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.

APPELLANTS' FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. Whether the lower court erred in finding Appellants' claims relate to UPS's delivery service and, therefore, are preempted by the Federal Aviation Administration Authorization Act ("FAAAA")?

II. Whether the lower court's ruling is contrary to the Congressional intent of the FAAAA preemption provision where Appellants' claims have no effect on UPS's services or competitive market forces?

III. Whether Appellants' claims fall within the intrastate "household goods" exception to FAAAA preemption?

STATEMENT OF THE CASE

This consolidated appeal arises out of severe personal injuries suffered by Appellant Cortland James Eggleston when he did not receive a thyroid medication shipped by the VA Hospital via Respondent United Parcel Service, Inc. ("UPS"). UPS wrongfully withheld the medication despite its knowledge that Mr. Eggleston would suffer severe health consequences without it, made misstatements to the Appellants regarding UPS's ability to find their house and deliver the medication, and failed to deliver the medication in a reasonable time.

Appellant Rebecca McCutcheon, Mr. Eggleston's wife, filed a Complaint on September 18, 2014, against UPS and John Doe. (R. pp. 13-18). The Complaint asserts causes of action for negligence, negligent entrustment, and loss of consortium. (R. pp. 15-17, ¶¶ 14-23). On December 15, 2014, UPS filed a motion to dismiss. (R. pp. 24-25). On April 1, 2015, Appellant Eggleston filed a Complaint against UPS and Rick Fogle, a UPS employee. (R. pp. 19-23). The Complaint asserts causes of action for negligence and negligent entrustment. (R. pp. 21-23, ¶¶ 17-23). On May 4, 2015, UPS filed a motion to dismiss. (R. pp. 26-27).

Appellants filed Memoranda in Opposition to UPS's motions to dismiss. (R. pp. 41-68). On September 28, 2015, the Honorable Maite Murphy held a hearing on the motions to dismiss. (R. pp. 149, 151). On February 22, 2016, the Court filed an Order Granting Defendant's Motion

to Dismiss in both cases. (R. pp. 5-10). On March 3, 2016, Appellants filed Rule 59(e), SCRCP, Motions to Reconsider, Alter, or Amend the lower court's Orders. (R. pp. 103-120). On April 6, 2016, the lower court filed Orders denying Appellants' Rule 59(e) motions. (R. pp. 11-12). Appellants timely filed Notices of Appeal, and this Court granted the parties' consent motion to consolidate the appeals. (R. pp. 1-4).

FACTS

Appellants are married and live in rural Eutawville, South Carolina. (R. pp. 19, 50). Mr. Eggleston is a veteran who receives medical care, including prescription medication, through the VA Hospital in Charleston, South Carolina. (R. p. 20, ¶¶ 5-6; p. 14, ¶¶ 5-7). "For years", Mr. Eggleston received his medications from the VA Hospital by UPS delivery to his home. (R. p. 20, ¶¶ 7-8; p. 14, ¶ 7). At issue in this case is a thyroid medication that Mr. Eggleston needed to control his thyroid condition. Without the medication, Mr. Eggleston can suffer severe and life-threatening consequences, including congestive heart failure. (R. p. 20, ¶ 5).

On April 11, 2013, Appellants expected to receive a refill of the thyroid medication from the VA Hospital via UPS. (R. p. 14, ¶ 5; p. 20, ¶ 9). Four days later, on April 15, the medication had not arrived. As a result, Mr. Eggleston suffered a thyroid storm that included "seizures, congestive heart failure, extremely elevated blood pressure, hospitalization, and surgical intervention." (R. p. 21, ¶ 15; p. 13, ¶ 8). Mr. Eggleston underwent surgery on April 18, 2013. (R. pp. 42, 56).

The VA Hospital and UPS communicated numerous times between April 11, 2013, and April 15, 2013, regarding the thyroid medication. (R. p. 20, ¶ 11; p. 14, ¶ 6). Appellants and UPS also communicated numerous times regarding the medication. (R. p. 20, ¶ 13; p. 14, ¶¶ 11-12). Despite many previous UPS deliveries of Mr. Eggleston's medication to his home, UPS informed Appellants that their home address did not exist or could not be located. (R. p. 20, ¶ 13; p. 14, ¶

11). Both the VA Hospital and Appellants informed UPS of the address to no avail. (R. p. 21, ¶ 15; p. 14, ¶ 12). Respondent Rick Fogle is a "substitute driver/delivery person" for UPS who failed to deliver Mr. Eggleston's thyroid medication. (R. pp. 19-21, ¶¶ 3-4, 12, 14-15). In fact, the medication did not arrive for over thirteen days. (R. pp. 42, 56).

