

IN THE SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-CC-00859

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SUN VISTA, INC.

APPELLANT

VERSUS

CAUSE NO. 2009-CC-00859

MISSISSIPPI DEPARTMENT OF EMPLOYMENT  
SECURITY

APPELLEE

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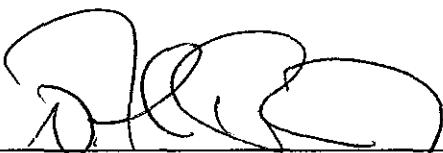
*CERTIFICATE OF INTERESTED PERSONS*

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The undersigned counsel of record certifies that the following listed person have an interest in the outcome of this case in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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|----|---|---------------------|
| 1. | Sun Vista, Inc.                               | Appellant           |
| 2. | Page, Mannino, Peresich & McDermott, P.L.L.C. | Attorneys of Record |
| 3. | Mississippi Department of Employment Security | Appellee            |
| 4. | David Alford                                  | Claimant            |

DATED this the 22nd day of December, 2009.

  
NATHAN L. PRESCOTT (MSB # [REDACTED])  
FRED MANNINO (MS [REDACTED])  
Attorneys for Appellant,  
Sun Vista, Inc.

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COMES NOW the Appellant, Sun Vista, Inc., a duly licensed Mississippi Corporation with its primary place of business located in Hancock County, Mississippi ("Sun Vista"), by and through its counsel of record, the law firm of Page, Mannino, Peresich & McDermott, P.L.L.C., specifically requests oral argument and files its Brief of the Appellant, and would show unto this Honorable Court as follows:

**I.**

**STATEMENT OF THE ISSUES**

1. Whether the Board of Review, Mississippi Department of Employment Security, erred when it determined that David Alford was an employee of Sun Vista.
2. Whether the Circuit Court of Hinds County, Mississippi, First Judicial District, erred by affirming the decision of the Board of Review, Mississippi Department of Employment Security.

**II.**

**STATEMENT OF THE CASE**

On April 24, 2007, David Alford filed his initial claim for benefits with the Mississippi Department of Employment Security (the "Department"). (R. Vol. 3, pg. 1; R.E. 0015). On July 10, 2007, a representative of the Department issued an inter-office communication stating that "The general manager of the firm, Jim Gurley, insist(s) that the claimant never worked for Sun Vista but rather for a subcontractor by the name of "Jose." (R. Vol. 3, pg. 8; R.E. 0016). On September 11, 2007, the Department issued a decision holding that under Miss. Code. Ann. §71-5-11 I (14) an employee-employer relationship existed between Sun Vista and David Alford. (R. Vol. 3, pg. 18-19; R.E. 0021-0022). On September 17, 2007, Sun Vista filed a protest of the Department's decision stating that Sun Vista did not pay an hourly rate to David Alford and did not provide David Alford with tools. (R. Vol 3, pg. 21; R.E. 0023). The protest further alluded to the fact that Jose De La Luz

Medrano a/k/a “Jose” employed David Alford and that Sun Vista did not. (R. Vol 3, pg. 21; R.E. 0023).

A telephonic hearing was held on December 7, 2007 before Administrative Law Judge Gary Holmes.<sup>1</sup> (R. Vol. 3, pg. 35; R.E. 0028). David Alford did not participate in the telephonic hearing and could not be cross-examined. (R. Vol. 3, pg. 35-86; R.E. 0028-0079). Administrative Law Judge Gary Holmes (the “ALJ”) upheld the Department’s ruling. (R. Vol. 3, pg. 109-112; R.E. 0003-0006). Sun Vista appealed the ALJ’s decision to the Board of Review, Mississippi Department of Employment Security ( the “Board”). (R. Vol. 3, pg. 114; R.E. 0080). The Board issued an opinion upholding the ALJ’s ruling on May 1, 2008. (R. Vol. 3, pg. 115-116; R.E. 0007-0008). The Board’s decision wholly adopted the Findings of Fact and Opinion of the ALJ. (R. Vol. 3 pg. 115-116; R.E. 0007-0008).

