

THE STATE OF SOUTH CAROLINA
Supreme Court

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

S.C. SUPREME COURT

Opinion No. 5686 (S.C. Ct. App. filed October 2, 2019)

Cortland James Eggleston, ... Petitioner,

v.

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

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

and

Rebecca McCutcheon, ... Petitioner,

v.

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

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

APPENDIX

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INDEX

Opinion of the Court of Appeals, Op. No. 5868 (S.C. Ct. App. filed October 2, 2019).....	1
Petition for rehearing.....	11
Order denying Petition for rehearing.....	16
Brief of Appellants.....	17
Brief of Respondent.....	36
Reply Brief of Appellants.....	68

(Materials from the Record on Appeal)

Notices of Appeal.....	86
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Orders

Order Granting Defendants' Motion to Dismiss (McCutcheon).....	90
Order Granting Defendants' Motion to Dismiss (Eggleston).....	93
Order Denying Plaintiff's Rule 59(e) Motion to Reconsider, Alter, or Amend (McCutcheon).....	96
Order Denying Plaintiff's Rule 59(e) Motion to Reconsider, Alter, or Amend (Eggleston).....	97

Pleadings

Complaint (McCutcheon).....	98
Complaint (Eggleston).....	104
UPS Motion to Dismiss (McCutcheon).....	109
UPS Motion to Dismiss (Eggleston).....	111
UPS Memorandum of Law in Support of its Motion to Dismiss Plaintiff's Complaint (McCutcheon).....	113
McCutcheon's Memorandum in Opposition to Defendants' Motion to Dismiss.....	126
Exhibit 1.....	134
Eggleston's Memorandum in Opposition to Defendants' Motion to Dismiss.....	140
Exhibit 1.....	148

Reply Brief in Support of UPS's Motion to Dismiss Plaintiff's Complaint (McCutcheon).....	154
Defendants' Memorandum of Law in Support of its Motion to Dismiss Plaintiff's Complaint (Eggleston).....	162
Letter from Defendants to Judge Murphy and attached proposed orders.....	181
Plaintiff's Rule 59(e), SCRCP, Motion to Reconsider, Alter, or Amend (McCutcheon).....	188
Plaintiff's Rule 59(e), SCRCP, Motion to Reconsider, Alter, or Amend, (Eggleston).....	197
Defendants' Response to McCutcheon's Rule 59(e), SCRCP, Motion to Reconsider, Alter, or Amend.....	206
Defendants' Response to Eggleston's Rule 59(e), SCRCP, Motion to Reconsider, Alter, or Amend.....	220
Transcript of Proceedings of September 28, 2015.....	234
Argument by Respondent.....	237
Argument by Appellants	242
Reply Argument by Respondent.....	246

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Cortland James Eggleston and Rebecca McCutcheon,
Appellants,

v.

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

of which United Parcel Service Inc. is the Respondent.

Appellate Case No. 2016-000984

Appeal From Orangeburg County
Maite Murphy, Circuit Court Judge

OCT - 4 2019

Opinion No. 5686

Heard November 5, 2018 – Filed October 2, 2019

AFFIRMED

Shane Morris Burroughs, of Lanier & Burroughs, LLC,
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HUFF, J.: Cortland James Eggleston appeals the trial court's dismissal of his
action against United Parcel Service (UPS) for personal injuries he suffered after

UPS failed to timely deliver thyroid medication. His wife, Rebecca McCutcheon, appeals the trial court's dismissal of her loss of consortium action. Eggleston and McCutcheon (collectively, Appellants) assert the trial court erred in holding their claims were preempted by federal law. We affirm.

