

State of Minnesota  
**In Court of Appeals**

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Robert Levy, Majestic Tile & Stone, and Majestic Tile & Stone, LLC,

*Relator,*

vs.

Department of Employment and Economic Development,

*Respondent,*

Cary Nelson,

*Respondent.*

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**RELATOR'S REPLY BRIEF  
AND SUPPLEMENTAL 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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## INTRODUCTION

The Court must reverse the ULJ's erroneous decision that Nelson is now, or has ever been, Majestic's employee. Majestic's opening brief showed that the ULJ's decision contained errors of law, was arbitrary, capricious and is not supported by "substantial evidence." DEED's response spotlights where the ULJ went astray. Like the ULJ, DEED misinterprets the "main expenses" provision of Minn. Stat. §§ 268.035, subd. 9(4) and 181.723. Similarly, like the ULJ, DEED fails to grasp that Majestic never provided Nelson with the materials that Nelson installed. These errors require reversal.

Even if the Court concludes that outright reversal is not warranted, it still must remand this matter for two reasons. First, the ULJ failed to make statutorily required credibility determinations. And second, the ULJ issued orders contradicting his own findings of fact. Both errors mandate, at the very least, remand of this case.

## SUPPLEMENTAL STATEMENT OF FACTS

DEED's statement of facts contains a critical error. The last sentence stating that "Majestic purchases the materials and hires Nelson for installation only" (R. Br. at 5 (citing T. 29.)) is wrong. Majestic has never purchased the materials that Nelson installs.

The following comes directly from the transcript:

ULJ: Did [Majestic] pay for any of your materials or expenses?

Nelson: No.

(T. 13.) The ULJ then followed up on this question:

ULJ: Who pays for the tile?

Nelson: Whoever the company...that [Majestic] got the job from is the one that furnishes the material, setting materials and tile.

(T. at 14.) There is no evidence contradicting Nelson's testimony. (*See* T. at 1-33.)

The entity furnishing the tile and setting materials is different for every job. On a residential project it is the homeowner and on a commercial project it is the building's owner or the general contractor. (App. 66 (Affidavit of Kevin Huss); App. 67 (Affidavit of Michael Mack) App. 70-71 (Affidavit of Loren Bauer).)

### ARGUMENT

DEED concedes that Nelson squarely meets 8 of the 9 factors embodied in Minn. Stat. § 268.035, subd. 9. (*See* R. Br. at 6-12 (failing to address 8 of the 9 factors).) DEED nonetheless suggests that the Court should affirm the underlying decision because Majestic pays for the materials that Nelson installs. (R. Br. at 7-9.) DEED is incorrect for two reasons. First, the statute does not require an independent contractor to incur the main expense of the *materials* he installs. Second, even if it did, Majestic never provided the materials that Nelson installed. For both reasons Nelson could not be, as the ULJ and DEED conclude, Majestic's employee.

#### **I. DEED ERRONEOUSLY BELIEVES THAT THE MAIN EXPENSE ELEMENT INCLUDES MATERIAL EXPENSES.**

DEED and Majestic agree on one important point: to be an independent contractor, the worker must "incur the main expenses related to the service or work that the independent contractor performs under contract." (Add. 12, Minn. Stat. § 268.035, subd. 9(4) (2007). The parties disagree, however, on how the "main expense" element is interpreted.

DEED suggests that “main expenses”—at least in the tile industry—includes the tile and setting materials. (R. Br. at 7 (“it is impossible to dispute that the ‘main expenses’ related to a tiling job includes the tile and the setting materials”).) DEED is incorrect. Minnesota Rule 5202.0110, subp. 8 explains that the “Main Expenses” part of the statute means:

- A. the expense of purchasing, renting, and maintaining tools, equipment, facility or office space, and vehicles used in providing the service;
- B. labor expenses related to the service;
- C. business expenses that are related to the service such as advertising, insurance, taxes, licenses, and permits; and
- D. the expense of materials used in providing the service, *except for building construction or improvement materials that under a contract are provided by the building owner or another contractor.*

(Add. 44.)<sup>1</sup> Thus, contrary to DEED’s point of view, independent contractors need not incur the expense for materials when those are provided by the “building owner or another contractor.”

