IN THE SUPREME COURT OF THE STATE OF DELAWARE

SPAR MARKETING SERVICES, INC., Employer Below, Appellant, v. UNEMPLOYMENT INSURANCE APPEAL BOARD, Appellee, and TAMMY BARR, Claimant Below, Appellee.	)	No. 143, 2012 C.A. No. K11A-03-003 WLW On Appeal From: Superior Court in and for Kent County K11A-03-003 WLW

APPELLEE'S ANSWERING SUPPLMENTAL
MEMORANDUM CONCERNING THE ISSUES REMANDED

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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ARGUMENT I

THE SUPERIOR COURT CORRECTLY DETERMINED SPAR FAILED TO ESTABLISH THAT CLAIMANT'S MERCHANDISING SERVICES WERE PERFORMED OUTSIDE THE USUAL COURSE OF SPAR'S BUSINESS OR OUTSIDE OF ALL THE PLACES OF BUSINESS OF THE ENTERPRISE FOR WHICH THE SERVICE WAS PERFORMED.

The classification of a worker as either an employee or independent contractor under Delaware's ABC test (19 *Del. C.* §3302 (10)(K)(i - iii)) is no easy task. As with any test involving a balancing of factors, much depends on the fact-finder doing the balancing. It is important to note the Delaware General Assembly did not include the common law terms of "master," "servant," and "independent contractor" for determining the existence of an employer/employee relationship for unemployment insurance purposes. Thus, for *respondeat superior* tort liability purposes merchandisers for Spar might well be treated as independent contractors under the common law control test, Prong A, and yet still be considered Spar employees for unemployment insurance purposes unless they are shown to work outside all Spar's places of business and to be customarily engaged in their own independent businesses. Despite being a challenge to apply, the ABC test has been in use in more than half of the states in this country since the mid-1940s. *See* Benjamin S. Asia, *Employment Relation: Common Law Concept and Legislative Definition*, 55 Yale L.J. 76 (1945).

A common sense reading of Prong B of the test required a showing by Spar that Tammy Barr's ("claimant's") merchandising services were either: (1) performed outside the usual course of Spar's business; or (2) were outside of the places of business of Spar's enterprise for which the claimant's merchandising services were performed. Spar proved neither. Spar offered no evidence, and has never argued, that claimant's services did not fall squarely within the usual course of its business, i.e., supplying merchandising services to its clients throughout the United States and internationally for a fee. Instead Spar has argued that since it has no Delaware place of business or headquarters - it has offices in Michigan and New York - claimant's Delaware merchandising services must necessarily be considered outside all of Spar's places of business, and thus it satisfied Prong B.

More than 30 years ago in *Dep't of Labor v. Medical Placement Services, Inc.*, 457 A.2d 382 (Del. Super. 1982), aff'd, 467 A.2d 454 (Del. 1983)(TABLE), a decision affirmed by this court, the Superior Court scolded the UIAB for adopting the same narrow interpretation of Prong B that Spar is urging upon the court. In *Medical Placement Services*, the UIAB held that trained healthcare technicians (registered nurses, licensed practical nurses, and nurses' aides) who provided their services at medical facilities or in private homes were not employees of the staffing company that brokered their services because it provided no location for work. In reversing the UIAB and criticizing its "narrow definition" of Prong B's "place of business" phrase and, more specifically, for overlooking the word "enterprise" when interpreting the statute, Judge O'Hara wrote:

> the nature of the M.P.S. is such that business cannot be transpired(sic)on its premises; the enterprise in which M.P.S. is engaged involves supplying technicians *to medical facilities and private homes*. Therefore, the latter locations are necessarily included within the enterprise and are, thus, subsumed within "place of business" as contemplated by §3302(9)(K)(ii). (Now (10)(K)(ii)).

According to the testimony of Ms. Heidi Savage, Spar's only witness before the UIAB, Spar provides no location for merchandising, i.e., product placements and displays, at its offices in Michigan or New York. Indeed, it is the nature of Spar's business enterprise that the merchandisers it supplies to its clients perform their merchandising services at Spar's clients' retail stores across the country. Claimant admittedly conducted certain administrative tasks from her home. But while she may have selected her Spar assignments and processed her invoices for payment from her computer terminal at home, claimant provided actual merchandising services - the actual setting up of displays and arranging of products - at Spar's clients locations and not in her home. Spar's clients' stores were properly considered by the Superior Court to be analytically indistinguishable from the medical facilities and private homes featured in *Medical Placement Services*. Other states have similarly rejected Spar's "home office or headquarters" restrictive interpretation of Prong B. *Cf. In Re Bargain Busters*, 287 A.2d 554,558-9 (Vt. 1977); *McPherson Timberlands, Inc. v. Unemployment Comm'n.*, 714 A.2d 822,823 (Me. 1998).