Appellant filed its Petition for Judicial Review of Decision of the Mississippi Department of Employment Security, Board of Review in the Circuit Court of Hinds County, Mississippi, on May 20, 2008. (R. Vol. 3, pg. 117; R.E. 0081). On or about August 15, 2008, following the filing of said Petition, Appellant made contact with the elusive Jose De La Luz Medrano who was incarcerated in Big Springs, Texas. (Exhibit to R., Brief of Appellant, Exhibit “B” thereto; R.E. 0098-0100). Appellant nor Appellee could locate Mr. Medrano prior to that time. On or about October 1, 2008, Appellant filed its Brief of the Appellant Praying for Reversal of the Board of Review’s Decision, or, In the Alternative, Motion to Remand in Light of Newly Discovered Evidence (the “Brief of the Appellant”). (Exhibit to R., Brief of Appellant; R.E. 0082-0099). Attached to the Brief of Appellant was an independent contractor agreement signed by Jose De La Luz Medrano and an affidavit of Mr. Medrano showing that Mr. Medrano was an independent

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<sup>1</sup> The Court should note that an in-person hearing was requested by Sun Vista, Inc.; however, said request was denied. (R. Vol 3, pg. 26-27; R.E. 0024-0025).

contractor of Sun Vista and that Mr. Medrano, not Sun Vista, employed David Alford. (Exhibit to R., Brief of Appellant, Exhibit "A" and "B" thereto; R.E. 0097-0100). The affidavit and independent contractor agreement corroborate Sun Vista's long-standing contention that David Alford was employed by Jose De La Luz Medrano, not Sun Vista. (Exhibit to R., Brief of Appellant, Exhibit "A" and "B" thereto; R.E. 0097-0100).

Oral arguments were held in the Circuit Court of Hinds County, Mississippi, First Judicial District (the "Circuit Court") on January 30, 2009. (R. Vol. 2, pg. 1; R.E. 0011). Among other things, Sun Vista argued that the affidavit of Mr. Medrano substantiated the entire testimony of Sun Vista and that the Board relied only on unreliable hearsay evidence of David Alford in making its decision. (R. Vol. 2, pg. 7-9; R.E. 0012-0014). Sun Vista asked that the decision of the Board be reversed, or in the alternative, that the matter be remanded. (R. Vol. 2, pg. 24; R.E. 0014). Despite the showing in the Circuit Court, Judge William Coleman affirmed the decision of the Board. (R. Vol. 1, pg. 15; R.E. 0009).

### III.

#### SUMMARY OF THE ARGUMENT

The Board's decision was based on insufficient evidence and was arbitrary and capricious. As the record shows and as will be outlined: Sun Vista was not the employer of David Alford. Sun Vista did not supervise or control the work of David Alford in any manner whatsoever. Sun Vista did not tell David Alford when to report for work or what to do while there. Sun Vista did not pay David Alford an hourly rate, and no such rate was set by Sun Vista. Sun Vista did not provide tools to David Alford, and Sun Vista owns no tools. David Alford did not submit an employment application to Sun Vista.

As Sun Vista has stated since the beginning of this dispute, David Alford was employed by an independent contractor of Sun Vista, Jose De La Luz Medrano. Jose De La Luz Medrano was

paid by Sun Vista for each job he bid. Jose De La Luz Medrano entered an independent contractor agreement with Sun Vista. Jose De La Luz Medrano controlled the work of David Alford and told David Alford when to arrive at work and when to leave work. Jose De La Luz Medrano told David Alford what to do while on the job, and Sun Vista was only interested in the finished product of the work of Jose De La Luz Medrano and his employees.

The ALJ and subsequently the Board had only the hearsay testimony of David Alford to rely on in making their determinations. David Alford was never cross-examined. At the ALJ hearing, Sun Vista showed through direct testimony that it was not David Alford's employer. The Department relied on the hearsay testimony of two of its representatives and an Independent Contractor Questionnaire completed by David Alford to attempt to show otherwise. The hearsay testimony is insubstantial, and at times, inconsistent. Further, the Independent Contractor Questionnaire appears to have been filled out by two different parties, and is thus wholly unreliable. The Board's decision was arbitrary and capricious and unsupported by substantial evidence. Its decision and the decision of the Circuit Court should be reversed or, in the alternative, this matter should be remanded to the Department for proceedings consistent with Sun Vista's showing herein and this Court's findings related thereto.