FACTS/PROCEDURAL HISTORY

As a veteran, Eggleston received treatment for his thyroid condition from the Veterans Administration (VA) hospital in Charleston. On numerous occasions in the past, UPS delivered shipments of medications from the VA hospital to Eggleston at his rural Eutawville address. On April 11, 2013, Eggleston was expecting a delivery of thyroid medication from the VA Hospital by UPS, but the medication failed to arrive. The VA Hospital communicated with UPS between April 11, 2013, and April 15, 2013, in an attempt to rectify the situation. After confirming Eggleston's address, a pharmacist with the VA accessed UPS's records and discovered the package was being held because a correct street name was needed. The pharmacist called UPS and spoke with a representative who contacted the local driver, Rick Fogle, and instructed him to contact Eggleston and make the delivery that date. The pharmacist also sent a partial refill of the medication by overnight delivery as Appellants had declined to acquire a partial supply from a local pharmacy due to transportation and financial issues.

Appellants also contacted UPS, which informed them Eggleston's address did not exist or could not be located, despite UPS's previous delivery of medications to the address. Eggleston's condition worsened into a thyroid storm, causing seizures, congestive heart failure, extremely elevated blood pressure, hospitalization, and surgical intervention. UPS finally delivered the medication thirteen days after it had been shipped.

Eggleston brought an action against UPS and Fogle for negligence and negligent entrustment. McCutcheon brought a similar action for loss of consortium. UPS moved to dismiss both actions asserting the state law claims were preempted by the the Federal Aviation Administration Authorization Act of 1994 (FAAAA), 49 U.S.C.A. § 14501(c)(1) (West 2016). The trial court granted the motions to dismiss in separate orders. Appellants filed motions to alter or amend, which the trial court denied. This appeal, which consolidated Appellants' actions, followed.

STANDARD OF REVIEW

The issue of whether a federal statute preempts state law is a question of law. *Weston v. Kim's Dollar Store*, 385 S.C. 520, 526, 684 S.E.2d 769, 772 (Ct. App. 2009). The appellate court "may make its own ruling on a question of law without deferring to the circuit court." *Henderson v. Summerville Ford-Mercury Inc.*, 405 S.C. 440, 446, 748 S.E.2d 221, 224 (2013); *see also Mims Amusement Co. v. S.C. Law Enft Div.*, 366 S.C. 141, 145, 621 S.E.2d 344, 346 (2005) (stating the appellate court may decide a novel question of law "based on its assessment of which answer and reasoning best comport with the law and public policies of this state and the [c]ourt's sense of law, justice, and right.").

LAW/ANALYSIS

I. Application of the FAAAA

Appellants argue the trial court erred in finding their claims were preempted by the FAAAA. We disagree.

"The preemption doctrine is rooted in the Supremacy Clause of the United States Constitution and provides that any state law that conflicts with federal law is 'without effect.'"¹ *Priester v. Cromer*, 401 S.C. 38, 43, 736 S.E.2d 249, 252 (2012) (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)). "[T]he purpose of Congress is the ultimate touchstone' of pre-emption analysis." *Id.* (quoting *Cipollone*, 505 U.S. at 516). "To discern Congress'[s] intent we examine the explicit statutory language and the structure and purpose of the statute." *Id.* (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990)).

In an attempt to improve the airline industry through "maximum reliance on competitive market forces," Congress enacted the Airline Deregulation Act (ADA), which included a preemption provision to "ensure that the States would not undo federal deregulation with regulation of their own."² *Rowe v. N.H. Motor Transp.*

¹ The Supremacy Clause provides federal law "shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI.

² This provision states, "[A] State . . . 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.A. § 41713(b) (West 2016).

Ass'n, 552 U.S. 364, 36-38 (2008) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992)).

Following similar deregulation of the trucking industry, Congress sought to preempt state trucking regulation with the FAAAA, which prohibits states from "enact[ing] or enforce[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C.A. § 14501(c)(1). As the preemption provision of the FAAAA tracks that of the ADA, the courts' interpretations of the scope of ADA preemption also apply to FAAAA preemption cases. *Rowe*, 552 U.S. at 370.

