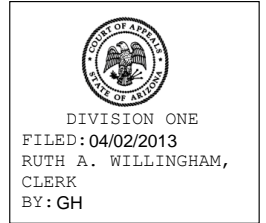


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



APPLECREEK GENERAL CONTRACTORS ) 1 CA-CV 12-0453  
LLC, an Arizona limited )  
liability company, ) DEPARTMENT B  
)  
Plaintiff/Appellant, ) **MEMORANDUM DECISION**  
) (Not for Publication -  
v. ) Rule 28, Arizona Rules of  
) Civil Appellate Procedure)  
CIE ANN SCOTT, a married woman; )  
AARON M. SCOTT, a married man; )  
and REGISTRAR OF CONTRACTORS, an )  
Agency of the State of Arizona, )  
)  
Defendants/Appellees. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. LC2011-000682-001

The Honorable Crane McClennen, Judge

**VACATED AND REMANDED WITH DIRECTIONS**

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**G O U L D**, Judge

¶1 This appeal arises out of the Arizona Registrar of Contractors' ("AROC") decision to revoke the contractor's license issued to Applecreek General Contractors, L.L.C. ("Applecreek"). The superior court affirmed AROC's decision, finding that the evidence substantially supported the revocation for aiding and abetting an unlicensed contractor in violation of Arizona Revised Statutes ("A.R.S.") section 32-1154(A)(10) (Supp. 2012). For the following reasons, we vacate the superior court's judgment and remand this case to the superior court with directions for the superior court to remand it to AROC for proceedings consistent with this decision.

#### **BACKGROUND**

¶2 Applecreek contracted with Cie Ann Scott and Aaron M. Scott (collectively "the Scotts") to remodel the Scotts' rental property in Sedona. The parties' "Sedona-Scott Residence Phase I" contract lists Applecreek's license number, and identifies John Rhoades ("Rhoades") as Applecreek's builder/representative. Rhoades identified Scott Podergois ("Podergois") as the project manager and estimator for Applecreek to Ms. Scott.

¶3 Within weeks of the contract's execution, the City of Sedona approved a revised set of plans. The revised plans deleted some of the work contained in the original plans, and as a result a dispute arose between the Scotts and Applecreek over

responsibility for the changes and the price to be paid for the project. The disputes between the parties continued, and shortly after work commenced, the Scotts twice complained to AROC. After visiting the site, AROC dispatched inspector Steve Willoughby ("Willoughby") to determine whether Podergois was an unlicensed contractor.

¶4 The AROC subsequently issued a citation and complaint against Applecreek for violations of A.R.S. §§ 32-1154(A)(1-3), (10), and (23). During the ensuing administrative hearing, Willoughby testified that Applecreek was paying Podergois as a Form 1099 independent contractor. When pressed, Willoughby made the following concession:

JOE O'CONNOR: Are there any actions that come to mind, other than the 1099 status you just mentioned, that would indicate or constitute in some way, that he was acting as an independent contractor?

STEVE WILLOUGHBY: No.

When asked whether Podergois would be considered an unlicensed contractor if Rhoades was paying him as a W-2 employee and taking out taxes, Willoughby responded: "No." Willoughby also testified that he did not know how Podergois was paid.

¶5 Based upon this evidence, the administrative law judge ("ALJ") found that "Steve Willoughby, an investigator for the Registrar, testified that Scott Podergois was paid by Respondent as a form 1099 independent contractor. Scott Podergois does not

possess a contracting license. *Therefore, Scott Podergois is determined not to have been an employee of Respondent on the subject property.*" (Emphasis added.)

¶6 The ALJ then concluded that Applecreek had aided and abetted an unlicensed contractor in violation of A.R.S. § 32-1154(A)(10), and recommended a five-day suspension of Applecreek's license. AROC adopted the ALJ's factual findings and conclusions of law, but ordered that Applecreek's license be revoked.

¶7 In accordance with A.R.S. §§ 12-124(A) (2003) and 12-905(A)(2003), Applecreek appealed to the superior court. Following briefing, the superior court reviewed the ALJ's rulings that were adopted by AROC, and concluded that the findings were supported by substantial evidence and not contrary to law. Applecreek appealed in accordance with A.R.S. § 12-913 (2003). We have jurisdiction. See A.R.S. § 12-2101(A)(1) (Supp. 2012).

#### **DISCUSSION**

¶8 "[W]hen an administrative decision is appealed to the superior court pursuant to the Administrative Review Act, A.R.S. §§ 12-901 to -914, the superior court decides only whether the administrative action was illegal, arbitrary, capricious or involved an abuse of discretion." *Havasu Heights Ranch & Dev. Corp. v. Desert Valley Wood Prods., Inc.*, 167 Ariz. 383, 386,

807 P.2d 1119, 1122 (App. 1990); A.R.S. § 12-910(E) (Supp. 2012). On appeal, we also review "the underlying issue of whether the administrative action was illegal, arbitrary, capricious or involved an abuse of discretion." *Havasu Heights*, 167 Ariz. at 386, 807 P.2d at 1122. This court independently reviews legal issues. *Id.* at 387, 807 P.2d at 1123.

