

THE STATE OF SOUTH CAROLINA
In The Supreme Court

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

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

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S.C. Supreme Court

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

v.

South Carolina Department of Employment and Workforce, Petitioner.

BRIEF OF RESPONDENT

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STATEMENT OF QUESTIONS ON CERTIORARI

- I. Did the Court of Appeals correctly decide that the personal care aides are independent contractors?

- II. Did the Court of Appeals correctly apply the scope of review?

STATEMENT OF THE CASE

On March 2, 2006, The South Carolina Employment Security Commission (SCESC) (currently known as South Carolina Department of Employment and Workforce (DEW)), issued a determination that Rest Assured, LLC (“Rest Assured”) had an employer-employee relationship with certain in-home personal care aides who had been designated as independent contractors. (R. pp. 49-50).

On April 3, 2006, Rest Assured appealed this determination for administrative review to the SCESC. (R. p. 51). The appeal was acknowledged by the SCESC on April 6, 2006. (R. p. 52). A hearing was held on September 12, 2006, and on February 16, 2007, the Administrative Hearing Officer, Chauntel Bland, issued his opinion and upheld the determination. (R. pp. 35-40).

On March 16, 2007, Rest Assured filed an application to appeal the Administrative Ruling to the full Employment Security Commission. (R. pp. 200-201). Four years later, on March 28, 2011, Rest Assured was informed by the now DEW that the appeal had been scheduled for review. (R. p. 202).

Rest Assured’s counsel, which had changed since the February 16, 2007, Administrative Ruling, submitted a written argument and requested to appear before the Appellate Panel to make a full argument. (R. pp. 203-214).

An appeal hearing was noticed for May 11, 2011. (R. p. 215). At the hearing on May 11, 2011, undersigned counsel for Rest Assured made oral arguments to the Appellate Panel. (R. p. 225). Subsequently, DEW issued an Appellate Panel Decision dated May 31, 2011, affirming the February 16, 2007 Administrative Ruling. (R. pp. 31-34).

On June, 30, 2011, Rest Assured timely filed a Petition and Notice of Intent to Appeal in Richland County Court of Common Pleas. (R. pp. 216-223). This appeal was filed in Richland County pursuant to South Carolina Code of Regulations § 47-57, South Carolina Code § 1-23-380, and South Carolina Rules of Civil Procedure R. 74. *Id.*

On July 11, 2011, DEW filed a Notice of Special Appearance and a Motion to Dismiss the Richland County Court of Common Pleas action based on an alleged failure to file the appeal in the Administrative Law Court. (R. p. 226). In response to the Motion to Dismiss, Rest Assured filed a Motion to transfer this appeal to the Administrative Law Court pursuant to Rule 204 of the South Carolina Appellate Court Rules and South Carolina law. *Id.*

On March 27, 2012, the circuit court issued an order denying the motion to dismiss and transferring the case to the Administrative Law Court (“ALC”) pursuant to Rule 204, SCACR, and South Carolina case law. (R. pp. 224-230). DEW appealed this decision to the South Carolina Court of Appeals, but the appeal was dismissed.

The ALC accepted this case and issued an Order Governing Procedure on October 19, 2012. (R. p. 10). On November 8, 2012, DEW filed a motion to dismiss the appeal before the ALC based on lack of jurisdiction. (R. p. 2). The ALC issued an order on December 19, 2012 denying the motion to dismiss. (R. p. 2).

On March 7, 2013, Rest Assured moved for leave to supplement the record with a letter dated May 8, 2008, from the Compliance Review Officer, South Carolina Department of Health and Human Services, to Rest Assured, LLC approving the subcontract of Rest Assured. (R. pp. 272-273).

On March 14, 2013, after briefing by both parties but without oral argument, the ALC issued an order affirming the decision of DEW Appellate Panel. (R. pp. 9-27). Also on March 14, 2013, the ALC denied Rest Assured's motion to supplement the record on appeal. (R. pp. 6-8).

On March 25, 2013, Rest Assured filed a Motion for Reconsideration of the Order Denying the Motion to Supplement the Record on Appeal. (R. pp. 276-278). The ALC denied this motion on April 15, 2013. (R. pp. 1-5).

Rest Assured appealed the ALC's Order to the Court of Appeals on April 15, 2013 (R. pp. 279-280). After full briefing and oral argument, the Court of Appeals unanimously reversed the ALC and expressly found Rest Assured's "aid workers were independent contractors." *Rest Assured, LLC v. S.C. Dep't of Emp. & Workforce*, Op. No. 2014-UP-235 (S.C. Ct. App. filed June 18, 2014) (App. pp. 18-19).

DEW filed a Petition for Rehearing and Request for Rehearing *En Banc*, but the Court of Appeals unanimously denied the DEW's requests on September 18, 2014. (App. pp. 1-16). On October 20, 2014, DEW filed with this Court a Petition for Writ of Certiorari to the Court of Appeals. On January 16, 2015, this Court granted the petition for certiorari as to Questions I and II.

