

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM SOUTH CAROLINA  
Workers' Compensation Commission

**RECEIVED**

AUG 31 2015

Supreme Court Appellate No. 2015-001330 **S.C. Supreme Court**

Opinion No. 5307 (S.C. Ct. App. filed April 1, 2015)

George Ferguson, Claimant, ..... Petitioner,

v.

New Hampshire Insurance Company, Carrier for AMERCO/U-HAUL International,  
and Sean P. Unterkoefer d/b/a United Stand Moving, Employer, and S.C. Workers'  
Compensation Uninsured Employers Fund, Defendants, ..... Respondents.

**PETITIONER'S REPLY TO  
RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI**

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**ARGUMENT**

**I. This case presents compelling reasons to grant the Petition for Writ of Certiorari [in Reply to Respondent’s argument I at page 7].**

Respondents summarily contend that “Petitioner failed to prove he met any of the criteria to grant his Petition for a Writ of Certiorari.” [Return at page 7]. Petitioner respectfully disagrees. This case presents novel questions of law concerning the employment relationship in the modern internet-based economy. The singularly unique issue in this case concerns the argument made by eMove that, despite performing moving services for eMove’s customers, moving helpers are neither employee nor subcontractor. The suggestion a company can provide labor for moving services with no employees or independent contractors is entirely novel – never having been addressed by this

Court nor any other. If U-Haul has indeed created a way to take a “15% cut” of labor free of employment taxes, liability for workers’ compensation and statutory employer responsibility, then it is appropriate for our State’s highest court to weigh in on this extraordinarily creative business model. See, e.g. Travelscape, LLC v. S.C. Dept. Of Revenue, 391 S.C. 89, 103 705 S.E.2d 28 (2011)(addressing taxation of internet business on direct appeal).

Furthermore, the decision here has far-reaching implications as employers and employees come to grips with new economy business models such as eMove and Uber.<sup>1</sup> For example, a federal district court judge recently denied Uber’s motion for summary judgment on its argument that its drivers are independent contractors; not employees. Uber’s argument parallels many of the arguments made by U-Haul in the instant case – with the significant difference that Uber acknowledges its service providers are either independent contractors or employees. See O’Connor v. Uber Technologies, Inc., No. C-13-3826 EMC (N.D. Cal. filed March 11, 2015)(finding Uber drivers are presumptively employees). The district court emphasized that “The application of the traditional test of employment – a test which evolved under an economic model very different from the new ‘sharing economy – to Uber’s business model creates significant challenges.” Id. at 27. The challenges presented by eMove’s business model are equally significant.

These issues go to the heart of the considerations governing review set out in Rule 242. This case presents novel questions of law. The underlying issues go beyond workers’ compensation, as

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<sup>1</sup>Uber’s business model is similar to eMove’s. “In a nutshell, Uber provides a service whereby individuals in need of vehicular transportation can log in to the Uber software application on their smartphone, request a ride, be paired via the Uber application with an available driver, be picked up by the available driver, and ultimately be driven to their final destination. Uber receives a credit card payment from the rider at the end of the ride, a significant portion of which it then remits to the driver who transported the passenger.” O’Connor v. Uber Technologies, Inc., No. C-13-3826 EMC (N.D. Cal. filed March 11, 2015)(page 2).

the decision of the court will affect the ability of the State to tax and regulate new economy businesses ensuring that the public is protected from unlicensed uninsured business operators.

**II. U-Haul is the statutory employer of George Ferguson [in Reply to Respondent's argument IV at pages 15-20].**

U-Haul argues it cannot be Ferguson's statutory employer because "a business that merely serves as a referral source for arranging work cannot be held liable as a statutory employer for an injured worker." [Return at page 17]. This is a straw man argument – relying on the false premise that U-Haul/e-Move is in the advertising business; rather than the business of providing "*moving services . . . to the consuming public.*" [R. P. 231; paragraph 1].

This same argument was made by Uber, albeit for the contention that its drivers were independent contractors rather than employees. Uber contended "it is not a 'transportation company,' but instead is a pure 'technology company' that merely generates 'leads' for its transportation providers through its software." O'Connor v. Uber Technologies, Inc., No. C-13-3826 EMC (N.D. Cal. filed March 11, 2015), at 10.

