

RECEIVED

Sep 08 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

SC WCC File No.: 1514359

Appellant Case No. 2021-000633

Rachel J. Turner, Employee,Appellant-Respondent,

v.

Medustrial Healthcare Staffing Services and Condustrual, Inc.;
Guarantee Insurance Company; Countrywide Staffing Solutions
Group, Inc., South Carolina Department of Corrections; State
Accident Fund; and South Carolina Uninsured Employer's Fund, Respondents,

of which Condustrual, Inc. f/k/a Medustrial Healthcare Staffing
Service, Employer is the Respondent-Appellant.

Respondent-Appellant's Final Reply Brief

George D. Gallagher, Esquire
Speed, Seta, Martin, Trivett, Stubley &
Fickling, LLC
Post Office Box 11669
Columbia, SC 29211
803.748.2259
ggallagher@speed-seta.com

Counsel for Respondent-Appellant
Condustrual, Inc.

TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIESi

REPLY TO APPELLANT-RESPONDENT’S BRIEF.....1

ARGUMENT.....1

I. The Agreement between SCDC and Condustrual does not establish that Turner
was Condustrual’s employee.....1

TABLE OF AUTHORITIES

South Carolina cases

Allen v. Phinney Oil Co., 241 S.C. at 178, 127 S.E.2d (S.C. 1962).....1

Bob Hammond Constr. Co. v. Banks Constr. Co., 312 S.C. 422, 424, 440 S.E.2d 890, 891
(Ct. App. 1994).....1

Sellers v. Tech Services, Inc., 421 S.C. 30, 803 S.E.2d 731 (Ct. App. 2017).....1

Weisz Graphics Div. of Fred B. Johnson Co. v. Peck Industries Inc., 304 S.C. 101, 403
S.E.2d 146 (Ct. App. 1991).....3

Respondent-Appellant (“Condustrial”) hereby offer the following Reply in response to Appellant-Respondent’s (“Turner”) Brief. This Reply will specifically focus on the applicability of the contract between Condustrial and SCDC to the issue of whether Turner is an employee or independent contractor.

I. The Agreement between SCDC and Condustrial does not establish that Turner was Condustrial’s employee.

Turner’s reliance on Sellers v. Tech Services Inc., 421 S.C. 30, 803 S.E.2d 731 (Ct. App. 2017) for the proposition that the agreement between SCDC and Condustrial (R., Vol. 7, p. 2971-2977) tends to prove Turner is an employee is sorely misplaced. In that case, Tech Services (Sellers’ alleged employer) represented to the City it was bidding a job for that Tech Services did not use subcontractors or independent contractors for purposes of securing necessary permits for the job in question. Sellers argued that Tech Services was essentially “holding him out” as its employee via these representations. However, Sellers is fundamentally different than the instant case because representations regarding the nature of one’s workforce in that case is an entirely different matter than contractual terms between parties to which Turner was not even privy. Here, Turner was not a party to the contract between Condustrial and SCDC, was not an intended third-party beneficiary to the contract, and there is no evidence in the Record that she even knew of its existence, much less its substance, prior to this claim arising. As such, Claimant cannot benefit from its terms. *See* Bob Hammond Constr. Co. v. Banks Constr. Co., 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994) (holding that a third person not in contractual privity with the contracting parties has no right to enforce the terms of a contract unless the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to that third person); *See also* Allen v. Phinney Oil Co., 241 S.C. at 178, 127 S.E.2d at 451. (an employee is not chargeable with the legal

consequences of the arrangement between purported employers except as is known and approved by him).