FACTS

Rest Assured is a business acting as a placement firm for in-home care services. (R. p. 41). Rest Assured places personal care aides (“PCAs” or “aides”) into patients’ homes to help with the patients’ daily care. (R. p. 76, ll. 12-17; R. p. 117, ll. 17-20). The aides 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 aides 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 aides as employees. (R. p. 142, ll. 1-3). However, Rest Assured and the aides themselves determined that they both desired independent contractor treatment. (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 aides 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 aides 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 aides have other full-time or part-time employment outside of any services they are performing through Rest Assured. (R. pp. 154-165). The aides are free to negotiate their contract rate with Rest Assured for each individual patient. (R. p. 75, ll.

9-20; p. 98 ll. 4-11). Rest Assured has an independent contractor agreement with each of the aides. (R. pp. 45-48).

The independent contractor agreement signed by each aide 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 aide]” and that the aide “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 aides 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 an aide 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 aides that meet the times available and the geographic location requested. (R. p. 83, l. 17 - p. 85, l. 13; R. p. 119, ll. 6-8).

Once the matching aides are identified, they are sent to the home of the patient to be interviewed by the patient. (R. p. 119, ll. 6-17). No representative of Rest Assured attends this interview. *Id.* The patient then picks which aide they want to provide the

services.¹ *Id.* Rest Assured has no influence over which aide is chosen. (R. p. 119, l. 18 - p. 120, l. 2). Importantly, the aide can accept or deny the position, and it is totally up to the aide to determine his/her own hours. (R. pp. 45-48; R. p. 78, ll. 11-13).

Once the aide is chosen by the patient, the aide 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 aide decides to utilize. (R. p. 87, ll. 9-20). An aide 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 aide back on the Registry. *Id.*

Rest Assured provides no supplies or equipment to the aide. (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).

Many of the aides 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 aide 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 aides 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).

¹ In its Brief, DEW 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.

ARGUMENT

I. The Court of Appeals correctly determined that the in-home personal care aides are independent contractors.

The Court of Appeals' decision should be affirmed. The Court of Appeals correctly determined that the relationship between Rest Assured and the in-home personal care aides was that of an independent contractor. This conclusion is supported by the contract entered between the parties as well as the conduct of the parties, which mirrored the contract. Additionally, this conclusion is supported by the four-factor test regarding the right to control.

A. The contract signed by the parties supports a finding that the aides are independent contractors.

When a court's or an agency's employment determination is challenged, the court will begin its analysis with the terms of the agreement itself. *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 300, 676 S.E.2d 700, 702 (2009). "The contract entered into by the parties must be considered in determining the nature of their relationship and has considerable weight." *Kilgore Grp., Inc. v. S.C. Emp't Sec. Comm'n*, 313 S.C. 65, 68, 437 S.E.2d 48, 50 (1993). "The primary test of [the contract's] character is the intention of the parties, which is to be gathered from the whole scope of the language used." *Id.*

In the case at hand, the contract between Rest Assured and the personal care aides plainly states that the relationship between the parties is that of an independent contractor. The contract describes in detail the nature of the relationship and how the parties shall conduct themselves, all of which supports a finding of an independent contractor relationship.

The contract states: (1) the aides' "schedule and hours are determined by [the aide]"; (2) the aide "will determine the method, details and means of performing the Services upon receiving the care plan for the patient"; (3) the aide "shall provide all supplies needed to perform the services and shall provide all transportation to the home of patient"; (4) the aide "shall be responsible for withholding, accruing and paying all income, social security, and other taxes and amounts required by law"; and (5) Rest Assured "will provide [the aide] with a Form 1099 at the end of year." (R. pp. 45-48).

The agreement further provides that "Rest Assured is aware that subcontractors work for a variety of agencies and/or clients" and actually *encourages* the aides to work for other agencies. (R. pp. 45-48). Indeed, more than 90% of the roughly 250 aides also work for other agencies. (R. pp. 186-194). The fact that most of the aides work for other providers is another factor weighing in favor of independent contractor status. *See e.g., Rhoney v. Fele*, 518 S.E.2d 536, 539 (N.C. Ct. App. 1999) (listing as a factor supporting a finding that a registered nurse was an independent contractor to a placement service that the nurse "could and did provide nursing services through other placement services. . . .").

Both Rest Assured and the aides signed the contract, expressly acknowledging that the aides were independent contractors. (R. pp. 45-48). Further, the contract specifically provided 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 independent contractor agreement does not merely declare the relationship is that of an independent contractor. The contract goes beyond just a recital, the terms of which illustrate the parties' intention to create an independent contractor relationship.

Further, the aides choose to become independent contractors after Rest Assured provided literature to them on the issue and access to an accountant to ask questions. (R. p. 143, ll. 8-13). The independent nature of the relationship of the parties and their intention is unambiguous.

Moreover, the parties' conduct mirrors the terms of the contract. The ALC found that Rest Assured complied with the terms of the contract and that the contract should be given considerable weight. (R. p. 15). There is no evidence in the record to suggest that the parties deviated from the terms of the contract in any way.

