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 Services, Inc. and Rick Fogle, ...Defendants,

Of Whom United Parcel Services, 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.

RESPONDENTS' FINAL BRIEF

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STATEMENT OF THE CASE

This consolidated appeal arises out of two state law tort cases which allege that United Parcel Service, Inc. ("UPS") delivered a package late, leading to personal injury: (1) Appellant Rebecca McCutcheon ("McCutcheon") seeks recovery for loss of consortium; and (2) Appellant Cortland James Eggleston ("Eggleston") seeks recovery for personal injury.

McCutcheon, Eggleston's wife, filed her underlying Complaint against Respondents UPS and John Doe, an unknown driver for UPS, on September 18, 2014. (*See* R. pp. 13-18). Therein, McCutcheon asserts a stand-alone loss of consortium claim against Respondents for UPS's alleged failure to timely deliver a package containing medication to Eggleston. (*See* R. pp. 13-18). McCutcheon claims that the late delivery damaged her marital relationship. (R. p. 17 at ¶ 21).

On December 12, 2014, UPS filed a Motion to Dismiss McCutcheon's Complaint on the basis that her state law tort claim based upon the allegation of negligent untimely delivery of a package, was preempted by the FAAAA, codified at 49 U.S.C. §14501(c), and therefore the Complaint should be dismissed for lack of subject matter jurisdiction and/or failure to state a

claim.[1] (*See* R. pp. 24-25 & R. pp. 28-40). On June 15, 2015, McCutcheon filed an Opposition to the Motion to Dismiss. (*See* R. pp. 41-48). Thereafter, on September 10, 2015, UPS filed a Reply in Support of its Motion to Dismiss. (*See* R. pp. 69-76).

Eggleston filed his underlying Complaint against Respondents UPS and UPS driver, Rick Fogle, on April 1, 2015. (*See* R. pp. 19-23). Eggleston asserts a personal injury claim against Respondents for their alleged failure to timely deliver a package containing his thyroid medication, which allegedly led to medical consequences. (*See* R. pp. 19-23). On May 4, 2015, Respondents filed a Motion to Dismiss Eggleston's Complaint, asserting federal preemption. (*See* R. pp. 26-27 & R. pp. 77-95). On June 15, 2015, Eggleston filed an Opposition to the Motion to Dismiss. (*See* R. pp. 55-62).

Both Motions to Dismiss were heard by the Honorable Maite Murphy on September 28, 2015. (*See* R. p. 149). Thereafter, on February 2, 2016, the trial court issued two separate Orders, granting Respondents' Motions and dismissing the McCutcheon and Eggleston Complaints. (*See* R. pp. 5-10). The trial court held that the state law tort actions were preempted by the FAAAA, and consequently dismissed the Complaints with prejudice pursuant to Rules 12(b)(1) and 12(b)(6), SCRCP. (R. pp. 5-10).

On March 3, 2016, Appellants each filed separate (but identical) Rule 59(e), SCRCP, Motions to Reconsider, Alter or Amend the trial court's February 2, 2016 Orders. (*See* R. pp. 103-120). Respondents filed their respective Responses to the Motions to Reconsider on March 21, 2016. (*See* R. pp. 121-148). On March 29, 2016, the trial court issued Orders denying both Motions for Reconsideration. (*See* R. pp. 11-12). Thereafter, on May 4, 2016, Appellants filed

[1] Respondent's Motion also set forth an alternative argument that McCutcheon's claims were preempted by the Carmack Amendment, codified at 49 U.S.C. §14706; however, that argument is not at issue in this appeal.

their Notices of Appeal, appealing the February 2, 2016 and March 29, 2016 Orders of the trial court. (*See* R. pp. 1-4). By way of July 18, 2016 Order, this Court granted the Appellants' Motions to consolidate their cases for purposes of this appeal.

FACTS

A. The Pleadings

In their Initial Brief, Appellants grow the allegations contained in their Complaints, evidenced by their inability to cite to any pleading after setting forth various allegations within their "Facts" section. (*See* Appellants' Initial Brief pp. 2-5). Despite Appellants' efforts to suggest otherwise, the tort action against Respondents is quite simple. The claim is that UPS delivered a package late which led to medical complications. (*See* R. pp. 13-23). The facts pled by Appellants are as follows:

- On or about April 11, 2013, Appellants were expecting a delivery of thyroid medication for Eggleston from the VA Hospital located in Charleston. (R. p. 14 at ¶ 5; R. p. 20 at ¶ 9);
- 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 Eggleston at his home address. (R. p. 14 at ¶¶ 6-7; R. p. 20 at ¶¶ 8, 11);
- There were communications between Eggleston and UPS regarding the delivery and UPS advised that his address could not be located. (R. p. 20 at ¶ 13);
- On or about April 15, 2013, the medication still had not been delivered to Eggleston. (R. p. 14 at ¶ 8);
- UPS informed Appellants that their address could not be located. (R. p. 14 at ¶ 11; R. p. 20 at ¶ 13);
- Respondent(s) negligently failed to timely deliver the medication. (R. p. 14 at ¶ 9);
- As a result of Respondents' failure to timely deliver the medication, Eggleston's thyroid condition worsened, resulting in hospitalization and surgical intervention. (R. p. 21 at ¶ 15);

- McCutcheon claims that as a result of UPS's negligence and the resulting injuries sustained by her husband, she has suffered a loss because of damage to her marital relationship. (R. p. 17 at ¶ 21);

- Eggleston claims that as a result of Respondents' "negligence, recklessness, carelessness, willfulness, wantonness, and gross negligence," he sustained injuries, suffered pain and suffering, incurred medical expenses and was unable to work. (R. p. 21 at ¶ 16).

