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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

RECEIVED  
MAY 21 2012

Clifton Newman, Circuit Court Judge

SC Court of Appeals

Case No. 2011-CP-40-4262

Rest Assured, LLC, .....Respondent,

v.

South Carolina Department of Employment and Workforce, .....Appellant.

MOTION TO DISMISS APPEAL

Respondent Rest Assured, LLC ("Rest Assured") moves for an order dismissing the notice of appeal filed by Appellant South Carolina Department of Employment and Workforce ("SCDEW"). SCDEW is attempting to appeal an order that is interlocutory and not immediately appealable. Therefore, the notice of appeal should be dismissed.

Statement of the Case

This case began with a determination on March 2, 2006 from the South Carolina Employment Security Commission ("SCESC" currently known as SCDEW) that Rest Assured, a placement firm for in-home care services, had an employer-employee relationship with certain in-home care personal aides who were designated as independent contractors. On April 3, 2006, Rest Assured

appealed this determination, and on February, 16, 2007, the administrative hearing officer upheld it. Consequently, on March 16, 2007, Rest Assured filed an application to appeal the administrative hearing officer's opinion to the full Employment Security Commission.

Four years later from the original hearing, SCDEW finally contacted Rest Assured on March 28, 2011 notifying Rest Assured that its appeal had been scheduled for consideration. Oral arguments were made on May 11, 2011, and SCDEW issued its Appellate Panel Decision on May 31, 2011, affirming the administrative hearing officer's ruling. The Appellate Panel Decision was mailed to Rest Assured with no copy to Rest Assured's counsel.

On June 30, 2011, Rest Assured filed a Petition and Notice of Intent to Appeal in Richland County Court of Common Pleas. In response, on July 11, 2011, SCDEW filed a Notice of Special Appearance and a Motion to Dismiss the Richland County Court of Common Pleas action on the ground that Rest Assured failed to file the appeal in the Administrative Law Court. In response to SCDEW's Motion to Dismiss, Rest Assured contended that the Court of Common Pleas was the appropriate court for the appeal, and in the alternative, filed a motion to transfer the appeal to the Administrative Law Court pursuant to Rule 204 of the South Carolina Appellate Court Rules and South Carolina law.

On January 19, 2012, the Honorable Clifton Newman heard SCDEW's Motion to Dismiss and Rest Assured's Motion to Transfer. On March 27, 2012, Judge Newman denied SCDEW's Motion to Dismiss on the grounds that there was sufficient ambiguity in the statutes controlling the appeal of the Appellate

Panel Decision at the time Rest Assured filed its appeal and that “the ends of justice would be best served by allowing Rest Assured to continue its appeal in the proper court [Administrative Law Court].” (Order, filed March 27, 2012, at 7.) Finding that the Administrative Law Court is the proper jurisdiction for the appeal, Judge Newman granted Rest Assured’s Motion to Transfer. It is the denial of SCDEW’s Motion to Dismiss and the granting of Rest Assured’s Motion to Transfer from which SCDEW seeks its appeal.

### Argument

#### **I. The Order is Not a Final Order.**

SCDEW’s notice of appeal should be dismissed because the order being appealed is interlocutory and not immediately appealable. As a general rule, only final orders are appealable. *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005). An order is not final if it decides the applicable law, but leaves open some questions of fact. *Mid-State Distribs., Inc. v. Century Imps., Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993). Moreover, an order is not final “[i]f there is some further act [that] must be done by the court prior to a determination of the rights of the parties.” *Id.*

Here, the order being appealed is not a final order. Rather, the order merely denies a motion to dismiss and grants a motion to transfer venue. Indeed, questions of fact remain, and the rights of the parties have not been determined. Therefore, the order is interlocutory and not immediately appealable.

## II. The Order Is Not An Immediately Appealable Interlocutory Order.

A party may immediately appeal an interlocutory order if the order (1) involves the merits or (2) affects a substantial right. S.C. Code Ann. § 14-3-330(1) and (2) (1976). Although this statute appears to cover a broad range of orders, South Carolina appellate courts have construed these provisions narrowly, rarely deciding that interlocutory orders are immediately appealable. *See, e.g., Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000) (holding that an order denying a motion for change of venue is not immediately appealable because any error in the order can be corrected by a new trial); *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 77-78, 533 S.E.2d 575, 577 (2000) (holding that an order denying bifurcation of trial on issues of liability and damages in personal injury case is not immediately appealable); *Tatnall v. Gardner*, 350 S.C. 135, 138, 564 S.E.2d 377, 379 (Ct. App. 2002) (holding that an order denying a motion to amend an answer to assert third-party claims is not immediately appealable).