DEW has consistently glossed-over the contract, giving it little to no consideration, presumably because the contract directly undermines a finding of an employer-employee relationship. Although DEW may be able to ignore a contract, South Carolina courts cannot. South Carolina law requires courts to give considerable weight to the agreement between the parties, especially when the intention of the parties is clear. Here, the intention of the parties to create an independent contractor relationship cannot be any clearer. The contract and its terms strongly indicate that the parties desired an independent contractor relationship over that of an employer-employee. Parties should be free to define the nature of their relationship and to enter into contracts memorializing the terms of their agreements. To find otherwise would be to render contracts meaningless, creating uncertainty between parties and uncertainty in the law.

Even if the determination of the right to control can be described as a close call, the terms of the contract and the parties' conformance of their conduct with the terms of the contract tips the scale in favor of finding that the in-home personal care aides are independent contractors.

Given the existence of the contract and the fact that the parties' conduct conformed to the agreement, the Court of Appeals correctly found that the aides were independent contractors.

B. The aides are independent contractors under the four-factor common law test.

In addition to the independent contractor agreement, the common law factors indicate an independent contract relationship between Rest Assured and the aides. Pursuant to the South Carolina Labor and Employment Act, DEW uses, among other specific provisions, common law rules to determine whether an employer-employee relationship exists versus an independent contractor relationship. S.C. Code Ann. § 41-27-230(1)(b) (1976).² The settled law in South Carolina is that the determination of whether a worker is an employee or an independent contractor focuses on the issue of control; specifically, whether the purported employer has the right to control the worker in the performance of his work. *Wilkinson*, 382 S.C. at 299, 676 S.E.2d at 702 (citing *S.C. Workers' Comp. Comm'n v. Ray Covington Realtors, Inc.*, 318 S.C. 546, 547, 459 S.E.2d 302, 303 (1995); *Chavis v. Watkins*, 256 S.C. 30, 32, 180 S.E.2d 648, 649 (1971)).

In evaluating the right to control, the court examines four factors which serve as a means of analyzing the work relationship as a whole: (1) direct evidence of the right or exercise of control; (2) the furnishing of equipment; (3) the method of payment; and (4) the right to fire. *Id.* (citing *Ray Covington Realtors*, 318 S.C. at 548, 459 S.E.2d at 303; *Chavis*, 256 S.C. at 32, 180 S.E.2d at 649; *Tharpe v. G.E. Moore Co., Inc.*, 254 S.C. 196,

² The common law rules regarding the employee/independent contractor analysis have developed in the context of a wide spectrum of agencies. For example, many workers' compensation cases cite to employment security cases for propositions regarding the employee/independent contractor relationship, and vice versa. Accordingly, the law cited will necessarily draw from a number of cases outside of DEW/SCESC context.

200, 174 S.E.2d 397, 399 (1970); *Dawkins v. Jordan*, 341 S.C. 434, 439, 534 S.E.2d 700, 703 (2000)). In *Wilkinson*, this Court overturned the traditional employee-friendly analysis and returned to a “jurisprudence that evaluates the four factors with equal force in both directions.” *Id.*

1. Rest Assured does not control the manner in which the work is performed.

When a new patient needs services, the client (Medicaid or VA) contacts Rest Assured and provides a Care Plan. This Care Plan lists the services that need to be provided to the patient (bathing, housekeeping, etc.) and lists the times an aide is needed. Rest Assured then matches these services and times with available aides. Rest Assured then sends several aides to interview with the patient. Rest Assured does not have any involvement in these interviews or the selection process. The patient selects the aide they prefer. The aide is then given the ultimate control over their work and allowed to accept or deny the job. Once they accept the job, it is up to the aide to determine the exact means and methods for the assigned tasks. Rest Assured does not supervise the work of the aide, or direct their means and methods. Rest Assured only makes calls approximately every four months to confirm that the tasks on the Care Plan are being completed.

These facts are consistent with the independent contractor agreement. The contract provides that the aides’ “schedule and hours are determined by [the aide]” 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 factual situation of the aides is analogous to the quintessential independent contractor, a building subcontractor. Just as a subcontractor would be given a set up plans to build a wall, the aide is given a

set of tasks to provide to the patient. Neither the subcontractor nor the aide are told how to complete the task, only to complete it. The subcontractor can choose any method to build the wall as long as the final product conforms with the plans, just as the aide can choose any method to complete the tasks as long as the task is completed.

DEW argues that the calls Rest Assured makes every four months indicates control over the aide. This is not correct. The calls serve only to confirm that the tasks are being performed. Rest Assured calls the patient every four months to ensure that the client is satisfied. (R. p. 135, l. 17 – p. 136, l. 4). Rest Assured does not provide any supervision over the aides or control the means and methods used by the aides to perform their work. (R. p. 87, ll. 9-20; R. p. 92, ll. 1-2). Rest Assured does not direct or control the aides in any way, and makes the phone calls to ensure that the work was performed and that the patient is satisfied. This check to ensure the final result of the workers efforts is met does not indicate an employment relationship. *See Kushner v. Legette*, 330 F.2d 447 (4th Cir. 1964) (“An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, without being subject to the control of his employer **except as to the result of his work.**”) (citing South Carolina law) (emphasis added).

