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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JACQUELINE ARCE, et al. Plaintiffs and Appellants, v. ASSOCIATED STUDENTS, CALIFORNIA STATE UNIVERSITY, NORTHRIDGE, et al., Defendants and Respondents.	B238387 (Los Angeles County Super. Ct. No. BC427228)

APPEAL from a judgment of the Superior Court of Los Angeles County. Frank J. Johnson, Judge. Reversed.

Law Offices of Shawn A. McMillan, Shawn A. McMillan, Stephen D. Daner and Samuel H. Park for Plaintiffs and Appellants.

Prindle, Amaro, Goetz, Hillyard, Barnes & Reinholtz, Michael L. Amaro and Sanaz Cherazaie for Defendants and Respondents.

INTRODUCTION

Appellants Jacqueline Arce and Antonio L. filed a complaint alleging that daycare provider Holly Downs had injured their 11-month old child either through an intentional battery or through her negligent supervision. The plaintiffs further alleged that California State University, Northridge and its related entity, Associated Students Children Center, were liable for the child's injuries because: (1) they had negligently referred Downs as a suitable daycare provider; and (2) Downs was acting as their actual or ostensible agent at the time the injuries were inflicted.

The CSUN defendants filed a motion for summary judgment arguing that plaintiffs had failed to introduce evidence that Downs was their agent or that they violated any duty of care when referring Downs. The trial court granted the motion and entered judgment dismissing the CSUN defendants. Plaintiffs appealed the judgment and we now reverse, concluding that there is a triable issue of material fact with respect to the issue of ostensible agency.

FACTUAL AND PROCEDURAL BACKGROUND

A. Summary of Plaintiffs' Complaint

1. Factual allegations

On December 2, 2009, Jacqueline Arce and Antonio L. filed a complaint asserting tort claims against Holly Downs, the Board of Trustees of California State University, Northridge (CSUN Board) and CSUN's related entity, Associated Students, for injuries that Downs allegedly inflicted on their infant son, A.L.[1] The complaint alleged that, as part of Arce's financial aid package, the CSUN Board and Associated Students (collectively CSUN defendants) agreed to provide Arce subsidized daycare services for her children, A.L. and N.L. The CSUN defendants referred Arce to "Camp Runnymeade

1 A.L. and his brother N.L were also named as plaintiffs, with Arce acting as their guardian ad litem.

Day Care," which was operated by the CSUN defendants' "agent and employee" Holly Downs.

On the morning of September 16, 2008, Arce dropped off A.L., then 9-months old, at Downs's home. At approximately 10:30 a.m., Arce called Downs to check on A.L. and was informed that he had just finished his breakfast and was about to lie down for a nap. At approximately 3:00 p.m., Downs called Arce and reported that A.L. had "fallen off the bed" and was acting "'weird.'" One minute later, Downs called Arce again and said that paramedics had arrived and wanted to speak to her. The paramedics informed Arce that A.L. was being airlifted to a children's hospital because he was "'acting inappropriately'" and "'needed proper treatment . . .'"

When Arce and Antonio L. arrived at the hospital, they were met by emergency room social worker Brett McGillivry, who told them that A.L. was undergoing an MRI. A team of doctors informed the parents that A.L. was suffering from seizures and that they "believed [he] was bleeding from his brain." The doctors also stated that A.L.'s symptoms could not have been caused by a fall from a bed.

At 5:10 p.m., the parents and McGillivry called Downs to discuss what had happened to A.L. "This time, Downs told [Arce] A.L. had not fallen off the bed. Downs said A.L. . . . . started to cry, but she ignored him and left him in the crib. . . . She went to check on A.L. after he had stopped crying, and she saw him in the crib, 'lying . . . limp like a noodle.'" After hearing these statements, McGillivry told the parents to end the call because he believed Downs was lying. McGillivry then "told [the parents] that [Downs] had previously told him and the paramedics a different story involving a changing table. McGillivry stated that he would relate these inconsistencies to the police. Later on, . . . the six year old son of [Downs] told yet another story, that [A.L.] was left solely in his care when he hit his head on the hard part of the crib and Downs was outside at the car when it happened."

The MRI results confirmed that "there was blood in A.L.'s brain." On the morning of September 17, A.L. underwent additional tests that indicated he had "retinal hemorrhaging in both eyes" and an "acute subdural hematoma on the left side of his brain

which was the cause of his seizures. According to the doctors, these symptoms w[e]re usually indicative of Shaken Baby Syndrome."

After meeting with the physicians, Antonio L. called Downs to "find out what had really happened to A.L. Downs told [Antonio L.] yet another different story. She told him that A.L. had been hitting his head all day with a rack of toys, and that he had fallen from a changing table two times."

2. Summary of plaintiffs' causes of action

The complaint pleaded alternative tort claims against Downs for battery and negligence. The battery claim alleged that Downs had "touched . . . A.L. in such manner to induce severe physical injuries, consistent with 'Shaken Baby Syndrome.'" The negligence claim alleged that "A.L. sustained injuries . . . as a result of . . . [Downs's] inadequate supervision."

The complaint also included a claim for "negligent referral" against the CSUN defendants. Plaintiffs asserted that the CSUN defendants "had breached their duty when they referred [p]laintiffs to [Downs]" because: (1) they "knew or should have known that [Downs] was unqualified and/or unable to deal with the children in her care"; and (2) they "knew or should have known that th[e] type of harm [caused to A.L.] could occur when an infant was improperly cared for."[2]

B. Summary of CSUN Defendants' Motion for Summary Judgment

1. CSUN defendants' motion for summary judgment and supporting evidence

Less than four weeks after the complaint was filed, the CSUN defendants filed a motion arguing that they were entitled to summary judgment on plaintiffs' claim for "negligent referral" because there was no evidence that they possessed any information indicating that Downs presented a "foreseeable" risk to A.L.

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2 The complaint asserted additional claims that are not directly relevant to this appeal, including intentional misrepresentation, intentional infliction of emotional distress, negligent infliction of emotional distress and constructive fraud.

