4000 AGENCY: DEFINITION

An agency is created as the result of the conduct of two parties.

The party for whom action is to be taken is the principal. The party who is to act is the agent.

An agency is based on an agreement between the parties which embodies three factual elements:

(1) the conduct of the principal showing that the agent is to act for him or her;

(2) the conduct of the agent showing that he or she accepts the undertaking;

(3) the understanding of the parties that the principal is to control the undertaking.

The conduct on the part of the principal must show that he or she is willing that the agent act for him or her and must indicate that the agent is to do so, subject to the principal's control. The conduct on the part of the agent must show that the agent acts or agrees to act on the principal's behalf, subject to principal's control.

A principal-agent relationship may be created or exist between the parties as a result of their acts and conduct, even if they had no knowledge or intent that the relationship was, or is being, created.

[Burden of Proof, Wis. JI-Civil 200]

COMMENT

The instruction and comment were approved by the Committee in 1978. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment. A case citation was corrected in 2005. A comment was added in 2019.

Rule v. Jones, 256 Wis. 102, 110, 40 N.W.2d 580 (1949); Seavey v. Jones, 235 Wis. 109, 111, 292 N.W. 436 (1940); Georgeson v. Nielsen, 214 Wis. 191, 196, 252 N.W. 576, 578 (1934); Restatement, Second, Agency § 1 (1958).

It is recommended that Instruction 4000 not be used as a basis for the establishment of vicarious liability. Instruction 4030 is more appropriate for that purpose. If, however, 4000 is used, then this paragraphs should be added to the instruction: "Before you can find that an agency existed in this case, you must be satisfied by the greater weight of the credible evidence, to a reasonable certainty, that _____ was an agent-servant of _____, that is, that _____ controlled or had the right to control the physical conduct of _____ in the performance of his or her services."

A servant is necessarily an agent, but an agent is not invariably a servant. To find a principal vicariously liable for the tort of his or her agent, the relationship must be that the agent is an agent-servant who is controlled by the owner or is subject to the owner's right to control the agent in the performance of his or her services, Arsand v. City of Franklin, 83 Wis.2d 40, 264 N.W.2d 579 (1978).

See Wis JI-Civil 1600, Servant: Driver of Automobile.

Recreational Activities; Liability. Wisconsin Stat. § 895.52 does not include a definition for the term “agent”, however, “agent” is included in § 895.52 (2), (3), (4) and (5) in a list of those who may have immunity from liability. To find an agent relationship for the purpose of immunity, the relationship must result from the manifestation of control, or the right to control the details, means or methods of the “agent” by the principal, including any acts that cause injury. Whether an independent contractor is an agent is a fact-bound inquiry. Westmas v. Creekside Tree, 2018 WI 12, 379 Wis.2d 471, 493, 907 N.W.2d 68.