DEW also relies on the fact the Rest Assured initially selects the aides to interview with the patient as evidence of an employer relationship. DEW bases this theory on the incorrect fact that the patients dictate the hours worked, and that Rest Assured participates in developing the Care Plan for the patient. Rest Assured is given a Care Plan by Medicaid or the VA. This Care Plan specifies the hours and services to be provided to the patient. Rest Assured then selects the available aides based solely on the

aides' available hours and geographical location. (R. p. 83, l. 17 - p. 84, l. 3; R. p. 85 ll. 2-13; R. p. 119, ll. 6-8). There is no discretion in this choice and thus no exercise of control.

Further, the Care Plan only provides a list of services to be provided to the patient, but does not provide any means and methods regarding how the services are to be provided. "The mere fact that one of the contracting parties is empowered to give general directions as to what is to be done without control over the methods and means of doing it does not necessarily have the effect of creating the relation of principle and agent or master and servant." *Chatman v. Johnny J. Jones Exposition Inc.*, 212 S.C. 215, 220, 47 S.E.2d 302, 304-305 (1948). Additionally, these hours and services are set prior to the aide accepting the job, and thus the aide is given the ultimate control with the ability to deny the job.

DEW Appellate Panel originally held that training offered by Rest Assured indicated control over the aides, but this is incorrect. (R. p. 34). Rest Assured encourages the aides to obtain training and stay current on all of the procedures they are required to perform. (R. p. 136, ll. 5-16). But the training is not mandatory. *Id.* Occasionally, "but very rarely," Rest Assured does offer optional training at their offices. *Id.* This "rare" optional training is not enough to indicate some control over the 250 aides working with Rest Assured. The ALC agreed, finding "that Rest Assured's offering of optional training is not indicative of control over its aides. The [DEW] Appellate Panel erred in its finding to the contrary." (R. p. 21).

2. The aides are responsible for bringing their own equipment.

Rest Assured's Independent Contractor Agreement explicitly states that the aide is responsible for all supplies and transportation and associated operating costs incurred to provide services. (R. p. 45). The aides are also responsible for maintaining their own licenses and obtaining training each year. *Id.* Rest Assured does not provide any equipment or supplies to the PCA. (R. p. 99, ll. 9-20). DEW Appellate Panel agreed, finding that "[e]quipment is not furnished." (R. p. 34). This factor weighs heavily in finding the aides are independent contractors.

3. The aides negotiate their pay rate and receive a 1099.

Although aides are paid hourly, the aides negotiate their rate with Rest Assured for each individual client. (R. p. 75, ll. 9-20; R. p. 98, ll. 4-11). Accordingly, one aide may have different rates for different clients. This method of pay is indicative of an independent contractor, as the aide is not being paid a set rate for all of their work. The aide is given the autonomy and control to negotiate their rate on a client-by-client basis.

Further, Rest Assured does not withhold any taxes, and provides an IRS Form 1099 to each aide at the end of the year. This is indicative of an independent contractor relationship. *Wilkinson*, 382 S.C. at 303, 676 S.E.2d at 704.

The ALC and DEW Appellate Panel erroneously found that because Rest Assured provided workers' compensation insurance, it indicated an employee relationship. Rest Assured is required by law to provide for such insurance, and this requirement cannot be held against it. According to South Carolina workers' compensation law, Rest Assured is liable for the work related injuries of the aides because they are considered statutory employees. S.C. Code Ann. § 42-1-410 (1976). The independent contractor agreement

specifically states that the “Company agrees to provide worker’s compensation insurance for Personal Care Aide Contractor as a “statutory employee.” (R. pp. 45-46) (emphasis added).

Because Rest Assured is required by South Carolina law to cover these aides for workers’ compensation, this fact cannot be used as a way to claim an employee relationship. Accordingly, the method-of-payment factor weighs in favor of finding that an independent contractor relationship.

4. Rest Assured does not have the right to fire the aides.

Both Rest Assured and the aides may terminate the written agreement between them. As noted by the *Wilkinson* court, an important consideration regarding the “right to fire” is “the recognition that a right of termination, in some form, exists in an independent contractor arrangement. The critical inquiry is the term ‘fire,’ for it embraces the employment relationship.” *Wilkinson*, 382 S.C. at 304, 676 S.E.2d at 704. The *Wilkinson* Court ultimately concluded that where termination was controlled by the terms of their agreement, and the putative employer did not retain the “right to fire,” a finding of an independent contractor arrangement was warranted. *Id.*

Rest Assured does not retain the right to fire the aide; rather it only retains the right to terminate the written agreement between them. The aide retains that same right. Rest Assured is acting only as a personal aide broker, connecting the aide and the client. A termination of the agreement would mean only that the aide would no longer be placed in the pool of eligible candidates for a job.