¶9 AROC revoked Applecreek's license pursuant to A.R.S. § 32-1154(A)(10), which prohibits the holder of a contractor's license from:

Aiding or abetting a licensed or unlicensed person to evade this chapter, knowingly or recklessly combining or conspiring with a licensed or unlicensed person, allowing one's license to be used by a licensed or unlicensed person or acting as agent, partner, associate or otherwise of a licensed or unlicensed person with intent to evade this chapter.

AROC is authorized to permanently revoke the license if its holder commits this offense. A.R.S. § 32-1154(B).

¶10 The administrative hearing testimony focused on whether or not Applecreek had violated this statute by using Podergois, an unlicensed contractor. One of the dispositive issues in the case was Podergois' employment status. AROC suspended Applecreek's license on the ground it aided and abetted Podergois in his status as an independent contractor. Thus, if Podergois qualified as an employee of Applecreek, there

would have been no independent contractor for Applecreek to aid and abet.

¶11 Applecreek argues that (1) the superior court and AROC applied an incorrect legal standard for distinguishing between employees and independent contractors, (2) Podergois did not qualify as an independent contractor even under the relevant tax laws, and (3) the use of a 1099 form is not dispositive of the independent contractor issue in any event. Because we find that AROC applied the incorrect legal standard on the employment issue, we do not reach the remaining issues raised by Applecreek.

¶12 In distinguishing between employees and independent contractors for the purposes of Title 32, the core inquiry is whether the employer has the right to exercise control over the performance of the individual's job duties. *Lundy v. Prescott Valley, Inc.*, 110 Ariz. 362, 363, 519 P.2d 61, 62 (1974); *Sobel v. Jones*, 96 Ariz. 297, 300, 394 P.2d 415, 416 (1964). In making this determination, courts have examined several factors, including: the right to control the operations, the method of payment, the relationship of the work to the employer's regular business, the nature of the business, the duration of the employment, materials and the place of work, and whether the work is specialized or skilled. While the method of payment is a relevant factor, it is not the sole, dispositive factor.

*Lundy*, 110 Ariz. at 363, 519 P.2d at 62; *Sobel*, 96 Ariz. at 300, 394 P.2d at 416. See Restatement (Second) of Agency § 220 (2012) (listing factors to determine whether a person is an employee or an independent contractor). Rather, all of the relevant factors must be examined in determining whether the employer has the "right to control the [person's] manner of accomplishing the particular job." *Sobel*, *Id.*

¶13 Here, the record shows that AROC, in adopting the findings of the ALJ, did not apply the proper legal standard in determining whether Podergois was an employee or an independent contractor. The language in the ALJ's decision makes it clear that the ALJ applied the incorrect legal standard. See *Hart v. Hart*, 220 Ariz. 183, 188, 204 P.3d 441, 446 (App. 2009) (holding that the presumption the trial court applied the correct law may be rebutted where the record clearly shows it applied the incorrect law). Instead of applying the multi-factor test required by law, the ALJ considered only one factor: Applecreek's use of a 1099 Form. See *Lundy*, 110 Ariz. at 364, 519 P.2d at 63 (reversing summary judgment in favor of a defendant who argued in part that the plaintiff "styled himself as self-employed in his tax returns"). As a result, we hold that AROC and the superior court misapplied the law. *Hart*, 220 Ariz. at 188, 204 P.3d at 446 (reversed and remanded for a new

hearing where court applied incorrect legal standard in placing restrictions on mother's parenting time).

**CONCLUSION**

¶14 We vacate the superior court's judgment and AROC's order revoking Applecreek's license, and remand this case to the superior court with directions to return it to AROC for proceedings consistent with this decision. *Zavala v. Arizona State Personnel Bd.*, 159 Ariz. 256, 267, 766 P.2d 608, 619 (App. 1987); A.R.S. § 12-910(E). Specifically, if AROC decides to conduct a new hearing in this matter, it must employ the proper legal standard for determining whether Podergois was an employee or an independent contractor. Further, we deny Applecreek's request for attorneys' fees because it has cited no supporting legal authority. See *Twin Peaks Constr., Inc. v. Weatherguard Metal Constr., Inc.*, 214 Ariz. 476, 479, ¶ 14, 154 P.3d 378, 381 (App. 2007).

/S/  
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ANDREW W. GOULD, Judge

CONCURRING:

/S/  
\_\_\_\_\_  
PATRICIA K. NORRIS, Presiding Judge

/S/  
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RANDALL M. HOWE, Judge