

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Chief Administrative Law Judge

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

Appellate Case No. 2014-002233

Rest Assured, LLC,

Respondent,

v.

South Carolina
Department of
Employment and
Workforce,

Petitioner.

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DEC 3 2014

S.C. Supreme Court

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Petitioner, the South Carolina Department of Employment and Workforce (“DEW”), submits this Reply to Respondent’s Return to DEW’s Petition for a Writ of Certiorari to the Court of Appeals. DEW requests that this Court review the Court of Appeals’ decision because the decision is in conflict with not only the prior decisions of this Court initially cited in DEW’s petition,¹ but also because it conflicts with this Court’s very recently published decision in *Nucor Corp. v. S.C. Dep’t of Emp. & Workforce*, ___ S.E.2d ___, 2014 WL 5836902 (S.C. Supreme Court filed Nov. 12, 2014).

ARGUMENT

The Court of Appeals’ decision conflicts with this Court’s binding precedent on: (1) the issue concerning delegation of control announced in *Kilgore Grp., Inc. v. S.C. Emp. Sec. Comm’n*, 313 S.C. 65, 437 S.E.2d 48 (1993); and (2) the proper application of the substantial evidence rule, most recently articulated in *Nucor Corp. v. S.C. Dep’t of Emp. & Workforce*, ___ S.E.2d ___, 2014 WL 5836902 (S.C. Supreme Court filed Nov. 12, 2014).

Respondent Rest Assured LLC (Rest Assured) maintains in its Return that it does not control its workers who are Personal Care Assistants (PCAs) and that *Kilgore Grp., Inc. v. S.C. Emp. Sec. Comm’n*, 313 S.C. 65, 437 S.E.2d 48 (1993) (Toal, J.), is not analogous to, or binding on, the instant case. *Kilgore*, however, is the only South Carolina unemployment tax liability case on the issue of when the employer delegates its right of control to its clients. Because the facts here are indistinguishable from those in *Kilgore*, the Court of Appeals erred in not citing and relying on the *Kilgore* decision.

Although Rest Assured continues to assert that this case is factually “more analogous” to the workers’ compensation case of *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*,

¹ *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).

382 S.C. 295, 676 S.E.2d 700 (2009), this conflicts with the well-reasoned finding of the Administrative Law Court (ALC) which expressly found *Wilkinson* to be factually distinguishable from the instant case. (R.pp.18-19).

Furthermore, Rest Assured has in no way responded to DEW's argument that *Wilkinson* is **legally** distinct from an unemployment tax liability matter.² *Wilkinson* is inapposite **legally** because there is a different standard of review between a workers' compensation case and an unemployment tax liability case, even when the underlying **factual** issue involves the determination of whether the workers are employees versus independent contractors.

In a workers' compensation case, the employee vs. independent contractor issue is a jurisdictional issue, and thus, 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) (emphasis added); *see also Wilkinson, supra*.

In the unemployment context, however, the factual determination by DEW on whether workers are employees from unemployment tax liability is reviewed under the deferential substantial evidence rule. Substantial evidence is:

[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. 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); *see also Merck v. S.C. Emp. Sec. Comm'n*, 290 S.C. 459, 461, 351 S.E.2d 338, 339 (1986) ("Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached.").

² In contrast, *Kilgore* is undeniably apposite both factually and legally.

This means that in the unemployment arena, there is a significantly more deferential standard of review than that used by a reviewing court in a workers' compensation case. Thus, even if Rest Assured was correct that *Wilkinson* is factually similar to the instant unemployment case, the Court in *Wilkinson* was free to review the evidence anew in that case; whereas here, the Court of Appeals was only supposed to review whether substantial evidence supported DEW's **decision** that Rest Assured's workers are employees.

