Restatement (Second) of Agency § 2 (1958)

Restatement of the Law - Agency | May 2022 Update

§ 2 Master; Servant; Independent Contractor

(1) A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.
(2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.
(3) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent.

Comment:

a. *Servants and non-servant agents.* A master is a species of principal, and a servant is a species of agent. The words "master" and "servant" are herein used to indicate the relation from which arises both the liability of an employer for the physical harm caused to third persons by the tort of an employee (see §§ 219- 249) and the special duties and immunities of an employer to the employee. See §§ 473- 528. Although for brevity the definitions in this Section refer only to the control or right to control the physical conduct of the servant, there are many factors which are considered by the courts in defining the relation. These factors which distinguish a servant from an independent contractor are stated in Section 220. The distinction between servants and agents who are not servants is of importance for the purposes of the Sections referred to. Statements made in the Restatement of this Subject as applicable to principals or agents are, unless otherwise stated, applicable to masters and servants. The rules as to liability of a principal for the torts of agents who are not servants are stated in Sections 250- 267, and those with respect to his liability in tort to such agents in Sections 470- 472. The duties of servants to masters and their liabilities to third persons are in general the same as those of agents who are not servants. However, servants may have only custody, as distinguished from possession of goods entrusted to them by the master (see § 339, Comment *g* and § 349), and a servant, because of his position, may not be responsible for mistakes made by him as to facts upon which his authority depends, whereas an agent who is not a servant would be responsible. See Comment *c* on § 383.

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b. *Servant contrasted with independent contractor.* The word "servant" is used in contrast with "independent contractor". The latter term includes all persons who contract to do something for another but who are not servants in doing the work undertaken. An agent who is not a servant is, therefore, an independent contractor when he contracts to act on account of the principal. Thus, a broker who contracts to sell goods for his principal is an independent contractor as distinguished from a servant. Although, under some circumstances, the principal is bound by the broker's unauthorized contracts and representations, the principal is not liable to third persons for tangible harm resulting from his unauthorized physical conduct within the scope of the employment, as the principal would be for similar conduct by a servant; nor does the principal have the duties or immunities of a master towards the broker. Although an agent who contracts to act and who is not a servant is therefore an independent contractor, not all independent contractors are agents. Thus, one who contracts for a stipulated price to build a house for another and who reserves no direction over the conduct of the work is an independent contractor; but he is not an agent, since he is not a fiduciary, has no power to make the one employing him a party to a transaction, and is subject to no control over his conduct.

The word "servant" is thus used to distinguish a group of persons for whose physical conduct the master is responsible to third persons. It is convenient to distinguish this group of persons from other persons for whose physical conduct the employer is not responsible. These latter persons fall into two groups: those who are agents but do not respond to the tests for servants, and those who are not agents. For the purpose of determining whether or not the employer is responsible for their physical conduct, however, it is immaterial whether such persons are agents or are not agents. For this reason the term "independent contractor" is used to indicate all persons for whose conduct, aside from their use of words, the employer is not responsible except in the performance of nondelegable duties.

c. *Servants not necessarily menials.* As stated more fully in Section 220, the term servant does not denote menial or manual service. Many servants perform exacting work requiring intelligence rather than muscle. Thus the officers of a corporation or a ship, the interne in a hospital, all of whom give their time to their employers, are servants equally with the janitor and others performing manual labor.

d. *Statutory use.* The words "master," and "servant" are frequently used with a limited meaning in statutes. The definitions of these words in this Section are not applicable in the interpretation of such statutes.

The word "employee" is commonly used in current statutes to indicate the type of person herein described as servant. In some of these it is specifically stated that an employee is a servant in the common law meaning. In others, without such statement, the courts have reached a similar result. This has been generally true of Employers' Liability and Workmen's Compensation Acts. In some statutes, however, the term "employee" has been given a much broader meaning than that given herein to the term "servant". This has been the tendency of the interpretation of both federal and state acts dealing with social security, unemployment insurance, minimum wage, fair labor practices and similar matters. The rules as to these matters are beyond the scope of the Restatement of this Subject. The term "servant" however, is largely used by courts in cases involving the master's liability for acts of the servant in the scope of employment.

Case Citations - by Jurisdiction

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U.S.

U.S.2003. Subsec. (2) cit. in sup. and quot. in diss. op. Former employee of medical clinic sued clinic for violating the Americans with Disabilities Act (ADA). The district court granted summary judgment for defendant, holding that defendant's four physician-shareholders were not employees under the ADA, and that defendant thus was not covered by the ADA because it did not have the requisite 15 employees. The court of appeals reversed and remanded. Reversing and remanding, this court held, inter alia, that, in determining whether the physician-shareholders were employees of the clinic, it was persuaded by the EEOC's focus on the common-law touchstone of control and its six-factor inquiry. The dissent argued that classifying the physician-shareholders as employees served the animating purpose of the ADA. Clackamas Gastroenterology Associates, P.C. v. Wells, 538 U.S. 440, 448, 452, 123 S.Ct. 1673, 1679, 1681, 155 L.Ed.2d 615, on remand 332 F.3d 1177 (9th Cir.2003).

U.S.1996. Cit. in disc. A private towing service that was removed from a city's rotation list of available towing service contractors brought a § 1983 action against the city, alleging that the removal was in retaliation for the towing service owner's refusal to contribute to the mayor's reelection campaign. The district court dismissed the complaint, and the court of appeals affirmed. Reversing and remanding, this court held, inter alia, that the protections given to public employees against discharge for refusing to support a political party or its candidates extended to independent contractors and that the complaint stated an actionable First Amendment claim. The court saw no reason why the constitutional claim here should turn on the distinction between employees and independent contractors, which was, in the main, a creature of the common law of agency and torts. O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712, 721, 116 S.Ct. 2353, 2359, 135 L.Ed.2d 874.

U.S.1982. Cit. in disc. The plaintiffs, the Commonwealth of Pennsylvania and several black individuals, brought an action alleging racial discrimination in the operation of an exclusive hiring hall and an apprenticeship program, both of which were established under a collective bargaining agreement negotiated between a union on the one side and several construction trade groups and employers on the other, all defendants in the present suit. The hiring hall was managed solely by the union while

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the apprenticeship program was directed by a committee of trustees half of whom were appointed by the union, half by the trade groups. The trial court found that the union had intentionally discriminated against blacks in the operation of the hiring hall; discrimination in the apprenticeship program was also found. The trial court found the union, the committee of trustees, and the trade groups liable under 42 U.S.C. § 1981 and imposed injunctive relief. Despite their lack of discriminatory intent, the trade groups were found liable for the unions' discriminatory conduct under agency principles. The trade groups appealed, the intermediate court affirmed, and the trade groups appealed again. This court reversed the decision below and ruled that 42 U.S.C. § 1981 requires proof of intentional racial discrimination before liability may be imposed. No proof of the trade groups' intentional discrimination was ever submitted. Citing the Restatement, this court also ruled that the trial court's attempt to attribute the union's discrimination to the trade groups on agency principles must fail. Such principles, the court found, require the right to control the agent's conduct. Here, no evidence was submitted to show that the trade groups controlled the union's discriminatory conduct or that the trade groups' appointed trustees were not independent of the trade groups. In summation, this court found the trade groups not subject to the trial court's injunctive relief because those trade groups had refrained from intentionally discriminating against the plaintiffs and because the union was not the agent of the trade groups. Statutory liability for racial discrimination was thus never triggered and agency principles were inapplicable. A dissenting opinion would have found such statutory liability by eliminating the intent requirement. General Bldg. Contractors Ass'n. v. Pennsylvania, 102 S.Ct. 3141, 3151.

U.S.1976. Cit. in sup. in ftn. A child injured in an automobile accident while returning from an outing sponsored by a neighborhood opportunity center, which was run by a community action agency under the Economic Opportunity Act, with his father brought suit against the United States under the Federal Tort Claims Act. The district court granted summary judgment in favor of the United States, but was reversed on appeal. The Supreme Court reversed the appeals court, holding that neither the community action agency nor the neighborhood opportunity center were federal agencies, and that their employees were not federal employees for purposes of the Federal Tort Claims Act. United States v. Orleans, 425 U.S. 807, 96 S.Ct. 1971, 1976, 48 L.Ed.2d 390.

U.S.1974. Cit. in op. in disc. subsec. (2) cit. in diss. op. in disc. This was an action brought under the Federal Employers' Liability Act (FELA) against a railroad to recover for injuries sustained by plaintiff workman while unloading automobiles from a railroad car. Plaintiff, an employee of a trucking company (PMT) which unloaded the cars under a contract with the railroad company, alleged that he was sufficiently under the railroad's control to bring him under coverage of the FELA, even though PMT supervisors controlled the day-to-day unloading process. The District Court held that PMT was serving generally as the railroad's agent, that PMT's employees were the railroad's agents for purposes of the unloading operation, that the work performed by plaintiff fulfilled the nondelegable duty of the railroad, and, therefore, that the relationship between plaintiff and the railroad sufficed to make the FELA apply. The Court of Appeals reversed on the ground that the District Court's test for FELA liability was too broad. Held: Case remanded with instructions. For the purposes of the FELA the question of employment, or master-servant status, is to be determined by reference to common-law principles. Under common-law principles, there are three methods by which a plaintiff can establish his employment with a rail carrier for FELA purposes even while he is nominally employed by another, i.e., (1) the employee could be serving as the borrowed servant of the railroad at the time of his injury, (2) he could be deemed to be acting for two masters simultaneously, (3) he could be a subservant of a company that was, in turn, a servant of the railroad. Nothing in the District Court's findings suggest that plaintiff was sufficiently under the railroad's control to be either a borrowed servant of the railroad or a dual servant of PMT and the railroad. Even the theory of a subservant relationship between plaintiff and the railroad fails, since the District Court's findings did not establish the master-servant relationship between the railroad and PMT necessary to render plaintiff a subservant of the railroad. Although the District Court was correct in concluding that PMT was an agent of the railroad, a finding of agency is not tantamount to a finding of a master-servant relationship. The District Court's conclusion that the railroad was “responsible” for the unloading operation is not tantamount to a finding that the railroad controlled or had the right to control the physical conduct of PMT employees, like the plaintiff, in the unloading operation. The District Court's findings clearly fail to establish that plaintiff was “employed” by the railroad. The concurring Justice felt that the Majority's detailed discussion of the evidence was unnecessary, that the case should be remanded to the District Court with instructions to apply the correct principles of master-servant law in determining plaintiff's status under the FELA, and that whether the railroad controlled, or had the right to control, plaintiff's work

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was "for the original factfinder to determine." The Dissent felt that the District Court had found that the requisite relationship was present to permit a recovery under the FELA, that the findings of fact made by the District Court were not clearly erroneous and supported its conclusion that FELA was applicable. The Dissent held that the District Court "made findings of fact easily sufficient to support the existence of an employment relationship under the correct substantive test, and he in fact found that the requisite relationship existed." Kelly v. Southern Pacific Co., 419 U.S. 318, 95 S.Ct. 472, 477, 482, 42 L.Ed.2d 498.

U.S.1973. Quot. in ftn. in sup. The plaintiffs sued under the Federal Tort Claims Act for damages, charging that the alleged negligence of government agents permitted their son to commit suicide. After being arrested for a federal crime, the decedent was temporarily housed in a state county jail pursuant to a contract between the county and the federal government providing for such arrangements. After he unsuccessfully attempted suicide, a federal district court ordered that he be sent to medical facilities. While preparing to do this, a federal marshal returned the prisoner to the county jail, where he committed suicide. The Court, looking at the defendant's control over county employees, held that such employees were not federal employees under the Tort Claims Act, and thus held that the defendants could not be liable for their negligence. The Court also remanded to the Court of Appeals the issue of the marshal's negligence, since the latter court had failed to consider this issue. Logue v. United States, 412 U.S. 521, 93 S.Ct. 2215, 2219, 37 L.Ed.2d 121.

C.A.1

C.A.1, 2009. Subsec. (2) quot. in case quot. in sup. African-American and Hispanic police officers employed by cities and by state transportation authority brought disparate impact race claim under Title VII of the Civil Rights Act against their direct employers as well as against state and state agency that prepared and administered promotional examinations for local police officers under the state civil-service system. The district court denied the state defendants' motion to dismiss. On interlocutory appeal, this court reversed and remanded, holding, inter alia, that the state defendants did not qualify as "employers" as that term was used in Title VII and thus officers could not state a Title VII claim against them. The court reasoned, in part, that state agency had no control over officers' day-to-day job performance and no right to exercise such control. Lopez v. Massachusetts, 588 F.3d 69, 84.

C.A.1, 2003. Cit. in disc. Company that contracted to review retail leases for overcharges by landlords sued tenant retailer for breach of contract, conspiracy, and quantum meruit. Plaintiff alleged that defendant conspired with its attorney to enter secret side deals with its landlords in an attempt to avoid compensating plaintiff under the contract. District court granted defendant summary judgment. This court affirmed in part, holding, inter alia, that plaintiff's conspiracy claim failed, because defendant's attorney was its agent, and a corporation could conspire with itself. Plaintiff did not allege that the attorney had any independent interest making it possible for him, under Texas law, to conspire with defendant. Leasehold Expense Recovery, Inc. v. Mothers Work, Inc., 331 F.3d 452, 463, on remand 2004 WL 1698290 (N.D.Tex.2004).

C.A.1, 1998. Cit. in headnotes, quot. in case quot. in disc. After an inn manager raped a guest at the inn, the guest sued the inn owner and its corporate parent for negligence and vicarious liability. The federal district court entered judgment on a jury verdict for plaintiff. This court affirmed, holding that there was sufficient evidence to hold defendants vicariously liable. The court concluded that under Maine law a master may be liable for the torts of his or her servants who are acting outside the scope of their employment when they are aided in accomplishing the tort by the existence of the agency relation. Because he was the defendants' agent, the manager knew that plaintiff was staying at the inn, he was able to find plaintiff's room late at night, he had the key to the room, and he used the key to gain access to plaintiff's room and rape her. Costos v. Coconut Island Corp., 137 F.3d 46, 47, 48.

C.A.1, 1997. Cit. in disc. Tax-exempt labor organization challenged deficiency assessment on income it received from advertisements contained in a yearbook it published. Among other things, organization maintained that the notice of deficiency was issued beyond the applicable limitation period. The tax court entered judgment against organization. Affirming, this court held that organization's reading of the tax form at issue was nonsensical, that the tax court's construction was reasonable, and that, even if the form could not be construed so as to give effect to the parties' intentions, it probably could have been reformed;

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that the solicitation, sale, and publication of displays and listings in the yearbook constituted the business of advertising, which was unrelated to organization's business; and that the tax court did not err in treating the outside firms that handled the advertising as organization's agents. State Police Ass'n of Massachusetts v. C.I.R., 125 F.3d 1, 7, cert. denied … U.S. …, 118 S.Ct. 1036, 140 L.Ed.2d 103 (1998).

C.A.1, 1989. Cit. in disc. A women's sportswear distributor advanced its sales representative more than $13,000 towards expected commissions, which the representative subsequently failed to earn. When the sales representative quit his job, the distributor sued to recover the money. The district court entered judgment for the employer. This court vacated and remanded, holding that the district court failed to apply the applicable law, which favored a presumption that an agent was not personally liable to repay advances in salary, absent a showing of a contrary intention. Amherst Sportswear Co., Inc. v. McManus, 876 F.2d 1045, 1049.

C.A.2,

C.A.2, 2018. Cit. in disc. Former employees of limousine-service company brought a lawsuit against company, alleging that defendant failed to pay plaintiffs for overtime work as required under the Federal Labor Standards Act. The district court entered judgment for defendant, finding that defendant was exempt from paying overtime wages, because it was a taxicab service under federal law. This court affirmed, holding, inter alia, that defendant was a taxicab service within the meaning of the Act, because it did not control its drivers' work. The court cited Restatement Second of Agency § 2 in explaining that, for defendant to control its drivers' work, it would have needed to directly supervise and control the physical conduct of its drivers instead of merely giving them assignments through a central dispatch service. Munoz-Gonzalez v. D.L.C. Limousine Service, Inc., 904 F.3d 208, 219.

C.A.2

C.A.2, 1994. Subsec. (2) quot. in sup. Federal contractor that successfully bid to refit vessels in Ready Reserve Force sued federal government's agent having service agreement with federal government to manage and conduct maintenance and repair of the vessels and agent's employee for libel after defendants sent letter carrying out explicit instructions of federal agency officials to plaintiff's sureties stating that plaintiff was in default of its contract. Affirming the district court's dismissal holding that suit was barred under the Federal Tort Claims Act (FTCA), this court held that provisions of service agreement between federal government and its agent established government's contractual authority to control agent's performance in detail, making defendants immune from suit under the FTCA. B & A Marine v. American Foreign Shipping, 23 F.3d 709, 713, cert. denied 513 U.S. 961, 115 S.Ct. 421, 130 L.Ed.2d 336 (1994).

C.A.2, 1991. Subsec. (3) cit. in disc. A wholly owned corporation of the Iranian government brought suit for damages against a tanker and its owners and operators for failure to deliver certain chemicals originally destined for Iran but ultimately discharged at Taiwan after the outbreak of war between Iran and Iraq. On remand, the district court granted summary judgment for the defendants. Affirming, this court held that, since the plaintiff's agent knew that the transaction violated United States law imposing an embargo on the sale or transfer of various items to Iran, that knowledge was attributable to the plaintiff as principal; therefore, the plaintiff was in pari delicto with those who intentionally violated the trade embargo and was barred from recovery. National Petrochemical Co. v. M/T Stolt Sheaf, 930 F.2d 240, 244.

C.A.2, 1990. Cit. in case cit. in disc., cit. in disc. Physicians designated by the FAA as aviation medical examiners (AMEs) issued a medical certificate to a pilot who subsequently suffered a heart attack at the controls of a plane, which then crashed, killing everyone aboard. The estates of two passengers sued the federal government for wrongful death under the Federal Tort Claims Act (FTCA), alleging that the AMEs were negligent in failing to discover the pilot's true physical condition. The government moved for summary judgment on the ground that the AMEs were not government employees under the FTCA, and the estates moved for partial summary judgment to strike that affirmative defense. The district court denied the government's motion, granted that of the estates, and certified the issue for interlocutory appeal. This court reversed and remanded, holding that the AMEs were independent contractors and not government employees, since the FAA did not supervise their day-to-

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day operations or manage the details of their work. Leone v. U.S., 910 F.2d 46, 49, cert. denied 499 U.S. 905, 111 S.Ct. 1103, 113 L.Ed.2d 213 (1991).

C.A.2, 1978. Subsec. (2) cit. in diss. op. in disc. Appeal by attorney defendant from a criminal conviction of violating the Labor Management Reporting and Disclosure Act of 1959, § 501(c), which provides criminal sanctions for "any person who embezzles, steals, or unlawfully and willfully obstructs or converts to his own use or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is employed, directly or indirectly…." Defendant, who was not an in house attorney, was hired by union officers to represent members arrested for strike activities. Defendant described himself as chief counsel to the union and submitted an affidavit indicating that he was at the local office daily and working on union business. He received 76% of his professional income in 1976 from the union through separate billings to the union following referrals of members to defendant by union officers. The court found that defendant fraudulently billed and received payment for services never rendered in violation of § 501(c), emphasizing that the common law distinction between employee and independent contractor was irrelevant, and holding that Congress intended, by use of the broad language of the act, to extend coverage outside the common law meaning of employee to any person employed by the union. The court also looked to the purpose of the act, that is to prevent looting, "which would not be served by excluding from coverage a trusted legal advisor." The dissent argued that when Congress intends to extend coverage of a criminal statute to independent contractors, it specifically enumerates the extent of further coverage. Furthermore, attempts by the courts to extend coverage of such criminal statutes beyond the common law meaning of employee, though upheld by the state's Supreme Court, have been legislatively frustrated. United States v. Capanegro, 576 F.2d 973, 980, certiorari denied 439 U.S. 928, 99 S.Ct. 312, 58 L.Ed.2d 320 (1978).

C.A.3

C.A.3, 1997. Subsec. (1) cit. in disc. City police officer sued unit commander, assistant police chief, police chief, and city for, inter alia, violations of 42 U.S.C. § 1983 and Title VII, alleging that she was a victim of commander's quid pro quo sexual harassment, which, in turn, created a hostile working environment. The district court entered judgment as a matter of law against plaintiff on most of the claims, submitted the remaining claims to the jury, and entered judgment on a jury verdict for defendants. Affirming in part, reversing in part, and remanding, this court held that, for purposes of s 1983 liability, assistant police chief could not be said to have acquiesced in commander's misconduct, since assistant chief had no supervisory authority over commander; that the claim of quid pro quo sexual harassment should have been submitted to the jury where the evidence could reasonably support a finding that plaintiff did not receive a transfer to the detective's bureau because she rebuffed commander's advances; and that the jury instruction concerning the bases for city's Title VII respondeat superior liability was proper. Robinson v. City of Pittsburgh, 120 F.3d 1286, 1294.

C.A.3, 1996. Cit. in conc. and diss. op., com. (b) quot. in disc. Clients of attorneys who purchased photocopies of clients' hospital records for the purpose of prosecuting clients' personal injury and medical malpractice claims sued hospitals and copy-service companies for violations of antitrust law, inter alia, alleging that defendants conspired to charge excessive prices for the photocopies. The district court granted defendants summary judgment on the antitrust claim. Affirming in part, this court held that the attorneys, rather than plaintiffs, were the direct purchasers of the photocopies and thus plaintiffs lacked standing to bring their antitrust claim. The partial dissent argued that the attorneys, as agents for their disclosed client-principals, purchased the copies for plaintiffs and that plaintiffs were the direct purchasers. McCarthy v. Recordex Service, Inc., 80 F.3d 842, 853, 860, cert. denied 519 U.S. 825, 117 S.Ct. 86, 136 L.Ed.2d 42 (1996).

C.A.3, 1993. Cit. in ftn. Founder of a company that provided support services to law firms sued a bank, alleging that bank converted his property by accepting checks embezzled by one of his employees. Granting judgment to founder pursuant to the "discovery rule" tolling principle, Pennsylvania federal district court concluded founder was not negligent. This court reversed and remanded, holding that Pennsylvania Supreme Court would refuse to apply the discovery rule in this case and that founder negligently facilitated his employee's forgeries by entrusting employee with bookkeeping without instituting internal mechanisms to control or monitor her behavior. The court stated that combining the responsibilities of bookkeeping with receipt of payments in a single employee—without supervision or any control mechanism— was negligent; furthermore, the

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defalcations were immediately traceable to and would not have resulted but for founder's failure to supervise and control employee's behavior. Menichini v. Grant, 995 F.2d 1224, 1233.

C.A.3, 1991. Subsec. (3) quot. in disc. The creator of a computer software system sued a competitor, alleging that the defendant's incorporation of the system into its own software constituted copyright infringement. The district court directed a verdict for the defendant, holding that the system belonged to the defendant as a work made for hire because the plaintiff was employed by the defendant when he created the system. Vacating and remanding, this court held that a fact issue existed as to whether the plaintiff was the defendant's employee or an independent contractor when he developed the system. The court stated that the plaintiff's apparent agency was not dispositive of this question. MacLean Assoc. v. Wm. M. Mercer-Meidinger-Hansen, 952 F.2d 769, 778.

C.A.3, 1991. Cit. in case quot. in disc. An employee on the payroll of a railroad's subsidiary sued the railroad for damages pursuant to the Federal Employers' Liability Act after he was injured while operating a forklift at one of the railroad's freight terminals. After the jury returned a verdict for the plaintiff, finding that he was the defendant's employee at the time of his injury, the district court granted the defendant's motion for a judgment n.o.v. Reversing and remanding, this court held that the evidence was sufficient to support the jury's finding that the plaintiff was the defendant's employee within the meaning of the Act as either a borrowed servant or a dual servant because he was subject to the defendant's control at the time of his injury. Williamson v. Consolidated Rail Corp., 926 F.2d 1344, 1349, appeal after remand 947 F.2d 936 (3rd Cir.1991).

C.A.3, 1985. Cit. in case cit. in disc. A newspaper company discharged mailroom and delivery employees that were provided by an independent corporation and hired new personnel in their places. In response to charges made by the unions involved in this and various other actions by the newspaper company, the National Labor Relations Board filed complaints against the newspaper company. The board found that the newspaper company was the statutory employer of the mailroom and delivery personnel, and ordered reinstatement of those employees because the newspaper company violated sections of the National Labor Relations Act in discharging and replacing them. The court of appeals affirmed, holding, inter alia, that the corporation which provided the mailroom and delivery personnel was an agent of the principal newspaper company because, under the "right to control" test, the newspaper company exercised significant control over the agent and its employees. Allbritton Communications Co. v. N.L.R.B., 766 F.2d 812, 818, cert. denied 474 U.S. 1081, 106 S.Ct. 850, 88 L.Ed.2d 891.

C.A.3, 1966. Cit. in sup. The decedent's claimants brought an action against the United States and the contract operator of the U.S.-owned vessel which collided with another vessel, resulting in personal injuries and deaths; judgment was had against both defendants. On appeal, the court held that the liability of the United States was exclusive under statutory law and that the contract operator, while he may have been an independent contractor, was acting for the principal, with his consent and under his direction. Petition of United States, 367 F.2d 505, 509.

C.A.4

C.A.4, 2020. Com. (b) quot. in sup. The U.S. Department of Justice brought criminal charges against co-founder of consulting firm, alleging that defendant violated federal statutes when he acted as an unregistered foreign agent of Turkey by publishing an opinion piece in a U.S. newspaper disparaging a political enemy of the President of Turkey. The district court acquitted defendant of all charges. This court reversed in part, vacated in part, and remanded, holding, inter alia, that the district court erred in finding that defendant was not the agent of the Turkish government on the grounds that he was not under the control of Turkey, because it construed the definition of "agent" too narrowly. Citing Restatement Second of Agency §§ 2 and 14N, the court explained that a principal-agent relationship under the common law was broader than the granular level of control exerted by an employer over an employee in an employer-employee relationship, and defendant could be the agent of Turkey so long as Turkey manifested consent for him to act under its direction and defendant consented to do so. United States v. Rafiekian, 991 F.3d 529, 540.

C.A.4, 1997. Cit. in headnote, cit. in disc. Physician who contracted with health systems organization to provide emergency room services sued organization for violations of Title VII, alleging that he was discharged in retaliation for having testified against

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organization in an unrelated sexual harassment case. The trial court granted organization's motion for summary judgment. Affirming, this court held that physician was not an employee within the meaning of Title VII but, an independent contractor, as evidenced by the fact that he determined his income, controlled the number of hours he worked, and decided which facilities to serve. In addition, letters written by the parties expressly stated their intent to create an independent contractor relationship. Cilecek v. Inova Health System Services, 115 F.3d 256, 257, 260.

C.A.4, 1982. Cit. in sup. Patient treated by a contract physician under the United States Public Health Services brought suit against the United States for the alleged negligence of the physician in treating him. In bifurcated proceedings, the district court first held that the physician was an employee of the United States, not an independent contractor, due to the control the federal government exercised over the administrative details of the physician's practice dealing with Public Health Services patients. The district court then conducted an abbreviated ex parte hearing on a prima facie showing of the alleged negligence of the physician and granted judgment for the patient. The court remanded to the district court for entry of judgment for the United States after finding that the physician was an independent contractor. The court stated that the test to determine if the physician is an employee of the federal government rests on whether the government had control over the primary activity contracted for, i.e., the treatment of patients, not mere control over the administrative details of the physician's performance. The court noted that Public Health services had contracted with private physicians to provide outpatient medical services for seamen in remote ports, and that the government had no control over the drugs or medical supplies that these physicians provided. The physicians were able to refuse certain Public Health Service patients, they received no office, space, supplies, or staff from the government, and the Public Health Services inspected the physician's facilities only once a year. The court concluded that the government did not exercise enough control over the physician's medical performance to find that he was an employee of the federal government. Wood v. Standard Products Co., Inc., 671 F.2d 825, 829.

C.A.4, 1974. Cit. and quot. in part and dist. Following the collapse of a scaffolding which caused the death of two workers, on the payroll of a subcontractor for defendant, the Secretary of Labor issued citations against the subcontractor and the contractor for safety violations under the Occupational Safety and Health Act. An administrative judge found that both the contractor and the subcontractor were responsible. The Occupational Safety and Health Review Commission reversed, and the Secretary sought review. Because the question of whether the general contractor was an “employer” for the purposes of the federal statute, could be answered either way, Congress had given the choice to the Commission. Its decision that the general contractor was not jointly responsible with the subcontractor for the safety of the subcontractor's workers was accepted by the court as binding. Furthermore, the question of whether access by employees to the danger zone created by the safety violation was sufficient to impose duties on the employer was also for the Commission to decide. Administrative agencies must, however, explain their grounds for rejecting an administrative judge's disposition of a case. The Commission's decision was an unexplained rejection of the administrative judge's decision and an unexplained departure from the rule of decision followed in other cases. On this issue then, the case must be remanded. Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1261.

C.A.5

C.A.5, 1997. Cit. in case cit. in disc., com. (a) cit. in disc. After a raid on a religious cult's compound, an agent for the Bureau of Alcohol, Tobacco, and Firearms (ATF) brought a defamation action against the United States, the ATF, several ATF officials in their individual capacities, and a psychiatrist who did work for the ATF. The psychiatrist, a full-time employee for the Washington state patrol who provided counseling for the ATF on an “as needed” basis, had come to Texas to provide his services to agents and their families in the aftermath of the raid. The federal district court denied defendants' motions to dismiss, holding that the ATF officials did not act within the scope of their employment and that the psychiatrist was an independent contractor. This court affirmed in part, reversed in part, and remanded, holding, inter alia, that the psychiatrist was an independent contractor and not an employee of the United States. The psychiatrist was a professional, the value of his work derived from his education and skill, he supplied the materials upon which his seminars were based, and his services were not part of the ATF's regular business. Furthermore, the psychiatrist's contract was silent on control, which suggested an independent contractor relationship. Rodriguez v. Sarabyn, 129 F.3d 760, 765.

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C.A.5, 1993. Quot. in disc., cit. in case cit. in disc., cit. in ftn., com. (a) quot. in disc. and cit. in ftn. The parents of a three-year-old boy who died in the emergency room of an Army hospital brought a medical malpractice action against the government under the Federal Tort Claims Act. Affirming the district court's judgment for defendant, this court held that the allegedly negligent emergency room physician was an independent contractor for whose acts defendant could not be held liable in tort. Plaintiffs had argued that defendant exercised control over the doctor's detailed physical performance to the extent necessary to establish that the doctor was defendant's employee. The court agreed that this was a critical element in finding the existence of an agency relationship, but the undisputed facts established that defendant did not have a traditional employer-employee relationship with the doctor. Broussard v. U.S., 989 F.2d 171, 175.

C.A.5, 1975. Com. (a) cit. in sup. Following certain incidents surrounding the revocation of credit by defendants, plaintiff suffered a heart attack and subsequently brought suit. From the granting of judgment n.o.v. for two defendants and new trials for two others, plaintiff appealed. The court affirmed in part and reversed in part. Defendant oil company was initially determined not to be a consumer reporting agency within the provisions of the Fair Credit Reporting Act. The company's directive to terminate plaintiff's credit was made for the purpose of protecting the oil company, rather than influencing the defendant motel who received the directive. The cause of action based upon the "user" provision of the Act was properly dismissed. The credit report in defendant's possession was not used in making the determination to terminate plaintiff's credit. As to the liability of the oil company for the actions of the clerk at the motel, the correct test is whether the alleged principal (oil company) had the right to control the physical details of the manner of the alleged agent's (motel clerk) performances. If an agent's act was incidental to carrying out the duties assigned to him by his master, the master may be held liable, even though he did not authorize the agent's means, and also though the agent may have sought to accomplish the master's business in a manner contrary to the master's expressed instructions. By virtue of an extension of credit arrangement between defendant oil company and defendant motel, the court concluded that the oil company controlled the clerk's activity to some degree. Whether there was sufficient control of the clerk's physical activities to render the oil company liable was a jury question. The court went on to conclude that the existence of contradictory yet reasonable inferences in the case rendered the district court's judgment n.o.v. as to the oil company improper. Thus, the case was remanded for a new trial on the question of the clerk's status as a servant of the oil company. As to the granting of a new trial to the clerk and motel, the trial court's decision was affirmed, the court noting that where verdicts in the same case are inconsistent on their faces indicating that the jury was confused, a new trial is appropriate. Finally, the court concluded that there was sufficient evidence from which a jury could reasonably conclude that defendant motel-franchisor should be liable for defendant clerk's actions. The issue was a question of apparent authority and proper for the jury to determine. In the interests of justice, the action against the franchisor was remanded due to the jury's confusion as to the proper application of law to the facts. Indemnification of the motel and clerk by defendant oil company was not proper since the oil company was not shown to be negligent. Wood v. Holiday Inns, Inc., 508 F.2d 167, 173.