Appellants never pled that UPS "wrongfully withheld" Eggleston's medication or that Respondents "had knowledge that Mr. Eggleston would suffer severe health consequences without [his medication]," although Appellants state this in their Initial Brief. (*Compare* Appellants' Initial Brief p. 1 *to* R. pp. 13-23). To support these new allegations, Appellants refer to an unidentified exhibit that appears to be a printout from the VA Hospital, which was improperly attached to the Oppositions to the Motions to Dismiss. (*See* Appellants' Initial Brief p. 3; *see also* R. pp. 49 & 63). This document is outside the pleadings and should receive no consideration.

B. Arguments Made to the Trial Court[2]

1. Respondents' Motions to Dismiss

In their Motions to Dismiss, Respondents argued that Appellants' state law claims of negligent untimely delivery of a package are preempted by the FAAAA, and therefore should be dismissed pursuant to Rules 12(b)(1) and 12(b)(6), SCRCP. (*See* R. pp. 31-35). In support of their argument, Respondents set forth the pertinent statutory language (R. p. 31), a brief legislative history (R. pp. 31-32), and an analysis explaining that the FAAAA preempts state laws "related to" a "service" of a motor carrier (R. pp. 32-34). Respondents specifically articulated their position

[2] This Court consolidated the McCutcheon and Eggleston actions for purposes of this appeal. Because all of the legal arguments set forth in the underlying motions are identical in each separate action, for purposes of this Final Brief, Respondents will cite only to the motions filed in the McCutcheon action, with the understanding that the same arguments were also briefed in the corresponding Eggleston filings.

that Appellants' tort claims are directly "related to" UPS's primary "service" – delivering packages – and therefore, are preempted by the FAAAA and subject to dismissal. (R. pp. 32-35).

2. Appellants' Opposition to the Motions to Dismiss and Respondents' Reply

In their Oppositions, Appellants set forth **two arguments only**: (1) "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"; and (2) the FAAAA's "household goods" exception to preemption applies because the subject package contained medication. (R. pp. 44-47). Notably, Appellants **did not oppose** Respondents' contention that Appellants' claims "relate to" a "service" performed by UPS within the meaning of FAAAA preemption. (*See* R. pp. 44-47). In fact, Respondents' Reply specifically points out to the trial court that Appellants "**do not dispute** . . . [that their] state law claims directly relate to the delivery 'service' that UPS provides." (R. p. 69) (emphasis added). Thereafter, Respondents again fully briefed their position, along with supporting case law, that the Complaints allege "negligent untimely delivery of a package, and therefore [are] undisputedly related to the primary 'service' that UPS provides," and therefore, are "preempted in [their] entirety by the FAAAA." (R. p. 70).

As to their Congressional intent argument, Appellants relied primarily on one case, *Omya, Inc. v. Vermont*, 33 F. App'x 581, 583 (2d Cir. 2002), which Respondents distinguished in their Reply. (*See* R. p. 43; R. p. 72). Respondents also replied by setting forth their argument regarding the plain language of the statute and Congress's clear intention for FAAAA preemption to be broad in scope, and therefore, encompassing Appellants' state law claims. (R. pp. 72-73).

Finally, with respect to their "household goods" exception argument, Appellants merely cited the language in the statute referring to the exception. (*See* R. pp. 46-47). No case law

interpreting or applying the exception was cited. (*See* R. pp. 46-47). The Oppositions lacked any legal support for Appellants' position, but rather presented a purely conclusory argument suggesting that because the subject package contained medication, it qualifies as a household good and the preemption exception must apply. (*See* R. pp. 46-47). Respondents addressed this legally insufficient argument in their Reply as well. (*See* R. pp. 74-75).

3. Oral Argument on Motions to Dismiss

Both Motions to Dismiss were heard by the Honorable Maite Murphy on September 28, 2015. (*See* R. p. 149). Respondents' counsel articulated the following pertinent points during the hearing:

- The essence of Appellants' claims is for "negligent delivery" (R. p. 152, lines 6-7);
- FAAAA has broad preemptory scope (R. pp. 153-154);
- FAAAA prohibits a state from "enforcing a law that is related to a service of a motor carrier in connection with the transport of property" (R. p. 154, lines 11-13); and
- There are severe consequences to motor carriers, such as UPS, if these types of negligent untimely delivery cases are permitted to survive (R. p. 156, line 11-p. 157, line 7).

