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THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. 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

Rest Assured, LLC,

Respondent,

v.

South Carolina Department of
Employment and Workforce,

Petitioner.

Appellate Case No. 2014-002233

REPLY BRIEF OF PETITIONER

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STATEMENT OF QUESTIONS ON CERTIORARI

- 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'S ADMINISTRATIVE JUDGMENT?**

ARGUMENT

I. **Rebuttal of Factual Matters Raised in Rest Assured's Brief**

DEW is compelled to rebut some of the representations made by Rest Assured in its Brief regarding the evidence in the Record on Appeal (ROA) and the impact of that evidence on the right-to-control test. The Court must review this case under the well-established and controlling precedent for determining the existence of an employer-employee relationship which demands that:

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 is 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, Inc. v. S.C. Emp. Sec. Comm'n, 281 S.C. 254, 259, 315 S.E.2d 373, 376 (Ct. App. 1984) (emphasis added, internal citations omitted).

1. **Rest Assured most certainly has contracts directly with its clients/patients.**

In its recitation of the Facts, Rest Assured initially states accurately that it “obtains patients from three primary sources, Medicaid, the U.S Department of Veteran Affairs (VA), **and private pay individuals**. (R.p.118, lines 1-10).” (Resp.Br., p.5) (emphasis added). Later in its brief, however, Rest Assured attempts to ignore that it often deals directly with private paying clients when it states that “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.” (Resp.Br., p.20).

Rest Assured then attempts to distinguish *Kilgore Group, Inc. v. S.C. Emp. Sec. Comm'n*, 313 S.C. 65, 437 S.E.2d 48 (1993), by arguing it does not have any direct

contracts with its “clients/patients.” Yet it is clear from the ROA that Rest Assured does indeed have direct contracts with at least a portion of its clients, just like the employer in *Kilgore*. (R.p.118, lines 1-12). When asked how she gets her clients, Rest Assured’s director, Reatha Johnson, responded that her dispatch requests come from “various sources,” including “private pay” clients who pay her “out of pocket.” (R.p.118, lines 1-8; *see also* p.83, lines 2-13). Ms. Johnson further explained that her “out of pocket” private clients pay directly to Rest Assured. (R.p.121, lines 3-9; p.98, lines 18-19; p.120, lines 9-14).

Moreover, when asked what the ultimate goal of Rest Assured’s business is, Ms. Johnson responded: “just to take care of the client” and match Personal Care Aides (“PCAs”) who are available for work with people who need caretaking services. (R.p.119, lines 1-8). Therefore, even where the initial referrals come from Medicaid or the VA and those agencies are billed by Rest Assured, the service that Rest Assured provides is indisputably directly to, and for the benefit of, the disabled client.

The principal holding of *Kilgore* is based on the salient fact that the placement agency’s clients “had no contract with the [temporary] workers,” and thus, the clients’ ability to exercise control over the workers’ activities was “derived solely” from the clients’ contracts with the temporary agency (*Kilgore*), and from “*Kilgore*’s contract with the workers.” *Kilgore*, 313 S.C. at 69, 437 S.E.2d at 50. The same resultant right to control exists in the instant case. Rest Assured’s clients (i.e., the individuals needing in-home caretaking services) have no contract with the PCAs, and the clients’ “ability to exercise control” over the PCAs’ activities is “derived solely” from: (1) the clients’ contracts with Rest Assured (regardless of whether they paid Rest Assured directly or a

government agency paid Rest Assured), and (2) Rest Assured's own agreement with the PCAs. *Id.*

The operative facts here are no different from those in *Kilgore* where this Court held that the substantial evidence supported an inference Kilgore "possessed the right to control the workers' performance and the manner in which it was done" and then "**delegated that authority to its clients.**" *Id.* (emphasis added). Rest Assured's repeated contention that it had no control over the PCAs' performance of their specific caretaking duties ignores the fact that, pursuant to *Kilgore*, the clients' control over the manner in which the PCAs performed their work is imputed to Rest Assured because of the nature of its business.