C.A.6

C.A.6, 2015. Com. (b) cit. in case quot. in diss. op. Recipients of notices regarding debts owed to the state of Ohio brought an action under the Fair Debt Collection Practices Act (FDCPA) against attorneys who were appointed as special counsel by the Ohio attorney general to collect the debts, alleging that defendants' use of the attorney general's office's letterhead was a false, deceptive, or misleading representation that defendants were acting on behalf of the attorney general. The district court granted defendants' motion for summary judgment. Vacating and remanding, this court held that there were genuine issues of material fact that precluded summary judgment. The dissenting opinion argued that defendants were entitled to an exception from the FDCPA as state officers because they were agents of the attorney general for debt-collection purposes, and pointed out, citing Restatement Second of Agency § 2, Comment *b*, that independent contractors were not precluded from being agents. Gillie v. Law Office of Eric A. Jones, LLC, 785 F.3d 1091, 1116.

C.A.6,

C.A.6, 2014. Subsec. (3) quot. in case quot. in diss. op. After a shipment of glass was accidentally destroyed by carrier's subcontractors during transit, and shipper's insurer paid shipper for the damages, insurer, as shipper's subrogee, sued carrier

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and its subcontractors, alleging, among other things, breach of the service contract between shipper and carrier. The district court entered judgment on a jury verdict in favor of plaintiff and denied defendants' motion for judgment as a matter of law, finding that defendants were not entitled to enforcement of a limitation-of-liability clause contained in the contract, because the clause only extended to damage occurring in carrier's custody, and the cargo was damaged in subcontractors' custody. The dissent argued that carrier was authorized as shipper's agent to limit subcontractors' liability, and that it did so by and on behalf of shipper; while the majority pointed out that carrier was defined at places in the contract as an independent contractor, nothing precluded carrier from acting as both an independent contractor and an agent, depending upon the activity in question. CNA Ins. Co. v. Hyundai Merchant Marine Co., Ltd., 747 F.3d 339, 377.

C.A.6

C.A.6, 2007. Subsec. (3) quot. in sup. Defendant who was convicted on federal charges of fraudulently obtaining more than $200,000 from school district, which had hired him to develop a television station for the high school, moved for a judgment of acquittal, arguing that the government did not show that he was an agent of the school district, as required to bring him within the compass of the federal antifraud statute. Affirming, this court held that, although the contracts between defendant and the school district described him as an independent contractor, ample evidence existed to allow the jury to conclude that he satisfied the statute's definition of an agent, i.e., that he was "authorized to act on behalf of" the school district. The court noted that, as a matter of legal custom and tradition, nothing about the title "independent contractor" invariably precluded someone from being an agent under appropriate circumstances. U.S. v. Hudson, 491 F.3d 590, 595, cert. denied 552 U.S. 1081, 128 S.Ct. 815, 169 L.Ed.2d 615 (2007).

C.A.6, 1999. Quot. in case cit. in disc., quot. in ftn. A seller of used machinery sued an India corporation and its alleged Ohio agent/buyer, seeking the balance of payment owed for a piece of machinery, known as a "calender," used in the production of rubber products. District court entered judgment on jury verdict for the India corporation. This court affirmed in part, reversed in part, and remanded, holding, inter alia, that the Ohio company acted more like an independent contractor than an agent, because it was acting under a separate agreement with plaintiff and had an independent basis of liability. Soberay Machine & Equipment Company v. MRF Limited, Inc., 181 F.3d 759, 767.

C.A.6, 1997. Subsec. (2) cit. in conc. op. A former employee brought, in part, a Title VII action against her former employer for sexual harassment based on a hostile work environment, claiming that defendant failed to implement prompt and appropriate corrective action in response to her complaints about a co-worker's unwanted sexual advances. The district court granted summary judgment for defendant, and this court affirmed. Although agreeing that defendant's reasonable response to plaintiff's allegations of sexual harassment entitled it to summary judgment, a concurring opinion argued that, contrary to statements in the majority opinion, it was not the law that an employer's liability for sex discrimination under Title VII required proof that the employer itself was guilty of sex discrimination; agency principles held an employer liable for its negligence in failing to prevent or remedy the discrimination of its agent-employee. Blankenship v. Parke Care Centers, Inc., 123 F.3d 868, 876, cert. denied … U.S. …, 118 S.Ct. 1039, 140 L.Ed.2d 105 (1998).

C.A.7

C.A.7, 2021. Cit. in diss. op. Insurer brought an action for declaratory judgment against, among others, insured, alleging that it had no duty to indemnify defendant against underlying vicarious-liability claims brought by the estate of a deceased roofing worker who had been employed by subcontractor, because those claims were meritless. The district court granted defendant's motion for summary judgment. This court affirmed with modifications on other grounds, holding that plaintiff was not absolved of its duty to indemnify, because the estate alleged a broad array of claims against defendant that made it possible for defendant to be liable for the actions of its agents and subcontractors. The dissent cited Restatement Second of Agency § 2 in arguing that the estate's complaints only alleged direct-liability claims against defendant, because defendant lacked the level of control over subcontractor's work necessary to create a principal–agent relationship from which vicarious liability could arise. United Fire & Casualty Company v. Prate Roofing & Installations, LLC, 7 F.4th 573, 587.

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C.A.7, 2014. Subsec. (2) cit. in case cit. in sup. Physician sued medical service corporation for discrimination in violation of the Americans with Disabilities Act, the Rehabilitation Act, and Title VII, alleging that she was terminated after she requested an open-ended leave of absence to recover from an injury to her hamstring tendon. The district court granted summary judgment for defendant. Affirming, this court held that plaintiff, who was a full partner, shareholder, and member of defendant's board of directors, was an employer, rather than an employee, of defendant, and was thus ineligible for the protections of the statutes at issue. The court noted that, under the common-law definition, a "servant" was a person whose work was controlled or was subject to a right to control by the master, and that, based on Restatement Second of Agency §§ and 220(2)(a), the element of control was the principal guidepost in assessing whether a person was an employee. Bluestein v. Central Wisconsin Anesthesiology, S.C., 769 F.3d 944, 952.

C.A.7, 2006. Subsecs. (1) and (2) cit. and quot. in sup. and quot. in case cit. and quot. but dist., com. (c) cit. in disc. Former employee of diner sued diner and its sole proprietor for discrimination and retaliation under Title VII. The district court entered summary judgment against plaintiff, concluding that defendants were not "employers" covered by the statute because they did not have at least 15 "employees." Reversing and remanding, this court held that the district court erred in concluding on summary judgment that the diner's managers, who were sole proprietor's mother and husband, were employers rather than employees; the district court failed to consider whether the managers exercised their authority by right, as a business owner or partner might, or, rather, at sole proprietor's delegation or discretion so as to subject the managers to the same control that sole proprietor exercised over any other employee of the diner. Smith v. Castaways Family Diner, 453 F.3d 971, 976, 979-981, 984, 985.

C.A.7, 1988. Subsec. (3) cit. in disc. A supplier of wood treatment chemicals designed and built a portion of the plaintiff's wood-processing plant, which was later targeted by the EPA as requiring priority attention under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. The plaintiff sued the supplier under one provision of that act, seeking contribution for the expenses of decontamination. The district court granted the defendant's motion for summary judgment, finding that the defendant had not owned or operated the plant and therefore could not be liable under the statute. Affirming, this court held that, although the defendant had designed and built the plant, trained the employees, and reserved the right to inspect operations, it had not been an owner or operator in the usual sense of the word. The court analogized the defendant's position to that of an independent contractor, having day-to-day control of its own specific operations. Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 157-158.

C.A.7, 1987. Subsec. (3) cit. in conc. op. The Secretary of Labor sought a declaratory judgment that as a matter of law migrant workers are farm "employees" for purposes of the Fair Labor Standards Act (FSLA), and are subject to the act's provisions governing minimum wage and child labor. The trial court entered judgment for the plaintiff, holding that migrant workers are employees under the act. Affirming, this court set out a six-step analysis for determining a worker's status as an employee or an independent contractor. A concurring opinion argued that the common law designation of independent contractor was a doctrine of tort law designed to block vicarious liability and should have no application under the FLSA, which has a different function and construes "employee" broadly. Sec'y of Labor, U.S. Dept. of Labor v. Lauritzen, 835 F.2d 1529, 1539, cert. denied 488 U.S. 898, 109 S.Ct. 243, 102 L.Ed.2d 232 (1988), rehearing denied 488 U.S. 987, 109 S.Ct. 544, 102 L.Ed.2d 574 (1988).

C.A.7, 1984. Cit. in case cit. in disc., quot. in ftn. Federal government removed plaintiff's malpractice action against Veterans Administration doctors to federal court, treating it as a Federal Torts Claim Act (FTCA) action. Plaintiff contested removal, arguing that because the doctors were temporary appointees to the VA whose performance was not strictly controlled and supervised by the VA, they were independent contractors rather than employees of the government, and therefore not immune from malpractice liability. The court affirmed the district court's holdings that the doctors were employees and immune from liability, and that plaintiff must proceed under the FTCA. It held that the strict control test was inappropriate in determining whether the physicians were employees or independent contractors, because the physicians' ethical obligation to exercise independent judgment prevented the VA from strictly controlling their performance. Quilico v. Kaplan, 749 F.2d 480, 483.

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C.A.8

C.A.8, 2010. Subsec. (2) quot. in sup. Worker brought a negligence action against homeowners, alleging that he fell and was seriously injured while doing roofing work and constructing an addition on property owned by defendants. The district court dismissed the case. Reversing and remanding, this court held that plaintiff's allegations that he was "employed," that defendants provided him with unsafe tools and equipment, and that he performed "inherently dangerous work as directed by" defendants were sufficient to raise a plausible inference that plaintiff was defendants' employee, rather than an independent contractor, under Missouri law for purposes of stating a common-law claim of employer liability. Hamilton v. Palm, 621 F.3d 816, 818.

C.A.8, 1989. Cit. in ftn. The plaintiff corporation bought an airplane and, per FAA rules, had an airworthiness inspection performed by a designated airworthiness representative and an airworthiness certificate issued. Two weeks later, the plaintiff discovered damaged wing spars, and the FAA withdrew the certificate until the plane was repaired. The plaintiff sued the United States under the Federal Tort Claims Act, alleging that the inspector was a federal employee and had performed the inspection negligently. The district court granted the defendant summary judgment on the ground that the United States was immune from tort liability under the discretionary function exception to the Act. This court affirmed on the ground that the inspector was not a federal employee, but an independent contractor. The court said that the FAA had no control over the inspector's daily activities or compensation and that the legislative history of the Civil Aeronautics Act indicating that Congress rejected the Civil Aeronautics Administration's employing 10,000 additional personnel in favor of authorizing the delegation of FAA inspection duties to private persons militated against finding the inspector to be a federal employee. Charlima, Inc. v. U.S., 873 F.2d 1078, 1080.

C.A.8, 1971. Cit. but dist. The trustee of two decedent plaintiffs brought an action for damages suffered as a result of defendant's negligence. Joined as a defendant, under the theory of respondeat superior, was the defendant's employer. Plaintiff won a judgment, and the employer appealed. The Court of Appeals found that there was sufficient evidence on the record to hold that it was a jury question as to whether the employer's business was being furthered by defendant's actions, for there was evidence by company officials that the journey in question was fulfilling the employer's need. The judgment was affirmed. Merchants National Bank of Cedar Rapids v. Waters, 447 F.2d 234, 236.

C.A.9

C.A.9, 1997. Cit. in case quot. in ftn. A seaman was injured when he slipped and fell down a stairway that led from the deck into the engine room. The seaman sued the company to which the United States Navy had chartered the ship, alleging causes of action under the Jones Act, the Suits in Admiralty Act, and general maritime law for negligence and unseaworthiness. District court granted the chartering company summary judgment. This court affirmed, holding that because it concluded that the charterer was operating the ship as the agent for the government, the seaman's action against the charterer was barred under the Suits in Admiralty Act. A number of provisions in the agreement indicated that the charterer consented to operate the ship on the government's behalf and subject to its overall control. Dearborn v. Mar Ship Operations, Inc., 113 F.3d 995, 998.

C.A.9, 1996. Cit. generally in disc. A man entered a resort hotel to board an elevator to see the view from the top of the hotel. A sign stated that access to the elevators was limited to hotel guests. A security guard attempted to stop the man from boarding the elevator, a scuffle ensued, and the man was struck in the head with a baton by one of several security guards, causing a bloody contusion. The man sued the hotel, alleging vicarious liability. The trial court of the Northern Mariana Islands granted the hotel summary judgment and the island supreme court affirmed. This court dismissed plaintiff's appeal, holding that no federal issue was implicated by the island supreme court's decision that the security guards were independent contractors rather than employees and that the hotel therefore could not be held vicariously liable for their actions. Castro v. Hotel Nikko Saipan, Inc., 96 F.3d 1259, 1260.

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C.A.10

C.A.10, 2020. Cit. in sup.; subsec. (3) quot. in case quot. in sup.; com. (a) cit. in sup. Farm workers sued agricultural employer, alleging, inter alia, that defendant breached an employment agreement entered into between the parties through a labor contractor and violated federal agricultural-labor statutes when labor contractor abruptly terminated plaintiffs' employment. The district court granted defendant's motion for summary judgment. This court reversed in part and remanded, holding that the district court erred in finding that labor contractor's breach of the parties' employment agreement could not be attributed to defendant, because a reasonable jury could find that labor contractor was defendant's agent. Citing Restatement Second of Agency §§ 2, 14N, and 220 and Restatement Third of Agency § 1.01, the court explained that the district court erred in reasoning that labor contractor was not defendant's agent because defendant lacked sufficient control over the manner and means of labor contractor's work in recruiting workers, and explained that the correct standard to apply was to examine whether defendant had a minimum level of control over labor contractor's conduct such that labor contractor manifested consent to act on defendant's behalf. Alfaro-Huitron v. Cervantes Agribusiness, 982 F.3d 1242, 1252, 1255.

C.A.10, 2003. Quot. in disc. Homeowners who were unsuccessfully charged with felony menacing and ethnic intimidation sued Jewish civil rights group and its director for defamation, invasion of privacy, and violations of federal wiretap statute arising from statements made by group and director regarding plaintiffs' allegedly anti-Semitic behavior against their Jewish neighbors, which were based on intercepted cordless phone conversations. Jury awarded plaintiffs damages. This court affirmed in part, holding that there was sufficient evidence of principal/agent relationship between group and neighbors' attorneys to support jury's verdict against group on federal wiretap claims based on attorneys' conduct in representing neighbors. Quigley v. Rosenthal, 327 F.3d 1044, 1064, certiorari denied 540 U.S. 1229, 124 S.Ct. 1507, 158 L.Ed.2d 172 (2004).

C.A.10, 2000. Cit. in diss. op. Non-Indian operator of hotel on property held in fee simple but surrounded by tribal lands brought a declaratory-judgment action against members of the Navajo Tax Commission, seeking a ruling that the Navajo Nation had no jurisdiction to impose a hotel occupancy tax on plaintiff's guests. Affirming the district court's grant of summary judgment for defendants, this court held, inter alia, that the Navajo Nation's exercise of civil authority over plaintiff's non-Indian guests arose out of a consensual relationship between the Nation and the guests. The dissent argued, in part, that the fact that the guests were served by plaintiff's Navajo employees in no way gave rise to a consensual relationship between the guests and the Nation, since, under agency law, plaintiff's employees represented plaintiff, not the Nation. Atkinson Trading Co. v. Shirley, 210 F.3d 1247, 1271, reversed 532 U.S. 645, 121 S.Ct. 1825, 149 L.Ed.2d 889 (2001).

C.A.10, 2000. Cit. in disc. Detainee sued state, city, county, and state and federal government officials under federal civil rights statutes and the New Mexico Tort Claims Act, alleging that defendants unlawfully detained him for 30 days without initiating extradition proceedings. Specifically, detainee alleged that, after a judge ordered his release, a county employee detained him one hour longer than the other prisoners. District court granted defendants summary judgment. This court affirmed, concluding that defendants were immune from plaintiff's claims under 42 U.S.C. § 1983, and that no fact issues existed as to the tort claims. The court held, inter alia, that the director of the county detention center was not vicariously liable for false imprisonment, because the director's supervisory position did not, by itself, establish him as principal/master and the county employee as agent/servant. Scull v. New Mexico, 236 F.3d 588, 600.

C.A.10, 1996. Subsec. (3) cit. in headnote and quot. but dist. The Federal Mine Safety and Health Review Commission upheld the assessment of a penalty by the Mine Safety and Health Administration against a company that manufactured and sold mining equipment for its failure to provide required annual refresher training to its service representatives who were sent onto mine property in connection with the sale of its products. Affirming, this court declined to adopt a common law test for determining whether the company was an independent contractor subject to the Federal Mine Safety and Health Act, holding that independent-contractor status was to be based not on the existence of a service contract or control, but on the performance of significant services at the mine. Since there was substantial evidence that the company's service representative performed significant services at the mine, the company was an independent contractor within the meaning of the Act. Joy Technologies, Inc. v. Secretary of Labor, 99 F.3d 991, 992, 996.

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C.A.10, 1993. Com. (d) cit. in ftn. Canadian corporation obtained copyright on computer program designed to test and train students with reading deficiencies. After New Mexico corporation began marketing similar software, Canadian corporation sued for copyright infringement. New Mexico federal district court granted Canadian corporation preliminary injunction against New Mexico corporation covering some portions of Canadian corporation's program, holding, in part, that defendant failed to rebut plaintiff's prima facie showing of validity of its copyright. This court affirmed, holding, inter alia, that plaintiff's prima facie case was not sufficiently rebutted to justify reversal of preliminary injunction on the basis of ownership of valid copyright. Noting that defendant alleged that all versions of plaintiff's programs were programmed by contract programming companies or individuals, none of whom worked for plaintiff, the court stated that defendant's broad assertions did not address critical question of whether plaintiff's programmers were or were not plaintiff's employees, considering relevant factors under common law of agency. Autoskill v. National Educational Support Systems, 994 F.2d 1476, 1489, cert. denied 510 U.S. 916, 114 S.Ct. 307, 126 L.Ed.2d 254 (1993).

C.A.10, 1978. Cit. in sup. Suit by former employee against employer newspaper publishers seeking damages alleging wrongful termination resulting from antitrust violations by defendant. The district court entered an order dismissing the action on the grounds that plaintiff's termination did not result from antitrust violations, but rather from his failure to adhere to his employer publisher's rules and regulations and from his insubordination. The appellate court affirmed the entry of summary judgment, holding that as an employee plaintiff was bound to follow certain directives issued by his employer. Among his duties was a duty not to compete with his employer concerning the subject matter of his employment and a duty to deal fairly with his employer at all times. Plaintiff's duties as the publishing company's district manager did not include any activity with regard to single-copy sales. Despite oral and written warnings, plaintiff continued to engage in such activities in violation of the company's rules and his common law duty not to compete with his employer. The defendant newspaper publisher's termination of plaintiff was therefore legitimate and not in violation of any anti-trust law. Farnell v. Albuquerque Pub. Co., 589 F.2d 497, 501.

C.A.11

C.A.11, 2011. Subsecs. (1)-(3) cit. in ftn. After worker, who had been sent by labor broker to assist operator of longshoring facilities in loading a cargo ship, was paralyzed from the waist down when a heavy piece of cargo being loaded into the ship's hold fell on him, he brought a negligence action against operator, claiming that the negligence of defendant's employees caused his injury. The district court granted summary judgment for defendant. Affirming, this court held that plaintiff's negligence claim against defendant was barred by the Longshore and Harbor Workers' Compensation Act, which had created a federal no-fault workers' compensation program that compensated injured maritime employees; defendant was plaintiff's borrowing employer at the time of plaintiff's injury, and thus was immune from tort liability under the Act's exclusivity provision. The court reasoned that plaintiff consented to being defendant's borrowed servant, he was doing defendant's work when he was injured, and defendant had the right to control his work. Langfitt v. Federal Marine Terminals, Inc., 647 F.3d 1116, 1120, 1121.

C.A.11, 1998. Com. (c) quot. in ftn. in sup. Municipal entities that purchased repackaged chlorine for treatment of drinking water, sewage, and swimming pools sued chemical companies, alleging that defendants had engaged in a conspiracy to fix prices for repackaged chlorine in Alabama in violation of federal and state antitrust law. The district court granted summary judgment for defendants. Affirming in part, reversing in part, vacating in part, and remanding, this court held, inter alia, that statements allegedly made to friends by defendant chemical company's late president, an agent or servant of the company, that he had been involved in fixing chlorine prices in the Southeast were admissible as nonhearsay party admissions. City of Tuscaloosa v. Harcros Chemicals, Inc., 158 F.3d 548, 557.

C.A.11, 1993. Cit. in disc. A city employee sued the city and its mayor, alleging that a lateral transfer was retaliation for her threat to file a discrimination suit. This court, reversing the district court's judgment on a jury verdict for the employee and remanding for further proceedings, held, inter alia, that the city could be held liable under the employee's Title VII claim, as the mayor was acting within the scope of his employment when he decided to transfer the employee, and he had used his agency relationship with the city to assist him in his unlawful retaliation. Goldsmith v. City of Atmore, 996 F.2d 1155, 1162.

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C.A.D.C.

C.A.D.C.2018. Quot. in disc., quot. in case quot. in disc.; coms. (b) and (d) quot. in ftn. to diss. op. After the National Labor Relations Board ruled that recycling-plant operator and staffing agency were joint employers for union-representation purposes, operator filed a petition for review. This court granted in part operator's petition, holding, inter alia, that, although the Board correctly stated the common law that the mere presence of an intermediary did not prevent an employer from being the master of its servants, it failed to correctly apply the facts of the case to the stated law. The court cited Restatement Second of Agency § 2 in explaining that the analysis of the master–servant relationship focused heavily on whether the employer had the right to control the subordinate. Citing § 2, the dissent argued that the majority failed to give due weight to the fact that operator did not seem to have the power to directly fire workers hired through staffing agency, which undermined the notion that operator had the right to exercise control over the workers. Browning-Ferris Industries of California, Inc. v. National Labor Relations Board, 911 F.3d 1195, 1211, 1230.

C.A.D.C.1983. Cit. in ftn. Some subcontractor employees filed third-party negligence actions following receipt of their workmen's compensation awards. The actions were filed against either the safety engineer or the contractor. Several issues were addressed by the district court in which the actions were brought, and the appeals were consolidated. This court affirmed the lower court's grants of summary judgment to the safety engineer, in which the engineer was held immune from negligence actions because it was an agent of the contractor. In light of the unqualified use of the word “agent” in the contract between the contractor and the safety engineer, this court found no reason to distinguish between servant and independent contractor agents in this case. Moreover, this court found both the consent and control necessary to sustain an agency relationship. Johnson v. Bechtel Associates Professional Corp., 717 F.2d 574, 578, judgment reversed 467 U.S. 925, 104 S.Ct. 2827, 81 L.Ed.2d 768 (1984), rehearing denied 468 U.S. 1226, 105 S.Ct. 26, 82 L.Ed.2d 919 (1984).

C.A.D.C.1981. Cit. in disc. and fol. and quot. in ftn. Federal prisoner being held at District of Columbia Reformatory brought an action against the United States under the Federal Tort Claims Act after he was stabbed and beaten by other inmates at the prison. The prisoner contended that the attack would not have taken place but for the prison officials' negligent failure to provide appropriate security. The United States moved before trial to dismiss the case on the ground that the District of Columbia Reformatory is not a federal agency as defined by the Federal Tort Claims Act and therefore that the United States could not be held liable for any negligence on the part of the prison's officials. After a trial, the District Court entered judgment in favor of the United States, and the prisoner appealed. The Court of Appeals found that the District Columbia Reformatory, over which the Federal government excises no greater leverage then it does over any other District of Columbia agency or facility, is not a federal agency for purposes of the federal Tort Claims Act. The court held that the statutory and regulatory restraints over the District of Columbia Reformatory are the essential equivalents of a contract, so that the Reformatory is in independent contractor of the United States and the United States, therefore, could not be held liable under the Federal Tort Claims Act for any torts committed against federal prisoners in connection with the operation of the Reformatory. Accordingly, the court held that the United States, motion to dismiss should have been granted, and the case was remanded. Cannon v. United States, 207 U.S.App.D.C. 203, 645 F.2d 1128, 1133.

C.A.D.C.1979. Quot. in ftn. Plaintiff worked intermittently as a foreign language broadcaster pursuant to a contract which indicated, inter alia, that the contractor (plaintiff) shall perform such services as an independent contractor, and not as an employee of the government. With the addition of two female nationals to the broadcast staff, plaintiff's contract was not renewed. Plaintiff filed suit under Title VII of the Civil Rights Act, alleging unlawful termination of her employment by reason of her sex, seeking declaratory relief, retroactive and prospective injunctions, and damages. The lower court granted defendant's motion to dismiss on the ground that the plaintiff was not an employee under the Act and hence not protected by its provisions, and it denied the plaintiff's cross-motion for partial summary judgement. On appeal, the court remanded, holding that the lower court erred in placing virtually exclusive reliance on the contract language as indicative of whether the plaintiff was an employee of the defendant, and that it should have received all of the circumstances surrounding the plaintiff's work relationship, in

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addition to considering the elements of her contract with the defendant. Spirides v. Reinhardt, 613 F.2d 826, 831, on remand 486 F.Supp. 685 (1980).

C.A.D.C.1978. Quot. in ftn. in disc. Civil service employees and their union brought action against the Administrator of the National Aeronautics and Space Administration (NASA), seeking a declaratory judgment and injunctive relief arising out of reduction in force action among civil service personnel at the space flight center. Plaintiffs' complaint alleged that independent technical service contractors, employed by NASA, were functionally employees of the United States, and that such arrangement violated Civil Service laws and NASA's own statute. Plaintiffs sought to have support service contracts set aside and to have employees who were terminated under reduction in force action take over the positions filled under the agreements with the contractors. The district court held that 22 of the 32 challenged support service contracts were invalid. On appeal, the Court of Appeals affirmed in part, vacated in part, and remanded with directions, holding, inter alia, that the degree of control or supervision by a party for whom work is eventually produced is the principal element that differentiates employees from independent contractors at common law. Lodge 1858, American Federation of Government Employees v. Webb, 580 F.2d 496, 504, certiorari denied 439 U.S. 927, 99 S.Ct. 311, 58 L.Ed.2d 319 (1978).

C.A.D.C.1963. Cit. in ftn. in sup. Water carrier was neither agent nor broker for original shipper, whose goods it had contracted to transport, in its contracting with another carrier to transport the goods. States Marine Lines, Inc. v. Federal Maritime Commission, 114 App.D.C. 225, 313 F.2d 906, 908, certiorari denied 374 U.S. 831, 83 S.Ct. 1872, 10 L.Ed.2d 1054.

C.A.Fed.

C.A.Fed.2014. Com. (d) cit. in sup. Survivors of eight firefighters who were killed when their van collided with a tractor-trailer while they were returning home from fighting a forest fire sought judicial review of the decision of the Department of Justice's Bureau of Justice Assistance denying their claims for survivors' benefits under the Public Safety Officers' Benefits Act. Affirming, this court held that the firefighters were not public-safety officers with the meaning of the Act, because they were formally employed by a private company that had an independent-contractor relationship with the government. The court noted that, even if the Act were read to adopt a common-law standard, the evidence did not support a finding that decedents here qualified as government employees under the common-law definition of "servant" set forth in Restatement Second of Agency § 2, Comment *d*. The court noted that private company, not the government, had a formal employment relationship with decedents, since its employees submitted timecards to and retrieved paychecks from company's headquarters, and company was entitled to terminate its employees at any time for any reason not prohibited by law. Moore v. Department of Justice, 760 F.3d 1369, 1375.

C.A.Fed.2010. Subsec. (3) quot. in disc. Patent holder sued competitor, alleging infringement of its patents regarding content delivery over the Internet. The district court entered a judgment as a matter of law for defendant, overturning a jury verdict for plaintiff. Affirming, this court held that plaintiff failed to prove infringement based on the actions of defendant and its customers as joint parties, because there was nothing to indicate that defendant's customers were performing any of the steps of the claimed method as agents for defendant; an essential element of agency was the principal's right to control the agent's actions, and, here, defendant's customers decided what content, if any, they would like delivered by defendant's service and then performed the step of "tagging" that content. Akamai Technologies, Inc. v. Limelight Networks, Inc., 629 F.3d 1311, 1320.

Ct.Int'l Trade

Ct.Int'l Trade, 2007. Cit. in disc. Former employees petitioned for trade-adjustment-assistance benefits from the United States Department of Labor after being terminated from their positions as "leased service workers." The Department issued a notice of negative determination on remand, in which it announced a new leased-worker policy establishing seven criteria to be applied in determining which entity employed, or exercised actual, operational control over, workers such as plaintiffs. This court remanded for, in part, the Department to explain its adoption of only some of the criteria set forth in the authorities on which it relied in formulating its seven-criteria test for control, noting, among other things, that, while the Department allegedly referred

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to Restatement Second of Agency § 220, that section listed more than 10 criteria, only some of which were adopted. Former Employees of Intern. Business Machines Corp. v. U.S. Secretary of Labor, 483 F.Supp.2d 1284, 1307.

Ct.Int'l Trade, 2001. Subsec. (3) quot. in ftn. On remand, for purposes of imposition of customs duties, this matter concerned the proper valuation of 34 shipments of fabric by importer from its parent in Quebec. This court held, inter alia, that the dutiable transaction values of the merchandise at issue must include the commissions that were paid to parent's selling agent, and remanded the case to the United States Customs Service for further proceedings. The court noted that the evidence supported the finding that selling agent operated as an independent contractor, but concluded that the distinction mattered little here. VWP of America, Inc. v. U.S., 163 F.Supp.2d 645, 655.

U.S.Ct.Cl.

U.S.Ct.Cl.1963. Cit. in ftn. in sup. A naval reserve officer who was attached in pay status to a mobilization team was "employed" in inactive duty training within meaning of statute at time when he fell on grounds of reserve training center after he had entered a gate and while he was walking toward training hall, pursuant to order to participate in inspection, and he was entitled to benefits of statute entitling persons disabled in line of duty to same compensation and benefits as paid to members of regular Navy, though he had not yet reported for duty. Meister v. United States, 319 F.2d 875, 878.

N.D.Ala.

N.D.Ala.2007. Cit. in case quot. in sup. White male attorney sued former employer, alleging, among other things, employment discrimination and retaliation. After a jury returned a verdict in favor of plaintiff, this court denied defendant's motion for a new trial, rejecting defendant's argument that the court invaded the attorney-client privilege by admitting into evidence defendant's partial motion to dismiss because it implied that a conversation occurred in which defendant expressed to its attorney a desire for the relief sought by the motion. The court reasoned, among other things, that, under Alabama law, admissions by an attorney concerning a matter within his employment typically bound his client without any evidence of whether the client actually authorized the admission. Tucker v. Housing Authority of Birmingham Dist., 507 F.Supp.2d 1240, 1273, affirmed by 229 Fed.Appx. 820 (11th Cir.2007).

D.Ariz.

D.Ariz.1993. Subsec. (3) quot. in sup. Class of Medicaid beneficiaries challenged sufficiency of behavioral health services provided to eligible children. Granting in part plaintiffs' motion for partial summary judgment, the court held, inter alia, that allegedly impermissible reductions of Medicaid services, made by regional behavioral health authorities, were taken on behalf of the state and, thus, amounted to state action even if the authorities were considered independent contractors. J.K. By and Through R.K. v. Dillenberg, 836 F.Supp. 694, 699.

C.D.Cal.

C.D.Cal.1998. Cit. in disc. Insureds sued insurer in state court for breach of contract, breach of the covenant of good faith and fair dealing, and unfair business practices, among other claims. After removal to federal court, insureds sought joinder of the nondiverse insurer's contractors to defend allegations of conspiracy and fraud. This court entered an order remanding the case to state court, holding, inter alia, that, although it was reasonably possible that the recently added defendants served as agents of the insurer and independent contractors at the same time, the insurer could be liable for the acts of its independent contractors when an agency relationship was demonstrated. The court stated that the insurer may have exerted some degree of control over the added defendants in the context of ordering them to explore and recommend cheaper alternatives. Therefore, it was conceivable that the alleged inflation was caused in part by the creation and execution of a conspiracy between the parties. Diaz v. Allstate Insurance Group, 185 F.R.D. 581, 592.

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C.D.Cal.1994. Subsec. (2) cit. in disc. Patent holder brought a patent infringement suit against, among others, licensor of trademark used by manufacturer/distributor on shoes that allegedly improperly incorporated flashing-light device covered by plaintiff's patent. Granting defendant's motion for summary judgment, the court held, inter alia, that there was no material issue of fact as to whether an agency relationship existed between defendant and manufacturer/distributor pursuant to which defendant could be held vicariously liable for manufacturer/distributor's infringing acts on the ground that defendant, through the licensing agreement, exercised sufficient control over manufacturer/distributor. The court said that plaintiff offered no affirmative evidence to support its theory, inasmuch as trademark license agreements did not in and of themselves create an agency relationship and the license agreement at issue indicated that defendant exercised only minimal control over manufacturer/distributor's activities. L.A. Gear, Inc. v. E.S. Originals, Inc., 859 F.Supp. 1294, 1299.

E.D.Cal.

E.D.Cal.1995. Cit. in disc. Individuals who wrote bad checks for retail purchases sued a debt collection agency, the collection agency's in-house attorney, and an outside law firm hired by the agency, alleging that defendants' debt collection practices of demanding more than the face value of the checks and threatening litigation where none was actually anticipated violated the Fair Debt Collection Practices Act and California law. Defendants argued that the law firm defendants, while under contract with the collection agency, were independent contractors and not agents for the purpose of the agency's vicarious liability. This court, among other dispositions, granted plaintiffs' motion for summary judgment concerning collection agency's vicarious liability for the acts of the other defendants. It determined that the agency, by allowing the outside attorneys to identify themselves to third parties as the agency's representatives, had made itself responsible for the acts of the attorneys performed in the course of that representation. Newman v. Checkrite California, Inc., 912 F.Supp. 1354, 1370.