The federal district court rejected the argument:

. Uber engineered a software method to connect drivers with passengers, but this is merely one instrumentality used in the context of its larger business. Uber does not simply sell software; it sells rides. Uber is no more a "technology company" than Yellow Cab is a "technology company" because it uses CB radios to dispatch taxi cabs, John Deere is a "technology company" because it uses computers and robots to manufacture lawn mowers, or Domino Sugar is a "technology company" because it uses modern irrigation techniques to grow its sugar cane. Indeed, very few (if any) firms are not technology companies if one focuses solely on how they create or distribute their products. If, however, the focus is on the substance of what the firm actually does (e.g., sells cab rides, lawn mowers, or sugar), it is clear that Uber is most certainly a transportation company, albeit a technologically sophisticated one.

Id.

Respondents argue “Petitioner never presented any evidence eMove contracted with anyone to move or engaged in moving itself.” [Return at page 17]. No matter how U-Haul/eMove spins the language, their contract unquestionably states that “moving helpers” provide “moving services.” [R. P. 231; paragraph 1]. Cf. Kilgore Group, Inc. v. S.C. Employment Sec. Comm’n, 313 S.C. 65, 68-69, 437 S.E.2d 48, 50 (1993) (“language in the contract merely declaring the relationship is that of an employer/independent contractor is not dispositive”). The contract created a binding agreement for Unterkoefer to provide moving services for which eMove received a 15% cut. eMove had a similar contract with its customers who paid eMove by credit card for the moving services. The conclusion: U-Haul’s eMove division sells moving services.

Respondents misstate the evidence when they argue “The only evidence in the record shows the customer arranged all of the details of the moving job with Unterkoefer . . .” [Return at page 18]. Unterkoefer may have called the customer to confirm the details – but that was only after the customer had booked the job with eMove and provided a credit card to eMove for payment. Only then did eMove provide Unterkoefer with the details of the job. [R.P. 148, line 23-page 53, line 14; p. 159, lines 1-18]. The consumer signed up on eMove’s website and provided the credit card information to eMove. The consumer was undeniably eMove’s customer.

Respondents also dismiss the “15% cut” of the moving services as not indicative of statutory employment because “Petitioner did not present any evidence regarding eMove’s sources of revenue . . .” Ferguson presented testimony from Unterkoefer, as well as the contract terms explicitly providing for “a 15% cut from the total amount paid by the Customer for the Services.” [R. P. 232; paragraph 9]. If eMove had other sources of revenue, it never presented any such evidence to rebut Ferguson’s prima facie case. See S.C. Dep’t of Motor Vehicles v. Brown, 406 S.C. 626, 753 S.E.2d

524 (2014)(once party bearing burden of proof makes prima facie case, burden of production to rebut prima facie case shifts to opposing party). The evidence in this case shows the 15% cut of moving services is eMove's only source of revenue. Even if eMove had other sources of revenue, the 15% cut of the moving services are unquestionably "an important part of the trade or business of the employer [or] are a necessary, essential, and integral part of the business of the employer." Glass v. Dow Chemical Co., 325 S.C. 198, 482 S.E.2d 49 (1997). See, also S.C.Code Ann. § 12-36-20 (2000)("Business' includes all activities, with the object of gain, profit, benefit, or advantage, either direct or indirect.").

U-Haul/eMove repeatedly contends "there is no evidence that actual moving was part of eMove's trade, business or occupation . . ." [Return at page 18]. No matter how many times U-Haul repeats this mantra, the argument continues to defy common sense. As in the Uber case, "it is obvious drivers perform a service for Uber because Uber simply would not be a viable business entity without its drivers." O'Connor v. Uber Technologies, Inc., No. C-13-3826 EMC (N.D. Cal. filed March 11, 2015), at 11. The only real difference between eMove and Uber is the percentage cut taken from the customer's credit card payment. eMove takes 15%; Uber takes 20%. "Put simply, the contracts confirm that Uber only makes money if its drivers actually transport passengers." Id.

eMove only makes money if its subcontractors (or employees) provide moving services. Simply put, eMove is engaged in the business of providing moving services in South Carolina. See Travelscape, LLC v. S.C. Dept. Of Revenue, 391 S.C. 89,, 103 705 S.E.2d 28, 35 (2011)(online travel company required to pay South Carolina Accommodations Tax on hotel rooms rented through its website "because it was engaged in the business of furnishing accommodations in South Carolina.").

As Ferguson proved that the moving services provided by Unterkoefler and his employees were an important, if not essential, part of U-Haul/eMove's business, he has proven that U-Haul is his statutory employer. Accordingly, Petitioner requests the Court issue the Writ of Certiorari to establish the law on these new economy employment arrangements.

