Filed 12/12/12

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

RUBEN MONARREZ, an Incompetent Person, etc., Plaintiff and Appellant, v. AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA, Defendant and Respondent.	B233512 (Los Angeles County Super. Ct. No. VC055461) **ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]**

THE COURT:

It is ordered that the opinion filed herein on November 20, 2012, be modified as follows:

Pages 14-15:

Final paragraph, starting on page 14, the second two sentences now read:

"He has worked for Auto Club since 1998. Hirad has worked for Auto Club almost exclusively since it began its towing operations over 20 years ago."

These two sentences are changed to read as follows:

"He has been an Auto Club technician since 1998. Hirad has contracted with Auto Club almost exclusively since it began its towing operations over 20 years ago."

This modification does not effect a change in judgment.

Respondent's Petition for Rehearing is denied.

Filed 11/20/12 (unmodified version)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

RUBEN MONARREZ, an Incompetent Person, etc., Plaintiff and Appellant, v. AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA, Defendant and Respondent.	B233512 (Los Angeles County Super. Ct. No. VC055461)

APPEAL from a judgment of the Superior Court of Los Angeles County. Raul A. Sahagun, Judge. Reversed.

Thon Beck Vanni Callahan & Powell, Kevin K. Callahan; Esner, Chang & Boyer, Stuart B. Esner, Holly N. Boyer for Plaintiff and Appellant.

Knapp, Petersen & Clarke, Stephen C. Pasarow, Maria A. Grover for Defendant and Respondent.

Ruben Monarrez suffered catastrophic injuries when he was struck by a hit-and-run driver while receiving roadside assistance for a flat tire. The issue presented by this appeal is whether the Automobile Club of Southern California (Auto Club) may be held liable for Monarrez's injuries. Following de novo review, we conclude that there are triable issues of material fact as to whether the tow truck company assisting Monarrez is the actual or ostensible agent of Auto Club, or whether it is an independent contractor. We reverse the summary judgment in favor of Auto Club.

FACTS

On January 31, 2008, Auto Club member Ruben Monarrez requested roadside assistance for a flat tire.[1] Auto Club dispatched a flat bed car carrier driven by Juan Felix. When Felix arrived at around 11:00 p.m., he found Monarrez standing near the front of his car on the right shoulder of the Long Beach freeway. Felix describes the area as "very dangerous, narrow, dark." Monarrez's car was six inches from the "fog line," the white line that separates the freeway lanes from the shoulder.

Felix decided to transport Monarrez's car to the next exit and change the tire off the freeway. He backed his truck up toward Monarrez's vehicle, got out, and obtained Monarrez's Auto Club card and identification. Felix's truck was encroaching onto the slow lane of the freeway.

Felix told Monarrez of his plan to move the car and said, "Can you go into my tow truck." Monarrez replied, "Okay." After their brief conversation, Felix dropped his clipboard in the truck and saw Monarrez near the guardrail, toward the back of the disabled car. While Felix positioned the car on his truck, he did not keep an eye on Monarrez, but was aware that Monarrez did not pass him on the way to the front of the truck. When he was done loading the car, Felix found Monarrez lying next to the tow

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[1] Auto Club is a member of the American Automobile Association (AAA), which accredits regional clubs and offers programs in training, communications systems, banking, insurance, fleet purchases, auto repair networks, credit cards, etc.

truck in the slow lane of the freeway, in a fetal position, after being struck by a motorist.[2] Felix activated an emergency button in his truck to alert Auto Club, which in turn notified the police. Monarrez suffered serious brain and orthopedic injuries, and requires 24-hour skilled nursing care for life.