Spar's earlier reliance on *Athol Daily News v. Bd. of Review of the Div. of Employment & Training,* 786 N.E.2d 365 (Mass. 2003) is strained. Merchandisers who contract with Spar to perform services for its clients are more closely analogous to the healthcare technicians in *Medical Placement Services* than to the newspaper delivery workers in *Athol* whose connection with a given address is both fleeting and insubstantial. The difference is self-evident: throwing or dropping a newspaper at a target address is an instantaneous connection and qualitatively very different from going inside a building to deliver healthcare or merchandising services. Thus the process servers in *Baynard and Torpey v. Delaware* Attorney *Services*, *LLC*, 2013 WL 2325302 (Del. Super. May 23, 2013) cited by Spar, like the newspaper delivery workers in *Athol*, have an equally insignificant connection to the physical location where the targets of process can be located. It is noteworthy that Judge Stokes was careful to state these two cases are limited to their facts. Thus they have no broad applicability even to other cases involving process serving employers let alone overrule *Medical Placement Services*. The Superior Court was correct to conclude on remand that Spar failed to satisfy Prong B.

ARGUMENT II

THE SUPERIOR COURT CORRECTLY DETERMINED SPAR FAILED TO ESTABLISH THAT CLAIMANT WAS CUSTOMARILY ENGAGED IN AN INDEPENDENTLY ESTABLISHED TRADE, OCCUPATION, PROFESSION OR BUSINESS OF THE SAME NATURE AS THAT INVOLVED IN THE SERVICE PERFORMED.

A plain reading of Prong C of the ABC test required a showing by Spar that claimant was (1) customarily engaged in (2) an independently established merchandising enterprise. Claimant was not called as a witness though she was subject to the UIAB's subpoena power. UIAB Rule 4.8.1. The UIAB relied on *Medical Placement Services* in determining that Spar failed the Prong C test. On remand the Superior Court was correct to reach the same conclusion.

Spar admitted at page 31 of its Opening Brief to this court that to satisfy the Prong C test, it was required to show that claimant was customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed. Spar also admitted at page 21 of its Opening Brief to this court that the record does not indicate whether claimant

actually performed merchandising services for other entities because she did not appear at the UIAB hearing. This is fatal to Spar's argument that it satisfied Prong C.

Spar offered no proof that claimant was engaged in a merchandising business, or any business, with clients of her own. Spar offered no proof that claimant advertised her own merchandising business or otherwise held herself out to the public as offering such services independent of Spar. Instead Ms. Savage observed that when merchandisers want to advertize themselves they "go to NARMS. It's an independent business." (A-94)[1]

Spar offered no proof that claimant purchased any insurance much less that she did so voluntarily as evidence of the independent existence of her own merchandising business. While the certified record contains more than 30 pages of Spar's insurance records, not one suggests that claimant, or a business owned by claimant, is a named insured under its policies. The evidence that Spar relies on shows only that claimant was required to purchase coverage, but whether she did or not as required by Paragraph 6 of the Independent Merchandiser Agreement (A-6) is unknown. Spar contends that claimant provided Spar with a tax I.D. number for a business; instead, the record shows she merely gave Spar a copy of her social security card with its number. (A-17) Spar did not offer into evidence any professional or business license issued to claimant or to any business or enterprise she may have organized or controlled that she could have either sold or otherwise profited from.

Spar has asserted that it did not assume any administrative duties regarding claimant's merchandising services, an assertion contradicted by the testimony of Ms. Savage who explained that the difference between what Spar was paid by its clients and what Spar paid to the merchandisers was a "mark up" for "administrative services" to make certain work was done correctly and on time. (A-99,100)

Evidence that claimant was contractually free to accept other merchandising assignments or to delegate Spar assignments to third parties does not constitute substantial evidence that she actually did those things. While the Independent Merchandiser Agreement provisions may have been relevant to a Prong A determination, they are irrelevant in the Prong C context. In short, Spar's arguments concerning

[1] References are to Spar's Appendix to its Opening Brief to the Court and are shown as (R -).

what other merchandisers do, or what claimant was contractually free to do, fail to establish the objective it set out for itself in its Opening Brief and that is required by the exemption statute, namely, to prove that the claimant herself was customarily engaged in an established business of her own. *Labor & Logistics Management v. Administrator, Unemployment Compensation Act*, 2012 WL 5205557 at *3, *4 (Conn. Super. 2012)