The factual summary in the CSUN defendants' motion alleged that Arce's older child, N.L., attended the Associated Students Children's Center (ASCC), which was an on-campus daycare facility owned and operated by Associated Students. The ASCC, however, did not have space for A.L. "As such, [Arce] applied for and received State subsidized child day care services through [the CSUN defendants'] Family Child Care Network program. Such program consisted of off-campus and state licensed day-care homes, that were independently owned and operated. CSUN students were provided a list of state licensed day care homes near the campus, and told to make an independent selection of a childcare provider from such list after visiting the same. [Arce] qualified for State subsidized childcare, and was given the list of licensed family childcare homes near the CSUN campus. [Arce] independently visited a number of the homes and interviewed the operations of the same. Ultimately, . . . Arce selected Downs."

The CSUN defendants contended that, to establish a claim for "negligent referral," the parents were required to show that Downs's "conduct [wa]s foreseeable." The defendants argued, however, that the evidence conclusively demonstrated that neither CSUN nor the ASCC "had . . . knowledge of any problems relating to any issue remotely similar as that alleged here with Downs' daycare home during the approximate 10 years she had been on [ASCC's] list of available independent state licensed daycare homes. Nor did [the CSUN defendants] have any prior knowledge that A.L. had been injured at Downs' daycare home any time prior to September 16, 2008. Thus, [d]efendants had no reason to foresee that anyone at Downs' daycare home would inflict injuries upon A.L. Without such foreseeability, [d]efendants owed no duty to [p]laintiffs."[3]

In support of its motion, the CSUN defendants provided a declaration from Jennifer De La Torre, the assistant director of the ASCC. De La Torre stated that the ASCC oversaw the Family Child Care Network (FCCN), which was "a program whereby

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3 The CSUN defendants also argued that, as government entities, they were immune from any liability arising from a "negligent referral." The trial court rejected the argument, concluding that ASCC was not a state entity. The CSUN defendants have not challenged that finding on appeal.

CSUN students who qualify for State subsidized childcare may have their children's daycare needs paid in full or in part by the State of California." De La Torre further stated that the ASCC maintained a list of state-licensed "Family Child Care homes near the CSUN campus" that participated in the FCCN program. According to De La Torre, these "childcare homes" were "independently owned and operated, and not affiliated with or owned in any way by the [CSUN defendants]." De La Torre represented that Holly Downs had participated in the FCCN program for over ten years and had never been the subject of any complaint involving the injury of a child.

The CSUN defendants also submitted a declaration from Elsa Lewis, who was an "[FCCN] coordinator." Lewis stated that, to participate in the FCCN program, the State of California required childcare providers to agree to "an annual personal observation" and additional "periodic observations once a parent receiving subsidy places his/her child in the provider's care." The provider was also required to obtain a "certain numeric score, based upon specific criteria set by the State of California." Lewis stated that although the ASCC conducted inspections of FCCN daycare providers, it did not "share any employees with the family childcare providers" or "have the ability to revoke a family childcare provider's license, shut down the facility, or fire any of the providers' employees."

Lewis also stated that she had personally conducted numerous inspections of Downs's daycare facility and never observed "anything that would lead [her] to believe [Downs], or anyone else on the premises would assault and or mistreat a child under Downs' supervisions [sic]." In the most recent annual "personal observation," Downs had "exceeded the requisite score required to be a provider in the FCCN."

Lewis's declaration also stated that she had "met with [Arce][,] provided her with a list of the family day providers in the [FCCN], and told her to pick a childcare provider after she performed her own investigation of the providers and personally visited the childcare homes."

2. Summary of plaintiffs' opposition and supporting evidence

a. Plaintiffs' arguments opposing summary judgment

Plaintiffs' opposition argued that there were triable issues of fact as to whether the CSUN defendants were liable for A.L.'s injuries under two different legal theories. First, plaintiffs argued that it had identified evidence indicating that the CSUN defendants were vicariously liable for Downs's conduct because she was acting as their actual or ostensible agent. Plaintiffs asserted that the "circumstances surrounding [the CSUN defendants'] relationship with [Downs] indicate[d] the existence of an actual agency" because defendants "exercised a certain level of control over the operation of . . . Downs' daycare" and Downs's contract with the ASCC did not state that she was an "independent contractor."

Plaintiffs further asserted that, even if Downs was not the CSUN defendants' actual agent, there were triable issues of fact as to whether she was their ostensible agent. According to plaintiffs, a reasonable trier of fact could conclude from the evidence that the CSUN defendants' "actions and . . . statements led plaintiffs to believe that [Downs] was employed by [them] and at all times was acting . . . as their agent in the rendition of childcare services." Plaintiffs further asserted that there was evidence Arce had "relied upon [the CSUN defendants'] representations when [she] chose to place . . . A.L. in [Downs'] care."

Plaintiffs also argued that, apart from the issue of agency, there were triable issues of fact as to whether the CSUN defendants were "[n]egligent for the referral of A.L. to . . . Downs for childcare services." Plaintiffs asserted that the ASCC's most recent evaluation of Downs indicated she had "fallen below recognized standards with her 'Safety Practices' and 'Balancing Personal and Caregiving Responsibilities.'" The plaintiffs also asserted that, in a past inspection, the state Community Care Licensing Board had cited Downs for "'safety' violations." Plaintiffs argued that this evidence showed Downs failure to supervise A.L. was foreseeable because it was "consistent with her [prior,] deficient safety practices."

b. Evidence filed in support of plaintiffs' opposition

In support of their opposition, plaintiffs introduced portions of Arce's deposition testimony. Arce stated that, in the summer of 2008, De La Torre had given her a tour of the ASCC, which Arce had "really liked." De La Torre informed Arce there was no space for A.L. at the on-campus facility, but stated that the ASCC "sponsored" another program that would enable A.L. to receive care and set up a meeting between Arce and Elsa Lewis to discuss the matter further. During this meeting, Lewis told Arce that the program De La Torre had referenced "was called the Family Child Care Network, . . . and that . . . CSUN hires outside daycares that comply with the [ASCC's] standard policies, the same standards of high quality daycares [sic], and that the reason for having them is for students who wanted to complete their studies and they hire them for the sole purpose when there is no vacancies [in the ASCC], there's these daycares to help them out, and these daycares are designed specifically to be at CSUN's standards."

According to Arce's deposition testimony, Lewis also stated that the ASCC conducted "random inspections" of the outside daycare facilities to ensure that they were "following the policies that they had requested from them in order to be hired by CSUN." Lewis then provided Arce a list of eight providers to choose from and "made it clear . . . that [Arce] was able to trust and rely on these agencies because of the fact that CSUN was hiring them and . . . held them to their standards." Lewis represented that these "daycares" provided the same "quality" of care that ASCC provided through its on-campus facility.