The Supreme Court found the statutory term "related to" "express[ed] a broad pre-emptive purpose." *Morales*, 504 U.S. at 383. Accordingly, "'state enforcement actions *having a connection with or reference to* carrier 'rates, routes, or services' are pre-empted." *Rowe*, 552 U.S. at 370 (quoting *Morales*, 504 U.S. at 384). "[S]uch pre-emption may occur even if a state law's effect on rates, routes, or services 'is only indirect.'" *Id.* (quoting *Morales*, 504 U.S. at 386). However, the FAAAA "does not pre-empt state laws that affect rates, routes, or services in 'too tenuous, remote, or peripheral a manner.'" *Id.* at 375 (quoting *Morales*, 504 U.S. at 390). The Supreme Court cautioned, "[T]he breadth of the words 'related to' does not mean the sky is the limit." *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013).

Furthermore, the Supreme Court held the inclusion of the phrase "with respect to the transportation of property" in the FAAAA's preemption provision, which is not in the ADA's similar provision, "massively limits the scope of preemption" ordered by the FAAAA. *Id.* at 261 (quoting *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 449 (2002) (Scalia, J., dissenting)). "[F]or purposes of FAAAA preemption, it is not sufficient that a state law relates to the 'price, route, or service' of a motor carrier in any capacity; the law must also concern a motor carrier's 'transportation of property.'" *Id.* The term transportation includes services related to the movement of property, which involves "arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, [and] unpacking" of property. 49 U.S.C.A. § 13102(23) (West 2016).

State common law rules fall within FAAAA preemption. *Nw., Inc. v. Ginsberg*, 572 U.S. 273, 281 (2014). "The regulatory bite of tort law is powerful and direct. '[R]egulation can be as effectively exerted through an award of damages as through

some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Tobin v. Fed. Express. Corp.*, 775 F.3d 448, 456 (1st Cir. 2014) (alteration in original) (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)). "[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 . . . 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). "To determine whether a claim has a connection with, or reference to [a carrier's] 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).

"[When] a plaintiff invokes traditional elements of tort law and the issue of preemption arises, 'the courts almost uniformly have resolved against federal preemption.'" *Jimenez-Ruiz v. Spirit Airlines, Inc.*, 794 F. Supp. 2d 344, 348 (D.P.R. 2011) (quoting *Dudley v. Bus. Exp., Inc.*, 882 F. Supp. 199, 206 (D.N.H. 1994)). The United States Court of Appeals for the Ninth Circuit explained, "Congress did not intend to preempt passengers' run-of-the-mill personal injury claims." *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1261 (9th Cir. 1998), *opinion amended on denial of reh'g*, 169 F.3d 594 (9th Cir. 1999).³ "[T]he proper inquiry is whether a common law tort remedy frustrates deregulation by interfering with competition through public utility-style regulation." *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186, 194 (3d Cir. 1998). "When state law does not have a regulatory effect, it is 'too tenuous, remote, or peripheral' to be preempted." *Id.* (citing *Morales*, 504 U.S. at 390); *see Kuehne v. United Parcel Serv., Inc.*, 868 N.E.2d 870, 872, 877-78 (Ind. Ct. App. 2007) (concluding homeowner's tort claim arising from fall over package left on front step was not preempted by the FAAAA); *Huertas v. United Parcel Serv., Inc.*, 974 N.Y.S.2d 758, 762 (N.Y. Sup. Ct. 2013) (holding the claim of a plaintiff who tripped over packages was not preempted because "the manner in which a delivery person stacked packages . . . is not related to a 'service' governed by the ADA or the FAAAA.").

³ In *Charas*, the Ninth Circuit considered four consolidated cases that involved: (1) A passenger hit by a flight attendant pushing a beverage cart; (2) A passenger hit by luggage falling out of the overhead bin after the plane landed; (3) A passenger who tripped over a piece of luggage allegedly left in the aisle by a flight attendant; and (4) A passenger who did not receive the assistance she requested and fell down a stairway while exiting the plane. *Id.* at 1261-62.