N.D.Cal.

N.D.Cal.1989. Cit. in disc., subsec. (2) quot. in ftn. A private security inspector who was injured on federal government-owned property managed by a private contractor sued the government for his injuries. The court denied the defendant's motion for summary judgment, holding that the defendant was liable for the negligent acts of the private contractor because the defendant contractually waived its sovereign immunity by designating the private contractor as its agent for specified purposes. Ferguson v. U.S., 712 F.Supp. 775, 780.

N.D.Cal.1988. Cit. in ftn., coms. (a) and (c) cit. in ftn. A motorcyclist sued the United States under the Federal Tort Claims Act (FTCA) for injuries he sustained when he was struck by a tractor-trailer, owned by a private corporation and driven by the corporation's employee, as it was transporting mail pursuant to a contract with the defendant. The court granted the defendant's motion to dismiss for lack of subject matter jurisdiction, concluding that neither the corporation nor its driver was an employee of the defendant within the meaning of the FTCA. The court said that the corporation was an independent contractor, not a government employee, since the defendant did not control the detailed physical performance of the corporation, nor did it supervise the corporation's day-to-day operations; furthermore, the driver was a part-time employee of the corporation and therefore was not a government employee, since the defendant did not control the driver's performance of the contract between the corporation and the defendant. Lerma v. U.S., 716 F.Supp. 1294, 1296, decision affirmed 876 F.2d 897 (9th Cir.1989).

D.Colo.

D.Colo.1996. Cit. in headnote, cit. in sup. Military officer sued for violation of the Right to Financial Privacy Act (RFPA), seeking a preliminary injunction to enjoin the Air Force from using, photocopying, or disseminating his financial records obtained from financial institutions that issued him government charge cards. Denying plaintiff's motion, the court held, inter alia, that, pursuant to the language and legislative history of the RFPA, settled agency principles, and the underlying contracts, the Air Force was, as a matter of law, plaintiff's “authorized representative” and, in that capacity, was a “customer,” entitled to

plaintiff's financial records obtained from the financial institutions. The court concluded that there was no substantial likelihood that plaintiff would prevail on his RFPA claim so as to be entitled to a preliminary injunction. Russell v. Dept. of Air Force, 915 F.Supp. 1108, 1111, 1119.

D.Del.

D.Del.1985. Subsec. (3) cit. in disc. The purchasers of a residential development sued the sellers for rescission of a contract on grounds of misrepresentation and mutual mistake after the sellers sold the property to the purchasers without a required approval, causing purchasers to lose 38 of the purchased lots. Both parties moved for summary judgment. The trial court denied both motions, holding that issues of material fact precluded summary judgment. The court stated that the mere fact that the person is an independent contractor does not exempt him from being an agent. Also, an independent contractor who does not exhibit any of the essential characteristics of an agency is not an agent. Shore Builders, Inc. v. Dogwood, Inc., 616 F.Supp. 1004, 1013-1014.

D.D.C.

D.D.C.2003. Quot. in ftn., cit. generally in case cit. in sup. Mother of a former federal prison inmate who was released to a halfway house and then fatally shot by an unknown gunman sued the Federal Bureau of Prisons (BOP), the halfway house, and house's director pursuant to the Federal Tort Claims Act (FTCA), alleging negligence, wrongful death, and pain and suffering, inter alia. This court granted in part BOP's motion to dismiss, holding, inter alia, that BOP was not liable under FTCA for any negligence allegedly committed by the halfway house, which was an independent contractor with BOP. BOP had no actual control over halfway house, as it did not staff, manage, or supervise halfway house on a daily basis. Phillips v. Federal Bureau of Prisons, 271 F.Supp.2d 97, 100.

D.D.C.2002. Cit. in case quot. in sup. Private contractor's employee who suffered severe electrical shock while working in federal government facility sued government agency for negligence under Federal Tort Claims Act. Granting government summary judgment, this court held that government agency was not liable for independent contractor's negligent maintenance of equipment. Cooper v. U.S. Gov't and Gen'l Svcs. Admin., 225 F.Supp.2d 1, 3.

D.D.C.1995. Quot. in disc. Physician sued hospital for, inter alia, federal civil rights violations when hospital refused his request for reappointment to its medical staff, unrestricted medical staff membership and hospital privileges. Specifically, physician alleged that even though he was not a hospital employee, hospital's discriminatory conduct violated Title VII by interfering with the employment relationships he had established with his patients. The court granted hospital's motion for summary judgment after physician failed to oppose it, but, alternatively, held that physician did not state a Title VII claim since he was not his patients' employee but, rather, their independent contractor. The court explained that doctor's patients did not supervise his work, supply his tools or equipment, pay his social security taxes or, most importantly, control the manner and means of the medical services rendered. Johnson v. Greater Southeast Community Hosp. Corp., 903 F.Supp. 140, 155, order vacated in part 1997 WL 377147 (D.D.C.1996).

D.D.C.1981. Quot. in ftn. in sup. The plaintiff was injured while working on federal property and sought to recover against the defendant under the Federal Tort Claims Act. The court granted the defendant's motion to dismiss because the plaintiff was the employee of an independent contractor when he was injured and the Federal Tort Claims Act specifically excludes the employees of independent contractors. Although the defendant reserved a right to inspect, this reservation was not a sufficient right of control to change plaintiff's employer from an independent contractor to a servant of the defendant. Jennings v. United States, 530 F.Supp. 40, 42.

S.D.Fla.

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S.D.Fla.2014. Subsec. (3) cit. in sup. Bar patrons brought claims sounding in negligence and vicarious liability against bar owner following an incident outside the bar in which plaintiffs were allegedly battered and arrested by off-duty police officers hired by defendant to perform security work. The trial court granted summary judgment for defendant as to plaintiffs' vicarious liability claims, holding that defendant could not be held vicariously liable for officers' actions under Florida law, because the officers were defendant's independent contractors, rather than employees. The court noted that, while plaintiffs were technically correct that officers could still be agents of defendant, because independent contractors could be agents under Restatement Second of Agency § 2, an employer was liable for the actions only of its employees or servants, not for the actions of its independent contractors. Martinez v. Miami-Dade County, 32 F.Supp.3d 1232, 1239.

S.D.Fla.2005. Cit. in case quot. in disc. Navy serviceman, his wife, and their child sued United States for the alleged malpractice of its navy personnel in connection with the child's delivery and birth. This court entered judgment on behalf of plaintiffs. Although defendant argued, inter alia, that the alleged malpractice was committed exclusively by a civilian physician who provided medical services under a sub-contract, the court found, as a matter of law, that civilian was an employee of defendant for purposes of the Federal Tort Claims Act (FTCA) when he rendered care to plaintiffs, because defendant, under the contract, had the authority to control his physical, day-to-day conduct. The court noted that a person acting on behalf of a "federal agency," a term synonymous with "servant or agent" of the government, was included within the FTCA's definition of a government employee. Bravo v. U.S., 403 F.Supp.2d 1182, 1194, opinion amended 2005 WL 3620200 (S.D.Fla.2005).

S.D.Fla.1996. Cit. in treatise cit. in disc. The EEOC sued a cruise line, the cruise line's manager, and an entertainment recruiting agency pursuant to the Americans with Disabilities Act (ADA), after the cruise line rescinded an applicant's employment contract when the applicant informed them that he tested HIV-positive. Defendants argued that the ADA did not apply because the relationship contemplated by the parties was not for employment but for an independent contractor. This court granted plaintiff's motions for partial summary judgment, holding, inter alia, that, notwithstanding the labeling of the contract as an "independent contractor agreement," the relationship described in the contract demonstrated that plaintiff, if he had been hired as an entertainer, would have been an employee. Defendants controlled the shows, selection of the cast, costumes, backing tapes, and hours of employment, and plaintiff would have had no choice of cruise staff duties, and no discretion in the performance of those duties. E.E.O.C. v. Dolphin Cruise Line, Inc., 945 F.Supp. 1550, 1556.

C.D.Ill.

C.D.Ill.1981. Cit. in disc. Migrant farm workers brought an action against farm labor contractors and their employees seeking damages and equitable relief alleging that the defendants had violated provisions of three federal statutes. The court held, inter alia, that the farm labor contractor was vicariously liable for violations by crew leaders, of the Farm Labor Contractor Registration Act during the period of the agency which extended from recruitment in Texas until the workers' return to Texas at the close of the season. The court found that the crew leaders had been the contractor's agents because they were subject to the contractor's control and direction in the discharge of their responsibilities and operations. The court found that the crew leaders and the farm labor contractor had acted intentionally in violation of the Farm Labor Contractor Registration Act and that their activities were conscious and deliberate although they may not have had a specific intention to violate the law and avoid its provisions. De La Fuente v. Stokely-Van Camp, Inc., 514 F.Supp. 68, 79.

N.D.Ill.

N.D.Ill.2019. Quot. in case quot. in disc. Data integration company that managed car dealer management information brought a lawsuit against providers of car dealer management systems; defendants counterclaimed, alleging that plaintiff accessed defendants' data systems without permission by exploiting the login information of defendants' authorized customers, and, among other things, committed data fraud in violation of federal and state statutes. This court denied in part plaintiff's motion to dismiss defendants' counterclaims, holding, inter alia, that the record was insufficient to establish whether or not plaintiff lacked the authority to access defendants' systems because it was not an agent of defendants' authorized customers. The cited Restatement Second of Agency § 2 in explaining that the agreement between defendants and their customers characterized third

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parties such as plaintiff as independent contractors, which could have precluded plaintiff from being an agent of the customers. In re Dealer Management Systems Antitrust Litigation, 362 F.Supp.3d 558, 567.

N.D.Ill.1995. Cit. in disc. Company that painted and refurbished dams sued its insurer for breach of a marine insurance contract when insurer refused to pay for damages resulting from the claimed barratry of one of company's masters. The alleged barratry occurred when the owner of a landing where one of company's vessels was docked released the vessel pursuant to the instructions of company's surety. The vessel was then sold. Denying company's motion for summary judgment, the court held that the insurance policy provision covering losses resulting from barratry of the masters and mariners did not apply here because the landing owner was not company's master. Relying on basic principles of agency law, the court explained that company did not exercise sufficient control over dock owner to create a master/owner relationship, nor did the parties intend to establish such an alliance. Minelli v. Frank B. Hall & Co. of Missouri, Inc., 898 F.Supp. 615, 620.

N.D.Ill.1989. Quot. in disc. A mortgage brokerage company went into Chapter 11 bankruptcy and adopted a reorganization plan, which called for claims of its employees and independent contractors to be addressed only after the claims of its investors were satisfied. An advertising agency and several actors, who had been advertising for the debtor prior to its bankruptcy, were sued by investors for fraud. They filed indemnification claims against the debtor, seeking to recover their legal expenses. The court denied the claimants' motion to give their claims the same priority as that of the debtor's investors, stating that the claimants were independent contractors. The court noted the claimants' assertion that they had been the debtor's agents was irrelevant because the presence of an agency relationship had no bearing on the claimants' independent contractor status. In re Diamond Mortg. Corp. of Illinois, 105 B.R. 876, 879.

N.D.Ill.1986. Cit. in disc. A worker, described as an "associated person," brought several actions against a futures commission merchant and others, stemming from the plaintiff's claim that he was a victim of racial discrimination. The defendants argued that the plaintiff's federal claim under 42 U.S.C. § 2000, Title VII, must fail, because the plaintiff was an independent contractor and not an employee, which is a requisite for a Title VII action. The court denied the defendants' motion to dismiss, finding, inter alia, that when an employer has the right to control and direct the work of an individual, there exists the likelihood that an employer-employee relationship is present. The court found that the defendants did not establish beyond dispute that the plaintiff was not an employee of the futures commission merchant. Mitchell v. Tenney, 650 F.Supp. 703, 706.

N.D.Ill.1981. Cit. in ftn. The defendant, a small corporation, secured the services of an advertising agency to purchase commercial air time on the plaintiff's television station. The advertising agency then contracted with the station for the running of defendant's commercials. The defendant understood that it was to make all payments to the advertising agency, which would then pay the station. The defendant made its payments in full, but the advertising agency was in financial difficulty and failed to complete its payments to the plaintiff station. The plaintiff then sued the corporation, alleging that the advertising agency was an agent for the defendant corporation, and that the defendant was bound by any contracts made by its agent. Both parties moved for summary judgment. The court denied both motions, asserting that an implied agency relationship must be inferred from the actions of the principal, and the facts were not clear enough to determine whether such a relationship existed between the defendant and the advertising agency. American Broadcasting Companies v. Climate Control, 524 F.Supp. 1014, 1016.

S.D.Ind.

S.D.Ind.2005. Subsec. (3) quot. in disc. Insurance agents/brokers sued medical-insurance company for, in part, breach of fiduciary duty after company terminated its relationship with plaintiffs upon its decision to withdraw from the major-medical-insurance market in various states. Denying company's motion for summary judgment on this claim, this court held, inter alia, that a fact issue existed as to whether company had a fiduciary relationship with plaintiffs; although plaintiffs did not dispute that they were independent contractors, such designation was not determinative as to whether a principle-agent relationship existed, because an independent contractor could nonetheless be an agent. Reginald Martin Agency, Inc. v. Conseco Medical Ins. Co., 388 F.Supp.2d 919, 928.

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W.D.La.

W.D.La.1997. Cit. in disc., com. (a) cit. in case cit. in disc. Woman was injured when she tripped over a rolled-up rug that had been placed just outside entrance to United States Post Office by cleaner hired by branch postmaster to strip, wax, and buff office floors; woman sued United States and cleaner under theories of strict liability, general premises liability, and negligence. United States filed an alternative motion for dismissal or for summary judgment. Granting the motion in part and denying it in part, the court held that, while the Federal Tort Claims Act (FTCA) precluded woman's strict liability and premises liability claims, material factual issues existed as to whether cleaner was an employee or independent contractor of United States for purposes of the FTCA. Cupit v. U.S., 964 F.Supp. 1104, 1109-1110.

D.Me.

D.Me.2009. Subsec. (1) cit. in case cit. in ftn. Former officers of local lodge of international labor organization sued organization and its president, asserting claims under federal and state law in connection with the imposition of a trusteeship on the lodge. This court granted summary judgment for defendants as to plaintiffs' federal claims and dismissed without prejudice plaintiffs' state-law claims, over which it declined to exercise supplemental jurisdiction. The court explained that the state-law tort claims potentially raised novel issues of state law best reserved in a state forum, for example, whether defendants could be vicariously liable for a potentially defamatory statement allegedly made by a district lodge president, given that the district lodge president was not a named defendant in this action. Keenan v. International Ass'n of Machinists and Aerospace Workers, 632 F.Supp.2d 63, 72.

D.Me.1995. Subsec. (3) cit. in headnote, cit. in sup. Once mortgagor became aware that her promissory note had been purchased, she sued the purchaser for, inter alia, breach of contract. Plaintiff alleged that defendant's purchase made it liable for the acts of the original holder which continued to service the note, although in wrongful ways that clearly violated defendant's established guidelines. The court held that because the original holder had blanket authority to service plaintiff's note, although not in the manner it did so, it was a general agent of defendant, even if it were an independent contractor, and this agency relationship rendered defendant, an undisclosed principal, liable for its agent's behavior. The court nevertheless dismissed the complaint, concluding that the agent could not bind defendant, a federal creation, beyond its actual authority. Dupuis v. Federal Home Loan Mortg. Corp., 879 F.Supp. 139, 139, 143.

D.Md.

D.Md.2012. Coms. (a) and (b) cit. and quot. in cases quot. in sup. Customers sued freight forwarder and warehousing company, among others, seeking to recover damages allegedly sustained as a result of the misplacement of their cargo. Granting summary judgment for freight forwarder, this court rejected plaintiffs' argument that freight forwarder was vicariously liable for the alleged negligence of warehousing company because company was freight forwarder's agent. The court reasoned that the question of freight forwarder's liability hinged not on agency, but on whether company was forwarder's "servant" or, instead, an independent contractor, and concluded that company was forwarder's independent contractor, because the two parties appeared to be independent businesses, and forwarder did not exercise control over company's selection of drivers; as a result, forwarder was not liable for the negligence of company or company's employees. Danner v. International Freight Systems of Washington, LLC, 855 F.Supp.2d 433, 454, 455.

D.Md.1981. Cit. in disc. The plaintiff's breach of contract claim was founded upon the defendant's alleged failure to pay commissions and to deliver goods under alleged delivery obligations. The defendant, a non-resident corporation, moved to dismiss the action, contending that Maryland lacked personal jurisdiction because the defendant was neither physically present nor doing business in Maryland, and the plaintiff's sales representatives were not general agents of the defendant. The court held that the defendant's physical presence was not a prerequisite to the exercise of personal jurisdiction where the nexus between the defendant and the forum state was such that the defendant was sufficiently transacting business within that state. The defendant

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did not have an absolute right to control the plaintiff's conduct, as would be necessary to hold the defendant liable for that conduct. However, because the plaintiff contracted with Maryland consumers on behalf of the defendant, an agency relationship sufficient to bring the defendant under the state's personal jurisdiction could be implied. The defendant's motion to dismiss was denied. Snyder v. Hampton Industries Inc., 521 F.Supp. 130, 142-143.

D.Md.1971. Com. (b) cit. and cit. in ftn. in sup. The subrogated insurers of the owner of tobacco brought this action against the company which arranged for purchase and storage of tobacco and against the owners and operators of the warehouse where the tobacco was stored when it burned. A Maryland statute required a warehouseman to furnish insurance on tobacco in storage. The court found the defendant to be the agent of the plaintiff, where the defendant was at all times subject to the control of the plaintiff and acted on behalf of the plaintiff as its commission agent, and held that even an independent contractor can be an agent for purposes of binding the principal on a contract. The court found the owners of the warehouses to be subagents of the plaintiff, because the defendant agent had the implied authority to appoint a subagent, lacking warehouses and packing facilities of its own. The plaintiff's substantial control over the defendant agent and subagent showed that they were not acting as mere suppliers. As a result of an agreement between the parties, insurance was provided by the plaintiff. The court found that the agent had thereby complied with the statute requiring that insurance be “furnished;” and hence the defendants were not liable for failing to provide insurance. General Cigar Co. v. Lancaster Leaf Tobacco Co., 323 F.Supp. 931, 938.

D.Md.1959. Quot. in sup. In action by plaintiff for damages arising from contract to dig and grade tunnel, question of whether defendant was employee or independent-contractor was for jury, based upon evidence. Mitchell v. Singstad, 177 F.Supp. 376, 382.

D.Mass.

D.Mass.2004. Subsecs. (2) and (3) quot. in disc. United States filed a complaint alleging that the two people running its cooperative project with university to help reform the Russian market system, invested and conducted business in Russia in a manner that could have given rise to real or apparent conflicts of interest. Upon cross-motions for summary judgment, this court granted government's motion in part, holding, inter alia, that the tenured university professor running the project was an employee of the cooperative and not an independent contractor; therefore, professor was subject to the conflict-of-interest provision in cooperative's regulations governing employees. U.S. v. President and Fellows of Harvard College, 323 F.Supp.2d 151, 169.

D.Mass.1976. Cit. in sup. Tenants in an apartment house owned by the United States (through HUD), sued under the Federal Tort Claims Act to recover for injuries sustained by the minor plaintiff as a result of a fall on a defective staircase in the building. The question before the court was whether the United States was responsible for the negligent acts of an area management broker with whom it had contracted for the maintenance and care of the apartment building. In dismissing the action on the merits and with prejudice, the court held that where the supervision of the apartment building by HUD was not on a day-to-day basis, “but only if major difficulties arise,” the management broker was an independent contractor and not an employee of the United States within the purview of the Federal Tort Claims Act, and, therefore, the United States was not liable for the negligence of the management broker. Harris v. United States, 424 F.Supp. 627, 629.

E.D.Mich.

E.D.Mich.2012. Cit. in case quot. in sup. Surgeon sued hospital after it suspended her medical staff privileges, asserting claims of race and gender discrimination. Granting summary judgment for hospital, this court held, among other things, that surgeon was an independent contractor, rather than an employee of hospital, and therefore could not maintain an employment discrimination action against hospital under Title VII of the Civil Rights Act. The court reasoned, in part, that surgeon admitted that she was "self-employed"; that she hired and paid her own employees; that she paid her own professional dues, licensing fees, and malpractice insurance premiums; that she did her own billing and collection of payments for all of her professional

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services; and the fact that she was subjected to corrective action by hospital did not establish that she was an employee of hospital. Brintley v. St. Mary Mercy Hosp., 904 F.Supp.2d 699, 717.

E.D.Mich.2005. Cit. in sup. Health maintenance organization sued manager of prescription drug program for breach of fiduciary duty and other claims, alleging that defendant failed to fully reimburse participating pharmacies and overcharged for its prescription management services. This court, inter alia, denied the parties' cross motions for summary judgment on the claim for breach of fiduciary duty, holding that there was a genuine issue of material fact as to whether defendant was an agent of plaintiff. The court observed that defendants' status as an independent contractor did not preclude defendant from also being an agent and therefore subject to some degree of control by plaintiff and accountability to plaintiff within the parameters of their agreement. Midwest Healthplan, Inc. v. National Medical Health Card Systems, Inc., 413 F.Supp.2d 823, 832, 834.

W.D.Mich.Bkrtcy.Ct.

W.D.Mich.Bkrtcy.Ct.2016. Subsec. (3) quot. in case quot. in ftn. After U.S. trustee was informed by Chapter 7 trustee of a pending sale of Chapter 7 debtor's property, U.S. trustee brought an adversary proceeding against debtor, seeking to revoke debtor's discharge, alleging that debtor fraudulently concealed the pending sale, which was for a price that was much higher than the value of the property disclosed in debtor's bankruptcy schedules. This court granted plaintiff's motion for partial summary judgment, holding that the Chapter 7 trustee's knowledge before the discharge of the alleged fraud was not imputed to plaintiff. In determining that that the Chapter 7 trustee was not an agent of plaintiff, the court cited Restatement Third of Agency § 1.02 and Restatement Second of Agency § 2(3) and noted that whether the Chapter 7 trustee was an independent contractor of plaintiff did not affect whether the trustee could be plaintiff's agent. In re Larson, 553 B.R. 646, 651.

D.Minn.

D.Minn.2000. Subsec. (3) cit. in disc. After the Securities and Exchange Commission (SEC) obtained a permanent injunction barring the president of a Greek brokerage firm from associating with any broker in the United States securities industry, the SEC sued the Greek brokerage firm and its president and an American brokerage firm and its CEO for whom the Greek firm's president was serving as a "finder" of Greek customers, seeking injunctive relief for violations, and aiding and abetting of violations, of federal securities laws. This court granted the SEC's motion for summary judgment and for entry of a permanent injunction, holding, inter alia, that the evidence sufficiently established that the Greek firm's president was controlled by the American firm so that he was an "associated person" under federal securities law and was in violation of the SEC's bar order and the Securities Exchange Act. U.S. S.E.C. v. Zahareas, 100 F.Supp.2d 1148, 1153, reversed in part, vacated in part 272 F.3d 1102 (8th Cir.2001).

D.Minn.1994. Quot. in ftn. Helicopter owners brought a products liability action against helicopter manufacturer for damages they sustained as a result of the crash of the helicopter due to mechanical failure. The court held that the jury's allocation of fault to nonparty independent contractor hired by plaintiffs to conduct a prepurchase inspection of the helicopter to ascertain if it was airworthy should not be reallocated to plaintiffs, since the inspection and maintenance of aircraft were not so singularly duties of the owner or operator that public policy dictated that they could not be delegated to others. The court said that defendant's request for adjustment of the amount it was obligated to pay so as to account for its right of contribution against plaintiffs was premature because defendant had not commenced an action for contribution against plaintiffs. The court thus denied defendant's motion for reallocation and entered judgment for plaintiffs for damages. Cosgrove v. McDonnell Douglas Helicopter Co., 847 F.Supp. 719, 723.

W.D.Mo.

W.D.Mo.2016. Cit. in case quot. in sup. Wife brought a wrongful-death action against store owner and architect that built the store, alleging that her husband and two minor children, who sought refuge in the store during a tornado, were killed when

large, unsupported wall panels inside the store collapsed on top of them. This court granted defendants' motion to dismiss plaintiff's claims against architect as barred by the statute of repose, and granted summary judgment for store owner, holding that plaintiff failed to demonstrate facts from which it could reasonably be concluded that architect's knowledge of a dangerous condition in the store could be imputed to store owner. The court noted that, under Restatement Second of Agency § 2, the terms "independent contractor" and "agent" were not mutually exclusive, and explained that a property owner who hired an independent contractor was entitled to rely on the contractor's work absent specific knowledge of the insufficiency of the work, and was not imputed to have knowledge of any defects simply because the contractor also served some agent-type functions for the owner. Housel v. HD Development of Maryland, Inc., 196 F.Supp.3d 1039, 1054.

D.Neb.

D.Neb.1997. Subsec. (3) cit. in ftn. A life insurance company sued one of its independent, nonsalaried marketing directors for a declaratory judgment that he owed it money under various agreements. After defendant counterclaimed for breach of contract, plaintiff raised the statute of limitations as an affirmative defense. The court entered a judgment holding that defendant's counterclaim was not barred by the applicable statutes of limitations, stating that a general or continuing agency relationship existed between the parties and that the applicable statutes of limitations did not begin to run on the counterclaim until defendant's demand for an accounting was refused and the agency relationship was terminated. The court noted that, because it had determined that defendant was plaintiff's agent, it was unnecessary to analyze the issue of whether defendant was also an independent contractor under Nebraska law. Lincoln Ben. Life Co. v. Edwards, 966 F.Supp. 911, 920, affirmed 148 F.3d 999 (8th Cir.1998).

D.Nev.

D.Nev.2015. Subsec. (2) cit. in case quot. in sup. Taxi driver and his wife, who was disabled, brought claims under the Americans with Disabilities Act (ADA) against taxi company, alleging that they were denied transportation by other employees of defendant because of wife's disability. This court granted plaintiffs' motion for partial summary judgment on defendant's affirmative defense that driver was defendant's independent contractor who was excluded from the ADA's protection, rather than a protected employee, holding that federal common-law principles of agency applied to determine employee versus independent-contractor status for a claim brought under the ADA, and that, here, most of the factors set forth in Restatement Second of Agency § 2 supported a finding that driver was an employee. Doud v. Yellow Cab of Reno, Inc., 96 F.Supp.3d 1076, 1087.

D.N.J.

D.N.J.2005. Cit. in sup. Title-insurance company, as the assignee and subrogee of a mortgage company, sued title agent, its subagent title agency, and subagent's owner and employee, inter alia, to recoup losses from a mortgage loan that assignor was fraudulently induced to make. This court granted plaintiff partial summary judgment, holding, inter alia, that title agent could be held liable for the fraudulent acts of owner and employee, as its subagents. Subagents had the power to bind title agent, a power possessed by agent independent contractors, but not nonagent independent contractors. Lawyers Title Ins. Corp. v. Phillips Title Agency, 361 F.Supp.2d 443, 449.

D.N.J.1986. Cit. in case quot. in disc. An injured merchant seaman sued a shipowner in negligence. The United States, on behalf of its alleged agent, the shipowner, moved for summary judgment. The court granted the government's motion, finding that the United States could properly move for summary judgment as the principal of the shipowner, that the injured merchant seaman's exclusive remedy was against the United States as the principal of the shipowner, and that the seaman's claim was time barred. Cruz v. Marine Transport Lines, Inc., 634 F.Supp. 107, 110, judgment affirmed 806 F.2d 252 (3d Cir.1986), cert. denied 481 U.S. 1048, 107 S.Ct. 2178, 95 L.Ed.2d 835 (1987).

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D.N.M.

D.N.M.2019. Cit. in sup.; coms. (a) and (b) cit. in sup. Property owners and insurers filed separate lawsuits against, among others, the U.S. Forest Service, alleging that the forest fire that damaged their property was caused by the negligent forest-clearing activities conducted by a Native American tribe that had contracted with defendant. After consolidating the actions, this court granted defendant's motion to dismiss, holding that defendant did not waive sovereign immunity for the tribe's actions, because the tribe was not a federal employee. The court explained that the definition of "federal employee" for the purposes of waiving sovereign immunity drew from common-law agency principles found under Restatement Second of Agency §§ 1, 2, and 220, and that the record weighed towards finding that defendant did not exhibit sufficient control over the tribe's work to constitute employment. De Baca v. United States, 399 F.Supp.3d 1052, 1178.

E.D.N.Y.

E.D.N.Y.1994. Cit. in disc., subsec. (3) cit. in disc. A bank customer who fell behind on his payments sued the debt collection agency, its employees, and the bank, as principal, alleging unscrupulous debt collection practices. Dismissing the bank but awarding judgment for plaintiff against the collection agency and its employees, this court held, inter alia, that, since the collection agency was an independent contractor and the bank was not a “debt collector” within the purview of the Federal Fair Debt Collection Practices Act, plaintiff failed to establish the bank's liability. The court stated that there was no evidence that the collection agency was subject to the bank's control with regard to its conduct in the actual performance of the debt collection work. Teng v. Metropolitan Retail Recovery Inc., 851 F.Supp. 61, 66.

S.D.N.Y.

S.D.N.Y.2020. Subsec. (2) quot. in sup. Book author filed a defamation claim in state court against the President of the United States in his individual capacity, alleging that the President defamed her by stating to the press that her accusations that he sexually assaulted her prior to his presidency were false and that she was a liar; the United States intervened and removed to this court. This court denied the government's motion to substitute itself as defendant, holding that the President was not the employee of a federal agency for the purposes of the Westfall Act. Citing Restatement Second of Agency §§ 2 and 220, the court explained that the fact that the executive branch of the United States did not have the power to control the President's work weighed towards a finding that the President and the government did not have an employee–employer relationship. Carroll v. Trump, 498 F.Supp.3d 422, 448.

S.D.N.Y.2020. Quot. in ftn. States sued the U.S. Department of Labor, alleging that defendant’s final rule that set forth certain factors for defining “joint employer” for the purposes of the Fair Labor Standards Act (FLSA) violated the Administrative Procedure Act (APA). This court, among other things, granted in part plaintiffs’ motion for summary judgment, holding that defendant’s definition violated the APA, because it conflicted with the broader definitions of “employer,” “employee,” and “employment” in the FLSA. The court noted that defendant’s definition was narrower than the definition set forth by Restatement Second of Agency § 2, because defendant’s definition required a person to exert control over another to qualify as an employer, whereas § 2 only required that a person have the right to exert control over another. New York v. Scalia, 490 F.Supp.3d 748, 788.

S.D.N.Y.2017. Subsec. (3) cit. in sup. Consumer filed a class action against magazine publisher, alleging that defendant violated the Video Rental Privacy Act by disclosing her personal information—including her name and address and the titles of magazines to which she subscribed—to third-party contractors for defendant's own gain, without notice or consent. This court granted in part defendant's motion for summary judgment, holding that the Act contained an exception to disclosures made to bona fide agents or employees, and that plaintiff could not state a claim under the Act against defendant with respect to its disclosures of information to certain contractors that were acting as its agents. The court noted that, under Restatement Second of Agency § 2, a party could be both an independent contractor and an agent. Boelter v. Hearst Communications, Inc., 269 F.Supp.3d 172, 194.

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S.D.N.Y.2000. Cit. generally in case quot. in disc. Photographer sued manufacturer and its chairman for copyright infringement, alleging that manufacturer's use of photos taken by plaintiff of manufacturer's products exceeded intended use. This court granted plaintiff summary judgment on the issue of liability under the Copyright Act. The court held, inter alia, that defendants could not substantiate a work-for-hire authorship defense, because chairman's instructions to plaintiff were so general as to fall within the realm of unprotectible ideas. Defendants did not contribute to the aesthetic choices of creation and had no technical photographic skills. SHL Imaging, Inc. v. Artisan House, Inc., 117 F.Supp.2d 301, 312.

S.D.N.Y.1996. Subsec. (2) cit. in disc. An insurer of air cargo that was stolen while left outside a ground terminal brought suit, as the subrogee of a consignee, against an air carrier and the subcontractor of the carrier's ground handling agent, which was handling cargo at the time of its loss. This court granted the subrogee's motion for partial summary judgment, striking the partial affirmative defense of limited liability. The court held, inter alia, that the subcontractor was not entitled to protection as a servant of the airline, because it acted independently in performing its work and took no instruction from any party regarding the actual physical handling of the freight. Hartford Fire Ins. v. Empresa Ecuatoriana, 945 F.Supp. 51, 56.