Plaintiffs also submitted a declaration from Arce that reiterated several of the statements she had made in her deposition. The declaration stated that while discussing the FCCN program with Lewis, Arce had "expressed concerns about sending [her] infant son . . . to an off campus facility." Lewis, however, "assured [Arce] that the [CSUN defendants] sponsored the [FCCN] program and that the childcare providers who worked in the program were managed by [the CSUN defendants] and were held to the same high quality standards that [Arce] had seen at the on-campus Children's Center." Lewis further stated that the CSUN defendants "conduct[ed] regular inspections" to "ensure the

quality of these off-campus providers" and described the providers as "an extension of the [ASCC]." Arce indicated that she had specifically relied on these representations when deciding whether to send A.L. to Downs's facility: "In deciding to use . . . the FCCN, I relied upon [the CSUN defendants'] representations regarding the [ASCC's] . . . operation and control over its off-campus providers."[4]

Arce also stated that she had signed a "parental agreement" with the CSUN defendants regarding A.L.'s childcare, but had never entered into any contract with Downs. According to Arce, this "parental agreement" did not indicate Downs was an independent contractor and that, if such information been "disclosed to [her]," she never would have "allowed . . . A.L. to be placed in the care of Downs . . . or any other so called 'independent' day care provider."

Arce also indicated that the ASCC required her to record the hours during which Downs had provided A.L. care on a time sheet containing the phrase "AS/CSUN Family Childcare Network" in large, bold-face print. Arce alleged that "[the] fact that these time sheets were from [the CSUN defendants]" reaffirmed her belief that Downs's facility was "sponsored and managed by [the CSUN defendants]."

Plaintiffs also submitted portions of the CSUN defendants' most recent evaluation of Downs's facility, which indicated that she had received low marks in the categories of "safety practices" and "balancing personal and caregiving responsibilities." In addition, plaintiffs provided a "Facility Evaluation Report" that the California Department of Social Services Community Care Licensing Division had issued after inspecting Down's

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4 Respondent argues that plaintiffs may not rely on Arce's declaration "to create a triable issue of fact." In support, it cites cases holding that courts should generally disregard "self-serving declarations [that] contradict . . . prior sworn [deposition] testimony." (*Archdale v. American Intern. Specialty Lines Ins. Co*. (2007) 154 Cal.App.4th 449, 473; *Collins v. Hertz Corp*. (2006) 144 Cal.App.4th 64, 79 [trial court "properly str[uck]" plaintiff's "declaration [that] contradict[ed] her deposition testimony"].) Respondent, however, has failed to identify any statement in Arce's declaration that contradicts her prior deposition testimony. We therefore consider the evidence.

facility in May of 2007. The report listed several "deficiencies," including the fact that Downs was supervising more than eight children without the aid of an assistant.

Finally, plaintiffs introduced excerpts from Downs's deposition stating that, in the hours before being taken to the hospital, A.L. had fallen from a "Lego table," hit the back of his head on a tile floor and pulled a wooden toy rack down upon himself. Downs estimated that, between September 15 and September 16, A.L. had fallen "six or seven" times while under her care.

3. Summary of CSUN defendants' reply brief

In their reply brief, the CSUN defendants argued that the plaintiffs had failed to show there was any triable issue of fact as to whether Downs was their agent. In regards to ostensible agency, the CSUN defendants argued that plaintiffs had "failed to present any evidence of representations or conduct . . . which caused [them] to select Downs over any of the other [seven] daycare providers" on the referral list. The CSUN defendants asserted that the "undisputed" evidence showed that Elsa Lewis had merely given Arce a list of potential providers and instructed her to "personally investigate the daycares by visiting them and talking to the operators." Arce admitted that, after receiving this information, she visited several of the daycare providers and ultimately selected Downs based on her belief that A.L. would get "more attention" than at other facilities. The CSUN defendants contended that because the evidence showed Arce's selection of Downs was predicated on information she had obtained during her independent investigations, they could not be held liable "based upon ostensible agency."

The CSUN defendants also argued that there was no triable issue of fact as to whether Downs was their actual agent because the "undisputed" evidence "establish[ed] that Down was an independent contractor of [the CSUN defendants.]." The CSUN defendants asserted that plaintiffs had presented no evidence that "defendants controlled the manner in which Downs provided the day to day care of A.L." or "directed that [she] follow a particular schedule in carrying out her responsibilities of caring for children."

In support of their assertion that Downs was not an actual agent, the CSUN defendants admitted deposition testimony in which Downs testified that she operated as an independent contractor. They also cited a paragraph in Arce's "parental agreement" stating: "Please note that provider policies including but not limited to arrival and departure times, arriving early or late, paying late fees for those payments due to provider from parent, are in effect, as you, the family, contract with both the provider and the AS network." According to CSUN, this paragraph, which Arce had initialed, demonstrated that "the [individual daycare] provider's . . . policies," and not those of CSUN, governed "such issues as arrival and departure times, and arriving early or late."

Finally, the CSUN defendants argued that, even if there was a question of fact as to whether Downs was their actual or ostensible agent, they could not be held liable for her "criminal conduct" because there was no evidence that they were aware Downs had "'assaultive propensities.'"

C. The Trial Court's Order Granting the Motion for Summary Judgment

After hearing oral argument, the court issued an order granting the CSUN defendants' motion for summary judgment. The court concluded that plaintiffs had introduced no evidence establishing a triable issue of fact as to whether the CSUN defendants had been negligent in referring Downs as a caretaker or were otherwise vicariously liable for her conduct under actual or ostensible agency.

The court ruled that, under *J.L. v. Children Institute* (2009) 177 Cal.App.4th 388 (*J.L.*), the plaintiff could not prevail on its "negligent referral" claim "absent proof of a duty to warn of a foreseeable harm." The court explained that this "element of foreseeability [wa]s critical" regardless of whether "the injuries were caused by negligence or by an intentional act of . . . Downs . . . ." According to the court, "nothing in the evidence . . . suggest[ed] that" the CSUN defendants "had actual or imputed knowledge that [Downs] had 'assaultive propensities'" that would forewarn of a battery. Nor did the record contain any evidence that the CSUN defendants "were on notice of any negligent behavior . . . . that would have suggested . . . that an infant in

[Downs's] . . . care . . . would be at risk of injury for any reason" or that "she was generally negligent in her care of the infants in her facility."

