Restatement (Second) of Agency § 220 (1958)

Restatement of the Law - Agency | May 2022 Update

§ 220 Definition of Servant

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.
(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;
(b) whether or not the one employed is engaged in a distinct occupation or business;
(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in the particular occupation;
(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is a part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant; and
(j) whether the principal is or is not in business.

Comment on Subsection (1):

a. *Servants not performing manual labor.* The word "servant" does not exclusively connote a person rendering manual labor, but one who performs continuous service for another and who, as to his physical movements, is subject to the control or to the

right to control of the other as to the manner of performing the service. The word indicates the closeness of the relation between the one giving and the one receiving the service rather than the nature of the service or the importance of the one giving it. Thus, ship captains and managers of great corporations are normally superior servants, differing only in the dignity and importance of their positions from those working under them. The rules for determining the liability of the employer for the conduct of both superior servants and the humblest employees are the same; the application differs with the extent and nature of their duties.

b. *Non-contractual employment.* The word "employed" as used in this Section is not intended to connote a contractual or business relation between the parties. In fact, as pointed out in Section 225, the relation may rest upon the most informal basis, as where the owner of a car invites a guest to drive the car temporarily in his presence or to assist him in making minor repairs.

c. *Generality of definition.* The relation of master and servant is one not capable of exact definition. It is an important relation in that upon it depends the liability of the master to third persons and to his employees under the provisions of various statutes as well as under the common law; the relation may prevent liability, as in the case of the fellow servant rule. It cannot, however, be defined in general terms with substantial accuracy. The factors stated in Subsection (2) are all considered in determining the question, and it is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relation. See Comment *g*. If the inference is clear that there is, or is not, a master and servant relation, it is made by the court; otherwise the jury determines the question after instruction by the court as to the matters of fact to be considered.

d. *Control or right to control.* Although control or right to control the physical conduct of the person giving service is important and in many situations is determinative, the control or right to control needed to establish the relation of master and servant may be very attenuated. In some types of cases which involve persons customarily considered as servants, there may even be an understanding that the employer shall not exercise control. Thus, the full-time cook is regarded as a servant although it is understood that the employer will exercise no control over the cooking. In other types of situations where an emergency creates peril to human lives, as in the case of a ship in a storm, a servant—in this case the captain—might properly refuse to be controlled by the ship owner and still cause his master to be liable for his negligence or other faulty conduct.

When two persons are engaged in a common undertaking, it may be understood that there is to be joint control, as where two men hire an automobile for a vacation trip, alternating in driving. On the other hand, two servants, directed to drive on their master's business and alternating in driving, do not agree to joint control, and one of them would not be liable to a person hurt by the negligent driving of the other.

Where the owner of a vehicle driven by a guest is in the vehicle, there is ordinarily an inference that he is in control, rebuttable only if he agrees with the guest to surrender complete control to him.

e. *Independent contractors.* It is important to distinguish between a servant and an agent who is not a servant, since ordinarily a principal is not liable for the incidental physical acts of negligence in the performance of duties committed by an agent who is not a servant. See § 250. One who is employed to make contracts may, however, be a servant. Thus, a shop girl is, and a traveling salesman may be, a servant and cause the employer to be liable for negligent injuries to a customer or for negligent driving while traveling to visit prospective customers. The important distinction is between service in which the actor's physical activities and his time are surrendered to the control of the master, and service under an agreement to accomplish results or to use care and skill in accomplishing results. Those rendering service but retaining control over the manner of doing it are not servants. They may be agents, agreeing to use care and skill to accomplish a result and subject to the fiduciary duties of loyalty and obedience to the wishes of the principal; or they may be persons employed to accomplish or to use care to accomplish physical results, without fiduciary obligations, as where a contractor is paid to build a house. An agent who is not subject to control as to the manner in which he performs the acts that constitute the execution of his agency is in a similar relation to the principal as to such conduct as one who agrees only to accomplish mere physical results. For the purpose of determining liability, they are both "independent contractors" and do not cause the person for whom the enterprise is undertaken to be responsible, under the rule stated in Section 219.

Illustrations:

1. P employs A as a broker to sell Blackacre. A, while driving T, a prospective customer, to inspect the premises, negligently injures him. P is not liable to T.

2. The salesman of a real estate broker, while driving T, a prospective customer, to view a house, negligently injures him. The broker, but not the broker's principal, is subject to liability to T.

f. Subservants. A subservant is a servant of the servant who employed him and also of the master for the conduct of whose affairs he was employed. See § 5(2).

Comment on Subsection (1), continued:

g. Statutory interpretation. The word servant has retained its early significance in cases involving the liability of the master to third persons and the common law liability of master and servant. However, in statutes dealing with various aspects of the relation between the two parties, the word "employee" has largely displaced "servant". In general, this word is synonymous with servant. Under the usual Employers' Liability Acts and the Workmen's Compensation Acts the tests given in this Section for the existence of the relation of master and servant are valid. Beyond this there is little uniformity of decision. Under the existing regulations and decisions involving the Federal Labor Relations Act, there is little, if any, distinction between employee and servant as here used. Under the federal and state wages and hours acts, the purpose of which is to raise wages and working conditions, persons working at home at piece rates and choosing their own time for work have been held to be employees, although clearly not servants as the word is herein used.

Comment on Subsection (2):

h. Factors indicating the relation of master and servant. The relation of master and servant is indicated by the following factors: an agreement for close supervision or de facto close supervision of the servant's work; work which does not require the services of one highly educated or skilled; the supplying of tools by the employer; payment by hour or month; employment over a considerable period of time with regular hours; full time employment by one employer; employment in a specific area or over a fixed route; the fact that the work is part of the regular business of the employer; the fact that the community regards those doing such work as servants; the belief by the parties that there is a master and servant relation; an agreement that the work cannot be delegated.

i. Effect of custom. The custom of the community as to the control ordinarily exercised in a particular occupation is of importance. This, together with the skill which is required in the occupation, is often of almost conclusive weight. Unskilled labor is usually performed by those customarily regarded as servants, and a laborer is almost always a servant in spite of the fact that he may nominally contract to do a specified job for a specified price. If, however, one furnishes unskilled workmen to do work for another, it is not abnormal to find that the workmen remain the servants of the one supplying them. See § 227. Even where skill is required, if the occupation is one which ordinarily is considered as a function of the regular members of the household staff or an incident of the business establishment of the employer, there is an inference that the actor is a servant. Thus, highly

skilled cooks or gardeners, who resent and even contract against interference, are normally servants if regularly employed. So too, the skilled artisans employed by a manufacturing establishment, many of whom are specialists, with whose method of accomplishing results the employer has neither the knowledge nor the desire to interfere, are servants. On the other hand, the question of the degree of skill requisite for the job is often determinative where the actor is employed temporarily to enter the household or establishment and render incidental assistance. Thus, one employing a laborer for a specific job is normally, as stated above, his master; whereas one engaging a plumber to repair a boiler is not, in the absence of a special arrangement for supervision. The fact that the state regulates the conduct of an employee through the operation of statutes requiring licenses or specific acts to be done or not to be done does not prevent the employer from having such control over the employee as to constitute him a servant.

Illustrations:

3. P, who knows little of social affairs, employs A as a social secretary to instruct P in her own deportment and the conduct of all social events, it being agreed that A is to live at P's home and to have complete management within her sphere. P is subject to liability for A's conduct within the scope of employment.

4. P employs a woman to open his summer house. It is agreed that she is to come just before his arrival to clean it and put it in order. For this she is to receive thirty dollars. During her presence in the house, she is P's servant.

Comment on Subsection (2), continued:

j. Period of employment and method of payment. The time of employment and the method of payment are important. If the time of employment is short, the worker is less apt to subject himself to control as to details and the job is more likely to be considered his job than the job of the one employing him. This is especially true if payment is to be made by the job and not by the hour. If, however, the work is not skilled, or if the employer supplies the instrumentalities, the workman may be found to be a servant.

k. Ownership of instrumentalities. The ownership of the instrumentalities and tools used in the work is of importance. The fact that a worker supplies his own tools is some evidence that he is not a servant. On the other hand, if the worker is using his employer's tools or instrumentalities, especially if they are of substantial value, it is normally understood that he will follow the directions of the owner in their use, and this indicates that the owner is a master. This fact is, however, only of evidential value.

Illustrations:

5. P employs A to drive him around town in A's automobile at $4.00 per hour. The inference is that A is not P's servant. If P supplies the automobile, the inference is that A is P's servant for whose conduct within the scope of employment P is responsible.

6. P employs a salesman who agrees to give substantially his full time to the employment and who is furnished a car by the employer. On these facts it is inferred that he is a servant.

7. P employs a salesman who agrees to give full time to the work but furnishes his own car, is paid by commission and can call on those whom he pleases. It is inferred that the salesman is not P's servant.

Comment on Subsection (2), continued:

l. Control of the premises. If the work is done upon the premises of the employer with his machinery by workmen who agree to obey general rules for the regulation of the conduct of employees, the inference is strong that such workmen are the servants of the owner, and this inference is not necessarily rebutted by the fact that the workmen are paid by the amount of work performed or by the fact that they supply in part their own tools or even their assistants. If, however, the rules are made only for the general policing of the premises, as where a number of separate groups of workmen are employed in erecting a building, mere conformity to such regulations does not indicate that the workmen are servants of the person making the rules.

Illustrations:

8. P conducts a manufacturing establishment for the manufacture of woolen goods. Certain factory employees normally arrive at eight in the morning and leave at five in the afternoon, but are not required to work a fixed number of hours or during specified periods, provided they accomplish a specified amount of work during the week, for each unit of which they receive compensation. Such employees are servants.

9. P is the owner of a coal mine employing miners. He provides them with the larger units of machinery and the means of ingress and egress. The miners supply their own implements, the powder necessary, and their own helpers, being paid for each ton mined and brought to the surface. The miners, including the assistants, are the servants of the mine owner. The assistants are servants of the miners and subservants of the owner.

Comment on Subsection (2), continued:

m. Belief as to existence of relation. It is not determinative that the parties believe or disbelieve that the relation of master and servant exists, except insofar as such belief indicates an assumption of control by the one and submission to control by the other. However, community custom in thinking that a kind of service, such as household service, is rendered by servants, is of importance.

Illustrations:

10. A, employed by a taxi company, is sent by P, his employer, to drive B from X to Y, and it is agreed between A, P, and B that for the purposes of the trip A is to be B's servant, although B is to exercise no more control over A's conduct than is normal in the ordinary case of passengers in taxicabs. A is not B's servant.

11. A is employed by P as resident cook for his household under an agreement in which P promises that he will in no way interfere with A's conduct in preparing the food. A is P's servant.

Case Citations - by Jurisdiction

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U.S.
C.A.1
C.A.2
C.A.2,
C.A.2
C.A.3
C.A.4
C.A.4,
C.A.4
C.A.5,
C.A.5
C.A.6,
C.A.6
C.A.7,
C.A.7
C.A.8,
C.A.8
C.A.9,
C.A.9
C.A.10
C.A.11,
C.A.11
C.A.D.C.
C.A.Fed.
Ct.Int'l Trade
U.S.Ct.Cl.
Ct.Fed.Cl.
S.D.Ala.

D.Ariz.
W.D.Ark.
C.D.Cal.
E.D.Cal.
N.D.Cal.
S.D.Cal.
D.Colo.
D.Conn.
D.Del.
D.D.C.
M.D.Fla.
S.D.Fla.
M.D.Ga.
N.D.Ga.
D.Idaho
C.D.Ill.Bkrtcy.Ct.
N.D.Ill.
N.D.Ind.
N.D.Ind.Bkrtcy.Ct.
S.D.Ind.
N.D.Iowa
S.D.Iowa,
D.Kan.
E.D.La.
W.D.La.
D.Me.
D.Md.
D.Mass.
D.Mass.Bkrtcy.Ct.
E.D.Mich.
D.Minn.
S.D.Miss.
E.D.Mo.
W.D.Mo.
D.Neb.
D.N.H.
D.N.H.Bkrtcy.Ct.
D.N.J.
D.N.J.Bkrtcy.Ct.
D.N.M.
E.D.N.Y.
E.D.N.Y.Bkrtcy.Ct.
N.D.N.Y.
S.D.N.Y.
W.D.N.Y.
E.D.N.C.
N.D.Ohio
S.D.Ohio
E.D.Okl.

W.D.Okl.
D.Or.
E.D.Pa.
M.D.Pa.
W.D.Pa.
D.S.D.
E.D.Tex.
N.D.Tex.
S.D.Tex.
W.D.Tex.
D.Vt.
W.D.Va.
D.V.I.
W.D.Wash.
N.D.W.Va.
S.D.W.Va.
E.D.Wis.
W.D.Wis.
Ala.
Alaska
Ariz.
Ariz.App.
Ark.
Ark.App.
Cal.
Cal.App.
Colo.
Colo.App.
Conn.
Conn.App.
Conn.Super.
Del.
Del.Ch.
Del.Super.
D.C.App.
Fla.
Fla.App.
Ga.App.
Hawaii App.
Idaho
Ill.
Ill.App.
Ind.
Ind.App.
Iowa
Kan.
Kan.App.
Ky.
Ky.App.

La.
Me.
Md.
Md.Spec.App.
Mass.
Mass.App.
Mich.
Mich.App.
Minn.
Minn.App.
Miss.
Mo.
Mo.App.
Mont.
Neb.
N.H.
N.J.
N.J.Super.App.Div.
N.J.Super.
N.M.
N.M.App.
N.Y.
N.Y.Sup.Ct.App.Div.
N.Y.City Civ.Ct.
N.C.
N.C.App.
Ohio
Ohio App.
Or.
Or.App.
Pa.
Pa.Super.
Pa.Cmwlth.
S.D.
Tenn.App.
Tex.
Tex.App.
Tex.Civ.App.
Utah,
Utah
Utah App.
Vt.
Va.
Wash.
Wash.App.
Wis.
Wis.App.
Wyo.

U.S.

U.S.2003. Subsec. (1) quot. in sup., subsec. (2) cit. in ftn., subsec. (2)(a) cit. in sup. Former employee of medical clinic sued clinic for violating the Americans with Disabilities Act (ADA) when it terminated her employment. The district court granted summary judgment for defendant, holding that defendant's four shareholder-director physicians 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 defendant's four shareholder-directors 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. Clackamas Gastroenterology Associates, P.C. v. Wells, 538 U.S. 440, 445, 448, 123 S.Ct. 1673, 1678, 1679, 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.1992. Subsec. (2) cit. in disc. Former insurance agent brought an action under the Employee Retirement Income Security Act (ERISA) against insurance company for which he had once worked, seeking to recover retirement benefits that defendant argued plaintiff had forfeited. On remand, the district court found that plaintiff qualified as an employee entitled to benefits under ERISA pursuant to a standard previously set by the court of appeals, and the court of appeals affirmed. Reversing, this court held that the term “employee” as used in ERISA incorporated traditional agency law criteria for identifying master-servant relationships and remanded for a determination whether plaintiff qualified as an employee under such common-law principles. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322, 112 S.Ct. 1344, 1348, 117 L.Ed.2d 581, on remand 969 F.2d 76 (4th Cir.1992).

U.S.1989. Subsec. (1) cit. in ftn., subsec. (2) cit. in disc., subsecs. (2)(d), (e), (f), (g), (h), and (j) cit. in ftn. A nonprofit organization entered into an oral agreement with a sculptor to create a statue dramatizing the plight of the homeless. A dispute arose over the statue's copyright ownership, requiring construction of the “work made for hire” provisions of the Copyright Act of 1976. “Work for hire” status under the Act was more easily obtained for works done by employees than for commissioned works. The district court held that the statue was a “work made for hire” and was owned by the organization. The court of appeals reversed, noting that the sculptor was an independent contractor, not an employee of the organization, and remanded for a determination of whether the statue was jointly authored by the parties, so that they co-owned the copyright. This court affirmed, stating that principles of the general common law of agency should guide in interpreting the meaning of “employee.” Community for Creative Non-Violence v. Reid, 490 U.S. 730, 750, 109 S.Ct. 2166, 2178, 2179, 104 L.Ed.2d 811.

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 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.1974. Quot. and cit. in sup. and subsec. (2)(d), (f), (g) cit. in ftn. in disc., cit. in conc. op., cit. in diss. op. in disc. and subsec. (2)(a), (d), (f), (g), (h) cit. and disc. in diss. op., com. (c) cit. in diss. op., com. (g) cit. in ftn. in diss. op. 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 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.” Kelley v. Southern Pacific Co., 419 U.S. 318, 95 S.Ct. 472, 476, 478, 480, 481, 482, 483, 484, 42 L.Ed.2d 498.

U.S.1960. Cit. in sup. In action under the Federal Employers' Liability Act brought against railroad by one employed by it as laborer in section gang with regular work-week from Monday through Friday, to recover for injuries he sustained when he was working on Saturday repairing a private siding under railroad foreman who had been engaged by company maintaining siding to recruit his crew and to have work performed under his direction, trial court committed reversible error when it gave instructions as to factors to be considered in determining whether plaintiff was an employee of railroad within meaning of the act, in effect

limiting inquiry to whether plaintiff was aware that railroad considered him not to be working for it, and when it refused to give instructions requested by plaintiff. Ward v. Atlantic Coast Line R. Co., 362 U.S. 396, 80 S.Ct. 789, 792, 4 L.Ed.2d 820.

U.S.1959. Cit. in sup. In action under Federal Employers' Liability Act for death of employee of railroad's grouting contractor, evidence disclosing that deceased, at time of death by reason of railroad's alleged negligence, was engaged in grouting work on railroad's right of way and was under supervisor employed by railroad, was sufficient to present a jury issue as to whether deceased, at time of death, had such relationship with railroad as entitled him to protection of act. Baker v. Texas & Pacific Railway Co., 359 U.S. 227, 79 S.Ct. 664, 665, 3 L.Ed.2d 756.

C.A.1

C.A.1, 2009. Subsecs. (1) and (2)(a) 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, 1997. Subsec. (2) cit. in case quot. in disc., subsec. (2)(i) quot. in part in disc. Company in the business of publishing insurance licensing texts and manuals brought copyright infringement action against one of its former officers, a coauthor of two recently published manuals, after defendant copied substantial portions of the manuals and distributed them as his own. Defendant argued that the copyright was invalid because he and plaintiff had an oral partnership agreement providing that they would be co-owners of any copyrighted material. The district court entered summary judgment for plaintiff. Affirming, this court held, in part, that the materials in question were works made for hire, as they were created by defendant and plaintiff's principal in the scope of their employment as employees of plaintiff, and that, under the work-for-hire doctrine, the employer, rather than the individual or individuals, was considered the author for purposes of the copyright. Saenger Organization v. Nationwide Ins. Licensing Associates, 119 F.3d 55, 60, 61.

C.A.1, 1996. Cit. in headnote, cit. and quot. in disc., cit. generally in ftn. A clothing company's sales representative who was fired and replaced by a younger man sued the company and the company's president and treasurer, alleging age discrimination and tortious interference with his advantageous business relationship. This court affirmed, holding, inter alia, that that plaintiff failed to provide sufficient evidence to support a finding that he was defendants' employee for the purposes of his federal and state statutory claims. The court stated that the common-law test used to determine whether a worker is an employee or an independent contractor under Massachusetts law, while directed towards the question of an employer's right to control a worker, involved the assessment of multiple factors. Speen v. Crown Clothing Corp., 102 F.3d 625, 626, 630, 632.

C.A.1, 1994. Cit. in disc. A dispute between a union and several contractor-employers over collective bargaining agreement fringe benefits claimed by owner-operator truck drivers went to arbitration. The arbitrator entered an order favoring the union, but two contractors challenged the award and the Massachusetts federal district court vacated the order. This court reversed and remanded, holding that a plausible reading of the agreement supported the arbitrator's ruling, but remand was necessary for determination of whether the Labor-Management Relations Act (LMRA) prohibited fringe benefits on the basis that the drivers were independent contractors rather than employees. The court stated that given the arbitrator's exclusive focus on past practice of treatment of operators and on contract provisions dealing with fringe benefit contributions, arbitrator did not conduct a proper LMRA § 302 agency test analysis. Labor Rel. Div. of Const. v. Intern. Bro. Local 379, 29 F.3d 742, 749.

C.A.1, 1989. Subsec. (2) quot. in ftn. A clinical psychologist treating Vietnam veterans at a hospital suffered reputational damage after a statement he made about Vietnam veterans to a reporter was misprinted in a national newspaper. He sued the publisher

for libel. The trial court entered judgment on the jury's verdict for the plaintiff. This court affirmed as to liability, but vacated as to amount. It determined that it was proper to let the jury decide whether the reporter was a free-lance independent contractor or a member of the newspaper's reportorial staff. The court stated that the jury reasonably found the reporter to be an employee and agent of the newspaper. It noted evidence that the reporter worked on a continuing basis as the newspaper's New Hampshire correspondent, called in stories daily, spoke with his editor five days a week, was paid per diem for his daily submissions, received paychecks directly from the newspaper, and was given detailed instructions on the sort of people to interview and the kind of questions to ask. Kassel v. Gannett Co., Inc., 875 F.2d 935, 942.

C.A.1, 1985. Subsec. (2) cit. in ftn. While being assisted by two tugboats, a tanker hit a city bridge. The master of one of the tugboats was also serving as docking master aboard the tanker. The city sued the tanker owner and the tugboat operator for damages that arose from the collision. The trial court entered judgment for the city, and the tanker owner appealed. The court of appeals affirmed, holding that the tanker owner had the burden of proving that the collision was an inevitable accident. This court also held that the trial court's factual finding that the collision was caused by the mistranslation of the master's orders by the tanker captain was not clearly erroneous. Further, the court upheld a pilotage clause in the contract between the tanker owner and the tugboat operator that required the tanker owner to reimburse the tug operator for its attorney fees, and affirmed the trial court's award of prejudgment interest from the date of the collision. City of Boston v. S.S. Texaco Texas, 773 F.2d 1396, 1399.

C.A.1, 1981. Cit. in disc. The respondents were two companies, one which made meals, sandwiches and coffee for sale at industrial plants and the other which leased trucks and route lists to driver-salesmen who sold the first company's products. The driver-salesmen voted to be represented by a union and the National Labor Relations Board, the petitioner herein, found that for the purposes of collective bargaining the two companies constituted one employer and it ordered the respondents to bargain. The issue on appeal was whether the driver-salesmen were employees or independent contractors. This court stated that the petitioner analyzed several factors in its determinations, including whether the putative employer had the right to control not only the results sought but also the means by which those results were achieved, the degree of proprietary interest, and in general, an overall assessment of all of the incidents of the relationship with no single factors being determinative. This court found that the evidence supported a finding that the driver-salesmen were employees rather than independent contractor. Order enforced. N.L.R.B. v. Maine Caterers, Inc., 654 F.2d 131, 133, certiorari denied 455 U.S. 940, 102 S.Ct. 1432, 71 L.Ed.2d 651 (1982).

C.A.1, 1974. Subsecs. (1)(2) cit. in sup. and coms. cit. in sup. From an order of the N.L.R.B. directing Seven-Up to cease certain unfair labor practices and to bargain with a union, Seven-Up appealed, and the N.L.R.B. sought enforcement. The court held that the Board decision should be set aside only if not supported by substantial evidence when viewed in the light of the entire record. The Board's conclusion that the company has the right to, and does, control the distributor's performance of their duties was amply supported. Thus, the court concluded that Seven-Up's distributors were employees and enforcement was granted. Seven-Up Bottling Co. v. N.L.R.B., 506 F.2d 596, 598.

C.A.1, 1973. Subsec. (1) cit. in case quot. in disc. A contractor's employee brought this action against a subcontractor for personal injuries sustained because of the allegedly negligent operation of a crane which belonged to the contractor, but which was being operated by the contractor's operators for purposes of the subcontractor. The contractor was impleaded as a third party defendant, and the district court held that the crane operator was the subcontractor's borrowed servant and directed verdicts against the subcontractor and in favor of plaintiff and the contractor. On appeal the court remanded for trial, holding that the question whether the contractor's employees operating the crane had become the subcontractor's borrowed servants, so that the latter was liable for their negligence, should have been submitted to the jury. Under New Hampshire law, the court observed, the fundamental test for determining liability for the negligence of a general employer's servant doing work for another is who exercised the right of control over the performance of that work to the extent of prescribing the manner in which it is to be executed. Wilson v. Nooter Corporation, 475 F.2d 497, 500, cert. denied, 414 U.S. 865, 94 S.Ct. 116, 38 L.Ed.2d 85 (1973), and later appeal 499 F.2d 705 (1st Cir.1974).

C.A.1, 1966. Subsec. (1) quot. in sup. The plaintiff, a former Volkswagen dealer in the Virgin Islands, sought damages against the defendant regional Volkswagen distributor, a Mexican corporation, under the Automobile Dealers' Act for disenfranchisement.

This court upheld the jury's determination that the plaintiff's rejection of the defendant distributor, whose Puerto Rican agent was served, as a partner in the dealer franchise on unreasonable terms was justified, but remanded the case for retrial on the issue of damages to be awarded the plaintiff dealer. Volkswagen Interamericana, S.A. v. Rohlsen, 360 F.2d 437, 441, certiorari denied 385 U.S. 919, 17 L.Ed.2d 143, 87 S.Ct. 230.

C.A.1, 1963. Cit. in sup. In an action by the United States against a distributor of coal in New England for breach of the minimum standards of employment of the Walsh-Healey Public Contracts Act, the court held that, where defendant had contract with government to supply coal to it in Boston, and defendant arranged with an independent Virginia Coal Mining Company to supply the coal and the supplier then got coal from sources which violated the Walsh-Healey Act, the employees of those sources were not employees of defendant but were independent contractors, and thus held that defendant was not liable. United States v. New England Coal & Coke Co., 318 F.2d 138, 144.

C.A.2

C.A.2, 2021. Com. (m) quot. in sup. Film producer and its successor sued screenwriter, seeking a declaration that, because screenwriter was producer's employee when he wrote the screenplay for a landmark horror film, the film was a "work made for hire" owned by successor under the Copyright Act. The district court granted summary judgment for screenwriter, finding that he was an independent contractor rather than an employee. This court affirmed. The court rejected producer and successor's argument that screenwriter's membership in a labor union suggested that, according to community custom, screenwriters expected to be treated as employees under Restatement Second of Agency § 220, noting that the fact that screenwriter might have been entitled to certain protections based on his employee status for purposes of labor law did not preclude him from being considered an independent contractor entitled to different protections based on his status as an author under copyright law. Horror Inc. v. Miller, 15 F.4th 232, 247.

C.A.2,

C.A.2, 2018. Com. (c) quot. in ftn. Electrician who was referred by his union to work on a construction project for university brought federal employment-discrimination and retaliation claims against university based on allegations that university terminated him from the project after he reported racist graffiti in a bathroom at the work site. The district court entered judgment in favor of university after a jury found that electrician was not university's employee. Affirming, this court held, among other things, that the district court did not err by submitting the question of whether electrician was university's employee to the jury. The court reasoned, in part, that, under Restatement Second of Agency § 220, if the inference was not clear as to whether or not there was an employer—employee relationship, the jury determined the question after instruction by the court as to the matters of fact to be considered. Knight v. State University of New York at Stony Brook, 880 F.3d 636, 641.

C.A.2

C.A.2, 2008. Com. (a) quot. in sup. Physician with hospital staff privileges sued hospital and others, alleging that defendants discriminated against her on account of her sex in violation of federal and state statutes. The district court granted summary judgment for defendants, ruling that plaintiff was an independent contractor who was not protected by the statutes at issue. Vacating and remanding, this court held, inter alia, that a genuine issue of material fact remained regarding plaintiff's employment status. The court reasoned that there was nothing intrinsic to the exercise of discretion and professional judgment typical of physicians that prevented a person from being an employee; the issue was the balance between the employee's judgment and the employer's control. Salamon v. Our Lady of Victory Hosp., 514 F.3d 217, 229.

C.A.2, 2004. Subsec. (2) cit. in case quot. in disc., cit. generally in sup., and quot. in ftn., coms. (a) and (d) quot. in sup. Residual beneficiary under deceased choreographer's will sued dance center, which had employed choreographer, to determine ownership of certain intellectual property rights. Trial court rejected most of beneficiary's ownership claims. Affirming in part, this court

held, inter alia, that, although center did not exercise great control over choreographer during her final years, it continued to employ her by maintaining her title as the center's artistic director, paying her salary and providing benefits, and allowing her to create dances on the center's premises with the center's resources; therefore, the dances she created in her later years were properly found to be works for hire, belonging to the center. Martha Graham School and Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, Inc., 380 F.3d 624, 636, 641, 642, cert. denied 544 U.S. 1060, 125 S.Ct. 2518, 161 L.Ed.2d 1110 (2005).

C.A.2, 2001. Subsec. (2) cit. in disc. and cit. in ftn., subsec. (2)(g) cit. in disc., subsec. (1) quot. in disc. and quot. in ftn., subsec. (2)(a) quot. in ftn. After benefits review board affirmed decision of administrative law judge (ALJ) awarding total disability compensation to shop steward under the Longshore and Harbor Workers' Compensation act, stevedoring company appealed. Affirming, this court held that evidence supported finding that shop steward was appellant's employee and that steward was totally and permanently disabled. Notwithstanding that appellant had no right to control the details of shop steward's work, ALJ's determination was correct based on relative nature of steward's work and relation of that work to appellant's business. American Stevedoring Ltd. V. Marinelli, 248 F.3d 54, 61-62.

C.A.2, 2000. Com. (d) quot. in disc., com. (h) cit. in ftn. Female worker who loaded furniture from trucks at a storage company's warehouse sued storage company for violating Title VII and the New York Human Rights Law (NYHRL), alleging sexual harassment and hostile work environment. District court granted defendant summary judgment. Reversing and remanding, this court held that plaintiff was an employee, rather than an independent contractor, and thus could invoke the protections of Title VII and the NYHRL. The court stated that, in determining whether a worker was an employee within the meaning of Title VII and the NYHRL, courts ordinarily should place particular weight on the extent to which the hiring party controlled the manner and means by which the worker completed her assigned tasks, rather than on how she was treated for tax purposes or whether she received benefits. Eisenberg v. Advance Relocation & Storage, Inc., 237 F.3d 111, 114, 115.

C.A.2, 1997. Cit. in headnote, subsec. (2) cit. in case cit. in disc. Israeli residents who were emigrants from Massachusetts brought Massachusetts state court defamation action against New York newspaper publisher, its New York reporter, Israeli newspaper, and Israeli newspaper's New York correspondent in connection with an article reporter wrote that allegedly portrayed residents as fiercely anti-Arab religious fanatics. Defendants removed the case to the United States District Court for the District of Massachusetts, which dismissed the claims against Israeli defendants and transferred the remaining claims to the United States District Court for the Southern District of New York. That court dismissed the claims against reporter and entered summary judgment for publisher. Affirming, this court held that personal jurisdiction was lacking over Israeli defendants; that the claims against reporter were time-barred; that residents did not establish that publisher had acted in a grossly irresponsible manner; and that, even if it had, it could not be found liable for the actions of reporter, an independent contractor. Chaiken v. VV Pub. Corp., 119 F.3d 1018, 1021, 1034, cert. denied … U.S. …, 118 S.Ct. 1169, 140 L.Ed.2d 179 (1998).

C.A.2, 1997. Cit. generally in disc. College student who was required to perform volunteer field work at a state-run hospital for the mentally disabled brought Title VII action against state and hospital, alleging that she was sexually harassed by a staff psychiatrist. The district court entered summary judgment for defendants. Affirming, this court held, in part, that plaintiff, who worked as an unpaid intern, was unable to state a valid Title VII cause of action, since she was not an employee within the meaning of the statute. O'Connor v. Davis, 126 F.3d 112, 115, cert. denied … U.S. …, 118 S.Ct. 1048, 140 L.Ed.2d 112 (1998).

C.A.2, 1993. Subsec. (2) cit. in case quot. in disc. Terminated salesman sued shoe company under Age Discrimination in Employment Act (ADEA) as well as state antidiscrimination law. The district court granted defendant summary judgment on ground that salesman was not "employee" within ADEA and state law, since salesman had entered agreement with defendant in salesman's capacity as a corporation, not as an individual. Vacating dismissal and remanding, this court held that there was no per se rule that an individual doing business as a corporate entity could not be recognized as an employee in a discrimination suit and that the district court on remand must apply common-law agency principles to determine whether salesman was employee or independent contractor. Frankel v. Bally, Inc., 987 F.2d 86, 89, on remand 1994 WL 177605 (S.D.N.Y.1994).

C.A.2, 1990. Cit. in disc., subsec. (2) cit. in sup. 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 United States 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 United States 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-day operations or manage the details of their work. Leone v. U.S., 910 F.2d 46, 49, 50, cert. denied 499 U.S. 905, 111 S.Ct. 1103, 113 L.Ed.2d 213 (1991).

C.A.2, 1987. Com. (c) cit. in sup. An employee was killed when a plane that belonged to a subsidiary of his employer crashed. His widow signed an agreement releasing both her husband's employer and its subsidiary from liability after she was told that such a release was necessary for insurance purposes. The widow later sued the subsidiary for her husband's wrongful death. The trial court found for the plaintiff, holding that she had been induced to sign the release by misrepresentation. This court affirmed, holding, inter alia, that because the employer and its subsidiary were separate entities, the state workers' compensation laws did not protect the subsidiary from liability, and that there was sufficient evidence for a jury to infer that at the time of the crash, the airplane was operated by the subsidiary's personnel under the control and supervision of the subsidiary, not of the decedent's employer. Woodling v. Garrett Corp., 813 F.2d 543, 550.

C.A.2, 1985. Cit. in disc. A corporation, its president, and its general manager were convicted of failing to withhold taxes from payments to workers. On appeal, this court held that the workers paid by the defendant corporation were employees and not independent contractors, and that the defendants could not seek the defense of a “safe haven.” The court stated that lack of good faith, deliberate tax evasion with concealed records, and the intent to defraud all worked to deny the defendants this defense. United States v. Mackenzie, 777 F.2d 811, 814, cert. denied 476 U.S. 1139, 106 S.Ct. 2889, 90 L.Ed.2d 977 (1986).

C.A.2, 1982. Subsecs. (1) and (2) cit in sup. A musicians' union filed a complaint against a hotel association, alleging that the association's refusal to bargain collectively until the union conceded that the musicians were independent contractors rather than hotel employees violated the National Labor Relations Act. The complaint further alleged that the association violated the Act by using personal service contracts and by suspending bargaining because of the union's filing of charges, and that several hotels violated the Act by withdrawing from the association to avoid collective bargaining. The NLRB, affirming the Administrative Law Judge, held that the musicians and band leaders were employees of the hotels and that therefore the association was required to bargain collectively with the musicians' union. A hotel petitioned for review of the NLRB order and the NLRB filed a cross-petition for enforcement of its order. This court noted that the proper test to distinguish between “employee” and “independent contractor” was the common law “right to control” test. Under this test, an employer-employee relationship exists if the purported employer controls or has the right to control both the results to be accomplished and the “manner and means” by which the purported employee brings about the result. The court noted that eight factors may be considered in determining employee status: whether the purported employee is engaged in a distinct occupation or business; whether the work involved is usually done under an employer's direction or by an unsupervised specialist; the skill involved; who supplies the instrumentalities and place of performance; the length of employment; the method of payment; whether the work is part of the employer's regular business and/or necessary to it; and the intent of the parties creating the relationship. After considering these factors, the court found that although the hotels exercised control over the type, time, and location of music produced by the steady engagement bands, they did not exert any significant authority over the manner in which either the band leaders or the musicians performed. The court held that the musicians were not hotel employees but employees of their band leaders, who were independent contractors. Thus, the association was not required to bargain collectively with the musician's union. Petition for review granted, and cross-petition for enforcement denied. Hilton Intern. Co. v. N.L.R.B., 690 F.2d 318, 320, 321.

C.A.2, 1978. Cit. in diss. op. in disc. Appeal by attorney defendant from a criminal conviction of violating the Labor Management Reporting the 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.2, 1975. Cit. in sup. and com. (m) in cit. in sup. A labor union, certified as the exclusive bargaining representative of snack food distributors, initiated an unfair labor proceeding against an alleged employer, a franchised dealer, when the defendant refused to recognize the plaintiff as the bargaining representative. The National Labor Relations Board (NLRB) ruled that defendant was an employer under § 2(3) of the National Labor Relations Act. Accordingly, the Board entered judgment for the union. Defendant's petition for review, granted; plaintiff's cross petition for enforcement denied. It was held that where distributors purchased merchandise from a franchise dealer at a set price and sell to their own customers, where they are not required to work any minimum number of hours or days, and where supervisors may accompany the distributor only with the distributor's permission, the defendant was not an employer under the “right of control” test. Moreover, it was held that a court must bow to the NLRB's view in an area outside the court's expertise only when the views presented are fairly conflicting. Lorenz Schneider Co. v. NLRB, 517 F.2d 445, 448, 449.

C.A.2, 1974. Cit. in ftn. in sup. From an adverse judgment, the United States appealed. The issue was whether certain so-called car shuttlers, engaged by taxpayer-Avis, were employees for the purpose of determining Avis' liability for federal employment taxes. The court found several factors relevant to determine whether an employer-employee relationship exists: (1) Does the person receiving the benefit have the right to control? (2) Does the person rendering service have a substantial investment, cost, opportunity to profit, or a special skill? If so, he may be an independent contractor. (3) Is the relationship between the parties permanent? (4) Does the person rendering a service work in the course of the recipient's business? Applying these tests, the court found that the car shuttlers were Avis employees. Judgment was reversed and the cause remanded. Avis Rent A Car System, Inc. v. United States, 503 F.2d 423, 429.

C.A.2, 1966. Subsec. (2) cit. in sup. A roofing and siding company used applicators to install its products, these men being paid by the company, working steadily though not exclusively for the contractor, and insured by him. In an action by the company for the refund of employees' taxes withheld from the applicators' wages, the court held that the court properly charged the jury on the employee-independent contractor issue and that the jury's determination that such men were employees was supported by the evidence. Lifetime Siding, Inc. v. United States, 359 F.2d 657, 660, certiorari denied 385 U.S. 921, 87 S.Ct. 233, 17 L.Ed.2d 144.

C.A.2, 1963. Subsec. (1) illus. 7 cit. in sup. Charge that salesman's employer could be held liable for consequences of accident involving salesman's automobile when he permitted another to drive him only if the salesman had been expressly or impliedly authorized to permit another to drive his automobile and that, in absence of any such authority or actual negligence on part of salesman, the employer could not be held liable, regardless of whether salesman and driver were pursuing employer's business at time of accident, could not be held error under Ohio law. Cooke v. E.F. Drew & Co., 319 F.2d 498, 499, 500.

C.A.2, 1963. Cit. in sup. Where employee of a stevedore was injured while unloading a barge with a hoister scow and sued the owner of the hoister, and where defendant was negligent in that its operator had obeyed an imprudent signal of stevedore's foreman and had moved crate when plaintiff was standing on it, the operator remained defendant's employee during the

unloading, and defendant could claim indemnification on theory that stevedore had breached implied warranties. Williams v. Pennsylvania R.R. Co., 313 F.2d 203, 209.

C.A.3

C.A.3, 2008. Subsec. (2) cit. in case quot. in sup. (general cite). Television network appealed from orders of the Federal Communications Commission (FCC) imposing statutory fines against it in connection with its broadcast of a Super Bowl halftime show in which two performers deviated from the show's script resulting in the fleeting exposure of a bare female breast on camera. This court vacated the orders and remanded, holding, inter alia, that the FCC could not impose liability on network for the acts of the performers, hired for the limited purposes of the show, under a proper application of vicarious liability and in light of certain First Amendment scienter requirements. The court concluded that the performers were not network's employees, because, while network's control over the manner and means by which the performers accomplished the show was extensive, and the right to control was an important factor, the balance of remaining factors weighed against a finding of employment. CBS Corp. v. F.C.C., 535 F.3d 167, 193, 197.

C.A.3, 1996. Subsec. (1) quot. in disc. An employee brought a sex discrimination action against the county prosecutor, the county prosecutor's office, and others, based upon defendants' failure to promote her from investigator to sergeant or lieutenant. Jury entered verdict for plaintiff, but New Jersey federal district court granted the county's motion to vacate the jury verdict. This court reversed, holding, inter alia, that as the New Jersey Law Against Discrimination was intended to combat intentional discrimination, and given that intentional discrimination was perpetrated by county officials here, New Jersey law would conclude that the prosecutor was the county policymaker in regard to personnel actions in the prosecutor's office and that the county could be held liable for the acts of intentional discrimination that occurred. It stated that the decision whether to promote an investigator fell within the exclusive province of the county prosecutor. Coleman v. Kaye, 87 F.3d 1491, 1500, certiorari denied 519 U.S. 1084, 117 S.Ct. 754, 136 L.Ed.2d 691 (1997).

C.A.3, 1996. Cit. in disc., cit. in conc. and diss. op. §§ 219-220. 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. Subsec. (1) quot. in sup. A ship's compulsory pilot sued the ship's owner under the Jones Act after the pilot was injured while leaving the ship. This court, affirming a judgment only partially in favor of the pilot, held, inter alia, that, under Delaware law, no employer-employee relationship existed between the pilot and the master of the vessel, so that the pilot could not recover under the Jones Act. The master, said the court, had no discretion in selecting pilots, and the only control he possessed was the responsibility to take action to relieve a pilot after concluding that the pilot was taking the vessel into danger. Evans v. United Arab Shipping Co. S.A.G., 4 F.3d 207, 216, cert. denied 510 U.S. 1116, 114 S.Ct. 1065, 127 L.Ed.2d 385 (1994).

C.A.3, 1987. Subsec. (1) cit. in disc. A company borrowed employees from another company to do specific work at the borrowing company's plant. The borrowed employees were negligent in their work, resulting in injury to an employee of the borrowing company. The injured employee sued the lending employer, and the defendant raised the borrowed servant doctrine in defense. The district court found for the plaintiff. Affirming, this court held, inter alia, that under an exception to the borrowed servant doctrine for skilled workers, the defendant continued to bear a sufficient amount of control over the borrowed employees to support the jury's conclusion that they were still employed by the defendant at the time of the accident. Tyson v. Litwin Corp., 826 F.2d 1255, 1258.

C.A.3, 1985. Cit. in disc., quot. in ftn. in disc. The plaintiff, a borrowed employee on loan to the defendant borrowing employer, was injured on the job. Before starting work for this employer, the employee had signed a form acknowledging the employer's control over his work. After recovering workers' compensation following his injury, plaintiff sued the defendant for negligence as a third-party tortfeasor. The defendant moved for summary judgment on the ground that plaintiff's action was barred by the exclusive remedy provision of the local workers' compensation act. Plaintiff prevailed in the district court because although the borrowed employee doctrine applied, the employee's knowing consent to a waiver of his common law rights to recovery was required. The court of appeals agreed that the borrowed employee doctrine applied because a servant is one who is subject to another's control or right to control, but reversed and remanded and entered judgment for the defendant employer because no express waiver of a borrowed employee's common law rights need be shown to entitle a borrowing employer to immunity from suit, as long as the borrowed employee had actual knowledge of the nature and risks of his new employment. Vanterpool v. Hess Oil V. I. Corp., 766 F.2d 117, 123, cert. denied 474 U.S. 1059, 106 S.Ct. 801, 88 L.Ed.2d 777.

C.A.3, 1980. Subsec. (1) cit. in sup. Plaintiff was employed as a clerk-typist by the Department of Public Works of Jersey City. Her salary was paid from funds made available to the city under the Comprehensive Employment and Training Act (CETA). After being discharged, plaintiff sued union officials, city officials, and the Secretary of Labor of the United States, alleging that she was discharged without a hearing, in violation of her constitutional rights to due process, equal protection, and assertion of her sexual preferences "for no other reason than plaintiff being a transsexual." After a hearing, the district court granted summary judgment in favor of the Secretary of Labor. On appeal, the judgment was affirmed. The court held that plaintiff had raised no genuine issue of material fact concerning the Secretary's liability. Control over a servant's conduct or the right to control his conduct is crucial to the imposition of vicarious liability. While CETA funds come from the federal government, the planning and implementation decisions that are crucial to the operation of CETA's programs are made at the local level and there is no thorough day-to-day federal supervision of local operations. Here the Secretary did not exercise any control over the city defendants' decision to discharge plaintiff. Moreover, he had no right to control the challenged conduct in this case because he had no direct responsibility for the city defendants' initial hiring and firing decisions. Therefore, the Secretary was not liable for any alleged unlawful acts committed by the city defendants. DeTore v. Local #245 of the Jersey City Public Employees Union, 615 F.2d 980, 984, on remand 511 F.Supp. 171 (1981).

C.A.3, 1979. Subsec. (2)(i) cit. in ftn. National Labor Relations Board (NLRB) seeks enforcement of its order directing a common carrier to bargain with truck owner-operators. The critical issue presented in the litigation is whether the truckers are employees of the defendant, or are independent contractors who are expressly exempted from the National Labor Relations Act. The owner operators had designated the Fraternal Association of Special Haulers as their bargaining representative. When the union demanded that the defendant bargain with it, the defendant refused, contending that the owner-operators are not the company's employees, but are, instead, independent contractors. Subsequently, the NLRB concluded that the owner-operators are employees of the defendant, issued an order directing the defendant to bargain with the union, and brought this petition to enforce its order. The court refused to enforce the board's bargaining order, holding that the defendant could not be compelled to bargain with the truck owner-operators. The court characterized the dispute as a question of agency law. The court stated that although not conclusive, the intent of the parties is relevant to an interpretation of the lease agreement between the defendant and the owner-operators. The court noted that the case evinced the defendant's lack of control over the details of the operators' performance, the operators' opportunity for entrepreneurial skill, their ownership of equipment, and their freedom from discipline by the company. N.L.R.B. v. A. Duie Pyle, Inc., 606 F.2d 379, 385.

C.A.3, 1972. Cit. in sup. In an action to recover amounts paid to and seized by the I.R.S. as social security taxes for steel consultants who were working abroad in foreign steel mills, but under contract with plaintiff corporation, the court held that an employer-employee relationship did not exist where plaintiff lacked a right to control or supervise the consultants' performances in any substantial aspect or to transfer or discharge the consultants without the consent of the consultants and the foreign plants. American Consulting Corporation v. United States, 454 F.2d 473, 477.

C.A.3, 1969. Cit. in quot. in sup. The plaintiff, a brakeman, sued the defendant railroad, under the Federal Employees' Liability Act, for damages for injuries sustained during a "hot run" on the premises of a steel company. The court held that all evidence

supported the finding that the brakeman was an employee of the railroad, rather than of the steel company even though the plaintiff was involved in the steel company's intra-plant “hot run” at the time of the injury. Valo v. Monessen Southwestern Railway Company, 407 F.2d 1400, 1402.

C.A.3, 1958. Cit. in sup. in ftn. In an action under Federal Employers' Act, where plaintiff's deceased husband had been employed and paid by a third party, but had been engaged exclusively in servicing products sold by third party and owned by defendant and had been partially under direction and control of defendant, plaintiff's husband was termed an employee of defendant to allow recovery. Byrne v. Pennsylvania Railroad Co., 262 F.2d 906, 911, certiorari denied 359 U.S. 960, 79 S.Ct. 798, 3 L.Ed.2d 766.

C.A.4

C.A.4, 2021. Cit. in sup. Former partner of law firm brought claims of discrimination under § 1981 and retaliation in violation of Title VII against law firm, alleging that defendant harassed her and denied her short-term leave she was qualified for on the basis of her race, gender, and her addressing issues of race and gender in the workplace. The district court granted defendant’s motion to dismiss. This court affirmed, holding, inter alia, that plaintiff failed to allege sufficient facts for her § 1981 and Title VII claims, because she was not an employee as defined by those statutes. Citing Restatement Second of Agency § 220 and Restatement Third of Agency § 7.07, the court explained that the primary factor in determining whether plaintiff was an employee was whether defendant had the right to control the progress of her work, and plaintiff alleged that defendant had the right to have other shareholders review her work after its completion, and, as a shareholder and co-equal owner of the firm, no other partner was her direct superior. Lemon v. Myers Bigel, P.A., 985 F.3d 392, 396, 397.

C.A.4,

C.A.4, 2018. Subsec. (2) quot. in case quot. in ftn. Cooperative of tobacco growers and its subsidiaries brought state-law claims for fraud, fraud in the inducement, and civil conspiracy against employee and contractor who worked for plaintiffs while simultaneously operating as confidential informants for the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives. The district court initially granted defendants' motion to substitute the United States as defendant for purposes of plaintiffs' state-law tort claims under the Westfall Act, but, on reconsideration, denied the motion. Vacating and remanding, this court held that the district court abused its discretion in granting plaintiffs' motion for reconsideration, because defendants were de facto federal agents acting within the scope of their employment when they engaged in the alleged tortious acts. The court reasoned, in part, that the district court did not clearly err with respect to its original finding that defendants were sufficiently supervised and directed by the government in their undercover activities to be deemed federal employees under Restatement Second of Agency § 220. U.S. Tobacco Cooperative Inc. v. Big South Wholesale of Virginia, LLC, 899 F.3d 236, 248.

C.A.4

C.A.4, 1997. Cit. in headnote, subsec. (2) cit. in disc., subsec. (2)(i) quot. in sup. 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 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, rather, 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, 260-262.

C.A.4, 1996. Cit. in ftn., subsec. (2) cit. in sup. and cit. and quot. in ftn., subsec. (2)(e) cit. in headnote (erron. cit. as s 220(2, 3)) and quot. in sup., subsec. (2)(i) quot. in ftn. Patient sued the United States under the Federal Torts Claims Act (FTCA), alleging that two physicians who had contracted with the United States Air Force to provide primary care medical services

were negligent in failing to diagnose his lung cancer. Affirming the district court's dismissal of plaintiff's claim to the extent that it relied on the physicians' alleged negligence, this court held that the physicians were independent contractors with, and not employees of, the United States for purposes of the FTCA, and, thus, the independent-contractor exception to the FTCA's waiver of sovereign immunity barred plaintiff's claim. Robb v. U.S., 80 F.3d 884, 885, 889-891, 893, 894.

C.A.4, 1993. Subsec. (1) quot. in case quot. in sup., cit. in ftn.; subsecs. (2), (2)(f), and (2)(g) cit. in ftn. A traveling agent employed by an unincorporated association of railroads was not employed by one of the individual railroads for Federal Employees' Liability Act purposes when the agent was severely injured by a train, owned by the member railroad, that struck his automobile while he was driving it through a railroad crossing operated by the member railroad. It was not disputed that the agent was traveling on business, but the court, vacating and remanding judgments below in favor of plaintiff, decided that, because of the special nature of the relationship between the association and its member railroads and the fact that the agent's time on the day of the accident was being charged by the association against a different member railroad, plaintiff could not be seen as an employee of the defendant railroad and was not covered by FELA. Dixon v. CSX Transp., Inc., 990 F.2d 1440, 1446, cert. denied 510 U.S. 915, 114 S.Ct. 305, 126 L.Ed.2d 252 (1993).

C.A.4, 1986. Cit. in sup., subsec. (3) and com. (k) cit. in sup. A union filed a representation petition for a unit consisting of all of a novelty company's vendors at an arena. The company contested and fired the vendors, who were members of the union's organizing committee, and their helpers. The National Labor Relations Board adopted the decision of the administrative law judge that the discharge of the helpers constituted an unfair labor practice. This court denied the company's petition for review and granted enforcement of the Board's order. The court reasoned that the helpers were employees of the company and not employees of the vendors, because the company had retained the right to control the manner and means by which they worked through the vendors by providing the vendors with all the equipment necessary to perform the job and by denying the vendors any discretion over the price or the product to be sold. ARA Leisure Services, Inc. v. N.L.R.B., 782 F.2d 456, 460.

C.A.4, 1986. Cit. in disc. An insurance company terminated its agent's contract to sell policies and denied the agent any portion of funds from two employee benefits programs because he had opened a new insurance business in competition with his former employer. The agent sued the insurance company for the funds under ERISA, claiming that the benefits from the two programs had vested. The trial court granted the insurance company's motion for summary judgment on the ground that the agent was not an employee within the scope of ERISA. Vacating and remanding, this court held that in the absence of any statutory definition of employee, the common law standard applied, and that it was for the trial court to determine whether the plaintiff was within the common law definition of employee based on the extent of one party's right to control the performance of another. Darden v. Nationwide Mut. Ins. Co., 796 F.2d 701, 705.

C.A.4, 1982. Coms. (c) and (m) cit. in sup. The plaintiff sought to recover the amount of a judgment for personal injuries obtained by plaintiff against the defendant's insured. The plaintiff was injured while helping the defendant's insured install a mobile home. In the lower court the plaintiff alleged that he was an employee of the defendant's insured. When the defendant claimed that it was not liable because a clause in the insurance policy excluded employees, the plaintiff alleged that he was not an employee but was a joint venturer. The jury returned a verdict in favor of the plaintiff, but the lower court granted a judgment n.o.v. for the defendant on the ground that, as a matter of law, the plaintiff was an employee of the defendant's insured. The court affirmed the judgment n.o.v., but on the grounds of judicial estoppel. The court concluded that the lower court erred in ruling the plaintiff an employee as a matter of law because the question of right to control should be resolved by the trier of fact. Allen v. Zurich Ins. Co., 667 F.2d 1162, 1165.

C.A.4, 1969. Subsec. (h) cit. in sup. Damage suit against railroad under Federal Employers' Liability Act brought by employee of company engaged by railroad to unload automobiles. In affirming a summary judgment for plaintiff, the court held that where the railroad contracted with shippers to assume the duty of unloading automobiles and to be paid services through the unloading stage, the duty of unloading automobiles had been specifically assumed by the railroad as part of its regular business, and the freight yard at which the corporation engaged by the railroad to unload automobiles could be reasonably regarded as the redistribution point in shipping of automobiles, and the corporation engaged in the unloading was an agent of the railroad,

and the Federal Employers' Liability Act was applicable with respect to injuries sustained by an employee of the unloading corporation during the unloading process. Smith v. Norfolk Western Railway Co., 407 F.2d 501, 503, cert. denied 395 U.S. 979, 89 S.Ct. 2134, 23 L.Ed.2d 767 (1969).

C.A.4, 1965. Subsec. (2) cit. in sup. Plaintiffs were horse trainers and horse owners who bred thoroughbred horses for racing. The defendants were horseshoers who performed services for the plaintiffs. The plaintiffs entered a complaint under the Sherman Act alleging that the defendants were engaged in a group boycott and price fixing. The district court held that the defendants were employees of the plaintiffs and, as such, were exempt from the federal antitrust laws. The court held that in order to make a determination as to whether a person was an employee, it must look at the whole picture, and no one fact can be said to be controlling. The court must balance all the requirements listed as being involved in an employer-employee relationship and then, after taking into consideration all the facts, make its determination. Taylor v. Horseshoers Local No. 7, 353 F.2d 593, 599, cert. den. 384 U.S. 969, 86 S.Ct. 1859, 16 L.Ed.2d 681.

C.A.4, 1959. Cit. in case quot. in sup. In action by trainman to recover for injuries sustained as a result of being required to engage in heavy physical labor too soon after an operation, physician, who was employee of defendant, was negligent in certifying plaintiff as fit for service seven weeks after drastic surgery. Dunn v. Conemaugh & Black Lick R. Co., 267 F.2d 571, 576.

C.A.5,

C.A.5, 2015. Subsec. (2) cit. and quot. in sup., cit. in case cit. in sup. Drilling-rig superintendent who was shot when gunmen invaded the rig brought a negligence action against purported employer of rig hands who had blocked the rig's stairs with equipment, which prevented the stairs from being raised and allowed the gunmen to board the rig, alleging that, under a theory of vicarious liability, defendant was liable for rig hands' negligence. The district court granted defendant's motion for summary judgment. This court affirmed, holding that defendant was not rig hands employer. The court cited Restatement Second of Agency § 220(2) for the factors used in distinguishing employees from independent contractors and determined that rig hands were not employees, because defendant did not furnish the rig or equipment, have the right to fire or hire rig hands, or have the right to direct rig hands or control the details of their work. Johnson v. GlobalSantaFe Offshore Services, Inc., 799 F.3d 317, 322-324.

C.A.5

C.A.5, 2010. Cit. in sup. and in ftn., subsecs. (2)(a)-(2)(j) quot. in disc., subsecs. (2)(a)-(2)(d), (2)(f), and (2)(i) cit. in sup. Patient brought an action for medical malpractice against orthopedic surgeon and the United States, alleging that his left leg was amputated above the knee following a failed knee replacement performed by surgeon at a Veterans Affairs medical center. The district court denied the government's motion to dismiss but granted surgeon's motion to dismiss, finding that surgeon was entitled to immunity under the Federal Tort Claims Act. Reversing and remanding, this court held that surgeon was not a federal employee at the time of the alleged negligence but, rather, an independent contractor, and therefore not entitled to immunity, because the power of the federal government to control the detailed performance of surgeon's services was insufficient to establish an employer-employee relationship. Creel v. U.S., 598 F.3d 210, 213-215.

C.A.5, 2010. Cit. in sup., subsecs. (2)(a)-(2)(j) quot. in disc., subsecs. (2)(a)-(2)(d), (2)(f), (2)(g), and (2)(i) cit. in sup. Patient sued United States under the Federal Tort Claims Act, alleging that he was injured by a cardiologist who operated on him at the Veterans Administration (VA) medical center. The district court granted the government's motion to dismiss for lack of subject-matter jurisdiction on grounds that cardiologist was not a federal employee but, rather, an employee of a university medical center who worked at the VA medical center pursuant to a contract between the university medical center and the VA. Affirming, this court held that cardiologist was an independent contractor of the VA rather than an employee, because the power of the government to control cardiologist's detailed physical performance at the VA medical center was not sufficient to establish an employee relationship. Peacock v. U.S., 597 F.3d 654, 659.

C.A.5, 1998. Cit. in headnotes, cit. in case cit. in sup., cit. and quot. in sup., subsec. (2) and com. (h) cit. in ftn., subsecs. (2)(a)-(2)(j) cit. in sup. Military dependent sued the United States and a physician under the Federal Tort Claims Act for injuries she received during a laparoscopic tubal ligation at an army hospital. The district court denied the government's motion to dismiss, finding that the physician was an employee of the United States acting within the scope of her employment when treating plaintiff, and substituted the United States for the physician as the sole defendant. Reversing, this court held, inter alia, that the physician, who had contracted with the army hospital to provide obstetrics/gynecological services to beneficiaries of the Civilian Health and Medical Program of the Uniformed Services, was an independent contractor, rather than an employee of the government, since the government exercised no control over the physician's detailed physical performance, and the balance of the remaining factors of Restatement (Second) of Agency § 220(2) weighed in favor of independent contractor status. Linkous v. U.S., 142 F.3d 271, 272, 273, 276, 277.

C.A.5, 1997. Subsec. (2) cit. in sup., subsec. (2)(a) quot. in sup., com. (h) cit. in sup. 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, 766.

C.A.5, 1990. Cit. in disc. A crab meat processor sued to recover social security and unemployment insurance taxes it had paid on behalf of workers that it claimed were independent contractors. The district court found the workers to be employees and ordered the plaintiff to pay the remaining taxes it owed. This court affirmed, agreeing that the factors indicating the workers' status as employees outweighed those indicative of independent contractor status. The court pointed out that, inter alia, all the work was performed on the plaintiff's premises in conditions created and monitored by the plaintiff and that the plaintiff had the ability to discharge workers. Breaux and Daigle, Inc. v. U.S., 900 F.2d 49, 52.

C.A.5, 1987. Quot. in ftn. in sup., subsec. (1) quot. in disc. After a charitable organization paid to have a television station film a parade for broadcast on a telethon, the station sold extra footage to an adult film producer. When the organization sued the producer for copyright infringement, the district court granted partial summary judgment to the defendant. Affirming, this court held that under the current copyright law the plaintiff must show that the television station fit the literal agency law definition of a servant subject to its control to establish infringement. The court noted that under the old law a plaintiff had to show only that it had paid for the work to establish such control. Easter Seal Soc. v. Playboy Enterprises, 815 F.2d 323, 327, 335.

C.A.5, 1981. Cit. in disc., subsec. (2)(d) cit. in disc., com. (m) quot. in part in ftn. The National Labor Relations Board (NLRB) ruled that the respondent employer had committed several unfair labor practices in violation of the National Labor Relations Act. Specifically, the Board found that the employer had (1) impermissibly interrogated and solicited help from employees in an effort to forestall union organizing activities; (2) imposed one-day suspensions on three employees in retaliation for their union activities; and (3) instituted changes in working conditions in an unlawful attempt to convert its employees to independent contractors and thereby deprive them of their statutory right to union representation. Underlying these findings was the Board's preliminary determination that the respondent's “employees” enjoyed such status—rather than that of “independent contractors”—and thus were entitled to the Act's protection. Upon concluding that the unfair practices were indicative of a pervasive and ongoing anti-union animus on the part of the employer, the Board ruled that a fair election among the employees on the issue of union representation was unlikely and that a bargaining order was necessary. The NLRB petitioned for enforcement of its order. The court noted that general principles of agency law govern the distinction between employee and independent contractor status for purposes of the National Labor Relations Act, and that the determination of “independence” for purposes

of determining whether an individual qualifies as employee or independent contractor ultimately depends upon assessment of all of the incidents of the relationship with the employee with no one factor being decisive. The court found that the package delivery service drivers were "employees" within the purview of the National Labor Relations Act where: the drivers were required to report in by eight in the morning, they could not refuse assigned loads, the employer specified the sequence of deliveries for all drivers and could have reassigned or modified the drivers' geographic areas for any reason, the drivers were prohibited from working for competing delivery services, and the employer was free to terminate at will its agreement with any driver. The court held, inter alia, that substantial evidence supported the finding of the National Labor Relations Board that the employer instituted changes in the employee-employer relationship not for legitimate business reasons but for the purpose of forestalling the employees' union activities in violation of the National Labor Relations Act. However, the court also held that the employer's actions were insufficiently coercive to warrant the extraordinary mandate of a bargaining order. Accordingly, the order was enforced in part and vacated in part. N.L.R.B. v. Amber Delivery Serv., Inc., 651 F.2d 57, 61, 63.

C.A.5, 1975. 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) performance. If an agent's act were 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.5, 1974. Cit. in disc. and in sup. In consolidated suits arising out of an offshore oil platform explosion and fire which extended to a vessel moored to the platform, the supplier of labor for the repair work which caused the explosion appealed an adverse judgment, claiming that, inter alia, its employee could not have created its liability, through the doctrine of respondeat superior, because all of the repairmen on the platform were allegedly borrowed by the firm that was maintaining and operating the platform for unmanned oil collection and storage purposes. This court disagreed, affirming this part of the judgment on the grounds, inter alia, that the supplier of labor had not shown sufficient control by the platform operator over the employee in question to overcome the presumption that the original employment relationship continued up to the time of the explosion. The court looked to evidence that the oral understanding between the parties was that the repairmen would be supervised by their own personnel, one of the supervisors being the employee in question; that although the platform operator's engineer generally supervised all platform work, the responsibility for directing details of the welding and pipefitting was with the repairmen supervisors; and that the negligence of the employee that was imputed to the supplier of labor occurred in this operational phase of the work. Re Dearborn Marine Service, Inc., 499 F.2d 263, 285, rehear. denied 512 F.2d 1061 (5th Cir.1975), and cert. dism'd 423 U.S. 886, 96 S.Ct. 163, 46 L.Ed.2d 118 (1975).

C.A.5, 1969. Cit. subsec. (2) in ftn. in sup. This was a maritime personal injury suit against the owner of a barge and the seller of the tank on the barge which a workman was repairing when he was injured. The workman's employer which entered into a contract with the barge owner to repair the tank aboard the barge had made no agreement with the seller of the tank which had undertaken to supervise repairs. Also, the seller exercised no element of control over the workmen. The court held that the workman was not a "borrowed servant" at the time of injury, and the suit against the seller was not barred on the theory that the exclusive remedy would be for workmen's compensation. Ruiz v. Shell Oil Co., 413 F.2d 310, 313.

C.A.5, 1965. Cit. in sup. in ftn. Plaintiff brings suit in favor of a decedent, who performed various services for defendant railroad, under the Federal Employers' Liability Act. The only issue was whether decedent was an employee within provisions of Act. The Court held that, in view of relationship between parties, type of work done, permanence and skill and other relevant factors, the decedent was not an employee. Fawcett v. Missouri P. R.R. Co., 347 F.2d 233, certiorari denied 382 U.S. 907, 86 S.Ct. 242, 15 L.Ed.2d 159.

C.A.6,

C.A.6, 2014. Subsec. (2) quot. in disc. and cit. in case quot. in disc. Catholic nuns brought suit under Title VII, inter alia, against private emergency-relief organization and county emergency-management agency, among others, alleging that defendants discriminated against plaintiffs based on their religion by terminating their status as disaster-relief volunteers. The district court granted summary judgment for defendants. Affirming, this court held that plaintiffs' volunteer relationship with defendants did not fairly approximate employment and was not covered by Title VII. The court applied the common-law agency factors set forth in Restatement Second of Agency § 220(2) in reasoning that, while plaintiffs had been disaster-relief volunteers with defendants for an extended period of time, they did not show that they received compensation, obtained substantial benefits, completed employment-related tax documentation, were restricted in their schedule or activities, or were generally under the control of either organization through any of the other incidents of an agency relationship. Marie v. American Red Cross, 771 F.3d 344, 352.

C.A.6, 2014. Cit. in case cit. in sup. Prospective employee sued prospective employer, alleging, among other things, that defendant violated the Energy Reorganization Act when it declined to hire him because he engaged in protected whistleblower activity at a prior job. The district court granted summary judgment for defendant, finding that plaintiff lacked standing because he was not an employee within the meaning of the Act. Affirming, this court held that the plain meaning of "employee" under the Act did not extend to applicants, and that plaintiff therefore did not have statutory standing under the Act. The court noted that, under Restatement Second of Agency § 220, the primary indicium of a master-servant relationship was a master's ability to control the manner and means by which production was accomplished, and that, because plaintiff never worked for defendant, it never controlled the manner or means of plaintiff's production. Vander Boegh v. EnergySolutions, Inc., 772 F.3d 1056, 1061.

C.A.6

C.A.6, 2011. Subsec. (2) cit. in case quot. in sup. Female former firefighter sued volunteer fire department and its fire chief, alleging sexual harassment, retaliation, and wrongful constructive discharge in violation of state and federal law. The district court granted department's motion for partial summary judgment, finding that department was not an employer subject to the antidiscrimination provisions of Title VII of the Civil Rights Act, because its firefighters received only de minimis benefits for their services and thus were not employees under Title VII. Reversing that portion of the decision and remanding, this court held that the district court erred in adding a significant-remuneration requirement as an independent antecedent to the common-law agency test. Bryson v. Middlefield Volunteer Fire Dept., Inc., 656 F.3d 348, 352.

C.A.6, 2010. Cit. in sup., subsec. (1) quot. in sup., subsec. (2) quot. in sup., cit. in case quot. in sup., and quot. in ftn. Hostler driver employed by contractor that provided trailer and container loading and unloading services for railway sued railway for negligence, after he was injured in railway's rail yard when a co-worker rear-ended his hostler. The district court granted

summary judgment for railway, finding that there was no master-servant relationship between railway and contractor or between railway and driver. Affirming, this court held, inter alia, that driver was not a subservant of railway because contractor was not a servant of railway; the undisputed evidence demonstrated that railway had no right to control, nor did it attempt to exercise control over, the manner and details of contractor's work. Campbell v. BNSF Ry. Co., 600 F.3d 667, 672.

C.A.6, 2006. Subsec. (2) cit. in case quot. in sup. Licensed insurance agent hired by association of metal-working companies to handle insurance policies for association and its members brought ERISA action against association and its insurer after his request for disability-insurance benefits under association's ERISA benefit plan was denied. The district court granted judgment in favor of defendants. This court affirmed, holding that agent was not a common-law employee, and thus was ineligible under the plan. The court reasoned that agent asserted that he was "self-employed" and "president of [a] one man company" on his social-security-disability-benefit applications, that he received 1099 tax forms and was responsible for his own payroll taxes, and that his consulting-service agreement with association referred to him as an independent contractor. Moore v. LaFayette Life Ins. Co., 458 F.3d 416, 439.

C.A.6, 1995. Subsec. (2)(i) cit. in sup. A video production company that produced and distributed "video postcards" of Michigan vacation spots sued a television network for copyright infringement, after the network aired a segment that included scenes from plaintiff's video. Michigan federal district court entered judgment for plaintiff. This court reversed, holding that because plaintiff's video was produced in part by independent contractors, its video was not a "work made for hire," and the copyright in the video as a "work made for hire" was invalid. Although plaintiff's owner had the right to control and had actual control of the video's production, the economic treatment of the assistants, the skill required of the assistants, and plaintiff's owner's own perceptions of the assistants' status compelled the conclusion that the assistants were independent contractors. Hi-Tech Video Productions v. Capital Cities/ABC, 58 F.3d 1093, 1097.

C.A.6, 1995. Coms. (b) and (c) quot. in ftn. Insurance salesman who filed amended federal tax returns to reflect his status as an independent contractor sued government when Internal Revenue Service denied his claimed refund. The district court entered judgment awarding plaintiff his refund and this court affirmed, holding that, in light of the relevant factors, plaintiff was more properly considered an independent contractor than an employee of the insurer that put him in business. The court took a flexible approach to defining the principal-agent relationship, noting that it depended upon the legal rights and liabilities of the parties, and explained that the facts that plaintiff furnished most of his own tools, controlled and supervised his assistants, worked entirely on commission, could realize a profit or risk a loss on his efforts, and worked away from the insurer's premises all militated in favor of labeling him an independent contractor. Ware v. U.S., 67 F.3d 574, 577.

C.A.6, 1994. Cit. in disc. A state agency and several mentally disabled persons sued the vendor and purchasers of a house and the real estate brokerage, asserting Fair Housing Amendments Act violations after the vendor refused to lease the house to the mentally disabled persons and sold it instead to a group of the property's neighbors. This court affirmed district court's entry of summary judgment for the defendants, holding that the brokerage and its principal were not vicariously liable for any alleged violations by the vendor, who was a brokerage employee, as the property had not been listed with the brokerage, it received no commission on the sale, and, when the employee discussed the proposed sale with the brokerage's principal, he advised that the brokerage considered the sale to be the employee's private transaction. Michigan Protection and Advocacy Service, Inc. v. Babin, 18 F.3d 337, 343.

C.A.6, 1990. Cit. in sup. Black guests at a private party held in a private club hall sued the club, a fraternal organization, and its parent after its bartender refused to serve the black guests. The plaintiffs alleged various theories including race discrimination in the refusal to form a contract, discrimination in public accommodations, and state law contract and emotional distress claims. The district court dismissed the plaintiffs' discrimination claims because it found that the private club exception to Title II of the 1964 Civil Rights Act barred any relief, and it also dismissed the pendent state law claims. Affirming in part, reversing in part, and remanding, this court held that the plaintiffs could maintain a cause of action under 42 U.S.C. § 1981 for refusal to contract without regard to the private club exemption of Title II; however, the court determined that the plaintiffs had no cause of action against the club's parent under s 1981. The court stated that the parent was not vicariously liable for the club's conduct

because the parent did not control the club, exert influence over it, or otherwise have a relationship in which the parent had to answer for the club's actions. Watson v. Fraternal Order of Eagles, 915 F.2d 235, 244.

C.A.6, 1989. Cit. in disc. A financial consultant and members of his family sued a vice chairman of a construction company, the company's employee benefit plan coordinator, and a mortgage broker for whom the plaintiff did loan brokering work on an independent contractor basis, pursuant to the Employee Retirement Income Security Act (ERISA), to recover medical and hospital expenses that the plaintiffs claimed were due them because of their participation in an employee benefit plan. The district court dismissed the action for lack of subject matter jurisdiction, finding that the plaintiff consultant did not have standing to sue under ERISA because he was never the defendants' employee. This court affirmed, stating that the defendants exercised no control over the plaintiff's activities and that the parties regarded the plaintiff as, at most, an independent contractor. Waxman v. Luna, 881 F.2d 237, 241.

C.A.6, 1989. Subsec. (2) cit. in case cit. in sup. After an insurance agent's contract was canceled by the insurance company and the company notified him that he was ineligible for any retirement benefits under the contract, the agent sued the company to enforce ERISA's nonforfeitability requirements and to recover benefits he claimed were due him. The district court held, inter alia, that the plaintiff was an employee under ERISA and that the deferred compensation plan was not exempted from the ERISA nonforfeitability requirements. Reversing in part, this court held that the plaintiff was not an employee but rather an independent contractor and that, as such, he failed to satisfy the vesting requirements of ERISA. The court stated that he hired his own employees, exercised managerial skills in the operation of his business, owned his own office condominium, was responsible for most of his expenses and for obtaining and maintaining a license to sell insurance, and maintained his own Keogh retirement plan. Wolcott v. Nationwide Mut. Ins. Co., 884 F.2d 245, 251.

C.A.6, 1988. Cit. in diss. op. Two employees sued their former employer and the employer's executive director for discharge in retaliation for exercising their First Amendment rights, claiming that the defendants violated 42 U.S.C. § 1983. The district court granted the defendants summary judgment, and this court affirmed, holding that the nonprofit corporation/employer did not act under color of state law and that its act of discharging the employees did not amount to state action where the plaintiffs failed to show that the defendants' lease of office space from the city at the rent of one dollar per year or the public funding of its office renovation project affected their discharges in any way. The dissent argued that the corporation was a public entity subject to the statute, and listed several factors to consider in determining whether acting for another is considered public or private action, noting that the factors were loosely adapted from a list of factors useful in determining whether one acting for another is a servant or an independent contractor. Adams v. Vandemark, 855 F.2d 312, 323, cert. denied 488 U.S. 1042, 109 S.Ct. 868, 102 L.Ed.2d 992 (1989).

C.A.6, 1987. Subsecs. (1) and (2) cit. in case quot. in disc. An employer sought to renegotiate its collective bargaining agreement with its truck driver employees to change their status to that of independent contractor. After negotiations with the union failed, the employer withdrew its recognition of the union and replaced the drivers who were unwilling to become independent contractors. The union's unfair labor practice complaint was dismissed by the administrative law judge. The NLRB reversed in part, finding that the drivers were still employees and that withdrawal of union recognition was a violation of federal law. This court ordered enforcement of the NLRB's order, holding that the employer had violated federal law by withdrawing union recognition, because its drivers were employees, and that the employer was entitled to institute unilateral changes in terms of employment, because the employer and the union had reached a bargaining impasse. N.L.R.B. v. H & H Pretzel, 831 F.2d 650, 654.

C.A.6, 1969. Quot. in full in sup. This was a proceeding on a petition for the enforcement of an order of the N.L.R.B. requiring a newspaper corporation to bargain with the union as collective bargaining agent for its distributors. The court held that the distributors in question which included “throw-off drivers”, “route tube distributors”, and newsstand distributors were employees of defendant and not independent contractors. N.L.R.B. v. Brush-Moore Newspapers, Inc., 413 F.2d 809, 812, cert. denied, 396 U.S. 1002, 90 S.Ct. 555, 24 L.Ed.2d 495 (1970).

C.A.6, 1968. Subsec. (2) quot. in part in sup. The plaintiff taxpayer, a small incorporated mover, sought a refund of deficiencies assessed against it for failure to collect Social Security and withholding taxes from its "gypsy chasers," who were skilled furniture handlers hired at various contact points to load and unload the plaintiff's and other movers' trucks under rather loose supervision from their drivers. They were hired through a steward and considered themselves independent contractors. Considering the factors listed in this section in determining whether an employer-employee relationship existed, the court here refused to hold the District Court finding that the "gypsy chasers" were independent contractors was clearly erroneous, and it affirmed a judgment for the plaintiff. Lanigan Storage & Van Co. v. United States, 389 F.2d 337, 342.

