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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Chief Administrative Law Judge
Case No. 12-ALJ-22-0209-AP

Opinion No. 2014-UP-235 (S.C. Ct. App. filed June 18, 2014)
Appellate Case No. 2013-000774

Rest Assured, LLC, Respondent,

v.

South Carolina Department of Employment and Workforce, Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 18, 2014.

QUESTIONS PRESENTED

1. **DID THE COURT OF APPEALS ERR BY ISSUING A DECISION WHICH CONFLICTS WITH SOUTH CAROLINA SUPREME COURT PRECEDENT, INCLUDING *KILGORE GRP., INC. V. S.C. EMP. SEC. COMM'N*, 313 S.C. 65, 437 S.E.2D 48 (1993) AND *SMOKY MOUNTAIN SECRETS, INC. V. S.C. EMP. SEC. COMM'N*, 318 S.C. 456, 458 S.E.2D 429 (1995)?**

2. **DID THE COURT OF APPEALS EXCEED ITS SCOPE OF REVIEW AND IMPROPERLY SUBSTITUTE ITS JUDICIAL JUDGMENT IN PLACE OF PETITIONER DEW'S ADMINISTRATIVE JUDGMENT?**

3. **DID THE COURT OF APPEALS ERR BY ISSUING A DECISION THAT EFFECTIVELY CREATES AN EXEMPTION FROM UNEMPLOYMENT FOR HOME HEALTH CARE WORKERS, WHEN ONLY THE LEGISLATURE SHOULD BE DETERMINING, AS A MATTER OF PUBLIC POLICY, WHICH WORKERS ARE EXEMPT FROM UNEMPLOYMENT INSURANCE COVERAGE?**

INTRODUCTION

Petitioner, the South Carolina Department of Employment and Workforce ("DEW"), petitions this Court to issue a writ of certiorari to the Court of Appeals to review the decision in *Rest Assured, LLC v. S.C. Dep't of Emp. & Workforce*, filed June 18, 2014 (Unpublished Opinion No. 2014-UP-235) (App.pp.18-19).

Pursuant to Rule 242(b), SCACR, a petition for a writ of certiorari to the Court of Appeals will be granted only where there are special and important reasons, including where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court and where there are novel questions of law.

DEW seeks a writ of certiorari for further review of this case because the decision of the Court of Appeals is in conflict with prior decisions of this Court. *See, e.g., Kilgore Grp., Inc. v. S.C. Emp. Sec. Comm'n*, 313 S.C. 65, 437 S.E.2d 48 (1993) (Toal, J.); *Smoky Mountain Secrets, Inc. v. S.C. Emp. Sec. Comm'n*, 318 S.C. 456, 458 S.E.2d 429 (1995).

The Supreme Court in *Kilgore* found that the temporary workers assigned by the employer (a staffing agency) to its clients were employees, and therefore, the employer was required to pay unemployment taxes on the wages paid to its employees. Given that *Kilgore* is existing South Carolina Supreme Court precedent, DEW frequently applies this case when determining whether workers are employees for unemployment tax liability purposes.

Kilgore is binding on, and not distinguishable from, the instant case. The Court of Appeals acknowledged the precedential importance of *Kilgore* by asking questions directly about its applicability during oral argument. **Despite this acknowledgment, the Court of Appeals failed to cite *Kilgore* in its decision. Indeed, the Court of Appeals failed to cite any of the binding cases on unemployment tax liability.** Instead, the Court of Appeals relied on a

workers' compensation case to support its decision.

In a workers' compensation case, the employee vs. independent contractor issue is a jurisdictional issue, and therefore the appellate court "may take its own view of the preponderance of the facts." *Pikaart v. A & A Taxi, Inc.*, 393 S.C. 312, 317, 713 S.E.2d 267, 270 (2011). In the unemployment tax liability context, however, the issue of whether an individual worker is an independent contractor or an employee is a question of fact, and the scope of review of DEW's decision on that factual issue is based on the substantial evidence rule. *See Kilgore, supra; Smoky Mountain Secrets, supra*; *Todd's Ice Cream, Inc. v. S.C. Emp. Sec. Comm'n*, 281 S.C. 254, 259, 315 S.E.2d 373, 376 (Ct. App. 1984).

The Court of Appeals failed to apply binding precedent in this case and exceeded its scope of review by making its own factual determination on the dispositive issue. For these reasons and others more fully outlined below, DEW respectfully requests that the petition for a writ of certiorari be granted to allow this Court's further review.

FACTUAL and PROCEDURAL BACKGROUND

Respondent Rest Assured, LLC ("Rest Assured") is a company that places in-home Personal Care Assistants (PCAs) to care for elderly and disabled people. Rest Assured keeps its own registry of over 280 PCAs, of which 70 to 90 are used each week. (R.p.41; pp.76-81). Rest Assured does not place the PCAs into its registry until they pass all background checks, including SLED check, tuberculosis test, etc. (R.p.85). Rest Assured gets connected to its clients by "dispatch requests" received from various government agencies, such as Medicaid, the U.S. Department of Veterans Affairs (VA), the South Carolina Department of Disabilities and Special Needs (DDSN), as well as from private paying individuals. (R.pp.117-118).