While some tort actions do not "give rise to the type of patchwork state regulations that the ADA [and FAAAA were] intended to dissolve," *Bower v. Egyptair Airlines Co.*, 731 F.3d 85, 96 (1st Cir. 2013), others may be "sufficiently connected to[a] carrier's service *with respect to the transportation of property* to warrant preemption." *Dan's City Used Cars*, 569 U.S. at 255. In *Bower*, the United States Court of Appeals for the First Circuit held a father's negligence claims against an airline for allowing a mother to take their minor children to Cairo in violation of a court order was preempted. 731 F.3d at 88. It explained,

[S]tandard common law duties of care have little effect on an airline[s] day-to-day operations. Accordingly, the ADA offers little reason to treat a passenger who slips and falls while deplaning differently than one who slips and falls in a restaurant. Were we to hold that EgyptAir violated its common law tort duty in this case, however, we would be imposing a fundamentally new set of obligations on airlines under the rubric of "duty of care." These would include heightened and qualitatively different procedures for the booking and boarding of certain passengers on certain flights. To defeat Congressional intent to preempt, a mere reference to a duty of care will not suffice. It is the nature and extent of that duty which alters the analysis.

Bower, 731 F.3d at 96 (citations and footnote omitted); *see Smith*, 134 F.3d at 259 (holding intentional tort claims were preempted to the extent the claims were premised on the airline's refusal to permit the plaintiff to board his flight because "boarding procedures are a service rendered by an airline").

In *Tobin*, the plaintiff sued Federal Express Corporation (Fed-Ex) for invasion of privacy, intentional and negligent infliction of emotional distress, and negligence alleging she and her daughter suffered from various symptoms caused by fear and anxiety arising from Fed-Ex mislabeling and misdelivering a package, which contained marijuana, to the plaintiff's address.⁴ 775 F.3d at 449-50. Observing

⁴ The plaintiff and her daughter contacted law enforcement and an officer warned them he was worried the intended recipient would come looking for the package. *Tobin*, 775 F.3d at 450. Later, "a man came to the plaintiff's door asking whether the plaintiff had received a package. The visitor's car was parked in the plaintiff's

plaintiff's claims involved FedEx's package handling, address verification, and delivery procedures, which were "necessary appurtenances of the contract of carriage," the United States Court of Appeals for the First Circuit found the claims implicated a service. *Id.* at 454.

It rejected the plaintiff's contention tortious conduct could never be a service, explaining: "While tortiously undertaken conduct may not itself be a service that would be bargained for or anticipated by a consumer, the relevant inquiry is whether enforcement of the plaintiff's claims would impose some obligation on an airline-defendant with respect to conduct that, when properly undertaken, is a service." *Id.* The court explained enforcement of plaintiff's claims would contravene Congress's intent to avoid "a patchwork of state service-determining laws, rules, and regulations." *Id.* at 455 (quoting *Rowe*, 552 U.S. at 373). It elaborated:

For the plaintiff to prevail on her common-law claims, she would have to prove either that FedEx's procedures were inadequate or that those procedures, though adequate, were carried out carelessly by FedEx's employees. In the former circumstance, a finding that FedEx's procedures were inadequate would have the significant effect of requiring new and enhanced procedures for labeling, verification, and delivery of packages (FedEx's main business). That effect would not be tenuous, remote, or peripheral.

Id. at 455 (citations omitted).