C.A.6, 1964. Subsec. (2) cit. in sup. Plaintiff's husband was fatally injured during the erection of a tower while employed by a subcontractor who was to furnish all labor, tools, and equipment necessary to perform the job in accordance with plans furnished by prime contractor. In action for wrongful death widow who received Workmen's Compensation benefits under Illinois law was denied recovery against prime contractor for negligence of person erecting tower since prime contractor was not an employer of the party erecting tower. Mooney v. Stainless, Inc., 338 F.2d 127, 135, certiorari denied 381 U.S. 925, 85 S.Ct. 1561, 14 L.Ed.2d 684.

C.A.7,

C.A.7, 2017. Cit. in case cit. in disc. Student filed a class action against cosmetology school, alleging, inter alia, that the work she performed at school's salon, where members of the public could receive cosmetology services at low prices, was compensable under the Fair Labor Standards Act. The district court granted defendant's motion for summary judgment. This court affirmed, holding that the district court correctly determined that plaintiff was not an "employee" for purposes of the Act, because the fact that plaintiff paid defendant for both instructional time in the classroom as well as for supervised practical-training time in the salon—both of which were state-mandated requirements for her degree and professional licensure—was inconsistent with the notion that plaintiff was an employee of defendant. In making its decision, the court noted that it had previously applied a multi-factor test derived from Restatement Second of Agency § 220 in determining whether an employment relationship existed under the Act. Hollins v. Regency Corporation, 867 F.3d 830, 835.

C.A.7

C.A.7, 2014. Subsec. (2)(a) 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 §§ 2(2) 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, 2012. Subsec. (2) quot. in sup. Estate of truck driver who was employed by a private trucking company that contracted with the U.S. Postal Service (USPS) sued the United States under the Federal Tort Claims Act (FTCA), alleging that decedent died from injuries he sustained as the result of a USPS employee's negligence. The district court granted summary judgment for the government. Reversing and remanding, this court held that, at the time of injury, decedent was not a borrowed employee of the USPS for purposes of the FTCA and the Illinois Workers Compensation Act, and thus workers' compensation was not his exclusive remedy; trucking company did not merely "lend employees" to the USPS but provided mail transportation and delivery services, and it trained, equipped, paid, and supervised its own employees using its own equipment to provide these services. Couch v. U.S., 694 F.3d 852, 860.

C.A.7, 2012. Cit. in ftn., subsec. (2) quot. in case cit. in sup. Pickup and delivery drivers for shipping company brought a class action against company, alleging that defendant's classification of plaintiffs as independent contractors, rather than employees, violated the Kansas Wage Payment Act (KWPA). The district court granted summary judgment for defendant. This court certified questions to the Kansas Supreme Court, including the question of whether plaintiffs were employees of defendant as a matter of law under the KWPA. The court noted that, while the "right of control" test was the most important consideration in determining whether an employment relationship existed, other factors that could be considered included those enumerated in Restatement Second of Agency § 220(2). Craig v. FedEx Ground Package System, Inc., 686 F.3d 423, 427.

C.A.7, 2009. Cit. in sup., cit. and adopted in case cit. in sup., cit. in ftn.; com. (c) cit. in sup. (erron. cit. as § 220.1). Estate of decedent who provided computer-programming services to health-insurance company through an information-technology company sued both companies, seeking, among other things, a declaration that decedent was companies' joint employee. The district court granted summary judgment for defendants. Affirming, this court held that decedent was an independent contractor, rather than an employee, of both companies. Applying the Restatement Second of Agency's 10-factor control test, the court noted that not a single factor supported the conclusion that decedent was an employee, other than the facts that defendants supplied decedent with the instrumentalities of his work, and that decedent's work could arguably be considered part of information-technology company's regular business, neither of which bore much weight in the overall analysis. Estate of Suskovich v. Anthem Health Plans Of Virginia, Inc., 553 F.3d 559, 564-566, 568.

C.A.7, 2006. Cit. in disc., subsecs. (1) and (2)(a) quot. in case quot. but dist., coms. (a) and (d) quot. in sup. 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, 977, 979, 985.

C.A.7, 2002. Subsec. (2) cit. in case cit. in op. conc. in part. EEOC applied to Illinois federal district court for an order enforcing a subpoena against a law firm that demoted 32 partners, seeking documentation bearing on coverage and discrimination. District court ordered firm to comply with subpoena in its entirety. This court vacated and remanded, holding that there was enough doubt about whether the 32 demoted partners were covered by the Age Discrimination in Employment Act to entitle EEOC to full compliance with the part of the subpoena relating to coverage. Opinion concurring in part argued that while it was very likely that the 32 demoted lawyers would be classified as partners rather than employees, it was unsure how the firm's other lawyers should be classified, and thus a remand was in order. E.E.O.C. v. Sidley Austin Brown & Wood, 315 F.3d 696, 708-709.

C.A.7, 1998. Cit. in headnote and sup. An employee of a tank car company died of asphyxiation inside a railroad tank car that was filled with pure nitrogen. His widow brought a wrongful death claim, alleging that the oil company for which the decedent's employer maintained tank cars, the oil company's customer, and a company that stored the customer's mineral oil shipments were negligent in storing the nitrogen in the tank car. Indiana federal district court granted defendants summary judgment. On appeal, plaintiff argued that the oil company exercised sufficient control over the tank car company's employees to establish an agency relationship, as opposed to an independent contractor arrangement. This court affirmed, holding, inter alia, that the tank car company was an independent contractor, because the oil company exercised no control over the tank car company's work, as it did not supervise or instruct the tank car company on how to perform the requested work. The tank car company had its own safety procedures and its employees were not required to follow the oil company's safety procedures. The oil company paid the tank car company by the job, and the parties believed that they had established an independent contractor relationship. Carter v. American Oil Co., 139 F.3d 1158, 1158, 1162.

C.A.7, 1990. Subsec. (1) quot. in disc., subsec. (2) cit. in disc. and quot. in ftn. A steel works facility employee who was injured while working in a steelyard sued a railroad that was a subsidiary of the steel company and that performed transportation

functions at the facility, claiming that he was an employee of the railroad for the purpose of establishing liability under the Federal Employers' Liability Act (FELA). The district court granted the defendant's motion for a directed verdict on the ground that the plaintiff was not the defendant's employee under the FELA. Affirming, this court rejected the plaintiff's argument that the plaintiff was a subservant of the steel company, which was in turn a servant of the defendant, holding that the evidence showed that the defendant exercised no control over the steel company at the time of the accident. Warrington v. Elgin, Joliet & Eastern Ry. Co., 901 F.2d 88, 90.

C.A.7, 1983. Subsec. (2) quot. in ftn. in sup. A patient suffered severe brain damage as a result of a surgeon's negligence during the course of an operation. The surgeon was an employee of the Air Force working on a fellowship with the Cardiovascular Surgery Associates (CVSA), under whose auspices the operation was performed. The district court held the United States liable in a medical malpractice action, finding that the surgeon's fellowship was primarily for the benefit of the Air Force. This court found that the surgeon's work, however narrowly defined, was not primarily for the benefit of CVSA. Therefore, the surgeon was not the borrowed servant of CVSA, and the government remained liable for his negligence. Affirmed. Green v. United States, 709 F.2d 1158, 1164.

C.A.7, 1982. Cit. in disc. The plaintiff, an American citizen, was an employee and director of an automobile repair company. He was also the husband of the company's president. The plaintiff divided his time supervising the company's operations in Misawa and Tokyo, Japan. The company operated facilities at Yokota Air Force Base under contract with the military exchange service. At the request of an employee of the Fuchu Exchange, the plaintiff agreed to deliver snow tires from Misawa to Tokyo by car during one of his trips between the two cities, although he already had made airplane reservations for that trip. The Fuchu Exchange employee arranged for the tires to be delivered from the Misawa base to the company's Misawa facilities. En route to Tokyo the plaintiff was involved in an automobile accident and suffered severe injuries. Although the plaintiff was initially taken to a Japanese hospital, at his request he was transferred to the United States military hospital in Misawa. The plaintiff was cleared for treatment as an employee and informed that he would need surgery at the United States military hospital in Tackikawa. The plaintiff was denied admission at Tackikawa because he was not an exchange employee at the time of the accident. The plaintiff brought a worker's compensation action against the exchange. The court affirmed the administrative law judge's denial of benefits. First, the court held that the exchange was not estopped from denying the plaintiff employee status despite the fact that it granted the plaintiff's request to be admitted as an employee to the Misawa hospital. Second, the court rejected the plaintiff's argument that he was a borrowed employee at the time of the accident. The court affirmed the judge's finding that the plaintiff was a gratuitous volunteer. Because the plaintiff was a director and husband of the president of a company that enjoyed a business relationship with the exchange, the plaintiff's activities were motivated by a desire to further his own or his employer's interests in maintaining that business relationship. Third, the court held that the judge did not err in applying the restrictive common law “right to control” test in favor of the more inclusive “relative nature of the work” test where the judge found the plaintiff to be a volunteer, and the workmen's compensation concept of employee was narrower than the common law concept of servant. Symanowicz v. Army and Air Force Exchange Service, 672 F.2d 638, 640, certiorari denied _ U.S. _, 103 S.Ct. 376, 74 L.Ed.2d 510 (1982).

C.A.7, 1980. Cit. in disc. and subsec. (2)(i) and com. (m) cit. in disc. A teamsters pension fund denied a truck operator's application for retirement benefits because he allegedly lacked employee status in the industry for a number of years. The truck operator brought an action challenging the decision. A judgment was entered in favor of the fund, and the plaintiff appealed. The appellate court stated that the belief of the parties is relevant, although in most cases not determinative, of the existence of a master-servant as opposed to an independent contractor relationship. The court noted that how the parties structure their social security and income tax relations may also be considered. The court held that the determination that the plaintiff did not have employee status, a prerequisite for benefit entitlement, was not erroneous as a matter of law. The court further stated that suits for pension benefits are equitable in nature, and, therefore, there was no right to a jury trial. The judgment was affirmed. Wardle v. Central States, Etc., 627 F.2d 820, 825.

C.A.7, 1968. Cit. in sup. The plaintiffs brought an action under the Federal Employers' Liability Act against the defendant railroad to recover for their decedent's wrongful death. The decedent was employed by a trucking company which performed

pick-up services for the defendant, and was killed when a fellow employee of the trucking company mistakenly bumped a trailer, causing it to crush the decedent. The court first found that the trucking company was a servant of the defendant. Hence the decedent, as an employee of the former, was an employee of the defendant since the trucking company could obtain insurance and sublet work only with the defendant's consent and the agreement between them was for an indefinite time, thus evidencing the defendant's control over the trucking company. It then reversed a judgment for the defendant because of errors below in admitting evidence and instructing the jury. Schroeder v. Pennsylvania R.R., 397 F.2d 452, 456.

C.A.7, 1965. Subsec. (2) quot. in dictum in ftn. Plaintiff company sold roofing and siding materials. It used services of men for installation, and the contracts with these men stated the relationship of independent contractor. Plaintiff exercised a large degree of control in inspecting and approving work and issuing jobs. It paid taxes under FICA and FUTA which it seeks to recover, claiming that these men were not employees. It further claimed that control is the only important question in determining the type of relation. The court held that control was only one factor to be considered, the question of whether the men were employees was properly submitted to a jury, and verdict that they were employees was proper in view of all the evidence. The contract which designated the men as independent contractors is not binding as to that classification, if other facts support a different conclusion. Hoosier Home Improvement Co. v. United States, 350 F.2d 640, 643.

C.A.8,

C.A.8, 2015. Subsec. (2) cit. in ftn., cit. in case quot. in ftn. Former drivers for a package-delivery company brought an action against company, alleging that they were misclassified as independent contracts rather than employees and were entitled to benefits that came with an employee classification. The district court granted plaintiffs' motion for partial summary judgment and entered judgment on a jury verdict for plaintiffs. Reversing and remanding, this court held that there were genuine issues of material fact as to whether plaintiffs were employees. The court noted that plaintiffs initially argued that Restatement Second of Agency § 220(2)'s ten-factor test applied before they reached an agreement with defendant that Missouri's similar, eight-factor test governed. Gray v. FedEx Ground Package System, Inc., 799 F.3d 995, 1000.

C.A.8, 2014. Cit. in case cit. in sup., subsec. (2) cit. in case quot. in sup. (general cite). Pathologist brought claims under the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA), inter alia, against hospital, alleging that hospital improperly terminated its pathology-services agreement with him after he suffered a heart attack, underwent a heart transplant, and was hospitalized for bipolar disorder. The district court granted summary judgment for defendant. Affirming, this court held that plaintiff, in performing professional services for defendant under the parties' agreement, was working as an independent contractor, rather than an employee, and thus the ADA and ADEA, which limited their protections to employees, did not cover him. In making its decision, the court weighed a nonexhaustive list of relevant common-law factors that the U.S. Supreme Court had derived from Restatement Second of Agency § 220(2). Alexander v. Avera St. Luke's Hosp., 768 F.3d 756, 761, 765.

C.A.8

C.A.8, 2010. Subsec. (2) adopted in case quot. in sup., com. (c) quot. in sup. Former marketing representative for brokerage company sued company, alleging wrongful termination in violation of the Age Discrimination in Employment Act (ADEA) and the Iowa Civil Rights Act (ICRA). The district court entered judgment on a jury verdict finding that plaintiff was an independent contractor, and dismissed plaintiff's claims. Affirming, this court held that there was ample evidence to establish that plaintiff was an independent contractor, rather than an employee, and thus not entitled to protection under the ADEA or the ICRA. The court noted that the U.S. Supreme Court had adopted a common-law test derived primarily from the Restatement Second of Agency § 220(2) for determining whether a worker was an employee or an independent contractor where the definition of "employee" in a federal statute was "circular and explain[ed] nothing," and concluded that that test applied to plaintiff's claims of age discrimination under the ADEA and the ICRA. Ernster v. Luxco, Inc., 596 F.3d 1000, 1003, 1005.

C.A.8, 2010. Subsec. (2) cit. in sup. and cit. in ftn. 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, 819.

C.A.8, 2010. Subsecs. (2) and (2)(h) and com. (f) cit. in sup., subsec. (2)(a) cit. and quot. in sup., subsec. (2)(i) and com. (e) quot. in sup., com. (j) quot. in case quot. in sup. Passenger who was injured in an accident that occurred while he was sleeping in the back of a tractor-trailer bearing package-delivery company's insignia sued company, among others, seeking to recover damages arising out of the accident. The trial court granted summary judgment for defendant. Reversing in part and remanding, this court held that, while some evidence suggested that driver of the tractor-trailer was an independent contractor, other evidence would support a jury finding that defendant had a right to control driver's performance and was his employer for purposes of respondeat superior. Huggins v. FedEx Ground Package System, Inc., 592 F.3d 853, 858-860.

C.A.8, 2008. Subsecs. (2)(a)-(2)(j) quot. in case quot. in sup. Farmer's insurer sought a declaratory judgment that it was not required to defend or indemnify farmer against an underlying wrongful-death action brought by estate and heirs of worker who was fatally injured while hauling agricultural products for farmer. The district court ruled in favor of insurer. Affirming, this court held, inter alia, that, under Arkansas law, worker was an employee of farmer, rather than an independent contractor, and therefore came within the policy's employee exclusion. The court noted, among other things, that farmer had the right to and did in fact exercise full control over worker, who hauled exclusively for farmer for an entire season, and that farmer supplied worker with all necessary equipment, paid all operating costs, and paid worker even when customers failed to pay farmer for jobs performed by worker. Northland Cas. Co. v. Meeks, 540 F.3d 869, 873.

C.A.8, 2006. Subsec. (2) cit. in sup. and cit. in case quot. in sup., com. (h) quot. in ftn. Physician diagnosed with bipolar disorder sued hospital and administrators for terminating his medical-staff privileges. The district court, inter alia, granted summary judgment for defendants as to plaintiff's claim under the Americans with Disabilities Act (ADA). Affirming in part, this court held that plaintiff was an independent contractor, rather than an employee protected under the ADA. The court noted that, while plaintiff was contractually subject to a heightened level of personal control, he performed highly skilled surgical work, leased his own office space, scheduled his operating-room time, employed and paid his own staff, billed his patients directly, and did not receive any Social Security or other benefits or federal tax forms from hospital. Wojewski v. Rapid City Regional Hosp., Inc., 450 F.3d 338, 342, 343.

C.A.8, 2003. Subsec. (2) quot. in case quot. in sup. Terminated musician sued chamber orchestra and director under state and federal law, alleging, inter alia, disability discrimination, failure of accommodation, and breach of confidentiality. Following district court's dismissal of complaint, another musician filed separate discrimination action against same defendants, alleging termination in retaliation for her complaints of sexual harassment by conductor. Affirming, this court held, inter alia, that despite conductor's control of rehearsals and concerts, musicians, who retained discretion to decline particular concerts, received no employee benefits, and did not have income taxes withheld, were independent contractors, not employees of orchestra, and were not entitled to protection of antidiscrimination statutes. Lerohl v. Friends of Minnesota Sinfonia, 322 F.3d 486, 489, cert. denied 540 U.S. 983, 124 S.Ct. 469, 157 L.Ed.2d 374 (2003).

C.A.8, 2003. Subsec. (2) quot. in case quot. in ftn., subsec. (2)(a) cit. in ftn. After worker was injured at insured company's job site, insurer sought declaration that worker's injuries were excluded from policy coverage because worker was insured's employee, and the policy excluded coverage for employees. District court granted insurer summary judgment. This court vacated and remanded, holding that worker was not an independent contractor, because insured controlled details of worker's job and provided bulk of the tools, and only basic skills were required for worker's job. But while worker was clearly not an independent

contractor, worker's injuries may have been covered if he was a "temporary worker" within policy's meaning. Shelter Mut. Ins. Co. v. Jones, 343 F.3d 925, 926.

C.A.8, 2000. Subsec. (2) cit. in case quot. in sup. Insurance agent sued insurer for violations of Title VII, alleging that the reasons for her termination were gender-based. The district court dismissed the complaint on the ground that plaintiff was an independent contractor, and therefore not protected under the provisions of Title VII. Affirming, this court held that, while there were some indicia of an employee-employer relationship between plaintiff and defendant, stronger evidence pointed to plaintiff's status as an independent contractor. Schwieger v. Farm Bureau Ins. Co. of NE, 207 F.3d 480, 484.

C.A.8, 1997. Subsec. (2) cit. in disc. Ordained minister sought a refund of deficiencies and interest assessed against him by the IRS for tax years 1986, 1987, and 1988 on the ground that the alleged deficiencies should have been allowed as the deductible business expenses of an independent contractor. The district court entered summary judgment for government, concluding that minister, while not an employee of the local church at which he preached, was an employee of the supervising district council and national church. Reversing and remanding, this court held that minister was an independent contractor because, with respect to his local church, he paid his social security and self-insurance taxes, provided his own health insurance, and set his schedule, and because neither district council nor national church controlled or had a right to control the manner and means by which he accomplished his duties. Alford v. U.S., 116 F.3d 334, 338.

C.A.8, 1997. Subsec. (2) cit. in case quot. in sup. Terminated insurance agent sued general agent and insurer for, inter alia, violations of the Americans with Disabilities Act (ADA), alleging, among other things, that he was constructively discharged when general agent refused to accommodate his disability, bipolar disorder. The district court entered summary judgment for defendants. Affirming, this court held, in part, that insurance agent, who controlled his daily activities and reported his earnings as income of a self-employed individual for federal tax purposes, was not an employee of insurer but, rather, an independent contractor, and thus was not covered under the ADA, and that, while insurance agent could be considered an employee of general agent, insurance agent had failed to establish that general agent's reasons for demanding his resignation were a pretext for discrimination. Birchem v. Knights of Columbus, 116 F.3d 310, 313.

C.A.8, 1996. Cit. in case quot. in sup. Trucking company filed an action for a declaratory judgment, asking the district court to declare owner-operators of tractors leased to the trucking company for long-distance hauling to be independent contractors and to enjoin pension funds from collecting contributions for these individuals. Affirming the district court's entry of judgment for plaintiff, this court held, inter alia, that the owner-operators were independent contractors rather than employees. The court stated that the district court properly applied the common-law test for determining independent-contractor status and that its findings of fact regarding the relationship between plaintiff and the owner-operators were not clearly erroneous and supported its legal conclusion as to the owner-operators' status as independent contractors. Berger Transfer v. Central States, 85 F.3d 1374, 1377.

C.A.8, 1994. Subsec. (2) cit. in sup. The widow of a lobbyist retained by a union sued an employee benefit plan as personal representative of his estate to recover health care benefits under the union's ERISA plan. This court affirmed district court's entry of summary judgment for the plan, holding, inter alia, that the trustees' determination that the lobbyist was not an employee of the union was not arbitrary or capricious under the Nebraska common law of master and servant, as, although the relationship was exclusive and long-term and at the direction of the union, the lobbyist's services were professional in nature, the union billed for costs of his compensation differently from the way it billed for its employees' services, and the lobbyist was not indicated as an employee on federal income tax forms prepared by the union and the lobbyist. Collins v. Central States Health and Welfare Fund, 18 F.3d 556, 560.

C.A.8, 1994. Subsec. (2) cit. in disc. and cit. in case cit. in disc., com. (i) cit. in disc. Female owner of small businesses that rented office space and provided secretarial services brought civil rights action against county, two county agencies that rented office space and used the secretarial services, and agencies' executive director, alleging that director sexually harassed her at work. District court granted defendants summary judgment, holding that plaintiff was not protected under Title VII because she was not an employee of either county agency. Affirming, this court held that district court properly applied the "hybrid" test,

as opposed to "economic realities" test, in determining that plaintiff was an independent contractor, not an agency employee. While agencies exercised some control over plaintiff, plaintiff maintained freedom in choosing her working hours and choosing services she would provide. Noting that there was no significant difference between hybrid test and Supreme Court's common law test, the court stated that, by adding employee benefit and tax treatment factors to Restatement factors, Supreme Court recognized that common law test encompassed economic factors. Wilde v. County of Kandiyohi, 15 F.3d 103, 105, 106.

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 trial 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, 1984. Quot. in ftn. in disc. Plaintiff owned and operated a tractor-trailer truck. The district court set aside a verdict of his employer's pension fund review committee denying his claim for pension funds. The main issue on appeal was whether plaintiff was an independent contractor or an employee. The court took the common-law approach of balancing such factors as method of payment, rights of the employer to discharge, and skills required for the job. Based on these factors, the court held that the plaintiff was an employee within the meaning of the pension plan and affirmed the judgment for the plaintiff, remanding only on the issue of interest due on the claim. Short v. Central States, S.E. & S.W. Areas Pen. Fund, 729 F.2d 567, 572.

C.A.8, 1981. Subsec. (2) cit. in case cit. in sup. The plaintiffs, a railroad employee and his wife, brought this products liability suit seeking damages for injuries sustained by the husband on his job as a result of an allegedly defective railroad flatcar trailer hitch. The first complaint alleged negligence under the Federal Employers Liability Act against the employer railroad for lack of maintenance and failure to inspect. The second complaint alleged strict liability against both a second railroad which owned the railroad car, for lack of maintenance and failure to inspect, and the manufacturer, for use of a defective design. The defendants appealed from a judgment awarding damages to the plaintiffs. First, the court held that the plaintiffs offered sufficient evidence to support each element of a strict liability claim. Next, the court found the owner of the railroad car subject to strict liability where state law included lessors within its strict liability coverage. In response to the employer railroad's contention that the plaintiff was not an employee within the meaning of the Federal Employers Liability Act, the court asserted that the crucial element of employee status is whether the employer had the right to control the employee. Noting that the employer supplied the employee's tools and hardhat, was responsible for safety conditions, supervised the daily work of the employee, and paid the subsidiary which paid the employee for the work done, the court held that there was sufficient evidence to support a jury finding that the plaintiff was an employee of the railroad. The court also held that there was no error in admitting the plaintiff's testimony that he believed the railroad supervisor to be his boss. Such testimony did not invade the province of the jury and was not conclusory as to the issue of fact concerning who was the plaintiff's employer. The court further found that evidence of collateral source payments in support of the defendants' malingering claim was inadmissable, and the trial court did not abuse its discretion in sustaining the plaintiffs' challenges of two veniremen for cause. On the basis of these findings the court affirmed in part. The court reversed and remanded for reconsideration of the damages award on the basis of inflammatory closing remarks made by the plaintiffs' counsel. Vanskike v. ACF Industries, Inc., 665 F.2d 188, 199, certiorari denied 455 U.S. 1000, 102 S.Ct. 1632, 71 L.Ed.2d 867 (1982).

C.A.8, 1973. Cit. in ftn. in sup. The plaintiffs, two taxicab companies, sued for refunds of payments they had made under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act on the grounds that their drivers were not "employees" within the meaning of the Acts. The plaintiffs owned and serviced the cabs and told the drivers where to operate;

fares were split evenly between the company and the driver, after deductions for the cost of gas and oil; the drivers were members of a union with which the plaintiffs had a contract. The trial court, finding that the plaintiffs had little control over how the drivers performed their service, held that the drivers were not "employees". Applying common law tests, the appellate court reversed, holding that the plaintiffs either exercised sufficient control, or, alternatively, that they had the right to exercise control that would make the drivers "employees". Air Terminal Cab, Inc. v. United States, 478 F.2d 575, 581, cert. denied, 414 U.S. 909, 94 S.Ct. 228, 38 L.Ed.2d 146 (1973).

C.A.8, 1968. Cit. in sup. The plaintiff taxpayers sought to obtain a refund of taxes assessed pursuant to alleged deficiencies in their taxes. The plaintiff husband, a member of the radiology staff of a hospital, claimed that he was an employee of the hospital and consequently entitled to a deduction for an annuity received from the hospital under section 403(b) of the Internal Revenue Code. Having found the control of the hospital over the plaintiff husband which the court declared was the master test for the existence of an employer-employee relationship very loose, the court affirmed a dismissal. Azad v. United States, 388 F.2d 74, 76.

C.A.8, 1965. Com. (c) quot. in sup. Various pieces of equipment, together with operating personnel, were leased to the United States by the plaintiff. After an accident caused extensive damages to a leased truck, plaintiff sued under the Tort Claims Act. The issue of whether the truck driver was an employee of the lessor of truck on whose payroll he was listed or of government under the "loaned-servant" doctrine at time of the accident was question of fact to be decided according to the terms of the contract. United States v. Peter Kiewit Sons Co., 345 F.2d 879, 882.

C.A.8, 1962. Cit. in sup. For the purposes of the Federal Insurance Contributions Act, chick sexers who were supplied to hatcheries by sexer suppliers were not employees of the suppliers where the only controls retained over the sexers were placing the sexers in different areas and requiring them to maintain the quality of their work, where the sexers chose their own hours of work, where most of the tools of work were supplied by the sexers, and where the hatcheries paid the sexers, the sexers turning over a percentage to the suppliers. Saiki v. United States, 306 F.2d 642, 649.

C.A.8, 1961. Cit. in ftn. in sup. In action for a review of the denial of a physician's application for social security benefits, the facts that the contract for the services of the physician for a partnership referred to the physician as an "associate physician" and failed to use term "employee" and that the physician's remuneration was geared to the partnership's income were not inconsistent with an employer-employee relationship within the Social Security Act, and the evidence did sustain the finding that the physician was not an employee. Cody v. Ribicoff, 289 F.2d 394, 396, 88 A.L.R.2d 970.

C.A.9,

C.A.9, 2020. Cit. in sup. White male surgeon filed claims against medical center that had granted him clinical privileges, alleging racial discrimination and retaliation in violation of Title VII of the Civil Rights Act. The district court granted summary judgment for medical center, finding that surgeon was an independent contractor, rather than an employee, who did not enjoy Title VII's protections. Affirming, this court held that surgeon was an independent contractor under the factors set forth in Restatement Second of Agency § 220. The court pointed out that surgeon was paid, taxed, and received benefits like an independent contractor, and that his duties did not exhibit the level of control present in an employment relationship, but rather, evidenced his professional independence from medical center in treating his patients. Henry v. Adventist Health Castle Medical Center, 970 F.3d 1126, 1130.

C.A.9, 2018. Quot. in case quot. in sup. (general cite). Association of motor carriers sued labor commissioner of the state department of industrial relations, seeking a declaration that the Federal Aviation Administration Authorization Act preempted defendant's application of the California Supreme Court's *Borello* standard to assess whether a motor carrier properly classified its drivers as independent contractors, rather than as employees who were entitled to benefits under the Labor Code. The district court granted defendant's motion to dismiss. Affirming, this court held that the Act did not preempt defendant from using the *Borello* standard with respect to motor carriers, because that generally applicable, common-law test, which drew from the

Restatement Second of Agency, was not "related to" motor carriers' prices, routes, or services. California Trucking Association v. Su, 903 F.3d 953, 958.

C.A.9, 2018. Subsec. (2) cit. in sup., cit. in cases cit. and quot. in sup. Consumers sued seller of vehicle-service contracts through a marketing vendor, alleging that seller was liable for several telemarketing calls that vendor made to consumers in violation of the Telephone Consumer Protection Act. The district court granted summary judgment for seller. Affirming, this court held that, while seller exercised some amount of control over vendor, it did not exercise the level of control necessary to be subject to vicarious liability for vendor's placement of the unlawful calls under Restatement Second of Agency § 220, which set forth ten non-exhaustive factors for determining whether a principal exercised sufficient control over an agent to be held vicariously liable as if it were the agent's employer. Jones v. Royal Administration Services, Inc., 887 F.3d 443, 446, 450, 451.

C.A.9, 2017. Subsec. (2) cit. in sup., cit. in cases cit. and quot. in sup. Consumers sued seller of vehicle-service contracts, seeking to hold it vicariously liable for telephone calls that a telemarketing vendor made to consumers on seller's behalf in violation of the Telephone Consumer Protection Act. The district court granted summary judgment for seller. This court affirmed, holding that the district court did not err in finding that vendor was seller's independent contractor, rather than its agent, and that seller therefore could not be vicariously liable for vendor's calls. The court reasoned that vendor was an independent contractor under the factors set forth in Restatement Second of Agency § 220(2), because it sold contracts for multiple companies without seller's direct supervision, provided its own equipment, set its own hours, and only received payment if it actually made a sale. Jones v. Royal Administration Services, Inc., 866 F.3d 1100, 1103, 1106.

C.A.9

C.A.9, 2010. Subsec. (2) cit. in case cit. in sup., com. (e) cit. in ftn. in sup. Small technology startup company sued developer of source code for company's software product, seeking a declaration that developer was its employee when he wrote the source code, such that it owned the copyright to the software. After a bench trial, the district court found for plaintiff. Affirming in part, this court held, inter alia, that the district court did not err in holding that the source code was a work made for hire, in light of the circumstances and the nature of plaintiff's business; while plaintiff did not exercise much control over the manner and means by which defendant created the source code, this was not as important to a technology startup as it might be to an established company, and defendant was an inventive computer programmer who was expected to work independently. JustMed, Inc. v. Byce, 600 F.3d 1118, 1125, 1127.

C.A.9, 2010. Cit. in case quot. in sup. (general cite). Drivers for freight pick-up and delivery business sued business, alleging that they were employees of business and, as such, had been deprived of benefits conferred upon them by the state labor code. The trial court granted summary judgment for defendant, concluding that plaintiffs were independent contractors rather than employees as a matter of law. Reversing and remanding, this court held that there was sufficient indicia of an employment relationship between plaintiffs and defendant such that a reasonable jury could find the existence of such a relationship under California law. The court noted that the Supreme Court of California had endorsed factors derived from the Restatement Second of Agency that could point to an employment relationship. Narayan v. EGL, Inc., 616 F.3d 895, 900.

C.A.9, 2010. Subsec. (1) quot. in case quot. in sup., subsec. (2) quot. in sup., subsec. (2)(i) cit. in sup., com. (c) cit. in case cit. in sup. Worker brought a negligent-injury claim under the Federal Employers Liability Act against railroad, alleging that he suffered a severe neck injury as a result of welding assignments he performed while employed by railroad or its subsidiary, or both intermittently, at their joint facilities. The district court granted summary judgment for defendant. Reversing and remanding, this court held that plaintiff's evidence raised a triable issue of fact as to whether defendant was his employer. The court concluded that plaintiff's evidence could reasonably have supported a finding that, under the subservant theory, subsidiary was defendant's servant, and that defendant had the right to control subsidiary's employees, including plaintiff. Schmidt v. Burlington Northern and Santa Fe Ry. Co., 605 F.3d 686, 690, 691.

C.A.9, 2010. Subsec. (2) cit. in sup., subsecs. (2)(b), (2)(e), and (2)(g) quot. in sup., subsec. (2)(i) cit. in sup. United States filed perjury charges against professional baseball player who swore under oath that he had not taken performance-enhancing drugs, after a lab was discovered to have recorded, under player's name, positive results of urine and blood tests for the drugs. The district court found inadmissible as hearsay a lab employee's testimony regarding trainer's statements that certain blood and urine samples he brought to the lab came from player. On interlocutory appeal, this court rejected the government's argument that trainer's statements, though not specifically authorized, were admissible because they came within the scope of an agency or employment relationship; trainer was an independent contractor, rather than an employee, and trainer was not player's agent for the limited purpose of the drug testing, because there was no evidence that player directed or controlled any of trainer's activities. U.S. v. Bonds, 608 F.3d 495, 504, 505.

C.A.9, 2008. Cit. in sup. Union of taxicab drivers who worked for company filed a charge with the National Labor Relations Board, alleging that company violated the National Labor Relations Act by refusing to participate in collective bargaining regarding drivers' terms of employment. The Board affirmed the administrative law judge's conclusion that drivers were employees and company had violated the Act. Affirming, this court held, inter alia, that the Board's determination that drivers were “employees” within the meaning of the Act was supported by substantial evidence that company exercised considerable control over the means and manner of drivers' performance and did not provide drivers with the ability to pursue entrepreneurial opportunities. N.L.R.B. v. Friendly Cab Co., Inc., 512 F.3d 1090, 1096.

C.A.9, 2001. Subsec. (2) and com. (h) cit. in disc. Non-collective-bargaining-unit managerial employee on whose behalf employer made contributions to union trust fund sued trustees of fund, claiming entitlement to health benefits. Affirming the district court's grant of summary judgment for defendants, this court held, inter alia, that, because neither the trust agreement nor any other separate agreement provided the detailed written agreement necessary for the trust fund to legally accept employer's contributions with respect to plaintiff's wages, plaintiff could not establish his eligibility for benefits. Guthart v. White, 263 F.3d 1099, 1105.

C.A.9, 2001. Com. (m) quot. but dist. Migrant farm workers, recruited by labor contractor in one state to work on farm in another state, sued grower under Agricultural Worker Protection Act and state law, alleging, inter alia, that grower provided substandard housing. The district court dismissed for lack of personal jurisdiction. Reversing and remanding, this court held, inter alia, that labor contractor was agent of grower, who purposefully availed himself of the privilege of doing business in other state and was therefore subject to court's personal jurisdiction. Ochoa v. J.B. Martin and Sons Farms, Inc., 287 F.3d 1182, 1192.

C.A.9, 1999. Cit. in headnotes and disc. In her bankruptcy schedules, debtor entertainer claimed that a check for $43,260 received from her subchapter S corporation constituted employee earnings under the California Civil Procedure Code and was therefore exempt from inclusion in the bankruptcy estate. The bankruptcy court sustained the trustee's objection to the debtor's claimed exemption, and the Ninth Circuit Bankruptcy Appellate Panel affirmed. This court reversed and remanded, holding, inter alia, that debtor was an employee of the subchapter S corporation, because her performance engagements were made through the corporation, which had the legal right to specify the services she performed and to control the manner in which she performed them; debtor was paid by the corporation rather than by the establishments at which she performed; and expenses connected with debtor's performances were paid by the corporation. In re Carter, 182 F.3d 1027, 1030.

C.A.9, 1995. Subsec. (2) cit. in case quot. in sup. Owner of road grader who contracted with United States government to cut and remove timber sued government under the Federal Tort Claims Act, alleging, inter alia, that it was liable when another contractor, retained to conduct a study of ponderosa trees, negligently moved the road grader to a spot where it was ultimately burned and vandalized. The district court dismissed the claim and this court affirmed, holding that the other contractor, who supplied his own tools and equipment, who was hired and paid not by defendant but by a lumber company, and who had primary authority concerning the performance of his job, was an independent contractor for whose negligence defendant could not be held responsible under a principal-agent theory of liability. Will v. U.S., 60 F.3d 656, 659, appeal after remand 152 F.3d 932 (9th Cir.1998).

C.A.9, 1990. Subsec. (1) cit. in sup. The INS filed a complaint against an employer, alleging, inter alia, that the employer knowingly hired an alien unauthorized for employment in the United States. The administrative law judge held for the employer based on the Immigration Reform and Control Act's grandfather provision exempting employers from violations of the act for employees hired before the statute's enactment. The chief administrative hearing officer reversed, finding that the alien had left the defendant's employ so as to relinquish his grandfather status before being rehired. Affirming, this court held that substantial evidence supported the officer's finding that the defendant knowingly hired the alien after the date of the enactment and failed to comply with employer verification requirements. The court said that the alien's decision to work for another employer on a temporary basis severed his employee-employer relationship with the defendant insofar as the defendant did not have the right to control the alien's actions during that period. Maka v. U.S. I.N.S., 904 F.2d 1351, 1361, opinion amended 932 F.2d 1352 (9th Cir.1991).

C.A.9, 1989. Quot. in ftn., subsec. (2)(a) quot. in disc. An artist was commissioned by a corporation to create four works of art, which were accepted and paid for. An art dealer purchased the works and any copyrights held by the corporation and registered the works in his name. The artist's widow notified the dealer of her claim of copyright ownership, yet the dealer proceeded with poster reproduction of one of the works, accepting purchase orders. The widow sued the dealer for damages and sought declaratory relief for copyright infringement and unauthorized use of a deceased personality's name. The district court granted the plaintiff a preliminary injunction enjoining the defendant from reproducing or selling any of the works. The court of appeals affirmed, holding that the artist was not a formal employee of the corporation, that the works did not come within the requirements for works by independent contractors to be works for hire, and that the corporation was not the holder of the copyright and could not have transferred it to the dealer; the works would be for hire only if agency law principles would define the artist as an employee of the purchaser, or if the works fell under any of the enumerated “works for hire” in the federal statute and the parties had a written agreement. Dumas v. Gommerman, 865 F.2d 1093, 1104, rejected in Community for Creative Non-Violence v. Reid, 490 U.S. 730, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989). See above case.

C.A.9, 1989. Subsec. (1) cit. in disc. and cit. in ftn., subsec. (2) cit. generally in disc. and quot. in ftn., coms. (b) and (g) cit. in disc. and cit. in ftn., com. (c) cit. in sup. A man was injured when, while skiing in the mountains, he collided with a member of a professional skiing team who was performing course maintenance. Through his guardian, he sued the team for the negligence of its member on a theory of respondeat superior. The district court granted summary judgment for the defendant on the ground that the team member involved in the accident was not the team's agent. This court reversed and remanded for a new trial, stating that respondeat superior applied if a master-servant relationship existed between the team and its member, and that whether such a relationship existed was a jury question. The factors to be considered by the jury were the degree of control of the team over its members, the character of the activity involved, and whether it was routine. Krueger v. Mammoth Mountain Ski Area Inc., 873 F.2d 222, 223-225.

C.A.9, 1984. Cit. in ftn. A debtor sought to enjoin a state from collecting unemployment, disability, and personal income withholding taxes that he had failed to pay for truck drivers who worked for him, believing them to be independent contractors, not employees. The bankruptcy court found for the debtor, and the district court affirmed. The appellate court reversed, however, concluding that the debtor had exercised sufficient control over the way the drivers did their jobs, that they were employees, not independent contractors. Thus, the court concluded, the state properly assessed unemployment, disability, and personal income withholding taxes against the debtor. In re Brown, 743 F.2d 664, 667.

C.A.9, 1983. Subsec. (2) cit. in ftn. in sup. Trustees of employee fringe benefit trust funds sued to recover contributions from a contractor for work performed by trenchers on construction jobs. The district court granted summary judgment for the contractor. This court affirmed, holding that the trenchers, who owned and operated their own equipment, were in reality independent contractors, and that § 302 of the Labor-Management Relations Act prohibited payments to trust funds on behalf of independent contractors, notwithstanding a provision of a collective bargaining agreement requiring contributions to trusts on behalf of owner-operators. Todd v. Benal Concrete Const. Co., Inc., 710 F.2d 581, 583, certiorari denied 456 U.S. 1022, 104 S.Ct. 1274, 79 L.Ed.2d 679 (1984).

C.A.9, 1982. Quot. and cit. in sup. As part of a strike settlement agreement, an employer agreed that "independent contractors" would be made union members and a portion of their monthly settlements would be allocated to union funds. Following settlement, the employer allegedly reneged on the agreement by freeing from union membership a group of workers who owned and operated their own equipment. The question was submitted to an arbitrator, who found the workers to be "employees" rather than independent contractors. This decision nullified the employer's contentions that enforcement of the arbitrator's award would give effect to an unlawful "hot cargo" agreement. Both the trial and appellate courts affirmed, noting that, while the arbitrator relied on an outmoded standard advanced in a case which had been overruled, he nonetheless properly based his decision on the employer's "degree of control" consistent with the common-law agency test and the Restatement. General Teamsters, Etc. v. Mitchell Bros. Truck Lines, 682 F.2d 763, 766.

C.A.9, 1981. Subsec. (2) quot. in sup. The defendant was a member of a general contractors' association and the association's agreement obligated the defendant inter alia, to pay into the employee benefit trust funds a certain amount for each hour worked by the defendant's employees. The defendant hired some people for repair and maintenance work and the plaintiffs, as union trustees, told the defendant that it owed money to the employee trust funds for the hours worked by the repairmen. The defendant refused to contribute on the grounds that such repairmen were not employees within the terms of the association's agreement. The lower court held that although the repairmen were independent contractors, the defendant had breached the association's agreement by hiring them so the court ordered the defendant to tender that amount which the defendant would have had to pay into the trust fund if the repairmen were employees under the agreement. Both parties appealed. On appeal, this court held, inter alia, that the lower court correctly concluded that the repairmen were independent contractors and not the defendant's employees because the repairmen were not supervised by the defendant, were not required to accept work from the defendant, and set their own equipment rental rate with the defendant but the rate could be renegotiated with the general contractor of the project. The defendant's only involvement in the employment relationship with the repairmen was to supply timecards. The court also found that the association's contract obligated the defendant to hire its own employees and that, by hiring these independent contractor repairmen, the defendant had breached the contract. The court remanded to determine the amount of the awards to the trustees. Waggoner v. Northwest Excavating, Inc., 642 F.2d 333, 336, vacated 455 U.S. 931, 102 S.Ct. 1417, 71 L.Ed.2d 640, on remand 685 F.2d 1224 (9th Cir.1982).

C.A.9, 1980. Quot. and fol. Plaintiff brought this suit against the United States under the Federal Tort Claims Act, after being shot and paralyzed when he was accompanying a federal drug informant. Plaintiff alleged that the Government was liable for the informant's acts on the theory that his injuries were caused by the negligence of the Government in the selection and supervision of the informant. The United States filed both a motion to dismiss for lack of jurisdiction and a motion for summary judgment. The district court denied the motion to dismiss, but granted partial summary judgment in favor of the Government. Plaintiff appealed from this order. On appeal this court concluded that the informant was not a Federal employee and that his activities were not subject to the actual control or right of control of any federal agent. In addition, the court determined that the informant was not an independent contractor and, therefore that it did not have to decide whether the activities of a drug informant involved particular risks or special dangers to others as would impose liability under sections 416 or 427 of the Restatement (Second) of Torts. The court also held that since the Government had not been negligent in its selection of the informant, liability could not be imposed on these grounds. Accordingly, since there was no possible basis under which the United States could be held liable, the judgment of the district court was affirmed. Slagle v. United States, 612 F.2d 1157, 1162.

C.A.9, 1978. Quot. in ftn. and com. (e) quot. in disc. Petition was filed for review and cross petition was filed for enforcement of an order of the National Labor Relations Board. Petitioner, who engaged primarily in the business of delivering household appliances and furniture from department stores to homes of purchasers, was found to be in violation of the National Labor Relations Act in refusing to bargain with the union purporting to represent truck drivers who handled deliveries for the department store with whom the petitioner had contracted. The Court of Appeals held, inter alia, that the owner-operators of trucks which handled the department store's deliveries were independent contractors and not employees for the purpose of the Act. The petition for review was granted, and the petition for enforcement denied because the Board, in its application of the law to the facts, overlooked accepted principles of the law of agency. Merchants Home Delivery Serv., Inc. v. N.L.R.B., 580 F.2d 966, 973.

C.A.9, 1978. Cit. in diss. op. in sup. The National Labor Relations Board sought a judgment granting enforcement of a Board order against a corporate lessee of a motion picture theater for violations of the National Labor Relations Act as to its union employees which occurred as a result of the corporate lessee subletting the operation of one of its theaters to a partnership. This court disagreed with the Board's finding that the sublease left the lessee in a position of ownership and control of the theater operation so as to make the sublessee partnership mere employees of the lessee, and, in denying the petition for enforcement of the Board's order, held that the sublessee partnership was an independent contractor because although it was alleged in the complaint filed by the unions that the lessee controlled the labor relations policy of the sublessee by retaining the right to control its labor costs, the remote impact of this power and the lack of evidence that the lessee ever attempted to control the sublessee's labor relations policy through exercise of its right does not warrant a finding that the lessee retained any meaningful control over the sublessee in this regard. The dissent expressed the opinion that the majority incorrectly applied an "actual common control" test rather than a "right to control" test in determining the status of the sublessee as an independent contractor rather than as an employee, and felt that under the latter standard, the evidence would support the Board's conclusion that the sublessee was an employee, or, at best, the agent, or manager of the lessee. N.L.R.B. v. Transcontinental Theaters, Inc., 568 F.2d 125, 132.

C.A.9, 1977. Subsec. (2)(b), (f), (g) cit. in sup. Employers and unions petitioned for review of an NLRB decision, and the Board cross-applied for enforcement. In denying enforcement, the court held, inter alia, that the finding that owner operators of dump trucks were employers of general contractors in a representation proceeding was not itself reviewable, but could be considered in reviewing unfair labor practice charges based on the employers' entering into new bargaining agreements covering the owner operators in the midst of election proceedings, provided the representation proceeding was incorporated into the unfair labor practice proceeding. It was also held that owner operators, running their businesses completely independent of the general contractors subject to the contractors' control in minor respects concerning the results of the work, were independent contractors. Associated Gen. Contractors, Etc. v. N.L.R.B., 564 F.2d 271, 279, 281, 282.

C.A.9, 1975. Cit. and fol., quot. in part in ftn. in sup. and com. (e) quot. in part in sup. Plaintiff, contending that its members were independent contractors rather than employees, petitioned for review of a decision and order of the N.L.R.B. requiring plaintiff to recognize and bargain with the certified representatives of the "members," whom the Board found to be "employees" within the meaning of the Act. The court denied enforcement of the Board's order. Determinations of whether an individual is an employee or an independent contractor are to be made by the application of common law agency principles to the total factual context of each case. The essential ingredient of the agency test is the extent of control exercised by the "employer." The drivers in question were found to be independent contractors. They made substantial personal investments in their taxicab activities, they were substantially independent in their operations, and the driver's contracts specifically provided that the relationship created was one of independent contractor. Finally, the provisions of the driver's contracts and rules and regulation did not sufficiently evidence plaintiff's control over the drivers. SIDA of Hawaii, Inc. v. NLRB, 512 F.2d 354, 357, 359.

C.A.9, 1972. Subsec. (2) cit. and cit. and quot. in ftn. in sup. A trial examiner of the N.L.R.B. held that certain suburban newspaper dealers were "employees" rather than "independent contractors" and thus were precluded from challenging a supplemental agreement covered by a union contract with a newspaper publisher. The court held that they were independent contractors because (1) the publisher lacked control over the dealers, especially over manner and means of distribution; (2) the risk of loss rested almost entirely on the dealers; and (3) the dealers had some proprietary interest in the dealerships as evidenced by investments of over a thousand dollars. Brown v. N.L.R.B., 462 F.2d 699, 705, cert. denied, 409 U.S. 1008, 93 S.Ct. 441, 34 L.Ed.2d 301 (1972).

C.A.9, 1972. Com. (c) cit. in diss. op. in sup. Plaintiff brought this federal tort claims action against the United States for damages resulting from the alleged negligence of a government boat operator. The court held that although the boat operator cooperated with a dam supervisor during flood protection operations, the boat operator was always an employee of the United States which retained the exclusive power of discharge. The dissent argued that the evidence permitted the reasonable inference that the boat operator remained the government's servant, but also permitted the equally reasonable inference that he was a

loaned servant controlled by the dam constructors and that the lower court's conclusion that he was a borrowed servant was not clearly erroneous. Dornan v. United States, 460 F.2d 425, 429.

C.A.9, 1972. Subsec. (i) cit. and quot. in sup. Oregon brought this suit against defendant, the employer of a tug captain, who was piloting a tugboat owned by codefendant tug company, for damages resulting from the collision of a barge with a channel pier while the barge was being towed. Officials of the two tug companies and the barge company arranged to have a change of tugs at a certain point and to have codefendant's tug complete the towing upstream. The court held that it was error to hold the defendant responsible for the negligence of its captain because the towing of the barge upstream was not defendant's affair, and because defendant had no control or responsibility for the operation, and hence the captain's conduct was not within the scope of his employment. State of Oregon, State Highway Com'n v. Tug Go-Getter, 468 F.2d 1270, 1276.

C.A.9, 1970. Subsec. (2) quot. in part in sup. The petitioner dairy company sought review of an NLRB order which found that its distributors were employees and not independent contractors. The court held for petitioner in view of the fact that the distributors were not supervised in serving their customers, bought their gasoline, oil, and garage services from suppliers of their own selection, hired their own helpers and substitutes, paid their own license fees and taxes, and set their own hours of work and sequence of deliveries. The court stated that evidence of economic control of the distributors by the dairy company is not necessarily proof of the kind of control relevant to whether the distributors were employees or independent contractors, citing franchise agreements as an example of economic control of independent contractors. Carnation Company v. NLRB, 429 F.2d 1130, 1133.

C.A.9, 1969. Subsecs. (1) (2) and (2)(b)(e)(f)(g)(i) and com. (k) cit. in sup. The petitioner, an association of machinery operators, asked for review of a decision of the N.L.R.B. that its members were employees of the contractors who hired them. The operators owned and ran their own trucks and grading machinery, paid their own costs, worked from job to job, and were told the specific job to be done, but not how they were to do it. The court held that the testimony did not reveal enough control over the operators to warrant a finding that they were employees, but tended to indicate that they were independent contractors. Associated Independent Owner-Operators, Inc., v. N.L.R.B., 407 F.2d 1383, 1385, 1386.

C.A.9, 1967. Quot. in ftn. in sup. The plaintiff's decedent was killed in the crash of an airplane in which he was travelling while on a reconnaissance flight during a forest fire, the pilot being under contract with the Government to provide such services. In an action under the Federal Tort Claims Act, the Government contended that it was not the pilot's employer and was thus not liable for the decedent's death. The court, rejecting the claim that the pilot was an independent contractor, held that the criteria for determining if one is a servant (or employee) had been satisfied and that the Government was liable. United States v. Becker, 378 F.2d 319, 321.

C.A.9, 1964. Coms. (c) and (g) cited in sup. in ftn. A member of an air force aeronautical and recreational club brought action action against United States under the Federal Torts Claim Act for injuries sustained in crash of club plane flown by another club member. The claim was dismissed since evidence sustained finding that pilot had not been acting as an agent of the club and hence not as an agent of the government at the time of the crash. Brucker v. United States, 338 F.2d 427, 428, cert. den. 381 U.S. 937, 85 S.Ct. 1769, 14 L.Ed.2d 701.

C.A.9, 1964. Subsec. (2) cit. in sup. A truck owner brought an action against the owner of a log loader and his employee, the operator, for injuries sustained during a loading operation. Under Idaho law, the operator of the loader was not a loaned servant of the truck owner, who was directing placement of the logs on his trailer but had no control over detail of operator's work. Therefore, automobile liability insurer which had issued policy to truck owner was not obligated to defend truck owner's action. Brumfield v. Truck Ins. Exch., 333 F.2d 699, 701.

C.A.10

C.A.10, 2020. Quot. in sup., cit. and adopted in cases cit. in sup.; subsec. (2)(a)-(j) cit. in case 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, 1250, 1255.

C.A.10, 2000. Subsec. (2) cit. in case cit. in ftn. Criminal defendant who had been convicted of, among other things, distribution of cocaine, challenged district court's denial of her motion to suppress testimony of confidential informant. Affirming, this court held, inter alia, that informant was not a government employee from whom government was required to withhold taxes; therefore, government's failure to withhold those taxes did not amount to a violation of law justifying application of the exclusionary rule. U.S. v. Jackson, 213 F.3d 1269, 1283, cert. denied 531 U.S. 1038, 121 S.Ct. 629, 148 L.Ed.2d 537 (2000).

C.A.10, 1996. Cit. in ftn. 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, 996.

C.A.10, 1993. Subsec. (2) quot. in ftn., com. (g) 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, 1992. Subsec. (2)(i) quot. in case cit. in sup. A parent company sold its subsidiary to defendant company. Plaintiff, employee of parent, chose to retain contract with parent, which would loan employee's services to defendant, rather than create new contract with defendant company. Employee sued defendant company for retirement benefits. The district court dismissed, and this court affirmed, holding that plaintiff was not employee of defendant within the meaning of Employment Retirement Income Security Act. The court relied on facts that employee intended to retain his contract with parent and had equal bargaining power with both companies while negotiating an employment agreement. Roth v. American Hosp. Supply Corp., 965 F.2d 862, 866.

C.A.10, 1989. Cit. in cases cit. in sup. An employee who was injured while performing maintenance on a plastic injection molding machine sued the plant manager, alleging that the manager had knowingly instructed the plaintiff to use a hazardous

maintenance method. The district court entered judgment on a jury verdict for the defendant, and the plaintiff appealed the court's exclusion as hearsay of testimony of the plaintiff's wife concerning a conversation between her husband and the plant's foreman about a new maintenance procedure for the molding machine. Affirming, this court rejected the plaintiff's argument that the challenged testimony was nonhearsay concerning a statement by an opposing party's agent made within the scope of the agency; an agency relationship between the declarant foreman and his coemployee, the defendant, was not established since it was not clear whether the defendant, at the time of the foreman's statements, had exercised any control over the foreman's activities. Boren v. Sable, 887 F.2d 1032, 1038.

C.A.10, 1987. Cit. in ftn. A terminated general partner sued the accounting firm that dismissed her, alleging violations of various antidiscrimination laws. The district court treated the defendant's motion to dismiss as one for summary judgment and denied the motion, concluding that the terminated partner was also an employee for the purpose of Title VII of the Civil Rights Act of 1964, the Age Discrimination Act of 1967, and the Equal Pay Act of 1963. The district court certified the question of coverage of the Acts for immediate appeal. Reversing and remanding, this court held that bona fide general partners were not employees under the antidiscrimination Acts. The court reasoned that the status of a general partner was substantially distinguishable from that of an employee because the legal and economic rights of each were different. The court rejected the plaintiff's arguments that the court should classify the plaintiff as an employee because of the economic realities and/or the plaintiff's degree of control of the circumstances. The court explained that those tests were developed to distinguish independent contractors from employees and, because the rights and responsibilities of independent contractors were distinguishable from those of general partners, the tests were largely inapplicable to this case. Wheeler v. Hurdman, 825 F.2d 257, 268, cert. denied 484 U.S. 986, 108 S.Ct. 503, 98 L.Ed.2d 501.

C.A.10, 1981. Quot. in sup. The plaintiff, a retired truck driver, sued the defendant pension fund alleging that the fund had wrongfully denied his application for retirement benefits. The defendant had denied the benefits on the grounds that the plaintiff had not had employee status in the industry for a number of years. The lower court granted summary judgment to the defendant. This court stated that Illinois law was in harmony with the Restatement (Second) of Agency concerning master/servant relationships. This court held that the defendant clearly had sufficient information to determine whether the plaintiff had been an employee of a particular company. The court held that the defendant's decision was not erroneous as a matter of law. Affirmed. Carter v. Central States, Etc., 656 F.2d 575, 576-577.

C.A.10, 1980. Com. (a) cit. in disc. This action was brought by a husband and wife, for injuries sustained by the husband when a crane cable snapped on board a drilling rig in Singapore. The plaintiffs sued the American parent company and its Singapore subsidiary, alleging negligence in their failure to provide a dependable crane operator, in the operation of the crane by the defendants' employee and in using a stretched and weakened cable. The lower court sustained the Singapore corporation's motion to dismiss for lack of in personam jurisdiction and granted summary judgment in favor of the American corporation, refusing to impose liability for acts of its subsidiary. On appeal, this court affirmed the ruling in favor of the Singapore corporation but reversed the judgment in favor of the American corporation and remanded the case for further proceedings. Under Oklahoma law, if the general employer has not given full control of a servant for the time during which the work is being performed, then the servant does not become the servant of the person for whom the work is performed merely because such person points out the work to the servant or gives him certain directions. Because the American corporation had executed a management agreement with the Singapore corporation, whereby the American corporation agreed to provide management personnel for the purpose of assisting the Singapore corporation in its operations and undertakings, this court found that the factual issue of control, by the American corporation over the management team in the Singapore operations, would not permit an affirmance of the summary judgment. Luckett v. Bethlehem Steel Corp., 618 F.2d 1373, 1381.

C.A.10, 1970. Cit. in sup. Plaintiff-appellee was a car cleaner for the defendant-appellant railroad. The plaintiff was laid off when the railroad ceased doing its own car cleaning and contracted it out, but was hired by the contractor and returned to the same job in the same yard. The defendant still supervised the cleaning operations. When the plaintiff was injured on the job, he brought suit against the railroad pursuant to the Federal Employer's Liability Act. After judgment for the plaintiff the defendant appealed, asserting (1) the plaintiff failed to prove any negligence which caused the injury and (2) the trial court

erred in determining as a matter of law that the railroad's cleaning contract was void under 45 U.S.C. 55 as an agreement the purpose of which was to exempt the railroad from FELA liability. The court affirmed for the plaintiff holding that (1) under the act the test of a jury case is whether the proofs justify the conclusion that the defendant's negligence played any part at all in the injury and concluded that probative facts supported the jury's verdict; and (2) that because the railroad controlled the significant parts of the car cleaning operation and the plaintiff was subject to the defendant's yardmaster, plaintiff was an employee of the defendant, subject to their right of control. Missouri-Kansas-Texas Railway Co. v. Hearson, 422 F.2d 1037, 1041.

C.A.11,

C.A.11, 2018. Cit. in sup.; subsec. (1) cit. and quot. in sup.; subsec. (2)(g) quot. in case quot. in sup.; coms. (*i*) and (*l*) quot. in sup. Mexican workers who were employed by contractor under a visa program to pick fruit at a citrus grove in Florida sued contractor and owner of the grove, alleging violations of the Fair Labor Standards Act (FLSA) and breach of contract. After workers reached a settlement with contractor, the district court conducted a bench trial and, on remand, concluded that owner was workers' joint employer. This court vacated in part and remanded, holding that owner was not an employer for purposes of workers' breach-of-contract claim. While the FLSA provided that a hired individual was an employee if, as a matter of economic reality, the individual was economically dependent on the hiring entity, workers' claim for breach of contract was governed by the common-law test set forth in Restatement Second of Agency § 220, which provided that a hired individual was an employee only if the hiring entity had the right to control the individual's work; here, owner had virtually no right to control the details of workers' physical work. Garcia-Celestino v. Ruiz Harvesting, Inc., 898 F.3d 1110, 1119, 1122, 1123, 1126, 1127, 1129, 1130.

C.A.11, 2016. Subsec. (2) cit. and quot. in sup., cit. in case cit. in sup. Referral service that referred local freelance stagehands to producers of concerts and live events brought an action against National Labor Relations Board (NLRB), seeking review of NLRB's decision to grant summary judgment for unfair labor practice against plaintiff for refusing to negotiate with the stagehands' union. This court vacated NLRB's decision, holding that plaintiff's stagehands were not employees under the National Labor Relations Act. Relying on the factors set forth in Restatement Second of Agency § 220(2), the court explained that the stagehands were independent contractors, particularly because plaintiff did not have control over the stagehands. Crew One Productions, Inc. v. N.L.R.B., 811 F.3d 1305, 1310-1314.

C.A.11, 2015. Cit. and quot. in sup., cit. in cases cit. in sup. Drivers for a delivery company brought a class action against company, seeking a declaratory judgment that plaintiffs were employees and were entitled to the benefits associated with such a status. On remand, the district court granted in part defendant's motion for summary judgment. This court reversed in part, holding that there were genuine issues of material fact concerning plaintiffs' status as employees. The court relied on Restatement Second of Agency § 220 for the factors to consider when evaluating if someone was an employee. The court determined that some of the § 220 factors weighed in favor of defendant's position, such as the fact that the parties' agreement identified plaintiffs as independent contractors, while other factors weighed in favor of plaintiffs' position, such as the fact that the agreement contained detailed provisions of procedures for plaintiffs to follow. Carlson v. FedEx Ground Package Systems, Inc., 787 F.3d 1313, 1317-1319.

C.A.11, 2014. Coms. (a), (d), and (h) quot. in sup. Daughter of an elderly cruise-ship passenger who fell and hit his head while the ship was in port and died of his injuries about a week later sued cruise line, seeking to hold it vicariously liable for the purported negligence of the ship's doctor and nurse who treated passenger after his fall. The district court granted defendant's motion to dismiss plaintiff's actual-agency claim under the *Barbetta* rule, which immunized a shipowner from respondeat superior liability whenever a ship's employees rendered negligent medical care to its passengers. Reversing and remanding, this court declined to adopt the *Barbetta* rule and concluded that plaintiff's allegations established a plausible agency relationship between defendant and its employees. Citing Restatement Second of Torts § 220, the court reasoned that defendant's alleged payment of salaries to the ship's medical staff suggested the existence of an agency relationship, that employers routinely answered for the misconduct of their skilled employees, and that the mere fact of physical separation between defendant and its medical employees did not inevitably defeat respondeat superior in medical-malpractice cases or elsewhere. Franza v. Royal Caribbean Cruises, Ltd., 772 F.3d 1225, 1237, 1240, 1248.

C.A.11

C.A.11, 2011. Cit. in sup., cit. in ftn., com. (e) cit. in sup. 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, 1121, 1125.

C.A.11, 1990. Subsec. (2) quot. in ftn. A house builder sued a competitor for copyright infringement, inter alia, after the competitor built a house that was almost identical to a house pictured in one of the plaintiff's advertising flyers. The district court entered judgment awarding the plaintiff damages. Reversing and rendering, this court held that the plaintiff had no valid copyright in the flyer because the plaintiff was not the flyer's author. The court said that, because the company that drafted the flyer was an independent contractor under common law principles of agency, the flyer was not a work made for hire that would have entitled the plaintiff to a rebuttable presumption of authorship. M.G.B. Homes, Inc. v. Ameron Homes, Inc., 903 F.2d 1486, 1491, 1492.

C.A.D.C.

C.A.D.C.2018. Cit. and quot. in sup.; com. (c) cit. in ftn.; coms. (j) and (k) cit. in sup. 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 § 220 in explaining that the analysis of the master–servant relationship focused heavily on whether the employer had the right to control the subordinate, as well as other factors, such as whether the subordinate operated its own, independent business, and whether the employer actually exercised its right to control and supervise the work. Browning-Ferris Industries of California, Inc. v. National Labor Relations Board, 911 F.3d 1195, 1211-1214, 1218.

C.A.D.C.2017. Subsec. (2) cit. and quot. in cases cit. and quot. in sup. and in ftn. Package-delivery service petitioned for review of a National Labor Relations Board order that found that defendant's single-route drivers were statutorily protected employees. This court granted plaintiff's petition for review and vacated the board's order, holding that plaintiff's drivers were independent contractors to whom the National Labor Relations Act's protections did not apply. The court looked to the factors set forth in Restatement Second of Agency § 220(2) in determining whether a worker was an employee or an independent contractor, and relied on a prior decision with facts that were virtually identical, which found that drivers were independent contractors. FedEx Home Delivery, an operating division of FedEx Ground Package System, Inc. v. National Labor Relations Board, 849 F.3d 1123, 1125.

C.A.D.C.2016. Subsec. (2) cit. and quot. in sup., cit. in cases cit. in sup.; coms. (h) and (j) quot. in sup.; com. (k) cit. in sup. Orchestra filed a petition, seeking review of a National Labor Relations Board (NLRB) decision that found that orchestra musicians were employees and entitled to join a union. This court denied the petition, deferring to the NLRB's finding that musicians were employees, because the case presented a choice between two fairly conflicting views. The court reasoned that some factors set forth in Restatement Second of Agency § 220(2) weighed in favor of musicians being employees—such as the fact that orchestra exercised control over musicians, musicians' work was part of orchestra's regular business, and musicians

were paid hourly—while other factors weighed in favor of musicians being independent contractors—such as the fact that musicians were highly skilled and worked for orchestra for a limited amount of time, and both parties believed musicians were independent contractors. Lancaster Symphony Orchestra v. National Labor Relations Bd., 822 F.3d 563, 565, 566, 568, 569.

C.A.D.C.2009. Cit. in diss. op.; subsec. (2) cit. in ftn. and cit. and quot. in ftn. to diss. op.; subsec. (2)(h) cit. in ftn. to diss. op.; com. (d) cit. in disc., quot. in case quot. in sup., and cit. and quot. in ftn. to diss. op. Package-delivery company sought review of the National Labor Relations Board's determination that it committed an unfair labor practice by refusing to bargain with the union certified as the collective bargaining representative for certain of its drivers. Vacating the Board's decision, this court held that drivers were independent contractors and not employees, citing evidence of drivers' entrepreneurial opportunity, including their ability to operate multiple routes, hire additional drivers and helpers, and to sell routes without permission, as well as the parties' intent expressed in the contract. The dissent argued that the majority discounted the significance of the fact that company imposed several requirements on drivers, and that drivers performed a function that was a regular and essential part of company's normal operations. FedEx Home Delivery v. N.L.R.B., 563 F.3d 492, 496, 497, 503, 506, 507, 509, 511, 512.

C.A.D.C.1990. Subsec. (2) cit. in ftn. and cit. and quot. in case cit. in sup., subsecs. (2)(e), (f), (h), and (i) quot. in disc. The former director of a union's learning program, which was largely funded by grants from the federal government, sued the union, inter alia, to recover her accrued pension benefits as well as general damages under the Employee Retirement Income Security Act and common-law tort and contract theories. The district court granted the defendant's motion for summary judgment on the ground that the plaintiff was an independent contractor and not an employee of the union. Vacating and remanding, this court held that, because the union had detailed, day-to-day control over the plaintiff's work, the plaintiff was a union employee, working on a long-term union project. Mayeske v. International Ass'n of Fire Fighters, 905 F.2d 1548, 1554-1556, cert. denied 498 U.S. 940, 111 S.Ct. 347, 112 L.Ed.2d 311 (1990).

C.A.D.C.1989. Cit. in disc. A transportation company created an “advisory council” composed of management representatives and interested drivers selected by the company, to discuss the company's policies affecting drivers. One driver who unsuccessfully tried to join the council filed a charge, alleging that the company's support of the council constituted an unfair labor practice. The administrative law judge found that the council was a labor organization, that the drivers were employees of the transportation company, and that the company, through its active involvement, had interfered with the labor organization's formation and administration. The National Labor Relations Board summarily affirmed, and the transportation company challenged the Board's jurisdiction, claiming that the drivers were not employees, but independent contractors; the Board's jurisdiction extended only to an employer's acts directed at its employees. This court held that the drivers were independent contractors; therefore the Board's order exceeded its jurisdiction and was set aside. The court noted that the extent of actual supervision exercised by the putative employer over the means and manner of the worker's performance is the most important element in determining independent contractor status. North American Van Lines, Inc. v. N.L.R.B., 869 F.2d 596, 599, 600.

C.A.D.C.1988. Cit. in ftn. A nonprofit unincorporated association devoted to the welfare of homeless people and a sculptor each filed a certificate of copyright registration for a sculpture created by the sculptor to symbolize the plight of the homeless, for which the association produced a pedestal and other elements. The sculptor objected to a planned tour of the sculpture to which he had donated his time in producing. The trial court found for the association. This court reversed and remanded, holding that the sculpture was not a work made for hire. In reaching its conclusion, the court noted that the sculptor was not an employee of the association under the rules of agency law when there was no written agreement between the parties, and the sculptor had donated his time and personally engaged assistants when needed. Community for Creative Non-Violence v. Reid, 846 F.2d 1485, 1494, cert. granted 488 U.S. 940, 109 S.Ct. 362, 102 L.Ed.2d 352 (1988), judgment affirmed 490 U.S. 730, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989). See above case.

C.A.D.C.1987. Subsecs. (1) and (2) and com. (m) quot. in ftn., subsec. (2)(b) cit. in ftn. A woman was employed part-time for one year as a clerical worker, and thereafter she was employed as a full-time salaried employee, doing the same work, for nine more years. At the end of that time she was fired and denied a pension because the first year's employment was not counted toward vesting of pension rights, and she sued the pension fund. The trial court found for the defendant and held that the plaintiff

had not been an employee during the first year. This court reversed and remanded, holding that for purposes of pension rights vesting under ERISA, the plaintiff had been an employee because the employer-employee relationship depended on common law agency principles, especially on that of control, and not on the employment contract or on the intent or understanding of the parties. Holt v. Winpisinger, 811 F.2d 1532, 1539, 1540.

C.A.D.C.1979. Subsec. (2)(a) 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 judgment. 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 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), affirmed 656 F.2d 900 (D.C.Cir.1981).

C.A.D.C.1978. Subsecs. (1) and (2) quot. in part in ftn. in disc. Civil service employees and their union brought an 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 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.1978. Quot. in ftn., coms. (a) and (e) quot. in part and com. (e) cit., com. (k) quot. in ftn. Taxicab companies filed a petition for review of a decision and order of the National Labor Relations Board requiring companies to recognize a union as representative of their lessee cab drivers. Alternatively, the Board filed a cross-application for enforcement. The court held that where the taxicab companies leased cabs to drivers and required drivers to post bonds to cover any damage done to the cabs during their operation, where the lease provided that the companies were not required to renew or extend leases and permitted termination of the lease if the cab was involved in any violation of a government ordinance, where the companies imposed virtually no control over the lessee drivers, independent of municipal regulations which were themselves beyond the companies' control, where the lessee drivers were not required to provide any revenue and the companies received the same amount of money irrespective of the amount received by the drivers, the lessee drivers were not employees of the taxicab companies within the meaning of the National Labor Relations Act. Local 777, Democratic U. Organizing Com. v. N.L.R.B., 603 F.2d 862, 874, 875, 878, 898.

C.A.D.C.1975. Subsecs. (1) and (2) cit. in ftn. in disc. in op. conc. in part and diss. in part. This appeal followed the adoption by the NLRB of the opinion of an administrative law judge that the union had entered into an illegal agreement with a moving company requiring independent owner-operators to become members. The board held that these drivers were not employees within the meaning of the National Labor Relations Act. The work stoppages by the union at the moving company were thus illegal in attempting to force the company to coerce the drivers into joining the union or cease doing business with them. The court held that the provision in question was a union signatory agreement violative of the Act if the owner-operators were not employees, but it noted that the board had adopted, without opinion, the decision of another administrative law judge in a similar

case that such drivers were employees. Because of the factual similarity and ostensible inconsistency, the court remanded the case for clarification. International Brotherhood of Teamsters, Etc. v. NLRB, 167 App.D.C. 387, 512 F.2d 564, 568.

C.A.D.C.1971. Quot. and cit. extensively in sup. in maj. and diss. ops.; coms. (k)(1) cit. in maj. op. in sup.; coms. (a)(c) quot. in diss. op. in sup. This was an appeal of a ruling by the NLRB to the effect that Teamster coercion of independent truck owners to join the union at a California worksite did not violate the National Labor Relations Act, since the Board found the truckers to be "employees" of the general contractor, rather than independent contractors. The Court of Appeals upheld the Board's finding. The court held that in examining the relationship of the owner-operators with the contractor, all of the indicia of control, the detailed supervision of the loading and the delivery of materials, the right of termination, the record keeping by the contractor, the scheduling of work were in the hands of the contractor. The dissenting judge felt that the economic fact of ownership of their trucks, plus the fact that the trucks, not the men, were paid by the hourly rate, indicated that the drivers were independent contractors. Joint Council of Teamsters No. 42 v. NLRB, 146 App.D.C. 275, 450 F.2d 1322, 1330-1333.

C.A.D.C.1966. Subsec. (2) and com. (c) quot. in sup. and subsec. 1 quot. in sup. in diss. op. The plaintiff was struck by a truck driven by and owned by a man who hauled gravel for a corporation under an agreement whereby each party had the daily right of refusal and payment was on a ten-mile basis. The court held that under the facts the master-servant relation issue was not so clear that reasonable men could reach but one conclusion, thus ruling that the issue must go to the jury, precluding summary judgment. The dissenting opinion would find only one conclusion, i.e. that the hauler was not the defendant's servant. Dovell v. Arundel Supply Corp., 124 App.D.C. 89, 361 F.2d 543, 546, 547, certiorari denied 385 U.S. 841, 87 S.Ct. 93, 17 L.Ed.2d 74.

C.A.Fed.

C.A.Fed.2014. Subsec. (1) quot. 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 employees of the government under Restatement Second of Agency § 220(1), because plaintiffs made no showing that the government actively supervised private company's personnel, and company, not the government, had a formal employment relationship with decedents. Moore v. Department of Justice, 760 F.3d 1369, 1375.

C.A.Fed.2010. Cit. 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, 1319.

C.A.Fed.2007. Com. (d) cit. in case cit. in sup. Assignee of patents claiming a method for processing debit transactions without a personal identification number (PIN) brought action for infringement against processor of financial transactions for clients as a third party, after defendant refused to obtain a license from plaintiff to offer certain PIN-less services to those clients. The district granted summary judgment for defendant. Affirming, this court held, inter alia, that defendant was not liable for direct or indirect infringement, because it did not perform or cause to be performed each and every step of the patented methods by itself. The court noted that some steps of the methods were performed by financial institutions rather than defendant, and there was no evidence that defendant directed or controlled the behavior of those institutions. BMC Resources, Inc. v. Paymentech, L.P., 498 F.3d 1373, 1379.

C.A.Fed.2007. Cit. in case cit. in disc. (general cite). Bank brought action against the federal government, alleging that the government breached an assistance agreement between bank and government by enacting the Financial Institutions Reform, Recovery, and Enforcement Act, which restricted bank's ability to count supervisory goodwill and capital credit toward compliance with its tangible capital requirement. The Court of Federal Claims entered judgment for bank. Reversing, this court held, inter alia, that the assistance agreement was tainted from its inception by fraud arising from bank chairman/CEO's knowingly false certifications to the government, which rendered the agreement void ab initio; under the general common law of agency, agent/CEO's knowledge was imputed to principal/bank, and because CEO's conduct was not entirely for his own purposes, the adverse-interest exception did not apply. Long Island Savings Bank, FSB v. U.S., 503 F.3d 1234, 1249.

Ct.Int'l Trade

Ct.Int'l Trade, 2007. Cit. in disc., cit. in ftn., subsecs. (2)(e) and (2)(h) cit. in ftn. 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 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.

U.S.Ct.Cl.