Rest Assured does not fire the aide. The aide is only taken off a job if the patient requests it. Rest Assured has no control over whether the aide remains on a job or not. If

an aide is taken off of a job, he or she is placed back on the Registry and the independent contractor agreement remains in effect. The removal of an aide from a job at a patient's request has no bearing on the independent contractor agreement.

The right to fire as it relates to an employment relationship centers on whether that right creates some control over the alleged employee. Here, the relationship between Rest Assured and the aides is governed by the written contract signed by the parties. The contract specifically provides the causes for termination and states that either party may terminate the agreement. (R. p. 46). Accordingly, Rest Assured does not have a right to fire the aides. It only has the right to terminate the agreement, and may only do so under certain terms.

C. The Court of Appeals correctly relied on *Wilkinson* to support a finding that the aides are independent contractors.

Contrary to what Petitioner argues, the Court of Appeals correctly found that the instant case is most analogous to the case of *Wilkinson*, 382 S.C. 295, 676 S.E.2d 700 (2009). 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, 676 S.E.2d at 703. The Court also found that a strong regulatory presence did not reflect control by the driver's motor carrier. *Id.* at 303, 676 S.E.2d at 704. This included the only "equipment" that was furnished to the driver, the company's logo on his truck. *Id.* The Court also found that the driver was paid per mile and issued a 1099, which was consistent with an independent contractor agreement. *Id.* Lastly, the *Wilkinson* Court 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." *Id.* at 304, 676 S.E.2d at 704.

Like the drivers in *Wilkinson*, the personal care aides chose to be independent contractors. The relationship between Rest Assured and the aides is governed by the agreement. The contract states that the aide will determine the "means and methods" of how the work is performed and the aide is free to choose his or her own hours and free to refuse any assignment. (R. p. 78, ll. 11-13; R. p. 142, l. 11 – p. 143, l. 7; R. pp. 45-48). With regard to equipment, the only thing furnished by Rest Assured is its name badge with the company logo.

Similarly, Rest Assured issues 1099 to all the aides and "withholds no taxes." (R. p. 45-48). Also, each aide is free to negotiate their rate for each separate assignment/job. (R. p. 75, ll. 9-20; R. p. 98, ll. 4-11). The provisions of the Independent Contractor Agreement with the aides specifically provide the causes for termination and provide that either party can terminate the agreement, eliminating any "right to fire." (R. pp. 45-48).

Finally, the fact that Rest Assured is highly regulated by the In-Home Care Providers Act does not indicate a right to control. Rest Assured is required by law to screen aides for certain "personal information, completion of a minimum education requirement, completion of minimum training and continuing education requirements, and screening for communicable diseases." S.C. Code Ann. § 44-70-40 (1976). The Act also requires that Rest Assured perform background checks on each of the aides. S.C. Code Ann. § 44-70-60 (1976). These requirements cannot be held against Rest Assured in analyzing the nature of the relationship between the parties.

D. This case is distinguishable from *Kilgore*.

Contrary to what Petitioner argues, this case is not like *Kilgore Grp., Inc.*, 313 S.C. 65, 437 S.E.2d 48 (1993). In *Kilgore*, this Court found that a company that supplied temporary workers used employees and not independent contractors. The company supplied temporary workers to various businesses, and then the businesses would “control the day-to-day activities of the workers” and direct the workers as to the specifics of their jobs and tasks. *Id.* at 67, 437 S.E.2d at 49. The temporary workers worked *alongside* the regular employees and were “under the direction of the supervisors for the various departments.” *Id.* The workers were given a task, directions on how to accomplish those tasks, and were supervised on a day-to-day basis.

In addition, the workers signed a contract stating that the relationship was one of independent contractor. *Id.* Based on these facts, the Court concluded that direction and control over the workers was imputed to the temporary agency because the clients’ control was “derived solely from their contracts with [the company].” *Id.* at 69, 437 S.E.2d at 49.

Unlike the contract in *Kilgore*, the contract in this case does more than state that the relationship between Rest Assured and the aides is that of independent contractor. Instead, the contract provides that the aides (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).

Further, the facts in this case are distinguishable from those in *Kilgore*. Here, there is no evidence that Rest Assured or the patient controlled the manner in which the aides performed their work. To the contrary, the independent contractor agreement specifically states that the aide controls the means and methods to accomplish the tasks. (R. p. 45). Rest Assured does not dictate how the services are performed, or which means and methods the aide uses. (R. p. 87, ll. 9-20). Moreover, there is no evidence in the record that the patient ever controls the means and methods of the aide.³ Accordingly, there is no control to be imputed to Rest Assured.

Moreover, unlike the workers in *Kilgore*, the aides are given the tasks (the Care Plan) *before* accepting the job and given the ultimate control in accepting or denying the job. Further, the aide is never told how to accomplish the tasks, given any direction, or supervised. Lastly, the aides are not given compensation prior to the completion of the job as in *Kilgore*.