Juan Felix works for Hirad, Inc., dba AM/PM Towing & Auto Repair (Hirad) in Bell Gardens and drives a truck insured under Hirad's $1 million commercial policy, but considers himself to be an Auto Club technician. Felix was certified by Auto Club in 1998. Technicians are recertified by Auto Club every four years and take a mandatory Auto Club orientation program every two years. If a technician's certification has expired or he has not taken the orientation class, he cannot log onto Auto Club's computer in his truck or receive dispatch calls. When a technician approaches a member, he communicates that he is AAA, to give the member confidence.[3]

According to Felix, Auto Club "basically teach[es] you how they expect you to do the job" during training classes conducted at an Auto Club office. He has viewed many Auto Club videotapes showing how to present himself and how to perform roadside service correctly and safely. He is always on his best behavior during Auto Club inspections, knowing that respondent could divert business if he and the shop are not up to snuff.

Hirad is described as an independent contractor in its "Preferred Contractor Roadside Assistance Contract" (the Contract) with Auto Club.[4] This is a non-negotiable

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[2] No one witnessed the collision, except the unknown motorist. Defendants speculate that Monarrez "wandered into traffic"—as if he were inclined to take a midnight stroll in freeway lanes after safely waiting 40 minutes on the shoulder for the arrival of the tow truck. It is equally plausible that Monarrez was hit while complying with Felix's directive to get into the tow truck cab. Monarrez may have tried to enter the cab using the driver's side door, which was encroaching onto the slow lane.

[3] Felix perceives AAA and Auto Club as one entity.

[4] The Contract reads, "It is the express intention of the parties that [Hirad's] relation to [Auto Club] in the performance of this Contract is that of an independent contractor,

form used with all contracting tow truck companies. The Contract requires Hirad to provide roadside assistance to AAA affiliates and their members. All service calls are at the sole discretion of Auto Club.

Hirad has contracted with Auto Club for over 20 years, and 85 to 90 percent of Hirad's business comes from Auto Club. Hirad's tow trucks and uniforms bear the AAA logo. According to Felix, "the only identifying information it had on your uniform identified you as a AAA person."

Auto Club vets tow truck companies (known as "stations" in Auto Club lingo) before contracting with them. It examines a company's towing experience, its record with local police departments, its management team, and its business references. As part of its quality assurance program, Auto Club provides service guidelines and training seminars to its contractors and monitors their performance through customer satisfaction surveys, visits to contractor stations, and investigation of consumer complaints.

The Contract requires Hirad to abide by the guidelines for preferred contractors established by Auto Club. To comply, "All facilities, vehicles and equipment of the Station shall be clean, neat in appearance and otherwise acceptable to the Club. The Station agrees that in rendering any roadside assistance to members, or in performing any repairs to the vehicle of a member, the Station's drivers, mechanics and other personnel shall be clean, uniformed and neat in appearance, and shall act in a safe, prompt, courteous, ethical and proficient manner, and the Station shall guarantee the best of material and workmanship. . . ."

If Hirad fails to perform services to the standard of Auto Club—or if the appearance of the shop, equipment or the technicians is substandard—Auto Club has the right to terminate the Contract or redirect calls to other stations. It is undisputed that

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and not an employee, agent, joint venturer or partner of [Auto Club]. [Hirad] shall not represent to any third party that any employment, agency, partnership or joint venture relationship exists between [Hirad] and [Auto Club]. . . . [Hirad's] personnel performing services under this Contract shall at all times be under [Hirad's] exclusive direction and control, and shall be employees of [Hirad] and not employees of [Auto Club]."

Auto Club can recommend to Hirad that a technician be disciplined or terminated. If the recommendation is not followed, Auto Club can terminate the Contract.

Auto Club has no contract with Juan Felix, nor does it screen, hire, pay, or schedule the hours of any technicians who work for Hirad. Auto Club does not own, control, lease, or maintain Hirad's tow trucks. Hirad is compensated by Auto Club on a per-call basis. Although Auto Club declares that the Contract "is not exclusive" and Hirad "is free to do business" with others, this claim is belied by the wording of the Contract.[5] Hirad's managers, supervisors, officers, shareholders and directors are barred from participating in any other towing business under the Contract, without the express written consent of Auto Club. Auto Club installs its own radio equipment and computers in Hirad's tow trucks and office.