Thus it found, "By using state common law as a blunt instrument to prescribe protocols for package labeling, verification, and delivery, the claims presented here would regulate how FedEx operates its core business." *Id.* at 456. Affirming the dismissal of the plaintiff's claims, the court ruled, "[When] the duty of care alleged drills into the core of a[] carrier's services and liability for a breach of that duty could [affect] fundamental changes in the carrier's current or future service offerings, the plaintiff's claims are preempted *Id.*

driveway with two men seated inside. Terrified, the plaintiff slammed the door shut and again contacted the police." *Id.*

We find the First Circuit's reasoning in *Tobin* persuasive. Appellants' claims are not "run of the mill" personal injury claims. Their allegations include UPS was negligent in failing to properly deliver the medication, in failing to properly and accurately locate Appellants, in failing to maintain proper policies and procedures for delivering parcels, and in failing to properly hire, train, supervise and oversee personnel. These allegations clearly go to the heart of the delivery service UPS offers. As the First Circuit found, "A damages award could result in fundamental changes to [UPS's] services—much more so than a damages award for a driving mishap or a slip-and-fall." *Id.* at 456. Such an award could result in "requiring new and enhanced procedures for . . . delivery of packages," which, like FedEx, is UPS's main business. *Id.* at 455. This effect would not be "tenuous, remote, or peripheral." *Rowe*, 552 U.S. at 375. Accordingly, we hold the trial court did not err in finding Appellants' claims were preempted by the FAAAA.

II. Household Goods Exemption

Appellants argue their claims fall within the "household goods" exemption to preemption. We disagree.

The FAAAA provides the act "does not apply to the intrastate transportation of household goods" 49 U.S.C.A. § 14501(c)(2)(B) (West 2016). The definition of household goods provides as follows:

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

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

(B) arranged and paid for by another party.

49 U.S.C.A. § 13102(1) (West 2016).

Although this definition seems broad, Congress clarified a narrower meaning applied to the term as follows: "The provisions of title 49, United States Code, and this subtitle (including any amendments made by this subtitle), that relate to the transportation of household goods *apply only to a household goods motor carrier* (as defined in section 13102 of title 49, United States Code)." Pub. L. No. 109-59 § 4202(c), 119 Stat. 1752 (2005)⁵ (emphasis added). A household goods motor carrier is defined as follows:

(A) In general.—The term "household goods motor carrier" means a motor carrier that, in the ordinary course of its business of providing transportation of household goods, offers some or all of the following additional services:

(i) Binding and nonbinding estimates.

(ii) Inventorying.

(iii) Protective packing and unpacking of individual items at personal residences.

(iv) Loading and unloading at personal residences.

(B) Inclusion.—The term includes any person that is considered to be a household goods motor carrier under regulations, determinations, and decisions of the Federal Motor Carrier Safety Administration that are in effect on the date of enactment of the Household Goods Mover Oversight Enforcement and Reform Act of 2005.

⁵ Although this amendment is not codified, the provision is fully binding law. *See Patten v. United States*, 116 F.3d 1029, 1033 n.3 (4th Cir. 1997) ("A piece of legislation becomes law when it is passed by Congress and signed by the President. Therefore, even though the [piece of legislation] was not codified, it was enacted, and it has the force of law.").

(C) Limited service exclusion.—The term does not include a motor carrier when the motor carrier provides transportation of household goods in containers or trailers that are entirely loaded and unloaded by an individual (other than an employee or agent of the motor carrier).

49 U.S.C.A. § 13102 (12) (West 2016).

Upholding the United States District Court for the District of Puerto Rico's reliance on the Interstate Commerce Commission's prior interpretations of the phrase, the First Circuit concluded, "[T]he transportation of household goods generally refers to the services of moving companies." *United Parcel Serv., Inc. v. Flores-Galarza*, 385 F.3d 9, 14 (1st Cir. 2004). The court rejected the argument this definition was too narrow, explaining "the enjoined scheme impermissibly affected UPS's prices, routes, and services in part because it required UPS to identify the contents of the packages (a deviation from standard procedures used for deliveries elsewhere in the United States)" *Id.* It agreed with the district court that "[f]orcing carriers to give special handling to all packages containing goods used in a home . . . would resurrect the unwieldy patchwork of state laws that Congress intended to eliminate through the [FAAAA]." *Id.* (omission in original) (quoting *United Parcel Serv., Inc. v. Flores-Galarza*, 275 F. Supp. 2d 155, 161 (D.P.R. 2003)). Thus, it noted an exception granting states regulatory authority over any packages containing household goods "would swallow the rule of preemption." *Id.*

We find UPS is not a household goods motor carrier. Thus, its delivery of medication did not constitute the transportation of household goods according to the statutory definition. Accordingly, the Appellants' claims did not fall within the household goods exemption to FAAAA preemption.

