

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM THE ADMINISTRATIVE LAW COURT  
Ralph King Anderson, III, Chief Administrative Law Judge  
Case No. 2012-ALJ-22-0209-AP

S.C. Supreme Court

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

2014-002233

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

v.

South Carolina Department of Employment and Workforce .....Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

- I. 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)?
  
- II. DID THE COURT OF APPEALS EXCEED ITS SCOPE OF REVIEW AND IMPROPERLY SUBSTITUTE ITS JUDICIAL JUDGMENT IN PLACE OF PETITIONER DEW'S ADMINISTRATIVE JUDGMENT?
  
- III. DID THE COURT OF APPEALS' DECISION CREATE AN EXEMPTION FOR UNEMPLOYMENT IN-HOME HEALTH CARE WORKERS?

## INTRODUCTION

Petitioner, the South Carolina Department of Employment and Workforce (“SCDEW”), petitions this Court for a writ of certiorari to review the Court of Appeals’ unanimous and unpublished decision in *Rest Assured, LLC v. S.C. Dep’t of Emp. & Workforce*, filed June 18, 2014 (Unpublished Opinion No. 2014-UP-235)(App.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). Because there are no novel questions of law, the decision was unanimous, and there is no conflict with this Court’s prior decisions, the Petition for Writ of Certiorari should be denied.

“A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” SCACR, 242(b). This case is highly distinctive and fact intensive and provides no special or important reasons for review. Petitioner simply seeks to reargue the case.

The Court of Appeals found unanimously that Rest Assured, LLC (“Rest Assured”) utilizes independent contractors and not employees, overruling the SCDEW and ALC. Court of Appeals Judges Huff, Thomas, and Pieper’s original unanimous and unpublished opinion was filed on June 18, 2014. Due to Judge Pieper’s retirement, Chief Judge Few stepped in to consider the SCDEW’s petition for rehearing. Again, all three Judges agreed the petition for rehearing should be denied. Accordingly, not three but four Court of Appeals Judges found in favor of Rest Assured.

Further, the Court of Appeals’ opinion does not conflict with any other decisions of this Court, including *Kilgore Group, Inc. v. S.C. Emp. Sec. Comm’n*, 313 S.C. 65, 437 S.E.2d 48, (1993). Whether a worker is an employee or independent contractor is a fact-

specific matter. *Kilgore* is highly distinguishable from the case of Rest Assured and is not binding on Rest Assured.

The Court of Appeals properly found that other Supreme Court cases were more factually similar to the case of Rest Assured. The Court of Appeals heard extensive arguments governing all cases and ultimately agreed with Rest Assured. This decision does not conflict with any prior opinions of this Court, especially given the fact intensive nature of these cases.

This case is highly distinctive, factually intensive, and presents no novel or important questions. The Court of Appeals' decision was unpublished and did not create any binding precedent. Accordingly, the Court should refuse to reargue the case and deny the Petition for Writ of Certiorari.

#### **COUNTER-STATEMENT OF THE CASE**

Rest Assured is a business acting as a placement firm for in-home care services. (R. p. 41). Appellant places personal care aides ("PCAs") into patients' homes to help with the patients' daily care. (R. p. 76, ll. 12-17; R. p. 117, ll. 17-20). The PCAs provide "custodial care" to the patients that consist of duties such as changing clothes, bathing, combing hair, meal preparation, and light housekeeping. (R. p. 76, ll. 12-17). The PCAs do not provide any medical care or other skilled nursing or services. (R. p. 139, l. 15 - p. 140, l. 1).

Rest Assured originally treated the PCAs as employees. (R. p. 142, ll. 1-3). However, Rest Assured and the PCAs themselves determined that they both desired independent contractor treatment of the PCAs. (R. p. 142, l. 11 - p. 143, l. 7). Rest Assured provided literature on the difference between an employee and an independent

contractor and provided access to an accountant to answer any questions. *Id.* The PCAs made the informed decision to be treated as independent contractors. *Id.* After this decision was made, Rest Assured stopped providing equipment, bonuses, employment awards, and started issuing 1099s. (R. p. 143, ll. 8-13).