In response, Appellants' trial counsel focused solely on the Congressional intent argument, claiming that because the FAAAA does not include a provision addressing personal injury cases, it is not meant to apply to those types of cases. (R. p. 157, line 9-p. 161, line 13). In doing so, counsel, for the first time, referred to *Kuehne v. UPS*, 868 N.E.2d 870 (Ind. Ct. App. 2007) ("*Kuehne*"), which he argued stands for the proposition that the purpose of the FAAAA was to address property loss claims, not personal injury claims. (R. p. 158, line 12-p. 159, line 18). Notably, *Kuehne* was never cited by Appellants in their Oppositions. (*See* R. pp. 41-48).[3]

[3] The trial court transcript refers to *Kuehne* phonetically as "Cooney."

The specific issue of whether Appellants' state law claims are "related to" UPS's service was never raised by Appellants during the hearing. The term "service" was only mentioned three times (*See* R. p. 158, lines 4 & 10; R. p. 160, line 9) and the key phrase "related to" was never used by Appellants' trial counsel at oral argument (R. pp. 157-161).[4] In response, Respondents' counsel articulated the following arguments for the trial court:

- The damages sought by Appellants are irrelevant to the issue of federal preemption (R. p. 161, line 15-p. 162, line 1);
- All of Appellants' claims are rooted in the underlying alleged conduct which is the alleged untimely delivery (R. p. 162, lines 1-9);
- *Kuehne* was not cited by Appellants in their Oppositions and is factually distinguishable (R. p. 162, line 9-p. 163, line 6);
- FAAAA has broad preemptory scope; (R. p. 163, line 24-p. 164, line 13) and
- Appellants are not without recourse as they could file a breach of contract claim (R. p. 164, line 13-p. 165, line 5).

No additional arguments were made during the hearing on behalf of Appellants.

On February 2, 2016, the trial court granted Respondents' Motions and dismissed both Complaints, holding that Appellants' claims were preempted by the FAAAA. (*See* R. pp. 5-10).

C. Appellants' Motions for Reconsideration

On March 3, 2016, Appellants each filed separate (but identical) Rule 59(e) Motions to Reconsider the trial court's February 2, 2016 Orders. (*See* R. pp. 103-111). Therein, Appellants raised the same two arguments, but untimely added a third: (1) **their 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 medication is excepted from

[4] When reviewing the transcript carefully, it becomes clear that when trial counsel used the word "service" during the hearing, he was actually conceding that his clients' claims were in some ways connected to UPS's delivery service. (R. pp. 157-161).

preemption under the household goods exception. (R. p. 105). Appellants had preserved only the second and third arguments. Appellants waived the first argument because it was never raised. (*See* R. pp. 41-48; R. pp. 157-161). Respondents stressed this in their Responses to the Motions to Reconsider, which were filed on March 21, 2016. (*See* R. pp. 125-126). That argument, as well as the case law cited in support of same,[5] was waived by Appellants, was never presented to the trial court prior to the Rule 59(e) Motion, was not properly preserved for appeal, and should not be considered by this Court.

On March 29, 2016, the trial court issued Orders denying both Motions for Reconsideration. (*See* R. pp. 11-12).

STANDARD OF REVIEW

A. Rules 12(b)(1) and 12(b)(6), SCRCP

"Whether a federal statute preempts state law is a question of law for the court to decide." *Weston v. Kim's Dollar Store*, 385 S.C. 520, 536, 684 S.E.2d 769, 777 (Ct. App. 2009). Similarly, "[t]he question of subject matter jurisdiction is a question of law for the court." *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 104, 431 S.E.2d 631 (Ct. App. 1993) (citation omitted). Questions of law are reviewed de novo. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

In deciding a motion to dismiss pursuant to Rule 12(b)(1), SCRCP, the court considers its "power to hear and determine cases of the general class to which the proceedings in question belong." *Watson v. Watson*, 319 S.C. 92, 93, 460 S.E.2d 394, 395 (1995) (internal quotation marks

[5] The following cases were cited for the first time by Appellants in their Motion for Reconsideration: *Gaines Motor Lines, Inc. v. Klaussner Furniture, Indus.*; *Dan's City Used Cars, Inc. v. Pelkey; New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*; *Sanchez v. Lasership, Inc.*; *Morales v. Trans World Airlines*; *American Airlines, Inc. v. Wolens*; *Rowe v. N.H. Motor Transp. Ass'n*; *Smith v. Comair*; and *Huertas v. United Parcel Serv. Inc.* None of these cases were decided after the September 28, 2016 hearing, and thus, were available to Appellants for inclusion in their Oppositions to the Motions to Dismiss.

omitted). Only "in certain circumstances" may a court consider "affidavits or other evidence" to determine whether jurisdiction exists. *Baird v. Charleston Cnty.*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999) (stating "evidence outside the pleadings may, in certain circumstances, be considered in support of a motion to dismiss based on lack of jurisdiction," such as "when the allegations of the complaint are factually sufficient under Rule 8(a)(1), SCRCP, but do not affirmatively show subject matter jurisdiction").