On April 15, 2013, UPS was "holding" the prescription package, despite its knowledge of Appellants' address, its prior delivery to that address, and its knowledge that Mr. Eggleston would suffer severe injuries without the medication. (R. pp. 49-54, 63-68). A note entered into the VA's system on April 15, 2013, states Eggleston was "in the middle of a thyroid crisis", UPS "states package being held because a correct street name is needed", the VA spoke with "Joseph @ UPS who contacted local driver to make contact with patient and redeliver today." (R. pp. 54, 68). Appellants did not have transportation or additional funds to get the prescription from another source. *Id.*

As a result of UPS's wrongful withholding of the medication, failure to locate Appellants' home as it had done in the past, and failure to deliver the medication, Mr. Eggleston suffered a "thyroid storm, causing seizures, congestive heart failure, extremely elevated blood pressure, hospitalization and surgical intervention." (R. p. 21, ¶ 15).

McCutcheon filed an action for negligence, negligent entrustment, and loss of consortium in September 2014, and Eggleston filed an action for negligence and negligent entrustment in April 2015. The actions do not seek recovery of loss or damage to property. UPS filed motions to dismiss the Complaints under Rules 12(b)(1) and (b)(6), SCRCP, based on a preemption provision in the Federal Aviation Administration Authorization Act ("FAAAA"), 49 U.S.C. § 14501(c). (R.

pp. 24-27).[1] UPS argued that Appellants' actions are based solely on UPS's failure to timely deliver the medication and such delivery is a service of a motor carrier with respect to the transportation of property that is preempted.

Appellants submitted Memoranda in Opposition to Defendant's Motions to Dismiss, arguing, among other things, that the FAAAA is aimed at laws related to a price, route, or service that have an economic effect, Congress did not intend to preempt a common law claim for physical injury such as the one presented in this case, and the household goods exception to preemption is applicable. (R. pp. 41-68). On September 28, 2015, the lower court held a hearing on UPS's motions. At the hearing, Appellants directly contested UPS's argument that their state law claims relate to a delivery service provided by UPS. (R. p. 158 lns. 1-20, p. 160 lns. 6-9). Appellants stated "the complaint itself, doesn't limit the allegations to merely the defendant's service." (R. p. 158 lns. 2-4). Rather, the Complaints allege, among other things, that UPS 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. So, this is not simply an issue of service." (R. p. 158 lns. 5-10).

The lower court granted UPS's motions in almost identical orders. Specifically, the court ruled that Appellants' negligence actions are based on delivery, which relates directly to a service UPS provides. (R. pp. 5-10). Therefore, the court found the FAAAA preempted the state law negligence claims and dismissed the cases under Rules 12(b)(1) and (b)(6), SCRCP. *Id.* Appellants timely filed Rule 59(e), SCRCP, motions to reconsider arguing (1) the state law tort claims are not

[1] UPS's motions also listed the Carmack Amendment as a basis for dismissal. However, the Carmack Amendment applies to interstate shipments, which are not at issue in this case. The lower court found, and the parties do not dispute, that the shipment from Charleston to Eutawville "constitutes an intrastate shipment." (R. pp. 6, 9).

related to a UPS service within the meaning of the FAAAA, (2) a finding of 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. (R. pp. 105, 114). The lower court denied Appellants' Rule 59(e) motions. (R. pp. 11-12).

Appellants now appeal from the Orders granting UPS's motions to dismiss and the Orders denying Appellants' Rule 59(e) motions. (R. pp. 1-4).

STANDARD OF REVIEW

"When reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court." *Doe v. Bishop of Charleston*, 407 S.C. 128, 134, 754 S.E.2d 494, 497 (2014). "If the facts alleged and inferences reasonably deducible from the allegations set forth in the complaint, viewed in the light most favorable to the plaintiff, entitle him to relief on any theory, dismissal under Rule 12(b)(6) is improper." *Id.* at 134, 754 S.E.2d at 497.

