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Master and Servant-Independent Contractor-Workmen's Compensation

MASTER AND SERVANT—INDEPENDENT CONTRACTOR—WORKMEN'S COMPENSATION—This was an appeal from the Industrial Board. One Krekler had a truck which he used in hauling crushed stone for the appellants, who were constructing a road. His brother drove for a time; at the request of appellants, the brother quit driving. Krekler then engaged another driver who was also unsatisfactory to appellants. Krekler himself thereupon started to drive, and did drive for two days until the accident. The truck overturned, crushing him. Deceased was paid $1.00 per yard hauled, and furnished the truck, the driver, and serviced the truck completely. There was no agreement that the deceased was to haul a certain or definite amount or for a certain time. His truck was one of several employed by the appellants. He could have quit at any time or could have been discharged at any time. Held, the deceased was an employee rather than an independent contractor.[1]

An independent contractor is one exercising an independent employment under a contract to do a certain work by his own methods and without subjection to the control of his employer, except as to the production of results.[2] A servant is a person employed to perform services for another in his affairs, and who in respect to his physical movements in the performance of the service is subject to the other's control or right to control.[3]

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[20] Donsky v. Kotimaki (1925), 125 Me. 72, 130 Atl. 871; Rosenau v. Peterson (1920), 147 Minn. 95, 179 N. W. 647.

[21] Gosling v. Gross (1917), 66 Pa. Super. 304; Lumber Co. v. Ry. Co. (1920), 115 S. C. 267, 105 S. E. 406.

[22] Keltner v. Patton (1927), 159 N. E. 162 (Ind. App.); Stark v. Wishart (1929), 90 Ind. App. 264, 168 N. E. 711.

[1] Carr v. Krekler, Appellate Court of Indiana, June 24, 1932, 181 N. E. 526.

[2] Prest-O-Lite v. Skeel (1914), 182 Ind. 593, 106 N. E. 365; accord, Falender v. Blackwell (1906), 39 Ind. App. 121, 79 N. E. 393; Washburn Crosby Co. v. Cook (1918), 70 Ind. App. 463, 120 N. E. 434; Zainey v. Rieman (1924), 81 Ind. App. 74, 142 N. E. 397; Marion Malleable Iron Works v. Baldwin (1924), 82 Ind. App. 206, 145 N. E. 559; Makeever v. Marlin (1931), 92 Ind. App. 158, 174 N. E. 517; New Albany Forge and Iron Co. v. Cooper (1892), 131 Ind. 363, 30 N. E. 294; Crockett v. Calvert (1856), 8 Ind. 127. Meechem, Agency, 2nd Ed., sec. 1870.

[3] American Law Institute, Restatement of the Law of Agency, § 220(1).

In determining whether one acting for another is a servant or an independent contractor, there are several matters of fact that the courts consider. The most important is the right of control over the means, methods and manner of performing the work.[4] If the employer retains such right, the relationship is generally one of employer and employee (master and servant); if the other person is permitted to choose for himself the method, means and manner of doing the work, and is permitted to select persons to do it, free from control of his employer in all matters connected with the doing of the said work, that person is ordinarily an independent contractor.[5] The emphasis is not on who actually did control, but who had the right to control.[6] The fact that the employer reserves the right to oversee and inspect the work during its progress for the purpose of assuring himself that the contract is being performed, does not put him in "control" of the person doing the work.[7] The control test for the relationship of the parties may be overcome by the presence of other matters of fact.[8]

Where the one employed is engaged in a distinct occupation or business from that of his employer, the inference is that the person is an independent contractor; where the person employed is engaged in the employer's regular

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[4] Zeithlow v. Smock (1917), 65 Ind. App. 643, 117 N. E. 665; Meyer v. Ind. Commission (1931), 347 Ill. 172, 179 N. E. 456. Meechem, Agency, 2nd Ed., § 1870.