In fact, South Carolina appellate courts have already held that an order denying a motion to dismiss and an order granting a motion to transfer are not immediately appealable. The South Carolina Supreme Court has held that orders denying motions to dismissed based on Rule 12(b)(1) or 12(b)(6) of the South Carolina Rules of Civil Procedure are not immediately appealable. *See Allison v. W.L. Gore & Associates*, 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011) (“A circuit court order denying a motion to dismiss for lack of subject matter jurisdiction is not directly appealable because, among other things, it does not

affect the merits.”); *Moyd v. Johnson*, 289 S.C. 482, 482, 347 S.E.2d 97, 98 (1986) (“We hold that the denial of a Rule 12(b)(6) motion is not directly appealable under S.C.Code Ann. § 14-3-330 (1976).”). Moreover, the South Carolina Supreme Court has also held that an order transferring matter from family court to court of general sessions is interlocutory and not immediately appealable. *State v. Lockhart*, 275 S.C. 160, 161, 267 S.E.2d 720, 720 (1980). Even if the Supreme Court had yet to rule on these issues, an analysis of the order in the present case reveals that it is not immediately appealable.

First, the order in this case does not involve the merits of the action. To involve the merits, an order must “*finally* determine some substantial matter forming the whole or a part of some cause of action or defense . . . .” *Peterkin v. Brigman*, 319 S.C. 367, 368, 461 S.E.2d 809, 809 (1995) (emphases supplied); *see also Register v. Niagara Fire Ins. Co.*, 248 S.C. 504, 505, 151 S.E.2d 640, 640 (1966) (holding that an order refusing to strike allegations in a pleading as irrelevant and redundant is not conclusive upon the trial of the case on the merits and is therefore not immediately appealable).

Because the order being appealed in the present case does not *finally* determine any matter in this case, much less any *substantial* matter, the order does not involve the merits and therefore is not immediately appealable. The order merely allows the case to proceed in the South Carolina Administrative Law Court, rather than the Richland County Court of Common Pleas. There is no final determination of a substantial matter in this case. No rights of any party have

been determined. Therefore, the order does not involve the merits of the action and is not immediately appealable.

Second, the order in this case does not affect a substantial right. An order affects a substantial right if it “(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial, or (c) strikes out an answer or any part thereof or any pleading in any action[.]” S.C. Code Ann. § 14-3-330(2). An order that does not finally end a case or prevent a final judgment from which a party may seek appellate review usually is considered an interlocutory order from which no immediate appeal is allowed. *Hagood*, 362 S.C. at 195, 607 S.E.2d at 709 (citing *Tatnall*, 350 S.C. at 138, 564 S.E.2d at 379)).

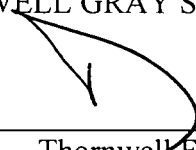

The order being appealed in this case does not determine or discontinue this action. Nor does it prevent a judgment from which an appeal might be taken. Indeed, this case is proceeding to the South Carolina Administrative Law Court so that the rights of the parties may be determined. Therefore, because the order does not finally end this case or prevent a final judgment from which an appeal may be taken, it should be considered interlocutory and not directly appealable.

#### CONCLUSION

Based on the foregoing, SCDEW’s notice of appeal should be dismissed. The order being appealed is not a final order and does not involve the merits or affect a substantial right, and therefore, is not an appealable order.

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: \_\_\_\_\_

  
  
Thornywell F. Sowell  
David C. Dick  
Post Office Box 11449  
Columbia, South Carolina 29211  
(803) 929-1400

Attorneys for Respondent

May 21, 2012

OTHER COUNSEL OF RECORD:

Debra S. Tedeschi  
Assistant General Counsel  
South Carolina Department of Employment and Workforce  
Post Office Box 8597  
Columbia, South Carolina 29202  
(803) 737-2666

Attorney for Appellant

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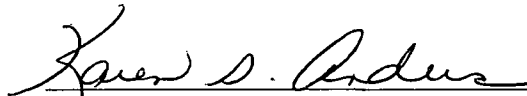
South Carolina Department of Employment and Workforce, .....Appellant.

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PROOF OF SERVICE

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I, of the law firm of Sowell Gray, Stepp & Laffitte, LLC, counsel for Respondent Rest Assured, LLC, certify that I have served a copy of Motion to Dismiss Appeal on Appellant South Carolina Department of Employment and Workforce by depositing a copy of it in the United States Mail, postage prepaid, on May 21, 2012, addressed to its attorney of record, Debra S. Tedeschi, Assistant General Counsel, South Carolina Department of Employment and Workforce, Post Office Box 8597, Columbia, South Carolina.

  
\_\_\_\_\_  
Karen S. Anders

May 21, 2012

**RECEIVED**  
MAY 21 2012  
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**VIA HAND DELIVERY**

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
Edgar Brown Building  
1205 Pendleton Street  
Columbia, South Carolina 29201

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**SC Court of Appeals**

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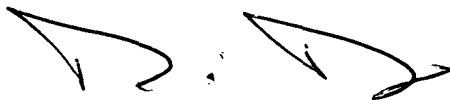
Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Respondent's Motion to Dismiss Appeal and Proof of Service in the above referenced matter, along with a \$25.00 check representative of the filing fee.

We would appreciate your filing as appropriate and returning a clocked-in copy via our courier.

By copy of this letter and as evidenced by the Proof of Service, we are serving a copy of same upon counsel for Appellant.

Very truly yours,



David C. Dick

Enclosures

cc: Debra S. Tedeschi, Esquire  
Thornwell F. Sowell, Esquire (via email)