#### IV.

#### ARGUMENT

In this matter, the Board's decision may be reversed if: 1) is not supported by substantial evidence, 2) is arbitrary and capricious, 3) is beyond the scope or power granted to the ruling entity or 4) violates a party's constitutional rights. *Mississippi Department of Employment Security v. Harbin*, 11 So. 3d 137, 139 (Miss. Ct. App. 2009). However, "when there is convincing evidence that the administrative judge has adopted all but verbatim the proposed findings of a party, and the Commission has then adopted those findings, (the appellate court) 'must view the challenged

findings of fact and the appellate record as a whole with a more critical eye to ensure that the (Commission) has adequately performed its function.” *Greenwood Utilities v. Williams*, 801 So.2d 783 (Miss. Ct. App. 2001).

The appellate court’s duty is to determine the sufficiency of the evidentiary basis of the lower body’s decision. *Mississippi Employment Sec. Comm’n v. Gilbert Home Health Agency*, 909 So. 2d 1142 (Miss. Ct. App. 2005). When a decision is not based on substantial evidence, “it necessarily follows that the decision is arbitrary and capricious.” *I.C.C. v. Union Pac. R. Co.*, 222 U.S. 541, 547, 32 S. Ct. 108 (1912)). Further, “Employment security contribution assessments are an excise tax and, therefore, every doubt as to their application must be resolved in favor of the taxpayer and against the taxing power.” *Miss. Employment Sec. Comm’n v. PDN, Inc.* 586 So. 2d 838, 849 (Miss. 1991).

**A. The Board and Circuit Court’s Decision Should be Reversed.**

**1. Law Governing Determination of Whether an Employer/Employee Relationship Existed.**

Miss. Code Ann. §71-5-11 I (14) states:

Services performed by an individual for wages shall be deemed to be Employment subject to this chapter unless and until it is shown to the satisfaction of the Department that such individual has been and will continue to be free from control and direction over the performance of such services both under his contract of service and in fact; and the relationship of employer and employee shall be determined in accordance with the principles of the common law governing the relation of master and servant.

Miss. Code Ann. §71-5-11 I (14) dictates that the relationship of employer and employee shall be determined in accordance with the principles of the common law governing the relation of master and servant. Factors to be considered at common law are:

- (a) the extent of control exercised over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the skill required in the particular occupation;



- (d) whether the employer supplies the tools and place of work for the person doing the work;
- (e) the length of time for which the person is employed;
- (f) the method of payment, whether by the time or by the job; and
- (g) whether or not the work is a part of the regular business of the employer.

*Mississippi Employment Sec. Comm'n v. PDN, Inc.*, 586 So. 2d 838, 841 to 842 (Miss. 1991) (citing *Mississippi Employment Sec. Comm'n v. Plumbing Wholesale Co.*, 69 So. 2d 814 (Miss. 1954)).

"The primary factor is the right to or degree of control." *Mississippi Employment Sec. Comm'n v. PDN, Inc.*, 586 So. 2d 838, 842 (Miss. 1991).

2. **Facts in the Record Show an Employer/Employee Relationship Did Not Exist between Sun Vista and David Alford.**

The Board's decision is unsupported by substantial evidence and is arbitrary and capricious. Jim Gurley, secretary/treasurer of Sun Vista, offered extensive testimony during the telephonic hearing held on December 7, 2007 (R. Vol. 3., pg. 53-73; R.E. 0046-0066); however, no live testimony of David Alford, the alleged employee, was offered. (R. Vol. 3; R.E. 0028-0079). David Alford has never submitted to direct examination by a representative of Sun Vista, and, as such, the Board and Circuit Court could only rely on hearsay statements of David Alford in making their determination. (R. Vol. 3; R.E. 0028-0079). The record shows that Sun Vista did not control the work of David Alford, that Sun Vista did not hire David Alford, that David Alford was an employee of Jose De La Luz Medrano, that Jose De La Luz Medrano was an independent contractor of Sun Vista, that David Alford's work was controlled by Jose De La Luz Medrano and that Sun Vista did not provide any tools to David Alford (*citations to follow*). To cite specifically:

- 1. David Alford, the party in question, did not complete an employment application form with Sun Vista, and the Department has not produced an employment application. (See generally R. Vol. 3; R.E. 0028-0079; R. Vol. 3 pg., 46, 60; R.E. 0039, 0053).
- 2. Sun Vista did not pay an hourly rate to David Alford and no such rate was set by Sun Vista. (R. Vol. 3, pg. 56-57; R.E. 0049-0050).
- 3. Sun Vista did not provide David Alford with tools necessary to perform his job; Sun Vista owns no tools. (R. Vol. 3, pg. 57, 61, 74; R.E. 0050, 0054, 0067).

4. Sun Vista did not and does not know or control what hours David Alford worked or what days of the week he worked. (R. Vol. 3, pg. 59-61; R. E. 0052-0054).
5. Sun Vista did not supervise or control the work of David Alford in any manner whatsoever. ( R. Vol. 3, pg. 59-61; R.E. 0052-0054); (*see also*, Exhibit to R., Brief of Appellant, Exhibit "A" thereto, Independent Contractor Agreement of Jose De La Luz Medrano; R.E. 0097; Exhibit to R., Brief of Appellant, Exhibit "B" thereto, Affidavit of Jose De La Luz Medrano; R.E. 0098-0100).
6. Jose De La Luz Medrano was a subcontractor of Sun Vista and was paid by Sun Vista for the job he bid not by the hour. (R. Vol. 3 pg. 56, 62; R.E. 0049, 0055; R. Vol. 3, pg. 76; R.E. 0069, Testimony of Jeffery Armstrong); (*see also*, Exhibit to R., Brief of Appellant, Exhibit "A" thereto; R.E. 0097; Exhibit to R., Brief of Appellant, Exhibit "B" thereto; R.E. 0098-0100).
7. Jose De La Luz Medrano was empowered to and did hire a subcontractor to aid him in performing his duties to Sun Vista. (R. Vol. 3, pg. 76, Testimony of Jeffery Armstrong; R.E. 0069).
8. Jose De La Luz Medrano entered into an independent contractor agreement with Sun Vista. (R. Vol. 3, pg. 56, 64, 76; R.E. 0049, 0057, 0069); (*see also*, Exhibit to R., Brief of Appellant, Exhibit "A" thereto; R.E. 0097; Exhibit to R. Brief of Appellant, Exhibit "B" thereto; R.E. 0098-0100).
9. Jose De La Luz Medrano was responsible for the work performed by David Alford; David Alford wrote in a form provided by the Mississippi Department of Employment Security that "I show up and Jose told us what to do." (R. Vol. 3, pg. 9; R.E. 0017; (*see also*, Exhibit to R., Brief of Appellant, Exhibit "A" thereto; R.E. 0097; Exhibit to R. Brief of Appellant, Exhibit "B" thereto; R.E. 0098-0100).
10. Sun Vista has no knowledge as to what services were to be performed by David Alford. (R. Vol. 3, pg.53-73; R.E. 0046-0066).
11. Sun Vista did not have top priority on David Alford's services. (R. Vol. 3, pg. 80, 82; R.E. 0073, 0075, Testimony of Larry Ladner, Field Representative of Department); (*see also*, Exhibit to R., Brief of Appellant, Exhibit "A" thereto; R.E. 0097; Exhibit to R., Brief of Appellant, Exhibit "B" thereto; R.E. 0098-0100).
12. Since Sun Vista had no relationship with David Alford, it could not terminate his services nor could David Alford terminate services with Sun Vista. (R. Vol. 3, pg. 62; R.E. 0055); (*see also*, Exhibit to R., Brief of Appellant, Exhibit "A" thereto; R.E. 0097; Exhibit to R. Brief of Appellant, Exhibit "B" thereto; R.E. 0098-0100).
13. The Department offered no live testimony of David Alford at the telephonic hearing to support its position, but relied only on the testimony of two of its employees, a field representative named Larry Ladner and a status specialist in Tax Department of

the Department named Noreen Pouty. (R. Vol. 3, pg. 41; R.E. 0034, Testimony of Noreen Pouty; R. Vol. 3, pg. 82; R.E. 0075, Testimony of Larry Ladner).

