

No. A10-996

State of Minnesota
In Court of Appeals

MAJESTIC TILE AND STONE,

Relator,

vs.

CARY NELSON,

Respondent,

and

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

Respondent.

RESPONDENT-DEPARTMENT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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Legal Issue

Minnesota law lays out the test for determining whether, for purposes of unemployment insurance, an individual performed building construction or improvement services in employment or as an independent contractor. To be considered an independent contractor rather than an employee, he must meet each of nine criteria, including that he, and not the entity for whom the work is being done, pays the main expenses of the job. Cary Nelson laid tile for Majestic Tile & Stone, LLC (“Majestic”) for several years, and Majestic paid for the cost of the tile and setting materials. Was Nelson an employee of Majestic?

Unemployment Law Judge (“ULJ”) Richard Croft found that Nelson performed services for Majestic in employment under the Minnesota Unemployment Insurance Law.

Statement of the Case

This case involves the question of whether Nelson was an employee of Majestic. Nelson applied for unemployment benefits in 2008 after the company for which he previously worked, Mendota Flooring, went out of business.¹ Nelson reported the work he had done for Majestic’s owner, Robert Levy, and since Levy had not filed any wage detail reports for Nelson with the Department of Employment and Economic Development (the “Department”), the Department

¹ T. 14-16. Transcript references will be indicated “T.” Exhibits in the record will be indicated “E-” with the number following.

conducted an audit that resulted in a determination of employment status. The audit found that Majestic had an employer-employee relationship with Nelson, and must pay taxes on the wages he earned.² Majestic appealed the determination,³ and ULJ Croft held a de novo hearing in which both Nelson and Majestic participated, with Majestic represented by counsel. The ULJ issued a decision holding that the services Nelson performed for Majestic were in employment.⁴ Majestic filed a request for reconsideration with the ULJ, who revised his factual findings and legal conclusions, but affirmed his holding that Nelson is an employee of Majestic.⁵

This matter is before the Minnesota Court of Appeals on a writ of certiorari Majestic obtained under Minn. Stat. § 268.105, subd. 7(a) (2009) and Minn. R. Civ. App. P. 115.

Statement of Facts

Cary Nelson has worked for Robert Levy and Majestic Tile for several years, beginning in late 2007.⁶ Nelson first worked with Levy when the two were employed by Mendota Flooring.⁷ Beginning in late 2007 Nelson worked for Levy as an individual, and continued to work for him after Levy formed Majestic Tile &

² Return-2A, E-1, E-5.

³ E-2.

⁴ Return-3; Appendix to Department's Brief, A6-A9.

⁵ Return-6; Appendix, A1-A5.

⁶ E-9.

⁷ T. 27.

Stone LLC in April of 2008.⁸ Nelson works as a tile setter, installing and grouting tile and other stones on different job sites.⁹ Nelson either works alone or with Levy, if the job is big enough.¹⁰

Before 2009, Nelson worked under the name of Nelson Tile & Stone.¹¹ In January of 2009, Nelson formed his own LLC, and procured a federal FEIN number, in order to comply with a change in Minnesota law.¹² Nelson then began to work for Majestic as C. Nelson Tile and Installation, LLC.¹³ Levy and Nelson also signed an independent contractor agreement in January of 2009.¹⁴

Nelson is paid by the job, based on his price sheet charging per square foot of work.¹⁵ Nelson sets the prices on the price sheet.¹⁶ Levy emails Nelson or hands him a work order, and tells him where and when to go to the job, and what the job entails.¹⁷ After the job is completed, Nelson sends Levy an invoice for his work.¹⁸ Levy has the right to discharge Nelson without incurring liability, although he must give 10 days' written notice if the termination is not for cause.¹⁹

⁸ T. 25-26.

⁹ T. 9.

¹⁰ T. 9.

¹¹ T. 18, 22.

¹² T. 10-11, 20-21.

¹³ T. 16.