Rest Assured maintains a registry of approximately 250 PCAs (the “Registry”). (R. p. 118, ll. 13-19). The PCAs approach Rest Assured and sign up for the Registry by providing their qualifications and the times that they are available to work. (R. p. 84, ll. 1-3). Most of the PCAs have other full-time or part-time employment outside of any services they are performing through Rest Assured. (R. pp. 154-165). The PCAs are free to negotiate their contract rate with Rest Assured for each individual patient. (R. p. 75, ll. 9-20). Rest Assured has an independent contractor agreement with each of the PCAs. (R. pp. 45-48).

The independent contractor agreement signed by each PCA specifically provides that “[b]y accepting assignment(s) as a subcontractor, it is under the assumption of Rest Assured that you are your own business representative.” (R. p. 48). The contract also provides that “schedule and hours are determined by [the PCA]” and that the PCA “will determine the method, details and means of performing the Services upon receiving the care plan for the patient.” (R. pp. 45-48). The contract also requires the PCAs to provide their own equipment and supplies and pay all required taxes on their own. *Id.*

Rest Assured obtains patients from three primary sources, Medicaid, the U.S. Department of Veteran Affairs (“VA”), and private pay individuals. (R. p. 118, ll. 1-10). When these sources have a patient in need, they contact Rest Assured and provide a list of services the patient requires and the times a PCA is needed (a “Care Plan”). (R. p. 138,

ll. 13-19). The Care Plan is simply an assessment of the patient needs and does not provide any means or methods on accomplishing the tasks necessary. (R. p. 138, l. 8 - p. 139, l. 14). Rest Assured's client care liaison then searches the Registry to match any PCAs that meet the skills required and times available. (R. p. 83, l. 17 - p. 84, l. 3; R. p. 119, ll. 6-8).

Once the matching PCAs are identified, they are sent to the home of the patient to be interviewed by the patient. (R. p. 119, ll. 6-17). The patient then picks which PCA they want to provide the services.<sup>1</sup> *Id.* Rest Assured has no influence on which PCA is chosen. (R. p. 119, l. 18 - p. 120, l. 2). Importantly, the PCA can accept or deny the position, and it is totally up to the PCA to determine his/her own hours. (R. pp. 45-48; R. p. 78, ll. 11-13).

Once the PCA is chosen by the patient, the PCA will begin to provide services to the patient. There is no supervision by Rest Assured in the performance of these services. (R. p. 92, ll. 1-2). Rest Assured does not care how the services are performed, or which means and methods the PCA decides to utilize. (R. p. 87, ll. 9-20). A PCA is only removed from a particular job at the request of the patient. (R. p. 112, l. 6 – p. 113, l. 6). Rest Assured then places the PCA back on the Registry. *Id.*

Rest Assured provides no supplies or equipment to the PCA. (R. p. 99, ll. 9-20). No gloves, hand wash, cups, medical supplies, or uniforms are provided by Rest Assured. (R. p. 99, l. 9 – p. 100, l. 10).

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<sup>1</sup> In its Petition for Writ of Certiorari, the SCDEW inappropriately cites Rest Assured's website. This information was never cited in the record below and is not a part of the Record on Appeal.

Many of the PCAs work for other in-home care providers while also working for Rest Assured. (R. p. 108, ll. 5-13). Rest Assured does not withhold any taxes, and provides an IRS Form 1099 to each PCA at the end of the year. (R. p. 111, l. 7; R. p. 112, ll. 1-2). Other in-home care providers also treat their PCAs as independent contractors, including the South Carolina Department of Disability and Special Needs, South Carolina Department of Health and Human Services, and Medicaid. (R. p. 128, l. 16 – p. 129, l. 4; R. p. 135, ll. 1-7; R. pp. 195-196; R. p. 197).

### ARGUMENT

**I. The Court of Appeals' Decision Does Not Conflict with South Carolina Supreme Court Precedent nor is *Kilgore* Binding in this Case.**

In its Petition for Writ of Certiorari, the SCDEW relies almost entirely on the premise that the Court of Appeals' decision conflicts with this Court's opinion in *Kilgore*. Because the independent contractor status of a worker is a fact-specific matter, and *Kilgore* is highly distinguishable, the Court of Appeals' decision does not present any precedential conflicts.

