

IN THE SUPREME COURT OF THE STATE OF OREGON

JOHN HARKNESS and SHERRI HARKNESS,
Plaintiffs-Appellants / Petitioners on Review,

v.

JACK R. PLATTEN,
Defendant-Respondent / Respondent on Review.

Washington County Circuit Court No. C092970CV
Court of Appeals Case No. A147439
Supreme Court Case No. S063222

**RESPONDENT ON REVIEW JACK R. PLATTEN'S
BRIEF ON THE MERITS**

Appeal from a Judgment of the Circuit Court of the State of Oregon
for Washington County
Honorable Charles D. Bailey, Circuit Court Judge

**Decision of the Court of Appeals Opinion
filed April 8, 2015
Before Armstrong, Presiding Judge, and Egan, Judge,
and Nakamoto, Judge**

NOVEMBER 2015

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I. Questions presented on review.

First Question: Petitioner acknowledges in its brief on the merits that it does not seek a modification of the common law standard for determining apparent authority, as set forth in *Badger v. Paulson Investment Company Inc.*, 311 Or 14, 803 P2d 1178 (1991). Petitioner's argument that the Court of Appeals misapplied that standard is in essence an argument that this court should review the evidentiary record *de novo* and reach a determination different than that reached by the trial court and the Court of Appeals regarding the sufficiency of the evidence to support a claim under a theory of apparent authority.

Second Question: Similarly, petitioner does not seek any modification of the law with regard to the standard for imposing vicarious liability on a principal, as set forth in *Chesterman v. Barmon*, 305 Or 439, 753 P2d 404 (1988). Again, petitioner is simply asking this court to review the evidentiary record *de novo* and reach a determination different than recorded by the trial court and the Court of Appeals regarding the sufficiency of the evidence to support a claim that Sunset and Directors were vicariously liable for Kantors' conduct.

II. Supplemental statement of facts.

Respondent adopts the Court of Appeals statement of relevant facts as set forth in its opinion, 270 Or App at 262-65.

III. Summary of the argument.

The trial court and the Court of Appeals both correctly applied the legal standard set forth in *Badger v. Paulson Investment Co., Inc.*, 311 Or 14, 803 P2d 1178 (1991), for imposing liability on a principal based the theory of apparent authority. Both the trial court and the Court of Appeals correctly applied the legal standard for imposing liability on a principal based on the theory of *respondeat superior*, as set forth in *Chesterman v. Barmon*, 305 Or 439, 753 P2d 404 (1988). As the Court of Appeals noted in its opinion, plaintiffs relied on the same evidence to support its theories of apparent authority and *respondeat superior*. The trial court and the Court of Appeals both determined that that evidence was insufficient to support a claim against Sunset or Directors under either theory. In essence, petitioner is asking this Court to review the evidentiary record *de novo* and reach a determination different than that reached by the trial court and the Court of Appeals regarding the sufficiency of evidence to support a claim under either the apparent authority or vicarious liability theories.

IV. Argument.

A. The Court of Appeals correctly articulated the standard for determining apparent authority as established in *Badger* and reaffirmed in *Eads*.

Apparent authority is an agency theory that applies when an agent acts in

excess of his or her actual authority but with the appearance of authority. The

Court of Appeals in this case stated:

“Apparent 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. The third party must also rely on that belief.” 270 Or App 269 [quoting *Badger, supra*]). The touchstone for apparent authority is that the principal must be responsible for the information that leads a third party to reasonably believe that the principal consents to the agent’s acts. That is, ‘the principal must take some affirmative step in creating the appearance of authority,’ and 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.’ *Eads v. Borman*, 351 Or 729, 737, 277 P3d 503 (2012). (Citing *Badger*, 311 Or at 24, n 9).” 270 Or App 269 (emphasis added).

Neither Petitioner nor Amicus Curiae disputes that this is a correct statement of the law regarding apparent authority.

B. The Court of Appeals did not misapply or in any way undermine the holding of *Badger*.

Petitioner contends that the Court of Appeals misapplied the principal of apparent authority in two respects:

“(1) Liability based on the principal of apparent authority may be imposed not only for conduct that the principal does not authorize, but also may be imposed for conduct that the principal expressly forbade, and (2) Liability based on the principal of apparent

authority is not negated by the fact that the agent had a secret or dishonest purpose to benefit herself.” (Petitioners’ Brief on the Merits, p. 2.)

There is nothing in the Court of Appeals’ opinion that remotely suggests that its decision was premised on the fact that the conduct that Kantor engaged in was expressly forbidden by Sunset and Directors. There is nothing in the Court of Appeals’ opinion suggesting the doctrine of apparent authority was not applicable because Kantor had a secret or dishonest purpose to benefit herself. Rather, the cornerstone of the Court of Appeals’ opinion was that there was no evidence that Sunset and Directors had provided any information to plaintiffs that was intended to cause, or that Sunset and Directors should have known would cause, plaintiffs to believe that Kantor was authorized to act on behalf of Sunset and Directors to propose and then carry out an investment scheme using the proceeds of conventional mortgages to fund private loans. 270 Or App 269 (2015).

The Court of Appeals’ decision in this case was premised on its determination that there was insufficient evidence that Sunset and Directors had said or done anything to create the appearance that Kantor was authorized to act on their behalf as a financial advisor and propose, and then carry out, an investment scheme involving the placement of private loans. The decision was

in no way premised on a holding that the theory of apparent authority was not available to plaintiffs because Kantor was expressly forbidden to participate in such an investment scheme in the course of her employment for Sunset and Directors, nor was it in any way premised on a holding that Kantor's dishonest motives precluded imposition of liability on Sunset and Directors under a theory of apparent authority.