¹⁴ T. 10, 21, 25, E-4.

¹⁵ T. 9-10, 14, E-14(Relator's Exhibit 8).

¹⁶ T. 17, 26.

¹⁷ T. 13.

¹⁸ T. 18-19, 22.

¹⁹ T. 27.

Nelson tries to work for Majestic at least five days a week, and more, when work is available.²⁰ Although Nelson is able to do work for others, at the time of the hearing he had only done two outside jobs since he began working for Majestic; one was for his brother's friend, and the other for his brother and sister-in-law.²¹

Nelson supplies his own tools and his own truck, and has a home office.²² He also carries commercial liability insurance.²³ However, Nelson never purchases his own setting materials or tile.²⁴ Majestic purchases the materials, and hires Nelson for installation only.²⁵

Standard of Review

When reviewing an unemployment-benefits decision, the Court of Appeals may affirm the decision, remand for further proceeding, reverse or modify the decision if Majestic's substantial rights were prejudiced because the decision of the ULJ violated the constitution, was based on an unlawful procedure, was affected by error of law, was unsupported by substantial evidence, or was arbitrary or capricious.²⁶

²⁰ T. 10.

²¹ T. 11-12.

²² T. 13-14.

²³ T. 24.

²⁴ T. 14.

²⁵ T. 29.

²⁶ Minn. Stat. § 268.105, subd. 7(d)(1)-(6) (2009).

Whether an individual performed services as an employee or an independent contractor is a mixed question of law and fact.²⁷ The Court of Appeals recently held in *Skarhus v. Davannis*, that it views the ULJ's factual findings "in the light most favorable to the decision,"²⁸ and will not disturb the ULJ's factual findings when the evidence substantially sustains them.²⁹ In *Ress v. Abbott Northwestern Hosp., Inc.*, the Supreme Court stated that the appellate courts exercise independent judgment on issues of law.³⁰

Argument

The statute governing independent contractors in the building and construction industries was amended in early 2009, and so the Department analyzes Nelson's employment status both before and after January 1, 2009. Under both statutes, Nelson was clearly an employee of Majestic.

1. Nelson worked in employment for Majestic Tile & Stone from December of 2007 to January 1, 2009.

Prior to January 1, 2009, Minn. Stat. § 268.035, subd. 9, read:

A worker doing commercial or residential building construction or improvement, in the public or private sector, performing services in the course of the trade, business, profession, or occupation of the employer, is considered an employee and not an "independent contractor" unless the worker meets all the following conditions:

²⁷ *Lakeland Tool & Eng'g v. Engle*, 450 N.W.2d 349, 352 (Minn. App. 1990).

²⁸ 721 N.W.2d 340, 344 (Minn. App. 2006) (citing *Lolling v. Midwest Patrol*, 545 N.W.2d 372, 377 (Minn. 1996)).

²⁹ *Id.* (citing Minn. Stat. § 268.105, subd. 7(d)).

³⁰ 448 N.W.2d 519, 523 (Minn. 1989).

- (1) maintains a separate business with the independent contractor's own office, equipment, materials, and other facilities;
- (2) holds or has applied for a federal employer identification number or has filed business or self-employment income tax returns with the federal Internal Revenue Service based on that work or service in the previous year;
- (3) operates under contracts to perform specific services or work for specific amounts of money under which the independent contractor controls the means of performing the services or work;
- (4) incurs the main expenses related to the service or work that the independent contractor performs under contract;
- (5) is responsible for the satisfactory completion of work or services that the independent contractor contracts to perform and is liable for a failure to complete the work or service;
- (6) receives compensation for work or service performed under a contract on a commission or per job or competitive bid basis and not on any other basis;
- (7) may realize a profit or suffer a loss under contracts to perform work or service;
- (8) has continuing or recurring business liabilities or obligations; and
- (9) the success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.

