

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
The Honorable Maite Murphy

Appellate Case No. 2016-000984

RECEIVED

APR 11 2017
SC Court of Appeals

Cortland James Eggleston, ... Appellant,

v.

United Parcel Service, Inc., and Rick Fogle, ... Defendants,

Of Whom United Parcel Service, Inc., is the Respondent,

and

Rebecca McCutcheon, ... Appellant,

v.

United Parcel Service, Inc., and John Doe, ... Defendants,

Of Whom United Parcel Service, Inc., is the Respondent.

RECORD ON APPEAL

BARNES LAW FIRM, LLC
Kathleen C. Barnes, Bar No. 78854
Post Office Box 897
Hampton, SC 29924
(803) 943-4529

LANIER & BURROUGHS, LLC
Shane M. Burroughs, Bar No. 70346
Post Office Drawer 2789
Orangeburg, SC 29116
(803) 268-9800
Attorneys for Appellants

BAMBERG LEGAL, LLC
Justin T. Bamberg,
Bar No. 100337
2331 Main Hwy.
Bamberg, SC 29003
(803) 956-5088

G. Troy Thames
421 Wando Park Blvd., Ste 100
Mount Pleasant, SC 29464
(843) 284-0832

Ryan R. Corkery
Ansa Assunacao, LLP
1600 JFK Blvd.
Four Penn Center, Suite 900
Philadelphia, PA 19103
(267) 528-0733
Attorneys for Respondent

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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MAY 06 2016

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable Maite Murphy

Case No. 2014-CP-38-01164

Rebecca McCutcheon, ... Appellant,

v.

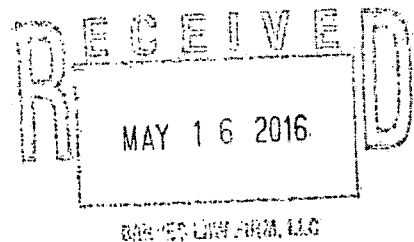
United Parcel Service, Inc. and John Doe, ... Defendants,

Of Whom, United Parcel Service, Inc. is the Respondent.

NOTICE OF APPEAL

Rebecca McCutcheon ("Appellant") appeals the Order of the Honorable Maite Murphy dated February 2, 2016, and filed February 22, 2016, granting United Parcel Service, Inc. ("Respondent") motion to dismiss, and the Order of the Honorable Maite Murphy dated March 29, 2016, and filed April 6, 2016, denying Appellant's Rule 59(e), SCRPC. Motion to Reconsider, Alter, or Amend. On April 6, 2016, Appellant received written notice of the Order denying the Rule 59(e), SCRPC, motion. This Notice is timely filed. A copy of the Orders appealed from are attached to this Notice.

[Signature block appears on the following page.]



Dated:

May 4, 2016

BARNES LAW FIRM, LLC

By:

Kathleen C. Barnes

Kathleen C. Barnes
Post Office Box 897
Hampton, SC 29924
803-943-4529

LANIER & BURROUGHS, LLC

Shane M. Burroughs
Justin T. Bamberg
Post Office Drawer 2789
Orangeburg, SC 29116
(803) 268-9800

Attorneys for Appellant

Other Counsel of Record:

G. Troy Thames
421 Wando Park Blvd., Suite 100
Mount Pleasant, SC 29464
(843) 284-0832

Ryan R. Corkery
Ansa Assunacao, LLP
1600 JFK Blvd.
Four Penn Center, Suite 900
Philadelphia, PA 19103
(267) 528-0733

Attorneys for Respondent UPS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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MAY 13 2016
CLERK OF COURT

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

The Honorable Maite Murphy

Case No. 2015-CP-38-00354

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MAY 06 2016
SC Court of Appeals

Cortland James Eggleston, ... Appellant,

v.

United Parcel Service, Inc. and Rick Fogle, ... Defendants,

Of Whom United Parcel Service, Inc. is the Respondent.

NOTICE OF APPEAL

Cortland James Eggleston ("Appellant") appeals the Order of the Honorable Maite Murphy dated February 2, 2016, and filed February 22, 2016, granting United Parcel Service, Inc.'s ("Respondent") motion to dismiss, and the Order of the Honorable Maite Murphy dated March 29, 2016, and filed April 6, 2016, denying Appellant's Rule 59(e), SCRCF, Motion to Reconsider, Alter, or Amend. On April 6, 2016, Appellant received written notice of the Order denying the Rule 59(e), SCRCF, motion. This Notice is timely filed. A copy of the Orders appealed from are attached to this Notice.

[Signature block appears on the following page.]

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MAY 16 2016
BARNES LAW FIRM, LLC

Dated:

May 4, 2016

BARNES LAW FIRM, LLC

By:

Kathleen C. Barnes

Kathleen C. Barnes
Post Office Box 897
Hampton, SC 29924
803-943-4529

LANIER & BURROUGHS, LLC

Shane M. Burroughs
Justin T. Bamberg
Post Office Drawer 2789
Orangeburg, SC 29116
(803) 268-9800

Attorneys for Appellant

Other Counsel of Record:

G. Troy Thames
421 Wando Park Blvd., Suite 100
Mount Pleasant, SC 29464
(843) 284-0832

Ryan R. Corkery
Ansa Assunacao, LLP
1600 JFK Blvd.
Four Penn Center, Suite 900
Philadelphia, PA 19103
(267) 528-0733

Attorneys for Respondent UPS

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG) Case No.: 2014-CP-38-01164
Rebecca McCutcheon,)
Plaintiff,)
vs.)
United Parcel Service, Inc. and John)
Doe,)
Defendants.)

ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS

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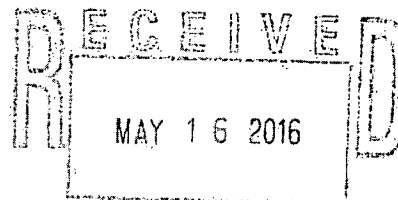
MAY 06 2016

SC Court of Appeals

This matter came before the Court on Monday, September 28, 2015, upon Motion of Defendants United Parcel Service, Inc. ("UPS") and John Doe (together, the "Defendants") for an Order pursuant to Rules 12(b)(1) & 12(b)(6) of the *South Carolina Rules of Civil Procedure* dismissing Plaintiff's Complaint in its entirety on the grounds that Plaintiff's state law tort action is preempted by federal statute 49 U.S.C. §14501(e) (the Federal Aviation Administration Authorization Act of 1994). Defendants and Plaintiff filed memorandums of law in support and opposition to Defendants' Motion, and present for the hearing was counsel for the Defendants, G. Troy Thames and Ryan R. Corkery, and counsel for Plaintiff, Shane M. Burroughs and Justin T. Bamberg. For reasons which will be fully explained below, the Court grants Defendants' Motion and dismisses Plaintiff's Complaint with prejudice.

FINDINGS OF FACT

The above-captioned loss of consortium tort action was initiated by Plaintiff Rebecca McCutcheon ("Plaintiff") against United Parcel Service, Inc. and its purported driver employee, John Doe. Plaintiff alleges that Defendants negligently delivered a package, shipped from the Veterans Administration Hospital in Charleston, South Carolina and containing Plaintiff's husband's thyroid medication, late to Plaintiff's husband, which resulted in personal injuries to him (Plaintiff's Complaint at ¶¶ 5-8 & 13). The basis of Plaintiff's loss of consortium claim is that the personal injuries suffered by her husband resulted in damage to Plaintiff's marital relationship. (*Id.* at ¶ 21). Plaintiff initiated the action on September 18, 2014, and Defendants timely filed a Motion to Dismiss on December 15, 2014.



BARBER LIVINGSTON, LLC

CONCLUSIONS OF LAW

The Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), codified at 49 U.S.C. §14501(c), provides:

[A] State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier ... or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 U.S.C. § 14501(c)(1). The United States Supreme Court has further clarified that the FAAAA preempts state laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1772 (2013) (quoting 49 U.S.C. § 14501(c)(1)).

As pled in the Complaint, the subject package was shipped by the VA Hospital in Charleston, South Carolina, to Plaintiff's husband at their home in Orangeburg, South Carolina. As such, the package constitutes an intrastate shipment. The loss of consortium state tort claims set forth in Plaintiff's Complaint are based upon an allegation that UPS, a motor carrier, negligently delivered the package untimely. These claims are based solely upon the specific service that UPS provides -- delivery of packages. Pursuant to the plain language set forth in the FAAAA, all of the state law claims set forth in Plaintiff's Complaint, which relate directly to the "service" provided by UPS, a motor carrier, are preempted. *See* 49 U.S.C. § 14501(c)(1).

Because the FAAAA expressly preempts the state law tort claims set forth in Plaintiff's Complaint, this Court lacks subject matter jurisdiction over Plaintiff's claims insofar as it lacks the statutory power to adjudicate those claims which have been preempted by federal law. As such, Plaintiff's Complaint is dismissed pursuant to SCRPC 12(b)(1). Moreover, and as an alternative grounds for dismissal, because the FAAAA expressly preempts the state law tort claims set forth in Plaintiff's Complaint, Plaintiff has failed to state any facts sufficient to constitute a valid cause of action under South Carolina state law. As such, Plaintiff's Complaint is dismissed pursuant to SCRPC 12(b)(1).

IT IS THEREFORE ORDERED that the above-entitled action against United Parcel Service, Inc. and Rick Fogle be hereby dismissed with prejudice and forever ended.

IT IS SO ORDERED.

St. George, South Carolina

Date Feb. 2, 2016

Maite Murphy
Maite Murphy
Presiding Judge

First Judicial Circuit

3 11 16 PM

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Cortland James Eggleston,

Plaintiff,

vs.

United Parcel Service, Inc. and Rick
Fogle,

Defendants.

) IN THE COURT OF COMMON PLEAS

)

) Case No.: 2015-CP-38-00354

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ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS

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SC Court of Appeals

This matter came before the Court on Monday, September 28, 2015, upon the Defendants United Parcel Service, Inc. ("UPS") and Rick Fogle (together, the "Defendants") for an Order pursuant to Rules 12(b)(1) & 12(b)(6) of the *South Carolina Rules of Civil Procedure* dismissing Plaintiff's Complaint in its entirety on the grounds that Plaintiff's state law tort action is preempted by federal statute 49 U.S.C. §14501(c) (the Federal Aviation Administration Authorization Act of 1994). Defendants and Plaintiff filed memorandums of law in support and opposition to Defendants' Motion, and present for the hearing was counsel for the Defendants, G. Troy Thames and Ryan R. Corkery, and counsel for Plaintiff, Shane M. Burroughs and Justin T. Bamberg. For reasons which will be fully explained below, the Court grants Defendants' Motion and dismisses Plaintiff's Complaint with prejudice.

FINDINGS OF FACT

The above-captioned personal injury tort action was initiated by Plaintiff Eggleston against United Parcel Service, Inc. and its driver employee, Rick Fogle. Plaintiff alleges that Defendants negligently delivered a package, shipped from the Veterans Administration Hospital in Charleston, South Carolina and containing Plaintiff's thyroid medication, late to him, which resulted in personal injuries to him. (Plaintiff's Complaint at ¶ 9). Specifically, Plaintiff alleges that Defendants' failure to timely deliver the package containing medication resulted in Plaintiff's thyroid condition worsening "to the point where he entered into a thyroid storm, causing seizures, congestive heart failure, extremely elevated blood pressure, hospitalization and surgical

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BARNES LAW FIRM, LLC

intervention.” (*Id.* at ¶ 15). Plaintiff initiated the action on April 1, 2015, and Defendants filed a Motion to Dismiss on May 4, 2015.

CONCLUSIONS OF LAW

The Federal Aviation Administration Authorization Act of 1994 (“FAAAA”), codified at 49 U.S.C. §14501(c), provides:

[A] State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier ... or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 U.S.C. § 14501(c)(1). The United States Supreme Court has further clarified that the FAAAA preempts state laws “related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.” *Dan’s City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1772 (2013) (quoting 49 U.S.C. § 14501(c)(1)).

As pled in the Complaint, the subject package was shipped by the VA Hospital in Charleston, South Carolina, to Plaintiff’s home in Orangeburg, South Carolina. As such, the package constitutes an intrastate shipment. All of the state tort law claims set forth in Plaintiff’s Complaint are based upon an allegation that UPS, a motor carrier, negligently delivered the package untimely. These claims are based solely upon the specific service that UPS provides – delivery of packages. Pursuant to the plain language set forth in the FAAAA, all of the state law claims set forth in Plaintiff’s Complaint, which relate directly to the “service” provided by UPS, a motor carrier, are preempted. *See* 49 U.S.C. § 14501(c)(1).

Because the FAAAA expressly preempts the state law tort claims set forth in Plaintiff’s Complaint, this Court lacks subject matter jurisdiction over Plaintiff’s claims insofar as it lacks the statutory power to adjudicate those claims which have been preempted by federal law. As such, Plaintiff’s Complaint is dismissed pursuant to SCRCP 12(b)(1). Moreover, and as an alternative grounds for dismissal, because the FAAAA expressly preempts the state law tort claims set forth in Plaintiff’s Complaint, Plaintiff has failed to state any facts sufficient to constitute a valid cause of action under South Carolina state law. As such, Plaintiff’s Complaint is dismissed pursuant to SCRCP 12(b)(1).

2 of 3

IT IS THEREFORE ORDERED that the above-entitled action against United Parcel Service, Inc. and John Doe be hereby dismissed with prejudice and forever ended.

IT IS SO ORDERED.

St. George, South Carolina

Date Feb. 2, 2016

Maite Murphy
Maite Murphy
Presiding Judge

First Judicial Circuit

3 of 3

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Rebecca McCutcheon,

Plaintiff,

vs.

United Parcel Service, Inc. and John Doe,

Defendants.

IN THE COURT OF COMMON PLEAS

Case No. 2014-CP-10-38-1164

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MAY 06 2016

SC Court of Appeals

ORDER DENYING PLAINTIFF'S

RULE 59(e) MOTION TO RECONSIDER,

ALTER, OR AMEND

Upon consideration of Plaintiff Rebecca McCutcheon's Rule 59(e) Motion to Reconsider, Alter, or Amend this Court's February 2, 2016 Order, as well as Defendant's Opposition thereto, it is **HEREBY ORDERED** that Plaintiff's Motion is **DENIED**.

In accordance with this Court's February 6, 2016 Order, the above-entitled action against United Parcel Service, Inc. and John Doe has been dismissed with prejudice and forever ended.

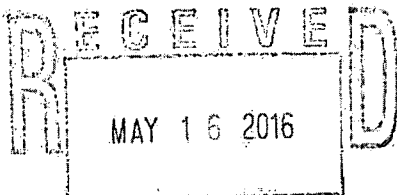
IT IS SO ORDERED.

St. George, South Carolina

Date March 29, 2016

Maitte Murphy
Maitte Murphy
Presiding Judge

First Judicial Circuit



DANIEL L. ALLEN, LLC

ATTEST: TRUE COPY

D. L. Allen
CLERK OF COURT
ORANGEBURG COUNTY, SC

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Cortland James Eggleston,

Plaintiff,

vs.

United Parcel Service, Inc. and Rick
Fogle,

Defendants.

) IN THE COURT OF COMMON PLEAS

) Case No.: 2015-CP-38-00354

) ORDER DENYING PLAINTIFF'S
) RULE 59(e) MOTION TO RECONSIDER,
) ALTER, OR AMEND

Upon consideration of Plaintiff Cortland James Eggleston's Rule 59(e) Motion to Reconsider, Alter, or Amend this Court's February 2, 2016 Order, as well as Defendants' Opposition thereto, it is **HEREBY ORDERED** that Plaintiff's Motion is **DENIED**.

In accordance with this Court's February 6, 2016 Order, the above-entitled action against United Parcel Service, Inc. and Rick Fogle has been dismissed with prejudice and forever ended.

IT IS SO ORDERED.

St. George, South Carolina

Date March 29, 2016

Maité Murphy
Maité Murphy
Presiding Judge

First Judicial Circuit

ATTEST: TRUE COPY

W. J. [Signature]
CLERK OF
ORANGEBURG COUNTY, SC

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

Rebecca McCutcheon,)

Plaintiff,)

vs.)

United Parcel Service, Inc. and John Doe,)

Defendants.)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2014-CP-38- 01104

COMPLAINT
(Jury Trial Demanded)

2014 SEP 18 PM 3:23

Now comes the Plaintiff complaining of the Defendants who would allege and state as follows:

1. That the Plaintiff is a citizen and resident of Orangeburg County, South Carolina.
2. That the Defendant, United Parcel Service, Inc., (UPS) is, upon information and belief, a corporation organized and existing under the State of South Carolina; Defendant UPS transacts business in Orangeburg County, South Carolina and is also a motor carrier as defined by South Carolina and Federal law, who is engaged in the interstate transporting of goods and materials in and through Orangeburg County, South Carolina.
3. That the Defendant, John Doe, is an unknown driver for UPS, who, at the time of injury to the Plaintiff, was a substitute driver/delivery person.
4. That at all times relevant hereto, John Doe was acting as an agent, servant or employee of UPS and was acting within the course and scope of his agency, service or employment so as to make UPS liable for the acts or omissions of John Doe under the theory of *Respondeat Superior*.

Wing B. Lee
CLERK OF COURT
ORANGEBURG COUNTY SC

FACTUAL ALLEGATIONS

5. That on or about April 11, 2013, Plaintiff was expecting delivery of thyroid medication for her husband, Courtland James Eggleston from the VA Hospital in Charleston, South Carolina.

6. That there was communication between the VA Hospital in Charleston, South Carolina and UPS on numerous occasions between April 11, 2013 and April 15, 2013 regarding the delivery of said thyroid medication for Plaintiff's husband, Mr. Eggleston.

7. That on numerous prior occasions, said thyroid medication had been successfully delivered by UPS to Plaintiff's husband at the address where Plaintiff and her husband have resided for many years.

8. That on or about April 15, 2013, said medication had not been delivered to Plaintiff's husband by Defendant John Doe, acting as an agent, servant, or employee of Defendant UPS.

9. That Defendant negligently failed to timely deliver said medications.

10. That Defendant negligently failed to timely deliver said medications after having previously delivering medications to the Plaintiff at the same address.

11. That Defendant informed Plaintiff that her address could not be located after having previously delivering medications to the Plaintiff at the same address.

12. That Defendant negligently failed to deliver said medications after being advised, by both the shipper and the Plaintiff of the correct address.

13. That as a result of Doe's negligence, recklessness, carelessness, wilfulness, wantonness, and gross negligence in the failing to deliver said medications, the Plaintiff's husband received serious and permanent injuries causing him to be under the

care of a doctor, to incur medical expenses, to experience severe excruciating pain, and to be unable to work and therefore caused to lose wages and profit; that he has suffered serious and permanent injuries which have and will in the future cause him to endure great physical pain, suffering, mental anguish, emotional distress, and ultimately cause the Plaintiff to incur future medical bills and wage loss.

**FOR A FIRST CAUSE OF ACTION AS TO DEFENDANTS UPS AND JOHN
DOE
(NEGLIGENCE)**

14. That Plaintiff reiterates and realleges the relevant allegations of the preceding paragraphs as fully as if repeated herein verbatim.

15. That the aforementioned damage to the Plaintiff was a direct and proximate result of Defendant UPS independently and by and through the acts and/or omissions of its agent, servant and/or employees, specifically Doe's negligent, careless, reckless, grossly negligent, wilful and wanton conduct at the time and place above mentioned in the following particulars to wit:

- a) In failing to properly deliver said medication;
- b) In failing to failing to properly deliver said medication in a timely manner;
- c) In taking over thirteen (13) days to deliver said medication;
- d) In failing to properly and accurately locate Plaintiff;
- e) In failing to maintain proper policies and procedures for delivering parcels;
- f) In failing to properly hire, train, supervise and oversee personnel;
- g) In failing to provide its drivers with accurate address information;
- h) In negligently retaining drivers who have shown a proclivity for carelessly failing to deliver parcels;

- i) In failing to have sufficient policies, procedures and implementation of such policies and procedures so as to prevent drivers/delivery persons such as Defendant Doe from being unable to adequately perform their routes
- j) In failing to institute, maintain and/or enforce proper policies and procedures to insure that its employees execute their responsibilities in a reasonable fashion to protect innocent citizens such as Plaintiff;
- k) In failing to exercise the degree of care, caution and control that a reasonably prudent person or persons would have exercised in the same or similar circumstances; and
- l) In such other and further particulars that the evidence in trial may show;

All of which combined and concurred as a direct and proximate cause of the injuries and damages sustained by Plaintiff herein, said acts being in violation of the statutes and laws of the State of South Carolina.

FOR A SECOND CAUSE OF ACTION AS TO DEFENDANT
UNITED PARCEL SERVICE
(NEGLIGENT ENTRUSTMENT)

16. That Plaintiff reiterates and realleges the relevant allegations of the preceding paragraphs as fully as if repeated herein verbatim.

17. That Defendant UPS, at the time of the events described herein had or should have had constructive knowledge of Defendant Doe's prior history of careless and/or negligent habits and record.

18. That Defendant UPS knew or should have known of Defendant Doe's lack of knowledge of the route and addresses thereon.

19. That despite this knowledge and under these circumstances, Defendant UPS entrusted its route and responsibilities to time deliver parcels to Defendant Doe at the time of the events described herein.

20. Defendant UPS is liable to Plaintiff for her injuries and damages given UPS' negligent, grossly negligent, reckless, wilful and wanton entrustment of to Defendant Doe.

FOR A THIRD CAUSE OF ACTION
(LOSS OF CONSORTIUM)

That Plaintiff reiterates and realleges the relevant allegations of the preceding paragraphs as fully as if repeated herein verbatim.

21. That as a result of Defendant's negligence, Plaintiff's husband suffered severe and permanent injuries, causing the Plaintiff to suffer loss because of damage to the marital relationship; that the Plaintiff has suffered damages due to the loss of companionship, society and comfort of her husband due to his injuries.

22. That the aforementioned damage to the Plaintiff's husband was a direct and proximate result of the Defendant's negligence, recklessness, carelessness, wilfulness, wantonness, and gross negligence in one or more of the particulars set forth herein. All of which combined and concurred as a direct and proximate cause of the injuries and damages sustained by Plaintiff herein, said acts being in violation of the statutes and laws of the State of South Carolina.

23. That as a direct and proximate cause of the aforementioned negligence, careless, recklessness, willfulness, and wantonness of the Defendant and/or one of its agents, the Plaintiff's husband, suffered severe and permanent injuries, causing the Plaintiff to suffer damages due to the loss of companionship, society, comfort of her husband and loss of wages due to his severe injuries.

WHEREFORE, the Plaintiff prays for judgment against Defendant for actual and punitive damages, the sum of all damages not to exceed Seventy-four Thousand Nine Hundred Ninety-nine and 99/100 (\$74,999.99) Dollars.

LANIER & BURROUGHS, LLC

Shane M. Burroughs, Esquire
Attorneys for Plaintiff
Post Office Drawer 2789
250 Gibson Street
Orangeburg, South Carolina 29116
(803)268-9800

9.10, 2014

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)
Cortland James Eggleston,)
Plaintiff,)
vs.)
United Parcel Service, Inc.,)
and Rick Fogle)
Defendants.)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2015-CP-38-00354

COMPLAINT

(Jury Trial Demanded)

ATTEST: TRUE COPY

Wingie B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

FILED FOR RECORD
WINNIE B. CLARK
CLERK OF COURT
ORANGEBURG COUNTY, SC

2015 APR -1 AM 11:19

Now comes the Plaintiff complaining of United Parcel Service, Inc. ("UPS") and Rick Fogle ("Fogle") (collectively, hereinafter "the Defendants") who would allege and state as follows:

1. That the Plaintiff is a citizen and resident of Orangeburg County, South Carolina.
2. That the Defendant, United Parcel Service, Inc., is, upon information and belief, a corporation organized and existing under the laws of a State other than the State of South Carolina. Further, Defendant UPS transacts business in Orangeburg County, South Carolina and is also a motor carrier as defined by South Carolina and Federal law, who is engaged in transporting of goods, materials, and medicine in and through Orangeburg County, South Carolina.
3. That Defendant Rick Fogle, who at the time of injury to the Plaintiff, was a substitute driver/delivery person for the Defendant UPS, is upon information and belief, a resident of one of the counties in the State of South Carolina.
4. That at all times relevant hereto, Fogle was acting as an agent, servant or employee of UPS and was acting within the course and scope of his agency, service or

employment so as to make UPS liable for the acts or omissions of Fogle under the theory of *Respondeat Superior*.

FACTUAL ALLEGATIONS

5. That the Plaintiff is a Veteran who suffers from a thyroid condition, that if left untreated or untimely medicated, can cause congestive heart failure, *inter alia*.
6. Plaintiff received and has in the past received medications from the VA Hospital in Charleston ("VA Hospital") delivered by UPS to his residence.
7. For years the Plaintiff has received his medications from the VA Hospital, delivered by UPS to his address at 399 Rodeo Drive, Eutawville, South Carolina.
8. That on numerous prior occasions, said thyroid medication had been successfully delivered from the VA Hospital by UPS to Plaintiff's address, where he has resided for many years.
9. That on or about April 11, 2013, Plaintiff was expecting delivery of thyroid medication from the VA Hospital in Charleston, South Carolina via UPS.
10. That Plaintiff's thyroid medication failed to arrive.
11. Plaintiff is informed and believes that there were multiple communications between the VA Hospital and UPS between April 11, 2013 and April 15, 2013 regarding the delivery of said thyroid medication to the Plaintiff.
12. That on or about April 11, 2013, and the dates following, Defendant Fogle, acting as an agent, servant, or employee of Defendant UPS failed to timely deliver Plaintiff's medication.
13. That there were communications between Plaintiff and Defendant UPS regarding this delivery, wherein in Defendant UPS advised Plaintiff that his address did not exist or could not be located.

14. That both the VA Hospital and the Plaintiff correctly advised Defendant UPS of the proper address and further informed UPS that it had delivered medication to Plaintiff's residence in the past. Notwithstanding this information, the Defendants failed to deliver Plaintiff's thyroid medication.

15. That the Defendants negligently failed to timely deliver said medications after being advised by both the VA Hospital and the Plaintiff of the correct address, causing the Plaintiff's thyroid condition to worsen to the point where he entered into a thyroid storm, causing seizures, congestive heart failure, extremely elevated blood pressure, hospitalization and surgical intervention.

16. That as a result of the Defendants' negligence, recklessness, carelessness, wilfulness, wantonness, and gross negligence in the failing to deliver said medications, the Plaintiff received serious and permanent injuries causing him to be under the care of a doctor, to incur medical expenses, to experience severe excruciating pain, and to be unable to work and therefore caused to lose wages and profit; that he has suffered serious and permanent injuries which have and will in the future cause him to endure great physical pain, suffering, mental anguish, emotional distress, and ultimately cause the Plaintiff to incur future medical bills and wage loss.

FOR A FIRST CAUSE OF ACTION AS TO DEFENDANTS UPS
AND FOGLE
(NEGLIGENCE)

17. That Plaintiff reiterates and realleges the relevant allegations of the preceding paragraphs as fully as if repeated herein verbatim.

18. That the aforementioned damage to the Plaintiff was a direct and proximate result of Defendant UPS independently and by and through the acts and/or omissions of its agent, servant and/or employees, specifically Defendant Fogle's negligent, careless,

reckless, grossly negligent, wilful and wanton conduct at the time and place above mentioned in the following particulars, to wit:

- a) In failing to properly deliver said medication;
- b) In failing to properly deliver said medication in a timely manner;
- c) In taking over thirteen (13) days to deliver said medication;
- d) In failing to properly and accurately locate Plaintiff;
- e) In failing to maintain proper policies and procedures for delivering parcels, including but not limited to medication such as Plaintiff's;
- f) In failing to properly hire, train, supervise and oversee personnel;
- g) In failing to provide its drivers with accurate address information;
- h) In negligently retaining drivers who have shown a proclivity for carelessly failing to deliver parcels;
- i) In failing to have sufficient policies, procedures and implementation of such policies and procedures so as to prevent drivers/delivery persons such as Defendant Fogle from being unable to adequately perform their routes;
- j) In failing to institute, maintain and/or enforce proper policies and procedures to insure that its employees execute their responsibilities in a reasonable fashion to protect innocent citizens such as Plaintiff;
- k) In failing to exercise the degree of care, caution and control that a reasonably prudent person or persons would have exercised in the same or similar circumstances; and
- l) In such other and further particulars that the evidence in trial may show;

All of which combined and concurred as a direct and proximate cause of the injuries and damages sustained by Plaintiff herein, said acts being in violation of the statutes and laws of the State of South Carolina.

FOR A SECOND CAUSE OF ACTION AS TO DEFENDANT UPS
(NEGLIGENT ENTRUSTMENT)

19. That Plaintiff reiterates and realleges the relevant allegations of the preceding paragraphs as fully as if repeated herein verbatim.

20. That Defendant UPS, at the time of the events described herein had or should have had constructive knowledge of Defendant Fogle's prior history of careless and/or negligent habits and records.

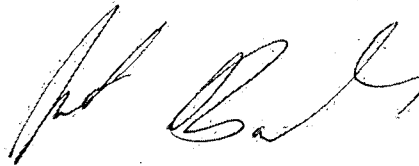
21. That Defendant UPS knew or should have known of Defendant Fogle's lack of knowledge of the route and addresses thereon.

22. That despite this knowledge and under these circumstances, Defendant UPS entrusted its route(s) and responsibilities to timely deliver parcels to Defendant Fogle at the time of the events described herein.

23. Defendant UPS is liable to Plaintiff for his injuries and damages given UPS' negligent, grossly negligent, reckless, wilful and wanton entrustment to Defendant Fogle.

WHEREFORE, the Plaintiff prays for judgment against the Defendants for actual and punitive damages as may be determined by the trier of fact, the cost of this action, and for such other and further relief as this Court may deem just and proper.

LANIER & BURROUGHS, LLC



Shane M. Burroughs, Esquire
Justin T. Bamberg, Esquire
Attorneys for Plaintiff
Post Office Drawer 2789
250 Gibson Street
Orangeburg, South Carolina 29116
(803)268-9800

3-30, 2015

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

) IN THE COURT OF COMMON PLEAS

)

) Case No. 2014-CP-10-38-1164

Rebecca McCutcheon,

Plaintiff,

vs.

United Parcel Service, Inc. and John
Doe,

Defendants.