[5] Indiana Iron Co. v. Cray (1897), 19 Ind. App. 565, 48 N. E. 803; Zeithlow v. Smock (1917), 65 Ind. App. 643, 117 N. E. 665; Lazarus v. Scherer (1931), 92 Ind. App. 90, 174 N. E. 293 (to the effect that this is a border line case, see Petzold v. McGregor (1931), 92 Ind. App. 528, 176 N. E. 640); Makeever v. Marlin (1931), 92 Ind. App. 158, 174 N. E. 517; Schurr v. Board, etc. (1899), 22 Ind. App. 188, 53 N. E. 871; Ryan v. Curan (1878), 64 Ind. 345; The Wabash, St. Louis & D. R. Co. v. Farver (1887), 111 Ind. 195, 12 N. E. 296; Vincennes Water Supply Co. v. White (1890), 124 Ind. 376, 24 N. E. 747; Bedford Stone Co. v. Henigar (1918), 187 Ind. 716, 121 N. E. 277; S. O. Co. v. Allen (1918), 121 N. E. 329 (reversed (1920), 189 Ind. 398, 126 N. E. 674). Other Indiana cases where this test was a factor in the decision are Dehority v. Whitcomb (1895), 13 Ind. App. 558, 41 N. E. 956; Parkhurst v. Swift (1903), 31 Ind. App. 521, 68 N. E. 620; Flander v. Blackwell (1906), 39 Ind. App. 121, 79 N. E. 393; Indiana, etc., Traction Co. v. Benadum (1908), 24 Ind. App. 121, 83 N. E. 261; Keller Constr. Co. v. Herkless (1915), 59 Ind. App. 472, 109 N. E. 797; Deep Vein Coal Co. v. Raney (1916), 62 Ind. App. 608, 112 N. E. 392; McGee v. Stockton (1916), 62 Ind. App. 555, 113 N. E. 388; Looney v. Prest-O-Lite Co. (1917), 65 Ind. App. 617, 117 N. E. 678; Sugar Valley Coal Co. v. Drake (1917), 66 Ind. App. 152, 117 N. E. 937; Mobley v. Rogers Co. (1918), 68 Ind. App. 308, 119 N. E. 477; Mackey v. Lafayette Loan & Trust Co. (1918), 70 Ind. App. 59, 121 N. E. 682; Casa v. Woodruff (1919), 70 Ind. App. 93, 123 N. E. 120; Marion Malleable Iron Co. v. Baldwin (1924), 82 Ind. App. 206, 145 N. E. 559. See also American Law Institute, Restatement of the Law of Agency, § 220(2).

[6] Sargent Paint Co. v. Petnovitsky (1919), 71 Ind. App. 353, 124 N. E. 881; Zeitlow v. Smock (1917), 65 Ind. App. 643, 117 N. E. 665.

[7] Indiana Iron Co. v. Cray (1897), 19 Ind. App. 565, 48 N. E. 803; Keller v. Herkless (1915), 59 Ind. App. 472, 109 N. E. 797; Rooker v. Lake Erie, etc., R. Co. (1917), 66 Ind. App. 521, 114 N. E. 998; Naylor v. St. Louis Sugar Co. (1921), 75 Ind. App. 132, 130 N. E. 152; Petzold v. McGregor (1931), 92 Ind. App. 528, 176 N. E. 640; Bedford Stone Co. v. Henigar (1918), 187 Ind. 716, 121 N. E. 277; Prest-O-Lite Co. v. Skeel (1914), 182 Ind. 593, 106 N. E. 365; in re J. Murray (1931), 154 A 352; Litts v. Risley Lumber Co. (1918), 224 N. Y. 321, 120 N. E. 730; Van Watermauleen v. Ind. Comm. (1931), 343 Ill. 73, 174 N. E. 846.

[8] Board of Comm. of Greene County v. Schertzer (1920), 73 Ind. App. 589, 127 N. E. 843; McDowell v. Dyer (1922), 78 Ind. App. 440, 133 N. E. 839, 70 U. of Pa. L. Rev. 343; Hoosier Veneer Co. v. Ingersold (1922), 78 Ind. App. 518, 134 N. E. 301; Domer v. Castator (1925), 82 Ind. App. 574, 146 N. E. 881.

occupation or business, he is usually held to be a servant.[9] Where the person employed receives a profit from his work, that is a factor in direct conflict with the relationship of employer and employee.[10] Where the occupation of the employee is distinct, the employer generally has little or no right of control over the manner and means of doing the task; thus many cases are decided on the control test without mention of this fact of the character of the occupation involved even when it is present.[11]