Auto Club provides technicians with a 150-page document entitled "Orientation Training for Independent Contract Station Service Technicians" (the Training Manual). The Training Manual is comprehensive, covering physical appearance (no visible tattoos, no untucked uniform shirts, no smoking, no tennis shoes), preparations, safety equipment and attitude of the technicians. Auto Club gives technicians a card with "Things to Say" to members.[6] The first sentence of the Training Manual reads, "To members, the service

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[5] The Contract reads, "The Station agrees to provide roadside assistance *only to the Club,* other than responding to requests received from public agencies, commercial accounts or private individuals . . . . The Station shall not enter into or maintain any contract, agreement or other arrangement to provide roadside assistance with any other person or entity, including, but not limited to, an auto club, vehicle manufacturer or other business entity which offers or provides roadside assistance, either directly or indirectly, on a membership or other basis." (Italics added.)

[6] The things to say include "Thank you for being a member for ___ years" as they verify membership status. Technicians should say "Let's see what can be done!", "Don't worry. This happens all the time," "That's no problem: I want to help you," "I know what it's like to be in your situation," "Do you have a ride?" and "Don't forget your personal belongings." As the service concludes, technicians are instructed to say that they seek to make the customer "totally satisfied," ask if they can be of any further assistance, and to close with "Thank you for choosing the Auto Club."

technician who responds to an emergency road service call **is** the Auto Club." It adds, "Our name, reputation and members are our most important asset." Technicians are trained by Auto Club how to communicate and build a rapport with customers, to listen, to avoid sexual harassment, to defuse angry members, to use de-stressing techniques in emergency situations, to problem solve, and to obey the Vehicle Code and federal safety regulations. Technicians are told to direct members to other Auto Club-affiliated businesses (rental car companies, repair facilities) and carry written materials for this purpose.

Much of the Training Manual is devoted to highway safety during service calls. In particular, technicians are instructed to "1. On a tow, put the member in the tow truck and have them put on their seat belt." Further, "Standing or working on the traffic side of vehicles is the highest level of EXPOSURE. Minimize the time spent in this area as much as possible. And definitely keep the member/customer out of this area." The Training Manual details how to provide towing services in dangerous areas like gore points, on curves, near accident debris, and on narrow freeway shoulders.

Felix agreed that "it was always made clear to you by AAA that member safety was the No. 1 priority." He knew he was supposed to explain the danger of remaining outside of the tow truck, because a member might not understand the hazards of standing on a freeway. He did not have this conversation with Monarrez.

According to Auto Club manager John Brower, Auto Club expects tow truck drivers to "initially make sure that the member is placed in a position of safety" and during the rendering of services "to make sure that they stay in a position of safety . . . so they don't get injured." The general public does not understand the hazards of being stopped along the side of a highway, so the technician has the responsibility "to do the best that he can to protect the members from harm," according to Brower. If a technician tries to comply with the Training Manual by instructing the member to get into the cab of the truck, and the member fails to comply, Auto Club would "expect the tow truck operator to undertake further efforts to communicate with the member to explain why they absolutely have to get into the cab." It is not sufficient "in terms of member safety

to simply say in passing, 'You should get into the cab,' and then when the member doesn't get into the cab, to just progress along and do their job without saying anything else." If a member persists in refusing to enter the cab, the driver is supposed to call dispatch and alert Auto Club. The technician "definitely has to keep the member away from the traffic side of the vehicle."

The Training Manual instructs on defensive driving, road rage, helping disabled members, entitlement to Auto Club services, what kind of services will be provided (dead battery jumpstart, fuel, towing, locksmith entry, etc.), and the codes and procedures used during radio conversations. In addition, technicians are advised to "talk up the benefits" of towing the car to an "AAA Approved Auto Repair Facility."