**A. Nelson Meets All 4 Factors of Minnesota Rule 5202.0110 and is Therefore an Independent Contractor.**

It is undisputed that Nelson meets all four factors identified by Minnesota Rule 5202.0110, subp. 8. The first element required Nelson to incur “the expense of purchasing, renting, and maintaining tools, equipment, office space and vehicles used in providing the installation service.” (Add. 44, Minn. R. 5202.0110, subp. 8(A).) This

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<sup>1</sup> This rule was adopted and effective in March of 2008, three months *before* Nelson Tile and Stone began performing subcontract work for Majestic. (See Add.74 (explaining that the Rule was adopted in March of 2008); Add. 6 (finding that Nelson began performing services for Majestic in June of 2008).)

factor is met. Before starting his tile installation business Nelson purchased “laser levels, different size straight edges (anywhere from eight feet down to two feet), a wet saw, tile cutter, different size levels..., trowels, rough floats, two wheel dollies, cordless grinders, a corded grinder, a truck, cam saw, cordless drill, mixing drill, band saw, extension cords and shop vacs.” (T. 17.) He also purchased office equipment, including a “desk, fax machine, printer, laptop, phone service and cell phone with [a] business number.” (T. 19.) Mr. Nelson worked in Nelson Tile and Stone’s office to prepare his bid sheet and prepare the invoices for the subcontract work that Nelson Tile and Stone performed. (T. 19-20.) The amounts he charged were designed “to cover any expenses that occur....” (T. 17.)

The second factor required Nelson to incur “the labor expenses related to the service” that he provides. (Add. 44, Minn. R. 5202.0110, subp. 8(B).) This factor is also met. Nelson testified that if an assistant was needed, then the assistant’s wages would be Nelson’s responsibility. (T. 19; *see also* T. 9 (Nelson testifying that he did not have a “rate of pay” when performing work for Majestic); T. 13 (further testifying that Majestic never provided Nelson with fringe benefits); T. 13 (and testifying that Majestic never withheld payroll taxes).)

The third factor required Nelson to incur “business expenses” related to the service that he provides “such as taxes, insurance and licenses.” (Add. 44, Minn. R. 5202.0110, subp. 8(C).) This factor is also met. Nelson had its own Commercial General Liability policy. (App. 64-65.) Nelson also paid its own taxes, taking deductions for his business operating expenses. (T. 13, 20; App. 56-62.)

Finally, the fourth factor required Nelson to incur the expense of materials used in providing the service, “except for building construction or improvement materials that under a contract are provided by the building owner or another contractor.” (See Add. 44, Minnesota Rule 5202.0110, subp. 8(D).) This factor is also met.

ULJ: Did [Majestic] pay for any of your materials or expenses?

Nelson: No.

(T. 13.) Nelson even explained that the tile and setting materials are provided by another contractor.

ULJ: Who pays for the tile?

Nelson: Whoever the company...that [Majestic] got the job from is the one that furnishes the material, setting materials and tile.

(T. at 14.)

DEED fails to discuss the statute, the record and the administrative rule providing instruction on how the “main expense” provision must be interpreted. (See R. Br. at 1-12.) Instead, DEED hangs its hat on the unpublished case—*Terra Firma Estates, Inc. v. Dep’t of Employment & Econ. Dev.*, 2006 WL 3490945 (Minn. Ct. App. Dec. 5, 2006). (See R. Br. at 8-9.) DEED’s reliance on *Terra Firma*, however, is misplaced for two reasons. First, it fails to take into account the change in the law. The case was decided in 2006, two years before Minnesota Rule 5202.0110 was adopted. In all likelihood, the rule was adopted to combat absurd results. Under the ULJ’s and DEED’s reasoning, every time a homeowner went to Home Depot and purchased siding, cabinets, plumbing fixtures or any other home improvement product that required expert installation, that

homeowner would be the installer's employer because the installer did not incur the main expense of the materials that he installed. This is an absurd result, and one that is not required by statute. Both DEED and the ULJ overlook the operative rule and fail to properly interpret the statute.

Second, even if the Court somehow avoids the operative rule, *Terra Firma* is factually distinguishable. DEED's own explanation of the case correctly explains that it involves the two roofers who "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." (R. Br. at 8.) Indeed, the court explained that "Terra Firma's president testified that Terra Firma paid for 95% of the materials for each job..." *Terra Firma*, 2006 WL 3490945 \*3. By contrast, Majestic has never paid for Nelson's materials or expenses. (T. 13-14.) And, there is no testimony to the contrary. The portion of the record that DEED relies upon (T. 29-30) says nothing about Majestic furnishing Nelson's materials. It involves testimony about how the flooring industry operates and explains that tile setters, such as Majestic and Nelson do not furnish the materials that are installed. Those are provided by the building owner or a general contractor. DEED is incorrect to suggest otherwise.