U.S.Ct.Cl.1966. Sec. cit. and illus. 10 and 11 quot. in sup. Plaintiff was required to pay FICA taxes on certain men who were hired as "applicators." Plaintiff contracted with homeowners for the installation of roofing and siding and hired the applicators to perform the work. The applicators furnished their own equipment, hired and determined the pay of their assistants, and were paid on a job rate rather than periodically. The court held that the applicators were not the employees of plaintiff, and therefore plaintiff was entitled to a refund for taxes paid. Rayhill v. United States, 176 Ct.Cl. 1120, 364 F.2d 347, 353, 355.

U.S.Ct.Cl.1965. Cit. in sup. Plaintiff brought this case to determine whether certain installers were its employees for the purposes of F.I.C.A. and the Federal Unemployment Tax Act. The court found that the installers themselves considered that they were self-employed, that they themselves paid self-employment taxes, and that the plaintiff did not assume any responsibility for the installers' employment taxes. The court also found many other facts which supported plaintiff's claim that the installers were self-employed, as well as facts showing the contra view. The court held that in close cases the feelings which the parties concerned have relating to their relationship, particularly with respect to the payment of employment taxes, is very significant. The court also said that the whole arrangement must be looked to in order for it to make the determination. Illinois Tri-Seal Prod., Inc. v. United States, 173 Ct.Cl. 499, 353 F.2d 216, 218, 229.

U.S.Ct.Cl.1965. Cit. in sup. Plaintiff, a partnership owning fishing boats, hired captains who in turn hired deckhands and took out the boats on fishing trips. The plaintiff paid the costs of maintenance and repair of equipment and split the money obtained from sale of catch with captains who paid their crews. Captains fished wherever they desired and sometimes worked for other owners. A labor union represented the captains and deckhands in negotiations with plaintiff. Plaintiff seeks a refund of FICA and FUTA taxes paid, claiming that the captains and crews were independent contractors, not employees. The court held that in view of all relevant facts concerning control, opportunity for profit or loss, permanency of relation and skill required, the plaintiffs stand in an employer-employee relationship with captains and crews and therefore are required to pay FICA and FUTA taxes. Court found that plaintiffs exercised sufficient right of control over captains and deckhands to prevent their being classified as independent contractors. Kirkconnell v. United States, 171 Ct.Cl. 43, 347 F.2d 260, 265.

U.S.Ct.Cl.1964. Sec. cit. in sup. in ftn. and subsec. (2) quot. in sup. The owner of a scallop boat brought suit for a refund of social security taxes paid for the captain and crew of the vessel. The court held that because the owner had the right to hire, fire, and instruct and was obligated for maintenance and care, then the captain and crew were employees of the owner who was, therefore, liable for the social security taxes. Cape Shore Fish Co., Inc., v. United States, 165 Ct.Cl. 630, 330 F.2d 961, 965.

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.

Ct.Fed.Cl.

Ct.Fed.Cl.2006. Subsec. (2) quot. in sup. Pilot's widow sought federal governmental death benefits after her husband was killed in a plane crash while delivering fire retardant to a forest fire at the request of the federal forest services. The Bureau of Justice Assistance denied the request, and the denial was affirmed on administrative appeal. Granting a motion by the United States for judgment on the administrative record, this court held that the administrative decision was supported by substantial evidence and was not arbitrary, capricious, or contrary to the law; because husband was a private contract pilot, and the federal government did not exercise supervisory or personnel control over his professional services, and because his employment, pay, and liability coverage were the responsibility of the government contractor that hired him, he was not a public-safety officer serving in an official capacity and, as such, was not eligible for the requested death benefits. LaBare v. U.S., 72 Fed.Cl. 111, 120, affirmed 493 F.3d 1343 (Fed.Cir.2007).

Ct.Fed.Cl.1997. Subsec. (2) cit. in disc. A floor installment business sued the government for an employment tax refund, and the government counterclaimed for negligence and failure to deposit penalties. This court held that the flooring company's installers were independent contractors and that the company was the statutory employer of the installers' helpers. The installers were independent contractors because the company sought to maintain control over its installers only to the extent that the company desired a ready, able work force that could successfully complete installation jobs while marketing the company's name. The installers retained their independence with respect to the sequence, manner, and skill with which jobs were completed, and they bore the risk of profit or loss on their jobs and controlled their own work force. Consolidated Flooring Services v. U.S., 38 Fed.Cl. 450, 455.

S.D.Ala.

S.D.Ala.1978. Cit. in sup. Plaintiff, the South Korean captain of a shrimp trawler, brought this action against the American builder of the vessel, the American loader, and the Nigerian owner for injuries sustained during the loading process. Suit was brought under the Jones Act and United States maritime law. The court granted the defendant owner's motion to dismiss and denied the builder's and the loader's motions to dismiss. As to the loader, the court noted that by the express terms of the Jones Act, an employer-employee relationship is essential to recovery. The employer need not be the owner or operator of the vessel, and the employment relationship may be implied from the facts. The court held that although the complaint alleged that the Nigerian owner was plaintiff's immediate employer, the complaint also suggested that plaintiff was the borrowed servant of the loader and entitled to assert a Jones Act claim. Kwak Hyung Rok v. Continental Seafoods, Inc., 462 F.Supp. 894, 897, affirmed 614 F.2d 292 (1980).

D.Ariz.

D.Ariz.2009. Quot. in sup., subsection (2) cit. in case quot. in sup. Telecommunications company brought claims for trespass and negligence against general contractor and subcontractor hired by town, alleging that defendants severed plaintiff's fiber-

optic cable while excavating to install an irrigation sleeve for town. Granting in part general contractor's motion for summary judgment, this court held that general contractor was not vicariously liable for subcontractor's severing of plaintiff's cable. The court concluded that there was no evidence that subcontractor was an employee, rather than an independent contractor; it was a short-term job for which subcontractor was paid a lump sum, subcontractor was engaged in a particular skilled obligation, there was no indication that general contractor retained control over the means and methods of the work, and the instrumentalities used to accomplish the job were obtained, at least in part, by subcontractor. Sprint Communications Co., L.P. v. Western Innovations, Inc., 618 F.Supp.2d 1101, 1117.

W.D.Ark.

W.D.Ark.1999. Cit. in sup. After being injured in a car accident due to the other driver's faulty breaks, accident victims sued the muffler shop franchisee and its franchisor for negligently failing to properly repair or replace the brakes. This court granted the franchisor summary judgment, holding, inter alia, that there was no fact issue as to whether an agency relationship existed between franchisor and franchisee. There was no evidence that franchisor exercised actual control over franchisee's shop, as franchisor did not control the manner in which franchisee hired and fired employees, trained and supervised employees, or performed services. Jones v. Filler, Inc., 43 F.Supp.2d 1052, 1056.

W.D.Ark.1982. Quot. in disc., cit. in disc. This suit arose when a repossessed car being towed by a pickup truck broke loose and crashed head-on into the plaintiffs' vehicle, killing one person and injuring the other occupants. The plaintiffs brought this diversity action against the truck driver, his employer, an automobile transporter which was the employer's alleged principal, and the parties repossessing the towed vehicle. The plaintiffs alleged that the negligent acts of the defendant driver were imputable to the other defendants because the driver was their agent. The defendants moved for summary judgment, denying that an agency relationship existed between them and the driver. Noting that federal courts followed the conflict of laws rules of the forum state, this court determined that Arkansas would apply the most significant relationship test for actions ex contractu. This court held that Colorado law would apply to determine the nature of the relationship between the driver, his employer, and one of the repossessing parties, as the contract between the parties was made in Colorado and was to be performed by delivery in that state. For the same reason, the law of Arizona was to be applied in determining the relationship between the driver, his employer, and the other repossessing party. The court then found that the driver and his employer were independent contractors, not agents, of the repossessing parties, and the repossessing parties were not liable for the driver's negligence. The court granted the repossessing parties' motions for summary judgment. The court further held that it was unclear whether the defendant driver was an agent or an independent contractor with regard to his employer and his employer's alleged principal, and these relationships presented factual issues to be decided by the trier of fact. Wright v. Newman, 539 F.Supp. 1331, 1339, 1340.

C.D.Cal.

C.D.Cal.2000. Cit. in disc., cit. generally in disc. In action brought by property-owning neighbors of federally funded research center to recover damages for contamination of their drinking water, defendant university that managed center petitioned for certification as a government employee for the purpose of claiming sovereign immunity under the Federal Tort Claims Act. Denying the petition, the court held, in part, that, because government did not actually supervise, direct, or control center's day-to-day operations, university could not be deemed a government employee. Vallier v. Jet Propulsion Laboratory, 120 F.Supp.2d 887, 903, 909, affirmed 23 Fed.Appx. 803 (9th Cir.2001).

E.D.Cal.

E.D.Cal.2012. Cit. in sup. Temporary worker who allegedly was injured on facility's premises brought a negligence action against facility. Granting defendant's motion for summary judgment, this court held that workers' compensation was the exclusive remedy available to plaintiff, because, as a temporary or leased employee, he was defendant's special employee, not an independent contractor. The court noted, among other things, that plaintiff was not engaged in a distinct occupation or business

but worked as a general laborer, he was paid on an hourly basis without any opportunity to increase or decrease remuneration by means of his managerial skills, and defendant provided the instrumentalities, tools, and work place. Ybarra v. John Bean Technologies Corp., 853 F.Supp.2d 997, 1004.

E.D.Cal.2009. Cit. in case cit. in sup., subsecs. (2)(b)-(2)(j) quot. in case cit. but dist. Mortgagor sued lender, among others, alleging that lender was vicariously liable under a master/servant theory for mortgage brokers' breach of fiduciary duty. Granting defendant's motion to dismiss this claim, this court held, inter alia, that the claim failed because plaintiff did not allege facts indicating that defendant exercised the requisite control over brokers' activities to establish an employer/employee relationship. Champlaie v. BAC Home Loans Servicing, LP, 706 F.Supp.2d 1029, 1056.

N.D.Cal.

N.D.Cal.2018. Cit. in case cit. in sup. (general cite). Driver who performed deliveries for Internet-based food-ordering service sued service, alleging that defendant improperly classified him as an independent contractor rather than as an employee and violated several California laws governing the treatment of employees. After a bench trial, this court found that defendant satisfied its burden of showing that plaintiff was properly classified as an independent contractor under California law. The court reasoned, in part, that defendant exercised little or no right to control the details of plaintiff's work, and that the secondary factors used in determining whether an individual was an employee or an independent contractor, which were derived from the Restatement Second of Agency, established that plaintiff was an independent contractor and not an employee. Lawson v. Grubhub, Inc., 302 F.Supp.3d 1071, 1083.

N.D.Cal.2018. Cit. in disc. (general cite). Drivers who performed drayage services for motor carrier that provided intermodal transport services to shippers brought an action against carrier, alleging that defendant mischaracterized plaintiffs as independent contractors rather than employees, and seeking, inter alia, reimbursement of expenses and deductions from wages. This court denied plaintiffs' motion for summary judgment on the issue of employment status, holding that summary judgment was not warranted, because some undisputed facts weighed in favor of classifying plaintiffs as employees and others weighed in favor of classifying plaintiffs as independent contractors. The court explained that California courts utilized secondary factors derived from the Restatement Second of Agency § 220, in addition to the right-to-control test, in determining employment status. Valadez v. CSX Intermodal Terminals, Inc., 298 F.Supp.3d 1254, 1272.

N.D.Cal.2016. Cit. in cases cit. and quot. in sup., cit. in ftn., cit. in case cit. in ftn. (general cite). Users of a smartphone application through which they made transportation requests and were matched with a driver brought an action under a theory of respondeat superior against operator of the application, alleging that they were sexually assaulted by their drivers. This court denied in part defendant's motion to dismiss, holding that plaintiffs alleged sufficient facts to support a plausible claim that an employment relationship existed between defendant and its drivers. The court determined that plaintiffs alleged sufficient facts to support their claim that the drivers were employees rather than independent contractors, reasoning, based on the factors set forth in Restatement Second of Agency § 220, that defendant controlled various aspects of the manner and means by which drivers could offer rides, set fare prices without driver input, and retained the right to terminate drivers at will. Doe v. Uber Technologies, Inc., 184 F.Supp.3d 774, 781-782.

N.D.Cal.2001. Cit. in disc. Former employee of package-delivery company brought suit in state court against company and his supervisors in their individual capacity, alleging age discrimination and retaliation. Company removed the action to federal court on the basis of diversity jurisdiction. Granting plaintiff's motion to remand to state court, the court held that company did not meet its burden of showing that supervisors were fraudulently joined. The court rejected company's argument that plaintiff was an independent contractor and thus could not sue supervisors for retaliation because the state Fair Employment and Housing Act protected only employees. Plute v. Roadway Package System, Inc., 141 F.Supp.2d 1005, 1009.

N.D.Cal.1989. Cit. in case quot. in disc. 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 authorized the private contractor to act on its behalf, making the private contractor a government employee by statutory definition. Ferguson v. U.S., 712 F.Supp. 775, 782.

N.D.Cal.1988. Cit. in ftn., com. (c) cit. in case quot. in disc. 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, 1295, 1296, decision affirmed 876 F.2d 897 (9th Cir.1989).

N.D.Cal.1983. Subsec. (2) cit. in disc. and quot. in ftn., subsecs. (2)(a), (e), and (h) cit. and quot. in disc., com. (c) cit. in disc. The fiancee of a government employee was involved in a car accident while she was househunting. She was using a government car that had been issued to the couple to facilitate househunting. The other driver sued the woman and the government. This court reconsidered and affirmed its prior grant of partial summary judgment to the plaintiff. The court looked at the relevant factors of an agency and found that the government had the right to control the woman's use of the car, the government voluntarily provided the car, and the woman was using the car for an official government purpose. It therefore held that the woman was a government employee under the general principles of agency law for purposes of the Federal Tort Claims Act. Brandes v. United States, 569 F.Supp. 538, 540-542.

S.D.Cal.

S.D.Cal.2012. Cit. in case quot. in sup (erron. cit. as § 200); com. (k) cit. and quot. in sup. Furniture-delivery driver brought a putative class action against trucking company, alleging that defendant misclassified the drivers it hired to perform home-delivery services as independent contractors, rather than employees. On remand, this court found in favor of defendant, holding that, under California law, plaintiffs were correctly classified as independent contractors. The court reasoned, in part, that, plaintiffs, not defendant, provided the majority of the tools or instrumentalities that defendants required plaintiffs to use to conduct their business, including the delivery trucks and a specific type of mobile telephone that allowed for two-way communication. Ruiz v. Affinity Logistics Corp., 887 F.Supp.2d 1034, 1039, 1046, 1047.

S.D.Cal.2010. Subsec. (2) cit. in sup. and quot. in case cit. in sup., com. (k) quot. in sup. Truck driver, individually and on behalf of all others similarly situated, filed a class action against provider of home delivery services to home furnishing retailers, alleging that defendant misclassified drivers as independent contractors rather than employees. After a nonjury trial, this court held that, while some factors supported a finding of an employer-employee relationship under Georgia law, the predominant evidence supported a finding that drivers were correctly classified as independent contractors; among other things, the extent of control given to drivers under their agreements with defendant was that of independent contractors, not employees, and defendant did not, by making certain tools available for drivers to purchase, “furnish or provide” the tools sufficient to weigh in favor of an employee relationship. Ruiz v. Affinity Logistics Corp., 697 F.Supp.2d 1199, 1206, 1217, 1218.

S.D.Cal.1996. Subsec. (2)(a) cit. in treatise quot. in ftn. Widow and children of worker who died allegedly as the result of exposure to excessive radiation while working at a nuclear generating station brought a wrongful death action against, among others, a co-owner of the station. On reconsideration, the court affirmed its prior decision denying defendant's motion for summary judgment and granting summary adjudication for plaintiffs that defendant was not a joint employer of plaintiffs' decedent and thus was not entitled to the protection of workers' compensation exclusivity. The court said that defendant was not in a principal-agent relationship with co-owner that operated the station, at least with respect to employees at the station, and had no right of control over plaintiffs' decedent. McLandrich v. Southern California Edison Co., 917 F.Supp. 723, 730.

D.Colo.

D.Colo.2015. Cit. in sup.; com. (d) cit. and quot. in sup. Distributor of prefabricated steel buildings brought an action against competitor, alleging that defendant created websites containing defamatory content about plaintiff and encouraged plaintiff's customers to file complaints against plaintiff; defendant filed a counterclaim for false advertising, alleging that plaintiff, through an entity it hired, made misrepresentations about its goods and services on blog posts and advertisements. This court denied in part plaintiff's motion for summary judgment on defendant's counterclaim, holding that there was a genuine issue of material fact as to whether entity was acting as plaintiff's agent, rather than as an independent contractor, when it published the allegedly false content. The court relied on the factors set forth in Restatement Second of Agency § 220 in determining whether an entity was an agent or an independent contractor. General Steel Domestic Sales, LLC v. Chumley, 129 F.Supp.3d 1158, 1170, 1171.

D.Conn.

D.Conn.2018. Subsec. (2) cit. in case quot. in disc. Production company and successor in interest brought a lawsuit against screenwriter, seeking a declaration that the screenplay written by screenwriter was a work for hire and that screenwriter did not have an authorship interest in the screenplay. This court granted screenwriter's motion for summary judgment, holding, inter alia, that screenwriter was an independent contractor, and that, as an independent contractor, his work could not be a work for hire. The court cited a U.S. Supreme Court case highlighting several factors derived from Restatement Second of Agency § 220 that courts would use to determine whether a person was an employee or an independent contractor, and reasoned that screenwriter was an independent contractor because he performed skilled work, received no employee benefits, was not treated as an employee for tax purposes, and did not grant production company the right to assign him additional projects. Horror Inc. v. Miller, 335 F.Supp.3d 273, 301-302.

D.Conn.2014. Cit. in case quot. in ftn. (general cite). Former employee of the state department of environmental protection, who attended a police academy run by the state's police-officer-standards-and-training council as part of his employment, brought an employment-discrimination action against the state, the department, and the council in connection with his termination, alleging illegal discriminatory practices by the department and the council. This court denied the council's motion for summary judgment, holding, among other things, that employee could assert a Title VII claim against the council, because there was a genuine issue of fact as to whether the department delegated a core duty under Title VII—the training of its employee police officers—to the council when it required such employees to attend the council's police academy, and whether the council, through its police academy, was functioning as the department's agent. The court noted that the Second Circuit considered, among other things, the factors set forth in Restatement Second of Agency § 220 in determining whether an agency relationship existed. Pathan v. Connecticut, 19 F.Supp.3d 400, 417.

D.Conn.2006. Cit. in case cit. in sup. Town employee sued town and town officials, alleging that defendants promoted her and then refused to honor that promotion or to compensate her for performing additional responsibilities. Granting in part defendants' motion to strike, this court held, inter alia, that the pertinent materials submitted by plaintiff included inadmissible double hearsay not subject to any hearsay exception. The court reasoned that defendant official's alleged initial statement to other town officials that plaintiff had an open case with the town and he did not want her in a supervisory role was nonhearsay because defendant official was an agent of a party, i.e., town, and his statement concerned a matter within the scope of his employment; however, there was no such hearsay exception for fire commissioner's second-level repetition of the statement to plaintiff, because commissioner was subject to defendant official's administrative supervision and was not town's agent. Lewis v. Town of Waterford, 239 F.R.D. 57, 61.

D.Conn.1998. Cit. in case quot. in ftn. After a psychiatric hospital resident sexually abused a patient, the patient sued the university that supervised the residency and a university faculty member who counseled the resident, alleging negligence, among other claims. This court granted in part and denied in part the university's motion for summary judgment, holding, inter alia, that the university was not liable under a respondeat superior theory, because the resident acted outside the scope of his

employment. However, there was a fact issue as to whether the faculty member was the hospital's agent, as opposed to an independent contractor. Garamella For Estate of Almonte v. N.Y. Med. Coll., 23 F.Supp.2d 153, 163.

D.Conn.1989. Cit. in case cit. in disc. A programmer developed and copyrighted a computer program enabling users to estimate the cost of machining a manufactured part. The programmer brought suit against former sales representatives for copyright infringement, breach of fiduciary duty, and unfair trade practices after the defendants began marketing a similar program. The district court held that screen displays generated by a computer program were copyrightable subject matter and that the plaintiff had established a valid claim under the Lanham Act, yet the court held for the defendants on the plaintiff's breach of fiduciary duty claim, stating that the plaintiff had failed to establish that he controlled the defendants' activities; factors indicative of control are the right of the principal to direct and control the work of the agent, whether the agent is engaged in a distinct operation, whether the principal or agent supplies the instrumentalities, tools, and place of work, and the method of payment. Manufacturers Technologies, Inc. v. Cams, Inc., 706 F.Supp. 984, 1005.

D.Conn.1987. Cit. in case quot. in disc. A corporation purchased a helicopter from a wholly owned international sales subsidiary of an aircraft manufacturer. After the helicopter crashed off the coast of Brazil, the corporation's insurer sued the manufacturer and the seller alleging that a defective part in the rotary mechanism caused the accident. This court found that the manufacturer was entitled to partial summary judgment on the issue of agency, holding, inter alia, that because the seller was controlled by the manufacturer and acted as its international marketing arm, it was the manufacturer's agent; and because the seller acted within its authority as agent in negotiating the sales contract, the manufacturer was entitled to avail itself of the contract's disclaimer provisions. Comind, Companhia de Seguros v. Sikorsky Aircraft, 116 F.R.D. 397, 403.

D.Del.

D.Del.2012. Quot. in sup., cit. in case quot. in sup. Lender brought a negligence claim, inter alia, against real estate appraisal management company, alleging that it suffered a significant financial loss as a result of a faulty appraisal done by an appraiser utilized by defendant. Denying defendant's motion for summary judgment, this court held that a genuine issue of material fact existed as to whether appraiser was defendant's servant or independent contractor for purposes of determining if defendant was vicariously liable for appraiser's alleged negligence; the determination that a party was an independent contractor as opposed to a servant was ordinarily a matter of fact resolved by the ultimate factfinder after an analysis of the factors of Restatement Second of Agency § 220, including whether defendant had the right to control the time, manner, and method of appraiser's execution of her work. ING Bank, FSB v. American Reporting Co., LLC, 843 F.Supp.2d 491, 495.

D.Del.1997. Subsec. (2) cit. in case quot. in disc. A temporary worker brought, in part, sex discrimination and retaliation claims under Title VII of the Civil Rights Act of 1964 against a temporary-employment agency and the customer to which she had been assigned by the agency. Granting the agency's motion for summary judgment on the Title VII sex discrimination and retaliation claims, the court held, inter alia, that the agency was not plaintiff's employer for purposes of Title VII and, therefore, was not liable for unlawful “employer practices.” The court said that the agency did not play a role in the manner and means by which plaintiff's work was accomplished, since plaintiff was trained and supervised by an employee of the customer and plaintiff was not accountable on a day-to-day basis to any employee of the agency. Williams v. Caruso, 966 F.Supp. 287, 295.

D.Del.1993. Cit. in sup. The former president/CEO of a corporation sued the corporation and its parent and affiliated companies, alleging breach of an incentive stock agreement by failing to issue unrestricted shares to the plaintiff after the employment relationship was terminated. This court, granting in part and denying in part summary judgment for the plaintiff, held, inter alia, that, under Delaware law, as the incentive stock agreement provision that the corporation could repurchase the plaintiff's shares if he terminated his employment voluntarily, and as the parties disputed whether the plaintiff had relinquished all employment duties when the employment relationship was modified, a fact issue existed that precluded summary judgment on the matter of voluntariness. Haft v. Dart Group Corp., 841 F.Supp. 549, 565.

D.Del.1973. Subsec. (2) quot. in part and fol. The plaintiff husband sued under the Jones Act for damages for personal injuries, and his wife sued for loss of consortium, both alleging the defendant's negligence in failing to maintain a seaworthy vessel. The husband was a deep sea diver employed by Corrosion which had contracted to supply diving services on an oil drilling barge which was owned and operated by Santa Fe, with whom the defendant had contracted for the drilling of oil. On the defendant's motion for summary judgment, the court held that under the Jones Act, the plaintiff had to establish an employer-employee relationship, and that the evidence was conflicting over whether the plaintiff could have been a "loaned servant" or "employee" of the defendant; the court therefore denied the defendant's motion. On the unseaworthiness claims, the court also denied the defendant's motion for a summary judgment holding that it was an issue of fact whether the defendant had sufficient control over the oil drilling barge. In addition, the court allowed the plaintiffs to join Santa Fe as a defendant. Francis v. Pan American Trinidad Oil Company, 59 F.R.D. 631, 635.

D.D.C.

D.D.C.2020. Subsec. (2) quot. in sup. Student athlete brought state-court actions against, among others, the United States and private medical practice, alleging, inter alia, that the government was vicariously liable for the medical malpractice of military fellow who, while he was employed by private practice, misdiagnosed her concussion. After consolidation and removal, this court denied in part the government's motion for summary judgment, holding that there was a genuine issue of material fact as to whether private practice was solely and vicariously liable for fellow's malpractice, because a reasonable jury could find that fellow remained the government's employee during his employment with private practice. The court weighed the factors set forth by Restatement Second of Agency § 220(2) in determining whether fellow was a borrowed agent because private practice exerted exclusive control over his work, and explained that the government only asserted bare allegations that private practice exercised full supervisory control over fellow and granted him privileges to treat its patients. Bradley v. National Collegiate Athletic Association, 464 F.Supp.3d 273, 285.

D.D.C.2017. Subsec. (2) quot. in sup. Patient sued, among others, United States, private medical practice, and federal employee who worked at practice as a military fellow, alleging that employee failed to provide her with proper medical care. This court denied the government's motion to dismiss based on the borrowed-servant doctrine, holding that questions of fact remained as to whether employee was a borrowed servant of private medical practice, such that practice was solely liable for tortious conduct committed by employee while working under its control and supervision. The court noted that, in considering whether an employee's negligence should be imputed to a special employer such as practice, the critical determination was which employer possessed the power of control based on the factors set forth in Restatement Second of Agency § 220. Bradley v. National Collegiate Athletic Association, 249 F.Supp.3d 149, 165.

D.D.C.2016. Subsec. (2) cit. in case quot. in sup. Employees of second-tier subcontractor that was no longer in business sued first-tier subcontractor, among others, claiming that defendants failed to pay plaintiffs for wages owed in connection with work performed on a construction project. After a bench trial, this court found, inter alia, that first-tier subcontractor was a joint employer of plaintiffs and that all defendants were jointly and severally liable to plaintiffs. The court cited the factors set forth in Restatement Second of Agency § 220(2) in defining an "employee" under the Fair Labor Standards Act, and, in applying the economic-reality test, reasoned that first-tier subcontractor had significant control over the timing and conduct of plaintiffs' work; even though first-tier subcontractor could not terminate plaintiffs' relationship with second-tier subcontractor, it could remove plaintiffs from the project and had a significant amount of control over plaintiffs' work in terms of schedules, wage rates, tools, and work performance. Perez v. C.R. Calderon Construction Inc., 221 F.Supp.3d 115, 140.

D.D.C.1993. Subsec. (2) cit. in sup. A company that had provided sales and marketing assistance for securities offerings sued the brokerage, asserting various claims including tortious interference with its alleged employment contracts with wholesalers, after the brokerage had offered employment to them. This court, granting summary judgment for the defendant, held, inter alia, that the wholesalers were not employees, but were independent contractors, as they were retained on a project by project basis, had no employment benefits, and were only minimally controlled by the company, so that they had no employment contracts that could have been interfered with. Equity Group, Ltd. v. Painewebber Inc., 839 F.Supp. 930, 934.

D.D.C.1976. Quot. in part and fol., coms. (1) and (k) to subsec. (2) quot. in part and fol., and subsec. (2)(h) cit. and fol. Certain civil service employees and their local bargaining representative brought this action against N.A.S.A., seeking a declaratory judgment and injunctive relief, arising out of a reduction in force action among civil service personnel at a space flight center. The plaintiffs claimed that N.A.S.A. had violated its personnel procurement restrictions by entering into unlawful contracts which resulted in the release of certain civil servants and the performance of work reserved to civil service personnel by the noncivil service employees of a contractor. In granting summary judgment, the court reviewed the findings of the civil service commission as to whether the proscribed relationship of employer-employee existed between N.A.S.A. and the contractor's employees. The court applied those standards defining the employer-employee relationship which were set forth in an opinion written by the former general counsel of the civil service commission. Among those elements were the performance of the work by the contractor's employees on government premises, whether the workers were using government-furnished equipment, and whether the work was in support of and integral to, the agency's mission. Lodge 1858, Amer. Fed'n of Gov't Emp. v. Adm'r, N.A.S.A., 424 F.Supp. 186, 205, 207, 210.

D.D.C.1971. Quot. in sup. and com. (b) quot. in sup. United States brought suit against the defendant university for discharging fuel oil into a river in violation of the Rivers and Harbors Act. The university had ordered a new heating system, which was to be fueled by oil. Before the system had been accepted by the defendant and before defendant was in control of the essential component parts of the system, the alleged leak occurred. The court held that the employee responsible for the spill was acting as an agent for the independent contractor building the system, rather than as an agent of the university. Judgment for the defendant. United States v. Georgetown University, 331 F.Supp. 69, 71.

M.D.Fla.

M.D.Fla.2012. Cit. and quot. in sup., adopted in case cit. in sup., com. (m) quot. in sup. (general cite). Insurer sued, among others, insured under a commercial general liability policy that excluded coverage for injuries to independent contractors, seeking a declaration that it had no obligation to defend or indemnify insured in a state-court wrongful-death action arising from the accidental death of security-camera installer on insured's premises. Granting summary judgment for insurer, this court held, inter alia, that insurer had no duty to defend or indemnify insured under the policy, because installer was working as an independent contractor when he fell to his death from insured's building; installer's proposal contemplated work independent of supervision from insured, installer was to provide the instrumentalities and tools for the work, and he was paid for the job in a subdivided lump sum and not by the hour, by the week or month, or by another unit of time. Catlin Specialty Ins. Co. v. Cohen, 883 F.Supp.2d 1182, 1185-1187.

M.D.Fla.2009. Cit. in sup., subsec. (2) quot. in ftn. (erron. cit. as § 202). Estate and family of rental-car passenger who died following an accident in which the car's brake system allegedly seized brought action for negligence, strict liability, and breach of warranty against franchisor of rental-car franchisee that provided the car. Granting summary judgment for defendant, this court held, inter alia, that defendant was not vicariously liable for franchisee's provision of the allegedly defective vehicle under theories of agency or respondeat superior. The court reasoned, in part, that only one factor potentially weighed in favor of finding franchisee to be an employee of franchisor rather than an independent contractor, namely, whether or not the work was part of the regular business of the employer; the most important factor, control, weighed heavily against employee status, because the agreement between franchisor and franchisee was “results” oriented rather than “means” oriented. Estate of Miller v. Thrifty Rent-A-Car System, Inc., 637 F.Supp.2d 1029, 1042.

S.D.Fla.

S.D.Fla.2017. Cit. in ftn. Political canvasser who was hired to work for company that provided campaign services brought a claim under Florida's Private Whistleblower Act against company, alleging that company terminated his contract in retaliation for reporting that company hired undocumented workers as canvassers. This court granted summary judgment for company, holding that canvasser could not state a claim under the Act against company, because he was not an employee of company, but

rather, an independent contractor. The court noted that, in determining whether an individual was an employee or an independent contractor for purposes of the Act, Florida followed the ten-factor common-law test outlined in Restatement Second of Agency § 220, which was similar to the economic-realities test, and explained that, under either test, canvasser was an independent contractor, because he was economically independent from company. Diego v. Victory Lab, Inc., 282 F.Supp.3d 1275, 1281.

S.D.Fla.2014. Subsec. (2) quot. in sup. and adopted in case 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, under the test set forth in Restatement Second of Agency § 220. The court reasoned, in part, that the evidence indicated that defendant did not control officers' physical performance of their security duties, and that officers received their instructions from the county police department's off-duty coordinator, rather than from defendant. Martinez v. Miami-Dade County, 32 F.Supp.3d 1232, 1239.

S.D.Fla.2012. Subsec. (2) cit. in sup. After the federal government indicted a foreign air cargo provider, among others, for participating in a price-fixing conspiracy and executed a plea agreement that granted immunity to certain of provider's employees and related corporations, government indicted, on similar charges, U.S. airline and individual who claimed to be an executive of both the airline and the provider. This court granted individual defendant's motion to dismiss the indictment, holding that defendant was entitled to immunity under the plea agreement in the prior case because he was an employee of both provider and airline; defendant submitted unrebutted evidence that, although airline paid him, provider set the amount of his salary and paid his bonuses and benefits. U.S. v. Florida West Intern. Airways, Inc., 853 F.Supp.2d 1209, 1230.

S.D.Fla.1990. Subsec. (2) cit. in case quot. in disc. An insurance agent sued his employer for damages after the employer discontinued payments to the agent under the disability portion of the agent's benefits plan. The court denied the defendant's motion for summary judgment, holding that the plaintiff's state law claims were not preempted by ERISA, because the plaintiff was an independent contractor, and not the defendant's employee, under common law agency principles. The court found that the factors in favor of classifying the plaintiff as an independent contractor, including his freedom to sell for other companies, the termination arrangements of the employment agreement, and his compensation by commission rather than by salary, outweighed those in favor of calling him the defendant's employee. Sica v. Equitable Life Assur. Soc. of U.S., 756 F.Supp. 539, 541.

M.D.Ga.

M.D.Ga.2018. Subsec. (2) quot. in case quot. in disc., cit. in case cit. in ftn. Worker injured while dismantling shelving units alongside associates in a warehouse brought a premises-liability action against owner of the warehouse, alleging that defendant negligently left the premises unsafe and that defendant was liable for the actions of the associates. This court granted defendant's motion for summary judgment, holding, inter alia, that defendant could not be vicariously liable for plaintiff's injuries, because the associates were not agents of defendant. The court cited Restatement Second of Agency § 220 in explaining that associates were never employed or partnered with defendant, nor did defendant ever control or supervise the dismantling work on its premises. Harrison v. Legacy Housing, LP, GPLH, LC, 324 F.Supp.3d 1288, 1299.

N.D.Ga.

N.D.Ga.2016. Subsec. (2) cit. but dist., cit. in case cit. in disc. Exotic dancer at a club brought an action against club operator, alleging that defendant misclassified her as an independent contractor and failed to pay her minimum wage or overtime as required under the Fair Labor Standards Act (FLSA). This court denied defendant's motion to dismiss, holding that there were genuine issues of material fact as to whether plaintiff was an employee based on the economic reality of the parties' relationship. The court explained that defendant's reliance on caselaw to support its argument that the court should give deference to the parties' independent-contractor agreement was misplaced, because that case involved agency law, and, while the factors set forth in Restatement Second of Agency § 220(2), which were used in distinguishing a servant from an independent contractor

for purposes of tort liability, were similar to those used in the FLSA economic-realities test, the economic-realities test utilized a broader definition of "employment." Hanson v. Trop, Inc., 167 F.Supp.3d 1324, 1333.

N.D.Ga.2013. Cit. in case cit. in disc., cit. and quot. in ftn., subsec. (2) quot. in disc. and cit. in case quot. in disc., com. (c) quot. in ftn. Company that manufactured and sold vinyl wallcovering products sued company that developed patterns for such products, claiming, among other things, that it owned the copyright to a pattern that was created at defendant's request by a designer who initially worked for plaintiff, but who left to work for defendant four days after he began work on the pattern. This court denied plaintiff's motion for partial summary judgment, holding that a genuine dispute remained as to whether the pattern was owned by plaintiff or by defendant under the "work made for hire" doctrine. The court noted that, unlike the cases cited by the parties, where the question at issue was whether a worker was an independent contractor or an employee under Restatement Second of Agency § 220, the issue here was whether the designer was an employee of plaintiff or an employee of defendant. U.S. Vinyl Mfg. Corp. v. Colour & Design, Inc., 32 F.Supp.3d 1253, 1261, 1262, 1265.

N.D.Ga.1981. Subsec. (2)(i) cit. in case cit. in sup. The plaintiffs, trustees of fringe benefit trusts, brought suit seeking to compel the defendant, a small family firm, to make contributions for a particular engineer. The defendant had entered into a collective bargaining agreement where it was required to make contributions to the plaintiffs on behalf of all the operating engineers that they employed. The defendant refused to make contributions for a particular engineer whom it characterized as an independent contractor and not as an employee. A special master investigating this action found, inter alia, that the engineer was an employee. The plaintiff filed this motion to adopt the special master's report on this issue; the trial court did so. In the decision, the court noted that: (1) the defendant had sole discretion over the engineer's job; (2) the defendant supplied the engineer's tools, office, and supporting business structure; (3) the defendant paid unemployment and workmen's compensation on the engineer; and (4) the employee did not have a separate business. This indicated that the defendant had exercised a sufficient degree of control over the engineer to support the finding that he was an employee and not an independent contractor, despite his right to refuse certain jobs. Hammond v. James W. Griffin Co., Inc., 520 F.Supp. 162, 164.

N.D.Ga.1969. Cit. The defendant, the United States, moved to dismiss a third-party claim against it on the grounds that the F.A.A. inspector, who wrongly certified as airworthy the plane which the other defendant sold to the plaintiff, was not an employee of the United States, and also that the Federal Tort Claims Act did not make the government liable for misrepresentation. The court, did not rule on whether or not the inspector was an employee of the United States, noting in this connection that such a determination involves many factors and citing s 220 of the Restatement. The case was dismissed on the ground that the third-party complaint was for misrepresentation, and the government was specifically exempted from such a suit by the terms of the Federal Tort Claims Act. Marival, Inc. v. Planes, Inc., 306 F.Supp. 855, 857.

D.Idaho

D.Idaho, 1987. Cit. in disc. A bicyclist was struck by a vehicle driven by a federal juror on his way to court. When the bicyclist sued the juror, the juror's insurer asserted a subrogation claim against the United States on the ground that he was a federal employee at the time of the accident. The court granted the government's motion for summary judgment, holding that the juror was not an employee of the government for purposes of the Federal Tort Claims Act. The court noted that, although the manner in which jurors were compensated was a relevant consideration at common law, it was an irrelevant consideration under the Federal Tort Claims Act. Sellers v. U.S., 672 F.Supp. 446, 447.

C.D.Ill.Bkrtcy.Ct.

C.D.Ill.Bkrtcy.Ct.1989. Com. (d) quot. in disc. After the purchasers of a van won a judgment against the car dealership on the ground that the dealership's agent used fraud in the sale, the car dealership's owner filed a bankruptcy petition. The purchasers of the van sued to have the judgment debt declared nondischargeable. The court held the debt nondischargeable, stating that, because the debtor enabled her husband to operate the business and exercised control over him, he was acting as her agent at the time of the fraudulent sale to the plaintiffs. In re Smith, 98 B.R. 423, 426.

N.D.Ill.

N.D.Ill.2015. Cit. in case cit. in disc. (general cite). Unpaid cosmetology student filed a putative class action against corporate owner/operator of cosmetology school, seeking unpaid wages under the Fair Labor Standards Act (FLSA) and related Illinois and Indiana statutes based on services plaintiff provided to paying customers at the school. This court granted defendant's motion for summary judgment, holding that plaintiff was not an employee under the FLSA, because, among other things, the services were provided to satisfy plaintiff's state requirements for clinical experience and the evidence did not show that defendant made a profit from plaintiff's services. The court noted that the Seventh Circuit had stated that it endorsed a 6-factor test in distinguishing an employee from an independent contractor for FLSA purposes, but had applied Restatement Second of Agency § 220's 10-factor test for common-law and ERISA claims. Hollins v. Regency Corporation, 144 F.Supp.3d 990, 995.

N.D.Ill.1997. Subsecs. (1) and (2) cit. in disc., com. (c) cit. in disc. Railroad employee who allegedly slipped, fell, and sustained serious injuries while walking across an icy railcar exchange yard sued yard and railroad for negligence under the Federal Employers Liability Act (FELA). Plaintiff maintained that, at the time of the accident, he was employed by both defendants. Defendants moved for summary judgment. Denying the motions, the court held that material factual issues existed as to whether there was any theory under which plaintiff could be considered a dual employee for purposes of FELA. Wallenberg v. Burlington Northern R.R. Co., 974 F.Supp. 660, 665.

N.D.Ill.1993. Cit. generally in sup., cit. generally in ftn. in sup. Author of texts brought copyright infringement suit against organization that printed and distributed texts after Department of Health and Human Services purported to grant defendant unrestricted permission to do so. The court granted plaintiff summary judgment. Rejecting defendant's argument that it owned copyright because plaintiff was defendant's employee, the court applied agency principles to determine that plaintiff was independent contractor, since plaintiff controlled text's content, did most work at home, and worked from own research materials. The court noted that only factor weighing against plaintiff was defendant's tax withholding. Respect Inc. v. Committee on Status of Women, 815 F.Supp. 1112, 1117.

N.D.Ill.1986. Subsec. (2)(a) 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.Ind.

N.D.Ind.2017. Cit. in case cit. in disc. In a multidistrict litigation brought against delivery company by delivery drivers claiming that they were employees, not independent contractors, the district court granted most of defendant's motions to dismiss, and the parties reached settlement agreements. The New Jersey class representatives objected to the settlement, arguing that counsel undervalued the class's claims when it settled for about 55% of what counsel thought to be the maximum amount achievable. This court confirmed the award, determining that counsel's assumptions—that, given New Jersey's change of law, the risk of destroying the class justified the substantial discount—were reasonable. The court noted that it had granted defendant's motion to dismiss after applying Restatement Second of Agency § 220's "right to control" test based on the New Jersey Supreme Court's use of that test, and explained that, subsequently, the supreme court explicitly adopted the "ABC" test used in the state's wage-and-hour law. In re FedEx Ground Package System, Inc., Employment Practices Litigation, 251 F.Supp.3d 1225, 1234.

N.D.Ind.2012. Subsec. (2) quot. in cases cit. in disc., coms. (h), (j), and (k) cit. in sup. Pickup and delivery drivers for shipping company brought a class action against company, alleging that defendant's classification of plaintiffs as independent contractors,

rather than employees, violated the Kansas Wage Payment Act. This court granted summary judgment for defendant, holding that plaintiffs were independent contractors; while the length of the job commitment was a factor that did not weigh strongly for either party, other factors strongly weighed in favor of independent-contractor status: defendant did not retain the right to direct the manner in which plaintiffs performed their work, plaintiffs were responsible for acquiring their own vehicles and other supplies necessary to the performance of their work, and most of plaintiffs' required skills, such as driving and customer-service skills, could be learned in the workplace. In re FedEx Ground Package System, Inc., 869 F.Supp.2d 942, 973, 984, 985, 987.

N.D.Ind.2012. Subsec. (2) cit. in sup. and in disc. and cit. and quot. in cases cit. and quot. in sup. In multidistrict litigation, pickup and delivery drivers for shipping company sued company, challenging defendant's practice of labeling drivers as independent contractors, rather than employees. This court granted in part and denied in part plaintiffs' motions for class certification, holding that class certification was warranted for plaintiffs in those states, including Arkansas, Kentucky, and New Jersey, where the determination of whether an employer/employee or independent-contractor relationship existed could be resolved primarily by the terms of the operating agreement between the parties, as guided by the factors of Restatement Second of Torts § 220, since under such an analysis common questions predominated over questions affecting only individual members. In re FedEx Ground Package System, Inc., Employment Practices Litigation, 283 F.R.D. 427, 444, 445, 448, 457, 460, 461, 465, 472, 473, 477, 478, 480-481, 492-494.

N.D.Ind.2011. Com. (k) cit. in case cit. in sup. Pedestrian who allegedly suffered a severe brain injury when he was struck by a tractor-trailer brought a negligence action against driver of the tractor-trailer, driver's employer, and pork-products seller that had contracted with driver's employer to transport its hogs. This court granted summary judgment for seller, holding that seller was not vicariously liable for driver's alleged negligence, because driver was acting as an independent contractor for seller rather than as seller's employee. In analyzing the case under Indiana's 10-factor test to distinguish employees from independent contractors, the court noted that, although driver provided his own tractor, seller also supplied equipment of substantial value to the endeavor, in the form of its trailer, and thus the factor involving the provision of the instrumentalities of employment was neutral. Carroll v. Kamps, 795 F.Supp.2d 794, 808.

N.D.Ind.2010. Cit. in disc., cit. in cases cit. and quot. in disc., subsec. (1) quot. in case quot. in disc., subsec. (2) cit. in disc., subsec. (2)(a) cit. in case quot. in disc. In multi-district litigation, drivers who entered into independent-contractor agreements with package-delivery company to provide package-delivery services sued company, generally seeking determinations that they were employees under various states' laws and therefore entitled to reimbursement of business expenses and back pay for overtime and other wages. This court here addressed all outstanding motions for summary judgment and disposed of all other pending cases in this multidistrict litigation docket. In its application of the various states' laws, the court discussed a number of those states' reliance on the factors for determining employment status set forth in Restatement Second of Agency § 220. In re FedEx Ground Package System, Inc., Employment Practices Litigation, 758 F.Supp.2d 638, 658-659, 665, 667, 669-670, 676-677, 679, 681-684, 690, 697-701, 706, 710, 712, 718, 732.

N.D.Ind.2010. Subsec. (2) quot. in sup., coms. (h), (j), and (k) cit. in sup. Pickup and delivery drivers for shipping company brought a class action against company under the Kansas Wage Payment Act, alleging that defendant's classification of plaintiffs as independent contractors, rather than employees, violated the Act. Granting summary judgment for defendant, this court held that plaintiffs were independent contractors as a matter of law; the evidence was insufficient to show that defendant retained the right to control plaintiffs and direct the manner in which they performed their work. Furthermore, while the fact that the operating agreement was for a definite term with defendant able to non-renew at the end of the term and contractor able to terminate on 30 days' notice did not weigh strongly in favor of either party, other factors weighed in favor of independent-contractor status: for instance, contractors were responsible for acquiring their vehicles and other supplies and could use the vehicles for other commercial or personal purposes. In re FedEx Ground Package System, Inc., 734 F.Supp.2d 557, 585, 597, 599.

N.D.Ind.2010. Cit. in case quot. in sup. In multidistrict litigation, drivers for package pickup and delivery company sued company, alleging that they had been improperly classified as independent contractors rather than employees. This court denied plaintiffs' request that the court give preclusive effect to the finding in a prior state-court class action that certain class members

in that action were defendant's employees, holding, among other things, that plaintiffs failed to show that the issue of defendant's reserved right to control was identical in both actions. The court reasoned that plaintiffs had not shown that application of the "right to control" test was significantly similar in both cases, noting that, to determine the right to control, jurisdictions analyzed varying factors and placed different emphasis on a finding of control, which could lead to different results. In re FedEx Ground Package System, Inc., Employment Practices Litigation, 712 F.Supp.2d 776, 784.

N.D.Ind.2010. Cit. but dist. Putative classes of delivery drivers from various states sued package-delivery service for which they worked, challenging defendant's practice of designating drivers as independent contractors, rather than employees. Plaintiffs moved for class certification. This court here reaffirmed its ruling that class certification was not appropriate for the Missouri plaintiffs' statutory-wage claim, holding that Missouri defined the "right to control" with reference to the actual exercise of control, and the issue of actual control would require a driver-by-driver analysis and could not be determined based on common evidence alone. The court rejected plaintiffs' argument that the applicable test for this claim was the Restatement Second of Agency § 220, stating that Missouri courts had consistently held that the Restatement test applied to respondeat superior, not statutory wage, claims. In re FedEx Ground Package System, Inc. Employment Practices Litigation, 273 F.R.D. 516, 530-531.

N.D.Ind.2009. Cit. in sup., cit. in case quot. in sup., subsec. (2) cit. in case cit. and quot. in sup. Putative classes of delivery drivers from various states sued package-delivery service for which they worked, challenging defendant's practice of designating drivers as independent contractors, rather than employees. Plaintiffs moved for class certification. This court, inter alia, granted the Arizona, Georgia, and Ohio plaintiffs' motion for class certification, concluding that the issue of whether defendant had the right to control the methods, manners, and means by which the drivers performed the contracted tasks, such as to make the drivers employees rather than the independent contractors that the operating agreement declared, turned on the 10-factor test of Restatement Second of Agency § 220(2). In re FedEx Ground Package System, Inc., Employment Practices Litigation, 662 F.Supp.2d 1069, 1077, 1078, 1086, 1087, 1101.

N.D.Ind.2008. Cit. in sup. and in disc., cit. and quot. in cases cit. and quot. in sup.; subsec. (2) cit. and quot. in sup. and cit. in disc.; subsecs. (2)(a)-(2)(j) quot. in sup., cit. in disc., and cit. in case quot. in disc. Putative classes of delivery drivers from various states sued package-delivery service for which they worked, challenging defendant's practice of designating drivers as independent contractors, rather than employees. Plaintiffs moved for class certification. This court, inter alia, granted the motions for class certification in cases involving drivers from 18 states, concluding that, with respect to almost all of those states, the question of whether defendant had the right to control the methods, manners, and means of the drivers' performance of their work was the chief factor in determining if the drivers were independent contractors or employees, along with the other factors of Restatement Second of Agency § 220(2) in some states, and could be answered by reference to the operating agreement and defendant's policies, rather than an examination of each individual driver. In re FedEx Ground Package System, Inc., Employment Practices Litigation, 273 F.R.D. 424, 443-444, 447, 459-460, 464, 471, 476, 477, 479-480, 491-493. See cases below.

N.D.Ind.Bkrtcy.Ct.

N.D.Ind.Bkrtcy.Ct.1990. Subsec. (2) quot. in disc. A Chapter 11 debtor, a bicycle assembly company, sought a determination of its tax liability as a contractor and not as an employer as described by the Internal Revenue Code. The court found a clear employer/employee relationship between the company and its workers. Factors considered by the court included a noncompetition agreement signed by the workers and the company's absolute responsibility to train, direct, and control its workers. Since no genuine issue of material fact existed regarding the plaintiff's status as an employer, the plaintiff was found liable for unpaid federal income taxes, social security taxes, and unemployment taxes. In re Associated Bicycle Service, Inc., 128 B.R. 436, 453.

S.D.Ind.

S.D.Ind.2017. Cit. in sup. Insurer brought an action against insured and driver of insured's vehicle, seeking a declaration that several policy exclusions precluded any duty to defend or provide coverage to insured and driver in an underlying lawsuit arising from a single car accident that injured a passenger in the car. This court granted summary judgment for insured, holding that insurer could not claim recoupment of costs incurred in defending insured in the underlying lawsuit, and denied summary judgment for insurer with respect to driver, holding that genuine issues of material fact existed as to whether passenger was an employee of insured. The court explained that Restatement Second of Agency § 220's ten-factor test applied in determining whether passenger was an employee of insured acting within the course of his employment at the time of the accident, but that disputed facts precluded summary judgment on the issue. Selective Insurance Company of America v. Smiley Body Shop, Inc., 260 F.Supp.3d 1023, 1034, 1035, 1037, 1038.

S.D.Ind.2015. Cit. in sup., cit. and quot. in cases cit. and quot. in sup.; com. (d) quot. in case quot. in sup. Worker who was injured in an accident while driving contractor's truck brought an action against contractor's insurer, seeking medical coverage under contractor's policy. This court denied defendant's motion for summary judgment, holding that there was a genuine issue of material fact as to whether plaintiff was contractor's employee for purposes of the state's workers' compensation law, such that coverage was excluded under the policy. The court pointed to conflicting evidence as to whether plaintiff was an employee or an independent contractor under Restatement Second of Agency § 220, including that contractor did not supervise plaintiff's work but could correct him, that contractor had hired plaintiff only for the day but had worked with him for years, and that contractor had provided plaintiff with his truck but required him to provide his own tools. Curtsinger v. State Farm Mut. Auto. Ins. Co., 120 F.Supp.3d 857, 859, 860.

S.D.Ind.2012. Subsec. (2) quot. in case quot. in sup. Two employees sued employer, drug-testing companies, and former nurse, alleging intentional infliction of emotional distress, negligent infliction of emotional distress, and invasion of privacy by intrusion upon seclusion stemming from an observed urine collection drug test ordered by employer and conducted by nurse. Granting summary judgment for drug-testing companies, this court held that companies could not be vicariously liable for any tortious actions by nurse, because nurse was an independent contractor, rather than an employee. The court reasoned that the length of nurse's work for companies (one day), the method of payment (a $40 lump sum in cash), the belief of the parties that this was an informal and limited relationship, companies' minimal control over the material details of the work, and the fact that the parties had no prior or subsequent work relationship all strongly favored nurse's status as an independent contractor. Lockhart v. ExamOne World Wide, Inc., 904 F.Supp.2d 928, 937-938.

S.D.Ind.2010. Quot. in sup., cit. in case quot. in sup., subsec. (1) quot. in case quot. in sup., coms. (d), (j), (k), and (m) quot. in sup. Police officer sued, among others, government contractor that provided training in domestic preparedness against weapons of mass destruction, alleging that, due to the negligence of defendant's instructors, he injured his shoulder during a hands-on training scenario. This court denied defendant's motion for summary judgment, holding, inter alia, that defendant's instructors were employees, and not independent contractors, under the Restatement Second's ten-factor analysis. The court reasoned that defendant exercised a great deal of control over the instructors with respect to the delivery of the class, requiring instructors to teach the class precisely as provided in the instructor's manual and not allowing them to deviate from the approved curriculum. Walker v. U.S., 758 F.Supp.2d 753, 759-761.

S.D.Ind.1997. Com. (g) cit. in ftn. After city, which had acquired the land on which artist's stainless steel sculpture was located, demolished the sculpture to clear the site for its urban renewal development project, artist brought suit against the city, alleging violation of his integrity rights under the federal Visual Artists Rights Act (VARA). The court granted artist's motion for summary judgment and denied city's cross-motion for summary judgment, holding, inter alia, that the sculpture was not a “work made for hire” subject to exclusion from VARA protection, since it was not created by artist within the scope of his employment with a sheet-metal fabricator. The court noted that the word “employee” had replaced “servant” in statutes dealing with the employment relationship, but that the two words were generally synonymous. Martin v. City of Indianapolis, 982 F.Supp. 625, 633.

S.D.Ind.1993. Cit. in sup. Workers who were discharged from their union positions or transferred to less desirable jobs sued union for violations of the Labor-Management and Reporting Disclosure Act and the federal wiretapping statute. Union, claiming that it was disciplining workers for violating union rules, took action after listening to recordings of their telephone conversations during which they criticized union officials. Union's refusal to turn over the recordings during discovery resulted in this motion by workers to compel production. Union resisted, arguing that any recordings were made by officials acting as individuals, not as agents of the organization. Granting plaintiffs' motion, the court held that union, although it did not own the recordings, exercised sufficient possession and control over them to render it responsible as a principal. Also, despite officials' tortious or illegal conduct, union was responsible as principal as officials were acting with the goal of advancing its interests. Finally, wiretapping, a fairly predictable means of accomplishing union's goals, could not be said to have been unforeseeable. McBryar v. U.A.W., 160 F.R.D. 691, 696.

N.D.Iowa

N.D.Iowa, 1997. Cit. in case quot. in disc. Trustee of estate of deceased corporate officer sought to recover life insurance benefits pursuant to the civil enforcement provisions of § 1132 of ERISA. Insurer moved for summary judgment on the ground that decedent was not a covered employee of corporation within the meaning of the insurance policy. Granting the motion, the court held that, under the clear and unambiguous language of the policy, only employees who worked more than 30 hours each week were covered, and, while it was undisputed that decedent worked 80 hours per week for corporation, he did so as an employee and sole shareholder of a professional corporation that, in turn, was hired by corporation. Furthermore, decedent, who controlled when, where, and how long he worked on projects for corporation, and whose income was treated by corporation as nonemployee compensation, was more properly considered an independent contractor than an employee. Coonley v. Fortis Benefit Ins. Co., 956 F.Supp. 841, 857, affirmed 128 F.3d 675 (8th Cir. 1997).

S.D.Iowa,

S.D.Iowa, 2016. Cit. in sup. Seller of agricultural products sued sales representative who formerly worked for seller as an independent contractor, alleging that, after defendant ended his relationship with plaintiff, he breached the covenant not to compete contained in the parties' agreement. This court granted summary judgment for defendant, holding that it would not be reasonable to enforce the covenant against defendant, because it was unreasonably restrictive of defendant's rights and not reasonably necessary to protect plaintiff's business. The court cited Restatement Second of Agency § 220 in noting that an employer's legitimate business interests in restricting the economic activity of an independent contractor would typically be more limited than with respect to an employee, because, among other things, independent contractors maintained greater control over the manner of their work. Ag Spectrum Company v. Elder, 191 F.Supp.3d 966, 973.

D.Kan.

D.Kan.2007. Subsec. (2) cit. and quot. in sup. After two African-American women who were shopping in a mall were detained by mall security on suspicion of collaborating with a third African-American woman suspected of check fraud, but were released after the police determined that they had not committed any crime, they sued mall owner/manager and security company, among others. Denying in part owner/manager's motion for summary judgment, this court held, inter alia, that a genuine issue of material fact existed as to whether security company was owner/manager's agent such that owner/manager was vicariously liable for torts committed by security company. The court pointed out that, while the security agreement between these defendants purported to create an independent-contractor relationship, owner/manager had control over many facets of the daily operations of mall security. Hunter v. The Buckle, Inc., 488 F.Supp.2d 1157, 1168.

D.Kan.2003. Subsec. (2) quot. in sup. Purported debtor who claimed to be a victim of identity theft and fraud sued bank, debt-collection agency, and agency's assistant manager, asserting claims for, in part, violations of state and federal consumer-protection laws, negligence, and invasion of privacy. Granting in part defendants' motion for summary judgment, the court held,

inter alia, that bank was not vicariously liable for the acts of debt-collection agency, which was an independent contractor and not an employee of bank, or of agency's assistant manager. Lowe v. Surpas Resource Corp., 253 F.Supp.2d 1209, 1232.

D.Kan.1992. Subsec. (2) cit. in disc. Family member sued employment agency that placed an emergency room doctor in hospital where the doctor allegedly contributed to the death of plaintiff's decedent. The trial court granted defendant summary judgment, holding that plaintiff did not show that defendant was liable for the doctor's actions under the doctrine of respondeat superior. It explained that defendant did not have control over the doctor's actions or decisions, nor did it instruct the doctor on how to treat or diagnose plaintiff's decedent; the doctor was merely an independent contractor for whose actions the agency was not liable. Griffith v. Mt. Carmel Medical Center, 809 F.Supp. 839, 841.

E.D.La.

E.D.La.2010. Subsec. (1) quot. in case quot. in disc. Temporary worker for independent contractor that contracted with railroad to upgrade its rail yard sued railroad, among others, seeking to recover damages under the Federal Employers' Liability Act (FELA) for injuries he sustained while working on the job site. Granting defendant's motion for partial summary judgment, this court held that plaintiff was not an employee of railroad for purposes of the FELA under a subservant theory of employment, i.e., that he was a subservant of contractor, which was in turn a servant of railroad. The court cited testimony suggesting that railroad did not play a significant supervisory role over, and thus did not control, the work of plaintiff or other employees of contractor; further, the contract between railroad and contractor did not grant railroad the right to supervise or direct contractor's employees. Morris v. Gulf Coast Rail Group, Inc., 829 F.Supp.2d 418, 423-424.

E.D.La.1970. Quot. in part in sup. The plaintiff sued the defendant publisher for defamation. On motion for summary judgment the defendant claimed, inter alia, that the allegedly libelous material had been submitted to it by an independent contractor, thus relieving it of liability for the subsequent publication by it. It was held that the affidavits raised a sufficient issue of fact as to the agency status of the submitter of the material to go to trial, thus denying the motion for summary judgment. Blanke v. Time, Inc., 308 F.Supp. 378, 381-82.

W.D.La.

W.D.La.1997. Cit. in disc., subsec. (2) cit. in ftn. 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.

W.D.La.1967. Cit. in sup. The plaintiff was the chief steward of a crew hired by the defendant boat owner from the plaintiff's employer, a catering company, to supply services to a drilling company. The plaintiff, who was in effect a borrowed servant, was injured while moving frozen meat into the boat's cramped freezer compartment. After the boat owner settled with the plaintiff, he sued the plaintiff's employer for indemnification, which this court granted. Apart from a contractual obligation between the parties that the catering company would be liable for injuries resulting from the operations in the boat's galley, it also appeared that the company was negligent in sending aboard more supplies than could be efficiently handled. Hanks v. California Co., 280 F.Supp. 730, 737.

W.D.La.1967. Com. (d) cit. in sup. The plaintiff, an employee of a catering company which was hired to supply men to work on a drilling barge, was injured when he slipped because of a foreign substance on the deck. The plaintiff's case against the defendant barge owner rested heavily upon whether the plaintiff was an employee of the owner, which the court decided affirmatively;

it also decided that the plaintiff was a borrowed servant. The court held against the defendant, as it was further ruled that the latter was negligent and breached a duty of providing a safe place to work. Hebert v. California Oil Co., 280 F.Supp. 754, 760.

D.Me.

D.Me.2012. Cit. in ftn. Delivery drivers in Maine sued package-delivery service, challenging defendant's classification of them as independent contractors, rather than as employees. This court granted plaintiffs' motion for certification of a class action asserting two statutory labor-law claims, holding, inter alia, that the predominance standard was satisfied for purposes of class certification, because, under the eight-factor test of Maine common law for distinguishing between employees and independent contractors, the three factors most relevant to this case—the right to control, the nature of the work, and its importance to defendant's business—were all subject to common evidence, primarily defendant's operating agreement signed by all drivers. The court noted that the Maine Law Court also followed the Second and Third Restatements of Agency, which listed criteria very similar to Maine's eight-factor test. Scovil v. FedEx Ground Package System, Inc., 886 F.Supp.2d 45, 51.

D.Me.1964. Cit. in sup. The plaintiff brought suit under the Federal Torts Claims Act for damages arising out of an automobile accident between himself and the defendant, a serviceman. The serviceman was traveling to a new permanent duty station, was being reimbursed by the government and was subject to the government's right of control even though he was partially acting in his own interests. The court held that he was acting within the scope of his employment at the time of the automobile accident and the government was liable. O'Brien v. United States, 236 F.Supp. 792, 796.

D.Me.1963. Cit. in sup. In action of fishing vessel owner to recover payments made under Social Security and Federal Unemployment Acts, with respect to earnings of captains and crew members, court held captains and crews were employees, and owner was not permitted to recover payments made. Capital Trawlers, Inc. v. United States, 216 F.Supp. 440, 445, affirmed (C.A.1) 324 F.2d 506.

D.Md.

D.Md.1963. Quot. in sup. Where horse trainers sought to enjoin horseshoers and local union from engaging in price fixing and refusing to shoe plaintiffs' horses unless they agreed to use exclusively union horseshoers when available, court refused injunction since farrier was employee of owner or trainer and court thus lacked jurisdiction under section 4 of the Norris-La Guardia Act. Taylor v. Local No. 7, Int'l Union of Journeymen Horseshoers, 222 F.Supp. 812, 820, 821.

D.Mass.

D.Mass.2016. Subsec. (2) cit. in case cit. in sup. Property manager filed, inter alia, an action under a theory of vicarious liability against company that was hired by property's management company to send secret shoppers to view management company's rental properties, alleging that defendant was liable for the conduct of its employee, a secret shopper who assaulted and battered plaintiff during a showing of a property. This court denied in part defendant's motion to dismiss, holding that plaintiff sufficiently stated a claim for vicarious liability. The court looked to the factors set forth in Restatement Second of Agency § 220(2) in determining whether there was an employer—employee relationship between defendant and the secret shopper, and concluded that the pleadings adequately alleged facts to support the existence of such a relationship, because they suggested that defendant had direction and control over the shopper's work and the shopper informed police officers who investigated the incident that he was working for defendant. Doe v. Medeiros, 168 F.Supp.3d 347, 351.

D.Mass.2010. Subsec. (2) cit. in sup. Arrestee brought a civil-rights action against police officer, city, and hospital, after doctor who worked at hospital, at officers' request, conducted a body cavity search of arrestee for drugs. After granting summary judgment for hospital, this court denied plaintiff's motion for reconsideration, holding that doctor was an independent contractor and thus hospital could not be vicariously liable for any torts that he may have committed. The court noted that the agreement

between doctor and hospital stated that doctor would act at all times as an independent contractor and that hospital would not have and would not exercise any control or direction over the manner or method by which he provided the services, and that plaintiff had produced no evidence tending to suggest the contrary. Spencer v. Roche, 755 F.Supp.2d 250, 262.

D.Mass.2004. Subsec. (2) cit. 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, 170.

D.Mass.2003. Subsec. (2) cit. in case quot. in sup. Female former real estate broker sued real-estate agency where she had worked for 25 years, alleging Title VII violations and state-law claims arising out of agency owner's inappropriate sexual conduct. This court dismissed the Title VII claims and remanded state-law claims, holding that plaintiff worked as independent contractor from at least December 1, 1999, and, therefore, was not covered by Title VII as to claims based on conduct by defendant or its employees after that date. After December 1, 1999, plaintiff was no longer a vice president of defendant, no longer received fixed compensation, and no longer received health insurance, workers' compensation, unemployment insurance, and vacation pay. Plaintiff developed sales leads independently and set her own hours, working as much or as little as she felt necessary to complete sale. Kakides v. King Davis Agency, Inc., 283 F.Supp.2d 411, 416.

D.Mass.2002. Cit. in sup. Terminated state employee who was disabled sued, inter alia, her employer's consulting firm and interim director sent by consulting firm to supervise employee's work department, alleging various violations of state and federal law arising out of her termination. This court granted in part defendants' motion to dismiss, holding, inter alia, that consulting firm was not vicariously liable for actions of interim director, who was acting as employer's employee, not as consulting firm's employee, in his capacity as interim director. Orell v. UMass Memorial Medical Center, Inc., 203 F.Supp.2d 52, 64.

D.Mass.1994. Subsec. (2) cit. in disc., com. (c) cit. and quot. in part in sup. and cit. in headnotes. The holders of song copyrights sued trade show organizers for unauthorized public performance of the songs by exhibitors and entertainers at a trade show and awards ceremony. The court dismissed plaintiffs' copyright infringement claims and entered judgment for defendants, holding, inter alia, that even though the organizers of the show exercised pervasive control over exhibitors, they had not done so with regard to the disc jockey and jazz band performers and thus could not be vicariously liable for any alleged infringement by them. Polygram Intern. Pub., Inc. v. Nevada/TIG, Inc., 855 F.Supp. 1314, 1315, 1325, 1326.

D.Mass.Bkrtcy.Ct.

D.Mass.Bkrtcy.Ct.2001. Subsec. (2) quot. in ftn. After employee sued corporate debtor and a real estate trust, seeking recognition of his ownership interest in debtor, trustee of debtor's Chapter 7 estate counterclaimed for breach of fiduciary duty and breach of implied covenant of good faith and fair dealing, among other claims, alleging that employee received undisclosed kickbacks from debtor's trade creditors. This court entered judgment in part for trustee, holding, inter alia, that employee breached his fiduciary duty to debtor by accepting unauthorized commissions. The court stated that employee was one of debtor's key employees and not an independent contractor, and thus owed debtor duties of good faith and loyalty. In re Tri-Star Technologies Co., Inc., 257 B.R. 629, 634-635.

E.D.Mich.

E.D.Mich.2012. Subsec. (2) 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 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.

D.Minn.

D.Minn.1964. Com. (m) quot. in sup. in ftn. A father who sold his business to his sons but often helped them with particular problems and received payments usually on a monthly basis and never worked for any other firm was considered an employee of the sons' partnership in determining his qualifications for benefits under the "self-employment" provisions of the Social Security Act. Substantial evidence which indicated that neither the father nor his sons believed their relationship was one of employer-employee was only one of many relevant factors to be considered, and not conclusive. Frantes v. Celebrezze, 237 F.Supp. 609, 612, 613.

S.D.Miss.

S.D.Miss.2007. Quot. in sup., cit. in case cit. in sup., subsecs. (a), (e), (g), (h), and (j) cit. in sup. and cit. in case cit. in disc., subsecs. (b), (d), (f), and (i) cit. in disc. and cit. in case cit. in disc. Patient whose leg was amputated as a result of complications following knee-replacement surgery at a Veterans Administration hospital brought suit under the Federal Torts Claims Act against, among others, the United States and the orthopedic surgeon who performed the knee replacement. After certifying surgeon as an employee of the federal government, this court dismissed him as a defendant, since plaintiff's exclusive remedy was against the federal government. The court reasoned that the factor of control, as well as the facts that hospital provided the instrumentalities, tools, and place of work for surgeon and was in the business of providing the orthopedic surgery services he performed supported the conclusion that surgeon was hospital's employee, rather than an independent contractor. Creel v. U.S., 512 F.Supp.2d 574, 581, 584, 585.

S.D.Miss.1996. Subsec. (1) quot. but dist. Employee of contractor that was retained to do track-grinding work for railroad brought negligence action against railroad, alleging that it was liable for his back injury under the theory that he was a subservant of railroad's servant or agent. Granting railroad's motion for summary judgment, the court held that contractor, plaintiff's employer, was not a servant or agent of railroad because, among other things, railroad did not control or have the right to control contractor or its workers. Plaintiff did not attempt to prove either that he was a borrowed servant or that he was working for two masters simultaneously when he sustained his injury. Dominics v. Illinois Central Railroad Co., 934 F.Supp. 223, 226.

E.D.Mo.

E.D.Mo.2013. Cit. in case cit. in disc. Former drivers for package-delivery company sued company, alleging that they were misclassified as independent contractors when they were in fact company employees, and that, as employees, they were entitled to reimbursement of business expenses and back pay for overtime. Granting plaintiffs' motion for partial summary judgment on the issue of employment status, this court held that defendant had the right to control and did control the means and manner of plaintiffs' work to such an extent that they were defendant's employees and not independent contractors. The court noted that, while, according to Restatement Second of Agency § 220, Comment *k*, the fact that a worker supplied his own tools was some evidence that he was not an employee, and plaintiffs in this case provided their own trucks and some equipment, defendant was intricately involved in the purchasing process, providing funds and recommending vendors. Wells v. Fedex Ground Package System, Inc., 979 F.Supp.2d 1006, 1021.

E.D.Mo.1985. Quot. in sup. A woman sued to recover for injuries she sustained as a result of allegedly falling from a ramp owned and operated by an air express company. The woman filed an amended complaint to include an air freight company as the principal in an agency relationship with the air express company. This court granted summary judgment for the air freight

company, finding that the level of control held by the air freight company was not sufficient to establish an agency relationship, since no representative of the air freight company had ever visited or inspected the premises or controlled the business in any way. Greco v. ABC Transnational Corp., 623 F.Supp. 104, 106.

E.D.Mo.1981. Cit. and quot. in sup. The plaintiff sued the defendants, the governor of Missouri and the Director of Revenue, alleging that her appointment as a Missouri fee agent was terminated because of her political affiliation, in violation of the First Amendment. The defendants argued, inter alia, that the plaintiff had not been an employee, and therefore the appointment could be terminated based upon her political affiliation. They also alleged that the plaintiff had not been terminated solely because of her political beliefs, but rather that other, neutral criteria had been used in the decision. This court stated that Missouri had adopted s 220 for determinations of whether an agent is an employee or an independent contractor. The court applied this standard to fee agents and held that fee agents were not employees of the state of Missouri but were more in the nature of independent contractors or franchisees. The court, therefore, held that fee agents were not protected from dismissal because of their political affiliations. Judgment was entered in favor of the defendants, and the plaintiff's complaint was dismissed. Joos v. Bond, 526 F.Supp. 780, 785, judgment affirmed 669 F.2d 542 (8th Cir.), certiorari denied 459 U.S. 878, 103 S.Ct. 174, 74 L.Ed.2d 143 (1982).

E.D.Mo.1981. Quot. in sup. The plaintiff, a motor vehicle license and tax fee agent for the state of Missouri, brought this action against the defendants under 42 U.S.C. 1983. The plaintiff alleged that his appointment was terminated because of his political affiliation, in violation of his First Amendment rights. The court ruled on the merits and found for the defendants. The court held that the plaintiff was not an employee of the state, but was more in the nature of an independent contractor or franchisee. The state exercised no control over the fee agents. The agent found his own office, staffed it with whom he liked, and collected his salary in fees collected from the public. Because fee agents are not state employees, they are not protected from dismissal for their political affiliations. Orenstein v. Bond, 528 F.Supp. 513, 518.

E.D.Mo.1981. Cit. and quot. in sup. The plaintiffs were fee agents for the Missouri Department of Revenue and had been appointed by a Democratic governor. After the defendant Republican governor was inaugurated, the plaintiffs were terminated based upon their political affiliation. The plaintiffs sued, arguing that the terminations violated their First Amendment rights. The court stated that the first issue was whether the plaintiffs were employees of the State of Missouri. The court applied the Restatement criteria and held that the fee agents were not employees, but were more like independent contractors or franchisees. The court held that because the plaintiffs were not employees, they were not protected from dismissal because of their political affiliations. The court entered judgment for the defendants and the complaint was dismissed with prejudice, However, on post-trial motions, the court ordered an injunction pending appeal. Sweeney v. Bond, 519 F.Supp. 124, 128, judgment affirmed 669 F.2d 542 (8th Cir.), certiorari denied 459 U.S. 878, 103 S.Ct. 174, 74 L.Ed.2d 143 (1982).

W.D.Mo.

W.D.Mo.1998. Quot. in case quot. in disc. Owner and lessee of property that was once used to manufacture herbicides brought action against prospective purchaser, alleging that purchaser was vicariously liable for harm caused as a result of its environmental consultant's installation of monitoring wells. Purchaser moved for summary judgment. Denying the motion, the court held, in part, that, in light of all the facts and circumstances, consultant was an independent contractor of purchaser, not its agent; however, material factual issues existed as to whether the installation of monitoring wells was an inherently dangerous activity that gave rise to a nondelegable duty of care on purchaser's part. K.C. 1986 Ltd. Partnership v. Reade Mfg., 33 F.Supp.2d 820, 827.

W.D.Mo.1995. Cit. in sup., subsec. (1) quot. in sup. After a woman died from a blood condition, her family sued the clinic, alleging that the clinic's doctor failed to properly diagnose the cause of her severe anemia. Trial court granted the clinic partial summary judgment. This court affirmed, holding, inter alia, that the clinic lacked the control necessary to deem the doctor its employee. The doctor was paid by the federal government, and the government's agreement with the clinic granted the National Health Service Corps the legal right to monitor, supervise, and control the doctor. There was no noncompetition agreement

between the doctor and the clinic nor a contract of any kind. Wray v. Samuel U. Rodgers' Community Health Center, 901 S.W.2d 167, 169.

W.D.Mo.1984. Cit. in disc. A corporation engaged in estimating costs of housing repairs contracted with a city to sell a computer system. The corporation brought this action for conversion against a city manager and a city attorney, alleging that the defendants failed to return certain computer parts and documents to the corporation. This court found that the manager, who ordered the attorney not to return the corporation's property, was liable for conversion as if he had retained the documents himself. The court also found that the attorney, who had followed the manager's orders, was not liable for the consequences of his conduct. The court noted that this principle would apply even if a person, such as the manager, was himself an agent or servant, acting for and on behalf of his principal or master. Because the manager's actions were taken within the scope of his employment, his actions would be imputed to his employer under principles of respondeat superior. Nika Corp. v. City of Kansas City, Mo., 582 F.Supp. 343, 355.

