. 223.

Kantor continued to deal with the Harknesses in the same manner after she moved to Directors. Tr. 459-62. As part of those dealings, the Harknesses borrowed an additional $196,800.00 from Directors, secured by a mortgage on a rental home they owned and borrowed another $172,800.00 on an equity line of credit from Directors. Tr. 259-61, 273; Exs. 13A and 13B. During that time, Mrs. Harkness, who handled most of these matters, met with and telephoned Kantor at Directors. Tr. 256-65, 459-62. Kantor's assistant at Director's, Ellen Tillotson, also dealt with Mrs. Harkness on Kantor's behalf. Tr. 263-65. Mrs. Harkness testified she believed she was dealing with Directors and otherwise would not have continued dealing with Kantor. Tr. 261-62, 272-73.

Defendant Platten's co-counsel, Flaherty, testified that although there was no direct evidence that the owners of Sunset and Directors knew what

Kantor was doing, she used their letterheads and forms, and the two companies received commissions off of those loans. Tr. 544-49, 584.

Some of the trust deeds for the loans Kantor purported to have made with the Harknesses' funds include instructions that they are to be returned to Sunset Mortgage after recording. *See* Exhibits H through N to the Affidavit of Hafez Daraee that is part of Exhibit 26 in this case. A number of the borrowers' payments were sent to the Sunset and Directors offices and Kantor would then deposit the money to the Harknesses' bank account. Tr. 250-51, 254, 262.

In his declaration in the *Kantor* lawsuit, Todd W. Johnson, Sunset's president and co-defendant, while asserting that the loans Kantor made with the money the Harknesses borrowed from Sunset were not the type of business Sunset conducted, also stated that in making those loans Kantor was competing with Sunset because Sunset could have made them instead "on a conventional basis." *See* ¶ 8 to Declaration of Todd W. Johnson, which is Exhibit A to the affidavit of attorney Hafez Daraee that is part of Exhibit 26 in this case.

In his deposition, excerpted as Exhibit C to the same Daraee affidavit, Johnson also testified, at pages 5-8, that Sunset was a "mortgage finance provider" and a "mortgage broker" that used both its own and others' money

to make secured real estate loans, and that Kantor was employed there on commission for eight years as a loan officer whose function was to originate loans.

In the excerpts from his deposition filed in response to Sunset's summary judgment motion, Johnson also testified that there could be "a time that a hard money loan [the sort of loans that Kantor told the Harknesses she was making with their funds] would be a benefit" as part of his "creative approach" to making loans. Pages 33-35 of Exhibit B to Exhibit 27A in this case. Johnson further testified that, while this activity by Kantor was not part of her job at Sunset and she never told him about it, telling clients they could use the equity in their real property to make more money is something a good loan officer could do, and loan officers at Sunset were encouraged to go out and find business. *Id.*, pages 40-42, and 55. There is no evidence in the record showing the Harknesses should have known of the limits place on Kantor's authority by Sunset's internal protocols.

Kantor testified that the loans made with the Harknesses' funds "were not Sunset Mortgage or Directors Mortgage loans," but were "done during my course of employment at Directors or Sunset." Page 206 of the Excerpts from the December 5, 2006, deposition of Joanne Kantor that is Exhibit O to the Affidavit of Hafez Daraee that is part of Exhibit 26 in this case. She

only testified that her dealings with the Harknesses were not part of her job at Directors because she had since learned that Directors' owner, Mark Hanna, did not allow loan officers to engage in such transactions. *Id.*, pages 233-35. The only loans that originated while Kantor was at Directors rather than at Sunset were those to the Walls, who Mrs. Harkness later learned were Kantor's parents, and a number of the other loans were renewed after Kantor left Sunset. Pages 259-61, and 291 of the December 6, 2006, deposition of Mrs. Harkness that is Exhibit G to Mr. Daraee's affidavit in Exhibit 26.

The trial court in this case failed to properly apply the *Badger* and *Gleason* standards, in part because it conflated the concepts of actual and apparent authority and concluded Sunset and Directors could not be liable because the evidence did not show those employers specifically gave her the authority to "create those loans" with the Harknesses' funds, even though the Harknesses' counsel pointed out in response that "apparent authority doesn't require that the principal affirmatively give the agent the authority." *See* ER 25, Tr. 948.