Nothing in the statute prohibits independent contractors from providing an installation *service*. Nelson provides this service and incurs the main expenses for the service that he provides. There is no evidence to the contrary and the Court must reverse.

**II. THE COURT SHOULD REVERSE BECAUSE THE ULJ ERRONEOUSLY CONCLUDED THAT MINN. STAT. § 181.723 (2009) DOES NOT APPLY.**

The Court must also reverse because the ULJ erroneously concluded that Minn. Stat. § 181.723 (2009) does not apply to this case. DEED acknowledges the error and argues that in lieu of reversal the Court should remand. Remand on this issue is inappropriate, however, because Nelson was performing work as an LLC and LLCs are not required to have independent contractor exemption certificates.

**A. DEED's Request for Remand is Inappropriate.**

Majestic and DEED agree on a second important point: In 2009 the law governing independent contractor classification changed. Before 2009, the applicable statute was Minn. Stat. § 268.035 and substantively, the nine point test found therein. That law was repealed, and on January 1, 2009, Minn. Stat. § 181.723 (2009) went into effect.

The ULJ originally overlooked Minn. Stat. § 181.723 and erroneously applied the repealed statute to the parties' 2009 relationship. (*See* Add. 2-3 (applying Minn. Stat. § 268.035 to the parties' 2009 relationship).) When Majestic pointed out the error, the ULJ conducted a statutory analysis before concluding that the new statute—Minn. Stat. § 181.723—did not apply. (Add. 7, “Minnesota Statute Section 181.723 is not applicable to this case.”)

DEED concedes that the ULJ erred and suggests that this case should be remanded for additional proceedings consistent with Minn. Stat. § 181.723. (R. Br. at 11, “[T]he Department would not oppose a decision from this Court remanding the matter for an additional inquiry....” (R. Br. at 11-12.) Deed strangely suggests that this is warranted

because although “the ULJ failed to apply Minn. Stat. § 181.723 at all, apparently wrongly believing that it did not apply” (R. Br. at 10) this was not the ULJ’s fault because “the Department had little input and no control over the legislature’s decision to adopt the Department of Labor and Industry’s statutory definition.” (*Id.* at 9-10.) According to DEED, the Court should remand to determine “whether Nelson has an independent contractor exemption certificate....” (R. Br. at 11-12.) Remand is inappropriate, however, because under the new statute no independent contractor exemption certificate was required.

**B. The Court Should Reverse Because There is no Evidence That Nelson Performed Services for Majestic in 2009 as an “Individual.”**

The new law changed the framework for independent contractor classification. Minn. Stat. § 181.723 contains specific definitions differentiating between “Persons” and “Individuals.” It defines a “Person” as any “individual, limited liability corporation, corporation, partnership, incorporated, or unincorporated association, sole proprietorship, joint stock company, or any other legal or commercial entity.” (Add. 65, Minn. Stat. § 181.723, subd. 1(a).) It goes on to define an individual as a “human being.” (*Id.* at subd. 1(d).)

The distinction is significant because if one is performing services as an “Individual” then that person must obtain an Independent Contractor Exemption Certificate (ICEC). (Add.65, Minn. Stat. § 181.723 subd. 2 (“This section only applies to *individuals*....)) By contrast, if one performs services through a registered entity—such

as an LLC—then no ICEC is required. *Id.* In fact, if one is performing services through an LLC an ICEC is not even available.

The Minnesota Department of Labor and Industry (DOLI) specifically explains that “***State Law requires individuals (not corporations, LLCs or partnerships)*** who work as independent contractors in the building construction industry to obtain from the Department of Labor and Industry an Independent Contractor Exemption Certificate (ICEC).” (Supp. App. 1, web page printed from <http://www.dli.mn.gov/CCLD/Icec.asp>) It goes on to note that “Businesses that are registered...with the secretary of state do not qualify for the ICEC.” (*Id.*) And finally, the Department tells the public that “**The ICEC is only required for independent contractor sole proprietorships who subcontract.**” (*Id.*)

All of the work that Nelson performed in 2009 was performed through C. Nelson Tile Installation, LLC. On January 14, 2009, Nelson registered C. Nelson Tile Installation, LLC with the Minnesota Secretary of State. (T. 20-21; App. 3.) Majestic’s President, Robert Levy, also registered an LLC, becoming Majestic Tile & Stone, LLC. (App. 2.) Nelson testified that he registered the LLC to comply with the newly enacted statute. (T. 20-21.)

