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SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF XXXXXXXXXXXXX

YYYYYYYY, Plaintiffs, v. MMMMMMM, Defendants.	Case No.: 0000000000 **MMMMMMMM TRIAL BRIEF**

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1.

SUMMARY

There is one issue to be decided at this phase: had the original case proceeded beyond the Motion for Summary Judgment and on to trial, could the cab companies have obtained a defense verdict? If this question is answered negatively, then a verdict here in favor of MMM is mandated, as the cab companies will have failed to prove the necessary element of causation for their prima facie case, sometimes referred to as the "case-within-a-case" requirement in legal malpractice cases. Without proof that the cab companies would have prevailed in the original lawsuit, they can not prevail here. Sukoff v. Lemkin (1988) 202 Cal.App.3d 740, 744; Campbell v. Magana (1960) 184 Cal.App.2d 751, 754.

Answering the question of causation in this malpractice case requires investigation of two key issues from the original case. They are:

1. Were the cab driver class members in the original case employees or independent contractors for the purposes of Unemployment Insurance and Workers' Compensation claims?
2. If the cab drivers were employees, did the cab companies' business practices of dissuading drivers from filing such claims, combined with their treatment of the security deposits and the absence of a minimum-wage guarantee violate the California Unfair Business Practices Act (California Business and Professions Code sections 17200 et seq.)?

MMM respectfully submits that given the evidence presented to date, in conjunction with the state of the law on these issues, both of these questions must be answered affirmatively. This then moots the finding of breach from phase 1 of the trial, and mandates a defense verdict in favor of MMM.

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2.

EMPLOYEE VS. INDEPENDENT CONTRACTOR

The issue of whether the cab drivers are employees or independent contractors is the first threshold question for this phase of the trial. The cases of Borello, Edwinson and Gallegos, all discussed previously in this trial, are determinative of this issue. However, these cases must be viewed in light of the statutory background and presumptions which control this area of the law. Especially with regard to the Unemployment and Workers' Compensation Insurance fields, which are highly regulated with specific statutory schemes, the case law may not be taken out of its intended context as it is designed to work together with these statutes. An examination of the statutory law is therefore appropriate before actually dealing with the ultimate issue.

A. Statutory Background and Presumptions

California law has a history and tradition of protecting individual working men and women. Several statutes best sum up this perspective. First, consider the mandate of California Labor Code section 3202, which provides:

> This division and Division 5 (commencing with Section 6300) shall be **liberally construed** by the courts with the purpose of **extending their benefits** for the protection of persons injured in the course of their employment. [Emphasis added].

Thus, by the plain terms of the Worker's Compensation code, when in doubt, err on the side of protecting the worker. Next, consider a pair of definitions. First is California Labor Code section 3353, which provides for a very specific and narrow interpretation of the phrase "independent contractor:"

> "Independent contractor" means any person who renders service for a specified recompense for a **specified result**, under the control of his principal as to the **result** of his work **only** and **not** as to the **means** by which such result is accomplished. [Emphasis added].

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In contrast to this is California Labor Code section 3357, which broadly defines "employee:"

> Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is **presumed** to be an employee. [Emphasis added].

Finally, California Labor Code section 5705 provides:

> The following are affirmative defenses, and **the burden of proof rests upon the employer to establish them**: (a) **That an injured person claiming to be an employee was an independent contractor** or otherwise excluded from the protection of this division where there is proof that the injured person was at the time of his injury actually performing service for the alleged employer. [Emphasis added].

From the juxtaposition of these three code sections, the legislature's intent is clear: workers are **presumed** to be employees, except the **narrowly-tailored** exception of the independent contractor. Where it wishes to claim that a worker falls within this exception, **the employer bears the burden of proof of overcoming this presumption**. This is the burden which the cab companies faced in the original case, and is the burden they still bear herein.

B. Determinative Tests and Factors

As this Court by now knows, the cab companies were entirely successful with using their leasing system to thwart the unemployment insurance and Workers' Compensation systems until 1989. During that time, the cab companies saved huge sums of money as a result of avoiding the employee expenses associated with various mandatory taxes and insurance policy premiums.