Moreover, Claimant's interpretation of the agreement between SCDC and Condustrial on this point is erroneous regardless. Turner asserts the contract requires that Condustrial only assign employee nurses to work at SCDC. This contention is contrary to the plain language of the preamble to the contract, which states the following: 1) "WHEREAS, SCDC desires to engage the services of Contractor to provide medical staffing personnel as an *independent contractor*;" and 2) "WHEREAS, Contractor desires to provide medical staffing personnel as an *independent contractor* under the terms and conditions set out in the Agreement." (emphasis added). R., Vol. 7, p. 2972. From the outset it is crystal clear that the contract does not preclude assignment of independent contractor nurses to SCDC; Condustrial is free to assign employee nurses and/or independent contractor nurses. The agreement does subsequently state that "RN's, LPN's, assigned to SCDC by Contractor are employees of Contractor and not SCDC." R., Vol. 7, p. 2972. The use of the term "are" in this context, instead of "must be" or "shall be," is significant because it clearly indicates SCDC is more concerned about deflecting liability arising out of its possible employment relationship with these nurses than the nature of their relationship with Condustrial.

This interpretation is evidenced by subsequent language regarding Condustrial's responsibility for wage payment issues, working conditions, payroll tax withholdings, other administrative functions, unemployment insurance, and, of course, workers compensation coverage. Specifically, the agreement states Condustrial "shall provide workers compensation insurance coverage for Contractor's employees who are assigned to SCDC." R., Vol. 7, p. 2976. Again, this language is not a prohibition against assignment of independent contractor nurses in accordance with the preamble to the agreement. This provision only means that in the event Condustrial assigns

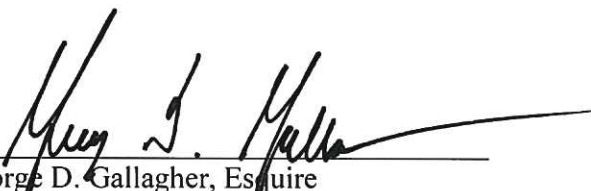
employee nurses to SCDC such nurses will be covered under the Act. Condustrial's provision of independent contractor nurses alleviates SCDC's concerns regarding its possible worker's compensation liability because an independent contractor is not subject to the workers compensation laws. Indeed, SCDC itself concurs with Condustrial's position that Tuner is an independent contractor and not an employee. The absence of any unequivocal contractual term or condition mandating that nurses assigned to SCDC shall be under the direction and control of Condustrial is further proof that the contract permits Condustrial's use of independent contractor nurses.

Finally, the ensuing relationship between SCDC and Condustrial over the seven years following execution of the contract in 2008 confirms SCDC's belief that the nurses were indeed independent contractors not subject to the Act. *See Weisz Graphics Div. of Fred B. Johnson Co. v. Peck Industries Inc.*, 304 S.C. 101, 403 S.E.2d 146 (Ct. App. 1991)(in commercial contracts for provision of goods a course of performance between the parties which is accepted or acquiesced to without objection by a party with opportunity to object is relevant to determine the meaning of a prior agreement). This subsequent course of performance between SCDC and Condustrial is especially probative when the contract is arguably ambiguous in light of its references to both "independent contractors," "contract nurses," and "employees." Specifically, it is undisputed that following execution of the contract SCDC never requested certificates of insurance from Condustrial confirming the nurses were covered employees under the Act. The reason for that failure is self-evident- SCDC knew the nurses were independent contractors.

Next, Condustrial's owner/president, Tony Durham, testified that he had an issue with the agreement's subsequent reference to "employees," but he continued with the agreement because the form was the "exact same contract" that had been provided from the former company and "they

all knew it was independent contractors.” R., Vol. 5, p. 1990-1991, 2010-2011, 2013, 2089,. Durham further described his subsequent dealings with SCDC confirming their knowledge that the contract nurses were considered independent contractors. R., Vol. 5, p. 1990-1991, 2010-2011, 2013, 2089, 2119.

For these reasons, the contract between SCDC and Condustrual is not applicable and/or not determinative to the issue of Turner’s status as an employee vs. independent contractor.