The two companies then executed an Independent Contractor Agreement. (T. 21; 25-26; App. 5-7.) The preamble explains that “This Agreement is entered into between Majestic Tile & Stone, LLC (‘the Company’) and C. Nelson Tile Installation, LLC (‘the Independent Contractor’).”

In 2009, Majestic sent Nelson 24 separate subcontracts Nelson's way. (App. 8-31) Every single work order was sent "To: C. Nelson Tile Installation, LLC." (*Id.*) Similarly, every single invoice that Nelson sent to Majestic was sent from "C. Nelson Tile Installation, LLC." (*Id.*) These were part of the overall Independent Contractor Agreement:

Q: And did you have an understanding that the Subcontract Work Orders and the Invoices were part of the larger Independent Contractor Agreement?

NELSON: Yes.

(T. 22.) In fact, the ULJ even found that all of the payments that Majestic made to Nelson in 2009 were made to C. Nelson Tile Installation, LLC. (Add. 6.)

Against these facts, DEED begs for remand suggesting that "Nelson, and not his LLC, was the one performing hard manual labor installing and grouting tile." (R. Br. at 12.) DEED cites nothing to support this allegation. (*See id.*) It does not address the subcontract work orders, the invoices, the master independent contractor agreement, the fact that Nelson registered the LLC to avoid the ICEC requirement, or any of the other hallmarks demonstrating that Nelson owned and operated his LLC and is therefore an independent contractor. (*See* DEED Br. at 1-13) In fact, DEED's entire argument rests on the false *assumption* that Majestic paid for the materials that Nelson installed. (*See* R. Br. at 12.) As was explained above, however, DEED's assumption is incorrect. The materials are purchased by either the general contractor or the owner. Majestic has never purchased the materials and it was error for both the ULJ and DEED to suggest otherwise. Reversal on this issue is therefore appropriate.

**C. C. Nelson Tile Installation, LLC Is Not An Employee Within the Meaning of Minn. Stat. § 268.035, subd. 25.**

Finally, this Court should reverse because an LLC cannot be an “*Employee*” for unemployment insurance purposes. “Employers must contribute to the unemployment trust fund based on wages paid to *employees*.” *Benco Delivery Servs., Inc. v. Dep’t. Employment and Econ. Dev.*, No. A09-942, 2010 WL 1657294 (Minn. App. Apr. 27, 2010) (citing Minn. Stat. § 268.035, subd. 25 (2006)). *Employee* is defined by statute as an “*individual*” who is performing or has performed services for an employer in employment.” *Benco*, 2010 WL 1657294 at \* 1 (citing Minn. Stat. § 268.035, subd. 13(1)). “*Individual*” in the construction industry is further defined as a “human being.” Minn. Stat. § 181.723 1(d) (2009).

Majestic did not pay wages to any “human beings” in 2009. The ULJ found that in 2009 all payments were made to C. Nelson Tile Installation, LLC. (Add. 6.) Because Majestic did not make payments to a “human being” in 2009, it could not have had any “employees” as defined by the statute. *See* Minn. Stat. § 268.035, subd. 13(1); Minn. Stat. § 181.723(1)(d).

DEED concedes that Majestic’s statutory analysis is correct but seeks to avoid the plain statutory language by suggesting “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” and by further suggesting that “the statute, like its predecessor prevents employers from using corporate trappings to avoid their tax obligations.” (R. Br. at 12.) DEED’s arguments miss the target.

There are no “corporate trappings” in this case. Here, Nelson did everything required to start, operate and run his LLC as an independent business. He registered the company with the state, purchased company owned tools and equipment, acquired a federal tax number, prepared a bid sheet to competitively bid contracts, had his own office, had its own Commercial General Liability policy, controlled its own means and methods and submitted invoices from and received payments in the company’s name. Finally, Nelson even testified that “All of the work I have done with Majestic since 2009 has been through my LLC.” (App. 77.) Thus, there is nothing to support DEED’s allegation that Nelson, not his LLC, was performing work for Majestic in 2009. This Court must, at the very least, reverse that portion of the ULJ’s decision holding that Nelson continues to be Majestic’s employee.