Notwithstanding the other factors outlined above, the primary factor in determining whether an employer/employee relationship exists is whether an alleged employer had the right to control and did control the work of an alleged employee. *Mississippi Employment Sec. Comm'n v. PDN, Inc.*, 586 So. 2d 838, 842 (Miss. 1991). In this instance, no direct evidence has been presented by Department that Sun Vista controlled or had the right to control the work of David Alford. Contrarily, Sun Vista did not supervise or control the work of David Alford in any manner whatsoever ( R. Vol. 3; pg. 59-60; R.E. 0052-0053) , but an independent contractor of Sun Vista did control the work of David Alford. (R. Vol. 3, pg. 9; R.E. 0017). The Department produced and the Board reviewed no evidence showing that Sun Vista controlled the actions of David Alford. Notwithstanding the clear showing of the facts outlined above (including a showing that Sun Vista did not control the work of David Alford) and an absence of any direct testimony from David Alford, the Board found that David Alford was an employee of Sun Vista and the Circuit Court affirmed the Board's decision. (R. Vol. 3, pg. 116; R.E. 0008) (R. Vol. 1, pg. 15; R. E. 0009). As shown by the record on appeal, pertinent parts of which are cited above, the Board of Review's decision is unsupported by substantial facts and is arbitrary and capricious.

3. ***No Substantial Evidence Exists showing that David Alford was the Employee of Sun Vista.***

David Alford did not testify at the hearing before the Administrative Law Judge (the "ALJ"), and Sun Vista has not been afforded an opportunity to cross-examine Mr. Alford. (R. Vol. 3; R.E. 0028-0079). The live testimony of Mr. Alford would exonerate Sun Vista much like the affidavit of Jose De La Luz Medrano and the record on appeal exonerate Sun Vista.

At hearing, the ALJ considered direct evidence presented by Sun Vista in the form of testimony of a principal of Sun Vista, Jim Gurley, and the testimony of an independent contractor

of Sun Vista, Jeffrey Armstrong. (R. Vol. 3, pg 53, 72; R.E.0046, 0065). The ALJ considered hearsay evidence presented by the Department in the form of an Independent Contractor Questionnaire completed by David Alford and the testimony of two representatives of the Department. (R. Vol. 3, pg. 9, 40- 41, 78; R.E. 0017, 0033-0034, 0071). As evidenced by the ALJ's opinion, the ALJ relied on the hearsay testimony (i.e. the Independent Contractor Questionnaire and the testimony of representatives of the Department) to make its determination and disregarded all of the direct evidence presented by Sun Vista.<sup>2</sup> (R. Vol. 3, pg. 109-112; R.E. 0003-0006). The ALJ and Board did not offer any analysis of the direct evidence presented by Sun Vista, and the Board wholly adopted the findings of fact of the ALJ. (R. Vol. 3, pg. 109-112, 115-116; R.E. 0003-0006 and R.E. 0007-0008).

**3(a) Hearsay Testimony of Representatives of the Department:**

The Department's argument has and will rely heavily on its observation that "Mr. Ladner (MDES Tax Field Representative) testified that he interviewed Mr. Alford and was told that Sun Vista told him where to work, what time to be there, and what to do while he was on the job. Mr. Alford also told Mr. Ladner that he was paid by Sun Vista and Sun Vista provided tools to Mr. Alford to complete his work." (Exhibit to R., Brief of Appellee, pg. 9; R.E. 0112). In other words, Mr. Alford allegedly told Mr. Ladner who told him when to show up for work, and then Mr. Ladner told the Administrative Law Judge what Mr. Alford had previously told him.