The fact that the particular occupation is one which is usually done under the direction of the employer in the particular locality tends to show the relationship of employer and employee.[12] Where the work is done by unskilled laborers, the persons thus engaged are customarily regarded as servants. A laborer is almost conclusively an employee in spite of the fact that he may nominally contract to do a fixed job at a fixed price.[13] The fact that the worker supplies his own tools is some evidence that he is not a servant and vice versa.[14] The fact that the person furnishes his own truck or team and wagon, in cases where the employment is to haul for the employer, is given little or no weight in deciding the relationship of the parties.[15] This fact in conjunction with others overcame the control test in one instance.[15a] Where the employer furnishes valuable tools to the worker to be used in his work he is generally held to be a servant,[16] probably because a close control can be inferred.

If the employer has the right to discharge the worker at any time, and the worker has the right to quit at any time, the worker is generally held

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[9] Board of Comm. of Greene County v. Schertzer (1920), 73 Ind. App. 589, 127 N. E. 843; Standard Oil Co. v. Allen (1920), 189 Ind. 398, 126 N. E. 674; Domer v. Castator (1925), 82 Ind. App. 574, 146 N. E. 881; Makeever v. Marlin (1931), 92 Ind. App. 158, 174 N. E. 517; Lazarus v. Scherer (1931), 92 Ind. App. 90, 174 N. E. 293.

[10] Petzold v. McGregor (1931), 92 Ind. App. 528, 176 N. E. 640.

[11] Marion Malleable Iron Works v. Baldwin (1924), 82 Ind. App. 206, 145 N. E. 559.

[12] American Law Institute, Restatement of the Law of Agency, § 220 (2, c).

[13] American Law Institute, Restatement of the Law of Agency, § 220 (2, d). Indiana Window Glass Co. v. Mauck (1920), 75 Ind. App. 642, 128 N. E. 451; Casa v. Woodruff (1919), 70 Ind. App. 93, 123 N. E. 120; Muncie Foundry & Machine Co. v. Thompson (1919), 70 Ind. App. 157, 123 N. E. 196; Board of Commissioners of Greene County v. Shertzer (1920), 73 Ind. App. 589, 127 N. E. 843; Princeton Coal Co. v. Lawrence (1911), 175 Ind. 469, 95 N. E. 423.

[14] American Law Institute, Restatement of the Law of Agency, § 220 (2, e), Keller v. Herkless (1915), 59 Ind. App. 472, 109 N. E. 797; Mobley v. Rogers Co. (1918), 68 Ind. App. 308, 119 N. E. 477; Marion Malleable Iron Works v. Baldwin (1924), 82 Ind. App. 206, 145 N. E. 559; Petzold v. McGregor (1931), 42 Ind. App. 518, 176 N. E. 640; Switow v. McDougal (1916), 184 Ind. 259, 111 N. E. 3; Standard Oil Co. v. Allen (1918), 121 N. E. 329; Marion Shoe Co. v. Eppley (1914), 181 Ind. 219, 104 N. E. 65; In re Murray (1931), 154 A 352.

[15] Hoosier Veneer Co. v. Ingersold (1922), 78 Ind. App. 518, 134 N. E. 301; Lower Vein Coal Co. v. Moore (1923), 80 Ind. App. 53, 137 N. E. 887; Spichelmier Fuel Supply Co. v. Thomas (1924), 81 Ind. App. 604, 144 N. E. 566; Grace Construction Co. v. Fowler (1926), 85 Ind. App. 265, 153 N. E. 819; Van Watermeullen v. Ind. Comm. (1931), 343 Ill. 73, 174 N. E. 846; Frost v. Blue Ridge Timber Co. (1928), 11 S. W. (2nd) 860. Contra Zeitlow v. Smock (1917), 65 Ind. App. 643, 117 N. E. 665; Brazton v. Mendelson (1922), 233 N. Y. 122, 135 N. E. 198.

[15a] Bd. of Comm. of Greene County v. Shertzer (1920), 73 Ind. App. 589, 127 N. E. 843.