Once Rest Assured receives a dispatch request, the company, through its "client care liaison," assesses the client's needs and then matches two potential PCAs, based primarily on their availability, to interview with the client. (R.p.80, lines 1-7; p.85, lines 2-13; p.95, lines 8-13). Therefore, the PCAs rely completely on Rest Assured for placement into these assignments. After the interviews, Rest Assured's client chooses the PCA for the job from the initial matches identified by Rest Assured.[1] (R.p.119-120). The PCA's job duties may include bathing and grooming of the client, companionship and meal preparation for the client, as well as light housekeeping. (R.p.82, lines 1-17).

A PCA's pay rate from Rest Assured is based on what the client is paying to Rest

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[1] Rest Assured's own website describes its matching services as follows:

> We work very hard to match a caregiver from our agency that not only has the experience but very similar in characteristics and personality as well. The success of Rest Assured Home Care was founded on the principles of catering to each individual's needs no matter how small and providing superior care and compassion while caring for you or a loved one.

See http://www.restassuredllc.net/Requirements.html (last visited October 20, 2014).

Assured. (R.pp.96-99). In other words, Rest Assured first negotiates with the client, and then Rest Assured negotiates with the PCA for an hourly rate; the PCAs themselves are not permitted to negotiate with the clients. (R.p.75). The client does not directly pay the PCA. For the referrals from a governmental agency, Rest Assured sends the bill directly to the agency which in turn, pays Rest Assured. (R.p.121, line 11-p.122, line 4). Rest Assured pays the PCA based on the PCA's weekly report of how many hours the PCA worked. (R.p.110).

Significantly, Rest Assured's director, Reatha Johnson, testified at the administrative hearing that if the client failed to pay Rest Assured, her company nonetheless would pay the PCA for the hours worked. (R.p.99, lines 1-8). Johnson explained: "I haven't actually had – had that situation to – to arise yet, but I would – I would certainly, you know, if they worked out the company would take a loss and just go ahead and pay that – aide [i.e., PCA]." (R.p.99, lines 4-8).

When asked if she supervised the PCAs, Johnson stated she would visit clients' homes every four months for "quality control" and to "ensure" clients were satisfied with the PCA, "as a representative of Rest Assured, **because that's who they initially contacted was Rest Assured for services.**" (R.p.135, lines 9-15) (emphasis added). Johnson further affirmed that these home visits were done to make sure her clients "are satisfied, and it's PR and marketing and all that." (R.p.135, line 17-p.136, line 4).

Moreover, the PCAs are covered by workers compensation insurance. (R.p.103). Rest Assured does not provide any tools or supplies to the PCAs; instead, supplies are provided either by the client or the PCA. (R.p.99, line 9-p.100, line 6). Johnson stated that she offered and encouraged training for the PCAs on her registry, but she did not require it. (R.pp.95-96; p.136). Each PCA wears a name badge with Rest Assured's logo on the badge. (R.pp.100-101).

For unemployment tax purposes, Johnson originally reported her PCAs as employees, but at some point decided to treat them as "subcontractors." (R.pp.142-143). Explaining this decision, Johnson testified at the hearing that "it just was not beneficial to me as a company to consider them employees because of their turnover rate, and they jump from agency to agency." (R.p.142, lines 11-13). When asked if any business practices changed once she considered them subcontractors, Johnson indicated that the only thing that changed was she no longer provided gloves to the PCAs and she stopped giving out "bonuses;" the relationship with her clients, however – assessing clients' needs and matching them with an appropriate PCA – that all stayed "the same." (R.p.143, lines 8-17).

After Johnson decided to treat the PCAs as subcontractors, rather than employees, the PCAs entered into an "Independent Contractor Agreement." (R.pp.166-168). The right to terminate outlined in the written agreement stated that either Rest Assured or the PCA could terminate the contract at any time. For Rest Assured, the right to terminate could be based upon when a PCA engaged in conduct that "is harmful, detrimental, improper, or fraudulent to or for the business." (R.p.167).

The power to terminate a PCA from a particular in-home job rested predominantly with the client. (R.p.88, lines 2-10; p.124, lines 9-11). After a client "fired" a PCA, Rest Assured generally would place the PCA right back into its registry for use on other jobs. (R.p.112, lines 6-15; p.153). The only instance where Rest Assured would terminate a PCA from its registry is when the PCA took one of Rest Assured's clients to a competing company. (R.pp.108-109).

This unemployment tax status determination case was triggered by Rest Assured's reclassification of the majority of its employees to "subcontractors" on its 2005 fourth quarter unemployment tax return, as well as by the filing of an unemployment claim by a former worker

of Rest Assured. (R.pp.44; 73; 62-63; 127-128).

As a result, a Field Deputy investigated Rest Assured regarding its tax liability status and furnished a report. (R.pp.152-153). The Employment Security Commission (DEW's predecessor agency) thereafter issued a determination on March 2, 2006, finding Rest Assured's workers should be classified as employees, and Rest Assured was liable for unemployment tax on the PCAs' wages. (R.pp.49-50).

On appeal, DEW's Appellate Panel affirmed this determination, finding Rest Assured has the right to control, and exercises control over, its PCAs. Therefore, DEW determined that these workers are employees for unemployment tax purposes. (R.pp.31-34).