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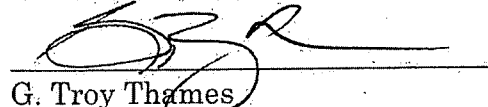
**DEFENDANT UNITED PARCEL
SERVICE, INC. NOTICE OF MOTION
AND MOTION TO DISMISS**

TO: SHANE M. BURROUGHS, ESQUIRE, ATTORNEY FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that Defendant United Parcel Service, Inc., will move this Court as soon as counsel may be heard for an Order pursuant to Rule 12(b)(6) of the *South Carolina Rules of Civil Procedure* dismissing the Plaintiff's Complaint in its entirety for it fails to state a claim upon which relief can be granted. Defendant so moves on the grounds that the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), codified at 49 USC §14501(c), or alternatively, the Carmack Amendment, codified at 49 USC §14706, broadly and completely supersede, pre-empt, and provide the exclusive remedy, if any, for the common law claims set forth and alleged in Plaintiff's Complaint.

Defendant craves reference to the appropriate law and any affidavits or memoranda to be provided to the Court.

TURNER, PADGET, GRAHAM & LANEY



G. Troy Thames

Post Office Box 22129

Charleston, South Carolina 29413-2129

Telephone: 843-576-2829

Facsimile: 843-577-1647

E-mail: TThames@turnerpadget.com

Charleston, South Carolina

ATTORNEYS FOR DEFENDANT
UNITED PARCEL SERVICE, INC.

December 12, 2014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ORANGEBURG	)	Case No.: 2015-CP-38-00354
	)	
Cortland James Eggleston,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	DEFENDANTS UNITED PARCEL
	)	SERVICE, INC. AND RICK FOGLE'S
United Parcel Service, Inc. and Rick	)	NOTICE OF MOTION
Fogle,	)	AND MOTION TO DISMISS
	)	
Defendants.	)	

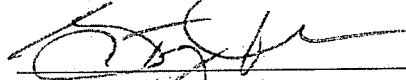
TO: SHANE M. BURROUGHS, ESQUIRE, ATTORNEY FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that Defendants United Parcel Service, Inc. and Rick Fogle (hereinafter "Defendants"), will move this Court as soon as counsel may be heard for an Order pursuant to Rules 12(b)(1) & 12(b)(6) of the *South Carolina Rules of Civil Procedure* dismissing the Plaintiff's Complaint in its entirety for this Court lacks subject matter jurisdiction and/or the Complaint fails to state a claim upon which relief can be granted. Defendants so move on the grounds that the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), codified at 49 USC §14501(c), or alternatively, the Carmack Amendment, codified at 49 USC §14706, broadly and completely supersede, preempt, and provide the exclusive remedy, if any, for the common law claims set forth and alleged in Plaintiff's Complaint.

Defendants crave reference to the appropriate law and any affidavits or

memoranda to be provided to the Court.

WILLSON JONES CARTER & BAXLEY, P.A.



G. Troy Thames

421 Wando Park Boulevard, Suite 100

Mount Pleasant, South Carolina 29464

Phone: 843-284-0832

Fax: 843-284-1081

Email: tthames@wjlaw.net

ATTORNEYS FOR DEFENDANTS
UNITED PARCEL SERVICE, INC. AND
RICK FOGLE

Mount Pleasant, South Carolina
April 30, 2015

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS
Case No. 2014-CP-10-38-1164

Rebecca McCutcheon,
Plaintiff,

vs.

United Parcel Service, Inc. and John Doe,
Defendants.

**DEFENDANT UNITED PARCEL SERVICE,
INC.'S MEMORANDUM OF LAW IN
SUPPORT OF ITS MOTION TO DISMISS
PLAINTIFF'S COMPLAINT**

**DEFENDANT UNITED PARCEL SERVICE, INC.'S MEMORANDUM OF LAW IN
SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

I. INTRODUCTION

This is a loss of consortium tort case. Plaintiff Rebecca McCutcheon ("Plaintiff") alleges that United Parcel Service, Inc. ("UPS") negligently delivered a package late to her husband, causing unspecified damage to their marital relationship. Plaintiff's state law tort action is preempted by federal statute, namely the Federal Aviation Administration Authorization Act of 1994, codified at 49 U.S.C. §14501(c), or the Carmack Amendment, codified at 49 U.S.C. §14706. 49 U.S.C. §14706, because it relates to an alleged failure in the transportation and delivery of goods by a motor carrier. Therefore, it should be dismissed with prejudice on lack of subject matter jurisdiction and/or failure to state a claim grounds.

Plaintiff filed the underlying Complaint against Defendants UPS and John Doe, an unknown driver for UPS, on September 10, 2014. (See Plaintiff's Compl., attached hereto as Exhibit A). Plaintiff asserted a stand-alone loss of consortium claim against Defendants for

UPS's alleged failure to timely deliver a package containing medication to Plaintiff's husband. (See *id.* generally).

Specifically, Plaintiff alleges that on or about April 11, 2013, she was expecting a delivery of thyroid medication for her husband from the VA Hospital located in Charleston. (*Id.* at ¶ 5). Plaintiff further alleges that between April 11, 2013 and April 15, 2013 there were communications between the VA Hospital and UPS regarding delivery of said medication and that "on numerous prior occasions" the medication was successfully delivered by UPS to her husband at their home address. (*Id.* at ¶¶ 6-7). According to the Complaint, on or about April 15, 2013, the medication still had not been delivered to Plaintiff's husband by UPS.¹ (*Id.* at ¶ 8).

Plaintiff alleges that UPS's failure to timely deliver the medication resulted in Plaintiff's husband suffering from serious and permanent injuries causing him to be under the care of a doctor, to incur medical expenses, to experience pain and suffering, and to be unable to work. (*Id.* at ¶ 13). The specific details of Plaintiff's husband's alleged physical injuries have not been pled. Plaintiff's husband has filed no personal injury claim of his own.

Plaintiff asserts that as a result of UPS's negligence and the resulting injuries sustained by her husband, Plaintiff herself has suffered a loss because of damage to her marital relationship. (*Id.* at ¶ 21). Although pled as separate causes of action for negligence and negligent entrustment, the entirety of Plaintiff's Complaint is based upon the same alleged conduct -- that UPS negligently failed to timely deliver the thyroid medication to Plaintiff's husband. (See *id.* generally).

For the reasons set forth below, Defendant United Parcel Service, Inc. respectfully requests that this Court grant its Motion to Dismiss, pursuant to SCRCP 12(b)(1) and/or SCRCP

¹ Of note, no specific details are provided in the Complaint about Plaintiff's address, communications Plaintiff may have had with UPS or the VA Hospital, or whether the medication was successfully delivered to Plaintiff's husband.

12(b)(6), and dismiss Plaintiff's Complaint on the grounds that Plaintiff's claims are preempted by federal law. Specifically, UPS asserts that the claims are preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), codified at 49 USC §14501(c), or alternatively, the Carmack Amendment, codified at 49 USC §14706.

II. LEGAL STANDARDS

A. South Carolina Rule of Civil Procedure 12(b)(1)

UPS moves to dismiss Plaintiff's Complaint pursuant to South Carolina Rule of Civil Procedure 12(b)(1), which allows a moving party to challenge the power of the Court as to the subject matter of the Complaint. *See* S.C.R.C.P. 12(b)(1). "[S]ubject matter jurisdiction refers to a court's constitutional or statutory power to adjudicate a case." *Johnson v. S.C. Dep't of Prob., Parole, & Pardon Servs.*, 641 S.E.2d 895, 897 (S.C. 2007). Therefore, a complaint is properly dismissed for lack of subject matter jurisdiction under SCRCP 12(b)(1) when the court lacks the "constitutional or statutory power to adjudicate [it]." *Id.*

B. South Carolina Rule of Civil Procedure 12(b)(6)

In the alternative, UPS moves to dismiss Plaintiff's Complaint pursuant to South Carolina Rule of Civil Procedure 12(b)(6), which allows a moving party to challenge a complaint where a plaintiff has failed "to state facts sufficient to constitute a cause of action." SCRCP 12(b)(6). To survive a motion to dismiss, when considering the claims in the light most favorable to the plaintiff, the complaint must state a valid claim which entitles the plaintiff to relief. *See Gentry v. Yonce*, 522 S.E.2d 137, 139 (S. C. 1999). In deciding a motion to dismiss pursuant to 12(b)(6), SCRCP, the trial court should consider only the allegations set forth on the face of the plaintiff's complaint. *Id.*

III. ARGUMENT

Plaintiff's state law claims of negligent untimely delivery of a package are preempted by either the Federal Aviation Administration Authorization Act of 1994, codified at 49 U.S.C. §14501(c), or the Carmack Amendment, codified at 49 U.S.C. §14706. Accordingly, Plaintiff's Complaint should be dismissed because this Court lacks subject matter jurisdiction and Plaintiff has failed to state facts sufficient to constitute a cause of action.

A. **Plaintiff's State Law Claims are Preempted by the Federal Aviation Administration Authorization Act of 1994 and Should be Dismissed in the Package Involved an Intrastate Delivery**

1. Federal Aviation Administration Authorization Act of 1994

The FAAAA provides in pertinent part:

[A] State, political subdivision of a State, or political authority of 2 or more States may not enact or **enforce a law**, regulation, or other provision having the force and effect of law **related to a price, route, or service of any motor carrier ...** or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 U.S.C. § 14501(c)(1). (emphasis added). Specifically, the United States Supreme Court has clarified that the FAAAA preempts state laws "related to a price, route, or **service of any motor carrier** . . . with respect to the transportation of property." *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1772 (2013) (quoting 49 U.S.C. § 14501(c)(1)) (emphasis added). Of note, the FAAAA is applicable to **intrastate** transportation of property, whereas the Carmack Amendment which is discussed further below, applies to **interstate** shipments. *See id.* at 1776.

As background, Congress enacted the FAAAA to free carriers, such as UPS, from the "patchwork of regulation" that had created "a huge problem for national and regional carriers attempting to conduct a standard way of doing business" and had caused "significant inefficiencies" and "inhibition of innovation and technology." Through preemption, Congress

intended that “[s]ervice options will be dictated by the marketplace.” H.R. Conf. Rep. No. 103-677, at 87-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1760-61. To accomplish these goals, Congress modeled the FAAAA on the preemption provision of the Airline Deregulation Act (“ADA”), and expressly endorsed “the broad preemption interpretation adopted by the United States Supreme Court in *Morales v. Trans World Airlines, Inc.*, [504 U.S. 374 (1992)]” in applying the ADA. *Id.* at 83.

Morales reasoned that the term “relating to” “express[es] a broad pre-emptive purpose” that encompassed any state law that “has a connection with or reference to” a carrier’s rate, route, or service. 504 U.S. at 383-84 (internal quotations and citation omitted). In *Am. Airlines, Inc. v. Wolens*, the Supreme Court carved out a single narrow exception to ADA preemption, strictly for “routine breach-of-contract claims”—i.e., claims “alleging no violation of state-imposed obligations, but seeking recovery solely for the airline’s alleged breach of its own, self-imposed undertakings”—because those claims do not require enforcement of state law. 513 U.S. 219, 228 (1995). The United States Supreme Court has specifically held that the same broad preemption interpretation given to the ADA in *Morales* applies to the FAAAA preemption provisions. *See Rowe v. New Hampshire Motor Transp. Ass’n*, 552 U.S. 364, 371 (2008).

2. Plaintiff’s State Law Claims are Preempted

As pled in the Complaint, the subject package containing the thyroid medication for Plaintiff’s husband was shipped from the VA Hospital in Charleston, South Carolina to Plaintiff’s home address in or around Orangeburg County; as pled, this was an intrastate shipment. Plaintiff’s state law tort claims, which are all based upon an allegation that UPS, a motor carrier, negligently delivered the package untimely, are barred by the FAAAA insofar as the statute expressly preempts state laws “related to a price, route, or **service of any motor**

carrier ... with respect to the transportation of property.” *Dan’s City Used Cars, Inc.*, 133 S. Ct. at 1772 (quoting 49 U.S.C. § 14501(c)(1)) (emphasis added). Here, Plaintiff’s state law claims against UPS do not merely have the prohibited “connection with or reference to” services, *Morales*, 504 U.S. at 383-84, they are **directly based on the specific service** that UPS provides – delivery of packages.

Although South Carolina case law has not yet interpreted this issue, numerous courts in various jurisdictions have provided compelling persuasive authority to dismiss plaintiff’s state law negligence claims related to delivery of a package because they are preempted by the FAAAA insofar as they relate directly to the “service” the carrier provides.² See e.g., *Rockwell v. United Parcel Serv., Inc.*, No. 2:99 CV 57, 1999 WL 33100089 (D.Vt.1999) (unreported opinion) (claims for negligent intake and delivery protocol, which “go to the heart of the services that UPS provides” were preempted); *Wine & Spirits Wholesalers v. Net Contents, Inc.*, 10 F. Supp. 2d 84, 87 (D. Mass. 1998) (tort claim against Federal Express for transporting liquor to Massachusetts from unlicensed, out-of-state wholesaler was preempted by ADA because “claim arises directly from the act of, and the method employed in, providing” carrier’s services); *Deerskin Trading Post, Inc. v. United Parcel Serv. of Am., Inc.*, 972 F. Supp. 665, 672 (N.D. Ga. 1997) (FAAAA preempted all state claims, including negligence, except for portion of breach of contract claim.); *Vieira v. United Parcel Service, Inc.*, 1996 WL 478686 at *1 (N.D. Cal. Aug 5, 1996)(unreported opinion) (negligence and conversion claim arising from lost UPS package related to “service” provided by UPS and was therefore preempted by FAAAA); *Rowe v. United Parcel Serv., Inc.*, No. CV-S-96-862-PMP, 1996 U.S. Dist. LEXIS 11266 (D.Nev. July 31,

² When there is no South Carolina case directly on point, this Court may look to other jurisdictions to determine if the issue has been decided and if the decision is persuasive authority. See *Ellis v. Oliver*, 515 S.E.2d 268, 271 (S.C. Ct. App. 1999).

1996) (unreported opinion) (dismissing state law claims for intentional and negligent infliction of emotional distress and defamation, which were based on alleged defamatory statements made by UPS employee who was investigating the contents of a package, based on FAAAA); *Wagman v. Fed. Exp. Corp.*, 1995 WL 81686, at *2 (7th Cir. Feb. 17, 1995) (unreported opinion) (affirming dismissal on preemption grounds of constructive fraud and other claims based on allegations of misleading advertising arising from late delivery of plaintiff's package).

Here, Plaintiff's tort claim is based squarely upon UPS's service – that UPS allegedly failed to deliver a package on time. All of the averments set forth in the Complaint are based upon that allegedly negligent conduct. (See Compl. generally). Pursuant to the plain language set forth in the FAAAA, Plaintiff's state law claims, which relate directly to the "service" provided by UPS, a carrier, are preempted. See 49 U.S.C. § 14501(c)(1).

Additionally, Plaintiff has not pled any breach of contract claim in her Complaint, which is the only possible claim related to delivery of a package that arguably could survive the preemption provision set forth in the FAAAA. See *Wolens*, 513 U.S. at 228 (noting narrow exception to ADA preemption). Therefore, Plaintiff's Complaint, which is based entirely upon the allegedly negligent untimely delivery of a package and related to the primary "service" that UPS provides, is preempted in its entirety by the FAAAA and should be dismissed with prejudice. See 49 U.S.C. § 14501(c)(1).

3. This Court Lacks Subject Matter Jurisdiction

Because the FAAAA expressly preempts the state law tort claims set forth in Plaintiff's Complaint, alternatively the Complaint should be dismissed pursuant to SCRCP 12(b)(1). This Court lacks subject matter jurisdiction over Plaintiff's claims insofar as it lacks the statutory power to adjudicate those claims which have been preempted by federal law. See *Eldridge v.*

City of Greenwood, 503 S.E.2d 191, 197 (S.C. Ct. App. 1998) (noting that preemption involves subject matter jurisdiction).³

4. Plaintiff Has Failed to State Facts Sufficient to Constitute a Cause of Action

Additionally, Plaintiff's Complaint should be dismissed pursuant to SCRPC 12(b)(6) as Plaintiff has failed to state facts sufficient to constitute a cause of action. SCRPC 12(b)(6) generally tracks the language set forth in Federal Rule of Civil Procedure 12(b)(6).⁴ South Carolina federal courts have dismissed a plaintiff's complaint pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim where the plaintiff's claims were preempted by federal law. *See e.g., Johnson v. Am. Towers, LLC*, No. CA 3:13-789-CMC, 2013 WL 3148329, at *1 (D.S.C. June 19, 2013) (unreported opinion). In accordance with the precedent set by South Carolina federal courts, this Court should dismiss Plaintiff's Complaint pursuant to SCRPC 12(b)(6) on the grounds that Plaintiff's claims are preempted by federal law.⁵

B. Plaintiff's State Law Claims are Preempted by the Carmack Amendment and Should be Dismissed if the Package Involved an Interstate Delivery

1. The Carmack Amendment

The Carmack Amendment, codified at 49 U.S.C. §14706, creates a uniform rule for carrier liability when goods are shipped in interstate commerce.⁶ As explained by the United

³ *See also State v. Illinois Cent. R.R. Co.*, 928 So. 2d 60, 69 (La. Ct. App. 2005) ("If a matter is preempted, a state court lacks subject matter jurisdiction to decide it."); *Venable v. GKN Auto.*, 421 S.E.2d 378, 379 (N.C. App. Ct. 1992) (affirming dismissal under N.C. Rule 12(b)(1) for lack of subject matter jurisdiction due to federal preemption).

⁴ Fed. R. Civ. P. 12(b)(6) provides that a moving party can seek dismissal of a complaint for "failure to state a claim upon which relief can be granted."

⁵ Where there is no South Carolina precedent construing SCRPC 12(b)(6) in connection with a defense of preemption, federal interpretation of Fed.R.Civ.P. 12(b)(6) is persuasive authority. *See e.g., Laffitte v. Bridgestone Corp.*, 674 S.E.2d 154, 162 (S. C. 2009).

⁶ The Carmack Amendment does not apply to shipments that are wholly intrastate. *See* 49 U.S.C. § 13504.

States Supreme Court, the purpose of the Carmack Amendment was to “supersede[] diverse state laws with a nationally uniform policy governing interstate carriers’ liability.” *N.Y., New Haven & Hartford R.R. v. Nothnagle*, 346 U.S. 128, 131 (1953).

The Amendment provides for liability of carriers under receipts and bills of lading in interstate commerce, and establishes the right of shippers to bring civil actions in federal district court against a carrier alleged to have caused “loss or damage” to transported goods. *See* 49 U.S.C. § 14706(d). Specifically, the Amendment makes a carrier liable “for the actual loss or injury to the property” it transports. *See* 49 U.S.C. § 14706(a)(1).

To accomplish the goal of uniformity, the Carmack Amendment preempts state law claims arising from **failures in the transportation and delivery of goods**. *See Ward v. Allied Van Lines, Inc.*, 231 F.3d 135, 138 (4th Cir. 2000). Since its inception, the Supreme Court has interpreted the Carmack Amendment as broadly occupying the entire interstate shipment field of commerce. *See Miracle of Life, LLC v. N. Am. Van Lines, Inc.*, 368 F. Supp. 2d 494, 496-97 (D.S.C. 2005) (discussing Carmack Amendment). (internal citations omitted). Almost every detail of the subject of interstate shipments is covered so completely by the Amendment that there can be no rational doubt but that Congress intended to take possession of the subject, and supersede all state regulation with reference to it. *See id.*

2. Plaintiff’s State Law Claims are Preempted

According to the averments set forth in the Complaint, the subject package was likely a purely intrastate shipment, and thus, the FAAAA applies to preempt Plaintiff’s state law tort claims. However, if Plaintiff alleges that the subject package was an interstate shipment, Plaintiff’s state law tort claims, which are all based upon an allegation of negligent untimely delivery, are barred by the Carmack Amendment insofar as the statute expressly and completely

preempts state laws arising from **failures in the transportation and delivery of goods**. See *Ward*, 231 F.3d at 138.

Although South Carolina courts have not ruled on this precise issue, numerous courts in various jurisdictions have held that claims akin to negligent delivery of a package are preempted by the Carmack Amendment.⁷ See e.g., *Smith v. United Parcel Serv.*, 296 F.3d 1244, 1247 (11th Cir. 2002)(claims against UPS alleging fraud, negligence, wantonness, or willfulness, and outrage were preempted by Carmack Amendment); *Bear MGC Cutlery Co. v. Estes Express Lines, Inc.*, 132 F.Supp.2d 937, 947-48 (N.D.Ala.2001)(Carmack Amendment preempted claims for negligence, wantonness, and outrage for failing to properly deliver goods); *Moffit v. Bekins Van Lines Co.*, 6 F.3d 305 (5th Cir.1993) (Carmack Amendment preempted various state law claims, including fraud, intentional infliction of emotional distress, and negligence where moving company failed to deliver household goods to new home in time for Christmas); *Hughes v. United Van Lines, Inc.*, 829 F.2d 1407, 1412, 1415 (7th Cir. 1987) (Carmack Amendment preempted claims for negligence, breach of contract, conversion, intentional misrepresentation, negligent misrepresentation, and negligent infliction of emotional distress where plaintiff's goods were destroyed by fire while in transit); *Southeastern Express Co. v. Pastime Amusement Co.*, 299 U.S. 28 (1936) (Carmack Amendment preempted negligence claim for failure to deliver in timely manner); *New York, Philadelphia & Norfolk R.R. Co. v. Peninsula Produce Exch. of Md.*, 240 U.S. 34 (1916) (Carmack Amendment preemption is "comprehensive enough to embrace all damages resulting from any failure to discharge a carrier's duty with respect to any part of the transportation to the agreed destination").

Here, Plaintiff's state law loss of consortium claim against UPS is based solely upon UPS's allegedly negligent conduct in failing to timely deliver a package. All of the averments

⁷ See footnote 2, *supra*.

set forth in the Complaint are based upon that allegedly negligent conduct. (See Compl. generally). Pursuant to the express complete preemption provisions set forth in the Carmack Amendment, Plaintiff's state law tort claims, which arise from alleged **failures in the transportation and delivery of goods**, are preempted in their entirety and should be dismissed with prejudice. See 49 U.S.C. §14706; see also *Ward*, 231 F.3d at 138.

3. This Court Lacks Subject Matter Jurisdiction

"Once an area of state law has been completely preempted, any claim purportedly based on that preempted state law is considered, *from its inception*, a federal claim, and therefore arises under federal law." *Mayflower Transit, L.L.C. v. Troutt*, 332 F. Supp. 2d 971, 976 (W.D. Tex. 2004) (internal citations omitted). Because the Carmack Amendment provides the exclusive cause of action for claims arising from the loss related to goods shipped in interstate commerce, and preempts state and common law causes of action based on such conduct, Plaintiff cannot "plead around" the Carmack Amendment. See *id.* Plaintiff's claims, assuming they relate to goods shipped in interstate commerce, are within the reach of the Carmack Amendment and arise under federal law.

Where the resolution of the underlying claim is governed by a federal statute, such as the Carmack Amendment, federal courts have subject matter jurisdiction over the claims. See e.g., *Andrews v. Atlas Van Lines, Inc.*, 504 F. Supp. 2d 1329 (N.D. Ga. 2007) (where Carmack Amendment's "complete preemption applied, the complaint alleging only state law claims stated federal claim within district court's subject matter jurisdiction."); *Reeves v. Mayflower Transit, Inc.*, 87 F. Supp. 2d 1251, 1254 (M.D. Ala. 1999) ("this court has subject matter jurisdiction since resolution of the claims is governed by [Carmack Amendment]").

The Carmack Amendment expressly vests the federal courts with jurisdiction over failures in the transportation and delivery of goods. Therefore, this Court lacks subject matter jurisdiction over Plaintiff's claims, which specifically relate to UPS's alleged failure in the transportation and delivery of a package. Plaintiff's Complaint should be dismissed with prejudice pursuant to SCRPC 12(b)(1).

4. Plaintiff Has Failed to State Facts Sufficient to Constitute a Cause of Action

Additionally, or in the alternative, Plaintiff's Complaint should be dismissed pursuant to SCRPC 12(b)(6) because, as pled, Plaintiff has failed to state facts sufficient to constitute a cause of action. As explained more fully above, South Carolina federal courts applying Federal Rule of Civil Procedure 12(b)(6) have dismissed a plaintiff's complaint on the basis that it failed to state a claim upon which relief can be granted where the plaintiff's causes of action were preempted by federal law. *See e.g., Johnson*, No. CA 3:13-789-CMC, 2013 WL 3148329, at *1 (unreported opinion) (granting Rule 12(b)(6) motion to dismiss on grounds of preemption). In accordance with the determinations made by South Carolina federal courts, this Court should dismiss Plaintiff's Complaint pursuant to SCRPC 12(b)(6) on the grounds that Plaintiff's claims are preempted by federal law.⁸

IV. CONCLUSION

For the reasons set forth above, Defendant United Parcel Service, Inc. respectfully requests that this Court grant its Motion to Dismiss pursuant to SCRPC 12(b)(1) and/or 12(b)(6), and dismiss Plaintiff's Complaint with prejudice because Plaintiff's tort action is preempted by federal law.

⁸ See footnote 5, *supra*.

WILLSON JONES CARTER & BAXLEY, PA



G. Troy Thames
421 Wando Park Blvd., Ste. 100
Mt. Pleasant, South Carolina 29464
Telephone: 843-284-0832
Facsimile: 843-284-1081
E-mail: tthames@wjlaw.net

Mt. Pleasant, South Carolina

Ryan R. Corkery
Ansa Assunacao, LLP
1600 JFK Blvd.
Four Penn Center, suite 900
Philadelphia, PA 19103
Telephone: 267-528-0733
Facsimile: 267-528-0726
Ryan.corkery@ansalaw.com

February 17, 2015

**ATTORNEYS FOR
UNITED PARCEL SERVICE, INC.**

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

Rebecca McCutcheon,)

vs.)

United Parcel Service, Inc., and)

Rick Fogle,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT
CIVIL ACTION NO: 2014-CP-38-001164

PLAINTIFF'S MEMORANDUM
IN OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS

The above-named Plaintiff, by and through her undersigned counsel, hereby submits this Memorandum in Opposition to Defendants' Motion to Dismiss and would respectfully show this Honorable Court as follows:

FACTS

The within action is a personal injury action that stems from a failure of the United Parcel Service, Inc. (UPS) and it's driver, Rick Fogle ("Defendants") to deliver much needed medication to a man suffering from hyperthyroidism. On or about April 15, 2013, Plaintiff's Husband, Courtland Eggleston, suffered a thyroid storm which was caused lack of medication by UPS' failure to deliver said medication in a timely manner. (A thyroid storm is a life-threatening condition that develops in cases of untreated hyperthyroidism cases, which, in the spectrum of endocrine emergencies, ranks as one of the most critical illnesses. The symptoms are severe and may include: agitation, loss of consciousness, confusion, diarrhea, tachycardia, restlessness, shaking, sweating, elevated blood pressure and sudden onset congestive heart failure. The mortality rate for those experiencing a thyroid storm is 20-30%.) On or about

April 18, 2013, the Plaintiff's Husband was required to undergo surgical intervention (Thyroidectomy) as he was biochemically significantly thyrotoxic, was experiencing congestive heart failure, had extremely elevated blood pressure (which is now permanent) and a large goiter was affecting his swallowing and potentially his airway.

This action does not involve regulation of motor carriers or any claims for loss of or damage to property. (See Complaint ¶¶ 1-23; ¶ WHEREFORE.) On or about April 11, 2013, Rebecca McCutcheon' ("Plaintiff") was expecting delivery of thyroid medication for her husband, Courtland James Eggleston from the VA Hospital in Charleston, South Carolina. (Complaint ¶ 5.) Prior to this time, the thyroid medication had been successfully delivered to Plaintiff's home on numerous occasions. (Complaint ¶ 7.)

From April 11, 2013 through April 15, 2013, there were multiple communications between the VA Hospital and Defendants regarding the delivery of the thyroid medication for Plaintiff's husband; however, the thyroid medication had not been delivered by April 15, 2013, despite the importance of Plaintiff's husband receiving and taking his medication in a timely fashion. (Complaint ¶ 6, 8.) In fact, over thirteen days had passed before the thyroid medication was delivered, and due to Defendants' failure to timely deliver the medication, both the Plaintiff and her husband suffered injury to their person. Please see Exhibit 1.

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Pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, a

trial judge may dismiss a claim when the defendant demonstrates the plaintiff's "failure to state facts sufficient to constitute a cause of action" in the pleadings filed with the Court. FOC Lawshe Ltd. P'ship v. Int'l Paper Co., 352 S.C. 408, 412, 574 S.E.2d 228, 230 (Ct. App. 2002). When considering such a motion, the Court must accept the allegations of the Complaint as true and must view the facts and all reasonable inferences therefrom in the light most favorable to the Plaintiff. See E.I. du Pont de Nemours & Co. v. Kolon Indus., 637 F.3d 435 (4th Cir. 2011). The Court must deny the motion if the facts and inferences, when viewed in the light most favorable to Plaintiff, show that Plaintiff could prevail under any theory. Murrow Crane Co. v. T.R. Tucker Constr. Co., 296 S.C. 427, 373 S.E.2d 701 (Ct. App. 1988).

ARGUMENT

I. The Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), and the Carmack Amendment do not Preempt Plaintiff's Claims.

A. Preemption

United States Supreme Court preemption jurisprudence provide: (1) the purpose of Congress is the ultimate touchstone in every preemption case; and (2) courts should begin with a presumption against preemption. Priester v. Cromer, 388 S.C. 425, 697 S.E.2d 567 (2010) (citing Wyeth v. Levine, 129 S. Ct. 1187, 1195, 173 L. Ed. 2d 51 (2009)). "Consideration of issues arising under the Supremacy Clause [of the U.S. Constitution] starts with the assumption that the historic police powers of the States are not to be superseded by . . . Federal Act unless that is the *clear and manifest purpose of Congress*." Omva, Inc. v. Vermont, 33 Fed. Appx. 581, 583 (2d Cir. Vt. 2002) (emphasis added.) (quoting Cipollone v. Liggett Group, 505 U.S. 504,

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B. FAAAA

In 1994, the United States Congress enacted the Federal Aviation Administration Authorization Act ("FAAA") to deregulate the motor carrier industry. See Pub. L. 103-305, 108 Stat. 1569, 1608 (1994). Section 601 of the FAAAA amended the Interstate Commerce Act, preempting state and local regulations concerning the price, route, or service of intrastate motor carriers. In 1995, Congress

passed the Interstate Commerce Commission Termination Act (the "ICCTA"), which took effect on January 1, 1996. See Pub. L. 104-88, 109 Stat. 803, 804 (1995) (codified at 49 U.S.C. § 14501(c)(1)). The ICCTA recodified former 49 U.S.C. § 11501(h) as 49 U.S.C. § 14501(c), and amended the statute to include an exemption for state regulation of nonconsensual tow rates. Stucky v. City of San Antonio, 260 F.3d 424, 428 (5th Cir. Tex. 2001).

