Rel: June 30, 2021

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1190026

Patrick Jackson

v.

Voncille Allen, as the personal representative of the Estate of Valerie Allen, and Penn Tank Lines, Inc.

Appeal from St. Clair Circuit Court
(CV-18-900049)

STEWART, Justice.

Patrick Jackson appeals from a summary judgment entered in favor of Voncille Allen, as the personal representative of the estate of Valerie

Allen ("the estate"), and Penn Tank Lines, Inc. ("PTL"). For the reasons discussed below, we affirm the judgment in part and reverse the judgment in part.

Facts and Procedural History

On March 30, 2016, Jackson was injured in an automobile accident while undergoing training and riding as a passenger in a tractor-tanker trailer commercial motor vehicle ("the CMV") driven by Valerie Allen ("Allen"). Allen died as a result of the accident. Jackson was an employee of PTL and was being trained by Allen at the time of the accident. Allen owned the CMV, and PTL was leasing the vehicle from Allen, who worked for PTL, delivering fuel, under an independent-contractor agreement. Jackson received medical treatment for his injuries after the accident, and PTL's workers' compensation insurance covered the costs of the treatment.

On February 27, 2018, Jackson sued the estate and PTL, alleging claims of negligence and "gross negligence and/or wantonness" against the estate and a claim of negligent or wanton hiring, training, and supervision against PTL; in addition, Jackson sought to hold PTL vicariously liable for Allen's actions through the doctrine of respondeat superior. Jackson

initially asked for the appointment of an administrator ad litem for the estate, and, after one was appointed, he filed an amended complaint naming the administrator ad litem, on behalf of the estate, as a defendant.

PTL filed an answer denying the allegations in the amended complaint and asserting various affirmative defenses. The administrator ad litem filed a motion to dismiss on behalf of the estate, asserting that both PTL and the estate were immune from suit under § 25-5-52 and § 25-5-53, Ala. Code 1975, commonly referred to as "the exclusive-remedy provisions" of the Alabama Workers' Compensation Act ("the Act"), § 25-5-1 et seq., Ala. Code 1975. Section 25-5-52 provides, in part:

> "Except as provided in [the Act], no employee of any employer subject to [the Act], ... shall have a right to any other method, form, or amount of compensation or damages for an injury or death occasioned by an accident or occupational disease proximately resulting from and while engaged in the actual performance of the duties of his or her employment and from a cause originating in such employment or determination thereof."

Under § 25-5-53,

> "[t]he rights and remedies granted in [the Act] to an employee shall exclude all other rights and remedies of the employee, his or her personal representative, parent, dependent, or next of kin, at common law, by statute, or

> otherwise on account of injury, loss of services, or death. Except as provided in [the Act], no employer shall be held civilly liable for personal injury to or death of the employer's employee, for purposes of [the Act], whose injury or death is due to an accident or to an occupational disease while engaged in the service or business of the employer, the cause of which accident or occupational disease originates in the employment. In addition, immunity from civil liability for all causes of action except those based upon willful conduct shall also extend ... to an officer, director, agent, or employee of the same employer ...."

(Emphasis added.) Jackson filed a response in opposition to the motion to dismiss, asserting that Allen had been an independent contractor and not an agent of PTL and that, as a result, his claims against the estate were not barred by the exclusive-remedy provisions.

Jackson filed a second amended complaint substituting Voncille Allen, Allen's mother, as the personal representative of the estate, as a defendant. In his second amended complaint, Jackson specifically alleged, among other things, that, at the time of the accident, Allen was acting as the agent of PTL, within the line and scope of her employment with PTL, and in furtherance of the business purposes of PTL. Voncille, on behalf of the estate, and PTL ("the defendants") filed separate answers denying, in part, the allegations in Jackson's second amended complaint and asserting

various affirmative defenses, including that Jackson's claims were barred by the exclusive-remedy provisions because Jackson had received workers' compensation benefits under the Act and because, they asserted, Allen had been PTL's agent and had been "acting in the line and scope of such agency" at the time of the accident.