Rest Assured appealed from DEW's final administrative decision to the Administrative Law Court (ALC).

In a well-reasoned Order, the ALC's Chief Administrative Law Judge, Ralph K. Anderson, III, affirmed DEW's decision to treat Rest Assured PCAs as employees for unemployment tax purposes. (R.pp.9-27). The ALC properly analyzed the record as a whole to discern whether substantial evidence supported DEW's findings. Judge Anderson considered both the written agreement between Rest Assured and the PCAs, as well as the evidence relating to the four-factor, common-law, "right to control" test set out by Justice Toal of the South Carolina Supreme Court. *Kilgore Grp., Inc. v. S.C. Emp. Sec. Comm'n*, 313 S.C. 65, 68-69, 437 S.E.2d 48, 49-50 (1993) ("Under South Carolina common law, the primary consideration in determining whether an employer-employee relationship exists is whether the purported employer has the right to control the servant in the performance of his work and the manner in which it is done.")

The ALC determined that the facts of the instant case "are quite similar to those in" *Kilgore*, a case specifically involving unemployment tax liability. (R.p.16). Moreover, the ALC expressly found the Supreme Court's decision in *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 297, 676 S.E.2d 700, 701 (2009) – which held that a workers' compensation claimant was an independent contractor, not an employee, for workers' compensation purposes – to be distinguishable from the instant case. (R.pp.18-19).

Rest Assured appealed from the ALC's decision. After full briefing and oral argument, the Court of Appeals reversed and expressly found Rest Assured's "aide workers were independent contractors." *Rest Assured, LLC v. S.C. Dep't of Emp. & Workforce*, (Unpublished Opinion No. 2014-UP-235, filed June 18, 2014).

The Court of Appeals did not cite or attempt to distinguish the *Kilgore* case (or any other unemployment tax liability case) even though *Kilgore* clearly is binding South Carolina Supreme Court precedent on the issue of unemployment tax liability status.[2] The Court of Appeals' opinion also failed to apply the proper standard of review regarding whether substantial evidence existed to support DEW's finding under the four-factor, common-law test, as clearly set out in *Kilgore*.

Instead, on the dispositive issue of whether PCAs were employees, the Court of Appeals only cited *Wilkinson*, a workers' compensation case.[3] In doing so, the Court implicitly

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[2] This Court in *Kilgore* specifically found substantial evidence supported the agency's finding that workers assigned to clients by a temporary staffing agency were employees of the staffing company for unemployment tax purposes. *Kilgore Grp., Inc. v. S.C. Emp. Sec. Comm'n*, 313 S.C. 65, 437 S.E.2d 48 (1993).

[3] In a workers' compensation case, the employee vs. independent contractor issue is a jurisdictional issue, and therefore the appellate court "may take its own view of the preponderance of the facts." *Pikaart v. A & A Taxi, Inc.*, 393 S.C. 312, 317, 713 S.E.2d 267, 270 (2011); *see also Wilkinson, supra.* In unemployment context, however, factual question of whether workers are employees is reviewed under the substantial evidence rule. *See infra*, Argument, Section II.

acknowledged it reweighed the facts, which is impermissible under the substantial evidence standard of review.

DEW requests further review of this case because the decision of the Court of Appeals is in conflict with prior decisions of the Supreme Court, and the questions of law involve an issue of public importance, namely whether DEW must apply the *Kilgore* precedent in determining unemployment tax liability cases.

ARGUMENT

I. The Court of Appeals' Decision Conflicts with South Carolina Supreme Court Precedent on the Dispositive Issue of Whether the Substantial Evidence Supports DEW's Determination that Rest Assured's Personal Care Aides Are Employees for Unemployment Insurance Tax Purposes.

Pursuant to statute, "employment" is defined to include any service performed by any individual "who, under the usual **common law rules** applicable in determining the employer-employee relationship, has the status of an employee." S.C. Code Ann. § 41-27-230(1)(b) (1986) (emphasis added).

Under South Carolina common law governing unemployment tax liability, "the primary consideration in determining whether an employer-employee relationship exists is whether the purported employer has **the right to control** the servant in the performance of his work and the manner in which it is done." *Kilgore Group, Inc. v. S.C. Emp. Sec. Comm'n*, 313 S.C. 65, 68, 437 S.E.2d 48, 49-50 (1993) (emphasis added). The test is not whether the actual control is exercised, but rather "whether there exists the right and authority to control and direct the particular work or undertaking." *Id.* The four factors demonstrating the right of control are: (1) direct evidence of the right to, or exercise of, control; (2) method of payment; (3) furnishing of equipment; and (4) the right to fire. *Id.*

Any written contract entered into by the parties must be considered in determining the nature of their relationship and has considerable weight; however, "language in the contract merely declaring the relationship is that of an employer/independent contractor is not dispositive." *Id.*

The instant case is indistinguishable from the facts in *Kilgore*. In *Kilgore*, the employer was "in the business of supplying temporary workers." *Kilgore*, 313 S.C. at 67, 437 S.E.2d at 49. As described by the *Kilgore* Court, the relevant facts were as follows:

> When clients contacted Kilgore with their specific employment needs, Kilgore negotiated with the client a fee for providing a worker or workers to meet the client's demands. Kilgore then contracted with the individual workers to fill the positions required by the client. According to Kilgore's president, the contract could be based on an hourly wage or on a fixed amount for the job. However, all workers were required to turn their hours in to Kilgore. Hourly workers were permitted to take "draws" on the amount they had worked. Kilgore's president testified that the contracts expressly provide that the relationship is one of an independent contractor.
>
> The clients controlled the day-to-day activities of the workers. Kilgore provided workers' compensation coverage for the workers but did not withhold any taxes from their wages.