W.D.Mo.1981. Cit. in disc. but dist. and cit. in ftn. In consolidated cases, appointed fee agents of the Department of Revenue of the state of Missouri brought an action claiming that they were illegally dismissed from their jobs solely because of their political beliefs. The court held that, regardless of whether the fee agents of the Department of Revenue of the state of Missouri had an independent contractor relationship with the state rather than an employer-employee relationship, the First and Fourteenth Amendments to the United States Constitution protected those fee agents from partisan dismissal where all of agents were satisfactorily performing their jobs and were terminated solely because of their political beliefs. The court noted that any application of the common law rules of decisions restated in s 220, which relate to the determination of questions of state law as to when a master is to be held liable for the torts of his servant, had no proper place in the determination of the First and Fourteenth Amendment questions of federal constitutional law presented in this case. Joseph v. Bond, 522 F.Supp. 1363, 1389, 1390, reversed 685 F.2d 436 (8th Cir.), certiorari denied _ U.S. _, 103 S.Ct. 63, 74 L.Ed.2d 65 (1982).

W.D.Mo.1970. Cit. in sup. in case & ftn., subsec. (1) cit. in sup., subsec. (2) cit. in sup., illus. 6 cit. in sup., illus. 7 cit. in sup. The plaintiff insurance company sought recovery of employment taxes paid. The issue is whether the agents of the plaintiff who were "financed" as opposed to "regular" agents, were employees or independent contractors. The plaintiff exercised detailed control over the activities of its financed agents, specifying procedures and requiring daily reports; the agents were engaged in selling plaintiff's policies, an integral part of plaintiff's business; while the work of insurance agents is generally that of specialists operating without supervision; plaintiff's "financed" agents were trainees requiring more supervision than "regular" agents; no specialized skill was required for one to become a financed agent; plaintiff supplied its financed agents with such "tools" as insurance policies, but not with cars or office space; the amount of compensation paid to a financed agent was unrelated to his job performance, and plaintiff retained complete control over employment tenure. Although the contract referred to financed agents as "independent contractors", the court held that the above factors, no one of which is determinative, lead to the conclusion that the financed agents were employees. M.F.A. Mutual Insurance Company v. United States, 314 F.Supp. 590, 594, 596, 598, 599, 600, 601.

D.Neb.

D.Neb.2004. Subsec. (2) cit. generally in case cit. in disc. On-and-off employee, allegedly terminated from employment in 1969 by reason of pregnancy by predecessor of present employer, brought, among other things, ERISA action against present employer. Denying employer's motion for summary judgment, this court held, inter alia, that, because actions under ERISA were governed by federal common law of agency, and the party that controlled administration of employee benefit plan was an agent of employer, action could proceed against employer. Woods v. Qwest Information Technologies, 334 F.Supp.2d 1187, 1195.

D.Neb.1997. 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.N.H.

D.N.H.1975. Subsec. (1) quot. in part in case quot. but dist. Plaintiff, an automobile dealer, brought this suit against the importer and the regional distributor, alleging violations of antitrust statutes and the automobile dealer's day in court act. The court held that the importer was not an automobile manufacturer as defined in the act and, accordingly, the distributor could not be considered one either, and granted the defendants' motions to dismiss these counts. The court also found that the importer had sufficient control over the essential business activities of the distributor to establish that it transacted business within the district and make the district the proper venue for an antitrust suit. The court rejected the importer's contention that venue was improper, since it did not sell cars in the state, nor ship them there for that purpose, and since it dealt only with the distributor. The court reasoned that such corporate pyramiding should not obscure the reality that the dealers were the essence of the importer's business, and that control was exercised over them via the distributor. In granting the motions to dismiss the claims under the act, the court noted that, for purposes of the act, an importer should be found to be a manufacturer when it is subject to the manufacturer's control. It found that the testimony in this case was not sufficient to establish an agency relationship, as the ultimate control of dealer operations was with the importer, not with the manufacturer. The importer thus was not a manufacturer as the act defined the term. Grappone, Inc. v. Subaru of America, Inc., 403 F.Supp. 123, 136.

D.N.H.Bkrtcy.Ct.

D.N.H.Bkrtcy.Ct.1999. Subsec. (2) cit. in disc. Trustee sought determination that Chapter 7 debtor's pension plan was not an ERISA-qualified plan, and therefore not excludable from estate property. Entering judgment for trustee, the court held that debtor was an employer, not a participant of the plan, and that his interest in it was property of the estate. In re Gaudette, 240 B.R. 649, 657, affirmed 2000 WL 1480438 (D.N.H.2000).

D.N.J.

D.N.J.2019. Quot. in sup., cit. in ftn. Customer filed a negligence claim against store, promoter of an event at the store, and disc jockey hired for the event, alleging that a large loudspeaker furnished and operated by disc jockey for the event emitted a blast of sound as he was walking by, causing him to sustain hearing loss, hyperacusis, and tinnitus. This court granted in part store's motion for summary judgment, holding that store was not liable for the actions of promoter or disc jockey under the doctrine of respondeat superior, because the evidence in the record demonstrated that neither promoter nor disc jockey was store's employee or servant under Restatement Second of Agency § 220. The court pointed out that store, which was in the business of selling women's wear and beauty products, did not pay an ongoing salary or benefits to promoter or disc jockey, but rather, had hired them for a single appearance for a few hours on one evening, and both promoter and disc jockey engaged in their separate businesses full time and did not provide services to store exclusively. Maran v. Victoria's Secret Stores, LLC, 417 F.Supp.3d 510, 527.

D.N.J.2003. Quot. in disc. Corporation in the business of arranging sale of oriental rugs from foreign manufacturers to retailers in the United States sued trade association comprised of importers and wholesalers of oriental rugs, association officers, and association members, alleging, in part, antitrust violations. Denying in part defendants' motion for summary judgment, the court held, inter alia, that active participation by an association member's secretary/treasurer in conspiracy to wreck plaintiff's trade shows and sabotage direct sales could be imputed to association member, because his actions were within the scope of his employment with member. Carpet Group Intern. v. Oriental Rug Importers Ass'n, 256 F.Supp.2d 249, 281.

D.N.J.2002. Quot. in case quot. in ftn. Subcontractor's employee who was injured while working on renovations at a government military base sued United States and the Army, among others, for damages. This court granted defendants partial summary judgment, holding, inter alia, that because the contractor was an independent contractor, the government could not be held liable for any acts of negligence of contractor or its subcontractor under the Federal Tort Claims Act's independent-contractor exception. The contract between contractor and the Army Corps of Engineers relinquished day-to-day control of the work site to contractor, required contractor to be responsible for demolition safety and supervision of the work site, and held contractor responsible to ensure the quality of materials delivered and work performed. Ryan v. U.S., 233 F.Supp.2d 668, 676.

D.N.J.2001. Subsecs. (2)(d)-(2)(g) cit. in sup. Docking pilots' association brought declaratory-judgment action in state court, seeking to expel member pilot after tugging service with which association had a contract sought pilot's expulsion from its rotation for safety reasons. Pilot removed the suit and filed third-party complaint against tugging service for violations of federal statutes and breach of contract. This court granted tugging service's motion for summary judgment, holding, inter alia, that as a matter of law pilot was an independent contractor and not an employee of tugging company. Although tugging company had control over hiring of new pilots, it had no control over manner and means of pilot's piloting activities. Further, the skill required to perform pilot's duties was very high, and most of instrumentalities and tools were provided by pilot and association. Metropolitan Pilots Ass'n, L.L.C. v. Schlosberg, 151 F.Supp.2d 511, 520, 521, 523.

D.N.J.Bkrtcy.Ct.

D.N.J.Bkrtcy.Ct.1981. Cit. in disc. This action arose from a suit brought by a debtor corporation against its creditor. The two corporations had a contractual relationship, whereby the creditor provided the debtor with raw materials, which the debtor manufactured into finished products. The debtor brought an action to determine which party was legally entitled to four specific products developed by a chemical consultant for the debtor, a former employee of the creditor. The creditor counterclaimed, alleging tortious interference with contractual relations and prospective business advantage. The creditor alleged that the debtor had only brought its action to prevent a proposed merger, and had no validity or good faith basis. The court characterized the creditor's claim as one for malicious prosecution, which like the other alleged torts, centered on the element of malice. The basis for the debtor's claim to the four products was that, at the time of their development, the chemical consultant had been a contract employee of the debtor, and not an independent consultant. The court noted that there was sufficient evidence to establish that the debtor had a good faith basis for believing this. On that basis alone, the court found the debtor's claim to the products to be at least colorable. Absent any evidence of the requisite malice, the debtor's suit was a proper one. Matter of Borne Chemical Co., Inc., 16 B.R. 514, 523.

D.N.M.

D.N.M.2019. Com. (h) quot. in disc. 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.

D.N.M.2012. Subsecs. (2)(a)-(2)(j) cit. in case cit. in sup., com. (h) cit. in sup. Arrestee brought, inter alia, claims pursuant to the New Mexico Tort Claims Act (NMTCA) against county board of commissioners, seeking to impose NMTCA supervisory liability on board under a theory of respondeat superior, in order to require it to answer for the torts of the arresting officer, a tribal police officer who was also duly appointed and commissioned as a county deputy sheriff. Granting summary judgment for defendant with respect to the NMTCA claims, this court held that the county sheriff's department did not exercise sufficient control over officer's activities to render the relationship one of employer and employee; rather, the totality of the circumstances,

including the factors of Restatement Second of Agency § 220, showed that officer was an independent contractor at the time of plaintiff's arrest and prosecution and, as such, was excluded from the NMTCA's definition of "public employee," such that his acts were not attributable to defendant. Segura v. Colombe, 875 F.Supp.2d 1141, 1147, 1148.

D.N.M.2009. Adopted in case cit. in sup. Former director/consultant for an annual bicycle race sued nonprofit organization that conducted the race, alleging copyright infringement in connection with certain documents he prepared for the race. Rejecting defendant's counterclaim that plaintiff made false and misleading statements in connection with the sale of his services, this court held, inter alia, that plaintiff was acting as an independent contractor, rather than an employee, when he prepared the documents. The court noted that the New Mexico Supreme Court had adopted the approach taken in Restatement Second of Agency § 220, which incorporated many factors in determining whether an individual was an employee or an independent contractor, including the degree of control the principal exercised over the details of the work. Wilson v. Brennan, 666 F.Supp.2d 1242, 1263.

E.D.N.Y.

E.D.N.Y.2004. Subsec. (2)(a) cit. generally in case cit. in disc. Marine radio technician sued vessel on which he was to perform radio safety survey, as well as vessel's agent, owner, and operator, for breach of warranty of seaworthiness and negligence after technician slipped, fell, and broke his leg while on board. Granting defendants' motion for summary judgment, the court held, inter alia, that defendants did not owe technician a duty of seaworthiness because his claim was precluded by the Longshore and Harbor Worker's Compensation Act, as it arose out of injuries sustained while on navigable waters and in the course of technician's maritime-based employment. Anastasiou v. M/T World Trust, 338 F.Supp.2d 406, 416.

E.D.N.Y.2000. Subsec. (2) cit. in disc. Seamen brought negligence and Jones Act action against president of their corporate employer and gasoline buyer, among others, seeking recovery for injuries they sustained from a fire while transferring gasoline from employer's vessel into a fuel truck. This court, inter alia, denied buyer's motion for summary judgment, holding that fact issues existed as to whether company hired to transport gasoline from vessel to buyer's premises was buyer's independent contractor, either performing inherently dangerous activity or negligently selected, thus rendering buyer liable for company's alleged negligence in removing gasoline. Jurgens v. Poling Transp. Corp., 113 F.Supp.2d 388, 400.

E.D.N.Y.1996. Cit. in disc., subsec. (2) and com. (f) cit. in headnote and in disc. Insurers, as subrogees of insured homeowners whose house was damaged by a fire allegedly caused by defective wiring installed by an electrical contractor, sued Board of Fire Underwriters for negligence because its inspector issued a certificate of compliance despite code violations. Granting defendant's motion for summary judgment, the court held that, although defendant was not entitled to municipal tort immunity, plaintiffs' claim was time-barred under general statutes of limitations. The court said that governmental immunity was not available because defendant was neither an employee nor an independent contractor of the town; defendant, and not the town, controlled the manner in which inspections were performed, defendant received its fee directly from the owner or contractor, and the town neither collected any fees nor paid any funds to defendant as part of the inspection requirement. Royal Ins. Co. of America v. Ru-Val Elec. Corp., 918 F.Supp. 647, 648, 652, 653.

E.D.N.Y.1978. Cit. in ftn. in disc. Plaintiff, a freight trucking company, sought a refund together with interest in withholding and Federal Insurance Contributions Act taxes paid for the year 1969. The taxes were assessed on amounts paid to a number of individuals for work performed in unloading shipments of beef. The court held that the assessments against plaintiff were not erroneous, based on its finding that the unloaders utilized by the freight trucking company were employees of the company for federal tax purposes. The court noted that the determination of whether a person is an employee for federal tax purposes is made according to common law principles, and that various factors must be considered. Although the method of payment was by the job, rather than hourly, and although the unloaders offered services to other truckers, the unloaders were employees rather than independent contractors. The company's drivers had the right to control the unloaders; the unloaders had no substantial investment in tools or equipment; no significant skill was required of the unloaders; and more than a transient relationship existed between the trucking company and the unloaders. Mav Freight Service, Inc. v. United States, 462 F.Supp. 503, 507.

E.D.N.Y.1971. Quot. in disc. in op. This was an action against the manufacturer of a jet bomber and the United States, as owner, to recover for the death of an employee of an engineering company, which company was a bailee of the government. The death occurred over the high seas when the employee exited from the aircraft while he was testing radar equipment pursuant to a government contract. In giving a judgment for the defendants, the court held (1) there was no negligence in the construction or design of the aircraft, (2) the government had not assumed such control over the performance by the manufacturer to render it vicariously liable for any claimed negligence of the manufacturer in the maintenance of the aircraft, and (3) nor did the government assume any such control so as to be vicariously liable for any improper training of the employee. Kropp v. Douglas Aircraft Co., 329 F.Supp. 447, 468.

E.D.N.Y.Bkrtcy.Ct.

E.D.N.Y.Bkrtcy.Ct.1992. Subsec. (2) cit. in disc. IRS sought to recover employment taxes for 1987 and 1988 from debtor who operated a business supplying critical care nurses to hospitals. Debtor moved to have the IRS's claim expunged, arguing that the nurses were not employees but independent contractors. Denying debtor's motion and allowing IRS's claim for taxes, the court held that, for purposes of federal withholding and insurance contribution (FICA) taxes, the nurses were debtor's employees, since they were paid directly by debtor, debtor's regular and only business was to supply their services, and debtor retained a right of control over their work assignments. In re Critical Care Support Services, Inc., 138 B.R. 378, 381.

N.D.N.Y.

N.D.N.Y.1996. Subsec. (2) cit. in case quot. in disc. After a commuter plane crashed, a surviving passenger sued the United States, a national airline, and the owner of a commuter airline, alleging, among other claims, breach of contract and negligence against the two airlines. This court, among dispositions, denied the airlines' motions for summary judgment, holding, inter alia, that plaintiff failed to produce evidence that showed the national airline exercised the degree of control necessary to find an employer-employee relationship. Evidence that the two airlines coordinated their routes and timetable and shared an agreed percentage of revenue for passengers connecting between the two did not establish the requisite degree of control. However, the issue of apparent authority was appropriately a question of fact for the jury. Momen v. U.S., 946 F.Supp. 196, 202.

S.D.N.Y.

S.D.N.Y.2020. Subsec. (1) cit. 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. Subsec. (1) quot. in sup., cit. in case cit. in sup. 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 observed that defendant’s list of factors was narrower than the common-law definition set forth by Restatement Second of Agency § 220(1), under which “employment” was defined by a person’s right to control another person, and the common law-definition was narrower than the definition set forth by the FLSA. New York v. Scalia, 490 F.Supp.3d 748, 786, 787.

S.D.N.Y.2014. Cit. in case cit. in ftn. (general cite). Former employee filed, among other things, a Title VII retaliation claim against former employer, alleging that she was terminated in response to her complaints about sexual harassment in the workplace. The jury entered judgment for plaintiff, awarding her compensatory damages. This court denied defendant's post-trial motions, holding that defendant qualified as an employer under Title VII because it employed the required number of employees. In reaching its decision, the court cited Restatement Second of Agency § 220 for the factors to consider when determining whether a person was an "employee," and noted that, even though Title VII did not define "employee," the court would define it by the conventional master-servant relationship as understood by the common-law agency doctrine. Echevarria v. Insight Medical, P.C., 72 F.Supp.3d 442, 457.

S.D.N.Y.2006. Subsec. (2) cit. in disc. University employee sued hospital under the False Claims Act, alleging that hospital was liable for civil penalties for conspiring with university in fraudulently billing Medicaid for university-physician services that were actually performed by midwives at clinic operated by hospital. Denying hospital's motion for summary judgment, this court held, inter alia, that a genuine issue of fact existed as to whether the two physicians who oversaw obstetric and gynecological care at the clinic were hospital employees so as to make hospital liable for their actions in falsifying medical charts. U.S. ex rel. Romano v. New York Presbyterian, 426 F.Supp.2d 174, 177.

S.D.N.Y.2005. Subsecs. (1) and (2)(b) quot. in disc., subsec. (2) cit. in case cit. in sup. Sales representative sued former employer and related entities to collect compensation and benefits allegedly due, asserting claims under ERISA and New York statutory and common law. The parties tried the state-law claims to a jury, which found, in part, that plaintiff was not an employee, but an independent contractor. Following a bench trial on the ERISA claim, this court dismissed, applying the doctrine of collateral estoppel to give preclusive effect to the jury's finding that plaintiff was an independent contractor. The court was bound by the jury's finding because both ERISA and the New York labor-law statute applied the same common-law test, emphasizing the hiring party's right to control a worker's manner and means of performance, to determine whether the worker was an employee, and the test was incorporated in the jury instructions. Kreinik v. Showbran Photo, Inc., 400 F.Supp.2d 554, 564, 568.

S.D.N.Y.1996. Cit. in headnote, subsec. (2) cit. in case quot. in disc. Seventy-eight-year-old attorney who was denied recertification to a panel that allowed members to represent indigent defendants in criminal proceedings and to be compensated by the state sued panel's screening committee for, inter alia, violations of the Age Discrimination in Employment Act (ADEA). Granting committee's motion to dismiss, the court held, in part, that relief was not available to attorney under the ADEA because he was committee's independent contractor, rather than its employee, as evidenced primarily by the fact that committee had no control over the means by which panel members did their work. Thomas v. Held, 941 F.Supp. 444, 446, 451.

S.D.N.Y.1995. Subsec. (2) cit. in case quot. in disc. American emigres who relocated to Israel sued the publisher of an American weekly newspaper for libel and intentional infliction of emotional distress arising from a 1985 article by a freelance journalist, alleging that the article was replete with misrepresentations and falsehoods. This court granted defendant summary judgment, holding, inter alia, that even assuming that the article could be read to imply that plaintiffs were terrorists, defendants could not be held grossly irresponsible for failing to see that innuendo. The court also held that defendant could not be held liable under the doctrine of respondeat superior, because the writer was an independent contractor. As an experienced reporter, the writer controlled the manner in which the article was written, and the editors made few substantive changes. Furthermore, the writer did not receive a regular salary; did not have a contract; did not receive fringe benefits; did not have taxes withheld; and did not maintain an office at the newspaper. Chaiken v. VV Publishing Corp., 907 F.Supp. 689, 699, affirmed 119 F.3d 1018 (2d Cir.1997). See above case. Cert. denied …U.S. …, 118 S.Ct. 1169, 140 L.Ed.2d 179.

S.D.N.Y.1990. Subsec. (1) quot. in disc., subsec. (2) cit. in case cit. in disc. A graphic artist who designed a poster sued the photographer who had taken the photograph used in the poster and a magazine publisher for copyright infringement and violations of the Lanham Act and state law. The court granted in part the defendants' motion for summary judgment on the copyright claim, holding that the plaintiff had not properly registered the sculpture that was the subject of the photograph. However, the court denied both parties' motions for summary judgment on the issue of whether the photographer's picture was a “work made for hire” of which the artist was the alleged author. The court stated that material factual disputes between the

parties existed concerning their roles at the outset of the project and about what occurred during the photographic sessions, and as to whether the photographer was preparing the work as an employee of the artist. Morita v. Omni Publications Intern., Ltd., 741 F.Supp. 1107, 1112, order vacated 760 F.Supp. 45 (S.D.N.Y.1991).

S.D.N.Y.1989. Quot. in case cit. in disc. An Egyptian physician sued a university medical college in New York, alleging federal causes of action for civil rights violations, inter alia, after the defendant refused to renew his appointment to the college's courtesy faculty. The court granted the defendant's motion for summary judgment, holding that the plaintiff had no cause of action under Title VII, because he was not the defendant's employee, but merely a volunteer. The court said that the defendant bestowed no pecuniary or other benefits on the plaintiff and that none of the defendant's faculty members assigned the plaintiff any work or attempted to exercise any control over what the plaintiff tried to do. Tadros v. Coleman, 717 F.Supp. 996, 1003, order affirmed 898 F.2d 10 (2d Cir.1990), cert. denied 498 U.S. 869, 111 S.Ct. 186, 112 L.Ed.2d 149 (1990), rehearing denied 498 U.S. 995, 111 S.Ct. 550, 112 L.Ed.2d 558 (1990).

S.D.N.Y.1978. Subsec. (2) cl. (i) and com. (m) cit. in ftn. in sup. Action by plaintiff, a New York corporation, to recover commissions allegedly owed to it by defendant, a Georgia corporation. Defendant moved for dismissal asserting, inter alia, lack of personal jurisdiction. The district court denied the motion to dismiss with leave to renew should jurisdictional facts develop warranting such action, and held, inter alia, that the plaintiff, the exclusive sales agent for defendant corporation in New York, could not be deemed an “agent” of that corporation so as to bring such corporation within the “transacting business” provision of New York's long-arm statute for the purpose of suit by that agent against the corporation to recover commissions, where it appeared that the plaintiff was not an “agent” in the strictest sense of the word, but was rather an independent contractor. The court noted in footnote, that plaintiff and defendant in their contract agreed that plaintiff would be an independent contractor. Parties' beliefs as to the nature of the relationship they created is not dispositive as stated in s 220 of the Restatement 2d of Agency, but is one of several factors to be considered. The court noted the other factors listed in s 220 and pertinent to a finding that plaintiff was an independent contractor. Plaintiff worked on a commission, plaintiff was a separate corporation, having its own business, and the long distance between defendant and plaintiff suggested that defendant exercised little daily control over plaintiff's activities. Loria & Weinhaus v. H.R. Kaminsky & Sons, F.R.D. 494, 498, motion granted 494 F.Supp. 253.

W.D.N.Y.

W.D.N.Y.2000. Subsec. (2) cit. in case quot. in sup. Female newspaper carrier sued newspaper company for Title VII hostile-environment sexual harassment, among other claims. This court granted defendant summary judgment, holding, inter alia, that plaintiff could not recover under Title VII because she was an independent contractor, not an employee, where she could hire assistance without defendant's approval, she used her own instrumentalities and tools, she did not receive employee benefits, and she was issued an IRS Form 1099 instead of a Form W2 to show her earnings. Peck v. Democrat and Chronicle/Gannett Newspapers, 113 F.Supp.2d 434, 437.

W.D.N.Y.1978. Cit. in sup. An action was brought under the Federal Tort Claims Act to recover damages arising out of a two-car collision in New York between the plaintiff and defendant serviceman which occurred while the latter was en route to a new base after his application for compassionate reassignment was approved. The defendant United States moved for summary judgment on the issue of liability, claiming that the serviceman was not acting within the scope of his employment at the time of the accident. The court found that under the New York law of respondeat superior, the determination of whether an employee was acting within the scope of his employment requires in part a determination that the employer was exercising, or had the power to exercise, some control, directly or indirectly, over the employee's activities, and that the right to control, not the exercise of it, was important for the application of the doctrine. The court held that this condition of liability was satisfied where the serviceman was at all times accountable to the Army for his actions, including the manner in which he drove his automobile. The employee also was found to satisfy a second condition of liability where he at the time of the accident must be acting in furtherance of duties owed to his employer. Accordingly, judgment was entered for plaintiff on the liability issue. Blesy v. United States, 443 F.Supp. 358, 361, 362.

E.D.N.C.

E.D.N.C.2004. Cit. in disc. Prison inmate brought action against state, alleging that he owned copyright to the "First in Flight" design used on North Carolina license plates, and that his state-prison employer wrongfully took his design in violation of copyright law. Dismissing the action upon state's motion for summary judgment, this court held that because common-law principles were intended to be incorporated into the copyright law, and inmate created design in response to employer's request, which was within the scope of his employment with the state, the design was a work made for hire, and there was no violation of copyright law. McKenna v. Lee, 318 F.Supp.2d 296, 300, affirmed 53 Fed.Appx. 268 (4th Cir.2002).

E.D.N.C.1996. Cit. in disc. Painting subcontractor who was injured while working on a project for a branch of the United States Postal Service sued government under the Federal Tort Claims Act (FTCA), alleging that government was negligent in failing to warn him of the dangerous conditions created at the site by the general contractor. Government moved to dismiss. Granting the motion, the court held that, while a government project manager exercised a great deal of supervision over the renovation of the facility, the extent of manager's authority did not rise to the level necessary to create an agency relationship with general contractor, and therefore general contractor was an independent contractor, not a government employee, for purposes of the FTCA. Critzer v. U.S., 962 F.Supp. 65, 67.

N.D.Ohio

N.D.Ohio, 1997. Cit. generally in cases cit. in sup., cit. generally in disc. A beauty salon operator sued the federal government for a refund of employment taxes and cancellation of tax assessments. The court held that, although plaintiff failed to produce sufficient evidence of partial payment to establish entitlement to a refund, judgment would be entered in plaintiff's favor on its claim for cancellation of the assessed taxes. The court stated that, under common law agency principles, the cosmetologists who leased chairs from plaintiff and whom plaintiff designated as independent contractors were not plaintiff's employees for employment tax purposes. Ren-Lyn Corp. v. U.S., 968 F.Supp. 363, 368, 369.

N.D.Ohio, 1988. Cit. in sup. An insurance agent and his corporation sued several insurance companies alleging wrongful denial of his pension benefits. This court held that the insurance agent was entitled to retirement benefits. The court, after weighing the common law factors used to distinguish an independent contractor from an employee, found that the agent's employment status was more like that of an employee; specifically, the control exerted over the agent by the insurance companies was far more pervasive and of greater duration than that exerted over a typical independent contractor. Plazzo v. Nationwide Mut. Ins. Co., 697 F.Supp. 1437, 1448, judgment reversed 892 F.2d 79 (6th Cir.1989).

S.D.Ohio

S.D.Ohio, 2002. Subsecs.(2)(h), (2)(j), and (2)(k) cit. in sup. Route supervisor for trash-collection company sued employer for violation of ERISA, alleging that, even though he was classified as an independent contractor, he met the requirements for consideration as a common-law employee, and, as such, was entitled to participate in defendant's ERISA pension plan. Granting plaintiff's motion for judgment on the pleadings, the court held that plaintiff was an employee, given, inter alia, that defendant exercised significant control over the direction, scheduling, and timing of plaintiff's off-premises activities, the duration of the parties' relationship was 16 years, and defendant provided plaintiff with access to its health-care plan. Rumpke v. Rumpke Container Service, Inc., 240 F.Supp.2d 768, 772, 773, 775.

S.D.Ohio, 2002. Cit. in sup., quot. in ftn. African-American temporary worker sued company to which he was assigned and individual supervisors, alleging racial and religious discrimination under Title VII and the Ohio Civil Rights Act, after supervisor told him, inter alia, that he needed to "look like the other African-American worker." Denying in part defendants' motion for summary judgment, this court held, inter alia, that under "economic realities" test, worker was considered an "employee" for purposes of the Ohio Civil Rights Act. Sublett v. Edgewood Universal Cabling Systems, Inc., 194 F.Supp.2d 692, 700, 701.

S.D.Ohio, 1990. 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 in the proceedings 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, 1469.

E.D.Okl.

E.D.Okl.1977. Cit. in disc. Taxpayer sought recovery for social security and withholding taxes, alleging that the telephone solicitors and exterminators for whom the taxes were paid were not employees but independent contractors. The court held that telephone solicitors and salaried exterminators were employees for whom social security and withholding taxes were not recoverable, but that unsalaried exterminators were independent contractors. Lieb v. United States, 438 F.Supp. 1015, 1021.

W.D.Okl.

W.D.Okl.2009. Subsec. (2) cit. in case cit. in sup., com. (m) cit. in sup. Sculptor sued decorative-accessories manufacturer, alleging that defendant infringed his copyrights for numerous sculptures and designs depicting animal themes. This court granted in part plaintiff's motion for partial summary judgment, holding, inter alia, that plaintiff was the owner of the copyrights at issue; under principles of agency law, two artists who assisted plaintiff in the sculpting of the pertinent designs were employees, rather than independent contractors, and thus the work they performed was work for hire within the meaning of the Copyright Act. The court reasoned that, although one artist worked in plaintiff's studio and the other did not, plaintiff provided both artists with tools and supplies, assigned the work they were to perform, and had the right to alter any of their work; the fact that plaintiff described one artist as an independent contractor in his answers to interrogatories and in his deposition was not dispositive. Huebbe v. Oklahoma Casting Co., 663 F.Supp.2d 1196, 1202, 1203.

D.Or.

D.Or.2010. Com. (e) cit. in ftn. Former employee of contractor brought employment discrimination and other claims under Oregon law against, among others, construction site owner that had hired contractor to construct wind turbine foundations at the site, alleging that owner was responsible for employee's termination for breaking site safety rules. Granting in part owner's motion for summary judgment, this court held that owner was not employee's employer and thus could not be liable to employee for unlawful employment discrimination; while owner had a very regimented safety program and retained the ability to remove or replace individuals on site, the record showed that contractor was in charge of employee's daily activities and that employee was paid by contractor, drove contractor's equipment, and was terminated by contractor. Duke v. F.M.K. Const. Services, Inc., 739 F.Supp.2d 1296, 1304.

E.D.Pa.

E.D.Pa.2014. Cit. in case quot. in sup. (general cite). Caucasian employee brought a § 1981 action against employer, alleging that defendant terminated his employment because of the discriminatory animus of a coworker and for conduct for which African American employees were not punished. The trial court granted defendant's motion for summary judgment on the hostile-work-environment claim but denied the motion for defendant's other claims. This court denied defendant's motion for reconsideration, holding that genuine issues of material fact precluded summary judgment on those claims. The court pointed out that the U.S.

Supreme Court applied the definition of "agent" found in Restatement Second of Agency § 220, and relying on § 219, the court held that an employer could be liable under a "cat's paw" theory when a biased employee acted outside the scope of employment and either was reckless or negligent, or was aided in accomplishing the tort by the existence of the agency relation. Burlington v. News Corp., 55 F.Supp.3d 723, 738.

E.D.Pa.1998. Subsec. (2) cit. in case quot. 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, 751.

E.D.Pa.1993. Subsec. (2) cit. in ftn. Former chef for monastery located on a private university campus sued monastery and university under the Age Discrimination in Employment Act (ADEA), inter alia, after he was discharged. Denying in part defendants' motion for summary judgment, the court held, inter alia, that a fact issue existed as to whether plaintiff was an employee of the monastery rather than an independent contractor for purposes of the ADEA claim. Stouch v. Brothers of Order of Hermits of St. Augustine, 836 F.Supp. 1134, 1140.

E.D.Pa.1977. Cit. in sup. Plaintiff, a cruise passenger, brought an action against the owner of the vessel and the ground tour operator for personal injuries sustained while the plaintiff was on a ground tour. The plaintiff alleged that the injuries were caused by the negligence of the ground tour operator's employee. The defendant vessel owner filed a motion for summary judgment, asserting that there was no legal relationship between itself and the ground tour operator sufficient to hold the vessel owner liable, and that an exculpatory clause in its promotional literature and on the ticket purchased by the plaintiff barred the plaintiff's recovery. The court denied the vessel owner's motion for summary judgment, finding that factual issues were present as to whether a master and servant relationship existed between the vessel owner and the ground tour operator, whether the ground tour operator had apparent authority to act as an agent for the vessel owner, and as to the validity of the exculpatory provision. Taylor v. Costa Lines, Inc., 441 F.Supp. 783, 785.

E.D.Pa.1959. Com. (c) quot. in ftn. in sup. In action by employee of contractor who was laying track for railroad and was injured thereon, from terms of the contract, plaintiff was not an employee of railroad and he could not recover from it for his injuries, since under the contract the contractor retained sufficient control of details of work to be classified as an independent contractor, rather than an employee. Okolinsky v. Philadelphia, Bethlehem & New England R. Co., 179 F.Supp. 801, 805, appeal dismissed (C.A.3) 282 F.2d 70.

M.D.Pa.

M.D.Pa.1995. Cit. in disc. Terminated zoning officer/building inspector sued county for due process violations alleging that he was a county employee with a property interest in his position and could only be dismissed for cause after a full hearing. Defendant argued that plaintiff, an independent contractor, was properly and legally terminated. Granting defendant's motion for summary judgment, the court held that plaintiff was an independent contractor with no entitlement to his position and no due process protection. In support of its conclusion the court noted that defendant supervised plaintiff from time to time but exercised no daily control over him, paid him not out of payroll but as an administrative expense, and provided only some of his work tools. Furthermore, plaintiff did not accumulate vacation or sick time and paid his own social security and self-employment taxes. Samson v. Harvey's Lake Borough, 881 F.Supp. 138, 142-143.

M.D.Pa.1990. Subsec. (1) quot. in case quot. in disc. An employee of a railroad subsidiary suffered injuries while working at a train yard operated by the subsidiary as an independent contractor for the railroad. The employee sued the railroad under the

Federal Employer's Liability Act (FELA) to recover damages for his injuries. Following a jury verdict for the plaintiff, the court granted the defendant's motion for judgment n.o.v., holding that the court lacked jurisdiction under the FELA because at the time of the accident the plaintiff was performing in his capacity as an employee of the subsidiary and was not at that time employed by the defendant. The court said that the defendant did not exert sufficient control over the manner in which the plaintiff performed his job to be considered the plaintiff's employer under the common-law principles of agency. Williamson v. Consolidated Rail Corp., 735 F.Supp. 648, 649, order reversed 926 F.2d 1344 (3rd Cir.1991), appeal after remand 947 F.2d 936 (3rd Cir.1991).

M.D.Pa.1975. Subsec. (2)(a), (b), (c), (d), (e), (g), (i) cit. and dist. The excess malpractice insurer of a radiologist brought a suit against a hospital's medical malpractice insurer on the theory that plaintiff's insured was an employee of the hospital when the cause of action arose. Due to the nature of the work of plaintiff's insured, the minimal extent of control exercised by the hospital over the doctor was not convincing one way or the other. The memorandum of agreement between the doctor and the hospital contained no indication that the parties viewed the relationship as one of employer-employee. The doctor received no fringe benefits, nor did the hospital make any normal payroll deductions. Furthermore, the doctor was not covered by the hospital's workmens' compensation insurance. The court, thus, was not convinced by a preponderance of the evidence that the doctor was an employee of the hospital at the time the cause of action arose. Judgment in favor of the hospital's insurer was entered. St. Paul Fire & Marine Ins. Co. v. Aetna Casualty & Surety Co., 394 F.Supp. 1274, 1276, 1277, aff'd, without op. 532 F.2d 747 (3rd Cir.1976).

M.D.Pa.1974. Cit. and quot. in ftn. in sup. and subsec. (2)(a) cit. in sup. Plaintiff brought an action against defendant and a riding academy where she sustained injuries in falling off a horse. The jury had returned an inconsistent special verdict charging the plaintiff with assumption of risk while finding her innocent of contributory negligence. Following entry of judgment, plaintiff moved for a new trial, and defendants moved for a directed verdict in the event plaintiffs motion was granted. The court granted the plaintiff's motion for a new trial, since the apparent inconsistent verdict, caused by the similarity of portions of one meaning of assumption of risk coinciding with the standard of care of a reasonable person involved in contributory negligence, resulted. The court granted the defendant a directed verdict because the riding academy was not an agent of the defendant, nor was it ever maintained that the defendant authorized any events surrounding the plaintiff's accident. Stephenson v. College Misericordia, 376 F.Supp. 1324, 1328.

M.D.Pa.1966. Cit. in sup. The defendant contractor was employed by a church to construct an art glass window designed by the defendant artist, but copied in process from the work of the plaintiff, who held the patents on such art glass construction. The court, finding valid patents and the infringement thereof, ruled that the artist was not relieved from liability just because he was acting at the contractor's command since he was an independent contractor for whose torts the contractor was not responsible and was not liable for indemnification. Baut v. Pethick Constr. Co., 262 F.Supp. 350, 360.

W.D.Pa.

W.D.Pa.2020. Cit. in case cit. in sup. (general cite). Photographer, among others, sued nonprofit organization, alleging that defendant violated plaintiff's copyright in photographs he took while cooperating with defendant during lobbying and protest activities. This court granted plaintiff's motion for declaratory judgment, holding that plaintiff owned the copyright in the disputed photographs, because he was not hired by defendant at the time he took them for the purposes of the "work for hire" exception to the Copyright Act. Citing Restatement Second of Agency § 220, the court explained that, even if plaintiff were hired by defendant, the facts and circumstances weighed towards a finding that plaintiff was not defendant's employee for the purpose of the exception, because plaintiff owned his own tools, the length of plaintiff's cooperation was short, and defendant did not have the right to assign plaintiff more work. Hubay v. Mendez, 500 F.Supp.3d 438, 449, 451.

W.D.Pa.1974. Subsec. (2)(k) quot. in sup. Plaintiff sued to recover for termination of his services with the defendant. Plaintiff claimed that an unlawful tying arrangement and price-fixing mechanism existed under federal antitrust law and that he was entitled to reasonable notification of discharge which had to be based on nonarbitrary, good cause, not present in the unconscionable contract existing between them. The court held that no tying arrangement existed since there were no tied and

tying products and no independent buyer-seller relationship existing. A conspiracy to fix prices needs two parties, which means that plaintiff, who was found to be an employee of defendant, and defendant corporation being one legal unit could not conspire with itself. The court found no authority under Pennsylvania law to hold the relationship between plaintiff and defendant as a joint venture, so that plaintiff was not entitled to termination of their relationship only upon good cause. The express terms of the contract plus Pennsylvania laws hold that defendant is plaintiff's employer and that due to the lack of required notice beyond two weeks in the contract, defendant may terminate their relationship with or without cause. Goldinger v. Baron Oil., 375 F.Supp. 400, 411.

W.D.Pa.1966. Cit. in sup. The plaintiff trucking corporation sought the refund of federal withholding and social security taxes paid over a three year period on the grounds that certain workers were not employees of the plaintiff and, therefore, not liable for the above governmental taxes. The court held that the plaintiff was entitled to a refund on the taxes erroneously assessed and collected since the employees were hired by a labor procurer who paid them and had the control over them and since the equipment provided for unloading was furnished by the consignee of the shipment. R. and H. Corp. v. United States, 255 F.Supp. 870, 872.

D.S.D.

D.S.D.2005. Subsec. (2) cit. in case quot. in disc. Surgeon who was under treatment for bipolar disorder sued hospital and physicians, alleging, in part, that defendants' termination of his privileges at the hospital without the provision of reasonable accommodations was a violation of the Americans with Disabilities Act (ADA). Granting summary judgment for defendants, this court held, inter alia, that plaintiff's relationship with hospital was that of an independent contractor and not an employee, and thus the ADA, which protected employees but not independent contractors, did not apply to plaintiff. The court noted that plaintiff billed patients directly for his services, and patients paid him directly; hospital did not issue a form W-2 to plaintiff or pay for his benefits; and plaintiff had his own staff to assist him with his practice and surgeries. Wojewski v. Rapid City Regional Hosp., Inc., 394 F.Supp.2d 1134, 1139, affirmed in part, vacated in part, remanded by 450 F.3d 338 (8th Cir.2006).

D.S.D.1990. Cit. in disc. An employee of a temporary agency who accepted a temporary position at a manufacturing plant was injured while cleaning a machine when another employee turned on the machine without ascertaining that the temporary employee's hands were clear. The temporary employee sued the owner and operator of the plant for negligence to recover compensatory and punitive damages. Granting the defendant's motion for summary judgment, the court held that, because the plaintiff was an employee of both the temporary agency and the defendant under South Dakota's workers' compensation statutes, the plaintiff's exclusive remedy for her injuries was workers' compensation. McMaster v. Amoco Foam Products Co., 735 F.Supp. 941, 944.

E.D.Tex.

E.D.Tex.1988. Cit. in case quot. in disc. After an employee of a packing company hired by an equipment owner to prepare its equipment for shipment overseas was injured while lifting a piece of equipment under the direction of an employee of the equipment owner, the injured employee successfully sued the owner for negligence. The court denied the defendant's motion for judgment n.o.v., rejecting the defendant's argument that the plaintiff must, as a matter of law, be a borrowed employee because the defendant was controlling the details of his work. The court stated that the original employment relationship was presumed to continue unless the defendant's control over the plaintiff was so pervasive as to be inconsistent with that presumption. Ponder v. Morrison-Knudsen Co., 685 F.Supp. 1359, 1369.

N.D.Tex.

N.D.Tex.1973. Cit. in sup. The plaintiff sued for damages, under the Federal Tort Claims Act, alleging that his eye injury had been caused by negligent supervision while he was attending school under the federal Manpower Development & Training

Act. Liability under the Tort Claims Act depended upon whether the supervisor was a federal "employee". The court found that under the Manpower Act, control over supervisory personnel was entrusted to state and local agencies, and thus held that the supervisor in question was not a federal employee, even though the school had been operated primarily with federal funds. The court, therefore, granted the defendant a summary judgment. Prater v. United States, 357 F.Supp. 1044, 1045.

S.D.Tex.

S.D.Tex.2016. Subsec. (2) and com. (j) cit. in sup. Relators brought a qui tam action against doctor, surgical assistant, and corporations that specialized in providing medical devices to doctors, alleging, inter alia, that defendants violated the Anti-Kickback Statute because corporations paid surgical assistant commissions on devices used in doctor's scheduled surgeries and that this relationship was arranged with the intent to induce doctor and assistant to order corporations' products. This court denied in part defendants' motion to dismiss, holding that plaintiffs provided sufficient evidence to demonstrate genuine issues of material fact as to whether assistant was a bona fide employee of corporations and fell within the statute's safe-harbor provision. The court cited Restatement Second of Agency § 220(2) in noting factors used in identifying an employer-employee relationship. Waldmann v. Fulp, 259 F.Supp.3d 579, 621, 624.

S.D.Tex.2008. Cit. and quot. in ftn., com. (d) cit. and quot. in ftn., com. (e) quot. in ftn. Holder of a patent on a method using videoconferencing to allow a physician to communicate with a medical-care giver and a patient in a remote healthcare facility brought an infringement action against providers of videoconferencing network links between physicians and patients. This court granted defendants' motion for summary judgment of noninfringement, holding, inter alia, that plaintiff failed to show that, under principles of agency, defendants directed or controlled the affiliated physicians whom it hired under contract to perform the work that was necessary to complete all of the steps of the method claimed in the patent. Emtel, Inc. v. Lipidlabs, Inc., 583 F.Supp.2d 811, 829, 837.

S.D.Tex.1998. Subsec. (2) quot. in disc. Doctor who slipped and fell at hospital sued his partnership's insurer for disability benefits and for violating the state insurance code. Insurer removed to federal court and asserted that the disability policy was part of an ERISA plan, preempting his state law claims. This court granted insurer's motion to dismiss, holding, inter alia, that plaintiff's partner was an employee and that the inclusion of the partner in the partnership's group policy was sufficient to bring the policy within the scope of ERISA; therefore, plaintiff's policy was part of an ERISA plan. Salameh v. Provident Life & Acc. Ins. Co., 23 F.Supp.2d 704, 711-712.

W.D.Tex.

W.D.Tex.2013. Subsec. (2) quot. in sup. and cit. and quot. in cases cit. and quot. in sup., subsecs. (2)(a)-(2)(j) and coms. (j) and (k) cit. in sup. Unaccompanied Central American-born minors who were placed in federal custody pending their immigration court proceedings brought, inter alia, a negligent-supervision claim against the United States, alleging that they were sexually, emotionally, and physically abused during their detention at a facility operated by a government contractor. Granting defendant's motion to dismiss this claim, this court held that plaintiffs' claim was barred by the independent-contractor exception to the Federal Tort Claims Act, because plaintiffs failed to establish that contractor was a federal agency or that its employees were acting as federal employees. The court found that the contract and other documents and the actions of the parties did not establish the kind of daily detailed control necessary to abrogate the independent-contractor exception, and that the 10-factor test of Restatement Second of Agency § 220 also weighed in favor of an independent-contractor relationship. Walding v. U.S., 955 F.Supp.2d 759, 792, 793, 808-811.

D.Vt.

D.Vt.1995. Subsec. (2)(a) cit. in headnote and 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, 670, 681.

W.D.Va.

W.D.Va.1965. Cit. but not fol. After the decedent asked the defendant to drive him somewhere, the latter agreed upon being given some money with which he might keep busy while waiting for the decedent. In the course of the trip, the decedent caused an accident to occur, killing him and injuring the defendant. The plaintiff insurance company sought declaratory judgment on its liability. The court held that the defendant driver was only a "casual employee" of the decedent and that the ordinary meaning of that term does not bring the driver within the provision of the insurance policy relieving the insurer of liability to employees of the insured. United Services Automobile Ass'n v. Pinkard, 258 F.Supp. 804, 807, affirmed (C.A.4) 356 F.2d 35.

D.V.I.

D.V.I.2001. Cit. in disc. Independent contractor's employee sued phone company and a car driver for injuries he suffered while repairing a phone line, when a passing car caught a cable, wrapped it around him, and threw him onto the road. This court granted in part phone company's motion for summary judgment, holding, inter alia, that an injured employee of an independent contractor had no cause of action in tort against the employer of that contractor under Restatement (Second) of Torts §§ 410 and 414. Allowing contractor's employees to sue contractor's employer in tort would create a class of employees with greater rights of recovery against employer than employer's own employees had themselves, even though those employees did the same work for the same employer. Gass v. Virgin Islands Telephone Corp., 149 F.Supp.2d 205, 213, affirmed in part, reversed in part 311 F.3d 237 (3d Cir.2002).

D.V.I.1984. Cit. in disc. A laborer who was borrowed by another employer sued the borrowing employer for negligence when he was injured on the job. The laborer had signed a "Rehire Form" indicating that he was a loanee and would be under the exclusive control of the defendant. The borrowing employer moved for summary judgment, asserting that the Workmen's Compensation Act and the "borrowed employee" doctrine precluded the laborer from bringing suit. While the court held that the "borrowed employee" doctrine applied, it denied the defendant's motion on the ground that a genuine issue of material fact existed whether the laborer knowingly consented to waive his rights when he signed the form. The court observed that informed acquiescence must have been present for the defendant to apply the borrowed employee doctrine against the laborer. Vanterpool v. Hess Oil Virgin Islands Corp., 589 F. Supp. 334, 337, 339, affirmed in part, reversed in part766 F.2d 117 (3d Cir.1985). See above case. Certiorari denied474 U.S. 1059, 106 S.Ct. 801, 88 L.Ed.2d 777 (1986).

D.V.I.1975. Cit. in disc. in sup. and coms. (j) and (i) quot. in part in sup. Plaintiff construction company brought suit for money due and owing on a construction contract and for damages flowing from the alleged breach of the contract by defendants. Defendant development corporation counterclaimed for damages stemming allegedly from work left undone, as well as for other work done in an unworkmanlike manner. The court initially found that the pile foundation, both as to design and construction, was adequate. Since this was held to be so, it was determined that the entire pile driving operation was properly supervised. Plaintiff did have a cause of action against the engineer, but not the architect, for expenses incurred in correcting the slab design since the engineer was acting as an independent contractor. The architect was held not liable under the theory that a principal is responsible only for the negligent acts of his agent and not those of an independent contractor. Where the contractor's substitution of the means of wall reinforcement was improper, due to the absence of a written field change signed by the architect acting for the owner, the plaintiff contractor would be held liable for rebuilding the walls in accordance with the specifications. The overall cost of rebuilding, as a result of a reexamination the owner made while the operation was shutdown, could not be recovered

where the owner took advantage of the shutdown necessitated by the raising and rebuilding of the walls. Therefore, setoff attributable to the reexamination was proper. In the absence of evidence of diminished incoming funds, the plaintiff could not recover payments made for equipment which lay dormant while the owner made a reexamination. However, plaintiff's interest on a loan paid during the shutdown resulting from the owner's inspection was recoverable. Furthermore, where the building had proved to be other than built in an unworkmanlike manner, the plaintiff contractor could recover the remainder of the contract price, less proper setoff. Also, where a 6-week delay between completion of a project and relocation was attributable to plaintiff's problem with the owner, the extra costs incurred by plaintiff thereto were recoverable. Punitive damages were awarded against the owner for lack of good faith. The court concluded by finding that owner could not recover for: (1) repairs of walls where cracks were caused by the tenants; (2) failure to construct a generator shed where it was not included in the original plans; (3) cost of clean-up for the fallen ceiling since liability therefore was not set; (4) change order of electrical work which was given after tenant had taken possession; (5) windows not properly anodized, in the absence of evidence of the cost of such work; (6) liquidated damages for inability to give lessee possession where the owner contracted for the date of possession without having a construction contract first; (7) penalties for delay in completion which was preceded by the collapse of the ceiling for which liability was not set. Finally, the architects could recover unpaid fees from the owner, subject to deductions for corrections due to mistakes. Whitfield Constr. Co. v. Commercial Development Corp., 392 F.Supp. 982, 999, 1000.

W.D.Wash.

W.D.Wash.2011. Subsec. (2) cit. in disc., cit. in sup., and cit. in case cit. in sup. Insurer brought suit for a declaration of its duties under a commercial general liability policy issued to insured real-estate broker, in connection with an underlying tort action brought against insured and others by pedestrian who allegedly fractured her ankle when she stepped in a hole left after real-estate signpost was removed by signpost installer. Granting partial summary judgment for plaintiff, this court held that signpost installer was not an insured under the insurance policy at issue here, because he was an independent contractor and not an employee of insured, and that, consequently, plaintiff owed no duty to defend him in the underlying action. The court reasoned that installer owned the signposts he installed, as well as his own tools, maintained his own storage building, paid his own taxes, and set his own daily schedule; further, he entirely controlled the physical process of installing and removing signposts, and how he used his tools, dug a hole, and filled an empty hole. Hartford Fire Ins. Co. v. Leahy, 774 F.Supp.2d 1104, 1117, 1118, 1120.

N.D.W.Va.

N.D.W.Va.1997. Subsec. (2) cit. in headnote and quot. in case quot. in disc. Visitors to a Veterans Administration hospital brought a negligence action against the United States and an elevator maintenance company, alleging that they were injured while using an elevator at the hospital. Granting the motion of the United States to dismiss for lack of subject matter jurisdiction, the court held, inter alia, that the elevator maintenance company was an independent contractor, because it was a separate company with specialized knowledge and control over its work; consequently, its negligence, if any, could not be imputed to the United States under the Federal Tort Claims Act. Talkington v. General Elevator Co., Inc., 967 F.Supp. 890, 891-893.

S.D.W.Va.

S.D.W.Va.2003. Com. (a) quot. in disc. Administrator of pension and welfare fund sued pension-fund trustees under ERISA, alleging that defendants wrongfully terminated his pension benefits. Granting plaintiff's motion for summary judgment, the court held, inter alia, that plaintiff was defendants' at-will employee, and thus was a plan participant eligible to receive benefits under the plan. The court said that, although defendants did not withhold taxes and plaintiff received income from other sources, the facts that defendants supplied plaintiff with whatever tools and supplies were needed for the job, retained complete discretion over when and how he worked, and paid plaintiff by the month for 20 years indicated that he was an employee, rather than an independent contractor. Cerra v. Harvey, 279 F.Supp.2d 778, 786.

S.D.W.Va.1980. Subsec. (1) and (2) quot. in disc., coms. (d), (g), (i), (j), (k), (l), (m), quot. in part in dis. The plaintiff railroad employee was injured when she slipped on a pat of butter in a cafeteria that the railroad provided for its employees. This cafeteria was operated by a catering service under an agreement with the railroad. The plaintiff brought a personal injury action against the railroad, alleging that the defendant failed to provide a safe place for her to work. The railroad then filed a third party complaint against the catering service and alleged that the plaintiff's injury was caused by the catering service's negligence, and that the agreement between the railroad and catering service provided for indemnification of the defendant for any damages recovered by the plaintiff. The jury returned a verdict for the plaintiff and against the defendant for $150,000. After the trial, both the railroad and the catering company filed separate motions for a judgment n.o.v. and for a new trial. The judge denied all of these motions. He found, however, that the agreement between the railroad and the catering service provided that the catering service should indemnify the railroad for the $150,000 verdict recovered against it plus the reasonable attorney's fees incurred by the railroad in maintaining its defense. In denying the motions for a new trial and for a judgment n.o.v., the court rejected the contentions of the railroad and the catering service that the catering service was not an agent of the defendant and, consequently, that its negligence was not imputable to the railroad under the so-called operational activity doctrine. Both parties conceded that under the Federal Employers Liability Act, the railroad would be liable for any injury to its employees caused by an agent. First, the court applied the operational activity test which is unique to FELA and concluded that the catering service was performing an operational activity of the railroad; consequently, its negligence was imputable to the railroad. The court, nonetheless, also applied the more traditional agency analysis expounded by the Restatement and concluded that the catering service's negligence was imputable to the railroad for several reasons. The terms of their agreement, for example, gave the railroad almost complete control over every detail in operating the cafeteria. In essence, the catering service performed only as cook and food server. Even though he catering service's business was distinct from that of the railroad, because it was perfectly natural for a railroad to run a cafeteria for its employees, this “distinct occupation” factor did not affect the catering service's status as agent. While skill is required to run a cafeteria, this “skill factor” did not affect the catering service's status as agent because the operation of the cafeteria in this case was incidental to the railroad's business. Because both the railroad and the catering service provided a portion of the tools and instrumentalities for the cafeteria, this factor testified more heavily in favor of an agency status for the catering service. The court noted that because the relationship of the parties under their agreement was to last a considerable time, this factor weighed more heavily in favor of agency than independent contractor status. It noted, however, that the agreement that the catering service was to retain the profits of the cafeteria was slightly more typical of an arrangement for an independent contractor than for an agent. Finally, the court noted that the parties did not believe that they were creating an agency relationship; this was evidenced by their agreement which provided that the catering service “will always be an independent contractor.” The court concluded, however, that this provision, as well as the parties' belief that they were not creating an agency relationship, was not controlling because all of the other factors weighed so strongly against an independent contractor status for the catering service. The court thus held that under traditional standards, the catering service was the railroad's agent, and its negligence was imputable to the railroad. Moore v. Chesapeake & O. Ry. Co., 493 F.Supp. 1252, 1259-1260, 1261, 1262, affirmed 649 F.2d 1004 (4th Cir.1981).

E.D.Wis.

E.D.Wis.2012. Subsec. (2) cit. but dist., cit. in case quot. but dist., cit. in ftn. (general cites). Former sales representative retained by company sued company for violations of the Fair Credit Reporting Act (FCRA), alleging that it did not give him, prior to his termination, notice that it had obtained a background check on him from a credit-reporting agency. This court granted summary judgment for defendant, holding that, because plaintiff was an independent contractor, rather than an employee, he was not covered by the protections of the FCRA with respect to defendant's acquisition of a credit report on him. The court concluded that, since plaintiff asserted neither common-law claims nor claims under the Fair Labor Standards Act, the proper test to apply in assessing the nature of plaintiff's work relationship with defendant was the common-law test previously set forth by the U.S. Supreme Court in an ERISA case, rather than the test of Restatement Second of Agency § 220(2). Lamson v. EMS Energy Marketing Service, Inc., 868 F.Supp.2d 804, 811, 812.

E.D.Wis.2008. Com. (d) cit. in case quot. in sup. Owner of a patent disclosing a multi-step process for making high-hardness rotary cutting blades brought an infringement action against competitors, arguing that defendants' subcontracting of the heat-

treating step of the process to an independent entity not owned or controlled by any of the defendants did not shield defendants from liability for infringement. This court denied defendants' motions for summary judgment of noninfringement, holding, inter alia, that a genuine issue of material fact existed as to whether defendants controlled the heat-treating process performed by the subcontractor, and thus were vicariously liable for subcontractor's acts. Fisher-Barton Blades, Inc. v. Blount, Inc., 584 F.Supp.2d 1126, 1143.

E.D.Wis.1999. Cit. in disc. A child was injured by lead-based paint; he and his parents sued the painter, a real estate broker, and the seller of the house, among others, for negligence. Granting the seller's motion for summary judgment and partially denying that of the broker, the court held, inter alia, that the seller was not liable for the painter's negligence, because she did not have a duty to supervise the painter's work or to double-check her broker's hiring suggestions. Chapman by Chapman v. Mutual Service Casualty Insurance Company, 35 F.Supp.2d 699, 708.

W.D.Wis.

W.D.Wis.2010. Subsec. (2) cit. in case quot. in disc. Co-owner of a company that developed, maintained, and licensed a web-based software program used in the auto financing industry sued company and other co-owner, seeking a declaration that he was the sole author of the software's source code; defendants counterclaimed, asserting, among other things, that company owned the copyright source code under the work-for-hire doctrine. Denying summary judgment for defendants on this counterclaim, this court concluded that plaintiff created the source code as a co-owner, not an employee, of company; while defendants argued that application of common-law agency principles led to a conclusion that plaintiff was an employee, the court pointed to his inherent right to control the business in concluding that he did not have an agency relationship with company. Woods v. Resnick, 725 F.Supp.2d 809, 823.

Ala.

Ala.1983. Cit. in disc., subsec. (2)(e) cit. in sup. 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, 22.

Alaska

Alaska, 2006. Subsec. (1) quot. in sup., subsec. (2) quot. in ftn. in sup. State employee who allegedly was injured while attending a use-of-force training program brought suit, under a respondeat superior theory, against company that designed the program taught by company-certified state employees serving as instructors, arguing that company was vicariously liable for the negligence of the instructors because they were defendant's servants. The trial court granted summary judgment for defendant. Affirming in part, this court held, inter alia, that although defendant set standards, curriculum, and course protocol, it did not possess sufficient control over the instructors to create a master-servant relationship. Anderson v. PPCT Management Systems, Inc., 145 P.3d 503, 507, 508.

Alaska, 2002. Subsec. (2) quot. and cit. in sup., quot. in case quot. in sup., com. (c) quot. in sup. and quot. in case quot. in ftn., subsec. (2)(a) cit. in sup., subsecs. (2)(b), (e), (g), and (i) cit. in sup. and in ftn. Following automobile collision, injured motorist sued teacher for personal injuries and alleged vicarious liability of book publisher that employed teacher to demonstrate educational materials. Trial court granted publisher summary judgment. Reversing and remanding, this court held, inter alia,

that fact issues existed as to whether teacher was employee or independent contractor of publisher, who controlled some aspects of teacher's work. Powell v. Tanner, 59 P.3d 246, 249-253, 255.

Alaska, 1991. Cit. in ftn. A mother filed a complaint on behalf of her three-year-old daughter against a church and a church worker, alleging that the worker sexually abused the child while she was entrusted to the care of the church's "tiny tots" program. The trial court granted the defendants' motions for summary judgment. Vacating and remanding, this court held that the evidence was insufficient to require a finding as a matter of law that the church exercised due care in screening the worker or that there were no issues of material fact for determination by the jury. The court noted that the church's argument that the worker's position as a volunteer did not require a formal interview or background check was without merit; since a volunteer may be a servant if subject to the control of another, a volunteer may be subject to the same interview and background checks as any other servant. Broderick v. King's Way Assembly of God, 808 P.2d 1211, 1221.

Alaska, 1987. Subsec. (2) cit. in disc. A general contractor hired a subcontractor with whom he had worked in the past to do roofing work on a construction project, giving the subcontractor control over the manner in which the work was to be performed. An employee of the subcontractor slipped on the ice-covered roof and, due to the subcontractor's negligent failure to install safety equipment, fell to his death. The employee's widow sued the general contractor for negligence and for negligent hiring of the subcontractor. The trial court granted summary judgment to the defendant. Affirming, this court held that the risks of ice being on the roof and of a worker falling were normal risks of roofing that the subcontractor, as an independent contractor, bore; and that the general contractor was not negligent in hiring the subcontractor because he was entitled to rely on the subcontractor's good reputation and competent past performance. Sievers v. McClure, 746 P.2d 885, 889.

Alaska, 1982. Cit. in disc. and in ftn. to disc., coms. (c) and (d) in disc. Personal representatives of workers killed in an airplane crash operated by a fellow employee while en route to a remote construction site brought action against the owner of the site, the contractor, the labor broker, and a personal representative of the estate of the employee who owned and operated the plane. The lower court granted summary judgment for the owner. This court held, inter alia, that employer can be held vicariously liable for the injuries of the accident resulting from the labor broker's negligence within the scope of his employment as a labor broker. The court listed ten factors from the Restatement relevant to distinguishing whether the labor broker was an independent contractor or a servant of the employer when he contracted to transport the workers to and from the construction site, stating that the employer's control over the manner of performance is the most significant. The court added that although the existence of the master-servant relationship is usually reserved for the jury, if the inference that the relationship exists is clear, it can be made by the court. The court concluded that the labor broker's responsibilities to transport the workers to and from the site arose out of his capacity as an independent contractor in charge of building construction, not out of his employment as a labor broker. The court also noted that the employer exercised no control over the manner in which the steel building erection job was performed and that its mere power to order any worker fired is not enough to infer that a master-servant relationship existed. The court held that the lower court's finding of summary judgment for the employer was proper. Sterud v. Chugach Electric Association, 640 P.2d 823, 826.

Alaska, 1981. Subsec. (1) com. (e) 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 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, 1980. Subsec. (1) quot. in ftn. The plaintiff was severely injured when an intoxicated driver collided with the motorcycle on which she was riding as a passenger. The driver had been drinking earlier in the evening at a bar and the plaintiff alleged in her complaint that employees of the bar had intentionally and negligently served liquor to the intoxicated driver in violation of AS 04.15.020 which provides that it is unlawful to sell intoxicating liquors to an intoxicated person. Her complaint named four defendants: two of the defendants were liquor licensees for the bar with the Alcoholic Beverage Control Board and the other two defendants were in the process of buying the bar from the defendant licensees at the time of the accident. In fact, two months prior to the accident, the defendant liquor licensees had prepared a warranty deed, bill of sale, and an application for transfer of the liquor license to the defendant bar purchasers. They also signed a "managerial agreement" which allowed the buyers to operate the premises until the closing and approval of transfer of the liquor license. When the accident occurred, the bar purchasers were actually operating the bar, and the defendant liquor licensees were in Washington. The plaintiff's claim against the defendant licensees was predicated on vicarious liability on the basis of two theories. First, the plaintiff contended that the defendant liquor licensees should be held liable to her because they continued to maintain control over the manner in which the business was operated as evidenced by the "managerial agreement." Alternatively, she argued that AS 04.10.180, which states that a "licensee is solely responsible for the lawful conduct of the business licensed under this title," creates civil liability for a licensee for the conduct of employees in a beverage dispensary. The trial judge granted summary judgment in favor of the defendant liquor licensees, and dismissed the complaint against them. The appellate court reversed in part and remanded the case. The appellate court held that the plaintiff could maintain a cause of action against the defendant liquor licensees under AS 04.15.020 because it provided for civil liability. The court rejected, however, the plaintiff's argument that the defendant liquor licensees should be held liable to her because they maintained actual control over the premises after the defendant bar purchasers became the operators of the bar. First, the court noted that the plaintiff had failed to produce actual evidence of this control. Second, the court concluded that the "managerial agreement" signed by all the parties failed to prove that the liquor licensees maintained control over the bar because this agreement contained no provision which would have allowed the licensees to exercise any control. Finally, the court rejected the plaintiff's argument that because the managerial agreement contained no affirmative provisions restricting control, it should be assumed that they retained such control. Instead, the court concurred with the lower court's view that this agreement merely gave the licensees a security interest in the bar. Alesna v. Le-Grue, 614 P.2d 1387, 1389.

Alaska, 1980. Subsec. (2) cit. and quot. in ftn. The plaintiff stepped off a construction vehicle he had loaded onto a lowboy trailer and was injured when he fell through a hole in the trailer. The plaintiff had been working at a construction site on the Alaskan pipeline. In his deposition, the plaintiff stated that his employer, an independent contractor, had knowledge of the hole in the trailer and had been told on several occasions to make the necessary repairs. The plaintiff sued several defendants based upon contracts which existed between the plaintiff's employer, a construction management contractor and an oil consortium, because each contract allotted safety responsibilities to each party. The plaintiff filed a tort action against the contractor and the oil consortium, arguing that the contractor had a contractual obligation to the consortium to insure that defective equipment was not used on the pipeline, that he was a third party beneficiary to this contract and that the contractor was in control of the project and had an absolute duty to provide adequate and proper safeguards. The plaintiff also argued that the contractor was acting as the consortium's agent and therefore, the consortium was responsible for any breach of duty committed by the contractor. The defendants were granted summary judgment on the grounds that the plaintiff's employer was an independent contractor, that they had no duty to inspect or repair the equipment, and that the plaintiff was an incidental rather than an intended beneficiary. The plaintiff appealed. This court stated that insofar as the contractor and the oil consortium maintained an independent contractor

relationship with the plaintiff's employer they were not liable for the plaintiff's injuries. However, if the contractor and the consortium maintained some control over the independent contractor then they could be held liable for the injuries incurred by an employee of the independent contractor. The extent of the control that was retained would determine whether the relationship should be characterized as a master-servant relationship or an independent contractor relationship. In this case that issue should have been a question for a jury so summary judgment should not have been granted. The court therefore reversed the lower court's decision and remanded the case. Hammond v. Bechtel, Inc., 606 P.2d 1269, 1275.

Alaska, 1980. Subsec. (2) cit. in disc. The plaintiff, an employee of a drilling company, was injured when a ditch caved in. The drilling company had leased a backhoe from the defendant company which had also furnished the backhoe operator who had dug the ditch. The plaintiff sued the defendant for the injuries he had sustained. The lower court granted the defendant's motion for a summary judgment based upon the doctrine of borrowed servants and the plaintiff appealed. This court rejected the borrowed servant rule, that a servant who is loaned by one master to another is regarded as acting for the borrowing master and the loaning master is not held responsible for the servant's negligent acts, and adopted a dual liability rule instead. The court's major objection to the borrowed servant doctrine was that the doctrine focused on whether a master-servant relationship existed rather than focusing on which of the two masters should be liable for the servant's tort. The court held that the question of how to distribute the loss caused by the borrowed servant, as between the lending and borrowing masters, should be determined in accordance with the principles of contribution and indemnity. The court therefore reversed and remanded the lower court's decision. Kastner v. Toombs, 611 P.2d 62, 64.

Alaska, 1977. Cit. in sup. Action was brought by the patron of a bar against the lessor and the licensees of the establishment for injuries sustained when he was hit by a bottle thrown by an allegedly inebriated patron. Although a statute provided that licensees were to be solely responsible for the lawful conduct of their business, the court held that since the bartender who sold the drinks to the inebriated patron was not under their control, civil liability should not be imposed vicariously on the licensees. They could, however, be held responsible for criminal and administrative violations. Barton v. Lund, 563 P.2d 875, 876.

Alaska, 1977. Subsec. (1) quot. in part in sup. and subsec. (2), coms. (h) and (i) cit. and quot. in part in sup. Plaintiff, injured when shot by a hunter who was in pursuit of a fleeing animal, brought suit against the hunter whose shot caused the injury and the hunter's companion and co-hunter. The trial court held that the co-hunter could not be held liable under joint venture and agency theories and the plaintiff appealed, arguing that a master-servant relationship existed between the defendants so as to impose liability on the co-hunter and that the hunter who fired the shot was the other's agent. The court affirmed, holding that the trial court was not in error in finding that the co-hunter did not exercise control over his companion sufficient to impose vicarious liability and that the findings that there was no consensual undertaking by the co-hunter to act as the other's agent were not erroneous. Nicholas v. Moore, 570 P.2d 174, 177.

Alaska, 1973. Cit. in ftn. in disc. The plaintiffs were driving south on a highway when their car collided with another vehicle driven by the employee of the defendant and owned by a third party. At the time of the accident, the employee was returning home from work and under a union agreement he received a daily payment of $8.50 remuneration, since the job site was situated a considerable distance from his home. However, all employees received such remuneration whether they commuted or lived near the jobsite. The plaintiffs charged that the employee was acting within the scope of his employment at the time the accident occurred, and that the defendant was liable under the respondeat superior doctrine. The defendant contended that although the employee was not acting within the held liable under the doctrine of respondeat superior, since the employe was not acting within the scope of his employment at the time the accident occurred. The trial granted the plaintiffs' motion for a directed verdict, ruling that, as a matter of law, defendant was liable under respondeat superior. The defendant appealed. Held: Reversed and remanded for a new trial. Scope of employment questions are jury issues where conflicting inferences can be drawn from undisputed facts. The facts in this case were undisputed, and it was the jury's function to determine whether the employee was acting within the scope of his employment at the time of the accident. Since there was substantial evidence from which the jury might have found that the driver was, or was not, acting within the scope of his employment, the trial court erred in directing a verdict for the plaintiffs on the respondeat superior liability issue. Luth v. Rogers And Babler Construction Company, 507 P.2d 761, 763.

Alaska, 1971. Quot. in part and cit. in ftn. in sup. Plaintiff subcontractor brought an action against defendant general contractor for injuries allegedly sustained through the negligence of defendant's employee. The accident occurred when defendant's employee, whom plaintiff was directing in an earth filling operation, struck and injured plaintiff with the front-end loader that he was operating. Defendant general contractor raised the defense that he was not liable under respondeat superior because at the time of the accident his employee was a loaned servant under the direction and control of plaintiff. Plaintiff lost at trial and argued on appeal that the jury instruction on the loaned servant issue, which stated the basic criteria to be that the employee be under the direction and control of plaintiff for the servant to be loaned, was in error. The court agreed with plaintiff and held that the instruction must state that the employee must become a true servant of the borrowing master before the loaned servant doctrine applies, that it must mention many of the relevant factors in deciding this issue, and that it must amplify on what is meant by direction and control, distinguishing between the mere mechanical control of directing a tractor driver and the over-all control required in a true master-servant relationship. Reader v. Ghemm Co., 490 P.2d 1200, 1203-1204.

Ariz.

Ariz.2012. Cit. in case cit. in sup., subsec. (2) cit. in sup. Motorcyclist who was hit by a car sued driver of the car and driver's employer, alleging that employer was vicariously liable for plaintiff's injuries. The trial court granted summary judgment for employer; the court of appeals affirmed. Affirming, this court held that employer was not liable for employee's alleged negligence, because employee, who was on an extended away-from-home assignment, was not acting within the scope of his employment when he and a co-worker, while returning to their hotel from a restaurant after work hours, were involved in the accident with plaintiff; employee was not serving employer's interests in traveling to and from the restaurant during his off hours, and employer did not control where, when, or even if employee chose to eat dinner. Engler v. Gulf Interstate Engineering, Inc., 280 P.3d 599, 602, 603.

Ariz.1990. Quot. in disc., coms. (c) and (j) cit. in disc., com. (h) cit. and quot. in disc., com. (m) quot. in disc. After a motorcyclist was injured in a collision with a car driven by a newspaper delivery agent, he sued the agent and the newspaper under theories of negligence and vicarious liability. The trial court awarded the newspaper summary judgment on the vicarious liability claim, concluding that the agent was an independent contractor. The intermediate appellate court affirmed. This court reversed on the ground that a reasonable jury could conclude that an employer-employee relationship existed between the newspaper and the agent. The court said the newspaper's involvement with all details of delivery, its broad discretion to terminate, and its heavy reliance on the agent's services supported an inference that the agent was an employee of the newspaper. Santiago v. Phoenix Newspapers, Inc., 164 Ariz. 505, 794 P.2d 138, 141-145.

Ariz.1979. Cit. in disc. in diss. op. Pedestrian brought an action against the driver of an automobile for injuries sustained when struck while walking on an Air Force base. The defendant, an enlisted man on active duty, had finished a day shift and was driving on base property to his off-base residence in his private motor vehicle when he struck the plaintiff, a civilian. The trial court entered judgment dismissing the suit against the defendant on the ground that at the time of the accident the defendant was acting within the scope of his employment for the Air Force, and that the suit was barred by the Federal Drivers Act, which provides that a suit against the United States under the Tort Claims Act shall be the exclusive remedy against a federal employee based upon a claim arising out of the employee's operation of a motor vehicle within the scope of his employment. On appeal the court reversed, holding that the so called going and coming rule which applies to employees injured on an employer's premises was inapplicable in tort liability suits. A minority opinion urged affirming the judgment of the trial court, since the defendant was still on his employer's premises and he was under the control of the government at the time the tort occurred. The dissent noted that such a holding would conform with previous decisions which found that various matters of fact may be considered in determining whether an employee is acting within the scope of his employment, so as to make the principal of respondeat superior fairly applicable. Driscoll v. Harmon, 124 Ariz. 15, 601 P.2d 1051, 1053.

Ariz.1974. Cit. in sup. Plaintiff sought recovery for services rendered to defendant in building a dam. This court held that the lower courts were in error in granting summary judgment for defendant, since no clear conclusion could be reached from the

facts that had been presented, as to whether the plaintiff was an independent contractor or an employee of the defendant. Lundy v. Prescott Valley, Inc., 110 Ariz. 362, 519 P.2d 61, 62.

Ariz.1963. Quot. in sup. In wrongful death action of plaintiff's decedent who was killed in a head-on automobile collision with an automobile driven by defendant's decedent who was employee of defendant, defendant was not liable under theory of respondeat superior since "employee" could sell anywhere in United States whenever he wanted to, and visited his home office only a few times yearly. Throop v. F.E. Young & Co., 94 Ariz. 146, 382 P.2d 560, 563.

Ariz.App.

Ariz.App.2019. Cit. in ftn. (general cite). After he was denied workers' compensation benefits from his employer's insurer, taxicab driver filed a timely protest to an administrative law judge, alleging that he was owed workers' compensation for injuries sustained while driving his taxicab. The administrative law judge entered an award for a non-compensable claim, finding that plaintiff was not owed workers' compensation because he was an independent contractor. This court affirmed, holding that, under Arizona law, several factors indicated that plaintiff was an independent contractor and not an employee. The court rejected plaintiff's reliance on Arizona caselaw utilizing Restatement Second of Agency § 220's factors for determining a worker's status as an employee or independent contractor, explaining that that case involved the distinction between employees and independent contractors in the context of vicarious liability, not workers' compensation benefits. Danial v. Industrial Commission, 434 P.3d 592, 595.

Ariz.App.2016. Cit. in disc.; com. (e) and illus. 2 and 7 quot. in disc. Widow of motorist brought a wrongful-death claim against real-estate broker, alleging that real-estate agent who worked for broker caused a car accident that killed motorist. The trial court granted summary judgment for defendant, finding that defendant was not vicariously liable for agent's negligence, because agent was its independent contractor, rather than its employee. Affirming, this court held that the trial court did not err in concluding that agent was an independent contractor under Restatement Second of Agency § 220. The court reasoned that, although broker required agent to carry auto insurance, that requirement did not dictate a right to control agent's driving; it was undisputed that broker did not tell agent which houses to visit, what routes to take, or when to meet clients—on the contrary, agent chose the territory where he worked, created his own advertisements, prospected for clients, drove his own car, worked from his home office, set up his own appointments, and worked purely on commission. Santorii v. MartinezRusso, LLC, 381 P.3d 248, 252-254.