"The question of subject matter jurisdiction is a question of law for the court. [The Court is] free to decide questions of law with no deference to the [circuit] court." *Hammer v. Hammer*, 399 S.C. 100, 104-05, 730 S.E.2d 874, 876 (Ct. App. 2012) (internal quotation marks and citation omitted). In deciding a Rule 12(b)(1), SCRCP, motion, "the court may consider, affidavits or other evidence necessary to determine the question of jurisdiction." *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 104, 431 S.E.2d 631, 632 (Ct. App. 1993).

ARGUMENT

At issue in this appeal is whether the FAAAA preempts this State's general negligence law under the facts of this case. "[C]ourts should begin with a presumption against preemption." *Priester v. Cromer*, 388 S.C. 425, 428, 697 S.E.2d 567, 569 (2010) (vacated on other grounds by

Priester v. Ford Motor Co., 562 U.S. 1254 (2011)) (citing *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)).

"The principal purpose of the FAAAA was to prevent States from undermining federal deregulation of interstate trucking through a patchwork of state regulations." *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 644 (9th Cir. 2014) (internal quotation marks omitted). The FAAAA preemption provision states, as to "motor carriers of property" such as UPS:

> (1) 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 . . . or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.
>
> (2) Matters not covered. Paragraph (1)--
>
> > (A) shall not restrict . . . 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.

49 U.S.C. § 14501(c)(1)-(2). UPS argued that this case involves only a service, not a price or route, of a motor carrier. (R. pp. 33-34, 82-83). The lower court's ruling is based only a finding that the claims relate to a service. (R. pp. 6, 9).

Because the preemption provision in the FAAAA is almost identical to the preemption provision in the Airline Deregulation Act[2] ("ADA"), courts to look to decisions interpreting the ADA for guidance in interpreting and applying the FAAAA. *See Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008) ("[T]he Congress that wrote the [FAAAA] language before us

[2] The ADA preemption provision states in relevant part, "Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 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 an air carrier that may provide air transportation under this subpart." 49 U.S.C. § 41713.

copied the language of the air-carrier pre-emption provision of the Airline Deregulation Act of 1978."). Further, there is no South Carolina state law and very little Fourth Circuit law regarding the FAAAA. Therefore, Appellants cite to and discuss case law from other jurisdictions when necessary. *Ellis by Ellis v. Oliver*, 335 S.C. 106, 111, 515 S.E.2d 268, 271 (Ct. App. 1999) ("When there is no South Carolina case directly on point, our courts may look to other jurisdictions to determine if the issue has been decided and if the decision is persuasive authority.").

For any one of the reasons discussed below, the Court should reverse the decision of the lower court and find Appellants' common law negligence claims are not preempted.

I. Appellants' Claims Do Not Relate to a Service Provided by UPS

The FAAAA does not preempt an action unless it involves "a law, regulation, or other provision having the force and effect of law related to a price, route, or service" of a motor carrier "with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). In this case, the lower court erred in finding Appellants' claims "related to" a delivery "service" provided by UPS and, therefore, are subject to preemption under the FAAAA.

The lower court erred in finding Appellants' "claims are based solely upon the specific service that UPS provides—delivery of packages." (R. pp. 6, 9, 46, 60). The allegations in Appellants' Complaints, taken as true under Rule 12(b)(6), include that UPS, with direct knowledge that Mr. Eggleston needed his medication to avoid a severe physical injury, wrongfully withheld the medication, failed to timely deliver the medication, incorrectly told Appellants their address did not exist or could not be located even though it delivered medications to their home for years, failed to locate Appellants' home, failed to properly train and supervise personnel, failed to provide drivers with accurate information, and negligently retained drivers it knew failed to deliver packages. (R. pp. 13-23). These allegations are not based solely on delivery and do not involve a UPS "service." (R. p. 160 lns. 6-10).