"In deciding a motion to dismiss pursuant to 12(b)(6), SCRCP, the court should consider only the allegations set forth on the face of the plaintiff's complaint." *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). It is improper for a court to consider matters outside the "the four corners of the complaint," when reviewing a motion in the context of Rule 12(b)(6). *Charleston Cnty. Sch. Dist. v. Harrell*, 393 S.C. 552, 559 & n.4, 713 S.E.2d 604, 608 & n.4 (2011) (holding court erred when it included matters outside complaint in deciding motion to dismiss). While the Court considers the claims in the light most favorable to the plaintiff, "[t]he [c]ourt may sustain the dismissal when the facts alleged in the complaint do not support relief under any theory of law." *Wilkinson v. E. Cooper Cmty. Hosp., Inc.*, 410 S.C. 163, 169-70, 763 S.E.2d 426, 430 (2014) (internal quotations and citations omitted).

B. Rule 59, SCRCP

An order on a Rule 59(e), SCRCP, motion for reconsideration is reviewed under an abuse of discretion standard. *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) (holding circuit court's ruling on a motion for reconsideration will not be disturbed on appeal absent an abuse of discretion); *McNair v. Fairfield Cnty.*, 379 S.C. 462, 466, 665 S.E.2d 830, 832 (Ct. App. 2008) (holding no abuse of discretion in denying Rule 59(e), SCRCP, motion); *Pollard v. Cnty. of Florence*, 314 S.C. 397, 402, 444 S.E.2d 534, 536 (Ct. App. 1994) (reviewing circuit court's ruling

on a Rule 59(e) motion pursuant to an abuse of discretion standard). "An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." *BB & T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006).

ARGUMENT

The trial court correctly determined that Appellants' state law claims based upon an allegation of negligent untimely delivery of a package are preempted by the FAAAA. (*See* R. pp. 5-10). 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). 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)).

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." H.R. Conf. Rep. No. 103-677, at 87-88 (1994). To accomplish these goals, Congress modeled the FAAAA after 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). 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) (emphasis added).

For the reasons set forth below, Appellants' arguments should be rejected by this Court and the trial court's February 2, 2016 Orders (granting Motions to Dismiss) and March 29, 2016 Orders (denying Motions for Reconsideration) should be affirmed.

I. APPELLANTS' "RELATING TO SERVICE" ARGUMENT WAS NOT PROPERLY PRESERVED FOR APPELLATE REVIEW, WAS WAIVED BY APPELLANTS, AND SHOULD NOT BE CONSIDERED BY THIS COURT.

A. Legal Standard

"Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) (quotations and citation omitted). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the [appellate] [c]ourt with a platform for meaningful appellate review." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014). "Imposing such a requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2012) (quotations and citation omitted). Further, such rules "prevent[] a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an

appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

Because "[a] party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not," *Poch v. Bayshore Concrete Prods./S.C., Inc.*, 386 S.C. 13, 31, 686 S.E.2d 689, 699 (Ct. App. 2009), **an issue or argument raised for the first time in a Rule 59 motion is not preserved for appellate review**. *Stevens & Wilkinson*, 409 S.C. at 567, 762 S.E.2d at 695 ("The circuit court, relying on well-settled precedent, declined to reach this issue because it was improperly raised for the first time in the Rule 59(e) motion. The court of appeals should have refused to entertain that theory as well for the same reasons."); *Dixon v. Dixon*, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (finding issue raised for first time in Rule 59 motion is not preserved for appellate review); *Kiawah Prop. Owners Grp. v. Public Serv. Comm'n.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (holding issue raised for first time in petition for rehearing not preserved for appellate review); *Susan R. v. Donald R.*, 389 S.C. 107, 118-19, 697 S.E.2d 634, 640 (Ct. App. 2010) (holding argument that attorney's fees award was excessive was not preserved for appellate review because argument was raised for first time in a Rule 59(e) motion); *Brailsford v. Brailsford*, 380 S.C. 443, 448, 669 S.E.2d 342, 345 (Ct. App. 2008) ("[T]he argument concerning section 62-1-106 was never presented to the trial court before the filing of the Motion to Alter or Amend; therefore, it is not preserved for appeal and we decline to address it."); *cf. State v. Aldret*, 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999) (explaining "a party must object at the first opportunity to preserve an issue for review).

While "a party is not required to use the exact name of a legal doctrine in order to preserve the issue," the party nonetheless must be "sufficiently clear" in framing his argument so as to draw the court's attention to the precise nature of the argument. *Herron,* 395 S.C. at 466, 719 S.E.2d at

642. If the party is not "reasonably clear" in his argument, he waives his right to later raise this argument on appeal. *Id.* at 468, 719 S.E.2d at 644 (holding party failed to "specifically articulate [ ] preemption argument," and thus waived issue for appellate purposes); *Poch*, 386 S.C. at 31, 686 S.E.2d at 699 (holding arguments that were undeveloped at trial level were not preserved for appellate review); *cf. Glasscock, Inc. v. U.S. Fidelity & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.").