S.D.N.Y.1976. Cit. in ftn. A longshoreman, employed by a third-party defendant, brought an action to recover for injuries sustained while assisting in unloading of cargo. The shipowner, time charterer, stevedore, and shipper asserted claims for indemnity against each other. The court found that the ship was unseaworthy, that such unseaworthiness was the proximate cause of plaintiff's injuries, and that plaintiff was not contributorily negligent. On the third and fourth party claims for indemnity, the court held (1) that under the time charter agreement, which placed responsibility of loading, storage, and discharge of cargo solely on the charterer, the charterer was required to indemnify the shipowner for the judgment recovered by the longshoreman, (2) that the shipowner was entitled to judgment against the stevedore whose breach of warranty of workmanlike performance of cargo operations resulted in the unsafe condition which caused the longshoreman's injuries, (3) that the stevedore was not entitled to recover against the shipowner because he failed to show that the owner interfered with stevedoring operations, created hazardous conditions, or failed to provide a ship reasonably free from peril, and (4) that the shipper, who was found to be negligent, was jointly liable with the stevedore for the plaintiff longshoreman's injuries. Fernandez v. Chios Shipping Co., Ltd., 458 F.Supp. 821, 825.

S.D.N.Y.1975. Cit. in sup. A longshoreman was injured when the crate on which he was working collapsed under him, and he brought suit against the owner of the ship upon which the crate was located at the time. The longshoreman's employer and the shipper which had acquired the cargo contained by the crate in question were impleaded. The jury, in a special verdict, awarded the plaintiff $50,000, based on the defendant's ship having been in unseaworthy condition, and found that negligence on the part of the third-party defendants had caused the plaintiff's injuries. The court granted the third-party defendants' motion for judgment notwithstanding the verdict, holding, inter alia, that the supplier of the crate had been negligent in its construction, and that this negligence could not be imputed to the shipper, which was not negligent of its own accord. Di Gregorio v. N.V. Stoomvaart, 411 F.Supp. 331, 334.

S.D.N.Y.1973. Cit. in sup. The plaintiff, owner of tobacco that had been subjected to water damage during shipment, brought an action against defendants, who purchased the tobacco as salvage, for injunctive relief and violation of the trademark laws of United States and the New York General Business Corporation Law, based upon defendants' actions in selling the damaged tobacco in tins bearing plaintiff's trademarks, which were associated with high quality tobacco, without warning customers as to the nature of the tobacco The court granted the injunctive relief and held, inter alia, that defendants' claim that the insurer of the tobacco was acting as plaintiff's agent when it conducted the salvage sale should be rejected, noting that plaintiff had no control over the terms of salvage sale. Alfred Dunhill Limited v. Interstate Cigar Co., Inc., 364 F.Supp. 366, 373, rev'd 499 F.2d 232 (2nd Cir.1974).

S.D.N.Y.1971. Subsec. (3) cit. and quot. in sup. The plaintiff, owner of screen printing machinery transported overseas aboard the defendant's vessel, sought to recover damages for injury to one case of machinery which was negligently dropped and damaged by the employees of the defendant stevedore upon discharge of the vessel. By separate contract with the carrier, the

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defendant had agreed to unload the vessel. A bill of lading limited the carrier's liability and stated that, beside the shipowner, "no other person … (including all agents and independent contractors) is liable to the shipper …" The court regarded the stevedores as "independent contractors," citing cases which so held. Thus the liability of the defendant stevedores was limited by the provisions of the bill of lading. Bernard Screen Printing Corporation v. Meyer Line, 328 F.Supp. 288, 290, aff'd, 464 F.2d 934 (2d Cir.1972), cert. denied, 35 L.Ed.2d 272 (1973).

S.D.Ohio

S.D.Ohio, 1997. Cit. in headnotes, cit. in disc., quot. in ftn. A manufacturer's former sales representatives brought a claim of wrongful termination against the manufacturer, alleging that defendant violated good faith duties and fiduciary obligations. Denying defendant's motion to dismiss, the court held, inter alia, that plaintiffs stated a claim on which relief could be granted and were entitled to present evidence to support their claim. The court said that the nature of the parties' relationship as either that of principal-agent or principal-independent contractor could not be determined on the facts presented in the complaint but was relevant to what duties, if any, were owed by defendant to plaintiffs. The court noted that an independent contractor might also be an agent. Tanksley & Associates v. Willard Industries, Inc., 961 F.Supp. 203, 204, 207.

S.D.Ohio, 1990. Com. (b) cit. in disc. A corporation sued its financial advisor, which had furnished both information and financial means to another corporation, enabling an attempted hostile takeover of the plaintiff. The plaintiff alleged breach of fiduciary duty, among other claims, contending that the advisor exploited for the purpose of insider trading confidential information gained by virtue of a prospective fiduciary relationship with the plaintiff. The court denied the defendant's motion to dismiss, holding that the allegations of a principal-agent relationship between the parties and that the defendant assumed the role of a de facto fiduciary were sufficient to state facts regarding the existence of a fiduciary duty; therefore, it did not determine at this point whether a fiduciary duty arose on the facts under a theory of prospective agency but noted that Ohio courts would recognize that, under certain circumstances, a prospective agent might owe a fiduciary duty to a prospective principal. General Acquisition, Inc. v. GenCorp Inc., 766 F.Supp. 1460, 1470.

D.Or.

D.Or.1992. Cit. in sup. A college received federal benefits for its students through a federal program. An employee of the college was indicted for theft from that program in violation of 18 U.S.C. § 666. The defendant moved to dismiss the indictment on the ground that he was not an agent of the college as required by the statute, since it was only recently that he had been transferred into the college's administrative student accounting department. Denying the motion to dismiss, this court held, in part, that the allegation that defendant was an employee of the college was sufficient to establish him as an agent for the purpose of the indictment. U.S. v. Wyncoop, 789 F.Supp. 345, 347, judgment reversed 11 F.3d 119 (9th Cir.1993).

E.D.Pa.

E.D.Pa.2017. Com. (b) quot. in sup. Professional photographer filed copyright-infringement claims against textbook publisher, alleging that defendant used licensed photographs—which were subject to a representation agreement and sublicensed to defendant by a third-party licensee of plaintiff—in unauthorized ways. This court denied defendant's motion to transfer venue based on a forum-selection clause in the sublicense agreement, holding that defendant could not invoke the clause as a basis for transfer, because plaintiff was not a party to the contract and had not asserted a breach-of-contract claim. In determining that plaintiff did not have the requisite control over its licensee to create a principal-agent relationship, the court quoted Restatement Second of Agency § 2, Comment *b*, noting that an independent contractor could be an agent but only where he ceded direction over the conduct of his work. Krist v. Pearson Education, Inc., 263 F.Supp.3d 509, 513.

E.D.Pa.2016. Cit. in sup.; subsecs. (1) and (3) quot. in sup. Television-and-online retailer brought an action under a theory of vicarious liability against participant in plaintiff's marketing affiliate program, alleging that defendant sublicensed its

nontransferable rights under the program to a company that, in an effort to earn commissions through defendant's participation in the program, crawled plaintiff's website in a way that overloaded its servers and interfered with its customers' ability to access and use the website. This court entered judgment for defendant, holding that defendant could not be vicariously liable, because plaintiff's allegations were insufficient to support an inference that a master—servant relationship existed between defendant and company. Citing Restatement Second of Agency § 2, the court determined that plaintiff's allegation that defendant required company to comply with plaintiff's terms and conditions was insufficient to plausibly infer that defendant had the right to control the manner and means by which company's work was accomplished. QVC, Inc. v. Resultly, LLC, 159 F.Supp.3d 576, 590.

E.D.Pa.2010. Subsec. (2) quot. in case quot. in sup. Employee of tax-preparation franchisee brought civil-rights action against supervisors, franchisee, and franchisor, alleging that supervisors sexually harassed, assaulted, and threatened her during her employment. Denying in part defendants' motion to dismiss, this court held, inter alia, that plaintiff alleged sufficient facts to raise a plausible claim that she was an employee of franchisor for purposes of federal and state employment laws. The court reasoned, in part, that plaintiff might be able to show that franchisor directly exercised significant control over her daily activities, or that franchisor indirectly exercised, through its authority to control franchisee's operations, significant control over her activities. Myers v. Garfield & Johnson Enterprises, Inc., 679 F.Supp.2d 598, 606.

E.D.Pa.1998. Cit. and quot. in cases quot. in disc., coms. (b) and (d) cit. in disc. High school basketball referee sued state athletic association for violations of Title VII and Title IX, alleging that assignors, whose role was to select referees to officiate at interscholastic basketball games, discriminated against her on the basis of gender. Association moved for summary judgment, arguing, among other things, that assignors were chosen by local chapters of basketball officials, which were merely groups of individuals who were not association members. Granting the motion in part and denying it in part, the court analyzed master-servant and principal-agent relationships before holding, inter alia, that material factual issues existed as to whether local chapters were servants or agents of association, whether assignors were servants or agents of local chapters, and whether assignors were subservants or subagents of association. Kemether v. Pennsylvania Interscholastic Athletic Ass'n, 15 F.Supp.2d 740, 747, 748.

E.D.Pa.1993. Subsec. (3) cit. in sup. A Chapter 11 bankruptcy debtor objected to a construction manager's claim for services performed in a project on the debtor's property. This court, affirming the bankruptcy court's allowance of the claim in an adjusted amount, held, inter alia, that, under New Jersey law, the debtor, which was a partnership, was liable on the contract, which was entered into by one of the partners, even if that partner was prohibited by letter agreements from incurring partnership debt, as the contract was usual to the partnership's business, the partner was authorized by the other partners to initiate the construction project, and the partner's deviation from the scope of his authority under the letter agreements was neither knowable nor foreseeable to the construction manager. In re Hunt's Pier Associates, 162 B.R. 442, 456.

E.D.Pa.1991. Subsec. (3) quot. in disc. A terminated employee sued her former employer for wrongfully discharging her in retaliation for her threatening to report its wrongdoings, alleging, inter alia, a violation of the Pennsylvania Whistleblower Law, which protected public employees. Granting summary judgment for the defendant, the court held that, since there was no evidence that the employer was an agent of the publicly funded hospital with which it had contracted to operate a cancer center, the employer did not come within the definition of “public body” under the statute and the statute did not apply to it. Cohen v. Salick Health Care, Inc., 772 F.Supp. 1521, 1527.

E.D.Pa.1981. Cit. and quot. in sup. and coms. (a) and (b) cit. in disc. and com. (d) cit. in ftn. The lessor of a trailer and the lessor's insurer brought a diversity action against the tractor owner who leased the trailer and his insurer to resolve issues of liability and insurance coverage with respect to a settled action which had been brought to recover for the death and injuries of automobile passengers resulting from a collision with the tractor-trailer, and the lessee of the trailer and its insurer counterclaimed. The court stated that generally, under the applicable law of Georgia, an employer is not liable for the negligent acts of an independent contractor employed by him; and one's status as independent contractor or servant turns on whether the employer has the power to control the manner in which the work is executed or whether he merely has the right to require certain results. At the time of the accident, the relationship between the lessee of the trailer and the lessor of the trailer was defined by the lease agreement.

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The court held, inter alia, that, although the tractor owner and driver who leased the trailer and the owner-lessor of the trailer described the tractor owner as an independent contractor, the relationship of master and servant existed where the driver agreed that the vehicle should be operated according to the trailer owner's rules, policies and practices, and that no freight would be transported on vehicles other than at the trailer owner's discretion; therefore, the trailer owner-lessor could not avoid liability for the death and injuries occurring in a collision between the tractor trailer and an automobile on the theory that the driver was an independent contractor. Judgment was entered for the defendants. Mustang Transp. Co. v. Ryder Truck Lines, Inc., 523 F.Supp. 1097, 1100, affirmed 688 F.2d 823 (3rd Cir.1982), certiorari denied _U.S. _, 103 S.Ct. 763, _L.Ed.2d _ (1983).

E.D.Pa.1980. Subsec. (1) quot. in part in disc. Creditors of a corporation brought an action against the corporation's joint venturers and partners to recover the debts of the corporation. The court found that the corporate entity could not be disregarded and the defendants could not be held liable for the debts of the corporation despite the defendants' involvement with the corporation. The court found that the kind of control the defendants exercised over the corporation was within the scope of financing and accounting and not a complete domination of all business affairs, the corporation was created as a genuine profit-seeking venture and not as a fraudulent device for the defendants' benefit, and the corporation operated as a corporation and appeared to others to be a corporation. The court also found that the evidence failed to establish that the corporation acted as the agent for the defendants. Accordingly, the court held that the defendants could not be held liable for the debts of the corporation. Realco Serv., Inc. v. Holt, 513 F.Supp. 435, 443, affirmed 671 F.2d 495 (3rd Cir.1981).

E.D.Pa.1976. Cit. in sup. Plaintiffs obtained a judgment against a railroad in a state personal injury action and sought an order directing preferred payment on their claim, which arose prior to reorganization of the railroad. The court held that the state court's determination as to whether the injured individual was an employee of the railroad was not binding for res judicata purposes, that a finding of agency is not tantamount to a finding of a master-servant relationship, and that the individual was not an employee of the railroad at the time of the injury and thus was not entitled to preferential treatment under the Bankruptcy Act. Matter of Penn Central Transportation Co., 419 F.Supp. 1370, 1372.

E.D.Pa.Bkrtcy.Ct.

E.D.Pa.Bkrtcy.Ct.1990. Cit. in disc., subsecs. (1) and (2) cit. in disc. (subsec. (2) erron. cit. as subsec. (12)), coms. (a) and (b) cit. in disc. A mortgagor defaulted on her mortgage and the government agency holding the mortgage assigned the mortgage to another party for foreclosure. The mortgagor filed for bankruptcy and filed an objection to the assignee's proof of claim, arguing that, since the original mortgagee had not sent her a disclosure statement conforming with the Truth in Lending Act, her debt should be offset by the penalty prescribed by the Act. This court held that the assignee, as an independent contractor of a United States government agency, was not immune from penalties, even though the agency itself was, by federal statute, immune from all penalties, and even though the penalties would ultimately be borne by the agency. Rejecting the assignee's argument that it was not an independent contractor, the court said that the assignee was clearly not the agency's employee. In re Gillespie, 110 B.R. 742, 752.

M.D.Pa.

M.D.Pa.1973. Cit. in ftn. but dist. This case arose out of an automobile accident involving a car owned by one of the two plaintiffs, and driven by the other, and a car owned by one of the three defendants, and driven by another. The third defendant was the professional football team on which both the other defendants were players, attending training camp at the time of the accident. The football team moved for summary judgment, to which the plaintiffs objected on the grounds that although there were no scheduled training activities late at night, at the time of the accident, the players' leisure time was spent within the scope of their employment relationship, inasmuch as they were effectively subject to 24 hour per day control, in the context of the training camp. In the course of holding that there was an issue of respondeat superior for jury determination, the court noted that Pennsylvania law recognized the Restatement's distinction between agency and master-servant relationships but that the distinction was not significant here, in the limited areas of burden of proof, jury roles, and summary judgment. Mauk v. Wright, 367 F.Supp. 961, 965.

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D.P.R.

D.P.R.2008. Com. (b) adopted in case cit. in ftn. Plaintiff sued the United States for return of two vehicles seized as part of a criminal investigation, alleging inadequate notice of forfeiture. Granting summary judgment, sua sponte, against plaintiff, this court held that no genuine issue of material fact existed as to plaintiff's reasonable notification of forfeiture. The court concluded that, pursuant to agency principles of the Civil Code of Puerto Rico, plaintiff's criminal deputies, who were in possession of the vehicles at the time of seizure, were plaintiff's agents for purposes of maintaining and operating the vehicles; notice sent to plaintiff's agents of impending forfeiture proceedings was therefore imputed to plaintiff. The court noted that, while the Civil Code sufficed to dispose of this case, the court's decision was in accord with Restatement Third of Agency § 5.03. Gonzalez-Gonzalez v. U.S., 581 F.Supp.2d 272, 279.

D.P.R.2008. Subsec. (3) quot. in ftn. Estate of subcontractor's employee sued premises owner, among others, alleging that, while working on improvements to owner's property, decedent fell from the roof and died as a result of the fall. Granting summary judgment for defendant on other grounds, this court held that genuine issues of material fact as to whether subcontractor was hired by defendant as an independent contractor or whether the construction agreement created an employer-employee relationship between subcontractor and defendant barred a determination by the court as a matter of law on the question of defendant's liability for subcontractor's alleged negligent actions and/or omissions with respect to decedent. Ocasio v. Hogar Geobel Inc., 693 F.Supp.2d 167, 179.

D.P.R.1998. Com. (b) quot. in disc. After a car driver was killed in an accident with a tractor-trailer operated by an independent contractor, the driver's relatives sued a farm-feed seller that had hired the independent contractor to deliver its products, alleging negligence. This court granted defendant summary judgment, holding, inter alia, that defendant was not liable for the independent contractor's acts, because defendant's requirements that those trucking its goods have certain insurance and a license indicated only a minimum requirement to ensure the safe transportation of sold goods and did not signify an employer-employee relationship. Lopez v. Nutrimix Feed Co., Inc., 27 F.Supp.2d 292, 297-298.

D.P.R.1995. Com. (b) cit. in headnote and quot. in sup. Minor who was injured when he fell from the rear of an ice cream truck brought a personal injury action against ice cream manufacturer. Granting defendant's motion for summary judgment, the court held that defendant was not liable for the alleged negligence of the ice cream truck owner's employee, since the truck owner was not defendant's independent contractor, but was merely a purchaser of defendant's products. The court said that the truck owner did not have a contract with defendant to sell its products or to serve as a distributor of defendant's products and that defendant had no control over the truck owner, over the way in which he sold defendant's products, or whether or not he sold the products. Rivera v. Flav-O-Rich, 876 F.Supp. 373, 374, 383.

D.R.I.

D.R.I.1995. Cit. in case quot. in sup. Seaman who was injured on a vessel owned by the United States sued the operator of the vessel and the United States. Granting in part defendant vessel operator's motion for summary judgment, the court held that plaintiff's sole remedy for his injuries was against the United States, pursuant to the provisions of the Public Vessel Act, since the incident causing plaintiff's injuries occurred on a public vessel and at the time of the incident defendant operator was an agent of the United States. The court said that logic mandated the finding that defendant operator was the United States' agent, since operator was employed as a fiduciary acting for the United States with its consent and subject to its extensive control and direction in the operation and maintenance of Navy vessels. Smith v. Mar, Inc., 877 F.Supp. 62, 66.

W.D.Tex.

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W.D.Tex.2015. Subsec. (3) cit. in sup. Insurer of insured trucking company brought an action against, among others, estate of driver who was killed in a single-vehicle accident while working for insured, seeking a declaratory judgment that it did not have a duty under insured's policy to indemnify insured in connection with defendant's judgment against insured in an underlying state-court wrongful-death action. This court denied in part defendant's motion for summary judgment, staying the determination of plaintiff's liability pending the resolution of an appeal in underlying action, because there was a genuine issue of material fact regarding driver's employment status. Citing Restatement Second of Agency § 2(3), the court noted that plaintiff's obligations were dependent on the facts proven in the underlying action, and that the jury's finding that driver was not an employee in the scope of employment at the time of the accident was based on jury instructions that failed to recognize that driver could have been an independent contractor. Canal Ins. Co. v. XMEX Transport, LLC, 126 F.Supp.3d 820, 829.

D.Vt.

D.Vt.1995. Cit. in sup. Female former employee of general partners of a limited partnership that marketed time shares at a resort sued her employers and others for, inter alia, acts of sexual harassment by her supervisor in violation of the Vermont Fair Employment Practices Act (FEPA). After the jury found defendants liable on the FEPA claims, the court denied in part defendants' motion for judgment as a matter of law, holding that, under traditional agency law, the fact that supervisory employee was aided in his campaign of harassment by his position as plaintiff's supervisor created automatic employer liability for "hostile environment" sexual harassment, even though supervisor's conduct was outside the scope of employment; in addition, defendants' liability for supervisor's "quid pro quo" harassment was absolute, since it was supervisor's position as defendants' agent and as plaintiff's supervisor that invested in him the power to create the implicit threat of consequences for refusing his advances. Fernot v. Crafts Inn, Inc., 895 F.Supp. 668, 682.

E.D.Va.

E.D.Va.2000. Cit. in ftn. After United States Navy vessel collided with a ship, ship's owner and operator sued for exoneration from liability. United States and injured claimants brought suit for damages against owner and operator, which counterclaimed for damages. This court held that, because owner and operator exercised due care in selecting deck officer and did not have reason to believe that he would commit navigational errors that gave rise to collision, they could limit liability for negligence of their vessel to value of vessel and its freight. Even if crewing agent, which was an independent contractor hired for crew screening and recommendations, was negligent in recommending officer, owner and operator, having satisfied their duty of due diligence to ensure that an effective crewing system was in place, could not be charged with negligence and could limit liability. In re National Shipping Co. of Saudi Arabia, 147 F.Supp.2d 425, 445.

E.D.Va.1988. Subsec. (3) cit. in case quot. in disc., quot. in sup. A defendant in a libel action who resided in Virginia and was served with process pursuant to Florida's long-arm statute brought suit in Virginia against the plaintiffs' attorneys for malicious prosecution and abuse of civil process. The attorneys moved to dismiss for lack of personal jurisdiction, and on forum non conveniens grounds. This court denied the motion to dismiss, finding an agency relationship between the process server and the attorneys. Accordingly, the attorneys could be held liable for torts arising from a process server's acts effected in Virginia while done within the scope of the agency relationship. Schleit v. Warren, 693 F.Supp. 416, 420.

E.D.Va.1980. Cit. in disc. The plaintiff, a seaman, was eligible for medical care provided by the United States Public Health Service. While working, the plaintiff was injured and was treated by a doctor at the Health Service for an infected finger. Later, another doctor discovered that the plaintiff's forearm had to be amputated because of the continued spread of the infection. The plaintiff brought an action against the United States for the alleged negligence of the Health Service doctor. The court noted that the degree of control able to be exercised by the federal government is the critical factor in determining whether one is an employee or an agent of the United States. The court concluded that even though the Service did not dictate the day-to-day medical judgment of the doctor, the doctor was not an independent contractor. The court held that for the purposes of the action, the doctor was an agent of the United States, and it ordered a judgment accordingly. Wood v. United States, 494 F.Supp. 792, 798, remanded 671 F.2d 825 (4th Cir.1982).

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E.D.Wis.

E.D.Wis.2011. Subsec. (3) quot. in sup. Insurance agents who ended their affiliation with insurance company sued company, seeking termination commissions allegedly due them under their contracts; company counterclaimed for, among other things, breach of the duty of loyalty. This court held, inter alia, that plaintiffs breached their respective duties of loyalty to company. The court rejected plaintiffs' argument that the common-law duty of loyalty had no application to the contract at issue because plaintiffs were not employees of company, explaining that independent contractors could be agents, and thus owe a common-law duty of loyalty to their employers; the line between employees and independent contractors was not as bright as plaintiffs portrayed it to be. Jarosch v. American Family Mut. Ins. Co., 837 F.Supp.2d 980, 995.

E.D.Wis.1995. Subsec. (3) cit. in headnote and disc. Toy distributor sued a sales representative company and its president for breach of fiduciary duty and for tortious interference with the distributor's contractual and prospective economic relationship with a toy retailer. Defendants counterclaimed for unpaid commissions. This court granted in part and denied in part plaintiff's motion for summary judgment, holding, inter alia, that defendants owed fiduciary duties to plaintiff, because there was no factual dispute that defendants were plaintiff's subagents and were aware that they were acting on behalf of plaintiff with respect to the sale of a certain game. Select Creations, Inc. v. Paliafito America, Inc., 911 F.Supp. 1130, 1132, 1152.

E.D.Wis.1967. Subsecs. (1) and (2) quot. and com. a quot. in part in sup. The plaintiffs brought an action in negligence against several defendants for injuries received in an automobile accident, among them the employer of the late driver of the other auto and a car rental service which they alleged was engaged in a joint enterprise with the employer. The court, recognizing that to be an agent one must act on behalf of another, to be a servant one must be controlled by that other, and that a distinction is made between the terms “agent” and “servant” because the principal is liable for the torts of the latter only, found in the relationship between the rental service and the driver's employer sufficient control over the latter by the former to deny the rental service's motion for summary judgment. Raasch v. Dulany, 273 F.Supp. 1015, 1017.

W.D.Wis.

W.D.Wis.1996. Subsec. (3) cit. in headnote and cit. in disc. Plaintiff sued college and debt collection agency for violations of federal and state laws, contending that defendants attempted to collect interest and collection fees not permitted by state law on a college debt she incurred as a student. Granting plaintiff's motion for summary judgment, the court held, inter alia, that collection agency was college's agent in collecting plaintiff's student loan and, thus, collection agency's violations of the Wisconsin Consumer Act could be attributed to college for the purpose of applying the two-year statute of limitations for actions arising under open-end credit transactions. The court said that, although college did not control the manner in which collection agency was to collect the debt, it did require that the agency collect the debt, it received plaintiff's payments from the agency, and it told the agency to hold off on its collection efforts and functioned as the primary source of information about plaintiff's debt. Patzka v. Viterbo College, 917 F.Supp. 654, 656, 661.

Ala.

Ala.2006. Com. (a) quot. in part in sup. and cit. in ftn. After patient died of brain damage that occurred during her recovery from anesthesia, patient's mother, as administrator of her estate, brought medical-malpractice and wrongful-death claims against nurse anesthetist, anesthesiologist, and their employer. The trial court entered judgment on a jury verdict for plaintiff. Reversing and remanding for a new trial, this court held, inter alia, that anesthesiologist was not vicariously liable for nurse anesthetist's conduct as her principal or master, because she was not his agent or servant but, rather, a co-worker. The court reasoned, in part, that plaintiff failed to show that anesthesiologist and nurse anesthetist had voluntarily entered into their relationship or that doctor possessed a reserved right of control over nurse. Ware v. Timmons, 954 So.2d 545, 553.

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Ala.1983. Subsec. (3) cit. in disc. The personal representatives of the estates of a husband and wife alleged in a wrongful death action that a lumber company was vicariously liable for the deaths of their decedents. The trial court granted summary judgment to the lumber company, the plaintiffs appealed, and this court affirmed. The court noted that the lumber company could be held liable if the logger whose negligently maintained truck caused the deaths was found to be its employee. However, the evidence, including the fact that the logger supplied all of its own equipment, admitted of no conclusion but that the logger was an independent contractor, and not an employee of the lumber company. The court also ruled that the task that the logger was performing at the time of the accident did not constitute a peculiar risk such that liability might be founded on the actions of the logger as an independent contractor. Williams v. Tennessee River Pulp & Paper, 442 So.2d 20, 21.

Ala.App.

Ala.App.2005. Cit. in disc. After bank settled an action for malicious prosecution arising from a debt-collection suit erroneously brought by its lawyers against a borrower, bank filed third-party legal-malpractice action against lawyers, seeking indemnity. The trial court granted lawyers' motion for summary judgment. Reversing and remanding, this court held, inter alia, that bank was vicariously liable for the acts of its lawyers when lawyers pursued debt-collection litigation by having borrower served by publication, by taking a default judgment against him, and by recording the judgment, because it was undisputed that such actions were taken in furtherance of bank's debt-collection business, and there was no evidence that lawyers' purpose was to accomplish some other personal objective. SouthTrust Bank v. Jones, Morrison, Womack & Dearing, P.C., 939 So.2d 885, 903.

Alaska

Alaska, 1997. Com. (a) quot. in disc. and ftn. A guest of a motor home tenant and the guest's grandfather sued the motor home owner, alleging that the guest was injured from carbon monoxide generated by a propane stove in the motor home. A jury found that the tenant was negligent, that the owner was not negligent, and that the tenant was not the owner's agent. The trial court denied plaintiffs' motion for judgment n.o.v. This court affirmed, holding, inter alia, that a jury could reasonably conclude that the owner and the tenant were not principal and agent. The court stated that the tenant's mere occupancy of the motor home and performance of duties that one would ordinarily expect of a tenant or bailee occupant would not entail sufficient acting on the account of the owner to create an agency relationship. The jury could have concluded that there was no agreement for services beyond that inherent in a normal landlord-tenant or bailor-bailee relationship, and therefore no agency relationship was created. It could also conclude that the owner retained no right to control the tenant beyond the right to terminate the bailment or tenancy and expel the tenant from the motor home. Absent a finding that an agency relationship existed, the jury had no basis for concluding that a master and servant relationship existed. Harris v. Keys, 948 P.2d 460, 465, 466.

Alaska, 1981. Cit. in disc. The defendant broadcasting company appealed from a jury verdict and award for wrongful discharge in favor of the plaintiff employee in a suit for breach of an employment contract. The trial court denied the defendant's motions for directed verdict and judgment notwithstanding the verdict. The plaintiff was the general manager of a television station owned by the defendant. According to the employment contract the plaintiff was subject to the supervision and control of the station's Board of Directors. Prior to the expiration of the plaintiff's contract of employment, the defendant discharged the plaintiff for refusing to follow the directions of the Board to discharge another employee. The plaintiff argued that the defendant was not justified in terminating the employment contract because a wilful failure by an employee to obey a reasonable order from his employer may, but does not necessarily, constitute a material breach where the resulting harm is small. Applying what it considered the unquestioned general rule that an employee's refusal to obey the reasonable instructions of his employer constitutes proper grounds for dismissal, the court found the plaintiff's argument to be without merit and held that the defendant was entitled to judgment. While recognizing the general principal that only a material breach justifies termination, the court reasoned that within the context of an employment contract, the duty of obedience owed by the employee to the employer is an essential element of the agreement. Because the element of employer control constitutes the essential distinction between an independent contractor and an employee, the court looked to the terms of the contract to determine the degree of control that the employer could exercise over his employee. Where the employment contract specified that the employee was subject to the supervision and control of the employer, the court concluded that a wilful refusal by the employee to follow a reasonable order

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directly undermined the contractual relationship and justified dismissal, regardless of how small the resulting harm. Because the Board's order was within its authority under the contract, and because the plaintiff wilfully refused to follow the reasonable instructions of his employer, the court held that the plaintiff's breach was material as a matter of law and the defendant therefore was justified in terminating the contract. Central Alaska Broadcasting v. Bracale, 637 P.2d 711, 713.

Alaska, 1970. Subsec. (3) quot. in ftn. in sup. Plaintiff borrowed money from the defendant for a car. Later he moved to another state. Claiming default, the defendant repossessed through a recovery service in the second state. Plaintiff brought action in the second state against the defendant for tortious or unlawful repossession by means of a long-arm statute. He prevailed. He then brought suit in the first state on the judgment and received a summary judgment. On appeal the court reversed and remanded, holding that there was a genuine issue of fact as to whether the recovery service was not an agent but simply an independent contractor and therefore would be immunized from "long-arm" jurisdiction. ALP Federal Credit Union v. Ashborn, 477 P.2d 348, 349.

Ariz.

Ariz.2000. Subsec. (3) quot. in disc., com. (b) quot. in disc. After a girl was hit and killed by a car while crossing a city street at dusk, her mother sued the city for negligence, alleging improper streetlight maintenance. After jury returned verdict for the city, trial court granted mother's motion for new trial. Appellate court reversed. This court vacated and remanded, holding that the mother was entitled to a jury instruction that the city had a nondelegable duty to maintain its highways in a reasonably safe condition and thus would be liable for any negligence of an independent contractor hired to maintain the streetlights. Wiggs v. City of Phoenix, 198 Ariz. 367, 370, 10 P.3d 625, 628.

Ariz.App.

Ariz.App.2012. Quot. in sup. After motorcyclist who allegedly was injured in a collision with a vehicle driven by motorist brought a negligence action against motorist, the company that employed motorist, and a related company that owned the car that motorist was driving, he moved to amend his complaint to add the owner of both of those companies as a defendant, arguing that owner was liable on an agency theory because motorist was employed by his company. The trial court allowed the addition of owner on a theory of respondeat superior, and then granted summary judgment for owner, dismissing him from the case. Affirming, this court held that, while a genuine issue of material fact existed as to whether motorist was driving within the scope of her employment with owner's company, there was no evidence that owner exercised control over motorist in the way that an employer controlled an employee, or that he was her employer. Alosi v. Hewitt, 276 P.3d 518, 524.

Ariz.App.2004. Com. (b) cit. in case cit. in disc. Motorist injured in traffic accident brought suit against property developer for negligent installation and maintenance of median landscaping at intersection where accident occurred. Trial court granted defendant's motion for summary judgment, finding that municipality had a nondelegable duty to ensure safety of intersection. Reversing and remanding, this court held that even if municipality had a separate, nondelegable duty to keep intersection safe, developer was not immunized from individual liability for its own negligence as the independent contractor of the property. Nelson v. Grayhawk Properties L.L.C., 209 Ariz. 437, 104 P.3d 168, 171.

Ariz.App.1996. Cit. in headnote, subsec. (3) quot. but dist. Medical center brought negligence action against state health care cost containment system, alleging that the failure of defendant's agent-health plans to process encounter data properly resulted in the nondisbursal of plaintiff's disproportionate-share payments. A hearing officer declined to address the negligence issue, but determined that health plans were defendant's agents and recommended that plaintiff be awarded its disproportionate-share payments. The administrative director reversed, concluding that health plans were independent contractors, and the trial court affirmed the director's decision. Reversing and remanding, this court held that, for purposes of the disproportionate-share payment program, health plans were agents of defendant, and that plaintiff should have been allowed to litigate its negligence claim before the trial court. SAMC v. AHCCCS, 188 Ariz. 276, 935 P.2d 854, 855, 860.