Ariz.App.2007. Cit. in disc., subsec. (1) quot. in ftn. Patron sued grocery store that contracted with loss-prevention and security-services provider, alleging that he was injured at the store during an altercation with a security guard who wrongly accused him of shoplifting. The trial court granted summary judgment for defendant. Reversing and remanding, this court held, inter alia, that the trial court abused its discretion in denying plaintiff's motion for additional disclosure as to whether a master-servant relationship existed between store and guard. The court noted that, while many factors suggested an independent-contractor, rather than a master-servant, relationship between store and guard, Arizona case law distinguished a servant from an independent contractor primarily based on the employer's right to control how the work was performed. Simon v. Safeway, Inc., 217 Ariz. 330, 173 P.3d 1031, 1035.

Ariz.App.2004. Cit. in disc., cit. in case cit. in disc., subsec. (1) cit. in ftn., subsec. (2)(h) cit. in disc., com. (c) cit. in disc. Middle-school teacher sued two students for negligence after she was struck by a cart they were pushing down a school hallway while performing errand for another teacher. Trial court granted defendants summary judgment, finding that defendants were school employees and therefore plaintiff's coemployees at the time of accident. This court reversed and remanded, holding, inter alia, that neither Restatement Second of Agency § 220 nor other common-law principles supported ruling as a matter of law that defendants were school employees at time of accident. Right of defendants' teacher to direct and control them in school-related matters emanated from statute rather than from any employment agreement. Mitchell v. Gamble, 207 Ariz. 364, 86 P.3d 944, 948, 949, 952.

Ariz.App.1988. Quot. in sup., subsec. (2) cit. generally in sup., com. (c) quot. and cit. in sup. A motorcyclist was struck by a newspaper delivery agent's car. The motorcyclist sued the newspaper for negligent supervision and for its agent's negligence on the theory of respondeat superior. The trial court granted the defendant summary judgment. Affirming the judgment on the respondeat superior count, this court stated that the delivery agent was not the defendant's employee, but an independent contractor because the defendant exercised no control over the agent's delivery methods. The court held the contract provisions allowing the defendant to terminate the agent for nonperformance or to send an employee to accompany the agent did not amount to the defendant's control. Santiago v. Phoenix Newspapers, Inc., 162 Ariz. 86, 781 P.2d 63, 66, 67, opinion vacated 164 Ariz. 505, 794 P.2d 138 (1990).

Ariz.App.1984. Subsec. (2) cit. in case quot. in disc. Union trust funds brought action to force a corporation to make contributions on behalf of owner-operators, as required by the master labor agreement. Defendant argued that the master labor agreement which classified owner-operators as employees was superseded by the National Labor Relations Act, which provided that an independent contractor did not have the status of an employee. The trial court entered judgment for plaintiffs, and this court affirmed. It classified the owner-operators as employees rather than independent contractors because, inter alia, they worked for defendant on a long-term basis, were precluded from working for other contractors, completed daily time sheets, and worked solely under defendant's licenses, rather than being individually licensed. Arizona Laborers, Teamsters v. Hatco, Inc., 142 Ariz. 364, 690 P.2d 83, 88.

Ariz.App.1983. Subsec. (2)(a)-(j) quot. in disc. (Erron. cit. as Agency.) The father of a member of a family trapeze act brought this action against the circus that engaged them when his son was injured while rehearsing the act. The lower court denied the circus's motion to dismiss for lack of subject matter jurisdiction. This court accepted jurisdiction and held that, because the trapeze artist was an employee of the circus and was injured during the course of his employment, the exclusive remedy was in workmen's compensation. The court stated that, in order to determine whether the artist was an employee of the circus or a contractor, a variety of factors must be considered, and that the reservation of the right to control, rather than the actual exercise of control, was determinative. Ringling Bros. v. Superior Ct. Pima County, 140 Ariz. 38, 680 P.2d 174, 178, 179.

Ariz.App.1973. Quot. and fol. The plaintiff sued to recover on a debt arising from the construction of a dam by the plaintiff for the defendant. A state law prohibited unlicensed contractors from bringing suit to collect compensation for their performance; the plaintiff was not licensed as a contractor. The plaintiff was to have been compensated $20/hour; he performed most of the work himself and withheld from the pay of his son-in-law, who assisted him, income and social security taxes. The trial court found that the plaintiff was a “contractor” and thus denied recovery. In affirming, the appellate court agreed that the plaintiff was a “contractor”, and not an employee, since he exercised complete control over the manner of his performance. Lundy v. Prescott Valley, Inc., 20 Ariz.App. 208, 511 P.2d 652, 654, vacated 110 Ariz. 362, 519 P.2d 61 (1974).

Ariz.App.1967. Quot. in part and com. (c) quot. in part in sup. The plaintiff, hired by the defendant farm owner to break in a horse owned by him for riding, was injured when, in attempting to apprehend the horse as it got away, his foot caught in the loop of a long rope fastened on both ends of the horse's bridles, he was thrown into the air, and his leg was severely broken. He sued the defendant in negligence, alleging that permitting such a long rope, over the plaintiff's objection, created a dangerous condition for anyone working with the horse. The jury's determination that the plaintiff was a servant of the defendant, hence creating an employer-employee relation, was held not to be unreasonable, and a judgment for the plaintiff was affirmed. Smith v. Goodman, 6 Ariz.App. 168, 430 P.2d 922, 925-26.

Ark.

Ark.2018. Cit. in sup.; subsec. (2) quot. in sup. Off-duty deputy sheriff, who was injured while working as a part-time security guard in a grocery store, filed a claim for workers' compensation benefits against grocery store. After the state workers' compensation commission concluded that, at the time of sheriff's accident, grocery store and county sheriff's department were joint employers of sheriff and that both were liable for sheriff's benefits and expenses, the court of appeals affirmed. Vacating and remanding, this court held that, under the factors set forth in Restatement Second of Agency § 220, sheriff was an independent

contractor of grocery store, rather than an employee. The court pointed out, among other things, that grocery store did not interview or train sheriff for the position, that sheriff was required to secure permission from the county sheriff's department in order to work at the store, and that grocery store was in the business of selling groceries, not in the business of providing law enforcement or security. Brookshire Grocery Company v. Morgan, 539 S.W.3d 574, 578, 579.

Ark.2010. Cit. in case quot. in sup. Motorists who were injured in a collision with a truck sued truck driver, authorized carrier, and truck owner that leased the truck to, and provided drivers for, carrier, alleging that driver's negligence caused the accident, and that owner and carrier were responsible for that negligence as driver's employers. The trial court granted summary judgment for carrier. Affirming, this court held that carrier was not vicariously liable for driver's negligence, because the agreement between carrier and owner made clear that it was the parties' intent that owner (along with driver) was an independent contractor, and that carrier did not have the right to control the substantive performance of the contract. The court pointed to evidence that, among other things, showed that, while carrier owned the trailers to be hauled, it did not pay for the maintenance or repair of owner's equipment; it paid owner, not drivers, for the work performed; and it did not control the routing of the trucks but paid by the mile. Kistner v. Cupples, 2010 Ark. 416, 6, 372 S.W.3d 339, 343.

Ark.2008. Subsecs. (2)(a), (2)(b), (2)(h), and (2)(j) quot. in sup. Motorist who was involved in an accident with a truck that was hauling poultry brought personal-injury action against truck owner and poultry owner. The trial court entered judgment on a jury verdict for plaintiff and denied poultry owner's motion for a directed verdict. Affirming, this court held, inter alia, that there was substantial evidence to support the jury's verdict that truck owner was not an independent contractor of poultry owner but, rather, an employee. The court pointed to testimony that poultry owner exerted control over truck owner by instructing truck owner on how to protect the poultry during transport, and reasoned that, because truck owner's sole purpose was to provide equipment and drivers to poultry owner, its only customer, a fair-minded person could conclude that it was not engaged in a distinct occupation or business. ConAgra Foods, Inc. v. Draper, 372 Ark. 361, 276 S.W.3d 244, 248, 250.

Ark.2000. Cit. in case cit. in disc. Insurer sued insured company to recover premiums owed on defendant's workers' compensation insurance. Trial court entered judgment for plaintiff. This court affirmed, holding, inter alia, that the trial court did not err in finding that the contract drivers retained by defendant were employees, since their work bore a significant relationship to the defendant's business under the "relative nature of the work" test, and the contracts here provided for an amount of control exceeding that specified by the Interstate Commerce Commission's regulations. Arkansas Transit Homes, Inc. v. Aetna Life & Casualty, 341 Ark. 317, 16 S.W.3d 545, 548.

Ark.1996. Cit. in headnote, cit. in disc. Woman sued newspaper publisher, among others, for injuries sustained when she was struck by a truck driven by one of publisher's deliverymen. Specifically, plaintiff alleged that publisher, as principal, was liable for the torts of deliveryman, its agent. The trial court disagreed and granted publisher's motion for summary judgment on the ground that, even if an agency relationship could be inferred from the parties' conduct, plaintiff presented no proof that such a relationship was intended. Reversing and remanding, this court held that the extent of control exercised by the recipient of services over the one giving them, not the intent of the parties, was the crucial factor in the determination of the existence of an agency relationship, and that material factual questions remained as to the control publisher maintained over deliveryman. Howard v. Dallas Morning News, Inc., 324 Ark. 91, 918 S.W.2d 178, 179, 183.

Ark.1994. Quot. in part in sup. A roofing contractor who had been recommended by a homeowners' insurer to make repairs to damaged property sued the homeowners after they refused to pay the balance due; the homeowners counterclaimed for negligent repairs and damage and cross-claimed against the insurer for damage attributable to the contractor's work. Affirming the trial court's entry of judgment n.o.v. for the insurer on the cross-claim, this court held that the insurer lacked the requisite control over the contractor's work to be liable for the allegedly negligent repairs, as the contractor had his own business and equipment, the insured had hired and fired the contractor, and the insurer was not in the home repair business. Dickens v. Farm Bureau Mut. Ins. Co., 315 Ark. 514, 517, 868 S.W.2d 476, 477-478.

Ark.1990. Cit. and quot. in sup., subsec. (a) cit. in disc. Tenants who were injured when a construction worker accidently caused an explosion and fire in their kitchen sued their landlord, who had hired the construction worker to do the repair work. The trial court entered judgment for the plaintiffs, holding the defendant vicariously liable for the construction worker's negligence. Reversing and dismissing, this court held that the defendant, who had not supervised the physical conduct of the contractor, was not liable for the contractor's negligence because their relationship was that of employer and independent contractor. Blankenship v. Overholt, 301 Ark. 476, 786 S.W.2d 814, 815, 816.

Ark.1984. Cit. in sup. The manager of the defendant's store quit or was released as the result of an investigation of his business by the defendant. The manager sued the defendant for intentional infliction of emotional distress, and the defendant counterclaimed for loss of inventory. The jury returned a verdict for plaintiff, and both parties appealed. This court reversed and remanded because improper jury instructions were given. Regarding plaintiff's contention that the trial court should have directed a verdict on defendant's counterclaim, this court held, inter alia, that it was not error to instruct the jury that the plaintiff, as employee and agent, owed a fiduciary duty to the defendant. Tandy Corp. v. Bone, 283 Ark. 399, 678 S.W.2d 312, 318.

Ark.App.

Ark.App.2017. Subsecs. (2)(a), (2)(b), and (2)(h) quot. in case quot. in sup. Store owner appealed after state workers' compensation commission affirmed an administrative law judge's determination that owner was a joint employer of county deputy sheriff who worked part time at the store as a security guard, such that owner was liable in part for workers' compensation benefits in connection with an incident in which deputy was injured while apprehending a shoplifter in the store. Affirming, this court held that, under Restatement Second of Agency § 220, deputy was an employee of owner, rather than an independent contractor. The court reasoned that deputy was injured during the course of performing his regular duties as a private security guard in furtherance of owner's interests in maintaining a secure store, and that, at the time of the incident, owner had more control over deputy's actions with respect to the shoplifter than did the county sheriff's department. Brookshire Grocery Company v. Morgan, 525 S.W.3d 58, 62.

Ark.App.2005. Subsec. (2) cit. and quot. in sup., subsec. (2)(i) cit. in disc., com. (e) cit. in disc., com. (m) quot. in sup. After driver employed by trucking company allegedly caused an accident that injured a motorist, motorist brought negligence suit against poultry corporation that hired trucking company to transport its chickens. The trial court granted summary judgment for defendant. Reversing and remanding, this court held that a question of fact remained as to whether defendant and trucking company had an employer-employee relationship. The court reasoned that, while defendant and trucking company clearly contemplated an independent contractor arrangement, the terms of their agreement were not determinative, and a reasonable fact-finder could infer an employer-employee relationship based on record evidence that defendant exercised control over trucking company by, among other things, instructing company how to transport defendant's chickens. Draper v. Conagra Foods, Inc., 92 Ark.App. 220, 229, 230, 232, 233, 212 S.W.3d 61, 67-69.

Ark.App.2005. Cit. in disc. Pilot who was injured in a plane crash filed a claim for workers' compensation benefits. The administrative law judge (ALJ) found, inter alia, that pilot was an employee, rather than an independent contractor, of a crop-dusting business. The workers' compensation commission affirmed the ALJ's determination that pilot was business's employee, and ruled that business was liable for his benefits. Affirming, this court held that substantial evidence supported the finding that pilot was business's employee; although the manner of pilot's pay was more indicative of that of an independent contractor, this was outweighed by the control that business exerted over his assignments as to when and where to fly and by its provision of all the necessary tools for him to complete the task. Riddell Flying Service v. Callahan, 90 Ark.App. 388, 206 S.W.3d 284, 288.

Cal.

Cal.2018. Cit. in disc., cit. in case cit. and quot. in sup. Delivery drivers who exclusively performed pickup and delivery work for company filed an action against company, alleging that defendant mischaracterized them as independent contractors rather than employees and violated, inter alia, wage orders governing the transportation industry. The trial court granted plaintiffs'

motion for class certification. The court of appeals affirmed. This court affirmed class certification, holding that, given the purpose of the applicable statute, plaintiffs had a sufficient commonality of interest under the "suffer or permit to work" standard for determining whether workers were employees or independent contractors. The court noted that the secondary factors to be considered in determining whether a worker was an employee or an independent contractor, beyond the common-law "control of details" standard, were primarily derived from Restatement Second of Agency § 220 and remained a useful reference. Dynamex Operations West, Inc. v. Superior Court, 416 P.3d 1, 15, 17.

Cal.2015. Cit. in case cit. in sup., subsec. (2) cit. in case cit. in sup. Victims of an accident caused by tow-truck driver hired by county transportation authority to provide free emergency roadside assistance pursuant to a state program sued, among others, state highway patrol, which trained tow-truck drivers and performed other services in connection with the program, alleging that it was liable for their injuries as tow-truck driver's "special employer." The trial court denied defendant's motion for summary judgment. The court of appeals directed entry of summary judgment in favor of defendant. While reversing and remanding, this court held, among other things, that, under Restatement Second of Agency §§ 220 and 227, the primary factor in determining whether a person was a servant and whether a lent servant had become a servant of a borrowing employer was the right of control, and defendant's right to control some aspects of towing operations did not confer upon it the status of a special employer as to tow-truck drivers who participated in the program. State ex rel. Dept. of California Highway Patrol v. Superior Court, 343 P.3d 415, 420.

Cal.2014. Subsec. (2) cit. in sup. and in conc. op., subsec. (2)(a) and coms. (*i*) and (k) quot. in sup., subsec. (2)(e) cit. in sup., com. (m) quot. in sup. and in conc. op. Newspaper carriers brought a class-action suit against newspaper, alleging that defendant illegally treated them as independent contractors, rather than employees. The trial court denied plaintiffs' motion for class certification. The court of appeals reversed in part and remanded. Affirming and remanding, this court held that the relevant question at the certification stage was whether the scope of defendant's right to control the manner and means of plaintiffs' work was susceptible to classwide proof. The court noted that, on remand, any consideration of common and individual questions arising from the secondary factors drawn from Restatement Third of Agency § 7.07 and Restatement Second of Agency § 220 should take into account the likely materiality of matters subject to common or individual proof. A concurring opinion argued that, in light of the majority's conclusion, its discussion regarding the interplay between the predominance inquiry and the Restatement Second factors in determining whether someone was an employee or an independent contractor was unnecessary. Ayala v. Antelope Valley Newspapers, Inc., 173 Cal.Rptr.3d 332, 327 P.3d 165, 171, 173, 176, 177, 180, 182-184.

Cal.2004. Cit. in disc., cit. and quot. in conc. and diss. op., subsec. (2)(i) quot. in conc. and diss. op. Workers hired through private labor suppliers sued municipal water district, alleging that defendant misclassified them as consultants and temporary employees, and thus illegally denied them retirement benefits for public employees. Trial court held that defendant was mandated to enroll all common-law employees in retirement plan. Court of appeal denied writ of mandate. This court affirmed, holding that statutory provision regarding employment by contracting agency incorporated common-law test for employment, and that there was no exception to mandatory enrollment for employees hired through private labor suppliers. Concurring and dissenting opinion argued that leased worker was not common-law employee, and that, in worker-leasing context, control over manner in which work was performed was not determinative of employment relationship and did not override parties' intent. Metropolitan Water District of Southern California v. Superior Court, 32 Cal.4th 491, 499, 512-515, 84 P.3d 966, 970, 979-981, 9 Cal.Rptr.3d 857, 861, 872-875.

Cal.1989. Cit. in disc., 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 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., 769 P.2d 399, 404, 415.

Cal.1989. Com. (e) 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 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, 260 Cal.Rptr. 183, 187, 775 P.2d 508, 512.

Cal.1982. Cit. in disc., coms. (d), (e), (h), (i) and (l) cit. in disc., subsecs. (2)(a) and (1) cit. in disc. The plaintiff, a shipowner, paid a pilotage fee to the city (the defendant) to have a local pilot provided to guide the ship within the harbor. Due to the pilot's guidance the ship hit and damaged a dock. The plaintiff filed an action for declaratory relief to determine the extent of each party's liability arising out of the collision. The lower court assigned 75 percent of the responsibility to the pilot and 25 percent to the ship's crew. The court further found that the city alone was liable for the negligence of its pilot-employee. Both parties appealed. The city contended that the common law “borrowed servant” doctrine made the shipowner liable for the pilot who committed the tort while carrying out the shipowner's bidding. The appellate court concluded that the shipowner should be liable for the pilot's torts because the services of the pilot were for the shipowner's benefit, and the shipowner had limited control over the pilot so that the pilot was not an independent contractor. However, the court further concluded that the city was also liable for the pilot's torts because the pilot was performing the city's business, and the city had control over the pilot. Accordingly, the court concluded that under the doctrine of respondeat superior, both masters would be jointly and severally liable. The case was reversed and remanded to apportion the damages between both parties. Societa Per Azioni v. City of Los Angeles, 31 Cal.3d 446, 183 Cal.Rptr. 51, 57-59, 645 P.2d 102, 107-110, certiorari denied 459 U.S. 990, 103 S.Ct. 346, 74 L.Ed.2d 386 (1982).

Cal.1970. Quot. in ftn. in sup. and cit. and coms. cit. in sup. The plaintiff, state director of employment, brought an action to force a television producer to pay unemployment insurance contributions. The court held that where the contract between defendant and its writers gave defendant the right to direct the writers in making modifications in teleplays, and where the collective bargaining agreement between the writers guild and the association of television producers referred to writers as employees and contained terms appropriate only if the writers were employees, the writers were employees, and defendant was liable for unemployment insurance contributions. Tieberg v. Unemployment Insurance Appeals Board, 2 Cal.3d 943, 88 Cal.Rptr. 175, 471 P.2d 975, 980, 982, 983.

Cal.App.

Cal.App.2021. Cit. in case quot. in sup. Newspaper home-delivery carriers filed a class action against newspaper, alleging that newspaper failed to pay carriers' mileage expenses in violation of the state's Labor Code. After a bench trial, the trial court entered judgment in favor of newspaper, finding that carriers were properly classified as independent contractors, rather than employees, and that the Labor Code therefore did not apply. This court reversed, holding that the trial court erred in relying on Employment Development Department regulations to determine that carriers were independent contractors, and remanded for the trial court to determine whether carriers were employees or independent contractors under the *Borello* test, which considered, among other things, the factors derived from Restatement Second of Agency § 220. Becerra v. McClatchy Co., 284 Cal.Rptr.3d 784, 795.

Cal.App.2018. Cit. in case cit. and quot. in disc. (general cite). Taxi driver brought a lawsuit against employer, alleging that employer violated wage-and-hour regulations on multiple occasions. The trial court granted defendant's motion for summary

judgment, finding that plaintiff was an independent contractor because he had purchased his own vehicle and his employment contract with defendant explicitly stated that he was not an employee. This court reversed and remanded, holding, inter alia, that there was a genuine issue of material fact as to whether plaintiff was an employee or independent contractor for wage-violation purposes. The court considered several factors drawn from Restatement Second of Agency § 220 in deciding whether plaintiff was an independent contractor, and explained that defendant failed to establish whether plaintiff was engaged in his own independent, separate business and that merely labeling a person as an employee or independent contractor in a contract was not dispositive. Garcia v. Border Transportation Group, LLC, 239 Cal.Rptr.3d 360, 367.

Cal.App.2017. Cit. in cases cit. and quot. in sup. (general cite), cit. in cases cit. and quot. in conc. op. (general cite). Taxicab company filed an action against taxicab driver, appealing the state labor commissioner's finding in favor of driver on his claim for unpaid wages based on allegations that company required him to pay a gate fee in exchange for obtaining a taxicab to drive for each of his shifts. After a bench trial, the trial court determined that several relevant cases were not controlling under the circumstances at issue here. Reversing, this court determined that the trial court erred in its legal analysis. The court cited Restatement Second of Agency § 220 for factors to be used in determining whether there was an employee—employer relationship, and analyzed caselaw, which applied those factors, explaining that the courts' observations should be applied to the instant case as well. The concurring opinion agreed with the majority's statement that the Supreme Court of California embraced the factors drawn from the Restatement Second of Agency and the Restatement Third of Agency. Linton v. Desoto Cab Company, Inc., 223 Cal.Rptr.3d 761, 767-771, 776, 777.

Cal.App.2015. Cit. in sup., cit. in case quot. in sup. Family of musician who died of acute propofol intoxication while under the care of his personal physician brought claims sounding in negligence and respondeat superior against music-production companies that hired the physician, at musician's request, to care for musician while he was on a concert tour. The trial court granted summary judgment for defendants. Affirming, this court held, among other things, that the trial court correctly ruled that, under the factors set forth in Restatement Second of Agency § 220, the physician was defendants' independent contractor, rather than their employee. The court reasoned that, even if one or two of the individual factors might suggest an employment relationship, summary adjudication was nevertheless proper, because all the factors weighed and considered as a whole established as a matter of law that the physician was an independent contractor. Jackson v. AEG Live, LLC, 183 Cal.Rptr.3d 394, 414, 416.

Cal.App.2014. Cit. in case quot. in sup. Drivers brought a putative class action against courier service, alleging that defendant improperly converted the status of all of its drivers from employees to independent contractors. The trial court granted plaintiffs' motion for class certification. This court granted in part defendant's petition for a writ of mandate ordering the trial court to decertify the class, holding that, while the trial court correctly allowed plaintiffs to rely on the Industrial Welfare Commission's definition of an employment relationship for purposes of plaintiffs' claims falling within the scope of the commission's wage order, the common-law definition of employee, which focused on a defendant's right to exercise control, rather than how that right was exercised, governed plaintiffs' claims falling outside the scope of the wage order. The court cited Restatement Second of Agency § 220 in noting that courts struggling to apply the common-law right-to-control test to the infinite variety of service arrangements eventually embraced a cluster of secondary indicia to guide resolution of the question of whether an employment relationship existed. Dynamex Operations West, Inc. v. Superior Court, 230 Cal.App.4th 718, 179 Cal.Rptr.3d 69, 78.

Cal.App.2013. Cit. in case cit. in sup. (general cite). Former employee brought, inter alia, statutory wage claims against former employer, seeking unpaid wages based on violations of the state's Labor Code. The trial court awarded plaintiff damages for unpaid wages. Affirming as modified, this court held that substantial evidence supported the trial court's finding that plaintiff was an employee, and not an independent contractor, under the traditional common-law multi-factor test for employee status. The court reasoned that, among other things, defendant controlled plaintiff's employment by requiring him to attend staff meetings, to record his hours on the same time sheets as other employees, and to perform the same administrative duties as other employees; defendant provided the supplies and equipment for plaintiff to use; plaintiff did not have any outside clients for whom he performed tax-preparation services; and defendant marketed plaintiff and his skills to clients as an employee, not an independent contractor. Bain v. Tax Reducers, Inc., 219 Cal.App.4th 110, 138, 161 Cal.Rptr.3d 535, 557.

Cal.App.2012. Subsec. (2) cit. in sup. and cit. in case quot. in sup. (general cites). Newspaper-home-delivery carriers brought a putative class action against newspaper, alleging that defendant improperly classified them as independent contractors, rather than employees. The trial court denied plaintiffs' motion for class certification. Reversing in part, this court held, inter alia, that the independent contractor-employee issue was amenable to class treatment. The court reasoned that, while the right to control work details (which was common to the class) was not the only consideration in resolving this issue, the so-called "secondary factors"—such as those derived from the Restatement Second of Agency § 220(2), including whether the one performing services was engaged in a distinct occupation or business, and whether the principal or the worker supplied the instrumentalities, tools, and place of work—could also be established for the most part through common proof, since almost all of those factors related to the type of work involved, which was common to the class. Ayala v. Antelope Valley Newspapers, Inc., 210 Cal.App.4th 77, 84, 148 Cal.Rptr.3d 138, 143.

Cal.App.2010. Cit. in case quot. in sup. (general cite). Injured motorcyclist sued city and owner/operator/driver of a dump truck that collided with plaintiff's motorcycle shortly after delivering a load of asphalt to city's work site. The trial court entered judgment on a jury verdict in favor of plaintiff. Reversing in part and remanding, this court held, among other things, that the trial court erred when it instructed the jury that the right of control, by itself, gave rise to an employer-employee relationship, and it was reasonably probable that this error prejudiced the jury's conclusion. The court noted that, while the right of control was the “primary” factor to be considered in determining whether a worker was an employee or an independent contractor, a group of “secondary” factors derived principally from the Restatement Second also had to be considered. Bowman v. Wyatt, 186 Cal.App.4th 286, 301, 111 Cal.Rptr.3d 787, 797.

Cal.App.2009. Cit. in disc. Former lessees of taxis sued lessor and its principals, alleging that lessor's leases wrongfully classified lessees as independent contractors rather than employees. The trial court denied plaintiffs' motion for class certification. Affirming, this court held, inter alia, that declarations by putative class members as to their understanding of their relationships with lessor showed that common questions of fact did not predominate. The court distinguished this case from a prior case holding that migrant harvesters were employees of a grower for purposes of workers' compensation, despite evidence that the grower exercised no actual control over the performance of the work, because grower exercised pervasive control over the operation as a whole, and the “secondary indicia” of Restatement Second of Agency § 220 supported a finding of an employer-employee relationship. Ali v. U.S.A. Cab Ltd., 176 Cal.App.4th 1333, 1347, 1348, 98 Cal.Rptr.3d 568, 580.

Cal.App.2009. Cit. in cases quot. in sup. Drivers who worked for a parcel-delivery company filed a class action against company, asserting various claims based on a core contention that it improperly classified drivers as independent contractors rather than employees. The trial court entered judgment on a jury verdict finding that drivers were independent contractors. Affirming, this court held, inter alia, that the trial court did not err by emphasizing in its jury instructions that the right of an employer to control the details of the work was the most important of the pertinent factors to consider in resolving whether drivers were independent contractors, even if this factor was not necessarily dispositive in all cases. Cristler v. Express Messenger Systems, Inc., 171 Cal.App.4th 72, 77, 89 Cal.Rptr.3d 34, 38.

Cal.App.2009. Cit. in disc., cit. in case cit. in disc., subsec. (2)(a) cit. in disc. (general cite). After state unemployment insurance appeals board issued a precedential decision assessing unemployment insurance employer contributions and penalties against an employer, nonprofit professional association of similar employers sought to invalidate the decision. The trial court found in favor of the board. Affirming, this court, inter alia, rejected plaintiff's argument that the primary or common-law test for employment status, regarding the right to control, operated completely exclusively from the secondary factors that had been identified in other factual contexts as useful for determining employment status, holding that the statutory provisions at issue had to be interpreted in light of comparable, complementary, and overlapping criteria developed in case law. Messenger Courier Ass'n of Americas v. California Unemployment Ins. Appeals Bd., 175 Cal.App.4th 1074, 1081, 1085, 1089, 1091, 96 Cal.Rptr.3d 797, 800, 803, 806, 807.

Cal.App.2007. Cit. in case quot. in ftn. Courier service sued state employment development department to recover employment taxes it paid for drivers it employed to pick up and deliver packages, asserting that the drivers were independent contractors rather than employees. After a bench trial, the trial court ruled in favor of the department. Affirming, this court held that the evidence supported the trial court's conclusion that the drivers operated as plaintiff's employees. The court reasoned that plaintiff exerted control over the drivers to coordinate and supervise its basic function, namely, timely delivery of packages, and that other factors to be taken into consideration also pointed to a finding of employee status. Air Couriers Intern. v. Employment Development Dept., 150 Cal.App.4th 923, 935, 59 Cal.Rptr.3d 37, 45.

Cal.App.2006. Cit. in case quot. in sup. (general cite). Referral agency for domestic workers sued state Compensation Insurance Fund, seeking, in part, a declaration that its workers were independent contractors rather than employees for workers' compensation purposes. The trial court granted defendant's motion to strike from the complaint references to the state's unemployment insurance code. Granting plaintiff's petition for peremptory writ of mandate to vacate the order, this court held that the code also applied in the context of workers' compensation. The court pointed out that the factors relevant to determining whether an individual was an employee or an independent contractor under the code were the same type of factors examined under common-law tests applied to that inquiry within the workers' compensation sphere. An Independent Home Support Service, Inc. v. Superior Court, 145 Cal.App.4th 1418, 1427, 52 Cal.Rptr.3d 562, 567-568.

Cal.App.2006. Cit. generally in sup. Company that provided courier services petitioned for a writ of administrative mandamus to overturn an administrative stop-work order and penalty issued by the Department of Industrial Relations based on the department's conclusion that petitioner's drivers were employees, rather than independent contractors, and that petitioner had failed to procure workers' compensation insurance for their benefit in violation of state law. The trial court denied the petition. Affirming, this court held that the department's findings and order were supported by substantial evidence. The court reasoned that, by obtaining clients in need of the service and providing the workers to conduct it, petitioner retained all necessary control over the operation as a whole, and that such control was sufficient to find an employment relationship for purposes of the workers' compensation act. JKH Enterprises, Inc. v. Department of Industrial Relations, 142 Cal.App.4th 1046, 1063, 48 Cal.Rptr.3d 563, 578.

Cal.App.2003. Cit. in case quot. in sup. Columnist for monthly newspaper sued newspaper and its part-owner for wrongful termination and related employment claims. Trial court granted defendants summary judgment, holding that plaintiff was an independent contractor. This court reversed in part and remanded, holding that fact issues existed as to whether plaintiff was an employee or an independent contractor. While plaintiff was paid by the article and was paid a nominal fee, he provided evidence that his articles were written under publisher's direction and control, that defendants gave him an office, a computer, a press pass, and phone extension, that he was required to attend staff meetings, and that plaintiff needed publisher's consent before submitting articles to other publications. Ali v. L.A. Focus Publication, 112 Cal.App.4th 1477, 1485, 5 Cal.Rptr.3d 791, 797.

Cal.App.1991. Quot. 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 stated that the county's ability to control a public defender's representation of clients was just one of several factors that must be considered in determining whether or not the public defender was a public employee as opposed to an independent contractor. Briggs v. Lawrence, 230 Cal.App.3d 605, 281 Cal.Rptr. 578, 584.

Cal.App.1990. Quot. in sup. A woman injured by a vehicle driven by a pizza deliverer sued the driver and his employer, as well as the manufacturer of the plaintiff's own car, alleging that the seat belt was defective. The plaintiff entered into separate settlements with the driver and the employer. The trial court held that the latter settlement was in good faith based on its finding that the driver was an independent contractor. This court issued a writ of mandate directing the trial court to vacate its order. It

held that the evidence did not support the finding of the trial court that the driver was an independent contractor, because he was an employee subject to his employer's control in all aspects of his job. Therefore, the employer was subject to the possibility of full vicarious liability for the employee's negligent act. It noted that the employer directed and controlled the number, nature, and type of pizzas to be delivered, the time of such deliveries, the persons to whom they would be delivered, and the price to be charged. Toyota Motor Sales v. Superior Court, 220 Cal.App.3d 864, 269 Cal.Rptr. 647, 652-653.

Cal.App.1987. Cit. in sup. The state's department of industrial relations assessed a penalty and a stop order on a cucumber production facility after the facility failed to maintain worker's compensation insurance on the cucumber pickers. The facility challenged the assessment before a hearing board, arguing that the pickers were independent contractors. The hearing board affirmed the assessment, holding that the pickers were employees. Reversing, this court held that the most important factor to consider in determining whether a worker is an employee or an independent contractor is the level of control exercised by the master over the details of the work, and that in this case the production facility did not retain sufficient control over the picking of the cucumbers to qualify the pickers as employees. Borello & Sons v. Dept. of Indus. Rel., 196 Cal.App.3d 1475, 242 Cal.Rptr. 554, 558, judgment reversed 48 Cal.3d 341, 256 Cal.Rptr. 543, 769 P.2d 399 (1989). See above case.

Cal.App.1987. Subsec. (1) and com. (c) quot. in disc., subsec. (2) quot. and cit. in disc. A college basketball player who was struck by a player from another college sued the other school for damages under the doctrine of respondeat superior. The trial court granted the defendant's motion for summary judgment. Affirming, this court stated that among the factors used in determining whether a master-servant relationship existed were whether the work was a part of the regular business of the employer, whether the parties believed they were creating the relation of master and servant, and whether the principal was "in business." The court held that universities were not in the business of playing various sports and that athletes were not hired to participate in interscholastic competition. Townsend v. State, 191 Cal.App.3d 1530, 237 Cal.Rptr. 146, 148.

Cal.App.1985. Quot. in disc., com. (c) quot. in ftn. and cit. in disc., subsec. (2) quot. in ftn. 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, 411, 412, review granted 215 Cal.Rptr. 854, 701 P.2d 1172 (1985).

Cal.App.1984. Com. (a) quot. in part. in ftn. in disc. The plaintiff was employed under an in-home supportive services program. When she was injured on the job, she sought worker's compensation benefits. From an award of these benefits, the state agency that administered the program and its insurer appealed. The court held that the plaintiff was a state employee because the state exercised control over the program and the workers. Although the plaintiff had not worked enough hours to qualify as an employee of the recipient of the program, this did not exclude her from coverage as a state employee. Remanded on the issue of the plaintiff's employment relationship with the recipient only. In-Home Supportive Services v. W.C.A.B., 152 Cal.App.3d 720, 199 Cal.Rptr. 697, 701.

Cal.App.1977. Cit. in disc. and quot. in ftn. The plaintiff had the exclusive right to distribute the Los Angeles Times in a specified geographical area and used carriers to make deliveries. The only contact the carriers had with the plaintiff during their employment were directions to start and stop delivery to a particular address. The plaintiff was assessed for unemployment insurance contributions, and his claim for a refund was refused by the Unemployment Insurance Appeals Board, which determined that the plaintiff was an employer of newspaper carriers, and, therefore, was within the contemplation of the California Unemployment Insurance Code. As such he was not entitled to a refund of contributions, penalites, and interest paid

under protest on behalf of the employees into the Unemployment Insurance Fund. The plaintiff appealed the Board's refusal, asserting that the carriers were independent contractors rather than employees. The court found that the Insurance Code requires employees to contribute to the Fund, while independent contractors are not required to contribute. The court noted that the factors to be considered in determining whether or not the employment relationship exists are contained in Section 220 of the Restatement (Second) of Agency, and that the primary factor to be considered is where the right of control lies within the relationship. After analyzing the plaintiff's relationship with the carriers, the court found substantial evidence of an employment relationship; the newspapers were sold by the plaintiff and delivered by others under his control. Therefore, the court held that the carriers were employees subject to the provisions of the Unemployment Insurance Code. Grant v. Director of Ben. Payments, 71 Cal.App.3d 647, 139 Cal.Rptr. 533, 536.

Cal.App.1976. Subsec. (2)(b) cit. in sup., com. on subsec. (2) cit. in sup., com. (m) cit. in sup. A company engaged in seasonal telephone sales campaigns sued to overturn an Unemployment Insurance Appeals Board decision that its telephone solicitors were employees and not independent contractors. The court held that plaintiff had the burden of proof and had failed to satisfy it, where the sales campaigns were the regular business of the company, no special training, education, or experience was required of the solicitors, and the solicitors paid only for their work room, supplies, and telephones if they made sales, although the solicitors generally worked for short periods of time, were paid on commission, and signed a written contract designating themselves as independent contractors. Smith v. California Dept. of Employment, 62 Cal.App.3d 306, 132 Cal.Rptr. 874, 876, 877.

Cal.App.1971. Cit. in sup. Plaintiff was injured when he fell from a column which his employer had negligently erected and supported. He sued the water district for whom the work was being done, as well as the engineering company which supervised the work, and was granted a directed verdict against both. The Court of Appeal rejected the lower court's reasoning that plaintiff's employer acted as agent for the water district, but upheld the judgment against the water district on the grounds that it had a non-delegable duty to take necessary precautions to avoid the high degree of physical risk present. Stilson v. Moulton-Niguel Water District, 21 Cal.App.3d 928, 98 Cal.Rptr. 914, 919.

Cal.App.1969. Cit. com. (c) in sup. This was an action by an electrical contractor against the owner and operator of a backhoe for damages which resulted when a waterpipe collapsed into a ditch being dug with it for the contractor. The court held that the owner of the backhoe who furnished it and its operator to the electrical contractor for ditch digging was not an independent contractor as a matter of law, so as to be barred from bringing an action for compensation by failure to have a contractor's license, where there was evidence that the operator of the backhoe was under the control and direction of the contractor as to details of the work. Dahl-Beck Electric Co. v. Rogge, 275 Cal.App.2d 893, 80 Cal.Rptr. 440, 443.

Cal.App.1969. Quot. in sup. The plaintiffs, free lance television screen writers for the program Lassie, appealed an adverse opinion of the defendant board that they were independent contractors, rather than employees of Lassie Television and that Lassie Television did not have to pay unemployment insurance contributions for them. The trial court reversed, but the Court of Appeals sustained the board's finding, holding that Lassie Television did not exercise complete control over the plaintiffs. Tieberg v. California Unemployment Insurance Appeals Bd., 82 Cal.Rptr. 886, 889, 890, superseded 2 Cal.3d 943, 88 Cal.Rptr. 175, 471 P.2d 975. See above case.

Cal.App.1968. Subsecs. (1) and (2) and com. (c) cit. in sup. The president and purchaser of the stock of the plaintiff incorporated restaurant sued the defendant, a woman devoid of business judgment who operated the restaurant for several months with the result that the indebtedness of the restaurant was increased by $7,000, for fraud, trespass, and for an accounting of the sums lost through her mismanagement. The defendant operated the restaurant after her ex-husband expressed an intent to quit claim to her his interest, and the other controlling stockholder negotiated a purchase of his interest with her. As the defendant never considered herself an agent of the corporation, did not act as an employee, operating the business without interference from either former controlling stockholder, holding the restaurant for her own benefit and not as a fiduciary, she was found to be acting as a prospective purchaser rather than as a servant-agent of the plaintiff. A judgment of only $300 for the plaintiff was affirmed. K. King & G. Shuler Corp. v. King, 259 Cal.App.2d 383, 66 Cal.Rptr. 330, 337, 338.

Cal.App.1965. Subsecs. (a) through (i) cit. and quot. in sup. 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 employers, 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 Bd. of Equalization, 238 Cal.App.2d 372, 47 Cal.Rptr. 848, 857, 858.

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, 623, 624.

Cal.App.1963. Cit. in sup., cit. in ftn. in sup. Partner, who was killed while operating a bulldozer under an arrangement with the contractor whereby the bulldozer was furnished by partnership with an operator for $10.50 per hour, was an independent contractor, rather than an employee of the contractor. Sparks v. L.D. Folsom Co., 217 Cal.App.2d 279, 31 Cal.Rptr. 640, 643, 644, 645.

Colo.

Colo.1997. Subsec. (2) cit. in disc. After a former employee of a county department of social services brought an action for, in part, age and sex discrimination against the department, the state, the department's director, and two of her supervisors, among others, the director and the supervisors filed cross-claims against the state for indemnification pursuant to the state Governmental Immunity Act (Act). The trial court granted summary judgment for the state on the cross-claim; the court of appeals reversed. Reversing and remanding, this court held that the cross-claimants were not entitled to indemnification from the state because they were not "public employees" of the state within the meaning of the Act. The court said that the director's performance was controlled by the board of county commissioners, which was also responsible for hiring, paying, and dismissing the director; daily control over the supervisors and authority over their hiring and dismissal were exercised by the county department of social services, through the county director and the county board. Norton v. Gilman, 949 P.2d 565, 567.

Colo.1995. Com. (a) quot. in spec. conc. op., com. (e) cit. in spec. conc. op. Investors sued a corporation and corporate officers for fraud and misrepresentation, alleging that the corporation's president secured the loan under the guise of funds for investments when in fact the president used money for his personal benefit. Trial court entered judgment for investors and appellate court affirmed. This court affirmed, holding, inter alia, that the corporation could be held liable under the doctrine of apparent authority, because the corporation put the president in a position that enabled him to commit fraud, the president acted within his apparent authority when he raised capital from individuals such as plaintiffs, and the president made representations to plaintiffs with the awareness they were false and with intent to induce plaintiffs to rely on the representations. Specially concurring opinion argued that the analysis of this case should be based on apparent authority, not on the distinction between agents who are servants and those who are not. Grease Monkey Intern., Inc. v. Montoya, 904 P.2d 468, 476, 477.

Colo.1993. Cit. in conc. and diss. op. Parishioner sued Episcopal diocese and its bishop for injuries she allegedly sustained as a result of her sexual relations with priest to whom she had gone for counseling. The trial court entered judgment on a jury verdict awarding plaintiff damages. Affirming in part, this court held, inter alia, that diocese was liable for negligent hiring and supervision of priest, since an agency or employment relationship existed between diocese and priest and there was sufficient evidence that diocese's placement of priest in the role of counselor and its lack of supervision of priest breached diocese's duty of care to plaintiff. A concurring and dissenting opinion argued that diocese could not be liable for negligent hiring or supervision since it was neither principal nor employer of priest. Moses v. Diocese of Colorado, 863 P.2d 310, 333, cert. denied 511 U.S. 1137, 114 S.Ct. 2153, 128 L.Ed.2d 880 (1994).

Colo.App.

Colo.App.2009. Cit. in sup., com. (m) quot. in sup. Motorist sued bus driver and his employer, seeking compensation for injuries she sustained when the bus struck her vehicle. The trial court, among other things, determined as a matter of law that driver was also an employee of the regional transportation district, that driver's potential liability was therefore capped by virtue of the state's Governmental Immunity Act, and that employer's respondeat superior liability could not exceed driver's potential liability. Affirming, this court held, inter alia, that the undisputed facts established that driver was an employee of the district and was therefore a public employee within the meaning of the Act. The court reasoned, in part, that, while the contract between employer and the district provided that employer was an independent contractor and that employee was not an employee of the district, how the parties referred to themselves in their contract was not dispositive. Henisse v. First Transit, Inc., 220 P.3d 980, 986.

Colo.App.2006. Cit. in disc. Candidate for hospital board of directors sued board's attorney and others for defamation and defamation per se in connection with statements made by board's attorney about candidate during a board meeting that were reported in a newspaper article. The trial court, inter alia, granted summary judgment for attorney. This court affirmed on ground that there was no genuine issue as to whether attorney acted with actual malice. In making its decision, the court declined to uphold the trial court's ruling that attorney was immune from state-tort claims under the Colorado Governmental Immunity Act; the record suggested that attorney merely advised board as part of his private practice and therefore was not an employee of board within the meaning of the Act but rather an independent contractor. Wilson v. Meyer, 126 P.3d 276, 283, cert. denied 2006 WL 381641 (Colo.2006).

Colo.App.2005. Subsec. (2) cit. in disc. Estate and survivors of patient who died in the emergency room of a private hospital brought a medical-malpractice action against resident physician, supervising physician, and city hospital that operated emergency-medicine residency program in which resident was enrolled. The trial court dismissed the action. Affirming in part, reversing in part, and remanding for reinstatement of plaintiffs' claims, this court held, inter alia, that the trial court did not err in determining that supervising physician was a “public employee” for purposes of the Colorado Governmental Immunity Act. The court reasoned that although supervising physician was not paid a salary by city hospital, his performance was subject to city hospital's control by virtue of a memorandum of understanding governing the operation of the residency program at the private hospital where he worked. Sereff v. Steedle, 148 P.3d 192, 195, reversed 167 P.3d 135 (Colo.2007).

Colo.App.1999. Com. (e) cit. in disc. Wheelchair user who was injured when her wheelchair struck a protruding threshold-cover plate at a city-owned theater and sh7e fell out of the chair brought premises-liability action against city. Reversing the trial court's denial of city's motion to dismiss and remanding, this court held, inter alia, that city was immune under governmental-immunity statute from vicarious liability for independent contractors' negligence in installing threshold and failing to detect dangerous condition. Springer v. City and County of Denver, 990 P.2d 1092, 1096, reversed 13 P.3d 794 (Colo.2000).

Colo.App.1993. Subsec. (2)(e) cit. in sup., coms. (e) and (k) cit. in sup. A company sought review of a final order of the Colorado Industrial Claim Appeals Panel holding that workers who installed floor covering purchased by the company's customers were covered by the Employment Security Act. This court, affirming in part and reversing in part, held that workers free from control of the retailer over the means and methods of performing the work and performing a substantial percentage of their services for others were engaged in an independent installation business and not subject to Act coverage. Carpet Exchange v. Indus. Claim Appeals, 859 P.2d 278, 281, 282.

Conn.

Conn.2018. Coms. (d) and (*i*) quot. in sup. Patient brought a medical-malpractice claim against hospital and resident, alleging that resident negligently perforated patient's colon during hernia-repair surgery under the supervision of patient's private physician, who had staff privileges at hospital. After patient settled with physician, the trial court entered judgment on a jury

verdict finding that resident and hospital were both liable for resident's negligence. The court of appeals reversed as to hospital on the ground that it did not control resident's performance of the surgery. Reversing that portion of the decision and remanding, this court held that there was sufficient evidence that hospital had a general right to control resident, such that resident was hospital's agent. The court reasoned, in part, that, under Restatement Second of Agency § 220, the fact that residents, like physicians generally, had to be free to exercise independent medical judgment did not preclude a trier of fact from finding the existence of a principal–agent relationship between a hospital and a resident. Gagliano v. Advanced Specialty Care, P.C., 189 A.3d 587, 594.

Conn.2008. Cit. in case quot. in sup. Insured sued insurer for breach of the insurance contract, alleging that defendant failed to pay plaintiff's claim after plaintiff provided timely notice of its losses to a third-party insurance broker from which plaintiff had procured the insurance. The trial court entered judgment on a jury verdict awarding plaintiff damages; the appellate court affirmed. Reversing and remanding, this court held that the trial court's failure to charge the jury on defendant's special defense of late notice was harmful error. The court explained that, once defendant raised the special defense of late notice, plaintiff had the burden of showing that its notice was timely and sufficient; whether insurance broker was defendant's agent was pertinent to that burden, and was a question of fact that should have been resolved by the jury based on certain factors, such as whether defendant had the right to direct and control broker's work. National Pub. Co., Inc. v. Hartford Fire Ins. Co., 287 Conn. 664, 678, 949 A.2d 1203, 1213.

Conn.2006. Cit. generally in case quot. in sup. Automobile lessees sued lessor and dealership, seeking reformation of their automobile leasing contract to include lessee wife, who while driving the vehicle had been involved in a serious accident, as an authorized driver of the leased vehicle. The trial court entered judgment for lessees, reforming the contract. Reversing and remanding, this court held that the trial court's finding that dealership was lessor's agent so as to impute to lessor the actions of dealership's employees with respect to execution of the lease was clearly erroneous; dealership's power-of-attorney granted in the dealership agreement was limited to the power to title vehicles, the agreement did not require dealership to use lessor to finance its vehicle leases, and dealership was a separate entity not owned by lessor. Wesley v. Schaller Subaru, Inc., 277 Conn. 526, 543, 893 A.2d 389, 400.

Conn.1998. Cit. and quot. in diss. op., cit. in ftn. to diss. op., subsecs. (1) and (2)(b) cit. in diss. op., com. (g) quot. in ftn. to diss. op. (erron. cit. as subsec. (1)(g), com.), subsec. (2) cit. in diss. op. and cit. in ftn. to diss. op., subsec. (2)(h) cit. and quot. in diss. op., subsec. (2)(j) cit. in ftn. to diss. op., com. (c) quot. in diss. op. (erron. cit. as com. (1)(c)), com. (d) quot. in diss. op. and quot. in ftn. to diss. op. (erron. cit. as com. (1)(d)). Surviving spouse of murdered taxicab driver filed workers' compensation claim to recover survivor benefits. Workers' compensation commissioner's denial of benefits was affirmed by the compensation review board, and the appellate court also affirmed. Affirming, this court held that, under the “right to control” test, decedent, who drove his cab pursuant to an owner-operator agreement with taxicab company, was an independent contractor, rather than an employee, within the meaning of the Workers' Compensation Act, and thus plaintiff was not entitled to survivor benefits. The dissent argued that reversal was required because the workers' compensation commissioner did not properly review, under Restatement (Second) of Agency § 220(2), all of the circumstances of decedent's work relationship to determine decedent's true status at the time of his fatal injury. Hanson v. Transportation General, Inc., 245 Conn. 613, 629-634, 716 A.2d 857, 865-868.

Conn.1983. Cit. in sup. A developer sued a roofing contractor and the supplier of the roofing materials after the roof installed by the roofer developed leaks. The roofer and the supplier had an agreement whereby the supplier would furnish a bond if the roofer complied with certain specifications, but this roof had not passed an inspection and no bond had been issued. The developer claimed that the supplier was liable under an agency theory, but the trial court found the supplier not liable. This court affirmed. It analyzed the facts in light of several factors used in defining an agency relationship, concluding that the roofer was not the supplier's agent, and finding no evidence of an apparent agency. Beckenstein v. Potter and Carrier, Inc., 191 Conn. 120, 464 A.2d 6, 14.

Conn.App.

Conn.App.2016. Cit. in case quot. in sup. (general cite). Patient who suffered a perforated colon during hernia-repair surgery filed negligence claims against, among others, hospital where her physician performed the surgery and fourth-year medical resident who was assigned to assist physician, alleging that resident perforated her colon during the operation. The trial court entered judgment on a jury verdict for patient. Reversing in part and remanding, this court held that hospital could not be vicariously liable for resident's actions. The court reasoned that, under Restatement Second of Agency §§ 14 and 220, the critical question was whether hospital had a right to control resident's performance of the surgery, and there was no evidence that specifically showed that resident had agreed to act or was authorized to act as an agent of hospital during patient's surgery. Gagliano v. Advanced Specialty Care, P.C., 145 A.3d 331, 339.

Conn.Super.

Conn.Super.1992. Cit. in disc. Temporary employment agency for nurses sued the Department of Labor, which administered the state unemployment compensation act, to dispute taxes paid based on defendant's alleged wrongful assessment that plaintiff's nurses were employees rather than independent contractors. After an administrative hearing holding for defendant, this court entered judgment for plaintiff, holding that plaintiff did not have right to control its nurses; therefore they were not employees under state law. The court noted that the characterization of the parties' relationship in the employment contract could be considered as a factor in determining plaintiff's right to control. Daw's Critical Care v. Dept. of Labor, 42 Conn.Sup. 376, 622 A.2d 622, 635, affirmed 225 Conn. 99, 622 A.2d 518 (1993).

Del.

Del.2012. Cit. in ftn., cit. in case quot. in sup. and cit. in ftn. Prospective buyer of cable-television systems sued creditors of seller, alleging that creditors tortiously interfered with the asset purchase agreements between buyer and seller by refusing to consent to the agreements. The trial court granted summary judgment for creditors. Affirming, this court held, as to one creditor, that that creditor did not have actual knowledge of the agreements, and that the knowledge of creditor's sub-advisor could not be imputed to creditor because sub-advisor was acting as creditor's independent contractor, rather than as its agent. The court noted, among other things, that the agreement between creditor and sub-advisor expressly stated that sub-advisor was an independent contractor, which suggested that they did not believe that they were creating the relation of "master and servant." WaveDivision Holdings, LLC v. Highland Capital Management, L.P., 49 A.3d 1168, 1177.

Del.2006. Cit. and quot. in sup., quot. in ftn., subsecs. (2)(a), (2)(b), and (2)(d)-(2)(j) and coms. (k) and (*l*) quot. in ftn., com. (j) cit. and quot. in ftn., com. (m) cit. in ftn. Mechanic who was injured while working at an automotive service station petitioned industrial accident board to determine his eligibility for workers' compensation. The board determined that mechanic was an ineligible independent contractor, and the superior court affirmed. Reversing and remanding, this court applied the criteria set forth in Restatement Second of Agency § 220, which the court found well-suited for determining whether a workers' compensation claimant was an eligible employee or an independent contractor of a single business, and concluded that the totality of the factors showed that mechanic's relationship with service station was that of an employee rather than an independent contractor. Falconi v. Coombs & Coombs, Inc., 902 A.2d 1094, 1096, 1098-1102, appeal after remand 2006 WL 3393489 (Del.Super.2006).

Del.1997. Cit. in headnote, cit. in disc., cit. in case cit. in disc., cit. and quot. in sup. 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 whether the weighmaster was defendant's servant or an independent contractor precluded summary judgment. The court held further 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, 58-60.

Del.1979. Cit. in disc. Plaintiff, a gas station service attendant, filed a claim for workmen's compensation disability benefits against a national oil company whose products were advertised and sold at a station operated by the dealer-owner of the premises. Claimant had been the victim of a robbery of the station which left him a quadriplegic with permanent brain damage. The Industrial Accident Board concluded that the dealer-owner, not the national oil company, was the claimant's employer for workmen's compensation purposes and dismissed the claim as to the oil company. On appeal, the court affirmed, holding that the claimant was the employee of the dealer-owner because only the dealer-owner had the right to hire, fire, determine wages, and fix job responsibilities. White v. Gulf Oil Corp., 406 A.2d 48, 51.

Del.1962. Cit. in disc. In an action by a servant against his employers from injuries resulting from a fall from a roof upon which the servant was working while attempting to clip branches from a tree on orders from his employers and where testimony permitted an inference that the servant took orders from the husband, the wife, and the wife's mother, all three being occupants of the estate, the question whether the wife's mother was also the servant's employer was for the jury to decide and the most important test for the jury to apply is that of control and the direction of the servant by the mother. Binsau v. Garstin, 177 A.2d 636, 641.

Del.Ch.

Del.Ch.2014. Cit. in case quot. in ftn., com (b) quot. in case quot. in ftn. Italian businessman who made a substantial loan to a joint venture that went bankrupt and defaulted on the loan sued Netherlands holding company that owned more than half of the joint venture and guaranteed millions of dollars worth of its debt, claiming, inter alia, that defendant committed fraud by failing to disclose the joint venture's involvement in an illegal price-fixing cartel. In entering judgment for defendant, this court held, inter alia, that Delaware, rather than English or Italian, law applied to plaintiff's claims, reasoning, in part, that no actual conflict existed between Delaware and Italian law. The court rejected plaintiff's argument that Delaware law differed from Italian law in that it required a traditional master—servant relationship in order for a defendant to be subject to vicarious liability, reasoning that Delaware did not in fact require such a relationship, and that the same result would be reached in this action under both Delaware and Italian law. Vichi v. Koninklijke Philips Electronics, N.V., 85 A.3d 725, 778.

Del.Super.

Del.Super.2020. Cit. in ftn. Seaman who worked on a tugboat that was towing a jet-fuel barge sued owner of the tugboat, seeking damages for a back injury he suffered when he threw mooring lines from the barge while helping it to dock. This court denied defendant's motion for partial summary judgment, holding that there were genuine issues of material fact as to whether defendant was in possession and control of the barge at the time of plaintiff's injury, because engineer presented evidence from which a reasonable jury could find that the tugboat's actions in towing, guiding, and docking the unmanned, unpowered barge constituted the exercise of exclusive control over the barge. The court cited Restatement Second of Agency § 220 in noting that the extent of control was generally an issue for the trier of fact to decide. Williams v. Dann Marine Towing, LC, 237 A.3d 820, 832.

Del.Super.1980. Cit. in disc. The defendant landowner entered a contract with a joint venture firm for the performance of construction work. The plaintiff was employed by the joint venture as an iron worker. The plaintiff was injured on the construction site and although safety equipment to prevent such injuries was available at the site, it was not in use where the accident occurred. The plaintiff sued the landowner and both parties moved for summary judgment. The court stated that Delaware safety regulations impose implementation responsibility on those in control of the workers and also on those who control the work area. Failure to fully implement these regulations and follow due care renders the assuming party liable for a worker's injuries. The court stated that generally a landowner is not liable for the torts of an independent contractor unless the owner has retained the power to control the methods and manner of work performance. However, even if the landowner is not liable under this general rule, it may still be liable if it retained sufficient control over part of the work, or retained possessory control of the work premises during the work. Because disputes existed as to material facts, summary judgment was inappropriate. The plaintiff's employer had contractually assumed the responsibility for safety regulation compliance. However,

if a jury were to find that the defendant landowner retained sufficient control to make it responsible for safety regulation implementation, such a contract provision will not absolve it of its non-delegable duty. Rabar v. E.I. duPont de Nemours & Co., Inc., 415 A.2d 499, 506.

Del.Super.1979. Cit. and quot. in ftn. 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, 140.

Del.Super.1970. Cit. in sup. and cit. subsec. (c) and com. on subsec. (2)(m). This was a workmen's compensation proceeding where an industrial accident board had awarded compensation to employee, and the employer appealed. The court held that the man was an employee when injured while dismantling a building for his employer in the latter's yard and with his equipment. Weiss v. Security Storage Co., 272 A.2d 111, 115, aff'd 280 A.2d 534 (1971).

D.C.App.

D.C.App.2019. Subsec. (2) quot. in sup. and in ftn.; coms. (h) and (j) cit. in sup.; com. (k) quot. in sup. Association that administered rules and procedures for sports at junior high schools and high schools petitioned for review of the National Labor Relations Board's determination that approximately 140 officials who refereed games for schools belonging to association were employees, rather than independent contractors, and that association violated the National Labor Relations Act by refusing to bargain with the union that sought to represent them. This court granted association's petition, holding that, under Restatement Second of Agency § 220, officials were independent contractors who were exempt from the protections of the Act. The court pointed out that the strongest factor supporting independent-contractor status was the fact that association itself paid the average official for only three games per year during the four-week postseason period, while schools negotiated with and paid officials directly during the seven-week regular season. Pennsylvania Interscholastic Athletic Association, Inc. v. National Labor Relations Board, 926 F.3d 837, 840-842.

D.C.App.2002. Cit. in ftn. After electrical subcontractor's employee fell to his death on the work site, the District of Columbia Department of Employment Services determined that subcontractor was solely liable for workers' compensation death benefits paid to decedent's widow. Affirming, this court held, inter alia, that, although decedent was helping general contractor's project superintendent at the time of the accident that caused his death, decedent was performing a voluntary act arising out of his employment with subcontractor, and there was no express or implied contractual arrangement establishing that he was either a special or borrowed employee of general contractor, or a joint employee of both subcontractor and general contractor. Union Light & Power Co. v. District of Columbia Dept. of Employment Services, 796 A.2d 665, 671.

D.C.App.1983. Cit. in ftn. in disc. The plaintiff, a discharged grocery store cashier, brought this action alleging libel and slander against the defendant, a corporation retained by the plaintiff's employer to investigate retail theft. An investigator employee of the defendant purchased merchandise through the plaintiff. The plaintiff failed to record the sale and instead pocketed the cash whereupon the plaintiff was discharged from his employment. The plaintiff's union filed a grievance on his behalf. A formal arbitration hearing was held at which the defendant's investigator testified under oath to the facts as she saw them. The arbiter denied the union's grievance and concluded that the plaintiff had committed retail theft. The plaintiff later filed this action alleging that he had been libelled by the defendant's written report to the employer and slandered by the investigator's testimony at the arbitration hearing. The trial court ruled the libel claim to be time-barred and granted summary judgment for the defendant on the slander claim on the basis of absolute privilege. The plaintiff appealed and this court affirmed stating that an absolute privilege attaches to all statements made in an arbitration hearing provided the publication is made to persons with a legitimate job-related interest in hearing the statements. Here, no excess publication by the defendant's investigator was shown and her

statements were thus absolutely privileged. This court rejected the plaintiff's contention that the investigator was an independent contractor, not an employee, and, therefore, the absolute privilege did not shield the defendant. Citing the Restatement, this court determined that the defendant's rigid control over the investigator's activities precluded her characterization as an independent contractor to the defendant. Sturdivant v. Seaboard Service System, Ltd., 459 A.2d 1058, 1060.

D.C.App.1982. Subsec. (1) cit. in disc., subsec. (2) quot. in ftn., com. (c) cit. in disc. 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, 861.

Fla.

Fla.1995. Cit. generally in disc. and in ftn., subsec. (2)(b) cit. in case quot. in disc. A street vendor who was injured when struck by a car while selling a certain publisher's newspapers sued the newspaper for workers' compensation benefits. Trial court held that vendor was not entitled to benefits because he was neither a direct nor a statutory employee of the newspaper. Appellate court affirmed. Answering a certified question, this court held that a prior case, which held that a newspaper was not vicariously liable for personal injuries to a third party caused by the negligence of a newspaper delivery person while delivering papers on his motorcycle because the delivery person was an independent contractor, remained viable. There was insufficient evidence of an agreement or a practice by the parties, particularly the vendor and the newspaper, to mandate a finding as a matter of law that there was an employer-employee relationship between them. Keith v. News & Sun Sentinel Co., 667 So.2d 167, 169-173.

Fla.1972. Subsec. (2) cit. in sup. The plaintiff truck driver sought review by a writ of certiorari of the affirmation by the industrial relations commission of an order by the judge of industrial claims that plaintiff was an independent contractor and not an employee of defendant trucking company, for workmen's compensation purposes. The court quashed the decision and gave directions to enter judgment for plaintiff. The court held that where plaintiff rented a trailer from defendant, received a percentage of defendant's freight charges as pay, was continually under control of defendant, was threatened with termination by defendant if he did not accept assignments, and was furnished with withholding slips by defendant, which made deductions for tax purposes, the plaintiff was defendant's employee, though the expressed intent of defendant was a carrier-independent contractor relationship. Justice v. Belford Trucking Co., 272 So.2d 131, 134.

Fla.1966. Subsec. (2), (a) quot. in sup. The petitioners, owners of a self-service wholesale grocery store and an alleged employer of the injured claimant, sought a determination of whether their employee was an independent contractor in fact or entitled to workmen's compensation as an employee. The court found sufficient evidence concerning the manner and length of the claimant's employment to justify compensation awarded for the injuries the employee-claimant sustained when the trunk-lid of one of the petitioners' customer's cars fell across his back while he was loading the customer's purchases. Cantor v. Cochran, 184 So.2d 173, 174.

Fla.App.

Fla.App.2017. Cit. and quot. in sup., cit. in cases cit. in sup. Former driver for a technology platform that connected drivers with paying customers brought an action for reemployment assistance against corporation that operated the technology platform. The state department of economic opportunity entered judgment for defendant. This court affirmed, holding that plaintiff was not an employee of defendant for the purpose of reemployment assistance. The court examined the factors set forth in

Restatement Second of Agency § 220, reasoning that "the extent of control" factor, which was recognized as the most important factor, weighed in favor of finding that defendant was an independent contractor, because the parties' agreement disclaimed an employer-employee relationship; plaintiff drove his own vehicle; and he controlled whether, where, when, and how to accept and perform trip requests. McGillis v. Department of Economic Opportunity, 210 So.3d 220, 224.

Fla.App.2012. Adopted in case cit. in sup., sec. and subsec. (1) quot. in sup., subsecs. (2)(a), (2)(b), (2)(e), (2)(f), (2)(h), and (2)(j) cit. in sup. Visitor at a recreational-vehicle (RV) show brought a premises-liability action against, among others, manufacturer of RV awnings and accessories, alleging that she was seriously injured when a metal pole from manufacturer's booth at the show hit her on the head. The trial court granted summary judgment for defendant. Reversing, this court held, inter alia, that a genuine issue of material fact existed as to whether defendant's sales representative, which set up and staffed defendant's booth, was an independent contractor or defendant's agent/employee; while an agreement between defendant and representative provided that representative was an independent contractor and not an agent or employee of defendant, the booth contract between defendant and the show's sponsor was signed by representative's employee on defendant's behalf, and defendant provided a certificate of liability insurance to the sponsor and agreed to indemnify it for representative's actions. Metsker v. Carefree/Scott Fetzer Co., 90 So.3d 973, 979-982.

Fla.App.2012. Cit. in sup., quot. in case quot. in sup. Employer, a dental center, appealed a decision of the Agency for Workforce Innovation (AWI) finding that a dentist who worked at the center was an employee for purposes of unemployment taxation. Affirming, this court held that the AWI's finding that employer exercised sufficient control over dentist's work to consider her an employee was supported by competent, substantial evidence. The court pointed to facts that employer provided the tools and space for dentist, scheduled patients, and determined where and when dentist performed services; further, dentist could not refuse patients, was required to work at a particular time, and could leave only if there were no scheduled patients. University Dental Health Center, Inc. v. Agency for Workforce Innovation, 89 So.3d 1139, 1140-1141.

Fla.App.2011. Subsec. (2) quot. in sup. Workers appealed from final order of state agency finding that they were independent contractors and thus not entitled to unemployment compensation benefits. This court affirmed, rejecting appellants' argument that state agency erred by failing to apply the criteria used by the Internal Revenue Service to determine, for employment tax purposes, whether an employer-employee relationship existed. The court pointed to the language of the controlling unemployment-compensation statute, which indicated that common-law rules were to be applied to determine the employment relationship and did not refer to other rules or factors; thus state agency had not erred by applying the test set forth in Restatement Second of Agency § 220, which had been adopted by the Supreme Court of Florida. Brayshaw v. Agency For Work Force Innovation, 58 So.3d 301, 302.

Fla.App.2008. Subsec. (1) and comments cit. in case cit. in disc. Customer brought negligence suit against satellite-television-service provider and provider's employee who installed a satellite system in his home, alleging that he fell from a ladder and was injured during the installation while handing employee a glass of water. The trial court granted summary judgment for defendants. Affirming, this court held, inter alia, that there was no legal relationship giving rise to a duty of care on which plaintiff could recover against defendants. The court rejected plaintiff's master-servant argument, finding it implausible that employee, who was himself the servant of provider, was authorized to hire customer as a servant, that customer was then performing a service for the master in the master's affairs, and that the master had any control over the service—obtaining a glass of water. Barrocas v. Directv, Inc., 974 So.2d 1127, 1129.

Fla.App.2008. Subsec. (2)(a) cit. in sup. Motorist injured in an accident with a vehicle owned by a driver employed by a company providing local package-delivery services for an international shipping firm's customers brought a personal-injury action against shipping firm. The trial court granted summary judgment for defendant. Reversing and remanding, this court held, inter alia, that the trial court erred in concluding, as a matter of law, that delivery company was an independent contractor for whose alleged negligence defendant was not vicariously liable under principles of agency law. The court pointed to detailed provisions in the parties' contract evidencing defendant's right to control delivery company's operations, including specific procedures that delivery company's employees had to follow when picking up, sorting, and delivering defendant's packages,

and requirements that the employees wear a uniform displaying defendant's marks and operate delivery vehicles painted in defendant's livery. Del Pilar v. DHL Global Customer Solutions (USA), Inc., 993 So.2d 142, 146.

Fla.App.2002. Cit. in sup. In a per curiam opinion, this court affirmed the judgment of the trial court. Thomas v. Stephenson, 816 So.2d 1216, 1217.

Fla.App.2001. Subsec. (2) quot. in ftn. Temporary employment agency appealed from Department of Labor, Division of Unemployment Compensation's determination that temporary laborer was its employee, rather than an independent contractor. Reversing, this court held that employment agency did not have direct control over the mode or details of employee's work, and there was no agency relationship between employment agency and its customers. Freedom Labor Contractors of Florida., Inc. v. State, Div. of Unemployment Compensation., 779 So.2d 663, 665.

Fla.App.2000. Quot. in sup., cit. in case cit. in sup. Condominium association appealed a determination by the division of unemployment compensation that plaintiff housekeeper and other maids doing work at the condominium were association employees for purposes of unemployment compensation benefits. This court reversed, holding that the maids were independent contractors, because the association did not exercise a sufficient degree of control over the maids to establish employee status where the association did not control which maids cleaned which units, the maids could decline the association's request to clean, and the maids were free to work for others. 4139 Management Inc. v. Department of Labor and Employment, 763 So.2d 514, 516-517.

Fla.App.1996. Quot. but dist. Parties who were injured as a result of a car accident sued driver who caused the accident and the client for whom he was working, alleging that driver was acting as client's agent when the collision occurred. At the time of the accident, driver, the owner of a business that supplied hot-air balloons for advertising purposes, was returning from a baseball game at which his balloons were used to promote client's video rental franchise. Client moved for summary judgment on the ground that driver was not its employee, but an independent contractor. The trial court granted the motion. Affirming, this court held that there was no agency relationship, primarily because the two defendants' businesses were entirely distinct and client did not control the details of driver's work. Buitrago v. Rohr, 672 So.2d 646, 647-648.

Fla.App.1996. Cit. generally in disc., subsec. (2) cit. in disc. In newspaper carrier's action for benefits, judge of compensation claims determined that carrier was an employee, rather than an independent contractor, and awarded the relief requested. This court reversed, and certified to the state supreme court two questions concerning the continuing validity of the case law on which its reversal was based. The supreme court answered the questions in the affirmative. Reaffirming its earlier decision to reverse the award of benefits and remanding, this court held that the finding that carrier was an employee was not supported by competent evidence. Fort Pierce Tribune v. Williams, 678 So.2d 355, 355.

Fla.App.1996. Cit. in headnotes, cit. in sup., quot. in case quot. in ftn. in sup. Attorney challenged conclusion of Division of Unemployment Compensation that his former secretary was an employee for purposes of unemployment benefits. Reversing, this court held that secretary, who did work on her own word processor, which she carried to and from attorney's office, who had the option of rejecting certain assignments, who found substitutes when necessary, and who came and went as she pleased, was not an employee, but an independent contractor. John W. Kearns, P.A. v. Dept. of Labor, 680 So.2d 619, 619, 620.

Fla.App.1995. Subsec. (2) cit. in diss. op. When an airline machinist union's strike ended upon termination of the airline's operations, union members who received strike benefits filed claims for unemployment benefits under the state unemployment compensation law. The unemployment appeals commission affirmed the appeals referee's finding that striking workers were employees of their union and that the strike benefits they received were wages. This court affirmed, holding that the referee's conclusion that plaintiffs were union employees and were paid wages during the strike was not clearly erroneous. The dissent argued that strike benefits were not wages for unemployment compensation tax purposes, and that because this was a tax case, the outcome had no bearing on whether plaintiffs would receive or must disgorge unemployment compensation benefits. International Ass'n of Machinists v. Tucker, 652 So.2d 842, 848.

Fla.App.1994. Cit. in sup., coms. cit. in sup. Driver who struck horse that had wandered onto a public roadway brought negligence suit for damages against horse's owner. The trial court granted summary judgment for defendant on the ground that, since the part-time stable hand who had failed to prevent the horse from escaping was an independent contractor and not defendant's employee, defendant was not liable on a respondeat superior theory. Reversing and remanding, this court held, inter alia, that questions of material fact existed as to whether the stable hand's skill was the degree of skill ordinarily associated with an independent contractor or an employee and whether the stable hand's use of defendant's tools in the performance of her duties was more consistent with the status of an employee rather than that of an independent contractor. Pate v. Gilmore, 647 So.2d 235, 236.

Fla.App.1993. Cit. in case cit. in sup. City police officer who was injured in a motorcycle accident while en route to a funeral home to escort a funeral procession as part of his "authorized off-duty" work for the police department sought workers' compensation benefits from the city and the funeral home. The judge of compensation claims found both defendants liable as "dual employers" of claimant. Affirming in part and reversing in part, the court held that claimant was solely an employee of the city when he was injured. The court stated that claimant was at all times an independent contractor with respect to the funeral home, which had virtually no control over the details of the work performed by claimant. F.T. Blount Funeral Home v. City of Tampa, 627 So.2d 1272, 1274.

Fla.App.1992. Cit. in sup., subsecs. (2)(a)-(2)(j) quot. in sup. Two motorists were injured in a collision with a heating and air-conditioning contractor, who was returning from a job done for a company that sold, installed, and serviced heating and air-conditioning equipment. The motorists sued the company to recover for their personal injuries under the theory of respondeat superior. The trial court granted the company's motion for summary judgment, ruling that the tortfeasor was an independent contractor and not an employee of the company. Reversing and remanding, this court held that, pursuant to the Restatement's ten-part test, issues of material fact existed as to whether there was an employer-employee relationship between the contractor and the company. It stated that there were fact questions as to whether the tortfeasor was engaged in a distinct business and as to the method of payment, and noted that the installation work was part of the company's regular business. Alexander v. Morton, 595 So.2d 1015, 1016-1018.

Fla.App.1992. Cit. in case cit. in sup., subsec. (2) quot. in sup. After state's department of labor and employment determined that certain temporary workers of a convention center should be classified as employees for purposes of unemployment compensation, the convention center requested from this court a review of the department's order. Reversing that part of the order that categorized scenic painters, photographers, security officers, and stage hands as employees, the court held that the principal factor for consideration was the employer's right of control over the mode of doing the work and that such control was lacking in the case of these workers. Dart Industries v. Dept. of Labor and Emp., 596 So.2d 725, 726, 727.

Fla.App.1990. Cit. in disc. A part-time employee for a law firm, who was injured at work, filed a claim for workers' compensation benefits. A judge of compensation claims found, inter alia, that, because the claimant was an employee of and not an independent contractor for a realty company for which she concurrently worked full-time as a real estate agent, her earnings as an agent could be added to those from the law firm to determine her average weekly wage. Reversing and remanding, this court held that the claimant's preinjury earnings as a real estate agent should not have been included in the average weekly wage figure because she was an independent contractor for the realty company. The court found no indication that the realty company had control over the means by which the plaintiff procured her sales and stated that the company was concerned only with the final results of her work. Edwards v. Caulfield, 560 So.2d 364, 370.

Fla.App.1989. Quot. in disc., cit. in case cit. in disc. The division of unemployment compensation held that an advertising agency that hired actors to perform roles in its commercials on an infrequent basis was obligated to pay an unemployment compensation tax on their behalf. Reversing, this court held that the agency was not obligated to pay the tax because the actors were independent contractors rather than employees of the agency. Zubi Advertising v. Dept. of Labor, 537 So.2d 145, 147.

Fla.App.1988. Quot. and cit. in sup. A telephone solicitor sued her former employer for unemployment compensation benefits allegedly due her. The unemployment compensation board determined that the plaintiff and her co-workers were employees and were entitled to the benefits. Reversing and remanding, this court held that the plaintiff was an independent contractor, not an employee; therefore the defendant was not required to pay benefits. The court reasoned that the defendant was concerned only with profits, not with exerting any control over its salespersons as an employer would. Delco Ind. v. Dept. of Labor & Emp. Sec., 519 So.2d 1109, 1112.