2. There is substantial evidence that both Rest Assured and Rest Assured's clients have the right to control the PCAs' work.

Rest Assured maintains in its brief that there is "no evidence that Rest Assured or the patient controlled the manner in which the aides performed their work." (Resp.Br., p.20). This assertion is refuted by the many instances in the ROA that establish the right to control the PCAs rested with both Rest Assured itself and Rest Assured's clients. Ms. Johnson stated unequivocally that the PCAs' work is most directly controlled by the in-home client:

With the contracts, [the PCAs] 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, lines 3-5) (emphasis added).

In addition, Ms. Johnson repeatedly testified that the decision on whether to retain or terminate the PCA from an assignment is based on the client's wishes. (R.p.92, line 7-p.93, line 2; p.112, lines 6-15). If the client is satisfied, then the PCA remains on the job.

(R.p.113, lines 4-6). This is the epitome of exercising the right to control, and, again, the right of Rest Assured's client to terminate a PCA's assignment is derived solely from the contracts with Rest Assured. *See Kilgore*, 313 S.C. at 69, 437 S.E.2d at 50.

Moreover, an initial assessment of the clients' care needs is what Rest Assured uses to match the PCAs to its clients. This is an integral part of the service that Rest Assured provides for its clients. Additionally, Ms. Johnson testified that the "nature of [her] business" is "solely determined by the needs of the client." (R.p.142, lines 13-15). She also stated that Rest Assured bases its choice of the PCA for an assignment on "the expectations" and needs of the client. (R.p.79, lines 4-12). Ms. Johnson specifically noted that her client care liaison is "very talented" with matching PCAs to clients. (R.p.85, lines 6-13). A PCA does not have any control whatsoever over choosing to work for Rest Assured's client; instead, a PCA only gets the chance to interview with Rest Assured's client when Rest Assured matches and then selects that PCA from its registry. It is, therefore, disingenuous for Rest Assured to now boldly claim it has "no discretion in [its] choice and thus no exercise of control." (Resp.Br., p.13).

Indeed, Rest Assured's contention that it has no control over the manner and method of the PCAs work is rebutted by Ms. Johnson's own description of her business model. Given that Rest Assured places PCAs in clients' homes to provide custodial care, the fact that the client controls the PCAs' work is pivotal to the issue of whether the PCAs are considered employees for unemployment purposes. As this Court stated in *Kilgore*, where the "clients believed the workers could be terminated at any time based upon their dissatisfaction of the workers' performance," this supports the agency's

determination that the workers were employees, and not independent contractors. *Kilgore*, 313 S.C. at 69, 437 S.E.2d at 50.

Finally, Rest Assured claims it does not retain the right to fire the PCAs; instead, it “only retains the right to terminate the written agreement between them.” (Resp.Br., p.15). Rest Assured then explains that a “termination of the agreement would mean **only** that the aid would no longer be placed in the pool of eligible candidates for a job.” *Id.* (emphasis added). This “termination of the agreement,” of course, exemplifies the right to fire. Moreover, Ms. Johnson testified that a PCA who works for Rest Assured does “not have a right in [the] contract to take my client that I’ve got, and take it to another agency.” (R.p.107, line 20-p.108, line 2). The so-called “Independent Contractor Agreement” between Rest Assured and the PCAs has a specific section entitled, “Agreement Not To Compete With The Company.” (R.p.46). The fact that the PCAs are bound by what amounts to a non-competition agreement is further evidence of the extensive control Rest Assured exerts over their work lives, and, thus, is further evidence of an employer-employee relationship.

When determining unemployment tax liability under South Carolina common law, the focus is on the right to control. *Kilgore*, 313 S.C. at 68, 437 S.E.2d at 49-50 (“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”) (emphasis added). In other words, the test is not whether actual control is exercised, but rather “whether there exists the right and authority to control and direct the particular work or undertaking.” *Id.* (explaining that 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).