B. Appellants Raised the Argument for the First Time in Their Rule 59 Motions for Reconsideration and Did Not Preserve It for Appeal

In their Motions to Dismiss, Respondents specifically contended that Appellants' tort claims are directly "related to" UPS's primary "service" – delivering packages – and therefore, are preempted by the FAAAA, and thus, subject to dismissal. (*See* R. pp. 31-35). Respondents noted that South Carolina had not specifically addressed the issue, but argued that courts across the country provide compelling persuasive authority to dismiss Appellants' state law claims because they "relate directly to the '**service**'" that UPS provides. (*See* R. p. 33). Respondents cited six (6) cases in support of this argument. (*See* R. pp. 33-34).

Appellants waived the argument in opposition to this. In their Oppositions to the Motions to Dismiss, Appellants set forth two arguments only: (1) "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"; and (2) the FAAAA's "household goods" exception to preemption applies. (R. pp. 44-47). Appellants did not refute UPS's contention that their claims "relate to" a "service" performed by UPS. (*See* R. pp. 44-47). Appellants did not distinguish (or even acknowledge) a single case cited by Respondents regarding

the argument that Appellants' claims "relate directly to the 'service'" that UPS provides. (*See* R. pp. 44-47).

In their Reply, Respondents specifically raised the issue to the trial court that Appellants "do not dispute . . . [that their] state law claims directly relate to the delivery 'service' that UPS provides." (R. p. 69). Respondents highlighted for the trial court that Appellants failed to distinguish any of the persuasive cases cited in the underlying Motions, and instead, rely on two separate arguments to oppose Respondents' Motions. Appellants were made aware of their waiver.

Nonetheless, at the hearing on Respondents' Motions, Appellants' counsel focused solely on the Congressional intent argument, claiming that because the FAAAA does not include a provision addressing personal injury cases, it is not meant to apply to those types of cases. (*See* R. p. 157, line 9-p. 161, line 13). In doing so, counsel, for the first time, referred to *Kuehne*, which he argued stands for the proposition that the purpose of the FAAAA was to address property loss claims, not personal injury claims. (R. p. 158, line 12-p. 159, line 18). Appellants' counsel, however, did not address any of the cases cited by Respondents' in their Motions and Replies regarding whether Appellants' state law claims are "related to" UPS's service.

The specific issue of whether Appellants' state law claims are "related to" UPS's service was never "specifically articulated" by Appellants during the hearing. *Herron,* 395 S.C. at 466, 719 S.E.2d at 642. The term "service" was only mentioned three times (R. p. 158, lines 4 & 10; R. p. 160, line 9) and the key phrase "related to" was never used by Appellants' trial counsel at the oral argument (R. pp. 157-161). No case law was cited at the hearing related to this argument.[6] Appellants conceded this argument by failing to oppose it in their Opposition papers and at the hearing. *See Herron,* 395 S.C. at 468, 719 S.E.2d at 644; *Aldret*, 333 S.C. at 312, 509 S.E.2d at

[6] Notably, *Kuehne* is only cited in support of Section II of Appellants' Argument regarding the Congressional intent of the FAAAA. (*See* Appellants' Initial Brief pp. 11-14).

813; *see also TNS Mills, Inc. v. S.C. Dep't of Revenue,* 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998) ("An issue conceded in a lower court may not be argued on appeal."). Appellants chose to waive this argument.

To attempt to escape waiver, Appellants conflate the argument at the hearing with the argument now advanced on appeal. None of the cases cited in Section I of Appellants' Argument—titled "Appellants Claims Do Not Relate to a Service Provided by UPS"—were ever cited in Appellants' Opposition to Respondents' Motions, or mentioned (even in passing) at the hearing on Respondents' Motions. (*Compare* R. pp. 44-47 and R. pp. 157-161 *with* Appellants' Initial Brief pp. 7-11). In sum, the trial court never had a "fair opportunity to rule on the issue[]" now advanced by Appellants, *Stevens & Wilkinson*, 409 S.C. at 567, 762 S.E.2d at 695, because it was never provided with any of the "relevant facts, law, and arguments" upon which Appellants now base their appeal, *Herron*, 395 S.C. at 465, 719 S.E.2d at 642.

In granting Respondents' Motions to Dismiss, the trial court considered and rejected the arguments that were actually advanced by Appellants. Only after the trial court ruled on Respondents' Motions did Appellant show the purported "ace card up his sleeve" in an attempt to get the proverbial second bite at the apple. *I'On, L.L.C.*, 338 S.C. at 422, 526 S.E.2d at 724. Via Rule 59 Motions, and for the first time in the case, Appellants advanced the novel argument that "[t]he Court's interpretation and application of the phrase 'related to' is overly broad and not supported by the law." (R. p. 106). Specifically, Appellants argued that their "common law negligence and loss of consortium claims are not 'related to' UPS's services within the meaning of the FAAAA." (R. p. 107). The trial court recognized the strategy and correctly rejected Appellants' attempt to "present an issue that could have been raised prior to the judgment but was not." *Poch*, 386 S.C. at 31, 686 S.E.2d at 699.