The court also concluded that "there [wa]s no evidence in the record to suggest that . . . [Downs] was an agent, actual or ostensible, of [the CSUN defendants]." As to actual agency, the court found that although Downs's contract with the CSUN defendants did not specifically describe her as an independent contractor, the evidence demonstrated that the "day-to-day operation of [the] . . . childcare facility was left entirely in the hands of Downs." According to the court, the fact that the CSUN defendants "periodically visited the facility, and apparently paid [Downs] directly for childcare services" was insufficient to "establish the degree of control necessary to support a finding that Downs was as an agent of [the CSUN defendants.]"

As to ostensible agency, the court ruled there was "no evidence . . . that any [CSUN defendant] committed an act upon which [p]laintiff[s] could have reasonably relied that would have implied the existence of an agency relationship . . . The facts . . . do not show any affirmative representation by [the CSUN defendants] that would have led [p]laintiff to believe that [the CSUN defendants] provided daycare services, utilizing Downs . . . as their agent or employee. They merely provided a list of eight daycare providers, each one of which was represented to have been licensed by the state, and which agreed to accept at least partial payment from [the CSUN defendants] for the daycare provided. Plaintiff visited several of the facilities, and spoke to several more, before selecting Downs' facility."

Three weeks after issuing its order, the trial court filed a judgment dismissing the CSUN defendants. Plaintiffs filed a timely appeal.[5]

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5 The appellants have not appealed the judgment "insofar as it relates to Defendant Board of Trustees of the California State University System." Accordingly, this appeal relates only to defendant "Associated Students, California State University Northridge," which operates the ASCC and is hereafter referred to as "CSUN."

DISCUSSION

Plaintiffs argue that the evidence in the record establishes that there are triable issues of fact as to whether: (1) Downs was CSUN's ostensible agent; (2) Downs was CSUN's actual agent; and (3) CSUN breached its duty of care by failing to warn plaintiffs that Downs was not a suitable daycare provider. We conclude that the plaintiffs have introduced sufficient evidence to establish a triable issue of fact on the issue of ostensible agency, and reverse the judgment.

A. Standard of Review

"A trial court should grant summary judgment 'if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' [Citation.] A defendant may establish its right to summary judgment by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to the cause of action. [Citation.] Once the moving defendant has satisfied its burden, the burden shifts to the plaintiff to show that a triable issue of material fact exists as to each cause of action. [Citation.] A triable issue of material fact exists where 'the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' [Citation.]

"'We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections were made and sustained. [Citations.]' [Citation.] We view the evidence and the inferences reasonably drawn from the evidence 'in the light most favorable to the opposing party.' [Citations.]" (*Neiman v. Leo A. Daly Co*. (2012) 210 Cal.App.4th 962, 967-968 (*Neiman*).)

B. Ostensible Agency

1. Elements of ostensible agency

"Ostensible agency" is a form of vicarious liability that applies "when the principal intentionally, or by want of ordinary care, causes a third person to believe

another to be his agent who is not really employed by him." (Civil Code, § 2300.) "Before recovery can be had against the principal for the acts of an ostensible agent, three requirements must be met: The person dealing with an agent must do so with a reasonable belief in the agent's authority, such belief must be generated by some act or neglect by the principal sought to be charged and the person relying on the agent's apparent authority must not be negligent in holding that belief. [Citations.] Ostensible agency cannot be established by the representations or conduct of the purported agent; the statements or acts of the principal must be such as to cause the belief the agency exists. [Citations.] "'"Liability of the principal for the acts of an ostensible agent rests on the doctrine of 'estoppel,' the essential elements of which are representations made by the principal, justifiable reliance by a third party, and a change of position from such reliance resulting in injury. [Citation.]" [Citation.]' [Citation.]" (*J.L., supra*, 177 Cal.App.4th at p. 404.)

An agent's ostensible "authority may be proved by circumstantial evidence [citations]; and it may likewise be implied from circumstances [citations]." (*Gaine v. Austin* (1943) 58 Cal.App.2d 250, 261.) "Whether ostensible agency exists '. . . is a question of fact.'" (*Kaplan v. Coldwell Banker Residential Affiliates, Inc*. (1997) 59 Cal.App.4th 741, 748 (*Kaplan*); *House Grain Co. v. Finerman & Sons* (1953) 116 Cal.App.2d 485, 492 [question of ostensible agency is "one of fact"].) Therefore, the issue may not be resolved on a motion for summary judgment "unless from the facts only one reasonable conclusion could be drawn." (*Koepke v. Loo* (1993) 18 Cal.App.4th 1444, 1449-1450; *Metropolitan Life Ins. Co. v. State Bd. of Equalization* (1982) 32 Cal.3d 649, 658 [agency is "a factual question [that] becomes a question of law when the facts can be viewed in only one way"]; *Thompson v. Occidental Life Ins. Co.* (1969) 276 Cal.App.2d 559, 564 (*Occidential Life*) [ostensible agency is a "matter[] for a trier of fact to resolve . . . [and] should not . . . [be] decided by an order granting a summary judgment"].)

2. Summary of cases analyzing ostensible agency claims

"Ostensible agency is ordinarily invoked only where the agent has contracted on behalf of the principal." (See 3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 175, pp. 220-221.) It is generally difficult to impose tort liability under ostensible agency because "the essential element of reliance on the representations or conduct of the principal is usually lacking." (*Ibid*.; see also *J.L.*, *supra*, at p. 405 [citing and quoting Witkin].)

Van Den Eikhor v. Hocker (1979) 87 Cal.App.3d 900 (*Hocker*) is illustrative. The plaintiff in *Hocker* was injured while traveling in a car driven by Gail Hocker, the 16-yeard old daughter of defendant Guy Hocker. Although Gail had only held her license for only five days and was visually handicapped, Guy gave her permission to drive his vehicle to a movie. On the way to the movie, Gail began "driving negligently" and "was involved in an accident" that resulted in plaintiff's injury. (*Id*. at p. 903.)

