

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

S.C. Supreme Court

WCC File No. 1023143
Appellate Case No. 2015-001330

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

George Ferguson..... Petitioner.

v.

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

**MOTION TO STRIKE
PETITIONER'S REPLY**

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT:

Pursuant to Rule 240, of the South Carolina Appellate Court Rules,
Respondents move to strike portions of Petitioner's reply, which present

arguments that he did not raise to the Court of Appeals, in his petition for rehearing, or in the petition for writ of certiorari.

In his Reply, for the first time in this case, Petitioner seeks to establish liability on a new employer-employee relationship theory, citing to an unpublished decision from the United States District Court of the Northern District of California. O'Connor v. Uber Techs, Inc., No. C-13-3826 EMC (filed March 11, 2015). Petitioner also seeks to introduce new evidence of Uber's business model from this decision to support his arguments, but he never presented this evidence to the Worker's Compensation Commission or the Court of Appeals.

In addition, O'Connor was issued over one month before Petitioner filed his Petition for Rehearing before the Court of Appeals, and three months before Petitioner filed his Petition for Writ of Certiorari. Petitioner had ample opportunity to raise and argue the holding in O'Connor before now. Because Petitioner failed to comply with several appellate procedural rules, Respondents respectfully move this Court to strike Arguments I and II from Petitioner's reply.

LAW/ANALYSIS

I. Arguments I and II Should be Struck Because Petitioner Cannot Raise New Theories of Liability and Offer Facts From the O'Connor Unpublished Decision as Proof in this Appeal; Additionally, Petitioner Cannot Rely on O'Connor as Precedent

Under Rule 268(d)(2), SCACR, an unpublished order has no precedential value and should not be cited except in proceedings in which they are directly involved. An unpublished decision like the one cited in Petitioner's reply (which does not even emanate from our jurisdiction) does not establish precedent and it is improper to rely on an unpublished decision. Higgins v. Med. Univ. of S.C., 326 S.C. 592, 600, 486 S.E.2d 269, 271 (Ct. App. 1997). Courts cannot accept the facts found within an unpublished decision as proof, nor may unpublished decisions serve as authority for any proposition. See id. at 601, 486 S.E.2d at 273.

Arguments I and II should be struck because Petitioner cites to O'Connor as his main support in those arguments. A party cannot rely on an unpublished order as precedent. Applying California law, O'Connor is also wholly irrelevant to this matter. See Rule 268(d)(2), SCACR (providing unpublished orders should be cited **only** in proceedings in which they are directly involved (emphasis added)).

More importantly, Petitioner did not disclose or present any evidence of Uber's business model before the Worker's Compensation Commission or the South Carolina Court of Appeals so that the evidence could be properly before this Court. The only "evidence" of Uber's business model is from this unpublished decision.¹ Petitioner cannot rely on any "facts" stated within O'Connor about Uber's business model, and he cannot represent to this Court that those "facts" constitute proof. See Higgins, 326 S.C. at 601, 486 S.E.2d at 273.

Petitioner cannot untimely raise an unpublished California decision in an attempt to sneak in new evidence to overcome his lack of discovery.² Throughout briefing and oral argument in this appeal, eMove has consistently argued and shown Petitioner's arguments lacked any support from the evidence in the record. (App. 345). Petitioner conceded as much at oral argument before the Court of Appeals. Petitioner's reply becomes evidently improper considering Petitioner chose to conduct no discovery as to eMove,

¹ For example, Petitioner uses O'Connor to attempt to introduce evidence of Uber's profit percentage from its drivers and Uber's software. (Reply pp. 4, 6).

² A case in which Petitioner has raised and lost on the (preserved and properly presented) issues three times without success.

including conducting no discovery on eMove's business model. Petitioner cannot argue a parallel between eMove and Uber's business models when there is no evidence in the record to support these arguments. Therefore, Arguments I and II should be struck because they present new evidence that was not before the Worker's Compensation Commission or the Court of Appeals.

II. Arguments I and II Should be Struck from the Reply Because Petitioner Did Not Raise These Arguments Before the Court of Appeals

Rule 242(d)(2), SCACR, provides only "those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." See also Mazloom v. Mazloom, 392 S.C. 403, 403, 709 S.E.2d 661, 661 (2011) (declining to address issue not decided by the Court of Appeals and not raised in petition for rehearing (citing Holly Hill Lumber Co. v. McCoy, 210 S.C. 440, 442, 43 S.E.2d 143, 144 (1947) (holding issue not raised in petition for rehearing is the law of the case))). Moreover, "[i]t is axiomatic that an issue cannot be raised for the first time on appeal." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

In his reply, Petitioner—for the first time—asserts he had an employer-employee relationship with eMove, citing O'Connor as support. For example, in his reply, Petitioner states this case raised the “singularly unique” issue of whether he was an employee or independent contractor of eMove. (Reply p. 1). Under Rule 242(d)(2), SCACR, arguments and issues not raised in the lower court are waived and cannot be considered as an issue before this Court. The only issue Petitioner raised with regard to eMove was that eMove was his statutory employer. Petitioner never argued before the Workers Compensation Commission or the Court of Appeals that they should determine whether he was an independent contractor or an employee of eMove. Because the issue of whether Petitioner was an employee or independent contractor of eMove was not raised to the Court of Appeals, Respondents respectfully request this Court strike Arguments I and II. The petition for writ of certiorari and the reply should only contain questions raised to the Court of Appeals. See Rule 242(d)(2), SCACR.³