In summary, Rest Assured contracts with the client, selects the PCAs from the registry who will interview with the client, requires weekly reports of hours worked, retains the responsibility for billing and collecting from the clients, and pays the PCAs an hourly wage. Furthermore, Rest Assured's business is providing PCA services; without the PCAs, this business could not operate. Thus, the PCAs' services are closely integrated with Rest Assured's business operations. All of these facts are typical of an employment relationship, and not one that involves independent contractors.

There is substantial evidence in the record, including Ms. Johnson's testimony establishing Rest Assured's business practices and the written contract, that illustrates Rest Assured has the right to control the PCAs. Reviewing this evidence, and applying binding precedent of Kilgore, compels that DEW's decision finding the PCAs to be employees must be reinstated.

II. Pursuant to South Carolina Law, the Determination of Rest Assured's Unemployment Tax Liability is Dependent on the Agency's Factual Findings on the Fact-Intensive Issue of Right to Control; Rest Assured's citation to out-of-state case law is inapposite.

The proper and full scope of review by an appellate court reviewing a final DEW decision is governed by statute, as follows:

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.

S.C. Code Ann. § 1-23-380(5).

As to the particular issue of whether a worker should be considered an employee for unemployment tax purposes, “[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, Inc. v. S.C. Emp. Sec. Comm'n*, 281 S.C. 254, 259, 315 S.E.2d 373, 376 (Ct. App. 1984) (emphasis added). Rest Assured seems to suggest in its brief that there are no factual disputes in this case;¹ on the contrary – the central issue of the instant case is a dispute over the inferences to be derived from the conflicting evidence regarding whether the PCAs are employees (versus independent contractors). *See Matter of Holbrook Speech*

¹ *See* Resp.Br. pp.24, 26, 27. Moreover, DEW has never contended or conceded that the facts in this case, and/or the inferences to be derived from the evidence, are undisputed.

Servs., Inc., 116 A.D.2d 863, 864, 498 N.Y.S.2d 185 (1986) (where purported nurse placement employer asserted it was a registry or referral service, and evidence supported this contention, “such conflict merely presents a factual controversy for” resolution by the unemployment agency).

The primary issue at the heart of this case is whether Rest Assured’s PCAs are employees for unemployment tax purposes. Pursuant to South Carolina law, this is a question of fact to be resolved by DEW. *Id.*; see also *Merck v. S.C. Emp. Sec. Comm’n*, 290 S.C. 459, 460, 351 S.E.2d 338, 339 (1986) (DEW’s Appellate Panel is the ultimate finder of fact in unemployment matters). Rest Assured’s reliance on non-binding, out-of-state case law that patently conflicts with this Court’s binding precedent, is inapposite to the instant case.

Furthermore, on appeal, the scope of review is strictly “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. 456, 457, 458 S.E.2d 429, 430 (1995) (citing *Kilgore, supra*). “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.” *Todd’s Ice Cream*, 281 S.C. at 258, 315 S.E.2d at 375.

“[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent a court from concluding that substantial evidence supports an administrative agency’s finding.” *Porter v. S.C. Pub. Serv. Comm’n*, 333 S.C. 12, 21, 507 S.E.2d 328, 332 (1998). As this Court recently explained, 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.” *Nucor Corp. v. S.C. Dep't of Emp. & Workforce*, 410 S.C. 507, 517, 765 S.E.2d 558, 563 (2014); *accord* S.C. Code Ann. § 1-23-380(5) (the reviewing court “may not substitute its judgment ... as to the weight of the evidence on questions of fact”);

Because there is ample evidence on the disputed issue of right to control that weighs in favor of a finding that Rest Assured’s PCAs are employees, the Court of Appeals erred in reversing and substituting its own judgement on this fact-intensive issue.