Furthermore, Sunset does not escape liability for breach of contract with respect to the loans that were renewed or "rolled over" after Kantor moved to Directors, including the forged Berning loan. When those loans

ultimately went unpaid, the Harknesses continued to suffer damages as a result of Kantor's misconduct while she was at Sunset. As the Harknesses' counsel pointed out in colloquy with the trial court, "[w]e don't remedy a breach of contract by, you know, passing it on to someone else." Tr. 964. The Harknesses also continued to be liable on and suffer loss from the mortgage on their home after Kantor moved to Directors.

The Court of Appeals' decision in this case, while providing a more extensive and different analysis from the trial court, was, unfortunately, perhaps more flawed. The linchpin of the Court of Appeals' analysis of the apparent authority question is the following holding:

> ". . . Plaintiffs seek to bind Sunset and Directors to an entire investment scheme whereby plaintiffs handed over significant funds from their conventional mortgage refinance to Kantor to invest as opportunities came along based solely on Kantor's oral promises that the investment vehicles (the hard-money loans) would be 'secure.' It was not objectively reasonable for plaintiffs to believe that that type of investment scheme was part of Kantor's job as a 'loan officer,' nor did Sunset or Directors provide any information to plaintiffs, whether directly or indirectly, that such a scheme or financial advice was part of Kantor's job. Giving Kantor the title of 'loan officer' and an office and access to letterhead is not the type of information that Sunset or Directors should have realized would cause a third party to believe that Kantor had the authority to set up such an investment scheme. . ."

Slip opinion, page 15, line 20, through page 16, line 9.[10]

[10] *Harkness v. Platten*, at 270 Or. App. 273, 348 P.3d 1153.

That holding was based on both an unduly circumscribed view of the evidence in this case and an unduly circumscribed interpretation of this Court's *Badger v. Paulson Investment Company, Inc.* decision. The Court of Appeals' decision disregards much of the evidence that was admitted in the trial court without objection. It holds that the only relevant evidence on the question of apparent authority was as follows:

> "Kantor had a business card that indicated she was a loan officer at Sunset; Kantor was a loan officer at Sunset and then Directors; plaintiffs met with Kantor at her office located in Sunset's offices and then Directors' offices; Kantor prepared documentation on Sunset's and then Directors' letterhead; plaintiffs dealt with Kantor's assistant at Directors'; and Sunset and Directors were in the business of brokering conventional loans"

Slip opinion, page 15, lines 5 – 10.[11]

Of the Court of Appeals' stated decisions to disregard evidence, probably the most significant is the following:

> "We also must disregard the evidence related to Kantor arranging for plaintiffs to take out a conventional loan from Sunset and Directors and the companies receiving a commission on those loans because those acts were within Kantor's actual authority as a loan officer for Sunset and Directors and are not evidence that Kantor had apparent authority to do more than just that."

Slip opinion, page 14, line 14, through page 15, line 3.[12]

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[11] *Harkness v. Platten*, at 270 Or. App. 272-73, 348 P.3d 1153.
[12] *Harkness v. Platten*, at 270 Or. App. 272, 348 P.3d 1153.

The Court of Appeals' appears to hold that an act within the agent's actual authority is irrelevant to and cannot be part of the group of facts establishing apparent authority, for which the court does not cite any precedent. If that were the law then, for example, Kantor's acts treated as relevant by the Court of Appeals, as quoted above (distributing business cards identifying herself as a loan officer, meeting with the plaintiffs in her offices on the employers' premises, using her employers' stationery), should also have been disregarded, as should the evidence in *Badger* that the dishonest salesmen had actual authority from Paulson to sell securities.

The Court of Appeals' decision does not reject but simply ignores the deposition testimony of Sunset's President, Todd Johnson, in the underlying case, which was introduced as evidence for the jury's consideration in this case as parts of Exhibits 26 and 27A, was summarized in the Appellants' Opening Brief at pages 12, 14, and 35 in that court, and is summarized again in this brief at pages 12-13 and 28. It was to the effect that advising clients to use the equity in their real estate to make money through "hard money" loans to third persons could be part of a loan officer's job, although it was not part of Kantor's job at Sunset.

