4060 INDEPENDENT CONTRACTOR: DEFINITION

Question _____ inquires whether, at the times material hereto, _____ was an independent contractor.

An "independent contractor" is a person who contracts with another to do something for him or her, but who is not controlled by the other, nor subject to the other's right to control, with respect to his or her physical conduct in the performance of the undertaking.

In arriving at your decision as to what your answer to this question should be, you may consider the contract between the parties; (the course of conduct of the parties, if the terms of the contract are in doubt as to control); the nature of the business or occupation of the parties; the party furnishing the instrumentalities or the tools for the work; the place of the work; the time of employment; the method of payment; the right to summarily discharge employees; the intent of the parties to the contract, so far as it is ascertainable; and any and all of the surrounding circumstances that tend to characterize the relationship.

COMMENT

This instruction and comment were published in 1962. The comment was revised in 1997 and 2004. Editorial changes were made in 1994 to address gender references in the instruction.

The general rule is that the liability of an independent contractor may not be imputed to a general contractor. See Wagner v. Continental Casualty Co., 143 Wis.2d 373, 421 N.W.2d 835 (1988); Jacob v. West Bend Mut. Ins. Co, 203 Wis.2d 524, 553 N.W.2d 800 (Ct. App. 1996); Kettner v. Wausau Ins. Co., 191 Wis.2d 723, 530 N.W.2d 399 (Ct. App. 1995). A contractor qualifies as an independent contractor when the principle contractor does not control the details of his or her work. The Wisconsin Supreme Court has ruled that this rule does not apply when a written contract between a general contractor and the land owner obligates the general contractor to "provide all necessary labor and materials and perform all work of every nature what so ever to be done in the erection of a residence." Brooks v. Hayes, 133 Wis.2d 228, 395 N.W.2d 167 (1986). In Brooks, the general contractor contracted to construct a residence for the plaintiff and subcontracted with a mason who negligently installed a control on a fireplace. A fire caused damage to the plaintiffs' structure. The plaintiffs sued the general contractor who defended claiming that he was not responsible for the negligence of the subcontractor whose work he did not control. Relying on the contract language which obligated the general contractor to provide all necessary labor and materials and to perform all the work necessary to construct the

residence, the supreme court rejected the argument. The court said that the delegation of the performance of a contract does not, unless the obligee agrees otherwise, discharge the liability of the delegating obligor. The court also held that the contract language implicitly imposed on the general contractor the duty to perform with due care. The court said accompanying every contract is a common law duty to perform with care, skill, reasonable expediency, and faithfulness the thing that they agreed to be done, and a negligent failure to observe any of the conditions is a tort, as well as a breach of contract.

The phrase in parentheses in the third paragraph should only be used if the terms of the contract are ambiguous or in doubt as to control and the right to control.

The language of the Restatement, Second, Agency § 2(3) (1958) was employed in this instruction in preference to the language employed in cases preceding the Restatement. In the case of Madix v. Hockgreve Brewing Co., 154 Wis. 448, 451, 143 N.W. 189 (1913), the following definition of an independent contractor was suggested:

> One who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to control to his employer, except as to the result of his work.

The second paragraph is taken from Badger Furniture Co. v. Industrial Comm'n, 200 Wis. 127, 227 N.W. 288 (1929). For other cases, see Kerl v. Rasmussen, 2004 WI 86, 273 Wis.2d 106, 682 N.W.2d 328, ¶ 24; Arsand v. City of Franklin, 83 Wis.2d 40, 264 N.W.2d 579 (1978); Weber v. Hurley, 13 Wis.2d 560, 109 N.W.2d 65 (1961); Harris v. Richland Motors Inc., 7 Wis.2d 472, 96 N.W.2d 840 (1959); Phaneuf v. Industrial Comm'n, 263 Wis. 376, 57 N.W.2d 406 (1953); Pleucner v. Industrial Comm'n, 249 Wis. 370, 24 N.W.2d 669 (1946); Sprecher v. Roberts, 212 Wis. 69, 248 N.W. 795 (1933); Nestle's Food Co. v. Industrial Comm'n, 205 Wis. 467, 237 N.W. 117 (1931); Tesch v. Industrial Comm'n, 200 Wis. 616, 229 N.W. 194 (1930); Habrich v. Industrial Comm'n, 200 Wis. 248, 227 N.W. 877 (1929); Medford L. Co. v. Industrial Comm'n, 197 Wis. 35, 221 N.W. 390 (1928); Kneeland-McClurg L. Co. v. Industrial Comm'n, 196 Wis. 402, 220 N.W. 199 (1928); Miller & Rose v. Rich, 195 Wis. 468, 218 N.W. 716 (1928); and Weyauwega v. Industrial Comm'n, 180 Wis. 168, 192 N.W. 452 (1923).