CONCLUSION

We hold the trial court did not err in ruling the FAAAA preempted Appellants' claims. Accordingly, the orders dismissing their claims are

AFFIRMED.

SHORT and WILLIAMS, JJ., concur.

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APPEAL FROM ORANGEBURG COUNTY
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APPELLANTS' PETITION FOR REHEARING

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ARGUMENT FOR REHEARING

Pursuant to Rules 221(a) and 240, SCACR, Appellants Cortland James Eggleston and Rebecca McCutcheon ("Appellants") petition this Court for rehearing of the Court's decision in *Cortland James Eggleston and Rebecca McCutcheon v. United Parcel Service, Inc.*, Opinion No. 5686 (S.C. Ct. App. filed October 2, 2019). Appellants submit that the Court misapprehended the law or overlooked the evidence when it affirmed the lower court's decision to dismiss the claims on the basis of Federal preemption. Appellants respectfully request the Court reconsider its decision for the reasons stated in its briefs, and including the following reasons:

I. The Court Erred in Finding Appellants' Claims Affect Delivery Services

Appellants argued that Respondent presented no argument or evidence that Appellants' claims would bind it to a particular service or interfere with competitive market forces. (Br. of App. pp. 10-11; Reply Br. of App. p. 6). The Court's opinion does not address this argument. "[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). Respondent failed to articulate how or present any evidence that Appellants' claims bind them to a particular delivery service in interference with competitive market forces. The Court likewise does not identify any particular service or part of a service that Appellants' claims will affect. It only summarily concludes the claims "could result" in new or enhanced procedures for package delivery. (Op. p. 8). As explained in Appellants' briefs, their claims do not have a significant effect on Respondent's services and do not bind it to a service. (Br. of App. pp. 7-11; Reply Br. of App. pp. 5-9).

It is Respondent's burden to prove preemption. *Eldridge v. City of Greenwood*, 331 S.C. 398, 411, 503 S.E.2d 191, 197 (Ct. App. 1998) ("[T]he party claiming preemption bears the burden of proving it."). It failed to do so and this Court erred in finding otherwise. There is no proof or evidence in the record that an award in Appellants' case "would result in requiring new and enhanced procedures for . . . delivery of packages." (Op. p. 8). The Court should grant the petition and reconsider that Respondent has the burden of proof and failed to meet it in this case.

II. The Court Erred in Not Ruling on Whether Congress Intended to Preempt Claims with no Economic or Other Affect on Services or Competition

The Court did not rule on Appellants' argument that their claims are not the type Congress intended the FAAAA to preempt because the claims have no economic regulatory effect on Respondent. "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). Stated another way, Congress intended to preempt laws that "set prices, mandate or prohibit certain routes, or tell motor carriers what services they may or may not provide, either directly or indirectly." *Dilts v. Penske Logistics, LLC*, 769 F.3d 367 (9th Cir. 2014). Appellants allege Respondent wrongfully withheld a package that it should have delivered. A jury finding in Appellants' favor would not affect competitive market forces or alter how Respondent operates its business. Appellants' claims do not set prices, mandate or prohibit routes, or tell Respondent what services to provide. They are not the type Congress intended to preempt. The Court should grant the petition and reconsider that Appellants' claims are not the type that Congress intended to preempt.

