THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC 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.

FINAL REPLY BRIEF

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FACTS

Appellants rely on and incorporate the statement of facts in its Initial Brief and reply below only to correct and clarify certain misstatements by UPS in its facts section.

UPS inaccurately states that Appellants did not plead certain matters, namely that UPS wrongfully withheld the medication and it knew Mr. Eggleston could suffer severe health consequences without the medication. To clarify the matter, Appellants quote from the Complaints as follows:

> "[T]here 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." (R. p. 20, ¶ 11; p. 14, ¶ 6).
>
> "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." (R. p. 20, ¶ 8).
>
> "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." (R. p. 20, ¶ 12).
>
> "That both the VA Hospital and the Plaintiff . . . informed UPS that it had delivered medication to Plaintiff's residence in the past." (R. p. 21, ¶ 14).
>
> "That the aforementioned damage to the Plaintiff was a direct and proximate result of Defendant UPS . . . In taking over thirteen (13) days to deliver said medication; . . . In such other and further particulars that the evidence in trial may show." (R. pp. 21-22, ¶ 18; pp. 15-16, ¶ 15).

Appellants clearly allege that, at least by April 11, UPS had the medication at issue and did not deliver it. Therefore, UPS wrongfully withheld the medication, i.e. without any basis and in the face of prior deliveries to Appellants' home. Appellants also clearly allege UPS knew Mr. Eggleston could suffer health consequences without the medication. They allege UPS spoke to both Plaintiff and the VA Hospital "regarding the delivery of said thyroid medication to the Plaintiff." (R. p. 20, ¶ 11; p. 14, ¶ 6). It is layman's knowledge that, in the absence of a prescribed medication, a person may suffer health consequences.

Finally, UPS inaccurately represents that Appellants did not oppose UPS's contention that the causes of action at issue relate to a "service" within the meaning of the Federal Aviation Administration Authorization Act ("FAAAA").[1] (Br. of Resp't at pp. 5-7). Appellants address this argument in detail in the argument section II below.

ARGUMENT

I. THE COURT MAY CONSIDER ALL DESIGNATED DOCUMENTS

UPS asks this Court to not consider a document that Appellants presented to the lower court, without objection, by attaching it as an exhibit to Appellants' memorandum in opposition to UPS's motion to dismiss. (Br. of Resp't p. 4). The Court should reject this request because the document was properly presented to the lower court and UPS failed to object to it below and did not file a motion to strike it from the record on appeal in this case. The Court may properly consider the document.

Appellants attached as an exhibit to its memorandum in opposition to UPS's motion to dismiss a document from the VA regarding the status of the prescription shipment and the VA's communications with UPS to get it to deliver the prescription. (R. pp. 49-54, 63-68). UPS did not object to the document in the lower court either by way of a motion or at the argument on the motions to dismiss. Thus, the issue was not raised below and is not preserved for this Court's review.[2] UPS cannot now complain about the document, after it was presented to and considered by the lower court without objection.

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[1] 49 U.S.C. § 14501(c).

[2] When a respondent raises an issue on appeal that it did not present to the lower court, "the appellate court likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal." *I'On, L.L.C. v. Mt. Pleasant*, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000). The Supreme Court has "emphasize[d] that all parties should raise all necessary arguments to the lower court and attempt to obtain a ruling." *Id.* at 422-23, 526 S.E.2d at 725.

UPS moved to dismiss, in part, under Rule 12(b)(1), SCRCP, for the alleged lack of subject matter jurisdiction. (R. pp. 26, 30, 152). 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); *see also Simons v. Longbranch Farms, Inc.*, 345 S.C. 277, 547 S.E.2d 500 (Ct. App. 2001) (trial court held evidentiary hearing on jurisdictional facts). Therefore, UPS's assertion that the exhibit is improper because it is "outside the pleadings" is meritless.

II. THE ISSUE AS TO WHETHER APPELLANTS' CLAIMS RELATE TO A UPS SERVICE IS PROPERLY PRESERVED, NOT WAIVED, AND SHOULD BE CONSIDERED BY THIS COURT

The issue of whether Appellants' claims are related to a UPS service within the meaning of the FAAAA is properly preserved for this Court's consideration.