In a similar common law negligence action involving personal injury, the New York Supreme Court held the claims did not involve a "service." In *Huertas v. United Parcel Serv., Inc.*, 974 N.Y.S.2d 758 (N.Y. App. Div. 2013), the plaintiff brought suit to recover for personal injuries sustained when she tripped over boxes stacked by UPS when it delivered them to a store where the plaintiff worked. *Id.* at 758-59. UPS argued that placement of the boxes by its delivery person constituted a "service" under the FAAAA. *Id.* at 760. The Court disagreed and held "the manner in which a delivery person stacked packages . . . is not related to a 'service' governed by the ADA or the FAAAA." *Id.* at 762. The Court explained that the "manner and location where the UPS delivery person stacked boxes in a store . . . are too remote from any state 'regulation' or the 'service' . . . . It was not the intent of Congress to preclude such common law negligence claims when it enacted the ADA or the FAAAA." *Id.* at 762-63. Just as the manner and location of stacking boxes is not a UPS "service", the wrongful withholding of Mr. Eggleston's medication and misstatements to Appellants regarding UPS's ability to locate their home, with knowledge that Mr. Eggleston needed the medication to avoid a serious physical injury, are not a UPS "service" within the meaning of the FAAAA.

Appellants' claims are also not "related to" any such "service." The United States Supreme Court interpreted the phrase "related to" as "having a connection with, or reference to, [] rates, routes, or services." *Morales v. TWA*, 504 U.S. 374, 384 (1992) (internal quotation marks omitted). However, the Supreme Court has "cautioned that § 14501(c)(1) does not preempt state law affecting carrier prices, routes, and services in only a tenuous, remote, or peripheral . . . manner." *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1778 (2013) (internal quotation marks

omitted) (citing *Morales*, 504 U.S. at 390).[3] "[T]he breadth of the words 'related to' does not mean the sky is the limit." *Dan's City Used Cars*, 133 S. Ct. at 1778; *see also Gaines Motor Lines, Inc. v. Klaussner Furniture Indus.*, 734 F.3d 296, 307 (4th Cir. 2013) ("The broad preemptive scope of the phrase 'related to,' however, is not without limits.").

This Court recognized that the limitations of the phrase "relate to." *Medical Park OB/GYN, P.A. v. Ragin*, 321 S.C. 139, 467 S.E.2d 261 (Ct. App. 1996) (finding claim not preempted by ERISA). It held "state actions which affect employee benefit plans in too tenuous, remote or peripheral a manner do not relate to the plan," and claims for negligence and misrepresentation concerning advice about an ERISA[4] plan did not sufficiently relate to the regulation or administration of an ERISA plan to trigger preemption.[5] *Id.* at 144-45, 467 S.E.2d at 264-65.

"To determine whether a claim has a connection with, or reference to [] prices, routes, or services, we must look at the facts underlying the specific claim." *Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998). In *Smith*, an airline refused to permit the plaintiff to board a second flight after a layover because no one asked for his photo identification prior to the first flight and he left his identification in his vehicle. *Id.* at 256. The Fourth Circuit held the plaintiff's false

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[3] *See also Am. Airlines v. Wolens*, 513 U.S. 219, 224 (1995) ("*Morales* also left room for state actions too tenuous, remote, or peripheral . . . . to have pre-emptive effect." (internal quotation marks omitted)).

[4] The ERISA preemption provision states in part: "Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter ***relate to*** any employee benefit plan." 29 U.S.C. § 1144(a) (emphasis added).

[5] This Court cited to *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) ("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." (internal quotation marks and citation omitted)).

imprisonment and intentional infliction of emotional distress claims 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 a passenger" that "too tenuously relates or is unnecessary to an airline's services." *Id.* at 259. The same result is warranted in this case.

The facts underlying Appellants' claims are that UPS knew Mr. Eggleston needed his medication to avoid serious physical injuries and knew that it previously delivered the medication to his home. Despite this knowledge, UPS wrongfully withheld the medication, misstated its ability to locate Appellants' home, and delivered it in an unreasonably late time frame.[6] This is outrageous conduct that is too tenuously or remotely related to a UPS service to be subject to preemption under § 14501(c)(1). Appellants' claims do not involve the loss or damage to the medication. Rather, they involve the personal injuries suffered as a result of UPS's negligent conduct.