[16] Indiana Iron Co. v. Cray (1897), 19 Ind. App. 565, 48 N. E. 803, American Law Institute, Restatement of the Law of Agency, Tentative Draft § 220.

to be an employee.[17] The fact that the employer has no right to discharge the worker at any time, and the worker cannot quit at any time, without being subjected to liability for breach of contract, tends to show the worker is an independent contractor.[18]

The method of payment is a factor to be considered in the determination of the relationship of the parties,[19] but it is not controlling;[20] nor does it matter how the person is compensated, if other factors show he is an independent contractor.[21] The fact that the amount of compensation is not fixed, does not make the person an employee.[22] The mere fact that the pay is by the load, ton, yard, number of feet, or the particular piece of work, does not necessarily indicate that the person is an independent contractor,[23] but if there is an agreement to do a stated piece of work for a fixed price, that fact tends to show the worker is an independent contractor.[24]

Where the occupation in which the person is employed is one which is ordinarily a function of the business of the employer, there is an inference that the person is a servant.[25] When the occupation is not a function of the business of the employer the inference is that the worker is an independent contractor.[26] The fact that the parties intend a certain relationship is given weight in deciding the relationship.[27] The fact that the person employed assistants to help in the prosecution of the work, while not sufficient in itself to create the relationship of independent contractor, is strongly indicative thereof.[28]

For a worker to be entitled to compensation under the Workmen's Compensation Act[29] he must be shown to be an employee (servant); if he is

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[17] Muncie Foundry and Machine Co. v. Mach (1919), 70 Ind. App. 157, 123 N. E. 196; Sargent Paint Co. v. Petrovitsky (1919), 71 Ind. App. 353, 124 N. E. 881; Coppes Bros & Zook v. Pontius (1917), 76 Ind. App. 298, 131 N. E. 845; Grace Construction Co. v. Fowler (1926), 85 Ind. App. 263, 153 N. E. 819; Lazarus v. Scherer (1931), 92 Ind. App. 90, 174 N. E. 293; Meyer v. Ind. Comm. (1931), 347 Ill. 172, 179 N. E. 456.

[18] Marion Malleable Iron Works v. Baldwin (1924), 82 Ind. App. 206, 145 N. E. 559; Slessor v. The Board of Ed. of City of Kalamazoo (1932), 256 App. Div. 127, 254 N. Y. S. 392.

[19] The Indiana Iron Co. v. Cray (1897), 19 Ind. App. 565, 48 N. E. 803; Lazarus v. Scherer (1931), 92 Ind. App. 90, 174 N. E. 293; Re J. Murray (Maine, 1931), 154 A. 352; American Law Institute, Restatement of the Law of Agency, § 220 (2, g).

[20] In re Duncan (1919), 73 Ind. App. 270, 127 N. E. 289; Meyer v. Ind. Comm. (1931), 347 Ill. 172, 179 N. E. 456.

[21] Marion Shoe Co. v. Eppley (1914), 181 Ind. 219, 104 N. E. 65.

[22] Marion Malleable Iron Works v. Baldwin (1924), 82 Ind. App. 206, 145 N. E. 559.

[23] Indian Window Glass Co. v. Mauck (1920), 75 Ind. App. 642, 128 N. E. 451; Coppes Bros. & Zook v. Pontius (1917), 76 Ind. App. 298, 131 N. E. 845.

[24] Petzold v. McGregor (1931), 92 Ind. App. 528, 176 N. E. 640; Leet v. Block (1914), 182 Ind. 271, 106 N. E. 373.

[25] American Law Institute, Restatement of the Law of Agency, § 220 (2, h).

[26] Mobley v. Rogers Co. (1918), 68 Ind. App. 308, 119 N. E. 477; Naylor v. Holland & St. Louis Sugar Co. (1921), 75 Ind. App. 132, 130 N. E. 152; Hadly v. Rogers (1921), 77 Ind. App. 203, 133 N. E. 401; Marion Malleable Iron Works v. Baldwin (1924), 82 Ind. App. 206, 145 N. E. 559.