"'Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.'" *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (quoting *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)). "At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge." *Herron*, 395 S.C. at 465, 719 S.E.2d at 642. Appellants raised their arguments on the related-to-service issue to the lower court, and the court ruled on the issue. Therefore, it is properly preserved for this Court's review.

UPS filed a motion to dismiss based in part on an alleged lack of subject matter jurisdiction. (R. pp. 24-28, 30). The entire basis for UPS's jurisdictional argument is that "Plaintiff's tort claim is based squarely upon UPS's service – that UPS failed to deliver a package on time." (R. p. 34) (stating also that the Complaint "is based entirely upon the allegedly negligent untimely delivery of a package and related to the primary 'service' that UPS provides"). UPS's argument as to

jurisdiction is that Appellants' claims are based upon its delivery service and, therefore, are related to a service within the meaning of 49 U.S.C. § 14501(c)(1). That is what UPS wrote in the proposed order ultimately signed by the lower court. *See* R. pp. 96-102, 6, 9 ("These claims are based solely upon the specific service the 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 related directly to the 'service' provided by UPS, a motor carrier, are preempted."). Accordingly, an issue before the lower court was the interpretation of the breadth of the phrase "related to" and its application to the facts of this case.

Appellants specifically raised the issue argued on appeal by raising it in opposition to UPS's assertion that the claims are based upon or related to a UPS service. Appellants cited to case law stating that "the ban on enacting or enforcing any law relating to rates, routes, or services is most sensibly read . . . to mean states may not seek to impose their own public policies or theories of competition or regulation."[3] (R. pp. 46, 60 (internal quotation marks omitted)). Appellants argued that their actions did not solely involve what UPS alleged to be a service, namely delivery of packages. "[T]he complaint itself, doesn't limit the allegations to merely the defendant's service. One thing we point out is an allegation that they failed to properly hire, train, supervise and oversee personnel. Failed to provide its drivers with accurate address information, negligently retained drivers who have shown a proclivity for carelessly failing to deliver parcels." (R. p. 158

[3] UPS implies that Appellants act improperly by citing case law on appeal that they did not cite below. (Br. of Resp't p. 15). However, UPS cites no law, and Appellants are aware of none, that prohibits a party from citing to additional case law on appeal that it did not cite below. Indeed, such a bizarre rule is contrary to the Appellate Court Rules and could negatively affect the law by discouraging parties from bringing to the court's attention all relevant authority. Rule 208(b)(7), SCACR ("When pertinent and significant authorities come to the attention of a party after his initial brief(s) have been served and filed, the party shall promptly advise the clerk of the appellate court, by letter, with a copy to all counsel, setting forth the citations").

lns. 2-9). Appellants argued the FAAAA does not preempt everything remotely related to a carrier—"There is no way . . . that [C]ongress of the United States could have intended to preempt each and every aspect of anything regarding a service carrier." (R. p. 161 lns. 5-8). Appellants argued to the lower court, and consistently argue on appeal, that their personal injury claims do not relate to UPS's services because they do not "target[] state economic regulation" or otherwise "regulate competition" or affect "costs" or "efficiency." (R. pp. 45-46, 59-60; Br. of App. pp. 10-11). Appellants also argued that "[i]mposing liability or opening up the defendant to liability for their actions and omissions in this case ***isn't targeted at services***." (R. p. 160 lns. 6-9) (emphasis added).

Finally, after the lower court issued a ruling that the actions related to a UPS service, Appellants filed a motion to reconsider the issue. (R. pp. 105-09, 114-18). UPS incorrectly asserted that Appellants did not previously contest the issue. The lower court issued an order denying Appellants' motion and made no comment or ruling on UPS's argument that any of Appellants' grounds for reconsideration were improper. (R. pp. 11-12).

Appellants directly raised the issue that their claims are not related to a service and the lower court ruled on that issue. This satisfies "the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Therefore, the issue is preserved.