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Ariz.App.1992. Cit. in disc. An employer sued its former employee for breach of a fiduciary duty, inter alia, alleging that the defendant left her employment to start her own company and that the defendant improperly solicited the plaintiff's employees and clients. The trial court granted summary judgment for the defendant. Affirming, this court held that the plaintiff had not presented a single specific instance of improper solicitation by the defendant of either the plaintiff's employees or clients, as it did not show any conversation or correspondence in which the defendant solicited employment or business prior to her termination. The court stated that, since the plaintiff did not ask any of its clients about the specific nature of their conversations with the defendant, nor did any of its employees say that the defendant offered them a job before she left the company, the evidence presented failed to raise a factual issue on plaintiff's claim for breach of fiduciary duty. McCallister Co. v. Kastella, 825 P.2d 980, 982.

Ariz.App.1984. Cit. in disc. The plaintiff sued to recover money after the defendant, a part-owner and employee of the plaintiff, had offered a customer, without the plaintiff's knowledge, a money-back guarantee on a solar heating system. The plaintiff argued that since the defendant had made the money-back guarantee without authority, the defendant should be liable for losses incurred. The trial court found for the plaintiff. This court affirmed, concluding that the defendant had breached his duty by not informing the plaintiff of his promise and therefore was liable. An agent who is a servant or employee of a principal, said the court, is liable for the failure to use reasonable skill in the exercise of its duties that results in injury to the principal or a third party. Solar-West, Inc. v. Falk, 141 Ariz. 414, 687 P.2d 939, 943.

Ariz.App.1983. Subsec. (3) cit. in disc. The defendants in a class action brought a defamation action against the plaintiff-clients and their attorneys in the class action, based on statements published in a newspaper article. The lower court vacated a default judgment entered against one client and granted summary judgment for all the clients and attorneys. This court affirmed, holding that the attorneys, in relation to their clients, were independent contractors, that the attorney-client relationship was one of agent and principal, and that under the rules of agency that applied to the relationship, the clients were not vicariously liable for their attorneys' defamatory statements, since there was no evidence that the clients actually or apparently authorized or ratified those statements. Green Acres Trust v. London, 142 Ariz. 12, 688 P.2d 658, 664, affirmed in part and vacated in part 141 Ariz. 609, 688 P.2d 617.

Ark.

Ark.1964. Cit. in sup. The plaintiff, a blacksmith who went from place to place with his tools, was injured while working for the defendant at defendant's place of business. The court, using the test of whether the defendant had the right to control the blacksmith's physical conduct in shoeing the horse, found that the blacksmith was an employee and entitled to workman's compensation. Clarksville Meat Co. v. Brooks, 237 Ark. 717, 375 S.W.2d 671, 672.

Cal.

Cal.1989. Cit. in diss. op. A deputy labor commissioner issued a stop order/penalty assessment against a cucumber grower for failure to secure workers' compensation coverage for the 50 migrant harvesters of its crop. The grower contended that the workers were independent contractors excluded from the workers' compensation law because they managed their own labor, shared in the profits or loss of the crop, and agreed in writing that they were not employees. The division of labor standards enforcement rejected these contentions, and the trial court found the division's findings supported by the evidence. The intermediate appellate court reversed. This court reversed, holding that all the meaningful aspects of the business were controlled by the grower, and that the remedial purposes of the state workers' compensation act mandated that the workers be protected. The dissent argued that the majority twisted well-established law to reach its conclusion that the harvesters were the grower's employees; under the statutory control test, the dissent found that the harvesters were independent contractors as a matter of law. Borello & Sons v. Dept. of Indus. Rel., 48 Cal.3d 341, 256 Cal.Rptr. 543, 559, 769 P.2d 399, 415.

Cal.1989. Subsec. (3) cit. in ftn. When a physician's insurer in a medical malpractice case refused to settle with a claimant, the claimant sued the insurer, its attorneys, and its expert witness, alleging, inter alia, conspiracy to violate provisions of the

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state insurance code that made it an unfair practice for an insurer to refrain from attempting to effectuate a prompt and fair settlement of a claim after liability had become reasonably clear. When the trial court denied the defendants' demurrers to the complaint, the defendants petitioned the appellate court for a writ of mandate to compel the trial court to sustain the demurrers. The intermediate appellate court summarily denied issuance of the writ. Issuing the writ sustaining the demurrers, this court held that the allegations of conspiracy among the insurer, its attorneys, and an expert witness to deprive the claimant of the benefits of the insurance code provision failed to state a cause of action, because the attorneys and the expert acted solely as the insurer's agents and did not personally share the statutory duty alleged to have been violated. Doctors' Co. v. Superior Court, 49 Cal.3d 39, 46, 260 Cal.Rptr. 183, 187, 775 P.2d 508, 512.

Cal.App.

Cal.App.1991. Com. (b) cit. in disc. A man who had been tried for murder and acquitted sued his public defenders for attorney malpractice committed during posttrial reimbursement hearings. The trial court sustained the public defenders' demurrers, determining that the plaintiff failed to state a cause of action. Affirming, this court held that since the plaintiff had not filed a claim against the county as required under the California Tort Claims Act, his complaint was fatally defective because salaried, full-time public defenders engaged in representing assigned clients were public employees acting in the scope of their employment within the meaning of the California Tort Claims Act. The court rejected the plaintiff's assertion that a public defender may be regarded as an employee for some purposes but must be treated as an independent contractor for others, reasoning that those terms have been said to be antithetical. Briggs v. Lawrence, 230 Cal.App.3d 605, 281 Cal.Rptr. 578, 583.

Cal.App.1990. Subsec. (2) and coms. (a)-(d) cit. in ftn. An insurance company acquired rights to a software system of a collateral insurance tracking service and hired the director of the service as a consultant. Several years later, the consultant started his own company in competition with his former employer. The insurance company sued the consultant for unfair competition, alleging that the defendant had copied its software, had induced its employees to work for him, and had solicited its clients. The trial court ruled for the plaintiff. Affirming, this court rejected the defendant's argument that the plaintiff's cause of action was preempted by federal copyright law. The court held the complaint was not preempted because, in addition to elements of copyright infringement, it included elements of breach of fiduciary duty, breach of confidential relationship, and unauthorized disclosure of trade secrets. Balboa Ins. Co. v. Trans Global Equities, 218 Cal.App.3d 1327, 267 Cal.Rptr. 787, 797, cert. denied 498 U.S. 940, 111 S.Ct. 347, 112 L.Ed.2d 311 (1990).

Cal.App.1985. Cit. in disc. Student participating in a basketball tournament was severely injured when a car in which she was riding, driven by a volunteer student host, overturned. Student sued the host school district and her home school district, contending that the districts negligently organized and conducted the tournament and that the volunteer host was an agent whose negligence was attributable to the districts. The trial court granted summary judgment to defendants based on a statute shielding school districts from liability for injuries incurred on field trips and on the additional ground that the volunteer host was not defendants' employee. This court reversed, holding that the statute, as qualified by a subsequent statute, did not bar liability for a school-sponsored off-campus activity; that defendants could be held liable for negligent selection of hosts; and that the trial court erred in ruling as a matter of law that the volunteer host was not an employee, since a determination of the master/servant relationship required consideration of fact-dependent criteria. Swearinger v. Fall River Joint Un. Sch. Dist., 166 Cal.App.3d 335, 212 Cal.Rptr. 400, 410.

Cal.App.1984. Subsec. (3) cit. in sup. Several employees were injured when equipment they were using for the manufacture of a chemical compound exploded. In an action against the company which had contracted to buy the chemical compound, a jury returned a verdict for the defendant. This court reversed, holding that the trial court erred in refusing to instruct the jury on the issue of whether the manufacturer was an independent contractor for the buyer. The court found that the vendor-purchaser and employee-independent contractor relationships were not mutually exclusive, and that the evidence supported inferences that the buyer had employed the manufacturer as an independent contractor. White v. Uniroyal, Inc., 155 Cal.App.3d 1, 202 Cal.Rptr. 141, 155, 158.

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Cal.App.1975. Coms. (b) and (c) cit. in sup. The plaintiff insurance salesman had entered into a termination assignment agreement with his general agent. The agreement provided that in consideration of the payment by the defendant of certain promotional expenses, the defendant would be entitled to commissions due the plaintiff after his termination. The plaintiff sought to have the agreement declared invalid because it was proscribed by a provision of the Labor Code. The court held that the Labor Code provision, which used the terms "wages" and "salary" was intended to apply to employees, not to independent contractors. Since the plaintiff was substantially free of the defendant's control, was independently licensed, and was not covered by workmen's compensation, the court held that he was an independent contractor, and the agreement was, therefore, enforceable. Fitch v. Pacific Fidelity Life Ins. Co., 54 Cal.App.3d 140, 126 Cal.Rptr. 445, 449.

Cal.App.1975. Com. (b) cit. in sup. A city brought suit to obtain payment of taxes assessed on the gross receipts on defendant. The defendant operated a parking facility under a written management agreement with the owner. Defendant was an independent contractor and was reimbursed by the owner. Defendant contended that only its management fees, and not the reimbursement for expenses, should be taxed as gross receipts. The trial court held for defendant, and this court affirmed. The court held that defendant was an agent, as well as an independent contractor, as it was subject to the owner's control in its management and operation of the facilities. It was, therefore, not subject to the tax on the reimbursed expenses, since the city code exempted such receipts of persons acting as agents or brokers. Los Angeles v. Meyers Bros. Parking System, Inc., 54 Cal.App.3d 135, 126 Cal.Rptr. 545, 546.

Cal.App.1965. Cit. in dictum. A taxpayer, engaged in the business of industrial catering and in-plant feeding, claimed an exemption from a state sales tax on the ground that, even as a retailer, it was not an independent contractor but an agent of the employers. The court upheld the tax finding that the plaintiff caterer was an independent contractor because the business engaged in by the plaintiff was a separate business from the employer's, the plaintiff was paid on a cost-plus-guaranteed profit basis, and it was the manifest intention of the parties to the employment contracts that the plaintiff was an independent contractor, even though the employers furnished the cafeteria premises and facilities, and the services rendered by the plaintiff were continued over an extended period of time. Automatic Canteen Co. of America v. State Board of Equalization, 238 Cal.App.2d 372, 47 Cal.Rptr. 848, 856.

Cal.App.1964. Cit. in sup. Plaintiff, an employee of a cement company, sued for injuries sustained while working on a special project at the cement company's plant site under direction of a machinery seller's employee, who was conducting tests for the benefit of the machinery buyer. The court held that a directed verdict was improper because a jury could have found that the cement company and machinery seller were independent contractors or that the machinery buyer had temporarily borrowed the cement company's facilities and employees and that an agency relationship existed between them and the buyer. Housewright v. Pacific Far East Line, Inc., 229 Cal.App.2d 259, 40 Cal.Rptr. 208, 212.

Cal.App.1964. Cit. in sup. Certain ranch properties were in the process of being subdivided. Plaintiff rented bulldozers to defendant's employee who was in charge of grading, excavating, and filling the lots in defendant's subdivision. The court held that the defendant's employee was an independent contractor; therefore the defendant was liable to the plaintiff for the rental price, since the defendant had no right to control the mode of doing work contracted for. The relationship was not changed to agency merely because the work to be done was under an architect's or engineer's supervision. Rodgers v. Whitson, 228 Cal.App.2d 662, 39 Cal.Rptr. 849, 853.

Cal.App.1963. Subsec. (3) quot. in sup. Where mill operators did not control logger's work methods but only furnished tractor and paid for timber cut, logger was independent contractor, whose knowledge of title status of timber land could not be imputed to mill operators. Sills v. Siller, 218 Cal.App.2d 735, 32 Cal.Rptr. 621, 624.

Colo.

Colo.1998. Cit. in diss. op. Concert promoter appealed a city revenue department's administrative decision that it was liable for a seat tax on tickets for a series of concerts that it had promoted under a joint venture with the city's zoological foundation,

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an agent of the city. The trial court affirmed the administrative decision, and the court of appeals reversed. Reversing and remanding, this court held that the concert series was not eligible for the seat-tax exemption for sales by the city or a department of the city because an agency relationship did not exist between the zoo and the joint venture, which sold the tickets, and thus the tickets were not sold by an agent or a subagent of the city. The dissent argued that the exemption was available because promoter, viewed either alone or as part of a joint venture, acted as an agent of the zoo in promoting the concert series; in carrying out its duties, it at all times acted on behalf of the zoo, for the zoo's benefit, and subject to the zoo's ultimate control. City & County of Denver v. Fey Concert Co., 960 P.2d 657, 669.

Colo.1992. Subsec. (3) quot. in diss. op. The children of a lobbyist killed in the crash of a charter aircraft sued the utility that had employed the lobbyist and hired the charter flight service, the negligence of which was stipulated by the parties to have been the cause of the crash. This court reversed a court of appeals reversal and remand of judgment for plaintiffs and remanded, holding, inter alia, that it was for the jury to determine whether the utility should have been liable under the "inherently dangerous activity" exception to nonliability for the negligence of independent contractors. A dissent argued that the prior decisions of this court adopting this exception should have been overruled because the exception was unnecessary, as more predictable theories of liability were available to address the policy considerations supporting it. Huddleston by Huddleston v. Union Rural Elec. Ass'n, 841 P.2d 282, 296, appeal after remand 897 P.2d 865 (Colo.App.1995).

Colo.1991. Subsec. (3) cit. in conc. and diss. op., com. (b) cit. and quot. in conc. and diss. op. Two employees filed workers' compensation claims with their self-insured employer, which used an independent insurance adjustor for its claims. The employees sued the insurance adjustor, alleging breach of contract and bad faith processing of their claims. The trial court granted the adjustor's motion for directed verdict in one case, and for summary judgment in the other. The intermediate appellate court reversed and remanded for reinstatement in both cases. Affirming, this court held that the independent claims adjustor, acting on behalf of a self-insured employer, owed a duty of good faith and fair dealing to the injured employees in investigating and processing their claims even in the absence of contractual privity with the employees. The concurring and dissenting opinion argued that the claims adjustor was an independent contractor agent and the employer, as principal, was solely liable for the agent's breach of the nondelegable duty of fair dealing and good faith. Scott Wetzel Services, Inc. v. Johnson, 821 P.2d 804, 814-815.

Colo.App.

Colo.App.2018. Subsec. (3) and com. (b) quot. in sup. Advertiser sued marketer for breach of contract, seeking payment for work it performed for marketer's client; marketer counterclaimed, alleging that advertiser disparaged marketer to the client and eventually stole the client. The trial court confirmed an arbitration decision in favor of advertiser. Affirming, this court held, among other things, that marketer's counterclaim arose under the parties' contract and was subject to arbitration. While the contract specified that advertiser was an independent contractor, advertiser was also acting as marketer's agent, because marketer controlled and had the right to control its work under Restatement Second of Agency § 2, and a serious violation of a duty of loyalty was a willful and deliberate breach of the contract of service by the agent. Digital Landscape Inc. v. Media Kings LLC, 440 P.3d 1200, 1212.

Colo.App.1975. Cit. Action was brought against a service station operator, an oil company, and a tire company by a motorist for injuries sustained when a tire he purchased from the station ruptured. The trial court granted summary judgment for the oil company, and plaintiff appealed. In affirming in part and reversing in part with directions, the court stated that the oil company did nothing to cause the plaintiff to reasonably believe that the station operator had authority to act on its behalf. Concerning agency in fact, the court said that the documents submitted by the defendants stating that the operator had total control over the management and operation of the station, that the oil company had exclusive control of the gasoline and gasoline sales, that the oil company could terminate the operator's lease on one day's notice, and that the oil company could determine the minimum hours the station remained open supported the inferences both for and against the ability of the oil company to control the operation of the station. Therefore summary judgment was improper. Aweida v. Kientz, 536 P.2d 1138, 1141.

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Conn.

Conn.2004. Quot. in ftn. in sup. Skier brought federal-diversity negligence action against ski area and ski instructor for collision between skier and instructor. District court certified two questions to Connecticut Supreme Court concerning, inter alia, whether under Connecticut law a skier assumed the risk of injury from collision with negligent ski instructor. Extensively discussing assumption-of-the-risk doctrine, and vicarious liability thereunder, this court held that the skier did not assume the risk for such injury because negligence of the ski instructor was not an inherent hazard of the sport of skiing. Jagger v. Mohawk Mountain Ski Area, Inc., 269 Conn. 672, 692, 849 A.2d 813, 825.

Conn.1988. Quot. in sup. Real estate developers sued their attorneys for legal malpractice, fraud, negligent misrepresentation, and violations of unfair trade practices laws after the defendants allegedly mishandled the developers' antitrust suit. The trial court dismissed the claim against one out-of-state attorney on the ground that it lacked personal jurisdiction. Affirming, this court held, inter alia, that the out-of-state attorney did not qualify as the agent of the other defendant attorney for purposes of jurisdiction. The court concluded that the trial court was not clearly erroneous in resolving the factual issue regarding whether the out-of-state attorney was an independent contractor or an agent. Rosenblit v. Danaher, 206 Conn. 125, 537 A.2d 145, 154.

Conn.1982. Subsec. (3) cit. in ftn. The defendants acquired title to a plot of land as the beneficiaries of a decedent's estate. The executrix of the estate hired a licensed surveyor to survey the property for the purpose of dividing it into two separate lots, each with the minimum street frontage required by a local ordinance for one or two family houses. The parcel was subdivided and both lots were sold. After the purchaser of one of the lots began construction it was determined that the original survey was incorrect and the error left the lot width in violation of the minimum frontage requirements. The owners of the property sought a variance, which was denied, and they returned the property to the defendants. The defendants sought a variance which was granted. The plaintiffs, neighboring property owners, brought this suit in the lower court, which found that the zoning board could not reverse its previous decision without a showing of change of circumstances; nor could it reverse where the hardship was self-created and consisted solely of financial loss to the defendants. This court affirmed because the hardship was self-created. Even if it were established that the surveyor was an independent contractor, it would not preclude a finding that he was also an agent of the executrix for other purposes arising out of the same relationship. Pollard v. Zoning Board of Appeals, Etc., 186 Conn. 32, 438 A.2d 1186, 1191.

Conn.Super.

Conn.Super.1996. Subsec. (3) cit. in case cit. in disc. A dealer brought an action under the Connecticut Unfair Trade Practices Act against a manufacturer of air- and water-treatment devices. Plaintiff moved for certification of the action as a class action, defining the proposed class as those individuals who responded to defendant's advertisements to become dealers and/or distributors. The court granted the motion for class certification. Noting that plaintiff's amended complaint alleged that persons were recruited by defendant, its employees, agents, and servants, the court redefined plaintiff's proposed class as that class of individuals who responded to advertisements of defendant, its employees, servants, or agents. The court said that defendant's argument that defendant was shielded from liability because plaintiff was wronged by independent contractors was a defense on the merits and, at this point, irrelevant to the issues; moreover, the terms agent and independent contractor were not necessarily mutually exclusive. Walsh v. National Safety Associates, Inc., 44 Conn.Sup. 569, 695 A.2d 1095, 1103, affirmed 241 Conn. 278, 694 A.2d 795 (1997).

Del.

Del.1997. Cit. in headnote, cit. in disc., com. (a) cit. in disc. A member of a chicken-catching crew that had been assembled by a weighmaster hired by a chicken-processing business sued the business to recover damages for injuries he suffered in a motor vehicle accident, alleging that defendant was vicariously liable for the weighmaster's negligent driving. Reversing the trial court's grant of summary judgment for defendant, this court held, inter alia, that a genuine issue of material fact as to

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whether the weighmaster was defendant's servant or an independent contractor precluded summary judgment. The court stated that if the jury found that the weighmaster was an independent contractor, it must then determine whether he was an agent or a nonagent independent contractor. Fisher v. Townsends, Inc., 695 A.2d 53, 54, 58.

Del.Super.

Del.Super.1979. Subsec. (2) and (3) quot. in sup. Plaintiff brought an action against an employer and an employee to recover for personal injuries sustained when her automobile was struck by the employee. At the time, the employee was using her own car to meet her supervisor. The employer filed a motion for summary judgment which was denied. The court held that although a master is not liable for the torts of his agent committed while driving to and from his place of employment, where an employee is required to use his own vehicle while working for an employer, and the purpose of the employee's trip is to meet her supervisor so that they could make business calls together, the employee was acting within the scope of employment, thus precluding summary judgment in favor of the employer. Barnes v. Towlson, 405 A.2d 137, 139.

D.C.App.

D.C.App.1982. Subsecs. (1) through (3) cit. in ftn. A security guard working in a grocery store arrested and allegedly assaulted a customer for his refusal to leave the premises when requested by the store's manager to do so. The charges against the customer were subsequently dropped; the customer brought suit against the grocery store, claiming false arrest and assault and battery. The issue was whether the store was liable for the actions of the security guard, who was employed by an independent security service. The trial court held the store liable on both counts, conditioned on the plaintiff's acceptance of a remittitur. The customer accepted, and the store appealed. This court affirmed as to the store's general liability, holding that the store's general right to control the guard in the performance of his duties characterized the relationship as one of master-servant. Because the use of force was a natural and ordinary part of the guard's duties, and the store left to the guard's discretion the degree of force to be applied, the store could be held liable for the guard's assault and battery. However, the court reversed as to the false arrest claim because probable cause existed. Safeway Stores, Inc. v. Kelly, 448 A.2d 856, 860.

D.C.App.1978. Cit. in sup. in ftn. Subsec. (3) quot. in part in sup. in ftn. Appeal by plaintiff attorney, from ruling of a District of Columbia court that defendant, a Connecticut corporation, could not be sued in the District of Columbia in a suit brought to recover fees and expenses allegedly due under a contract. Plaintiff was retained by the Corporation to negotiate on its behalf with the Food and Drug Administration; expenses of setting up an office in the District of Columbia to facilitate the negotiations were to be paid by the corporation. The court reversed and remanded holding that plaintiff was defendant's agent and, therefore, defendant was "transacting business" in the District "by an agent" within the meaning of the District of Columbia Code provision that "A District of Columbia Court may exercise personal jurisdiction over a person, who acts directly or by agents, as to a claim for relief arising from the person's—(1) transacting any business in the District of Columbia" … and that defendant accordingly had established the "minimum contacts" necessary for personal jurisdiction over it in the District consistent with due process. Plaintiff was an agent and not an independent contractor by virtue of the control defendant's exercised over him through the defendant's purposefully availing itself of the privilege of conducting activities within the foreign state. Rose v. Silver, 394 A.2d 1368, 1371, rehearing denied 398 A.2d 787 (1979).

Fla.App.

Fla.App.1990. Cit. in ftn. to conc. op. In a lawsuit against a newspaper, the trial court directed a verdict for the defendant, on the ground that its home delivery carrier was an independent contractor and not an employee of the defendant. This court affirmed. The specially concurring opinion suggested that the amount of control of the delivery person by the business entity should be the key factor in distinguishing an employee from an independent contractor and that the degree of control was so considerable in this case that if such a standard were applied to all other business entities today there would be very few true employees

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and a vast number of independent contractors. Walker v. Palm Beach Newspapers, Inc., 561 So.2d 1198, 1199, dismissed 576 So.2d 294 (Fla.1990).

Fla.App.1987. Quot. in spec. conc. op. An independent contractor signed a noncompetition agreement with a distributor to promote a line of products. When the independent contractor obtained the rights to the product line from the manufacturer for himself, the distributor sued him. The trial court dismissed the complaint on the ground that the agreement was unenforceable against the defendant. While reversing and remanding on other grounds, this court affirmed the trial court's finding that the defendant was not bound because of his status. The specially concurring opinion argued that the independent contractor should be considered an agent for the purposes of the agreement; a person may be both an independent contractor and an agent in certain situations. Amedas, Inc. v. Brown, 505 So.2d 1091, 1094-1095.

Hawaii

Hawaii, 2003. Com. (a) quot. in disc. State civil rights commission and its director, on behalf of African-American spectator at college basketball game, sued team's student manager for discrimination in public accommodations, alleging that manager called spectator a racial slur. Commission held manager liable to plaintiffs, and appellate court affirmed in part. This court affirmed, holding that student manager was university's agent, that he was acting within scope of his authority when he directed racial slur at fan, and that utterances were not protected by First Amendment. Agency relationship between university and manager was created by express agreement in university's student-athlete handbook. Manager's conduct of interacting with spectators was of the kind that he was authorized to perform, and conduct occurred within authorized time and space limits. State v. Hoshijo ex. rel. White, 102 Hawai'i 307, 76 P.3d 550, 562.

Idaho,

Idaho, 2020. Subsec. (3) quot. in sup., quot. in case quot. in sup. Gym client brought claims of negligence against gym trainer and gym, alleging that plaintiff's fractured hand was caused by trainer's negligence while plaintiff was using a weight machine on gym premises. The trial court granted defendants' motion for summary judgment, finding, inter alia, that plaintiff's claim against trainer was barred by the release provision contained in the membership agreement entered into between plaintiff and gym, because trainer was an agent of gym. This court reversed and remanded, holding that the trial court erred in finding that there was no dispute of material fact as to whether there was an express or apparent principal–agent relationship between the defendants. The court observed that, under Restatement Second of Agency § 2(3), the fact that the employment agreement between the defendants described trainer as an "independent contractor" did not conclusively determine that there was no agency relationship between them, because the existence of such a relationship was established by the parties' circumstances and not by their words. Nelson v. Kaufman, 458 P.3d 139, 146.

Idaho

Idaho, 1989. Subsec. (3) quot. in dictionary in disc. A manufacturer of paper products hired a contractor to apply fiberglass to its bleaching tower dome. The dome was leaking a toxic gas used in paper manufacturing, and an employee of the contractor was injured. He sued the manufacturer for negligence. The trial court ruled for the plaintiff. Reversing on other grounds, this court rejected the defendant's argument that its violation of OSHA standards should not be viewed as negligence per se because the purpose of OSHA regulations was to protect its own employees and not the employees of an independent contractor. The court stated that the purpose of OSHA regulations was to provide a safe workplace for all workers on the defendant's premises. Moreover, OSHA standards were particularly applicable to the plaintiff because the plaintiff's employer was required to follow the defendant's directions in performing the work, and was thus more closely bound to the defendant than a regular independent contractor. Walton v. Potlatch Corp., 116 Idaho 892, 781 P.2d 229, 234.

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Idaho, 1969. Quot. subsec. (3) in sup. This was a prosecution for embezzlement. A gas station service station manager entrusted with an oil company's gasoline for the purpose of its sale failed to perform his duty of turning over to the company a portion of the proceeds of sales belonging to the company. The court held the manager guilty of embezzlement of proceeds entrusted to his care. State v. Compton, 92 Idaho 739, 450 P.2d 79, 80.

Idaho App.

Idaho App.1986. Cit. in ftn., subsec. (2) quot. in sup. Cattle owners filed a lawsuit against a dairy, alleging that the livestock the owners leased to the dairy had been provided inadequate care, which reduced their market value. At trial, the jury awarded damages against an agent of the dairy, but not against the dairy itself. The trial court, however, entered judgment n.o.v., extending liability to the dairy as well. The dairy appealed, and this court affirmed in part and reversed in part, finding, inter alia, that the dairy, having undertaken the performance of the cattle leases, assumed a contractual obligation that was coextensive with the dairy's duty in tort to exercise reasonable care concerning property entrusted to its possession, and this duty could not be delegated. Herbst v. Bothof Dairies, Inc., 110 Idaho 971, 719 P.2d 1231, 1234.

Ill.

Ill.2004. Cit. in diss. op., subsec. (3) and com. (b) quot. in diss. op. Architectural firm that, with the assistance of legal counsel, obtained judgment against real-estate developer for unpaid debt was sued by developer for tortious interference with business relationships after firm's counsel publicly disclosed developer's tax information as part of its collection efforts. Trial court granted firm summary judgment, but the appellate court reversed. Reversing, this court held, inter alia, that no genuine issue of material fact existed, since there was no evidence that counsel acted as firm's agent when it engaged in the allegedly tortious conduct, or that firm ratified such misconduct. One dissent argued that counsel was acting as both an independent contractor and an agent with a fiduciary relationship with firm, and a genuine issue of material fact remained as to whether, even if action of counsel fell outside the scope of its authority, firm acquiesced to or ratified the misconduct. The other dissent agreed that counsel was both an agent and an independent contractor, but contended that there was no basis for concluding as a matter of law that counsel's misconduct was outside the scope of agency. Horwitz v. Holabird & Root, 212 Ill.2d 1, 287 Ill.Dec. 510, 816 N.E.2d 272, 285, 297.

Ill.2000. Cit. in disc., subsec. (2) quot. in disc. After Little League coach was attacked and beaten by opposing team's manager and assistant coaches during tournament, he sued assailants and Little League association that sponsored assailants' team, among others. Trial court entered judgment on jury verdict for plaintiff; appellate court affirmed. This court reversed, holding, inter alia, that assistant coaches were servants of sponsor. Although plaintiff did not argue that coaches were servants, he did assert that coaches were agents of sponsor, which had duty to control their actions. Following instruction on right to control actions of another, jury's verdict for plaintiff implicitly determined that coaches met instruction's definition of agency. Hills v. Bridgeview Little League Ass'n, 195 Ill.2d 210, 234, 253 Ill.Dec. 632, 647, 745 N.E.2d 1166, 1182.

Ill.App.

Ill.App.2020. Cit. in sup. After an intoxicated motorist caused a car accident while leaving a ranch where he had voluntarily helped friends and coworkers unload grain and then socialized and drank alcohol with them for several hours, estate and family of decedent who was killed in the accident sued motorist and owners of the ranch, alleging, among other things, that owners were liable for motorist’s negligence because motorist was acting as their agent when the accident occurred. The trial court granted summary judgment for owners. Affirming, this court held that motorist was not an employee or agent of owners under Restatement Second of Agency §§ 2 or 220, because they did not hire motorist to help with the grain, ask him to stop by the ranch, or compensate him for his work, nor did they have any ability to control motorist or his vehicle. Bowyer as Next Friend of Eskra v. Adono, 156 N.E.3d 594, 604.

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Ill.App.2005. Quot. in disc. Patient and his wife sued physician for medical malpractice and loss of consortium. Trial court dismissed suit based on one-year statute of limitations for actions against a public entity or its employees, finding that defendant was a hospital employee. This court affirmed, holding, inter alia, that defendant was an employee of hospital, since hospital maintained right to control defendant's work. Defendant's contract required him to perform full-time surgical services for hospital. The fact that defendant made independent medical decisions did not mean that he was precluded from being an employee simply because hospital did not specifically control every medical decision he made. Wheaton v. Suwana, 355 Ill.App.3d 506, 511, 291 Ill.Dec. 407, 411, 823 N.E.2d 993, 997.

Ill.App.2003. Subsec. (2) quot. in disc. Intoxicated volunteer camp leader lost control of car and had an accident that resulted in death of one passenger and injury to another. Injured passenger and deceased passenger's estate sued camp leader and corporate charity that sponsored camp for negligence and respondeat superior. Affirming the trial court's grant of summary judgment for charity, this court held that charity was not vicariously liable under respondeat superior, because while camp leader had master-servant relationship with charity, his act of stopping at a bar and drinking for two hours severed the connection. Camp leader's act of driving other camp-leader passengers was gratuitous and not within scope of his employment, since no one from charity directed camp leader to drive passengers back to camp. Alms v. Baum, 343 Ill.App.3d 67, 277 Ill.Dec. 757, 796 N.E.2d 1123, 1127.

Ill.App.2003. Quot. in sup. Over one year after surgery that allegedly left patient with infection and the need for additional surgery, patient and wife sued surgeon for medical malpractice. Trial court dismissed action as untimely. Affirming, this court held that surgeon was employee of county hospital subject to one-year statute of limitations under Local Government and Governmental Employees Tort Immunity Act where surgeon had employment contract with hospital requiring him to perform full-time surgical services for hospital, maintain regular office hours, be accessible around the clock, live within county, and abide by provisions in hospital's employee handbook. Wheaton v. Suwana, 341 Ill.App.3d 929, 935-936, 276 Ill.Dec. 219, 224-225, 793 N.E.2d 978, 983-984, judgment vacated 206 Ill.2d 646, 278 Ill.Dec. 816, 799 N.E.2d 681 (2003).

Ill.App.1998. Subsec. (2) quot. in disc. Special administrators of estate of child who drowned while in the care of foster parents sued parents for negligence. The trial court dismissed the complaint on grounds of sovereign immunity and lack of subject matter jurisdiction. Affirming, this court held, in part, that sovereign immunity barred plaintiffs' claim because defendants, who were appointed by the Department of Children and Family Services to perform duties that were statutorily mandated as government duties, were agents of the state. Even if, as plaintiffs argued, defendants were independent contractors, sovereign immunity would still apply under the theory that the state, which owed a nondelegable duty of care to foster children, was vicariously liable for the wrongful acts of its contractor-foster parents. Nichol v. Stass, 297 Ill.App.3d 557, 561, 232 Ill.Dec. 16, 19, 697 N.E.2d 758, 761.

Ill.App.1994. Com. (c) cit. in disc. The estate of a deceased patient sued the attending physician, a covering physician, and the hospital, alleging malpractice in connection with the patient's death. This court affirmed trial court's entry of summary judgment for the attending physician, holding, inter alia, that, as the patient's mother knew that her daughter would be treated by the covering physician and signed a consent for that treatment, the attending physician could not be vicariously liable for the covering physician's alleged negligence. The court stated that, although an attending physician benefits from a coverage arrangement, the imposition of liability would discourage coverage arrangements and curtail the availability of medical service. Steinberg v. Dunseth, 259 Ill.App.3d 533, 197 Ill.Dec. 587, 589, 631 N.E.2d 809, 811.