The inquiry of whether a claim relates to a service further requires an analysis of the effect of the alleged preempted state law on the defendant motor carrier. "[T]he 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) (holding the FAAAA preempted a state statute requiring carriers to convert independent contractors to employees). UPS made no argument and presented no evidence that Appellants' claims are sufficiently "related to" UPS "services" such that they bind UPS to a

[6] *See Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 538, 773 S.E.2d 144, 146 (2015) ("[T]he two theories of vicarious liability and corporate liability can coexist in a lawsuit.").

particular service or interfere with competitive market forces within the industry. *See Cole v. S.C. Elec. & Gas, Inc.*, 355 S.C. 183, 195, 584 S.E.2d 405, 412 (Ct. App. 2003) ("It is well established that a party pleading an affirmative defense has the burden of proving it.").

"[T]he state laws whose effect is forbidden under federal law are those with a ***significant impact*** on carrier rates, routes, or services." *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 375 (2008) (internal quotation marks omitted) (emphasis added). In this case there is no argument or evidence that Appellants' claims have a "forbidden" "significant impact" on any UPS service.

This Court should reverse the lower court's finding that Appellants' claims relate to UPS's delivery service and, instead, find the claims are not subject to preemption.

II. Congress Did Not Intend to Preempt Appellants' Common Law Negligence Claims That Have No Affect, Economic or Otherwise, on UPS's Services or Competitiveness

This Court may also reverse the lower court's orders as inconsistent with Congress's purpose in enacting the FAAAA. "The target at which [the FAAAA preemption provision] 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, Inc. v. Pelkey*, 133 S. Ct. 1769, 1780 (2013) (internal quotation marks omitted) (holding FAAAA did not preempt state law claims against a towing company for post-towing disposal of a vehicle). "The Conference Report on the Federal Aviation Administration Authorization Act of 1994 observed that 'state ***economic*** regulation of motor carrier operations . . . is a huge problem for national and regional carriers attempting to conduct a standard way of doing business.'"[7] *City*

[7] This is in accord with the purpose of the ADA. *See Charas v. TWA*, 160 F.3d 1259, 1261 (9th Cir. 1998) ("[I]n enacting the ADA, Congress intended to preempt only state laws and lawsuits that would adversely affect the ***economic*** deregulation of the airlines and the forces of competition within the airline industry. Congress did not intend to preempt passengers' run-of-the-mill personal injury claims." (emphasis added)); *Id.* at 1265 ("Nothing in the [ADA] itself, or its legislative history, indicates that Congress had a clear and manifest purpose to displace state tort

of Columbus v. Ours Garage & Wrecker Serv., 536 U.S. 424, 440 (2002) (emphasis added) (quoting H. R. Conf. Rep. No. 103-677, p. 87 (1994)).

Appellants' claims do not affect competitive market forces for UPS and do not involve state economic regulation of motor carrier operations, and UPS made neither argument below. Rather, the claims in this case are common law negligence actions that involve law equally applicable to all persons and entities.

In *Dilts v. Penske Logistics, LLC*, 769 F.3d 367 (9th Cir. 2014), the Court of Appeals for the Ninth Circuit ruled that state laws requiring employers to provide certain meal and rest breaks "are not the sorts of laws 'related to' . . . services that Congress intended to preempt" because they "do not set prices, mandate or prohibit certain routes, or tell motor carriers what services they may or may not provide, either directly or indirectly." *Id.* at 647. The same logic is applicable here. South Carolina negligence law at issue is not the sort of law Congress intended to preempt, especially in a case such as this one that does not challenge a specific business practice of UPS or relate to any regulation of UPS's business or services.[8] This action will have no effect on the services UPS provides and is not the type of action Congress intended to preempt with the FAAAA.

The Supreme Court's opinion in *Dan's City Used Cars* also supports this argument. In that case, the plaintiff sued under state consumer protection and negligence laws for a towing company's post-towing disposal of his car to a third-party. 133 S. Ct. at 1777. The Supreme Court

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law in actions that do not affect deregulation in more than a peripheral manner." (internal citation and quotation marks omitted)).