Fla.App.1988. Quot. in ftn. in sup. After a live-in health-care aide filed a claim for unemployment compensation benefits, the state agency found that aides were employees rather than independent contractors. Reversing, this court held that the aides were independent contractors of the health care agency, since the requisite control for employee status was not present. Global Home Care, Inc. v. Dept. of Labor, 521 So.2d 220, 221.

Fla.App.1988. Cit. in disc., subsec. (2) cit. in sup., com. cit. in case quot. in disc. A victim of personal injuries sued a carpet seller and a carpet installer, alleging that the carpet installer negligently parked his truck in front of the walkway to the plaintiff's condominium building, causing the plaintiff to fall over a concealed obstruction as he crossed the common lawn area that was the only available access route. The trial court granted summary judgment for the carpet seller. This court affirmed, holding that the carpet installer was an independent contractor and not an employee of the carpet seller when the installer performed the delivery and installation under its own direction, utilized its own vehicle and tools, and the seller exercised no control over the manner of installation. Wiseman v. Miami Rug Co., 524 So.2d 726, 729.

Fla.App.1987. Quot. in disc. A former worker for a company that arranged for prospective buyers to visit time-share resorts was found to be eligible for unemployment benefits by a referee, and the unemployment appeals commission affirmed. Reversing, this court stated that numerous factors were used to determine whether one acting for another was a servant or an independent contractor, including the extent of control that, by the agreement, the master may exercise over the details of the work. The court reasoned that the company exercised no control over the details of the woman's work and that the right of control as to the mode of doing the work was the principal consideration in making the determination. F.L. Enterprises v. Unemp. Apps. Com'n, 515 So.2d 1340, 1341-1342.

Fla.App.1987. Cit. in case quot. in disc. An independent carpet installer ran a stop sign and collided with another vehicle, killing a passenger in the vehicle. The decedent's husband sued the carpet seller for wrongful death, alleging that the carpet installer was an employee of the seller. The trial court entered summary judgment in favor of the plaintiff. Reversing, this court held that the carpet installer was not an employee of the seller, but an independent contractor; therefore, the seller was not liable for wrongful death. The court supported its conclusion by noting that the carpet installer performed his work without any supervision or involvement from the seller. Kane Furniture Corp. v. Miranda, 506 So.2d 1061, 1063, review denied 515 So.2d 230.

Fla.App.1987. Cit. in sup., quot. in sup. An appeal was taken from an order issued by the unemployment compensation division of the state department of labor and employment security, which determined that certain drywall hangers and finishers were employees, rather than independent contractors. This court reversed this order, holding that under the applicable state test for determining whether an employer-employee relationship existed, the most significant factors weighed in favor of finding that the workers were independent contractors. Messer v. Dept. of Labor & Employment Sec., 500 So.2d 1372, 1372, 1373.

Fla.App.1987. Quot. in case quot. in sup., cit. in sup. A hospital patient sued a hospital, a nurses registry, and a private nursing attendant recommended by the registry to recover damages for the negligent care she allegedly received. The trial court entered a judgment based on a jury verdict in the registry's favor, and directed a verdict in the nurse's favor. This court affirmed the judgment as to the registry and reversed and remanded for a new trial as to the nursing attendant, holding, inter alia, that the registry could not be held vicariously liable for the nurse's alleged negligence when the registry was merely an employment agency, the nurse did not have an exclusive relationship with the registry and was paid by her patients, and the registry withheld neither taxes nor social security and provided no medical or health benefits. Robinson By and Through Bugera v. Faine, 525 So.2d 903, 905, 906.

Fla.App.1987. Subsec. (2) cit. in disc. The guardians ad litem of minors who undertook to sell newspaper subscriptions sued the newspaper, among others, alleging that one of its supervisors had sexually molested the minors. The plaintiffs claimed that the newspaper was vicariously liable for the torts of the supervisor under either an actual agency theory or by virtue of apparent authority. The trial court granted summary judgment for the newspaper because it found that both the corporation that employed the supervisor and the supervisor himself were independent contractors, not employees, of the corporation that owned the newspaper. Reversing and remanding, this court held that summary judgment was premature because discovery was still in progress and therefore the court did not have sufficient information to determine the status of either the supervisor or the employing corporation. The court explained that an agreement between two parties was not dispositive of one's status as an agent or an independent contractor; instead, the standard for making such a determination was the degree of control exercised by the employer over the agent. Singer v. Star, 510 So.2d 637, 640.

Fla.App.1986. Cit. in sup. A building inspector entered a construction work site where he was attacked by a subcontractor and forced to sign a card verifying that the subcontractor's work passed inspection. The inspector sued the general contractor alleging that the subcontractor was an agent, servant, or employee of the general contractor and was acting within the scope of his employment. The trial court granted a directed verdict to the defendant. Reversing and remanding, this court held that it was for a jury to determine whether the subcontractor was acting as the defendant's agent by evaluating such criteria as the amount of control over the workplace, length of employment, degree of skill involved in the work, and permanence of employment. Carroll v. Kencher, Inc., 491 So.2d 1311, 1312.

Fla.App.1985. Quot. in sup., cit. in disc., cit. in diss. op.; com. (c) quot. in sup. and cit. in ftn.; subsec. (2) cit. in ftn. in diss. op. A motorist sued a truck driver and a lumber company under the theory of respondeat superior for personal injuries arising from an automobile accident. Reversing the judgment of the trial court, this court held that, because the truck driver was not a servant of the lumber company but was an independent contractor, the lumber company could not be held liable for his torts. The dissent argued that there was sufficient evidence of control and integration of functions performed by the truck driver for the lumber company to permit a factfinder to determine that the truck driver was an employee of the lumber company. Georgia-Pacific Corp. v. Charles, 479 So.2d 140, 142, 145, review denied 488 So.2d 67 (1986).

Fla.App.1985. Cit. in case cit. in sup. The plaintiff sued a trucking company and its insurer after being injured when a tire he was mounting for the trucking company exploded. The plaintiff alleged that he was a third-party beneficiary of an automobile liability insurance policy issued to the trucking company. Claiming independent contractor status, as opposed to that of an employee, the plaintiff contended that he fell outside the language of the insurance policy meant to exclude employees from coverage and argued that independent contractors qualified for coverage under the policy. The trial court entered summary judgment in the insurer's favor, and the plaintiff appealed. This court reversed and remanded. Citing the ten tests found in the Restatement to determine whether one is an employee or an independent contractor, this court held that several disputed issues of material fact remained unsettled. Strickland v. Progressive American Ins. Co., 468 So.2d 525, 526.

Fla.App.1984. Cit. and quot. but dist. The plaintiff appealed from an order of the state's department of labor adopting a recommendation that certain individuals performing services for the plaintiff be considered employees and not independent contractors. This court reversed the order, holding that the individuals were not employees where the parties did not believe that they were creating a master-servant relationship the individuals supplied all their own tools and the individuals worked on their own schedules and controlled the means by which they performed the service. D.O. Creasman Elect. v. State Dept. of Labor, 458 So.2d 894, 897-898.

Fla.App.1984. Subsec. (2) quot. in sup. and quot. in diss. op., subsec. (2)(a) quot. in sup., com. (a) cit. in diss. op. and cit. in ftn. to diss. op. The owner of an interstate moving business appealed an order of the state department of labor subjecting him to an unemployment tax for two truck drivers the plaintiff claimed were independent contractors. The court held on appeal that the board misconstrued the type of control an individual must exercise in order to establish an employer-employee relationship. Under the Restatement position, one must look to the extent of control the individual had over matters authorized by the

agreement. Here, the agreement between the plaintiff and the drivers specifically stated that the plaintiff had no control over the details of the truck drivers' work. Judgment was reversed. A dissent argued that the majority misconstrued the necessary element of control, weighing such factors as whether the work performed was considered part of the plaintiff's business, the method of payment, and the level of skill required. Hilldrup Transfer v. State, Dept. of Labor, 447 So.2d 414, 416, 417, 420, 421, 423, 424.

Fla.App.1983. Cit. in ftn. in sup. A physician was affiliated part-time with a medical clinic for two years without an employment agreement, and full-time for the following four years with an employment agreement. Upon termination, he tendered his shares of stock in the clinic to the clinic for repurchase. They were worth the price he paid if he was considered to be employed for less than five years, but worth the fair market value if he was considered employed for more than five years. The trial court disallowed evidence showing independent contractor status for the first two years of affiliation. This court reversed, holding that the primary test for an employer-employee relationship was whether the person being served exercised control over the performer's manner of work, not just the result. Moles v. Gotti, 433 So.2d 1380, 1381.

Fla.App.1981. Cit. in per curiam opinion affirming the decision of the Florida Department of Labor and Employment Security, Unemployment Appeals Commission. Bass v. Florida Department of Labor and Employment Security, 399 So.2d 62, 62.

Fla.App.1968. Subsec. (2)(a)-(h) quot. in sup. The plaintiff, sewer subcontractor on a Navy building project, was injured when he was struck by a truck driven by an employee of the defendant contractor, and he sued the defendant in negligence. The defense was that the plaintiff was an employee of the defendant and that his workmen's compensation remedy preempted any alternative remedy. The court found that, as the plaintiff supplied his own materials, hired his own workers, and was accountable to the defendant for only the end product, he was not an employee of the defendant under the tests of this section, and a summary judgment for the defendant was reversed. Stevens v. International Builders, 207 So.2d 287, 289, cert. discharged, 217 So.2d 101 (1968).

Ga.App.

Ga.App.2021. Cit. in ftn. Worker who slipped and fell in a rail yard and was injured while working for contractor that provided transport services to railway sued railway, alleging, among other things, a claim under the Federal Employers' Liability Act. The trial court granted summary judgment for railway, finding that worker was not railway's employee for purposes of the Act. This court affirmed that portion of the decision, holding, as a matter of law, that contractor, and not railway, was worker's employer under the Act. The court reasoned, in part, that most of the factors set forth in Restatement Second of Agency § 220 for determining whether a worker was an employee favored railway. Fross v. Norfolk Southern Railway Company, 863 S.E.2d 714, 720.

Ga.App.2015. Cit. in sup., cit. in case cit. in ftn., subsecs. (1) and (2) quot. in ftn. Farmer's automobile insurer sued driver who sustained serious injuries while hauling corn for farmer in a truck owned by farmer, seeking a declaration that driver was excluded from coverage under farmer's policy. The trial court granted summary judgment for insurer, finding that driver was not covered under the policy, because he was farmer's employee at the time of the accident, rather than an independent contractor. Affirming, this court held that the undisputed facts showed that driver was farmer's employee, because farmer controlled the time, manner, method, and means of execution of driver's work. The court rejected driver's argument that he was an independent contractor under the factors set forth in Restatement Second of Agency § 220, reasoning that transporting crops was a regular part of farmer's business. Royal v. Georgia Farm Bureau Mut. Ins. Co., 777 S.E.2d 713, 715.

Ga.App.2011. Subsecs. (2)(e), (2)(f), and (2)(i) quot. in ftn. Nightclub patron brought a negligence action against nightclub and female impersonator, among others, alleging that he was injured when female impersonator, dressed as a dominatrix, cracked his whip in the direction of the audience at the edge of the stage and struck plaintiff in the eye. The trial court granted summary judgment for nightclub. Affirming, this court held that nightclub was not vicariously liable for impersonator's negligence, because impersonator was an independent contractor, rather than an employee. The court reasoned that nightclub did not control the time, manner, and method of executing the work; for instance, it did not choose or supply the music to which the performers

would dance and lip-sync or the costumes they would wear, and impersonator did not perform his unique services on a regular basis or for a fixed period of time for nightclub. Orton v. Masquerade, Inc., 716 S.E.2d 764, 766, 767.

Ga.App.1998. Subsec. (2) cit. in case cit. in disc. After a college student injured his foot when he fell while practicing rappelling techniques at a tower during a military science class, he sued the college for negligence. Trial court granted plaintiff's motion for partial summary judgment. This court reversed, holding that the college's department of military science was operated by adjunct professors and instructors who were independent contractors. The college did not have the right to control the time, manner, and method of the Army sergeant's method of instruction in military science, and the sergeant provided his own tools of the trade. Armstrong State College v. McGlynn, 234 Ga.App. 181, 505 S.E.2d 853, 856.

Ga.App.1994. Subsec. (2) cit. in disc. A homeowner who slipped and fell on water placed on the floor by a carpet cleaner sued the carpet-cleaning company on a respondeat superior theory. His wife had ordered defendant's services based on its good advertising. The trial court granted defendant summary judgment on the issue of apparent or ostensible agency, and denied defendant's motion for summary judgment on the issue of actual agency. Affirming in part and reversing in part, this court held that the trial court did not err in denying defendant's motion for summary judgment on the actual agency issue, since material issues of fact existed as to whether employer had the right to direct the time, the manner, the methods, and the means of execution of the work, as contrasted with the right to insisting upon results according to contract specifications. The court also determined that the trial court's denial of plaintiffs' motion for summary judgment on the apparent agency issue was not error, since it was not necessary that plaintiff husband personally place any reliance upon defendant's representations in that his wife was acting on his behalf as both his marital partner and as a member of an extended household in which all expenses were shared. Keefe v. Carpet & Upholstery Cleaning, 213 Ga.App. 439, 444 S.E.2d 857, 859.

Ga.App.1993. Subsec. (2) cit. in case cit. in sup. The employee of an equipment installer was injured while repairing a suction fan in a factory and sued the factory, alleging negligence. This court affirmed summary judgment for the factory, holding, inter alia, that the installer was an independent contractor whose alleged negligence could not be imputed to the factory. The court rejected the employee's argument that the factory, by allowing the installer to use the allegedly defective forklift from which the employee fell, had interfered with the installer's right to control the employee's work, as it was the installer's president who decided to use the forklift without the knowledge of anyone connected with the factory. Murphy v. Blue Bird Body Co., 207 Ga.App. 853, 854, 429 S.E.2d 530, 532.

Ga.App.1988. Subsec. (2) quot. in case quot. in ftn. A tenant sued her landlord for personal property damage sustained in a fire that started when a worker hired by the landlord used a blowtorch to remove paint from the apartment building's entrance columns. The trial court entered judgment on the jury's verdict for the plaintiff and this court reversed, holding, inter alia, that the landlord was entitled to a directed verdict on the plaintiff's allegation of liability pursuant to the doctrine of respondeat superior. The court explained that because the landlord hired the worker to do a specific task, over which the landlord did not retain the right to control the details, the worker was an independent contractor and not the landlord's employee. The fact that the landlord paid the worker on a weekly basis did not establish that he was the landlord's employee, because he was paid a weekly draw commensurate with the work he completed. Mason v. Gracey, 189 Ga.App. 150, 375 S.E.2d 283, 285-286.

Ga.App.1983. Cit. in sup. A debtor sued the trust company that had hired an attorney to enforce judgment against him on a promissory note. The debtor claimed that the attorney's methods for collecting the debt were abusive and were the cause of a heart attack and other medical problems he had suffered, and that the trust company should be held liable for the infliction of emotional distress. The trial court granted summary judgment to the trust company, and this court affirmed. The court ruled that the trust company could not be held liable for the attorney's actions because, since the company had only directed that a particular result be accomplished and had not controlled how it should be accomplished, the attorney was an independent contractor. Plant v. Trust Co. of Columbus, 168 Ga.App. 909, 310 S.E.2d 745, 746.

Ga.App.1978. Subsec. (2) cit. in case cit. in sup. Plaintiffs, owners of a “western-wear” store, brought an action against a general contractor to recover for damage to their inventory which resulted from a fire allegedly caused by the negligence of defendant's

employees. Plaintiffs charged that a group of block masons employed by defendant left a warming fire unattended and that a spark from the fire ignited the house which stored plaintiffs' inventory. The trial court entered judgment in plaintiffs' favor. The appellate court affirmed the judgment holding, inter alia, that the evidence authorized the inference that the block masons were acting as employees of the defendant, rather than as independent contractors, as alleged by defendant, so as to render the defendant liable for their negligence under the doctrine of respondeat superior where defendant's superintendent instructed the mason crew on construction technique, which they were to follow, and also directed the crew to other job locations. Atlanta Commercial Builders, Inc. v. Polinsky, 148 Ga.App. 181, 250 S.E.2d 781, 783.

Ga.App.1977. Cit. in case cit. in sup. The husband and the children of decedent brought an action against defendant hospital for allegedly negligent treatment which caused decedent's death. Defendant's motion for directed verdict on grounds that the acting physician was an independent contractor was granted. On appeal, the court reversed the judgment for defendant, holding that there was sufficient evidence of defendant's right to control the actions of the physician to raise a jury question as to whether the physician was defendant's employee. Under such circumstances, the trial court erred in directing a verdict for defendant. Hodges v. Doctor's Hospital, 141 Ga.App. 649, 234 S.E.2d 116, 118.

Ga.App.1975. Subsec. (2) cit. in disc. Plaintiff brought suit under the Federal Employers' Liability Act for injuries received in a fall from a pole on which he was working. The trial court held that he was an independent contractor and thus not entitled to recovery under the Act. This court affirmed. It noted that, using the criteria in s 220(2), the evidence established that plaintiff was an independent contractor at the time of his injury. Plaintiff was a former railroad employee who, after being laid off, established his own firm through which he continued to work for defendant on a part-time basis, and he had submitted a flat-fee bid for this job. Plaintiff was in total supervision of the job, hired his own workers, paid them himself, and supplied his own tools. The court also held that as plaintiff had been hired specifically to replace defective poles, he could not recover on a common law negligence theory. Moss v. Central of G.R. Co., 135 Ga.App. 904, 219 S.E.2d 593, 596, cert. denied 425 U.S. 907, 96 S.Ct. 1501, 47 L.Ed.2d 758 (1976).

Hawaii App.

Hawaii App.1994. Com. (h) cit. in case quot. in sup. Injured woman sued, among others, owner of car that rear-ended car in which she was passenger under theory of negligent entrustment. The parties dismissed the claim by stipulation, but plaintiff amended to allege that driver of defendant's car acted as defendant's agent, servant, or employee, and that defendant was therefore liable under doctrine of respondeat superior. The trial court granted defendant summary judgment and dismissed with prejudice all claims against him. This court affirmed, holding that overwhelming evidence in the record indicated that driver was not defendant's employee. It said that defendant's list establishing rules of conduct for guests on his premises, including rules for use of his car, did not indicate or establish that persons for whom list was intended were his employees. Lai v. St. Peter, 10 Hawaii App. 298, 869 P.2d 1352, 1358.

Idaho

Idaho, 1967. Cit. in sup. The plaintiff, an employee of a timber company, sued the defendant, a partnership which hauled timber to the mill of the plaintiff's employer, to recover for injuries received from the alleged negligence of the defendant's driver in unloading his truck. The plaintiff was the operator of a device to insure safe unloading, but, as the device was not functioning, he asked the driver to unload them himself. As the employer of the plaintiff generally controlled the unloading operation and the driver was acting under the orders of the employer's agent (the plaintiff) here, the defendant, though an independent contractor, was the servant of the plaintiff's employer during the unloading, not a third party against whom recovery in addition to workmen's compensation was permitted, and a dismissal of the action was affirmed. Gropp v. Pluid, 91 Idaho 722, 429 P.2d 852, 858.

Idaho, 1967. Com. (d) cit. in sup. The plaintiff driver of an automobile sued two defendants in negligence for his injuries, damages, and the wrongful death of his 15-year-old daughter: the driver and owner of the automobile with which he collided and the driver's employer. The driver was the manager of a plant of his employer and was accustomed to use his auto to obtain

parts for the mill; on this trip he was seeking parts and returning from taking his wife to the dentist. A directed verdict for the employer was reversed, for it was held that there was enough evidence that the employer had sufficient right to control the driver on such trips, and that acting partially for his own purposes was not enough to take the driver's conduct out of the scope of employment, to go to the jury on the question of the defendant employer's liability under the theory of respondeat superior. Van Vranken v. Fence-Craft, 91 Idaho 742, 430 P.2d 488, 493.

Idaho, 1959. Cit. in disc. Where the driver of an automobile which struck the deceased was neither an agent, an employee, nor a servant of the defendant, and the use and operation of the automobile by the driver in reporting to the defendant's place of work was entirely by the driver's own choice and under the complete and independent control of himself, as an individual, the driver would clearly not be a person "employed by another person who is responsible for his conduct" who falls within the scope of the wrongful death statute, and therefore the prospective employer was not found to be liable for the negligent acts committed by the driver in his operation of the automobile. Lallatin v. Terry, 81 Idaho 238, 340 P.2d 112, 116.

Ill.

Ill.2004. Cit. 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 intentionally tortious conduct, or that firm ratified such misconduct. A dissent argued that counsel was both an agent with fiduciary duties and an independent contractor, and determined 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, 297.

Ill.2000. Cit. in disc., com. (c) cit. and quot. in disc., com. (d) cit. in disc. After Little League coach was attacked and beaten by opposing team's manager and assistant coaches, 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 asserted 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.1974. Cit. in disc. After an employee was awarded workmen's compensation for injuries received, his employer and its insurance carrier appealed on the grounds that the worker had been lent to the corporation on whose property the injury occurred and that the corporation was, therefore, a "borrowing employer" and thus liable for the claim under the workmen's compensation act. The court held that the most significant inquiry was whether the corporation had the right to control the manner in which the work was performed, and that, due to the large number of relevant factors, the question of the existence of a lent employee relationship was one of fact to be determined by the industrial commission, and found that the commission's determination that the worker was not a lent employee was not contrary to the manifest weight of the evidence, noting that the employee never consented to a change of employers, that he still received work orders from the appellant, and that the corporation never tried to exercise direct control over him. M & M Electric Co. v. Industrial Com., 57 Ill.2d 113, 311 N.E.2d 161, 163.

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.

Ill.App.2005. Subsec. (1) quot. in case quot. in sup. Employee of refrigerated railroad-car service provider brought action under the Federal Employers' Liability Act (FELA) against a railroad-transportation company that used provider's services, claiming, in part, that, because his direct employer was company's servant, he was an employee of company for FELA purposes, and, therefore, company was liable for his carpal-tunnel syndrome that allegedly resulted from the company's negligence. The trial court granted summary judgment for company. Affirming, this court held, inter alia, that employee failed to show that company had any control over the means and manner of employee's performance; in order to establish the creation of a "subservant" relationship between company and employee, a showing that company directly supervised and controlled employee was required. Larson v. CSX Trans., Inc., 359 Ill.App.3d 830, 296 Ill.Dec. 283, 835 N.E.2d 138, 144.

Ill.App.2005. Com. (i) quot. in sup. 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 the 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, 512, 291 Ill.Dec. 407, 412, 823 N.E.2d 993, 998.

Ill.App.2003. Cit. in disc., coms. (c) and (d) cit. 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. Cit. in sup., com. (i) 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, 936, 276 Ill.Dec. 219, 225, 793 N.E.2d 978, 983, judgment vacated 206 Ill.2d 646, 278 Ill.Dec. 816, 799 N.E.2d 681 (2003).

Ill.App.1994. Com. (d) 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.

Ill.App.1992. Cit. in disc., subsecs. (1) and (2) cit. in disc. A laborer supplied by a labor-leasing firm was seriously injured while working at a railroad yard. The laborer sued the railroad for his personal injuries, pursuant to the Federal Employers Liability Act, alleging that he was an employee of the railroad at the time of the injury, thus within the ambit of the statute. The

trial court entered summary judgment for defendant. Reversing and remanding, this court held that plaintiff presented evidence raising a factual question as to whether defendant controlled or had the right to control plaintiff's activities to render him an employee of defendant for purposes of the statute. The court noted that there were three methods by which plaintiff could have established his employee status with defendant, although nominally employed by another: the borrowed, dual, and subservant theories. Buccieri v. Illinois Cent. Gulf R.R., 235 Ill.App.3d 191, 176 Ill.Dec. 142, 601 N.E.2d 840, 844-846.

Ill.App.1990. Cit. in disc. A drunken motorist was involved in an accident with another car in which he and the other driver were killed and the passenger in the other car was severely injured. At the time of the accident, the motorist was en route to a number of businesses in an effort to sell raffle tickets for a local VFW post. The injured passenger sued the VFW, alleging that the VFW was negligent in failing to regulate its local post by allowing the post to conduct an unlicensed raffle. The trial court dismissed, and this court affirmed, holding, inter alia, that the plaintiff failed to state a cause of action under the doctrine of respondeat superior since he failed to allege an agency relationship between the VFW and the decedent motorist, who was a volunteer for the local post but not an employee. The court noted that the complaint alleged neither that the VFW could control the motorist's conduct nor that the VFW was even aware of his activities. Morgan v. Vets of Foreign Wars of U.S., 206 Ill.App.3d 569, 151 Ill.Dec. 802, 806, 565 N.E.2d 73, 77, appeal denied 139 Ill.2d 598, 159 Ill.Dec. 109, 575 N.E.2d 916 (1991).

Ill.App.1981. Subsec. (1) cit. and quot. in sup. and subsec. (2) cit. in disc. and subsec. (2)(i) cit. and quot. in part in disc. and com. (m) cit. and quot. in part in sup. An injured employee of a wholly owned subsidiary corporation brought an action under the Federal Employers' Liability Act against the parent railroad corporation for injuries alleged to have been sustained in a fall. Following a jury trial, a verdict was returned in favor of the plaintiff and damages were awarded. In answer to a special interrogatory, the jury found that the plaintiff had been employed by the defendant railroad corporation at the time of his injury. The trial court entered judgment on the jury verdict. On appeal, the defendant asserted, inter alia, that the trial court erred in refusing to direct a verdict in its favor on the grounds that insufficient evidence was submitted to establish that the plaintiff was employed by the defendant at the time of his injury, as required for recovery under the Federal Employers' Liability Act. The court stated that proof of railroad employment for purposes of the FELA is strictly limited to evidence of actual control or supervision by the railroad over the physical conduct of the plaintiff or proof that the railroad had the right to control the plaintiff's activities. The court found that the evidence of instances of direct control or supervision by the railroad over the day-to-day performance of the duties of the subsidiary's employees was sufficient to establish employment for the purposes of the FELA. Accordingly, the court held, inter alia, that the trial court properly presented the question of the plaintiff's relationship to the defendant railroad corporation to the jury. The trial court's judgment was affirmed. Kottmeyer v. Consolidated Rail Corp., 98 Ill.App.3d 365, 53 Ill.Dec. 710, 716-718, 424 N.E.2d 345, 351-353.

Ill.App.1979. Cit. in disc. Claimant was injured while painting a car dealership owned by the respondent. The Industrial Commission awarded the claimant workman's compensation; the award was affirmed by the trial court, and the respondent appealed. The owner of the car dealership argued that the claimant was an independent contractor, not an employee, at the time of the incident. The court determined that various factors, particularly the respondent's exercise of the right to control the claimant's work, indicated that the claimant was not an independent contractor. The judgment awarding compensation was affirmed. Bob Neal Pontiac-Toyota v. Indus. Commission, 89 Ill.2d 403, 60 Ill.Dec. 636, 639, 433 N.E.2d 678, 681.

Ill.App.1979. Cit. in disc. (Erron. cit. as Agency.) Accountant partners brought an action against a former associate, seeking damages arising from an alleged breach of an oral employment agreement. The associate counterclaimed for compensation due. The trial court entered judgment in favor of the partners for money received from clients by the associate, and entered judgment in favor of the associate for compensation due. The parties agree that their business relationship was to have been defined in a written agreement, and that such an agreement was never executed. On appeal the plaintiffs argue that the defendant became an employee, while the defendant argues to the contrary. The court affirmed the findings of the lower court and held that the verdict in favor of the partners for money received from clients by the associate did not require the conclusion that the associate collected such fees as an employee of the partners. The court also found that such a verdict could be reconciled with the remaining verdicts in favor of the associate, the substance of which was that the associate was not an employee. In reaching its conclusion, the court stated that determination of whether the relationship of an employer-employee exists depends

on such factors as the matter of having the right to discharge, the manner and direction of the work of the parties, and the right to terminate the relationship, with the right to control the manner of doing work being the most important consideration. Jones v. Atteberry, 77 Ill.App.3d 463, 33 Ill.Dec. 28, 396 N.E.2d 104, 109.

Ill.App.1975. Cit. in case quot. in disc. Plaintiff was a member of a crane crew who was injured at a construction site. Suit was brought against the general contractor, the owner of the project site, and the power company which owned the transmission lines there. The defendant contractor argued that plaintiff was its employee and, therefore, limited to recovery under the Workmen's Compensation Act. Plaintiff contended that he continued to be employed and paid by the company which rented the crane and the crew to the contractor, and that the contractor's employees gave him instructions as to where to place the crane and what functions to perform with it. As a result of one of the instructions, the boom of the crane was hoisted near one of the transmission lines and an electrical charge "arced" off the line and injured plaintiff. The lower court granted the defendant's motion for summary judgment, and this court reversed, finding that there was a triable issue of fact to be determined as to whether plaintiff was a loaned employee at the time of the injury. Dowell v. William H. & Nelson Cunliff Co., 26 Ill.App.3d 388, 324 N.E.2d 660, 663.

Ill.App.1967. Cit. and com. (c) cit. in case cit. in sup. The plaintiff, an employee of a local cartage company which had a contract with the defendant railroad to do "piggyback" work, was injured while in the course of employment. An agreement between the two companies stated that the independent contractor-cartage company's workers were to remain the sole employees of the company and would not be subject to the direction or control of the railroad. The court affirmed a decision for the defendant and agreed that it was a question of fact for the jury as to the plaintiff's employment status, which was found to be as an employee of the cartage company. Waters v. Chicago & E. Ill. R.R., 86 Ill.App.2d 48, 229 N.E.2d 151, 157.

Ill.App.1966. Com. (m) quot. in sup. Plaintiffs were injured in an automobile accident involving an individual who worked for the defendant and was, at that moment, driving his car for business purposes. The relationship between the defendant and the individual driving the car was a cross between an employer-employee relationship and one where he could be considered an independent contractor. In the agreement between the defendant and the tortfeasor it stated that the relationship was that of an independent contractor. The court held that such a statement is not to be considered as conclusive of the issue. The important facts to look to are their conduct, whether one exerts a control over the other, and the overall surrounding circumstances. To hold otherwise, the court stated, would allow an employer to relieve himself from liability for the torts committed by his employee simply by stating in a contract that the relationship is that of an independent contractor. Hamilton v. Family Record Plan, Inc., 71 Ill.App.2d 39, 217 N.E.2d 113, 118.

Ind.

Ind.2013. Cit. in diss. op. Members of the Indiana House of Representatives Democratic Caucus, who left the state to block a vote on impending legislation, sued Speaker of the House, state auditor, and others, seeking to recover amounts that had been withheld from their pay as fines and to enjoin future action to recover the fines. The trial court entered judgment for plaintiffs. Reversing and remanding, this court directed the trial court to dismiss for lack of justiciability. The dissent argued that defendants' seizure of plaintiffs' pay violated the Indiana Wage Payment Statute, contending that plaintiffs were employees of the State, because their wage and salary information was reported on Form W-2; the State provided them with certain benefits, including offices and supplies; they performed the core of their duties (voting on legislation) in the statehouse; and enacting legislation was part of the regular business of the State. Berry v. Crawford, 990 N.E.2d 410, 427.

Ind.2001. Coms. (c), (m), and (j) cit. in disc. Truck driver sued his general contractor after sustaining injuries while refueling truck. Trial court denied defendant's motion to dismiss, which claimed that plaintiff was defendant's employee and, therefore, the workers' compensation act applied. The court of appeals reversed. Vacating and remanding, this court held, inter alia, that sufficient evidence existed to show that plaintiff was not defendant's employee, and thus defendant failed to carry its burden of proving that plaintiff's claim of injury fell within the scope of the workers' compensation act. GKN Co. v. Magness, 744 N.E.2d 397, 402-403, 406.

Ind.2001. Quot. in sup., cit. in case cit. in sup., subsec. (1) quot. in sup., subsec. (2) cit. in sup., coms. (a), (h), and (k) cit. in sup., com. (m) quot. in sup. Man who was injured by brother-in-law while they were doing maintenance work at their father-in-law's farm sued farmer for vicarious liability for brother-in-law's negligence. Trial court entered summary judgment for farmer; appellate court reversed and remanded. This court affirmed trial court judgment, holding that brother-in-law was an independent contractor, not farmer's employee, because the leading factor of control leaned heavily toward independent-contractor status. Brother-in-law was answerable to farmer for results only, not the particulars of how he went about accomplishing assigned tasks. Furthermore, brother-in-law provided the backhoe that was used on the day plaintiff was injured, his hours were not regular, and his service was not continuous. Moberly v. Day, 757 N.E.2d 1007, 1010, 1012, 1013.

Ind.1995. Cit. in headnotes, cit. generally in disc. and in ftn., subsec. (1) quot. in sup., subsec. (1)(a), (g) and (i) cit. in disc. Mortgage broker who located clients for mortgage company in exchange for a commission sued company for breach of contract. Even though the contract was titled, in large bold print, "Independent Contractors Agreement," broker sought liquidated damages pursuant to a state statute providing for employees' remedies. The trial court granted broker's motion for summary judgment and the intermediate appellate court affirmed. Vacating the appellate judgment, affirming in part and reversing in part the trial court judgment, and remanding, this court held that material factual issues existed as to the extent of control company exercised over the details of broker's work, the method of payment, and the parties' belief in the type of relationship—employer-employee or independent contractor—they were establishing. Mortgage Consultants, Inc. v. Mahaney, 655 N.E.2d 493, 493-497.

Ind.App.

Ind.App.2018. Subsec. (1) cit. and quot. in sup., quot. in case quot. in sup.; subsec. (2) quot. in case quot. in sup.; coms. (a) and (d) quot. in case quot. in sup.; com. (h) quot. in sup. Mother of babysitter employed by church brought a wrongful-death action against church and senior pastors that directly supervised babysitter, after babysitter was found unresponsive in employees' swimming pool. The trial court denied defendants' motion to dismiss for lack of subject-matter jurisdiction, in which they alleged that babysitter was their employee and thus the Worker's Compensation Act provided the exclusive remedy. This court affirmed, holding that the evidence supported the trial court's conclusion that babysitter was an independent contractor. The court weighed the factors set forth in Restatement Second of Agency § 220(2) in distinguishing independent contractors from employees, and determined that, while a few factors leaned toward babysitter having employee status, those factors were less significant and did not outweigh the factors leaning toward independent-contractor status, noting that the leading factor of control was neutral. Family Christian World, Inc. v. Olds, 100 N.E.3d 277, 281, 282, 284.

Ind.App.2016. Subsec. (2) quot. in case quot. in sup. Driver brought an action against newspaper, alleging that defendant was vicariously liable for the negligence of newspaper deliverywoman who, while distributing the newspaper, left her vehicle sitting in a northbound lane, which caused plaintiff, who was traveling in a southbound lane, to move his vehicle, lose control, and crash. The trial court granted defendant's motion for summary judgment. This court affirmed, holding that there was no genuine issue of material fact that deliverywoman was not acting as defendant's employee at the time of the accident. The court relied on the factors set forth in Restatement Second of Agency § 220(2), reasoning that defendant did not control the means of how deliverywoman delivered the newspaper, it paid her on a per newspaper basis, deliverywoman provided her own vehicle and insurance, and the contract between defendant and deliverywoman classified her as an independent contractor. Bauermeister v. Churchman, 59 N.E.3d 969, 975.

Ind.App.2016. Cit. and quot. in cases cit. and quot. in sup. Worker who was injured while working for construction company brought a personal-injury action against company. In a separate action, company's insurer sought a declaratory judgment that it had no duty to defend company based on a clause in company's policy that excluded coverage for injuries sustained by employees. The trial court consolidated the two actions and granted company's and insurer's motions for summary judgment. This court affirmed, holding that the trial court did not err in finding, as a matter of law, that plaintiff was company's employee at the time he was injured and that he was required to pursue a claim for benefits under Indiana's Workers' Compensation Act. The

court cited Restatement Second of Agency § 220 for the factors used in distinguishing between an employee and an independent contractor. Vinup v. Joe's Const., LLC, 64 N.E.3d 885, 890, 891.

Ind.App.2015. Quot. in case quot. in sup. Store customer brought a negligence action, inter alia, against store, among others, alleging that defendant was vicariously liable for the actions of a loss-prevention officer who physically attacked plaintiff under the belief that he had shoplifted. The trial court granted summary judgment for defendant. Affirming in part, this court applied the ten-factor test found in Restatement Second of Agency § 220(2) to distinguish between employees and independent contractors, and concluded that the facts in the record supported the trial court's conclusion that the officer was an independent contractor and that, consequently, liability for his actions did not attach to defendant via the doctrine of respondeat superior. Barnard v. Menard, Inc., 25 N.E.3d 750, 756, 757.

Ind.App.2010. Subsec. (1) quot. in sup. Resident of nursing-care facility sued facility, after a member of a local string band that was scheduled to give a free performance at the facility drove a vehicle across facility's front porch and through its wall, striking and injuring resident. The trial court granted summary judgment for facility. Affirming, this court held, among other things, that there was no evidence supporting resident's claim that the band, and thus band member, was acting as an independent contractor to facility such that facility was liable via the non-delegable duty exception to the independent-contractor rule. The court pointed out that the band was to provide musical entertainment as a charitable and entirely voluntary service for the residents of facility, and did not come at facility's behest or under facility's control. Gilbert v. Loogootee Realty, LLC, 928 N.E.2d 625, 633.

Ind.App.2009. Subsec. (1) quot. in case quot. in sup., subsec. (2)(a) quot. in sup. (erron. cit. as § 220(a)), coms. (h) and (m) cit. and quot. in case cit. and quot. in sup. Injured farm laborer brought a negligence claim against licensed harvesting contractor who hired him as part of her crew, and sought to hold produce distributor vicariously liable for contractor's alleged negligence. The trial court granted summary judgment for distributor. Affirming, this court held, inter alia, that licensed harvesting contractor was an independent contractor, rather than distributor's employee, for purposes of determining distributor's vicarious liability for plaintiff's injuries. The court pointed out, among other things, that contractor only answered to distributor regarding the results of the harvest and generally controlled her crew, their methods, and the details of the tasks; contractor was not paid an hourly wage but, instead, was paid a “set rate”; and distributor believed that contractor was an independent contractor. Guillaume v. Hall Farms, Inc., 914 N.E.2d 784, 789, 790.

Ind.App.2009. Subsecs. (2) and (2)(c) cit. and quot. in sup., subsec. (2)(a) cit. in case quot. in sup., subsecs. (2)(b) and (2)(d) cit. in sup., subsecs. (2)(h) and (2)(i) 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, 15, 16, 18.

Ind.App.2008. Subsec. (2) quot. in case quot. in sup. Custodial parent and estate of other parent of a motorist who was killed in a collision with a truck brought a wrongful-death action against truck driver and logging company for which driver was hauling logs when the accident occurred. The trial court granted summary judgment for logging company. Affirming, this court held, inter alia, that the trial court correctly determined, as a matter of law, that truck driver was an independent contractor, and not an employee, of logging company at the time of the accident, and that logging company therefore was not liable for truck driver's negligence. The court reasoned that company did not assume control over truck driver in the loading, transporting, or delivering of logs; driver was a skilled laborer who owned the truck he used to haul the logs; driver's hours with company were neither regular nor continuous; and company was not in the business of hauling logs. Beatty v. LaFountaine, 896 N.E.2d 16, 20, 21.

Ind.App.2008. Subsecs. (2)(a)-(2)(j) quot. and adopted in case quot. in sup. (general cite). Sheet-metal worker sued property owners for damages after he fell from owners' roof and was injured. Although the trial court agreed with owners that worker was an independent contractor rather than an employee, it denied owners' motion for summary judgment. Affirming on interlocutory appeal, this court held, inter alia, that the trial court's independent-contractor determination did not require it to grant summary judgment for owners, because the determination of whether owners assumed a duty to provide a safe environment for worker called for a different analysis than was necessary for the independent-contractor determination. Peterson v. Ponda, 893 N.E.2d 1100, 1104.

Ind.App.2008. Cit. in sup., subsec. (2) quot. in case quot. in sup. Worker who delivered newspapers for company sued company for unpaid wages and damages under Indiana wage statutes applicable to "employees." The trial court granted summary judgment for defendant. Affirming, this court held that plaintiff was an independent contractor, not an employee, and thus could not recover under the statutes. The court pointed out, among other things, that plaintiff had significant control over the method and details of his work, provided his own vehicle, paid for supplies provided by defendant, and was paid on a per-newspaper basis; additionally, defendant was not responsible for providing benefits or withholding taxes, and the parties' contract, which referred to plaintiff as an independent contractor, specifically entitled him to seek additional work and maintain his own hours. Snell v. C.J. Jenkins Enterprises, Inc., 881 N.E.2d 1088, 1091.

Ind.App.2008. Subsecs. (1) and (2) quot. in sup.; com. (h) quot. in case quot. in sup. (erron. cit. as subsec. (2)); com. (m) quot. in case quot. in sup. After car passenger was killed in a collision with truck that was hauling logs, passenger's parents brought wrongful-death action against truck's driver/owner and company that hired driver. The trial court granted summary judgment for company. Affirming, this court held that company was not liable for driver's actions, because driver was an independent contractor, not an employee; while driver painted company's logo on his truck and acted as company's primary log hauler, he alone controlled the loading and driving of the truck, his hours were not regular and his service for company was not continuous, he was free to and did in fact haul logs for other parties, and he believed that he was an independent contractor. Walker v. Martin, 887 N.E.2d 125, 131, 133, 134.

Ind.App.2006. Subsec. (1) and com. (d) quot. in case quot. in sup.; subsec. (2) cit. and quot. in sup., quot. in case quot. in sup., and cit. generally in conc. and diss. op.; com. (h) cit. in sup. and quot. in case quot. in sup.; com. (m) quot. in sup. After company was sued by worker who suffered injuries from an electric shock, insurer that defended company sued worker, seeking a declaratory judgment that worker was not covered under the insurance policy because he was an employee rather than an independent contractor. The trial court granted summary judgment for insurer. Reversing and remanding for trial, this court found that the 10 factors used by Indiana in distinguishing employees from independent contractors were split fairly evenly and revealed substantial issues of material fact. The concurring and dissenting opinion argued that analysis of the evidence with regard to each particular factor should have been left to a trier of fact. Carter v. Property Owners Ins. were neither regular nor continuous; and company was not in the business of hauling logs. Beatty v. LaFountaine, 896 N.E.2d 16, 20, 21. Co., 846 N.E.2d 712, 717-722.

Ind.App.2005. Com. (j) cit. in case cit. in disc. Hospital nurse who was employed by a temporary staffing company sued hospital for negligence after he was stuck with an infected needle. The trial court dismissed the suit. This court affirmed, holding that subject-matter jurisdiction was lacking because plaintiff was a co-employee of hospital and staffing company, thus making him eligible for company's workers' compensation but barring him from suing hospital for damages. In balancing factors established by the state supreme court, the court held that hospital proved that plaintiff was a co-employee. The court noted that, since the contract between company and plaintiff showed that the duration of plaintiff's hospital assignment was only 13 weeks, the "length of employment" factor weighed against finding that he was a co-employee. Jennings v. St. Vincent Hosp. and Health Care Center, 832 N.E.2d 1044, 1053.

Ind.App.2004. Subsec. (2) quot. in case quot. in sup., com. (i) cit. in sup. Sign-business operator, injured while doing work for another company, appealed decision of workers' compensation board denying operator's claim for benefits. Finding that

operator was independent contractor and not employee of the other company, this court affirmed the board's decision. Howard v. U.S. Signcrafters, 811 N.E.2d 479, 482, 483.

Ind.App.2002. Cit. in sup., cit. in diss. op., subsec. (2) cit. and quot. in sup., com. (i) cit. in sup., com. (m) quot. in sup. Auto dealership challenged worker's compensation board's determination that claimant, who drove vehicles to and from auction sites for dealership, was employee. Affirming, this court applied the ten-factor Restatement test to conclude that claimant was dealership employee based on length of relationship, parties' subjective belief, fact that work was regular part of dealership's business, fact that dealership supplied instrumentalities to do work, and fact that claimant had no special skills or separate business. The dissent argued that while most of the ten factors were evenly balanced, the dealership's lack of control over the claimant's work indicated that claimant was an independent contractor. Expressway Dodge, Inc. v. McFarland, 766 N.E.2d 26, 29, 31-33.

Ind.App.2002. Adopted in case cit. in sup., quot. in sup., subsec. (1) quot. in case quot. in sup., subsec. (2) quot. in sup., com. (d) cit. in case cit. in sup. Automobile insurer sued insured magazine-subscription-processing company for a declaratory judgment that liability coverage did not exist for death of passenger in sales-crew manager's van. Affirming the trial court's entry of judgment for insured, this court held that, because passenger was not an employee of insured at the time of his death, the insurance policy's exclusion of liability coverage for injury to employees did not apply. Indiana Ins. Co. v. American Community Services, Inc., 768 N.E.2d 929, 936-938.

Ind.App.2002. Quot. in case quot. in sup., cit. in sup. Patron sued adult entertainment club for damages after male exotic dancer fell and landed on patron's hand. The trial court denied club's motion to strike affidavit of club's former general manager and club's motion for summary judgment. Affirming, this court held, inter alia, that, where club exerted some degree of control over dancer's work but did not supply costumes, provide benefits, or withhold taxes, genuine issue of material fact existed as to whether dancer was employee or independent contractor of club. P.T. Barnum's Nightclub v. Duhamell, 766 N.E.2d 729, 738, 739.

Ind.App.2000. Cit. in disc. Leased workers brought action against employee-leasing company, seeking to recover unpaid wages under the Indiana Wage Payment Statute. The trial court entered summary judgment for defendant. Affirming, this court held, in part, that plaintiffs, having failed to show that defendant exercised or even retained any right to exercise control over their conduct, had not established the existence of an employment relationship such that defendant could be found statutorily liable for unpaid wages. Black v. Employee Solutions, Inc., 725 N.E.2d 138, 143.

Ind.App.2000. Subsec. (i) cit. in ftn. Driver and passenger who were injured when their truck was struck by a vehicle escorting a tractor-transported modular home sued company that was transporting the modular home, among others, for negligence. Trial court granted summary judgment to defendant. This court affirmed, holding, inter alia, that no employer-employee relationship existed between defendant and the tractor driver or between defendant and the escort-vehicle driver, since defendant did not hire the escort-vehicle driver, the driver did not think he was the defendant's employee, and the defendant could not fire him. Similarly, tractor driver and defendant had entered into contracts specifically stating that the tractor driver was an independent contractor. Kahrs v. Conley, 729 N.E.2d 191, 194.

Ind.App.2000. Cit. in disc., quot. in case cit. in ftn., cit. in diss. op. Individual who was struck by brother-in-law's backhoe as he and brother-in-law were working on their father-in-law's farm brought personal-injury action against father-in-law, alleging that he was liable under a theory of respondeat superior. The trial court entered summary judgment for defendant. Reversing and remanding, this court held, in part, that material factual issues existed as to whether brother-in-law was defendant's employee at the time of the incident. Dissent argued that, in determining brother-in-law's status, the trial court correctly applied a seven-factor test, under which it found him to be an independent contractor. Moberly v. Day, 730 N.E.2d 768, 769, 771, vacated 757 N.E.2d 1007 (2001). See above case.

Ind.App.2000. Cit. in ftn. Parents of two boys who were sexually molested by a Little League equipment manager sued the Little League for vicarious liability and negligence. Trial court entered judgment on jury verdict for the parents. This court affirmed, holding, inter alia, that fact issues existed as to whether the manager's acts were authorized by the Little League. Manager, who was under the direct supervision of the Little League board of directors and could be discharged by it, was an "employee" for purposes of the doctrine of respondeat superior. Southport Little League v. Vaughan, 734 N.E.2d 261, 268.

Ind.App.1999. Cit. in ftn., subsec. (2) quot. in ftn., com. (*l*) quot. in ftn. Construction company carpenter was injured while installing roof trusses on a townhouse when a crane operator raised the truss unexpectedly. The injured carpenter sued the crane service that assigned the crane operator, alleging negligence. Trial court dismissed for lack of subject matter jurisdiction, holding that plaintiff and the crane operator were coemployees. This court affirmed, holding, inter alia, that the trial court properly determined that the crane operator was also an employee of the construction company when plaintiff was injured, in light of the construction company's control of the crane operator's work at the job site. Nowicki v. Cannon Steel Erection Co., 711 N.E.2d 536, 544.

Ind.App.1972. Cit. in sup. This was an action against a commission salesman and his employer for negligence in an automobile accident. The salesman was on his day off, and on the way home to lunch, but he was returning from a sale to a customer and had arranged for other appointments in the afternoon. The employer had reimbursed him for his mileage incurred in the morning sale. The salesman received fringe benefits, insurance, and paid vacations. The court held that there was sufficient evidence for the jury to find that there was a master-servant relationship at the time of the accident because the facts indicated a right to direct and control the conduct of the salesman by the employer. Gibbs v. Miller, 283 N.E.2d 592.

Iowa

Iowa, 2003. Subsec. (2)(a) quot. in disc. Wife sued hospital for medical malpractice after husband's death from respiratory difficulties following surgery. Trial court entered judgment on jury verdict for wife. This court affirmed and modified, holding, inter alia, that hospital had nondelegable duty to provide competent medical care to outpatients and inpatients relying on emergency-room physicians in absence of their personal physicians; therefore hospital was vicariously liable for negligent acts of its physicians. Wolbers v. The Finley Hospital, 673 N.W.2d 728, 733.

Iowa, 1995. Cit. in disc., com. (m) quot. in case quot. in sup. Unemployed tractor trailer driver challenged a decision by the Department of Employment Services denying him benefits on the ground that he had been an independent contractor, not an employee, of his former employer. In reaching his decision, the administrative law judge (ALJ) relied exclusively on the fact that two agreements between driver and employer indicated that the parties intended for driver to be an independent contractor. The trial court affirmed. Reversing and remanding for a new trial before the ALJ, this court held that he applied an incorrect legal standard when he determined driver's status by focusing on the parties' intent to the exclusion of other relevant factors. Gaffney v. Dept. of Employment Services, 540 N.W.2d 430, 434.

Iowa, 1986. Cit. in disc. A county employee was injured at a work site by the defendant, who had been hired by the county to furnish and operate a dragline machine for the bridge-building project. The employee sued the defendant for negligence, and the defendant claimed that because he was a county employee, he was entitled to two statutory affirmative defenses. The trial court held that the evidence would not support a finding that the defendant was a county employee, and entered judgment for the plaintiff. This court affirmed, holding that the evidence that the defendant brought his own employees to the work site and often sold his services as the operator of his own equipment, and that the parties had not intended for the defendant to be a county employee supported a finding that the defendant was an independent contractor, even though the county controlled the work site. Peterson v. Pittman, 391 N.W.2d 235, 237.

Iowa, 1985. Subsec. (1) quot. in disc. The plaintiff, a psychiatrist, appealed a district court decision affirming the ruling of the Iowa Department of Social Services that she violated agency rules governing the Medical Assistance Act. The plaintiff had entered into an agreement with a corporation providing psychological services, whereby she would act as medical director for the

corporation in return for a salary. Plaintiff's services as a supervisor entitled the corporation to receive payment for the services through Medicaid, as Medicaid was paid only to individuals with provider numbers, which were issued only to physicians. The court upheld a hearing officer's determination that an employment relationship did not exist between the plaintiff and the psychologists employed by the corporation, that the relevant administrative rule required direct supervision of the psychologists, that clinical records had been improperly maintained, that the plaintiff did not meet the burden of proof necessary to estop the agency from asserting violations, and that the agency had the authority to impose sanctions on the plaintiff by recovering improperly paid claims. The court noted the Restatement's definition of "servant" in its discussion of whether the plaintiff was in an employment relationship with the corporation. Fernandez v. Iowa Dept. of Human Services, 375 N.W.2d 701, 706.

Iowa, 1984. Cit. but not fol. in case cit. in sup., cit. in disc. A salesman sued his alleged former employer to recover commissions, liquidated damages, and attorney's fees. The trial court entered judgment for the salesman. This court affirmed, holding that the trial court properly instructed the jury that the most important consideration in determining whether the salesman was an employee or independent contractor was the right to control the physical conduct of the salesman and not the parties' intention about the relationship they created. Miller v. Component Homes, Inc., 356 N.W.2d 213, 217.

Iowa, 1979. Cit. in sup. and com. (d) cit. in sup. The Public Employment Relations Board appealed from a lower court decision holding that it did not have jurisdiction over food service workers at a county public hospital, who alleged that they were wrongfully discharged from their positions because of union activity. On appeal, the court affirmed, holding that the Public Employment Relations Act did not authorize the Public Employment Relations Board to assert jurisdiction in a joint employment situation where one of the joint employers was not a public employer, and the Public Employers Relations Board exceeded its statutory authority in assuming jurisdiction over a dispute between employees and the joint employers. Jackson City Public Hos. v. Public Employment, 280 N.W. 426, 434.

Iowa, 1976. Subsecs. (2)(f) and (2)(i) cit. in sup. As the result of the negligence of two employees of a contractor in assisting a truckdriver for a concrete supplier in dumping his load, plaintiff was injured. Plaintiff argued that the employees were borrowed servants of the supplier at the time of the accident, and, therefore, their negligence should subject the supplier to liability. The court, noting the custom of construction company employees providing guidance to delivery drivers in backing in their loads as part of their work for the construction company, and noting that the employees spent only a short time helping the truckdriver, held that plaintiff had not introduced substantial evidence that the supplier, through the truckdriver, had the right of control of the acts of the employees. Burr v. Apex Concrete Co., 242 N.W.2d 272, 276.

Iowa, 1970. Cit. in sup. After working on the plaintiff's car gratuitously and with the plaintiff's knowledge and consent, the plaintiff's son and a friend took the car out on a highway at night to test it. They drove onto the highway at a low speed, with the friend following the plaintiff's son at a short distance in his own car. The defendant hit the friend's car, which hit the plaintiff's car. The trial court found the plaintiff's son negligent for failing to keep a lookout. The court held that the son was an agent of the plaintiff, so that the son's negligence could be imputed to the plaintiff to bar recovery. Duffy v. Harden, 179 N.W.2d 496, 502, 503.

Iowa, 1963. Cit. in sup. A truck driver was found not to be an employee of a pie shop where the driver owned his own truck, bought and sold pies at prices fixed by the pie shop, had no schedule, and was not compensated by the shop, although in actual practice he did load the pies at a certain time each day and the contract was terminable by written notice. Schlotter v. Leudt, 255 Iowa 640, 123 N.W.2d 434, 437.

Iowa, 1961. Cit. in sup. In an action on behalf of a widow for workman's compensation, where a truck owner leased his truck to a company on a single-trip basis under a written agreement that the company, paying a stipulated price per hundred pounds of cargo, would be responsible for any loss or damages to cargo and equipment, and for any property damage or public liability resulting from the operation of the equipment, the truck owner was an employee, not an independent contractor, of the company at the time he was killed while making a trip on behalf of the company. Daggett v. Nebraska-Eastern Express, Inc., 252 Iowa 341, 107 N.W.2d 102, 107.

Kan.

Kan.1992. Subsec. (2) cit. in disc. Worker injured in grain elevator by employee on assignment from temporary agency sued agency and elevator operator for negligence. The jury returned a verdict for worker after the trial court denied agency's motion for directed verdict. Affirming in part, this court held that enterprise justification for vicarious liability required that agency be held liable unless it relinquished sufficient control over employee to establish abandonment. It held that the trial court did not err in submitting the issue of abandonment to the jury, since borrowed employee could be employee of both operator and agency concurrently where agency did not abandon employee's services to operator. Bright v. Cargill, 251 Kan. 387, 837 P.2d 348, 366, appeal after remand 254 Kan. 853, 869 P.2d 686 (1994).

Kan.1988. Cit. in disc., com. (h) cit. in disc., cit. in diss. op. Motorists who were injured when their pick-up truck was struck by a car driven by a pastor sued the pastor for negligence and his diocese under the theory of respondeat superior. The trial court granted summary judgment for the diocese. Affirming, this court held as a matter of law that the legal relationship of the pastor to the diocese was that of an independent contractor, because he was driving his own automobile on the day of the accident and the details of his work were not under the control of the diocese; therefore the pastor's negligence could not be imputed to the diocese. The dissent argued that the motion for summary judgment should have been denied because it raised a genuine issue of material fact regarding the status of the pastor as an employee and whether he was acting within the scope of his employment at the time of the accident. Brillhart v. Scheier, 243 Kan. 591, 758 P.2d 219, 223, 225.

Kan.1984. Subsec. (1) quot. in case quot. in disc. Plaintiff sued doctor, nurse anesthetist, and hospital for injuries resulting from alleged negligent administration of an anesthetic prior to a caesarean section and the failure of all involved to advise her of the risks of the operation or of the anesthetic used. The district court granted summary judgment for defendants. This court reversed and remanded, holding, inter alia, that whether the doctor had control over the work of the nurse anesthetist and was therefore liable for the anesthetist's negligence was a matter for the trier of fact, and that the hospital and the nurse anesthetist failed to establish that they included in a release which named only the anesthetic's manufacturer. McCullough v. Bethany Medical Center, 235 Kan. 732, 683 P.2d 1258, 1262.

Kan.1970. Quot. in part in sup. At the time in question defendant was a licensed used car and mobile home dealer. Defendant's employee had made a sale of a mobile home in which two used cars were to be a down payment. After the contract, which was complete on its face, was signed the employee furnished the customer a dealer's license plate to bring the cars to the place of business. The customer could not bring the cars himself, so he secured the services of another man to be the driver. Enroute to the defendant's business, the driver was involved in an accident in which the plaintiff was injured. The issue was whether the driver under such circumstances was an agent of the defendant. The court reversed a judgment against the defendant, finding as a matter of law that there was no substantial evidence to support the finding of the jury that the driver was acting as the defendant's agent when the collision occurred. Hughes v. Jones, 206 Kan. 82, 476 P.2d 588, 593.

Kan.1961. Cit. in sup. Where patient brought a malpractice action against a surgeon, an anesthesiologist, and a resident physician who administered anesthesia, court held that patient had good claim and cause of action against all since the surgeon had general responsibility for the operation. Voss v. Bridwell, 188 Kan. 643, 364 P.2d 955, 966.

Kan.App.

Kan.App.2019. Cit. in disc., quot. in case quot. in disc.; com. (b) cit. in disc. Patient brought a lawsuit against physician, alleging that defendant committed malpractice arising from negligently performed surgery. The trial court granted defendant's motion for summary judgment. This court affirmed, holding, inter alia, that defendant was an employee of a municipal hospital, and that plaintiff failed to comply with state statutes requiring plaintiff to provide defendant with written notice of a pending lawsuit. The court cited Restatement Second of Agency § 220 in explaining that defendant was an employee of the government because the hospital controlled several aspects of his work, such as the amount of fees charged for his services and whether

he could accept a new patient, and the language of defendant's employment contract referred to the hospital as "employer" and defendant as "employee of employer." Nash v. Blatchford, 435 P.3d 562, 571, 572, 574.

Kan.App.2011. Subsec. (2) quot. in case quot. in sup. Truck driver filed a claim for workers' compensation benefits, alleging that she was injured during the course of her employment with company that leased trucks to drivers such as herself to haul loads for company and various brokers. After driver's claim was granted, the state board affirmed. Affirming, this court held that driver was an employee of company rather than an independent contractor; among other things, company retained sufficient control over driver's conduct to support the board's finding that she was an employee, and driver did not have a business distinct from her relationship with company, because company owned and supplied the truck for her hauling business, and if company decided not to supply her with a truck, her business would end. Olds-Carter v. Lakeshore Farms, Inc., 45 Kan.App.2d 390, 250 P.3d 825, 834.

Kan.App.2009. Subsec. (2) cit. and quot. in cases quot. in disc. State workers' compensation division found cab company and its owner statutorily liable for civil penalties arising from company's failure to maintain workers' compensation insurance for its drivers; the trial court affirmed. This court affirmed the trial court's determination that the cab drivers were employees of the cab company, rather than independent contractors, noting that, while Kansas courts primarily employed the “right to control” test in making employee/independent-contractor determinations, they could also consider certain other factors, including those set forth in Restatement Second of Agency § 220(2). Here, for example, the trial court found that none of the drivers held themselves out as being in business for themselves, and company owned the cabs, paid insurance on the cabs, secured licensing from the city to operate the cabs, and paid for all cab repairs. Hill v. Kansas Dept. of Labor, Div. of Workers Compensation, 42 Kan.App.2d 215, 210 P.3d 647, 654, 655.

Kan.App.2005. Subsec. (2) cit. in sup. Insurance company sued insured for payment of a premium adjustment based on an audit that company had conducted at the end of the policy period, which, insured contended, included independent contractors that should not have been covered by the policy. The trial court entered judgment for company in an amount less than the company had requested. Affirming, this court held, inter alia, that independent contractors were not employees and were, therefore, not covered by the policy; because insured did not control its independent contractors or monitor their work hours, provide them with tools, vehicles, or other workers, or pay them W-2 wages, those individuals were self employed and did not expose the company to any potential liability for workers' compensation benefits under the policy. Travelers Indem. Co. of Ill. v. Challenger Fence Co., Inc., 34 Kan.App.2d 276, 119 P.3d 666, 668.

Kan.App.2001. Subsec. (2) quot. in sup., cit. in case cit. in sup., and cit. generally in sup. Patient who had suffered a stroke sued doctor after he misdiagnosed her condition as a diabetic episode. Trial court granted doctor summary judgment, holding that doctor was a hospital employee under state tort claims act, and that notice was required under act. This court affirmed, holding, inter alia, that, standing alone, the fact that hospital had no right to control or supervise doctor in his professional care of any individual patient was not sufficient to create independent-contractor relationship. Doctor was an employee, because hospital had right to exercise enough control over him to see that his treatment was within professional standards. Hospital supplied doctor's facilities, equipment, supplies, and insurance; it paid him a salary; and contract did not state that parties intended independent-contractor relationship. Knorp v. Albert, 29 Kan.App.2d 509, 28 P.3d 1024, 1028, 1029.

Ky.

Ky.2002. Cit. in diss. op., subsec. (2) cit. and quot. in sup. and cit. in diss. op., subsecs. (2)(b), (2)(f), and (2)(h) cit. in sup. Two former newspaper delivery persons filed claims for unemployment-insurance benefits. State unemployment insurance commission upheld finding of state division of unemployment insurance that they were employees and not independent contractors. Trial court affirmed, but appellate court reversed, holding that newspaper carriers were independent contractors. This court reversed, holding that commission provided sufficient reasons to support its decision that carriers were in fact employees and not independent contractors. The court stated that while ability to control specific details of the work was an important factor, no single Restatement factor was determinative of whether a person was an employee or independent contractor

for unemployment-insurance purposes. Dissent argued that carriers were independent contractors, since the extent of control that newspaper exercised over details of the work was the principal standard. Kentucky Unemployment Ins. Com'n v. Landmark Community Newspapers of Kentucky, Inc., 91 S.W.3d 575, 578-580, 582.

Ky.1971. Subsec. (2) cit. in sup. The plaintiff, administratrix of the estate of the deceased mechanic who was killed when struck by a car on a return trip to his garage, brought this action against the defendant insurance company to recover the benefit of a policy, issued to a timber company, which provided a benefit for accidental death of any employee of the timber company. The court affirmed a judgment dismissing the claim because the following facts indicated that the deceased was not an employee of the timber company: the specific work for which the deceased was hired was the welding of broken parts of a bulldozer; the timber company did not purport to exercise control over the details of how the welding was done, but only over what result was desired; and the return trip to the deceased's garage was for the purpose of accomplishing the specific work project satisfactorily. Mullins v. Western Pioneer Life Insurance Company, 472 S.W.2d 494, 495.

Ky.1971. Cit. but dist. The plaintiff motorist brought this action for personal injuries sustained in a collision on a highway with a mule. Defendants were the owner and the custodian of the mule. The custodian of the mule was the secretary of the company which owned the mule. The court found that the custodian had been negligent in protecting against the mule's escape, but the court did not extend vicarious liability to the owner-company according to the rule of respondeat superior, because the secretary's duties as secretary did not include per se the obligation to serve as custodian of the company's animals. The secretary was not the agent or the servant of the company in caring for the mule; rather she was acting in the capacity of a gratuitous bailee. The court maintained that even if she were regarded as a "non-servant agent," the company was not subject to liability for her actions, since it retained no control or right of control over her conduct. Rankin v. Blue Grass Boys Ranch, Inc., 469 S.W.2d 767, 775.

Ky.1964. Com (c) cit. in sup. The plaintiff was injured when he was run over by a mine motor he was riding. He contended the injury was due to the negligence of the defendant's workmen. The defendant contended that the men were not his workers but were independent contractors. The defendant entered into evidence written contracts of some of the men, his payments to them, his non-payment of social security and withholding taxes. The court held that the ultimate test of agency is right to control, that actual practice may outweigh provisions of a written contract; that a jury may determine the facts for themselves that there was an agency relationship. Coleman v. Baker, 382 S.W.2d 843, 846.

Ky.1962. Cit. in sup. Where deceased bulldozer operator had agreed to split any profits with the owner of the dozer and the defendant company had agreed simply to hire the dozer and operator at certain hourly rates, the operator was not the employee of the defendant. Sellards v. B. & W. Coal Co., 358 S.W.2d 363, 364.

Ky.1961. Cit. in sup. Where decedent had been hired by a carpenter who had in turn been hired to repair defendant's building on an hourly basis and, in other respects, was an independent contractor, decedent was not employee of defendant and was not entitled to compensation therefrom. Johnson v. Winburn, 353 S.W.2d 209, 211.

Ky.App.

Ky.App.2011. Subsec. (2) quot. in sup. and adopted in case cit. in sup. School board sought judicial review of the Kentucky Unemployment Insurance Commission's order that claimant, who was a substitute teacher, was eligible for benefits. Reversing the Commission's order, the trial court ruled that substitute teaching did not qualify as covered employment under the applicable statute, thus rendering substitute teachers categorically ineligible for unemployment benefits. This court reversed that ruling, vacated the remaining portions of the trial court's order, and remanded the matter to the Commission for a hearing regarding the nature of the employment relationship between claimant and school board on the basis of the common-law factors identified in Restatement Second of Agency § 220(2). Kentucky Unemployment Ins. Com'n v. Boone County Bd. of Educ., 354 S.W.3d 605, 608.

Ky.App.2009. Subsec. (2) quot. in case quot. in sup. Victims of an automobile collision caused by motorist sued, among others, grocery store that employed motorist's wife, alleging that motorist was store's agent, because he was on an errand to buy sausage for store at the time of the accident. The trial court granted summary judgment for store. Affirming, this court held, inter alia, that store could not be liable for damages caused by motorist's negligence as a matter of law, because there was no evidence that store exercised any control over motorist. The court noted that, apart from supplying the money to wife, who gave the money to motorist to buy the sausages, store did not exercise any control over how motorist performed the task; motorist drove his own vehicle, chose the route he traveled, and could have decided not to complete the errand without any direct consequences from store. Brooks v. Grams, Inc., 289 S.W.3d 208, 212.

Ky.App.2007. Subsec. (2) quot. in case quot. in sup. After subcontractor failed to pay subsubcontractor for work performed on a construction project, subsubcontractor sued owner of the project and filed a mechanic's and materialman's lien against the property. The trial court granted summary judgment for owner. Affirming, this court held, inter alia, that subsubcontractor's prelien notice to owner was untimely. The court rejected subsubcontractor's argument that the prelien notice was not required because general contractor was owner's agent, reasoning that a general contractor was not deemed an agent of a landowner as a matter of law, and, in any event, the evidence showed that owner did not make daily decisions on the worksite and general contractor provided the workers and tools for the job. Brock v. Pilot Corp., 234 S.W.3d 381, 385.

Ky.App.2004. Subsec. (1) cit. and quot. in sup. subsec. (2) cit. in case cit. in sup., com. (g) quot. in ftn. Manager/partner of a limited-liability company filed claim for unemployment benefits. Trial court affirmed an order of the Kentucky Unemployment Insurance Commission denying plaintiff unemployment benefits. This court affirmed, holding that plaintiff was not an employee of the company so as to be entitled to unemployment benefits. The court stated that plaintiff made all the decisions pertaining to the operations of the company and referred to the company as being “my company.” Borkowski v. Com., 139 S.W.3d 531, 533, 534.

Ky.App.2000. Cit. in case quot. in disc. Employee of independent contractor retained by railroad to perform specialized ballast-cleaning work sued railroad for negligence under the Federal Employers' Liability Act (FELA). The trial court entered summary judgment for defendant. Affirming, this court held that defendant did not retain the right to control the manner of contractor's work, and that therefore plaintiff could not be considered defendant's employee for FELA purposes. Brown v. CSX Transp., Inc., 13 S.W.3d 631, 633.

Ky.App.1979. Cit. in sup. The Workmen's Compensation Board awarded benefits to a salesman's widow, on behalf of herself and her infant child, after the salesman was fatally injured while attempting to return to his house from a sales meeting and social event sponsored by his employer. In this action, employer appealed from a judgment of the lower court affirming the decision of the Board. On appeal, the employer denied that he had an obligation to compensate the salesman's dependents, arguing that the salesman was an independent contractor not an employee, and that, notwithstanding his status, the salesman did not die of a work related injury. This court rejected the employer's argument and affirmed the judgment of the lower court. The court found specifically that the salesman's services formed an inseparable part of the regular business of the employer and were, therefore, entitled to protection under the Workmen's Compensation Law. The court also found that the accident occurred during the course of a special errand for the employer and was, therefore, a work related injury. Husman Snack Foods Company v. Dillon, 591 S.W.2d 701, 703.

La.

La.2004. Com. (a) cit. in case cit. in disc. Widow and child of duck hunter killed in hunting accident brought negligence action alleging employer was vicariously liable for tortuous conduct of employee who fired fatal shot. Trial court granted summary judgment in favor of employer, and court of appeal affirmed. Affirming, this court held that shooter's general activities at the time of the accident were not within the scope of his employment, and, therefore, employer was not vicariously liable. Richard v. Hall, 874 So.2d 131, 138 (La.2004), **6.

La.1990. Subsec. (1) and com. (a) cit. in disc. A guest at a hunting camp who was accidentally shot by his host sued his host's employer, since the host entertained guests at the camp as part of his regular business activities. The trial court found the employer vicariously liable for the host's actions. Reversing, the intermediate appellate court found the employer not liable, because the accident did not occur within the scope of the host's employment. This court reversed, finding the host's use of the camp, which was to further his employer's business interests, within the scope of his employment. Ermert v. Hartford Ins. Co., 559 So.2d 467, 476.

Me.

Me.2011. Cit. in treatise cit. in diss. op. Claimant who was hired by an employment agency and assigned to work at bottling plant of agency's client filed, among other things, a petition to remedy discrimination pursuant to Maine's Workers' Compensation Act against client, alleging that he was injured while working at client's plant and was fired for exercising his rights under the Act. The workers' compensation board hearing officer denied claimant's petition. Affirming, this court held that claimant did not have a right of action against client, because he did not have a contract for hire with client, and thus client was not his employer. The dissent argued that, under the traditional eight-part test for determining an individual's employment status, claimant was an employee of client. Doughty v. Work Opportunities Unlimited/Leddy Group, 2011 ME 126, 33 A.3d 410, 419.

Me.2006. Cit. in diss. op. Survivors of motorist killed in a car accident with a driver returning home after working at an annual promotional event sponsored by his employer sued driver and his employer. The trial court granted summary judgment for employer. Vacating and remanding, this court held that genuine issues of material fact existed as to whether driver was acting within the scope of his employment at the time of the accident so as to hold employer vicariously liable to plaintiffs. The dissent argued that, pursuant to the "going and coming" rule, driver was not acting within the scope of his employment during his commute because he was not subject to employer's control and was not acting with a purpose to serve employer, and that the "special mission" exception to the rule did not apply. Spencer v. V.I.P., Inc., 910 A.2d 366, 371.

Me.1999. Com. (j) cit. in ftn. Plaintiff, who allegedly suffered personal injuries when he was struck by car driven by newspaper carrier, brought, in part, vicarious-liability claim against publishing company. The trial court granted summary judgment for defendant. Vacating in part and remanding, this court held, inter alia, that genuine issues of material fact as to whether carrier was defendant's employee or an independent contractor precluded summary judgment. Legassie v. Bangor Pub. Co., 1999 ME 180, 741 A.2d 442, 446.

Me.1997. Com. (j) cit. in sup., com. (k) quot. in disc. After a worker suffered injuries when he fell off a ladder while replacing a roof on a store, he sued the storeowner for negligence. The store's insurer brought suit seeking a declaratory judgment that it was not obliged to defend or indemnify the store because bodily injury to an employee was excluded from coverage. Trial court granted insurer summary judgment. This court affirmed, holding that trial court properly ruled that plaintiff was an employee within the meaning of the commercial general liability policy. Plaintiff's short period of employment was insufficient to establish his status as an independent contractor, given the fact that he was paid by the hour and given the lack of other evidence supporting such a determination. Although plaintiff brought his own hand tools and shovels, on a comparative basis the storeowner provided far more valuable equipment—air guns, pump jacks, scaffolding, and a ladder. North East Ins. Co. v. Soucy, 693 A.2d 1141, 1145, 1146.

Me.1972. Com. (m) cit. in diss. op. in sup. Defendant, supplier of hardware and plumbing equipment, contracted with a homeowner to replace a sink and counter and install new cabinets in her kitchen, and arranged with plaintiff to do the necessary carpentry work on the job, as was done often in the past. As that job neared completion, plaintiff arranged with the homeowner to install a new kitchen ceiling and was injured during the course of that work. The dissent argued that plaintiff's characterization of himself as a self-employed person was not conclusive against him, and the fact that defendant had the right to direct how and when the carpentry was to be done indicated that plaintiff was sufficiently under defendant's control to take him out of the category of independent contractor. Michaud v. Charles R. Steeves & Sons, Inc., 286 A.2d 336, 342.

Md.

Md.2001. Adopted in case quot. in disc., quot. in ftn., cit. 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, 389, 390, 392, 780 A.2d 303, 317, 319.

Md.1985. Com. (m) cit. in diss. op. An employee of a temporary services agency sued a company to which he had been provisionally assigned for negligence, seeking damages for injuries he received on the job. After the case went to the jury and the jury awarded damages to the plaintiff, the trial court granted judgment n.o.v. for the company and dismissed the negligence action. The employee appealed, but before consideration by the appellate court, this court granted certiorari on its own motion. This court affirmed, holding that the employee was also an employee of the company to which he was provisionally assigned, and his exclusive remedy against the company was under the workmen's compensation laws, because of the control the company exercised over the employee. The dissent argued that the question of whether the plaintiff was an employee of the company was for the jury to decide, and that the evidence the employee produced was sufficient to support the jury's conclusion that the company's control over him was minimal and that the temporary services agency was his exclusive employer. Whitehead v. Safway Steel Products, 304 Md. 67, 497 A.2d 803, 816.

Md.1971. Cit. subsecs. (a) and (b) in sup. The pilot of a helicopter, used in traffic reports for a radio station, was killed in a crash. His widow filed a Workmen's Compensation claim against the company owning the helicopter. On appeal, the question was whether the pilot was an employee of the radio station or of the helicopter company. The court upheld the finding of the Workmen's Compensation Commission that the pilot was an employee of the helicopter company. The pilot was supplied under contract to the radio station by the company, who paid his salary, had the right to control his work or terminate his services, and provided the pilot as part of the company's regular business. Loving Helicopter v. Kauffman, 13 Md.App. 418, 283 A.2d 640, 643.