Johnson's testimony contradicts the Court of Appeals linchpin holding, quoted above, that, as a matter of law, it was not objectively

reasonable for Mr. and Mrs. Harkness to believe that Kantor's dealings with them were part of her job as a loan officer. That type of transaction was not part of Kantor's job as a loan officer only because of the companies' internal protocols, which the Court of Appeals' decision holds Mr. and Mrs. Harkness were responsible to know as a matter of law. There was no evidence that they did know them or as to why they should have known them, other than the court's assumed definition of "loan officer." These were at least jury questions, not matters for a directed verdict.

The Court of Appeals' decision, immediately after quoting similar language from *Badger*, quotes from *Eads v. Borman* where, in reaffirming *Badger*, this Court's majority opinion stated "the principal must take some affirmative step in creating the appearance of authority, one that the principal either intended to cause or 'should realize' likely would cause a third party to believe that the putative agent has authority to act on the principal's behalf" and "[i]n assessing the reasonableness of the reliance, the analysis is influenced by what is customary and usual for certain positions or within certain professions." Slip opinion, page 11, lines 10-17.[13]

The Court of Appeals did not discuss the essence of the *Badger* standard, noted above, that

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[13] *Harkness v. Platten*, at 270 Or. App. 270, 348 P.3d 1145.

> "Where a principal has, by his voluntary acts, placed an agent in such a situation that a person of ordinary prudence is justified in assuming that such agent has authority to perform a particular act and deals with the agent upon that assumption, the law does not permit the principal to claim that the agent was not authorized or even was prohibited from performing the act."

Badger, at 311 Or. 23, 803 P.2d 1183 (also quoted and discussed at pages 29-30 of the Appellants' Opening Brief). It is especially important in the context of this case that the Court of Appeals' decision does not acknowledge the related rule that the principal's liability for the conduct of an agent acting within the agent's apparent authority is not eliminated by the fact that the agent had a secret or dishonest purpose to benefit himself by engaging in misconduct that the principal did not actually authorize, as Ms. Kantor did here.

While not acknowledging those rules, the Court of Appeals' decision noted, as though important, that Kantor was not performing duties for which she was hired as a loan officer and that there was no evidence the control persons at Sunset or Directors were aware of Kantor's arrangement with Mr. and Mrs. Harkness. *See* slip opinion, page 4, lines 4-10.[14]

In summary, the Court of Appeals' decision disregards Sunset President Johnson's testimony, and disregards the holdings in *Badger* and other leading case law that apparent authority can exist even when the agent

[14] *Harkness v. Platten*, at 270 Or. App. 264, 348 P.3d 1148.

is acting contrary to the principal's instructions or for dishonest personal gain. It specifically rejects evidence of the mortgage loans to Mr. and Mrs. Harkness from which Sunset and Directors benefited, because those loans were within Kantor's actual authority. Instead, the court's decision emphasizes that in making the "hard loans" Kantor was not performing the job for which she was hired and that her superiors did not know about her conduct. The court then holds Mr. and Mrs. Harkness were not objectively reasonable in believing that the investment scheme she marketed to them was part of her job as a "loan officer." Slip opinion, page 16, lines 3-4.[15] In all of this, the Court of Appeals' decision badly confuses the doctrines of actual and apparent authority.

Finally, in distinguishing *Badger* from this case, the Court of Appeals' decision oversimplifies the relevant facts of *Badger*. *See* slip opinion at pages 16-17. It fails to acknowledge that, as this Court carefully described in *Badger*, and as the discussion of *Badger* at pages 28-33 of the Appellants' Brief in this case makes clear, the sale of unregistered securities by the salesmen agents was not merely unapproved by the principal, Paulson Investment Company, but was illegal. Nevertheless, Paulson was held liable on the basis of apparent authority in large part because the sale of securities

[15] *Harkness v. Platten*, at 270 Or. App. 273, 348 P.3d 1153.

in general was Paulson's business and the salesmen had actual authority to sell securities.