In 1989, however, this unbridled success ended with the seminal case of S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341. In this case, the California Supreme Court held that migrant farm workers, operating under a system easily analogous to the cab companies' leasing system, were employees as opposed to independent contractors. The Court initially explained its' rationale in finding the employer's version of the facts unpersuasive in the following manner:

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> The grower controls the … operations on its premises from planting to sale of the crops. It simply chooses to accomplish **one integrated step** in the production of one … crop by means of **worker incentives** rather than **direct supervision**. It thereby retains **all necessary control** over a job which can be done only one way. Borello, supra. at 345. [Emphasis added].

The facts of the Tracy case are analogous to Borello in this regard. The cab companies have simply chosen to accomplish one integrated step of the actual operation of the taxi cabs[1] in their business of operating a taxi company by means of worker incentives in the form of obtaining fares to pay the gate fees and earn a living,[2] instead of through direct supervision.[3]

In the Borello case, as in Tracy, a contract between the parties wherein they allegedly "voluntarily" agreed that their relationship was one of independent contractor as opposed to employee. The Borello Court dismissed this summarily, stating:

> The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced. Borello, supra. at 349.

The Borello Court reasoned that given the disparity in the relative bargaining positions of the parties and the one-sided nature of the contract at issue, it would disregard the contractual provisions and look beyond it to the actual relationship of the parties to determine the workers' status. Id. So to, then, must the Court in Tracy have done, and so must this Court now do. Indeed, the uncontroverted testimony provided from the EDD's division chief bears this out.[4]

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[1] See, e.g., testimony of BBBB (7/11/00) 119(5)-120(15); 199(4-11)

[2] See, e.g., testimony of AAAA (7/5/00) 270(3-14); BBBBB (7/12/00) 196(10-14)

[3] The nature of cab driving does not require direct supervision. See, e.g., testimony of BBBBB (7/5/00) 131(15)-132(7); GGGGG (711/00) 168(25)-169(23)

[4] "Choice of status is irrelevant; it is the actual working conditions that determine status, not the paper that is signed." GGGGGG (12/11/00) 227(4-7); 227(20)-228(14); MMM's Exhibits 162 and 164

The Borello Court then discussed certain general factors beyond the traditional "control" test which a Court may consider in making its determination on this issue:

> Additional factors include (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. [Citations]. Generally, ... the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations. [Citations]. Borello, supra. at 351.
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> Besides the "right to control the work," the factors include (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business. Borello, supra. at 354-355.

These factors ultimately became the roadmap for a finding of employee status in Borello, and are the blueprint for the defeat of the cab companies the Tracy case on the same issue, for the same reasons: the companies' exert control over each of these facets of the relationship with the drivers. The manner and means of this control are almost too innumerable to detail herein.

1. Background factors to be considered in assessing control

This court should not accept, as the cab companies are certain to urge, that the only time that should be considered is while the drivers are actually behind the wheel of a cab. The relationship of the drivers to the companies is much more detailed than that and far exceeds that narrow scope.[5]

With this realization, background factors, such as those referred to immediately above, become relevant to the inquiry. By way of example, while the cab drivers are to a certain extent performing a distinct service or function, that fact remains that they are simply driving passengers around the city, a task that does not require much in the way of training. Indeed, the testimony in this case has shown clearly that the cab companies even accepted individuals with absolutely no experience.[6] Further, because driving a cab is not the type of work which lends itself to direct supervision,[7] its' absence is not cause for remark. Further, the testimony has been unanimous that with the exception of an A-card, and a Driver's license, the cab drivers supply none of the instrumentalities necessary to carry out their trade.[8] Indeed, all such instrumentalities are specifically provided for in the purported "lease" contract, and are to be provided by the cab companies.[9] The length of time for any of the shifts was always set by the cab companies at ten hours; drivers could not take out cabs for consecutive 24-hour periods.[10] The method of payment to the drivers was by the fare, which is analogous to the "by-the-bucket" model employed by Borrello with his migrant farmers who were found to be employees, in that it attempts to substitute a profit motive for overt control.[11] Finally, as we discussed at length above, it has been conclusively proven that the cab company plaintiffs herein are in the business of being cab companies, as opposed to being in the business of being leasing companies.[12] As such, cab drivers, **as cab drivers**, are both performing work that is part of the cab companies' regular business and are rendering a service that is an integral part of the cab companies' business.