Plaintiff sued Guy Hocker under the theory that Gail was acting as his ostensible agent at the time of the accident. In support of this theory, plaintiff introduced evidence that Guy regularly used the vehicle in his real estate business and that the vehicle "carried on either side removable magnetic signs advertising Guy's . . . business." (*Hocker, supra*, 87 Cal.App.3d at p. 903.) The jury found that "Gail was operating Guy's car as his agent and within the scope of her authority." The trial court, however, "granted [a] motion for new trial . . . essentially on its view that substantial evidence did not exist to support the . . . finding of agency and authority." (*Id*. at p. 904.)

The appellate court affirmed, explaining that even if the evidence was sufficient to show that Guy had engaged in conduct that caused the plaintiff to reasonably believe Gail was acting as his agent, there was no evidence that this belief played any role in plaintiff's injury. In effect, the court reasoned that because there was no evidence Guy's representations of agency induced plaintiff to drive with Gail, "there [wa]s no basis for an estoppel, and estoppel is the real foundation for . . . ostensible agency ." (*Hocker, supra,* 87 Cal.App.3d at p. 906.)

Other cases, however, demonstrate that a principal may be held liable in tort under ostensible agency if there is a proper showing of reliance. (Witkin, *supra*, Agency and Employment, § 175, p. 221 ["liability of the principal in tort may be established" upon showing of reliance] [citing Restatement (Second) of Agency § 267 (1958) ["There must be such reliance upon the [principal's] manifestation [of agency] as exposes the plaintiff to the negligent conduct"].) For example, in *Kaplan v. Coldwell Banker*, *supra*, 59 Cal.App.4th 741, the plaintiff filed a suit alleging that his real estate agent, who owned a Coldwell Banker franchise, had fraudulently misrepresented the true nature of three parcels of property. The complaint sought to impose vicarious liability on Coldwell Banker, asserting that the plaintiff had "'placed great faith and trust in said defendants, and each of them, particularly because . . . [the real estate broker] was part of the Coldwell Banker organization which had an established reputation for honesty, integrity and expertise.'" (*Id*. at p. 744.)

The parties' evidence showed that the broker "independently owned and operated his real estate office, Coldwell Banker Citrus Valley Realtors, a Coldwell Banker franchise." (*Kaplan*, *supra*, 59 Cal.App.4th at p. 744.) The franchise agreement "required [the broker] to hold himself out to the public as 'an independently owned and operated member of Coldwell Banker Residential Affiliates, Inc.' This disclaimer language was printed on [the broker's] advertising but much smaller than that touting Coldwell Banker. [¶] The [plaintiff] testified that he 'went for the sign,' did not notice the disclaimer language, and trusted Coldwell Banker, a large reputable company with a national existence." (*Ibid*.) Coldwell Banker moved for summary judgment and the trial court granted the motion, "rul[ing] there were no triable facts that would cause Coldwell Banker to be liable for the [broker's] acts or omissions." (*Id*. at p. 743.)

The court of appeal reversed, concluding that although the evidence established Coldwell Banker "did not control the day-to-day operation of [the broker's] real estate office" (*Kaplan*, *supra*, 59 Cal.App.4th at p. 745), there was a "triable issue of fact . . . with respect to ostensible agency." (*Id*. at p. 744.) The court explained that, through the franchise advertising materials, "Coldwell Banker made . . . representations to the public

in general, upon which [the plaintiff] relied. . . . Plaintiff, and members of the public generally, might believe that Coldwell Banker 'stood behind' [the broker's] realty company. The venerable name, Coldwell Banker, the advertising campaign, the logo, and the use of the word 'member' were and are designed to bring customers into Coldwell Banker franchises. As [plaintiff] stated at his deposition: Coldwell Banker's 'outreach was successful. I believed the . . . [broker was] Coldwell Banker. They do a good job of that.'" (*Id*. at p. 747.)

The court further explained that, although the broker's advertising materials contained a disclaimer, the plaintiff had testified that he "did not notice the small print. . . language. Instead, he relied on the large print and believed that he was dealing with Coldwell Banker, i.e., that Coldwell Banker 'stood behind' [the broker]. An ordinary reasonable person might also think that [broker] was an ostensible agent of Coldwell Banker." (*Kaplan*, *supra*, 59 Cal.App.4th at pp. 747-748.)

The court reached a similar conclusion in *Beck v. Murray* (1966) 245 Cal.App.2d 976 (*Murray*). The plaintiff filed a complaint against Arthur Murray, Incorporated (Murray) seeking statutory damages "for a violation by its licensee of . . . provisions of the Dance Act (Civ. Code, §§ 1812.80-1812.95)." (*Id*. at p. 977.) The evidence showed that Murray licensed dances studios "under contracts whereby the licensee [wa]s authorized to use the name 'Arthur Murray Studios' in connection with his business." (*Ibid*.) Pursuant to the terms of the contract, each licensee was "required to utilize certain methods of dance instruction developed by Murray and to conform to certain requirements dealing with the decor of the dance studios, to render reports and accountings to Murray and to pay Murray a percentage of the gross receipts from the studio operation." (*Ibid*.) The contract also required that the licensee "display 'conspicuously' in his studio a sign . . . read[ing] as follows: '[Licensee] is authorized to operate an Arthur Murray Dance Studio . . . pursuant to license agreement with Arthur Murray, Inc. and the licensee is solely responsible for all courses enrolled at this studio and all obligations of any kind respecting the business of this studio. Arthur Murray, Inc., New York, N.Y.'" (*Id*. at p. 978.)

Ned Bosnick owned and operated the "Arthur Murray Dance Studio" pursuant to a Murray license. After Bosnick's employees convinced plaintiff to enroll in a "course of lessons," she filed claims against Bosnick and Murray for violations of the Dance Act. (*Murray, supra*, 245 Cal.App.2d at p. 978.) Bosnick was dismissed and the action proceeded to trial against Murray under the theory of both actual and ostensible agency. The trial court found that Bosnick was "not an actual agent of Murray, but that he was an ostensible agent," and awarded plaintiff statutory damages. (*Ibid*.) Murray appealed, asserting that the evidence did "not support the finding of ostensible agency." (*Ibid*.)