The Court of Appeals exceeded its scope of review by improperly substituting its judicial judgment for DEW's judgment. As this Court recently explained in *Nucor*, even when the Court would have taken a different view if it had been weighing the evidence, the Court may not "substitute [its] view of the evidence for that of the fact-finder." *Nucor Corp. v. S.C. Dep't of Emp. & Workforce*, ___ S.E.2d ___, 2014 WL 5836902, at *5 (S.C. Supreme Court filed Nov. 12, 2014). The *Nucor* Court explained that under the deferential substantial evidence standard of review, the reviewing court may be "constrained to affirm" DEW's decision when "supported by some evidence in the record." *Id.*

Although *Nucor* involved an unemployment claimant's eligibility for benefits, its holding on the substantial evidence standard echoes what the Court has repeatedly stated in unemployment tax liability law cases. *E.g., Smoky Mountain Secrets, Inc. v. S.C. Emp. Sec. Comm'n*, 318 S.C. 456, 457, 458 S.E.2d 429, 430 (1995) (appellate scope of review "is limited to determining the existence or not of substantial evidence supporting the factual findings" of the unemployment agency, and therefore finding the Court of Appeals had exceeded its scope of review); *Kilgore, supra* (applying substantial evidence standard when affirming unemployment agency's finding that temporary workers were employees); *Todd's Ice Cream, supra* (applying

substantial evidence standard when affirming unemployment agency's decision that ice cream truck drivers were employees).

In the instant case, more than one inference arguably can be drawn from the evidence in the record on whether PCAs are properly classified as employees. However, "[w]here 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." *Todd's Ice Cream*, 281 S.C. at 259, 315 S.E.2d at 376. The appellate court "cannot substitute its judgment for that of an administrative agency ... even though reasonable men might draw two inconsistent conclusions from the evidence presented." *Id.*

For these reasons, the Court of Appeals failed to properly apply this Court's applicable precedents on both the critical factual issue (delegation of control) and the standard of review (substantial evidence). Accordingly, the Court of Appeals erred in reversing the ALC's decision affirming DEW, and this Court should grant certiorari.

Without this Court's further review, many other similarly-situated employers will look to the Court of Appeals' decision, despite it being unpublished, and argue that they too should escape unemployment tax liability. Therefore, the impact of the Court of Appeals' decision on DEW is much more significant than Rest Assured asserts. For DEW, the Court of Appeals' decision may affect subsequent determinations made in cases involving in-home care providers, specifically, and for any employers who delegate control to its clients. DEW believes that the precedent of *Kilgore* has been called in to question by the Court of Appeals' determination, and seeks certiorari so the Court can provide clarity on this important issue involving unemployment tax policy.

CONCLUSION

DEW requests that the 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 the Court's prior opinions, but such binding precedent was **not** applied by the Court of Appeals, and therefore, the Court of Appeals' opinion is in conflict with this Court's prior decisions.

Respectfully submitted,

A handwritten signature in black ink, reading "Debra S. Tedeschi", written over a horizontal line.

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December 1, 2014

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. 2012-ALJ-22-0209-AP

Appellate Case No.: 2013-000774

Rest Assured, LLC,

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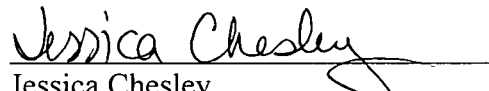
PROOF OF SERVICE

I certify that I have served the Petitioner South Carolina Department of Employment and Workforce's Reply to Return in Opposition to Petition for a Writ of Certiorari on the parties in this case by depositing a copy of it in the United States Mail, postage prepaid, on December 1, 2014, addressed to the parties at their addresses of record:

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December 1, 2014

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
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RE: Rest Assured LLC v. SC Department of Employment and Workforce
Appellate Case No. 2013-000774

Dear Mr. Shearouse:

Enclosed are the original and six copies of the Reply to Return in Opposition to Petition for Writ of Certiorari and Proof of Service to opposing Counsel.

Please let me know if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Jessica Chesley".

Jessica Chesley
Administrative Legal Assistant for
Debra S. Tedeschi
Deputy General Counsel

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