Id. at 67, 437 S.E.2d at 49.

The PCAs, like the temporary workers in *Kilgore*, did not contract directly with the clients, but rather, Rest Assured (like the temporary staffing agency in *Kilgore*) directly negotiated first with the clients, and then separately with the PCAs, after they were matched to a client.[4] Moreover, in *Kilgore*, the evidence showed it was the clients who controlled the temporary "workers' performance and the manner in which it was done." *Id.* at 69, 437 S.E.2d at 50. Similarly, Rest Assured's owner, Johnson, testified that the PCAs "do basically what the

[4] Johnson's testimony was clear that the PCAs were not permitted to negotiate fees with the clients. (R.p.75, line 6-10).

client wants them to do." (R.p.94, lines 1-5). Johnson stated further that she bases her decision of whether to retain or terminate a PCA based on what the client wants. (R.pp.92-93).

The *Kilgore* Court specifically concluded that because the clients "had no contract with the [temporary] workers ... **their ability to exercise control over the workers' activities was derived solely from their contracts**" with the temporary agency (Kilgore) and "Kilgore's contract with the workers." *Id.* at 69, 437 S.E.2d at 50 (emphasis added). Therefore, the Court concluded the substantial evidence supported an inference that "Kilgore **possessed the right to control the workers' performance and the manner in which it was done and delegated that authority to its clients.** *Id.* (emphasis added).

Likewise, the evidence in the instant case shows that Rest Assured clearly possessed the right to control the PCAs' work performance via Rest Assured's own contractual relationship with its clients. Relying directly on the *Kilgore* precedent, the ALC found as follows:

> It can thus be inferred that Rest Assured delegates most of its authority to its clients. It is noteworthy, however, that Rest Assured still maintains some direct control over its PCAs through the care plan and its periodic supervision of its PCAs work, thus reflecting more direct control than that exercised by the employer in *Kilgore*.

(R.pp.17-18).

The ALC correctly found that substantial evidence in the record supports Rest Assured had the right to control, and exercises that control over, the PCAs. First, it is Rest Assured who initially selects, i.e., matches, the PCA to the client. This is the ultimate right to control because only Rest Assured has the authority to send the PCA to the client. As noted by the ALC, because Rest Assured narrows the slate of possible PCA candidates and then delegates the ultimate choice of PCA to its client, Rest Assured has a right of control, and this negates the independence of the PCAs.

Moreover, there is also substantial evidence on the factor related to method of payment to support that Rest Assured's PCAs are employees. The PCAs' hourly pay is derived from the rate Rest Assured is paid by the client (or the agency referring the client). Therefore, the method and amount of payment – an hourly rate that is not freely negotiated by the PCA, but rather agreed upon within the constraints of the rate that has already been agreed to between Rest Assured and the client – is more in Rest Assured's control than the PCAs. The fact that the PCAs are paid by the hour, based on worksheets turned in to Rest Assured, and regardless of whether the client actually pays its bill, further indicates Rest Assured is the employer of the PCAs. This factor therefore also weighs in favor of the employer-employee relationship.

Regarding the right to fire, Johnson testified that the client had the ability to fire the PCA. (R.p.88, lines 2-10; p.124, lines 9-11). Pursuant to *Kilgore*, this control is therefore properly imputed to Rest Assured. *See Kilgore*, 313 S.C. at 69, 437 S.E.2d at 50 (1993) (where the clients "believed the workers could be terminated at any time based upon their dissatisfaction of the workers' performance," this showed the workers were employees). Moreover, the language of the written agreement, which gives both Rest Assured and the PCA a "right to terminate," indicates an intention to create an at-will relationship. (R.p.46). An at-will relationship favors an employer-employee relationship, rather than an independent contractor relationship. *See Wilkinson*, 382 S.C. at 304, 676 S.E.2d at 704 (at-will relationship indicates employee).

It is therefore clear from the record that substantial evidence established that Rest Assured's clients had abundant control over the way the PCAs performed their work. **Pursuant to South Carolina Supreme Court precedent, this control must be imputed to Rest Assured.** *Kilgore*, 313 S.C. at 69, 437 S.E.2d at 50.

The Court of Appeals' opinion failed to cite this Court's *Kilgore* precedent, even though

Kilgore is directly applicable and was relied on by both DEW and the ALC. Furthermore, the Court of Appeals failed to cite **any** of this Court's binding cases in the unemployment tax liability area, including but not limited to, *Smoky Mountain Secrets, Inc. v. S.C. Emp. Sec. Comm'n*, 318 S.C. 456, 458 S.E.2d 429 (1995). As stated above, the omission of any reference to precedential cases that applied the proper standard of review suggests the Court of Appeals erred by taking its own view of the facts.