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The FAAAA provides for instances in which Federal authority preempts state authority over intrastate transportation. See 49 USC §14501. As a general rule, the statute prevents a State from enacting or enforcing a "law related to a price, route, or service" of a motor carrier with respect to the transportation of property. Id. Subsection (c) specifically addresses motor carriers of property, See 49 U.S.C. 14501(c), and contains an express provision excluding "transportation of household goods" from the preemptive nature of the statute. 49 U.S.C. 14501(c)(2)(B). The purpose of the general rule set forth in 49 U.S.C. 14501(c)(1) is to eliminate overlapping state and municipal regulations, which increased costs, decreased efficiency, and reduced competition and innovation. See Stucky v City of San Antonio (2001, CA5 Tex) 260 F3d 424, reh, en banc, den (2001, CA5 Tex) 266 F3d 342 and (ovrld in part by City of Columbus v Ours Garage & Wrecker Serv. (2002) 536 US 424, 153 L Ed 2d 430, 122 S Ct 2226, 2002 CDOS 5452, 2002 Daily Journal DAR

6867, 15 FLW Fed S 447) and cert gr, vacated, remanded (2002), 536 US 936, 153 L Ed 2d 801, 122 S Ct 2617, 2002 CDOS 5604, 2002 Daily Journal DAR 7058, on remand, remanded (2002, CA5 Tex) 307 F3d 315.

Plaintiff would contend that the medication to have been delivered but for Defendants' failure to do so qualifies as a household good subject to the FAAAA exclusion provision of 49 U.S.C. § 14501(c)(2)(B). In addition, there is nothing contained in the language of the FAAAA to suggest that Congress' "clear and manifest" intent was to, while focusing solely on regulatory aspects of motor carriers, do away with an individual's right to pursue redress in state court for physical harm to their person caused by a motor carrier's failure to deliver items such as medication.

C. Carmack Amendment

The Carmack Amendment only preempts state and common law in instances where goods are lost, damaged or untimely delivered in interstate commerce. 1 Sorkin, Goods in Transit §5.02[1] at 5-16; see Missouri Pac. R.R. Co. v. Elmore & Stahl, 377 U.S. 134, 137 (1964), and Ward v. Allied Van Lines, Inc., 231 F.3d 135, 138 (4th Cir. 2000). The Carmack Amendment's scope is determined by reference to 49 U.S.C. §13501, also a provision of the Interstate Commerce Act, and in relevant part, provides Carmack applies to motor transportation of property: (1) between a place in a state and a place in another state; or (2) between a place in the United States and a place in a foreign country "to the extent the transportation is in the United States." 49 U.S.C. §13501(1)(A),(E) (2000). The Carmack Amendment does not apply to intrastate commerce. Id.

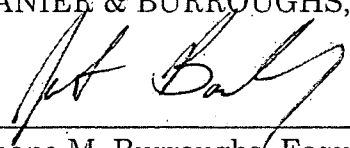
Therefore, the Carmack Amendment is wholly inapplicable to the case at hand because this case does not involve interstate commerce. Instead, this case involves intrastate delivery of medication from the VA Hospital in Charleston, South Carolina to the Plaintiff's residence in Orangeburg, South Carolina. Moreover, at no time did the medication or vehicle(s) delivering it have to travel across the border into another state in route to Plaintiff's residence from Charleston.

CONCLUSION

For the reasons set forth above, the Plaintiff respectfully requests this Court deny Defendants' Motion to Dismiss and grant Plaintiff any and all such other relief as this Court deems just and proper.

Date: 6-15-15

LANIER & BURROUGHS, LLC


Shane M. Burroughs, Esquire
Justin T. Bamberg, Esquire

ATTORNEYS FOR THE PLAINTIFF
Post Office Drawer 2789
250 Gibson Street
Orangeburg, SC 29116
(803) 268-9800

EGGELSTON, CORTLAND JAMES

7m<A>m

Ht(cm): 190.50 (04/15/2013)

Wt(kg): 89.82 (04/15/2013)

DOB: [REDACTED]

Rx #: 228424205

Orderable Item: METHIMAZOLE TAB

CMOP Drug: METHIMAZOLE 10MG TAB

*Dosage: 10MG

Verb: TAKE

Dispense Units: 1

Noun: TABLET

*Route: ORALLY

*Schedule: Q8H

Patient Instructions: FOR HYPERTHYROIDISM

SIG: TAKE ONE TABLET BY MOUTH EVERY 8 HOURS FOR HYPERTHYROIDISM

Patient Status: OPT NSC

Issue Date: 04/10/13

Fill Date: 04/11/13

Last Fill Date: 04/11/13 (Mail)

Last Release Date: 04/11/13

Lot #: 24067901

Expires: 04/11/14

MFG: Par

Days Supply: 60

QTY (TAB): 180

of Refills: 1

Remaining: 1

Provider: PARKER, KRISTINE U

Routing: Mail

Copies: 1

Clinic: CHS ENDOCRINE FELLOW PARKER

Division: VAMC CHARLESTON (534)

Pharmacist:

Patient Counseling: NO

Remarks:

Provider Comments: express mail/overnight if possible. patient thyrotoxic and
out of medications

Finished By: RUCH, BONNIE F

Filled By: CHISOLM, EBONIE S

Checked By: KOSCINSKI, BRANT A

Entry By: PARKER, KRISTINE U

Entry Date: 04/10/13 16:40:28

Original Fill Released: 04/11/13

Routing: Mail

Refill Log:

#	Log Date	Refill Date	Qty	Routing	Lot #	Pharmacist
---	----------	-------------	-----	---------	-------	------------

There are NO Refills For this Prescription

Partial Fills:

#	Log Date	Date	Qty	Routing	Lot #	Pharmacist
---	----------	------	-----	---------	-------	------------

1	04/15/13	04/15/13	30	Window	24066401	
---	----------	----------	----	--------	----------	--

Division: 534 RELEASED: 04/15/13

REMARKS: ups holding prev packag

Activity Log:

#	Date	Reason	Rx Ref	Initiator Of Activity
---	------	--------	--------	-----------------------

1	04/11/13	PATIENT INSTR. ORIGINAL		
---	----------	-------------------------	--	--

EXHIBIT 1

Patient Information

Apr 15, 2013 10:24:42

Page: 1 of 1

EGGELSTON, CORTLAND JAMES

7m<A>m

Ht (cm): 130.50 (04/15/2013)

DOB: [REDACTED]

Wt (kg): 89.82 (04/15/2013)

SEX: MALE

Non-VA Meds on File - Last entry on 06/27/12

Eligibility: NSC

RX PATIENT STATUS: OPT NSC

Disabilities:

399 RODEO DRIVE

PO BOX 955

HOME PHONE: [REDACTED]

CELL PHONE: 000-000-0000

WORK PHONE:

EUTAWVILLE

SOUTH CAROLINA 29943

Prescription Mail Delivery: Regular Mail

Allergies

Verified: PROPRANOLOL HYDROCHLORIDE,

Remote:

Adverse Reactions

Pending Clinic Appointments:

APR 24, 2013 07:50 TRI LAB (AM), PRIMARY CARE (8 days)

JUL 10, 2013 03:00 CHS WARFARIN TELE TEAM 2-X *** Canceled ***

JUL 10, 2013 09:30 CHS WARFARIN TELE TEAM 2-X (85 days)

EGGELSTON, CORTLAND JAMES

399 RODEO DRIVE

DOB: [REDACTED]

PO BOX 355

EUTAWVILLE

PHONE: [REDACTED]

SOUTH CAROLINA 29043

ELIG: NSC

WEIGHT(Kg): 89.82 (04/15/2013)

HEIGHT(cm): 190.50 (04/15/2013)

CrCL: 117.4(est.) (CREAT:0.75mg/dL 4/15/13)BSA: 2.19

DISABILITIES:

ALLERGIES: PROPRANOLOL HYDROCHLORIDE,

ADVERSE REACTIONS:

Patient Has Archived Prescriptions

Medication Profile Sorted by DRUG NAME
METHIMAZOLE 10MG TAB to METHIMAZOLE 5MG TAB

Rx#	Drug	REF	ST	REM	Issued	Last Fill
22710254	METHIMAZOLE 10MG TAB		DE	0	07-25-12	07-25-12
QTY: 180 SIG: TAKE TWO TABLETS BY MOUTH EVERY 8 HOURS FOR HYPERTHYROIDISM						
22719877	METHIMAZOLE 10MG TAB		DE	0	08-14-12	11-30-12
QTY: 180 SIG: TAKE TWO TABLETS BY MOUTH EVERY 8 HOURS FOR HYPERTHYROIDISM						
522342420	METHIMAZOLE 10MG TAB		A	1	04-10-13	04-11-13
QTY: 180 SIG: TAKE ONE TABLET BY MOUTH EVERY 8 HOURS FOR HYPERTHYROIDISM						

Non-VA MEDS (Not Dispensed by VA)

SULINDAC 200MG TAB

Dosage: 200MG

Schedule: TWICE A DAY AFTER MEALS

Date Documented: 05/02/05

Status: Discontinued (05/27/12)

MULTIVITAMIN/MINERALS THERAPEUT CAP/TAB

Dosage: 1 TABLET

Schedule: ONCE A DAY

Date Documented: 05/27/12

Status: Active



CONSOLIDATED MAIL OUTPATIENT PHARMACY

Consolidated Mail Outpatient Pharmacy National Web Application

[Order Lookup](#) | [File a QA Report](#) | [Check QA Report Status](#) | [File CMOP QA Score](#)

Order Number: 534-75814-77 | Patient: EGGELSTON, CORTLANDJAMES (*****0170) | QA Reporting Options for Entire Order 534-75814-77 ->

Address Specified In Order: 399 RODEO DRIVE PO BOX 955 BUTA WVILLE, SC 29048

CMOP	Date/Time Received	Date/Time Completed	RX Number	Product Code	Order Status	NDC	Drug Name	Qty	Drug Cost	Package	It
Charleston (766)	2013-04-02 15:34:05	2013-04-03 10:46:38	22724041A (2of5)	M0036	Filled At CMOP Accepted by Medical Center Vista 4/3/2013 11:13:17 AM	0037300473	METOPROLOL TARTRATE 100MG TAB	63	\$1.52	0037300473 100MG TAB (USPS)	

Current User: Kosciński, Brant (VHA07\VHACHAKosciB) | Brant.Kosciński@va.gov

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[FirstGov](#) | [White House](#) | [USA Freedom Corps](#)

Reviewed/Updated Date:

USPS

04/16/13 10:14:32

List Data

Page 1 of 1

Action	Qty	By	Date/Time
Script Entered	180	BFR	04/11/2013 09:40:30 AM
Pending	180	n/a	04/11/2013 09:40:30 AM
Label Printed	n/a	n/a	04/11/2013 11:56:48 AM
Script Fill	n/a	ESE	04/11/2013 11:56:53 AM
Filled	180	ESE	04/11/2013 11:56:53 AM
Script Verify	n/a	BAK	04/11/2013 12:20:13 PM
Verified	180	BAK	04/11/2013 12:20:13 PM
Routed	n/a	BAK	04/11/2013 12:20:33 PM
Batched To: UPS	180	BAK	04/11/2013 12:20:33 PM
UPS	180	BAK	04/11/2013 12:20:33 PM
UPS	180	BAK	04/11/2013 12:20:33 PM

Scriptpro dispensing info

NOTE DATED: 04/15/2013 15:30

LOCAL TITLE: PHARMACY INTERVENTION

STANDARD TITLE: PHARMACY E & M NOTE

VISIT: 04/15/2013 15:30 CH3 PHARM COUNSELING SPEC-X

Pharmacy Intervention:

Notes: Patient's spouse called concerned that overnight delivery of methimazole has still not been received and stated he's in the middle of a thyroid crisis. Confirmed with central pharmacy records and VA mailroom that rx was released to UPS on Thu 4/11/13. Confirmed address with patient's spouse. Pulled UPS records which states package being held because a correct street name is needed. Called UPS @ (1-800-742-5377) regarding held package with tracking number 1ZA39F1903459336553. Spoke with Joseph @ UPS who contacted local driver to make contact with patient and redeliver today. Also provided another partial overnight deliver for tomorrow as backup since patient and spouse declined getting a partial supply from local pharmacy d/t transportation and financial issues. Case d/w Dr Charles in Endo who spoke with patient to have patient come to VAMC ER for evaluation today.

METHIMAZOLE 10MG TAB TAKE ONE TABLET BY MOUTH EVERY 8 HOURS FOR HYPERTHYROIDISM

Signed by: /s/ BONNIE F. RUCH, B.S. PHARM, PHARM.D.

SPECIALTY CLINICAL PHARMACIST

04/15/2013 15:42

EGGELSTON, CORTLAND JAMES

CHARLESTON VAMC

Printed: 04/15/2013 12:45

DOB: [REDACTED]

Pt Loc: 3BN MED B334-9

Vice SF 509

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF ORANGEBURG)

FIRST JUDICIAL CIRCUIT

Courtland James Eggleston,)

CIVIL ACTION NO: 2015-CP-38-00354

vs.)

PLAINTIFF'S MEMORANDUM

IN OPPOSITION TO DEFENDANTS'

MOTION TO DISMISS

United Parcel Service, Inc., and)

Rick Fogle,)

Defendants.)

The above-named Plaintiff, by and through his undersigned counsel, hereby submits this Memorandum in Opposition to Defendants' Motion to Dismiss and would respectfully show this Honorable Court as follows:

FACTS

The within action is a personal injury action that stems from a failure of the United Parcel Service, Inc. (UPS) and its driver, Rick Fogle ("Defendants") to deliver much needed medication to a man suffering from hyperthyroidism. On or about April 15, 2013, Courtland Eggleston ("Plaintiff"), suffered a thyroid storm which was caused lack of medication by UPS' failure to deliver said medication in a timely manner. (A thyroid storm is a life-threatening condition that develops in cases of untreated hyperthyroidism cases, which, in the spectrum of endocrine emergencies, ranks as one of the most critical illnesses. The symptoms are severe and may include: agitation, loss of consciousness, confusion, diarrhea, tachycardia, restlessness, shaking, sweating, elevated blood pressure and sudden onset congestive heart failure. The mortality rate for those experiencing a thyroid storm is 20-30%.) On or about

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H.R. Conf. Rep. No. 103-677, [584] at 1757 (Section 14501 "is identical to the preemption provision deregulating air carriers . . . and is intended to function in the exact same manner with respect to its preemptive effects."); *Deerskin Trading Post, Inc. v.*

United Parcel Service of America, Inc., 972 F. Supp. 665, 668-69 (N.D. Ga. 1997) (tracing legislative history of Section 14501 and concluding that "Congress intended for [Section 14501] to be applied in an identical manner as the preemption provision of the ADA."). The Supreme Court has noted that the ADA preemption provision was specifically concerned with state *economic* regulation. *See American Airlines, Inc. v. Wolens*, 513 U.S. 219, 229 n. 5, 130 L. Ed. 2d 715, 115 S. Ct. 817 (1995) ("the ban on enacting or enforcing any law 'relating to rates, routes, or services' is most sensibly read, in light of the ADA's overarching deregulatory purpose, to mean states may not seek to impose their own public policies or theories of competition or regulation on the operations of an air carrier") (internal quotation and citation omitted).

Omya, Inc. v. Vermont, 33 Fed. Appx. 581, 583-584 (2d Cir. 2002).

The FAAAA provides for instances in which Federal authority preempts state authority over intrastate transportation. See 49 USC §14501. As a general rule, the statute prevents a State from enacting or enforcing a "law related to a price, route, or service" of a motor carrier with respect to the transportation of property. Id. Subsection (c) specifically addresses motor carriers of property, See 49 U.S.C. 14501(c), and contains an express provision excluding "transportation of household goods" from the preemptive nature of the statute. 49 U.S.C. 14501(c)(2)(B). The purpose of the general rule set forth in 49 U.S.C. 14501(c)(1) is to eliminate overlapping state and municipal regulations, which increased costs, decreased efficiency, and reduced competition and innovation. See Stucky v City of San Antonio (2001, CA5 Tex) 260 F3d 424, reh, en banc, den (2001, CA5 Tex) 266 F3d 342 and (ovrld in part by City of Columbus v Ours Garage & Wrecker Serv. (2002) 536 US 424, 153 L Ed 2d 430, 122 S Ct 2226, 2002 CDOS 5452, 2002 Daily Journal DAR 6867, 15 FLW Fed S 447) and cert gr, vacated, remanded (2002), 536 US 936, 153 L

Ed 2d 801, 122 S Ct 2617, 2002 CDOS 5604, 2002 Daily Journal DAR 7058, on remand, remanded (2002, CA5 Tex) 307 F3d 315.

Plaintiff would contend that the medication to have been delivered but for Defendants' failure to do so qualifies as a household good subject to the FAAAA exclusion provision of 49 U.S.C. § 14501(c)(2)(B). In addition, there is nothing contained in the language of the FAAAA to suggest that Congress' "clear and manifest" intent was to, while focusing solely on regulatory aspects of motor carriers, do away with an individual's right to pursue redress in state court for physical harm to their person caused by a motor carrier's failure to deliver items such as medication.

C. Carmack Amendment

The Carmack Amendment only preempts state and common law in instances where goods are lost, damaged or untimely delivered in interstate commerce. 1 Sorkin, Goods in Transit §5.02[1] at 5-16; see Missouri Pac. R.R. Co. v. Elmore & Stahl, 377 U.S. 134, 137 (1964), and Ward v. Allied Van Lines, Inc., 231 F.3d 135, 138 (4th Cir. 2000). The Carmack Amendment's scope is determined by reference to 49 U.S.C. §13501, also a provision of the Interstate Commerce Act, and in relevant part, provides Carmack applies to motor transportation of property: (1) between a place in a state and a place in another state; or (2) between a place in the United States and a place in a foreign country "to the extent the transportation is in the United States." 49 U.S.C. §13501(1)(A),(E) (2000). The Carmack Amendment does not apply to intrastate commerce. Id.

Therefore, the Carmack Amendment is wholly inapplicable to the case at hand

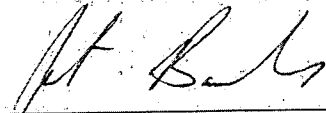
because this case does not involve interstate commerce. Instead, this case involves intrastate delivery of medication from the VA Hospital in Charleston, South Carolina to the Plaintiff's residence in Orangeburg, South Carolina. Moreover, at no time did the medication or vehicle(s) delivering it have to travel across the border into another state in route to Plaintiff's residence from Charleston.

CONCLUSION

For the reasons set forth above, the Plaintiff respectfully requests this Court deny Defendants' Motion to Dismiss and grant Plaintiff any and all such other relief as this Court deems just and proper.

Date: 6-15-15

LANIER & BURROUGHS, LLC


Shane M. Burroughs, Esquire
Justin T. Bamberg, Esquire

ATTORNEYS FOR THE PLAINTIFF
Post Office Drawer 2789
250 Gibson Street
Orangeburg, SC 29116
(803) 268-9800

EGGELSTON, CORTLAND JAMES

7m<A>m

PID: [REDACTED]

Ht(cm): 190.50 (04/15/2013)

DOB: [REDACTED]

Wt(kg): 89.32 (04/15/2013)

Rx #: 228424205

Orderable Item: METHIMAZOLE TAB

CMOP Drug: METHIMAZOLE 10MG TAB

*Dosage: 10MG

Verb: TAKE

Dispense Units: 1

Noun: TABLET

*Route: ORALLY

*Schedule: Q3H

Patient Instructions: FOR HYPERTHYROIDISM

SIG: TAKE ONE TABLET BY MOUTH EVERY 3 HOURS FOR HYPERTHYROIDISM

Patient Status: OPT NSC

Issue Date: 04/10/13

Fill Date: 04/11/13

Last Fill Date: 04/11/13 (Mail)

Last Release Date: 04/11/13

Lot #: 24057901

Expires: 04/11/14

MFG: Par

Days Supply: 60

QTY (TAB): 180

of Refills: 1

Remaining: 1

Provider: PARKER, KRISTINE U

Routing: Mail

Copies: 1

Clinic: CHS ENDOCRINE FELLOW PARKER

Division: VAMC CHARLESTON (534)

Pharmacist:

Patient Counseling: NO

Remarks:

Provider Comments: express mail/overnight if possible. patient thyrotoxic and out of medications

Finished By: RUCH, BONNIE F

Filled By: CHISOLM, EBONIE S

Checked By: KOSCINSKI, BRANT A

Entry By: PARKER, KRISTINE U

Entry Date: 04/10/13 16:40:28

Original Fill Released: 04/11/13

Routing: Mail

Refill Log:

#	Log Date	Refill Date	Qty	Routing	Lot #	Pharmacist
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=====

There are NO Refills For this Prescription

Partial Fills:

#	Log Date	Date	Qty	Routing	Lot #	Pharmacist
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1	04/15/13	04/15/13	30	Window	24056401	
---	----------	----------	----	--------	----------	--

Division: 534 RELEASED: 04/15/13

REMARKS: ups holding prev packag

Activity Log:

#	Date	Reason	Rx Ref	Initiator Of Activity
---	------	--------	--------	-----------------------

=====

1	04/11/13	PATIENT INSTR. ORIGINAL		
---	----------	-------------------------	--	--

EXHIBIT 1

063

Patient Information

Apr. 15, 2013@10:24:42

Page: 1 of 1

EGGELSTON, CORTLAND JAMES

7:06A.m

PID: [REDACTED]

Ht(cm): 139.53 (04/15/2013)

DOB: [REDACTED]

Wt(kg): 83.82 (04/15/2013)

SEX: MALE

Non-VA Meds on File - Last entry on 06/27/12

Eligibility: NSC

RX PATIENT STATUS: OPT NSC

Disabilities:

399 RODEO DRIVE

PO BOX 955

HOME PHONE: [REDACTED]

CELL PHONE: 000-000-0000

EUTAWVILLE

WORK PHONE:

SOUTH CAROLINA 29043

Prescription Mail Delivery: Regular Mail

Allergies

Verified: PROPANOLOL HYDROCHLORIDE,

Remote:

Adverse Reactions

Pending Clinic Appointments:

APR 24, 2013@07:50 TRI LAB (AM) PRIMARY CARE (8 days)

JUL 10, 2013@03:00 CHS WARFARIN TELE TEAM 2-X *** Canceled ***

JUL 10, 2013@09:30 CHS WARFARIN TELE TEAM 2-X (85 days)

EGGELSTON, CORTLAND JAMES

199 RODEO DRIVE

DOB: [REDACTED]

PO BOX 955

EUTAWVILLE

PHONE: [REDACTED]

SOUTH CAROLINA 29043

ELIG: NSC

WEIGHT(Kg): 89.82 (04/15/2013) HEIGHT(cm): 190.50 (04/15/2013)

CrCL: 117.4(est.) (CREAT:0.75mg/dL 4/15/13)BSA: 2.19

DISABILITIES:

ALLERGIES: PROPRANOLOL HYDROCHLORIDE,

ADVERSE REACTIONS:

Patient Has Archived Prescriptions

Medication Profile Sorted by DRUG NAME
METHIMAZOLE 10MG TAB to METHIMAZOLE 5MG TAB

REF

Rx#	Drug	ST	REM	Issued	Last Fill
22710264	METHIMAZOLE 10MG TAB	DE	0	07-26-12	07-26-12
QTY: 130	SIG: TAKE TWO TABLETS BY MOUTH EVERY 8 HOURS FOR HYPERTHYROIDISM				
22719877	METHIMAZOLE 10MG TAB	DE	0	08-14-12	11-30-12
QTY: 130	SIG: TAKE TWO TABLETS BY MOUTH EVERY 8 HOURS FOR HYPERTHYROIDISM				
522342420	METHIMAZOLE 10MG TAB	A	1	04-10-13	04-11-13
QTY: 130	SIG: TAKE ONE TABLET BY MOUTH EVERY 8 HOURS FOR HYPERTHYROIDISM				

Non-VA MEDS (Not Dispensed by VA)

SULINDAC 200MG TAB

Dosage: 200MG

Schedule: TWICE A DAY AFTER MEALS

Date Documented: 05/02/06

Status: Discontinued (05/27/12)

MULTIVITAMIN/MINERALS THERAPEUT CAP/TAB

Dosage: 1 TABLET

Schedule: ONCE A DAY

Date Documented: 06/27/12

Status: Active



CONSOLIDATED MAIL OUTPATIENT PHARMACY

Consolidated Mail Outpatient Pharmacy National Web Application

[Order Lookup](#) | [File a QA Report](#) | [Check QA Report Status](#) | [Print MOP QA Staff](#)

Order Number: 534-75814-77 | Patient: EGGELSTON, CORTLAND JAMES (*****0170) | QA Reporting Options for Entire Order 534-75814-77 -->

Address Specified In Order: 399 RODEO DRIVE PO BOX 965 BUTA WVILLE, SC 29048

CMOP	Date/Time Received	Date/Time Completed	RX Number	Product Code	Order Status	NDC	Drug Name	Qty	Drug Cost	Package	It
Charleston (755)	2013-04-02 15:34:05	2013-04-03 10:46:38	22724041A (2of5)	M0085	Filled At CMOP Accepted by Medical Center Vista 4/3/2013 11:13:17 AM	00373004704	METOPROLOL TARTRATE 100MG TAB	53	\$1.52	503140500007581400077001235648 (USPS)	

Current User: Koscinski, Brant (VHA07\VHACHAKosciB) | Brant.Koscinski@va.gov

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Reviewed/Updated Date:

USPS

04/16/13 10:14:32

List Data

Page 1 of 1

Action	Qty	By	Date/Time
Script Entered	180	BFR	04/11/2013 09:40:30 AM
Pending	180	n/a	04/11/2013 09:40:30 AM
Label Printed	n/a	n/a	04/11/2013 11:56:48 AM
Script Fill	n/a	ESE	04/11/2013 11:56:53 AM
Filled	180	ESE	04/11/2013 11:56:53 AM
Script Verify	n/a	BAK	04/11/2013 12:20:13 PM
Verified	180	BAK	04/11/2013 12:20:13 PM
Routed	n/a	BAK	04/11/2013 12:20:33 PM
Batched To: UPS	180	BAK	04/11/2013 12:20:33 PM
UPS	180	BAK	04/11/2013 12:20:33 PM
UPS	180	BAK	04/11/2013 12:20:33 PM

Scriptpro dispensing info

.....
 MEDICAL RECORD

Progress Notes

NOTE DATED: 04/15/2013 16:30

LOCAL TITLE: PHARMACY INTERVENTION

STANDARD TITLE: PHARMACY E & M NOTE

VISIT: 04/15/2013 16:30 CHS PHARM COUNSELING SPEC=X

Pharmacy Intervention:

Notes: Patient's spouse called concerned that overnight delivery of methimazole has still not been received and stated he's in the middle of a thyroid crisis. Confirmed with central pharmacy records and VA mailroom that rx was released to UPS on Thu 4/11/13. Confirmed address with patient's spouse. Pulled UPS records which states package being held because a correct street name is needed. Called UPS @ (1-800-742-5377) regarding held package with tracking number 1ZA39F190345933553. Spoke with Joseph @ UPS who contacted local driver to make contact with patient and redeliver today. Also provided another partial overnight deliver for tomorrow as backup since patient and spouse declined getting a partial supply from local pharmacy d/t transportation and financial issues. Case d/w Dr Charles in Endo who spoke with patient to have patient come to VAMC ER for evaluation today.

METHIMAZOLE 10MG TAB TAKE ONE TABLET BY MOUTH EVERY 8 HOURS FOR HYPERTHYROIDISM

Signed by: /es/ BONNIE F. RUCH, B.S. PHARM, PHARM.D.

SPECIALTY CLINICAL PHARMACIST

04/15/2013 16:42

.....
 EGSELSTON, CORTLAND JAMES

CHARLESTON VAMC

Printed: 04/15/2013 12:46

DOB [REDACTED]

Pt Loc: 33N MED B334-9

Vice SF 509

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ORANGEBURG	)	Case No. 2014-CP-10-38-1164
	)	
Rebecca McCutcheon,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	REPLY BRIEF IN SUPPORT OF
	)	DEFENDANT UNITED PARCEL SERVICE,
United Parcel Service, Inc. and John Doe,	)	INC'S MOTION TO DISMISS
	)	PLAINTIFF'S COMPLAINT
Defendants.	)	
	)	
	)	

**REPLY BRIEF IN SUPPORT OF DEFENDANT UNITED PARCEL SERVICE,
INC'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

Defendant United Parcel Service, Inc. ("UPS")¹, by and through its counsel, hereby sets forth its Reply Brief in Support of its previously filed Motion to Dismiss Plaintiff's Complaint, and in support thereof avers as follows:

I. ARGUMENT

A. Plaintiff's State Law Claims are Preempted by the Federal Aviation Administration Authorization Act of 1994

In her opposition, Plaintiff tellingly does not dispute the two controlling points: (1) her state-law claims directly relate to the delivery "service" that UPS provides; and (2) the FAAAA expresses a **broad** preemptive purpose. Rather, Plaintiff's opposition is limited to two points. First, Plaintiff discusses the purported Congressional intent behind the enactment of the FAAAA to suggest it is inapplicable. Second, and alternatively, Plaintiff contends that the FAAAA's household goods exception applies to her claim. Both arguments are incorrect.

¹ Plaintiff's Memorandum in Opposition to UPS's Motion to Dismiss includes Rick Fogle as a named defendant in the caption; however, the only Complaint filed by Plaintiff Rebecca McCutcheon names only UPS and John Doe as defendants. No amended complaint has been filed to date. As such, UPS remains the only specifically named defendant to this lawsuit. Mr. Fogle is not a defendant in this lawsuit.

Plaintiff's Complaint alleges negligent untimely delivery of a package, and therefore is undisputedly related to the primary "service" that UPS provides. This means it is preempted in its entirety by the FAAAA. See 49 U.S.C. § 14501(c)(1). Courts across the country conclude that **dismissal** of a plaintiff's state law **tort claim** is the appropriate remedy where those claims are preempted by federal law. See *Brown v. United Airlines, Inc.*, 720 F.3d 60 (1st Cir. 2013) (affirming dismissal where tort claims were preempted by ADA); *Bower v. Egyptair Airlines Co.*, 731 F.3d 85 (1st Cir. 2013) (affirming dismissal by way of summary judgment where claims were preempted by ADA); *Wise Recycling, LLC v. M2 Logistics*, 943 F. Supp. 2d 700, 706 (N.D. Tex. 2013) (dismissing negligence claims that were preempted by FAAAA); *State ex rel. Grupp v. DHL Exp. (USA), Inc.*, 970 N.E.2d 391 (N.Y. App. Ct. 2012) (affirming dismissal where plaintiff's claims were preempted by federal law); *Mudd-Lyman Sales & Serv. Corp. v. United Parcel Serv., Inc.*, 236 F. Supp. 2d 907 (N.D. Ill. 2002) (granting summary judgment and dismissing plaintiff's state law claims which were preempted by FAAAA); *Beyer v. Acme Truck Line, Inc.*, 802 So. 2d 798 (La. Ct. App. 2001) (affirming dismissal of plaintiff's lawsuit with prejudice where state law claims, including intentional interference with business relationships, unjust enrichment, and fraud, were preempted by FAAAA and ADA); *Rockwell*, 1999 WL 33100089 at *4 (dismissing plaintiff's complaint because claims preempted by FAAAA); *Vieira*, 1996 WL 478686 at *1 (granting summary judgment and dismissing plaintiff's claims which were preempted). Similarly, this Court should dismiss Plaintiff's Complaint because it is preempted in its entirety by the FAAAA.

