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The Alabama Court of Civil Appeals holds that providing all the equipment necessary to provide contracted services, by itself, is not necessarily sufficient to give rise to the existence of an employment relationship under Alabama Workers' Compensation Act. Rather, courts must look to the totality of the circumstances to determine whether the purported employer retained sufficient right of control over the manner in which services were performed.

## Who's in Control? An Alabama Court Analysis of Independent Contractor vs. Employee Status Under Alabama's Workers' Compensation Law

By Kelly Reese

On January 28, 2011, the Alabama Court of Civil Appeals released its opinion in *Susan Schein Chrysler Dodge v. Rushing*, finding that an injured worker was an independent contractor and not an employee under the Alabama Workers' Compensation Act. The Court of Civil Appeals decision makes clear that resolution of the central issue of "control" will not turn on a single fact but must be decided on a case-by-case basis in light of all the attendant facts. To reach its decision, the Court of Civil Appeals had to distinguish *Ex parte Curry*<sup>1</sup> – a controlling Alabama Supreme Court decision with facts substantially similar to those of *Rushing* but where the Supreme Court found the worker was an employee and not an independent contractor.

### Background Facts

**Dealership Transfers.** Rushing was one of several retirees who supplemented their retirement income by transferring vehicles to and from multiple Birmingham area car dealerships, including Susan Schein Dodge. When Susan Schein did not have a specific vehicle to meet a customer's request, the dealership would call a third party who maintained a list of persons who would make the dealership transfers for a flat fee. Rushing was on that list. The logistics of the dealership transfers were straightforward. Two drivers would ride in one vehicle (the "chase vehicle") provided by the Birmingham dealership to the other dealership. One would drive that vehicle back and the other would drive the customer's vehicle back to Birmingham.

**The Arrangement.** Rushing would receive a call from a third party who offered him a dealership transfer assignment. He was free to accept or decline any assignment. If he accepted the assignment, Rushing himself selected a second person to drive the chase vehicle back to the dealership in Birmingham. Rushing could choose his own routes, take any rest breaks needed or desired, and complete the dealership transfer on his own schedule (subject only to a "reasonable time" requirement). In fact, Rushing was not required to follow any particular rules or guidelines, other than to obey applicable traffic laws. Rather, he was only required to inspect the vehicle and report any damage or condition issues to the dealership before bringing it back to Birmingham. Rushing was paid a flat fee, plus expenses, by check upon completion of the dealership transfer with

no tax withholdings. At the end of the year, Rushing received a Form 1099 for any dealership transfer for which he earned in excess of \$600 and reported all income from dealership transfers on his income tax as “other income.”

**Rushing’s Ill-Fated Trip.** Rushing accepted a dealership transfer assignment from Susan Schein to pick up a vehicle in Jacksonville, Florida. Susan Schein provided him with the make, model, and vehicle identification number of the vehicle, a dealership tag for the vehicle, and other documents necessary to effectuate transfer of title between the dealerships. Susan Schein also provided him with the chase vehicle. Rushing selected another driver to accompany him and return that vehicle to Susan Schein. On the trip back from Jacksonville to Birmingham, Rushing was injured in a collision with another vehicle. Rushing filed a claim seeking workers’ compensation benefits for those injuries.

## The Law

To determine whether an employer-employee relationship exists for purposes of Alabama’s Workers’ Compensation Act, a court must look to whether the purported employer retained the right both to direct the manner in which the work is done as well as the result to be accomplished.<sup>2</sup> A court must look to the right to control and not whether control was actually exercised.<sup>3</sup> The factors to be considered in determining whether the right to control exists include: (1) direct evidence demonstrating the right to control or exercise of control; (2) the method of payment for services; (3) whether equipment is furnished; and (4) whether the other party has the right to terminate employment.<sup>4</sup>