In *Kilgore*, this Court found that a company which supplied temporary workers utilized employees and not independent contractors. Because *Kilgore* and Rest Assured both used transient workers, the SCDEW believes *Kilgore* should be binding in this case. However, the similarity between the two cases ends there.

The case of Rest Assured is highly distinguishable from *Kilgore*. Most importantly, in *Kilgore* the contract with the temporary workers merely stated the relationship was one of independent contractor. *Kilgore*, 313 S.C. at 67, 437 S.E.2d at 49. By severe contrast, the contract between Rest Assured and the PCAs provided that the

PCAs (1) understood and knew that they were independent contractors and their own business representative; (2) would determine their own means and methods for accomplishing the work; (3) would pick and choose their own hours; (4) would supply their own equipment and supplies; (5) would be provided a IRS Form 1099; and (6) would be responsible for the all tax liabilities as Rest Assured withheld no taxes. (R. pp. 45-48).

This Court in *Kilgore* provided, “[t]he primary test of its [a contract’s] character is the intention of the parties, which is to be gathered from the whole scope of the language used.” *Kilgore*, 313 S.C. at 69-70, 437 S.E.2d at 50. The intention of Rest Assured and the PCAs in this contract was that of independent contractor, as distinguished in *Kilgore* where the contract intention was unclear. The Court of Appeals unanimously recognized this distinction.

In *Kilgore*, the temporary employment company would supply temporary workers to various businesses. *Id.* at 67, 437 S.E.2d at 49. These businesses would then dictate the day-to-day activities of the workers and direct the workers as to the specifics of their jobs and tasks. *Id.* This Court ruled that direction and control over the workers was imputed to the temporary agency because the clients’ control was “derived solely from their contracts with Kilgore.” *Id.* at 69, 437 S.E.2d at 49.

Rest Assured has no contract with the client/patient. Rest Assured’s contract is with the provider, i.e. Medicaid, VA, and others, not the third-party patient. The client (Medicaid, VA) does not control the PCAs. The PCAs are given a specific Care Plan up-front, allowed to accept or deny the assignment, and then allowed to perform the services as they see fit. This is in direct contrast to *Kilgore* where the clients contracted directly

with the agency, hired the worker, and then directed all of the actions of the worker. Further, the Court in *Kilgore* relied on testimony that the temporary workers were treated exactly the same as the permanent workers of the client and controlled in the same manner. *Id.* at 67, 437 S.E.2d at 49. In this case, the PCAs were not treated as employees or controlled by either Rest Assured or the client.

Rest Assured's case is far more analogous to the case of *Wilkinson*, 382 S.C. 295, 676 S.E.2d 700. In *Wilkinson*, this Court found that a long-haul truck driver was an independent contractor, not an employee. *Id.* The Court based its decision on the driver's choice to become an independent contractor, the contract term that provided for the "means and methods" to be determined by the driver, and the fact that the driver could refuse any assignment. *Id.* at 301-02. Similarly, Rest Assured's PCAs also chose to be independent contractors, there is a specific contract term that the PCA will determine the "means and methods," and the PCA is free to choose their own hours and refuse any assignment. (R. p. 78, ll. 11-13; R. p. 142, l. 11 – p. 143, l. 7; R. pp. 45-48).

The Court in *Wilkinson* also found that the driver was paid per mile and issued a 1099 which was consistent with an independent contractor agreement. 382 S.C. at 303, 676 S.E.2d at 704. Similarly, Rest Assured issues 1099 to all the PCAs and "withholds no taxes." (R. p. 45-48). Also, each PCA is free to negotiate their rate for each separate assignment/job. (R. p. 75, ll. 9-20). This is strongly indicative of an independent contractor relationship.

Lastly, the Court in *Wilkinson* held that there was no right to fire because "termination of the parties' relationship was controlled by their agreement" and "either party could terminate the contract upon 30 days' notice." 382 S.C. at 304, 676 S.E.2d at

704. Similarly, the relationship between Rest Assured and the PCAs is governed by the agreement. The provisions of the Independent Contractor Agreement with the PCAs specifically provide the causes for termination and provide that either party can terminate the agreement. (R. pp. 45-48). Accordingly, Rest Assured does not have a right to fire the PCAs.