The ALJ accepted this tenuous evidence as substantial and the Board wholly adopted the ALJ's findings. The whole scheme is confusing, insubstantial and unreliable. This Court should

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<sup>2</sup> The ALJ focused on factors which could show that David Alford was not the independent contractor of the Sun Vista rather than focusing on factors which show that David Alford was the employee of someone other than Sun Vista. (*see*, R. Vol. 3, pg. 109-112; R.E. 0003-0006). The ALJ's decision was adopted summarily and without written analysis by the Board. (*see*, R. Vol. 3, pg. 115-116; R.E. 0007-0008, Board Decision).

contrast the unreliable hearsay testimony presented to the ALJ to Mr. Gurley's direct testimony that Sun Vista owns no tools, that Sun Vista did not and does not know or control what hours David Alford worked or what days of the week he worked, and that Sun Vista did not supervise or control the work of David Alford in any manner whatsoever. (R. Vol. 3. pg. 57, 61, and 74; R.E. 0050, 0054, 0067).<sup>3</sup> To corroborate the testimony of Jim Gurley, Mr. Medrano's affidavit shows that Mr. Medrano controlled the work of David Alford and was his employer. (Exhibit to R., Brief of Appellant, Exhibit "B" thereto; R.E. 0098-0100).

Further, the field representative of the Department assigned to this matter, Larry Ladner, could not descriptively report what Sun Vista allegedly told Mr. Alford to do, and revealed that "[Mr. Alford] was on Jose's crew.... from what I remember....he pretty well did what Jose told him to do." (R. Vol. 3, pg. 80; R.E. 0073). So, based on Mr. Ladner's self-serving hearsay testimony, it was not Sun Vista that controlled Mr. Alford's actions, but Mr. Medrano who controlled Mr. Alford's actions. (R. Vol. 3, pg. 80; R.E. 0073). This testimony fully comports with the content of Mr. Alford's Independent Contractor Questionnaire on which Mr. Alford wrote "I show up...and Jose told us what to do," and Mr. Medrano's affidavit which states "I required that David Alford be at work from 8 a.m. until 4 p.m., and I gave him specific instructions and direction in the daily performance of his duties as my employee." (R. Vol. 3, pg. 9; R.E. 0017; Exhibit to R., Brief of Appellant, Exhibit "B" thereto; R.E. 0098-0100).

The hearsay testimony of representatives of the Department is unreliable. The Board's Decision is not based on substantial evidence and should be overturned. *Johnson v. Mississippi Employment Sec. Com'n* (Miss. 2000).

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<sup>3</sup> No party has ever contended that Sun Vista directed the work of David Alford while Mr. Alford was on the job.

**3(b) Hearsay Testimony in the form of an Independent Contractor Questionnaire:**

Apart from the hearsay testimony of the Department's representatives, the Board had the Independent Contractor Questionnaire of David Alford to rely upon. (R. Vol. 3, pg. 9; R.E. 0017). David Alford was never cross-examined as to the contents of the Independent Contractor Questionnaire, as such, the testimony contained therein is unreliable. (R. Vol. 3, pg. 33-38; R.E. 0026-0031).

Further, David Alford was not an Independent Contractor of Sun Vista, but was an employee of Jose De La Luz Medrano. The questions found in the Independent Contractor Questionnaire do not attempt to establish who David Alford was employed by, but attempt to establish that David Alford was not an independent contractor of Sun Vista. (R. Vol. 3, pg. 9-12; R.E. 0017-0020). Sun Vista has always claimed that David Alford was employed by Jose De La Luz Medrano, and this is supported by the record. (R. Vol. 3, pg. 8; R.E. 0016). The Independent Contractor Questionnaire and the answers thereto are irrelevant to the pending matter.

Also, a layman's review of the Independent Contractor Questionnaire, shows that the document seems to have been filled out by more than one person. (R. Vol 3, pg. 9-10; R.E. 0017-0018). A juxtaposition of the curled and cursive "y" and "g" following the original answer with questions 5 and 13 with the printed "y" and "g" in the blanks above the words "Home Address of Worker" and "Nature of Firm's Business" on the Independent Contractor Questionnaire reveals that someone other than David Alford added language to David Alford's answers to the Independent Contractor Questionnaire. In fact, the words written in cursive following David Alford's original answer to question 5 and 13 are used in the ALJ's opinion to find that " (a hammer, tape and nail apron) were provided by the employer" and that "( the claimant performed work) at a rate of pay determined by Sun Vista" (R. Vol. 3, pg. 110; R.E. 0004). Sun Vista cannot identify the party who wrote in cursive at the top of the Independent Contractor Questionnaire and who offered secondary

answers to questions 5 and 13;<sup>4</sup> however, given that the Independent Contractor Questionnaire is an unreliable document which is apparently filled out in two handwritings, evidence derived therefrom should not be considered “substantial” in determining that David Alford was an employee of Sun Vista. The Board’s decision is unsupported by substantial facts and is arbitrary and capricious. The Board’s decision and the decision of the Circuit Court should be reversed.