It is worth noting that the DEW Appellate Panel never made any factual findings regarding any alleged control by the client or patient. (R. pp. 31-34). The DEW Appellate Panel did not make any findings or draw any conclusions that ever mentioned any control by the patient or client over the aide. *Id.* The DEW Appellate Panel did not base its employment decision on any alleged control by the patient or client. *Id.* It was not until

³ DEW cites to one line in the record in response to the question of whether the aide can change the patient Care Plan without Rest Assured's authorization to which Reatha Johnson, owner of Rest Assured, replies "With the contracts, they know that they're there for custodial reasons and they get in there and they do basically what the client wants them to do in their scope of practice." (R. p. 94, ll. 1-5). This response applies only to the tasks that the aide agrees to perform and not to any means and methods as to how to accomplish these tasks. In fact, this indicates that the aide can change the tasks without Rest Assured and thus establishes lack of control by Rest Assured.

the case was on appeal before the ALC that DEW ever raised the issue of alleged control by the client or patient.

The present case is also legally distinguishable from *Kilgore*. 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 aides. The aides 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.

Even if the third-party patient controlled the aide as DEW alleges, which Rest Assured strongly disputes, there is no contract between the patient and Rest Assured by which to derive control. Further, the contract with the aides specifically does not allow control of the aide, thus there is no control to be delegated to the patients by Rest Assured.

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. Just because the Court of Appeals did not cite *Kilgore* does not mean that the court ignored the decision, or that the decision conflicts with *Kilgore* as argued by Petitioner.

The New York cases cited by Petitioner represent the rulings of a single jurisdiction, and stem from a single case, *Matter of David Gentile Nursing Servs.*

(*Roberts*), 480 N.E.2d 745 (N.Y. 1985), and thus are not persuasive. Further, the majority of jurisdictions that have dealt with factually similar circumstances as the instant case have found the workers to be independent contractors. See e.g., *Long v. Superior Care, Inc.*, 427 S.W.3d 106 (Ark. Ct. App. 2013)(home health aide was found to be an independent contractor because she signed an agreement acknowledging her status as self-employed and was responsible for her own training, certifications, equipment, and payment of taxes); *Fletcher v. Workers' Comp. Appeal Bd.*, No. 1664 C.D. 2009 (Pa. Commw. Ct. 2010)(unpublished)(home health aide was found to be an independent contractor when she signed an agreement and understood she was an independent contractor and the home health agency did not control her day-to-day activities); *Rhoney v. Fele*, 518 S.E.2d 536 (N.C. Ct. App. 1999)(temporary nursing agency found to have independent contractors when the work was sporadic, the nurses could reject the job, and there was no supervision of the services provided); *In re Serino*, 190 B.R. 778 (Bankr. M.D. Pa. 1995)(temporary nursing agency found not liable for federal unemployment tax because nurses were independent contractors); *Avchen v. Kiddoo*, 246 Cal.Rptr. 152 (Cal. Ct. App. 1988), (nursing referral service agencies were not intended by the legislature to be employers within the meaning of the California Act); *Hospital Res. Personnel, Inc. v. United States*, 68 F.3d 421 (11th Cir. 1995)(temporary nursing agency found not liable for federal unemployment tax because agency did not control the nurses and thus they were independent contractors); *Robison v. Faine*, 525 So.2d 903 (Fla. Dist. Ct. App. 1987), (tort case filed against a nurse referral agency where court found the nurses were independent contractors); *Critical Care Register Nursing, Inc. v. United States*, 776 F.

Supp. 1025 (E.D. Pa. 1991)(temporary nursing agency found to have independent contractors).

Finally, Rest Assured is authorized by the South Carolina Legislature to treat its aides as independent contractors. As an In-Home Care Provider, Rest Assured is governed by the “Licensure of In-Home Care Providers Act” (the “Act”). S.C. Code Ann. § 44-70-10 (1976). The Act provides:

“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 (1976) (emphasis added). Rest Assured is modeled on the State of South Carolina’s independent contractor arrangement provided by the Department of Disability and Special Needs. (R. p. 116, ll. 5-13).

This is consistent with federal law. The Fair Labor Standards Act of 1938 specifically provides for an exemption from minimum wage and overtime requirements for individuals providing companionship services to clients in their own homes. 29 U.S.C.A. § 213(a)(15). This federal law recognizes the difficulties faced in the companionship services industry, and provides an exemption. South Carolina law, federal law, case law from other jurisdictions, and the actions of the SCDDSN all support the proposition that the home health industry is distinct from other industries and aides should be treated as independent contractors.

Analyzing the four factors regarding the right to control, the Court of Appeals correctly found that the substantial evidence did not support the decision by the ALC and

DEW. Accordingly, this Court should affirm the Court of Appeals and find the aides were independent contractors.