Ind.

Ind.2006. Com. (a) cit. in disc. Victim involved in automobile accident with employee driving his employer's truck sued employer and employee's estate. The trial court, inter alia, granted summary judgment for estate on its cross-claim for defense and indemnity from employer, which self-insured the truck; the court of appeals affirmed in part. Vacating the trial court's order, this court held that a self-insured employer that supplied a vehicle for an employee's use had a duty to inform the employee of liability risks in using the vehicle, and that a breach of that duty imposed on the employer an obligation to indemnify and

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defend the employee against liability arising from permissive use of the vehicle. The court remanded for further proceedings on whether employer made appropriate disclosure here. Northern Indiana Public Service v. Bloom, 847 N.E.2d 175, 187.

Ind.1999. Cit. in ftn., subsec. (2) cit. in disc., subsec. (3) quot. in disc. A woman who developed recurring headaches after giving birth sued her anesthesiologist and the hospital for negligently administering an epidural anesthetic. Trial court granted the hospital summary judgment, holding that plaintiff could not recover because the anesthesiologist was an independent contractor. Appellate court reversed, holding that the hospital could be held liable under the doctrine of apparent or ostensible agency. This court affirmed in part, reversed in part, and remanded, holding, inter alia, that there were fact issues as to the existence of an apparent or ostensible agency relationship. The court concluded that if the hospital had failed to give meaningful notice, if the patient had no special knowledge regarding the arrangement the hospital had made with its physicians, and if there was no reason that the patient should have known of these employment relationships, then patient's reliance on the apparent agency was presumed. Sword v. NKC Hospitals, Inc., 714 N.E.2d 142, 148.

Ind.App.

Ind.App.2012. Subsec. (3) quot. in case quot. in sup. Husband whose wife died following surgery in hospital brought a medical-malpractice action against hospital, among others. The trial court denied plaintiff's motion for partial summary judgment, holding that genuine issues of material fact existed as to whether independent-contractor physicians who treated decedent at the hospital were hospital's apparent agents. Affirming, this court held, as a matter of first impression, that the expiration of the statute of limitations with respect to the independent-contractor physicians did not foreclose plaintiff's suit against hospital based on a theory of apparent authority. Columbus Regional Hosp. v. Amburgey, 976 N.E.2d 709, 714.

Ind.App.2009. Adopted in case cit. in sup., cit. and quot. in sup. After insured was acquitted of criminal charges of insurance fraud, he brought a malicious-prosecution action in state court against nonprofit organization funded by insurance companies to investigate insurance fraud, and one of its investigators who assisted the FBI in the fraud case. After the U.S. Attorney General denied defendants' request for certification of investigator as a federal employee under the Westfall Act, and the federal district court affirmed the denial of certification and remanded to the state trial court, the state court also declined defendants' certification request. Affirming, this court held, inter alia, that, under the common-law strict-control test, investigator was not a federal employee, but participated in the federal government's investigation as a volunteer and an independent contractor. The court concluded that the federal government did not have control over investigator's physical performance of his day-to-day activities. Jaskolski v. Daniels, 905 N.E.2d 1, 14.

Ind.App.1983. Subsecs. (1) and (2) quot. in sup. A driver delivering cookies for a church guild hit the plaintiff motorcyclist. The plaintiff sued the church for his injuries, and the trial court held the church liable. This court affirmed, holding that the church was a master and the driver a servant; thus respondeat superior applied, because the church had the right to control the driver's conduct at the time of the accident and the driver was acting within the scope of his employment. Even though the driver was a gratuitous servant, he had subjected himself to the church's control. Trinity Lutheran Church, Inc. v. Miller, 451 N.E.2d 1099, 1101-1102.

Iowa App.

Iowa App.1988. Subsec. (3) cit. in case cit. in sup. After a tavern burned down, an insurance adjuster guaranteed the former owner that she would be compensated by the insurer for her interest in the property as a contract vendor. However, the insurer paid the entire amount of the insurance proceeds to the purchaser, who then stopped making payments to the former owner. When the former owner sued the insurer, the trial court granted summary judgment to the defendant on the ground that the adjuster was an independent contractor. Reversing and remanding, this court held that there was a genuine issue of material fact as to whether the adjuster had the authority to bind the insurer to pay the plaintiff. The court said that a person could be both an agent and an independent contractor. Brown v. United Fire & Gas Co., 432 N.W.2d 708, 710.

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Iowa App.1984. Subsec. (3) cit. in sup. After plaintiff was raped by a cable television installer, she sued the cable television franchisee and the independent contractor which employed the installer. This court reversed a summary judgment the defendants, holding, inter alia, that there was a material issue of fact as to whether the installer acted under the control and with the authority of both the independent contractor and the franchisee. The court recognized that an individual could be both an agent and an individual contractor. D.R.R. v. English Enterprises, CATV, 356 N.W.2d 580, 583.

Kan.

Kan.1984. Subsec. (3) cit. in sup. Plaintiffs entered into a joint venture with the defendant to develop oil and gas leases. When the defendant acquired new leases without the plaintiffs' knowledge, they brought this action for breach of fiduciary duty and sought to impose a constructive trust on the interests acquired by the defendant in the breach of this duty. Judgment for the plaintiffs was affirmed. The court rejected defendant's argument that, because the mutual interest agreement identified the defendant as an independent contractor, the trial court erred in finding that a fiduciary relationship existed. The court held that, taken as a whole, the agreement established a fiduciary relationship; it also noted that a person could be both an independent contractor and an agent for another. First Nat. Bank and Trust Co. v. Sidwell Corp., 234 Kan. 867, 678 P.2d 118, 124.

Me.

Me.1996. Subsec. (1) cit. in ftn. Wife of convicted felon sued local sheriff and deputy for, inter alia, defamation after deputy falsely told reporter that the sheriff's department returned a rifle belonging to felon to his wife. The trial court granted defendants' motion for summary judgment. Affirming in part, vacating in part, and remanding, this court held that a jury could find slanderous per se deputy's implication that wife became a criminal accomplice by returning a firearm to a convicted felon. Additionally, material factual issues existed as to whether deputy's statement was conditionally privileged as one he was required to make in the course of his official duties. Finally, summary judgment was inappropriate on wife's claim that sheriff, as deputy's master, was vicariously liable for deputy's tortious acts under the theory of respondeat superior. Rippett v. Bemis, 672 A.2d 82, 88.

Me.1992. Quot. in sup. A landowner whose timber mistakenly was chopped down sued a property manager for damages, alleging that defendant was liable as a principal for the timber cutter's trespass. Vacating the trial court's judgment for plaintiff and remanding, this court held that because defendant neither directed the timber cutter's actions nor authorized the trespass onto plaintiff's land, the timber cutter was more properly characterized as an independent contractor than as an agent. The court noted that while independent contractors could be considered agents in some cases, the lack of supervision by defendant over the timber cutter precluded that categorization here. The court explained that, in general, there was no vicarious liability upon the employer of an independent contractor. Bonk v. McPherson, 605 A.2d 74, 78.

Me.1990. Com. (b) cit. in sup. A petroleum products franchisor and distributor sued its franchisee and the franchisee's convenience stores to recover money for products sold and for payments due on two promissory notes. The defendant counterclaimed, alleging several counts, including liability for the negligent manner in which the petroleum tanks were installed at one of the defendant's stores. The trial court directed a verdict in favor of the plaintiff on the negligent tank installation counterclaim and entered judgments for both parties based on jury verdicts awarding them each damages on their complaints. Vacating the judgments and remanding, this court held, inter alia, that the lower court properly directed a verdict for the plaintiff on the negligent installation claim. The court stated that the person who installed the tanks was an independent contractor, based on the fact that he was hired to do a contract job and his tortious conduct was not under the control of the plaintiff. C.N. Brown Co. v. Gillen, 569 A.2d 1206, 1214.

Me.1980. Quot. in part in ftn. The plaintiff a private corporation, contracted with a city to provide it with school bus service. A local union then began a drive to organize the plaintiff's school bus drivers. The union filed with the Maine Labor Relations Board for unit determination and a bargaining agent election. The examiner found that the Board had jurisdiction because the plaintiff was a public employer. The plaintiff appealed. This court stated that in a unit determination proceeding, the Board's

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findings of fact are final, absent fraud. The court stated that applicable statutes provide that any person acting on behalf of a municipality is a public employer. "Acting on behalf of" invokes general agency principles, so that agents may be agent-servants or agent-independent contractors, depending upon whether the agent's performance is subject to another's control. One may be both an agent and an independent contractor. A servant is controlled by the master as to physical conduct but an independent contractor's physical conduct is not subject to another's control. The plaintiff acted on behalf of the city and under its control so that it was a public employer for purposes of the Labor Relations Law. Baker Bus Service, Inc. v. Keith, 416 A.2d 727, 731.

Me.1975. Cit. in sup. Plaintiff brought suit for deceit and breach of fiduciary duty. The lower court entered judgment for plaintiff and awarded defendant a real estate broker's commission. Plaintiff's appeal from the award of the commission was sustained. Defendant never claimed such a commission, and the court erred awarding the commission gratuitously. Whatever the nature of defendant's antecedent interest in the property, his acquisition of the property was an indubitable incident of the agency. An agent who, in violation of his duty to his principal, uses, for his own purposes, assets of the principal's business is subject to liability to the principal for the value of the use. Thus, defendant was liable to his principal for secret profits, in this case moneys wrongfully retained after the purpose of the agency was accomplished. The court concluded that the measure of plaintiff's damage was the difference between the sum entrusted to defendant and the contract price actually paid by defendant to acquire the property in his own name prior to the transfer to plaintiff in accordance with the agency relation. Desfosses v. Notis, 333 A.2d 83, 86.

Md.

Md.2001. Com. (d) cit. in ftn. and in sup. Former employee sued employer for breach of contract, quantum meruit, and unjust enrichment, and brought a claim for unpaid wages in violation of state Wage Payment and Collection Act (Wage Act). The trial court dismissed the Wage Act claim. The court of special appeals reversed in part, holding that the claim should be reinstated. Affirming and remanding, this court held, inter alia, that the issue of whether plaintiff was an employee under the Wage Act was improperly withheld from the jury by the trial court's dismissal. Baltimore Harbor Charters, Ltd. v. Ayd, 365 Md. 366, 390, 392, 780 A.2d 303, 317, 319.

Md.1987. Com. (b) cit. in disc. and cit. and quot. in ftn., com. (d) quot. in ftn. A worker employed by a subcontractor was killed in a fall on the job. The worker's survivors sued a safety management contractor who had been employed by the same government entity that had employed the principal construction contractor who had hired the subcontractor by whom the worker was employed. The trial court granted summary judgment for the defendant, holding that because the government entity was a statutory employer, the defendant was immune from suit under worker compensation law for performing the entity's nondelegable duty. This court reversed and remanded, holding that the government entity was not a statutory employer because it was not performing a contract itself. The court further held that the defendant contractor was not, for purposes of a sole remedy statute, an agent of the government entity, because the entity did not exercise control over the defendant to the extent it would over a servant or employee. Brady v. Ralph Parsons Co., 308 Md. 486, 520 A.2d 717, 730, 731, appeal after remand 82 Md.App. 519, 572 A.2d 1115 (1990).

Md.Spec.App.

Md.Spec.App.2003. Com. (b) quot. in case quot. in sup. Investor who lost his entire investment after he was fraudulently induced to invest in unregistered, high-risk securities by financial advisor sued financial advisor, broker-dealer that employed financial advisor, and issuers of securities for negligence and intentional and negligent misrepresentation. Trial court granted issuers summary judgment, stating that neither broker-dealer nor its employee was actual or apparent agent of issuers. Affirming in part and remanding, this court held, inter alia, that issuers were not liable under agency theory where escrow arrangement did not create agency relationship, issuers' acceptance of investor's subscription did not constitute ratification of broker-dealer's actions, direct contact did not exist between issuers and employee or broker-dealer until after investor was induced to buy securities, and evidence did not establish agency relationship under "appearance of authority" theory. Brooks v. Euclid Systems Corp., 151 Md.App. 487, 827 A.2d 887, 903.

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Md.Spec.App.1999. Com. (a) quot. in disc. and cit. in headnote. Customers brought a class action against a tax preparation company for breach of fiduciary duty, fraudulent concealment, and violation of the Consumer Protection Act, alleging that the company failed to disclose its financial stakes in the portion of a rapid refund program through which the customers obtained bank loans secured by anticipated refunds. Trial court granted defendant's motion to dismiss, holding that defendant had no duty to disclose the benefits because no fiduciary obligation existed between defendant and its customers. This court reversed, holding that there was a fact issue regarding the existence of a principal-agent relationship that gave rise to a fiduciary duty to disclose any conflict of interest. Green v. H & R Block, Inc., 355 Md. 488, 735 A.2d 1039, 1051.

Md.Spec.App.1998. Subsec. (1) quot. in case quot. in sup. A patient brought a medical malpractice action against a hospital and a doctor, after he was misdiagnosed as having prostate cancer and received several radiation treatments. An arbitration panel found no liability. The patient's personal representative then sued to nullify the award. Trial court granted defendants summary judgment. This court reversed and remanded, holding, inter alia, that a fact issue existed as to whether a master-servant relationship existed between the hospital and the doctor, and thus whether the hospital was vicariously liable for the doctor's negligence. The contractual rights of control that the hospital had over the doctor's hiring, work schedule, billing, credentialing, continuing education, and performance of his professional duties was sufficient to create a fact issue as to whether the hospital had the right to control the doctor's physical conduct in the performance of his service. Hunt v. Mercy Medical, 121 Md.App. 516, 710 A.2d 362, 376.

Md.Spec.App.1984. Cit. in disc., com. (a) cit. in disc., subsec. (1) quot. in disc. Owner of race horses sued race track for negligently failing to discover that the owner's trainer had entered the wrong horse in two races. The owner alleged that defendant's negligence in allowing the poorer horse to run under the name of the better horse resulted in a loss in the value of the better horse. A jury found that the trainer's contributory negligence barred the owner from recovering. On appeal, the owner argued that because the trainer was an independent contractor, rather than a servant, the owner was not vicariously liable for the trainer's negligence. This court affirmed. It agreed that a trainer who ran his own business and retained control over his duties was an independent contractor, but noted various circumstances in which a principal could be liable for the tortious conduct of an agent who was not a servant. Because the owner placed the trainer in a position to misrepresent the horses and defraud the track and the public, the owner was liable for the trainer's mistakes. Sanders v. Rowan, 61 Md.App. 40, 484 A.2d 1023, 1028.

Mass.

Mass.1996. Com. (a) cit. in disc. A finance company sued attorneys, alleging that they were vicariously liable for fraud and intentional misrepresentations committed by their law partner in an opinion letter regarding a financial transaction. Federal district court entered judgment on jury verdict for defendants. Answering certified questions from the circuit court of appeals, this court held, inter alia, that a partnership may be liable by one of two routes for the unauthorized acts of a partner: if there is apparent authority, or if the partner acts within the scope of the partnership at least in part to benefit the partnership. In this case, the jury instructions required the jury to consider both routes to vicarious liability. Kansallis Finance Ltd. v. Fern, 421 Mass. 659, 659 N.E.2d 731, 733.

Mass.1977. Cit. in ftn. in disc. A cafe patron brought suit against the cafe and an off-duty city police officer, who was serving as a “bouncer” on the cafe's premises, for damages for assault on the patron by the off-duty police officer. Plaintiff, an executive of a computer service company, was at the bar talking with a female acquaintance. A man approached and asked her to dance several times. She declined. He took her arm and plaintiff said, “Leave her alone.” The man grabbed plaintiff by his shirt, and plaintiff pushed him away. No blows were struck. Defendant rushed over, slammed plaintiff against the wall, and struck him in the mouth seriously damaging plaintiff's bridgework. Defendant then dragged him outside by the hair and shoved him to the ground. A police wagon arrived, and plaintiff was driven to the hospital. He was then driven to jail where he spent the night in a cell. The superior court rendered judgments of $25,000 against the cafe and the officer, and defendants appealed. The cafe owner claimed error in the denial of a judgment n.o.v. or a new trial, and the officer claimed error in the denial of a new trial. In discussing the borrowed servant doctrine, illustrated by the question of whether one who uses the services of policemen on paid detail may be held liable as a principal for their conduct, the court said that although the cases have not been entirely in accord

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with the nomenclature of the Restatement, they have tended to like results. Citing the Restatement, the court stated that the off-duty policeman was implicitly authorized by the principal to use force in appropriate situations, and the fact that an agent used force inappropriately or excessively would not relieve the principal here by putting those tortious acts beyond the scope of the policeman's employment. Judgments affirmed. Davis v. DelRosso, 371 Mass. 768, 359 N.E.2d 313, 315.

Mass.1963. Cit. in sup. In action for breach of contract whereby defendant allegedly agreed to pay plaintiff a percentage of profit realized from a stock transaction, court said that plaintiff did not appear to have been a broker in the sense of being employed to negotiate for defendant, or to introduce the parties to each other, or to be the effective cause of arranging a particular transaction. Davidson v. Robie, 345 Mass. 333, 187 N.E.2d 371, 374.

Mass.App.

Mass.App.2012. Quot. in sup. After insured under a commercial property and general liability policy that excluded coverage for injuries to independent contractors brought a negligence action against insurance agency, alleging failure to obtain proper insurance coverage, agency brought a third-party complaint against insurer, seeking a declaration that the policy afforded coverage to insured for personal-injury claims brought by a structural engineer on insured's construction project. The trial court granted summary judgment for insurer. Affirming, this court held that, while engineer, who was hired by the architectural-services contractor on the project, was not in direct privity with insured, the plain terms of insured's business agreements described services delegated to contractor and engineer as those to be performed by independent contractors, and thus engineer qualified as an independent contractor under the plain meaning of the insurance policy's exclusion. Cable Mills, LLC v. Coakley Pierpan Dolan and Collins Ins. Agency, Inc., 82 Mass.App.Ct. 415, 421, 974 N.E.2d 1134, 1140.

Mass.App.2005. Subsec. (3) cit. in disc. Pedestrian struck by a taxi while at airport sued taxi driver, taxi leasing company, and airport authority. The trial court granted leasing company and authority summary judgment. This court affirmed in part, holding, inter alia, that the authority could not be held vicariously liable for driver's negligence simply because it provided and allowed driver to participate in the airport's taxi pool. There was no evidence that driver was the authority's franchisee or independent contractor so as to establish a relationship between them in the absence of an actual contract, particularly since driver was free to provide authority with no service if he so desired. Peters v. Haymarket Leasing, Inc., 64 Mass.App.Ct. 767, 780, 835 N.E.2d 628, 638.

Mass.App.1996. Cit. in headnote, subsec. (3) cit. in sup. Disabled worker sued workers' compensation insurance carrier for intentional infliction of emotional distress, alleging that carrier was liable for the tortious conduct of physicians and investigators whose job was to determine whether worker continued to be disabled. The trial court granted carrier's motion for a directed verdict. Affirming, this court held that carrier was not liable for the allegedly tortious conduct of physicians and investigators because they were independent contractors who were employed by various other independent contractors whose services carrier engaged, and because carrier retained no control over the manner and means of their work. Paradoa v. CNA Ins. Co., 41 Mass.App.Ct. 651, 672 N.E.2d 127, 127-129.

Mich.App.

Mich.App.1999. Cit. in disc. Employee of an independent contractor hired to lay cable wire died when a car snagged a portion of the cable that became elevated from the highway, causing the cable reel to jerk forward into the employee. The decedent's estate sued the general contractor and the cable television company for negligence. This court reversed and remanded a trial court judgment for plaintiff, holding, inter alia, that the general contractor could not be held liable under the doctrine of retained control, because the control retained by the general contractor did not have any effect on the manner or environment in which the work was performed. Candelaria v. BC General Contractors, Inc., 236 Mich.App. 67, 600 N.W.2d 348, 352.

Mich.App.1990. Subsec. (3) cit. in diss. op. The representative of the decedent's estate brought a medical malpractice action against the decedent's physician, inter alia, alleging that the defendant's failure to detect and treat the decedent's hip fracture,

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which occurred when the decedent fell off a cart in the emergency room of a government hospital while awaiting treatment for a urinary tract infection, caused the decedent's death as a result of complications from surgery later performed to treat the fracture. The trial court granted summary judgment for the defendant on the ground of governmental immunity. Reversing and remanding, this court held that, since the defendant was in private practice with staff privileges at the hospital and was not a government employee, he was not entitled to governmental immunity. The dissent argued that the defendant was entitled to governmental immunity as the hospital's agent because his alleged negligence arose in the course of his duties on behalf of the hospital. Douglas v. Pontiac General Hosp., 182 Mich.App. 446, 452 N.W.2d 845, 846, judgment reversed 473 N.W.2d 68 (Mich. 1991).

Mich.App.1968. Quot. in sup. The plaintiff sued the defendant oil company as third-party tortfeasor for injuries resulting from the negligent upkeep of the station where he worked. He was not notified at the time he was hired, or while he worked at the gas station that his employer was not the gas station manager, but the oil company. The defendant asked for accelerated judgment because the plaintiff was barred from this suit as an employee of the defendant covered by Workmen's Compensation. The court ruled that the plaintiff was not barred because he was never told that he was an employee of the defendant and therefore eligible for Workmen's Compensation. Erickson v. Goodell Oil Company, 15 Mich.App. 398, 166 N.W.2d 648, 650, rev'd, 384 Mich. 207, 180 N.W.2d 798 (1970).

Minn.

Minn.1985. Cit. in diss. op. The acting commissioner of the state's department of human rights sought to enjoin a sports and health club corporation from engaging in certain practices in violation of the state human rights act. The commissioner alleged that the club owners, “born again” fundamentalist Christians, questioned prospective employees regarding their marital status and religious beliefs, terminated and refused to promote employees because of differences in beliefs, and failed to provide open public accommodations. The commissioner also sought class certification for all persons who had applied for employment with one of the clubs and who were required to furnish information regarding sex, marital status and religion. The club owners alleged protection under the First Amendment and the state constitution. The hearing examiner enjoined continuation of the club's practices, but refused to certify the certain class. Both the commissioner and the club appealed. This court affirmed in part, holding that the state human rights act was facially neutral and did not infringe upon the club's constitutional rights, since the commissioner was not attempting to regulate or single out any particular religion for adverse treatment and therefore the injunction was proper. The court held that interviews of prospective employees and the promotion practices violated the act, and reversed in part, holding that class certification was required for all persons who had applied for employment subject to these violations. A dissenter stated that to some extent, all employees have a fiduciary relationship to their employers, and that those at managerial levels should not have to associate with persons who reject the basic objectives and philosophy of the business. State by McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 858.

Minn.1980. Quot. in sup. Plaintiff brought action against county and conservation officer for damages for injuries sustained by plaintiff when his truck overturned as a result of encountering a mud slick on a county highway. Evidence was that the slick was the result of the action of the conservation officer about an hour prior to the accident when he dynamited a beaver dam located near the road and did not remove the resulting debris from the highway. The blasting was done at the request of a county highway maintenance employee. The hazardous condition was not marked or flagged in any way to warn drivers, and the county was not notified of the hazard until after the accident. The trial court held that the county could not be held vicariously negligent for the act of the conservation officer because, as a matter of law, the failure to clear the mud off the road was collateral negligence on the part of an independent contractor which relieved the county of liability. The appeals court reversed the judgment of the lower court, holding that a principal is liable for the negligent performance of a nondelegable duty by an independent contractor, and that road maintenance is such a duty. Negligence of an independent contractor is collateral only when the negligence is disassociated from any inherent or contemplated special risk which may be expected to be created by the work. The risks created by the explosion were inherent in the work, and, therefore, the county is vicariously liable for the negligence of the conservation officer. Westby v. Itasca County, 290 N.W.2d 437, 438.

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Minn.1975. cit. in sup. The plaintiff research scientist brought an action against the defendant nonprofit corporate foundation and its executive director for breach of a contract to sponsor a research project. The defendant foundation had induced the grantee institution to withdraw its sponsorship from a cancer research grant awarded by the United States Public Health Service to the foundation and to the plaintiff, who was the project's principal investigator. The plaintiff also sought damages for interference with business relationships and for defamation. The defendants argued that the plaintiff's relationship with the grantee foundation was that of an employee, terminable at will. The trial court disagreed, and instructed the jury, as a matter of law, that the plaintiff was not an employee. The appellate court held that the trial court had erred in ruling on the employee-independent contractor issue as a matter of law, since the evidence was not conclusive on that point. Wild v. Rarig, 234 N.W.2d 775, 789, cert. denied and appeal dismissed, 424 U.S. 902, 96 S.Ct. 1093, 47 L.Ed.2d 307 (1976), rehear. denied, 425 U.S. 945, 96 S.Ct. 1689, 48 L.Ed.2d 190 (1976).

Minn.1970. Quot. in sup. The plaintiff, a seller of plumbing supplies, brought an action to recover for plumbing supplies delivered to defendant contractor. The supplies were ordered by a master plumber, who plaintiff alleged sold his equipment to defendant and became defendant's employee. The court did not decide whether a sale had ever been consummated, since a person who works with his own tools can still be an employee. The court found that the plumber was defendant's employee on the basis of defendant's business records. Burman Company v. Zahler, 286 Minn. 400, 178 N.W.2d 234, 238.

Minn.1965. Cit. and quot. in sup. in ftn. The plaintiff sued the defendant salesman and his alleged employer for injuries sustained in an automobile accident which occurred while the defendant salesman was driving to a farm where he stored trailers which he used mainly for delivering his employer's products. The court held that the salesman was an employee, not an independent contractor, and was acting within the scope of his employment at the time of the accident for he had in his possession the employer's order blanks and catalog, even though he was not intending to make a sale. Boland v. Morrill, 270 Minn. 86, 132 N.W.2d 711, 715.

Minn.1964. Com. (b) cit. in ftn. but not fol. Plaintiff sued for personal injuries sustained in a collision between his car and a truck driven and owned by defendant Merrell while leased to defendant Dart. The court held that, although the truck was subject to exclusive control of Dart, creating a master-servant relationship between Dart and Merrell, Merrell was not acting within the scope of his employment at the time of the accident. Therefore his negligence could not be imputed to Dart. Gackstetter v. Dart Transit Co., 269 Minn. 146, 130 N.W.2d 326, 328.

Minn.App.

Minn.App.2005. Quot. in disc. After a drunk driver killed a mother and injured her children in a car accident, the father and his three children sued a national war veterans association, the association's regional department, and its local post for negligence in illegally selling alcohol to the drunk driver. Trial court granted defendants summary judgment. This court affirmed, holding that the national association and its regional department were not vicariously liable for the local post's illegal alcohol sale under the doctrine of respondeat superior, because there was insufficient evidence that the association or the department had a right to control the physical undertakings of the local post's daily activities. Urban ex rel. Urban v. American Legion Post 184, 695 N.W.2d 153, 160, affirmed 723 N.W.2d 1 (Minn.2006).

Minn.App.1989. Quot. in case quot. in disc. When an automobile buyer defaulted on a car loan from a bank, the bank contracted for a company to repossess the automobile. After the company's employees assaulted the buyer's daughter while repossessing the automobile, she sued the bank for damages. The trial court granted the defendant's motion for summary judgment on the ground that the repossession company was an independent contractor and that the contractor's unlawful conduct was outside the scope of its relationship with the bank. Although reversing on other grounds, this court agreed that the bank did not control the means and manner of the repossession company's performance. Nichols v. Metropolitan Bank, 435 N.W.2d 637, 639.

Miss.

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Miss.2005. Quot. in ftn. Contractors working on mall-renovation project sued mall owner after construction manager hired by owner misappropriated funds remitted by owner for payment of contractors. The trial court granted summary judgment for owner, finding, inter alia, that there was no agency relationship between owner and manager, because manager acted as an independent contractor. Reversing and remanding, this court held, among other things, that fact issues existed as to whether an agency relationship between owner and manager existed and that, if such a relationship were established, owner's payments to manager would not extinguish owner's debt to plaintiffs. The court pointed out that manager could be both an independent contractor and an agent as the two roles were not mutually exclusive. Aladdin Const. Co., Inc. v. John Hancock Life Ins. Co., 914 So.2d 169, 172.

Miss.1999. Cit. in sup. Survivors of airplane passenger killed in crash sued airport authority for negligence, alleging that authority was liable for the misconduct of the legally intoxicated pilot, a principal of authority's airport manager. The trial court entered summary judgment for authority. Affirming, this court held that, because the relationship between authority and airport manager was one of principal and independent contractor, authority was not liable for pilot's actions. Heirs of Branning v. Hinds Com. College, 743 So.2d 311, 316.

Miss.1994. Subsecs. (2) and (3) quot. in case quot. in disc., com. (b) cit. in case quot. in disc. Motorist who was injured in an accident with a trucker hauling raw materials to an asphalt plant sued the plant's owner for negligence on the theory of respondeat superior, alleging that defendant was trucker's employer and thus was liable for trucker's negligent acts. Affirming the trial court's granting of summary judgment for defendant and remanding, this court held that trucker was an independent contractor and not defendant's employee at the time of the accident. Richardson v. APAC-Mississippi, Inc., 631 So.2d 143, 148.

Mo.

Mo.1965. Cit. in sup. The plaintiff sustained personal injuries when a truck in which he was a passenger collided with an automobile driven by the defendant within the scope of the defendant's employment. The court affirmed an award to the plaintiff, but reduced the amount of recovery allowed in lieu of the rule of reasonable uniformity of verdicts for personal injury cases because the original judgment was excessive in light of all the circumstances. Dean v. Young, 396 S.W.2d 549, 553.

Mo.1963. Cit. in sup. Where owner employed builder to do construction work for stipulated price and retained no power to direct manner of doing work or right to control builder in performance of contract, builder was independent contractor for whose negligent acts owner was not liable. Martin v. First National of Independence Co., 372 S.W.2d 919, 923.

Mo.App.

Mo.App.2013. Com. (b) cit. in ftn. After motorist drove into the wrong lane in a construction zone, causing her car to drop into a large hole, injured passenger and others sued general contractor that was hired to perform the construction work and subcontractor that was hired to provide traffic-control services, alleging that defendants negligently failed either to barricade or cover the hole or to provide traffic controls sufficient to direct motorists around it. The trial court entered judgment on a jury verdict in favor of defendants. Affirming, this court held that the trial court did not err by permitting defendants to argue before the jury that they acted as ordinary and prudent persons by doing only what was asked of them by contract. The court nevertheless concluded that defendants were not entitled to rely on a defense to liability available to "employee" road contractors, because defendants were independent contractors or "non-agent service providers" rather than employees of the owner of the bridge. Peterson v. Progressive Contractors, Inc., 399 S.W.3d 850, 866.

Mo.App.2006. Cit. in ftn. Customer sued independent insurance agent for negligence in failing to procure insurance on customer's portable concrete plant, after the plant was destroyed in a windstorm. On remand, the trial court granted partial summary judgment for plaintiff on liability, and entered judgment on a jury verdict awarding plaintiff damages. Affirming, this court held, inter alia, that summary judgment was properly granted for plaintiff on liability because defendant had neither actual authority under its agreement with insurer, nor apparent authority manifested by insurer to plaintiff, to bind insurer for more

than three days to the insurance coverage defendant orally promised plaintiff; thus, defendant's failure to actually notify insurer of the intended policy was negligence. The court noted in passing that, contrary to a potentially misleading assertion in Missouri case law, an independent contractor could be an agent. Parshall v. Buetzer, 195 S.W.3d 515, 519.

Mo.App.1993. Cit. in sup. Terminated employee who had received confirmation of employer's job offer in letter failing to state employment's duration sued employer and employer's administrator, alleging, among other claims, breach of contract. The trial court granted defendants summary judgment, finding that no contract existed. Affirming, this court held that letter was not an employment contract and that employee could not assert promissory estoppel to defeat Statute of Frauds' requirements that employment contract be in writing and include duration of employment relationship, since there would be no mutuality of obligation if employee could quit and suffer no liability while employer would be held liable if it terminated employment relationship. Moreover, the court noted that the employer-employee relationship was one of agency rather than contract law and was therefore primarily consensual in nature. McCoy v. Spelman Memorial Hosp., 845 S.W.2d 727, 730.

Mo.App.1991. Cit. in case cit. in disc. A city council created a nonprofit development corporation to facilitate the issuance of tax-exempt bonds and thus assist the city in funding projects. An individual sued the city, the mayor, and the city council, seeking a declaration that, by acting through the corporation, the defendants violated the city charter requiring city council to submit for voter approval any proposal to issue general obligation bonds, and that the city, as principal, could not authorize its agent, the corporation, to do something that it could not do as principal. The trial court granted the defendants summary judgment, concluding that no agency relationship existed between the corporation and the city. This court affirmed, holding that, although the plaintiff proved that the corporation worked on behalf of and solely for the city's benefit, the evidence conflicted with the plaintiff's assertion that the corporation was subject to the city's control. Jennings v. City of Kansas City, 812 S.W.2d 724, 733.

