

IN THE SUPREME COURT OF THE STATE OF NEVADA

CRAIG A. MUELLER, ESQ.,  
INDIVIDUALLY; AND CRAIG A.  
MUELLER, PC, A PROFESSIONAL  
CORPORATION D/B/A CRAIG A.  
MUELLER AND ASSOCIATES,  
Appellants,  
vs.  
PAYROLL SOLUTIONS, INC., A  
NEVADA CORPORATION; AND U.S.  
EXPRESS LEASING, INC., A NEVADA  
CORPORATION,  
Respondents.

No. 53010

**FILED**

**MAY 23 2012**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *Tracie K. Lindeman*  
DEPUTY CLERK

ORDER AFFIRMING IN PART,  
REVERSING IN PART, AND REMANDING

This is an appeal from a district court judgment in a contract and tort action. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

On appeal, appellants assert that the district court's findings, that appellants' former office manager had apparent authority to enter into a lease agreement and that respondent U.S. Express Leasing, Inc., was entitled to recover on its counterclaim for breach of the agreement, were not supported by substantial evidence. Appellants also contend that the district court erred by concluding that respondent Payroll Solutions, Inc. (PSI), was not liable for damages under the agreement between appellant Craig A. Mueller, P.C. (CAM) and PSI, since PSI did not perform

a background check on the former office manager who later embezzled money from appellants.

This court defers to the district court's findings unless they are clearly erroneous or not based upon substantial evidence. Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 238, 955 P.2d 661, 664 (1998). Substantial evidence is evidence that "a reasonable mind might accept as adequate to support a conclusion." Id. (internal quotations and citations omitted). Whether an agent had authority to proceed as she did is a question for the trier of fact, and findings in that regard will not be disturbed when they are adequately supported by the record. Western Indus., Inc. v. General Ins. Co., 91 Nev. 222, 226-27, 533 P.2d 473, 476 (1975). Under agency law, "an agent must have actual authority, express or implied, or apparent authority" to bind the principal. Dixon v. Thatcher, 103 Nev. 414, 417, 742 P.2d 1029, 1031 (1987). Apparent authority exists when the principal places an agent in such a position that the agent appears to have the authority claimed or exercised. Id.

Here, after a three-day bench trial, the district court found that appellants' former office manager had apparent authority to enter into an agreement for the lease of copy machines with a company that provided such services. The court found that in negotiating the agreement, the company was provided with a copy of an earlier contract with a different copy machine supplier, which was executed by the previous office manager, lending credence to the apparent authority of appellants' office managers to execute copy machine leases. See Great American Ins. v. General Builders, 113 Nev. 346, 352, 934 P.2d 257, 261 (1997) (providing that the party claiming that apparent authority existed "must prove (1) that [it] subjectively believed that the agent had authority

to act for the principal and (2) that [its] subjective belief in the agent's authority was objectively reasonable"). The record also demonstrates that the copy machines were in appellants' office and appellants were aware of them and using them, and did not seek to return them until months after the lease was negotiated. The district court ultimately concluded that U.S. Express Leasing, as a bona fide purchaser of the agreement, was entitled to recover against appellants under the agreement for the deficiency following the sale of the copiers. As substantial evidence supports the district court's findings, we affirm this portion of the district court's judgment.

With regard to the claims against PSI, the court found that appellants failed to demonstrate that PSI breached its contract with CAM by not performing a background investigation on the office manager before hiring her, and that CAM failed to show that PSI breached its duty of care and was negligent in hiring the office manager, thereby foreseeably and proximately causing the damages associated with the office manager's subsequent misappropriation of funds.


On January 12, 2011, this court received a letter from Howard Winters, purportedly acting in proper person on behalf of PSI, stating that he directed counsel not to defend this appeal. Winters further explained that PSI is no longer a going concern, its assets have been sold, and its employees have been terminated, and that he is leaving the country.<sup>1</sup> When PSI did not file an answering brief, this matter was submitted for a

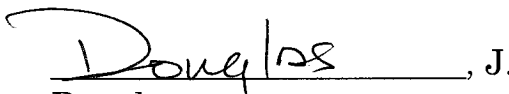
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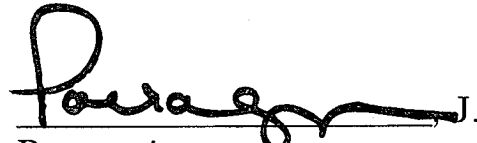
<sup>1</sup>It is unclear why Winters, not PSI's attorney of record Martha J. Ashcraft, submitted the letter notifying this court of PSI's intention not to file an answering brief, as Ashcraft never filed a motion to withdraw, and she thus remains the attorney of record in this appeal.

decision. Since PSI failed to file an answering brief, we treat the failure as a confession of error. NRAP 31(d) (noting that this court may treat a respondent's failure to file a brief as a confession of error). As PSI has conceded we error, we reverse the district court's judgment as it pertains to PSI only and remand this matter to the district court for entry of judgment in favor of appellants on their claims against PSI. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Elizabeth Goff Gonzalez, District Judge  
Stephen E. Haberfeld, Settlement Judge  
Mueller Hinds & Associates  
Martha J. Ashcraft  
Deaner, Malan, Larsen & Ciulla  
Eighth District Court Clerk