The defendants filed a joint motion for a summary judgment in which they argued that PTL had complete immunity from Jackson's claims and that the estate had limited immunity from Jackson's claims because, they asserted, Allen had been an agent of PTL. In support of their argument, the defendants alleged, among others, the following undisputed facts. Allen owned the CMV and was leasing it to PTL at the time of the accident, and Allen and PTL had entered into an independent-contractor agreement. Pursuant to the terms of both the CMV lease and the independent-contractor agreement, PTL was to have exclusive possession, control, and use of the CMV "as required by the rules and regulations of the United States Department of Transportation" ("USDOT"). Also, pursuant to the terms of the independent-contractor agreement, Allen was required to remain "qualified" as a driver under

USDOT regulations and state regulations. The independent-contractor agreement also specified that PTL would provide commercial "public liability" insurance for Allen and the CMV while it was being used in furtherance of PTL's business.

The defendants also alleged that it was undisputed that, at the time of the accident, in addition to delivering fuel for PTL, Allen was training Jackson on behalf of PTL. The defendants submitted deposition testimony showing, among other things, that Allen and Paul Ooten, Allen's former manager, had entered into an oral agreement pursuant to which Allen would become a "driver trainer" for PTL. Ooten sent Allen to a PTL safety class in 2013 where she was instructed on how to train new drivers on fuel-loading and -unloading procedures. Ooten testified that PTL utilized both employees and independent contractors as trainers but that independent contractors, like Allen, received additional compensation to train new PTL employees. The defendants also submitted in support of their summary-judgment motion a training manual that contained specific, daily instructions and a checklist for tasks a trainer was required to perform while training.

The defendants also argued in their summary-judgment motion that Allen had been performing a nondelegable duty on behalf of PTL and that the performance of such a duty had made Allen an agent of PTL. The defendants pointed to Federal Motor Carrier Safety Administration ("FMCSA") regulations, specifically 49 C.F.R. § 376.12(c)(1), which requires a motor carrier leasing a CMV to have exclusive possession, control, and use of the vehicle and to assume complete responsibility for the operation of the vehicle. The defendants further stated that, under FMCSA regulations, an owner-operator of a CMV, despite his or her status as an independent contractor, will be deemed to be the employee of the motor carrier while operating a CMV. The defendants argued that those types of obligations created by law a nondelegable duty and that, therefore, Allen had been PTL's agent.

Jackson filed a response in opposition to the defendants' summary-judgment motion in which he argued that a genuine issue of material fact existed as to the amount of control PTL had exercised over Allen and as to whether Allen had been PTL's agent. In support of his argument, Jackson alleged that Allen had been responsible for training Jackson

pursuant to USDOT regulations and "a loose PTL training program." Jackson alleged that the independent-contractor agreement required Allen to use her own judgment when conducting her work, and, he asserted, there were no other written agreements affecting the relationship between Allen and PTL. Jackson further alleged that PTL had not possessed the authority to require Allen to accept specific assignments and that PTL had not withheld taxes from Allen's paychecks. Jackson also alleged that, although Allen had been required to comply with PTL's policies and procedures, Allen had been required by the independent-contractor agreement to provide her own safety clothing, shoes, and equipment and that her authority to enter a loading ground to fill the CMV tank had come from the operator of the loading ground, not from PTL. In support of his response, Jackson submitted documentary evidence and testimony that had already been submitted by the defendants in support of their summary-judgment motion.

On August 8, 2019, the trial court entered a summary judgment in favor of the defendants. Jackson filed a motion to alter or amend the summary judgment, in which he asked the trial court to specify the basis

upon which it had entered a summary judgment. On September 20, 2019, after a hearing, the trial court entered an order in which it granted Jackson's motion and included more specific language explaining the bases for its summary judgment. The trial court found, in pertinent part:

> "A. [Jackson] did not contest any of the material facts set forth in Defendants' Statement of Undisputed Facts as contained within Defendants' Motion for Summary Judgment and likewise did not contest any of the additional material facts set forth in paragraph 8 of the Supplemental Submission in Support of Defendants' Motion for Summary Judgment; thus, the Court adopts and finds the said material facts, including the following:
>
> > "a. At the time of the accident made the basis of this action, truck driver Valerie Denise Allen, deceased ('Allen'), who held a valid State of Alabama commercial driver's license ('CDL'), was an agent for Defendant Penn Tank Lines, Inc. ('PTL') and was performing nondelegable duties on behalf of PTL, a federally registered interstate motor carrier of property possessing operating authority granted by the Federal Motor Carrier Safety Administration ('FMCSA').
> >
> > "b. At the time of the accident made the basis of this action, [Jackson] was an employee of PTL under the Act who subsequently sought and obtained workers' compensation benefits available under the Act from his employer, PTL, and its worker's compensation insurer in relation to the injuries [Jackson] suffered in the said accident.