Additionally, a close reading of *Kilgore* shows that this Court obviously intended for the decision to apply to more than simply the temporary staffing agency context. Indeed, in holding that "it can be inferred Kilgore possessed the right to control the workers' performance and the manner in which it was done and delegated that authority to its clients," the Court specifically cited two cases: *John W. Tripp & Assoc. v. Industrial Claims Appeals Office,* 739 P.2d 245 (Colo. Ct. App. 1987) (where the business provided management consulting, professional recruiting, placement, and temporary employment services); and *Matter of Holbrook Speech Services, Inc.,* 116 A.D.2d 863, 498 N.Y.S.2d 185 (1986) (where the business provided speech, occupational and physical therapists to nursing homes, home care agencies, and private patients). *Kilgore*, 313 S.C. at 69, 437 S.E.2d at 50.

The case of *Holbrook Speech Services* is particularly analogous to the instant case. Holbrook was a professional corporation engaged in the business of providing the services of speech, occupational and physical therapists to nursing homes, home care agencies, and private patients. *Holbrook*, 498 N.Y.S.2d at 186. The *Holbrook* court recognized that "the services provided by the therapists are not of a nature to be supervised or controlled by the employer" but that there were, "however, other indicia of an employment relationship." Specifically, the salient facts noted by the court were that Holbrook maintained a registry of therapists; contracted

directly with the various clients first; and then selected an appropriate therapist from the registry." *Id.* In addition, Holbrook billed its clients directly and collected payment. *Id.* The *Holbrook* court upheld the New York Unemployment Insurance Appeal Board's finding that the therapists on the registry were employees and explained as follows:

> While Holbrook strenuously maintains that it is simply a "registry or referral service" and there is considerable evidence supportive of this contention, such conflict merely presents a factual controversy for Board resolution. Upon comparison, it becomes clear that Holbrook was [] actively engaged in client contact, assignment, fees and wages.

Id.

Likewise, Rest Assured is actively engaged in contacting the clients, assigning the PCAs to the clients, collecting the fees, and then directly paying the PCAs their wages. The facts here are indistinguishable from those of *Holbrook*, which was directly cited and relied upon by this Court in *Kilgore*.

It is significant to note that Rest Assured has repeatedly contended in this appeal that it acts "only as a placement agency and broker and had no control over the PCAs." (Rest Assured Reply Brief, pp.1-2; *see also* Rest Assured Appellant Brief, p.9 "broker or other middleman"). However, current, binding South Carolina Supreme Court precedent specifically envisions that an employment placement agency has employees whose wages are subject to unemployment tax liability.[5] *Kilgore*, *supra*. Rest Assured's contention is tantamount to an argument against this Court's precedent, and is one that the Court of Appeals should have rejected outright. Instead, the Court of Appeals inappropriately issued a decision that is in direct conflict with the Court's decisions on this issue.

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[5] It is also worth noting that the Legislature recognizes that temporary staffing agencies in South Carolina are subject to unemployment taxation, and temporary workers of these agencies are entitled to unemployment benefits provided they meet specific eligibility requirements. *See* S.C. Code Ann. § 41-35-110(3)(c) (Supp. 2013).

Accordingly, DEW urges this Court to grant its request for a writ of certiorari to reverse the Court of Appeals' decision which conflicts with prior decisions of the South Carolina Supreme Court.

II. The Court of Appeals Exceeded its Scope of Review by Reversing the Administrative Law Court, Which Found DEW's Decision Was Supported by Substantial Evidence in the Record, and Improperly Substituting its Judicial Judgment for Agency Judgment.

By reversing the ALC's decision, the Court of Appeals exceeded the narrow scope of review in unemployment tax status cases. The ALC had correctly determined that the record contained substantial evidence to support DEW's finding that Rest Assured's PCAs are employees. In contrast, the Court of Appeals' reversal amounts to judicial fact-finding. Thus, this Court should grant certiorari, reverse the Court of Appeals' decision, and find that DEW's final agency administrative determination is supported by substantial evidence.

The Court of Appeals clearly engaged in judicial fact-finding when it specifically stated in its opinion as follows:

> **We reverse and find the aide workers were independent contractors....**
>
> We agree with [Rest Assured's] argument that their personal care aide workers were not employees but contract workers.... In our consideration of the record as a whole, we do not find there is substantial evidence in the record to support the ALC's decision.

Rest Assured, LLC v. S.C. Dep't of Emp. & Workforce, filed June 18, 2014 (Unpublished Opinion No. 2014-UP-235) (emphasis added). The Court of Appeals incorrectly viewed this case as one of review of the ALC's decision.[6] Instead, the Court of Appeals was statutorily

[6] Rest Assured incorrectly maintained in its Court of Appeals Reply Brief that the "substantial evidence rule does not govern the standard of review over this decision." (Rest Assured Reply Brief, p.1). While the Court of Appeals' Order references the substantial evidence rule, it does not cite any unemployment insurance cases. Rather, the Court of Appeals cited only *ESA Servs.,*

required to evaluate whether the substantial evidence in the record supports **DEW's final administrative decision** that Rest Assured had misclassified its workers as independent contractors.

