THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Supreme Court Appellate No. 2015-001330

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. Unterkoefler d/b/a United Stand Moving, Employer, and S.C. Workers' Compensation Uninsured Employers Fund, Defendants, ... Respondents.

PETITIONER'S RETURN TO RESPONDENT AMERCO/U-HAUL'S MOTION TO STRIKE PETITIONER'S REPLY

Respondent's Motion to Strike Petitioner's Reply Brief should be denied. Petitioner raised no arguments not previously raised before both the Commission and the Court of Appeals. All the issues raised are properly before this Court having been raised and ruled on below or raised in the Petition for Rehearing to the Court of Appeals. Respondents primary argument to strike is simply based on their discomfiture over the commonality between their own specious arguments and those raised by Uber in the O'Connor case. O'Connor is simply used as argument of counsel in response to the arguments made by Respondent in their Return.

To the extent Respondent seeks to reargue the merits of the Petition, the appropriate means would be to move for leave to file a sur-reply brief; not a Motion to Strike.

I. Petitioner's Argument I and II are properly before the Court on Petition for Writ of Certiorari as the arguments of Petitioner's counsel are proper .

Respondent contends "Arguments I and II should be struck because Petitioner cites to O'Connor as his main support in those argument." [Motion, page 3]. The essence of Respondent's argument is that a "party cannot rely on an unpublished order as precedent." [Motion, page 3]. Respondent complains about quotations appearing in Petitioner's Reply from O'Connor v. Uber Technologies, Inc., No. C-13-3826 EMC (N.D. Cal. filed March 11, 2015).

Respondent wholly misunderstands the application of Rule 268(d)(2) regarding use of unpublished orders in briefs. It *is* improper to cite an unpublished order as *binding authority* since such orders have no precedential value. However, as stated in the Higgins case (relied on by Respondent): "This is not to say that circuit court orders cannot be submitted to a trial judge as one would submit a memorandum of law on a particular issue, but judges may not accept the facts found therein as proof for summary judgment, nor may they expressly rely on the order as authority for any proposition." Higgins v. Medical University of South Carolina, 486 S.E.2d 269, 273, 326 S.C. 592, 600 (Ct. App. 1997)

Respondent cites Higgins for the proposition that "Courts cannot accept the facts found within an unpublished decision as proof, nor may unpublished decisions serve as authority for an proposition." [Motion, page 3]. This is something of a mischaracterization. The Higgins court actually stated:

> We hold that neither the doctors nor the trial court could rely on facts and legal conclusions within the circuit court orders. Thus, the doctors' assertions at the hearing, which were based on facts within the orders, constituted factual statements of counsel. Moreover, the orders were, in effect, memoranda submitted by counsel.

> In any event, the trial court could not properly consider factual statements from either when deciding the motions, however they are characterized. Id.

Higgins involved an appeal from a grant of summary judgment in a medical malpractice case against several defendant doctors. The doctors filed 12(b)(6) motions to dismiss on the grounds they were individually immune from suit under the Tort Claims Act. The judge *sua sponte* converted the 12(b)(6) motions to motions for summary judgment. Some of the doctors produced affidavits; others presented previous circuit orders from other cases in which they had been granted immunity.

The court of appeals held it was error for the trial judge to rely on the facts and legal conclusions in the previous trial court orders as evidence that the doctors were employees of MUSC, thus immune to suit individually.[1] Thus, some of the doctors were using previous orders as factual evidence of their own employment status – when the proper thing would have been to submit affidavits as the other doctors had done. There was no problem with presenting the orders to the court; only in using them as proof of facts in support of summary judgment.

Here, the gravamen of Respondent's motion is the charge that the O'Connor case is being used "to represent to this Court that those 'facts' [about Uber's business model] constitute proof." [Motion, page 4]. The similarity between Uber's (publicly known) business model and Respondent's is simply argument of counsel.

U-Haul has consistently made the "neither fish nor fowl" argument that its "moving helpers" are neither independent contractors nor employees. The reference to O'Connor was not made for proof of any facts; only to illustrate the fundamental absurdity of this argument. The "15% cut"

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[1]Strictly speaking, the holding is dicta in that the court of appeals held the plaintiffs had not preserved the issue. The court ultimately held conversion of the motion to dismiss to a motion for summary judgment was improper, but was nonetheless harmless error as the motion to dismiss would have been properly granted.

eMove receives from the moving services performed by its subcontractors is well established by the evidence in the record. [R. P. 232; paragraph 9]. The suggestion that Petitioner is trying to "sneak in new evidence to overcome his lack of discovery" is absurd and offensive.

Petitioner could as easily have made the same arguments and done the same analysis as was done by the O'Connor court. Indeed, he has throughout this case. However, if one is going to quote another's writing – whether from a court case, treatise, hornbook, novel or newspaper – proper credit should be given to the author.

Furthermore, striking a portion of a party's brief or petition is a drastic remedy, not to be taken without due consideration. In the few prior decisions where our appellate courts have considered such motions, the courts have not struck the briefs. No prior case has ever struck argument of counsel in a Petition or Brief. An argument may be rejected on preservation grounds – which is not the case here – but not actually struck from a brief or Petition.