An Auto Club supervisor visits Hirad and speaks to the people there two or three times per month (or more, if someone has complained about the station), in addition to communicating 10 to 15 times per month by telephone. The Auto Club supervisor thoroughly inspects the station for cleanliness, examines the equipment, and checks the grooming and uniforms of the technicians. In the words of Hirad's owner, "They keep in touch to let us know how we're doing": Auto Club contacts him "every few days" and is "very involved in your business." Auto Club is "continually involved in the process of your providing services to members by their ongoing training and also with respect to providing [customer] surveys and the weekly status reports," as well as directing what Hirad's drivers should do and say when they arrive on scene. To members, "the service technician who responds to an emergency road service is the Auto Club."

After emergency services have been rendered, Auto Club sends a survey to its members asking them to gauge the performance of the station. Auto Club generates a "Weekly Performance Report" that it provides to each station, based on the customer satisfaction surveys. This information is shared with AAA, which "tabulates the member satisfaction level on a national basis." Auto Club, not AAA, decides whether a station should be terminated for providing substandard service.

PROCEDURAL HISTORY

Monarrez filed suit through his guardian ad litem. The complaint alleges that Juan Felix was inadequately trained in safety procedures, and negligently allowed Monarrez to remain in a dangerous and vulnerable location on the freeway shoulder, contrary to industry custom and safe practice. This negligence led to plaintiff's injuries.

AAA and Auto Club moved for summary judgment, arguing that they have no duty to Monarrez because Felix works for an independent contractor. Defendants insisted that they merely provide "orientation on proper personal grooming and greeting" and do not control the method of towing and servicing vehicles. Monarrez responded that there are triable issues as to whether Hirad is the employee, agent, or ostensible agent of Auto Club, which exerts "tremendous control over every detail" of its relationship with Hirad. Plaintiff did not oppose AAA's request for summary judgment.

The trial court granted the motion of AAA and Auto Club because the Contract "expressly defines their relationship as that of independent contractor." The court found that Auto Club "had no control of the manner or means by which [Hirad] performed its emergency roadside service." Plaintiff failed to present substantial evidence establishing a different relationship, and the provisions of the Training Manual "are merely 'guidelines.'" Judgment was entered in favor of AAA and Auto Club.

DISCUSSION

1. Appeal and Review

The judgment is appealable. (Code Civ. Proc., § 437c, subd. (m)(1).) Summary judgment "shall be granted 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." (*Id.*, subd. (c).) The moving papers are strictly construed, while the opposition is liberally construed in the most favorable light; doubts about the propriety of granting the motion are resolved in favor of denying it. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768; *Stratton v. First Nat. Life Ins. Co.* (1989) 210 Cal.App.3d 1071, 1083.) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations,

trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) Review is de novo. (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003.)

2. The Parties' Contentions

Auto Club contends that Hirad is an independent contractor; therefore, Auto Club is not vicariously liable to third parties for the torts of Hirad's employees. (*Privette v. Superior Court* (1993) 5 Cal.4th 689, 693.) Auto Club argues that it has no right to control the manner in which Hirad's employees perform their work, plus the Contract specifies that the relationship between Auto Club and Hirad "is that of an independent contractor, and not an employee, agent, joint venturer or partner of the Club" Monarrez counters that there is a triable issue of fact as to whether Hirad and Juan Felix are the actual or ostensible agents of Auto Club. Hirad acts at the bidding of Auto Club by sending a tow truck to assist stranded motorists; Auto Club collects money from its members for this service; and Auto Club dominates every aspect of Hirad's operations. In addition, Felix's uniform and truck bearing the Auto Club logo lead the public to believe that he is the agent of Auto Club, not an independent contractor.