**B. If the Board’s Decision is not Reversed, this Matter Should be Remanded Based on New Evidence Presented to the Circuit Court which Confirms that the Board’s Decision was Unsupported by Substantial Evidence and Arbitrary and Capricious:**

Though study of the evidence presented to the Board shows that the decision of the Board was arbitrary and capricious and unsupported by substantial evidence, in order to avoid a miscarriage of justice, it is asked that the Court consider two pieces of evidence that were unobtainable prior to the Board’s decision but are included with exhibits to the Record on Appeal. Such consideration will aid the Court in determining that, at the very least, this matter should be remanded to the Department for considerations consistent with the showings in this Brief of the Appellant. Those pieces of evidence are:

1. The Independent Contractor Agreement between Sun Vista and Jose De La Luz Medrano. (Exhibit to R., Brief of Appellant, Exhibit “A” thereto; R.E. 0097).
2. The Affidavit of Jose De La Luz Medrano. <sup>5</sup> (Exhibit to R. Brief of Appellant, Exhibit “B” thereto, Affidavit of Jose De La Luz Medrano; R.E. 0098-0100).

Through the entire course of proceedings below, Sun Vista maintained a position that no employer/employee relationship existed between it and David Alford and did so based on the facts that Jose De La Luz Medrano was an independent contractor of Sun Vista, and that Jose De La Luz

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<sup>4</sup> Though Larry Ladner would have been in a position to offer secondary answers, Sun Vista cannot affirmatively identify his hand-writing.

Medrano, if anyone, employed David Alford (R. Vol. 3, pg. 8; R.E. 0016).<sup>8</sup> Representatives of the Department, Mr. Ladner and Ms. Pouty, maintained an opposite position. However, Mr. Ladner admitted that they had not made contact with Mr. Medrano thus speaking to the potential importance of his, Mr. Medrano's testimony. (R. Vol. 3, pg. 80; R.E. 0073). Sun Vista contends that the Department should have interviewed Mr. Medrano before making its erroneous decision. In 2006, Jose De La Luz Medrano entered an Independent Contractor Agreement whereby he agreed to perform tasks to further the business of Sun Vista "as an independent contractor and not as an employee." (Exhibit to R., Brief of Appellant, Exhibit "A" thereto; R.E. 0097). On September 15, 2008, Mr. Medrano signed an Affidavit. (Exhibit to R. Brief of Appellant, Exhibit "B" thereto; R.E. 0098-0100). The position set forth in the Affidavit mirrors the position Sun Vista has maintained since the start of the dispute, and establishes that Mr. Medrano was an independent contractor of Sun Vista and the employer of David Alford (Exhibit to R., Brief of Appellant, Exhibit "B" thereto; R.E. 0098-0100). Specifically, through the affidavit, it is shown that:

1. Mr. Medrano worked as an independent contractor of Sun Vista and was so employed from November 2006 to January 2007;
2. While an independent contractor, Mr. Medrano was paid for the job that he bid, and was not paid by the hour;
3. Sun Vista did not supervise or control Mr. Medrano's work in any manner, and he was only responsible for completing the job in a timely and workmanlike fashion. Sun Vista gave Mr. Medrano no instructions or directions in the daily performance of his duties;
4. Sun Vista did not provide any tools to Mr. Medrano. Mr. Medrano supplied his own tools to perform his duties as an independent contractor;

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<sup>8</sup> To refresh, in Interoffice Communication dated July 10, 2007 and prepared by Larry Ladner, field officer for the Department, Mr. Ladner reports "the general manager of the firm, Jim Gurley, insists that the claimant never worked for Sun Vista but rather for a subcontractor by the name of "Jose." (R. Vol. 3, pg. 9, R.E. 0016).