The facts in *Yurs v. Director of Labor, Dept. of Labor, Div. of U.C.*, 235 N.E.2d 871 (Ill. App. 1968), a case relied upon by the Superior Court in *Medical Placement Services*, are more nearly analogous to the facts of the instant matter than are those of *Skyhawke Tech. LLC v. Unemployment Compensation Bd. of Review*, 27 A.3d 1050 (Pa. Cmwlth. 2011) cited by Spar. In *Skyhawke* the claimant admitted: (1) he believed himself to be an independent contractor and not an employee when he performed global positioning satellite mapping of golf courses for Skyhawke; and (2) that Skyhawke would not exercise control over "[his] activities or business operation." *Id.* at 1051. In *Yurs*, on the other hand, an organist who performed at a funeral home was found to be an employee of the funeral home and not an independent contractor where the funeral home: (1) included the organist's charge as part of the funeral home's bill to the customer; (2) payment to the organist was made by the funeral home and was not contingent on receiving payment from the customer; (3) there was no evidence that the organist determined her rate of pay; and (4) there was no evidence of any advertising or professional listing of her services. Instantly, claimant never made admissions that she believed herself to be an independent contractor or that she had a "business operation" over which Spar had no control.

The UIAB has taken the position that Spar offered no evidence at all to suggest claimant was herself an entrepreneur with a trade, occupation, profession or business independent of Spar's and as to which her Spar assignments were merely a part. Claimant's meager earnings from Spar might suggest she needed additional money to live on but Spar left the courts to guess as to her other possible sources of income and how her days were spent. Clearly more is required to satisfy Prong C. If, as Justice Berger inquired, Spar had shown that claimant was customarily engaged in an independently established merchandising enterprise with "three clients of her own," the UIAB may well have considered claimant

not only an independent contractor but a self-employed individual from whom a recoupment of all benefits previously paid should have been sought pursuant to 19 *Del. C.* § 3325, thus restoring the "symmetry" between the Division of Unemployment Insurance's payment of benefits and assessment of taxes. *See Workman v. UIAB*, 2011 WL 3903793 at *4 (Del. Super. Sept.1, 2011) (an individual was self-employed and ineligible for unemployment insurance where he made more than *de minimus* efforts on behalf of two start up businesses he owned despite their unprofitability and his contention that he was available for full-time employment outside the 40 hours per week he devoted to his businesses).

The assertion that Spar faces a dilemma if the court adopts the UIAB's Prong C interpretation is specious. When Spar receives applications from prospective merchandisers, and again when it interviews them, it has ample opportunity to classify them correctly as either employees or independent contractors. If it later develops – as in the instant case – that the Division of Unemployment Insurance disagrees with Spar's classification, Spar has the opportunity to make a proper record establishing compliance with the Prong C test by calling the claimant as a witness. Spar's interpretation of the Prong C test would have this court read the words "customarily engaged in" and "independently established" out of the statute entirely; that is something only the General Assembly has the power to do. Indeed, having already used the word "free" in Prong A (§3302 (10)(K)(i)), the General Assembly presumably would have used the words "free to engage in" rather than "customarily engaged in" in articulating the Prong C test (§3302(10)(K)(iii)) if that is what it meant to say. This court will not interpolate words that are not in a statute.

Recently, in rejecting the same argument Spar makes to this court, the New Jersey Superior Court held that Spar "failed to convincingly establish particular facts demonstrating that the merchandisers were conducting independent business operations, including business operations with other entities." *Spar Marketing Services, Inc. v. New Jersey Department of Labor and Workforce Development,* 2013 WL 890071 at *5 (N.J. Super. A.D. 2013).

In conclusion, to avoid liability for unemployment insurance taxes an employer must show more than a mere absence of control under Prong A. As the Superior Court cogently observed in its remand decision, its holding is in harmony with the remedial nature of 19 *Del. C.* Chapter 33 and the court's long-

standing practice of construing this law in favor of employees who are unemployed through no fault of their own. *Haskon, Inc. v. Coleman*, 310 A.2d 657 (Del. Super. 1973). The UIAB made a good faith effort to follow the seminal ABC precedent of this court and concluded that Spar offered no evidence, much less substantial evidence, to demonstrate any independent entrepreneurial enterprise by the claimant. At best Spar proved that if claimant had a proprietary interest of her own, it would have been free of Spar's control. Spar failed Prong C. The Superior Court's decision on remand should be affirmed.

Respectfully submitted,

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