3. The Label Used by the Parties Is Not Dispositive

The language in the Contract referring to Hirad as an independent contractor does not create an open and shut case. "The label placed by the parties on their relationship is not dispositive . . . ." (*S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 349 (*Borello*).) The courts have disregarded formal documents purporting to create an independent contractor relationship "whenever the acts and declarations of the parties are inconsistent" with independent contractor status. (*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 877.) Independent contractor status is a jury question when the evidence or inferences are disputed. (*Borello*, at p. 349; *Seneris v. Haas* (1955) 45 Cal.2d 811, 831.) The issue is one for the court "if only one inference may be drawn from all the facts." (*Torres v. Reardon* (1992) 3 Cal.App.4th 831, 838; *Quintal v. Laurel Grove Hospital* (1964) 62 Cal.2d 154, 167.)

4. Actual and Ostensible Agency

"An agent is one who represents another, called the principal, in dealings with third persons." (Civ. Code, § 2295.) An "actual" agency occurs when the agent "is really employed by the principal." (Civ. Code § 2299.) An "ostensible" agency occurs "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." (Civ. Code § 2300; *J.L. v. Children's Institute, Inc.* (2009) 177 Cal.App.4th 388; 403.) Agency may be implied from the facts and proved by circumstantial evidence. (*Tomerlin v. Canadian Indem. Co.* (1964) 61 Cal.2d 638, 643-644; *American Cas. Co. v. Krieger* (9th Cir. 1999) 181 F.3d 1113, 1121; *Hartong v. Partake, Inc.* (1968) 266 Cal.App.2d 942, 960.) Inferences may be drawn from the conduct of the parties. (*Nichols v. Arthur Murray, Inc.* (1967) 248 Cal.App.2d 610, 614; *Wolf v. Price* (1966) 244 Cal.App.2d 165, 172.)

The primary test for agency is control. If one of the parties has the right to control and supervise the actions of another, there is an agency not an independent contractor relationship, even if the right to control is not exercised and there is no actual supervision of the agent's work. (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370; *Hardin v. Elvitsky* (1965) 232 Cal.App.2d 357, 373.) Secondary factors to consider include: whether the person hired is performing services in a distinct occupation or business; whether the work is done under the direction of the principal or by a specialist without supervision; the skill required; who provides the tools and workplace; whether services are performed for an indefinite period of time; whether payment is by time or by the job; and whether the parties believed they were creating an employer/employee relationship. (*Malloy*, at pp. 371-372; *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 299-300.)

An agency relation may be created informally, so long as the conduct of each "manifest[s] acceptance of a relationship whereby one of them is to perform work for the other under the latter's direction." (*Malloy v. Fong*, *supra*, 37 Cal.2d at p. 372.) The rules that determine whether there is an independent contractor versus employee relationship are the same rules that apply when determining if there is an independent contractor versus agent relationship. (*Rogers v. Whitson* (1964) 228 Cal.App.2d 662,

671.) "[T]he distinguishing features of an agency are representative character and derivative authority." (*Lovetro v. Steers* (1965) 234 Cal.App.2d 461, 474; *Gipson v. Davis Realty Co.* (1963) 215 Cal.App.2d 190, 206.)

Monarrez's complaint contains multiple allegations of an agency relationship. Agency need only be generally pleaded. Agency is not a cause of action (the cause of action is negligence) but is an averment of an ultimate fact, subject to proof at trial. (*Skopp v. Weaver* (1976) 16 Cal.3d 432, 437; *City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 212-213; *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 886; *Cano v. Tyrrell* (1967) 256 Cal.App.2d 824, 830 ["the fact of agency is evidentiary matter to be proved by competent evidence during trial"]. See also 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading" § 919, p. 333 ["it is difficult to see why agency and scope of employment must be pleaded in tort actions]".) We reject Auto Club's claim that agency is inadequately pleaded in Monarrez's complaint.