III. The Resolution of This Appeal Depends on More Than Simply the Interpretation of a Written Contract.

Regarding the right to control test, this Court has clearly stated a “contract entered into by the parties must be considered in determining the nature of their relationship and has considerable weight. **However, neither of the parties control the legal effect of the contract by the language used therein.**” *Todd's Ice Cream*, 281 S.C. at 258, 315 S.E.2d at 375; *accord Kilgore*, 313 S.C. at 68, 437 S.E.2d at 49-50 (“language in the contract merely declaring the relationship is that of an employer/independent contractor is not dispositive”).

Pursuant to South Carolina statute, “[n]o agreement by an individual to waive, release or commute his rights to [unemployment] benefits ... shall be valid.” S.C. Code Ann. § 41-39-10. This statute specifically forbids an employer from “directly **or indirectly**” requiring or accepting “any waiver of rights” to unemployment benefits by an employee. *Id.* (emphasis added). Indeed, any employer who violates this statute “shall, for each offense, be fined not less than one hundred dollars nor more than one thousand dollars or be imprisoned for not more than six months or both.” *Id.*

Rest Assured asserts that if this Court decides that the relationship between Rest Assured and its PCAs “is something other than what is stated in the contract,” this “will render the contract meaningless and undermine the parties’ ability to control the nature of their relationship.” (Resp.Br., p.28). However, contracts between employers and workers are not binding on DEW, which is an executive branch agency bound to carry out its public taxation functions in accordance with governing law, regulations, and binding precedent of this Court. Where, as here, the relevant facts and case law indicate an employer-employee relationship, the parties may not subvert such a conclusion through a contract. *See Todd's Ice Cream*, 281 S.C. at 258, 315 S.E.2d at 375 (neither of the parties controls the legal effect of the contract simply by the language used in the contract); S.C. Code Ann. § 41-39-10 (any agreement by an individual to waive or commute his rights to unemployment benefits is invalid, and an employer may not “indirectly” require a waiver of unemployment rights by an employee).

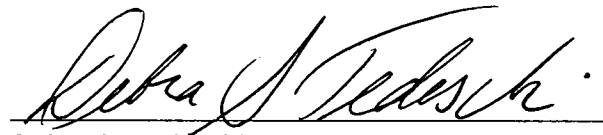
Put simply, Rest Assured’s broad suggestion that “the parties’ relationship is governed by the terms of a contract” is contradicted by binding South Carolina statutory and case law. (Resp.Br., p.27).

Accordingly, because of the substantial evidence in the record showing Rest Assured’s right to control, and the scope that governs appellate review, the Court must reverse the Court of Appeals and reinstate DEW’s decision that Rest Assured is liable for unemployment taxes on the PCAs’ wages.

CONCLUSION

In conclusion, for the reasons discussed above, as well as in Petitioner's opening Brief, this Court should reverse the Court of Appeals' opinion, and reinstate the ALC's Order which upheld DEW's finding that Rest Assured's PCAs are employees for the purpose of unemployment tax liability.

Respectfully submitted,



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April 20, 2015

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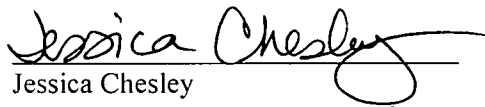
PROOF OF SERVICE

I certify that I have served the Reply Brief of the Petitioner Department of Employment and Workforce on Respondent Rest Assured, LLC by depositing a copy of it in the United States Mail, postage prepaid, on April 20, 2015, addressed to its attorneys of record,

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April 20, 2015

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APR 23 2015

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
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RE: Rest Assured LLC v. SC Department of Employment and Workforce
Appellate Case No. 2014-002233

Dear Mr. Shearouse:

Enclosed are fifteen copies of the Reply Brief of the Petitioner, SC Department of Employment and Workforce. Also included is a Proof of Service to the other parties.

Please let me know if you have any questions.

Sincerely,

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

Jessica Chesley
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