> "c. No evidence has been presented to the Court indicating that Allen's conduct was willful nor does [Jackson] allege that Allen engaged in any willful conduct with [Jackson's] operative Second Amended Complaint stating claims for negligence (Count one) and gross negligence and/or wantonness (Count two) in relation to Allen.

"B. Pursuant to the provisions of the Act, regulations of the FMCSA, and the common law, this Court finds and declares as follows:

> "a. Because [Jackson's] alleged injuries from the accident occurred while working for his employer, Defendant PTL, said Defendant PTL has complete immunity under the Act from liability in relation to the claims against it contained in [Jackson's] Second Amended Complaint.
>
> "b. Allen, in turn, has limited immunity under the Act that bars all claims against her and her Estate contained in the Second Amended Complaint, none of which are based on willful conduct, because she was an agent of [Jackson's] employer, to-wit: PTL, at the time of the accident."

Jackson timely filed a notice of appeal.

Standard of Review

"This Court's review of a summary judgment is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue

> of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952-53 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce 'substantial evidence' as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12. '[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' West v. Founders Life Assur. Co. of Fla., 547 So. 2d 870, 871 (Ala. 1989)."

Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004).

Discussion

At the outset, we note that Jackson does not challenge the summary judgment insofar as the trial court found that PTL was entitled to complete immunity under the exclusive-remedy provisions of the Act. Accordingly, the summary judgment as to the claims asserted against PTL is affirmed. See Boshell v. Keith, 418 So. 2d 89, 92 (Ala. 1982)("When an appellant fails to argue an issue in its brief, that issue is waived.").

Jackson challenges the trial court's judgment insofar as it found that Allen had been an agent of PTL. First, Jackson argues that the question whether an agency relationship existed between Allen and PTL is a jury question that should not have been resolved by a summary judgment. Jackson cites Lee v. YES of Russellville, Inc., 784 So. 2d 1022, 1028 (Ala. 2000), in which this Court stated: "Whether the agency existed is, we conclude, a question for a jury to decide." Jackson further argues that, even if the trial court properly considered Allen's agency status at the summary-judgment stage, there were nonetheless genuine issues of material fact that precluded a determination, as a matter of law, that Allen was an agent of PTL. This Court has explained that "the court may grant a motion for a summary judgment" only "[w]here ... all the basic facts are undisputed and the matter is one of interpretation or of reaching a conclusion of law by the court." Studdard v. South Cent. Bell Tel. Co., 356 So. 2d 139, 141 (Ala. 1978)(citing Bible Baptist Church v. Stone, 55 Ala. App. 411, 316 So. 2d 340 (1975)).

The issue, then, is whether the circumstances presented a genuine issue of material fact as to whether Allen was an agent of PTL's at the

time the accident occurred. The parties correctly note that "agent" is not defined in the Act. Jackson contends that, to determine whether Allen was an agent, the test to be applied is contained in Morrison v. Academy Life Insurance Co., 567 So. 2d 1309 (Ala. 1990), and asks whether, at the time of the accident, Allen was authorized as a fiduciary of PTL, whether she had the power to make PTL a party to a transaction, or whether she was subject to PTL's control over her conduct. Jackson argues that there is no evidence indicating that Allen was authorized to act as a fiduciary for PTL or that she was authorized to make PTL a party to a contract, and he argues that genuine issues of material fact exist as to the scope of PTL's control over Allen.

The defendants argue that their summary-judgment motion was not based on the traditional right-of-control test, discussed infra, but, instead, on Allen's undisputed legal status as a commercial driver and driver-trainer for PTL who, at the time of the accident, was delivering fuel for PTL and providing training to Jackson on behalf of PTL, which, they assert, made her an agent as a matter of law.

This Court has previously explained that the test for determining whether one is an agent or an independent contractor is whether the employer "retained a right of control" and that it does not matter whether the employer actually exercised such control. Turner v. ServiceMaster, 632 So. 2d 456, 458 (Ala. 1994). In Turner, a hospital had contracted with ServiceMaster as an independent contractor to train and supervise hospital-employee housekeeping staff. A nurse employed by the hospital fell and suffered an injury, and she sued the hospital seeking workers' compensation benefits. Additionally, she sued ServiceMaster, alleging claims of negligent and wanton training and supervision. ServiceMaster asserted that it was immune from liability, pursuant to § 25-5-11, Ala. Code 1975, of the Act, because, it alleged, it was an agent of the hospital and, therefore, only claims involving willful conduct were permitted against it.[1] Id. at 457. This Court explained: "The test for determining