The Court of Appeals was thoroughly briefed on the facts and issues in both *Kilgore* and *Wilkinson*. The Court of Appeals heard extensive oral arguments regarding both cases. Ultimately, the Court of Appeals unanimously found that *Wilkinson*, and not *Kilgore*, was most factually similar to the case of Rest Assured and provided the most guidance.

In its Petition for Rehearing and Request for Rehearing *En Banc*, the SCDEW argued that the Court of Appeals had overlooked *Kilgore* and that *Kilgore* was binding on this case. (App. pp. 8-10). The Court of Appeals again unanimously rejected this argument and denied the petition for rehearing.<sup>2</sup>

“Whether an individual is an employee or an independent contractor is a fact-specific determination reached by applying certain general principles.” *Spivey v. D.G. Const. Co.*, 321 S.C. 19, 467 S.E.2d 117 (Ct. App. 1996). Whether the Rest Assured PCAs were employees or independent contractors is specific to this case. *Kilgore* does not present any binding precedent simply because it may have some similarities. Further, *Kilgore* is highly distinguishable from the case of Rest Assured.

The Court of Appeals properly held that the conduct between the Rest Assured and its workers was similar to that of *Wilkinson*. SCDEW’s Petition for Writ of

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<sup>2</sup> This unanimous denial of the Petition for Rehearing included a fourth judge, Chief Judge Few, who replaced the retired Judge Pieper. (App. p. 1).

Certiorari is nothing more than an attempt to reargue the case. Accordingly, this Court should deny the Petition for Writ of Certiorari.

**II. The Court of Appeals Correctly Applied the Substantial Evidence Standard and Did Not Exceed its Scope of Review.**

Petitioner argues that the Court of Appeals exceeded the scope of review and engaged in judicial fact-finding. However, the Court of Appeals properly applied the substantial evidence standard and found that there was not substantial evidence to support the employment decision of the SCDEW and the ALC. Accordingly, the Court of Appeals properly determined that the Rest Assured PCAs were independent contractors.

The Administrative Procedures Act (APA), provides that the court can reverse or modify a decision if it is “affected by other error of law,” “clearly erroneous in the view of the reliable, probative, and substantial evidence on the whole record,” or “arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” S.C. Code Ann. § 1-23-380 (1976). The Court of Appeals properly applied this standard, citing *ESA Servs., LLC v. S.C. Dep’t of Revenue*, 392 S.C. 11, 707 S.E.2d 431 (Ct. App. 2011). (App. pp. 19). “Although this court shall not substitute its judgment for that of the ALC as to findings of fact, we may reverse or modify decisions that are controlled by error of law or are clearly erroneous in view of the substantial evidence on the record as a whole.” *Id.* at 24, 707 S.E.2d at 438.

As the Petitioner repeatedly points out its Petition for Writ of Certiorari, “Appellate scope of review in this action is limited to determining the existence or not of substantial evidence supporting the factual findings of Petitioner.” *Smokey Mountain Secrets, Inc. v. S.C. Emp. Sec. Comm’n*, 318 S.C. 456, 457, 458 S.E.2d 429, 430 (1995). The Court of Appeals did just that.

The Court of Appeals unanimously held that “[i]n 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.” (App. pp. 19). The Court of Appeals did exactly what the standard set by this Court requires, it found that there was not substantial evidence to support the decisions of the lower tribunals.

The Court of Appeals did not engage in any fact-finding. Specifically, there were no major issues of fact even before the Court of Appeals,<sup>3</sup> and the Court of Appeals did not make any findings of fact. The Court of Appeals simply considered the record as a whole and found there was not substantial evidence to justify the decision by the ALC and SCDEW. Petitioner is merely unhappy with the outcome from the Court of Appeals and wants this Court to reconsider the record as a whole. Because the Court of Appeals properly applied the substantial evidence standard, the Petition for Writ of Certiorari should be denied.

**III. The Court of Appeals’ Unpublished Opinion Does Not Create Any Exemptions for In-Home Custodial Care Workers.**

Petitioner argues that the Court of Appeals’ decision provides a blanket exemption for in-home health care workers from unemployment insurance coverage. However, because these employment decisions are determined on a case-by-case basis, and the Court of Appeals’ opinion is unpublished, the decision from the Court of Appeals only affects Rest Assured and does not create a blanket exemption.