Mo.App.1991. Cit. in sup. The holder of a promissory note sued the note's makers for collection. The defendants counterclaimed, alleging that they were induced to invest in an apartment complex by the plaintiff's fraudulent misrepresentations about the deductibility on their personal income tax return of certain closing costs, construction costs, and the real estate sales commission. The trial court found for the plaintiff, concluding that any representations made by the plaintiff regarding deductibility of certain expenses were misrepresentations of law; because everyone was presumed to know the law, such misrepresentations were not available as an affirmative defense to the claim on the note. This court affirmed, holding that neither the plaintiff's statement that he was the defendants' agent nor the existence of the business relationship between the parties gave rise to a confidential relationship, a recognized exception to the nonactionability of misrepresentations of law. The court reasoned that the critical element of control in establishing an agency relationship was absent. Lucas v. Enkvetchakul, 812 S.W.2d 256, 261.

Mo.App.1990. Cit. in disc. A man traded in his car to a dealer, signing over the title to a bank, which was to retain title until the dealer paid the bank the remaining amount due on the car. The dealer sold the automobile to a company without providing the title, as it never paid the bank and never acquired title. The original owner instituted an action for replevin against the dealer, and the purchaser filed a third-party action against the original owner. The trial court awarded the purchaser actual and punitive damages pursuant to a jury verdict. Reversing, this court held that the dealer who fraudulently sold the car to the purchaser was an independent contractor and was not acting as the agent for the original owner, and, thus, the original owner was not liable for the dealer's fraud. The court stated that an agency relationship did not exist because the original owner did not retain any right to control the dealer's subsequent conduct and the original owner left all the details regarding the disposition of the car to the dealer. Lange Co. v. Cleaning by House Beautiful, 793 S.W.2d 869, 871.

Mo.App.1988. Quot. in case quot. in disc. A juvenile charge of the state suffered a crushed arm while she was collecting trash on the premises of the youth services division under the direction of a state employee. When the juvenile and her mother sued the state for negligence, the trial court granted summary judgment to the defendant, based on the doctrine of sovereign immunity. Reversing and remanding, this court held that the state was liable under the common law doctrine of vicarious liability, because the state employee exercised actual control over the manner in which the juvenile performed her tasks. Bowman v. State, 763 S.W.2d 161, 164.

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Mo.App.1987. Cit. in disc. A contractor sued a city in a dispute over its obligation to install a waste water system. That dispute was settled, and the contractor released the city and its agents from all further claims. When the contractor then sued the city's engineering firm, the trial court granted the defendant's motion for summary judgment. Affirming, this court held that the defendant was the agent of the city in its dealings with the contractor and was included within the terms of the release. The court said that agency was a fiduciary relationship that resulted from the consent by one person, the principal, to another, the agent, for the agent to act on the principal's behalf and subject to the principal's control. The court stated that, although the engineering firm was an independent contractor to the extent it supplied professional engineering services, since it had a fiduciary obligation to the city, an agency was established. Tri-City Const. v. A.C. Kirkwood & Assoc., 738 S.W.2d 925, 931.

Mo.App.1985. Cit. in sup. A purchaser of a truck sued an automobile credit company after the truck was damaged by a repossessing company, which had been hired by the credit company to repossess the truck. The trial court awarded the purchaser damages. Reversing, this court held that the credit company was not responsible for the wrongs of the repossessing company, because it had no control or right of control over the physical conduct of the repossessing company in its performance of the contract. Scott v. Ford Motor Credit Corp., 706 S.W.2d 453, 460.

Mo.App.1974. Cit. in sup. The plaintiff judgment creditor served a summons of garnishment on the appellant who owed certain sums to the defendant judgment debtor. The amounts owed were for tractor trailers leased by the defendant to the appellant, a common carrier, which leases provided that the defendant would be responsible for all expenses incidental to the operation and maintenance of the vehicles and would be in turn compensated with a fixed percentage of the carrier's revenues. In upholding the garnishment against the carrier for the full amount of its indebtedness to the defendant, the court held that the defendant had an independent contractor relationship with the carrier, that his earnings were, therefore, not for personal services, and that the indebtedness was not protected against garnishment by the relevant provisions of the Consumer Credit Protection Act. Gerry Elson Agency, Inc. v. Muck, 509 S.W.2d 750, 755.

Mo.App.1967. Subsec. (2) quot. and subsec. (3) quot. in part in sup. The defendant insurance company was sued by the plaintiff, who sustained injuries when a car driven by one of the defendant's premium-collectors skidded across a highway dividing line and struck him. The case was remanded, as the trial court's instructions erroneously were concerned with a theory of "driving" on the wrong side of the road. However, the court here dismissed the defendant's contentions that the collector was an independent contractor and cited the several factors which would have permitted the jury to find that he was an agent. Jokisch v. Life & Cas. Ins. Co., 424 S.W.2d 111, 113.

Mo.App.1965. Quot. in sup. Plaintiff contested payment of taxes made under terms of employment security laws, claiming that the workers for whom the state demanded the tax payment were not "employees" within the provisions of the law. The court held that since the plaintiff made no effort to control the method of performance of services of the sales manager and telephone solicitors involved, they were independent contractors rather than employees. Hence, no tax could be imposed on plaintiff for their benefit. Handley v. State Division of Employment Security, 387 S.W.2d 247, 253.

Mo.App.1964. Subsec. (3) quot. in sup. in ftn. Defendant sheet metal subcontractor was held liable to indemnify a contractor against whom the plaintiff-homeowner had recovered judgment for a faulty installation of a fireplace. Defendant had performed all of the work without aid or supervision of the contractor and was therefore an independent contractor. Thus if there was negligence in the installation, the sheet metal company was liable to the contractor. Listerman v. Day & Night Plumbing and Heating Service, Inc., 384 S.W.2d 111, 114.

Mont.

Mont.1995. Cit. in case cit. in disc. Female employee sued her former employer for wrongful discharge, sexual harassment, assault, and violation of her basic personal rights, alleging that she was forced to quit because her supervisor sexually harassed her and the employer failed to do anything about it. The trial court dismissed the complaint on the ground that the Montana Human Rights Act (Act) provided plaintiff's exclusive remedy. Affirming, this court held, inter alia, that, because of the addition

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of "agent" to the Act's definition of "employer," the Act encompassed sexual harassment committed by one employee against another and was not limited to direct acts by the employer; therefore, the Act provided plaintiff's exclusive remedy for her supervisor's alleged sexual harassment. Fandrich v. Capital Ford Lincoln Mercury, 272 Mont. 425, 901 P.2d 112, 115.

Mont.1994. Quot. in case cit. in disc. Condominium unit owner sued condominium association and plumber hired by association to install a new heating system in owner's unit, alleging, inter alia, negligent workmanship by plumber resulting in the asbestos contamination of the unit. Reversing the trial court's granting of summary judgment for defendants and remanding, this court held that plumber and condominium association were not privies so as to bar plaintiff's suit against plumber under the doctrine of res judicata based on the dismissal of plaintiff's counterclaim in a prior lawsuit brought against plaintiff by the association. The court held that no agency relationship existed between plumber and condominium association that would establish a shared legal interest between them with regard to the asbestos contamination claim, since the association had no right of control over plumber's work. Holtman v. 4-G's Plumbing & Heating, Inc., 264 Mont. 432, 872 P.2d 318, 321.

Mont.1991. Quot. in case quot. in disc. A high school student sued the school district and her physical education teacher for negligence to recover damages for injuries she sustained during gym class. The trial court granted the defendants' motion for summary judgment on the ground that they were immune from suit. Reversing and remanding, this court held that, although the school district was immune from liability for the acts or omissions of its agent, the physical education teacher, the school district's purchase of liability insurance waived its immunity. Crowell v. School Dist. No. 7, 247 Mont. 38, 805 P.2d 522, 524.

Mont.1989. Subsec. (2) quot. in disc. A girl who was injured on an icy stairway at school was granted leave by the trial court to amend her complaint for negligence to add the school janitors as defendants. The trial court denied the janitors' motion for dismissal of the amended complaint on immunity and statute of limitations grounds. The janitors filed an application for relief via supervisory control from the trial court's order granting the plaintiffs leave to belatedly amend. Granting the application and remanding, this court held that by statute the janitors were agents of the school district, as manifested by their agency with the district's governing school board, and were immune from prosecution. The court stated that, since any failures by the school district to provide sufficient funding for maintenance of the sidewalk and employment of additional custodians were omissions by its legislative body, the school board, then the omissions of the janitors occurred during the lawful discharge of duties associated with the omissions by the school board. Eccleston v. Third Judicial Dist. Court, 240 Mont. 44, 783 P.2d 363, 368.

Neb.

Neb.1970. Cit. in sup. This was an action by administratrix of the estate of decedent who was fatally injured when an automobile in which he was a passenger collided with a milk tank truck. As to the issue of the agency between the milk truck driver and his alleged employer the court held, inter alia, that whether the driver was in fact an independent contractor or an employee of a cooperative creamery association was properly submitted to the jury in view of the fact that the cooperative maintained control over the driver's methods of carrying out the contract and that he had no more independence than employees in general enjoy. Sandrock v. Taylor, 185 Neb. 106, 174 N.W.2d 186, 191.

N.H.

N.H.1985. Subsec. (1) cit. in sup. The plaintiff worked as a clerk in the county's court, during which time he received prior service credits from a retirement plan created specifically for court clerks, but received no credit from a state retirement plan. The clerk sued the county, which had enrolled other employees in the state retirement plan, demanding that he be reinstated into the state retirement plan by "buying back" service credits for the years he worked for the county's court. The trial court found for the clerk. On appeal this court reversed, holding that the county was not the clerk's employer, as it had no managerial or fiscal control over him. Instead, the superior court exercised those controls over the clerk and was therefore his employer. Samaha v. Grafton County, 126 N.H. 583, 493 A.2d 1207, 1210.

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N.J.

N.J.2006. Subsec. (2) cit. in case quot. in sup. (general cite). Physician, who was a shareholder-director of a professional association of radiologists, sued the association, alleging, among other claims, a violation of the Conscientious Employee Protection Act (CEPA). The trial court granted summary judgment for association; the appellate division reversed. Reversing the appellate division's decision and reinstating the trial court's judgment, this court held that plaintiff was not sufficiently subject to the association's control and direction that she could reasonably be considered its employee within the meaning of CEPA; as chairperson of medical imaging, and one of five or six shareholder-directors who shared in the association's management and control, plaintiff was a powerful member of the association in a position to influence its operation. Feldman v. Hunterdon Radiological Associates, 187 N.J. 228, 244, 901 A.2d 322, 332.

N.J.1996. Subsecs. (2) and (3) cit. in disc. Landowners brought a groundwater contamination action against an oil company, the oil company's distributor, and the owner of an independent service station that sold the oil company's products. Plaintiffs alleged in part that oil company was vicariously liable for the discharge from the service station of petroleum products into the groundwater. Trial court granted defendants summary judgment. Appellate court affirmed in part, reversed in part, and remanded. This court affirmed, holding, inter alia, that plaintiffs' vicarious liability claim failed because they failed to prove that oil company hired service station owner as an independent contractor. Furthermore, neither the distributor nor the oil company exercised control over the operation of the service station. Bahrle v. Exxon Corp., 145 N.J. 144, 678 A.2d 225, 232.

N.J.1985. Cit. in conc. and diss. op. In a consolidated action, employees brought civil suits against their employer and its company physicians. The employees alleged that the employer and the physicians had intentionally exposed the employees to asbestos in the workplace and had deliberately concealed from the employees the risk of exposure. The trial court granted summary judgment to the employer but refused to dismiss the claims against the company physicians. The intermediate appellate court reversed the trial court's denial of the physicians' motion for summary judgment and affirmed the judgment in favor of the employer. Affirming in part, reversing in part, and remanding, this court adopted a "substantial certainty" standard in determining whether the employer had intentionally exposed the employees to asbestos and found that the employer was subject to a suit at common law. A concurring and dissenting opinion argued that the company physicians would have been more appropriately identified as independent contractors and should not have been granted coemployee immunity. Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161, 501 A.2d 505, 527, appeal after remand 226 N.J.Super. 572, 545 A.2d 213 (1988), cert. granted 113 N.J. 377, 550 A.2d 480 (1988).

N.J.Super.

N.J.Super.1993. Cit. in ftn. Employer brought an unfair competition action against former employee who, while still employed by plaintiff, formed a company to offer computer-related services in competition with plaintiff. The trial court entered judgment against defendant for $1,716, the gross receipts earned by defendant as the result of his unfair competition. Affirming, this court held that plaintiff was not entitled to recover the compensation it had paid defendant during the period of his disloyalty. The court stated that, even if reimbursement of past compensation were an appropriate measure of damages under New Jersey law, the record here was devoid of evidence pinpointing the pay period in which each disloyal act was committed and showing the amount of compensation apportioned to that period. Simulation Systems v. Oldham, 269 N.J.Super. 107, 634 A.2d 1034, 1036.

N.J.Super.1988. Com. (b) quot. in disc. The owner of rental premises submitted a claim to its insurer for damages caused by vandalism and freezing of the plumbing system. The insurer refused to pay, arguing that the owner had not complied with the requirement that the water supply be shut off and the pipes drained. The owner sued to recover the loss, and the trial court, after receiving the jury's answers to special interrogatories, entered judgment for the plaintiff on the vandalism count and dismissed the freezing-loss count. Reversing and remanding, this court held that the jury's answers to the special interrogatories were contradictory and warranted a retrial. The court stated that the dispositive question was not whether the realty company, which had been responsible for turning off the water, was the plaintiff's agent but only whether the plaintiff acted with reasonable care in instructing the company to get the draining job done. JMB Enterprises v. Atl. Emp. Ins., 228 N.J.Super. 610, 550 A.2d 764, 767.

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N.M.

N.M.1996. Quot. in case quot. in disc. Survivors of employee of independent contractor who was electrocuted while working on an airport renovation project sued general contractor for, inter alia, wrongful death. Defendant moved for summary judgment on the ground that the workers' compensation act provided plaintiffs' exclusive remedy, and, under the act, defendant was immune from liability for injuries sustained by statutory employees. The trial court granted the motion. Reversing, this court held that workers' compensation immunity was inapplicable where the injured party was an independent contractor; that whether decedent was an independent contractor depended on various factors, including the extent of control, if any, that defendant could rightfully exercise over his work; and that defendant, having neglected to present evidence of decedent's employment status, failed to make a prima facie showing entitling it to summary judgment. Chavez v. Sundt Corp., 122 N.M. 78, 920 P.2d 1032, 1036.

N.M.1996. Quot. in sup., com. (d) quot. in sup. In two separate actions, injured employees of subcontractors were denied payment of workers' compensation benefits from the general contractors. The cases were consolidated for appeal, and the court of appeals held that the subcontractors were not independent contractors under the Workers' Compensation Act and that the general contractors were "statutory employers" responsible for paying the benefits. Reversing in part and remanding, this court adopted the "right-to-control" test of the Restatement (Second) of Agency § 220 for distinguishing a "servant" from an independent contractor, an approach mirrored in s 2's definition of "independent contractor." The court concluded that the general contractors were not statutory employers and thus were not liable for payment of the benefits. Harger v. Structural Services, Inc., 121 N.M. 657, 916 P.2d 1324, 1331.

N.M.App.

N.M.App.2005. Subsec. (3) quot. in disc. After participant in a training exercise conducted by an air ambulance service was killed in a helicopter crash, personal representatives of decedent's estate brought a negligence action against, among others, hospital whose helicopter pad was used by the service as its base of operations. The trial court directed a verdict for plaintiffs on defendant's duty of care, and entered judgment on a jury verdict for plaintiffs. Reversing and remanding, this court held that the fact issue of whether an employer-independent contractor relationship existed between defendant and service was improperly decided by the trial court rather than the jury for purposes of determining the existence of a duty of care. Talbott v. Roswell Hosp. Corp., 2005-NMCA-109, 138 N.M. 189, 118 P.3d 194, 197.

N.M.App.1998. Com. (a) cit. in diss. op. Individual was shot and killed while visiting friends who were house-sitting for third party/homeowner; individual's parents brought wrongful death action against homeowner and sitter who fired the fatal shot. The trial court entered summary judgment for homeowner. Reversing, this court held that material factual issues existed as to the existence of an employer-employee relationship between homeowner and house sitters, who were to perform certain services; whether, and to what extent, homeowner retained the right to control the manner in which sitters performed their duties; whether sitter's failure to secure homeowner's firearms as instructed constituted an omission occurring within the scope of employment; and whether the shooting was foreseeable. Dissent believed that homeowner had no right to control the way in which sitters did their job, and that the game of horseplay during which decedent was shot was both unforeseeable to and unauthorized by homeowner. Madsen v. Scott, 125 N.M. 475, 963 P.2d 552, 561.

N.M.App.1981. Cit. in sup. The plaintiff sought to recover for conversion. Both the plaintiff and the defendant had permission to remove material from a community pit. The plaintiff stockpiled material near the front of the pit. The defendant then ordered a loader operator to create a path through the stockpiled material and remove material from behind the stockpile. When the plaintiff returned much of its stockpiled material was missing. The defendant asserted that it was not liable because the loader operator was an independent contractor. The trial court found for the plaintiff and the defendant appealed. The court affirmed. The court held that it was the nature of a relationship, not the name given it by the parties, which controlled how a court would characterize that relationship for assessing liability. Ulibarri Landscaping, Etc. v. Colony Materials, 97 N.M. 266, 639 P.2d 75, 78, 79.

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N.Y.

N.Y.2003. Subsec. (3) quot. in case quot. in sup. Plaintiff sued city school construction authority and contractor to recover damages for injuries he allegedly sustained when piece of concrete fell from classroom wall during school-renovation project. Denying contractor summary judgment, the court held that fact issues existed as to whether contractor was an independent contractor or an agent entitled to benefit of one-year statute of limitations for proceedings against authority's agents. Marmolejo v. New York School Construction Authority, 195 Misc.2d 708, 711, 761 N.Y.S.2d 772, 775.

N.Y.1979. Cit. in diss. op. in sup. Plaintiff, a real estate broker brought an action to recover a commission, and attempted to commence an action against the defendant buyer by serving a copy of the summons upon a corporation, one of the joint venturers. The lower court denied a motion to dismiss the defense of lack of personal jurisdiction, and thereupon dismissed the complaint against the defendant. On appeal, the court reversed, holding that where service of the summons was made upon the secretary-receptionist of the joint venture, who told the process server that she was authorized to accept it, service was proper, notwithstanding the claim that service was not in accordance with a statute providing that service shall be made upon a corporation by delivering a summons to an officer, director, cashier or any agent authorized by appointment or by law to receive service. The dissent would affirm the lower court, holding that because plaintiff chose to obtain jurisdiction over the defendant joint venture by serving one of the corporate joint venturers, it was required to effectuate service upon that corporation pursuant to the service requirements of the state statute, and that service upon the secretary-receptionist was improper. The secretary-receptionist was not an officer, director, cashier, or assistant cashier of the joint venture, nor was she either a general or managing agent or any other agent authorized by appointment to receive service. She was a receptionist and typist whose job it was to answer the telephone and perform secretarial services for persons employed in the office of the corporation. There was no showing that she had the power to act on behalf of the corporation in its business dealings or that she was clocked with discretion to act on behalf of the corporation, which is the hallmark of an agent. The dissent also noted that the corporation did not acquiesce in the unauthorized receipt of process or ratify the acceptance of the summons. “In fact respondent has specifically moved to dismiss upon the grounds that her receipt of the summons was unauthorized.” Sullivan Rlty. Organ. v. Syart Trading Corp., 68 A.D.2d 756, 417 N.Y.S.2d 976, 980.

N.Y.1977. Com. (a) cit. in sup. An employer brought suit against one of its own senior contract specialists, alleging that by virtue of his employment with plaintiff, defendant was instrumental in securing the awarding of a contract to a particular construction company, and that he demanded, and received, payment by that company for obtaining the contract for it. Plaintiff claimed that this was done by defendant in violation of his duty of loyalty to plaintiff. The trial court denied defendant's motion to dismiss the complaint as being barred by the statute of limitations, and an appellate court affirmed. The Court of Appeals affirmed, holding that the action was governed by the six-year statute of limitations applicable to actions upon a contractual obligation or liability, and not by the three-year statute of limitations pertaining to actions to recover damages for injury to property; that in determining the obligations running between employer and employee, the relevant law is that of master-servant and principal-agent; and that an employee must not seek to acquire indirect advantages from third persons for performing duties and obligations owed to his employer. Western Elec. Co. v. Brenner, 41 N.Y.2d 291, 392 N.Y.S.2d 409, 411, 360 N.E.2d 1091, 1093, 1094.

N.Y.Sup.Ct.App.Div.

N.Y.Sup.Ct.App.Div.2004. Cit. in disc. In an action against a Cayman Islands corporation, its directors, and a bank that served as financial manager under a subscription agreement, the trial court dismissed, inter alia, plaintiff's claims for breach of fiduciary duty against bank and bank's employees. Affirming, this court held, in part, that defendants were not plaintiff's agents because plaintiff lacked the requisite control. The court said that the parties merely had an arm's-length business relationship. SNS Bank, N.V. v. Citibank, N.A., 7 A.D.3d 352, 356, 777 N.Y.S.2d 62, 66.

N.Y.Sup.Ct.App.Div.1997. Com. (a) cit. in case quot. in disc. A director of emergency medical services for a hospital sued the hospital for lost wages and reinstatement, alleging that he was terminated in retaliation for his investigation into an incident in

which emergency medical technicians declared a patient dead when she was in fact still alive. The hospital counterclaimed for breach of fiduciary duty and fraud. The trial court denied the hospital's motion to add those counterclaims except those based on plaintiff's alleged falsifications of his time records. This court affirmed as modified, holding, inter alia, that the allegations of false time records could proceed under the counterclaim for fraud only. The court stated that the possible absence of economic loss to defendant did not require the conclusion that defendant had failed to state a cause of action. While a trier of fact might conclude that the hospital sustained no consequential damages, it nevertheless stated a valid cause of action in contract for which nominal damages were recoverable. Rodgers v. Lenox Hill Hosp., 239 A.D.2d 140, 657 N.Y.S.2d 616, 617.

N.Y.Sup.Ct.App.Div.1987. Subsec. (3) quot. in sup. A seller sued homeowners and a renovator to recover the balance due on goods sold to the renovator and delivered to the homeowners' residence. The trial court severed the actions and granted summary judgment to the plaintiff against the renovator. Affirming, this court held that the renovator was liable for the balance due on the merchandise delivered to the homeowners' residence because according to the terms of the contract entered into by the defendants, the renovator was acting as an independent contractor rather than as the homeowners' agent when it purchased the goods from the plaintiff. E.B.A. Wholesale v. S.B. Mechanical Corp., 127 A.D.2d 737, 512 N.Y.S.2d 130, 131.

N.Y.Sup.Ct.App.Div.1981. Com. (a) cit. in disc. Former wife brought action against her former husband seeking to set aside, upon grounds of fraud, an agreement which had the effect of modifying the child support and alimony provisions of an Illinois divorce decree. The lower court entered an order which denied the husband's motion to dismiss the wife's complaint upon the grounds of lack of personal jurisdiction and the bar of the statute of limitations, and the husband appealed. The appellate court held, inter alia, that the husband, who was under a duty to disclose to the wife his true income and who did not disclose to his attorney his true income, was liable for the misrepresentation of his attorney to the wife, with respect to his income, regardless of whether the attorney made the misrepresentations innocently. The court found that the attorney was the husband's agent and not an independent contractor and that, as the master, the husband may be liable for the misrepresentation of his servant under the theory enunciated in Section 256 of the Restatement (Second) of Agency. Accordingly, the lower court's judgment was affirmed. Abbate v. Abbate, 82 A.D.2d 368, 441 N.Y.S.2d 506, 515.

N.Y.Sup.Ct.App.Div.1976. Quot. in part in diss. op. Plaintiff administratrix of the estate of a ten-year-old decedent brought this wrongful death action, arising out of decedent's drowning, against an organization to whose custody the child had been entrusted. The lower court entered an interlocutory judgment of liability against defendant and directed further proceedings for an assessment of damages, and defendant appealed. The court, in a memorandum opinion, affirmed, holding that whether an agency relationship existed between the organization and the volunteer who was entrusted with the custody of the child at the time of its death was a question for the jury, that the evidence was sufficient to support the finding that such agency relationship existed, and that the trial court properly ordered further proceedings to determine the question of damages. The dissent, citing the Restatement's definition of the agency relationship, stated that defendant should not have been held liable under the principle of respondent superior, since defendant did not have the ability, or the right, to control the conduct of the child's custodian. Garcia v. Herald Tribune Fresh Air Fund, Inc., 51 A.D.2d 897, 380 N.Y.S.2d 676, 680.

N.Y.Sup.Ct.

N.Y.Sup.Ct.1984. Subsec. (3) cit. in sup. Plaintiff, allegedly harassed and assaulted by a process server in his attempt to serve a complaint upon her employer, sued the process server, the process server's employer, and the law firm that engaged the process server. This court dismissed the complaint against the law firm, finding that it did not retain sufficient control over the process server to be liable for the process server's alleged malfeasance. Bockian v. Esanu Katsky Korins & Siger, 124 Misc.2d 607, 476 N.Y.S.2d 1009, 1013.

N.Y.Sup.Ct.1961. Com. (b) quot. in part in sup. In stockholder's derivative action which corporation sought to vacate because of improper service, fact that service was made on officer of corporation was proper, since officer was duly authorized agent of the corporation. Ackert v. Ausman, 29 Misc.2d 971, 218 N.Y.S.2d 811, 827.

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N.Y.Cl.Ct.

N.Y.Cl.Ct.1987. Cit. in disc. A county sued a state to recover money it paid to settle tort claims, alleging that it was coerced into paying the settlement figure by the state's insurer. The court held, inter alia, that the county was entitled to recovery because the insurance company was liable for wrongfully disclaiming liability on the morning of the trial and thereby depriving the county of the opportunity to prepare and present an effective defense. The court stated that liability was vicariously imputed to the state because it voluntarily assumed a contractual duty to prepare the county's defense. The performance of such a duty can often be delegated, but the principal cannot escape the duty simply by delegation and thus can be held liable for his agent's failure to fulfill the duty. The court noted that whether liability is imposed on a principal often depends on his relationship with his agent, but this case illustrates an exception to the general rule that a principal is not liable for the wrongs of an independent contractor or nonservant agent. Sullivan County v. State, 135 Misc.2d 810, 517 N.Y.S.2d 671, 674, judgment affirmed 137 A.D.2d 165, 528 N.Y.S.2d 227 (1988).

N.C.

N.C.2004. Subsec. (3) cit. in disc. After contractor who visited rental home to prepare estimate on demolition of home was injured when tenant's dogs attacked him, he brought a strict-liability claim against tenant and negligence claims against landlord and tenant. The trial court entered judgment on a jury verdict for plaintiff, but the court of appeals reversed. Reversing, this court held, inter alia, that landlord had control over the harboring of the dogs, and had the ability to order its management company to order tenant to remove the dogs. Therefore, management company was landlord's agent, and landlord was liable for management company's negligence in permitting tenant to keep the dogs despite its knowledge that the dogs had previously attacked others. Holcomb v. Colonial Associates, L.L.C., 358 N.C. 501, 597 S.E.2d 710, 716, rehearing denied 359 N.C. 198, 607 S.E.2d 270 (2004).

N.C.1996. Cit. in case quot. in disc. A guardian ad litem brought suit under the tort claims act against the state department of human resources on behalf of a minor child who had been abused by his stepfather, alleging that the department had failed to adequately respond to reports of abuse. The industrial commission denied defendant's motion for summary judgment, and the appellate court affirmed. This court affirmed, holding that, regarding the provision of child protective services, there existed a sufficient agency relationship between the department of human resources and the county director of social services and his staff such that the doctrine of respondeat superior was implicated. Based on the statute governing social services, the department had substantial and official control over the provision of child protective services and had designated the county director as the person responsible for carrying out the policies formulated through the department. Gammons v. NC Dept. of Human Resources, 344 N.C. 51, 472 S.E.2d 722, 726.

N.C.1979. Cit. in sup. Claimant filed a claim against the Department of Human Resources under a Tort Claims Act, alleging that a foster child with a contagious virus was negligently placed in her home by the county department of social services. The department moved to dismiss the claim for lack of jurisdiction, contending that the department of social services is not a state department and that the director and the employees are not State employees. The Industrial Commissioner held that the industrial commission did have jurisdiction. This order was affirmed by the full commission and by the appeals court. The Supreme Court also affirmed, holding that with respect to the principles of agency law and respondeat superior, the department of human resources is a department of the state. Therefore the industrial commission did have jurisdiction to determine whether the claimant's injuries arose as a result of a negligent act of the director or his staff while acting within the scope of their obligation to place children in foster homes. Vaughn v. North Carolina Dept. of Human Res., 296 N.C. 683, 252 S.E.2d 792, 795.

N.C.App.

N.C.App.2013. Subsec. (3) quot. in sup. Dump-truck driver who was injured while unloading logs that he had delivered for his employer to a sawmill brought a negligence action against sawmill operators, alleging, among other things, that defendants

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owed him a nondelegable duty to provide him with a safe working environment due to the inherently dangerous nature of the work that plaintiff was performing on their property. The trial court granted summary judgment for defendants. Affirming, this court held that defendants did not owe plaintiff a nondelegable duty to provide him with a safe place to unload his logs, because neither plaintiff nor his employer had an independent-contractor relationship with defendants; instead, plaintiff was merely delivering a load of logs to be sold to defendants. Although a seller (or the employee of a seller) was entitled to the same legal protections as all persons lawfully on a landowner's premises, he was not entitled to the additional protections afforded to independent contractors, or their employees, who were hired by the landowner to engage in inherently dangerous activities. Burnham v. S & L Sawmill, Inc., 749 S.E.2d 75, 82.

Ohio,

Ohio, 2015. Subsec. (3) quot. in diss. op., cit. in case quot. in diss. op. Charter schools' governing boards brought claims for, among other things, breach of fiduciary duty against companies that plaintiffs contracted with to operate and manage the schools, alleging that defendants used money provided by plaintiffs to purchase buildings in their own names, rather than plaintiffs', and used the buildings for their own benefit, rather than for the schools. The trial court denied in part plaintiffs' motion for partial summary judgment; the court of appeals affirmed. This court reversed in part, holding that, under the parties' contracts, defendants had a fiduciary duty to plaintiffs. The dissent argued that, although independent contractors could sometimes also be agents under Restatement Second of Agency § 2(3), defendants were independent contractors that were not also agents, because the contracts showed that plaintiffs conferred on defendants all functions relating to the management of the schools, leaving plaintiffs with no control over management. Hope Academy Broadway Campus v. White Hat Mgt., L.L.C., 145 Ohio St.3d 29, 47, 46 N.E.3d 665, 681.

Ohio

Ohio, 1988. Cit. in disc. After an independent trucker who was supplied with a shipper's tractor and trailer died in an accident, his son sued the shipper for workers' compensation death benefits. The trial court on a jury verdict affirmed an award of benefits by the workers' compensation board to the plaintiff, and the intermediate appellate court affirmed. Affirming, this court held that, because the plaintiff submitted sufficient evidence to permit reasonable minds to differ on the issue of who had the right to control the manner or means of doing the work, the trial court did not abuse its discretion in submitting the issue to the jury. Bostic v. Connor, 37 Ohio St.3d 144, 524 N.E.2d 881, 884, rehearing denied 38 Ohio St.3d 711, 533 N.E.2d 364 (1988).

Okl.

Okl.2004. Subsec. (3) quot. in ftn. to diss. op. After third-party administrator for self-funded county health-insurance program denied insured's claim for emergency medical treatment and tonsillectomy, insured sued administrator for breach of contract and breach of tort duty of good faith and fair dealing. Trial court entered judgment for administrator, holding that administrator was not in privity with insured. Appeals court affirmed. This court vacated appeals court and affirmed trial court, holding that administrator did not owe insured a duty of good faith and fair dealing, since it did not act sufficiently like an insurer. Dissent argued that trial court should conduct fact-based inquiry to determine whether administrator functioned as county's nonemployee agent or as independent contractor. If agency relationship existed between administrator and county, administrator could be liable for bad-faith tort. Wathor v. Mutual Assur. Adm'rs, Inc., 2004 OK 2, 87 P.3d 559, 567.

Okl.App.

Okl.App.1995. Subsec. (3) cit. in headnote and quot. in sup. Motorist whose car was struck by a limb that fell from a tree being trimmed by a professional trimmer hired by homeowners brought a negligence action against homeowners. Affirming the trial court's grant of summary judgment for defendants, this court held, inter alia, that defendants were not liable for the allegedly

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tortious acts of the professional trimmer, who was an independent contractor rather than an agent or employee of defendants. Lane-Hill v. Ruth, 910 P.2d 360, 361, 362.

Okl.Crim.App.

Okl.Crim.App.1990. Subsec. (3) quot. in disc. A concessionaire's contract with the city to collect fees and issue camping and fishing permits specified that the concessionaire was an independent contractor and not an employee. When fees collected were not turned over to the city as required, the concessionaire was charged with embezzlement under a statute that did not expressly include independent contractors but included agents, defined to the jury as one who is given the authority to act for, and in the name of, another. She was convicted by the jury. This court affirmed the conviction, holding that the concessionaire was both an independent contractor and an agent of the city within the meaning of the statute. The court noted that the city had assumed the right to control the concessionaire's conduct, and in performing a municipal function, the concessionaire owed the city loyalty and obedience. Morrison v. State, 792 P.2d 1189, 1191.

Or.App.