1. Plaintiff Avoids Applicable Case Law

Plaintiff's Opposition focuses solely on background information and completely ignores all of the case law cited within UPS's brief which squarely demonstrates that courts throughout the country have specifically applied the FAAAA (or ADA) preemption to negligent delivery claims like Plaintiff's claims here. For instance, Plaintiff ignores two cases cited by UPS which specifically address the issue.

First, in *Rockwell v. United Parcel Serv., Inc.*, where the plaintiff's complaint sought to impose liability on UPS and its delivery person for plaintiff's injuries, the United States District Court for the District of Vermont held that plaintiff's claims for negligent intake and delivery protocol, which "go to the heart of the services that UPS provides," were preempted by the FAAAA. No. 2:99 CV 57, 1999 WL 33100089, at *2 (D.Vt. July 7, 1999). Second, the United States District Court for the Northern District of California, in *Vieira v. United Parcel Service, Inc.*, held that plaintiff's negligence and conversion claim arising from a lost UPS package related to the "service" provided by UPS and was therefore preempted by the FAAAA. No. C-95-04697, 1996 WL 478686 at *1 (N.D. Cal. Aug 5, 1996).

Tellingly, Plaintiff contends that the FAAAA is inapplicable, but completely ignores these and the litany of additional cases referenced by UPS. Plaintiff does not even attempt to distinguish any of the case law cited by UPS. Instead, Plaintiff simply avoids the pointed case law and makes two separate arguments, which for the reasons explained below, are both without merit.

2. Congress Intended for the FAAAA's Preemption to Have Broad Scope

Plaintiff fails to cite even one case which stands for her proposition that because the Congressional intent regarding enactment of the FAAAA included economic considerations, the FAAAA's preemption is inapplicable to Plaintiff's common law negligence claim which arises

out of the timeliness of UPS's delivery service. Rather, Plaintiff relies primarily upon *Omya, Inc. v. Vermont*, 33 F. App'x 581, 583 (2d Cir. 2002)², which is completely factually distinguishable insofar as it involved a court's analysis of the Vermont Environmental Board's restriction on the number of daily round-trips permitted by tractor trailers transporting plaintiff's goods on a particular roadway in Vermont. Plaintiff's reliance on the *Omya* decision is inapposite.

Plaintiff's argument regarding Congressional intent also overlooks the clear language set forth in the FAAAA. While this Court should consider Congress's intentions in enacting the statute, "the Court's analysis begins, and usually ends, with the **language of the statute.**" *Deerskin Trading Post, Inc. v. United Parcel Serv. of Am., Inc.*, 972 F. Supp. 665, 667 (N.D. Ga. 1997) (emphasis added); *see also Fox v. Moultrie*, 666 S.E.2d 915, 917 (S.C. 2008) (noting that in interpreting a statute, the court "must look to the plain meaning" and "[i]f the statute is clear and unambiguous, 'that is the end of the matter for the court.')" (internal citations omitted). Section 14501(c)(1) clearly provides that no state shall "enact or enforce any law, regulation, or any other provision having the force and effect of law related to a price, route, or **service** of any motor carrier." 49 U.S.C. § 14501(c)(1) (emphasis added). "Congress intended for the preemption provision of the FAAAA—which employs identical language to the preemption provision of the ADA—to be **broad in scope** and that the FAAAA's preemption provision precludes any state enforcement action **having a connection with or reference to** any price, route, or **service** of any motor carrier, motor private carrier, or air carrier." *Deerskin Trading Post, Inc.*, 972 F. Supp. at 668 (emphasis added).

² Of note, this case was not selected for publication in the Federal Reporter.

In *Deerskin Trading Post, Inc.*, the United States District Court for the Northern District of Georgia, evaluated the congressional intent related to the FAAAA, as well as the history of cases interpreting the identical language of the ADA's preemption provision, and concluded that:

a state law tort action against a carrier, where the subject matter of the action is related to the carrier's prices, routes, or services, is a state enforcement action having a connection with or reference to a price, route, or service of any motor carrier, motor private carrier, or air carrier for purposes of the FAAAA.

Id. at 672. Similarly, in *Mastercraft Interiors, Ltd. v. ABF Freight Sys., Inc.*, the United States District Court for the District of Maryland analyzed the legislative history of Section 14501(c)(1)³, which it found "clearly reflects the intent of Congress that preemption provisions, such as [Section 14501(c)(1)], are to be given **broad scope**, as federal law must govern shipping prices and services." 284 F. Supp. 2d 284, 286 (D. Md. 2003).

Plaintiff's argument ignores Congress's clear intent for the FAAAA's preemptive provision to have **broad scope** and to be applicable to any state enforcement action "**having a connection with or reference to any . . . service of any motor carrier.**" 49 U.S.C. § 14501(c)(1). Plaintiff's state law tort action against UPS, which relates directly to UPS's service, "is a state enforcement action having a connection with or reference to a price, route, or service of any motor carrier, motor private carrier, or air carrier for purposes of the FAAAA." *Deerskin Trading Post, Inc.*, 972 F. Supp. at 672. Therefore, Plaintiff's action is preempted pursuant to the plain language of the FAAAA.

³ By way of background, the at-issue preemptive provision was initially enacted as part of the Federal Aviation Administration Authority Act ("FAAAA") passed by Congress in 1994. In 1995, Congress enacted the Interstate Commerce Commission Termination Act ("ICCTA"), which re-codified the preemptive provision as 49 U.S.C. § 14501(c)(1). When referring to the FAAAA throughout its brief, UPS is referring to the preemption provision set forth in Section 14501(c).

3. The FAAAA's Household Goods Exception is Inapplicable

Plaintiff's contention that the FAAAA is inapplicable because the at-issue package containing medication qualifies as a household good under the FAAAA's exemption is misguided. The language of the FAAAA exempts certain measures from its preemptive scope.

See 49 U.S.C. § 14501(c)(2). Specifically, Section 14501(c) provides in pertinent part:

(1) General rule.--Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier [. . .]

(2) **Matters not covered.**--Paragraph (1)--

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles; the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) **does not apply to the intrastate transportation of household goods;**
and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

49 U.S.C. § 14501(c)(1)-(2) (emphasis added). The FAAAA "expressly does not regulate a state's authority to: enact safety regulations with respect to motor vehicles; control trucking routes based on vehicle size, weight, and cargo; impose certain insurance, liability, or standard transportation rules; regulate the intrastate transport of household goods and certain aspects of tow-truck operations; or create certain uniform cargo or antitrust immunity rules." See *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 644 (9th Cir. 2014). In other words, the FAAAA does not

prohibit a state from enacting legislation which regulates intrastate transportation of household goods. *See City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 438,(2002) (noting that pursuant to Section 14501(c)(2)(B) and (C), "preemption 'does not apply' to state or local power to regulate in particular areas"). However, that is not the situation we have here.

Plaintiff's claims do not arise out of any South Carolina law regarding the regulation of intrastate transportation of household goods; rather, they arise from South Carolina's **tort law**. UPS is seeking dismissal of Plaintiff's tort law claims. The FAAAA's household goods exemption is inapplicable.

B. Plaintiff's State Law Claims are Preempted by the Carmack Amendment if the Package Involved an Interstate Delivery

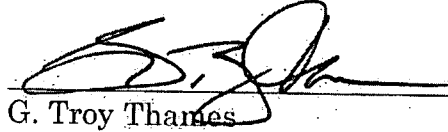
With respect to the Carmack Amendment, Plaintiff's opposition simply contends that the Carmack Amendment's preemption provision is inapplicable because the at-issue delivery did not involve interstate commerce. Plaintiff states that the package was shipped from the VA Hospital in Charleston, South Carolina to the Plaintiff's residence in Orangeburg, South Carolina. As set forth in their brief, UPS concedes that if the subject package was a purely intrastate shipment, the FAAAA, rather than the Carmack Amendment, applies to preempt Plaintiff's state law tort claims. However, UPS simply maintains that, should any argument be subsequently made by Plaintiff that the at-issue package involved an interstate delivery, Plaintiff's claims should be dismissed pursuant to the Carmack Amendment for the reasons set forth in UPS's previously filed briefing.

II. CONCLUSION

For the reasons set forth above, as well as those set forth in the previously filed brief, Defendant United Parcel Service, Inc. respectfully requests that this Court grant its Motion to

Dismiss pursuant to SCRCP 12(b)(1) and/or SCRCP 12(b)(6), and dismiss Plaintiff's Complaint with prejudice because Plaintiff's tort action is preempted by federal law.

WILLSON JONES CARTER & BAXLEY, PA



G. Troy Thames
421 Wando Park Blvd., Ste. 100
Mt. Pleasant, South Carolina 29464
Telephone: 843-284-0832
Facsimile: 843-284-1081
E-mail: tthames@wjlaw.net

Mt. Pleasant, South Carolina

Ryan R. Corkery
Ansa Assunacao, LLP
1600 JFK Blvd.
Four Penn Center, suite 900
Philadelphia, PA 19103
Telephone: 267-528-0733
Facsimile: 267-528-0726
Ryan.corkery@ansalaw.com

September 10, 2015

**ATTORNEYS FOR
UNITED PARCEL SERVICE, INC.**

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Cortland James Eggleston,

Plaintiff,

vs.

United Parcel Service, Inc. and Rick
Fogle,

Defendants.

) IN THE COURT OF COMMON PLEAS

) Case No.: 2015-CP-38-00354

) DEFENDANTS UNITED PARCEL

) SERVICE, INC. AND RICK

) FOGLE'S MEMORANDUM OF LAW IN

) SUPPORT OF THEIR MOTION TO

) DISMISS PLAINTIFF'S COMPLAINT

)

)

)

)

)

FILED FOR REC
RECEIVED
SEP 14 2015
CLERK OF COURT
ORANGEBURG COUNTY, SC

**DEFENDANTS UNITED PARCEL SERVICE, INC. AND RICK FOGLE'S BRIEF
IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

I. INTRODUCTION

This is a personal injury tort case. Plaintiff Cortland James Eggleston ("Plaintiff") alleges that Defendants United Parcel Service, Inc. ("UPS") and its driver, Rick Fogle (hereinafter collectively "Defendants"), negligently delivered a package, containing Plaintiff's thyroid medication, late to him, causing personal injuries to him. Of note, Plaintiff's wife, Rebecca McCutcheon, has filed a separate loss of consortium claim against UPS. UPS has moved to dismiss Ms. McCutcheon's Complaint on the same grounds as those set forth below. On June 15, 2015, Plaintiff McCutcheon and Plaintiff Eggleston each filed separate, but identical, briefs in opposition to the respective Motions to Dismiss; however, Defendants had not yet filed their briefings in support of their Motion to Dismiss Plaintiff Eggleston's lawsuit. At this time, Defendants would like to present their below brief in support of their Motion to Dismiss, as well as a reply brief to the arguments set forth in Plaintiff's opposition memorandum.

ORANGEBURG COUNTY, SC
CLERK OF COURT
Wing B. Clark
JANESTRUE CO.

Here, Plaintiff's state law tort action is preempted by federal statute, namely the Federal Aviation Administration Authorization Act of 1994, codified at 49 U.S.C. §14501(c), or the Carmack Amendment, codified at 49 U.S.C. §14706 49 U.S.C. §14706, because it relates to an alleged failure in the transportation and delivery of goods by a motor carrier. Therefore, it should be dismissed with prejudice on lack of subject matter jurisdiction and/or failure to state a claim grounds.

Plaintiff filed the underlying Complaint against Defendants UPS and UPS driver Rick Fogle on April 1, 2015. (*See* Plaintiff's Compl., attached hereto as Exhibit A). Plaintiff asserted a personal injury claim against Defendants for their alleged failure to timely deliver a package containing thyroid medication to Plaintiff. (*See id.* generally).

Specifically, Plaintiff alleges that on or about April 11, 2013, Plaintiff was expecting a delivery of his thyroid medication from the VA Hospital located in Charleston, South Carolina via UPS. (*Id.* at ¶ 9). Plaintiff further alleges that between April 11, 2013 and April 15, 2013 there were communications between the VA Hospital and UPS regarding delivery of said medication and that "on numerous prior occasions" the medication was successfully delivered by UPS to Plaintiff at his home address. (*Id.* at ¶¶ 8 & 11). According to the Complaint, despite the fact that both the VA Hospital and Plaintiff advised UPS of Plaintiff's proper address, Defendants failed to deliver Plaintiff's thyroid medication. (*Id.* at ¶ 14). Plaintiff alleges that Defendants' failure to timely deliver the medication resulted in Plaintiff's thyroid condition worsening "to the point where he entered into a thyroid storm, causing seizures, congestive heart failure, extremely elevated blood pressure, hospitalization and surgical intervention." (*Id.* at ¶ 15).

Plaintiff claims that as a result of Defendants' "negligence, recklessness, carelessness, willfulness, wantonness, and gross negligence," Plaintiff sustained injuries, suffered pain and suffering, incurred medical expenses and was unable to work. (*Id.* at ¶ 16). Although pled as separate causes of action for negligence and negligent entrustment, the entirety of Plaintiff's Complaint is based upon the same alleged conduct -- that Defendants negligently failed to timely deliver the thyroid medication to Plaintiff. (*See id.* generally).

For the reasons set forth below, Defendants respectfully requests that this Court grant their Motion to Dismiss, pursuant to SCRCP 12(b)(1) and/or SCRCP 12(b)(6), and dismiss Plaintiff's Complaint on the grounds that Plaintiff's claims are preempted by federal law. Specifically, Defendants assert that the claims are preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), codified at 49 USC §14501(c), or alternatively, the Carmack Amendment, codified at 49 USC §14706.

II. LEGAL STANDARDS

A. South Carolina Rule of Civil Procedure 12(b)(1)

Defendants move to dismiss Plaintiff's Complaint pursuant to South Carolina Rule of Civil Procedure 12(b)(1), which allows a moving party to challenge the power of the Court as to the subject matter of the Complaint. *See* S.C.R.C.P. 12(b)(1). "[S]ubject matter jurisdiction refers to a court's constitutional or statutory power to adjudicate a case." *Johnson v. S.C. Dep't of Prob., Parole, & Pardon Servs.*, 641 S.E.2d 895, 897 (S.C. 2007). Therefore, a complaint is properly dismissed for lack of subject matter jurisdiction under SCRCP 12(b)(1) when the court lacks the "constitutional or statutory power to adjudicate [it]." *Id.*

B. South Carolina Rule of Civil Procedure 12(b)(6)

In the alternative, Defendants move to dismiss Plaintiff's Complaint pursuant to South Carolina Rule of Civil Procedure 12(b)(6), which allows a moving party to challenge a complaint where a plaintiff has failed "to state facts sufficient to constitute a cause of action." SCRCP 12(b)(6). To survive a motion to dismiss, when considering the claims in the light most favorable to the plaintiff, the complaint must state a valid claim which entitles the plaintiff to relief. *See Gentry v. Yonce*, 522 S.E.2d 137, 139 (S. C. 1999). In deciding a motion to dismiss pursuant to 12(b)(6), SCRCP, the trial court should consider only the allegations set forth on the face of the plaintiff's complaint. *Id.*

III. ARGUMENT

Plaintiff's state law claims of negligent untimely delivery of a package are preempted by either the Federal Aviation Administration Authorization Act of 1994, codified at 49 U.S.C. §14501(c), or the Carmack Amendment, codified at 49 U.S.C. §14706. Accordingly, Plaintiff's Complaint should be dismissed because this Court lacks subject matter jurisdiction and Plaintiff has failed to state facts sufficient to constitute a cause of action.

A. Plaintiff's State Law Claims are Preempted by the Federal Aviation Administration Authorization Act of 1994 and Should be Dismissed if the Package Involved an Intrastate Delivery

1. Federal Aviation Administration Authorization Act of 1994

The FAAAA provides in pertinent part:

[A] State, political subdivision of a State, or political authority of 2 or more States may not enact or **enforce a law**, regulation, or other provision having the force and effect of law **related to a price, route, or service of any motor carrier ... or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.**

49 U.S.C. § 14501(c)(1). (emphasis added). Specifically, the United States Supreme Court has clarified that the FAAAA preempts state laws “related to a price, route, or **service of any motor carrier** . . . with respect to the transportation of property.” *Dan’s City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1772 (2013) (quoting 49 U.S.C. § 14501(c)(1)) (emphasis added). Of note, the FAAAA is applicable to **intrastate** transportation of property, whereas the Carmack Amendment which is discussed further below, applies to **interstate** shipments. *See id.* at 1776.

As background, Congress enacted the FAAAA to free carriers, such as UPS, from the “patchwork of regulation” that had created “a huge problem for national and regional carriers attempting to conduct a standard way of doing business” and had caused “significant inefficiencies” and “inhibition of innovation and technology.” Through preemption, Congress intended that “[s]ervice options will be dictated by the marketplace.” H.R. Conf. Rep. No. 103-677, at 87-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1760-61. To accomplish these goals, Congress modeled the FAAAA on the preemption provision of the Airline Deregulation Act (“ADA”), and expressly endorsed “the broad preemption interpretation adopted by the United States Supreme Court in *Morales v. Trans World Airlines, Inc.*, [504 U.S. 374 (1992)]” in applying the ADA. *Id.* at 83.

Morales reasoned that the term “relating to” “express[es] a broad pre-emptive purpose” that encompassed any state law that “has a connection with or reference to” a carrier’s rate, route, or service. 504 U.S. at 383-84 (internal quotations and citation omitted). In *Am. Airlines, Inc. v. Wolens*, the Supreme Court carved out a single narrow exception to ADA preemption, strictly for “routine breach-of-contract claims”—i.e., claims “alleging no violation of state-imposed obligations, but seeking recovery solely for the airline’s alleged breach of its own, self-imposed undertakings”—because those claims do not require enforcement of state law. 513 U.S.

219, 228 (1995). The United States Supreme Court has specifically held that the same broad preemption interpretation given to the ADA in *Morales* applies to the FAAAA preemption provisions. See *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 371 (2008).

2. Plaintiff's State Law Claims are Preempted

As pled in the Complaint, the subject package containing the thyroid medication for Plaintiff was shipped from the VA Hospital in Charleston, South Carolina to Plaintiff's home in Orangeburg, South Carolina; as pled, this was an intrastate shipment. Plaintiff's state law tort claims, which are all based upon an allegation that UPS, a motor carrier, negligently delivered the package untimely, are barred by the FAAAA insofar as the statute expressly preempts state laws "related to a price, route, or **service of any motor carrier** . . . with respect to the transportation of property." *Dan's City Used Cars, Inc.*, 133 S. Ct. at 1772 (quoting 49 U.S.C. § 14501(c)(1)) (emphasis added). Here, Plaintiff's state law claims against Defendants do not merely have the prohibited "connection with or reference to" services, *Morales*, 504 U.S. at 383-84, they are **directly based on the specific service** that UPS provides – delivery of packages.

Although South Carolina courts have not yet interpreted this issue, numerous courts in various jurisdictions have provided compelling persuasive authority for a determination that a plaintiff's state law negligence claims related to delivery of a package are preempted by the FAAAA (or ADA) insofar as they relate directly to the "service" the carrier provides.¹ See e.g., *Rockwell v. United Parcel Serv., Inc.*, No. 2:99 CV 57, 1999 WL 33100089 (D.Vt.1999) (unreported opinion) (claims for negligent intake and delivery protocol, which "go to the heart of the services that UPS provides" were preempted); *Wine & Spirits Wholesalers v. Net Contents*,

¹ When there is no South Carolina case directly on point, this Court may look to other jurisdictions to determine if the issue has been decided and if the decision is persuasive authority. See *Ellis v. Oliver*, 515 S.E.2d 268, 271 (S.C. Ct. App. 1999).

Inc., 10 F. Supp. 2d 84, 87 (D. Mass. 1998) (tort claim against Federal Express for transporting liquor to Massachusetts from unlicensed out-of-state wholesaler was preempted by ADA because "claim arises directly from the act of, and the method employed in, providing" carrier's services); *Deerskin Trading Post, Inc. v. United Parcel Serv. of Am., Inc.*, 972 F. Supp. 665, 672 (N.D. Ga. 1997) (FAAAA preempted all state claims, including negligence, except for portion of breach of contract claim.); *Vieira v. United Parcel Service, Inc.*, 1996 WL 478686 at *1 (N.D. Cal. Aug 5, 1996)(unreported opinion) (negligence and conversion claim arising from lost UPS package related to "service" provided by UPS and was therefore preempted by FAAAA); *Rowe v. United Parcel Serv., Inc.*, No. CV-S-96-862-PMP, 1996 U.S. Dist. LEXIS 11266 (D.Nev. July 31, 1996) (unreported opinion) (dismissing state law claims for intentional and negligent infliction of emotional distress and defamation, which were based on alleged defamatory statements made by UPS employee who was investigating the contents of a package, based on FAAAA); *Wagman v. Fed. Exp. Corp.*, 1995 WL 81686, at *2 (7th Cir. Feb. 17, 1995) (unreported opinion) (affirming dismissal on preemption grounds of constructive fraud and other claims based on allegations of misleading advertising arising from late delivery of plaintiff's package).

Here, Plaintiff's tort claim is based squarely upon UPS's service – that Defendants allegedly failed to deliver a package on time. All of the averments set forth in the Complaint are based upon that allegedly negligent conduct. (See Compl. generally). Pursuant to the plain language set forth in the FAAAA, Plaintiff's state law claims, which relate directly to the "service" provided by UPS, a carrier, are preempted. See 49 U.S.C. § 14501(c)(1).

Additionally, Plaintiff has not pled any breach of contract claim in his Complaint, which is the only possible claim related to delivery of a package that arguably could survive the

preemption provision set forth in the FAAAA. *See Wolens*, 513 U.S. at 228 (noting narrow exception to ADA preemption). Therefore, Plaintiff's Complaint, which is based entirely upon the allegedly negligent untimely delivery of a package and related to the primary "service" that UPS provides, is preempted in its entirety by the FAAAA and should be dismissed with prejudice. *See* 49 U.S.C. § 14501(c)(1).

3. This Court Lacks Subject Matter Jurisdiction

Because the FAAAA expressly preempts the state law tort claims set forth in Plaintiff's Complaint, alternatively the Complaint should be dismissed pursuant to SCRCP 12(b)(1). This Court lacks subject matter jurisdiction over Plaintiff's claims insofar as it lacks the statutory power to adjudicate those claims which have been preempted by federal law. *See Eldridge v. City of Greenwood*, 503 S.E.2d 191, 197 (S.C. Ct. App. 1998) (noting that preemption involves subject matter jurisdiction).²

4. Plaintiff Has Failed to State Facts Sufficient to Constitute a Cause of Action

Additionally, Plaintiff's Complaint should be dismissed pursuant to SCRCP 12(b)(6) as Plaintiff has failed to state facts sufficient to constitute a cause of action. SCRCP 12(b)(6) generally tracks the language set forth in Federal Rule of Civil Procedure 12(b)(6).³ South Carolina federal courts have dismissed a plaintiff's complaint pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim where the plaintiff's claims were preempted by federal law. *See e.g., Johnson v. Am. Towers, LLC*, No. CA 3:13-789-CMC, 2013 WL 3148329, at *1 (D.S.C. June

² *See also State v. Illinois Cent. R.R. Co.*, 928 So. 2d 60, 69 (La. Ct. App. 2005) ("If a matter is preempted, a state court lacks subject matter jurisdiction to decide it."); *Venable v. GKN Auto.*, 421 S.E.2d 378, 379 (N.C. App. Ct. 1992) (affirming dismissal under N.C. Rule 12(b)(1) for lack of subject matter jurisdiction due to federal preemption).

³ Fed. R. Civ. P. 12(b)(6) provides that a moving party can seek dismissal of a complaint for "failure to state a claim upon which relief can be granted."

19, 2013) (unreported opinion). In accordance with the precedent set by South Carolina federal courts, this Court should dismiss Plaintiff's Complaint pursuant to SCRCF 12(b)(6) on the grounds that Plaintiff's claims are preempted by federal law.⁴

B. Plaintiff's State Law Claims are Preempted by the Carmack Amendment and Should be Dismissed if the Package Involved an Interstate Delivery

1. The Carmack Amendment

The Carmack Amendment, codified at 49 U.S.C. §14706, creates a uniform rule for carrier liability when goods are shipped in interstate commerce.⁵ As explained by the United States Supreme Court, the purpose of the Carmack Amendment was to "supersede[] diverse state laws with a nationally uniform policy governing interstate carriers' liability." *N.Y., New Haven & Hartford R.R. v. Nothnagle*, 346 U.S. 128, 131 (1953).

The Amendment provides for liability of carriers under receipts and bills of lading in interstate commerce, and establishes the right of shippers to bring civil actions in federal district court against a carrier alleged to have caused "loss or damage" to transported goods. *See* 49 U.S.C. § 14706(d). Specifically, the Amendment makes a carrier liable "for the actual loss or injury to the property" it transports. *See* 49 U.S.C. § 14706(a)(1).

To accomplish the goal of uniformity, the Carmack Amendment preempts state law claims arising from **failures in the transportation and delivery of goods**. *See Ward v. Allied Van Lines, Inc.*, 231 F.3d 135, 138 (4th Cir. 2000). Since its inception, the Supreme Court has interpreted the Carmack Amendment as broadly occupying the entire interstate shipment field of commerce. *See Miracle of Life, LLC v. N. Am. Van Lines, Inc.*, 368 F. Supp. 2d 494, 496-97

⁴ Where there is no South Carolina precedent construing SCRCF 12(b)(6) in connection with a defense of preemption, federal interpretation of Fed.R.Civ.P. 12(b)(6) is persuasive authority. *See e.g., Laffitte v. Bridgestone Corp.*, 674 S.E.2d 154, 162 (S. C. 2009).

⁵ The Carmack Amendment does not apply to shipments that are wholly intrastate. *See* 49 U.S.C. § 13504.

(D.S.C. 2005) (discussing Carmack Amendment). (internal citations omitted). Almost every detail of the subject of interstate shipments is covered so completely by the Amendment that there can be no rational doubt but that Congress intended to take possession of the subject, and supersede all state regulation with reference to it. *See id.*

2. Plaintiff's State Law Claims are Preempted

According to the averments set forth in the Complaint, the subject package was likely a purely intrastate shipment, and thus, the FAAAA applies to preempt Plaintiff's state law tort claims. However, if Plaintiff alleges that the subject package was an interstate shipment, Plaintiff's state law tort claims, which are all based upon an allegation of negligent untimely delivery, are barred by the Carmack Amendment insofar as the statute expressly and completely preempts state laws arising from **failures in the transportation and delivery of goods**. *See Ward*, 231 F.3d at 138.

Although South Carolina courts have not ruled on this precise issue, numerous courts in various jurisdictions have held that claims akin to negligent delivery of a package are preempted by the Carmack Amendment.⁶ *See e.g., Smith v. United Parcel Serv.*, 296 F.3d 1244, 1247 (11th Cir. 2002)(claims against UPS alleging fraud, negligence, wantonness, or willfulness, and outrage were preempted by Carmack Amendment); *Bear MGC Cutlery Co. v. Estes Express Lines, Inc.*, 132 F.Supp.2d 937, 947-48 (N.D.Ala.2001)(Carmack Amendment preempted claims for negligence, wantonness, and outrage for failing to properly deliver goods); *Moffit v. Bekins Van Lines Co.*, 6 F.3d 305 (5th Cir.1993) (Carmack Amendment preempted various state law claims, including fraud, intentional infliction of emotional distress, and negligence where moving company failed to deliver household goods to new home in time for Christmas); *Hughes v. United Van Lines, Inc.*, 829 F.2d 1407, 1412, 1415 (7th Cir. 1987) (Carmack Amendment

⁶ See footnote 1, *supra*.

preempted claims for negligence, breach of contract, conversion, intentional misrepresentation, negligent misrepresentation, and negligent infliction of emotional distress where plaintiff's goods were destroyed by fire while in transit); *Southeastern Express Co. v. Pastime Amusement Co.*, 299 U.S. 28 (1936) (Carmack Amendment preempted negligence claim for failure to deliver in timely manner); *New York, Philadelphia & Norfolk R.R. Co. v. Peninsula Produce Exch. of Md.*, 240 U.S. 34 (1916) (Carmack Amendment preemption is "comprehensive enough to embrace all damages resulting from any failure to discharge a carrier's duty with respect to any part of the transportation to the agreed destination").

Here, Plaintiff's state law personal injury claim against UPS and Mr. Fogle is based solely upon Defendants' allegedly negligent conduct in failing to timely deliver a package. All of the averments set forth in the Complaint are based upon that allegedly negligent conduct. (See Compl. generally). Pursuant to the express complete preemption provisions set forth in the Carmack Amendment, Plaintiff's state law tort claims, which arise from alleged **failures in the transportation and delivery of goods**, are preempted in their entirety and should be dismissed with prejudice. See 49 U.S.C. §14706; see also *Ward*, 231 F.3d at 138.

3. This Court Lacks Subject Matter Jurisdiction

"Once an area of state law has been completely preempted, any claim purportedly based on that preempted state law is considered, *from its inception*, a federal claim, and therefore arises under federal law." *Mayflower Transit, L.L.C. v. Troutt*, 332 F. Supp. 2d 971, 976 (W.D. Tex. 2004) (internal citations omitted). Because the Carmack Amendment provides the exclusive cause of action for claims arising from the loss related to goods shipped in interstate commerce, and preempts state and common law causes of action based on such conduct, Plaintiff cannot "plead around" the Carmack Amendment. See *id.* Plaintiff's claims, assuming they relate to

goods shipped in interstate commerce, are within the reach of the Carmack Amendment and arise under federal law.