The appellate court, however, found that the trial court's agency finding was supported by "substantial evidence": "Plaintiff testified that she had received numerous phone calls, introduced by the statement 'Arthur Murray Dance Studio calling'; she received mailings purportedly from the 'Arthur Murray Dance Studio'; the contract which she executed showed the other party to be the 'Arthur Murray School of Dancing,' with the written signature of a 'registrar.' When she visited the dance studio, she saw signs, posters and cards with the name 'Arthur Murray' prominently displayed. When asked as to her reasons for enrolling in the dance lessons, plaintiff testified: 'Well, being an Arthur Murray Dance Studio and seeing them on television and hearing about them, everybody was talking about it, I finally was convinced that maybe it was the thing to do to go down to Arthur Murray's Dance Studio and see what they had to offer.' She testified that no one told her that the studio was owned or operated by Bosnick, her attention was not called to the disclaimer sign [in the window], nor did she see it." (*Murray, supra*, 245 Cal.App.2d at p. 979.) The court explained that a trier of fact could "properly . . . deduce" from this evidence that the plaintiff "believed Bosnick and his employees to be agents of Murray . . [and] that she relied on such a belief in enrolling for dance lessons." (*Ibid*.)

The court also rejected Murray's contention that the plaintiff could not reasonably believe Bosnick was his agent because the disclaimer in the studio window stated that Bosnick was "solely responsible for all courses enrolled at this studio and all obligations of any kind respecting the business of this studio." (*Murray, supra*, 245 Cal.App.2d at

p. 978.) The court explained that the required disclaimer was "vague and ambiguous" and did not, as a matter of law, negate "the obvious implications of agency which persons such as plaintiff should have been expected to draw from the use of the Arthur Murray name." (*Murray, supra,* 245 Cal.App.2d at p. 980.)

C. *There are Triable Issues of Fact on the Issue of Ostensible Agency*

1. Plaintiffs have established a triable issue of fact on every element of their ostensible agency claim

To "withstand summary judgment" on their ostensible agency claim (*Kaplan, supra,* 59 Cal.App.4th at p. 748), plaintiffs were required to show that a triable issue of fact exists as to whether: (1) CSUN engaged in conduct that caused the plaintiffs to believe Downs was its agent; (2) plaintiffs relied on those representations to their detriment; and (3) plaintiffs' belief and subsequent reliance were reasonable, and not a product of their own negligence. (See *Kaplan, supra,* 59 Cal.App.4th at p. 747 [summarizing elements of ostensible agency]; *J.L., supra,* 177 Cal.App.4th at p. 404; Civ. Code, §§ 2300, 2334.) When viewed in the light most favorable to the plaintiffs, the evidence in the record "would allow a reasonable trier of fact to find" in favor of plaintiffs on each of these three elements. (*Neiman, supra,* 210 Cal.App.4th at p. 968.)

Plaintiffs have introduced evidence that CSUN made numerous statements that might have reasonably caused Arce to believe Downs was its agent. In her deposition testimony, Arce repeatedly stated that Elsa Lewis told her CSUN "hire[s]" the "outside daycares" that participate in the FCCN program. Lewis also allegedly stated that the ASCC "managed" the outside daycare providers, which she characterized as "an extension" of the on-site daycare facility.

Arce also described other acts and representations that might reasonably support a belief that Downs was an agent of CSUN. First, Arce testified that the time sheets that ASCC used to record Downs's hours contained a large header stating "AS/CSUN Family Childcare Network." Arce and Downs were both required to sign this time sheet, which did not contain any further information indicating Downs or her daycare were separate

entities from CSUN. (See *Kaplan*, *supra*, 59 Cal.App.4th at p. 747 [use of Coldwell Banker name and logo on franchise advertising materials might cause public to believe Coldwell Banker "stood behind" franchise]; *Murray*, *supra*, 245 Cal.App.2d at p. 979 ["signs, posters and cards with the name 'Arthur Murray' prominently displayed" supported finding that dance studio was Murray's ostensible agent].) Second, CSUN informed Arce that the ASCC frequently inspected the outside daycare facilities to ensure that they were "following the policies that [were required] . . . in order to be hired by CSUN." Third, Arce was only required to enter into a "parental agreement" with ACCS; she was not required to enter into any similar agreement with Downs. Fourth, there is no evidence in the record that either CSUN or Downs ever explained to Arce that the outside daycare facilities were independently owned and operated. (See *Murray*, *supra*, 245 Cal.App.2d at p. 979 [trial court's finding of ostensible agency supported, in part, by plaintiff's testimony "that no one told her that the studio was [not] owned or operated by" the principal].)

As in *Kaplan* and *Murray*, Arce also provided testimony that she relied on defendant's conduct when deciding whether to utilize Downs as a daycare provider. According to Arce, Lewis "made it clear" that she could "trust and rely" on any of the eight daycare providers on the ASCC's referral list "because of the fact that CSUN was hiring them and . . . held them to their standards." Arce also stated in her declaration that, after she expressed concerns to CSUN about sending her child to an off-campus facility, Lewis assured her that the ASCC managed all of the childcare providers who participated in the program. Arce further alleged that "in deciding to use . . . the FCCN," she specifically "relied upon [CSUN's] representations regarding the ASCC's . . . operation and control over its off-campus providers. . . ."

Considered collectively, the evidence summarized above raises triable issues of fact as to whether CSUN engaged in conduct that caused Arce to believe that Downs's was its agent and whether Arce justifiably relied on such conduct when making her decision to send A.L. to Downs's facility.

We recognize that CSUN has identified conflicting evidence that might convince a trier of fact that Arce knew, or should have known, that Downs was not an agent or that any such belief was the result of Arce's own negligence. (*Kaplan, supra*, 59 Cal.App.4th at p. 748.) For example, Arce initialed a paragraph in the ASCC parental agreement informing her that parents were required to comply with the outside daycare "provider['s] [attendance] policies . . . as you, the family, contract with both the provider and the AS network." CSUN also introduced evidence that it directed Arce to independently investigate the daycare facilities on the referral list before making a selection. Moreover, the trier of fact might choose to discredit Arce's description of her conversations with Lewis or otherwise reject Arce's assertion that she would not have utilized Downs's services but for CSUN's representations regarding Downs's status as an agent.

