doctrine of respondeat superior does not usually apply to intentional torts. On the other hand, employer liability might nonetheless result if an injured party can show that the employer was negligent in hiring an employee who has a propensity for violence. In such a case, the employer is not vicariously liable (i.e., liable for someone else's acts) but primarily liable (i.e., liable for his own negligence).

Agents Acting with Actual or Ostensible Authority

Employers often conduct business deals through the efforts and representations of agents or employees. Business deals and contracts are negotiated and signed by the agents on behalf of the principal or business. In such instances, the usual rule is that if the agent is acting with **actual** or **apparent authority** (sometimes called **ostensible authority**), the business or employer is the party bound by the contract or agreement and the agent is not liable. Actual authority exists when an agent does something expressly authorized and approved by the employer. Ostensible or apparent authority exists when the principal puts the agent in a position where others are led to believe that the agent has authority, even though in fact he or she does not.

actual authority
The power given, in fact, to an agent by the principal or employer.

apparent authority
Authority created by conduct that leads a third person to believe that authority exists.

ostensible authority
Another term for apparent authority.

Read the case of *Kaplan v. Coldwell Banker Residential Affiliates, Inc.*, which follows, for more explanation of actual and ostensible agencies and the legal consequences stemming from these relationships.

Kaplan v. Coldwell Banker Residential Affiliates, Inc.,

59 Cal. App. 4th 741, 69 Cal. Rptr. 2d 640 (1997)

Facts and Proceedings

Appellant purchased three parcels of agricultural property from Albert La Monte, Jr. and Helen La Monte for approximately $1 million. He later discovered that the property was not as represented. Appellant, a superior court judge, was an experienced investor and had employed real estate brokers in other transactions. Before purchasing the property, he has been involved in the purchase or sale of an office building, some storefront commercial property, five single family residences, an apartment building, and commercial property.

Appellant filed suit against the La Montes and their real estate broker, Gerald Adams and Land Marketing Inc., for fraud, misrepresentation, and breach of fiduciary duty. He also sued his broker, Eric L. Marsh dba Coldwell Banker Citrus Valley Realtors, and salesperson, Philip Davidson, who assisted him in the transaction.

Coldwell Banker was named as a defendant on a respondeat superior theory. Appellant alleged that he ". . . placed great faith and trust in said defendants, and each of them, particularly because . . . [Marsh] was part of the Coldwell Banker organization which had an established reputation for honesty, integrity and expertise."

However, Marsh independently owned and operated his real estate office, Coldwell Banker Citrus Valley Realtors, a Coldwell Banker franchise. The franchise agreement required Marsh 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 Marsh's advertising but much smaller than that touting Coldwell Banker.

Appellant 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.

The first amended complaint alleged that "CBCVR [Marsh] is the franchisee of Coldwell Banker pursuant to an agreement whereby, *inter alia,* CBCVR may use the name Coldwell Banker, thereby benefiting from Coldwell Banker's goodwill and reputation for expertise and integrity in the field of real estate brokerage; further, Coldwell Banker receives compensation and has the right to and does exercise control over the conduct of CBCVR."

Coldwell Banker moved for summary judgment. (Code Civ. Proc., § 437c.) The evidence was undisputed that it did not control the day-to-day operation of Marsh's real estate office. Relying on *Cislaw v. Southland Corp.* (1992) 4 Cal.App.4th 1284, 6 Cal.Rptr.2d 386, the trial court granted the motion for summary judgment.

Franchisor-Franchisee Relationship

In determining whether a true agency relationship exists between a franchisor and franchisee, the courts focus on the right to control. (*Wickham v. Southland Corp.* (1985) 168 Cal.App.3d 49, 59, 213 Cal.Rptr. 825; *Nichols v. Arthur Murray, Inc.* (1967) 248 Cal.App.2d 610, 613, 56 Cal.Rptr. 728.) If the "franchise agreement gives the franchisor the right of complete or substantial control over the franchisee, an agency relationship exists. '[I]t is the right to control the *means and manner* in which the result is achieved that is significant in determining whether a principal-agency relationship exists.'" (*Cislaw v. Southland Corp., supra,* 4 Cal.App.4th 1284, 1288, 6 Cal.Rptr.2d 386.)

True Agency-Respondeat Superior

The trial court correctly ruled there were no triable issues as to any material facts to hold Coldwell Banker liable on a respondeat superior theory for Marsh's activities. In *Cislaw,* a minor purchased clove cigarettes from a 7-Eleven store and died of respiratory failure. The parents filed suit against Southland Corporation (7-Eleven), the franchisor, based on the theory that the franchise agreement created a principal-agent relationship. The trial court ruled that the store franchisees were independent contractors and granted summary judgment for Southland Corporation. The Court of Appeal affirmed, holding that a true principal-agency relationship exists only when the franchisor retains complete or substantial control over the daily activities of the franchisee's business. (*Cislaw v. Southland Corp., supra,* 4 Cal.App.4th at p. 1296, 6 Cal.Rptr.2d 386.)

The same principle applies here. The fact that Coldwell Banker received a royalty based on Marsh's gross receipts did not create a true agency relationship. If the law was otherwise, every franchisee who independently owned and operated a franchise would be the true agent or employee of the franchisor.

Here it was undisputed that Marsh independently owned and operated the franchise. Marsh hired and fired employees, set office wages and commissions, and determined his business hours. The franchise agreement recited that he was an independent contractor and that Coldwell Banker could only terminate for cause. This was an important factor in determining whether Marsh was an agent or an independent contractor. (*Id.*, at pp. 1294-1297, 6 Cal.Rptr.2d 386.)