Where the resolution of the underlying claim is governed by a federal statute, such as the Carmack Amendment, federal courts have subject matter jurisdiction over the claims. *See e.g., Andrews v. Atlas Van Lines, Inc.*, 504 F. Supp. 2d 1329 (N.D. Ga. 2007) (where Carmack Amendment's "complete preemption applied, the complaint alleging only state law claims stated federal claim within district court's subject matter jurisdiction."); *Reeves v. Mayflower Transit, Inc.*, 87 F. Supp. 2d 1251, 1254 (M.D. Ala. 1999) ("this court has subject matter jurisdiction since resolution of the claims is governed by [Carmack Amendment]").

The Carmack Amendment expressly vests the federal courts with jurisdiction over failures in the transportation and delivery of goods. Therefore, this Court lacks subject matter jurisdiction over Plaintiff's claims, which specifically relate to Defendants' alleged failure in the transportation and delivery of a package. Plaintiff's Complaint should be dismissed with prejudice pursuant to SCRPC 12(b)(1).

4. Plaintiff Has Failed to State Facts Sufficient to Constitute a Cause of Action

Additionally, or in the alternative, Plaintiff's Complaint should be dismissed pursuant to SCRPC 12(b)(6) because, as pled, Plaintiff has failed to state facts sufficient to constitute a cause of action. As explained more fully above, South Carolina federal courts applying Federal Rule of Civil Procedure 12(b)(6) have dismissed a plaintiff's complaint on the basis that it failed to state a claim upon which relief can be granted where the plaintiff's causes of action were preempted by federal law. *See e.g., Johnson*, No. CA 3:13-789-CMC, 2013 WL 3148329, at *1 (unreported opinion) (granting Rule 12(b)(6) motion to dismiss on grounds of preemption). In accordance with the determinations made by South Carolina federal courts, this Court should

dismiss Plaintiff's Complaint pursuant to SCRCP 12(b)(6) on the grounds that Plaintiff's claims are preempted by federal law.⁷

IV. RESPONSE TO PLAINTIFF'S OPPOSITION

A. Plaintiff's State Law Claims are Preempted by the Federal Aviation Administration Authorization Act of 1994

In his opposition to Defendants' Motion to Dismiss, Plaintiff tellingly does not dispute the two controlling points: (1) his state law claims directly relate to the delivery "service" that UPS provides; and (2) the FAAAA expresses a broad preemptive purpose. Rather, Plaintiff's opposition is limited to two points. First, Plaintiff discusses the purported Congressional intent behind the enactment of the FAAAA to suggest it is inapplicable. Second, and alternatively, Plaintiff contends that the FAAAA's household goods exception applies to his claim. Both arguments are incorrect.

Plaintiff's Complaint alleges negligent untimely delivery of a package, and therefore is undisputedly related to the primary "service" that UPS provides. This means it is preempted in its entirety by the FAAAA. *See* 49 U.S.C. § 14501(c)(1). Courts across the country conclude that dismissal of a plaintiff's state law tort claim is the appropriate remedy where those claims are preempted by federal law. *See Brown v. United Airlines, Inc.*, 720 F.3d 60 (1st Cir. 2013) (affirming dismissal where tort claims were preempted by ADA); *Bower v. Egyptair Airlines Co.*, 731 F.3d 85 (1st Cir. 2013) (affirming dismissal by way of summary judgment where claims were preempted by ADA); *Wise Recycling, LLC v. M2 Logistics*, 943 F. Supp. 2d 700, 706 (N.D. Tex. 2013) (dismissing negligence claims that were preempted by FAAAA); *State ex rel. Grupp v. DHL Exp. (USA), Inc.*, 970 N.E.2d 391 (N.Y. App. Ct. 2012) (affirming dismissal where plaintiff's claims were preempted by federal law); *Mudd-Lyman Sales & Serv. Corp. v. United*

⁷ See footnote 4, *supra*.

Parcel Serv., Inc., 236 F. Supp. 2d 907 (N.D. Ill. 2002) (granting summary judgment and dismissing plaintiff's state law claims which were preempted by FAAAA); *Beyer v. Acme Truck Line, Inc.*, 802 So. 2d 798 (La. Ct. App. 2001) (affirming dismissal of plaintiff's lawsuit with prejudice where state law claims, including intentional interference with business relationships, unjust enrichment, and fraud, were preempted by FAAAA and ADA); *Rockwell*, 1999 WL 33100089 at *4 (dismissing plaintiff's complaint because claims preempted by FAAAA); *Vieira*, 1996 WL 478686 at *1 (granting summary judgment and dismissing plaintiff's claims which were preempted). Similarly, this Court should dismiss Plaintiff's Complaint because it is preempted in its entirety by the FAAAA.

1. Plaintiff Avoids Applicable Case Law

Plaintiff's Opposition focuses solely on background information and completely ignores all of the case law cited above which squarely demonstrates that courts throughout the country have specifically applied the FAAAA (or ADA) preemption to negligent delivery claims like Plaintiff's claims here. For instance, Plaintiff ignores two cases cited by Defendants which specifically address the issue.

First, in *Rockwell v. United Parcel Serv., Inc.*, where the plaintiff's complaint sought to impose liability on UPS and its delivery person for plaintiff's injuries, the United States District Court for the District of Vermont held that plaintiff's claims for negligent intake and delivery protocol, which "go to the heart of the services that UPS provides," were preempted by the FAAAA. No. 2:99 CV 57, 1999 WL 33100089, at *2 (D.Vt. July 7, 1999). Second, the United States District Court for the Northern District of California, in *Vieira v. United Parcel Service, Inc.*, held that plaintiff's negligence and conversion claim arising from a lost UPS package

related to the "service" provided by UPS and was therefore preempted by the FAAAA. No. C-95-04697, 1996 WL 478686 at *1 (N.D. Cal. Aug 5, 1996).

Tellingly, Plaintiff contends that the FAAAA is inapplicable, but completely ignores these and the litany of additional cases referenced by Defendants. Plaintiff does not even attempt to distinguish any of the case law cited by Defendants. Instead, Plaintiff simply avoids the pointed case law and makes two separate arguments, which for the reasons explained below, are both without merit.

2. Congress Intended for the FAAAA's Preemption to Have Broad Scope

Plaintiff fails to cite even one case which stands for his proposition that because the Congressional intent regarding enactment of the FAAAA included economic considerations, the FAAAA's preemption is inapplicable to Plaintiff's common law negligence claim which arises out of the timeliness of UPS's delivery service. Rather, Plaintiff relies primarily upon *Omya, Inc. v. Vermont*, 33 F. App'x 581, 583 (2d Cir. 2002)⁸, which is completely factually distinguishable insofar as it involved a court's analysis of the Vermont Environmental Board's restriction on the number of daily round-trips permitted by tractor trailers transporting plaintiff's goods on a particular roadway in Vermont. Plaintiff's reliance on the *Omya* decision is inapposite.

Plaintiff's argument regarding Congressional intent also overlooks the clear language set forth in the FAAAA. While this Court should consider Congress's intentions in enacting the statute, "the Court's analysis begins, and usually ends, with the **language of the statute.**" *Deerskin Trading Post, Inc. v. United Parcel Serv. of Am., Inc.*, 972 F. Supp. 665, 667 (N.D. Ga. 1997) (emphasis added); see also *Fox v. Moultrie*, 666 S.E.2d 915, 917 (S.C. 2008) (noting that in interpreting a statute, the court "must look to the plain meaning" and "[i]f the statute is clear

⁸ Of note, this case was not selected for publication in the Federal Reporter.

and unambiguous, 'that is the end of the matter for the court.'") (internal citations omitted). Section 14501(c)(1) clearly provides that no state shall "enact or enforce any law, regulation, or any other provision having the force and effect of law related to a price, route, or **service** of any motor carrier." 49 U.S.C. § 14501(c)(1) (emphasis added). "Congress intended for the preemption provision of the FAAAA—which employs identical language to the preemption provision of the ADA—to be **broad in scope** and that the FAAAA's preemption provision precludes any state enforcement action **having a connection with or reference to** any price, route, or **service** of any motor carrier, motor private carrier, or air carrier." *Deerskin Trading Post, Inc.*, 972 F. Supp. at 668 (emphasis added).

In *Deerskin Trading Post, Inc.*, the United States District Court for the Northern District of Georgia evaluated the congressional intent related to the FAAAA, as well as the history of cases interpreting the identical language of the ADA's preemption provision, and concluded that:

a state law tort action against a carrier, where the subject matter of the action is related to the carrier's prices, routes, or services, is a state enforcement action having a connection with or reference to a price, route, or service of any motor carrier, motor private carrier, or air carrier for purposes of the FAAAA.

Id. at 672. Similarly, in *Mastercraft Interiors, Ltd. v. ABF Freight Sys., Inc.*, the United States District Court for the District of Maryland analyzed the legislative history of Section 14501(c)(1)⁹, which it found "clearly reflects the intent of Congress that preemption provisions, such as [Section 14501(c)(1)], are to be given **broad scope**, as federal law must govern shipping prices and services." 284 F. Supp. 2d 284, 286 (D. Md. 2003).

⁹ By way of background, the at-issue preemptive provision was initially enacted as part of the Federal Aviation Administration Authority Act ("FAAAA") passed by Congress in 1994. In 1995, Congress enacted the Interstate Commerce Commission Termination Act ("ICCTA"), which re-codified the preemptive provision as 49 U.S.C. § 14501(c)(1). When referring to the FAAAA throughout its brief, UPS is referring to the preemption provision set forth in Section 14501(c).

Plaintiff's argument ignores Congress's clear intent for the FAAAA's preemptive provision to have **broad scope** and to be applicable to any state enforcement action "**having a connection with or reference to any . . . service of any motor carrier.**" 49 U.S.C. § 14501(c)(1) (emphasis added). Plaintiff's state law tort action against Defendants, which relates directly to UPS's service, "is a state enforcement action having a connection with or reference to a price, route, or service of any motor carrier, motor private carrier, or air carrier for purposes of the FAAAA." *Deerskin Trading Post, Inc.*, 972 F. Supp. at 672. Therefore, Plaintiff's action is preempted pursuant to the plain language of the FAAAA.

3. The FAAAA's Household Goods Exception is Inapplicable

Plaintiff's contention that the FAAAA is inapplicable because the at-issue package containing medication qualifies as a household good under the FAAAA's exemption is misguided. The language of the FAAAA exempts certain measures from its preemptive scope. See 49 U.S.C. § 14501(c)(2). Specifically, Section 14501(c) provides in pertinent part:

(1) General rule.--Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier [. . .]

(2) **Matters not covered.**--Paragraph (1)—

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) **does not apply to the intrastate transportation of household goods;**
and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is

performed without the prior consent or authorization of the owner or operator of the motor vehicle.

49 U.S.C. § 14501(c)(1)-(2) (emphasis added). The FAAAA “expressly does not regulate a state’s authority to: enact safety regulations with respect to motor vehicles; control trucking routes based on vehicle size, weight, and cargo; impose certain insurance, liability, or standard transportation rules; regulate the intrastate transport of household goods and certain aspects of tow-truck operations; or create certain uniform cargo or antitrust immunity rules.” See *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 644 (9th Cir. 2014). In other words, the FAAAA does not prohibit a state from enacting legislation which regulates intrastate transportation of household goods. See *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 438, (2002) (noting that pursuant to Section 14501(c)(2)(B) and (C), “preemption ‘does not apply’ to state or local power to regulate in particular areas”). However, that is not the situation we have here.

Plaintiff’s claims do not arise out of any South Carolina law regarding the regulation of intrastate transportation of household goods; rather, they arise from South Carolina’s tort law. Defendants are seeking dismissal of Plaintiff’s tort law claims. The FAAAA’s household goods exemption is inapplicable.

B. Plaintiff’s State Law Claims are Preempted by the Carmack Amendment if the Package Involved an Interstate Delivery

With respect to the Carmack Amendment, Plaintiff’s opposition simply contends that the Carmack Amendment’s preemption provision is inapplicable because the at-issue delivery did not involve interstate commerce. Plaintiff states that the package was shipped from the VA Hospital in Charleston, South Carolina to Plaintiff’s residence in Orangeburg, South Carolina. As set forth in their above brief, Defendants concede that if the subject package was a purely intrastate shipment, the FAAAA, rather than the Carmack Amendment, applies to preempt

Plaintiff's state law tort claims. However, Defendants simply maintain that, should any argument be subsequently made by Plaintiff that the at-issue package involved an interstate delivery, Plaintiff's claims should be dismissed pursuant to the Carmack Amendment for the reasons set forth in the above briefing.

V. CONCLUSION

For the reasons set forth above, Defendants United Parcel Service, Inc. and Rick Fogle respectfully request that this Court grant their Motion to Dismiss pursuant to SCRPC 12(b)(1) and/or SCRPC 12(b)(6), and dismiss Plaintiff's Complaint with prejudice because Plaintiff's tort action is preempted by federal law.

WILLSON JONES CARTER & BAXLEY, PA



G. Troy Thames
421 Wando Park Blvd., Ste. 100
Mt. Pleasant, South Carolina 29464
Telephone: 843-284-0832
Facsimile: 843-284-1081
E-mail: tthames@wjlaw.net

Mt. Pleasant, South Carolina

Ryan R. Corkery
Ansa Assunacao, LLP
1600 JFK Blvd.
Four Penn Center, suite 900
Philadelphia, PA 19103
Telephone: 267-528-0733
Facsimile: 267-528-0726
Ryan.corkery@ansalaw.com

September 10, 2015

**ATTORNEYS FOR
UNITED PARCEL SERVICE, INC.**

WILLSON JONES CARTER & BAXLEY, P.A.

ATTORNEYS AT LAW

GREENVILLE

CHARLESTON

COLUMBIA

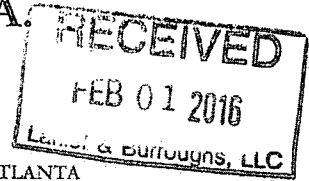
CHARLOTTE

RALEIGH

ATLANTA

G. Troy Thames
Direct (843) 284-0832
Fax (843) 284-1081
tthames@wjlaw.net

421 Wando Park Boulevard, Suite
100 Mount Pleasant, SC 29464
www.wjcblaw.net



January 29, 2016

Honorable Judge Maite Murphy
P.O. Box 802
5200 E. Jim Bilton Blvd.
Saint George, SC 29477

Re: Rebecca McCutcheon vs. UPS & John Doe
C/A No.: 2014-CP-38-1164
Cortland James Eggleston v UPS & Rick Fogle
C/A No.: 2015-CP-38-354
WJC&B File No.: 0157.00018

Dear Judge Murphy:

I have enclosed one original and one copy of the Order Granting Defendant's Motion to Dismiss for these two cases. After a review of the enclosed, if you believe it is proper, please sign the Order Granting Defendant's Motion to Dismiss and return to me in the envelope provided. I will then forward the Orders to the Clerk for filing.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.

G. Troy Thames

GTT/ajm

Enclosure

cc Justin Tyler Bamberg
Mr. Shane M. Burroughs

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Rebecca McCutcheon,

Plaintiff,

VS.

United Parcel Service, Inc. and John Doe,

Defendants:

IN THE COURT OF COMMON PLEAS

Case No.: 2014-CP-38-01164

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

This matter came before the Court on Monday, September 28, 2015, upon Motion of Defendants United Parcel Service, Inc. (“UPS”) and John Doe (together, the “Defendants”) for an Order pursuant to Rules 12(b)(1) & 12(b)(6) of the *South Carolina Rules of Civil Procedure* dismissing Plaintiff’s Complaint in its entirety on the grounds that Plaintiff’s state law tort action is preempted by federal statute 49 U.S.C. §14501(c) (the Federal Aviation Administration Authorization Act of 1994). Defendants and Plaintiff filed memorandums of law in support and opposition to Defendants’ Motion, and present for the hearing was counsel for the Defendants, G. Troy Thames and Ryan R. Corkery, and counsel for Plaintiff, Shane M. Burroughs and Justin T. Bamberg. For reasons which will be fully explained below, the Court grants Defendants’ Motion and dismisses Plaintiff’s Complaint with prejudice.

FINDINGS OF FACT

The above-captioned loss of consortium tort action was initiated by Plaintiff Rebecca McCutcheon ("Plaintiff") against United Parcel Service, Inc. and its purported driver employee, John Doe. Plaintiff alleges that Defendants negligently delivered a package, shipped from the Veterans Administration Hospital in Charleston, South Carolina and containing Plaintiff's husband's thyroid medication, late to Plaintiff's husband, which resulted in personal injuries to him (Plaintiff's Complaint at ¶¶ 5-8 & 13). The basis of Plaintiff's loss of consortium claim is that the personal injuries suffered by her husband resulted in damage to Plaintiff's marital relationship. (*Id.* at ¶ 21). Plaintiff initiated the action on September 18, 2014, and Defendants timely filed a Motion to Dismiss on December 15, 2014.

CONCLUSIONS OF LAW

The Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), codified at 49 U.S.C. §14501(c), provides:

[A] State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier ... or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 U.S.C. § 14501(c)(1). The United States Supreme Court has further clarified that the FAAAA preempts state laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1772 (2013) (quoting 49 U.S.C. § 14501(c)(1)).

As pled in the Complaint, the subject package was shipped by the VA Hospital in Charleston, South Carolina, to Plaintiff's husband at their home in Orangeburg, South Carolina. As such, the package constitutes an intrastate shipment. The loss of consortium state tort claims set forth in Plaintiff's Complaint are based upon an allegation that UPS, a motor carrier, negligently delivered the package untimely. These claims are based solely upon the specific service that UPS provides – delivery of packages. Pursuant to the plain language set forth in the FAAAA, all of the state law claims set forth in Plaintiff's Complaint, which relate directly to the "service" provided by UPS, a motor carrier, are preempted. *See* 49 U.S.C. § 14501(c)(1).

Because the FAAAA expressly preempts the state law tort claims set forth in Plaintiff's Complaint, this Court lacks subject matter jurisdiction over Plaintiff's claims insofar as it lacks the statutory power to adjudicate those claims which have been preempted by federal law. As such, Plaintiff's Complaint is dismissed pursuant to SCRPC 12(b)(1). Moreover, and as an alternative grounds for dismissal, because the FAAAA expressly preempts the state law tort claims set forth in Plaintiff's Complaint, Plaintiff has failed to state any facts sufficient to constitute a valid cause of action under South Carolina state law. As such, Plaintiff's Complaint is dismissed pursuant to SCRPC 12(b)(1).

IT IS THEREFORE ORDERED that the above-entitled action against United Parcel Service, Inc. and John Doe be hereby dismissed with prejudice and forever ended.

IT IS SO ORDERED.

_____, South Carolina

Date _____, 2016

Maite Murphy
Presiding Judge

First Judicial Circuit

) IN THE COURT OF COMMON PLEAS

) Case No.: 2015-CP-38-00354

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intervention.” (*Id.* at ¶ 15). Plaintiff initiated the action on April 1, 2015, and Defendants filed a Motion to Dismiss on May 4, 2015.

CONCLUSIONS OF LAW

The Federal Aviation Administration Authorization Act of 1994 (“FAAAA”), codified at 49 U.S.C. §14501(c), provides:

[A] State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier ... or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 U.S.C. § 14501(c)(1). The United States Supreme Court has further clarified that the FAAAA preempts state laws “related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.” *Dan’s City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1772 (2013) (quoting 49 U.S.C. § 14501(c)(1)).

As pled in the Complaint, the subject package was shipped by the VA Hospital in Charleston, South Carolina, to Plaintiff’s home in Orangeburg, South Carolina. As such, the package constitutes an intrastate shipment. All of the state tort law claims set forth in Plaintiff’s Complaint are based upon an allegation that UPS, a motor carrier, negligently delivered the package untimely. These claims are based solely upon the specific service that UPS provides – delivery of packages. Pursuant to the plain language set forth in the FAAAA, all of the state law claims set forth in Plaintiff’s Complaint, which relate directly to the “service” provided by UPS, a motor carrier, are preempted. *See* 49 U.S.C. § 14501(c)(1).

Because the FAAAA expressly preempts the state law tort claims set forth in Plaintiff’s Complaint, this Court lacks subject matter jurisdiction over Plaintiff’s claims insofar as it lacks the statutory power to adjudicate those claims which have been preempted by federal law. As such, Plaintiff’s Complaint is dismissed pursuant to SCRCP 12(b)(1). Moreover, and as an alternative grounds for dismissal, because the FAAAA expressly preempts the state law tort claims set forth in Plaintiff’s Complaint, Plaintiff has failed to state any facts sufficient to constitute a valid cause of action under South Carolina state law. As such, Plaintiff’s Complaint is dismissed pursuant to SCRCP 12(b)(1).

IT IS THEREFORE ORDERED that the above-entitled action against United Parcel Service, Inc. and Rick Fogle be hereby dismissed with prejudice and forever ended.

IT IS SO ORDERED.

_____, South Carolina

Date _____, 2016

Maite Murphy
Presiding Judge

First Judicial Circuit

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	CIVIL ACTION NO. 2014-CP-38-01164
Rebecca McCutcheon,	)	
	)	
Plaintiff,	)	PLAINTIFF'S RULE 59(e), SCRCP.
	)	MOTION TO RECONSIDER, ALTER
v.	)	OR AMEND
	)	
United Parcel Service, Inc. and John Doe,	)	
	)	
Defendants.	)	

FILED FOR RECORD
 WINNIE B. CLARK
 2016 MAR -3 P 3:11
 CLERK OF COURT
 ORANGEBURG, SC

Plaintiff Rebecca McCutcheon ("Plaintiff") moves this Court pursuant to Rule 59(e), SCRCP, to reconsider, alter, or amend its February 2, 2016 Order granting Defendant United Parcel Service, Inc.'s ("UPS") motion to dismiss. This Motion is based on the memorandum of law below and any exhibits filed along with this Motion, the pleadings, and applicable law, as well as any other memorandum of law that Plaintiff may submit to the Court at or prior to a hearing on this Motion. For the reasons stated below, Plaintiff requests the Court reconsider its Order and deny UPS's motion.

FACTUAL BACKGROUND

Plaintiff is the wife of Cortland James Eggleston, a veteran who suffers from a serious thyroid condition and received his medication via UPS. (Cmplt. ¶ 5). On April 11, 2013, the VA hospital in Charleston, South Carolina, shipped the medication overnight delivery to Plaintiff's home in rural Eutawville, Orangeburg County, South Carolina. *Id.* at ¶¶ 1, 7; Exh. to Memo. in Opp. to Mot. to Dismiss. When the package did not arrive until over thirteen days later, Eggleston suffered a life-threatening "thyroid storm" that resulted in severe pain and surgical intervention.

(Cmplt. ¶ 13; Memo. in Opp. to Mot. to Dismiss pp. 1-2).

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Winnie B. Clark
 CLERK OF COURT
 ORANGEBURG COUNTY, SC

When the medication had not arrived by April 15, Plaintiff called the VA, which noted in Eggleston's file that "UPS records . . . states package being held because a correct street name is needed. Called UPS . . . Spoke with Joseph @ UPS who contacted local driver to make contact with patient and redeliver today." (Exh. to Memo. in Opp. to Mot. to Dismiss). "[F]or many years" prior to the event at issue, UPS successfully delivered the medication from the VA to Plaintiff's home. (Cmplt. ¶ 7). Despite this, UPS told Plaintiff "that her address could not be located." *Id.* at ¶ 11.

After her husband suffered severe injuries and medical intervention from the absence of his medication, Plaintiff filed this action against UPS and John Doe (the delivery person) for negligence, negligent entrustment, and loss of consortium. Plaintiff does not seek recovery of loss or damage to property.

UPS filed a motion to dismiss under Rules 12(b)(1) and 12(b)(6), SCRCP, arguing Plaintiff's claims are preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), 49 U.S.C. § 14501(c), or the Carmack Amendment, 49 U.S.C. § 14706. Plaintiff submitted a Memorandum in Opposition to Defendant's Motion to Dismiss. On September 28, 2015, the Court held a hearing on Defendant's motion. On February 2, 2016, the Court signed an Order granting the motion based on (1) a lack of subject matter jurisdiction under Rule 12(b)(1), SCRCP and (2) failure to state a claim under Rule 12(b)(6)¹, SCRCP. Both rulings are based on the Court's finding that the FAAAA preempts Plaintiff's claims. Plaintiff argues below that finding is incorrect and, therefore, challenges the Court's decision as to subject matter jurisdiction and failure to state a claim.

¹ The Order states the Complaint is dismissed "pursuant to SCRCP 12(b)(1)" for failure to state facts sufficient to constitute a valid cause of action. Plaintiff assumes the Court intended to refer to Rule 12(b)(6), SCRCP.

Plaintiff received a copy of the Order on February 22, 2016, and timely serves this motion to reconsider, alter, or amend under Rule 59(e), SCRCP.

STANDARD

In ruling on a Rule 12(b)(6), SCRCP, motion to dismiss, the court must consider all well-pled allegations as true.” *Disabato v. S.C. Ass’n of Sch. Adm’rs*, 404 S.C. 433, 441, 746 S.E.2d 329, 333 (2013). “If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, dismissal under Rule 12(b)(6) is improper.” *Fabian v. Lindsay*, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014) (internal quotation marks omitted). “[N]ovel questions of law should not ordinarily be resolved on a Rule 12(b)(6) motion.” *Chestnut v. AVX Corp.*, 413 S.C. 224, 227, 776 S.E.2d 82, 84 (2015).

A challenge to subject matter jurisdiction is raised by a motion to dismiss under Rule 12(b)(1), SCRCP. *Ballenger v. Bowen*, 313 S.C. 476, 478, 443 S.E.2d 379, 380 (1994). Evidence outside the pleadings may be considered in deciding a motion to dismiss based on lack of jurisdiction. *Baird v. Charleston Cnty.*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999).

ARGUMENT

The Court should alter or amend its judgment for any one of these independent reasons: (1) Plaintiff’s claims are not related to a UPS “service”, (2) finding preemption under the facts of this case is contrary to the Congressional intent and purpose of the FAAAA, and (3) the intrastate shipment of a household good at issue in this case is excepted from preemption.

49 U.S.C. § 14501(c)(1) states:

Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct

air carrier covered by section 41713(b)(4) [49 USCS § 41713(b)(4)] or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 U.S.C. § 14501(c)(1) (emphasis added). UPS argued only that Plaintiff's claims are based on a service, and the Court's ruling is based only a finding that the claims are based on a service. Therefore, there is no issue regarding whether the claims relate to a price or route.

As an initial matter, cases interpreting the Airline Deregulation Act ("ADA") are persuasive authority as to the interpretation of the FAAAA because Congress used language in the FAAAA that is identical to the predecessor ADA. See *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 369 (2008) (stating in a case interpreting the FAAAA, "we follow *Morales* [interpreting the ADA] in interpreting language in the 1994 Act before us here. . . . Here, the Congress that wrote the language before us copied the language of the air-carrier pre-emption provision of the" ADA).

I. Plaintiff's Claims are Not "Related To" UPS's Services

The Court's interpretation and application of the phrase "related to" is overly broad and not supported by the law. "The broad preemptive scope of the phrase 'related to,' [in the FAAAA] is not without limits." *Gaines Motor Lines, Inc. v. Klaussner Furniture Indus.*, 734 F.3d 296, 307 (4th Cir. 2013) (holding a breach of contract case not preempted under the FAAAA where "[n]o state law or regulation governing the Motor Carriers' prices, routes, or services is implicated"). "[T]he breadth of the words 'related to' does not mean the sky is the limit."² *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1778 (2013) (holding the FAAAA did not preempt state-law

² "If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for really, universally, relations stop nowhere. But that, of course, would be to read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality." *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).

claims against a towing company for the company's post-towing disposal of the vehicle). Rather, when determining the effect of a state regulation on carriers, "the appropriate inquiry in such a case is whether the provision, directly or indirectly, *binds* the . . . carrier to a particular price, route or service and *thereby interferes with competitive market forces* within the . . . industry." *Sanchez v. Lasership, Inc.*, 937 F. Supp. 2d 730, 740 (E.D. Va. 2013) (internal quotation marks omitted) (emphasis added) (holding state statute on independent contractors preempted).

Plaintiff's common law negligence and loss of consortium claims are not "related to" UPS's services within the meaning of the FAAAA. UPS presented no argument in this case that the South Carolina common law at issue binds UPS or interferes with competitive market forces. Further, UPS presented no argument as to any effect of this lawsuit on its services. Rather, UPS solely argued, and the Court found, that the claims are based on the delivery of packages, which is a service that UPS provides. This is too general and tenuous of a connection and is not the effect Congress intended.

In *Morales*, the Supreme Court recognized that some state action may have "too tenuous, remote, or peripheral" an affect to be pre-empted.³ 504 U.S. at 390. In *Wolens*, the Supreme Court expanded upon this principle by holding that a breach of contract claim based an airline's "self-imposed undertakings" was not pre-empted because it involved "privately ordered obligations" and not the State's enforcement of any a law, rule, regulation, or other provision of law. 513 U.S. at 228-29. The Fourth Circuit took that one step further in *Smith v. Comair, Inc.*, 134 F.3d 254

³ This holding in *Morales*, and the number of courts that have cited it, demonstrate that UPS incorrectly stated in its memorandum in support of the motion to dismiss that there is "a single narrow exception" to preemption for "breach-of-contract claims." (Def. Memo. in Opp. pp. 5, 7). Rather, whether preemption applies is a case-specific inquiry, and the United States Supreme Court has found preemption not to exist in cases not involving breach of contract. See *Dan's City Used Cars*, 133 S. Ct. at 1778 (holding the FAAAA did not preempt state-law claims against a towing company for the company's post-towing disposal of the vehicle).

(4th Cir. 1998), by holding that the plaintiff's claims for false imprisonment and intentional infliction of emotional distress were not preempted "to the extent [the] claims are based on conduct distinct from Comair's determination not to grant permission to board" but instead on "outrageous conduct on the part of an airline toward of a passenger" that "too tenuously relates or is unnecessary to an airline's services." *Id.* at 259. "If, for example, an airline held a passenger without a safety or security justification, a claim based on such actions would not relate to any legitimate service and would not be preempted." *Id.*

Plaintiff's case is not limited to the allegation that UPS negligently delivered the package untimely. Plaintiff also alleges that UPS held the medication without any justification, even going so far as to tell Plaintiff that, despite numerous successful deliveries to her home in the past, "her address could not be located." (Cmplt. ¶ 11). Such action is not related to any legitimate service and should not be preempted.

"[T]he state laws whose 'effect' is 'forbidden' under federal law are those with a 'significant impact' on carrier rates, routes, or services." *Rowe*, 552 U.S. at 375 (quoting *Morales*, 504 U.S. at 388, 390). UPS does not argue, and the Court did not find, that South Carolina common law on negligence and loss of consortium has a significant impact on carrier services. That is because there is no impact, significant or otherwise, to UPS's services as a result of this case. Rather, UPS's prices, routes, and services would remain unchanged in the event Plaintiff prevailed.