Md.1963. Cit. in sup. Where an experienced practical nurse who cared exclusively for single nursing home patient and who was selected by nurses' registry rather than by home, but who was paid by home only as a matter of convenience and said home was reimbursed from patient's trust income, said nurse was not an employee of home and not entitled to recover workmen's compensation from it. Edith A. Anderson Nursing Homes, Inc. v. Walker, 232 Md. 442, 194 A.2d 85, 86.

Md.Spec.App.

Md.Spec.App.2012. Subsec. (1) quot. in sup., com. (h) cit. and quot. in sup. Purchaser of a parcel of land sued title insurer and title companies, alleging that title companies had negligently failed to discover and report that the parcel had been previously conveyed to another purchaser, and that title insurer was vicariously liable for their negligence. On remand, the trial court entered judgment for plaintiff. Reversing, this court held, as a matter of first impression, that plaintiff could not hold title insurer vicariously liable for any negligence of title companies, as insurer's agents, with respect to the status of title to the parcel; insurer's liability was limited to the terms of its title-insurance policy. Columbia Town Center Title Co. v. 100 Investment Ltd. Partnership, 203 Md.App. 61, 36 A.3d 985, 1003, 1004.

Md.Spec.App.1990. Subsecs. (1) and (2)(a) cit. in disc. A patient who suffered complications from the administration of anesthesia before surgery brought a medical malpractice action against the lead surgeon, the anesthesiologist, the nurse anesthetist, and the hospital. The trial court entered judgment on the jury's verdict for the surgeon and granted the other defendants' motions for judgment n.o.v. Affirming the judgment for the surgeon and reversing the judgments for the other defendants and remanding, this court held that the trial court properly rejected the plaintiff's proposed jury instruction as to the surgeon's liability based on the “captain of the ship” doctrine. Applying the “borrowed servant” doctrine, which imposed liability

on the lead surgeon for the negligent acts of those he borrowed to perform the surgery only if he controlled their conduct, this court held that there was no evidence that the surgeon in any way supervised or controlled, attempted to supervise or control, or had the right or power to supervise or control the conduct and decisions of the other defendants. Franklin v. Gupta, 81 Md.App. 345, 567 A.2d 524, 535, cert. denied 319 Md. 303, 572 A.2d 182 (1990).

Md.Spec.App.1984. Cit. 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.2018. Cit. in disc., cit. in case cit. in disc. Newspaper-delivery agent under contract with delivery-service provider filed a workers' compensation benefits claim for injuries suffered while loading and delivering newspapers. The administrative judge denied plaintiff's claim; the reviewing board affirmed. This court affirmed, holding that plaintiff was an independent contractor under the workers' compensation statute and the independent contractor statute. In order to determine plaintiff's employment status under the workers' compensation scheme, the court applied the multi-factor test under Massachusetts common law, noting that this test was largely derived from Restatement Second of Agency § 220 and conformed to tests used in other jurisdictions. Ives Camargo's Case, 96 N.E.3d 673, 676.

Mass.2014. Cit. in sup., com. (d) quot. in case cit. in sup. Estate of a residential-treatment counselor who was killed by a patient while working at a treatment facility operated by a charitable corporation that provided mental health and rehabilitation services brought a wrongful-death action against, among others, corporation's directors, alleging that, because of defendants' admissions and operating policies, facility's employees were unaware of patient's mental-health history and record of violent crimes. The trial court granted defendants' motion to dismiss. Vacating and remanding, this court held that, because defendants acted as counselor's employer in voting to adopt or in failing to adopt the corporate policies at issue, they were immune from suit under the exclusive remedy provision of the workers' compensation act for injuries that she sustained while acting within the course of her employment. The court reasoned that, to the extent that plaintiff's complaint alleged that defendants had the ability to direct and control the activities of the facility's employees and to implement workplace safety, the complaint thereby impliedly alleged that defendants were acting in the capacity of an employer. Estate of Moulton v. Puopolo, 467 Mass. 478, 489, 5 N.E.3d 908, 919.

Mass.2003. Subsec. (2) cit. in case quot. in sup. College basketball player who was punched by opposing player during a game sued opposing team's coach and other university's trustees, alleging that university was vicariously liable for conduct of its scholarship athlete and that defendants were negligent in failing to prevent assault. Trial court granted defendants' motions to dismiss and for summary judgment. This court affirmed, holding that assailant's status as a scholarship athlete did not make him university's agent, and thus, university was not vicariously liable for torts committed by assailant while playing for its basketball team. The court rejected assertion that respondeat superior doctrine rendered schools liable for their students' acts, and it declined to treat scholarship students differently from paying students for these purposes. Kavanagh v. Trustees of Boston University, 440 Mass. 195, 198, 795 N.E.2d 1170, 1174.

Mass.2002. Subsec. (2) cit. in sup., com. (d) quot. in sup., com. (c) cit. in ftn. Patient and husband, as administrators of stillborn child's estate, sued medical group, alleging that group was vicariously liable under theory of respondeat superior for malpractice of one of its physicians. Trial court granted group summary judgment. Vacating and remanding, this court held, inter alia, that proof that group controlled physician's actions was not necessary to impose vicarious liability, but fact question remained as

to whether physician was acting within scope of his employment when treating patient. Dias v. Brigham Medical Associates, Inc., 438 Mass. 317, 322, 780 N.E.2d 447, 451.

Mass.2001. Com. (d) quot. in disc. Patient of a city hospital's emergency room sued company that managed the hospital, alleging negligent treatment by a nurse who was a city employee. Jury awarded plaintiff damages, but trial court granted company's motion for judgment n.o.v. This court affirmed, holding, inter alia, that company was not vicariously liable for nurse's negligence. Although company had right to exercise discretion and supervision over nursing staff's activities, patient-care issues were left to the medical staff and hospital board members, who acted for the city. Hohenleitner v. Quorum Health Resources, Inc., 435 Mass. 424, 431-432, 758 N.E.2d 616, 622.

Mass.1985. Com. (i) cit. in disc. Parents sued a medical doctor for malpractice, alleging that the doctor negligently failed to diagnose their son's condition before he died at a city hospital emergency room. The doctor was a second-year resident in a private hospital, but pursuant to the program requirements she "rotated" to work at public hospitals on certain days. The trial court granted the doctor's motion for summary judgment based on the doctor's claim that she was temporarily employed by the city while she was working in the city hospital, and, as a public employee, she was immune to liability under the state tort claim act. Reversing, this court held that there was a genuine issue of a material fact as to whether the city hospital exercised direction and control over the doctor, thus making her a servant of the city. Kelley v. Rossi, 395 Mass. 659, 481 N.E.2d 1340, 1342.

Mass.1978. Subsec. (2) cit. in sup. The Commonwealth appealed from judgments for damages for private nuisance resulting from oil seepage from fuel tanks at a state school into a brook running through the premises of the three plaintiffs. This court upheld the retroactive application of a prior decision holding that the Commonwealth was not immune from liability if it creates or maintains a private nuisance which causes injury to the real property of another, and rejected the Commonwealth's contention that the seepage resulted from the negligent acts of an independent contractor, where the evidence showed that the Commonwealth retained the right and power of directing in detail how the alleged independent contractor's work should be done. Bousquet v. Commonwealth, 374 Mass. 824, 372 N.E.2d 257, 258.

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 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.1969. Quot. in sup. Plaintiffs were struck by defendant driver. He had been told to leave the site of the job, and go to the office to pick up the payroll. The accident happened while he was enroute. Plaintiffs sued both the driver and his employer. The trial court gave judgment for the employer, because the driver was not its servant at the time. The court on appeal reversed. It held that, although he was driving his own car and chose the route, the employer had the right to control the performance of his services. The court abandoned the old rule whereby the employer had to control the manner and means of the performance. The court in reversing the decision held that there must be a relation between the duties being performed as servant, and the act that caused the injury. Konick v. Berke, Moore Co., 355 Mass. 463, 245 N.E.2d 750, 751.

Mass.1969. Cit. in sup. The plaintiff, a wrestling fan, sued the defendants, a wrestling matchmaker and the arena owner, for injuries sustained when one of the wrestlers in the match was thrown out of the ring. The court ruled that the defendant arena owner who had seen wrestlers thrown from the ring before, was negligent in failing to warn the plaintiff of this possibility. The court also ruled that the defendant wrestling matchmaker could not be held liable for the action of the wrestlers he hires. Silvia v. Woodhouse, 356 Mass. 119, 248 N.E.2d 260, 264.

Mass.1964. Cit. in sup. Guest in defendant's motel sustained injuries when she slipped and fell after getting out of a tub because of her inability to shut off the hot water on a shower fixture. The motel owner was not liable when the fixture was new, and the owner made a daily inspection of the shower handles and there was no evidence that the owner knew or should have known of any defects in the fixture. The owner was also not liable for the negligence, if any, of the plumber who completed the installation since it appeared that he was an independent contractor. Bearse v. Fowler, 347 Mass. 179, 196 N.E.2d 910, 912.

Mass.App.

Mass.App.2011. Subsec. (2) cit. in ftn. and cit. in case cit. in disc. Construction worker sought workers' compensation benefits from two developers, alleging that developers provided him with regular noncontractual construction work, and, in the course of this work, he was seriously injured. An administrative court found for plaintiff. Affirming, this court held that plaintiff was defendants' joint employee and not an independent contractor. The court found no error in the administrative court's application of a number of factors, including those gleaned from Restatement Second of Agency § 220(2), to determine plaintiff's employment status, holding that indicia supporting employee status, especially the duration, continuity, and near exclusivity of the working relationship, the absence of any contract and the resulting exposure of plaintiff to at-will termination, and payments made to plaintiff as an individual, indicated that plaintiff was an employee of defendants who could receive workers' compensation benefits. Case of Whitman, 80 Mass.App.Ct. 348, 352, 353, 952 N.E.2d 983, 987, 988.

Mass.App.2005. Subsec. (2) cit. in ftn. Medical provider lodged criminal complaint that led to the arrest of a part-time billing-services worker on larceny charges, after worker quit working for provider and refused to return a billing-information database. The trial court, in a bench verdict, found defendant guilty of larceny and imposed a sentence of probation. This court reversed the judgment and set aside the finding, holding that the evidence was insufficient to establish beyond a reasonable doubt that the database in defendant's possession belonged to provider rather than defendant, since the record adduced by the prosecution did not show defendant to be provider's employee, rather than an independent contractor, nor did it show that provider hired defendant to assemble the database. Com. v. DiJohnson, 63 Mass.App.Ct. 855, 859, 830 N.E.2d 1103, 1106.

Mass.App.2005. Cit. in disc., subsec. (1) and com. (d) cit. in disc., subsec. (2) cit. in disc. and quot. in ftn. 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 reversed in part, holding, inter alia, that plaintiff produced sufficient evidence that company had at least an attenuated right of control over driver so as to possibly hold it vicariously liable under the doctrine of respondeat superior for his negligence. The court said that company provided the necessary instrumentalities to operate the vehicle as a taxi, its name was prominently displayed on the vehicle, and driver was required to return the taxi to company after each shift. Peters v. Haymarket Leasing, Inc., 64 Mass.App.Ct. 767, 774, 835 N.E.2d 628, 634.

Mass.App.2003. Cit. in disc. On behalf of an employee, government employees' association filed a charge of prohibited practice by the county, and demanded arbitration with Labor Relations Commission. The day after charge was filed, state legislature abolished the county and transferred all functions, assets, liabilities, and control of county business to the state. Commission dismissed charges, holding that plaintiff failed to identify the proper employer. This court affirmed, holding that plaintiff did not meet its burden of naming proper employer. Plaintiff's simple assertion that by statute the state had assumed all assets and liabilities of abolished county was insufficient to resolve confusion whether sheriff or some other state entity was the employer. National Ass'n of Government Employees v. Labor Relations Com'n, 59 Mass.App.Ct. 471, 474, 796 N.E.2d 856, 859.

Mass.App.2000. Subsecs. (1) and (2) and coms. (d) and (h) cit. in ftn. Foundation that was ordered by Department of Industrial Accidents (DIA) to pay a share of physician's medical expenses challenged the order, arguing, among other things, that physician was not its employee for purposes of the workers' compensation statute. The reviewing board of the DIA affirmed. Reversing, this court held that whether the DIA correctly determined that physician was an employee of both hospital and foundation was irrelevant, since physician had failed to establish by a preponderance of the evidence that workplace conditions caused the harm sustained. Patterson v. Liberty Mut. Ins. Co., 48 Mass.App.Ct. 586, 723 N.E.2d 1005, 1010.

Mass.App.1991. Cit. in disc. An association contracted to provide and arrange for medical services to HMO members. A patient sued the association, along with other defendants, alleging that it was liable for a physician's negligence in providing prenatal and obstetrical care to her. The trial court granted summary judgment for the association. Affirming, this court held that the association could not be held vicariously liable, because the evidence showed that the association did not control, or retain the right to control, the physician's professional activities. The court noted that the association did not employ the physician directly or pay the physician, nor did it control the physician's actual medical medical decisions. Chase v. Independent Practice Ass'n, 31 Mass.App.Ct. 661, 583 N.E.2d 251, 254.

Mass.App.1991. Subsec. (2) cit. in disc. A real estate firm refused to pay a broker associated with that firm her commission on a sale. The broker filed a criminal suit against the firm's owner alleging the violation of a state statute whose general purpose was to assure that employees were paid on a weekly basis, and the owner was convicted. Reversing, setting aside the jury verdict, and entering a not guilty judgment for the defendant, this court held that the statute was misapplied because the broker was an independent contractor and not an employee. Although subject to minor elements of control, the broker made her own hours, received no base salary, had no vacation or sick pay benefits, was not required to attend sales meetings, and was not supervised as to the manner and times of showing properties to customers. Com. v. Savage, 31 Mass.App.Ct. 714, 583 N.E.2d 276, 278.

Mass.App.1982. Cit. in sup. The plaintiff sought to recover for injuries sustained in an accident at a construction site, allegedly caused by the negligence of the defendants, a truck driver and his employer. The lower court found for the plaintiff. The defendants appealed from the judgment and from an order denying their motion for a new trial. This court affirmed. The defendants claimed that the defendant driver was, at the time of the accident, a special employee of the plaintiff's employer, thereby barring the present action. The court disagreed, holding, inter alia, that the question of special employment was for the jury because more than one conclusion was permissible under the evidence presented. The evidence was sufficient for the jury to conclude that the driver was not a special employee of the plaintiff because the defendant employer retained control over him. Pemberton v. Boas, 13 Mass.App.Ct. 1015, 433 N.E.2d 490, 492.

Mich.

Mich.1988. Com. on subsec. (1) cit. in conc. op. On order of the court, the plaintiffs' application for leave to appeal was denied, with one of the justices concurring on the grounds that nothing in the record suggested that the ownership-management structure was devised to avoid third-party liability or liability under the workers' compensation act and that the question was one of law. Bergman v. Cleveland Cliffs Iron Co., 431 Mich. 851, 425 N.W.2d 97, 97.

Mich.App.

Mich.App.1971. Cit. in sup. Plaintiff was injured in an automobile collision with a newspaper delivery man and brought suit against the newspaper for the injuries thereby sustained. The majority held that, as a matter of law, the delivery man was an independent contractor and, therefore, his employer was not liable for his torts. The dissent, basing its opinion on lack of independence in the performance of the delivery man, would have held that the carrier's form of employment was a jury question. Sliter v. Cobb, 36 Mich.App. 471, 194 N.W.2d 75, 87, rev'd. 388 Mich. 202, 200 N.W.2d 67 (1972).

Minn.

Minn.2020. Cit. in diss. op. Graduate student who participated in an unpaid clinical psychology practicum at hospital in order to complete university's graduation requirements sued hospital and university, alleging that the practicum training director discriminated against her based on her race and sex. The trial court granted hospital's motion to dismiss and university's motion for judgment on the pleadings. This court reversed in part and remanded, holding that student stated a claim against hospital for employment discrimination under the Human Rights Act. The dissent cited Restatement Second of Agency § 220 in arguing that renumeration was an essential condition of the employment relationship, and that student could not be an employee and was not entitled to protection under the Human Rights Act because she received no wages, salary, or benefits from hospital for her work. Abel v. Abbott Northwestern Hospital, 947 N.W.2d 58, 81.

Minn.1977. Cit. in sup. State brought an action against a magazine and book clearinghouse for consumer fraud and false advertising, fraudulent recruiting practices, and transacting business without a certificate of authority. The state sought an injunction and civil penalties. The lower court enjoined the defendant from conducting business in the state without a certificate of authority and from employing fraudulent and deceptive practices in connection with the sale of merchandise, recruitment of sales personnel, and advertising, and the court imposed civil penalties. The defendants appealed, contending that the sale of books and magazine subscriptions was conducted through door-to-door solicitation managed by contractors, and that the contractors were independent contractors not under its control. The court affirmed the lower court's decision and held that lower court's finding that the solicitors and the contractors were employees of the magazine and book clearinghouse was not clearly erroneous. The court noted that whether a salesman in a particular situation can be characterized as an independent contractor or as an agent is a question of fact, and that, primarily, courts will deem a salesperson an employee of one who has the right to exercise control over the manner of sale and to direct the result to be accomplished. State By Spannaus v. Mecca Enterprises, Inc., 262 N.W.2d 152, 154.

Minn.1977. Cit. in ftn. in diss. op. in dictum. Plaintiff, a plumber, sought Workmen's Compensation benefits for disability arising from injuries incurred while performing work for the defendant, City of Fountain. In view of the facts that plaintiff operated his own business, that the defendant engaged his services as any other customer would, that the plaintiff could perform the work whenever, and in whatever manner, he wished, and that defendant's employee merely worked with, and did not supervise, the plaintiff, the court concluded that plaintiff was engaged as an independent contractor and reversed the lower court's decision which awarded compensation to the plaintiff. The dissent maintained that Workmen's Compensation should be awarded whenever the services performed constitute a recurring and integral part of the serviced party's business, and that the plaintiff's repairing of city sewer and water pipes clearly brought him within the rule. Wangen v. City of Fountain, 255 N.W.2d 813, 817.

Minn.1976. Cit. in ftn. in sup. A corporation engaged dealers to sell vacuum cleaners door-to-door on consignment. The dealers generally worked out of their own homes, were free to establish the principal incidents of their sales activities, and were not provided with offices, desk space, or business phones. The corporation did not pay any of the dealers' expenses, nor withhold social security or income tax. The Commissioner of Employment Services, because the corporation had the right to terminate the dealer agreement at any time, found that the corporation had the right to control the means and manner of the dealer's performance, and was thus an employer for the purposes of the Minnesota law of unemployment compensation. In this suit to overturn that determination, the court held that the degree of control necessary to bring the relationship within that of servant and master, and thus within the statute, was not shown. Speaks, Inc. v. Jensen, 243 N.W.2d 142, 144.

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. Com. (k) cit. in ftn. 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. Quot. in case cit. in sup. Defendant sold farm equipment on a straight commission basis for a farm supply firm. He was on the firm's records for social security, income tax, automobile and group insurance, and workmen's compensation purposes. While on his way to inspect his own warehouse and trailers, which he used to store and deliver the firm's products, but having no intention to do any selling for the firm at that time, defendant was involved in an automobile accident with the plaintiff. The court determined that there was sufficient evidence to sustain the jury's findings that an employer-employee relationship did exist and that the defendant was acting within the scope of his employment. Boland v. Merrill, 270 Minn. 86, 132 N.W.2d 711, 715.

Minn.1962. Cit. in sup. in ftn. In an action to recover workman's compensation, where deceased sold and applied on a commission basis fertilizer manufactured by defendant, used some of his own equipment, yet was told specifically which account he must service first, it was held that there was a sufficient degree of control by defendant for plaintiff to recover compensation. Pettis v. Harken, Inc., 263 Minn. 289, 116 N.W.2d 565, 568.

Minn.1960. Com. (c) cit. in sup. in ftn. In an action to obtain death benefits, where the evidence showed that deceased had sold, on a commission basis, products manufactured by defendant, that deceased had set own retail sale prices after buying from defendant at wholesale price and had set own hours and manner of working, the relationship was shown to be one of vendor-vendee, and the deceased's administratrix was not able to recover benefits. Geerdes v. J.R. Watkins Co., 258 Minn. 254, 103 N.W.2d 641, 646.

Minn.App.

Minn.App.1996. Cit. in conc. and diss. op., com. (c) cit. in conc. and diss. op. Challenge was made to finding by commissioner of economic security that, for purposes of reemployment insurance taxation, newspaper delivery woman was employee of newspaper, rather than independent contractor. Reversing, this court held that the determination of an employment relationship was a question of law, and that delivery woman, who set her own hours, used her own car, found and hired substitutes when necessary, and was solely responsible for her taxes, was an independent contractor. Concurring and dissenting opinion believed that the existence of a master-servant or employment relationship was an ultimate fact issue that should not have been decided as a matter of law. Neve v. Austin Daily Herald, 552 N.W.2d 45, 49, 50.

Minn.App.1984. Com. (m) cit. in sup. Former county court reporters, who were deemed district court reporters after a reorganization, sought severance pay from the county. The county denied their claims, contending that plaintiffs had been state employees, not county employees. This court reversed a summary judgment for the county, holding that plaintiffs had been county employees, and were thus entitled to severance pay, where the county paid the reporters' salaries and benefits, furnished the reporters material and equipment, issued an employee manual, and had previously granted severance pay to reporters. Paske v. County of Dakota, 356 N.W.2d 775, 778, affirmed in part, reversed in part 379 N.W.2d 537 (1986).

Miss.

Miss.1994. Subsec. (2) quot. in ftn., cit. generally in disc., and cit. in sup. 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, 149-151.

Miss.1981. Cit. in disc. Claimant, who was working for a logging company, that had a contract to cut timber, and was injured while sawing trees, filed a claim for worker's compensation benefits against the party contracting with the logging company. The lower court upheld the award of benefits, and the party that contracted with the logging company appealed, contending that the claimant was not employed by it, that he was employed by the logging company, an independent contractor, and that it had no liability in the matter. The question before the court was whether the party was the employer of the logging company or whether the logging company was an independent contractor, relieving the party of any liability incurred by the logging company in its employee relationships. The court noted that, in general, it is said that the right to control, not actual control of, the details of the work is the primary test of whether a person is an independent contractor or an employee. The court found that substantial evidence demonstrated an employer-employee relationship, and not an independent contractor relationship between the parties. Therefore, the court held that the evidence sustained the finding that the claimant was entitled to compensation benefits from the party contracting with the logging company, and the judgment of the lower court upholding that finding was affirmed. Georgia-Pac. Corp. v. Crosby, 393 So.2d 1348, 1349.

Miss.1964. Cit. in sup. The plaintiff was injured while driving a logging truck. The plaintiff was hired by Durham and contended Durham was the defendant's employee. The defendant contended that Durham was an independent contractor. The direct evidence showed that defendant directed Durham in some operations and had right of control over him on all others. The court held that Durham was the defendant's employee. Boyd v. Crosby Lumber & Mfg. Co., 250 Miss. 433, 166 So.2d 106, 108.

Mo.

Mo.1996. Cit. in disc. Customer who was sexually assaulted and shot after she was abducted from outside a gasoline station and convenience store sued the station's lessor/franchisor. The trial court granted summary judgment for defendant on the ground that it was not a possessor of the property and had no right of control over the lessee/franchisee of the station. Reversing and remanding, this court held, inter alia, that a question of fact existed as to whether defendant controlled or had the right to control the franchisee's provision of security measures so as to subject defendant to liability under the doctrine of respondeat superior. J.M. v. Shell Oil Co., 922 S.W.2d 759, 764.

Mo.1983. Cit. in ftn. in sup. The plaintiff's decedent was killed when the car in which he was a passenger collided with a truck carrying a load for the defendant freight broker. The defendant was in the business of putting shippers in touch with truck operators. This court found that the defendant was instrumental in implementing this particular truck's journey and held that the defendant could not escape liability on these facts by asserting independent contractor status. Instead, the jury was properly instructed on the law of agency and the elements of benefit and the right to control. Because the defendant was engaged in a joint venture, no additional showing of control over the truck while it was on the highway was necessary. Jury verdict for the plaintiff was affirmed. The dissent argued that the requisite element of control was lacking. Johnson v. Pacific Intermountain Exp. Co., 662 S.W.2d 237, 242, certiorari denied 466 U.S. 973, 104 S.Ct. 2349, 80 L.Ed.2d 822 (1984).

Mo.1979. Quot., cit. and fol., com. on subsec. (1)(g) cit. in sup., and subsec. (2) cit. in sup. Dependents of a workman, who was killed as he operated a truck used to haul milk to a cheese company, filed a claim for workmen's compensation benefits. The Industrial Commission denied relief, holding that the workman operated the milk route as an independent contractor, and, therefore, was not an employee of the cheese company within the workmen's compensation laws. On appeal, the court reversed following Section 220 to hold that for the purposes of workmen's compensation benefits, the milk driver was an employee of the cheese company to which he hauled milk. Cedrasky v. Mid-America Dairymen, Inc., 583 S.W.2d 193, 196, 197, 199, 200, 201, 203.

Mo.1973. Quot. in part in sup. While working on defendant's limestone pulverizing machine, plaintiff was injured by a wrench negligently left attached to a revolving part of the machine by one of defendant's regular employees. In its appeal from an adverse judgment on the verdict, defendant claimed, inter alia, that plaintiff's sole and exclusive remedy was under workmen's compensation, thus challenging the jury's finding that plaintiff was an independent contractor and not defendant's employee at the time of the accident. The court adopted the tests laid down in the Restatement and held that the facts were enough in dispute to make the determination of the relationship of the parties a jury issue instead of a matter of law. The court further held that there was sufficient evidence for the jury to resolve all the Restatement's tests in plaintiff's favor where it was adduced, inter alia, that plaintiff, who had a welding business of his own, was in charge of and was personally responsible for the repair of the machine which injured him, that he customarily performed tasks for defendant which required considerable skill and training, that he supplied his own instrumentalities and tools, that he had never been explicitly told to work certain hours but worked whatever hours were necessary, that neither social security nor federal or state income tax had been withheld from amounts paid him, and that defendant had not even sent a report of plaintiff's injury to the workmen's compensation commission. Cline v. Carthage Crushed Limestone Company, 504 S.W.2d 102, 106, 107, 108, 109.

Mo.1965. Quot. 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: age, injury, and amount of compensation received to date. Dean v. Young, 396 S.W.2d 549, 553.

Mo.1965. Com. (c) cit. in sup., and coms. (b) and (c) quot. in sup. A crane hired from an independent contractor collapsed, while holding up roof sections which were being welded to a metal tank, and killed one of the welders. The court held that there was enough evidence for the jury to find that the crane operator was still the employee of the independent contractor even though he was directed by the welder's fellow employees. Parlow v. Dan Hamm Drayage Co., 391 S.W.2d 315, 320.

Mo.1960. Sec. cit., illus. quot. in sup. In action by plaintiff for damages as a result of collision with car driven by agent of defendant, plaintiff failed to show that defendant had right to control agent's actions, and directed verdict for defendant was affirmed. Kickham v. Carter, 335 S.W.2d 83, 87.

Mo.App.

Mo.App.2014. Cit. in ftn., subsec. (1) quot. in sup., subsec. (2) quot. in case quot. in sup., com. (c) cit. in sup., coms. (d) and (g) quot. in ftn., com. (h) quot. in sup. Children of patient who died of colon cancer sued medical center, alleging that a radiologist at the medical center negligently interpreted the results of patient's CT scan, delaying the treatment of her cancer. The trial court granted summary judgment for medical center, finding that children were barred by a state statute from recovering against medical center for the radiologist's tortious actions, because the radiologist was not a "physician employee" of medical center within the meaning of the statute, but rather, an employee of medical center's contractor. This court reversed and remanded to the trial court with instructions to determine whether the radiologist was medical center's "employee" by reference to common-law principles of agency. The court noted that Missouri courts had adopted the criterial set forth in Restatement Second of Agency § 220, which were substantially consistent with the factors set forth in Restatement Third of Agency § 7.07, for determining whether an agent who did work at the behest of a principal was an employee. Jefferson ex rel. Jefferson v. Missouri Baptist Medical Center, 447 S.W.3d 701, 709-712.

Mo.App.2013. Quot. in case quot. in ftn. Minor children of parents who were killed in a head-on collision with a log truck sued, among others, wood products company for which driver was operating the log truck, arguing that defendant was liable for driver's negligence. The trial court entered judgment on a jury verdict for defendant. Reversing and remanding, this court held, inter alia, that the trial court committed prejudicial error by instructing the jury that driver had to be defendant's "employee" in order for defendant to be liable, and in refusing to give plaintiffs' proposed modification that driver had to be defendant's

"agent." The court reasoned that the trial court's instructions erroneously allowed the jury to find for plaintiffs only if it found that driver was an employee of defendant, when it was well settled that an "employer" was also liable for damages attributable to the conduct of an "agent" acting within the course and scope of agency; here, defendant's potential liability was not based on driver being an employee of defendant, but rather an agent. Blunkall v. Heavy and Specialized Haulers, Inc., 398 S.W.3d 534, 542.

Mo.App.2009. Cit. in sup., quot. in ftn. Electrical contractor's employee brought negligence action against landowner that hired contractor to carry out a rural electrical project, after employee was severely shocked and injured while working on landowner's property. The trial court granted summary judgment for landowner. Reversing, this court held, inter alia, that the evidence did not establish as a matter of law that contractor was an independent contractor over which landowner did not exercise sufficient control as to the manner in which the day to day work on the project was done so as to absolve landowner of liability for plaintiff's injuries. The court pointed to evidence that the work performed by contractor was part of the regular business of landowner, an electrical cooperative; contractor's employees received training from landowner; landowner supplied all necessary materials for the project; and there was two-way radio contact between landowner's dispatcher and contractor's employees over the manner in which employees were performing their work. Brister v. Ikenberry, 300 S.W.3d 588, 593.

Mo.App.2003. Subsec. (2) quot. in case quot. in sup., com. (j) quot. in sup., com. (h) cit. and quot. in sup. Children of motorist who was killed in vehicular collision with newspaper delivery driver brought wrongful-death action against driver and newspaper. Trial court granted newspaper summary judgment. Reversing and remanding, this court held that fact issues including newspaper's control over driver, length of driver's employment contract and newspaper's right to terminate contract, and driver's skill requirements prevented summary judgment on questions of agency relationship between newspaper and driver and newspaper's vicarious liability for driver's actions. Jones v. Brashears, 107 S.W.3d 441, 445-447.

Mo.App.2002. Subsec. (2) quot. in sup. Jogger who suffered serious injuries after being struck by newspaper carrier's van brought negligence action against newspaper and owner of carrier's route. The trial court granted newspaper summary judgment. Affirming, this court held that route owner was independent contractor, not newspaper employee; therefore newspaper was not liable to jogger. Lee v. Pulitzer Pub. Co., 81 S.W.3d 625, 631.

Mo.App.2002. Subsec. (2) cit. in sup. Patient sued hospital and physicians for medical malpractice after misdiagnosed sinus infection spread to patient's brain. The trial court entered judgment on jury verdict for patient. Affirming, this court held, inter alia, that, notwithstanding fact that physician was not hospital's employee, whether physician and hospital had agency relationship was a jury question. Scott v. SSM Healthcare St. Louis, 70 S.W.3d 560, 567.

Mo.App.2001. Subsec. (2) quot. in sup. Church sued adjacent landowner and logger hired by him after trees on church's land were erroneously cut and sold. The trial court awarded church treble damages against both parties, then granted landowner new trial. Logger and church appealed; landowner cross-appealed denial of his motions for judgment n.o.v. and for directed verdict. Reversing and remanding, this court held that logger, who controlled details of work and supplied equipment and laborers, and landowner and logger was independent contractor of landowner; therefore landowner was not liable for logger's actions in trimming trees from church's property. Trinity Lutheran Church v. Lipps, 68 S.W.3d 552, 559.

Mo.App.2000. Cit. generally in sup., quot. in sup., subsec. (1) quot. in ftn., subsec. (2)(b) and com. (h) cit. in sup., com. (m) quot. in sup. After their son was killed in a car accident with an insurance agent who was heading to an appointment with a potential customer, parents filed a wrongful-death action against insurer and insurer's state general agent under the doctrine of respondeat superior, alleging that insurance agent was defendants' employee and was traveling to meet a prospective client on their behalf when he negligently caused the accident. Reversing the trial court's grant of summary judgment for insurer and remanding, this court held that the trial court erred in finding as a matter of law that insurance agent was an independent contractor and that insurer was therefore not vicariously liable for his negligent actions. The court said that agent sold insurance for only insurer, his contract with insurer had a noncompetition clause if he left or was fired by insurer, and there was evidence that insurer retained a right to control agent. Bargfrede v. American Income Life Ins. Co., 21 S.W.3d 157, 161-165, 168.

Mo.App.1998. Subsec. (2) cit. in case cit. in disc. After the Missouri Consolidated Health Care Plan (MCHCP), a state agency that contracted with various managed-care companies for the provision of medical services to plan members, denied a state employee's application for reimbursement of her attorney's fees and expenses incurred in obtaining coverage from her managed-care company for gastroplasty surgery, the state employee petitioned for judicial review. Affirming the trial court's dismissal of the petition, this court held that the state employee's managed-care company was not an agent of MCHCP so as to entitle the employee to attorney's fees and expenses under Missouri law for prevailing in an agency proceeding brought against the state. The court said that MCHCP did not exert control over the services, location, or selection of medical staff provided by the managed-care company; moreover, the managed-care company neither held itself out as an agent for MCHCP, nor did MCHCP ever state that the managed-care company was its agent. Rogers v. Board of Trustees Consol. Health, 972 S.W.2d 591, 593.

Mo.App.1997. Subsec. (1) cit. in headnote and quot. in disc. Insurer that had issued a business automobile policy to husband and wife as conamed insureds brought an action for a declaratory judgment that the policy provided no liability coverage to husband's employee for a personal injury claim made against him by another of husband's employees. The trial court entered judgment for insurer, holding that husband's employee against whom the claim had been made was not covered under the policy because of an exclusion for bodily injuries to a fellow employee. Reversing and remanding, this court held, inter alia, that, since named-insured wife was an "employee" of named-insured husband and thus was a "fellow employee" of the injured employee, an endorsement to the policy eliminating the fellow-employee exclusion if the injured person was a fellow employee of a named insured applied; thus, husband's employee was entitled to coverage for the injured employee's personal injury suit. The court said that wife was her husband's employee because she often performed various duties for husband's sole proprietorship and that she was subject to husband's control while performing the services, even though she received no compensation for the services and did not perform any duties for the company on the day of the accident. American States Ins. Co. v. Broeckelman, 957 S.W.2d 461, 463, 466.

Mo.App.1997. Cit. in headnotes, subsec. (2) quot. in disc. and sup. Motorist who was severely injured in a multi-vehicular collision in which his wife was killed brought personal injury and wrongful death action against driver of dump truck involved in the accident, and driver's employer. The jury determined that defendants were jointly and severally liable in the amount of $1.2 million, and the trial court entered judgment accordingly. Affirming, this court held, in part, that the evidence supported a finding that driver was an agent of employer, rather than an independent contractor, particularly where it was shown that employer exercised as much control as he could over the details of driver's work and had previously rejected a suggestion that the parties contract for driver's services. Carter v. Wright, 949 S.W.2d 157, 157, 158, 160, 162.

Mo.App.1996. Subsecs. (1) and (2) cit. in case quot. in sup. After claimant/cable installer was granted workers' compensation benefits, a plurality of the Labor and Industrial Relations Commission reversed on the ground that claimant was an independent contractor rather than an employee of the cable company. Reversing and remanding, this court held that, despite the fact that the parties' contract designated claimant as an independent contractor, claimant, under the "relative nature of the work test," was an employee for purposes of his workers' compensation claim for injuries he sustained while on assignment; the cable company supplied the tools and financed their purchase by withholding installments from claimant's paychecks, provided insurance indirectly, gave claimant a picture badge, gave claimant daily assignments, and periodically communicated with claimant by radio dispatch. Burgess v. NaCom Cable Co., 923 S.W.2d 450, 452.

Mo.App.1996. Subsec. (2) quot. in sup. Motorist who was injured in a collision with a vehicle driven by a licensed real estate agent whose license was placed with a real estate agency sued both the agent and the agency, alleging that the agent's negligence was imputable to the real estate agency because defendants were mutual agents and principals in the operation of a joint venture. Affirming the trial court's grant of summary judgment for the real estate agency, this court held that the agent's status at the time of the accident was that of independent contractor and that defendants were not engaged in a joint venture. Eads v. Kinstler Agency, Inc., 929 S.W.2d 289, 291-292.

Mo.App.1996. Subsec. (2) cit. in sup. Brokerage firm challenged a finding by the labor and industrial relations commission that certain of its registered securities brokers, who were also licensed insurance agents, were employees for purposes of the state

employment security law. Reversing, this court held that the evidence was insufficient to establish that brokers were employees, rather than independent contractors, since, among other things, they sold securities part-time and did so from somewhere other than firm's premises, they were not reimbursed for general business expenses, and, most significantly, firm retained no control over the "where, when, and how" of the job. Travelers Equities v. Div. of Emp. Sec., 927 S.W.2d 912, 921.

Mo.App.1995. Subsec. (2) quot. in sup., com. (h) quot. in case quot. in sup. Passenger who was seriously injured in an automobile accident sued a delivery company and the driver who was making deliveries for the company when his truck sideswiped the car in which plaintiff was riding. Reversing the trial court's grant of summary judgment for delivery company and remanding, this court held, inter alia, that a question of material fact existed as to whether the driver was the delivery company's employee or an independent contractor. Ferguson v. Pony Exp. Courier Corp., 898 S.W.2d 128, 132, 133.

Mo.App.1993. Subsec. (2) cit. in case quot. in sup. Worker who was paid by cat litter manufacturer to sniff and evaluate used litter samples as part of market research program sought unemployment benefits after her work was terminated. The Missouri Labor and Industrial Relations Commission determined that worker was an employee rather than an independent contractor; the trial court reversed. Reversing, this court held that since worker was given particular instructions and scheduling in performing the work, had to meet certain requirements to fill the position, and was required to render the services personally, she was an employee for purposes of unemployment benefits, particularly because such market research was an integral part of manufacturer's business. Edward Lowe Ind. v. Missouri Div. of Employment Sec., 865 S.W.2d 855, 857.

Mo.App.1992. Subsec. (2) cit. in case cit. in sup. State labor commission sought determination whether general bail bonder's agents were employees under state law. The trial court found that bail bond agents were not employees, and this court affirmed, holding that agents were independent contractors. The court considered several factors in determining agents' status such as the fact that agents were responsible for controlling their own hours and the amount of work they performed as well as obtaining their own office space, employees, and supplies. The court determined that the agents' only need from the general bail bonder was access to his power of attorney. Division of Employment Sec. v. Hatfield, 831 S.W.2d 216, 219.

Mo.App.1990. Subsec. (1) quot. in case quot. in disc. An insurer sought a declaratory judgment that a girl who had been selling fireworks for an insured on his property when she died in a conflagration was an "employee" within the meaning of the policy's exclusion-of-liability clause and that it was not obligated to defend the wrongful death action brought against the insured. The trial court entered judgment on a jury verdict for the plaintiff. Affirming, this court held that "employee," as used in the liability coverage exclusion clause, was unambiguous and that the trial court's instruction to the jury that an employee was a person who was in the service of an employer under any contract of hire, express or implied, oral or written, was the proper definition of the term as used in the policy exclusion. Auto Owners Mut. Ins. Co. v. Wieners, 791 S.W.2d 751, 756.

Mo.App.1990. Subsec. (2) quot. in disc., subsec. (2)(b) and coms. (d), (h), and (j) quot. in sup. A widow alleging that her husband's death was caused by a physician's negligence sued, inter alia, a corporation that had contracted with the hospital to provide the hospital's emergency room physicians. The trial court granted the defendant summary judgment. Reversing and remanding, this court held that the evidence raised a material fact issue as to whether the physician in question was the defendant's employee, thereby making the defendant vicariously liable. The court noted that the defendant required the physician to respond to in-house codes and requests of hospital staff to assess in-house patients. Also, the court noted that the defendant's contract with the physician contained a noncompetition clause, indicating that the physician was not engaged in a distinct occupation or business, the one-year renewable contract indicated that a long-term relationship was contemplated, the defendant undertook to insure the physician, and the defendant paid the physician an hourly rate, which was the same amount whether he saw one patient or one hundred. Keller v. Missouri Baptist Hosp., 800 S.W.2d 35, 38, 39.

Mo.App.1987. Subsec. (2) quot. in case cit. in sup. A painter was injured when he fell from a ladder while painting a restaurant. When he filed a claim for worker's compensation against the restaurant, the labor and industrial relations commission held that he was an employee and not an independent contractor and awarded the benefits. Affirming, this court held that what began as an employer-independent contractor relationship evolved into an employer-employee relationship. The court said that the

defendant exercised considerable control over the plaintiff in regard to the painting job and all other tasks assigned to him. The court stated that the exercise of control over the work of another was a strong indicator of an employer-employee relationship. Cope v. House of Maret, 729 S.W.2d 641, 643.

Mo.App.1984. Cit. in disc. A hospital employee claiming wrongful discharge brought an action for reinstatement. She was dismissed after she refused to sign a consent form stating that she was voluntarily taking a polygraph test and had waived all liability against the polygrapher and the hospital arising from the test. The hospital had required its employees to take the test as part of an investigation into the harassment of hospital supervisors. The employee had agreed to take the test. The trial court dismissed the action. On appeal, this court affirmed, rejecting the employee's argument that the hospital's conduct constituted an exception to the "employment at will" doctrine in that it violated public policy. Ising v. Barnes Hospital, 674 S.W.2d 623, 626.

Mo.App.1982. Cit. generally in disc., subsec. (1) quot. in sup., subsec. (2) cit. in sup. The plaintiff was injured when a trailer he was unloading from a railroad car slipped out of position and fell on his hands. He sought compensation for his injuries from the defendant railroad under the Federal Employers' Liability Act (FELA). The plaintiff acknowledged that he was employed by a trucking company that was a wholly-owned subsidiary of the railroad, but he contended that he was also employed by the railroad, within the meaning of the FELA, at the time he was injured. The trial court entered judgment for the railroad notwithstanding the jury's verdict for the plaintiff; the plaintiff appealed. This court stated that in analyzing the employment issue, the primary factor was the right to control and direct the worker in the detailed performance of his work at the time of the injury. Where the plaintiff testified that a railroad official directed, controlled, and supervised his work on a day-to-day basis, there was sufficient evidence to submit the employment issue to the jury. The trial court's judgment was reversed, and the case was remanded with direction to reinstate the jury's verdict. Vinyard v. Missouri Pac. R.R., 632 S.W.2d 272, 274, 275.

Mo.App.1981. Cit. in sup. The plaintiff was involved in an automobile accident while insured by insurance company A. The plaintiff contacted his agent, who represented a group of insurance companies. The agent neglected to file an accident report with the state, which resulted in the suspension of the plaintiff's driver's license for two months. The agent corrected his mistake and the plaintiff's license was reinstated. The plaintiff's policy lapsed for nonpayment of premium, but the plaintiff did not have knowledge of this until he was involved in another accident and was told that he was not insured. The plaintiff sued one of the four companies in the insurance group, but not insurance company A. The lower court found in favor of the plaintiff and the defendant appealed. The plaintiff argued, inter alia, that the agent's negligence, as an employee of the group of insurance companies, imposed liability on any or all of the member companies of that group. This court stated that the plaintiff's agent was not an employee of either the insurance group or of the individual companies, but rather, was an independent contractor. The group did not closely supervise the agent, he was paid by commission, he did not have regular hours and he provided his office and supplies. Therefore, the defendant insurer had not been a principal when the agent's alleged negligent act occurred, and it did not have a duty to the plaintiff. Reversed with directions. Hampton v. American Family Mut. Ins. Co., 624 S.W.2d 497, 498.

Mo.App.1976. Com. (c) cit. in sup. Defendant corporation leased demolition equipment and furnished its own employees as equipment operators to a demolition contractor. In this suit, the owner of a building next to the demolition project attempted to recover for damage to the building on a theory of respondeat superior. The court held that where defendant surrendered its control over its employee operators, and the contractor had full authoritative direction and control over the employees, the employees at the time of the accident were special employees of the contractor, and defendant could not be held liable. Tractor-Trailer Sup. v. Wilbur Waggoner, Etc., 539 S.W.2d 465, 468.

Mo.App.1972. Subsec. (1) com. (e) cit. and quot. in part and com. (c) cit. but dist. Plaintiff sought to recover for injuries sustained when a tractor owned by defendant struck him. The court held that there was no master-servant relationship between the tractor-owner, who was a concessionaire at a public park, and the tractor driver, who had appeared on the scene by chance and who had offered to assist the plaintiff in pulling a stalled vehicle without contemplation of pecuniary benefit from defendant, but rather out of concern over the advisability of defendant's driving the tractor while recovering from surgery. Cloninger v. Wolfe, 477 S.W.2d 440, 443.

Mo.App.1967. Cit., coms. (k) and (h) cit., and illus. 6 and 7 cit. in sup. The plaintiff claimed compensation under the Missouri Workman's Compensation Law for injuries sustained in an automobile accident while on his way to visit a prospective customer, as an alleged employee of the defendant automobile dealer. The court, however, denied the compensation sought on the grounds that the claimant was an independent contractor, since he had paid his own automobile expenses and had continued to operate a cafe while operating under his employer's general control on a strict commission basis. Griffin v. Sinks Ford Sales, 413 S.W.2d 856, 858, 859.

Mo.App.1967. Subsecs. (2)(a), (e), (f), and (h) quot. 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, 114.

Mo.App.1965. Subsec. (2) and com. (h) cit. in sup. The plaintiff sustained injuries while delivering a school bus as an employee of the school bus company and sought recovery under workmen's compensation. This court affirmed a verdict but modified the amount the plaintiff claimant would receive, for the Industrial Commission settled the factual question that the plaintiff was an employee and had awarded compensation to the claimant. This court could not set aside the Commission's determination of employer-employee relationship but was limited to modifying the total benefits to be received. Gass v. White Superior Bus Co., 395 S.W.2d 501, 505.

Mont.

Mont.1999. Subsec. (1) cit. in cases quot. in sup.; subsec. (2) cit. in case quot. in sup., quot. in ftn., cit. in ftn., and cit. in diss. op. Employees of company that provided repair services to railroad carrier sustained on-the-job injuries; employees sued company and carrier for violations of the Federal Employers Liability Act (FELA). Defendants argued that, because company was not a railroad, plaintiffs could not recover FELA benefits against it, and because carrier was not their employer, plaintiffs were not entitled to damages from it. The trial court entered judgment for defendants. Reversing, this court held that the evidence supported the finding that a master-servant relationship existed between defendants, that plaintiffs were subservants of a company that was a servant of a railroad, and that plaintiffs could invoke FELA's protections. Dissent believed that the lower court's finding with respect to the lack of an agency relationship between defendants was not clearly erroneous. Watts v. Montana Rail Link, Inc., 975 P.2d 283, 285, 286, 294, 295.

Neb.

Neb.1997. Cit. in disc. A newspaper distributor sought unemployment benefits from a newspaper publisher. A Department of Labor claims deputy determined that the distributor was not entitled to unemployment insurance benefits, the department's appeal tribunal reversed the deputy's decision, and the trial court reversed the decision of the appeal tribunal. This court affirmed, holding, inter alia, that the distributor was an independent contractor and was not performing services under a contract of hire. The court determined that the degree of control the distributor exercised over the method and manner of performing his work was greater than that exercised by the newspaper owner. There was no actual payment made to him by the newspaper owner, and no Social Security or income taxes were deducted from the compensation he realized. Furthermore, the distributor owned and controlled the primary item of equipment necessary to perform his work. Omaha World-Herald v. Dernier, 253 Neb. 215, 570 N.W.2d 508, 514.

Neb.1995. Cit. in disc. and sup., cit. generally in disc. Father of teenage newspaper carrier who was severely injured when she was struck by a car while delivering papers sued newspaper to recover workers' compensation benefits for his daughter. The Workers' Compensation Court awarded the benefits, finding that teenager was an employee, not an independent contractor. The Workers' Compensation Review Panel reversed but was itself subsequently reversed by the Nebraska Court of Appeals.

Affirming the appellate court, this court held that teenager was an employee and, as such, entitled to receive workers' compensation benefits. In support of its holding the court noted, among other things, that newspaper maintained control of all the important details of teenager's work, she was under the supervision of newspaper's district manager, and newspaper supplied the workplace, instrumentalities, and tools needed for the job. Larson v. Hometown Communications, Inc., 248 Neb. 942, 540 N.W.2d 339, 347, 348, 352.

Neb.1984. Cit. in sup., com. (i) cit. in sup. Victim of accident sued the driver of the truck involved, the truck's owner, and the publisher who had hired the truck's owner to haul newspapers. A jury returned a verdict against all defendants, finding, inter alia, that the truck's owner was an agent of the publisher. This court reversed, holding as a matter of law that no agency existed and that the owner was an independent contractor. The court observed that the publisher's control over the owner was minimal, and that the owner had a distinct occupation, supplied his own materials, worked without supervision and depended on profit for compensation. The court also noted that arrangements concerning taxes and insurance indicated that the parties did not believe they had created a master-servant relationship. Eden v. Spaulding, 218 Neb. 799, 359 N.W.2d 758, 762, 763.

Neb.1983. Subsec. (2) quot. in sup. A corporation brought this action against the state Department of Labor to relieve itself from unemployment compensation tax assessments resulting from the classification of a salesman as an employee. A written contract between the salesman and the corporation afforded the corporation almost no control over the salesman's activities. Consequently, when the salesman terminated the contract and filed a claim for unemployment compensation the corporation asserted that the salesman was an independent contractor and not an employee. After unsuccessfully petitioning the Department of Labor to recognize the salesman's independent contractor status the corporation appealed to the trial court. The trial court reviewed the facts and found the salesman to be an independent contractor. The Department of Labor appealed, and this court affirmed the salesman's characterization as an independent contractor. The court rejected the Department of Labor's contention that the short list of statutory factors determining independent contractor status was controlling. The court found that the legislature had intended to codify the common law concept of independent contractor. The statutory definition was thus an illustrative, not exhaustive, list of the factors determining who was an independent contractor. The Restatement was quoted extensively to show other such factors and, after examining those factors, this court found the salesman to be an independent contractor. The corporation's lack of control over his activities proved decisive. The corporation was therefore not required to pay unemployment tax assessments for the salesman. A dissenting opinion would not have gone beyond the statutory language to define the meaning of independent contractor. ERSPAMER Advertising Co. v. Dept. of Labor, 333 N.W.2d 646, 648.

Neb.1983. Cit. in disc. The plaintiff, a salesman on a delivery route, brought this action against a corporation to recover commissions withheld by the corporation. The corporation counterclaimed for the value of inventory shortages and for bad checks received by the plaintiff from his customers. The corporation provided the plaintiff with a delivery truck, a customer list, and a guaranteed weekly income. The plaintiff and the corporation later entered into an agreement drafted by the corporation. The agreement termed the plaintiff an “employee” of the corporation and established corporate control over the plaintiff's activities. A dispute later arose when the value of inventory shortages and customers' bad checks was deducted from the plaintiff's weekly commission payments. The plaintiff ended his employment and brought this action; the corporation then filed its counterclaim. The trial court found that the plaintiff was an employee of the corporation and that the corporation thereby had no statutory right to withhold the disputed amounts from his pay. The corporation appealed to this court and asserted that the plaintiff was an independent contractor, not an employee. Thoroughly examining the pertinent state statute, this court affirmed the decision below and found the plaintiff to be the corporation's employee. The corporation by its own document had characterized and labelled the plaintiff as its employee. Citing the Restatement, among other authorities, this court found that the degree of control exercised over the plaintiff's activities, in combination with other factors, prevented the plaintiff from being viewed as an independent contractor. Because wages could not be statutorily withheld from an employee, absent written agreement or statutory direction, this court found the corporation liable for the plaintiff's withheld wages. The corporation's counterclaim was dismissed for want of proof. Rudolf v. Tombstone Pizza Corp., 333 N.W.2d 673, 677.

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.2007. Cit. and quot. in sup., subsecs. (a) and (e)-(h) quot. in sup., com. (j) cit. in sup. Former caseworker in city's welfare department sued city for wrongful termination. On remand, the trial court denied summary judgment for city, and entered judgment on a jury verdict finding city liable on a theory of respondeat superior for the acts of plaintiff's supervisor. Affirming, this court held that there were sufficient material fact issues before the trial court as to whether supervisor's allegedly wrongful termination of plaintiff was within the scope of her employment to defeat city's motion for summary judgment. Whether city lacked the requisite control over supervisor, because of her elected status, to preclude vicarious liability was one subissue in dispute; there was evidence that mayor had the ability to tell department heads what to do, but that he could not discipline or fire supervisor. Porter v. City of Manchester, 155 N.H. 149, 921 A.2d 393, 398, 399.

N.H.1994. Cit. in headnote, cit. in sup., cit. in case cit. in sup. A motorcycle driver was injured when he was struck by a car driven by an elected member of a church finance committee, who was in the process of delivering church financial records to its treasurer. Motorcycle driver and his wife sued the church, alleging that the car driver was acting as the church's agent at the time of the accident. The trial court granted defendant summary judgment, holding that the car driver was not a church employee or agent and was performing services as an independent contractor. This court affirmed, holding, inter alia, that, although the church may have had control over the tasks assigned to the committee member, it had no right to control the physical performance or the details of the accounting services she was performing. The court stated that, in the appropriate circumstances, the church could have been held liable even though the committee member was performing her accounting services on a volunteer basis, without hope or expectation of a reward. Boissonnault v. Bristol Federated Church, 138 N.H. 476, 642 A.2d 328, 328, 329.

N.H.1994. Cit. in sup. Taxicab company sought a determination of whether it had to secure workers' compensation for its drivers. A state labor department hearing officer answered in the affirmative, finding the drivers to be employees of the cab company, not independent contractors. This court affirmed, holding that, although cab company was in the business of leasing cars to drivers, it was also in the business of taking calls from customers for taxi service and dispatching drivers to those customers. There was, consequently, a continuous, essential connection between the cab company's work and that of the drivers. Moreover, the taxi drivers did not present themselves as being a business entity. Petition of City Cab of Manchester, Inc., 139 N.H. 220, 652 A.2d 1202, 1203.

N.H.1993. Coms. (h) and (i) cit. in disc. Apprentice electrician who was injured on a worksite sought workers' compensation benefits. The compensation appeals board decided that claimant was entitled to workers' compensation benefits from his general employer's insurer, finding that claimant was not a special employee under the borrowed servant doctrine of a party that had contracted for electrical services from claimant's general employer. Affirming, the court stated, inter alia, that the facts that an electrician's job required significant skill and was the type of work generally subcontracted out and that claimant, as an apprentice, could not legally work without the direct supervision provided by his general employer's licensed master electricians supported the board's finding. Appeal of Longchamps Elec., Inc., 137 N.H. 731, 634 A.2d 994, 998.

N.H.1992. Cit. in sup. and adopted. An employee of a firm that supplied short-term labor to other businesses was injured while on assignment to one of his employer's customers. After receiving workers' compensation from his employer, employee sued customer for negligence. Trial court granted summary judgment for defendant, holding that plaintiff was a borrowed servant at the time of the injury and his status as such protected defendant from a negligence suit. Affirming, this court held that plaintiff was an employee of the customer and as such was barred by the state workers' compensation statute from bringing a negligence claim against it. Applying the Restatement test, as set forth in the state department of labor regulations, the court stated that the contract placed plaintiff under the direction of the customer's foreman and gave customer the right to terminate plaintiff;

furthermore, customer had the right to control and direct plaintiff's work. LaVallie v. Simplex Wire and Cable Co., 135 N.H. 692, 609 A.2d 1216, 1218.

N.H.1989. Cit. in disc. An insurance company sought a declaratory judgment that an insurance policy it issued, which excluded coverage of bodily injuries to any employee of the insured, did not cover the personal injury claims brought against it by a laborer hired by the insured in his construction contracting business. The trial court ruled for the plaintiff. Affirming, this court held that the laborer was an employee, rather than a subcontractor, within the meaning of the exclusion clause in the policy. The court stated that the laborer was subject to the insured's immediate control, was not engaged in a distinct business, was an unskilled laborer rather than a specialist, was not responsible for supplying the location or specialized tools for his work, was employed exclusively by the insured, and was paid by the hour, not the job. Merchants Ins. Group v. Warchol, 132 N.H. 23, 560 A.2d 1162, 1165.

N.H.1985. 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 plaintiff. 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.

N.H.1985. Subsec. (1) cit. in disc. Employee of a partnership who was injured at work and collected workman's compensation benefits sued the individual members of the partnership for negligence. The lower court dismissed the suit, holding that the individual defendants were immune because they were employers within the meaning of the workmen's compensation statute. On appeal, this court vacated the order and remanded for a determination of whether the partnership agreement provided that the individual partners did not retain their rights of management and control of the business. The court held that a partner retaining his right of management was in an employment relationship with a partnership employee and therefore was an employer under the workmen's compensation law. Swiezynski v. Civiello, 126 N.H. 142, 489 A.2d 634, 637.

N.H.1984. Cit. in disc. A logger suffered an injury that caused blindness in one eye. The plaintiff appealed a decision of the state labor commissioner that the logger was an employee, not an independent contractor, and therefore was entitled to worker's compensation benefits. Affirming, this court concluded that, when the totality of the circumstances were viewed, the logger was clearly an employee since he had never worked at a similar logging operation, he had been told what trees to fell and what hours to work, and he had never been told by the plaintiff that he was considered an independent contractor. Burnham v. Downing, 125 N.H. 293, 480 A.2d 128, 130.

N.H.1975. Cit. in disc. Plaintiff appealed to the lower court after being denied workmen's compensation benefits by the state commissioner of labor. The trial court held that plaintiff was not entitled to such benefits because he was not an employee of defendant. This court affirmed. Plaintiff was working on defendant's property, cutting and piling logs. Defendant had engaged an independent contractor to perform the cutting, who had then engaged the plaintiff. Plaintiff's relation to the contractor was also that of an independent contractor, being paid on a flat-fee basis. Plaintiff often did this type of job and hired employees to assist him. The court noted that plaintiff had the right to control the manner in which he performed his contract, and that, considering the factors in s 220, the evidence warranted the finding that he was an independent contractor. Walker v. Charles Di Prizio & Sons, Inc., 348 A.2d 355, 357.

N.H.1970. Cit. in sup. (noting that it retains definition of "servant" from the first Restatement). In an action for wrongful death, personal injuries, and property damage from an automobile accident the trial court reserved and transferred to the state supreme court, without ruling, on an agreed statement of facts, the questions: (1) Is the defendant liable for the negligence of its employee in the operation of a motor vehicle owned by the employee and operated while on company business, within the scope of his employment, and (2) If it is necessary to show control or the right to control by the defendant, what constitutes "control" or

"right to control." The court overruled its previous trend of cases, holding that where it is agreed that a regular employee is sent upon a specific errand, using his own car with the knowledge and permission of the employer, and it is agreed he was acting within the scope of his employment at the time of the accident, the employer is liable for his acts whether it had control or not. Accordingly, the first question was answered in the affirmative and the second question required no answer. Hunter v. R.G. Watkins & Son, Inc., 265 A.2d 15, 17.

N.H.1962. Cit. in sup. In action for damages to trucks involved in head-on collision, because one person lent his servant to another for a particular employment, the immediate controller of servant was liable for damages, and not general controller. Currier v. Abbott, 104 N.H. 299, 185 A.2d 263, 267.

N.J.

N.J.2015. Cit. and quot. in sup., cit. in case quot. in sup. Administrator of live-in caretaker's estate filed a wrongful-death action against 89-year-old motorist who had hired decedent to work for him, alleging that caretaker's death was the result of defendant's negligence in striking caretaker with his vehicle while attempting to park. The trial court entered judgment on a jury verdict finding that caretaker was an independent contractor and awarding damages to caretaker's estate. The court of appeals reversed remanded, finding that the jury charge was incomplete and misleading. This court reversed and reinstated the jury's verdict, holding that the charge, though flawed, did not warrant reversal. The court noted that the model jury charge at issue largely tracked the language of Restatement Second of Agency § 220, which defined "servant" for purposes of establishing a principal's liability in tort under the doctrine of respondeat superior, and concluded that, although the charge could have been more artfully drafted, it did not misinform the jury as to the controlling law and was neither ambiguous nor misleading. Estate of Kotsovska ex rel. Kotsovska v. Liebman, 116 A.3d 1, 16, 17.

N.J.2015. Subsecs. (1), (2), (2)(e), and (2)(h) cit. but not fol. Workers brought an action in federal court against retailer that hired them to deliver mattresses ordered by its customers, alleging that retailer miscategorized them as independent contractors when they were in fact employees. The district court granted summary judgment for retailer, ruling that the undisputed facts demonstrated that workers were independent contractors. The court of appeals certified to this court the question of which test applied to determine an individual's employment status for purposes of state wage laws. Rejecting the common-law "right to control" test articulated in Restatement Second of Agency § 220, this court held that the "ABC" test, employing three criteria derived from the New Jersey Unemployment Compensation Act —lack of employer control over the work, work performed outside employer's usual course of business, and individual engaged in independently established trade or profession—governed whether an individual was an employee or an independent contractor for purposes of resolving claims under the New Jersey Wage Payment Act and the New Jersey Wage and Hour Law. Hargrove v. Sleepy's, LLC, 220 N.J. 289, 297, 300, 306, 307, 106 A.3d 449, 454, 455, 459, 460.

N.J.2007. Cit. in disc. Chiropractor sued automobile insurer and others, alleging that his termination from his position reviewing medical records for insurer was in violation of New Jersey's "whistleblower" statute, the Conscientious Employee Protection Act (CEPA). The trial court granted summary judgment for defendants; the appellate division reversed and remanded. Affirming as modified and remanding, this court held that a genuine issue of material fact existed as to whether plaintiff qualified as an employee for CEPA purposes, notwithstanding the fact that his agreement with insurer described him as an independent contractor. The court noted that the relevant test for determining whether the specialized and nontraditional worker was entitled to CEPA's protection utilized a hybrid approach that reflected the common-law agency right-to-control test and an economic-realities test. D'Annunzio v. Prudential Ins. Co. of America, 192 N.J. 110, 123, 927 A.2d 113, 121.

N.J.2006. Cit. but dist. in case quot. in sup., subsec. (2) quot. in ftn. and cit. generally in disc. 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, 242, 247, 901 A.2d 322, 331, 334.

N.J.2003. Cit. and quot. in sup., cit. in ftn. Pedestrian who was struck by motorist's vehicle brought suit for negligence against motorist and motorist's employer. The trial court granted partial summary judgment for plaintiff, and the appellate division affirmed. Affirming, this court held, inter alia, that motorist, who was returning home from a client location at the time of the accident, was acting within the scope of her employment when the accident occurred, and thus employer was vicariously liable under the doctrine of respondeat superior. The court invoked the required-vehicle exception to the going-and-coming rule to subject employer to vicarious liability. Carter v. Reynolds, 175 N.J. 402, 409, 410, 815 A.2d 460, 464.

N.J.2003. Cit. in sup. Motorist who was injured in an automobile accident with an attorney who was commuting to his part-time job as a municipal court judge sued attorney and attorney's law firm under principles of agency and respondeat superior. The trial court granted summary judgment for plaintiff and attorney, and held that law firm was vicariously liable for attorney's negligence. The appellate division reversed on the ground that attorney's commute to his job as a judge was unrelated to his law-firm activity. Affirming, this court declined to adopt enterprise-liability theory to impute attorney's negligence to law firm, but instead retained the principles of Restatement Second of Agency §§ 220, 228, 229 as its vicarious-liability standard. O'Toole v. Carr, 175 N.J. 421, 425, 815 A.2d 471, 474.

N.J.2001. Cit. in case cit. in disc., subsec. (1) quot. in disc. Former criminal defendant whose drug-trafficking conviction had been dismissed on the grounds of prosecutorial and police misconduct sued state, county prosecutors, and prosecutors' investigative subordinates for false arrest, malicious prosecution, and other claims. County prosecutors and their subordinates filed cross-claims demanding that state provide them with indemnification and legal representation. The trial court granted state summary judgment on the cross-claims. Reversing and remanding, this court held that state could be held vicariously liable for the tortious conduct of cross-claimants during the investigation, arrest, and prosecution of plaintiff, and that state could be required to indemnify and defend them for that tortious conduct pursuant to the relevant provisions of the Tort Claims Act. Wright v. State, 169 N.J. 422, 436, 778 A.2d 443, 451.

N.J.1998. Cit. in headnotes, subsec. (2) quot. in disc. Motorist was severely injured when a contractor transporting hot asphalt to a construction site failed to stop at a red light, collided with motorist's vehicle, and spilled asphalt onto her car; she brought negligence action against project owner, contractor, and company that loaded the asphalt onto contractor's truck. The trial court entered judgment on a jury verdict for motorist. The intermediate appellate court reversed and remanded as to project owner's liability. Affirming, this court held that, given the lack of control owner retained over the project, contractor had to be considered an independent contractor, rather than a servant, of owner; that liability could not be imposed upon owner under the theory that it hired an incompetent contractor; and that, because paving, the job for which contractor was hired was not an inherently dangerous activity, owner was not liable on the ground that it breached a nondelegable duty to take special precautions against the dangers arising from the act of paving. Mavrikidis v. Petullo, 153 N.J. 117, 707 A.2d 977, 978, 984.

N.J.1996. Cit. in diss. op., subsecs. (1) and (2) quot. in diss. op. Former salesperson for a real estate firm sued his former employer for wrongful discharge in violation of public policy, inter alia, alleging that his employment was terminated because his vote to approve a municipal parking ban was contrary to the interests of a client of his former employer. Reversing the trial court's grant of summary judgment for defendant and remanding, this court held that a genuine issue of material fact existed as to whether plaintiff was defendant's employee for the purpose of invoking a cause of action based on wrongful discharge. The dissent argued that plaintiff was an independent contractor, since defendant did not exercise over plaintiff the control typical of a common law employment relationship. MacDougall v. Weichert, 144 N.J. 380, 437, 438, 677 A.2d 162, 190.

N.J.1985. Cit. in conc. and diss. op. In a consolidated action, employees brought civil suits against their employer and its company physicians, alleging 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 co-employee 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.1964. Quot. in sup. The plaintiff sued for workmen's compensation death benefits on behalf of her decedent husband. The court held that the decedent was an employee despite the fact that the decedent owned the tractor and leased it to the employer. The court using a “control test” and a “relative nature of the work” test decided that the owner-operator of the truck was an employee and not an independent contractor. Tofani v. L. Biondo Bros. Motor Express, Inc., 83 N.J.Super. 480, 200 A.2d 493, 497, affirmed 43 N.J. 494, 205 A.2d 736.

N.J.Super.App.Div.

N.J.Super.App.Div.2015. Cit. in ftn. In African American employee's action for racial discrimination and harassment against former employer, this court affirmed the trial court's decision that employer was not vicariously liable for the actions of its supervisor in allegedly creating a hostile work environment that resulted in employee's constructive discharge. In making its decision, the court noted that the Restatement Second of Agency had been superseded by the Restatement Third of Agency, and that Restatement Second of Agency §§ 219, 220, 228-237, and 267 had been subsumed and consolidated in Restatement Third of Agency § 7.07. Dunkley v. S. Coraluzzo Petroleum Transporters, 118 A.3d 355, 358.

N.J.Super.App.Div.2012. Adopted in case quot. in sup., quot. in sup. Accident victims who were struck by an automobile operated by driver who was transporting patient from an outpatient surgical center to her home brought a personal-injury action against driver and second surgical center, which had arranged for patient's transportation. The trial court, inter alia, granted partial summary judgment for plaintiffs, determining that driver was second surgical center's agent/employee, rather than an independent contractor. Reversing on the agency issue, this court held that whether driver was acting as second center's agent at the time of the accident was a question for the jury. While the trial court determined from the facts that, among other things, second surgical center exercised "an expansive control" over driver's actions at the time of the accident, and that driver was not engaged in an occupation distinct from his work for the surgical center, a rational jury could as readily conclude from the facts that driver was acting as an independent contractor. Mangual v. Berezinsky, 428 N.J.Super. 299, 307, 53 A.3d 664, 668, 669.

N.J.Super.App.Div.2012. Subsec. (2) cit. in case quot. in sup. State department of environmental protection sued prospective developer of an island and contractor hired by developer to monitor the behavior of endangered bald eagles that nested on the island, alleging that defendants harassed the eagles in violation of the Endangered and Nongame Species Conservation Act. The trial court granted summary judgment for defendants. Reversing in part and remanding, this court held that questions of fact remained as to whether developer was vicariously liable for contractor's alleged harassment of the eagles, in light of plaintiff's evidence raising an inference that developer exercised some measure of control over contractor's monitoring program. State, New Jersey Dept. of Environmental Protection v. Cullen, 424 N.J.Super. 566, 586, 39 A.3d 208, 220.

N.J.Super.

N.J.Super.2004. Cit. in case quot. in sup. Injured motorist brought action, based in part on principles of respondeat superior, against tortfeasor's employer. Affirming the trial court's grant of employer's motion for dismissal, this court held, inter alia, that New Jersey courts continued to adhere to the traditional “scope of employment” test, and that the law of respondeat superior remained unchanged; therefore, the fact that tortfeasor was not acting in the scope of his employment at the time of the accident was dispositive. French v. Hernandez, 370 N.J.Super. 104, 121, 850 A.2d 585, 596, reversed 184 N.J. 144, 875 A.2d 943 (2005).

N.J.Super.1993. Cit. in disc. Workers' compensation insurer sued insured to recover additional premiums for outside truckers used by insured in addition to its regular full-time drivers; insured counterclaimed to recoup contested additional premiums it had already paid. The trial court denied insurer summary judgment and granted insured's cross-motion for summary judgment on the counterclaim. Affirming, this court held that insurer could not charge additional premiums for outside truckers, since, inter alia, insured's contracts with them established truckers' status as independent contractors not subject to workers' compensation coverage by insured notwithstanding the remote possibility that the truckers might someday attempt to claim coverage as employees. Aetna Ins. v. Trans American, 261 N.J.Super. 316, 618 A.2d 906, 911.

N.J.Super.1984. Cit. in disc., com. (g) cit. in ftn. Natural parents sued state and foster parents for an accidental injury to their child while he was in foster care. When the state refused to defend or indemnify the foster parents, their insurer sought a declaration that the state was obligated to do so. The chancery division found that the foster parents were state employees and thus entitled to defense and indemnification. The appellate division reversed and remanded, holding that the state did not have a sufficient right of control over foster parents, who enjoyed considerable autonomy in day-to-day supervision of children and received no pay other than expenses, to render them state "employees"; their status was more akin to that of independent contractors. Conferring employee status on foster parents would also place an intolerable burden of potential liability upon the state. New Jersey Property-Liability Ins. v. State, 195 N.J.Super. 4, 477 A.2d 826, 829, 832.

N.J.Super.1982. Cit. in disc. The central issue in this declaratory judgment action was whether foster parents were state employees for purposes of the state tort claims act. A child was injured while in the temporary care of foster parents. His natural parents sued the foster parents and the state for damages. The state was required to defend any state employee sued as a result of an act occurring in the course of employment, but it refused to defend the foster parents, contending that they were independent contractors. The foster parents' insurer brought a separate action to compel the state to defend and indemnify the foster parents, and the actions were consolidated. The foster parents and their insurer moved for summary judgment. The court stated that one must look to a combination of factors to determine the status of an individual worker. Control was a critical factor, and while the state did not supervise foster parents on a day-to-date basis, the control the state exercised over foster parents was still considerable. The court also made strong public policy arguments against adding to the burden of foster parents. It concluded that foster parents were public employees entitled to indemnification. Summary judgment was granted for the plaintiffs. N.J.Property-Liab., Etc. v. State, 446 A.2d 189, 190.

N.J.Super.1977. Cit. and subsecs. (1) and (2) and coms. cit. in disc. Plaintiff, a passenger in a car driven by defendant, was seriously injured when the car collided with a truck at an intersection. Both plaintiff and defendant were high school students. Plaintiff brought suit against defendant driver, as well as the school board, claiming that defendant driver was acting as an agent and servant of school board since the car was returning from a school-sponsored trip at the time of the accident. Summary judgment determining that defendant student was acting as an agent of the school board was granted when the school board failed to answer requests for admission on the subject of agency within the time limitation. On appeal, the court held that, in spite of school board's failure to respond in timely fashion, summary judgment was precluded where the trial judge, at the time of ruling on the motion, had before him the board's denial of agency, and the question of whether the driver was, in fact and law, the servant of the school board involved determination of issues of material facts by the court. Gilborges v. Wallace, 153 N.J.Super. 121, 379 A.2d 269, 274, 275, aff'd in part and remanded in part 78 N.J. 342, 396 A.2d 338 (1978).

N.J.Super.1976. Subsec. (1) quot. in sup. An employee of a trucking company, which was a wholly owned subsidiary of defendant Penn Central Transportation Company, brought suit against Penn Central for negligence under the Federal Employers' Liability Act. The trial court dismissed the action, and this court affirmed, but the United States Supreme Court vacated the judgment and remanded for consideration in light of a similar United States case. That case noted that the requirement for recovery under the Act of a showing of a master servant relationship between a plaintiff and a firm could be met by a showing that plaintiff was the servant of a company which was, in turn, a servant of defendant. The court here held that there was sufficient evidence in the record for the jury to conclude that the subsidiary was organized for and continued to serve only the

interests of the Penn Central Railroad, so that plaintiff might be found to be a subservant of Penn Central and remanded for a new trial. Pelliccioni v. Schuyler Packing Company, 140 N.J.Super. 190, 356 A.2d 4, 8.

N.J.Super.1975. Cit. in sup. The infant plaintiff, who was injured, while on the premises of her grandmother, by a tractor driven by the grandmother's son-in-law, brought a personal injury action against both the grandmother and her son-in-law. The son-in-law then filed a third-party complaint seeking a declaratory judgment construing his mother-in-law's homeowner's insurance policy to encompass coverage for himself as an additional insured. The son-in-law argued that in mowing his mother-in-law's lawn, he was acting as an employee within the terms of the insurance policy. The trial court held that the policy provision was ambiguous and should, therefore, be construed to afford, rather than to deny coverage. On appeal, the superior court held that the contract provision was not ambiguous, and that the meaning of the word employee should be governed by the popular understanding of the word shared by the members of the general public who purchase insurance. Since the son-in-law performed the work gratuitously and was not under the direction or control of his mother-in-law as to the time or methods of performance, the court held that the son-in-law was not an employee within the meaning of the policy provision. Petronzio v. Brayda, 138 N.J.Super. 70, 350 A.2d 256, 261.

N.J.Super.1961. Cit. in sup. In action for injuries sustained by employee of subcontractor when the electric drill he was using jammed while he was drilling an overhead steel beam in plant of defendant corporation, causing him to fall into an empty steel tank, defendant general contractor was guilty of no breach of duty to plaintiff, since it did not supervise, direct, or concern itself in any way with the installation of the equipment it had manufactured, nor did defendant corporation breach its duty of providing plaintiff with a safe place in which to work. Wolczak v. National Electric Products Corp., 66 N.J.Super. 64, 168 A.2d 412, 415.

N.J.Super.1960. Sec. and coms. cit. in sup. When plaintiff was injured when a truck driver of defendant hit him and he sued defendant and alleged employer of defendant, question whether defendant was employee of alleged employer should have gone to jury. Andryishyn v. Ballinger, 61 N.J.Super. 386, 160 A.2d 867, 869, 870.

N.M.