Kantor's conduct here also involved the making of ostensibly secured loans on real property transactions at both ends of the deal, which was Sunset's and Directors' business, and Kantor had actual authority to make loans. Indeed, based on Sunset President Johnson's testimony, unlike the illegal unregistered securities in *Badger*, the "hard money loans" here could have been part of a real estate mortgage company's business. There was no evidence that loans and investments of that type were illegal. There is no basis for holding Mr. and Mrs. Harkness as a matter of law to the knowledge that they were not part of the companies' business, especially when the only evidence in the record that they were not was evidence of Sunset's and Directors' internal protocols, and both the mortgage loans from those companies to the Harknesses and their "hard money loans" to third parties, were closely related integral parts of the program Kantor sold them.

Plaintiffs were entitled to a jury determination of whether they should have prevailed in the underlying case on their tort claims arising out of Kantor's conduct, based on the doctrine of *respondeat superior*.

The trial court also failed to properly determine the liability of Kantor's codefendant employers in the *Kantor* lawsuit on the other theories, which were essentially torts. Such liability arises under the doctrine of

respondeat superior, by which an employer is vicariously liable for an employee's tortious conduct, including intentional torts, when the employee acts within the scope of employment. This Court's opinion in *Chesterman v. Barmon*, 305 Or. 439, 442, 753 P.2d 404, 406 (1988), explains that doctrine and lists three requirements that must be met in order to establish that the employee's conduct was within the scope of employment: (1) the conduct must have occurred substantially within the time and space limits authorized by the employment; (2) the employee must have been motivated, at least partially, by a purpose to serve the employer; and (3) the act must have been of a kind that the employee was hired to perform.

The trial court in this case conflated the concept of *respondeat superior* liability for tort claims with the concept of apparent authority that applied to the breach of contract claims in the *Kantor* lawsuit, although the Harknesses' trial counsel pointed out the difference. *See* ER 40-41, 43-47; Tr. 1002-03, 1006-10. As a practical matter, however, it only makes a potential difference with respect to the second element for *respondeat superior* liability – that the employee must have been motivated, at least partially, by a purpose to serve the employer – which is not part of the test for apparent authority. The evidence for the first and third elements – that the conduct must have occurred substantially within the time and space

limits authorized by the employment, and the act must have been of a kind that the employee was hired to perform – is the same as the evidence for Kantor's apparent authority discussedin this brief above, at pages 26-30, with respect to the breach of contract claim.

The evidence for the second element of *respondeat superior* liability is present in the fact that Kantor persuaded the Harknesses to obtain the funds which she would then purportedly lend to other borrowers by taking out loans from Sunset and Directors, using as collateral their equities in first their residence and then a rental house that they owned. A jury could find that these loans to the Harknesses, which Kantor arranged in her capacity as a loan officer with first Sunset and then Directors, had a partial purpose to benefit, and did benefit, those two employers.

Because of these flaws in the trial court's analysis, it never addressed the substance of the Harknesses tort claims alleged against Kantor, Sunset, and Directors in the underlying case. The evidence summarized in the summary of facts, above (pages 6-17), established most, if not all of those claims as they were alleged in the Second Amended Complaint in that case. *See* Ex. 25. Indeed, the trial court described Ms. Kantor as a "true villain" and opined that it was "a crying shame that Ms. Kantor hasn't spent some time behind bars for her actions" (Tr. 1011), thus indicating that the tort

claims against Kantor were valid and the court was only rejecting the *respondeat superior* liability of her employers.

The Court of Appeals addressed Plaintiffs' vicarious tort liability claim against Defendants Sunset and Directors under the doctrine of *respondeat superior* only in footnote 6 of its decision. Citing and quoting the same three element test and authority that Plaintiffs cited and quoted (pages 37-38, above), the footnote then quotes Plaintiffs as contending only that the evidence of the first and third elements "is the same as the evidence for Kantor's apparent authority discussed above with respect to the breach of contract claim," opines that Plaintiffs "did not raise or develop any legal arguments as to how that evidence meets the *respondeat superior* elements," and declines to address the doctrine.