**III. Sean Unterkoefler d/b/a United Stand Moving is the direct Employer of George Ferguson [in Reply to Respondent's argument IV at pages 7-12].**

Respondents argue "The particular facts of this case do not weigh in favor of an employment relationship [because] Unterkoefler and Petitioner had a very loosely organized relationship." [Return at page 12]. Petitioner agrees that Unterkoefler had few of the indicia of operating a business – even to the point that his relationship with U-Haul was more akin to an employee than an independent contractor. Unterkoefler was not incorporated; had no business license; paid no taxes; paid his employees in cash; had no insurance; had no office and no equipment. See Crim v. Decorator's Supply, 291 S.C. 193, 352 S.E.2d 520 (Ct. App. 1986)(holding worker who worked only for employer was an employee because he "never owned a company himself, never received a federal employer's identification number, and never filed a partnership or proprietor's tax return. He neither maintained a business listing in the telephone book nor advertised his services as a carpet installer in any other way. He did not carry Workers' Compensation Insurance."). Indeed, the fact U-Haul would hire someone like Unterkoefler to provide moving services is precisely why the legislature created the statutory employer doctrine. See Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 523 S.E.2d 766 (1999)(a rule allowing a business owner to avoid "the responsibility for workers' compensation by subcontracting out the work . . . is against this Court's policy."). While the legislature intended to exclude very small businesses (less than 4 employees) from mandatory

coverage under the Workers' Compensation Act, it created the statutory employer doctrine to prevent large companies from avoiding the Act by doing the work through multiple small subcontractors.

The argument made by Respondent conflates "casual employees" with independent contractors. The Act provides that to be excluded from the Act, the employment must be "*both casual and not in the course of the trade, business, profession, or occupation of his employer . . .*" S.C. Code Ann. § 42-1-130 (2007). Even if Ferguson's employment by Unterkoefer was "loosely organized," the work he was doing when he was injured was in the course of Unterkoefer's business of providing moving services.

Respondents contend the "loosely organized" nature of Unterkoefer's operation suggests that Ferguson was an independent contractor rather than an employee. Unterkoefer may have been loose in how he ran his business, but Ferguson had no indicia of operating a business at all. Unterkoefer signed a contract with U-Haul to provide moving services for its customers. Unterkoefer also took the affirmative steps to undergo a training program; to enter his availability on the website; and to ensure that U-Haul paid him for the job upon its satisfactory completion. U-Haul cannot foist an independent contractor relationship onto an unknowing Ferguson when it was U-Haul who set Unterkoefer up in a loosely organized business. See Fortner v. Thomas M. Evans Const. and Development, LLC, 741 S.E.2d 538, 402 S.C. 421 (Ct. App. 2013)(statutory employer doctrine applied even though employee "was not aware of" who was actually paying for his work).

As to the four factors indicative of an employment relationship, Respondents argue this case is factually akin to Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009). Historically, the Wilkinson case is important for it changed the law from a single factor being dispositive of employment to evaluating all four factors "in an evenhanded manner in

determining whether the questioned relationship is one of employment or independent contractor.”

Id. at 706.

Wilkinson had been an employee, but chose to alter his relationship to independent contractor. He signed a contract; purchased a tractor and executed an “Equipment Lease Contract” which “set forth in detail the respective rights and responsibilities of the parties.” Id. at 701. The dispositive point in Wilkinson was the existence of “an unchallenged independent contractor arrangement where the parties’ conduct follows the agreement in every material respect.”<sup>2</sup>

None of the Wilkinson policy considerations apply here. Ferguson believed he was covered by workers’ compensation – only learning otherwise after his accident. He certainly never made the affirmative step to take himself out of protections of the Act nor purchase similar coverage.

Post-Wilkinson, the Court has been faced with several employee versus independent contractor situations. In each case, the Court has looked at the totality of the evidence.

In Shatto, this Court reversed the Court of Appeals, finding that a nurse anesthetist was an employee of the hospital in which she worked and was injured. The Court looked back to Wilkinson, observing that “Wilkinson carried the equivalent of his own worker’s compensation coverage . . . owned his own tractor and ‘assumed responsibility for all costs, including fuel, oil, repairs, insurance, road taxes, fuel taxes, mileage taxes, and any weight violations.’” Shatto v. McLeod Reg’l Med. Ctr., 406 S.C. 470, 753 S.E.2d 416, 419 (2013). The Court concluded the

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<sup>2</sup>Wilkinson was covered by an “occupational accident” policy which had paid out benefits to his widow. The fact the independent contractor agreement provided other resources to draw upon in the event of a workplace injury was also of importance in the Court’s decision. The Court noted “The policy considerations favoring a finding of compensability are further diminished where, as here, the independent contractor procures workers’ compensation coverage or its functional equivalent.”

evidence preponderated in favor of an employee relationship between Shatto and the hospital – despite the existence of a contract declaring her an independent contractor.