³ To the extent Petitioner believes O'Connor is relevant and that he was a direct employee of eMove (both of which eMove denies and asserts there is no evidence to establish such findings), these arguments should have been raised in a timely manner. Although Petitioner had ample opportunity to raise this issue to the Court of Appeals in his petition for rehearing, this argument is also unpreserved as this theory of liability was never raised to or

Finally, under well-established preservation rules, Petitioner should not be allowed to raise these arguments for the first time on appeal. See Wilke, 330 S.C. at 76, 497 S.E.2d at 733. Petitioner has never presented any evidence or any argument that an employee and employer relationship existed between he and eMove. Accordingly, Respondents respectfully move this Court to strike Arguments I and II from the reply.

**III. Arguments I and II Should be Struck from the Reply Because
They Raise Arguments Not Presented in the
Petition for Writ of Certiorari**

South Carolina law clearly establishes that Petitioner cannot argue issues in a Reply that were not raised in his petition for writ of certiorari. See Bochette v. Bochette, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) (“An appellant may not use either oral argument or the reply brief as a vehicle to argue issues not argued in the appellant's brief.”); Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) (“[A]n argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief.”). See Jackson v. Bi-Lo Stores, Inc., 313 S.C. 272, 277, 437 S.E.2d 168, 171 (Ct. App. 1993)

ruled upon by the Worker’s Compensation Commission or the Court of Appeals. See Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733.

“The partners make several new arguments relating to estoppel and ratification in their reply brief. However, these arguments are not properly before this Court because an appellant cannot make new arguments for reversal in a reply brief.”).

Petitioner had the entire pendency of this case to raise an argument that he was in an employer-employee relationship with eMove. Petitioner chose not to do so. Petitioner also had ample opportunity to timely cite to O'Connor and chose not to do so. Petitioner cannot raise new arguments and new authorities on issues that were never raised in the Petition for Writ of Certiorari. See Jackson, 313 S.C. at 277, 437 S.E.2d at 171 (“[A]n appellant cannot make new arguments for reversal in a reply brief.”).

The need to strike Arguments I and II from the reply becomes even more apparent when considering the fact that Respondents have no opportunity to respond to those newly raised arguments.⁴ Accordingly, Arguments I and II are not properly before this Court because Petitioner

⁴ O'Connor does not establish precedent in South Carolina. Moreover, O'Connor is distinguishable not only because it did not address whether Uber was a statutory employer, but also because the California test to determine the existence of an employee and employer relationship is different than the one used by South Carolina courts. See Lewis v. L.B. Dynasty, 411 S.C. 637, 641, 770 S.E.2d 393, 395 (2015). O'Connor did not even reach the issue of whether Uber drivers were considered independent contractors or employees, as represented by Petitioner. Rather, the California Court merely found the issue was one for the jury to decide.

cannot raise new arguments in a Reply that were not presented in his petition for writ of certiorari.

CONCLUSION

Because Arguments I and II in Petitioner's reply violate several appellate procedural rules as discussed above, Respondents respectfully move this Court to strike those arguments.

Respectfully submitted,

COLLINS & LACY, P.C.

By: 
CHRISTIAN STEGMAIER
cstegmaier@collinsandlacy.com
ASHLEY R. KIRKHAM
akirkham@collinsandlacy.com
1330 Lady Street, Suite 601
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660 (voice)
(803) 771-4484 (facsimile)

**Attorneys for Respondents
AMERCO/U-HAUL International and
New Hampshire Insurance Company**

Columbia, South Carolina
November 12, 2015

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PROOF OF SERVICE

Counsel for Respondents certifies that they have served Respondents' Motion to Strike Petitioner's Reply on all parties by depositing a copy of it in the United States Mail, postage prepaid, on November 12, 2015, addressed to the following attorneys of record:

Stephen B. Samuels, Esquire
Samuels Law Firm, LLC
1320 Richland Street
Columbia, SC 29201

Lisa C. Glover, Esquire
Uninsured Employers' Fund Division
State Accident Fund
Post Office Box 210039
Columbia, SC 29221-0039

Natasha M. Hanna, Esquire
4717 Jenn Drive, Suite 102
Myrtle Beach, SC 29577

Sean Unterkoefer
United Stand Moving
25 Wing Street
Lisbon Falls, Maine 04252

Respectfully submitted
COLLINS & LACY, P.C.

By: 

CHRISTIAN STEGMAIER (S.C. ID 68648)

cstegmaier@collinsandlacy.com

ASHLEY R. KIRKHAM (S.C. ID 80114)

akirkham@collinsandlacy.com

1330 Lady Street, Suite 601

Post Office Box 12487

Columbia, South Carolina 29211

(803) 256-2660 (voice)

(803) 771-4484 (facsimile)

**ATTORNEYS FOR RESPONDENTS
AMERCO/U-HAUL International and New
Hampshire Insurance Company**

Columbia, South Carolina