The analysis in the Court of Appeals' footnote is mystifying. Plaintiffs' argument in support of the *respondeat superior* theory, including the legal authority stating the three-element test and the quoted reference to the supporting evidence for the first and third elements is found at pages 38-40 of the Appellants' Opening Brief. What Plaintiffs actually said as to those two elements was as follows:

> ". . .The evidence for the first and third elements – that the conduct must have occurred substantially within the time and space limits authorized by the employment, and the act must have been of a kind that the employee was hired to perform – is the same as the

> evidence for Kantor's apparent authority discussed above with respect to the breach of contract claim."

Appellants' Opening Brief, pages 39-40. The referenced supporting evidence is discussed in detail at pages 33-36 of that brief. All of that evidence and discussion applies to the first and third elements of *respondeat superior*. There was nothing to add regarding how that evidence applied to those two elements. Repeating that discussion would have wasted the court's time.

Although not acknowledged in the Court of Appeals' footnote, Plaintiffs also addressed as follows the second element of the test for *respondeat superior* liability:

> "The evidence for the second element of *respondeat superior* liability is, however, present in the fact that Kantor persuaded the Harknesses to obtain the funds which she would then purportedly lend to other borrowers by taking out loans from Sunset and Directors, using their equities in first their residence and then a rental house that they owned as collateral. A jury could find that these loans to the Harknesses, which Kantor arranged in her capacity as a loan officer with first Sunset and then Directors, had a partial purpose to benefit, and did benefit, those two employers."

Appellants' Opening Brief, page 40.

This Court has explained that, in the intentional tort context, it is not necessary that the intentional tort itself was committed in furtherance of any interest of the employer or was even of the same kind of activity that the employee was hired to perform. That circumstance is rare and not necessary

for vicarious liability. Instead, the focus should be on whether conduct that was within the scope of employment arguably resulted in the acts that caused the plaintiff's injury. *Fearing v. Bucher*, 328 Or. 367, 375-76, 977 P.2d 1163, 1167 (1999) (allegations in complaint held sufficient to state a claim of vicarious liability based on doctrine of *respondeat superior* against archdiocese for sexual abuse suffered at hands of priest). *Accord*, *Lourim v. Swensen*, 328 Or. 380, 386, 977 P.2d 1157, 1160 (1999) (same holding regarding vicarious liability of Boy Scouts for sexual abuse of minor scout by adult volunteer). This case is not within the exception from the *Fearing* and *Lourim* holdings that applies when the employee's intentionally tortious conduct occurs outside of the time and space limits of employment. *See Minnis v. Oregon Mutual Insurance Co.*, 334 Or. 191, 206, 48 P.3d 137, 145 (2002).

In addition to the unfairness to Plaintiffs of the manner in which the Court of Appeals' decision treated their *respondeat superior* argument, the decision is likely to result in confusion as to what is needed to support that theory under the three-element test stated by this court in *Chesterman v. Barmon*. This is at least in part because the Court of Appeals' decision itself spends several pages describing most of the evidence that is relevant to both

the apparent authority and *respondeat superior* theories, and then summarizes, in contradiction of its later footnote 6:

> "Thus, as presented to the trial court below (and again on appeal to us) both plaintiffs' apparent authority and *respondeat superior* theories were based on the same argument and evidence – Sunset and Directors clothed Kantor with the apparent authority to engage in the investment scheme with plaintiffs on behalf of the companies as part of her employment as a loan officer with the companies."

Slip opinion, page 10, lines 9-13.[16]

CONCLUSION

There was at least sufficient evidence to submit to a jury in this case the "case within a case" question of whether Mr. and Mrs. Harkness should have prevailed on their claims against Sunset and Directors under the doctrines of apparent authority and *respondeat superior*. The trial court's decision in this case granting a directed verdict to Defendant on those issues at the close of Plaintiffs' case, and the Court of Appeals' decision affirming

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[16] *Harkness v. Platten*, at 270 Or. 269, 48 P.3d 1151.

the trial court's judgment, should both be reversed, and this case should be remanded for a new trial.

Respectfully submitted,

s/ Emil R. Berg

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I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b)(i)(A), and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 10,141 words.

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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2015 I served the foregoing Petitioners' Brief On the Merits on

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