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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT SPAR MARKETING SERVICES, INC.'S REPLY BRIEF

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TABLE OF CONTENTS

TABL	E OF AUTHORITIESii
INTRO	ODUCTION1
RESP	ONSE TO COUNTERSTATEMENT OF FACTS 2
ARGUI	MENT3
I.	The Board's Finding That SMS Failed To Satisfy The "B" Prong Must Be Reversed Because It Is Premised On A Misapprehension Of The Law And Ignores Evidence In The Record
II.	The Board Erroneously Held That Ms. Barr Was Not Engaged In An Independent Business or Trade
CONC	LUSION 10

TABLE OF AUTHORITIES

Cases

Comm'r of the Div. of Unemployment Assistance v. Town Taxi of
Cape Cod, Inc., 862 N.E.2d 430 (Mass. App. Ct. 2007)9
Dep't of Labor v. Med. Placement Services, Inc., 457 A.2d 382 (Del. Super. 1982)4
Skyhawke Tech. LLC v. Unemployment Compensation Bd. Of Review, 27 A.3d 1050 (Pa. Cmwlth. 2008)8
Yurs v. Director of Labor, 235 N.E.2d 871 (Ill. App. 1968)8
<u>Statutes</u>
19 Del. C. § 3302 (10) (K)(i)-(iii)

INTRODUCTION

In its Opening Brief, Appellant, employer-below Spar Marketing Services, Inc. ("Appellant" or "SMS"), established that the Superior Court and the Unemployment Insurance Appeal Board (the "Board") erroneously concluded that Ms. Barr was its employee under the "ABC Test" codified at 19 Del. C. § 3302(10)(K)(i)-(iii). This Court then directed the Board to file an answering brief, particularly with respect to prong "A"-the only part of the test relied upon by the Superior Court. The Board complied with commendable candor, admitting in its Answering Brief that it and the Superior Court were wrong in concluding that prong "A" had not been established by SMS.

Unfortunately, the Answering Brief does not end there. It goes on to attempt to preserve the Superior Court's holding of employee status through inaccurate citations to the record and inaccurate restatements of the statutory "B" and "C" prongs. As is established in the remainder of this Reply Brief, the Board's factual and legal positions are entirely unavailing.

Consequently, for the reasons set forth herein as well as those previously set forth in detail in SMS' Opening Brief, the Board's decision that the claimant was an employee of SMS and not an independent contractor, and the Superior Court's affirmance of that decision, should be reversed.

RESPONSE TO COUNTERSTATEMENT OF FACTS

The Board's "Counterstatement of Facts" is relevant only to prong "A" of the "ABC" Test. As such, given the Board's capitulation with respect to that prong, there is no legal requirement for any response here.

Although the Counterstatement does not directly address Prongs "B" and "C" of the "ABC" Test, a number of material factual inaccuracies with respect to those prongs are embedded in the "Argument" section of the Board's Answering Brief. Those inaccuracies are addressed in SMS' responses herein to the Board's arguments.

The Counterstatement is, in any event, materially inaccurate. As examples: (1) the Board incorrectly asserts that the cost of the claimant's workers' compensation and general liability insurance "would be borne by" SMS, not the claimant. Answering Brief at 3; and (2) the Board incorrectly asserts that SMS receives a "mark up" "to ensure the clients' satisfaction with the work performed." Answering Br. at 4. Neither assertion includes a record citation because neither assertion is accurate.

ARGUMENT

I. The Board's Finding That SMS Failed To Satisfy The "B" Prong Must Be Reversed Because It Is Premised On A Misapprehension Of The Law And Ignores Evidence In The Record.

The Superior Court did not address Prong "B" of the "ABC" In its Answering Brief, the Board makes one crucial factual admission, ignores one crucial undisputed fact, and makes one crucial factual mistake. The Board concedes that the claimant may have performed services inside her own home and outside of the premises of any retail store. Answering Br. at The Board ignores the undisputed evidence that SMS performs services from its acknowledged business locations outside the State of Delaware and not solely at the locations where claimant performed services. A-93:7-12, cited at Opening Br. at 28. Board also incorrectly assumes that the retail stores in which the claimant performed a portion of her merchandising services are all SMS' clients. As acknowledged by the Board, many of SMS' clients are product manufacturers as opposed to retail Answering Br. at 3. Merchandising services are performed for those product manufacturer clients in retail locations whether or not those retail locations are also SMS' clients.

The fact that SMS provides services beyond those performed by the claimant, the fact that the claimant performs services at

her own home, and the fact that the retail stores in which the claimant performs some of her services may not be SMS' clients, clearly move this case outside the purview of Dep't of Labor v. Med. Placement Services, Inc., 457 A.2d 382, 386 (Del. Super. 1982), aff'd without op., 467 A.2d 454 (Del. 1983) (TABLE).

In Medical Placement, the Court relied on the fact that the putative employer performed no services at its stated places of business and on the fact that services were performed by putative employees only at the locations of its clients. That is not the case here. It is undisputed that SMS provides services from its acknowledged locations outside the State of Delaware. The Board concedes that the claimant performed services at her home, and the retail stores where she performed other services were not necessarily SMS' clients.