In factually similar cases involving personal injury incidental to delivery, the courts have held Congress did not intend to preempt common law negligence claims. In *Huertas v. United Parcel Serv., Inc.*, 974 N.Y.S.2d 758 (N.Y. App. Div. 2013), the plaintiff brought suit for negligence to recover for personal injuries sustained when she tripped and fell over stacked boxes that she asked the UPS delivery person to place on the counter so no one would trip on them. *Id.*

at 758-59. The Court held the claim was not preempted under the FAAAA because the facts dealt “with the manner in which a delivery person stacked packages; it is not related to a ‘service’ governed by the ADA or the FAAAA.” *Id.* at 762. “It is not the intent of Congress to preclude such common law negligence claims when it enacted the ADA or FAAAA.” *Id.* at 762-63.

There is no evidence that Congress intended to extend the reach of the FAAAA to personal injury incidental to a delivery. There is no explicit textual reference regarding damage to persons. Therefore, there is not support for finding a Congressional intent to supplant state law concerning personal injury in this case. Plaintiff’s claim is separate and apart from the loss or damage of the prescription goods—it relates solely from the personal injuries suffered when UPS unjustifiably retained Eggleston’s medication, failed to locate Plaintiff’s address, and did not timely deliver the medication.

For these reasons, the Court should reconsider its Order and deny UPS’s motion.

II. Congress Did Not Intend to Preempt State Common Law That Does Not Affect Competitive Market Forces or a Carrier’s Operations

The Court’s decision is inconsistent with Congress’s purpose in enacting the FAAAA. “The target at which [the FAAAA] aimed was ‘a State’s direct substitution of its own governmental commands for competitive market forces in determining (*to a significant degree*) the services that motor carriers will provide.’” *Dan’s City Used Cars*, 133 S. Ct. at 1780 (quoting *Rowe*, 552 U.S. at 372) (emphasis added); *see also Thompson v. UFP Eastern Div., Inc.*, 2012 U.S. Dist. LEXIS 120129, *8, 2012 WL 3686064 (D.S.C. Aug. 24, 2012) (“The FAAAA was promulgated in order to protect the competitive market forces from state regulation.” (internal quotation marks omitted)). “Congress sought to relieve motor carriers from the absurd inefficiencies in their operations, which made it difficult to efficiently conduct a standard way of

doing business and impeded their ability to compete and provide quality services to their customers.” *Sanchez*, 937 F. Supp. 2d at 743.

In *Dan’s City Used Cars*, the Supreme Court held that state consumer protection and tort laws regarding the disposal of a towed vehicle were not preempted by the FAAAA because

The state laws in question hardly constrain participation in interstate commerce by requiring a motor carrier to offer services not available in the market. Nor do the state laws invoked by [plaintiff] freez[e] into place services that carriers might prefer to discontinue in the future. New Hampshire’s laws on disposal of stored vehicles, moreover, will not open the way for a patchwork of state service-determining laws, rules, and regulations.

Dan’s City Used Cars, 133 S. Ct. at 1780 (internal quotation marks and citation omitted). The same conclusion is warranted in this case. Plaintiff’s common law negligence and loss of consortium claims do not (1) constrain participation in interstate commerce by requiring UPS to offer services not available in the market, (2) freeze into place services that UPS might want to discontinue in the future, or (3) create a patchwork of state service-determining laws, rules, and regulations. Plaintiff’s action is simply “not the kind of burdensome state economic regulation Congress sought to preempt.” *Id.* at 1780 (internal quotation marks omitted). Therefore, the Court should reconsider its Order and deny UPS’s motion.

III. Intrastate Shipment of a “household good” is Excepted from Preemption

Section 14501(c)(2)(B) states that “Paragraph (1)-- . . . does not apply to the intrastate transportation of household goods.” 49 U.S.C. § 14501(c)(2)(B). The Court’s Order does not address Plaintiff’s argument that this case involves the intrastate transportation of household goods. It is undisputed that the medication traveled only within the state of South Carolina.

The term “household goods”, as used in connection with transportation, means personal effects and property used or to be used in a dwelling, when a part of the equipment or supply of such dwelling, and similar property if the transportation of such effects or property is--

(A) arranged and paid for by the householder, except such term does not include property moving from a factory or store, other than property that the householder has purchased with the intent to use in his or her dwelling and is transported at the request of, and the transportation charges are paid to the carrier by, the householder; or

(B) arranged and paid for by another party.

49 U.S.C. § 13102(10). Eggleston's medication is a personal effect and property to be used in Plaintiff's dwelling. The transportation of the medication was arranged and paid for by the VA hospital, "another party." *Id.* Therefore, the medication meets the criteria for a household good that is excepted from preemption under the FAAAA.

The Court's Order does not address this argument by Plaintiff, and she requests the Court alter or amend the Order to rule on this raised issue and deny UPS's motion to dismiss.

CONCLUSION

For the reasons stated above, the Court should reconsider its Order and deny UPS's motion to dismiss.

LANIER & BURROUGHS, LLC

Shane M. Burroughs, Esquire
Justin T. Bamberg, Esquire
Attorneys for Plaintiff
Post Office Drawer 2789
250 Gibson Street
Orangeburg, South Carolina 29116
(803)268-9800

3.2, 2016

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Cortland James Eggleston,

Plaintiff,

v.

United Parcel Service, Inc. and Rick Fogle,

Defendants.

) IN THE COURT OF COMMON PLEAS

) CIVIL ACTION NO. 2015-CP-38-00354

) **PLAINTIFF'S RULE 59(e), SCRPC.**
) **MOTION TO RECONSIDER, ALTER**
) **OR AMEND**

FILED FOR RECORD
WINNIE B. CLARK
2016 MAR - 3 P 3:17
CLERK OF COURT
ORANGEBURG, SC

Plaintiff Cortland James Eggleston ("Plaintiff") moves this Court pursuant to Rule 59(e), SCRPC, to reconsider, alter, or amend its February 2, 2016 Order granting Defendant United Parcel Service, Inc.'s ("UPS") motion to dismiss. This Motion is based on the memorandum of law below and any exhibits filed along with this Motion, the pleadings, and applicable law, as well as any other memorandum of law that Plaintiff may submit to the Court at or prior to a hearing on this Motion. For the reasons stated below, Plaintiff requests the Court reconsider its Order and deny UPS's motion.

FACTUAL BACKGROUND

Plaintiff is a veteran who suffers from a serious thyroid condition and received his medication via UPS. (Cmplt. ¶ 5). On April 11, 2013, the VA hospital in Charleston, South Carolina, shipped the medication overnight delivery to Plaintiff's home in rural Eutawville, Orangeburg County, South Carolina. *Id.* at ¶¶ 7, 9; Exh. to Memo. in Opp. to Mot. to Dismiss. When the package did not arrive until over thirteen days later, Plaintiff suffered a life-threatening "thyroid storm" that resulted in severe pain and surgical intervention. (Cmplt. ¶ 15; Memo. in Opp. to Mot. to Dismiss pp. 1-2).

ATTEST: TRUE COPY

Winnie B. Clark

CLERK OF COURT

ORANGEBURG COUNTY

When the medication had not arrived by April 15, Plaintiff's wife called the VA, which noted in Plaintiff's file that "UPS records . . . states package being held because a correct street name is needed. Called UPS . . . Spoke with Joseph @ UPS who contacted local driver to make contact with patient and redeliver today." (Exh. to Memo. in Opp. to Mot. to Dismiss). "[O]n numerous" occasions prior to the event at issue, UPS successfully delivered the medication from the VA to Plaintiff's home. (Cmplt. ¶ 8). Despite this, UPS told Plaintiff "that his address did not exist or could not be located." *Id.* at ¶ 13.

After Plaintiff suffered severe injuries and medical intervention from the absence of his medication, he filed this action against UPS and Rick Fogle (the delivery person) for negligence and negligent entrustment. Plaintiff does not seek recovery of loss or damage to property.

UPS filed a motion to dismiss under Rules 12(b)(1) and 12(b)(6), SCRCF, arguing Plaintiff's claims are preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), 49 U.S.C. § 14501(c), or the Carmack Amendment, 49 U.S.C. § 14706. Plaintiff submitted a Memorandum in Opposition to Defendant's Motion to Dismiss. On September 28, 2015, the Court held a hearing on Defendant's motion. On February 2, 2016, the Court signed an Order granting the motion based on (1) a lack of subject matter jurisdiction under Rule 12(b)(1), SCRCF and (2) failure to state a claim under Rule 12(b)(6)¹, SCRCF. Both rulings are based on the Court's finding that the FAAAA preempts Plaintiff's claims. Plaintiff argues below that finding is incorrect and, therefore, challenges the Court's decision as to subject matter jurisdiction and failure to state a claim.

¹ The Order states the Complaint is dismissed "pursuant to SCRCF 12(b)(1)" for failure to state facts sufficient to constitute a valid cause of action. Plaintiff assumes the Court intended to refer to Rule 12(b)(6), SCRCF.

Plaintiff received a copy of the Order on February 22, 2016, and timely serves this motion to reconsider, alter, or amend under Rule 59(e), SCRCPP.

STANDARD

In ruling on a Rule 12(b)(6), SCRCPP, motion to dismiss, the court must consider all well-pled allegations as true.” *Disabato v. S.C. Ass’n of Sch. Adm’rs*, 404 S.C. 433, 441, 746 S.E.2d 329, 333 (2013). “If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, dismissal under Rule 12(b)(6) is improper.” *Fabian v. Lindsay*, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014) (internal quotation marks omitted). “[N]ovel questions of law should not ordinarily be resolved on a Rule 12(b)(6) motion.” *Chestnut v. AVX Corp.*, 413 S.C. 224, 227, 776 S.E.2d 82, 84 (2015).

A challenge to subject matter jurisdiction is raised by a motion to dismiss under Rule 12(b)(1), SCRCPP. *Ballenger v. Bowen*, 313 S.C. 476, 478, 443 S.E.2d 379, 380 (1994). Evidence outside the pleadings may be considered in deciding a motion to dismiss based on lack of jurisdiction. *Baird v. Charleston Cnty.*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999).

ARGUMENT

The Court should alter or amend its judgment for any one of these independent reasons: (1) Plaintiff’s claims are not related to a UPS “service”, (2) finding preemption under the facts of this case is contrary to the Congressional intent and purpose of the FAAAA, and (3) the intrastate shipment of a household good at issue in this case is excepted from preemption.

49 U.S.C. § 14501(c)(1) states:

*Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law **related to a price, route, or service** of any motor carrier (other than a carrier affiliated with a direct*

air carrier covered by section 41713(b)(4) [49 USCS § 41713(b)(4)] or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 U.S.C. § 14501(c)(1) (emphasis added). UPS argued only that Plaintiff's claims are based on a service, and the Court's ruling is based only a finding that the claims are based on a service. Therefore, there is no issue regarding whether the claims relate to a price or route.

As an initial matter, cases interpreting the Airline Deregulation Act ("ADA") are persuasive authority as to the interpretation of the FAAAA because Congress used language in the FAAAA that is identical to the predecessor ADA. *See Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 369 (2008) (stating in a case interpreting the FAAAA, "we follow *Morales* [interpreting the ADA] in interpreting language in the 1994 Act before us here. . . . Here, the Congress that wrote the language before us copied the language of the air-carrier pre-emption provision of the" ADA).

I. Plaintiff's Claims are Not "Related To" UPS's Services

The Court's interpretation and application of the phrase "related to" is overly broad and not supported by the law. "The broad preemptive scope of the phrase 'related to,' [in the FAAAA] is not without limits." *Gaines Motor Lines, Inc. v. Klaussner Furniture Indus.*, 734 F.3d 296, 307 (4th Cir. 2013) (holding a breach of contract case not preempted under the FAAAA where "[n]o state law or regulation governing the Motor Carriers' prices, routes, or services is implicated"). "[T]he breadth of the words 'related to' does not mean the sky is the limit."² *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1778 (2013) (holding the FAAAA did not preempt state-law

² "If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for really, universally, relations stop nowhere. But that, of course, would be to read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality." *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).

claims against a towing company for the company's post-towing disposal of the vehicle). Rather, when determining the effect of a state regulation on carriers, "the appropriate inquiry in such a case is whether the provision, directly or indirectly, *binds* the . . . carrier to a particular price, route or service and *thereby interferes with competitive market forces* within the . . . industry." *Sanchez v. LaserShip, Inc.*, 937 F. Supp. 2d 730, 740 (E.D. Va. 2013) (internal quotation marks omitted) (emphasis added) (holding state statute on independent contractors preempted).

Plaintiff's common law negligence claims are not "related to" UPS's services within the meaning of the FAAAA. UPS presented no argument in this case that the South Carolina common law at issue binds UPS or interferes with competitive market forces. Further, UPS presented no argument as to any effect of this lawsuit on its services. Rather, UPS solely argued, and the Court found, that the claims are based on the delivery of packages, which is a service that UPS provides. This is too general and tenuous of a connection and is not the effect Congress intended.

In *Morales*, the Supreme Court recognized that some state action may have "too tenuous, remote, or peripheral" an affect to be pre-empted.³ 504 U.S. at 390. In *Wolens*, the Supreme Court expanded upon this principle by holding that a breach of contract claim based on an airline's "self-imposed undertakings" was not pre-empted because it involved "privately ordered obligations" and not the State's enforcement of any a law, rule, regulation, or other provision of law. 513 U.S. at 228-29. The Fourth Circuit took that one step further in *Smith v. Comair, Inc.*, 134 F.3d 254 (4th Cir. 1998), by holding that the plaintiff's claims for false imprisonment and intentional

³ This holding in *Morales*, and the number of courts that have cited it, demonstrate that UPS incorrectly stated in its memorandum in support of the motion to dismiss that there is "a single narrow exception" to preemption for "breach-of-contract claims." (Def. Memo. in Opp. pp. 5, 7). Rather, whether preemption applies is a case-specific inquiry, and the United States Supreme Court has found preemption not to exist in cases not involving breach of contract. See *Dan's City Used Cars*, 133 S. Ct. at 1778 (holding the FAAAA did not preempt state-law claims against a towing company for the company's post-towing disposal of the vehicle).

infliction of emotional distress were not preempted “to the extent [the] claims are based on conduct distinct from Comair’s determination not to grant permission to board” but instead on “outrageous conduct on the part of an airline toward of a passenger” that “too tenuously relates or is unnecessary to an airline’s services.” *Id.* at 259. “If, for example, an airline held a passenger without a safety or security justification, a claim based on such actions would not relate to any legitimate service and would not be preempted.” *Id.*

Plaintiff’s case is not limited to the allegation that UPS negligently delivered the package untimely. Plaintiff also alleges that UPS held the medication without any justification, even going so far as to tell Plaintiff that, despite numerous successful deliveries to his home in the past, “his address did not exist or could not be located.” (Cmplt. ¶ 13). Such action is not related to any legitimate service and should not be preempted.

“[T]he state laws whose ‘effect’ is ‘forbidden’ under federal law are those with a ‘significant impact’ on carrier rates, routes, or services.” *Rowe*, 552 U.S. at 375 (quoting *Morales*, 504 U.S. at 388, 390). UPS does not argue, and the Court did not find, that South Carolina common law on negligence has a significant impact on carrier services. That is because there is no impact, significant or otherwise, to UPS’s services as a result of this case. Rather, UPS’s prices, routes, and services would remain unchanged in the event Plaintiff prevailed.

In factually similar cases involving personal injury incidental to delivery, the courts have held Congress did not intend to preempt common law negligence claims. In *Huertas v. United Parcel Serv., Inc.*, 974 N.Y.S.2d 758 (N.Y. App. Div. 2013), the plaintiff brought suit for negligence to recover for personal injuries sustained when she tripped and fell over stacked boxes that she asked the UPS delivery person to place on the counter so no one would trip on them. *Id.* at 758-59. The Court held the claim was not preempted under the FAAAA because the facts dealt

“with the manner in which a delivery person stacked packages; it is not related to a ‘service’ governed by the ADA or the FAAAA.” *Id.* at 762. “It is not the intent of Congress to preclude such common law negligence claims when it enacted the ADA or FAAAA.” *Id.* at 762-63.

There is no evidence that Congress intended to extend the reach of the FAAAA to personal injury incidental to a delivery. There is no explicit textual reference regarding damage to persons. Therefore, there is not support for finding a Congressional intent to supplant state law concerning personal injury in this case. Plaintiff’s claim is separate and apart from the loss or damage of the prescription goods—it relates solely from his personal injuries suffered when UPS unjustifiably retained his medication, failed to locate his address, and did not timely deliver the medication.

For these reasons, the Court should reconsider its Order and deny UPS’s motion.

II. Congress Did Not Intend to Preempt State Common Law That Does Not Affect Competitive Market Forces or a Carrier’s Operations

The Court’s decision is inconsistent with Congress’s purpose in enacting the FAAAA. “The target at which [the FAAAA] aimed was ‘a State’s direct substitution of its own governmental commands for competitive market forces in determining (*to a significant degree*) the services that motor carriers will provide.’” *Dan’s City Used Cars*, 133 S. Ct. at 1780 (quoting *Rowe*, 552 U.S. at 372) (emphasis added); *see also Thompson v. UFP Eastern Div., Inc.*, 2012 U.S. Dist. LEXIS 120129, *8, 2012 WL 3686064 (D.S.C. Aug. 24, 2012) (“The FAAAA was promulgated in order to protect the competitive market forces from state regulation.” (internal quotation marks omitted)). “Congress sought to relieve motor carriers from the absurd inefficiencies in their operations, which made it difficult to efficiently conduct a standard way of doing business and impeded their ability to compete and provide quality services to their customers.” *Sanchez*, 937 F. Supp. 2d at 743.

In *Dan's City Used Cars*, the Supreme Court held that state consumer protection and tort laws regarding the disposal of a towed vehicle were not preempted by the FAAAA because

The state laws in question hardly constrain participation in interstate commerce by requiring a motor carrier to offer services not available in the market. Nor do the state laws invoked by [plaintiff] freez[e] into place services that carriers might prefer to discontinue in the future. New Hampshire's laws on disposal of stored vehicles, moreover, will not open the way for a patchwork of state service-determining laws, rules, and regulations.

Dan's City Used Cars, 133 S. Ct. at 1780 (internal quotation marks and citation omitted). The same conclusion is warranted in this case. Plaintiff's common law negligence claims do not (1) constrain participation in interstate commerce by requiring UPS to offer services not available in the market, (2) freeze into place services that UPS might want to discontinue in the future, or (3) create a patchwork of state service-determining laws, rules, and regulations. Plaintiff's action is simply "not the kind of burdensome state economic regulation Congress sought to preempt." *Id.* at 1780 (internal quotation marks omitted). Therefore, the Court should reconsider its Order and deny UPS's motion.

III. Intrastate Shipment of a "household good" is Excepted from Preemption

Section 14501(c)(2)(B) states that "Paragraph (1)-- . . . does not apply to the intrastate transportation of household goods." 49 U.S.C. § 14501(c)(2)(B). The Court's Order does not address Plaintiff's argument that this case involves the intrastate transportation of household goods. It is undisputed that the medication traveled only within the state of South Carolina.

The term "household goods", as used in connection with transportation, means personal effects and property used or to be used in a dwelling, when a part of the equipment or supply of such dwelling, and similar property if the transportation of such effects or property is--

(A) arranged and paid for by the householder, except such term does not include property moving from a factory or store, other than property that the householder has purchased with the intent to use in his or her dwelling and is transported at the request of, and the transportation charges are paid to the carrier by, the householder; or

(B) arranged and paid for by another party.

49 U.S.C. § 13102(10). Plaintiff's medication is a personal effect and property to be used in his dwelling. The transportation of the medication was arranged and paid for by the VA hospital, "another party." *Id.* Therefore, the medication meets the criteria for a household good that is excepted from preemption under the FAAAA.

The Court's Order does not address this argument by Plaintiff, and he requests the Court alter or amend the Order to rule on this raised issue and deny UPS's motion to dismiss.

CONCLUSION

For the reasons stated above, the Court should reconsider its Order and deny UPS's motion to dismiss.

LANIER & BURROUGHS, LLC

Share M. Burroughs, Esquire
Justin T. Bamberg, Esquire
Attorneys for Plaintiff
Post Office Drawer 2789
250 Gibson Street
Orangeburg, South Carolina 29116
(803)268-9800

3.2, 2016

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

) IN THE COURT OF COMMON PLEAS

) Case No. 2014-CP-10-38-1164

Rebecca McCutcheon,

Plaintiff,

vs.

United Parcel Service, Inc. and John Doe,

Defendants.

)
)
)
) **DEFENDANT UNITED PARCEL SERVICE,
INC.'S RESPONSE TO PLAINTIFF'S RULE
59(e) MOTION TO RECONSIDER, ALTER,
OR AMEND**
)
)
)
)

**DEFENDANT UNITED PARCEL SERVICE, INC.'S
RESPONSE TO PLAINTIFF'S RULE 59(e)
MOTION TO RECONSIDER, ALTER, OR AMEND**

Defendant United Parcel Service, Inc. ("UPS" or "Defendant") hereby submits its Response in Opposition to Plaintiff's Rule 59(e) Motion to Reconsider, Alter or Amend this Court's February 2, 2016 Order granting Defendant's Motion to Dismiss Plaintiff's Complaint. For the reasons set forth below, Defendant requests that this Court deny Plaintiff's Motion because it involves no new facts or law developed since the Court's decision and recycles the same three issues. Plaintiff's negligent untimely delivery claim is squarely preempted by federal statute. There is nothing to reconsider. The Court's decision is in accord with volumes of case law across the country.

I. INTRODUCTION

This is a personal injury case alleging that UPS delivered a package late, leading to a medical issue. On February 2, 2016, this Court entered an Order granting Defendant's Motion to Dismiss Plaintiff's Complaint, applying well-established national case law and following the plain language of the federal statute. The Court held that Plaintiff's state law tort claims based upon the

allegation of negligent untimely delivery are preempted by the Federal Aviation Administration Authorization Act of 1994 (the "FAAAA"). The Court's ruling was based upon extensive briefings and extensive oral argument on the very issues Plaintiff now recycles. The three recycled issues are: (1) whether Plaintiff's untimely delivery claim is "related to" UPS's "service"; (2) whether preemption here is consistent with Congressional intent; and (3) whether a household goods exception applies. Each of these three issues were briefed and specifically argued during the hearing. There is nothing to reconsider. There is no new fact and no new law which has developed since the Court's ruling.

For the reasons more fully articulated below, each of the arguments raised in Plaintiff's Motion are without merit. Plaintiff's Motion should be denied.

II. RELEVANT PROCEDURAL HISTORY

Plaintiff filed the underlying Complaint against Defendant on September 18, 2014. (*See* Compl.). Therein, Plaintiff asserted a loss of consortium claim against Defendant for its alleged failure to timely deliver a package containing thyroid medication to Plaintiff's husband. (*See id.* generally).

The issues raised by Plaintiff's Reconsideration Motion have been long-addressed. First, on December 12, 2014, Defendant filed a Motion to Dismiss Plaintiff's Complaint on the basis that Plaintiff's state law tort claims for loss of consortium, which are all based upon an allegation of negligent untimely delivery of a package, are preempted by federal law -- the Federal Aviation Administration Authorization Act of 1994, codified at 49 U.S.C. §14501(c), or alternatively, the Carmack Amendment, codified at 49 U.S.C. §14706 49 U.S.C. §14706. (*See* Def. Mot. to Dismiss & Def. Brief in Support of Mot. to Dismiss). On June 15, 2015, Plaintiff filed an Opposition to Defendant's Motion to Dismiss. (*See* Pl. Memo. in Opp.). Thereafter, on September 10, 2015,

Defendant filed a Reply in Support of its Motion to Dismiss, which addressed all of the arguments raised by Plaintiff's Opposition. (See Def. Reply). Defendant's Motion to Dismiss was heard by this Court on September 28, 2015. Thereafter, on February 2, 2016, this Court entered its Order addressing the legal issues in detail, granting Defendant's Motion and dismissing Plaintiff's Complaint. (See February 2, 2016 Order). This Court held that "Plaintiff's state law tort action is preëempted by federal statute 49 U.S.C. §14501(c)," the FAA. (*Id.*) This Court dismissed Plaintiff's Complaint, with prejudice, pursuant to SCRCP 12(b)(1) and (6). (*Id.*)

III. LEGAL STANDARD

Plaintiff's Motion omits the guidelines controlling her Motion under South Carolina Rule of Civil Procedure 59(e). "The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in the decision on the merits." *Arnold v. State*, 420 S.E.2d 834, 842 (S.C. 1992). A Rule 59(e) motion should **not** be used merely to **regurgitate verbatim arguments** previously raised and rejected by the Court. See *Quality Trailer Prods. v. CSL Equip. Co.*, 562 S.E.2d 615, 618 (S.C. 2002) (holding that Rule 59(e) motion which merely recited "arguments previously raised and previously ruled upon by the trial court... was not, despite its caption, an appropriate Rule 59(e) motion").

Likewise, "[a] party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." *Hickman v. Hickman*, 392 S.E.2d 481, 482 (S.C. Ct. App. 1990); see also *Stevens & Wilkinson of S. Carolina, Inc. v. City of Columbia*, 762 S.E.2d 693, 695 (S.C. 2014). Federal cases interpreting FRCP 59(e) have limited its scope.¹ For example,

¹ "Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical." *Elam v. S. Carolina Dep't of Transp.*, 602 S.E.2d 772, 779 (S.C. 2004). "Because Rule 59(e), SCRCP is substantially the federal rule, an examination of authorities addressing [a specific issue regarding the rule], as it pertains to the federal courts, is appropriate." *Heins v. Heins*, 543 S.E.2d 224, 227 (S.C. Ct. App. 2001)

in *Fields v. Astrue*, the South Carolina District Court noted that “[a] motion to reconsider is **not appropriate** to argue matters that could have been presented in prior motions or to **rehash issues already ruled upon** because the losing party disagrees with the ruling.” No. CIV.A. 9:09-1763-BM, 2010 WL 9073555, at *1 (D.S.C. Oct. 5, 2010) (internal citations omitted); *see also Rouse v. Nielson*, 851 F.Supp. 717, 734 (D.S.C. 1994) (“Rule 59(e) motions ‘are not at the disposal of an unsuccessful party to rehash the same arguments and facts previously presented.’”) (internal citations omitted). “Motions to reconsider may not be used to initiate arguments or legal theories that the proponent had the ability to address prior to the judgment.” *Tetrev v. Pride Int’l, Inc.*, 243 F.R.D. 246, 248 (D.S.C. 2007) (internal citation omitted).

“Instead, a motion may be properly made under Rule 59(e) for only one of three reasons: (1) an intervening change in the controlling law has occurred; (2) evidence not previously available has become available; or (3) it is necessary to correct a clear error of law or prevent manifest injustice.” *Rouse*, 851 F.Supp. at 734 (citing *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir.1993)); *see also City of Charleston, S.C. v. Hotels.com, LP*, 586 F. Supp. 2d 538, 541 (D.S.C. 2008) (citing *Pacific Ins. Co. v. American Nat. Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir.1998)). None of those reasons are present here.

In short, a motion under Rule 59(e) should not simply recycle the same issues already briefed and argued. This is precisely what Plaintiff’s Motion does.

IV. ARGUMENT

A. Plaintiff Presents No Arguments Which Merit Reconsideration Pursuant to Rule 59(e) Standard

Plaintiff sets forth three bases for her request for reconsideration: (1) Plaintiff’s claims are not “related to” a UPS service, (2) finding preemption under the facts of this case is contrary to

the Congressional intent and purpose of the FAAAA, and (3) the FAAAA's household goods exception applies. (Mot. at 3).

Plaintiff's first argument for reconsideration is based upon Plaintiff's assertion that her claims against Defendant, which are based solely upon an allegation of **negligent untimely delivery of a package** containing Plaintiff's husband's medication, somehow are not "related to" UPS's service. (Mot. at 4-7). However, the issue of whether Plaintiff's claims relate to UPS's service, within the context of FAAAA preemption, was clearly outlined by Defendant in its Motion to Dismiss. Therein, Defendant articulated its position that Plaintiff's state law tort claims are entirely preempted because they are **related to** "the specific service that UPS provides – delivery of packages." (Def. Brief in Support of Mot. to Dismiss at 6). Defendant further stated: "Pursuant to the plain language set forth in the FAAAA, Plaintiff's state law claims, which relate directly to the "service" provided by UPS, a carrier, are preempted." (*Id.* at 7).

Plaintiff did not contest this argument in her Opposition to the Motion to Dismiss, as noted by Defendant in its Reply brief: "In her opposition to Defendant's Motion to Dismiss, Plaintiff tellingly does not dispute the two controlling points: (1) her state law claims directly relate to the delivery "**service**" that UPS provides" (Def. Reply at 1). Defendant's position was argued before this Court at the September 28, 2015 hearing. Again, Plaintiff failed to oppose Defendant's argument at that time. If Plaintiff disagreed with Defendant's argument regarding the relation of Plaintiff's claims to UPS's services, she was obligated to assert her objection in her Opposition or during oral argument. Plaintiff cannot get a second bite at the apple now, and "present to the court an issue [she] **could have raised** prior to judgment but did not." *Hickman*, 392 S.E.2d at 482 (emphasis added). Further, defense counsel extensively argued this issue during the hearing.

Plaintiff's first argument for reconsideration is improper and should not be considered by this Court.

Plaintiff's second argument regarding Congressional intent of the FAAAA is **identical** to the argument previously set forth in Plaintiff's Opposition (*see* Pl. Memo. in Opp. at 4-7), as well as Defendant's reply brief, which articulated Congress' intent for the FAAAA's preemption to have broad scope (*see* Def. Reply at 3-5). Although Plaintiff cites different cases in support of her argument this time around (none of which were decided after the September 2015 hearing), her underlying argument is the same.² Plaintiff cites no new facts and no new law to support her argument. Consequently, this exact issue regarding Congressional intent was argued before this Court on September 28, 2015, and was contemplated by this Court in its February 6, 2015 ruling. Plaintiff should not be permitted to merely regurgitate or rehash **the same argument** which was previously raised and **rejected** by the Court. *See Quality Trailer Prods.*, 562 S.E.2d at 618; *see also Fields*, 2010 WL 9073555, at *1; *Rouse*, 851 F.Supp. at 734; *Tetrev v.*, 243 F.R.D. at 248. Plaintiff's argument does not warrant reconsideration by this Court.