This Court also reversed the Court of Appeals in Lewis v. L.B. Dynasty, LLC, Op. No. 27509 (S.C.Sup.Ct. filed March 18, 2015)(Shearouse Adv.Sh. No. 11 at 27). Lewis dealt with a singularly unconventional employment relationship where the employee paid a “tip-out fee” to the employer for the right to work for tips on the employer’s premises. Rather than get bogged down in “a myopic view . . . of the facts presented,” the Court again emphasized that the “inquiry is a balance of factors based on the totality of the circumstances.” Id. The essential analysis boiled down to the employer having sufficient control for Lewis to be the club’s employee – even though “Lewis had no set schedule, and came when she chose with no other repercussion than the loss of income.” Id.

In the instant case, the totality of the evidence shows Ferguson was Unterkoefler’s employee. Three of the four factors distinctly point to an employer-employee relationship. Only the method of payment factor is questionable. And that factor is only questionable because Unterkoefler testified he sometimes gave Ferguson the money for an entire job to split with a helper; other times he paid Ferguson half the job. However, only Unterkoefler (and U-Haul) knew the price of the job. Ferguson’s pay for any given job was entirely determined by his employer. He never knew how much the customer paid U-Haul for the job nor how much he would be paid for any given job. Ferguson’s lack of knowledge and lack of control over his earnings is not consistent with an independent contractor.

Considering the totality of the evidence, the Court of Appeals erred in finding Ferguson was an independent contractor. Therefore, the Petition for Writ of Certiorari should be granted.

**IV. Sean Unterkoefer d/b/a United Stand Moving is subject to the Workers' Compensation Act because he employed 4 or more employees during the relevant time period [in Reply to Respondent's argument IV at pages 13-15].**

Respondents primary argument is essentially that Unterkoefer never required more than three employees (plus himself) at any given moment to perform the moving services. Respondents observe that of the 54 jobs completed in the critical period of July and August 2010, there were only five occasions where Unterkoefer required two two-man crews. [Return, page 14 n.7].

This is the crux of the issue. If an employer can avoid workers' compensation liability by scheduling its employees so that there are never more than three employees on the clock at any given time, then Unterkoefer wins the argument and is not subject to the Act. The Court need look no further; this becomes entirely a statutory employer case.

It seems unlikely such a strict rule would apply to such a complex scenario. It would be an absurd result if the rule required four full-time employees to be working at all times. As argued in the Petition, what if the employer is a convenience store open 24-hours per day, seven days a week? It would require a minimum of 4 full-time employees and one part-time employee (working the extra 8 hours) to cover the store. The payroll for that given week would show all five employees – even though at any given moment there would be one single employee on the clock. Surely the convenience store would be held subject to the Act. The same logic should apply to Unterkoefer.

The method for analyzing these situations was set out in Hartzell v. Palmetto Collision, LLC, 406 S.C. 233, 750 S.E.2d 97 (Ct. App. 2013). After discussing its previous decisions drawn from North Carolina's precedents, the Court of Appeals concluded it "must determine whether Employer (1) employed the same number of persons, although not necessarily the same individuals, (2) during

the [critical period], (3) with some constancy, (4) not by chance or for a particular occasion, and (5) without regard to the regularity of the days or hours worked.” Id. at 103. The court ultimately held the employer was subject to the Act, having employed five identified individuals during the first quarter of 2009 – four of whom it considered regularly employed.

The four individuals regularly employed were on the employer’s payroll throughout the critical period, working together. The court found the fifth individual was not regularly employed because he “did not appear on the company payroll; his work for the shop was ‘sporadic,’ and Employer issued him a form 1099. Id. at 103.

In the instant case, there are some differences from the employer in Hartzell. Unterkoefler had no formal payroll. He paid his employees in cash. He did not pay taxes, nor issue 1099’s or W2’s, nor report wages to the Department of Employment and Workforce. He kept no business records at all. Unterkoefler’s lack of record keeping and failure to comply with any employment and tax laws make it difficult to know exactly who worked and when. It hardly seems fair that Ferguson should be penalized by his employer’s poor business methods (particularly since U-Haul/eMove put Unterkoefler into business).

Nonetheless, the practical reality is that many employers operate as Unterkoefler did. The problem is particularly rampant in the construction trades – where the bulk of statutory employers cases arise. In this cases, other methods of proof must suffice. The evidence here is based on the testimony of Unterkoefler and Ferguson, plus the limited records from U-Haul/eMove over how many jobs were done.