III. APPELLANTS' STATE LAW NEGLIGENCE CLAIMS DO NOT RELATE TO A UPS SERVICE WITHIN THE MEANING OF THE FAAAA

UPS's argument on this issue is overly simplistic. UPS argues that it delivers packages and, because this case involves delivery of a package, it is related to a service and preempted under the FAAAA. The FAAAA preemption analysis is not as simple as UPS would have this Court

believe. Rather, UPS is required but failed to prove that Appellants' claims "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).

Significantly, UPS fails to respond to Appellants' argument that it presented no evidence or argument that Appellants' claims "are sufficiently 'related to' UPS 'services' such that they bind UPS to a particular service or interfere with competitive market forces." (Br. of App. pp. 10-11). There is no such evidence to present.[4]

"[T]he party claiming preemption bears the burden of proving it." *Eldridge v. City of Greenwood*, 331 S.C. 398, 411, 503 S.E.2d 191, 197 (Ct. App. 1998). UPS's assertion that a claim relates to a service is insufficient to prove preemption applies under § 14501(c)(1). Rather, a defendant asserting preemption must show that the alleged "effect on [its] prices, routes, and services ***rises to the requisite level*** for FAAAA preemption." *Mass. Delivery Ass'n v. Coakley*, 769 F.3d 11, 23 (1st Cir. 2014) (emphasis added) (stating that, on remand, the district court must determine if a state statute governing the classification of couriers for delivery services rises to the "requisite level"). That a claim may "implicate" a service only brings a defendant "halfway home." *Tobin v. Fed. Express Corp.*, 775 F.3d 448, 454 (1st Cir. 2014). Preemption requires that "the challenged law must have a forbidden significant effect on prices, routes, or services." *Id.* at

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[4] *See Godfrey v. Oakland Port Servs. Corp.*, 230 Cal. App. 4th 1267, 1278-279 (Cal. App. 1st Dist. 2014) (finding a defendant failed to meet its burden of demonstrating preemption because it "presented no evidence of any imposed conditions or costs, let alone rising to the level of creating a significant impact upon its prices. No showing was made regarding the number of routes, costs of additional drivers, tractors, trailers, or other such factors that [defendant] could have claimed it would face should it have to comply with state law. To the contrary, [defendant] has made no showing of interference with competitive market forces within the industry" (internal quotation marks omitted)).

454 (internal quotation marks omitted). Appellants' claims do not have a forbidden significant effect on a UPS service.

UPS unsuccessfully attempts to distinguish the cases cited by Appellants to detract from the fact that it cannot cite a single case which says that every negligence case involving the delivery of a package is preempted by the FAAAA—what UPS urges this Court to hold. *See Tobin*, 775 F.3d at 456 (stating the preemption "framework calls for an ***individualized assessment of the facts underlying each case*** to determine whether a particular state-law claim will have a forbidden effect" (emphasis added)). To the contrary, one case cited by UPS says that "the Supreme Court has consistently found that the ADA preempts all tort claims relating to airline prices, routes, or services, except for those that fall into the realm of personal injury." *Wine & Spirits Wholesalers v. Net Contents*, 10 F. Supp. 2d 84, 87 (D. Mass. 1998). The cases cited by UPS are distinguishable in that they do not involve personal injury negligence claims involving the negligent withholding and failure to deliver a package. *See, e.g.*, *Tobin*, 775 F.3d at 449 (involving allegations that the defendant misdelivered a package of illegal drugs to plaintiff); *Wine & Spirits Wholesalers*, 10 F. Supp. 2d at 85 (involving allegations that defendant tortiously interfered with plaintiff's business relations by illegally shipping alcohol into Massachusetts); *Deerskin Trading Post, Inc. v. United Parcel Serv. Of Am., Inc.*, 972 F. Supp. 665, 666 (N.D. Ga. 1997) (regarding allegations that UPS "overcharged Plaintiff" for its "services in shipping packages to Plaintiff's customers"); *Vieira v. UPS*, 1996 U.S. Dist. Lexis 11223, *1-2, 1996 WL 478686 (N.D. Cal. 1996) (seeking property damage for a lost package of two gold rings); *Wagman v. Fed. Express Corp.*, 1995 U.S. App. Lexis 3111, *2-3 (4th Cir. 1995) (involving allegation that defendant's misleading advertising of next day delivery caused plaintiffs to miss the statute of limitations in filing a complaint).