II. The Court of Appeals properly applied the substantial evidence standard.

The Court of Appeals properly applied the substantial evidence standard in determining that the aides are independent contractors. The court reviewed the evidence in the record and determined that the ALC's findings were clearly erroneous in view of the substantial evidence in the record as a whole.

According to the Administrative Procedures Act (APA), an appellate court may reverse or modify a decision if the agency's inferences, conclusions, or decisions are "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). "Although [an appellate court] shall not substitute its judgment for that of the ALC as to findings of fact, [an appellate court] may reverse or modify decisions that are controlled by error of law or are clearly erroneous in view of the substantial evidence in the record as a whole." *ESA Servs., LLC v. S.C. Dep't of Revenue*, 392 S.C. 11, 24, 707 S.E.2d 431, 438 (Ct. App. 2011).⁴

This is exactly what the Court of Appeals did. After briefing and oral argument, the Court of Appeals determined that the ALC's findings were clearly erroneous in view of the substantial evidence in the record as a whole. To the contrary, the Court of

⁴ DEW asserts that the Court of Appeals' reliance on this case is incorrect because it is not an unemployment insurance case. The Court of Appeals did not cite the case for its facts. The Court of Appeals cited the case for its standard of review. The case does not have to be factually identical for the standard to apply. Even DEW cites the same standard.

Appeals did what appellate courts do, which is review the record as a whole and determine whether the decision reached was clearly erroneous. In light of the contract between the parties and the conformity of the parties' conduct to the contract, the Court of Appeals determined that the conclusion below was erroneous.

Further, there is nothing in the Court of Appeals' decision to suggest that the Court of Appeals engaged in judicial fact-finding or substituted its judgment for that of the tribunal below, as argued by DEW. The facts in this case were not in dispute. Counsel for DEW admitted this at oral argument.⁵

DEW does not argue that the Court of Appeals cited the incorrect standard in rendering its decision. DEW simply states that the Court of Appeals must have applied the incorrect standard because DEW disagrees with the result reached. DEW provides no basis to support its assertion that the Court of Appeals incorrectly applied the substantial evidence standard. DEW's argument is conclusory. Without explanation or analysis, DEW argues that because the Court of Appeals determined that the aides were independent contractors, the Court of Appeals must have participated in judicial fact-finding and/or substituted its judgment for that of the lower tribunals. There is no evidence to support this.

As DEW repeatedly points out in its brief, “[a]ppellate 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’t Sec. Comm’n*, 318 S.C. 456, 457, 458 S.E.2d 429, 430 (1995). The Court of Appeals did just

⁵ When the Court of Appeals asked counsel if she agreed that there was no dispute as to the facts in the case, counsel for DEW responded, “I would agree to the extent that the majority of the facts are not disputed.”

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. p. 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.

Under DEW’s theory, the administrative law court could never be reversed without the appellate court exceeding its scope of review. This theory renders the appellate process meaningless. The whole point of the appellate process is to allow parties to seek relief when the lower court has erred. Any one of the arguments made by DEW could be used to argue that the ALC decision violated the standard of review. The ALC, as a reviewing court, must also apply the substantial evidence standard of review. S.C. Code Ann. § 1-23-380 (1976); *see also* S.C. Code Ann. § 1-23-600 (1976).

Although DEW repeatedly cites the ALC decision in its brief and refers to the decision as “well-reasoned,” the ALC made findings of fact not addressed by DEW’s Appellate Panel and therefore substituted its judgment for that of DEW. As discussed previously, the DEW Appellate Panel does not mention any alleged control by the client or patient. (R. pp. 35-40). It was the ALC, sitting as an appellate court, which made these findings of fact, which DEW now relies upon to argue that the Court of Appeals erred.

As another example, the ALC held that the “finder of fact could have found that the clients [patients] provide nearly all of the equipment to the aides and that what the aides supply is negligible.” (R. p. 23). But the finder of fact, the DEW Appellate Panel, found that “[e]quipment is not furnished.” (R. p. 34). The ALC improperly substituted its

own judgment as to whether equipment was furnished when the DEW Appellate Panel already made the determination that it was not.

Even if the Court of Appeals can be said to have exceeded the scope of review, the substantial evidence standard does not apply to all aspects of this case. The substantial evidence standard applies only to factual determinations. *See Smoky Mountain Secrets, Inc. v. S.C. Emp't Sec. Comm'n*, 312 S.C. 111, 113, 439 S.E.2d 288, 289 (Ct. App. 1993), *rev'd in part*, 318 S.C. 456, 458 S.E.2d 429 (1995) (“We must affirm the factual findings of the Commission if they are supported by substantial evidence.”) (emphasis added). The standard does not apply to questions of law, which an appellate court may review de novo. *Catawba Indian Tribe v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) (questions of law reviewed de novo). Further, the interpretation of a contract is a matter of law. *Felts v. Richland Cnty.*, 303 S.C. 354, 400 S.E.2d 781 (1991) (action to construe an employment contract).