### **III. THE CASE MUST BE REMANDED BECAUSE THE ULJ FAILED TO MAKE CREDIBILITY DETERMINATIONS.**

Even if the Court is not prepared to completely reverse the ULJ’s decision, it must remand this case because the ULJ failed to make statutorily required credibility determinations. Minn. Stat. § 268.105, subd. 1(c) provides “[w]hen the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision, the unemployment law judge must set out the reason for crediting or discrediting that testimony.” Nelson testified that Majestic does not pay for, or provide, any of the tile or setting materials that he installs. (T. 13-14.) Despite this testimony, the ULJ found that Majestic furnished Nelson’s materials. He failed to make

appropriate credibility determinations and at the very least, this Court must remand.<sup>2</sup>

DEED does not address the statute or the case law, all but conceding that the case must, at the very least, be remanded. (*See* R. Br. at 1-12.) Whether Majestic furnished the materials is a significant factor when analyzing the relationship of the two parties. The ULJ made no findings to support discrediting Nelson's testimony. His failure to make them constitutes reversible error.

#### **IV. THERE IS NO EVIDENCE TO SUPPORT DEED'S ERRONEOUS ORDER THAT NELSON WAS MAJESTIC'S EMPLOYEE IN 2007.**

The ULJ issued two orders stating that Nelson had "an employment relationship with Majestic Tile & Stone since December 2007." (Maj. Br. at 19 (Citing Add. 4, 7.) This conclusion of law contradicts the evidence, including the ULJ's own finding of fact.

Nelson testified that he did not begin performing subcontract work for Majestic until "somewhere in the middle of 2009 or 2008..." (T. 8.) The ULJ's findings confirm Nelson's testimony. The first order, under the heading "**Findings of Fact**" states, "Cary

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<sup>2</sup> *See Hibbard v. Park Supply Inc.*, A07-0721, 2008 WL 1748233 (Minn. Ct. App. Apr. 15, 2008) (remanding when the ULJ failed to make express findings on credibility, despite acknowledging that the testimony was in the nature of "he said she said"); *Ferhat v. Hertz Corp.*, A07-0202, 2008 WL 763207 (Minn. Ct. App. March 25, 2008) (remanding when the ULJ failed to make express credibility findings on why he believed the employer's version of the facts leading up to termination rather than the relator's); *Johnson v. Allina Health Systems*, A09-2288, 2010 WL 3463640 (Minn. Ct. App. Sept. 7, 2010) (remanding because the ULJ failed to make express findings on credibility when relator denied accusations made against her made by employer); *Holbrook v. Maschka, Riedy & Ries PLLP*, A07-2408, 2009 WL 66036 (Minn. Ct. App. Jan. 13, 2009) (remanding because the ULJ failed to make credibility findings when relator and employer disagreed on whether the relator gave proper notice of her absence from work); *Geringer v. S-M Enterprises Inc.*, A09-1098, 2010 WL 772956 (Minn. Ct. App. Mar. 9, 2010) (remanding where the ULJ failed to make credibility findings regarding relator's testimony that he was performing tasks above his pay grade).

Nelson has performed services for Majestic Tile & Stone from about *June 2008 through present.*” (Add. 2.) The second order makes the exact same finding. (Add. 6.)

How could Nelson enjoy an employment relationship in December of 2007 if he did not begin performing services until June of 2008? DEED does not answer this question or try to rehabilitate the ULJ’s error. It ignores the conundrum praying that the Court will overlook the problem. This error alone requires the Court to, at the very least, remand the case for an order that is based on fact found by the ULJ.

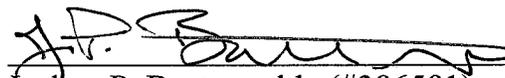
**CONCLUSION**

For the reasons argued herein, Majestic respectfully requests that this Court issue an order reversing the decision of the ULJ and enter an order determining that Nelson is not Majestic’s employee. Alternatively, the Court should remand the decision with express instructions that Nelson is not Majestic’s employee from December 2007 through May of 2008, and further, that the “employment relationship,” to the extent there was one, ended on January 1, 2009.

Respectfully submitted,

Dated: 10. 7. 2010

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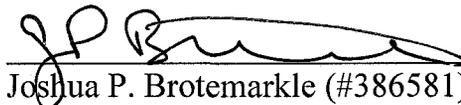
**CERTIFICATE OF COMPLIANCE**

The undersigned counsel for Relator Majestic Tile and Stone, LLC and Robert Levy certifies that this Reply Brief complies with the requirements of Minn. R. App. P. 132.01 for a brief produced with a proportional font. The length of this brief is 3,631 words, excluding the Table of Contents, Table of Authorities and Supplemental Appendix. This brief was prepared using Microsoft Word 2003.

Respectfully submitted,

Dated: 10.7.2010

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