5. <u>Case Law Regarding Independent Contractor, Employee, or Principal/Agent Status: The Primary Issue Is Control</u>

An independent contractor is "a person who is employed by another to perform work; who pursues an 'independent employment or occupation' in performing it; and who follows the employer's 'desires only as to the results of the work, and not as to the means whereby it is to be accomplished.'" (*White v. Uniroyal, Inc.* (1984) 155 Cal.App.3d 1, 24.) In short, the person hiring an independent contractor has """no right of control as to the mode of doing the work contracted for."""" (*Privette v. Superior Court, supra,* 5 Cal.4th at p. 693.) The "essence" of the relationship is the "'control of details'—that is, whether the principal has the right to control the manner and means by which the worker accomplishes the work." (*Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1, 10 (*Estrada*).)

In *Borello*, an agricultural firm claimed that its harvesters were independent contractors who applied skill and judgment, controlled their own work and were compensated only for results. The Supreme Court disagreed. The workers' tools were simple; the work required stamina but no special skill; their pay did not depend on their

initiative; they were an integrated part of the grower's business; and they were dependent upon the grower for their income. Borello exercised "'pervasive control over the operation as a whole'" and all meaningful aspects of the business relationship (price, payment and the right to deal with consumers) was controlled by it. (48 Cal.3d at p. 355-356.) Because Borello "retains all *necessary* control" over its operation, it could not assert that it lacks control over the exact means by which one step of its operation is performed. (*Id.* at p. 357.) Further, the work is "permanent" in the sense that the workers return year after year to work for Borello. (*Ibid.*)

The cases reflect the complexity of modern business relationships. In one instance, plaintiff truck drivers owned their vehicles and transported cargo from the port to the facilities of defendant's customers; their relationship with the defendant was designated as that of independent contractor. Plaintiffs paid all expenses associated with their trucks while defendant provided a placard with its name to affix to the trucks. Though defendant did not own plaintiffs' trucks, it inspected and approved them. Plaintiffs chose their own routes when defendant dispatched them to haul cargo, and they did not wear uniforms or adhere to a dress code. If they refused a dispatch, they were subject to disciplinary action and denied future work. Plaintiffs were paid by the defendant for the lease of their trucks and with a payroll check. (*Arzate v. Bridge Terminal Transport, Inc.* (2011) 192 Cal.App.4th 419, 421-423.)

The court in *Arzate* found a triable issue of fact as to whether the plaintiffs were independent contractors. On the one hand, the defendant did not control the manner in which the truckers hauled the loads in their own trucks, paid their own expenses, and decided when to rest or eat. On the other hand, defendant issued W-2 forms; withheld taxes; offered health benefits; paid hourly rates; and could terminate with 24 hours' notice. While the defendant claimed it merely made arrangements between customers and the truckers for the movement of containers, this was in fact defendant's regular business. (192 Cal.App.4th at p. 427.)

In *Estrada*, truck drivers had to provide vehicles that met the specifications and standards of FedEx; mark the trucks with the FedEx logo; pay all costs of operating and

maintaining the trucks; use the trucks exclusively in the service of FedEx; service a particular area; follow FedEx methods designed to avoid theft, loss and damage; foster FedEx's "'professional image'" and "'good reputation'"; drive safely; wear a FedEx uniform; and maintain a physical appearance that met FedEx standards as detailed in various corporate manuals. The drivers worked exclusively for FedEx, which could terminate the contract on written notice. The drivers and trucks were subject to daily inspection, and if found lacking, the driver could be barred from service. Drivers met twice a year with a FedEx manager and received annual progress reviews. (154 Cal.App.4th at pp. 5-8.)