Although the analysis of the nature of an employment relationship is a fact-intensive inquiry, the question ultimately involves questions of law and questions of fact. Other jurisdictions have held that where there are no facts in dispute, the nature of the employment relationship becomes a question of law. *Neve v Austin Daily Herald*, 552 N.W.2d 45 (Minn. Ct. App. 1996) (“When the facts are undisputed, we move directly to step two, and the determination of whether an employment relationship exists is purely a legal question.”); *Pearson v. Indus. Comm'n*, 743 N.E.2d 685 (Ill. App. Ct. 2001) (“When, however, there is no conflict in the evidence and but one conclusion can reasonably be drawn therefrom, the existence of an employer/employee relationship can be decided as a question of law.”); *Whitehead v. Safeway Steel Products, Inc.*, 497 A.2d

803 (Md. 1984) (“Where the terms and manner of employment are disputed and different inferences may be drawn therefrom, the issue is a mixed questions of law and fact, to be determined by the trier of the facts, under proper instructions, but where the essential terms and manner of employment are undisputed, the question is one of law for the court.”); *Stillman v Workers Comp. Appeal Bd.*, 569 A.2d 983 (Pa. Commw. Ct. 990) (“[I]t goes without saying that the existence of an employer-employee relationship is a question of law which must be determined on the basis of the facts of the individual case.”); *Benavidez v Sierra Blanca Motors*, 959 P.2d 569 (N.M. Ct. App. 1988) (“[W]hether the status of an employer-employee relationship exists is a question of law if the material facts are undisputed.”); *Uninsured Employers’ Fund v. Garland*, 805 S.W.2d 116 (Ky. 1991) (“Whether decedent was an employee or an independent contractor is a question of law if the facts below are substantially undisputed.”).

Here, the parties’ relationship is governed by the terms of a contract. The interpretation and effect of that contract is a question of law. Further, the determination of whether the aides are employees or independent contractors is a legal question having legal consequences. Although the analysis is fact-intensive in nature, the ultimate question is one of law. Moreover, in a case like this one, where there admittedly are no issues of fact, the question before the court is one of law. Although the Court must give deference to the lower court on questions of fact, the Court is free to consider all the facts in making the legal determination regarding the nature of the relationship between the parties. This is especially true in this case, where the relationship is governed by the Independent Contractor Agreement, and the interpretation of a contract is a question of law.

DEW relies on *Todd's Ice Cream, Inc. v. S.C. Emp. Sec. Comm'n*, 281 S.C. 254, 315 S.E.2d 373 (Ct. App. 1984), for the premise that any time there is a question regarding the nature of the employment relationship, the issue becomes a question of fact. *Id.* at 259, 315 S.E.2d at 376 (“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.”). But that is not what *Todd's Ice Cream, Inc.* says. The case says that where the *evidence* is conflicting, the question becomes one of fact. It does not say that the overarching question itself – of whether someone is an employee or an independent contractor – is one of fact.

Because the Court of Appeals properly applied the standard of review, the decision should be affirmed.

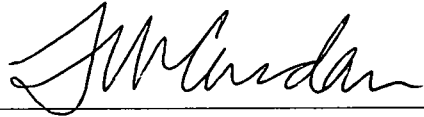
CONCLUSION

The Court of Appeals' decision should be affirmed. The parties entered into a contract stating their desire not to have an employer-employee relationship. The contract outlines the terms and conditions of employment, all of which are consistent with an independent contractor relationship. The contract has never been challenged as invalid or illegal in any way. The parties have conformed their conduct to the terms of the contract. Since 2006, Rest Assured has used and relied upon the existence of the contract. There is nothing more the parties could have done to make their intention and the nature of the relationship any clearer. A decision holding that the relationship is something other than what is stated in the contract will render the contract meaningless and undermine the parties' ability to control the nature of their relationship.

Even without the contract, the parties' conduct supports a conclusion that the aides are independent contractors. The aides determine their schedule, accept or deny jobs, choose the means and method of performing their jobs, provide their own equipment and training, negotiate the rate for each patient, and receive a Form 1099.

The Court of Appeals' decision is consistent with Supreme Court precedent and properly applies the substantial evidence standard. Accordingly, this Court should uphold the decision of the Court of Appeals and conclude that the aides are independent contractors for unemployment tax purposes.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APR 8 2015

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

S.C. Supreme Court

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

PROOF OF SERVICE

I, the undersigned attorney, 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 **the Brief of Respondent** by placing a copy of same in the U.S. Mail, First Class, postage prepaid, on April 8, 2015, as follows:

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



Tina M. Cundari, Esquire



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April 8, 2015

RECEIVED

APR 8 2015

VIA HAND-DELIVERY

The Honorable Daniel E. Shearouse
Clerk, The South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

S.C. Supreme Court

RE: Rest Assured v. SCDEW
Appellate Case No. 2013-002233
SGSL No.: 6251/1500

Dear Mr. Shearouse:

Enclosed please find the original and sixteen (16) copies of the Brief of Respondent. 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.

Sincerely,

Tina Cundari

TMC:sec

Enclosure

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