## The Trial Court

The *Rushing* trial court, relying on the Alabama Supreme Court’s decision in *Ex parte Curry*, found that Rushing was an employee. In *Ex parte Curry*, the Alabama Supreme Court, on a scant factual record, reversed the trial court’s determination, which had been affirmed by the Court of Civil Appeals, that the plaintiff truck driver was an independent contractor rather than an employee. In so holding, the Alabama Supreme Court focused on the following facts relative to the right of control: (1) the employer controlled what loads the plaintiff picked up; (2) the employer controlled where the plaintiff picked up his loads; (3) the employer controlled how the plaintiff handled the loads during transit; and (4) the employer controlled where the loads were delivered. As for the method of payment for services, the Alabama Supreme Court found that the plaintiff was not paid until the purported employer received its payment from the shipper. The plaintiff would receive a percentage of the payment from the shipper plus expenses incurred. With regard to the provision of equipment, the Supreme Court found that the purported employer provided the primary equipment utilized to provide services (via a truck lease) and other unspecified equipment, reimbursed the plaintiff for expenses, and provided the necessary permits and insurance. Concerning whether the plaintiff had the right to terminate the relationship, the Supreme Court noted that he could terminate his employment with 30 days written notice per the lease agreement. The *Rushing* trial court essentially followed the *Ex parte Curry* analysis to the letter.<sup>5</sup>

**Right of Control.** Like the employer in *Ex parte Curry*, Susan Schein told Rushing what to pick up and where to deliver it. If there was something wrong with the vehicle, Rushing was required to inform Susan Schein and await further instructions from the dealership.

**Equipment.** Going beyond what was provided to the plaintiff in *Ex parte Curry*, Susan Schein provided all of the equipment used by Rushing to perform the services, as well as reimbursing him for expenses and providing the tag necessary to legally transport the vehicle to Birmingham.

**Payment.** As in *Ex parte Curry Casey*, Rushing was paid by the job and reimbursed for expenses.

## Court of Civil Appeals

To reach its decision in *Rushing*, the Court of Civil Appeals had to find some way to distinguish *Ex parte Curry*, which at first glance seems squarely on point and controlling. The Court of Civil Appeals found help in this regard in the case of *Sartin v. Mike Madden*, 955 So. 2d 1024 (Ala. Civ. App. 2006) which stated that “[n]o one fact by itself can create an employer-employee relationship.” Given that premise, the court in *Rushing* was able to downplay the undisputed fact that Susan Schein provided all of the equipment to Rushing necessary to provide the dealership transfer services. The court then concluded that the control exerted over Rushing extended only to

what he was ultimately to accomplish – the successful transfer of a vehicle. In reaching this conclusion, the court focused on the level of discretion afforded Rushing by the arrangement. First, Rushing could decline any offered assignment. Second, Rushing could choose his route and control his conduct on that route. Third, Rushing's completion of the transfer immediately concluded the relationship. Fourth, Rushing could and did provide the same services for other dealerships. Beyond these facts, the Court of Civil Appeals noted that the relationship bore none of the traditional indicia of employment, such as an employment application, scheduled work hours, provision of health insurance or vacation/holiday benefits. The final straw seems to have been the absence of any evidence that either Rushing or Susan Schein considered there to be an employment relationship between them prior to the accident. Indeed, Rushing and Susan Schein both assumed the he was self-employed for income tax reporting purposes. Ultimately, the Court of Civil Appeals ended its analysis as it had begun by emphasizing the importance of evaluating the relationship on the "totality of the evidence" as opposed to focusing on one isolated factor, such as the provision of equipment.

## Implication for Alabama Employers

*Rushing* is an important decision for Alabama employers in the workers' compensation arena because it provides clear authority for the proposition that a purported employer may, under certain circumstances, supply all of the equipment necessary to perform the contracted services without creating an employment relationship with an individual *if* minimal control is exerted over the manner in which the services are provided. The decision in *Rushing* also provides helpful guidance on formulating the contours of a defensible independent contractor relationship with specific factual examples which, taken together, militate against a finding of employment status. Of course, Alabama employers may find this case problematic when they want to argue for the existence of an employment relationship in order to invoke the exclusive remedy provisions of the Alabama Workers' Compensation Act.

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<sup>1</sup> 607 So. 2d 230 (Ala. 1992).

<sup>2</sup> *Atchison v. Boone Newspaper, Inc.*, 981 So. 2d 427, 431 (Ala. Civ. App. 2007).

<sup>3</sup> *Turnipseed v. McCafferty*, 521 So. 2d 31, 32 (Ala. Civ. App. 1987).

<sup>4</sup> *Ex parte Curry*, 607 So. 2d 230 (Ala. 1992).

<sup>5</sup> The *Rushing* decision does not explain how the trial court dealt with the termination issue.