[27] Mobley v. Rogers Co. (1918), 68 Ind. App. 308, 119 N. E. 477; Coppes Bros. & Zook v. Pontius (1921), 76 Ind. App. 298, 131 N. E. 845.

[28] Switow v. McDougal (1916), 184 Ind. 259, 111 N. E. 3; Domer v. Castator (1925), 82 Ind. App. 574, 146 N. E. 881; Lazarus v. Scherer (1931), 92 Ind. App. 90, 174 N. E. 293; Lichtenager v. Silverman (1931), 254 N. Y. S. 392.

[29] Acts of 1929, c, 172; 1929 Burns Sup. sec. 9447.

shown to be an independent contractor he is denied compensation.[30] The liability under the workmen's compensation acts is not based upon fault on the part of the employer, but upon the theory that the burden of industrial injuries should be placed upon the industry in which they occur.[31] As a rationalization of the liability without fault placed upon the employer, some courts have said that the liability to pay for injuries to an employee is implied in every contract of employment.[32] The courts of Indiana and the majority of the other states are liberal in finding a worker an "employee."[33] If there is doubt as to the relationship the worker is held to be an "employee."[34] The view has been expressed that the law of independent contractor should be eliminated in proceedings under the Workmen's Compensation Acts since it grew up in a law that is foreign to the theory of liability under the acts.[35] It is submitted, however, that the legislature may have intended to limit recovery under the acts to a particular class, namely that class called "employees" as distinguished from "independent contractors," as these terms were used at the time of the passage of the Act. The same problem arose under the Dangerous Occupation Act and the Employer's Liability Acts which preceded the Workmen's Compensation Act, where the term "employee" was used to describe the class of persons that came within the Acts. Thus it would seem that the legislature would have enlarged the class protected by eliminating the independent contractor defense if it had wished to.

It is submitted that in cases where the relationship of master and servant is a necessary element in determining the vicarious liability of the employer for the negligent act of a worker, the courts are more strict in finding the worker an employee than in workmen's compensation cases.[36]

Hauling cases under the Workmen's Compensation Act in Indiana and other jurisdictions, with similar facts are generally in accord with the principal case.[37] When the special policy behind the theory of liability under

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[30] Columbia School Supply Co. v. Lewis (1917), 63 Ind. App. 386, 115 N. E. 103; Coppes Bros. & Zook v. Pontius (1917), 76 Ind. App. 298, 131 N. E. 845; Zalney v. Rieman (1924), 81 Ind. App. 74, 142 N. E. 397; Standard Oil Co. v. Allen (1920), 189 Ind. 398, 126 N. E. 674.

[31] In re Duncan (1919), 73 Ind. App. 270, 127 N. E. 289; Crawfordsville Shale Brick Co. v. Starburk (1924), 80 Ind. App. 649, 141 N. E. 7; Imperial Brass Mfg. Co. v. Ind. Comm. (1922), 306 Ill. 11, 137 N. E. 411, 26 A. L. R. 161.

[32] Kennedy v. Cunard (1921), 189 N. Y. S. 402.

[33] Chicago, etc., R. R. Co. v. Haufman (1921), 78 Ind. App. 474, 133 N. E. 399. But see Standard Oil Co. v. Allen (1918), 121 N. E. 329, 123 N. E. 329, 126 N. E. 674.

[34] In re Duncan (1919), 73 Ind. App. 270, 127 N. E. 289; McDowell v. Duer (1922), 78 Ind. App. 440, 133 N. E. 339; Hurst Rec. v. Hunley (1924), 81 Ind. App. 203, 141 N. E. 557; Dowery v. State (1925), 84 Ind. App. 37, 149 N. E. 922; Feey v. Bobrink (1926), 84 Ind. App. 559, 151 N. E. 705.

[35] Brandeis, J., dissent, in Crowell v. Benson (1932), 52 Sup. Ct. 305.