Finally, Plaintiff's third argument regarding the FAAAA's household goods exception is also **identical** to an argument previously raised in Plaintiff's Opposition (*see* Pl. Memo. in Opp. at 7), which Defendant opposed in its reply brief (*see* Def. Reply at 6-7). Plaintiff cites **no new facts** or **any case law** in support of her previously raised argument that the household goods exemption applies; rather, Plaintiff suggests that because this Court's February 2, 2016 Order did

² In her Opposition, Plaintiff plainly argued that "Congress did not intend for the FAAAA [] to preempt an injured party's rights to pursue redress in state court for physical harm to their person caused by a motor carrier's failure to deliver medication." (Pl. Memo. in Opp. at 4). In explaining Congress' intent, Plaintiff referenced "economic regulation", "competition", and "to eliminate overlapping state and municipal regulations, which increased costs, decreased efficiency, and reduced competition and innovation." (*Id.* at 5-6). In this Motion, Plaintiff again references the intent to "protect the competitive market forces" and "to relieve motor carriers from the absurd inefficiencies in their operations" (Mot. at 7), as well as "the kind of burdensome state economic regulation Congress sought to preempt" (Mot. at 8). Plaintiff merely re-packages the issue. **The underlying argument is the same in both briefings.**

not specifically state that the exception did not apply, Plaintiff's argument warrants reconsideration. In doing so, Plaintiff chooses to ignore the clear implication made by this Court's ruling on preemption – Plaintiff's claims are preempted by the FAAAA, therefore, **none of the exceptions to preemption apply**. Failure to specifically discuss the inapplicable exemptions in the Order does not warrant reconsideration of this exact same argument, which was **previously raised and rejected by the Court**. See *Quality Trailer Prods.*, 562 S.E.2d at 618; see also *Fields*, 2010 WL 9073555, at *1; *Rouse*, 851 F.Supp. at 734; *Tetrev v.*, 243 F.R.D. at 248. Plaintiff's argument does not warrant reconsideration by this Court.

In sum, Rule 59(e) is not intended to allow a disappointed litigant to ask for a “do-over.” Plaintiff presents no arguments which merit reconsideration. Before the Court issued its ruling, the parties briefed the very same three issues extensively, and the Court heard lengthy oral argument. While the decision whether or not to grant or deny a Motion for Reconsideration is discretionary, “[b]ecause of the interests in finality and conservation of judicial resources, Rule 59(e) motions should be granted sparingly.” *Rouse*, 851 F.Supp. at 734; see also *City of Charleston, S.C. v. Hotels.com, LP*, 586 F. Supp. 2d 538, 541 (D.S.C. 2008) (“Reconsideration of a judgment is an extraordinary remedy which should be used sparingly.”). Applying these stringent standards to Plaintiff's Motion and the arguments set forth therein, Plaintiff's Motion should be denied.

B. As Articulated in this Court's Well-Reasoned February 2, 2016 Order, Plaintiff's Claims are Preempted by the Federal Aviation Administration Authorization Act of 1994 and Must be Dismissed

Plaintiff's claims are preempted by the FAAAA. Plaintiff's state law tort claims, which are all based upon an allegation that UPS, a motor carrier, negligently delivered a package untimely, are barred by the FAAAA insofar as the statute expressly preempts state laws “related

to . . . service of any motor carrier . . . with respect to the transportation of property.” 49 U.S.C. § 14501(c)(1) (emphasis added); see e.g., *Rockwell v. United Parcel Serv., Inc.*, No. 2:99 CV 57, 1999 WL 33100089 (D.Vt.1999) (claims for negligent delivery protocol, which “go to the heart of the services that UPS provides” were preempted); *Wine & Spirits Wholesalers v. Net Contents, Inc.*, 10 F. Supp. 2d 84, 87 (D. Mass. 1998) (tort claim against Federal Express for transporting liquor to Massachusetts from unlicensed out-of-state wholesaler was preempted by ADA because “claim arises directly from the act of, and the method employed in, providing” carrier’s services); *Deerskin Trading Post, Inc. v. United Parcel Serv. of Am., Inc.*, 972 F. Supp. 665, 672 (N.D. Ga. 1997) (FAAAA preempted all state claims, including negligence, except for portion of breach of contract claim.); *Vieira v. United Parcel Service, Inc.*, 1996 WL 478686 at *1 (N.D. Cal. Aug 5, 1996) (negligence and conversion claim arising from lost UPS package related to “service” provided by UPS and was therefore preempted by FAAAA); *Rowe v. United Parcel Serv., Inc.*, No. CV-S-96-862-PMP, 1996 U.S. Dist. LEXIS 11266 (D.Nev. July 31, 1996) (dismissing state law claims for intentional and negligent infliction of emotional distress and defamation, which were based on alleged defamatory statements made by UPS employee who was investigating the contents of a package, based on FAAAA); *Wagman v. Fed. Exp. Corp.*, 1995 WL 81686, at *2 (7th Cir. Feb. 17, 1995) (affirming dismissal on preemption grounds of constructive fraud and other claims based on allegations of misleading advertising arising from late delivery of plaintiff’s package).

Accordingly, **dismissal** of Plaintiff’s state law **tort claim** is the appropriate remedy where those claims are preempted by federal law, such as the FAAAA. See *Brown v. United Airlines, Inc.*, 720 F.3d 60 (1st Cir. 2013) (affirming dismissal where tort claims were preempted by ADA); *Bower v. Egyptair Airlines Co.*, 731 F.3d 85 (1st Cir. 2013) (affirming dismissal by way of

summary judgment where claims were preempted by ADA); *Wise Recycling, LLC v. M2 Logistics*, 943 F. Supp. 2d 700, 706 (N.D. Tex. 2013) (dismissing negligence claims that were preempted by FAAAA); *State ex rel. Grupp v. DHL Exp. (USA), Inc.*, 970 N.E.2d 391 (N.Y. App. Ct. 2012) (affirming dismissal where plaintiff's claims were preempted by federal law); *Mudd-Lyman Sales & Serv. Corp. v. United Parcel Serv., Inc.*, 236 F. Supp. 2d 907 (N.D. Ill. 2002) (granting summary judgment and dismissing plaintiff's state law claims which were preempted by FAAAA); *Beyer v. Acme Truck Line, Inc.*, 802 So. 2d 798 (La. Ct. App. 2001) (affirming dismissal of plaintiff's lawsuit with prejudice where state law claims, including intentional interference with business relationships, unjust enrichment, and fraud, were preempted by FAAAA and ADA); *Rockwell*, 1999 WL 33100089 at *4 (dismissing plaintiff's complaint because claims preempted by FAAAA); *Vieira*, 1996 WL 478686 at *1 (granting summary judgment and dismissing plaintiff's claims which were preempted). Plaintiff's Motion seeking reconsideration should be denied.

C. The Arguments Set Forth in Plaintiff's Motion Are Without Merit

1. Plaintiff's Claims Are Directly "Related to" the "Service" UPS Provides

Plaintiff argues that her claims against Defendant – negligent untimely delivery of a package containing medication – are not “related to” UPS’s services. On its face, this argument is illogical. Delivery of packages is the quintessential, core service UPS provides to its customers. Plaintiff’s allegations, therefore, are **directly “related to” UPS’s delivery of packages.**

Plaintiff fails to cite any new facts³ or any new legal precedent to support her illogical argument. Rather, Plaintiff simply cherry-picks various limited quotations from numerous cases,

³ According to Plaintiff's Complaint, the only operative pleading, Plaintiff has set forth a claim for loss of consortium sounding in negligence and negligent entrustment against Defendant. This tort claim is based solely upon Plaintiff's allegation that Defendant negligently delivered a package containing Plaintiff's husband's medication untimely. Plaintiff's newly asserted suggestion that she also has a claim against UPS for holding her husband's medication without justification is not supported by the pleadings. Nor does it support any separate cognizable tort claim.

which notably, were decided long before the September 28, 2015, hearing and frankly, are inapposite. For instance, *Gaines Motor Lines, Inc. v. Klaussner Furniture, Indus.* involved a **breach of contract** claim, which is not present here; the Supreme Court, in *Dan's City Used Cars, Inc. v. Pelkey*, evaluated a specific, limited issue – whether state law claims regarding the disposal of towed vehicles by a towing company were “related to” the “transportation of property” or the “service” of a motor carrier within the meaning of FAAAA, thus, distinguishing it factually from the present case; the district court in *Sanchez v. Lasership, Inc.*, was tasked with evaluating a specific state regulation of wage and independent contractor laws; and *Smith v. Comair* involved a plaintiff’s claims for breach of contract, false imprisonment, and intentional infliction of emotional distress based on an airline’s refusal to permit him to board his flight. None of the cases cited by Plaintiff involved a state tort law claim involving an allegation of negligent delivery of a package, which so clearly relates to the core service provided by a motor carrier.

The only case cited which Plaintiff even suggests as being factually similar to the underlying claims, *Huertas v. United Parcel Serv. Inc.*,⁴ is factually distinguishable insofar as it does not involve negligent delivery of a package. In determining that the alleged negligent conduct was not preempted, the New York lower court stressed that “the facts of this case deal with the manner in which a delivery person stacked packages,” *Huertas*, 974 N.Y.S.2d 758, 762 (N.Y. Sup. Ct. 2013), not the delivery of the packages themselves. Relying primarily upon the limited holding in *Huertas*, Plaintiff argues that this Court’s ruling “is not supported by the law” (Mot. at 4) and that FAAAA does not apply to common law negligence claims (*id.* at 7). That was a trip and fall case where the incident occurred long after the delivery. It is very different than here: an allegation

⁴ Notably, *Huertas* have never been cited or relied upon by any other court with respect to preemption under the FAAAA.

of untimely delivery of a package, the very core service of UPS. Additionally, Plaintiff fails to address the volume of cases cited by Defendant which demonstrate that courts throughout the country have specifically applied the FAAAA (or ADA) preemption to common law negligence claims, specifically to negligent delivery claims similar to Plaintiff's claims here.⁵

For example, in *Rockwell v. United Parcel Serv., Inc.*, where the plaintiff's complaint sought to impose liability on UPS and its delivery person for plaintiff's personal injuries, the United States District Court for the District of Vermont held that plaintiff's claims for **negligent delivery protocol**, which "**go to the heart of the services that UPS provides,**" were preempted by the FAAAA. No. 2:99 CV 57, 1999 WL 33100089, at *2 (D.Vt. July 7, 1999) (emphasis added). Similarly, the United States District Court for the Northern District of California, in *Vieira v. United Parcel Service, Inc.*, held that plaintiff's negligence and conversion claim arising from a **lost UPS package related to the "service" provided by UPS** and was therefore preempted by the FAAAA. No. C-95-04697, 1996 WL 478686 at *1 (N.D. Cal. Aug 5, 1996) (emphasis added).

Plaintiff's tort claim is based squarely upon UPS's service – that Defendant allegedly failed to deliver a package on time. All of the averments set forth in the Complaint are based upon that allegedly negligent conduct. (*See* Compl. generally). Therefore, as this Court properly ruled, Plaintiff's Complaint, which is based entirely upon the allegedly negligent untimely delivery of a package and "related to" the primary "service" that UPS provides, is preempted in its entirety by the FAAAA and must be dismissed with prejudice. *See* 49 U.S.C. § 14501(c)(1).

⁵ *See* case law cited in previous Argument section, as well as all case law cited in Defendant's Brief in Support of its Motion to Dismiss and Defendant's Reply Brief, which Defendant incorporates as if set forth fully herein.

2. Congress Intended for the FAAAA's Preemption to Have Broad Scope

As noted above, Plaintiff's argument regarding Congressional intent of the FAAAA is **identical** to the argument previously set forth in Plaintiff's Opposition (*see* Pl. Memo. in Opp. at 4-7),⁶ as well as Defendant's Reply brief (Def. Reply at 3-5). The issue was argued before this Court and, thus, contemplated by this Court in its February 6, 2015 ruling. Plaintiff's argument should not be reconsidered.

That said, even if the Court were to reconsider this identical issue, as argued in Defendant's Reply Brief in Support of its Motion to Dismiss, which Defendant incorporates as if set forth fully herein, Plaintiff's argument continues to overlook the clear, plain language set forth in the FAAAA. *See Deerskin Trading Post, Inc. v. United Parcel Serv. of Am., Inc.*, 972 F. Supp. 665, 667 (N.D. Ga. 1997) ("the Court's analysis begins, and usually ends, with the language of the statute."). Section 14501(c)(1) clearly provides that no state shall "enact or enforce any law, regulation, or any other provision having the force and effect of law related to a price, route, or **service** of any motor carrier." 49 U.S.C. § 14501(c)(1) (emphasis added). "Congress intended for the preemption provision of the FAAAA—which employs identical language to the preemption provision of the ADA—to be **broad in scope** and that the FAAAA's preemption provision precludes any state enforcement action **having a connection with or reference to** any price, route, or **service** of any motor carrier, motor private carrier, or air carrier." *Deerskin Trading Post, Inc.*, 972 F. Supp. at 668 (emphasis added). Pursuant to the plain language of the FAAAA, as adopted by Congress, Plaintiff's claims, which have a direct connection and relation to UPS's services, are preempted.

⁶ See footnote 2, *supra*.

3. The FAAAA's Household Goods Exception is Inapplicable

As explained above, Plaintiff's argument regarding the FAAAA's household goods exception is **identical** to the argument previously raised in Plaintiff's Opposition (*see* Pl. Memo. in Opp. at 7), which Defendant opposed in its reply brief (*see* Def. Reply at 6-7). Plaintiff's argument was argued before and rejected by this Court in its February 2, 2016 Order which held that Plaintiff's claims were preempted by the FAAAA and not exempted from preemption. This argument should not be reconsidered.

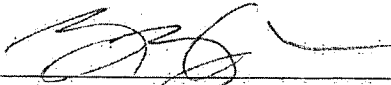
Plaintiff tellingly cites **no case law** in support of her position that the limited household goods exception applies here. None exists. The FAAAA provides for an exemption whereby states are not prohibited from enacting legislation which regulates intrastate transportation of household goods. *See* 49 U.S.C. § 14501(c)(2). As argued in Defendant's Reply Brief in Support of its Motion to Dismiss, which Defendant incorporates as if set forth fully herein, Plaintiff's claims do not arise out of any South Carolina law regarding the regulation of intrastate transportation of household goods; rather, they arise from South Carolina's **tort law**. Defendant is seeking dismissal of Plaintiff's tort law claims. The FAAAA's household goods exemption is, therefore, inapplicable and Plaintiff's argument suggesting otherwise is without merit.

V. CONCLUSION

For the reasons set forth above, Defendant United Parcel Service, Inc. respectfully requests that this Court deny Plaintiff's Motion to Reconsider, Alter or Amend this Court's February 2, 2016 Order dismissing Plaintiff's Complaint.

(signature page to follow)

WILLSON JONES CARTER & BAXLEY, PA


G. Troy Thames
421 Wando Park Blvd., Ste. 100
Mt. Pleasant, South Carolina 29464
Telephone: 843-284-0832
Facsimile: 843-284-1081
Mt. Pleasant, South Carolina
E-mail: tthames@wilaw.net

AND

Ryan R. Corkery
Ansa Assunacao, LLP
1600 JFK Blvd.
Four Penn Center, suite 900
Philadelphia, PA 19103
Telephone: 267-528-0733
Facsimile: 267-528-0726
Ryan.corkery@ansalaw.com

March 21, 2016

**ATTORNEYS FOR UNITED PARCEL
SERVICE, INC.**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ORANGEBURG	)	Case No.: 2015-CP-38-00354
	)	
Cortland James Eggleston,	)	DEFENDANTS UNITED PARCEL
	)	SERVICE, INC. AND RICK FOGLE'S
Plaintiff,	)	RESPONSE TO PLAINTIFF'S RULE
	)	59(e) MOTION TO RECONSIDER,
vs.	)	ALTER, OR AMEND
	)	
United Parcel Service, Inc. and Rick	)	
Fogle,	)	
	)	
Defendants.		

**DEFENDANTS UNITED PARCEL SERVICE, INC. AND RICK
FOGLE'S RESPONSE TO PLAINTIFF'S RULE 59(e)
MOTION TO RECONSIDER, ALTER, OR AMEND**

Defendants United Parcel Service, Inc. ("UPS") and Rick Fogle (hereinafter collectively "Defendants") hereby submit their Response in Opposition to Plaintiff's Rule 59(e) Motion to Reconsider, Alter or Amend this Court's February 2, 2016 Order granting Defendants' Motion to Dismiss Plaintiff's Complaint. For the reasons set forth below, Defendants request that this Court deny Plaintiff's Motion because it involves no new facts or law developed since the Court's decision and recycles the same three issues. Plaintiff's negligent untimely delivery claim is squarely preempted by federal statute. There is nothing to reconsider. The Court's decision is in accord with volumes of case law across the country.

I. INTRODUCTION

This is a personal injury case alleging that UPS delivered a package late, leading to a medical issue. On February 2, 2016, this Court entered an Order granting Defendants' Motion to Dismiss Plaintiff's Complaint, applying well-established national case law and following the plain language of the federal statute. The Court held that Plaintiff's state law tort claims based upon the allegation of negligent untimely delivery are preempted by the Federal Aviation Administration

Authorization Act of 1994 (the “FAAAA”). The Court’s ruling was based upon extensive briefings and extensive oral argument on the very issues Plaintiff now recycles. The three recycled issues are: (1) whether Plaintiff’s untimely delivery claim is “related to” UPS’s “service”; (2) whether preemption here is consistent with Congressional intent; and (3) whether a household goods exception applies. Each of these three issues were briefed and specifically argued during the hearing. There is nothing to reconsider. There is no new fact and no new law which has developed since the Court’s ruling.

For the reasons more fully articulated below, each of the arguments raised in Plaintiff’s Motion are without merit. Plaintiff’s Motion should be denied.

II. RELEVANT PROCEDURAL HISTORY

Plaintiff filed the underlying Complaint against Defendants on April 1, 2015. (*See* Compl.). Therein, Plaintiff asserted a personal injury claim against Defendants for their alleged failure to timely deliver a package containing thyroid medication to Plaintiff. (*See id.* generally).

The issues raised by Plaintiff’s Reconsideration Motion have been long-addressed. First, on May 4, 2015, Defendants filed a Motion to Dismiss Plaintiff’s Complaint on the basis that Plaintiff’s state law tort claims, which are all based upon an allegation of negligent untimely delivery of a package, are preempted by federal law -- the Federal Aviation Administration Authorization Act of 1994, codified at 49 U.S.C. §14501(c), or alternatively, the Carmack Amendment, codified at 49 U.S.C. §14706 49 U.S.C. §14706. (*See* Defs. Mot. to Dismiss & Defs. Brief in Support of Mot. to Dismiss). On June 15, 2015, Plaintiff filed an Opposition to Defendants’ Motion to Dismiss. (*See* Pl. Memo. in Opp.).¹ Defendants’ Motion to Dismiss was heard by this Court on September 28, 2015. Thereafter, on February 2, 2016, this Court entered

¹ Defendants’ response to Plaintiff’s Opposition was incorporated into Defendants’ Brief in Support of Their Motion to Dismiss.

its Order addressing the legal issues in detail, granting Defendants' Motion and dismissing Plaintiff's Complaint. (See February 2, 2016 Order). This Court held that "Plaintiff's state law tort action is preempted by federal statute 49 U.S.C. §14501(c)," the FAAAA. (*Id.*) This Court dismissed Plaintiff's Complaint, with prejudice, pursuant to SCRCP 12(b)(1) and (6). (*Id.*)

III. LEGAL STANDARD

Plaintiff's Motion omits the guidelines controlling his Motion under South Carolina Rule of Civil Procedure 59(e). "The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in the decision on the merits." *Arnold v. State*, 420 S.E.2d 834, 842 (S.C. 1992). A Rule 59(e) motion should **not** be used merely to **regurgitate verbatim arguments** previously raised and rejected by the Court. See *Quality Trailer Prods. v. CSL Equip. Co.*, 562 S.E.2d 615, 618 (S.C. 2002) (holding that Rule 59(e) motion which merely recited "arguments previously raised and previously ruled upon by the trial court... was not, despite its caption, an appropriate Rule 59(e) motion").

Likewise, "[a] party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." *Hickman v. Hickman*, 392 S.E.2d 481, 482 (S.C. Ct. App. 1990); see also *Stevens & Wilkinson of S. Carolina, Inc. v. City of Columbia*, 762 S.E.2d 693, 695 (S.C. 2014). Federal cases interpreting FRCP 59(e) have limited its scope.² For example, in *Fields v. Astrue*, the South Carolina District Court noted that "[a] motion to reconsider is **not appropriate** to argue matters that could have been presented in prior motions or to **rehash issues already ruled upon** because the losing party disagrees with the ruling." No. CIV.A. 9:09-1763-

² "Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical." *Elam v. S. Carolina Dep't of Transp.*, 602 S.E.2d 772, 779 (S.C. 2004). "Because Rule 59(e), SCRCP is substantially the federal rule, an examination of authorities addressing [a specific issue regarding the rule], as it pertains to the federal courts, is appropriate." *Heins v. Heins*, 543 S.E.2d 224, 227 (S.C. Ct. App. 2001)

BM, 2010 WL 9073555, at *1 (D.S.C. Oct. 5, 2010) (internal citations omitted); *see also Rouse v. Nielson*, 851 F.Supp. 717, 734 (D.S.C. 1994) (“Rule 59(e) motions ‘are not at the disposal of an unsuccessful party to rehash the same arguments and facts previously presented.’”) (internal citations omitted). “Motions to reconsider may not be used to initiate arguments or legal theories that the proponent had the ability to address prior to the judgment.” *Tetrev v. Pride Int’l, Inc.*, 243 F.R.D. 246, 248 (D.S.C. 2007) (internal citation omitted).

“Instead, a motion may be properly made under Rule 59(e) for only one of three reasons: (1) an intervening change in the controlling law has occurred; (2) evidence not previously available has become available; or (3) it is necessary to correct a clear error of law or prevent manifest injustice.” *Rouse*, 851 F.Supp. at 734 (citing *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir.1993)); *see also City of Charleston, S.C. v. Hotels.com, LP*, 586 F. Supp. 2d 538, 541 (D.S.C. 2008) (citing *Pacific Ins. Co. v. American Nat. Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir.1998)). None of those reasons are present here.

In short, a motion under Rule 59(e) should not simply recycle the same issues already briefed and argued. This is precisely what Plaintiff’s Motion does.

IV. ARGUMENT

A. Plaintiff Presents No Arguments Which Merit Reconsideration Pursuant to Rule 59(e) Standard

Plaintiff sets forth three bases for his request for reconsideration: (1) Plaintiff’s claims are not “related to” a UPS service, (2) finding preemption under the facts of this case is contrary to the Congressional intent and purpose of the FAAAA, and (3) the FAAAA’s household goods exception applies. (Mot. at 3).

Plaintiff’s first argument for reconsideration is based upon Plaintiff’s assertion that his claims against Defendants, which are based solely upon an allegation of **negligent untimely**

delivery of a package containing Plaintiff's medication, somehow are not "related to" UPS's service. (Mot. at 4-7). However, the issue of whether Plaintiff's claims relate to UPS's service, within the context of FAAAA preemption, was clearly outlined by Defendants in their Motion to Dismiss. Therein, Defendants articulated their position that Plaintiff's state law tort claims are entirely preempted because they are **related to** "the specific service that UPS provides – delivery of packages." (Defs. Brief in Support of Mot. to Dismiss at 6). Defendants further stated: "Pursuant to the plain language set forth in the FAAAA, Plaintiff's state law claims, which relate directly to the "service" provided by UPS, a carrier, are preempted." (*Id.* at 7).

Plaintiff did not contest this argument in his Opposition to the Motion to Dismiss, as noted by Defendants in their brief: "In his opposition to Defendants' Motion to Dismiss, Plaintiff tellingly does not dispute the two controlling points: (1) his state law claims directly relate to the delivery "**service**" that UPS provides" (Defs. Brief in Support of Mot. to Dismiss at 13). Defendants' position was argued before this Court at the September 28, 2015 hearing. Again, Plaintiff failed to oppose Defendants' argument at that time. If Plaintiff disagreed with Defendants' argument regarding the relation of Plaintiff's claims to UPS's services, he was obligated to assert his objection in his Opposition or during oral argument. Plaintiff cannot get a second bite at the apple now, and "present to the court an issue [he] **could have raised** prior to judgment but did not." *Hickman*, 392 S.E.2d at 482 (emphasis added). Further, defense counsel extensively argued this issue during the hearing. Plaintiff's first argument for reconsideration is improper and should not be considered by this Court.

Plaintiff's second argument regarding Congressional intent of the FAAAA is **identical** to the argument previously set forth in Plaintiff's Opposition (*see* Pl. Memo. in Opp. at 4-7), as well as Defendants' briefing, which articulated Congress' intent for the FAAAA's preemption to have

broad scope (*see* Defs. Brief in Support of Mot. to Dismiss at 13-17). Although Plaintiff cites different cases in support of his argument this time around (none of which were decided after the September 2015 hearing), his underlying argument is the same.³ Plaintiff cites no new facts and no new law to support his argument. Consequently, this exact issue regarding Congressional intent was argued before this Court on September 28, 2015, and was contemplated by this Court in its February 6, 2015 ruling. Plaintiff should not be permitted to merely regurgitate or rehash **the same argument** which was previously raised and **rejected** by the Court. *See Quality Trailer Prods.*, 562 S.E.2d at 618; *see also Fields*, 2010 WL 9073555, at *1; *Rouse*, 851 F.Supp. at 734; *Tetrev v.*, 243 F.R.D. at 248. Plaintiff's argument does not warrant reconsideration by this Court.

Finally, Plaintiff's third argument regarding the FAAAA's household goods exception is also **identical** to an argument previously raised in Plaintiff's Opposition (*see* Pl. Memo. in Opp. at 7), which Defendants opposed in their brief (*see* Defs. Brief in Support of Mot. to Dismiss at 17-18). Plaintiff cites **no new facts** or **any case law** in support of his previously raised argument that the household goods exemption applies; rather, Plaintiff suggests that because this Court's February 2, 2016 Order did not specifically state that the exception did not apply, Plaintiff's argument warrants reconsideration. In doing so, Plaintiff chooses to ignore the clear implication made by this Court's ruling on preemption – Plaintiff's claims are preempted by the FAAAA, therefore, **none of the exceptions to preemption apply**. Failure to specifically discuss the inapplicable exemptions in the Order does not warrant reconsideration of this exact same

³ In his Opposition, Plaintiff plainly argued that "Congress did not intend for the FAAAA [] to preempt an injured party's rights to pursue redress in state court for physical harm to their person caused by a motor carrier's failure to deliver medication." (Pl. Memo. in Opp. at 4). In explaining Congress' intent, Plaintiff referenced "economic regulation", "competition", and "to eliminate overlapping state and municipal regulations, which increased costs, decreased efficiency, and reduced competition and innovation." (*Id.* at 5-6). In this Motion, Plaintiff again references the intent to "protect the competitive market forces" and "to relieve motor carriers from the absurd inefficiencies in their operations" (Mot. at 7), as well as "the kind of burdensome state economic regulation Congress sought to preempt" (Mot. at 8). Plaintiff merely re-packages the issue. **The underlying argument is the same in both briefings.**

argument, which was **previously raised and rejected by the Court**. See *Quality Trailer Prods.*, 562 S.E.2d at 618; see also *Fields*, 2010 WL 9073555, at *1; *Rouse*, 851 F.Supp. at 734; *Tetrev v.*, 243 F.R.D. at 248. Plaintiff's argument does not warrant reconsideration by this Court.

In sum, Rule 59(e) is not intended to allow a disappointed litigant to ask for a "do-over." Plaintiff presents no arguments which merit reconsideration. Before the Court issued its ruling, the parties briefed the very same three issues extensively, and the Court heard lengthy oral argument. While the decision whether or not to grant or deny a Motion for Reconsideration is discretionary, "[b]ecause of the interests in finality and conservation of judicial resources, Rule 59(e) motions should be granted sparingly." *Rouse*, 851 F.Supp. at 734; see also *City of Charleston, S.C. v. Hotels.com, LP*, 586 F. Supp. 2d 538, 541 (D.S.C. 2008) ("Reconsideration of a judgment is an extraordinary remedy which should be used sparingly."). Applying these stringent standards to Plaintiff's Motion and the arguments set forth therein, Plaintiff's Motion should be denied.

B. As Articulated in this Court's Well-Reasoned February 2, 2016 Order, Plaintiff's Claims are Preempted by the Federal Aviation Administration Authorization Act of 1994 and Must be Dismissed

Plaintiff's claims are preempted by the FAAAA. Plaintiff's state law tort claims, which are all based upon an allegation that UPS, a motor carrier, negligently delivered a package untimely, are barred by the FAAAA insofar as the statute expressly preempts state laws "**related to . . . service of any motor carrier . . . with respect to the transportation of property.**" 49 U.S.C. § 14501(c)(1) (emphasis added); see e.g., *Rockwell v. United Parcel Serv., Inc.*, No. 2:99 CV 57, 1999 WL 33100089 (D.Vt.1999) (claims for negligent delivery protocol, which "go to the heart of the services that UPS provides" were preempted); *Wine & Spirits Wholesalers v. Net Contents, Inc.*, 10 F. Supp. 2d 84, 87 (D. Mass. 1998) (tort claim against Federal Express for

transporting liquor to Massachusetts from unlicensed out-of-state wholesaler was preempted by ADA because "claim arises directly from the act of, and the method employed in, providing" carrier's services); *Deerskin Trading Post, Inc. v. United Parcel Serv. of Am., Inc.*, 972 F. Supp. 665, 672 (N.D. Ga. 1997) (FAAAA preempted all state claims, including negligence, except for portion of breach of contract claim.); *Vieira v. United Parcel Service, Inc.*, 1996 WL 478686 at *1 (N.D. Cal. Aug 5, 1996) (negligence and conversion claim arising from lost UPS package related to "service" provided by UPS and was therefore preempted by FAAAA); *Rowe v. United Parcel Serv., Inc.*, No. CV-S-96-862-PMP, 1996 U.S. Dist. LEXIS 11266 (D.Nev. July 31, 1996) (dismissing state law claims for intentional and negligent infliction of emotional distress and defamation, which were based on alleged defamatory statements made by UPS employee who was investigating the contents of a package, based on FAAAA); *Wagman v. Fed. Exp. Corp.*, 1995 WL 81686, at *2 (7th Cir. Feb. 17, 1995) (affirming dismissal on preemption grounds of constructive fraud and other claims based on allegations of misleading advertising arising from late delivery of plaintiff's package).