[8] "The FAAAA was promulgated in order to protect the competitive market forces from state regulation." *Thompson v. UFP Eastern Div., Inc.*, 2012 U.S. Dist. Lexis 120129, 2012 WL 3686064, *8 (D.S.C. 2012).

held the FAAAA did not preempt the plaintiff's claims because "[t]he 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 . . . freeze into place services that carriers might prefer to discontinue in the future." *Id.* at 1780 (internal quotation marks omitted). In this case, the state negligence law at issue does not require UPS to offer services not available in the market or freeze into place services it might want to discontinue in the future.

Finally, that Congress did not intend to preempt all state law claims for personal injury is demonstrated by case law and the exception to preemption that a State may still "regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization." § 14501(c)(2)(A). A complete preemption of state tort law would have rendered insurance of a motor carrier unnecessary. *See Hodges v. Delta Airlines*, 44 F.3d 334, 338 (5th Cir. 1995) (noting that Congress did not intend for the ADA preemption provision to preempt all state claims for personal injury because air carriers are still "required to maintain insurance" that covers personal injuries). Numerous courts have held that state law personal injury actions are not preempted. *See, e.g.*, *Hodges*, 44 F.3d at 336 ("[F]ederal preemption of state laws, even certain common law actions 'related to services' of an air carrier, does not displace state tort actions for personal physical injuries or property damage caused by the operation and maintenance of aircraft."); *Margolis v. United Airlines, Inc.*, 811 F. Supp. 318, 321, 324 (E.D. Mich. 1993) (holding negligence and loss of consortium claims arising out of injury when luggage fell from overhead bin were not preempted by the ADA because "state common law claim based on negligence and the standard of reasonable care does not purport to regulate the services that the air carriers provide to their customers" and "Congress did not intend to preempt state common law actions for personal injury based on the negligence of the airline or its

employees"); *Kuehne v. UPS*, 868 N.E.2d 870, 872, 877 (Ind. Ct. App. 2007) (holding negligence and loss of consortium claims arising out of tripping over package left at the doorstep were not preempted where "there is no showing that a remedy for a personal injury of this type significantly impacts federal deregulation in this area" and "the FAAAA does not contain a remedy for personal injury claims").[9]

Appellants' actions, which do not involve economic regulations and have no effect on market forces or UPS's services, are simply not the kind of claims Congress intended to preempt with the FAAAA. Therefore, the Court should reverse the lower court's rulings and find the claims are not subject to preemption.

III. Appellants' Claims Satisfy the "Household Goods" Exception to Preemption

Even if the Court finds that Appellants' claims involve a law related to a UPS service that Congress intended to preempt, it should still reverse the lower court because Appellants' claims fall within an express exception to preemption.

Section 14501(c)(2)(B) states that the preemption provision, "Paragraph (1)-- . . . does not apply to the intrastate transportation of household goods." 49 U.S.C. § 14501(c)(2)(B).

> 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

[9] In *Am. Airlines v. Wolens*, 513 U.S. 219 (1995), the Supreme Court specifically noted that the airline seeking a preemption ruling "does not urge that the ADA preempts personal injury claims relating to airline operations" and cited "acknowledgment by counsel for petitioner that 'safety claims', for example, a negligence claim arising out of a plane crash, 'would generally not be preempted.'" 513 U.S. at 231 n.7.

(B) arranged and paid for by another party.

49 U.S.C. § 13102(10). "[T]he general preemption rule, § 14501(c)(1), 'does not apply to the transportation of household goods.'" *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424, 435 (2002) (quoting § 14501(c)(2)(B)). "The Act [FAAAA] exempts certain measures from its preemptive scope, including state laws regulating motor vehicle safety, size, and weight; motor carrier insurance; and ***the intrastate transportation of household goods***." *Dan's City Used Cars*, 133 S. Ct. at 1776 (emphasis added) (citing 49 U.S.C. §§14501(c)(2)(A)-(B)).

Mr. Eggleston's medication is a personal effect and property to be used in his dwelling. It is undisputed that this case involves intrastate transportation. (R. p. 154 ln. 22). Finally, the transportation of the medication was arranged and paid for by another party, specifically the VA hospital. Therefore, the medication falls within the definition of a "household good" that is exempted from preemption under the FAAAA. Applying the presumption against preemption and this applicable exception, this Court should reverse the lower court and find Appellants' claims are not subject to preemption.

CONCLUSION

For the reasons state above, the Court should 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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