DEW clearly determined that Rest Assured's PCAs are "employees and should be reported for unemployment tax purposes." (R.p.34). Instead of reviewing that determination under the narrow substantial evidence standard, the Court of Appeals improperly took its own view of the evidence and reversed DEW's factual findings.

1. The Court of Appeals failed to determine whether the evidence in the record would allow reasonable minds to reach the conclusion that DEW reached in order to justify its administrative agency action.

DEW is an agency governed by the Administrative Procedures Act (APA). *See Gibson v. Florence Country Club*, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) (finding DEW's predecessor, the Employment Security Commission, subject to the APA).

In reviewing a determination on the employment status of workers for unemployment tax purposes, the standard of review to be applied by the Court is the substantial evidence rule under the APA. *Smoky Mountain Secrets, Inc. v. S.C. Emp. Sec. Comm'n*, 312 S.C. 111, 112, 439 S.E.2d 288, 289 (Ct. App. 1993), *rev'd in part on other grounds,* 318 S.C. 456, 458 S.E.2d 429 (1995); *see also Kilgore, supra.*

This is a very "narrow scope of review." *McEachern v. S.C. Emp. Sec. Comm'n*, 370 S.C. 553, 561, 635 S.E.2d 644, 69 (Ct. App. 2006). The appellate court may reverse the decision of the agency only "where it is arbitrary or capricious or constitutes an abuse of discretion.

LLC v. S.C. Dep't of Revenue, 392 S.C. 11, 24, 707 S.E.2d 431, 438 (Ct. App. 2011). *ESA Servs.* involves an appellate review of the ALC's findings of fact on a contractual issue, so it is not at all analogous to this case.

Reviewing courts apply the substantial evidence rule, under which the agency's decision is upheld unless it is 'clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.'" *Id.* at 557, 635 S.E.2d at 646-47 (footnotes and citations omitted); *accord* S.C. Code Ann. § 1-23-380;[7] *Merck v. S.C. Emp. Sec. Comm'n*, 290 S.C. 459, 461, 351 S.E.2d 338, 339 (1986) (when reviewing DEW's final decisions, the reviewing court "must affirm the factual findings of the Commission if they are supported by substantial evidence").

"Substantial evidence" is defined as:

> [S]omething less than the weight of the evidence; it is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action. The substantial evidence rule does not allow judicial fact-finding, or the substitution of judicial judgment for agency judgment.

Todd's Ice Cream, Inc. v. S.C. Emp. Sec. Comm'n, 281 S.C. 254, 258, 315 S.E.2d 373, 375 (Ct. App. 1984); *see also Friends of Earth v. Pub. Serv. Comm'n of S.C.*, 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010) (substantial evidence is "evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion as the agency").

Furthermore, the reviewing court "may not substitute its judgment ... as to the weight of

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[7] S.C. Code Ann. § 1-23-380 provides for "Judicial review upon exhaustion of administrative remedies" and states as follows:

> (5) The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

the evidence on questions of fact." S.C. Code Ann. § 1-23-380(5); *accord Grant v. S.C. Coastal Council*, 319 S.C 348, 461 S.E.2d 388 (1995). The findings of the agency are "presumed correct and will be set aside only if unsupported by substantial evidence." *Kearse v. State Health & Human Services Fin. Comm'n*, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995). The possibility of drawing two inconsistent conclusions from the evidence does not mean the agency's conclusion is unsupported by substantial evidence. *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). Finally, it is the Appellant who bears the burden "to prove convincingly that the agency's decision is unsupported by the evidence." *Id.*

Notably, when reviewing the Court of Appeals' decision in *Smoky Mountain Secrets,* the Court reversed the Court of Appeals' own finding that the delivery workers were independent contractors. This Court emphatically stated that "[a]ppellate scope of review in this action is limited to determining the existence or not of substantial evidence supporting the factual findings" of DEW's predecessor agency, the Employment Security Commission. *Smoky Mountain Secrets, Inc. v. S.C. Emp. Sec. Comm'n*, 318 S.C. 456, 457, 458 S.E.2d 429, 430 (1995). The Court in *Smoky Mountain Secrets* held that the record contained "substantial evidence supporting the finding that Respondent had the right and authority to control and direct persons delivering its products, thus qualifying them as employees rather than independent contractors," and thus, the Court of Appeals had exceeded its scope of review by making its own factual finding that the workers were not employees.

This is precisely the circumstances of the instant case. Here, DEW determined that Rest Assured's PCAs are employees, and therefore it must report these workers for purposes of unemployment tax liability. (R.p.34). DEW made the factual findings that Rest Assured

exercises control over its workers by supervising work and controlling the method and manner by which payment is made. *Id.*

Under the Court's narrow scope of review, it is clear that DEW's tax status determination is supported by substantial evidence and the ruling is not affected by any error of law. The ALC correctly affirmed, and this Court should reverse the Court of Appeals since it exceeded its scope of review.