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5 See fn. 10, supra.
6 See, e.g., testimony of DDDD (3/13/00) 59(18)-60(12); AAAAA (7/5/000) 250(15-20)
7 See fn.12, supra.
8 See, e.g., testimony of BBBB (7/5/00) 132(8-16); GGGGG (7/11/00) 169(24)-170(13); FFFFF (7/12/00) 32(5-8)
9 See, e.g., MMM's Exhibit 122
10 Id.
11 See fns. 11 and 12, supra.
12 See fns. 2 and 3, supra.

2. Gatekeeper manifestations of control

Perhaps one of the clearest examples of this control is fact that the purported "lease" contracts are completely non-negotiable.[13] Likewise, security deposits are non-negotiable,[14] as are the changes to the lease contracts which the cab company defendants seemingly make at will.[15] The cab companies also control the manner in which the drivers get to the road by controlling the setting-up of the shift system itself,[16] as well as how it is administered in terms of which cabs went out on which shifts[17] with which drivers.[18] Added to this is the fact that the cab companies perform initial gatekeeping functions by interviewing[19] and evaluating[20] applicants, going so far as to require a formal application,[21] collecting references,[22] and administering written tests.[23] As if this were not enough, the cab companies then have the ultimate stranglehold on the flow of incoming taxicab drivers: the "hire letter," which the testimony unanimously stated was an absolute requirement for a prospective driver.[24] Despite this need, the cab companies, are under absolutely no obligation to give out this letter, thus granting unto them the power and ability to deny entrance into the very industry those prospective drivers they wished to keep out.[25]

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[13] See, e.g., testimony of DDDD (3/8/00) 188(8-13); 189(6-7); 189(23)-190(12); 197(4-11); 197(25)-198(8); FFFF (3/13/00) 92(23)-101(9); BBBB (7/5/00) 87(22)-88(1); 89(6-8); 89(25)-90(5); MMMM's Exhibits 53-56

[14] See, e.g., testimony of DDDD (7/10/00) 88(24)-89(6); GGGGG (7/12/00) 44(9-11); MMMMM (7/12/00) 256(14-25); FFFFF (12/12/00) 166(2-4)

[15] See, e.g., testimony of DDDD (3/8/00) 198(25)-199(10); 200(1-5); BBBB (7/5/00) 76(20)-77(1); 77(17-19); AAAA (7/5/00) 254(24)-255(9); 255(19-23); GGGG (7/11/00) 80(21)-81(21); HHHH (7/12/00) 56(12-25); MMMMM (7/12/00) 254(3-13); 257(10)-258(5); RRRRR (12/11/00) 89(7-16)

[16] See, e.g., testimony of DDDD (3/12/00) 7(8)-8(4); MMMM (7/19/00) 26(13-21); RRRR (12/11/00) 141 (12-14)

[17] See, e.g., testimony of MMMM (7/12/00) 259(8-14); QQQQ (7/19/00) 89(21)-91(6)

[18] See, e.g., testimony of MMMM (7/12/00) 243(14)-244(3); DDDDD (7/19/00) 47(11)-48(7)

[19] See, e.g., testimony of FFFFF (7/10/00) 86(19-24)

[20] See, e.g., MMM's Exhibits 13, 108, 109, 123, 136, 139, 143-148, 150, 152, 156, 161, 172

[21] Id.

[22] Id.

[23] Id.; See also testimony of FFFF (7/10/00) 92(10-20); RRRR (7/10/00) 203(4-12)

[24] Id.; See also testimony of BBBB (7/5/00) 117(7-15); FFFF (7/10/00) 92(21)-93(1); RRRR (7/10/00) 203(13)-204(1); DDDD (12/12/00) 115 (4-10)

[25] See §3B8 below, regarding the critical difference between having the power (which matters) and exercising it (which doesn't).