5. Mr. Medrano could have delegated his duties or hired a substitute to perform services he was contracted to perform for Sun Vista;
6. Mr. Medrano was responsible for re-doing defective work and replacing materials at his own expense;
7. Mr. Medrano determined the price to charge for his services. Mr. Medrano bid out numerous jobs;
8. During his time as an independent contractor of Sun Vista, Mr. Medrano employed David Alford;
9. Mr. Medrano's employee, David Alford, was employed in laying concrete;
10. Mr. Medrano provided David Alford's tools; Mr. Medrano determined David Alford's rate of hourly pay and made sure he was paid, and Mr. Medrano supervised and controlled David Alford's work;
11. Mr. Medrano required that David Alford be at work from 8 a.m. until 4 p.m., and Mr. Medrano gave him specific instructions and directions in the daily performance of his duties as my employee;
12. David Alford was Mr. Medrano's employee and he treated him as such. Mr. Medrano interviewed him, hired him, and before leaving, David Alford informed Mr. Medrano that he was quitting; and
13. Sun Vista did not employ David Alford.(Exhibit to R., Brief of Appellant, Exhibit "B" thereto; R.E. 0098-0100).

Consideration of the subject affidavit fully substantiates the statements of Sun Vista and others as documented in this Brief. Further, consideration of the affidavit fully substantiates the numbered contentions of Sun Vista found in Part IV, A, 2 of this Brief. In short, Sun Vista was not the employer of Mr. Alford, and Jose De La Luz Medrano was. This position has been maintained by Sun Vista since the start of this dispute. (R. Vol. 3, pg. 8; R.E. 0016). If the facts of this proceeding do not warrant reversal of the Board and Circuit Court's decision, it is asked that this Court remand this matter back to the Department for proceedings consistent with the showings within this Brief of Appellant and the findings of this Court related thereto.

V.

CONCLUSION

The Record on Appeal shows that Sun Vista did not employ David Alford, that Mr. Alford was employed by Jose De La Luz Medrano and that Mr. Medrano was an independent contractor of Sun Vista. Further, the Record on Appeal contains no substantial evidence that Sun Vista controlled the work of or had the power to control the work of David Alford, and the testimony of David Alford was not offered at the hearing before the ALJ. Accordingly, the decision of the Board is unsupported by substantial evidence and is arbitrary and capricious, and the decision of the Board and the decision of the Circuit Court should be reversed. If those decisions are not reversed, this matter should be remanded to the Department for proceedings consistent with the showings of this Brief of Appellant and the findings of this Court related to those showings.

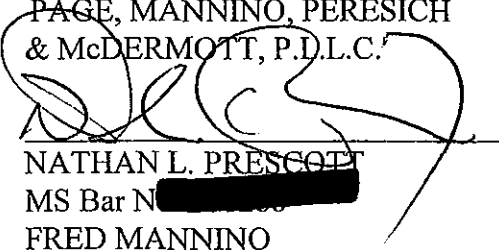
WHEREFORE, PREMISES CONSIDERED, Sun Vista prays that this Court render a judgment reversing the Board and Circuit Court's decision and determining that an employer/employee relationship did not exist between Sun Vista and David Alford. In the alternative, Sun Vista prays that this matter be remanded to the Mississippi Department of Employment Security for proceedings consistent with the showings of this Brief of Appellant and the findings of this Court related to those showings.

This the 22nd day of December, 2009.

Respectfully submitted,

Sun Vista, Inc.

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**CERTIFICATE OF SERVICE**

I, NATHAN L. PRESCOTT, of the law firm of Page, Mannino, Peresich & McDermott, P.L.L.C., do hereby certify that I have this day mailed, by United States Mail, postage prepaid, a true and correct copy of the above and foregoing **Brief of Appellant, Sun Vista, Inc.** to LeAnn Brady, Esq., at her usual address of Mississippi Department of Employment Security, Attn: Legal Department, P.O. Box 1699, Jackson, MS 39215.

This the 22nd day of December, 2009.

  
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NATHAN L. PRESCOTT, ESQUIRE

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