Ultimately, however, determining the existence of an ostensible agency is a "matter[] for a trier of fact to resolve.'" (*Occidental Life, supra,* 276 Cal.App.2d at p. 564; *Kaplan, supra,* 59 Cal.App.4th at p. 748; *Brown v. Chiang* (2011) 198 Cal.App.4th 1203, 1229 [for purposes of estoppel, "whether reliance on a . . . statement or conduct is reasonable is a question of fact"].) "[W]here different conclusions might reasonably be drawn from [the] circumstances, the question whether the relation was that of [agency] is one which must be left to the jury." (See *Lowmiller v. Monrom Lyon & Miller* (1929) 101 Cal.App. 147, 150, disapproved of on another ground in *California Employment Stabilization Commission v. Morris* (1946) 28 Cal.2d 812, 819.) Based on the evidence in the record, we cannot conclude that, as a matter of law, no reasonable trier of fact would find in favor of plaintiffs on ostensible agency. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239 [whether plaintiff reasonably relied on fraudulent statement is a question of fact that "may be decided as a matter of law [only] if reasonable minds can come to only one conclusion based on the facts'"]; *Koepke, supra*, 18 Cal.App.4th at p. 1449.)

2. CSUN's arguments that it is entitled to summary judgment lack merit

CSUN, however, argues that we should affirm the trial court's ruling on the issue of ostensible agency because: (1) this case is indistinguishable from *J.L. vs. Children's*

Institute, *supra*, 177 Cal.App.4th 388, which rejected a similar ostensible agency claim; (2) plaintiffs have failed to show that CSUN caused Arce to select Downs from its referral list; and (3) regardless of whether Downs was CSUN's ostensible agent, Downs's alleged conduct fell outside the scope of her employment duties.

a. J.L. vs. Children's Institute, supra, *177 Cal.App.4th 388, is distinguishable*

CSUN contends that the trial court properly concluded that this case cannot be meaningfully distinguished from *J.L. vs. Children's Institute*, *supra*, 177 Cal.App.4th 388. The defendant in *J.L.*, the Children's Institute, Inc. (CII), was a nonprofit corporation that provided subsidized childcare services to qualifying families. As in this case, CII ran a licensed day care facility, but also contracted with private, state-licensed day care homes to which eligible families were referred. Although CII did not license these private facilities, it provided them the training and education necessary to obtain state licensing.

The parties' evidence showed that CII determined the plaintiff, a minor, qualified for subsidized childcare and presented his family with a list of three daycare providers. The plaintiff selected a facility that was owned and operated by Yolanda Yglesias. Several months later, the plaintiff's mother saw two adult males at the facility who Yglesias identified as her grandchildren. Mother expressed concern to CII "about whether those individuals were authorized to be at the daycare facility." (*J.L.*, *supra*, 177 Cal.App.4th at p. 393.) In response, CII informed the mother that Yglesias had "assured [it] the individuals remained outside doing mechanical work . . . [and] added that individuals needed to be authorized to be present at the Yglesias home." (*Ibid*.) Approximately one month later, the plaintiff's mother saw Yglesias's 14-year old grandchild, E.Y., inside the daycare area and again expressed her concerns to CII. Although CII conducted an investigation, it never saw E.Y. near the children and was not "suspicious of nor concerned by [his] presence because [it] never received a report about

a lack of supervision by Yglesias or any inappropriate behavior by [the grandchild]." (*Ibid*.) E.Y. subsequently raped the plaintiff.

Plaintiff, acting through a guardian ad litem, filed a negligence claim against CII based on Yglesias's alleged lack of proper supervision. As in this case, plaintiff's negligence claim had two components. First, plaintiff asserted that CII was "itself negligent in its referral." (*J.L.*, *supra*, 177 Cal.App.4th at p. 394.) Second, although plaintiff conceded that Yglesias was an independent contractor, he alleged that CII was vicariously liable for her failure to supervise under a theory of ostensible agency. CII filed a motion for summary judgment, which the trial court granted.

The appellate court affirmed. In regards to the negligent referral claim, the court ruled that CII did not owe the plaintiff any duty to protect against an unforeseeable intentional tort committed by a third party at the daycare facility. The court concluded that because the plaintiff had failed to introduce any evidence "showing [CII] had actual knowledge of E.Y.'s assaultive tendencies or that he posed any risk of harm, his conduct was not foreseeable and CII owed no duty to protect against the attack." (*J.L.*, *supra*, 177 Cal.App.4th at p. 398.)

The appellate court also rejected plaintiff's ostensible agency claim, ruling that "the undisputed evidence failed to establish any triable issue of fact suggesting that [CII] made any statements or engaged in any conduct that would tend to generate a reasonable belief in appellant's mother . . . that Yglesias was [CII's] agent." (*J.L.*, *supra*, 177 Cal.App.4th at p. 404.) The court explained that plaintiff's evidence showing CII trained and paid Yglesias was insufficient to create a triable issue on ostensible agency because "there was no evidence showing that [the mother] was aware of these facts." (*Id*. at p. 404.) The only other relevant, admissible evidence on the issue[6] consisted of CII's

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6 A footnote in the opinion indicates that most of the "'evidence' on which [the] appellant [had] relie[d] [was] contained in [a] . . . declaration, which appellant submitted in support of [a] motion for new trial." (*J.L.*, *supra*, 177 Cal.App.4th at p. 404, fn. 2.).) The court refused to consider this evidence because plaintiff filed it after the trial court ruled on the motion for summary judgment and had not appealed the denial of his motion for new trial.

statements to plaintiff's mother that E.Y. had to be "authorized" to be at the day care facility. According to the court, "[t]hese conversations failed to show evidence of" ostensible agency because CII "did not purport to be able to obtain 'authorization' for E.Y. to be in the home, nor did [the mother] look to CII to obtain such authorization." (*Id*. at pp. 404-405.)

The court specifically differentiated *Kaplan*, *supra*, 59 Cal.App.4th 741, explaining that "[i]n that case, the plaintiff testified that he relied on '[t]he venerable name, Coldwell Banker, the advertising campaign, the logo, and the use of the word "member"' to believe that a franchisee was the ostensible agent of Coldwell Banker." (*J.L.*, *supra*, 177 Cal.App.4th at p. 406.) The appellate court contrasted plaintiff's evidence, which did not show that "Yglesias held herself out as part of CII or that [the mother] believed she was dealing directly with CII when she selected Yglesias to provide day care for appellant. Evidence that CII and Yglesias maintained some relationship was insufficient to create a triable issue as to ostensible agency." (*Ibid*.)