It bears repeating that the proper appellate scope of review in this case is narrowly "limited to determining the existence or not of substantial evidence supporting the factual findings of" DEW. *Smoky Mountain Secrets, Inc. v. S.C. Emp. Sec. Comm'n*, 318 S.C. at 457, 458 S.E.2d at 430 (citing *Kilgore Group, Inc. v. S.C. Emp. Sec. Comm'n,* 313 S.C. 65, 437 S.E.2d 48 (1993)). In *Smoky Mountain Secrets,* the Supreme Court reversed the Court of Appeals' decision which found delivery drivers were independent contractors, which was contrary to the Employment Security Commission's finding that these workers were employees for unemployment tax purposes. The Supreme Court held the Agency's finding that the workers were employees "was not clearly erroneous," and therefore, the Court of Appeals had "exceeded its scope of review." *Smoky Mountain Secrets,* 318 S.C. at 457, 458 S.E.2d at 430 (reversing pursuant to Rule 220, SCACR, the Court of Appeals' conclusion in *Smoky Mountain Secrets, Inc. v. S.C. Emp. Sec. Comm'n*, 312 S.C. 111, 116, 439 S.E.2d 288, 291 (Ct. App. 1993) that the drivers were independent contractors).

Just as in *Smoky Mountain Secrets*, the Court of Appeals has in the instant case exceeded its scope of review, re-weighed the facts, and participated in judicial fact-finding, which is contrary to the substantial evidence standard found in the APA.

Under the APA's substantial evidence rule, the appellate court may only reverse an administrative decision:

> [I]f such decision is affected by errors of law, characterized by an abuse of discretion, or clearly erroneous in view of the substantial evidence on the whole record. "Substantial evidence" is something less than the weight of the evidence; it is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action. **The substantial evidence rule does not allow judicial fact-finding, or the substitution of judicial judgment for agency judgment. A judgment upon which reasonable men might differ will not be set aside.**

Todd's Ice Cream, Inc. v. S.C. Emp. Sec. Comm'n, 281 S.C. 254, 258, 315 S.E.2d 373, 375 (Ct. App. 1984) (emphasis added); *see also* S.C. Code Ann §§ 1-23-380(5), 1-23-610(B).

The record in the instant case supports DEW's conclusion that Rest Assured had the right to control the PCAs, and that control was mostly delegated to Rest Assured's clients. *See Kilgore*, 313 S.C. at 69, 437 S.E.2d at 50. When the Court of Appeals decided the PCAs were independent contractors, it impermissibly substituted its own judgment for DEW's decision, and improperly reversed the ALC's decision which found DEW's conclusion was supported by substantial evidence in the record.

Because the substantial evidence rule does not allow judicial fact-finding, or the substitution of judicial judgment for agency judgment, this petition for a writ of certiorari should be granted to correct the erroneous decision issued by the Court of Appeals.

2. Even when the record on appeal allows the possibility of drawing two different conclusions from the evidence, this does not mean DEW's conclusion is unsupported by substantial evidence.

The possibility of drawing two inconsistent conclusions from the evidence does not mean the agency's conclusion is unsupported by substantial evidence. *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. at 226, 467 S.E.2d at 917. Simply because the factual record may contain evidence upon which reasonable minds might differ does not mean that the Court of

Appeals was empowered to reverse DEW's decision. As the Court of Appeals in *Todd's Ice Cream* accurately noted:

> **Where the evidence relating to whether an individual is an independent contractor or employee is conflicting or where more than one inference can be derived therefrom, the question is one of fact.** This court cannot substitute its judgment for that of an administrative agency when the agency's factual findings [are] supported by substantial evidence, as is the case here, even though reasonable men might draw two inconsistent conclusions from the evidence presented.

Todd's Ice Cream, 281 S.C. at 259, 315 S.E.2d at 376 (citations omitted, emphasis added). Moreover, when applying the substantial evidence rule, the appellate court may reverse only "in those cases where a manifest or gross error of law has been committed by the administrative agency." *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981).

In the instant case, DEW did not commit a manifest or gross error of law by concluding from the evidence in the record that Rest Assured has the right to control the work of its PCAs. It is beyond dispute that reasonable minds could reach the same conclusion that DEW reached when the evidence establishes that Rest Assured controlled the placement of the PCAs, collected the fees from the clients, paid wages to the PCAs, and periodically supervised the PCAs at their workplaces in clients' homes.

Even if the evidence arguably allows more than one inference to be derived from the evidence in the record on the issue of control because Rest Assured and all of its PCAs entered into a written "independent contractor agreement," there is nevertheless clear evidence that Rest Assured:

- initially matched the PCAs to the clients;
- had the right to control the PCAs and directly exercised that right of control when it would make in-home visits to ensure the quality of the PCAs' work and the clients' satisfaction; and

- exercised complete control regarding the method of payment, by negotiating fees first with the clients and then with the PCAs, collecting all monies, as well as paying the PCAs even if the clients failed to pay.

This undisputed evidence clearly supports a reasonable determination that the PCAs are employees. Where the evidence relating to whether an individual is an independent contractor or employee is conflicting or where more than one inference can be derived therefrom, the question is one of fact, and that factual finding is made by DEW. *Todd's Ice Cream,* 281 S.C. at 259, 315 S.E.2d at 376. Because the record on appeal contains substantial evidence supporting DEW's decision that the PCAs are employees, the Court of Appeals impermissibly re-weighed the facts and engaged in judicial fact-finding, thereby exceeding its scope of review. *See Lark v. Bi-Lo, Inc.,* 276 S.C. at 136, 276 S.E.2d at 307 (for an appellate court to reverse a final agency decision, "the decision under appeal must be 'clearly erroneous' in view of the substantial evidence on the whole record").