Thus, unlike the classification of workers in other industries, the classification of workers in the building construction and improvement trades under this statute is an all-or-nothing enterprise. The law did not allow building construction and improvement workers to be classified as independent contractors unless they met all of nine criteria, including that they incurred “the main expenses related to the service or work.” It is impossible to dispute that the “main expenses” related to a tiling job includes the tiles and the setting materials. This very large expense is not Nelson’s responsibility.

Both Nelson and Levy admitted at hearing that Nelson does not pay for the materials used in the jobs he performs. Instead, Majestic pays for the materials,

just as an employer would in a classic employment setting. This is one of the nine factors listed in the statute. The statute dictates that individuals working in construction are employees unless it can be shown that they meet *all nine factors*, and Nelson does not.

This case is entirely similar to *Terra Firma Estates, Inc. v. Dep't of Employment & Econ. Dev.*³¹ There, the Court considered two individuals who worked as roofers. The two owned their own trucks, tools, and equipment, worked under their own business names, carried liability insurance, and had federal tax-identification numbers.³² They did roofing work for Terra Firma, a construction company that paid for the roofing materials that the two individuals used in completing the roofing jobs. The Court concluded that the two were employees, and not independent contractors, as they did not meet all nine of the criteria laid out by statute. It held that:

Because we cannot conceive of a definition of the “main expenses” related to a roofing job that does not include the roofing materials, we conclude that the ULJ did not err in concluding that Allie and James did not meet the statutory condition that they incur the main expenses related to the roofing work that they performed under their contracts with Terra Firma and, therefore, under Minn. Stat. § 268.035, subd. 9, they are considered to be employees of Terra Firma, rather than independent contractors.

Nelson did not purchase the tiles and setting materials that were the “main expenses” incurred in each job; Levy freely admitted at hearing that he had the

³¹ 2006 WL 3490945 (Minn. App. Dec. 5, 2006) Appendix, A10-A12.

³² *Id.* at *1.

purchasing power to purchase the materials necessary for the job, and that Nelson provided the labor.³³ The materials were provided by Majestic. Prior to January 1, 2009, under the statute in effect at the time, Nelson was an employee, and not an independent contractor, of Majestic.

2. Nelson worked in employment for Majestic Tile & Stone after January 1, 2009, and continues to do so.

The law governing independent contractors in the construction industry changed in 2009. Minn. Stat. § 268.035, subd. 9, was repealed effective January 1, 2009, by 2007 Laws Ch. 135, Art. 3, Sec. 42. In its place, the legislature adopted Minn. Stat. § 181.723, subd. 3, which explains that “...for purposes of chapter[] ...268, as of January 1, 2009, an individual who performs services for a person that are in the course of the person's trade, business, profession, or occupation is an employee of that person and that person is an employer of the individual.” The amended unemployment insurance statute now contains a cross-reference, under Minn. Stat. § 268.035, subd. 9a, explaining that “[f]or purposes of this chapter, section 181.723 determines whether a worker is an independent contractor or an employee when performing public or private sector commercial or residential building construction or improvement services.”

This statutory change was unusual, in that unemployment insurance laws are generally entirely contained in Minn. Stat. § 268.001, *et seq.* The unemployment insurance statutory scheme is designed to stand alone, and indeed

³³ T. 30.

the Department had little input and no control over the legislature's decision to adopt the Department of Labor and Industry's statutory definition. To the Department's knowledge, this will be the first time the Court of Appeals has considered this amended statute.

Minn. Stat. § 181.723, subd. 3, makes a presumption that individuals such as Nelson are employees. The exceptions to this presumption are laid out in Minn. Stat. § 181.723, subd. 4:

An individual is an independent contractor and not an employee of the person for whom the individual is performing services in the course of the person's trade, business, profession, or occupation only if (1) the individual holds a current independent contractor exemption certificate issued by the commissioner; and (2) the individual is performing services for the person under the independent contractor exemption certificate as provided in subdivision 6. The requirements in clauses (1) and (2) must be met in order to qualify as an independent contractor and not as an employee of the person for whom the individual is performing services in the course of the person's trade, business, profession, or occupation.