The prior cases have all dealt with a parties attempt to insert facts (or evidence of facts) about the particular case which do not appear in the record. In Parker, the Court stated: "Motion was made by respondent to strike certain matters from appellant's brief. These matters were irrelevant and have not been considered." Parker v. South Carolina Public Service Com'n, 314 S.E.2d 597, 599, 281 S.C. 215, 217 (1984). In Bilton, the court of appeals ruled "facts improperly stated in both parties' briefs are not considered." Bilton v. Best Western Royal Motor Lodge, 282 S.C. 634, 321 S.E.2d 63 (Ct. App. 1984). See, also. Becker v. Uhe, 221 S.C. 334, 70 S.E.2d 346 (S.C., 1952)("It is also true that appellants' brief embodies numerous facts which do not appear in the transcript of record, in violation of Rule 8, Section 7. While this breach of the rule is condemned, we do not think the

appeal should be dismissed. Of course, the facts improperly stated in the brief will not be considered.")

Here, there is no misrepresentation of facts nor any attempt to insert additional evidence about the facts of this case into the record. Petitioner quoted from a California district court case involving a company with a business model akin to eMove. Even a published opinion from the California Supreme Court would at most be persuasive authority. Here, the case is quoted for the cogency of its reasoning; not as authority for any factual or legal proposition. The members of this Court are fully capable of appreciating that any reference to O'Connor or Uber is merely argument of counsel by analogy to illustrate the common sense proposition that "moving services" can only be performed by workers – who must by definition be either independent contractors or employees.

The arguments themselves have all been made previously with citation to the record and South Carolina authority.[2] Respondent's motion is merely an attempt to distract the Court from the compelling reasons why the Petition for Writ of Certiorari should be granted. The Motion to Strike should be denied.

II. Petitioner's Argument I and II are properly before the Court on Petition for Writ of Certiorari as no new issues have been raised.

Respondent contends "Arguments I and II should be struck because Petitioner did not raise those arguments to the Court of Appeals". [Motion, page 5].

Argument I is directed to Rule 242, SCACR. Rule 242 governs the considerations used by this Court in granting or denying Certiorari. The argument raises no new issues on the merits. It

[2]In Arguments I and II of the Reply, Petitioner cites 4 reported South Carolina cases, 1 statute, and 1 rule of court.

merely addresses how the erroneous decisions below are sufficiently novel and important to warrant review and reversal by the South Carolina Supreme Court.

Respondent again misstates Petitioner's argument. Respondent writes: "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." [Motion, page 6]. The mischaracterized passage in the Reply actually states:

> 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.

[Reply to Return to Writ of Certiorari, pages 2-3],

Petitioner is not arguing he is a direct employee of eMove. eMove never paid Petitioner for the work he did. eMove paid Unterkoefler. Yet, despite taking "a 15% cut from the total amount paid by the Customer for the Services" and paying the rest to Unterkoefler, eMove persists in the fiction that Unterkoefler is neither a subcontractor nor an employee. [R. P. 232; paragraph 9].

The argument made in the Petition and throughout this case is that labor comes in only two forms: independent contractors and employees. Ferguson was Unterkoefler's direct employee. Unterkoefler himself could very well be considered an employee of eMove, but the case has been argued under the presumption that Unterkoefler is a subcontractor. Unterkoefler's status makes no difference one way or the other. The core issue eMove seeks to evade is application of the Glass factors. See Glass v. Dow Chemical Co., 325 S.C. 198, 482 S.E.2d 49 (1997)(owners are statutory

employers for injuries related to activities that: (1) are an important part of the trade or business of the employer [or] (2) are a necessary, essential, and integral part of the business of the employer). As the 15% cut is eMove's sole source of revenue, the moving services performed by their subcontractors and the employees of their subcontractors plainly meet the test for statutory employment.

The Motion to Strike should be denied.

III. Petitioner's Argument I and II are properly before the Court on Petition for Writ of Certiorari as they are first raised in the Petition for Writ of Certiorari.

The issue in this case has always been the same. Ferguson is Unterkoefler's direct employee and the statutory employee of eMove and its parent AMERCO/U-HAUL. No matter how many times Respondent tries to deflect, mischaracterize or misquote the arguments, the central issue has remained the same. The arguments made in the Reply are simply Petitioner's legitimate and proper reply to the statements made by Respondent in their Return.

As to footnote 4, it does not matter whether California's test for the existence of an employee/employer relationship differs slightly from South Carolina's. Both states have long recognized that people who perform labor for pay are either employees or independent contractors. That fundamental precept cannot be changed even though the labor may be sold through the internet, a smartphone or some other as yet unknown technology. Until moving services are performed entirely by robots, the people who do the actual work (and suffer the actual injuries) can only be employees or subcontractors.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests the Court deny Respondent AMERCO/U-HAUL's Motion to Strike.

Respectfully Submitted

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Columbia, South Carolina
November 22, 2015

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Compensation Uninsured Employers Fund, Defendants, ... Respondents.

PROOF OF SERVICE

I certify that I am paralegal to Stephen B. Samuels and I have caused a copy of the **Petitioner's Return to Respondent Amerco/U-Haul's Motion to Strike Petitioner's Reply** 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 **November 23, 2015**, addressed as follows:

Lisa C. Glover, Esquire
Uninsured Employers' Fund Division
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Christian Stegmaier, Esquire
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Collins and Lacy, PC
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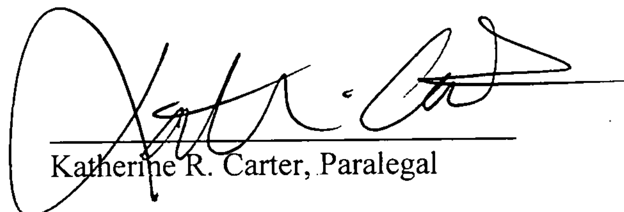

Katherine R. Carter, Paralegal

November 23, 2015
Columbia, South Carolina