UPS cites to one case—*Rockwell v. UPS*, 1999 U.S. Dist. Lexis 22036, 1999 WL 33100089 (D. Vt. 1999)—that seeks recovery for personal injury. However, it is easily distinguishable from the allegations and absence of proof of a significant economic effect in this case. In *Rockwell*, UPS delivered a package to the plaintiff that contained a pipe bomb that killed the plaintiff's son and seriously injured her. *Id.* at *1. The court found the plaintiff's claims related to a service and pricing based on the specific allegations of the complaint. Specifically, the plaintiff alleged "UPS should have used a heightened and elaborate inspection process as part of its delivery service." *Id.* at *8. The court found these specific allegations would have a forbidden significant economic impact on UPS and, therefore, were preempted.

> [The allegations] would necessarily require that UPS, at a minimum and as stated in Plaintiff's Complaint, employ the services of various and sundry technological devices such as metal detectors, X-ray machines, as well as trained dogs. Furthermore, UPS would not only be placed in a position where it must protect its receiving customers from potential explosives sent by its shipping customers, but Plaintiff seeks to impose a hodgepodge of state laws which would mandate various obligations upon UPS to protect the general public from products or objects that *may* be hazardous and life threatening. This would place UPS, and other carriers, in a position of segregating, sorting, screening and organizing its billions of packages based on their point of origin, where they are destined, over which states the packages might fly and through which airports the packages could foreseeably be transferred, diverted or otherwise handled. . . . [I]mposition of such a duty would necessarily impact directly upon UPS's services and pricing . . . .

Id. at *8-9 (internal quotation marks and citations omitted). There are no specific allegations or evidence in this case that Appellants' claims impact UPS's services in any manner, let alone at the level of impact present in *Rockwell*. Therefore, it is factually distinguishable. Further, it is significant that the court did not simply say that the case involved delivery of a package and, therefore, was preempted. Rather, the court did what Appellants urge this Court to do, look at the specific allegations of the case to determine if it will have a forbidden significant economic impact on UPS's services.

Neither party located a case that is factually on point with this case, i.e., a case in which the allegations are that a carrier had possession of a package that it knew contained a prescription sent by a hospital to a patient to whom the carrier previously delivered prescription packages but withheld the package without any basis for over a week, resulting in severe health consequences to the patient. The absence of a case factually on all fours with this case means only that this Court should follow preemption law by conducting "an individualized assessment of the facts underlying [the] case to determine whether [the] particular state-law claim will have a forbidden effect." *Tobin*, 775 F.3d at 456. To avoid repetition, Appellants refer the Court to the arguments in its initial brief that there is no such forbidden effect in this case.

IV. CONGRESS DID NOT INTEND TO PREEMPT APPELLANTS' COMMON LAW NEGLIGENCE CLAIMS IN THIS CASE

UPS fails to respond to Appellants' argument that Congress, in enacting the FAAAA, did not intend to displace state tort law claims but, rather, intended to preempt states laws with an economic regulatory effect. *See* Br. of App. pp. 12-14 and the cases cited therein. For brevity, Appellants refer the Court back to its Initial Brief and respond only to specific assertions made by UPS.

UPS cites to *Tobin* for its new argument that Appellants' claims will affect its services. (Br. of Resp't pp. 21-22). As an initial matter, UPS did not make any such argument to the lower court and the lower court did not make a ruling on it, as UPS failed to ask the court to do so or include any such ruling in its proposed orders. *See I'On, L.L.C. v. Mt. Pleasant*, 338 S.C. 406, 422-23, 526 S.E.2d 716, 725 (2000) ("[A]ll parties should raise all necessary arguments to the lower court and attempt to obtain a ruling."); R. pp. 6, 9 (finding only that Appellants' claims are "based" on UPS's delivery of packages). Should the Court consider the argument, UPS misreads *Tobin*.