This raises a thorny factual issue; the ULJ in this case did not inquire into whether Nelson had ever procured such an exemption certificate. Indeed, the ULJ failed to apply Minn. Stat. § 181.723 at all, apparently wrongly believing that it did not apply. While this Court will properly review the ULJ's legal conclusions, it cannot make factual findings in the ULJ's stead. Like the ULJ, counsel for Majestic Tile similarly failed to inquire into whether Nelson had such a certificate. While the DOLI website contains a searchable database of such exemption

certificates, and a search shows no results for Nelson or his LLC, this cannot take the place of factfinding by the ULJ.

It is unlikely that Nelson would have been able to obtain such a certificate, as the requirements for obtaining one, as laid out in Minn. Stat. § 181.723, subd. 5, subsume the nine-part test under the predecessor statute in Minn. Stat. § 268.035. Namely, in order to procure such a certificate, under Minn. Stat. § 181.723, subd. 5(a)(8)(iv), Nelson would need to swear that he “incurs the main expenses related to the service that the individual performs under contract,” something that, as discussed above, Nelson would be unable to do.

It is arguably unnecessary to know whether Nelson has such an exemption certificate. Under clause (2) of Minn. Stat. § 181.723, subd. 4, Nelson is still an employee of Majestic, even if he does have a certificate, unless he “is performing services for the person under the independent contractor exemption certificate as provided in subdivision 6.” Under Minn. Stat. § 181.723, subd. 6:

An individual is performing services for a person under an independent contractor exemption certificate if...

(b) at the time the individual is performing services listed on the individual's independent contractor exemption certificate, the individual meets all of the following conditions...

(4) is incurring the main expenses related to the services that the individual is performing for the person under the contract...

Thus, while the Department would not oppose a decision from this Court remanding the matter for an additional inquiry into whether Nelson has an

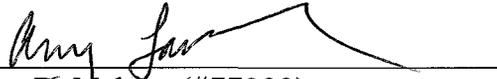
independent contractor exemption certificate, the Department also believes that such an inquiry is unnecessary. Even if Nelson were to have somehow procured one, it is irrefutable that he is not incurring the main expenses related to the services that he is providing. Nelson lays and grouts tile, but pays for neither the tiles nor the setting material. He is not performing work under an independent contractor exemption certificate, as defined in Minn. Stat. § 181.723, subd. 6, and is therefore an employee under Minn. Stat. § 181.723.

Finally, relator's brief argues that Nelson could not be an employee of Majestic because his LLC is not a "human being" under Minn. Stat. § 181.723, subd. 1(d). But the statute, like its predecessor under Minn. Stat. § 268.035, prevents employers from using corporate trappings to avoid their tax obligations. The statute does not concern itself with whether, for example, an employer makes its checks payable to an individual employee or to the employee's LLC. Instead, subd. 3 of the statute simply inquires into whether "an individual...performs services for a person that are in the course of the person's trade, business, profession, or occupation..." Here, Nelson was the individual performing the services for Majestic. Nelson, and not his LLC, was the one performing hard manual labor installing and grouting tile. Like the roofers in *Terra Firma*, Nelson had formed a corporation for tax purposes, but also like the roofers in *Terra Firma*, Nelson was ultimately the one who performed the services. He is an employee under Minn. Stat. § 181.723.

Conclusion

Nelson is not responsible for the main expenses relating to the services he provides to Majestic Tile. As such, Unemployment Law Judge Richard Croft properly found in this case that the services Nelson provided to Majestic were provided in employment. Under Minn. Stat. §§ 268.035 and 181.723, Nelson is an employee of Majestic. The Department requests that the Court affirm the decision of the Unemployment Law Judge.

Dated this 28th day of September, 2010.



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