Accordingly, **dismissal** of Plaintiff's state law **tort claim** is the appropriate remedy where those claims are preempted by federal law, such as the FAAAA. *See Brown v. United Airlines, Inc.*, 720 F.3d 60 (1st Cir. 2013) (affirming dismissal where tort claims were preempted by ADA); *Bower v. Egyptair Airlines Co.*, 731 F.3d 85 (1st Cir. 2013) (affirming dismissal by way of summary judgment where claims were preempted by ADA); *Wise Recycling, LLC v. M2 Logistics*, 943 F. Supp. 2d 700, 706 (N.D. Tex. 2013) (dismissing negligence claims that were preempted by FAAAA); *State ex rel. Grupp v. DHL Exp. (USA), Inc.*, 970 N.E.2d 391 (N.Y. App. Ct. 2012) (affirming dismissal where plaintiff's claims were preempted by federal law); *Mudd-Lyman Sales & Serv. Corp. v. United Parcel Serv., Inc.*, 236 F. Supp. 2d 907 (N.D. Ill. 2002) (granting summary

judgment and dismissing plaintiff's state law claims which were preempted by FAAAA); *Beyer v. Acme Truck Line, Inc.*, 802 So. 2d 798 (La. Ct. App. 2001) (affirming dismissal of plaintiff's lawsuit with prejudice where state law claims, including intentional interference with business relationships, unjust enrichment, and fraud, were preempted by FAAAA and ADA); *Rockwell*, 1999 WL 33100089 at *4 (dismissing plaintiff's complaint because claims preempted by FAAAA); *Vieira*, 1996 WL 478686 at *1 (granting summary judgment and dismissing plaintiff's claims which were preempted). Plaintiff's Motion seeking reconsideration should be denied.

C. The Arguments Set Forth in Plaintiff's Motion Are Without Merit

1. Plaintiff's Claims Are Directly "Related to" the "Service" UPS Provides

Plaintiff argues that his claims against Defendants – negligent untimely delivery of a package containing medication – are not “related to” UPS's services. On its face, this argument is illogical. Delivery of packages is the quintessential, core service UPS provides to its customers. Plaintiff's allegations, therefore, are directly “related to” UPS's delivery of packages.

Plaintiff fails to cite any new facts⁴ or any new legal precedent to support his illogical argument. Rather, Plaintiff simply cherry-picks various limited quotations from numerous cases, which notably, were decided long before the September 28, 2015, hearing and frankly, are inapposite. For instance, *Gaines Motor Lines, Inc. v. Klaussner Furniture, Indus.* involved a **breach of contract** claim, which is not present here; the Supreme Court, in *Dan's City Used Cars, Inc. v. Pelkey*, evaluated a specific, limited issue – whether state law claims regarding the disposal of towed vehicles by a towing company were “related to” the “transportation of property” or the

⁴ According to Plaintiff's Complaint, the only operative pleading, Plaintiff has set forth a claim for negligence and negligent entrustment against Defendants. Both of these tort claims are based solely upon Plaintiff's allegation that Defendants negligently delivered a package containing Plaintiff's medication untimely. Plaintiff's newly asserted suggestion that he also has a claim against UPS for holding his medication without justification is not supported by the pleadings. Nor does it support any separate cognizable tort claim.

“service” of a motor carrier within the meaning of FAAAA, thus, distinguishing it factually from the present case; the district court in *Sanchez v. Lasership, Inc.*, was tasked with evaluating a specific state regulation of wage and independent contractor laws; and *Smith v. Comair* involved a plaintiff’s claims for breach of contract, false imprisonment, and intentional infliction of emotional distress based on an airline’s refusal to permit him to board his flight. None of the cases cited by Plaintiff involved a state tort law claim involving an allegation of negligent delivery of a package, which so clearly relates to the core service provided by a motor carrier.

The only case cited which Plaintiff even suggests as being factually similar to the underlying claims, *Huertas v. United Parcel Serv. Inc.*,⁵ is factually distinguishable insofar as it does not involve negligent delivery of a package. In determining that the alleged negligent conduct was not preempted, the New York lower court stressed that “the facts of this case deal with the manner in which a delivery person stacked packages,” *Huertas*, 974 N.Y.S.2d 758, 762 (N.Y. Sup. Ct. 2013), not the delivery of the packages themselves. Relying primarily upon the limited holding in *Huertas*, Plaintiff argues that this Court’s ruling “is not supported by the law” (Mot. at 4) and that FAAAA does not apply to common law negligence claims (*id.* at 7). That was a trip and fall case where the incident occurred long after the delivery. It is very different than here: an allegation of untimely delivery of a package, the very core service of UPS. Additionally, Plaintiff fails to address the volume of cases cited by Defendants which demonstrate that courts throughout the country have specifically applied the FAAAA (or ADA) preemption to common law negligence claims, specifically to negligent delivery claims similar to Plaintiff’s claims here.⁶

⁵ Notably, *Huertas* have never been cited or relied upon by any other court with respect to preemption under the FAAAA.

⁶ See case law cited in previous Argument section, as well as all case law cited in Defendants’ Brief in Support of their Motion to Dismiss, which Defendants incorporate as if set forth fully herein.

For example, in *Rockwell v. United Parcel Serv., Inc.*, where the plaintiff's complaint sought to impose liability on UPS and its delivery person for plaintiff's personal injuries, the United States District Court for the District of Vermont held that plaintiff's claims for **negligent delivery protocol**, which "**go to the heart of the services that UPS provides,**" were preempted by the FAAAA. No. 2:99 CV 57, 1999 WL 33100089, at *2 (D.Vt. July 7, 1999) (emphasis added). Similarly, the United States District Court for the Northern District of California, in *Vieira v. United Parcel Service, Inc.*, held that plaintiff's negligence and conversion claim arising from a **lost UPS package related to the "service" provided by UPS** and was therefore preempted by the FAAAA. No. C-95-04697, 1996 WL 478686 at *1 (N.D. Cal. Aug 5, 1996) (emphasis added).

Plaintiff's tort claim is based squarely upon UPS's service – that Defendants allegedly failed to deliver a package on time. All of the averments set forth in the Complaint are based upon that allegedly negligent conduct. (See Compl. generally). Therefore, as this Court properly ruled, Plaintiff's Complaint, which is based entirely upon the allegedly negligent untimely delivery of a package and "related to" the primary "service" that UPS provides, is preempted in its entirety by the FAAAA and must be dismissed with prejudice. See 49 U.S.C. § 14501(c)(1).

2. Congress Intended for the FAAAA's Preemption to Have Broad Scope

As noted above, Plaintiff's argument regarding Congressional intent of the FAAAA is **identical** to the argument previously set forth in Plaintiff's Opposition (see Pl. Memo. in Opp. at 4-7),⁷ as well as Defendants' briefing in support of their Motion to Dismiss (see Defs. Brief in Support of Mot. to Dismiss at 13-17). The issue was argued before this Court and, thus, contemplated by this Court in its February 6, 2015 ruling. Plaintiff's argument should not be reconsidered.

⁷ See footnote 3, *supra*.

That said, even if the Court were to reconsider this identical issue, as argued in Defendants' Brief in Support of their Motion to Dismiss, which Defendants incorporate as if set forth fully herein, Plaintiff's argument continues to overlook the clear, plain language set forth in the FAAAA. See *Deerskin Trading Post, Inc. v. United Parcel Serv. of Am., Inc.*, 972 F. Supp. 665, 667 (N.D. Ga. 1997) ("the Court's analysis begins, and usually ends, with the language of the statute."). Section 14501(c)(1) clearly provides that no state shall "enact or enforce any law, regulation, or any other provision having the force and effect of law related to a price, route, or **service** of any motor carrier." 49 U.S.C. § 14501(c)(1) (emphasis added). "Congress intended for the preemption provision of the FAAAA—which employs identical language to the preemption provision of the ADA—to be **broad in scope** and that the FAAAA's preemption provision precludes any state enforcement action **having a connection with or reference to** any price, route, or **service** of any motor carrier, motor private carrier, or air carrier." *Deerskin Trading Post, Inc.*, 972 F. Supp. at 668 (emphasis added). Pursuant to the plain language of the FAAAA, as adopted by Congress, Plaintiff's claims, which have a direct connection and relation to UPS's services, are preempted.

3. The FAAAA's Household Goods Exception is Inapplicable

As explained above, Plaintiff's argument regarding the FAAAA's household goods exception is **identical** to the argument previously raised in Plaintiff's Opposition (see Pl. Memo. in Opp. at 7), which Defendants opposed in their brief (see Defs. Brief in Support of Mot. to Dismiss at 17-18). Plaintiff's argument was argued before and rejected by this Court in its February 2, 2016 Order which held that Plaintiff's claims were preempted by the FAAAA and not exempted from preemption. This argument should not be reconsidered.

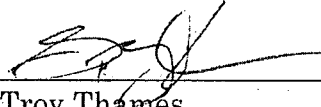
Plaintiff tellingly cites **no case law** in support of his position that the limited household goods exception applies here. None exists. The FAAAA provides for an exemption whereby states are not prohibited from enacting legislation which regulates intrastate transportation of household goods. *See* 49 U.S.C. § 14501(c)(2). As argued in Defendants' Brief in Support of their Motion to Dismiss, which Defendants incorporate as if set forth fully herein, Plaintiff's claims do not arise out of any South Carolina law regarding the regulation of intrastate transportation of household goods; rather, they arise from South Carolina's **tort law**. Defendants are seeking dismissal of Plaintiff's tort law claims. The FAAAA's household goods exemption is, therefore, inapplicable and Plaintiff's argument suggesting otherwise is without merit.

V. CONCLUSION

For the reasons set forth above, Defendants United Parcel Service, Inc. and Rick Fogle respectfully request that this Court deny Plaintiff's Motion to Reconsider, Alter or Amend this Court's February 2, 2016 Order dismissing Plaintiff's Complaint.

(Signature Page to Follow)

WILLSON JONES CARTER & BAXLEY, PA



G. Troy Thames
421 Wando Park Blvd., Ste. 100
Mt. Pleasant, South Carolina 29464
Telephone: 843-284-0832
Facsimile: 843-284-1081
Mt. Pleasant, South Carolina
E-mail: tthames@wilaw.net

AND

Ryan R. Corkery
Ansa Assunacao, LLP
1600 JFK Blvd.
Four Penn Center, suite 900
Philadelphia, PA 19103
Telephone: 267-528-0733
Facsimile: 267-528-0726
Ryan.corkery@ansalaw.com

March 21, 2016

**ATTORNEYS FOR UNITED PARCEL
SERVICE, INC.**

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

COURT OF COMMON PLEAS

ORIGINAL

Rebecca McCutcheon

Plaintiff,

vs.

United Parcel Service, Inc.,
and John Doe,

Defendant,

C/A #: 2014-CP-38-01164

MOTIONS

Courtland James Eggleston,

Plaintiff,

vs.

United Parcel Service, Inc.,

Defendant.

C/A #: 2015-CP-38-00354

Orangeburg County Courthouse
September 28, 2015

BEFORE:

HONORABLE MAITE MURPHY, PRESIDING JUDGE.

APPEARANCES:

G. Troy Thames, Esquire
Ryan R. Corkery, Esquire
Attorney for UPS

Shane M. Burroughs, Esquire
Attorney for Plaintiffs

TAKEN BY MELISSA R. SINGLETARY
CERTIFIED VERBATIM REPORTER

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Certificate of Service

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(There were no Exhibits marked during this Motion)

Courtland James Eggleston vs. United Parcel Ser. et al. 3

1 The Court: All right. Gentlemen.

2 Mr. Thames: Your Honor, this --- I'm Troy Thames for
3 Defendant, UPS, along with my co-counsel Ryan Corkery,
4 who has been Pro hav in these case or this case. Just as
5 a matter of housekeeping, the case that is on the docket
6 is Courtland James Eggleston vs. UPS. That's the 2015-
7 354 case. There's another matter, Your Honor, that we've
8 been trying to get these two heard at the same time. The
9 other case is called Rebecca McCutcheon vs. UPS, and that
10 case number is 2014-CP-38-1164. We have --- they are
11 companion cases. Ms. McCutcheon is the spouse of Mr.
12 Eggleston. It all arises out of the same set of facts and
13 circumstances. UPS has filed motions to dismiss in both
14 cases. We have filed almost identical memorandums in
15 support of both and we would like to make one argument
16 for both cases today with the consent of Plaintiffs who
17 I've spoke with several times and understand they agree
18 with doing that just to kind of help speed things along.
19 For the purposes of the Motion, Ryan is going to be
20 arguing for UPS.

21 The Court: Is that correct, counsel?

22 Mr. Burroughs: Yes, Your Honor. No objection to
23 that.

24 The Court: All right. You may proceed.

25 Mr. Corkery: Good afternoon, Your Honor.

1 The Court: Good afternoon.

2 Mr. Corkery: May it please the court. Again, my
3 name is Ryan Corkery here on behalf of UPS and one of its
4 drivers by the name of Rick Fogle. Your Honor, as
5 attorney Thames alluded to, these are two companion
6 personal injury actions. They sound in tort law. They,
7 in their essence or for the negligent delivery. Our
8 failure to delivery a package on time by UPS. The
9 allegations is that UPS delivered a particular package,
10 in this instance, medication too late, which allegedly
11 led to personal injury sustained by the Plaintiff husband
12 and loss of consortium by his wife. The gist of why we
13 are here today. We are moving to dismiss under 12(b)(6)
14 and 12(b)(1). The issue is federal preemption. There is
15 a particular federal statute commonly known as F4A and
16 I'll go into a little more shortly. But known as F4A and
17 it stands for the proposition that these sorts of
18 untimely delivery claims made by a motor carrier are
19 preempted by federal statute. They are not permitted.
20 That is why we are here under 12(b)(6) for the failure to
21 state facts to constitute a cause of action and/or under
22 12(b)(1) for subject matter jurisdiction. We are seeking
23 an Order dismissing the case with prejudice.

24 Now, the lineage of this particular statute which
25 concerns motor carriers such as UPS is linked to the

1 airline industry. And a little bit of context here, I
2 think helps to kind of place it into perspective and give
3 a little bit of background. It's linked to the airline
4 industry. Back in the late '70's, Congress through the
5 Commerce clause deregulated the airline industry and they
6 did so through something called the ADA, the Airline
7 Deregulation Act. And what that did was preempt a lot of
8 everyday or garden variety tort actions.. Negligent
9 infliction of emotional distress. The failure to land on
10 time on your particular flight. Boarding disputes or
11 refusal to board a particular passenger as well as a
12 whole host of state economic regulatory claims. They
13 wiped all those away. The motor carrier industry wanted
14 the same for them as much as anything to put the motor
15 carrier industry on equal footing with the airline
16 industry. UPS was only a motor carrier, fed ex was both
17 an airline and motor carrier at the time. The process
18 begin in 1980 and concluded in 1994 with the F4A.

19 Now, what is that? That's the Federal Aviation
20 Administration Authorization Act really intended to apply
21 to motor carriers. Now, what it did is it again said we
22 are going to preempt all sorts of enforcement actions at
23 the state level against motor carriers. It's codified at
24 49USC14501C1. That's the preemption provision itself. It
25 is importantly we're dealing with express preemption and

1 it is very, very broad. The United States Supreme Court
2 has looked at a line of cases under the ADA and
3 determined that that preemption clause mirrors the F4A,
4 where they mirror one another. Justice Ginsburg has a
5 line of cases under ADA including American Airlines
6 versus Warling. All these are set out in our brief as
7 well as a Dan's City Towing, which applies to motor
8 carriers, more recently, I think it's a 2013 opinion.
9 The elements importantly here squarely aligned with the
10 facts as alleged by plaintiffs in their complaint. And
11 that is it prohibits a State from enforcing a law that is
12 related to a service of a motor carrier in connection
13 with the transport of property. It deals importantly
14 with intrastate commerce or intrastate transportation.
15 It's sister statute is the Carmack Amendment, which we've
16 also brought up in our brief but as plead it's an
17 interesting delivery here. It's somewhat of a straight
18 forward application. We're dealing with the State of
19 South Carolina enforcing it's tort law as to the delivery
20 service which is the core service, of course, for UPS.
21 The motor carrier UPS and it's the transport of property.
22 In this incidence medication within intrastate. That
23 sets up, again, a very broad straightforward express
24 preemption provision and application here.

25 There's a couple of cases. There's three cases.

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1 There's a host that we lay out, Your Honor, in our
2 briefing. Three are particularly important here. They
3 are all UPS cases. Unfortunately, we don't have any
4 South Carolina State or Federal decisions on this topic
5 but there has been three instances among many involving
6 UPS specifically. Three Federal Court judges have looked
7 at this very preemption and the sort of argument that UPS
8 is making here and in each instance they found that the
9 tort law claim was preempted. One comes out of the
10 District of Vermont. That's the Rockwell case. The
11 second comes out of the northern district of Georgia.
12 That's the Deerskin Trading Post case; and the third,
13 comes out of the northern California. That's the Vieira,
14 V-I-e-I-r-a, case. They stand for the proposition that
15 all sorts of tort claims relating to the poor service of
16 UPS are flatly preempted. One, the plaintiff was
17 challenging UPS's inspection protocols. UPS unknowingly
18 delivered a pipe bomb, what turned out to a pipe bomb in
19 a package and when the Plaintiff opened it, one died and
20 one was badly injured. The Court, the Federal Judge
21 there said this is preempted under this particular
22 provision. Another one was a lost package altogether.
23 That tort action was preempted. Again, relating to UPS's
24 poor service delivery. Another one related to pricing,
25 which is also another one of the categories that a action

1 can relate to or preempted.

2 These are the cases --- May I approach, Your Honor.

3 The Court: Yes, sir. Do you happen to have an extra
4 copy of your Motion, as well?

5 Mr. Corkery: I believe so, yes, Your Honor.

6 Mr. Thames: Your Honor, do you need the motion or
7 the memo or ...

8 The Court: Do you have you both?

9 Mr. Thames: I have everything.

10 The Court: Thank you.

11 Mr. Corkery: To address briefly, Your Honor, a
12 couple of arguments that Plaintiffs make from their
13 perspective. They point to some background information on
14 congressional intent here. As to the F4A. It's true.
15 In part, Congress was contemplating the tort of pure
16 economic regulation. Pure state statutes and regulations.
17 But time and again the United States Supreme Court has
18 said that's not where it ends. That was a part of it but
19 a lot of the spirit of it was to knock out sort of garden
20 variety, again, tort claims that relate to the very
21 service here. The policy spirit of it is, for instance,
22 if we are to allow these sorts of late delivery claims,
23 which is what this is, to survive, the motor carrier
24 becomes bogged down in the same way that the airline
25 industry as to late arrivals or boarding claims. UPS,

1 for instance, may deliver on the order of 13 million
2 packages per day. If the courts are to entertain and to
3 permit those source of claims to survive despite the
4 preemptive statute it's going open up the flood gates to
5 all source of litigation every time a package is either
6 delivered late or it's lost and that's really the spirit
7 behind the statute in the first place. Thank you.

8 The Court: Mr. Burroughs.

9 Mr. Burroughs: Thank you, Your Honor. Your Honor, I
10 have a copy of our memorandum in opposition to
11 defendant's motion. We've outlined in our memorandum
12 some specifics particularly as he mentioned with regard
13 to the congressional intent. I think that that is
14 extremely important because when you look at the F4A, one
15 thing you will notice is that the F4A, while it does
16 include certain preemptions, it does not include any
17 provision that addresses personal injury claims and I
18 think that is a very, very important thing here because
19 we're not just talking about the failure of a package to
20 be delivered, we're talking about the end result of a
21 package not being delivered timely.

22 This case stems from a package that never made it to
23 the plaintiff and his wife is bringing a loss of
24 consortium claim. But the plaintiff suffered severe and
25 debilitating personal injuries as a result of the

1 defendant's failure to deliver the package. One thing
2 that I do want to point out is even in the complaint, the
3 complaint itself, doesn't limit the allegations to merely
4 the defendant's service. One thing we point out is an
5 allegation that they failed to properly hire, train,
6 supervise and oversee personnel. Failed to provide its
7 drivers with accurate address information, negligently
8 retained drivers who have shown a proclivity for
9 carelessly failing to deliver parcels. So, this is not
10 simply an issue of service. And it also sounds in state
11 tort law for personal injury.

12 I want to hand up, Your Honor, a case and as he
13 mentioned this would be what I would refer to as a case
14 of first impression here in South Carolina. This
15 particular case addresses all three of the cases
16 referenced by the defendant and I think it provides a lot
17 of guidance in how, Your Honor, should approach
18 evaluating the issues presented here today. In my
19 pronunciation of this, I'll just say it's Cooney, don't
20 quote me on that pronunciation, but it does a very good
21 job of breaking down this issue because in Indiana this
22 was a case of first impression up there and this opinion
23 here is a court of appeals opinion. The citation for the
24 records is 868NE2d870. This is a June 2007 opinion.
25 Initially, the Court goes through and it lays out the

1 explanation of Rockwell, which you've heard. It also
2 goes on to discuss the Vieira case which the defendants
3 discussed and the Deerskin case. And one thing that this
4 court did is it pointed out some key points that
5 distinguished the issues in that case from the three
6 cited by UPS, the Defendant in the Cooney case. One
7 thing that they pointed out and this is the view that
8 that court took is that we are of the view that the
9 purpose of the F4A was to address lost or damage to
10 property as opposed to personal injury. And that is the
11 view that we asking, Your Honor, to take in this case.
12 They gone on to say moreover Congress did not provide for
13 any remedy in the statute to those who suffer a personal
14 injury following the negligent delivery of a package.
15 That is essentially what we have here. The Court goes on
16 to point out a number of other things and I think if you
17 read it and actually take time to digest what is in the
18 opinion it is very instructive for this matter.

19 I want to read you a particular quote of importance
20 and as you know we are in South Carolina and South
21 Carolina is a State that prides itself on it's State
22 power specifically it's separation from the Federal
23 Government. The Court says, "Unitiës argument", in this
24 case, the Defendant, ignores the presumption against
25 preemption. And we pointed out in our brief that there

1 is a presumption against preemption. The Court goes on to
2 say that plaintiffs claims are common law based personal
3 injury actions, which concern health and safety an area
4 traditionally regulated by the States pursuant to the
5 police powers. That is the same exact situation that we
6 are in on behalf of the plaintiffs. Imposing liability
7 or opening up the defendant to liability for their
8 actions and omissions in this case isn't targeted at
9 services. It isn't targeted at the items that the F4A
10 seeks to preempt. It's targeted at health and safety and
11 because of the actions of the defendants and their
12 omissions, it's out position that the plaintiff was
13 injured, his health was drastically damaged and it's a
14 safety thing. I also want to go on to point out that
15 again the court sites the plaintiffs claims nonetheless
16 sound in common law based personal injury action which
17 concerns the health and safety in an area that is
18 traditionally regulated by the States under their police
19 powers.

20 In evaluating whether or not the plaintiffs claims
21 should be preempted. In the Cooney case, the court went
22 on to conclude that they could not say that state tort
23 remedies that already existed at common law must be
24 negated in light of such preemption statues. Moreover,
25 there is no showing that a remedy for a personal injury

1 of this type significantly impacts Federal Deregulation
2 in this area. Also, the Court goes on to say the F4A
3 does not contain a remedy for personal injury claims. I
4 say that again. The F4A does not contain a remedy for
5 personal injury claims. There is no way, in my position,
6 that congress of the United States could have intended to
7 preempt each and every aspect of anything regarding a
8 service carrier. That would leave plaintiffs, like my
9 clients, with absolutely no redress for injuries they
10 have sustained at the hands of the defendants.

11 And, of course, the same argument would apply to
12 both the loss of consortium claim and Mr. Eggleston's
13 personal injury claim.

14 The Court: Any reply.

15 Mr. Corkery: Please, briefly, Your Honor. As I
16 jotted them down about six quick points. First, taking
17 them chronologically as I remember them. Plaintiff's
18 counsel referenced some of the damages claims involved
19 here. The outcome and the damages the personal injury
20 involved or otherwise are wholly irrelevant to our pure
21 legal analysis here. This is a pure federal preemption
22 issue. The outcome there is not a single case, that I'm
23 aware of, where they have contemplated what the resulted
24 injury was under either the ADA or the F4A. Those sorts
25 of things can be relevant at a damages trial. They are

1 wholly irrelevant here. Secondly, counsel alludes to the
2 corporate negligence claims essentially as they are
3 called supervision entrustment those sorts of things
4 within the complaint. They are all rooted though in the
5 underlying conduct which is the untimely delivery itself.
6 You can't have those without the untimely delivery claim,
7 the underlying conduct. Those are derivative of that
8 claim. They are not going to be standing alone as
9 counsel suggest. Third, the Cooney case, I'm familiar
10 with it a bit. I will note that this is the first time
11 that counsel has ever brought this case before the court
12 or provided us with any notice of it. It was not
13 cited within either of their briefings. It catches us a
14 little bit by surprise. With that said there are some
15 things that stand out. It is a, first of all, a minority
16 opinion coming out of the Indiana Appellate Court first.
17 Secondly, it is a distinguishable from our instance here.
18 That instance related to where a package was left and
19 some passage of time occurred and then the personal
20 injury plaintiff, I believe, tripped over it and the
21 court notes and stresses right up front and even in the
22 note section provided in the printed opinion from counsel
23 that it related to a subsequent occurrence down the road.
24 It's essentially a causal chain type argument. This is
25 something that happens far afterward. It's not relating

1 to as courts have referred to it including the Supreme
2 Court, the heart of the service that a motor carrier has
3 provided. The timely delivery in and of itself or the
4 "core service" as it's been referenced to by Federal
5 Courts. So, Cooney comes to us a little bit late in the
6 game but it's distinguishable. Fourth, counsel
7 referenced some safety issues and I think he's alluding
8 to State Police Powers which, of course, are reserved to
9 the States. He is correct. However this case deals in no
10 way with a State Police Power. In deed, Congress has
11 carved out those sorts of State Police Powers that
12 counsel references. Those relate to over the road
13 accidents. No one is saying here today that this statute
14 preempts motor vehicle accidents involving motor
15 carriers. In deed, to date it does not. It's also
16 specifically carved out by statute instances where
17 State's can regulate the hazardous materials. The weights
18 of the vehicles and enforce financial responsibility laws
19 at the State level. Those are the sorts of State powers
20 that have been reserved and congress has acknowledged
21 that. No where does that come into play here. We're not
22 dealing with a safety issue. The pure legal allegation
23 here is that the package was late and that is squarely
24 related to a service under 14 501 ©) (1). Five, counsel
25 refers to a presumption here, in general, against

1 preemption. Conceptually that is true. However, it is
2 negated here where we have the United States Supreme
3 Court and the Dan City Towing case in 2013, a short while
4 ago, specifically saying, again, that this preemption
5 provision under F4A mirrors that under ADA and they have
6 described it time and again as extremely board. On one
7 of the cases you have in your hand, Your Honor, goes into
8 a lot of detail. I believe it's the Rockwell case or the
9 Vieira case. That goes into so much detail about how
10 board this is to be construed. It is expressed
11 preemption and it is board. Absent those two things,
12 counsels concept comes into play. It's just not involved
13 here. Sixth and lastly, counsel suggest that congress
14 has completely wiped away any sort of recourse. That
15 would be available to any customer or recipient. That's
16 incorrect. It's wiped away personal injury claims.
17 However, Justice Ginsburg, time and again in the ADA line
18 of cases including specifically in Morales and American
19 Airlines vs. Whirlwinds, has said that what is reserved,
20 however, are breached contract claims. Preemption doesn't
21 touch those. That is an independent contract by two
22 contracting parties. It is not going to wipe out a
23 breach of contract claim. Same applies for F4A under the
24 same interpreted United States Supreme Court case law.
25 So, a recipient or customer does have a recourse but what

1 Congress has done again is rule out the personal injury
2 claims. Again, so not as to inundate the motor carrier
3 industry or the airline industry with the sort of
4 personal injury claims being brought here today. Thank
5 you.

6 The Court: Gentlemen, obviously I have some
7 interesting reading ahead of me. I will take the matter
8 under advisement and notify you.

9 Mr. Corkery: Thank you.

10 Mr. Burroughs: Thank you, Your Honor.

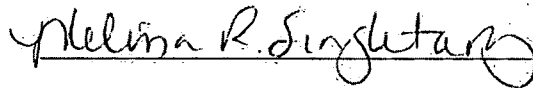
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CERTIFICATE

This is to certify that the transcript in the matter of Courtland James Eggleston vs. United Parcel Service, Inc., and Rick Fogle and Rebecca McCutcheon vs. United Parcel Service, Inc. Vs. John Doe, consisting of Seventeen (17) pages is a true and correct transcript; said hearing was reported by the method of Stenomask with Backup.

I further certify that I am not employed by any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 16th day of July, 2016.



Melissa R. Singletary
Certified Court Reporter

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
The Honorable Maite Murphy

Appellate Case No. 2016-000984

Cortland James Eggleston, ... Appellant,

v.

United Parcel Service, Inc., and Rick Fogle, ... Defendants,

Of Whom United Parcel Service, Inc., is the Respondent,

and

Rebecca McCutcheon, ... Appellant,

v.

United Parcel Service, Inc., and John Doe, ... Defendants,

Of Whom United Parcel Service, Inc., is the Respondent.

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted,

Kathleen C. Barnes

Kathleen Chewning Barnes, SC Bar No. 78854
Barnes Law Firm, LLC
P.O. Box 897
Hampton, SC 29924
803-943-4529

April 10, 2017

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APR 11 2017

SC Court of Appeals

LANIER & BURROUGHS, LLC
Shane M. Burroughs, S.C. Bar No. 70346
Post Office Drawer 2789
Orangeburg, SC 29116
(803) 268-9800

Justin T. Bamberg, SC Bar No. 100337
BAMBERG LEGAL, LLC
2331 Main Highway
Bamberg, SC 29003
(803) 956-5088
Attorneys for Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
The Honorable Maite Murphy

Appellate Case No. 2016-000984

RECEIVED

APR 11 2017

SC Court of Appeals

Cortland James Eggleston, ... Appellant,

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Of Whom United Parcel Service, Inc., is the Respondent,

and

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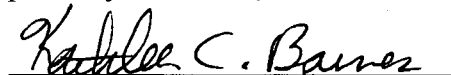
Of Whom United Parcel Service, Inc., is the Respondent.

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies that the Final Brief of Appellants and Final Reply
Brief of Appellants comply with Rule 211(b), SCACR.

Respectfully submitted,

April 10, 2017



Kathleen Chewning Barnes, SC Bar No. 78854
Barnes Law Firm, LLC
P.O. Box 897
Hampton, SC 29924
803-943-4529

LANIER & BURROUGHS, LLC
Shane M. Burroughs, S.C. Bar No. 70346
Post Office Drawer 2789
Orangeburg, SC 29116
(803) 268-9800

Justin T. Bamberg, SC Bar No. 100337
BAMBERG LEGAL, LLC
2331 Main Highway
Bamberg, SC 29003
(803) 956-5088
Attorneys for Appellants