[1]Section 25-5-11 permits an injured employee to bring a cause of action against a third party, including, among others, a co-employee or an agent of the employer, who is jointly liable with the employer for the employee's injury, but only if the third party's willful conduct contributed to the injury, and does not affect the immunity afforded the designated persons in § 25-5-53. See Padgett v. Neptune Water Meter Co., 585 So. 2d

whether ServiceMaster's role in its relationship with [the h]ospital was that of an independent contractor or that of an agent, is whether [the h]ospital retained a right of control over the means ServiceMaster employed to manage and train the housekeeping personnel, not whether the hospital actually exercised such control." Turner, 632 So. 2d at 458. Turner's right-of-control test continues to be an appropriate standard to be used in determining the existence of an agency relationship, and neither party has asked this Court to overturn it.[2]

In support of his right-of-control argument, Jackson raises the same arguments he made in his response in opposition to the defendants' summary-judgment motion. In particular, Jackson points to the independent-contractor agreement between Allen and PTL that expressly identified Allen as an independent contractor and stated that Allen was to use her own judgment in determining how to perform under the agreement. Jackson also asserts that any oral agreement outside the

900 (Ala. 1991).

[2]The defendants argue that their agency argument is not based on the right-of-control test, but, nevertheless, they cite Turner in support of their position.

written independent-contractor agreement, i.e., the alleged oral training agreement, is ineffective because the independent-contractor agreement provided that the parties to that agreement did "not intend to create any other type of relationship between themselves" and that "any verbal or prior agreements between the parties have no force or effect."

Jackson also asserts that Allen had the right to accept or reject assignments and that Allen's authority to enter a loading ground where the CMV tank would be filled had come from the operator of the loading ground, not from PTL. In addition, Jackson asserts that Allen was paid as an independent contractor, that PTL did not withhold taxes from her compensation, and that, if Allen was assigned additional duties, i.e., trainer work, PTL would negotiate with her and she would receive additional compensation. Jackson also asserts that there was no evidence indicating that PTL retained the right to control Allen's daily schedule or hours.

Jackson further asserts that, although Allen had been required to comply with PTL's policies and procedures, she had been required by the independent-contractor agreement to provide her own clothing, safety

shoes, and equipment. Jackson cites Parr v. Champion International Corp., 667 So. 2d 36 (Ala. 1995), in support of his argument, in which this Court explained that an agency relationship is not created by an employer's retention of the right to supervise or inspect an independent contractor's work. Parr, 667 So. 2d at 39 (quoting Weeks v. Alabama Elec. Coop., Inc., 419 So. 2d 1381, 1383 (Ala. 1982)).

Jackson also argues that Allen's position as a trainer did not render her an agent of PTL, asserting that, even though Allen had been required to follow instructions and to fill out a detailed training form while training Jackson, that level of control does not create an agency relationship because, Jackson contends, there is no evidence to indicate that PTL supervised the manner in which Allen performed her training and, pursuant to the training manual, PTL's training program "'afforded latitude for a trainer and trainee's style.'" Jackson's brief at 23. Citing Pugh v. Butler Telephone Co., 512 So. 2d 1317 (Ala. 1987), and Pate v. United States Steel Corp., 393 So. 2d 992 (Ala. 1981), Jackson asserts that the right to supervise or inspect an independent contractor's work to ensure compliance does not create a master-servant relationship and that

there must be a right of control over the manner in which the independent contractor performs his or her work.[3]

Applying Turner, the resolution of the question whether Allen was an independent contractor or an agent depends on whether PTL retained the right of control over the means Allen used in performing her job duties of delivering fuel and training Jackson. Turner, 632 So. 2d at 458. Furthermore, "[b]ecause working relationships take a wide variety of forms, each case must depend on its own facts, and all features of the relationship are considered together. Burbic Contracting Co. v. Willis, 386

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[3]In Pugh, this Court stated:

> "In the absence of a non-delegable duty, the mere retention of the right to supervise or inspect the work of an independent contractor as the work progresses to ensure compliance with the terms of an agreement does not operate to create a master-servant relationship. There must be a retention of control over the manner in which the work is done, before an agency relationship is created."