The trial court in *Estrada* found that the FedEx drivers are employees, not independent contractors. The contractual agreement had all the constraints of an employment relationship under the guise of the independent contractor model. The drivers' work "is wholly integrated into FedEx's operation"; the work is "essential to FedEx's core business"; they "work exclusively and full time for FedEx"; their customers are "assigned to them by FedEx"; and they "must wear uniforms and conform absolutely to FedEx's standards." (154 Cal.App.4th at p. 9.) The appellate court wrote that although the manner and means to satisfy the contract are within the discretion of the drivers, FedEx could effectively terminate the drivers at will. Most significantly, "FedEx's control over every exquisite detail of the drivers' performance, including the color of their socks and the style of their hair" showed that the drivers are employees. The uniforms and trucks are marked with the FedEx logo, the drivers receive employee benefits, have regular schedules, and are supervised by FedEx managers. "The customers are FedEx's customers, not the drivers' customers." The drivers work exclusively for FedEx and generally do so for a long time. (*Id.* at pp. 11-12.)

6. <u>Existence of Triable Issues of Fact in This Case</u>

We cannot say that from all the evidence presented only a single inference can be drawn, so that the issue of actual or ostensible agency can be decided as a matter of law. The trial court in this case looked primarily at the Contract, but we discount the

"independent contractor" label used in the Contract and focus instead on the conduct of the parties. The court also deemed the Training Manual to be "mere guidelines."

The evidence shows that the Training Manual is not a "mere guideline." It controls every detail of the technicians' appearance and behavior from the acceptable (clean, uniformed, well groomed, courteous, prompt, ethical, safe and proficient) to the unacceptable (visible tattoos, tennis shoes, untucked uniform shirts, cigarette smoking). The Training Manual specifies the exact actions a technician must undertake during a highway service call, requiring that the member be put inside the tow truck cab, with the seat belt fastened; Auto Club dispatch must be notified if a member resists getting into the truck.

Auto Club's tight control is not illusory. It is undisputed that Auto Club can summarily terminate its relationship with Hirad if the appearance of the technicians, the tow trucks or the shop is not up to snuff, if the services provided fail to meet Auto Club standards or if Hirad fails to discharge a technician when Auto Club demands it. The right to terminate employment at any time strongly tends "'to show the subserviency of the employee, since it is incompatible with the full control of the work usually enjoyed by an independent contractor. Perhaps no single circumstance is more conclusive to show the relationship of an employee than the right of the employer to end the service whenever he sees fit to do so.'" (*Brose v. Union-Tribune Publishing Co.* (1986) 183 Cal.App.3d 1079, 1085.)

Technicians are certified by Auto Club and cannot log in or receive dispatches if their certification lapses or if they fail to undergo Auto Club training every two years. Almost all of Hirad's business comes from Auto Club. Hirad's principals and managers are barred from doing business with Auto Club's competitors and even from owning another towing company, without Auto Club's written consent. Customers are Auto Club customers, not Hirad's customers. All service calls are at the sole discretion of Auto Club.

Juan Felix testified that Auto Club "teaches you how they expect you to do the job." He has worked for Auto Club since 1998. Hirad has worked for Auto Club almost

exclusively since it began its towing operations over 20 years ago. Auto Club closely monitors the performance of Hirad and its technicians through face-to-face inspections, telephone calls every few days, weekly status reports and customer survey results. Hirad's owner agreed that Auto Club is "very involved" in his business and is "continually involved in the process of your providing services to members . . . ." Technicians are instructed what to say to Auto Club members at every phase of their interaction and how to safely perform all types of roadside service.

From this evidence, we cannot conclude that Auto Club has no right to control the manner and means by which Hirad and its technicians accomplish their work. On the contrary, Auto Club trains the technicians how to do the work, dispatches calls to them, then follows up with inspections and customer surveys to ensure that the technicians are maintaining the proper physical appearance and using Auto Club-approved methods. The work performed by the technicians *is* Auto Club's regular business, not a one-off job or occasional event. This is full-time employment carrying out Auto Club's business of providing roadside assistance, under the direction of Auto Club. Hirad's work is wholly integrated into Auto Club's operations and essential to its core business. Failure to conform to Auto Club standards results in termination. If Auto Club recommends the discipline or termination of a technician, failure to follow this recommendation could cause the station's contract to be terminated or calls directed elsewhere.