N.M.2015. Subsec. (2) adopted in case quot. in disc. Driver who was arrested for reckless driving on a state highway that was on tribal land brought a § 1983 action against tribal officer who arrested him; officer filed a third-party complaint against county, seeking a declaratory judgment that, under the New Mexico Tort Claims Act (NMTCA), county was required to defend and indemnify him. The trial court entered judgment for county and the court of appeals affirmed. This court reversed, holding that officer provided sufficient evidence that he was acting as a public employee under the NMTCA. In reaching its decision, the court described the multi-factor analysis set forth in Restatement Second of Agency § 220(2) for determining whether an individual was an independent contractor, but explained that, in this case, the right-to-control analysis alone resolved the issue and established that officer was a public employee commissioned to act as a deputy sheriff for the county. Loya v. Gutierrez, 350 P.3d 1155, 1168.

N.M.2008. Subsec. (1) cit. in case cit. and quot. in ftn. Employee who allegedly was injured while working as a graphic technologist for his direct employer's customer, and received workers' compensation benefits for his injury through his direct employer's insurer, sued customer under a negligence theory. The district court granted summary judgment for defendant, and the court of appeals affirmed. Affirming, this court held that defendant had the right to control the details of plaintiff's work, thus making defendant plaintiff's special employer and, as such, immune from tort liability under the exclusivity provision of the workers' compensation act; in concluding that the statutory employment test did not apply to plaintiff, the court necessarily concluded that plaintiff was neither a statutory employee nor an independent contractor. Hamberg v. Sandia Corp., 2008-NMSC-015, 143 N.M. 601, 179 P.3d 1209, 1212.

N.M.2004. Cit. in sup., cit. in case cit. and quot. in sup., subsec.(2) coms. (a-j) cit. in sup., subsec. (2)(c) cit. and quot. in sup. Store employee sued county sheriff's department's volunteer chaplain, who ran over employee's foot in store parking lot while driving department vehicle on personal errand. Trial court granted chaplain summary judgment based on statute of limitations,

and appellate court reversed. This court reversed in part, holding, inter alia, that chaplain was department employee at time of accident, and was protected by two-year statute of limitations under Tort Claims Act where department exercised sufficient control over chaplain's activities, and chaplain was not "self-directed," was assigned duties by department, and was at all times provided with instrumentalities, including a vehicle, to carry out department's business. Celaya v. Hall, 135 N.M. 115, 85 P.3d 239, 242-244.

N.M.1999. Subsec. (1) quot. but dist. Survivors of accidental-shooting victim brought negligence action against homeowner for whom shooter's brother was housesitting when the incident occurred at the home. The trial court entered summary judgment for homeowner, but the intermediate appellate court reversed on the ground that a triable question existed as to whether homeowner and housesitter shared an employer-employee relationship. Reversing, this court held that housesitting required little or no skill and was not considered an occupation, and that housesitter here was not subject to homeowner's control or right of control; therefore, the court could not say that an employer-employee relationship existed. Madsen v. Scott, 128 N.M. 255, 992 P.2d 268, 270.

N.M.1996. Subsec. (1) 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. Cit. in disc. and in sup. and adopted; subsec. (1) cit. in headnotes, cit. generally in synopsis, and cit. and quot. in sup.; coms. (e) and (l) quot. in sup.; coms. (h)-(m) cit. in disc. 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 held, inter alia, that the term "independent contractor" in the Act should be construed as a common law term and adopted the "right-to-control" test of the Restatement (Second) of Agency § 220 for distinguishing a "servant" from an 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, 1324-1326, 1328, 1330, 1331, 1334, 1336, 1337.

N.M.1990. Subsec. (1) quot. in disc. Three motorists were killed when a truck, driven by an intoxicated person, collided with their vehicle. The personal representative for the motorists' estates sued, among others, the county board of commissioners, alleging that the county's sheriff deputies, pursuant to a county policy, refused to enter a bar to enforce liquor control laws so as to prevent the individual from driving while intoxicated. The trial court dismissed the complaint, but the intermediate appellate court reversed. Affirming in part, reversing in part, and remanding, this court held, inter alia, that although the county did not possess statutory authority or a contractual right to control the details of a sheriff deputy's performance, the deputies acted as servants of the county because they implemented an express county policy voluntarily or under some form of duress or compulsion. Thus, the county could be held vicariously liable for the deputies' negligence in failing to take reasonable steps to investigate a disturbance involving the intoxicated individual at a bar, because the plaintiff had proven that they were acting as servants of the county independent of any allegation that the county exercised direct supervisory control. California First Bank v. State, 111 N.M. 64, 801 P.2d 646, 651.

N.M.1968. Com. (d) subsec. (1) quot. in sup. Plaintiff was shot by defendant's agent while on defendant's property. Plaintiff had been called to retrieve a cow and calf that had wandered on to defendant's land. Plaintiff and defendant had an altercation about the cattle, and the agent shot plaintiff. Plaintiff offered evidence that although formally retired, the agent was still employed

by defendant corporation which was run by defendant's wife. Plaintiff sued the agent and corporation. Plaintiff recovered a judgment and defendant appealed. The court held that defendant was the corporation's agent, even though retired because he performed the same duties as when employed. Defendant was acting within the scope of employment and with full knowledge of the corporation. Even though the corporation did not exercise control over the particular act, it was in general control and even though the agent was working gratis, it did not diminish the agency relationship. The act was intentional and tortious and done in connection with the agent's employment so the principal was liable. McCauley v. Ray, 80 N.M. 171, 453 P.2d 192, 201, 202.

N.M.1964. Cit. in sup. Defendant leased a service station to an oil company which, in turn, leased it back to defendant. The defendant allowed two persons to operate the station in return for certain profits received from sales. A patron, who slipped and fell on an oil puddle on the pavement of the service station, brought suit against the oil company and the defendant; the court found that the oil company exercised no control over the operation of the station, despite the facts that the station displayed the signs of the oil company and used the oil company's credit cards. The court also found that there were questions of fact concerning the defendant's control over the two operators of the station, since the defendant employed a “Station Supervisor” who checked the station every week or two. Shaver v. Bell, 74 N.M. 700, 397 P.2d 723, 727.

N.M.1962. Illus. 7 cit. in sup. In a suit for damages from negligent operation of auto by defendant agent, defendant principal was not liable for the agent's actions where agent was paid on a commission basis, chose his hours and place of work, used his own car, was given $5.00 expense money for each night on the road, occasionally took orders for other companies besides principal, and where principal could have terminated employment at any time. Romero v. Shelton, 70 N.M. 425, 374 P.2d 301, 303.

N.M.App.

N.M.App.2010. Subsecs. (2)(a)-(2)(j) cit. in sup., adopted in case quot. in sup., and cit. in cases cit. in sup.; subsec. (2)(i) quot. in sup. Sales managers and salespersons for magazine-subscription-processing company, or their estates, brought a personal-injury action against company, alleging that managers and salespersons were killed or injured in a single-vehicle accident when a rear tire on the vehicle, owned by one of the plaintiffs and overloaded with 15 people, blew out. The trial court granted summary judgment for defendant. Affirming, this court held that sales managers and salespersons were independent contractors, rather than employees, for purposes of determining defendant's liability; sales managers entered into independent-contractor agreements with defendant, there was no evidence that defendant controlled the details of managers' daily operations, salespersons were hired by each sales manager, and details of a salesperson's work were controlled by the sales manager of each sales crew, not by defendant. Korba v. Atlantic Circulation, Inc., 2010-NMCA-029, 148 N.M. 137, 231 P.3d 118, 120-124.

N.M.App.2007. Cit. in case cit. in disc., adopted in case cit. but dist. Contract employee who was injured while working at a government laboratory sued laboratory for negligence. The trial court granted summary judgment for defendant, holding that defendant was plaintiff's special employer, and was therefore immune from tort liability under the exclusivity provisions of the state workers' compensation act. Affirming, this court held that the trial court correctly applied the special-employer, rather than the statutory-employer, test to the facts of this case. The court pointed out that the totality-of-the-circumstances test, argued to be applicable by plaintiff, was the approach to be used in determining whether a contractor was an independent contractor, not in determining whether an employer could be considered a statutory employer. Hamberg v. Sandia Corp., 2007-NMCA-078, 142 N.M. 72, 162 P.3d 909, 914, affirmed by 143 N.M. 601, 179 P.3d 1209 (N.M.2008).

N.M.App.2005. Subsec. (1) quot. in sup. Worker who was injured while working in a manufacturing plant owned by parent company's subsidiary when a roll of insulation material fell on him brought negligence action against second subsidiary. Trial court granted defendant summary judgment. This court affirmed, holding that plaintiff was an employee of defendant within the meaning of the Workers' Compensation Act, and, therefore, the Act provided the sole remedy against defendant. Plaintiff failed to rebut defendant's prima facie showing that it had the right to control the work in the plant; although plaintiff used his own tools, defendant hired the plant workers and had the right to terminate them. Headley v. Morgan Management Corp., 137 N.M. 339, 110 P.3d 1076, 1078.

N.M.App.2003. Cit. in sup., cit. in case cit. in sup., subsec. (2)(i) quot. in sup. Three years after a car driven by a volunteer chaplain for county sheriff's department injured store employee in store's lot, employee sued county, department, and chaplain for negligence. At time of accident, chaplain was running a personal errand. Trial court granted chaplain summary judgment, holding that chaplain was a public employee acting within scope of his duties, and therefore plaintiff's suit was barred by state tort claims act's statute of limitations. This court reversed and remanded, holding that there was fact issue as to whether chaplain was an independent contractor because of department's lack of actual control over, or right to control, details of his work. Celaya v. Hall, 134 N.M. 19, 71 P.3d 1281, 1283, 1284.

N.M.App.1998. Cit. in disc., subsec. (2) cit. in disc., com. (m) quot. in disc. Inmate who was injured while participating in work-release program was denied workers' compensation benefits by workers' compensation judge (WCJ). This court reversed WCJ's decision. The supreme court affirmed in part, reversed in part, and remanded. On remand, WCJ again determined that inmate could not recover benefits because he was not an employee of the company for which he was working when he was injured. Reversing, this court held that inmate could be considered an employee where company provided him with the tools and equipment needed to perform his assigned tasks, directed and supervised inmate's work, and controlled the means and methods of his performance, and that inmate was a “worker” for purposes of the Workers' Compensation Act. Benavidez v. Sierra Blanca Motors, 125 N.M. 235, 959 P.2d 569, 571-573.

N.M.App.1998. Subsec. (1) cit. in case cit. in sup. Employee of national youth recreation organization's local chapter sued national organization, among others, to recover damages for personal injuries he sustained when a dead tree he was helping to cut down on premises of local chapter's youth camp fell on him. Affirming in part the trial court's entry of judgment awarding plaintiff damages, this court held, inter alia, that defendant was not plaintiff's statutory employer and thus was not entitled to immunity from tort liability under the exclusivity provisions of the workers' compensation act. Enriquez v. Cochran, 126 N.M. 196, 967 P.2d 1136, 1154.

N.M.App.1998. Cit. in diss. op., subsec. (1) quot. in sup., com. (h) cit. in case 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, 555, 562.

N.Y.

N.Y.2020. Cit. in conc. op.; subsec. (j) quot. in ftn. to conc. op.; com. (g) cit. in conc. op. Delivery business that used a website and smartphone application to assign a courier to pickup and deliver customers' orders appealed a finding by the state board of unemployment insurance in favor of courier, arguing that it did not owe contributions to the unemployment fund on behalf of courier, because its couriers were independent contractors. The court of appeals reversed and remitted to the board for further proceedings. This court reversed and reinstated the decision of the board, holding that substantial evidence supported the board's determination that the delivery business exercised sufficient control over its couriers to render them employees. The concurrence argued for the application of the test set forth in Restatement of Employment Law § 1.01 for determining employee status, which considered factors such as whether a business effectively prevented its workers' entrepreneurial control over their services, noting that this test was based on similar tests set forth in Restatement of Agency § 220, Restatement Second of Agency § 220, and Restatement Third of Agency § 7.07. Matter of Vega, 149 N.E.3d 401, 411, 412.

N.Y.1994. Com. (i) quot. in conc. op. Truck driver who delivered a shipment of rice to grocer was injured in a fight with three men who had been hired by grocer to unload truck. Trial court denied grocer summary judgment but appellate court reversed.

This court affirmed the appellate court, holding that record did not support existence of any fact question that could lead to conclusion that defendant supervised these day laborers' activities for vicarious liability purposes. Defendant did not exercise actual or constructive control over performance and manner in which unloaders' work was performed. Concurrence argued that defendant was not liable, because unloaders' assault was not undertaken in furtherance of defendant's business. It asserted that the issue of control was not relevant in resolving this case; however, it noted that defendant told workers where to place the unloaded sacks and that workers had no authority to choose when or where to perform unloading. Lazo v. Mak's Trading Co., Inc., 84 N.Y.2d 896, 898, 620 N.Y.S.2d 794, 795, 644 N.E.2d 1350, 1351.

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

N.Y.Sup.Ct.App.Div.1981. Cit. in diss. op. The plaintiffs, security guards formerly employed by the defendant school district, challenged the termination of their civil service positions and the contract between the defendant and a private security service which replaced the plaintiffs. The plaintiffs claimed that the new security personnel were actually employees of the school district, and because the New York State Constitution required that all appointments in the state civil service be competitive, the new contract violated the constitution. The trial court granted the plaintiffs' petition for reinstatement and back pay. The appellate court reversed, holding that where the school district did not control the hiring and salaries of the private service employees and did not supervise their daily activities, the school district was not in control of the private employees. Lacking this element of control, the school district's relationship with the new guards did not constitute an employer-employee relationship so as to violate the state constitution. The dissent recognized that the control exercised by the employer is the crucial element in determining whether an employer-employee relationship exists. The dissent pointed out that the employees were compensated according to their time at the job site, the employer furnished almost all of the required equipment, the employees worked at no other job, the private contractor did not exercise discretion as to the mode, manner, and details of the work, the employer could effectively dismiss employees by terminating the contract, and the employees took direction from supervisors who worked for the employer. The dissent argued that these factors showed the requisite element of control and supervision to establish an employer-employee relationship in violation of the state constitution. Nassau Ed. Chap. v. Great Neck U. Free Sch., 85 A.D.2d 733, 445 N.Y.S.2d 812, 816, order affirmed 57 N.Y.2d 658, 454 N.Y.S.2d 67, 439 N.E.2d 876 (1982).

N.Y.Sup.Ct.App.Div.1979. Quot. in diss. memorandum op. in sup. The court had affirmed the decision of an Industrial Board that pallbearers engaged by a funeral home to render services as pallbearers to the family of a deceased person were employees of the funeral home. The dissent quoted Section 220 and stated that the relationship of the pallbearers to the funeral home in terms of this definition does not conform with that of employer-employee. “There is lack of control by appellant (funeral home); the relationship is an extremely casual one; the work performed is not part of appellant's business but only an accommodation offered when a family does not wish to provide its own pallbearers; the parties to the arrangement do not consider themselves as employer-employees; it is to the livery company that the employees look for engagement to work and for training and direction in the service they supply and, finally, the cost of the service rendered by the pallbearers is borne by the customers of the appellant and not the appellant.” Harman Funeral Home v. Ross, 69 A.D.2d 799, 415 N.Y.S.2d 400, 401.

N.Y.City Civ.Ct.

N.Y.City Civ.Ct.1977. Cit. in sup. in ftn. The Commissioners of the New York State Insurance Fund brought suit for premiums under a policy of workmen's compensation insurance in a case involving the determination of whether defendant “employed” maintenance men in the conduct of his cleaning business, or whether defendant “sold” maintenance work to “buyers” who operated independently. The court rendered judgment for plaintiffs, holding that the test for judicial review of decisions by the Workmen's Compensation Board could not be applied to the instant action, since no administrative body had acted, and the court took extensive testimony, examined documents admitted into evidence, and had a full opportunity to evaluate the credibility of witnesses; and that defendant exercised sufficient control over his so-called “buyers” to make them employees for purposes of workmen's compensation. Commissioners of State Ins. Fund v. Kaplan, 89 Misc.2d 610, 392 N.Y.S.2d 971, 974.

N.C.

N.C.1994. Subsec. (2)(c) cit. in sup. The administrator of the estate of a patient who died when anesthesia complications arose during surgery sued the surgeon. This court, reversing the intermediate appellate court's affirmance of a directed verdict for the surgeon based on inapplicability of respondeat superior and remanding for a new trial, held, inter alia, that the surgeon could be held liable for the anesthetist's alleged negligence, even though the anesthetist was considered a skilled assistant, if the surgeon had, in fact, possessed the right to control the actions of the anesthetist at the time of the anesthetist's allegedly negligent act, regardless of whether the surgeon should reasonably have been aware of the negligent conduct sought to be imputed to him. A jury question was therefore presented on the issue of control. Harris v. Miller, 335 N.C. 379, 397, 438 S.E.2d 731, 741.

N.C.App.

N.C.App.1992. Subsecs. (2)(b), (2)(h), and (2)(i) cit. in disc. The personal representative of a worker who was killed when the walls of a sewer trench he was digging collapsed sued the landowner, inter alia, for negligence under a theory of respondeat superior. The trial court granted the landowner's motion for summary judgment. Affirming, this court held that the construction company that had employed the decedent was not the landowner's employee but an independent contractor, since the landowner did not retain any right to control and direct the manner in which the construction company executed the details of its task. The court noted that the landowner was not in the business of installing sewer systems, while the construction company was engaged in that type of business, and that the sole proprietor of the construction company did not believe he was the landowner's employee. Cook v. Morrison, 105 N.C.App. 509, 413 S.E.2d 922, 925.

N.C.App.1988. Com. (c) cit. in sup. A participant in a federally funded training program was injured when the sanitation truck he was working on was involved in an accident. The trainee sued the driver of the truck in negligence and the city on a theory of respondeat superior. The trial court granted the defendants' motions for summary judgment, holding that the Worker's Compensation Act was the trainee's exclusive remedy. Affirming, this court held that the city exercised sufficient control over the trainee for him to be classified as an employee for purposes of the Act. Sutton v. Ward, 92 N.C.App. 215, 374 S.E.2d 277, 279.

N.C.App.1971. Cit. but dist. This was an appeal from a directed verdict for the plaintiff by the defendant life insurance company. The trial court had ruled as a matter of law that the insurance agent defendant was an employee of the life insurance company and was not an independent contractor, as claimed by the company. The court found that it was beyond the power of the lower court to make such a ruling in view of the fact that there was conflicting evidence in regard to the agent's status. The court held that such conflicting evidence must be considered by a jury as a question of fact and ordered a new trial. Little v. Poole, 11 N.C.App. 597, 182 S.E.2d 206, 210.

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).

Ohio, 1986. Cit. in disc. During an intercollegiate game, a student athlete was injured by a player of the opposing team. The student sued the opponent's university under the doctrine of respondeat superior. The trial court awarded the university summary judgment, holding that no agency relationship existed between the opposing player and the university. The intermediate appellate court reversed, holding that genuine issues of fact existed on the question of agency. Reversing, this court held that there was

no agency relationship between the player who inflicted the injury and the university, because the elements of control, contract, and economic benefit were absent. Hanson v. Kynast, 24 Ohio St.3d 171, 494 N.E.2d 1091, 1095.

Ohio App.

Ohio App.2013. Subsec. (2) cit. in case quot. in disc. Patient who went into cardiac arrest and died several days after undergoing lap-band surgery at a private medical center brought a medical-negligence and wrongful-death suit against, among others, physician who performed the procedure. The trial court granted defendant's motion to dismiss, finding that he was entitled to civil immunity as a state employee, because he was an owner and shareholder of the medical center, which contracted with the University of Cincinnati (UC), a state university, to teach and train UC medical residents. Reversing and remanding, this court held that defendant was not a state employee at the time of patient's treatment and thus was not entitled to immunity. The court reasoned that there was no contract of employment between UC and defendant, the state did not have control over defendant's actions, and there was no symbiotic relationship between the state and the medical center. Poe v. Univ. of Cincinnati, 2013-Ohio-5451, 5 N.E.3d 61, 66.

Ohio App.2006. Cit. in case cit. in ftn. City that transferred properties to developer for redevelopment and provided financing for the project initiated foreclosure actions against the properties and lien holders after developer abandoned the project; subcontractor that had filed a mechanics' lien against the properties brought a cross-claim for a statutory lien on public funds for work it had performed on a "public improvement." The trial court entered judgment for subcontractor against city. Affirming, this court held that subcontractor properly filed a lien against public funds. The court stated that city transformed the project into a public improvement authorized by public authority by controlling not only the financing but also the mode and manner of the work to be performed, and thus overstepped its role as creditor and entered into a principal-agent relationship with developer. Cincinnati v. Scheer & Scheer Dev., 169 Ohio App.3d 101, 106, 2006-Ohio-1221, 862 N.E.2d 122, 126.

Ohio App.1972. Cit. subsec. (2) and cit. com. (c). This was an action for negligence of defendant's employee while employee was delivering a shipment to a customer. Defendant claimed that the employee was an independent contractor at the time of the accident. This court reversed the summary judgment for defendant because there remained genuine issues of fact as to whether there was a master-servant or an independent contractor relationship. The employee owned, serviced, and paid insurance on the delivery truck and was paid separately for the deliveries he made, but there was also evidence that he was a full time employee of defendant, that there was no separate agreement to perform the deliveries, and that the employee was under the control and supervision of defendant's foreman when he made the deliveries. Duke v. Sanymetal Products Co., 31 Ohio App.2d 78, 60 Ohio Ops.2d 171, 286 N.E.2d 324, 327.

Or.

Or.2009. Com. (e) cit. in disc. Passenger who was injured while riding an airport shuttle bus brought negligence action against bus driver and driver's employer, which provided shuttle-bus service under a contract with airport. The trial court granted summary judgment for defendants. The court of appeals affirmed. Reversing and remanding, this court held that defendants failed to demonstrate that plaintiff's only permissible tort action was against airport because they were airport's agents within the meaning of the state tort claims act; the contract did not provide that airport had the right to control the physical manner in which the drivers carried out their driving duties, and thus did not support the conclusion that employer or its employees, including driver, were acting as airport's agents for purposes of imposing vicarious liability on airport for their alleged negligence. Vaughn v. First Transit, Inc., 346 Or. 128, 137, 206 P.3d 181, 187.

Or.2003. Cit. in disc. Former union employee sued union, its business agent, and the international union, alleging, among other things, violation of whistleblower law following employee's dismissal after she made allegations against local union's business agent. Trial court entered judgment on jury verdict for employee on whistleblower claim and awarded noneconomic and punitive damages. Appellate court affirmed international union's liability, but ordered new trial if employee did not agree to reduction of punitive-damages award. Reversing in part, this court held, inter alia, that jury was incorrectly instructed on agency principles

regarding international union's liability for actions of local union and its business agent, where instructions allowed jury to hold international union liable for all acts of local union, a nonservant agent, even acts over which international union had no control. Jensen v. Medley, 336 Or. 222, 236, 82 P.3d 149, 157.

Or.2002. Cit. and quot. in diss. op.; subsec. (1) cit. in disc., quot. in sup., and cit. and quot. in cases cit. and quot. in disc. Estate of driver who was killed in a motor-vehicle accident with dealer of meat and fish products sued dealer's supplier for negligence on a theory of vicarious liability. Trial court granted summary judgment for defendant, and court of appeals affirmed. Affirming, this court held that, as a matter of law, dealer was an independent contractor, since no reasonable jury could conclude that defendant had a sufficient right to control dealer's performance for dealer to be considered defendant's employee. The dissent argued that plaintiff was entitled to have a jury apply the factors of Restatement (Second) of Agency § 220 to decide whether a master-servant relationship existed. Schaff v. Ray's Land & Sea Food Co., Inc., 334 Or. 94, 100, 105, 110-113, 45 P.3d 936, 939, 942, 945, 946.

Or.1979. Quot. and fol. Plaintiff brought suit against a bank and others to recover for damages to a fishing boat that was negligently struck by a tugboat which the defendant bank had repossessed and was renovating at the time. The lower court found the bank liable for the codefendant tugboat's negligence on a respondeat superior theory, and the bank appealed. On appeal, the court affirmed, holding that the contract between the bank and the codefendant, who was to complete the renovation work and who was operating the tugboat at the time of the collision, was ambiguous and the jury, assessing the contract, together with other evidence received, could conclude that the agreement created an employment relationship between the bank and the codefendant. Meskimen v. Larry Angell Salvage Co., 286 Or. 87, 592 P.2d 1014, 1018.

Or.1979. Quot. in sup. cit. in conc. op. Motorcyclist brought suit to recover against motorcycle distributor and manufacturer on the theory that they were vicariously liable for the negligence of the dealer in performing service work under the terms of the warranty agreement. The plaintiff purchased a new motorcycle in June of 1973. Early in July he took the motorcycle to the dealer's shop for the first inspection required under the terms of his warranty. The plaintiff was severely injured while riding on the motorcycle five days later. The trial court determined that the accident was caused by a loose drive chain slipping off the sprocket, and that the dealer had negligently failed to inspect and adjust it properly. The trial court entered judgment against both the manufacturer and the distributor, and they appealed. The court affirmed as to the distributor, finding that the distributor had the contractual right to control the manner in which the dealer performed warranty service on its motorcycles. In its discussion, the court remarked that it often cited the Restatement's definition of a servant, but it expressed concern with treating right to control as the sole test of the existence of a master servant relationship. In a specially concurring opinion, a justice reminded that under certain circumstances one may be liable for the torts of an independent contractor, and that the trend is toward enlargement of the liability of a defendant for the torts of another, even where there is a relationship between them of employer and independent contractor, rather than one of master and servant. This comment was in reference to the justice's belief that the element of right to control establishes only a servant, rather than an independent contractor, relationship, but is not determinative of liability to a third person. Peeples v. Kawasaki Heavy Industries, Ltd., 288 Or. 143, 603 P.2d 765, 767, 770.

Or.1973. Quot. in part in sup. The plaintiff sought damages for injuries sustained in an auto accident. The defendants were the driver of the other car and his aunt. The plaintiff alleged that at the time of the accident, the driver was the aunt's servant, since the driver was in the process of delivering badly needed oxygen to the aunt's mother, who was the driver's grandmother. The court held that even if the aunt had asked the driver to get the oxygen, she was not his “master” for purposes of liability because of the lack of evidence that she employed him and that she could control his conduct. Jorgensen v. Richard, 266 Or. 263, 512 P.2d 991, 992.

Or.1966. Cit. in sup. in ftn. Where an employee was using his own means of transportation, route, and time to go to a trade convention, was under no obligation to do so, was not being reimbursed for his expenses, and was not employed to engage in such activities, his employer was not liable for injuries caused by the employee's negligent driving at the time. The incidental benefit to the employer did not place the employee's activities within the scope of his employment. Gossett v. Simonson, 243 Or. 16, 411 P.2d 277, 281.

Or.1966. Subsec. (1) quot. in sup. The plaintiff sought damages for personal injuries sustained, as a result of the defendant driver's negligence, against the defendant heating company which, the plaintiff contended, was the employer of the tort-feasor. The court found evidence insufficient to warrant the jury's consideration that the driver, an independent salesman, was also the servant of the defendant, even though the defendant did exercise some degree of control over its salesmen by furnishing order books, in view of the salesmen's requirement of carrying public liability insurance, the express disclaimer of liability by the defendant, and the mode of payment to the salesmen which did not deduct any governmental withholdings. Jenkins v. AAA Heating and Cooling, Inc., 421 P.2d 971, 973.

Or.1963. Sec. and com. (d) quot. in sup., com. (c) quot. in part in sup., com. (m) cit. in sup. In action for injuries and damages sustained in automobile collision, question whether driver, who agreed to drive brother's automobile to brother's farm and feed stock gratuitously and who allegedly negligently became involved in collision with vehicle driven by his own wife and occupied by brother, was acting as servant of brother raised a jury issue. Kolwaleski v. Kolwaleski, 235 Or. 454, 385 P.2d 611, 612, 613, 614, 615.

Or.1963. Quot. in sup. In an action arising from a collision between plaintiff's bus and a car driven and owned by distributor of defendant publisher's newspaper, in an appeal by the defendant publisher to be relieved of liability on the ground that defendant distributor was an independent contractor, the court held that the evidence, which indicated a considerable degree of control over distributor by publisher, was sufficient to warrant submission of the issue to the jury and that its verdict that distributor was an employee was not erroneous as a matter of law. Wallowa Valley Stages, Inc. v. Oregonian Pub. Co., 235 Or. 594, 386 P.2d 430, 432.

Or.App.

Or.App.2016. Com. (e) quot. in sup. (erron. cite as com. (c)). Union president who had worked for the state department of revenue brought an action against state, alleging, inter alia, that defendant interfered with plaintiff's disclosure of violations of federal and state law when it failed to police its email systems for offensive, threatening, and libelous statements about overtime-wage claims that plaintiff filed against defendant. The trial court granted defendant's motion to dismiss. This court affirmed, holding that plaintiff failed to allege facts sufficient to indicate that he was an "employee" as defined in the relevant whistleblowing statute. The court determined that plaintiff was not an "employee" because he was "under contract" with the state through an agreement that authorized him to act as union president on release time from defendant, and explained, citing Restatement Second of Agency § 220, Comment *e*, that when "under contract" was read in context, it pertained to the distinction between an employee and an independent contractor. Dinicola v. State, 382 P.3d 547, 561.

Or.App.2009. Quot. in case quot. in sup., com. (e) cit. in case quot. in disc. Motorcyclist brought a negligence action against pizza delivery driver, pizza franchisee that employed driver, and franchisor, alleging that he was injured when his motorcycle collided with a vehicle operated by driver. The trial court granted franchisor's motion for summary judgment, and entered a limited judgment for franchisor. Affirming, this court held that the facts were insufficient to establish franchisor's vicarious liability for the negligent driving of franchisee's employee. The court reasoned that franchisee was, at most, a nonemployee agent of franchisor, and that, under the franchise agreement, franchisor did not have the right to control the physical details of the conduct that injured plaintiff—namely, the manner in which driver carried out his driving duties for franchisee. Viado v. Domino's Pizza, LLC, 230 Or.App. 531, 535, 547, 217 P.3d 199, 202, 208-209.

Or.App.1982. Cit. in disc. The plaintiff brought an action against the county, alleging that two circuit court clerks were negligent in failing to process writs of attachment and notices of garnishment within a reasonable time, and that the plaintiff was unable to collect a judgment as a result. The county moved for and was granted summary judgment, and the plaintiff appealed. The issue on appeal was whether the clerks were county employees for the purposes of tort liability under the theory of respondeat superior. It was agreed that the clerks were hired by and responsible to the circuit court administrator, and that the primary test to determine the existence of a master-servant relationship was the right to control. The plaintiff contended that the county had

the right to control the administrator, and through him the clerks, because the county approved and paid the administrator's salary. This court stated, however, that payment of the administrator's salary had little to do with the right of control. The statutes relating to the appointment and duties of a circuit court administrator clearly showed that the administrator was under the control of the circuit court judges, who were state officers. Therefore the county did not have control over the administrator sufficient to make him a county employee. The judgment was affirmed. University Medical Assoc. v. Multnomah County, 645 P.2d 557, 558.

Or.App.1979. Subsec. (1) and com. (b) cit. 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 his authority. Jones v. Herr, 39 Or.App. 937, 594 P.2d 410, 412.

Pa.

Pa.1979. Cit. in disc. A public defender had represented the plaintiff in a proceeding initiated to commit him to a mental hospital. The plaintiff sued the public defender claiming that he had negligently represented him and, as a result, the plaintiff had been improperly confined. The defendant moved for a judgment on the pleadings stating that as a public defender he was absolutely immune from suit as a matter of law. The lower court granted the motion and the plaintiff appealed. This court held that public defenders were not public officials but rather public employees and not entitled to sovereign immunity. The court stated that a public defender does not serve as a public administrator with policymaking or sovereign functions. The court stated that the defender's role while representing his client was like that of a privately employed attorney and could, therefore, subject him to suit for negligent representation. Reese v. Danforth, 486 Pa. 479, 406 A.2d 735, 738, 739.

Pa.Super.

Pa.Super.2021. Subsec. (1) cit. in case quot. in sup. In an action for medical malpractice against two physicians, patient also sued hospital that was physicians' ostensible employer and dialysis clinic that was their actual employer, alleging that hospital and clinic were vicariously liable for physicians' negligence; hospital filed a cross-claim against clinic, seeking indemnification or contribution. The trial court denied clinic's motion for summary judgment, finding that hospital was entitled to seek indemnity or contribution from clinic. This court affirmed, holding, among other things, that questions of fact remained as to whether hospital was entitled to indemnity from clinic. The court cited Restatement Second of Agency § 220 in noting that the right to control was determinative in resolving whether one person was the servant of another, and that the right to supervise, even as to the work and the manner of performance, was not sufficient. McLaughlin v. Nahata, 260 A.3d 222, 235.

Pa.Super.1985. Subsec. (1) quot. in disc. The plaintiff was injured in a collision with a vehicle owned and operated by the defendant. The defendant was the private duty nurse for her passenger. The plaintiff sued the driver and the passenger and alleged that the driver was acting within the scope of her employment at the time of the collision. The passenger moved for summary judgment and the trial court granted the motion. This court reversed and remanded. Noting that a servant is someone employed to perform services for another who has a right to control that performance, the court held that whether the driver was an independent contractor or servant was a material issue that precluded summary judgment. Melmed v. Motts, 341 Pa.Super. 427, 491 A.2d 892, 893.

Pa.Super.1982. Subsec. (2) cit. in ftn. A contract dispute between an engineering firm and its client was submitted to arbitration as required under the contract. The arbitrators found in favor of the engineering firm. The trial court confirmed the arbitrator's award, and the client appealed. This court stated that in arbitration agreements, the arbitrator was the final judge of both law and fact, and his award could be overturned only if there was fraud or some other irregularity resulting in an unjust award. The client

argued that the award should be vacated because the firm, as a business corporation, had contracted to perform professional services in violation of state law. The court noted that both sides had addressed this issue before the arbitrators, and it could not say that the arbitrators' decision was such a capricious disregard of the law as to require vacatur. The client also claimed that the trial court erred in denying the client's request for additional discovery because the firm had suppressed certain facts at the arbitration proceeding. These facts related to the existence of a subcontractor from which the firm was to receive a kickback. This court found no merit in the client's arguments, noting that the firm was an independent contractor, free from the client's control with regard to the means of performing its work, and there was no requirement that the firm furnish the names of any subcontractors. The court further found that the alleged kickback was merely a discount provision. The trial court's order was affirmed. Parking Unlimited v. Monsur Med. Foundation, 445 A.2d 758, 763.

Pa.Cmwlth.

Pa.Cmwlth.1981. Subsec. (2) cit. in sup. A pharmacist appealed the order of the Hearings and Appeals Unit of the Department of Public Welfare (DPW) upholding DPW's permanent suspension of the pharmacist from the Medical Assistance Program and sustaining DPW's demand for restitution for amounts paid to the pharmacist under the Medical Assistance Program. The pharmacist allegedly conducted business at an unlicensed pharmacy at a medical center which contained a dental office in contravention of the section of the medical assistance program which required participating pharmacies to be licensed by the State Board of Pharmacy and the statutory section which declared that no person shall operate a pharmacy without a Board permit. The record showed the interdependence of the dental office and the pharmacy at the medical center. By written agreement, the pharmacist paid a salary to the dentist and furnished the office fixtures, while the dental office supplied 97% of the prescriptions filled at the pharmacy. The record also indicated that the pharmacist could terminate the dentist's employment since the pharmacist had unilaterally ended agreements with other professionals at the medical center. The court held that substantial evidence in the record showed conclusively that the pharmacist conducted business at an unlicensed pharmacy at the medical center. The court found that, according to the criteria enumerated in Section 220(2), the economic and functional interdependence of the pharmacy and the dental office demonstrated that the dentist practicing at the pharmacist's medical center was the pharmacist's employee, and thus the pharmacist was deemed to know the regulations pertaining to the dentist and was liable for billing the DPW in violation of the medical assistance program manual which lists drugs not compensable when prescribed by dentists. The court held that full restitution was justified since the pharmacist had the duty to respond to uncommon drug prescriptions and, as the dentist's employer, the pharmacist was deemed to know which drugs were not compensable when prescribed by a dentist. The judgment of the Hearings and Appeals Unit of the Department of Public Welfare was affirmed. Askin v. Com., Dept. of Public Welfare, 56 Pa.Cmwlth. 80, 423 A.2d 1371, 1374.

Pa.Cmwlth.1978. Subsec. (2) and com. (k) cit. in sup. Bus owner filed a petition for the review of an assessment against him of unpaid unemployment compensation contributions on behalf of drivers of his buses to whom he paid wages. The court found that since the plaintiff controlled, stored, and maintained equipment with which the drivers performed their work, he did have the right to control the drivers' work and did, in fact, exercise that right. The court held that, in view of a statute distinguishing an employee from an independent contractor, the bus drivers were the owner's employees, and he was liable for contributions under the Unemployment Compensation Law. Biter v. Commonwealth, Dept. of Labor & Industry, 39 Pa.Cmwlth. 391, 395 A.2d 669, 671.

S.D.

S.D.1966. Cit. in sup. The plaintiff sought recovery for damages sustained at a service station, owned by the defendant oil company and operated by the defendant lessee, while the plaintiff's tire was being mounted on a rim by the defendant lessee. A judgment against the defendant oil company was reversed because the court found that the plaintiff failed to sustain his burden of proving that the lessee was an actual or apparent employee, under respondeat superior, of the defendant oil company, and therefore, was not liable for lessee's negligent actions. Westre v. De Buhr, 144 N.W.2d 734.

Tenn.App.

Tenn.App.2005. Subsec. (1) cit. in disc. Purchaser of modular home sued contractor that constructed the house and manufacturer of the house modules, alleging shoddy construction. The trial court entered a default judgment against contractor, and awarded plaintiff damages against manufacturer. Reversing and remanding, this court held, inter alia, that plaintiff failed to prove that contractor was acting as manufacturer's agent with regard to the construction of the house, and thus manufacturer was not vicariously liable under a theory of respondeat superior for contractor's performance of its contract with plaintiff. The court stated that there was no evidence of the sort of control over the details or the manner in which contractor performed its work needed to establish an agency relationship between contractor and manufacturer. Tucker v. Sierra Builders, 180 S.W.3d 109, 120.

Tenn.App.2001. Subsec. (1) cit. in disc., subsec. (2) cit. in ftn. Construction worker sued crane owner, alleging that owner was vicariously liable for the crane operator's negligence in causing worker to fall from roof. Crane owner sought indemnity from plaintiff's employer. The trial court found crane owner vicariously liable under a theory of respondeat superior, and granted employer's motion for partial summary judgment. Reversing in part and remanding, this court held, inter alia, that employer was not entitled to summary judgment because a genuine issue of fact existed as to whether crane operator was employer's borrowed servant. Armoneit v. Elliott Crane Service, Inc., 65 S.W.3d 623, 629.

Tex.

Tex.2002. Com. (i) quot. in sup. and cit. in ftn. After patient suffered brain damage from cardiac arrest, she and her parents sued, inter alia, teaching hospital for vicarious liability for negligence of medical resident who was employed by medical foundation in residency program sponsored by teaching hospital. Trial court rendered judgment against hospital on jury verdict, but credited hospital with amount plaintiffs received from settling defendants. Appellate court affirmed. This court reversed and rendered judgment that plaintiffs take nothing against teaching hospital, holding that there was no evidence to support jury's findings of joint enterprise, joint venture, "mission" or nonemployee respondeat superior, or ratification. When resident treated patient, he acted as borrowed employee of foundation, since foundation had right to direct and control details of resident's medical treatment of patient. The court noted that Texas law on corporate practice of medicine did not render resident's employment by hospital a factual impossibility. St. Joseph Hosp. v. Wolff, 94 S.W.3d 513, 540.

Tex.1998. Com. (d) cit. in disc. Emergency room patient brought medical malpractice action against hospital, alleging that it was vicariously liable for the substandard care provided by one of its physicians. The trial court entered summary judgment for hospital, but the intermediate appellate court reversed. Reversing, this court held that patient failed to establish that hospital was liable under a theory of ostensible agency, as hospital took no affirmative action that would have led a reasonable patient to believe that emergency room physicians were its employees or agents. To the extent that the doctrine of apparent agency imposed a different standard of liability, it was not followed in Texas. Baptist Memorial Hosp. System v. Sampson, 969 S.W.2d 945, 947.

Tex.App.

Tex.App.2015. Com. (d) cit. in sup. Oil-field employee and estate of deceased oil-field employees who were injured or killed in an automobile accident when their crew leader was driving them to company-provided housing after their shift filed tort claims under a theory of vicarious liability against employer. The trial court granted defendant's motion for summary judgment. This court affirmed, holding that defendant could not be liable for the tortious acts of its employee, because the accident did not occur within the course and scope of employment. Citing Restatement Second of Agency § 220, Comment *d*, the court noted that the master's right to control the means and methods of the servant's work was an important factor for determining whether to impose vicarious liability on the master for the servant's work, and concluded that, while the transportation originated and furthered employer's business, employer did not control the transportation. Painter v. Amerimex Drilling I, Ltd., 511 S.W.3d 700, 705.

Tex.App.2006. Com. (d) cit. in disc. Widow of nursing-home resident sued, among others, nursing home's parent corporation for negligence on a theory of vicarious liability. The trial court entered judgment on a jury verdict for plaintiff. Reversing and rendering judgment for defendant, this court held, inter alia, that the evidence was insufficient to support a judgment of vicarious liability against parent corporation as employer of the nursing-home staff that provided the allegedly negligent health care. The court reasoned that the trial record established that the nursing home, not parent corporation, controlled the details of the employees' actions relating to the care that decedent received. Heritage Housing Development, Inc. v. Carr, 199 S.W.3d 560, 565.

Tex.App.2003. Coms. (e) and (g) quot. in conc. op. Defendant was convicted following jury trial of improper sexual activity with a person in custody and sexual assault while he was transporting victim and others to county jail. Affirming conviction, this court held, inter alia, that county jail exercised sufficient control over defendant to make him jail's employee for purposes of supporting his conviction for improper sexual activity with a person in custody. Concurring opinion noted distinction between "employees" and "independent contractors." Edwards v. State, 97 S.W.3d 279, 292.

Tex.App.1982. Subsec. (2) quot. in diss. op. A service station customer brought an action against the owner of the station, a security guard, and the guard's employer after the security guard shot the customer in the belief that he had robbed or was attempting to rob a cashier. The jury found that the security guard was the borrowed employee of the owner on loan from his employer. The trial court awarded damages against the guard, the employer, and the owner. This court affirmed. In response to the employer's argument that if the guard acted as the owner's employee, he could not also act as the employee of the employer, the court stated that there was evidence showing that both the employer and the owner exercised joint control over the security guard. The dissent argued that no damages should have been awarded against the owner of the service station because there was insufficient evidence, both legally and factually, to support of finding that the security guard was the borrowed employee of the owner. Gulf Oil Corporation v. Williams, 642 S.W.2d 270, 274.

Tex.Civ.App.

Tex.Civ.App.1978. Cit. in sup. General contractor's workmen's compensation insurer appealed trial court judgment awarding recovery to employee of subcontractor. Held: reversed and decision rendered for appellant. The court on appeal found no probative evidence of an express or implied contract creating a master-servant relationship rather than that of independent contractor-contractee. Without such a relationship there could be no recovery under the workmen's compensation statute. To support a finding that employee/appellee was entitled to workmen's compensation benefits from the general contractor's policy, there would have had to be shown evidence that: (1) subcontractor was general contractor's agent with express or implied authority to hire other employees for general contractor and that subcontractor had done so in this case, or (2) that general contractor exercised such control and direction of details of employee/appellee's work, or other evidence of an employer-employee relationship between them, as to raise an inference, either through implied contract or the borrowed servant rule, that appellee was general contractor's own employee. The Court referred to the Restatement section discussing employer's control over details of the work procedure as distinguished from the end product thereof. United States Fidelity & Guar. Co. v. Goodson, 568 S.W.2d 443, 447, error refused n.r.e.

Tex.Civ.App.1974. Cit. in sup. This was an action by a part-time windmill repairman against the owner of a windmill repair service to recover workmen's compensation benefits. The owner had requested the repairman's help on a job involving use of equipment which the owner lacked, but which the repairman had. The parties drove to the work site in the repairman's truck. The repairman took care of his own social security and income tax withholding payments and paid his own car insurance, oil, gas, and truck expenses. His work required special skills, and he used his own equipment and tools. On the job, he obeyed the owner as to the manner in which the work was to be performed. The lower court rendered judgment for the repairman. On appeal, Held: Judgment affirmed. The evidence was sufficient to support the jury's verdict that the repairman was an employee of the owner rather than independent contractor at the time of the accident. Whether one is an employee for workmen's compensation purposes is to be determined by the right of control as to the details of the employment being in the one alleged to be the employer. Allstate Ins. Co. v. Scott, 511 S.W.2d 412, 414, error refused no reversible error.

Tex.Civ.App.1972. Quot. in part in sup. Plaintiff alleged that he had an automobile accident with an employee of defendant who was driving a company car at the time of the accident. The court held that while driving a company car raised a presumption of a master-servant relationship so as to create vicarious liability, this presumption was rebutted by the clear and uncontradicted evidence that the employee was on a purely personal mission at the time and was not under the control, or right to control, of the defendant. The employee was driving his family to his parents' home for Christmas vacation and had not conducted any business for the company that day, nor was he to conduct any business at his parents' home, or in that particular area. Gifford-Hill & Company v. Moore, 479 S.W.2d 711, 714.

Tex.Civ.App.1969. Quot. in sup. Defendant's employees worked at plaintiff's dock, moving cars around the yard. One of plaintiff's employees requested defendant's employees to move a certain crane. While moving the crane, it came in contact with high-voltage wires causing damage. Plaintiff sued and the trial court held that defendant's employees were within the scope of their employment at the time of the accident and ordered the employer to pay damages. On appeal the court reversed. The court held, in order for the employees to be within the scope of their employment, they must be on their master's business. The particular crane-moving operation was a mere gratuity, well outside the scope of employment, and therefore, the employer cannot be liable for the damage. Atchison, Topeka and Santa Fe Railway Company v. Port of Beaumont Navigation District, 438 S.W.2d 843, 847.

Utah,

Utah, 2014. Cit. in case quot. in diss. op., com. (c) 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 city retained the right to control the manner in which defendants directed traffic. The court cited Restatement Second of Agency § 220, Comment *c*, in observing that, because a master-servant relationship could not be defined in general terms with substantial accuracy, courts commonly looked to several factors, including the right to discharge, in determining whether such a relationship existed. 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 the test outlined in § 220. Mallory v. Brigham Young University, 2014 UT 27, 332 P.3d 922, 928, 933.

Utah

Utah, 1996. Cit. in headnote, cit. in disc. Boy scout who was on his way home from a troop meeting when he was struck by a car being driven by his scoutmaster sued scoutmaster, national scouting organization, and local council for negligence. After plaintiff and scoutmaster reached a settlement, the trial court granted the remaining defendants' motion for summary judgment. Affirming in part and vacating in part, this court held that defendants could not be found vicariously liable for scoutmaster's tortious conduct because he was not their employee, as evidenced primarily by the fact that they did not have the right to control his activities as troop leader. Glover By and Through Dyson v. Boy Scouts, 923 P.2d 1383, 1384, 1385.

Utah, 1986. Cit. in disc. A cement worker who was injured while at a construction site sought reversal of a state industrial commission order denying him worker's compensation benefits because it found that he was an independent contractor and not an employee. This court reversed and remanded, holding, inter alia, that the plaintiff was an employee of a subcontractor on the job, because the subcontractor retained the right to control the plaintiff's work. The court stated that the fact that the plaintiff intended to become an independent contractor in the future and took limited steps toward this end did not negate his employee status at the time of the accident. Bennett v. Industrial Com'n of Utah, 726 P.2d 427, 429.

Utah, 1976. Subsec. (2) cit. in ftn. in sup. This was an action for a declaratory judgment that an individual who was injured while unloading a truck and who put in a claim under an insurance policy issued to the owner of the truck was an employee and not an independent contractor of the owner for the purposes of a provision which excluded coverage in an employer-employee relationship. The claimant did various odd jobs for the owner, including driving the truck, which was maintained by the owner. Claimant received approximately $2.50 an hour, and had no authority to do more than the tasks assigned. The court held that the claimant was an employee of the owner for the purposes of the insurance policy. Truck Insurance Exchange v. Yardley, 556 P.2d 494, 496.

Utah App.

Utah App.1991. Cit. in disc. A company in the business of providing workers to demonstrate various products in grocery and department stores sought a ruling from the state department of employment security to determine whether the demonstrators were to be considered company employees or independent contractors for the purposes of the state employment security act. The department found that the demonstrators were employees under the act; a board of review affirmed. Here, the plaintiff argued, inter alia, that the board of review improperly interpreted the act by categorizing 20 factors listed in the act into four broad categories, and then giving more weight to some factors and less weight to others. Finding the record insufficient, this court reversed and remanded for additional factfinding but concluded that it was not unreasonable for the board to categorize the 20 factors into four categories that reflected the test the legislature had traditionally dictated in determining employment status, focusing on control and independence. Tasters Ltd. v. Dept. of Employment Sec., 819 P.2d 361, 366, appeal after remand 863 P.2d 12 (1993).

Vt.

Vt.2018. Cit. in sup., cit. in ftn.; subsecs. (2)(a)-(j) cit. in sup.; com. (c) quot. in sup., cit. in diss. op.; com. (h) quot. in sup.; coms. (*i*) and (*l*) quot. 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 set forth in Restatement Second of Agency § 220. The dissent cited § 220 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, 1151-1156.

Vt.2017. Cit. in case quot. in disc. 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 Restatement Second of Agency § 220 in determining the existence of an employer-employee relationship where the proposed employee had specialized expertise and the right-to-control test would not govern. LeClair v. LeClair, 169 A.3d 743, 757.

Vt.2010. Sec. and subsec. (2)(a) cit. in disc., subsecs. (1) and (2)(a)-(2)(j) cit. and quot. in disc., subsecs. (2)(f)-(2)(h) cit. in sup. Widow of motorist killed in a collision with a truck sued truck driver and waste-hauling business for which driver was working at the time of the accident. Following the resolution of widow's claims, trucker's insurer brought a third-party complaint against waste-hauler's insurer, alleging that trucker was hauler's employee and that therefore hauler's insurer had to defend and indemnify trucker. Affirming the trial court's entry of judgment for trucker's insurer, this court held, inter alia, that the trial court did not err in concluding that, under the right-to-control test, trucker was hauler's employee, because hauler had a right to control the means and methods of trucker's work; while hauler argued that Restatement Second of Agency § 220 (and its 10

factors) was the correct standard for determining trucker's status, the court pointed out that the factor of right to control was an integral part of § 220 and, even excluding that factor, application of the remaining factors led to the same result. Hathaway v. Tucker, 2010 VT 114, 14 A.3d 968, 977-979.

Vt.2000. Cit. in sup. Airplane owner's liability insurer brought suit for a declaratory judgment that it had no duty to defend or provide coverage for flight instructor in a wrongful-death suit arising out of a mid-air collision. Affirming the trial court's grant of summary judgment for instructor, this court held that instructor was an employee of owner, and thus was covered as an insured under the policy. The facts that owner supplied the airplane and scheduled its use in flight instruction, that instructor's duties were part of owner's regular business, that instructor was paid by and through owner, and that the parties had an ongoing relationship of more than one year supported the conclusion that instructor was an employee rather than an independent contractor. RLI Ins. Co. v. Agency of Transportation, 171 Vt. 553, 762 A.2d 475, 477.

Vt.1998. Subsec. (2)(i) cit. in disc. A client brought a malpractice claim against the private attorney who represented him at state expense in a probation revocation proceeding. Trial court entered judgment for defendant, holding that plaintiff's exclusive right of action was against the state. This court reversed, holding that the attorney was not a state employee, and therefore was subject to liability. The court noted that the attorney's contract with the public defender provided that the contract defender was not a state employee and required the defender to have malpractice insurance. Reed v. Glynn, 724 A.2d 464, 466.

Va.

Va.1969. Cit. subsec. (1) in sup. This was an action against a hospital, surgeon and nurse anesthetist to recover for alleged wrongful death of administrator's decedent, whose death allegedly resulted from the negligent administration of an anesthetic prior to and during surgery. The court held that actual control is not the test of whether a person is an agent of another, but rather it is the right to control which is determinable. Whitfield v. Whittaker Memoral Hosp., 210 Va. 176, 169 S.E.2d 563, 567.

Wash.

Wash.2012. Cit. in disc. 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 instructions to the jury were in error 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—rather than the common-law right-to-control test; while the right to control was a factor for consideration, it was not dispositive. Anfinson v. FedEx Ground Package System, Inc., 281 P.3d 289, 295, 299.

Wash.2011. Cit. in disc. Class of employees of nonprofit public defender organizations sought enrollment under the Public Employees Retirement System (PERS) as county employees, contending that defender organizations were not different from any other agency of county. The trial court found that the class was eligible for PERS enrollment. Affirming, this court held that defendant county had exerted such right of control over the defender organizations as to make them agencies of the county. The court reasoned that imposing stringent control over the organizations' formal structure, not allowing them to have other clients without defendant's consent, preventing them from leasing or acquiring property without defendant's approval, and establishing a pay scale for their employees, among other things, revealed that defendant had gradually extended its right of control over the organizations until they had become vassal agencies of defendant. Dolan v. King County, 172 Wash.2d 299, 258 P.3d 20, 30.

Wash.2002. Quot. in ftn. Employee sued former employer in connection with treatment by co-workers and supervisors after employee filed workers' compensation claim, alleging disability discrimination, retaliation, negligent and intentional infliction of emotional distress, and defamation. Trial court entered judgment for employee. Appellate court reversed and remanded. Reversing in part, this court held, inter alia, that former employer was vicariously liable for the outrageous conduct of its

employees. The dissent argued that employees' intentionally tortious actions were outside the scope of their employment. Robel v. Roundup Corp., 148 Wash.2d 35, 68, 59 P.3d 611, 628.

Wash.2002. Cit. in diss. op., subsecs. (1), (2)(a), (2)(e), (2)(g), and (2)(a)-(2)(j) 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.1980. Subsec. (2) cit. in sup. The plaintiff was injured while repairing a forklift used in his employer's business. The employer and the defendant had entered into an oral agreement whereby the employer had leased a repair shed from the defendant and did all repair work for the defendant. The defendant had allowed the employer to use the forklift free of charge. Both the plaintiff and his employer knew that the motor on this forklift could start unexpectedly. The plaintiff argued that the employer was negligent in his supervision of and instruction of the plaintiff and that the defendant company was vicariously liable. This court stated that the relationships between superior and subordinate business parties can be characterized as being either a master and servant relationship or as an independent contractor relationship. The most crucial factor to consider in this determination is the right of the one party to control the details of the work performed by the other party. Where, as here, the superior business party has not retained any control then he is not liable for the negligence of the subordinate business party. Therefore the court held that, as a matter of law, the employer was an independent contractor and the defendant was not vicariously liable. Larner v. Torgerson, 93 Wash.2d 801, 613 P.2d 780, 782.

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.1970. Subsec. (2) quot. in sup. in conc. op. The plaintiff carpenter filed a claim of lien and sought to foreclose it. By statute, a contractor, who is defined in part as “any person who (is) in the pursuit of an independent business” cannot enforce a lien unless he is licensed. The concurring opinion stated that by the Restatement's test, plaintiff was an independent contractor and hence not allowed to enforce the lien. Stewart v. Hammond, 471 P.2d 90, 95.

Wash.1966. Com. (c) cit. and subsec. (2) quot. 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.1963. Cit. in sup. In action for injuries received by employee, in absence of indication that employee in any way consented to employer-employee relationship with one defendant, Workmen's Compensation Act afforded no immunity to that defendant, although by agreement between corporations known employer of employee was agent of such defendant, since under Workman's

Compensation Act the consent of the employee is crucial in establishing the employer-employee relation. Fisher v. City of Seattle, 62 Wash.2d 800, 384 P.2d 852, 854.

Wash.App.

Wash.App.2015. Com. (a) cit. and quot. in sup. Contractor's employee who fell from a scaffold during a demolition project brought a negligence action against, among others, contractor, alleging that defendant was vicariously liable for the negligence of a planner—hired by defendant's subcontractor—who negligently designed the demolition work plan. The trial court entered judgment on a jury verdict for defendant. This court affirmed, holding that planner was a borrowed servant of defendant under the borrowed-servant doctrine, and thus workers compensation barred plaintiff from recovering against defendant because planner was a fellow servant. The court rejected plaintiff's argument that planner could not be a borrowed servant because his work constituted supplying "brainpower" or professional services, and, citing Restatement Second of Agency § 220, Comment *a*, explained that the term "servant" was not limited to a person who performed manual labor. Wilcox v. Basehore, 189 Wash.App. 63, 93, 356 P.3d 736, 751-752.

Wash.App.2010. Subsec. (2) adopted in case cit. but dist. Pickup and delivery drivers for shipping company brought a class action against company under the Washington Minimum Wage Act (MWA), claiming a right to overtime pay. The trial court entered judgment for defendant on a jury verdict finding that the class members were independent contractors, not employees, and dismissed the case. Reversing in part and remanding, this court held that the trial court erred in instructing the jury on the right-to-control test for determining whether a worker was an employee or an independent contractor, concluding that the economic-realities test, as applied by federal courts to the Fair Labor Standards Act, on which the MWA was patterned, was the proper test to use for purposes of the MWA. The court explained that, while the common-law right-to-control test was developed to define an employer's vicarious liability for injuries caused by his employee, the purpose of the MWA was to provide remedial protections to workers. Anfinson v. FedEx Ground Package System, Inc., 159 Wash.App. 35, 244 P.3d 32, 43.

Wash.App.2007. Com. (b) cit. in sup. Chiropractor's former employer sued chiropractor, clinic that employed chiropractor, and clinic owner for, in part, trade-secret misappropriation under the Uniform Trade Secrets Act and tortious interference with business expectancy, alleging that chiropractor stole plaintiff's confidential client list and used it to solicit plaintiff's clients for clinic. The trial court entered judgment on a jury verdict finding clinic vicariously liable. Reversing and remanding, this court held that the fact that chiropractor was not yet formally employed by clinic when she solicited plaintiff's clients did not shield clinic from vicarious liability based on agency principles; however, plaintiff did not prove that chiropractor was clinic's agent when she committed her tortious acts, since there was no evidence that clinic controlled or had a right to control chiropractor's client solicitations or had any concurrent knowledge of her wrongful actions. Thola v. Henschell, 140 Wash.App. 70, 164 P.3d 524, 532.

Wash.App.2004. Quot. in ftn. Car-accident victims sued car's owner, its driver, and driver's girlfriend, alleging that driver was acting as girlfriend's agent when he went to pick her up. Trial court granted girlfriend's motion for summary judgment. This court reversed and remanded, holding that fact issue existed as to whether driver of the car who struck and injured plaintiffs was acting as the agent of his girlfriend at the time of the accident. Driver testified that girlfriend instructed him to pick her up, directed him to the place where he could find car keys, and told him where to pick her up. The trip's purpose was for her benefit—to take her home in the middle of the night. The scope of driver's use of the car that night was limited to one errand for girlfriend's benefit. O'Brien v. Hafer, 122 Wash.App. 279, 93 P.3d 930, 934.

Wash.App.2002. Com. (h) cit. in case cit. in ftn. Furniture-rental company's temporary employee was injured in a car accident while riding in a car driven by furniture company's permanent employee. Employee sued furniture company for negligence. Trial court granted furniture company summary judgment, holding that it was statutorily immune from suit because employee was a "loaned servant." This court reversed and remanded, holding that fact issues existed as to whether there was a mutual agreement as to employee's consent to control by furniture company. Although employee accepted a job with furniture company

from temporary-employment agency, employee also stated that he considered employment agency to be his sole employer. Rideau v. Cort Furniture Rental, 110 Wash.App. 301, 39 P.3d 1006, 1008.

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.1993. Com. (h) cit. and quot. in sup. Laborer for general contractor was directed to help subcontractor unload glass windows. Laborer slipped and injured his back while unloading windows, and was permanently disabled. Laborer sued several parties, including subcontractor, for negligence. Trial court entered judgment on a jury verdict against subcontractor, holding, inter alia, that laborer was not subcontractor's "loaned servant" as a matter of law. Reversing and remanding, this court held, in part, that issue of whether laborer was a "loaned servant" should have been submitted to a jury. The court noted that the determination of "loaned servant" status was normally a factual issue, and here there was substantial conflicting evidence on both the right to control and whether laborer consented to the transfer. Regarding control, subcontractor was responsible for close supervision of the unskilled labor provided by general contractor, the job lasted for several days, and unloading windows was a part of subcontractor's regular business. Jones v. Halvorson-Berg, 69 Wash.App. 117, 847 P.2d 945, 948.

Wash.App.1992. Cit. in disc. A patient sued a surgeon for negligence, alleging that a sponge was left inside his body during a hernia operation and that, after being taken to recovery, the plaintiff had to go back into surgery to have the sponge removed. The trial court granted the plaintiff summary judgment on the issue of the defendant's liability. Reversing and remanding, this court held, inter alia, that the evidence was insufficient to support the inference of control needed for the application of vicarious liability under the "captain of the ship" doctrine, because the nurses, who were to count the sponges as they were used and removed from the patient's body and then report the result to the surgeon, were employed by the hospital, the procedure for counting sponges was established by the hospital, and nothing in the record suggested that the surgeon had any reason to doubt the information given to him or assume control over that procedure in any way. Van Hook v. Anderson, 64 Wash.App. 353, 824 P.2d 509, 514.

Wash.App.1987. Subsec. (2) quot. in case quot. in disc. A construction worker sued a landowner in negligence for the personal injuries he sustained in a fall from the roof of a house under construction. The trial court granted the plaintiff's motions for judgment n.o.v. and a new trial, holding that the defendant was liable for the plaintiff's employer's negligence because of their agency relationship. Reversing, this court dismissed the plaintiff's claim, holding that the motion for judgment n.o.v. should not have been granted on the issues of agency or control, and that the motion for a new trial should have been denied. The court reasoned that there was substantial evidence to find that the plaintiff's employer was an independent contractor rather than an agent of the defendant, and that the defendant did not retain the right to exercise control over the construction project. The court also rejected the plaintiff's argument that the defendant had a duty to protect him from the negligence of his own employer, reasoning that an owner has a duty to protect only innocent third parties not connected with the work, not employees of an incompetent independent contractor. Chapman v. Black, 49 Wash.App. 94, 741 P.2d 998, 1001.

Wash.App.1981. Subsec. (2) cit. in disc. and com. (c) cit. in disc. Landowner brought an action against a timber buyer to recover treble damages for timber trespass. A bench trial resulted in the award of treble damages against the timber buyer, less a set-off. The timber buyer appealed, claiming that the party engaged in the actual logging operation who committed the trespass was an independent contractor of the timber buyer rather than its agent and, further, that the trespass was unintentional and therefore not subject to treble damages. The contract between the timber buyer and the logging company specified that the

logging company was an independent contractor. The record showed that the logging company was a separate entity distinct from the timber buyer, that its employees were paid by it, and that it supplied its workers with tools and equipment. The timber company argued that the logging company was an independent contractor as a matter of law. The trial court found, however, that the employees of the logging company were agents of the timber buyer because the timber company retained the right to control them by the presence of the president of the timber buyer in the field. The appellate court noted that the factors to be considered in determining whether an agency relationship exists include: the extent of control; whether a distinct business exists; who supplies the tools and equipment; the length of time worked; the method of payment; whether or not the work is part of the regular business of the employer; and kind of occupation with reference to whether, in the locality, the work is usually done under the direction of the employer, or by a specialist without supervision. The court stated that the crucial factor is the right of control which must exist to prove agency, and that this control is not established if the asserted principal retains the right to supervise the asserted agent merely to determine if the agent performs in conformity with the contract; instead, control establishes agency only if the principal controls the manner of performance, in this case the actual cutting. The court held that the evidence supported the finding that the logging company was the agent of the timber buyer since it was shown that the president of the timber company supervised the entire logging operation, including the cutting, branding, and loading, thereby controlling the manner of performance. The court also held that the evidence supported a finding of recklessness in the timber trespass, entitling the landowner to treble damages. Accordingly, the judgment of the trial court was affirmed. Bloedel Timberlands Development v. Timber, Etc., 28 Wash.App. 669, 626 P.2d 30, 33.

Wash.App.1981. Subsec. (1) cit. in disc.; subsec. (2) cit. and quot. in case quot. in disc.; com. (d) cit. in disc. An injured motorist appealed from a summary judgment of the trial court dismissing his personal injury claim against the alleged principal of the driver of the vehicle with which the plaintiff collided. The appellate court noted that, in ruling on a motion for summary judgment, the trial court and the appellate court must consider the facts in the light most favorable to the nonmoving party and decide whether a genuine issue of material fact was presented regarding vicarious responsibility of the alleged principal for the alleged agent's negligence. The court also stated that summary judgment in favor of the alleged principal of a tortfeasor should be denied where the facts relevant to agency or independent contractorship are in dispute or are susceptible of more than one interpretation. The court held that where the alleged principal did not have the right to control its alleged agent's banking activities, employment decisions, or driving procedures, the activities in which the driver was engaged at the time of the accident, the defendant could not be held vicariously liable for the plaintiff's injuries. Accordingly, the judgment of the trial court was affirmed. Kroshus v. Koury, 30 Wash.App. 258, 633 P.2d 909, 911-912.

Wash.App.1978. Cit. in disc. but not fol. Patient, who was treated in hospital's emergency room, brought medical malpractice action against hospital. Hospital moved for summary judgment, asserting that it could not be held liable for doctor's negligence upon theory of respondeat superior because doctor was independent contractor and not its agent. The lower court granted hospital's motion for summary judgment, and, on appeal, the court held that summary judgment was inappropriate. The Court of Appeals ruled that the application of the traditional right of control test of an agency relationship has not solved the problem because the governing body of a hospital never actually exercises, nor can it exercise, much control over a physician's medical decisions and his actual treatment of patients; and that where a physician is found not to be the actual agent of the hospital, the hospital may still be held liable for his departures from good medical practice under the so-called “holding out” theory so long as hospital acts in some way which leads the patient to a reasonable belief that he is being treated by a hospital employee. Adamski v. Tacoma General Hospital, 20 Wash.App. 98, 579 P.2d 970, 973.

Wash.App.1978. Subsec. (2) quot. in sup. and subsec. (1) com. (d) cit. in sup. Executrix of estate of deceased employee of a partnership brought a wrongful death action, based on negligence, against a tugboat company and another defendant. The deceased, an employee of a partnership which had been hired by the tugboat company to refurbish large steel and wood pallets used in their business, had been sandblasting one of the pallets when it fell on him causing his death. The trial court found that the partnership was an independent contractor and that the only duty that the tugboat company owed to the deceased was that of a public invitee. The trial court held that, although the tugboat company had a duty as a possessor of land to inform the partnership's employees of any hidden dangers, no hidden dangers were found. It dismissed the case, finding that the tugboat company had no responsibility for the deceased's death. The executrix appealed. The court reversed and remanded, holding

that there was substantial evidence in the record that the tugboat company had retained control and/or the right to control the partnership's operation for sandblasting the pallets, and, therefore, that the issue of whether the relationship between the partnership and the tugboat company was one of master and servant or independent contractor was a question of fact for the jury and not for the court to decide. The court also held that there was not only substantial evidence from which a jury could find that the tugboat company controlled, or had the right to control, part of the partnership's operation as well as the entire general area where the work was being performed, but also substantial evidence that the tugboat company had failed to provide a reasonably safe place to work and reliable safety equipment, under the principles of the common law or tort, causing the deceased employee's death. Franklin v. Puget Sound Tug & Barge Co., 1 Wash.App. 517, 586 P.2d 489, 493, 494.

Wash.App.1977. (As amended 1978). Subsec. (2) cit. in sup. Plaintiffs, acting as the representatives of their respective decedents, who were employees killed in an explosion at an explosives plant, brought wrongful death actions against various defendants including, inter alia, an employee of the parent corporation of the plant operator. The trial court granted defendants' motions for summary judgment. On appeal, the court affirmed the motion holding, inter alia, that the trial court correctly decided a loaned servant issue as a matter of law, and it rejected plaintiffs' contention that an employee of the parent corporation was individually liable. He was an employee of the parent corporation undisputably on loan to the explosives plant and, therefore, not individually liable to plaintiffs. Peterick v. State, 22 Wash.App. 163, 589 P.2d 250, 265.

Wash.App.1976. Subsec. (1) cit. in sup., subsec. (2) quot. in sup., com. (d) 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, 1391.

Wash.App.1975. Cit. in sup. Judgment was entered in which appellant was found to have been an employee of the state penitentiary and not an employee of the appellee school district. The teacher appealed. The court affirmed. The question of plaintiff's employer was at issue as determinative of the propriety of the plaintiff's contract not being renewed. The test rests upon a determination as to which party, if any, possesses the right to control the activity of the employee. The record showed the plaintiff's employment at all times was controlled by personnel at the penitentiary. Furthermore, plaintiff was paid from the penitentiary's resources. The lower court's finding of fact that it was the penitentiary that controlled plaintiff was thus supported by the evidence. Barendregt v. Walla Walla School Dist., 13 Wash.App. 448, 534 P.2d 1404, 1405, rev'd, 87 Wash.2d 154, 550 P.2d 525 (1976).

Wis.

Wis.2020. Quot. in diss. op.; com. (g) and illus. 2 quot. 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, under the factors set forth in Restatement Second of Agency § 220, producer did not have control over the details of limited-liability company's work in setting up the band, producer did not furnish limited-liability company with equipment or training, and

producer did not have a contractual right to terminate limited-liability company. Lang v. Lions Club of Cudahy Wisconsin, Inc., 939 N.W.2d 582, 608, 609.

Wis.2018. Com. (g) cit. in case quot. in diss. op. Former employer sued former employee who left employer to work for employer's competitor, alleging that employee violated the "non-solicitation of employees" provision in the parties' employment contract by communicating with employer's employees about potential employment with competitor. The trial court granted summary judgment for employer. The court of appeals reversed, finding that the provision was an unreasonable restraint on employees that was unenforceable under a state statute. Affirming, this court held that the provision was not reasonably necessary for employer's protection, as required for it to be enforceable under the statute. The dissent cited Restatement Second of Agency § 220 in arguing that, while employees were included within the statute's protection of "servants," the non-solicitation provision at issue did not come within the meaning of the statute, which regulated the "restraint of trade," rather than the "restraint of employees." Manitowoc Company, Inc. v. Lanning, 906 N.W.2d 130, 152.

Wis.2004. Cit. in case quot. 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.

Wis.1988. Quot. in ftn. A hospital patient and his wife sued a hospital to recover damages for the alleged negligence of a radiologist who worked at the hospital as an independent contractor. The trial court granted the hospital's motion for summary judgment, and the intermediate appellate court affirmed. This court reversed and remanded, holding that, while the plaintiff could not base his claim on the theory of respondeat superior or nondelegable duty, the hospital could be held liable under the doctrine of apparent authority for the negligent acts of a physician retained by the hospital to provide emergency room care, where the radiologist who committed the negligent act was an independent contractor, but where the patient did not know, or could not be imputed to know of such status. Pamperin v. Trinity Memorial Hospital, 144 Wis.2d 188, 423 N.W.2d 848, 852.

Wis.1981. Cit. and quot. in ftn. An employee of a temporary help business sued, inter alia, a customer, as the owner of a propane system which exploded and injured the plaintiff. The defendant moved for summary judgment on the ground that it was the plaintiff's special employer. The trial court dismissed the complaint. The intermediate appellate court reversed. On review, this court stated that whether the plaintiff, as a loaned employee, had consented to have the defendant, as the borrowing employer, become his special employer did not depend upon the existence of an express written or oral contract or agreement between the parties or on the plaintiff's intentions or understanding. Rather, the consent of the plaintiff could be found in the actual nature of the plaintiff's relationship with the borrowing employer. The court held that the employee, who knew when he was hired by the temporary help business that his work would be performed for its customers, who had worked at the defendant's business for three months, who was hired to perform work as an unskilled laborer and was subject to a high degree of controlled supervision by the defendant, who worked on the defendant's business premises and whose work was part of the defendant's regular business which could not be controlled by the temporary help business and from which the defendant could remove him, consented to have the defendant become his special employer, so that workers' compensation was the exclusive remedy against the defendant even though the temporary help business paid wages and social security taxes, withheld taxes and could terminate employment. Accordingly, the court reversed the judgment of the intermediate court and affirmed the trial court's judgment. Meka v. Falk Corp., 102 Wis.2d 148, 306 N.W.2d 65, 70, 70-71.

Wis.1978. Cit. and fol. in case quot. in disc. and cit. in ftn. 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 the 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 a 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, 584.

Wis.1977. Subsec. (1) quot. in sup. Plaintiff brought an action against a water ski club, the club's insurer, and the club's program manager for personal injuries sustained during a water ski show when the program manager, preparing to perform his clown act, negligently discharged a shotgun used in his act. On appeal, the court affirmed a judgment against the club, holding that the program manager's preparation was directly related to his employment, was not an unnatural, disconnected, or extraordinary part of the service contemplated, and thus was within the scope of his employment. Judgment against the insurer was also upheld, the court ruling that the clause in the club's policy specifically exempting the insurer from liability on claims against the club attributable to performance in a ski show did not apply, since the injuries occurred while the manager was preparing to perform and not actually performing. Scott v. Min-Aqua Bats Water Ski Club, Inc., 79 Wis.2d 316, 255 N.W.2d 536, 539.

Wis.1959. Cit. in sup. In action for personal injuries sustained in automobile collision, fact question was presented with regard to relationship between defendant and driver of automobile which collided with plaintiff's, and defendants were thus not entitled to summary judgment on theory that such driver was an independent contractor rather than an employee of defendant. Harris v. Richland Motors, Inc., 7 Wis.2d 472, 96 N.W.2d 840, 843.

Wis.1958. Cit. in sup. Automobile owner's 16-year-old nephew who carried pails of water across sidewalk and who assisted in washing automobile without agreement or expectation of reward, if not an employee or servant of automobile owner in strict sense, was owner's agent in fetching water, and owner was liable to pedestrian who slipped on ice which formed when water spilled from pail on sidewalk. Heims v. Hanke, 5 Wis.2d 465, 93 N.W.2d 455, 458.

Wis.App.

Wis.App.2016. Com. (g) cit. 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 § 220, 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.

Wis.App.1995. Cit. in headnote, quot. in case quot. in sup. Foster child who allegedly had been sexually abused in the foster home in which the county had placed her brought, in part, § 1983 and state-law negligence claims against the county, among others. Reversing in part the trial court's denial of the county's motion for summary judgment and remanding, this court held, inter alia, that the woman who operated the licensed foster home was not an agent or a servant of the county's department of social services so as to render the county vicariously liable for her negligence toward plaintiff, since the department lacked the requisite degree of control over how the foster parent undertook the day-to-day care of the children. Kara B. by Albert v. Dane County, 198 Wis.2d 24, 60, 542 N.W.2d 777, 780, 792.

Wyo.

Wyo.1987. Subsec. (2) and com. (h) cit. in case cit. in sup. A widow brought a wrongful death action against the father of a hunter who killed her husband in a hunting accident. The trial court granted summary judgment to the defendant. Affirming, this court held that the defendant was not vicariously liable for his son's negligence because no master-servant relationship or joint enterprise existed between them, as there was no direction or control by the defendant, and that the violation of the hunting statute was not the proximate cause of the death of the plaintiff's deceased. The court noted that the prime consideration

in deciding whether an agency existed was whether the defendant had control over his son's conduct, and concluded that no agency existed because the son had complete control over when and how to use his rifle. Holliday v. Bannister, 741 P.2d 89, 95.

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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