512 So. 2d at 1318. In Pate, this Court explained the principle that retaining the right to supervise or inspect work of an independent contractor, to monitor the progression of the work, does not create a master-servant relationship. 393 So. 2d at 995.

So. 2d 419 (Ala. 1980)." Sessions Co. v. Turner, 493 So. 2d 1387, 1390 (Ala. 1986).

The facts demonstrated that Allen was acting in furtherance of PTL's business by delivering fuel and by training Jackson at the time the accident occurred. There was a dispute, however, as to the amount of control PTL retained over Allen. For instance, although PTL did not control Allen's daily schedule, Allen was required to follow PTL's policies and procedures in performing her duties and maintaining her equipment, in addition to being required to comply with USDOT regulations and FMCSA regulations while delivering fuel. Moreover, although Allen was required to follow PTL's detailed training manual and checklist while training Jackson, she was permitted to implement whatever style she chose. In addition, Allen was required to provide her own equipment and had the discretion to accept or reject assignments.

Based on the facts before the trial court, we conclude that there was a dispute as to whether PTL retained a right of control over the manner in which Allen performed her responsibilities at the time the accident occurred, and that dispute should have been submitted to a jury for

resolution. Accordingly, the trial court incorrectly concluded that, as a matter of law, Allen was PTL's agent. Turner, 632 So. 2d at 458. Based on our holding, we pretermit discussion of any other issues raised by the parties.

Conclusion

We affirm the judgment insofar as the trial court determined that PTL was entitled to complete immunity from Jackson's claims against it pursuant to the exclusive-remedy provisions of Act. We reverse the judgment insofar as the trial court determined, as a matter of law, that Allen was PTL's agent under the purview of the exclusive-remedy provisions of the Act, and we remand the cause for further proceedings.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Mitchell, J., concurs specially.

Parker, C.J., and Shaw, Wise, Bryan, and Mendheim, JJ., concur in the result.

Bolin and Sellers, JJ., concur in part and dissent in part.

MITCHELL, Justice (concurring specially).

Whether one is an agent of another is a question of fact, not law. Our cases are clear on this. See, e.g., Kennedy v. Western Sizzlin Corp., 857 So. 2d 71, 77 (Ala. 2003) ("[S]ummary judgment on the issue of agency is generally inappropriate because agency is a question of fact to be determined by the trier of fact."); Lee v. YES of Russellville, Inc., 784 So. 2d 1022, 1028 (Ala. 2000) ("As this Court has held, 'the existence and scope of an agency relationship are questions of fact to be determined by the jury.' " (citation omitted)). Because the existence of an agency relationship is a question of fact, "it is not the trial court's function to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Nix v. Franklin Cnty. Dep't of Hum. Res., 234 So. 3d 450, 456 (Ala. 2017) (cleaned up). Thus, the trial court in this case had to determine whether, in response to the defendants' motion for summary judgment, Patrick Jackson produced substantial evidence that Valerie Allen had not been an agent of Penn Tank Lines, Inc. ("PTL").

That determination turned on whether PTL "retained a right of control" over Allen's conduct on the job, even if PTL did not "actually exercise[] such control." Turner v. ServiceMaster, 632 So. 2d 456, 458 (Ala. 1994). Jackson produced substantial evidence that PTL did not retain control. Specifically, as the main opinion notes, Jackson presented evidence that Allen had signed an agreement expressly identifying her role as an independent contractor and requiring her to use her own judgment in performing her obligations under the agreement; that PTL had not withheld taxes from her pay and that she would be paid extra if she agreed to perform additional work; that PTL had no right to control her schedule or hours; that she had the right to accept or reject PTL's assignments; and that she had been required by her independent-contractor agreement to provide her own clothing and safety equipment.

Based on that and other evidence submitted in response to the defendants' summary-judgment motion, it is clear to me that Jackson met his burden by producing substantial evidence of a genuine dispute of material fact -- that is, whether PTL had retained a right of control over

Allen. Thus, the trial court should not have entered summary judgment on Jackson's claims against Allen's estate.

BOLIN, Justice (concurring in part and dissenting in part).

I agree with the main opinion that the trial court correctly determined that Penn Tank Lines, Inc. ("PTL"), was entitled to complete immunity from Patrick Jackson's claims against it based on the exclusive-remedy provisions of the Workers' Compensation Act. However, I respectfully dissent to reversing the summary judgment in favor of Voncille Allen, as the personal representative of the estate of Valerie Allen. I believe that Valerie Allen was an agent of PTL because Valerie was acting as PTL's agent while she trained Jackson on behalf of PTL. That is, Valerie was wearing her "agent" hat while she trained Jackson as a PTL driver.