Accordingly, this Court should grant the petition for a writ of certiorari to correct the Court of Appeals' decision and re-establish the proper analysis for this unemployment tax liability issue.

III. The Court of Appeals' Opinion Effectively Creates an Exemption for Home Health Care Workers, When Only the Legislature Should Be Determining, as a Matter of Public Policy, Which Workers Are Exempt From Unemployment Insurance Coverage.

One of the arguments raised by Rest Assured on appeal is that because workers for in-home care providers are permitted to be treated as independent contractors, these workers should therefore be exempt from unemployment insurance coverage. This argument is without merit. Unless and until the Legislature expressly exempts employees of in-home health care providers from South Carolina's laws governing unemployment, the common law rules to determine

employment and unemployment tax liability still govern. *See Kilgore, supra.* This Court should grant DEW's petition for certiorari because the Court of Appeals' opinion effectively grants in-home health care aides an exemption from unemployment which has **not** been authorized by the Legislature.

Rest Assured cites S.C. Code Ann. § 44-70-20,[8] which states as follows:

> **"In-home care provider" means a business entity**, corporation, or association, whether operated for profit or not for profit, that for compensation directly provides or makes provision for in-home care services **through its own employees or agents or through contractual arrangements with independent contractors** or through referral of other persons to render in-home care services when the individual making the referral has a financial interest in the delivery of those services by those other persons who would deliver those services.

S.C. Code Ann. § 44-70-20(3) (emphasis added). By the very language of this statute, an in-home care provider is the business that provides people to perform in-home care services, *see* § 44-70-20(2), and these people may be **either employees or independent contractors** of the business. The primary purpose of this statutory scheme has nothing to do with unemployment tax liability, but instead governs the licensing of in-home care providers. *See* S.C. Code Ann. § 44-70-30 ("An in-home care provider must apply for and obtain a license issued by the department that is effective for a specified time period following the date of issue as determined by the department."). This statute applies to Rest Assured as a business, but has absolutely nothing to do with whether Rest Assured's workers are treated as employees for unemployment tax purposes.

Instead, it is Title 41, Chapters 27-41 of the South Carolina Code that governs unemployment determinations. For example, the Legislature's declaration of public policy related to unemployment states the following:

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[8] *See* Rest Assured Reply Brief pp. 2-3.

> Economic insecurity due to unemployment is a serious menace to health, morals and welfare of the people of this State; involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the General Assembly to prevent its spread and to lighten its burden which so often falls with crushing force upon the unemployed worker and his family; the achievement of social security requires protection against this greatest hazard of our economic life; **this can be provided by encouraging the employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment,** thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The General Assembly therefore declares that in its considered judgment the public good and the general welfare of the citizens of this State require the enactment of this measure, under the police powers of the State, **for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.**

S.C. Code Ann. § 41-27-20 (1986) (emphasis added).

Indeed, this Court has recognized that:

> With respect to the Employment Security Law, the General Assembly has clearly stated its intention that the Law protect those involuntarily unemployed against economic insecurity caused by the inability of industry to provide stable employment. **As social legislation, the Employment Security Law should be construed to provide protection to as many employees as possible.**

Alton Newton Evangelistic Ass'n, Inc. v. S.C. Emp. Sec. Comm'n, 284 S.C. 302, 305, 326 S.E.2d 165, 167 (Ct. App. 1985) (citing S.C. Code Ann. § 41-27-20) (emphasis added).

Despite the generally broad coverage of employees under South Carolina's unemployment law, the Legislature has specifically exempted many categories of workers from unemployment insurance coverage. *See* S.C. Code Ann. § 41-27-260 (Supp. 2013) (section entitled "Exempted employment"). As recently as June 6, 2014, this statutory section was amended to add categories to exempted employment. 2014 S.C. Act No. 265. However, the Legislature has never exempted home health care workers from unemployment coverage. Thus, whether the PCAs in this case are determined to be employees for unemployment tax liability

purposes must be based on "the usual common law rules," as directed by S.C. Code Ann. § 41-27-230(1)(b).

The effect of the Court of Appeals' decision, however, is to exempt home health care workers from unemployment insurance coverage, even where their employer has the right to control their work. Any blanket exemption should be effectuated by the Legislature, via statutory amendment, and not through a Court of Appeals' decision.

For this reason, as well as the others articulated above, the Court should grant DEW's petition for a writ of certiorari to reverse the Court of Appeals' misguided decision in this matter. This is an important matter of public tax policy that calls out for this Court's review.

CONCLUSION

Accordingly, for all the reasons discussed above, DEW requests that this Court grant the petition for a writ of certiorari to review and reverse the Court of Appeals' decision. This case involves an important matter of unemployment tax policy that is properly governed by this Court's prior opinions, but such binding precedent was **not** applied by the Court of Appeals.

Respectfully submitted,

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