Petitioner completely misstates arguments raised by Rest Assured on appeal regarding legislation governing in-home care providers. On appeal, Rest Assured pointed

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<sup>3</sup> On oral argument before the Court of Appeals, Petitioner conceded that there were no major issues of fact.

out the “Licensure of In-Home Care Providers Act” (the “Act”). S.C. Code Ann. § 44-70-10 (1976). The Act provides that in-home care providers can offer “services through its own employees or agents or through contractual arrangements with independent contractors . . . .” S.C. Code Ann. § 44-70-20 (1976).

The purpose of pointing out this provision was to make it clear that the Legislature intended to allow in-home care providers to be able to offer their services through independent contractors. This was offered to rebut the SCDEW’s apparent argument that *Kilgore* requires all temporary workers to be treated as employees. The SCDEW’s argument would make it impossible for a temporary worker to ever be considered an independent contractor.

However, just as *Kilgore* does not create a blanket requirement that all temporary workers be treated as employees, the Court of Appeals’ opinion in this case does not create a blanket exemption for in-home care workers. As noted above, whether an individual is an employee or an independent contractor is a fact-specific determination. Each case is decided on its own merits. The Court of Appeals’ opinion is clear that its decision is limited to the record and facts provided in the Rest Assured case.

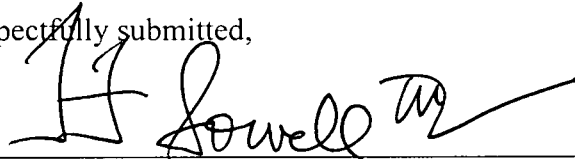
Further, the Court of Appeals’ opinion is unpublished and does not create any binding precedent for other parties. Accordingly, it is legally impossible for this opinion to create any blanket exemption for in-home care workers.

Because the Court of Appeals’ unanimous decision is strictly limited to the facts of the Rest Assured case, and because the opinion is unpublished, the Court should deny the Petition for Writ of Certiorari.

**CONCLUSION**

The decision rendered by the Court of Appeals does not present any novel questions of law, was unanimous, and does not conflict with this Court's prior decisions. The Court of Appeals properly applied the substantial evidence standard and determined there was not substantial evidence to support the prior decisions by the ALC and SCDEW. The Court of Appeals issued an unpublished unanimous decision that will have no binding effect on any other case. Further, the Court of Appeals unanimously denied the SCDEW's Petition for Rehearing. This case has been thoroughly considered by four Court of Appeals Judges, and there are no special or important reasons for this Court rearguing the case. Accordingly, the Court should deny the SCDEW's Petition for Writ of Certiorari.

Respectfully submitted,



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**Attorneys for Respondent**

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PROOF OF SERVICE

I, the undersigned, of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for the *Respondent Rest Assured, LLC*, certify that I served all counsel in this action with a copy of **RETURN TO PETITION FOR A WRIT OF CERTIORARI** by placing a copy of same in the U.S. Mail, First Class, postage prepaid, on November 19, 2014, as follows:

Debra S. Tedeschi  
Deputy General Counsel  
Department of Employment and Workforce  
P.O. Box 8597  
Columbia, South Carolina 29202



Traci Clark  
Paralegal

November 19, 2014

**VIA HAND-DELIVERY**

The Honorable Jenny Abbot Kitchings  
Clerk, The South Carolina Court of Appeals *Supreme Ct.*  
Edgar Brown Building  
1205 Pendleton Street  
Columbia, South Carolina 29201

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**S.C. Supreme Court**

RE: Rest Assured v. SCDEW  
Appellate Case No. 2013-000774  
SGSL No.: 6251/1500

Dear Ms. Kitchings:

Attached please find the original and seven (7) copies of the Return to Petition for a Writ of Certiorari. We would appreciate your filing as appropriate and returning a clocked in copy via our courier. By copy of this letter and as evidence by the Proof of Service, we are serving a copy of same upon all counsel.

Very truly yours,



Thornwell F. Sowell

TFS:tc

Attachment

cc: Debra Sherman Tedeschi, Esquire (via U.S. Mail)  
David C. Dick, Esquire (via email)