The *Tobin* court expressly provided for a claim such as Appellants. After noting that numerous courts have found common-law personal injury claims not preempted, the court stated: "Although claims arising out of careless driving or infelicitously placed packages ***may not impose any greater duty*** on an airline than that which exists for any other firm, ***the common-law claims here are of a different genre***." *Tobin*, 775 F.3d at 455-56 (emphasis added). It further explained that, in the *Tobin* case, "[a] damages award could result in fundamental changes to FedEx's services – much more so than a damages award for a driving mishap or a slip-and-fall." *Id.* at 456. In *Tobin*, the plaintiff alleged FedEx misdelivered and mislabeled the package sent to her and wrongfully disclosed her address. *Id.* at 450. This case does not involve allegations of misdelivery, mislabeling, or wrongful disclosure of the plaintiff's personal information. Rather, Appellants allege UPS wrongfully withheld a package when it should have delivered it. A jury finding that UPS should have delivered the package would not affect its competitive market forces or alter how UPS operates its business. Thus, Congress did not intend to preempt Appellant's claims.

V. APPELLANTS' HOUSEHOLD GOODS EXCEPTION ARGUMENT CONTAINS CITATION TO STATUTORY AND CASE LAW AND, THEREFORE, IS NOT CONCLUSORY

Appellants' household goods exception argument is not abandoned but properly supported by authority and argument. The argument contains quotations from and citations to two applicable statutes, we well as quotations from and citations to two cases. (Br. of App. pp. 14-15). Statutes and case law are authority. *See cf.* Jean Hoefer Toal et al., Appellate Practice in South Carolina 432 (3d ed., South Carolina Bar 2016) ("[T]he appellate court will decline to consider an argument where there is no citation to authority"). The argument falls under a separate argument heading and issue on appeal, and is not conclusory. Rather, the argument states the applicable law—statutes—and cites the facts that place this case squarely within the statutes.

In short, UPS's abandonment argument is meritless. The fallacy of its argument is evidenced by the fact that UPS's own argument on the merits that contains only one case citation. There is little law interpreting or discussing in detail 49 U.S.C. § 13102(10). However, that does not mean that an argument regarding the statute is conclusory because it does not contain discussion of an unspecified number of cases, as argued by UPS.

The argument is properly before this Court and provides sufficient material for this Court to consider and rule on the argument.

VI. THE HOUSEHOLD GOODS EXCEPTION APPLIES IN THIS CASE

It is undisputed that the prescription at issue was a "personal effect[] and property used or to be used in a dwelling" and its intrastate transportation was "arranged and paid for by another party" besides the householder. 49 U.S.C. § 13102(10). Therefore, this case involves the intrastate transportation of a household good. UPS does not dispute this in its brief. (Br. of Resp't p. 24). Rather, it argues, without authority, that the household goods exception applies only to a law directly regulating the intrastate transportation of a household good. This is contrary to the plain language of 49 U.S.C. § 14501(c)(2)(B):

> Matters not covered. Paragraph (1) [the preemption provision]—
>
> . . . (B) does not apply to the intrastate transportation of household goods . . . .

§ 14501(c)(2)(B). The statute does not say that the preemption provision does not apply to a law regulating the intrastate transportation of household goods. It says the paragraph does not apply to "***the intrastate transportation*** of household goods." *Id.* This makes sense given that Congress enacted the FAAAA as an amendment to the Interstate Commerce Act and under ***interstate*** commerce concerns. *See City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424, 429 (2002) ("The Interstate Commerce Act, as amended by the Federal Aviation Administration Authorization Act of 1994 . . . ."); *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1780

(2013) ("Concerned that state regulation impeded the free flow of trade, traffic, and transportation of interstate commerce, Congress resolved to displace certain aspects of the State regulatory process." (internal quotation marks omitted)).

Based on the plain language of the statute, the household goods exception is applicable to this case. Therefore, Appellants' claims are not preempted.

CONCLUSION

Appellants request the Court reverse the lower court's Orders, find that these actions are not preempted, and remand the cases to the trial court to proceed as pled.

Respectfully submitted,

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