4030 SERVANT: DEFINITION

Question _____ inquires whether, at the times material hereto, _____ was a servant of _____.

A "servant" is one employed to perform service for another in his or her affairs and who, with respect to his or her physical conduct in the performance of the service, is subject to the other's control or right to control.

In arriving at your decision as to what your answers to this question should be, you may consider the nature of the transaction, the methods pursued, the general understanding of the parties in their dealings with each other which tend to reveal the nature of their relationship, and any and all other surrounding circumstances, including the conduct of the parties, which tend to characterize the relationship.

You will carefully consider the credible evidence and reasonable inferences from the evidence bearing on this inquiry, and, if you are satisfied that ____ was, at all times material hereto, acting in the capacity of a servant of _____, as that term is here defined, you will answer the question "yes"; otherwise, you will answer it "no."

COMMENT

The instruction and comment were approved by the Committee in 1962. The comment was updated in 2001 and 2004. An editorial correction was made in 2015.

The second paragraph is taken from Heims v. Hanke, 5 Wis.2d 465, 468, 93 N.W.2d 455 (1958), which relies on Restatement, Second, Agency § 225 (1958). See also Arsand v. City of Franklin, 83 Wis.2d 40, 265 N.W.2d 579 (1978); Harris v. Richland Motors, 7 Wis.2d 472, 96 N.W.2d 840 (1959); Meyers v. Matthews, 270 Wis. 453, 71 N.W.2d 368 (1955); Phaneuff v. Industrial Comm'n, 263 Wis. 376, 57 N.W.2d 406 (1953); Thurn v. LaCrosse Liquor Co., 258 Wis. 448, 46 N.W.2d 212 (1951); Ryan v. Department of Taxation, 242 Wis. 491, 8 N.W.2d 393 (1943). See also Kerl v. Rasmussen, 2004 WI 86, 273 Wis.2d 106, 682 N.W.2d 328.

The third paragraph is based on Nestle's Food Co. v. Industrial Comm'n, 205 Wis. 467, 237 N.W. 117 (1931).

The test of the relationship is not the exercise of control by the principal, but his or her right to exercise control over the other. Employers Mut. Ins. Co. v. Industrial Comm'n, 230 Wis. 670, 676, 284 N.W. 548 (1939). See Harris v. Richland Motors, supra; Thurn v. LaCrosse Liquor Co., supra; Badger Furniture Co. v. Industrial Comm'n, 200 Wis. 127, 227 N.W. 288 (1929).

This instruction covers the common-law definition of a servant under a master-servant relationship. It is assumed that it could very well be employed to define an employee under an employer-employee relationship since ". . . the relationship of employer and employee is substantially the same as that of master and servant." Ryan v. Department of Taxation, supra at 497.

When the cause of action arises under special acts, such as Compensation, Unemployment, Social Security or Federal Employer's Liability, the language of the particular act should be examined to see if there are definitions of the relationship contained therein, and, if so, whether they conform to the common-law statement.

There are certain matters of fact which may be considered in arriving at a determination of whether a person is acting as a servant of another. These may be found by reference to Restatement, Second, Agency § 220 (1958). They are not included in this general definition of a servant; if the facts warrant, the general instruction may be tailored to include some or all of the material matters of fact involved.

Captain of Ship Doctrine. In a recent decision, the plaintiff in a medical malpractice action argued that the surgeon should be held vicariously liable for the negligence of two hospital nurses from a county-owned hospital who were responsible for counting sponges. Lewis v. Physicians Ins. Co., 2001 WI 60, 243 Wis.2d 648, 627 N.W.2d 484. The hospital was county-owned and, therefore, its liability at the time was limited to $50,000.

The trial court, on summary judgment, agreed with the plaintiff's argument that, as a matter of law, the surgeon is the "captain of the ship" and is responsible for the actions of the parties that were in the operating room. Interestingly, the plaintiff did not argue that the surgeon was vicariously liable for the nurses' actions under the doctrine of respondeat superior. Both the court of appeals and supreme court rejected the adoption of the captain of the ship doctrine to impose liability on the doctor. The supreme court said the "captain of the ship doctrine" has lost its vitality across the country as plaintiffs have been able to sustain actions against full-care modern hospitals for the negligence of their employees.

In Kerl v. Rasmussen, 2004 WI 86, the court said a "master" is a principal who employs an agent to perform service in his or her affairs and who controls or has the right to control the physical conduct of the other in the performance of the service. ¶ 19.