George D. Gallagher, Esquire
Counsel for Respondent-Appellant Condustrual, Inc.
f/k/a Medustrial Healthcare Staffing
S.C. Bar # 12149
Speed, Seta, Martin, Trivett, Stublely & Fickling, LLC
Post Office Box 11669
Columbia, SC 29211
803.748.2259
ggallagher@speed-seta.com

RECEIVED

Sep 08 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2021-000633

Rachel J. Turner, Employee, Appellant-Respondent,

v.


Medustrial Healthcare Staffing Service and Condustrual, Inc.; Guarantee Insurance Company; Countrywide Staffing Solutions Group, Inc.; South Carolina Department of Corrections; State Accident Fund; and South Carolina Uninsured Employer's Fund, Respondents

of which Condustrual, Inc. f/k/a Medustrial Healthcare Staffing Service, Employer, is the Respondent-Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Respondent-Appellant's Final Reply Brief complies with SCACR 211(b).

September 7, 2022


George D. Gallagher, Esquire
Speed, Seta, Martin, Trivett, Stubley &
Fickling, LLC
Bar No. 12149
Post Office Box 11669
Columbia, South Carolina 29211
Attorney for Appellant-Respondent
Condustrual, Inc.

RECEIVED

Sep 08 2022

SC Court of Appeals

PROOF OF SERVICE

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2021-000633

Rachel J. Turner, Employee, Appellant-Respondent,

v.

Medustrial Healthcare Staffing Service and Condustrual, Inc.; Guarantee Insurance Company; Countrywide Staffing Solutions Group, Inc.; South Carolina Department of Corrections; State Accident Fund; and South Carolina Uninsured Employer's Fund, Respondents

of which Condustrual, Inc. f/k/a Medustrial Healthcare Staffing Service, Employer, is the Respondent-Appellant.

PROOF OF SERVICE

I certify that I have served the Respondent-Appellant's Final Reply Brief to all parties by electronic mail and/or by depositing a copy of it in the United States Mail, postage prepaid, on September 8, 2022, addressed to all attorneys of record at the addresses below:

The Honorable Amy Bracy
Judicial Director
S.C. Workers' Compensation
Commission
Post Office Box 1715
Columbia, SC 29202
judicial@wcc.sc.gov

Erin Farthing, Esq.
State Accident Fund
PO Box 1166
Lexington, SC 29071
EFarthing@saf.sc.gov

Gregory M. Alford, Esq.
Attorney at Law
PO Drawer 8008
HILTON HEAD
ISLAND, SC 29938
gregg@alfordlawsc.com

Lisa C. Glover, Esq.
SC Uninsured Employers' Fund
P:O Box 1815
Lexington, SC 29071
lglover@saf.sc.gov

Jasmine Smith, Esq.
Robinson Gray Stepp & Laffitte,
LLC
PO Box 11449
Columbia, SC 29211
jsmith@robinsongray.com

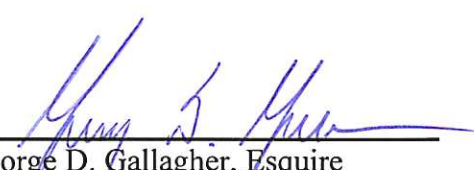
Beth Richardson, Esq.
Robinson Gray Stepp & Laffitte,
LLC
PO Box 11449
Columbia, SC 29211
brichardson@robinsongray.com

Grady L. Beard, Esq.
Robinson Gray Stepp & Laffitte,
LLC
PO Box 11449
Columbia, SC 29211
gbeard@robinsongray.com

James P. Newman, Jr., Esq.
Howser, Newman & Besley, LLC
P O Box 12009
Columbia, SC 29211
jnewman@hnblaw.com

Stephen B. Samuels, Esq.
Samuels Reynolds Law Firm
1320 Richland Street
Columbia, SC 29201
stephen@samuelsreynolds.com

September 7, 2022


George D. Gallagher, Esquire
Speed, Seta, Martin, Trivett, Stublely &
Fickling, LLC
Bar No. 12149
Post Office Box 11669
Columbia, South Carolina 29211
Attorney for Appellant-Respondent
Condustrial, Inc.