It is therefore clear that SMS' services <u>and</u> the claimant's services extended beyond claimant's performance of services at the locations of SMS' clients. As such, the *Medical Placement* holding that the putative employer's clients' places of business must be determined to be the putative employer's places of business under the "B" Prong if no services are performed elsewhere is not applicable. SMS performs services elsewhere. The claimant performs services elsewhere. And the retail stores where claimant performed some of her services may well not even be SMS' clients.

In this circumstance, SMS has clearly satisfied the plain statutory requirements of the "B" Prong which are unambiguously set forth in the disjunctive. The claimant's services may not have been performed outside of SMS' usual course of business, but those services clearly were performed outside of all of SMS' places of business. Nothing more is required to satisfy the "B" Prong, and the Board's arguments to the contrary are without merit.

II. The Board Erroneously Held That Ms. Barr Was Not Engaged In An Independent Business or Trade.

The "C" Prong also was not addressed by the Superior Court. In its Answering Brief, the Board attempts to insert a requirement not found in the plain language of that statutory provision and also attempts to place an impossible evidentiary burden on any business or individual who desires to contract with an independent contractor in the State of Delaware.

First, the Board contends that SMS must establish that the claimant:

is engaged in an independently established trade, profession or business of the same nature as Spar's, i.e., providing merchandising opportunities to merchandisers with her own clients for an administrative fee.

Answering Br. at 2. There is no support for this remarkable assertion in the statute or, to SMS' knowledge, in any reported decision.

not require that the independent statute does The in the exact same business as the entity or contractor be individual who contracts with the independent contractor, only that she or he be engaged in her own independent trade, business or profession. The evidence demonstrating that the claimant's merchandising trade, business or profession is independently established, that her ability to provide services in that trade, business or profession exists separate and apart from her contractual relationship with SMS, and that she not economically dependent upon SMS to continue in that trade, business or profession is set forth at length in SMS' Opening Brief at 4, 13, 14. All of that evidence stands essentially unchallenged by the Board, notwithstanding its unsupported assertion that this evidence should be held "weightless" by this Court. Answering Br. at 13.

The Board's attempt to avoid the logical consequence of that evidence—by attempting to unilaterally amend the language and requirements of the "C" Prong—is unsustainable. Rather than defeating SMS' position, it serves to buttress and highlight the conclusion that SMS satisfied the actual requirements of the "C" Prong such that the Board's contrary decision, and the Superior Court's affirmance of that contrary decision, must be reversed.

It should also be noted that the Board attempts to establish an impossible burden for Delaware businesses and

contract with independent wish to individuals who may contractors through its contention that SMS could only safely contract with the claimant as an independent contractor if it first verified that she was already actively providing the same services to multiple other clients and if it thereafter continually monitored her to verify that she continued to provide those services to multiple other clients. Answering Br. at 12-13. That is not and cannot be a requirement under the "C" Prong or the "ABC" Test in general. Indeed, if SMS or any other entity or individual attempted to engage in the level of supervision and monitoring necessary to meet this purported test, the Board would undoubtedly find a Prong "A" violation.

SMS does not dispute that it is obliged under the "C" Prong to establish that merchandising is an independently established trade, occupation profession or business, and it did so. However, nothing in the "C" Prong obligates SMS (or any other entity or individual) to monitor the extent to which an individual voluntarily chooses to participate in that independently established trade, occupation, profession or business.

There is no requirement in Delaware law that independent contractors must engage in an independently established business on a full-time basis. There are only the requirements that the contractor be free from direction and control when he or she

chooses to engage in the business and that he or she perform the services outside of the places of business of the entity with whom she or he contracts (if the services are in the other party's usual course of business). Those requirements were satisfied here; as such, all three prongs of the "ABC" Test have been established.

Finally, the Board's reliance on Yurs v. Director of Labor, 235 N.E.2d 871 (Ill. App. 1968) is unpersuasive. There, the Court held that an organist who played for a funeral home was not involved in an independent business or trade primarily because: (i) the funeral home provided her with equipment; (ii) she did not determine her rate of pay; (iii) she did not advertise her services; and (iv) she did not operate without hindrance from the funeral home. Id. at 875-76. None of these factors are present here. The record evidence shows that: (i) provided Ms. Barr no equipment; (ii) Ms. Barr could determine her rate of pay; (iii) Ms. Barr could advertise on a national database; and (iv) as the Board now concedes, Ms. Barr did operate free from control and without hindrance from SMS. The existence of these factors conclusively A-25-26; A-92. demonstrates that Ms. Barr was engaged in an independent business or trade. See, e.g., Skyhawk Tech. LLC, 27 A.3d 1050, 1058 (Pa. Cmwlth. 2008); Comm'r of the Div. of Unemployment Assistance v. Town Taxi of Cape Cod, Inc., 862 N.E.2d 430, 436 (Mass. App. Ct. 2000).

In sum, the Board's arguments that Ms. Barr was not engaged in an independent trade are unpersuasive, and the Court should reverse the Board's decision and the Superior Court's affirmance of that decision.

CONCLUSION

For the foregoing reasons, the Superior Court's order affirming the Board should be reversed. SMS should be held not to be an "Employer" within the meaning of Delaware's unemployment compensation laws as it has met its burden of establishing that the claimant's services were provided as an independent contractor in conformance with the requirements of 19 Del. C. § 3302(10)(K)(i)-(iii).

Respectfully submitted:

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