[36] Rooker v. Lake Erie etc. R. R. Co. (1917), 66 Ind. App. 521, 114 N. E. 998; Washburn v. Crosby Co. (1918), 70 Ind. App. 463, 120 N. E. 434; Sargent Paint Co. v. Petrovitzky (1919), 71 Ind. App. 353, 124 N. E. 881; Scott Construction Co. v. Cobb (1927), 86 Ind. App. 699, 159 N. E. 763; Crockett v. Calvert (1856), 8 Ind. 127; Ohio & Miss. R. R. Co. v. Davis (1864), 23 Ind. 553; Ryan v. Curan (1878), 64 Ind. 345; The Wabash & St. Louis R. R. Co. v. Farver (1887), 111 Ind. 195, 12 N. E. 296; Falender v. Blackwell (1906), 39 Ind. App. 121, 79 N. E. 393; Braxton v. Mendelson (1922), 233 N. Y. 122, 138 N. E. 198.

[37] Sugar Valley Coal Co. v. Drake (1917), 66 Ind. App. 152, 117 N. E. 937;

the Workmen's Compensation Act, the factors going to show the relationship, and the weight given to each factor are considered, the case seems rightly decided. R. S. M.

PLEADING—APPEAL AND ERROR—REVERSAL BECAUSE OF ERRONEOUS OVERRULING OF DEMURRER—Plaintiff sued for breach of a written contract. Plaintiff was appointed superintendent of city schools in Crawfordsville for a period of three years. He alleged that defendant discharged him "in violation of contract and without good cause." Defendant demurred to the complaint on the ground of insufficient facts because the complaint did not show that plaintiff was discharged by action of the board in which the board acted in bad faith, corruptly, fraudulently, or that the board had grossly abused its discretion. Demurrer was overruled and defendant filed a general denial. The case was tried and judgment was rendered for the plaintiff. Defendant appealed assigning as errors, first, that the trial court erred in overruling the demurrer to the complaint; and second, that the trial court erred in overruling defendant's motion for a new trial. Held, demurrer to the complaint should have been sustained and the judgment is therefore reversed.[1]

It is obvious that the court in the principal case reversed the decision of the trial court solely because of the erroneous overruling of the demurrer. The court said, "Our ruling as to the demurrer makes it unnecessary to consider the other questions presented by this appeal." The other important question presented by the appeal, as stated in the facts, was whether the lower court wrongfully overruled the defendant's motion for a new trial. The appellate court absolutely refused to consider the merits of the controversy when it refused to consider the ruling of the lower court on the defendant's motion for a new trial; and therefore the reversal was had merely because of an erroneous ruling on the demurrer. This action of the court is in violation of the statutes covering this situation. Section 725 Burns 1926 provides that "no judgment shall be stayed or reversed, in whole or in part, for any defect in form, variance, or imperfection contained in the record, pleadings, process, entry, returns, or other proceedings therein which by law might be amended by the court below, but such defects shall be deemed to be amended in the Supreme Court; nor shall any judgment be stayed, or reversed, in whole or in part, where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below." Section 426 Burns 1926 provides that "the court must in every stage of the action disregard any error or defect in the pleadings or proceedings which does not affect the substantial right of the

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Washburn Crosby Co. v. Cook (1918), 70 Ind. App. 463, 120 N. E. 434; Nissen Transfer Co. v. Miller (1920), 72 Ind. App. 261, 125 N. E. 652; Coppes Bros. & Zook v. Pontius (1917), 76 Ind. App. 298, 131 N. E. 845; McDowell v. Duer (1922), 78 Ind. App. 440, 133 N. E. 839; Hossier Veneer Co. v. Ingersol (1922), 78 Ind. App. 518, 134 N. E. 301; Latshaw v. McCarter (1922), 79 Ind. App. 623, 137 N. E. 565; Spichelmeier Fuel & Supply Co. v. Thomas (1924), 81 Ind. App. 604, 144 N. E. 566; Crockett v. Calvert (1826), 8 Ind. 127; Zeitlow v. Smock (1917), 65 Ind. App. 643, 117 N. E. 665; Braxton v. Mendelson (1922), 233 N. Y. 122, 135 N. E. 198; Louchrlan v. Autophone Co. (1902), 78 N. Y. S. 919; Kavanaugh v. Belden (1931), 247 N. Y. S. 714; Constello's Case (1919), 232 Mass. 456, 122 N. E. 560.

[1] School City of Crawfordsville v. Montgomery, Supreme Court of Indiana, 1933, 187 N. E. 57.