There are substantial differences between the evidence presented in *J.L*. and the evidence at issue in this case. First, Arce has introduced evidence that CSUN informed her that it "hired" and "managed" the outside family day care providers, which it characterized as "an extension" of the ASCC. In contrast, the only "statement" or conduct at issue in *J.L.* was plaintiff's assertion that CII told his mother that E.Y. had to be "authorized" to be at the day care facility.

Second, Arce testified that, in deciding whether to send A.L. to an off-campus facilities on the ASCC's referral list, she specifically relied on CSUN's assertions that she could "trust" all of the day care providers because "CSUN was hiring them and holding them to their standards." No similar evidence of "reliance" was presented in *J.L*.

b. Plaintiffs were not required to prove that CSUN caused them to select Downs rather than any of the other providers on the referral list

CSUN next argues that, to satisfy the reliance element, plaintiffs were required to introduce "evidence . . . of representations or conduct by [CSUN] which caused

[plaintiffs] to select Downs over any of the other [seven] daycare providers" on the referral list. They further contend that plaintiffs have failed to make such a showing because the undisputed evidence demonstrates that "any representations [CSUN] made were general statements allegedly made about all [FCCN] providers" and that Arce's decision to select Downs, as opposed to any of the other listed providers, was based on information she gathered during her own investigation.

To satisfy the reliance element, a plaintiff must show that the defendant's conduct caused a "'"change of position . . . resulting in injury. [Citation.]" [Citation.]' [Citation.]" (*J.L., supra*, 177 Cal.App.4th at p. 404.) Arce's deposition and declaration contain statements indicating that she would not have agreed to send A.L. to any of the off-campus providers (including Downs) in the absence of CSUN's assurances that it hired, supervised and managed all providers who participated in the FCCN program. Arce's declaration also states that if CSUN had disclosed that Downs was an independent contractor, she never would have "allowed . . . A.L. to be placed in the care of Downs . . . or any other so called 'independent' day care provider." This evidence shows that there is a triable issue of fact as to whether the plaintiffs relied on CSUN's representations when deciding to send A.L. to the facility at which he was allegedly injured.

We find no merit in CSUN's contention that plaintiffs may only survive judgment if they show that defendant's conduct "caused [them] to select Downs over any of the other daycare providers" on the referral list. Evidence that Arce would not have sent A.L. to any of the providers but for CSUN's representations is sufficient.

3. CSUN has failed to demonstrate that Downs was acting outside the scope of her employment duties

Finally, CSUN contends that, even if the trier of fact were to find that Downs was its agent, they cannot be held liable for the injuries she inflicted on A.L. because the evidence demonstrates that her conduct fell outside the scope of her employment.

"Under the doctrine of respondeat superior, an innocent employer may be liable for the torts its employee commits while acting within the scope of his employment. This

liability is based not on the employer's fault, but on public policies concerning who should bear the risk of harm created by the employer's enterprise. It is considered unjust, for example, for an employer to disclaim responsibility for injuries occurring in the course of its characteristic activities. [Citation.] Moreover, losses caused by employees' torts are viewed as a required cost of doing business, the risk of which an employer may spread through insurance. [Citation.]" (*Yamaguchi v. Harnsmut* (2003) 106 Cal.App.4th 472, 481 (*Yamaguchi*).)

"[T]he determining factor in ascertaining whether an employee's act falls within the scope of his employment for respondeat superior liability is not whether the act was authorized by the employer, benefited the employer, or was performed specifically for the purpose of fulfilling the employee's job responsibilities. [Citation.] Rather, the question is whether the risk of such an act is typical of or broadly incidental to the employer's enterprise. [Citation.] [¶] An employer may therefore be vicariously liable for the employee's tort . . . if the employee's act was an outgrowth of his employment, inherent in the working environment, typical of or broadly incidental to the employer's business, or, in a general way, foreseeable from his duties. [Citation.] By contrast, an employer *will* not be held liable under the respondeat superior doctrine for conduct that occurs when the employee substantially deviates from the employment duties for personal purposes or acts out of personal malice unconnected with the employment, or where the conduct is so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business. [Citations.]" (*Yamaguchi, supra,* 106 Cal.App.4th at pp. 481-482.)

"'Ordinarily, the determination whether an employee has acted within the scope of employment presents a question of fact; it becomes a question of law, however, when "the facts are undisputed and no conflicting inferences are possible."' [Citation.]" (*Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1019, fn. omitted.)

Plaintiffs have alleged alternative tort claims asserting that Downs injured A.L. either through an intentional battery or through her negligent supervision. CSUN argues that it "cannot be held legally liable for Downs' alleged wrongful conduct" under either

theory because "it was unforeseeable that Downs would . . . cause any physical injuries to a child, whether by intentional or negligent acts." In support, CSUN notes that the record contains no evidence that it "authorized Downs to use force against any child in her care" or "encouraged or condoned Downs to leave A.L. unsupervised."

As explained above, however, the "determining factor" in ascertaining whether an agent's conduct falls within the scope of his employment is not whether the act was authorized by the employer; it is whether "the risk of such an act is typical of or broadly incidental to the employer's enterprise." (*Yamaguchi*, *supra*, 106 Cal.App.4th at p. 481.) We cannot say, as a matter of law, that a daycare provider's failure to provide proper supervision to a child under her care is so "unusual," "startling" or "[un]foreseeable" so as to preclude recovery under respondeat superior. (*Id.* at p. 482 [employee acts outside the scope of his or her employment when "conduct is so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business. [Citations.]"].) In effect, CSUN asserts that an employer cannot be held liable when an employee executes their employment duties in a negligent manner. This is not the law.[7]

In summary, plaintiffs have introduced "evidence raising a triable issue of fact on an ostensible agency theory . . . sufficient to withstand summary judgment." (*Kaplan*, *supra*, 59 Cal.App.4th at p. 748.) Because we conclude that the trial court's judgment dismissing CSUN must be reversed on the issue of ostensible agency, we need not address whether plaintiffs have shown a triable issue of material fact regarding their "negligent referral" or "actual agency" claims.

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7 We express no opinion as to whether the CSUN defendants may be held liable under the respondeat superior doctrine for any intentional tort that Downs may have committed against A.L.

DISPOSITION

The trial court's judgment is reversed as to defendant Associated Students, California State University, Northridge. Appellants shall recover their costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.