Nonetheless, Appellants again raise this identical issue on appeal. (*Compare* R. pp. 106-109 *and* Appellants' Initial Brief pp. 7-11). They are too late. This Court "should [ ] refuse[ ] to entertain that theory as well for the same reasons" as the trial court. *Stevens & Wilkinson*, 409 S.C. at 567, 762 S.E.2d at 695; *see also Dixon*, 362 S.C. at 399, 608 S.E.2d at 854; *Kiawah Prop.*, 359 S.C. at113, 597 S.E.2d at 149; *Susan R.*, 389 S.C. at 118-19, 697 S.E.2d at 640; *Brailsford*, 380 S.C. at 448, 669 S.E.2d at 345; *cf. Aldret*, 333 S.C. at 312, 509 S.E.2d at 813. Appellants have not preserved their argument that their state law claims are not "related to" UPS's service.

II. ALTERNATIVELY, IF THIS COURT CONSIDERS THE ARGUMENT, IT SHOULD FIND THAT APPELLANTS' STATE LAW CLAIMS DIRECTLY RELATE TO DELIVERY OF PACKAGES, THE PRIMARY SERVICE UPS PROVIDES, AND THEREFORE, ARE PREEMPTED BY THE FAAAA.

Alternatively, this Court should affirm the trial court's ruling that all of Appellants' claims against Respondents "relate directly to the 'service' provided by UPS, a motor carrier" within the meaning of the FAAAA's preemption provision, and hold that the Complaints were properly dismissed pursuant to Rules 12(b)(1) and 12(b)(6), SCRCP. (R. pp. 5-10).

A. Appellants' State Law Claims Directly "Relate to" UPS's "Service"

The FAAAA 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)). "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." *Deerskin Trading Post, Inc. v. United Parcel Serv. of Am., Inc.*, 972 F. Supp. 665, 672 (N.D. Ga. 1997).

Although South Carolina courts have not yet interpreted this issue, numerous federal courts throughout the country have provided compelling persuasive authority for a determination that a

plaintiff's state law negligence claims regarding delivery of a package are preempted by the FAAAA (or ADA) insofar as they are directly "related to" the "service" the carrier provides. *See e.g., Tobin v. Fed. Exp. Corp.*, 775 F.3d 448, 452-457 (1st Cir. 2014) (ADA preempted recipient's common law claims related to incorrectly delivered package); *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,* 972 F. Supp. at 672 (FAAAA preempted all claims, including negligence, except for portion of breach of contract claim.).[7]

In particular, in *Deerskin Trading Post*, the district court thoroughly discussed the legislative history of the FAAAA, finding that Congress intended the preemption provision "to be broad in scope." *Deerskin Trading Post,* 972 F. Supp. at 668 (internal citations omitted). The court explained that a plaintiff's claim against a carrier should be analyzed to determine whether it expressly refers to a motor carrier's prices, routes or services "or would have a significant economic effect" on the carrier's prices, routes or services. *Id.* at 671-72 (internal quotations and citations omitted). Ultimately, the tort claims asserted in *Deerskin* were held to "relate to" the

[7] Federal courts have also addressed the issue through unpublished opinions. *See Rockwell v. United Parcel Serv., Inc.*, No. 2:99 CV 57, 1999 WL 33100089, at *2 (D. Vt. July 7, 1999) (claims for negligent intake and delivery protocol, which "go to the heart of the services that UPS provides" were preempted); *Vieira v. United Parcel Serv., Inc.*, No. C–95–04697 CAL ARB, 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, at *1 (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.*, No. 94-1422, 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).

prices charged by UPS for various services because the "core of each claim" was that UPS inappropriately charged the plaintiff. *Id.* at 672.

Appellants argue that their claims against Respondents – negligent untimely delivery of a package containing medication – are not "related to" UPS's service. On its face, this argument is incredible. Delivery of packages is the quintessential service UPS provides to its customers. Like their Oppositions to the Motions to Dismiss, Appellants' Initial Brief ignores all of the case law cited by Respondents which squarely demonstrates that courts throughout the country have specifically applied the FAAAA (or ADA) preemption to negligent delivery claims like Appellants' claims here; instead, Appellants simply cherry-pick various limited quotations from numerous cases, which frankly, are inapposite. (Appellants' Initial Brief pp. 7-11).

For instance, *Gaines Motor Lines, Inc. v. Klaussner Furniture Indus., Inc.,* 734 F.3d 296 (4th Cir. 2013) 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.,* 937 F. Supp. 2d 730 (E.D. Va. 2013) was tasked with evaluating a specific state regulation of wage and independent contractor laws; *Smith v. Comair, Inc.*, 134 F.3d 254 (4th Cir. 1998) 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; and this Court's decision in *Medical Park OB/GYN, P.A. v. Ragin*, 321 S.C. 139, 467 S.E.2d 261 (Ct. App. 1996) ERISA preemption, not the FAAAA or ADA. None of these cases cited by Appellants involved an allegation of a late package delivery – UPS's quintessential service.