The franchise agreement further required that Marsh hold his real estate office out as an independently owned and operated business. Marsh testified that his business cards and office letterhead contained the standard disclosure: "Independently Owned and Operated Member of Coldwell Banker Residential Affiliates Incorporated." The Coldwell Banker logo did not appear on any of the real estate forms or transactional documents used by Marsh.

Marsh was the actual broker in the transaction, not Coldwell Banker. Marsh, not Coldwell Banker, owed appellant a fiduciary duty. Absent a showing that Coldwell Banker controlled or had the right to control the day-to-day operations of Marsh's office, it was not liable for Marsh's acts or omissions as a real estate broker on a true agency-respondeat superior theory. (*E.g., Cislaw v. Southland Corp., supra,* 4 Cal.App.4th 1284, 1290-1292, 6 Cal.Rptr.2d 386; *Weiss v. Chevron, U.S.A., Inc.* (1988) 204 Cal.App.3d 1094, 1100, 251 Cal.Rptr. 727.)

Ostensible Agency

The trial court erroneously rejected appellant's ostensible agency theory. Civil Code section 2300 provides: "An agency is ostensible 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." Here, appellant tendered the issue of whether Coldwell Banker, by the want of ordinary care, could be responsible for Marsh's actions. (*Walsh v. American Trust Co.* (1935) 7 Cal.App.2d 654, 660, 47 P.2d 323.)

"It is elementary that there are three requirements necessary before recovery may be had against a principal for the act of an ostensible agent. The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; such belief must be generated by some act or neglect of the principal sought to be charged; and the third person in relying on the agent's apparent authority must not be guilty of negligence." (*Associated Creditors' Agency v. Davis* (1975) 13 Cal.3d 374, 399, 118 Cal.Rptr. 772, 530 P.2d 1084.)

The ostensible authority of an agent cannot be based solely upon the agent's conduct. (*Lindsay-Field v. Friendly* (1995) 36 Cal.App.4th 1728, 1734, 43 Cal. Rptr.2d 71.) "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." (*Preis v. American Indemnity Co.* (1990) 220 Cal.App.3d 752, 761, 269 Cal.Rptr. 617.)

(continued)

Here Coldwell Banker made no specific representations to appellant personally. It did, however, make representations to the public in general, upon which appellant relied. We understand why appellant, and members of the public generally, might believe that Coldwell Banker "stood behind" Marsh'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 appellant stated at his deposition: Coldwell Banker's "outreach was successful. I believed they [Marsh and Davidson] were Coldwell Banker. They do a good job of that."

Appellant, a sophisticated real estate investor and superior court judge did not notice the small print disclaimer language. Instead, he relied on the large print and believed that he was dealing with Coldwell Banker, i.e., that Coldwell Banker "stood behind" Marsh. An ordinary reasonable person might also think that Marsh was an ostensible agent of Coldwell Banker. We obviously express no opinion on whether a trier of fact will so conclude or whether appellant was himself negligent. (*Associated Creditors' Agency v. Davis, supra,* 13 Cal.3d at p. 399, 118 Cal.Rptr. 772, 530 P.2d 1084.)

Whether ostensible agency exists ". . . is a question of fact . . . and may be implied from circumstances. (Citations.)" (*Yanchor v. Kagan* (1971) 22 Cal.App.3d 544, 550, 99 Cal.Rptr. 367; *see also Walker v. Signal Companies, Inc.* (1978) 84 Cal.App.3d 982, 999, 149 Cal.Rptr. 119.) For summary judgment purposes, it is sufficient to observe that a triable issue of material fact is present. Nothing in *Cislaw v. Southland Corp., supra,* 4 Cal.App.4th 1284, 6 Cal.Rptr.2d 386, compels a contrary determination because that case did not present an issue of ostensible agency. (*Id.* at p. 1288, 6 Cal.Rptr.2d 386.) Cases are not authority for an issue not considered in the court's opinion. (*E.g., People v. Heitzman* (1994) 9 Cal.4th 189, 209, 37 Cal.Rptr.2d 236, 886 P.2d 1229.)

Our holding is not a declaration that Coldwell Banker, or other large real estate franchise companies, are routinely fair game for any real estate transaction gone awry. However, where, as here, the plaintiff introduces some evidence raising a triable issue of fact on an ostensible agency theory, such is sufficient to withstand summary judgment.

The judgment is reversed.

Case Analysis

1. Why did the appellate court refuse to apply the doctrine of respondeat superior?
2. Why did the appellate court say that the theory of ostensible agency might apply?

SEC. 11–3 EMPLOYMENT LAW ISSUES

Employment law deals with the rules affecting the relationship between employers and employees. In general, this includes the creation of the relationship, the rights and obligations of both the employer and employee during the relationship, and the rights and obligations of the parties upon termination of the relationship. Employment law often overlaps with principles of tort law, contract law, and intellectual property law. Additionally, constitutional law and numerous labor laws and regulations play a substantial role. Both the state and federal governments regulate employment, and both have various administrative agencies regulating specific areas of the employment relationship.

Creating the Employer–Employee Relationship

collective bargaining
Joining together of employees for the purpose of negotiating; often done by a union.

employment-at-will
An employment arrangement without a fixed term.

An employer–employee relationship is created when the employer hires an employee. Sometimes this results from a formal contract where terms were negotiated by the parties. Length of employment, compensation, working conditions, and rights upon termination are spelled out. Other times, an employee is hired subject to terms and conditions found in a pre-existing contract between the employer and a labor union or other **collective bargaining** unit. Still, other times, the employment agreement is an informal one. If the parties do not agree on the length of time for the employment, it is an **employment-at-will**. This means that the employee can be terminated at any time, without cause.