C. The Court of Appeals correctly held that *Badger* was factually distinguishable.

The Court of Appeals concluded that Plaintiff's reliance on *Badger* to make their case for apparent authority was misplaced. After reciting the pertinent facts in *Badger*, the Court of Appeals, in this case, concluded:

“That circumstance is in sharp contrast to this case, in which neither Sunset nor Directors provided any information to Plaintiffs from which they could reasonably conclude that Kantor was authorized by them to act as a financial advisor to, or engage in investment schemes with, its mortgage customers.” 270 Or App at 273-74.

The Court of Appeals' finding that *Badger* was factually distinguishable in no way “undermines” the holding of *Badger*.

D. The Court of Appeals correctly concluded that the evidence in the record did not support a finding of apparent authority.

For Sunset or Directors to be bound by Kantor's conduct in engaging in

the investment scheme with plaintiffs, plaintiffs had to show that (1) Sunset and Directors, provided information to plaintiffs that was intended to cause, or Sunset and Directors should have known would cause, plaintiffs to believe that Kantor was authorized to act on behalf of Sunset and Directors, in proposing, and then acting as a financial advisor in carrying out, the investment scheme; and (2) based on that information, plaintiffs reasonably believed that Kantor was so authorized. *Badger*, 311 Or at 25; *see also Eads*, 351 Or at 737.

The Court of Appeals concluded that plaintiffs did not put on sufficient evidence of apparent authority to survive defendant's directed-verdict motion.

The Court of Appeals stated:

"Plaintiffs presented no evidence that Kantor had the apparent authority to give investment advice on behalf of either company, engage in the proposed investment scheme, or, for the contract claim, bind Sunset or Directors to the oral terms of that scheme. We start our discussion with the evidence that must be disregarded under the law of apparent authority *because there was no evidence presented that that information came from Sunset or Directors*: (1) the homemade flyer at John's workplace; (2) the notes directing borrowers to deliver payments to Kantor's office (viz., the address of Sunset's and then Directors' office); and (3) Sherri delivering a cashier's check to Kantor that was made out to Sunset. 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." 270 Or App at 272 (emphasis added).

The Court of Appeals then stated that plaintiffs were left with the following evidence to support the apparent authority theory:

“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.” 270 Or App at 272-73.

The Court of Appeals found that evidence insufficient to bind Sunset and Directors to an investment scheme whereby plaintiffs handed over significant funds from conventional mortgage loans to Kantor to invest in private loans. The Court of Appeals correctly determined that neither Sunset nor Directors provided any information to plaintiffs, directly or indirectly, from which plaintiff could reasonably conclude that such a scheme or financial advice was part of Kantor's job as a loan officer for Sunset and Directors.

E. The Court of Appeals did indirectly address the issue of *respondeat superior* and correctly affirmed the trial court's directed verdict on the tort claims.

With regard to the third element of respondeat superior, the Court of Appeals noted:

“[I]t was undisputed that Kantor, in fact, was not performing duties for which she was hired as a loan officer, with regard to the investment scheme and hard money loan arrangements - that type of transaction was not part of the business of either

Sunset or Directors, and neither Sunset nor Directors received any fees or commissions from the hard money loans.” 270 Or App at 264.

The Court of Appeals also noted that plaintiffs conceded that there was no evidence that Kantor had any actual authority as part of her employment to engage in such an investment scheme. 270 Or App at 268 n 4. The Court of Appeals noted that, in both the trial court and in the Court of Appeals, plaintiff’s apparent authority and *respondeat superior* theories were based on the same argument and evidence; that is, that Sunset and Directors clothed Kantor with the apparent authority to engage in the investment scheme on their behalf. Plaintiffs acknowledge below that the evidence regarding the first and third elements of *respondeat superior* with regard to the tort claims was the same evidence plaintiffs relied on to support its claim of apparent authority on the contract claim. 270 Or App at 271, n 6.

Plaintiff did not present any argument, either in the trial court or in the Court of Appeals, that the quantum proof necessary to establish apparent authority on the tort claims was somehow different than the quantum of proof necessary to establish apparent authority on the contract claim. For the same reasons that the Court of Appeals found the evidence on the record to be insufficient to support the theory of apparent authority on the contract claim, the

evidence was insufficient to support plaintiff's theory of apparent authority on plaintiff's tort claims.

F. The petition for review in this case was improvidently granted.

Where are the legal issues to be decided? There is no dispute that this court's holding in *Badger, supra*, is controlling on the issue of apparent authority. Neither Petitioner nor Amicus Curiae has asked for any modification of this court's holding in *Badger*. Neither has identified any aspect of the *Badger* holding that requires clarification. Simply put, Petitioner is asking this court to review the trial court record *de novo*, and reach a determination different than that reached by the Court of Appeals regarding the sufficiency of the evidence to support plaintiffs' apparent authority theory, which was the linchpin of both their contract and tort claims.

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V. Conclusion.

Defendant asks this court to dismiss the Petition for Review as improvidently granted, or in the alternative, to affirm the decision of the Court of Appeals.

Dated: November 12, 2015.

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**CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH
AND TYPE SIZE REQUIREMENTS**

Brief Length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief is 2097.

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I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes, as required by ORAP 5.05(4)(f).

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CERTIFICATE OF SERVICE

I hereby certify that I served the following *Respondent on Review Jack R. Platten's Brief on the Merits* with the State Court Administrator using the Appellate Court e-file system, which will send notification of such filing to the following:

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