The only case cited which Appellants even suggest as being factually similar to the underlying claims, *Huertas v. United Parcel Serv. Inc.*,[8] 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*, Appellants attempt to argue that the FAAAA does not apply to common law state tort claims; however, they fail to address the numerous cases cited by Respondents and considered by the trial court, which demonstrate that federal courts throughout the country have specifically applied the FAAAA (or ADA) preemption to common law negligence claims, specifically to negligent delivery claims similar to Appellants' claims here.

Despite Appellants' attempts to alter and inflate the claims set forth in their Complaints, all allegations against Respondents are derivative of the same underlying alleged conduct: that UPS's package delivery was late. All are based on UPS's delivery service, which is the primary and fundamental service that UPS provides to its customers. As pled in the Complaints, Appellants' state law tort claims for negligent untimely delivery 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)). Appellants' state law claims against Respondents 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 – and therefore, are preempted in their entirety by the FAAAA.

[8] *Huertas* has never been cited or relied upon by any other court with respect to preemption under the FAAAA.

B. Appellants' State Law Claims, Which are Preempted by the FAAAA, Should be Dismissed Under Rules 12(b)(1) and/or 12(b)(6), SCRCP

As the trial court correctly ruled, 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, 71 (1st Cir. 2013) (affirming dismissal where tort claims were preempted by ADA); *Bower v. Egyptair Airlines Co.*, 731 F.3d 85, 98 (1st Cir. 2013) (same); *Wise Recycling, LLC v. M2 Logistics*, 943 F. Supp. 2d 700, 706 (N.D. Tex. 2013) (dismissing negligence claims that were preempted by FAAAA); *Mudd-Lyman Sales & Serv. Corp. v. United Parcel Serv., Inc.*, 236 F. Supp. 2d 907, 912 (N.D. Ill. 2002) (dismissing plaintiff's state law claims which were preempted by FAAAA). This Court should affirm the dismissal of Appellants' Complaints on the basis of federal preemption pursuant to Rules 12(b)(1) and/or 12(b)(6), SCRCP. *See Eldridge v. City of Greenwood*, 331 S.C. 398, 411, 503 S.E.2d 191, 197 (Ct. App. 1998) (noting that preemption involves subject matter jurisdiction)[9]; *Columbia Venture, LLC v. Dewberry & Davis, LLC*, 604 F.3d 824, 830-32 (4th Cir. 2010) (affirming dismissal of complaint pursuant to Rule 12(b)(6) where plaintiff's claims were preempted by federal law).[10]

III. CONGRESS INTENDED FOR THE FAAAA'S PREEMPTION TO BE INTERPRETED AND APPLIED BROADLY, WHICH INCLUDES APPLICATION TO APPELLANTS' STATE LAW TORT CLAIMS.

Appellants argue that Congress did not intend to preempt their negligence claims because those claims have no effect, economic or otherwise, on UPS's services or competitiveness; however, Appellants' argument overlooks the clear language set forth in the FAAAA, and also

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[9] *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).

[10] Where there is no South Carolina precedent construing SCRCP 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.*, 381 S.C. 460, 482 n.10, 674 S.E.2d 154, 166 n.10 (2009).

disregards the effect that allowing such claims to proceed would have on motor carriers, such as UPS. Therefore, Appellants' argument should be rejected by this Court.

While this Court may secondarily 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,* 972 F. Supp. at 667; *see also Fox v. Moultrie*, 379 S.C. 609, 614, 666 S.E.2d 915, 917 (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). The FAAAA 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).

"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*, 972 F. Supp. at 668. That intent is driven by the desire to further "efficiency, innovation, and low prices" as well as "variety [and] quality" of services and to ensure that the states do not "undo federal deregulation with regulation of their own." *Tobin*, 775 F.3d at 455 (analyzing broad preemptive scope of ADA).

In *Tobin v. Fed. Exp. Corp.*, the First Circuit evaluated a plaintiff's common law tort claims arising out of an incorrectly delivered package by Fed Ex and determined that said claims were preempted by the ADA. *Id.* at 452-457. Specifically, in that case, the plaintiff alleged, and Fed Ex admitted, that the subject package was mislabeled and misdelivered. *Id.* at 454. After establishing that the plaintiff's claims implicated Fed Ex's services within the meaning of the

ADA, the court analyzed whether the claims "related to" those services, noting that the "language of the ADA is meant to be construed broadly, consistent with **Congress's intention** that ADA **preemption should have an expansive reach**." *Id.* (internal citation omitted) (emphasis added). The First Circuit Court of Appeals went on to analyze whether the state common law would "directly substitute[] the state's own policies for competitive market forces" and thereby "produce precisely the effect the preemption clause seeks to avoid: 'a patchwork of state service-determining laws, rules, and regulations'" and ultimately concluded that plaintiff's common law claims would have such an effect. *Id.* at 455 (citing *Rowe*, 552 U.S. at 372).