Or.App.2000. Coms. (a) and (b) cit. in ftn. Motorists were injured when their car was struck by pilot car whose driver was returning from having delivered a mobile home; motorists sued manufacturer of mobile home, among others, for negligence, arguing that defendant was vicariously liable for the actions of its agent. The trial court entered summary judgment for defendant. Affirming in part, reversing in part, and remanding, this court held, inter alia, that a reasonable juror could find that driver was the employee of the pilot-car lessor employed by defendant, which was sufficient to render driver defendant's employee as well, and that the "special errand" exception to the "going and coming" rule of nonliability applied. Brown v. Pettinari, 165 Or.App. 279, 994 P.2d 1231, 1233.

Or.App.1980. Quot. in sup. The plaintiff filed an action, seeking to recover damages for personal injuries alleged to have been suffered by her at a social party held at a fraternity house owned by the defendant corporation. The lower court entered judgment of involuntary nonsuit in favor of the defendant, and the plaintiff appealed. On appeal, the court had to find whether there was sufficient evidence from which the jury could have found that the defendant corporation was liable for the acts of the members of the local fraternity or for its failure to supervise those members. The court noted that the plaintiff had to prove not only that an agency relationship existed between the defendant and the members of the fraternity, but also that the defendant had a right to control the physical details of the members' actions as in the relationship of master and servant. The court held, inter alia, that the evidence, and the inferences to be drawn therefrom, did not show that the defendant had a right to control the actions of the officers and members of the fraternity and, therefore, the defendant could not be held vicariously liable for the negligent acts of the fraternity members. The judgment of the lower court was affirmed. Stein v. Beta Rho Alumni Ass'n, Inc., 49 Or.App. 965, 621 P.2d 632, 636.

Or.App.1979. Subsec. (2) quot. in disc. An apartment complex resident manager brought an action against mini-warehouse partners, a resident warehouse manager and her husband for injuries sustained when the husband closed the car door on the apartment manager's head after she had gone to the warehouse to discuss the warehouse manager's son's vandalism at the apartment complex. The lower court granted the warehouse partner's motion for summary judgment, and the apartment manager appealed. On appeal, the court reversed holding that substantial fact issues, precluding summary judgment, existed as to whether the warehouse manager's husband was the agent of the warehouse partners at the time of the incident and whether in closing the car door on the apartment manager's head, he was acting within the scope of this authority. Jones v. Herr, 39 Or.App. 937, 594 P.2d 410, 412.

Pa.

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Pa.1970. Com. (a) quot. in sup., subsecs. (1) and (2) quot. in sup. In an auto collision case the court partially repudiated the imputed contributory negligence doctrine (which charged the owner-passenger with the contributory negligence of the driver), and affirmed a jury verdict for the plaintiff. The concurring opinion argued that the court did not go far enough, noting that the court followed the Restatement which retained the doctrine in the areas of master servant relationships and joint enterprise. Smalich v. Westfall, 440 Pa. 409, 269 A.2d 476, 481.

Pa.1960. Cit. in sup. and cit. in diss. op. Where taxpayer entered into contract with clients to prepare and serve food to employees at prices fixed by clients, who furnished equipment, including space and napery and cutlery, and client paid deficits when expenses exceeded charges and a refund was made of excess of charges over expenses to clients, and taxpayer bought, stored and took all price advantages on food, supplied labor and put forth meals as agreed upon with clients, it was acting more as an independent contractor than as the agent of clients and was not liable for tax on its gross receipts, under city mercantile license tax ordinance. Tax Review Bd. v. Slater System, Inc., 398 Pa. 477, 158 A.2d 561, 568.

Pa.Super.

Pa.Super.1988. Subsecs. (1) and (2) quot. in case quot. in sup. A shoplifter sued a department store for injuries he sustained while being pursued and apprehended by an employee of another store. The trial court granted summary judgment to the store on the ground that it could not be liable because it was not the employer of the person who chased the plaintiff. Affirming, this court held that the store would have been liable only if a master-servant relationship had existed between itself and the other store's employee. The court reasoned that there was no such relationship in this case because the store had not agreed to let the apprehender act for it and had had no control over his conduct. Mapp v. Gimbels Dept. Store, 373 Pa.Super. 210, 540 A.2d 941, 943.

Pa.Super.1986. Subsecs. (1) and (2) and com. (a) quot. in disc. Two union members and a security guard who were shot by other union members during picketing activities sued their international and local unions for personal injuries, claiming that the shootings were a result of the unions' negligence in failing to control the picket line. The trial court entered judgment for the three injured plaintiffs, awarded damages, and denied post-verdict motions for a new trial or judgment n.o.v. The unions appealed, contending that the plaintiffs' right to recovery was delimited by the provisions of the Pennsylvania Labor Anti-Injunction Act and that the shooting was unforeseeable and beyond the ambit of the unions' responsibility. This court reversed and entered judgment n.o.v., noting that the purpose of the statute was to shield unions and their membership from liability for unlawful and unauthorized acts of persons associated with the union. The court also dismissed the plaintiffs' argument that the unions were liable on the agency theory of apparent authority, since the plaintiffs could not be said to have relied on the apparent authority of the culpable union members acting as agents of the union to avoid being the victims of the shooting incident. Gajkowski v. Intern. Broth. of Teamsters, Etc., 350 Pa.Super. 285, 504 A.2d 840, 849, order affirmed in part, reversed in part 515 Pa. 516, 530 A.2d 853 (1987).

Pa.Super.1979. Subsec. (2) cit. in disc. The owner of a tractor-trailer brought an action against the defendant to recover the amount required to repair his tractor-trailer after it had been involved in an automobile accident. The trial court directed a verdict in favor of the plaintiff. On appeal, the court held, inter alia, that the driver of the plaintiff's tractor-trailer was not a servant of the plaintiff, since the plaintiff did not have the right to control the physical conduct of the driver. Thus, the contributory negligence of the driver did not bar recovery by the plaintiff. Turley v. Kotter, 263 Pa.Super. 523, 398 A.2d 699, 702.

Pa.Cmwlth.

Pa.Cmwlth.1979. Coms. (a) and (c) cit. in ftn. The plaintiff's license as an official inspection station was suspended because one of the plaintiff's employees falsified the inspection records kept by the plaintiff. The plaintiff appealed an order which upheld the suspension and argued that because the plaintiff had not known of the employee's actions and because the employee's knowledge was not imputable to the plaintiff, the decision should be reversed. This court agreed with the plaintiff and held that it would be

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unjust to hold an employer liable for the misdeeds of a servant or agent when the one in a managerial position had no knowledge of the employee's misdeeds. J.C. Penney Co. v. Com. Dept. of Transp., 45 Pa.Cmwlth. 520, 405 A.2d 1041, 1042, 1043.

R.I.

R.I.1978. Cit. in disc. Sister of deceased brought action to compel deceased's children to convey to her the legal title to certain real estate that sister conveyed to deceased upon his representation that there were certain liens that needed to be attended to. Deceased assured sister that her interest was protected and that the real estate was still hers. The trial court found that the facts warranted the imposition of both a resulting and constructive trust on the property. On appeal, the court affirmed and ruled that an agency relationship had been created between the sister and the deceased when she allowed the deceased to act in her behalf in clearing up liens, and that the deceased had breached his fiduciary obligation as agent. Cahill v. Antonelli, _ R.I. _, 390 A.2d 936, 939.

S.C.App.

S.C.App.1984. Subsec. (3) cit. in sup. Defendants and the attorney-general cross-appealed from a judgment in this action brought under the state's unfair trade practices act. This court affirmed in part, reversed in part, and remanded. A real estate developing corporation contracted to have a broker sell its lots in a subdivision and collect the proceeds for it in exchange for commissions. The broker and his salesmen made numerous misrepresentations to buyers. This court, inter alia, found that the developer could be liable on agency theory. The evidence showed that the broker was an agent as well as an individual contractor. Moreover, though the developer, the broker, or both may have been unaware of the misrepresentations of the salesmen, they were still liable, as a principal was liable for all acts of an agent or subagent acting within the scope of his agency. State ex rel. McLeod v. C & L Corp., Inc., 280 S.C. 519, 313 S.E.2d 334, 338.

S.D.

S.D.2002. Subsec. (2) quot. in disc. After house-trailer owner's granddaughter was killed while helping to remove an addition to the trailer, decedent's estate brought a wrongful-death action against owner. The trial court entered judgment on a jury verdict for defendant. Reversing and remanding, this court held, inter alia, that the trial court erred in refusing to instruct the jury on the law regarding gratuitous employees and respondeat superior. Buisker v. Thuringer, 648 N.W.2d 817, 820.

S.D.1987. Subsec. (3) quot. in ftn. An employee of a painting subcontractor, engaged by the general contractor to paint a newly constructed water tower, was injured in a fall at the site as a result of the subcontractor's negligence. The injured employee sued, inter alia, the owner of the water tower; the trial court granted summary judgment to the owner. Affirming, this court held that the subcontractor was an independent contractor, and the owner was not liable for physical harm to another resulting from acts or omissions of an independent contractor or its servants. Haufle v. Svoboda, 416 N.W.2d 879, 880.

Tenn.App.

Tenn.App.1964. Com. (b) cit. in case quot. in sup. Plaintiff, a defendant in a prior negligence case, sued his insurance carrier for not defending him in the prior case. Defendant insurance carrier answered stating that they only were to defend him if an independent contractor was involved. The complaint in the prior negligence case alleged an agency relationship. The court held that the term “agent” was not inconsistent with the term “independent contractor” and that while an “independent contractor” was in contrast to a “servant,” they were both “agents.” Since there was doubt as to which was meant, the insurance carrier was obligated to defend. Dempster Bros., Inc. v. United States Fidelity & G. Co., 54 Tenn.App. 65, 388 S.W.2d 153, 156.

Tex.

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Tex.1983. Com. (b) cit. in sup. An oil company contracted with a lease service for the maintenance of lease sites. An indemnity clause held the oil company harmless for injuries to employees of the lease service or of its subcontractors. An independent contractor secured by the lease service brought suit against both the oil company and the lease service for injuries sustained while performing work requested by the oil company. A jury returned a verdict for the plaintiff, and the trial court denied the oil company's cross-claim under the indemnity clause. The court of appeals reversed as to the cross-claim. This court reversed, holding that as an independent contractor the plaintiff could not be deemed an employee. The plaintiff's claim therefore did not fall within the scope of the indemnity clause. Ideal Lease Service v. Amoco Production Co., 662 S.W.2d 951, 952.

Tex.App.

Tex.App.2018. Cit. in sup. Heating, ventilation, and air-conditioning contractor brought a claim for breach of fiduciary duty against former employee who formed and began operating a competing business while still employed by plaintiff. The trial court entered judgment on a jury verdict for plaintiff. Affirming in part, this court held that the trial court did not abuse its discretion by instructing the jury that defendant owed a fiduciary duty to plaintiff. The court rejected defendant's argument that he was not a manager of plaintiff, reasoning that defendant knew what work plaintiff was bidding on and the price it was quoting, and that he owed plaintiff a duty not to solicit plaintiff's customers by submitting competing bids for the same work. The court cited Restatement Second of Agency §§ 2 and 25 and Restatement Third of Agency § 1.01 in support of the proposition that an employee–employer relationship was a species of the formal principal–agent relationship, and that, when a fiduciary relationship of agency existed between an employee and an employer, the employee had a duty to act primarily for the benefit of the employer in matters connected with the employment. Salas v. Total Air Services, LLC, 550 S.W.3d 683, 690.

Tex.App.1995. Subsecs. (2) and (3) cit. in diss. op., com. (b) quot. in diss. op. Insured sued insurer for Insurance Code (Code) violations when insurer denied its claim for contractual liability coverage. Insurer brought third-party complaint against local insurance agency that wrote the policy, alleging breach of fiduciary duty and agency agreement. When local agency testified at trial that coverage was erroneously denied because of a clerical mixup, the trial court entered judgment on a jury verdict awarding insured $1.8 million for insurer's unknowing Code violations but finding no breach by local agency. Modifying and affirming, this court held, inter alia, that agency's knowledge of the clerical error was imputed to insurer as principal and, therefore, for purposes of the Code, insurer denied coverage knowingly. Punitive damages were found appropriate as authorized by statute. Dissent believed that the Code clearly defined the relationship between insurer and local agency, there was no reason to refer to the common law of agency for further clarification, insurer could not be held liable on an imputed knowledge theory where local agency was not a servant but an independent contractor, and punitive damages were improper. Md. Ins. v. Head Indus. Coatings, 906 S.W.2d 218, 246, 246-247.

Utah,

Utah, 2014. Quot. in diss. op., subsec. (2) quot. in sup. Motorcyclist brought a negligence action against private university and its traffic cadet, alleging that he was injured in a motor-vehicle accident caused by cadet's negligent direction of traffic exiting a football-stadium parking lot. The trial court dismissed plaintiff's complaint on the ground that he failed to file a timely notice of claim with the city under Utah's Governmental Immunity Act. The court of appeals reversed in part. Reversing, this court held that defendants were servants, and therefore employees, of the city for purposes of applying the Act, because, pursuant to Restatement Second of Agency § 2(2), city retained the right to control the manner in which defendants directed traffic. The dissent argued that defendants were city's independent contractors, thus excluding them from the statutory definition of employee, because their relationship with city stemmed from a nonbinding ordinance that authorized university cadets to direct traffic in certain circumstances, but did not indicate that city reserved any right to control them, pursuant to § 2. Mallory v. Brigham Young University, 2014 UT 27, 332 P.3d 922, 928, 933.

Utah App.

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Utah App.2012. Cit. and quot. in sup. Motorcyclist brought a personal-injury action against university and university traffic cadet, among others, alleging that he was struck by an automobile after cadet directed him out of a university parking lot. The trial court dismissed the complaint, holding that, because cadet was directing traffic under color of city's authority, she was an employee of the city and was entitled to governmental immunity under the Governmental Immunity Act of Utah (GIAU). Reversing in part and remanding, this court held that the evidence was insufficient to determine if defendants were acting under city's control and direction while performing traffic-control activities, such that they were agents of the city acting as its employees and were expressly covered by the GIAU. Mallory v. Brigham Young University, 2012 UT App 242, 285 P.3d 1230, 1240.

Vt.

Vt.2018. Subsec. (2) quot. in ftn. and in diss. op. Worker who was hired to repair a furnace at a rental property sued owners of the property, after owners' grandson, who suffered from mental illness, near-fatally attacked him, alleging that owners were vicariously liable for the negligence of their son, who managed the property, in hiring grandson to paint the property and in supervising grandson's work. The trial court granted summary judgment for owners. Affirming, this court held that owners were not vicariously liable for son's alleged negligence, because there was no employer–employee relationship between owners and son under the right-to-control test. The court noted that worker made no claim that son was acting as owners' agent under Restatement Second of Agency § 2, such that owners were directly liable for son's actions. The dissent cited § 2 in arguing that a jury could reasonably infer that owners had the right to control the means and methods of son's work as property manager at their rental property, so as to make them potentially liable for his conduct in hiring and supervising grandson. Kuligoski v. Rapoza, 183 A.3d 1145, 1150, 1155.

Vt.2017. Subsec. (1) cit. and quot. in sup. Roofer brought an action against his grandfather, alleging that he fell from the second-story roof of defendant's building after defendant had ordered him to begin roofing work despite the roof's icy condition. The trial court granted summary judgment for defendant on plaintiff's premises-liability claim and denied plaintiff's motion to amend the complaint to add an unsafe-workplace claim. This court reversed and remanded, holding, inter alia, that a factual dispute over the right to control plaintiff's work precluded summary judgment on the unsafe-workplace claim. The court noted its reliance on the definition of "master" set forth in Restatement Second of Agency § 2(1) in emphasizing that the essential element of the master-servant relationship was the right to control. LeClair v. LeClair, 169 A.3d 743, 757.

Vt.1995. Subsecs. (2) and (3) quot. in disc. A teacher who unsuccessfully attempted to obtain a teaching job in an elementary school after leaving a similar position in another district's elementary school sued school district, the two school boards, and the principals of the two schools, alleging that adverse comments made by the former principal of her former school to the principal of the school to which she applied resulted in her not receiving the job. Trial court granted summary judgment to all defendants except the former principal of plaintiff's former school. This court affirmed in part and reversed in part, holding, inter alia, that there was insufficient manifestation of control to create a principal and agent relationship between the school district and the former principal. The presence of a contractual provision requiring former principal to refer employment inquiries to the school superintendent did not create a right of control. Breslauer v. Fayston School Dist., 659 A.2d 1129, 1134.

Wash.

Wash.2013. Subsec. (2) cit. in case cit. in conc. and diss. op., subsec. (3) quot. in case quot. in sup. and cit. in case cit. in conc. and diss. op. After employee of independent contractor hired by airlines for support services was injured while working at an airport, he sued airport's owner/operator, alleging that defendant failed to maintain safe premises. The trial court granted summary judgment for defendant. The court of appeals reversed. Affirming and remanding, this court held, inter alia, that a genuine issue of material fact existed as to whether, under the retained-control exception to the general rule that the employer of an independent contractor had no liability for injuries to the contractor's employees, defendant retained sufficient control over plaintiff and his employer such that it had a duty to maintain a safe workplace. The concurring and dissenting opinion argued that

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the retained-control exception did not apply under the circumstances of this case, because there was no employment relationship between defendant and the independent contractor for which plaintiff worked. Afoa v. Port of Seattle, 296 P.3d 800, 809, 815.

Wash.2012. Subsec. (3) cit. in ftn. to diss. op. Pickup and delivery drivers for shipping company brought a class action against company, seeking overtime wages under the Washington Minimum Wage Act (MWA). The trial court entered judgment for defendant, after the jury determined that plaintiffs were independent contractors, not employees. The court of appeals reversed in part and remanded. Affirming, this court held, inter alia, that the trial court's jury instruction for determining worker status was erroneous and prejudicial to plaintiffs, because the correct legal standard for determining whether a worker was an employee under the MWA was the economic-dependence test, i.e., whether, as a matter of economic reality, the worker was economically dependent upon the alleged employer or was instead in business for himself, not the right-to-control test. The dissent argued that the jury instruction correctly embraced both the right-to-control test and the broader economic reality of the parties' relationship, and that the majority's economic-dependence standard was unworkable. Anfinson v. FedEx Ground Package System, Inc., 281 P.3d 289, 303.

Wash.2002. Subsecs. (2) and (3) quot. in sup. Contractor's employee, who was injured when elevator shifted while he was installing fireworks on structure, brought personal-injury action against owner of structure. Trial court granted owner summary judgment; appellate court affirmed in part. Affirming in part and reversing in part, this court held, inter alia, that owner of structure was not liable for contractor's negligence toward contractor's employee based on owner's alleged "retained control" over contractor's work performance. Kamla v. Space Needle Corp. 147 Wash.2d 114, 122, 52 P.3d 472, 474.

Wash.2002. Cit. in diss. op. Truck driver appealed from decision of Department of Labor and Industries denying his claim for workers' compensation benefits on the ground that his employer was engaged exclusively in interstate commerce and elected not to provide coverage. The trial court affirmed, but the court of appeals reversed. Reversing, this court held that employer's exemption from mandatory coverage as a common carrier engaged in interstate commerce could not be overcome by claimant's subjective belief that he worked for the interstate carrier on intrastate deliveries. The dissent argued that material questions of fact existed as to whether employer employed claimant to make any intrastate deliveries. Stelter v. Department of Labor & Industries of State, 147 Wash.2d 702, 712, 714, 57 P.3d 248, 252, 254.

Wash.1976. Cit. and dist. Defendant school district hired plaintiff to teach in Washington State Penitentiary pursuant to an agreement to provide teachers for the prison's educational program. Plaintiff was subsequently notified that his contract would not be renewed. Plaintiff brought this suit alleging violation of his rights under his employment contract and a continuing contract law. The law defined "employee" as a "teacher or other certified employee, holding a position as such with a school district", and the court held, inter alia, that the legislature did not intend to invoke the common law concepts of master and servant, and that, where the employment contract said that plaintiff was an employee, plaintiff was compensated by defendant, plaintiff was subject to the same withholding provisions and received the same administrative notices as the other teachers in the district, and defendant attempted to nonrenew plaintiff's contract as if he were an employee subject to the law, plaintiff was an "employee" of defendant within the meaning of the law. Barendregt v. Walla Walla School District No. 140, 87 Wash.2d 154, 550 P.2d 525, 527.

Wash.1966. Subsec. (3) cit. in sup. Plaintiff hired defendant to do certain chores on plaintiff's farm while plaintiff was away. Plaintiff's horses escaped because of defendant's negligence, and plaintiff paid the damages. Plaintiff could not recover from defendant on a theory of respondeat superior because defendant's duties involved his own time, his own equipment, and a freedom from plaintiff's control. Defendant was at most an independent contractor. Hollingbery v. Dunn, 68 Wash.2d 59, 411 P.2d 431, 435.

Wash.App.

Wash.App.2018. Subsec. (2) quot. in case quot. in sup. Labor union sued public university, seeking to enjoin defendant from releasing, in response to a non-profit organization's request under the Public Records Act, certain emails associated with union

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organizing that were created by, received by, or in the possession of certain university employees. The trial court concluded that the records were not "public records." This court affirmed, holding that documents relating to faculty organizing and addressing faculty concerns were not within the scope of employment, did not relate to university's conduct of government or the performance of government functions, and were not public records subject to disclosure. The court cited the definition of "employee" set forth in Restatement Second of Agency § 2 in support of the proposition that an employee's communication was within the scope of employment only when the job required it, the employer directed it, or it furthered the employer's interests. Service Employees International Union Local 925 v. University of Washington, 423 P.3d 849, 857.

Wash.App.2005. Subsecs. (2) and (3) quot. in case cit. in sup. Employee sued former employer for breach of contract, promissory estoppel, and negligent misrepresentation. Trial court dismissed the suit. This court reversed and remanded, holding, inter alia, that plaintiff presented a fact issue as to whether he was terminated. The court rejected defendant's argument that plaintiff had no right of action because he was not discharged but quit rather than accept a different position. Defendant's owner testified that he fired plaintiff and did not offer him another job with the company, but instead made a vague offer to have plaintiff represent the company on commission. The court accepted plaintiff's assertion that this was a position of an independent contractor, not an employee. Flower v. T.R.A. Industries, Inc., 127 Wash.App. 13, 111 P.3d 1192, 1199.

Wash.App.1994. Cit. in ftn. A laborer at an aluminum reduction plant who was rendered unconscious by fumes and then struck by parts of a bus that was being dismantled sued the plant owner for negligence in failing to provide a safe workplace. The trial court granted defendant partial summary judgment and then entered judgment on a jury verdict for defendant. Reversing and remanding, this court held, inter alia, that defendant could be held directly liable because it owed a common law duty of care to control safety-related matters at the plant. The court also determined that defendant was not vicariously liable for the negligent acts or omissions of its contractor even though principal hired contractor to do inherently dangerous work, since plaintiff was an employee of the independent contractor. It noted that whether a relationship was one of principal and independent contractor was a question different from whether principal owed a common law duty of care, but that the concept of control affected both questions. Phillips v. Kaiser Aluminum & Chemical, 74 Wash.App. 741, 875 P.2d 1228, 1234.

Wash.App.1983. Subsec. (3) cit. in disc. A salesman formerly employed by the defendant brought this action to recover unpaid sales commissions. Both parties had agreed that in exchange for managing a sales office the plaintiff would receive 35% of all commissions generated by the office. Later the defendant unilaterally changed the commission rate to 15% of the plaintiff's sales only, plus a monthly salary. Seven such sales or closings on which the plaintiff was paid a reduced rate commission, or no commission at all, were the subject of this action. The trial court found for the plaintiff, the defendant appealed and this court affirmed. Preliminarily, this court found that the defendant had the right to control, and did indeed strictly control, the manner in which the plaintiff could make sales. Such control proved the plaintiff was an employee. Ebling v. Gove's Cove, Inc., 34 Wn.App. 495, 663 P.2d 132, 134.

Wash.App.1976. Subsec. (3) cit. in sup. A sign company laid out the exact size and location of a hole to be dug for the installation of a sign, and engaged a backhoe operator to dig the hole. The operator struck a gas line, causing an explosion which damaged plaintiff. The trial court held that the backhoe operator was the sign company's agent. The Court of Appeals affirmed, holding that, although the operator was essentially self-employed, where the operator worked 90% of his time for the sign company, had no employees, was not registered as a contractor or subcontractor, was not bonded, did not himself obtain permits or licenses for his jobs, and dug the holes at locations and in dimensions in exact accordance with the instructions of the sign company, he was an agent of the sign company and not an independent contractor, so that the sign company was liable to plaintiff. The court also held that the sign company was liable because it had a non-delegable duty to ascertain where any gas lines were located. Massey v. Tube Art Display, Inc., 15 Wash.App. 782, 551 P.2d 1387, 1390.

W.Va.

W.Va.1995. Cit. in ftn. Foreign nationals who worked in West Virginia orchards sued placement agency with which they contracted to bring them to this country and find them work and individual orchard owners under the West Virginia Wage

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Payment and Collection Act (Act), alleging that certain deductions were invalid under the Act. Although the agency appeared as plaintiffs' employer on forms filed with the federal government, provided their workers' compensation coverage and had exclusive authority to hire and fire them, orchard owners supervised plaintiffs' daily activities. Reversing the trial court's grant of summary judgment for orchard owners and remanding, this court held that, for purposes of the Act, owners were joint employers with agency, agency was owners' agent and that, as principals, owners were subject to a ten-year statute of limitations on the contract signed by their agent and plaintiffs, not the five-year period they claimed. Rowe v. Grapevine Corp., 193 W.Va. 274, 456 S.E.2d 1, 4.

Wis.

Wis.2020. Subsec. (3) cit. in diss. op. Festival attendee brought a claim sounding in negligence against festival producer and limited-liability company that was a member of a band producer had hired, alleging that plaintiff suffered injuries when she tripped over an electrical cord placed by limited-liability company's sole member. The trial court granted defendants' motion for summary judgment. The court of appeals reversed in part. This court reversed, affirming the trial court's finding that limited-liability company enjoyed the same statutory immunity for recreational activities as producer, because it was an agent of producer and, through the actions of its sole member, laid down the electrical cords that allegedly caused plaintiff to trip. The dissent argued that limited-liability company was not an agent of producer, because limited-liability company was best described as an independent contractor, as defined by Restatement Second of Agency § 2(3), given that it was hired by producer to perform set-up work for music activities, with producer having minimal control over its work. Lang v. Lions Club of Cudahy Wisconsin, Inc., 939 N.W.2d 582, 607.

Wis.2018. Subsec. (3) quot. in sup. Family and estate of pedestrian sued tree-trimming company and its insurer, after company cut a tree branch that fell on pedestrian and killed her while she was walking on a public path. The trial court granted summary judgment for defendants on the ground that plaintiffs' claims were barred by the state's recreational-immunity statute. The court of appeals reversed. Affirming, this court held that company was not an agent of the entity that hired it to trim the tree for purposes of the statute, because the entity had neither control of, nor the right to control, the details of company's work, including the acts that resulted in pedestrian's death. The court explained that, under Restatement Second of Agency § 2, an independent contractor was one who contracted with another to do something for the other but who was not controlled by the other with respect to the contractor's physical conduct. Westmas v. Creekside Tree Service, Inc., 907 N.W.2d 68, 76.

Wis.2010. Subsec. (3) quot. in case quot. in sup. Widow of machinist brought negligence claim, inter alia, against alleged supplier of asbestos-containing products to decedent's employer, claiming that decedent's death from mesothelioma resulted from his work machining the supplied products. The trial court granted summary judgment for defendant. The court of appeals reversed. This court reversed the court of appeals' decision, holding that Wisconsin precedent barred plaintiff's Restatement Second of Torts § 388 claim, under the general rule that defendant, as the principal that hired decedent's employer as an independent contractor, was not liable to decedent for injuries sustained performing the contracted work, and that neither the affirmative-act or extrahazardous-activity exceptions applied. Tatera v. FMC Corp., 2010 WI 90, 328 Wis.2d 320, 786 N.W.2d 810, 820.

Wis.2004. Subsecs. (1) and (3) quot. in disc., com. (b) cit. in disc. After being shot by former boyfriend, former girlfriend brought suit on behalf of herself and her deceased fiancé's estate against franchisor and franchisee of fast-food restaurant where former boyfriend was employed, alleging vicarious liability under the doctrine of respondeat superior. The trial court granted franchisor's motion for summary judgment, and the court of appeals affirmed. Affirming, this court held, inter alia, that franchise agreements were insufficient to create master-servant relationship, which would give franchisor right of control over daily operation of specific aspect of franchisee's business that allegedly caused the harm. Because franchisor had no control over supervision, hiring, or retention of franchisee's employees, it could not be vicariously liable for former boyfriend's violent rampage. Kerl v. Dennis Rasmussen, Inc., 273 Wis.2d 106, 682 N.W.2d 328, 334, 335.

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Wis.1978. Secs. (1), (2), and (3) quot. in ftns. in disc. and com. (b) quot. in part. in disc. This action was brought against the city to recover for the death of a passenger in the crash of a private aircraft being flown as a scheduled part of an Independence Day celebration planned by an alleged agency of the city. Judgment for plaintiff, and city appealed. The court reversed and remanded, holding, inter alia, that the finding of agency was insufficient to establish the city's vicarious liability for the pilot's negligence, absent further showing that the pilot was the city's servant, i.e., subject to the city's right to control his physical conduct in the performance of his services. Arsand v. City of Franklin, 83 Wis.2d 40, 264 N.W.2d 579, 582, 583, 584, 585.

Wis.1978. Cit. in disc., and quot. in ftn. in sup. Salesman brought action against an equipment manufacturer to recover commissions allegedly owed to him on the sale of equipment. The trial court entered an order denying the manufacturer's motion for summary judgment, and the manufacturer appealed. The court held that the two-year statute of limitations covering claims for compensation for personal services did not apply to the salesman's action to recover commissions, since the salesman was paid for the results or fruits of his labor, that is, sales, rather than for labor itself, and was, therefore, not an independent contractor required to bring his claim within the two-year limit. Saunders v. DEC Int'l Inc., 85 Wis.2d 70, 270 N.W.2d 176, 179.

Wis.1977. Subsec. (3) and com. (b) quot. in sup. The plaintiff, a general contractor, contracted with the lessee of an ice arena owned by the defendant city to furnish labor and materials to improve the facility. Upon completion, plaintiff sought to enforce a construction lien against the defendant, alleging that lessee contracted with the plaintiff while acting as an agent of the defendant and thus defendant was an "owner" under the construction lien statute. The court reversed an order sustaining a demurrer to plaintiff's complaint and held that a general statement that a party was an agent of another was sufficient to meet the demurrer challenge, that the lower court erroneously concluded that lessee's status as an independent contractor was necessarily inconsistent with an allegation of agency and that the plaintiff's allegation that defendant and lessee were engaged in a joint venture also stated a cause of action. James W. Thomas Const. Co., Inc. v. City of Madison, 79 Wis.2d 345, 255 N.W.2d 551, 553.

Wis.1961. Quot. in sup. In action arising out of an automobile collision presenting question as to whether foreign corporation was liable as employer of the owner of one of the automobiles, since employee-manager of magazine solicitation crew was free to work when, where, and as long as he pleased and was paid straight commission and managed crew and sold subscriptions according to his own methods, he was an "independent contractor" and corporation was not liable for collision. Bond v. Harrel, 13 Wis.2d 369, 108 N.W.2d 552, 556, 98 A.L.R.2d 330.

Wis.1959. Cit. in sup. Dealer, who sold machines manufactured by Iowa corporation, and whose territory included most of Wisconsin, resided in Wisconsin and donated his full time and energy, as required by contract with corporation, in soliciting sales for corporation, was corporation agent to establish corporation as "doing business" in Wisconsin, so that service could be made by corporation within or without Wisconsin. Dettman v. Nelson Tester Co., 7 Wis.2d 6, 95 N.W.2d 804, 807.

Wis.App.

Wis.App.2016. Quot. in cases quot. in sup.; subsec. (3) quot. in sup. Injured victim brought an action against auctioneer's employee who struck plaintiff while he was driving a vehicle that auctioneer was preparing to auction off for vehicle's owner; auctioneer's insurer filed a cross-claim against owner's primary liability insurer, alleging that driver was insured under owner's policy. The trial court granted auctioneer's insurer's motion for summary judgment. This court reversed, holding that the accident was not covered by owner's liability insurer's policy. The court explained that the policy limited coverage for anyone other than an officer, agent, or employee of owner to those without other insurance, and concluded, citing Restatement Second of Agency § 2, that driver was not covered under the policy, because he had other insurance and was an independent contractor and not an agent with respect to his driving, given that owner had no control over his activities. Romero v. West Bend Mut. Ins. Co., 885 N.W.2d 591, 601.

Wyo.

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Wyo.1985. Cit. in diss. op. Hoping to avoid payments into an unemployment compensation fund, the president of a cab company tried to place cab drivers outside the realm of employee status by fashioning a lease agreement intended to make the drivers independent contractors. The Employment Security Commission ruled that the leasing arrangement did not alter the employees' status. The trial court reversed, and the Commission appealed. Reversing, this court held that the drivers were employees within the meaning of the law. The dissent argued that substantial evidence established that the drivers were independent contractors, noting that the finding that the company lacked control over the drivers indicated that they were engaged in an independent trade, occupation, or business. Employment Sec. Com'n of Wyo. v. Laramie Cabs, 700 P.2d 399, 410.

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