The testimony showed Ferguson himself worked with 3 other employees at various times (plus Unterkoefler): David Coates, Arly Barr and Kenneth Hill. [R. p. 48, lines 19-25; R. p. 152; Tr.

page 69, lines 19-25]. Unterkoefler testified to one other employee named Josh. [R. p. 152 Tr. page 69, lines 19-25]. This gives us four employees. Customer surveys mention various other employees by name including “David”, “Mark”, “Mike”, “CJ”, “Tyrone,” and “Josh.” [R. p. 241-252]. Notably CJ and Tyrone did a job on August 19, 2010 – two days before Ferguson was injured. Ferguson, Barr, Coates, Hill, Josh, CJ and Tyrone all worked during that period. There are four specifically identifiable employees who worked the week of the accident.

The totality of this evidence is enough to show that Unterkoefler is subject to the Act. Unterkoefler employed nine different people during the critical period – with four specifically identified employees working on the week of Ferguson’s accident. Given that there were 22 jobs in July and 32 jobs in August, these employees were working with some constancy and not by chance for a particular occasion. The likelihood that all nine employees worked part-time makes no difference – the determination is made without regard to the regularity of the days or hours worked.

Ferguson presented sufficient evidence to prove the Hartzell requirements by a preponderance of the evidence. Therefore, he requests the Court grant the Petition for Writ of Certiorari.

**V. The Commission has jurisdiction over U-Haul International [in Reply to Respondent’s argument V at pages 20-22].**

Respondents contend Petitioner has raised a new issue that “eMove should be held liable as an upstream employer.” [Reply at 20]. Respondents misunderstand the issues raised. Upstream employer is synonymous with statutory employer. This is simply a difference in semantics; not substance. The issue is preserved.

Regarding the discussion about whether Unterkoefer himself could be U-Haul's direct employee rather than subcontractor, this point is not made as a separate or new issue. The point is made simply to illustrate the fallacy in U-Haul's argument that it is not in the business of providing moving services. Unterkoefer's relationship with U-Haul looks very much like an employer-employee relationship. See Crim v. Decorator's Supply, 291 S.C. 193, 352 S.E.2d 520 (Ct. App. 1986).

Had Unterkoefer been injured and brought this case, then his employment relationship with U-Haul would be the central issue. As Ferguson is the claimant, Unterkoefer's exact status is not necessary to the ultimate decision in this case. Ferguson prevails if he shows that U-Haul is his statutory employer. Therefore, there is no issue preservation problem in this case.

**VI. A remand is required as Ferguson is entitled to temporary compensation and medical treatment for the injuries to his right hand, right arm, right knee, and right shoulder [in Reply to Respondent's argument VI at pages 22-23].**

Respondents contend that Ferguson has not preserved "the issue of whether he is entitled to temporary compensation and medical treatment for his alleged injuries because the Appellate Panel did not rule on this issue." [Return at 22].


Petitioner raised these issues on his Form 30 and before the Court of Appeals. [R. Page 34-35]. Neither the Appellate Panel nor the Court of Appeals ruled on the issue because the claim was denied on the employment relationship issues. See Pack v. State Dept. of Transp., 673 S.E.2d 461, 381 S.C. 526 (Ct. App. 2009)(remanding for additional findings on issues not addressed or incompletely addressed by Commission). When a dispositive issue renders the particular issue moot or unripe, the failure to rule is not fatal should an appellate court reverse on the dispositive issue.

Many workers' compensation cases are remanded after an appeal for the Commission to determine the details of compensation. Indeed, this principle has been even more deeply enshrined since this Court issued Bone v. U.S. Food Serv., 404 S.C. 67, 744 S.E.2d 552 (2013)(remanding for commission to determine benefits to be awarded).

**CONCLUSION**

For the foregoing reasons, Petitioner respectfully requests the Court grant the Petition for Writ of Certiorari.

Respectfully Submitted



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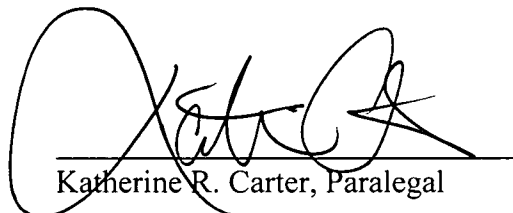
**PROOF OF SERVICE**

I certify that I am paralegal to Stephen B. Samuels and I have caused a copy of the **Petitioner's Reply to Respondents' Return to Petition for a Writ of Certiorari** to be served by mailing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on **August 31, 2015**, addressed as follows:

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