Here, Appellants' state law tort claims against UPS would have such an effect. Similar to the analysis in *Tobin*, for Appellants "to prevail on [their] common law negligence claims, [they] would have to prove," for example, "that [UPS's delivery] procedures were inadequate or that those procedures, though adequate, were carried out carelessly by [UPS's] employees." *Id.* In the former instance, "a finding that [UPS's delivery] procedures were inadequate would have the significant effect of requiring new and enhanced procedures" for verification and delivery of packages, UPS's main business. *Id.* "**That effect would not be tenuous, remote, or peripheral.**" *Id.* (emphasis added); *see also Bower*, 731 F.3d at 96 (preempting common law claims whose enforcement would impose a "fundamentally new set of obligations on airlines" including "heightened and qualitatively different procedures" for passenger booking and boarding).

In the latter situation, "a finding that the actions of [UPS's] employees breached a state-law duty of care would also produce a significant forbidden effect. Such a finding would effectively supplant market forces with [South Carolina] common-law definitions of reasonableness and, thus, create the very patchwork of state-based regulations that [FAAAA] preemption is meant to preclude." *Tobin*, 775 F.3d at 455. In addition, "the risk of a patchwork

effect is heightened where, as here, the claims are of the sort typically tried to a jury." *Id.*; *see also DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 88 (1st Cir. 2011) (warning that "detailed, ad hoc compliance schemes" could arise not just state by state, but verdict by verdict).

By using their state law tort claims "as a blunt instrument to prescribe protocols for package [ ] verification, and delivery, the claims presented [by Appellants] would regulate how [UPS] operates its core business." *Tobin*, 775 F.3d at 456 (citing *Rowe*, 552 U.S. at 372–73; *Bower*, 731 F.3d at 96). Allowing Appellants' claims to proceed and potentially result in a damages award against UPS "could result in fundamental changes to [UPS's] service." *Id.* In sum, this Court should affirm the trial court's holding that Appellants' claims are preempted by the FAAAA, which is in line with Congress's intent that the FAAAA's preemptive scope be interpreted and applied broadly.

IV. APPELLANTS' HOUSEHOLD GOODS EXCEPTION ARGUMENT SHOULD BE DEEMED ABANDONED AS IT IS MERELY CONCLUSORY AND LACKS SUPPORTING LEGAL AUTHORITY.

Appellants' argument regarding the applicability of the FAAAA's "household goods" exception should be deemed abandoned for purposes of this appeal. "South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." *Glasscock*, 348 S.C. at 81, 557 S.E.2d at 691. A reference to supporting authority without any discussion of the case law's applicability is considered conclusory and constitutes an abandonment of the party's reliance on those cases. *See e.g. State v. Tyndall*, 336 S.C. 8, 17, 518 S.E.2d 278, 283 (Ct. App. 1999) (holding that one sentence reference to case without including any discussion of the decision or its applicability to party's circumstances constituted abandonment of legal issue on appeal).

In support of their argument that the FAAAA's "household goods" exception applies, Appellants cite no legal authority defining, interpreting, or applying the exception to preemption. (Appellants' Initial Brief pp. 14-15). Rather, Appellants simply quote the statute itself, as well as two cases merely identifying that the exception exists. (*See id.*). No legal analysis of the exception is presented by Appellants. Appellants simply argue, in a purely conclusory fashion, that because the subject package contained medication, which is personal property Eggleston would have used in his household, it constitutes a "household good" and thus, falls within the FAAAA's exception. (*Id.* p. 15). Appellants' argument that their claims satisfy the "household goods" exception to FAAAA preemption is purely conclusory and lacks any supporting legal authority, and thus, should be deemed abandoned for purposes of this appeal and not considered by this Court. *Glasscock, Inc.*, 348 S.C. at 81, 557 S.E.2d at 691; *Tyndall*, 336 S.C. at 17, 518 S.E.2d at 283.

V. ALTERNATIVELY, THIS COURT SHOULD FIND THAT THE FAAAA'S HOUSEHOLD GOODS EXCEPTION IS INAPPLICABLE TO APPELLANTS' CLAIMS.

Alternatively, this Court should affirm the trial court's holding that Appellants' claims are preempted by the FAAAA and not exempted by the household goods exception. The FAAAA "expressly does not regulate a state's authority to . . . regulate the intrastate transport of household goods." *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.

However, Appellants' 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. Therefore, under the plain language of the FAAAA, the so-called "household goods" exception is inapplicable to Appellants' state law tort claims for personal injury and loss of

consortium. Accordingly, this Court should affirm the trial court's holding that Appellants' claims are preempted by the FAAAA and not exempted by the household goods exception.

CONCLUSION

For all of the aforementioned reasons, this Court should affirm the trial court's February 2, 2016 Orders (granting Motions to Dismiss) and March 29, 2016 Orders (denying Motions for Reconsideration).

Respectfully submitted,

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May 31, 2017

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 Services, Inc. and Rick Fogle .....Defendants,

Of Whom United Parcel Services, 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 *Respondent's Final Brief* complies with Rule 211(b), SCACR.

June 1, 2017

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