As in *Borello*, Auto Club "retains all necessary control" over the operation, even if an Auto Club manager is not standing there overseeing each service call. In effect, Auto Club oversees Hirad's operations by having members rate every aspect of their experience in a survey: the members function as Auto Club's "eyes" each time roadside service is rendered. Consumer complaints could lead to termination. Hirad's relationship with Auto Club is for an indefinite period and constant. A trier of fact could find the existence of an actual agency between Auto Club and Hirad.

A trier of fact could also find that Hirad is the ostensible agent of Auto Club. This is acknowledged by Auto Club in the first sentence of the Training Manual: "To members, the service technician who responds to an emergency road service call **is** the

Auto Club." The uniform of the technician bears only the logo of Auto Club. Their trucks bear the Auto Club logo. The owner of Hirad testified that when technicians respond to a call they are viewed by motorists as Auto Club, not as an independent contractor. When technicians approach motorists, they identify themselves as Auto Club to instill confidence. At the completion of service, technicians say "Thank you for choosing the Auto Club," thereby encouraging members to believe the service was rendered by Auto Club, not an independent contractor. Technicians are instructed to "talk up" and direct members to Auto Club-affiliated car repair facilities and rental car companies, and carry printed materials in their trucks for this purpose. Auto Club's conduct could reasonably lead its members to believe that the technicians are agents acting on Auto Club's behalf, so that they can rely on Auto Club's reputation—and the technicians' expertise—to keep them safe from harm. (Civ. Code, § 2300.)

A trier of fact may find it improbable that a member like Monarrez sees the tow truck and the technician's uniform bearing the Auto Club logo and thinks that this must be an independent contractor. (See *Kaplan v. Coldwell Banker Residential Affiliates, Inc.* (1997) 59 Cal.App.4th 741, 747-748 [where defendant made representations to the general public that caused people to believe it "'stood behind'" franchisees who displayed defendant's logo, a triable issue of fact was presented as to whether an ordinary reasonable person might believe that the broker was an ostensible agent of defendant instead of an independent contractor].) Auto Club presented no evidence suggesting that Monarrez (or any member of the public) should know that the tow truck and technician belong to an independent contractor. (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 509 ["there is no evidence that plaintiff should have known that [two attending physicians] were not the agents of the [defendant] Hospital"].)

Auto Club seeks to wriggle out of the case by arguing that the tow trucks and the technicians wear the logo of AAA, not Auto Club, so members could not believe that the tow trucks and technicians are agents of Auto Club . Monarrez is a member of Auto Club, and the Training Manual plainly says that to members, the technician "**is**" the Auto Club. When calls are made for emergency service, they go to Auto Club. If any

confusion is created by using the national AAA logo, Auto Club is responsible for the confusion, as a member of AAA. After all, even Juan Felix believes that Auto Club and AAA are one entity. (See fn. 3, *ante*.)

On a final note, we observe that an appellate court in Florida found a jury question on the issue of whether a towing station is an agent of AAA, instead of an independent contractor. (*American Automobile Association, Inc. v. Tehrani* (Fla.App. 1987) 508 So.2d 365.) The factors that created the triable issue were: the trucks bore AAA insignia and were equipped with radios furnished and installed by AAA; the station was required to maintain properly equipped trucks operated by competent technicians 365 days a year; services were rendered to AAA members at prices set by AAA; AAA required prompt response to service calls; the station was paid a flat rate per call; AAA regularly inspected the station and if dissatisfied with the equipment or the technicians could stop dispatching calls to the station; and AAA had exclusive control over service call dispatches. (*Id.* at pp. 368-370.) The evidence in the case at bench creates a triable issue regarding agency that is as compelling as the *Tehrani* case.

DISPOSITION

The judgment is reversed. Appellant is entitled to recover his costs on appeal.

CERTIFIED FOR PUBLICATION.

BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.