SELLERS, Justice (concurring in part and dissenting in part).

I respectfully dissent from that part of the main opinion reversing the summary judgment in favor of Voncille Allen, as the personal representative of the estate of Valerie Allen ("Allen's estate"). The trial court held as a matter of law that Valerie Allen ("Allen") was an agent of Penn Tank Lines, Inc. ("PTL"), at the time of the accident in question and, that thus, Patrick Jackson's claims against Allen's estate were barred by the exclusive-remedy provisions of the Alabama Workers' Compensation Act ("the Act"), § 25-5-1 et seq., Ala. Code 1975. See § 25-5-53, Ala. Code 1975 (extending immunity for causes of action based upon willful conduct to, among others, agents of the same employer). The main opinion reverses the summary judgment in favor of Allen's estate because, it concludes, a jury question is presented regarding whether an agency relationship did in fact exist between Allen and PTL at the time of the accident.

Whether someone is classified as an independent contractor or an agent is an important distinction because there are benefits, detriments,

and risk-shifting associated with those classifications. The Internal Revenue Service, for instance, gives the following guidance:

> "The general rule is that an individual is an independent contractor if the payer has the right to control or direct only the result of the work and not what will be done and how it will be done. ...
>
> "....
>
> "You are not an independent contractor if you perform services that can be controlled by an employer (what will be done and how it will be done)."[4]

See also Black's Law Dictionary 920 (11th ed. 2019) (defining "independent contractor" as "[s]omeone who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it").

There are circumstances in which a person can be both an independent contractor and an agent or employee depending on the specific duties that are being performed. In this case, Allen delivered

[4]As of the date of this decision, June 30, 2021, this material could be found at: https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined. A copy of the material is available in the case file of the clerk of the Alabama Supreme Court.

wholesale fuel for PTL under an independent-contractor agreement. Allen also had an oral agreement with Paul Ooten, Allen's former manager, in which Allen consented to train employees regarding PTL's procedures for loading and unloading fuel tankers. Ooten testified that Allen was paid an additional weekly stipend to be available to train others, regardless of whether she did so or not. Ooten further testified that, although Allen was an independent contractor, she was required to follow PTL's loading and unloading procedures and that she was afforded no discretion to deviate from those procedures. The training manual outlining those procedures states, in relevant part, that the program "requires a very specific order of sequenced training and must be adhered to by all parties." Allen was also required to complete a daily checklist form for each day she trained a driver; that checklist was in turn forwarded to PTL's risk department. Allen, in fact, filled out three checklists in March 2016 in conjunction with training Jackson. In other words, it was undisputed that Allen was afforded no freedom to deviate from PTL's procedures for training employees like Jackson on how to load and unload fuel tankers. Rather, pursuant to its strict procedures, PTL reserved the right of complete

control over how Allen was to train drivers; thus an agency relationship was created. See Pugh v. Butler Tel. Co., 512 So. 2d 1317, 1318 (Ala. 1987) (noting that "[t]here must be a retention of control over the manner in which the work is done, before an agency relationship is created"). See also Tyson Foods, Inc. v. Stevens, 783 So. 2d 804, 808 (Ala. 2000) (noting that "whether an agency exists is determined from the facts, not by how the parties choose to characterize their relationship"). Factually, the only reason Jackson was riding in the tractor-tanker trailer commercial motor vehicle ("the CMV") being driven by Allen was for training purposes. If Jackson had not been riding with Allen at the time of the accident, Allen would have been acting solely in her capacity as an independent contractor. However, Jackson's presence in the CMV changed the nature of Allen's relationship with PTL; Jackson's presence created an agency relationship legally resulting in Allen's estate being exempt from suit under § 25-5-53 of the Act. In our modern world, with the ever-increasing development and general understanding of quantum physics, one concept that is more widely accepted is that something or somebody can be two seemingly mutually exclusive things at the same time. For instance, while

justice and mercy are opposites, a judge can possess both qualities and yet be completely consistent. The same is true here: a person can be an independent contractor and an agent at the same time. Once Jackson entered the CMV with Allen, Allen's role as an independent contractor was subsumed by her role as an agent, i.e., a driver trainer for PTL. Accordingly, I would affirm that part of the trial court's judgment holding that Allen was an agent of PTL at the time of the accident.