III. The Court Erred in Holding the Household Goods Exception Does Not Apply

The Court's holding as to the household goods exception is a misinterpretation of the applicable law. The Court's reliance on the definition of "household goods motor carrier", which is not part of the FAAAA, changes the meaning of the household goods exception. If Congress meant for the exception to apply to "household goods motor carrier[s]", it could easily have written that language into the statute. However, it did not. See, e.g., *S.C. Dep't of Consumer Affairs v. Rent-A-Center, Inc.*, 345 S.C. 251, 256, 547 S.E.2d 881, 883-84 (Ct. App. 2001) ("The canon of construction *expressio unius est exclusio alterius* or *inclusio unius est exclusio alterius* holds that to express or include one thing implies the exclusion of another, or of the alternative." (internal quotation marks omitted)).

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

(B) arranged and paid for by another party.

49 U.S.C. § 13102(10) (emphasis added). The emphasized words show that the exception applies to, *inter alia*, property that a householder purchases directly from a factory or store to be used in his dwelling and for which he requests transportation. Transportation of a good from a factory or store to a home is not a moving-company service and shows the error of this Court's interpretation of the exception. Further, a review of *UPS v. Flores-Galarza*, 385 F.3d 9 (1st Cir. 2004), which

this Court relied upon, and its reliance on *UPS v. Flores-Galarza*, 275 F. Supp. 2d 155 (D.P.R. 2003), shows an interpretation of “household goods” as including delivery to a “home or office.” 275 F. Supp. 2d at 160 (internal quotation marks omitted). The FAAAA household goods exception does not apply to an “office” but only to property to be used in a “dwelling.” Therefore, the law related to a separate Act is not directly applicable to the FAAAA exception. The Court should reconsider its decision and apply the plain language of the household goods exception to this case.

CONCLUSION

For the reasons stated above and those in Appellants’ briefs, the Court should grant the petition for rehearing and find Appellants’ action are not preempted.

Respectfully submitted,



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October 15, 2019

The South Carolina Court of Appeals

Cortland James Eggleston and Rebecca McCutcheon,
Appellants,

v.

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

of which United Parcel Service Inc. is the Respondent.

Appellate Case No. 2016-000984

ORDER

DEC - 2 2019

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

<u>Thomas C. Yliff</u>	J.
<u>Paul E. Short, Jr.</u>	J.
<u>H. Bruce Wais</u>	J.

Columbia, South Carolina

cc:

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The Honorable Maite Murphy

FILED

November 27, 2019

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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TABLE OF CONTENTS

STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	1
FACTS	2
STANDARD OF REVIEW	5
ARGUMENT	5
I. Appellants' Claims Do Not Relate to a Service Provided by UPS.....	7
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...	11
III. Appellants' Claims Satisfy the "Household Goods" Exception to Preemption.....	14
CONCLUSION	15

TABLE OF AUTHORITIES

Cases

<i>Am. Airlines v. Wolens</i> , 513 U.S. 219 (1995)	9, 14
<i>Charas v. TWA</i> , 160 F.3d 1259 (9th Cir. 1998).....	11
<i>Chew v. Newsome Chevrolet, Inc.</i> , 315 S.C. 102, 431 S.E.2d 631 (Ct. App. 1993).....	5
<i>City of Columbus v. Ours Garage & Wrecker Serv.</i> , 536 U.S. 424 (2002).....	12, 15
<i>Cole v. S.C. Elec. & Gas, Inc.</i> , 355 S.C. 183, 584 S.E.2d 405 (Ct. App. 2003).....	11
<i>Dan's City Used Cars, Inc. v. Pelkey</i> , 133 S. Ct. 1769 (2013).....	passim
<i>Dilts v. Penske Logistics, LLC</i> , 769 F.3d 637 (9th Cir. 2014).....	6, 12
<i>Doe v. Bishop of Charleston</i> , 407 S.C. 128, 754 S.E.2d 494 (2014).....	5
<i>Ellis by Ellis v. Oliver</i> , 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999)	7
<i>Gaines Motor Lines, Inc. v. Klaussner Furniture Indus.</i> , 734 F.3d 296 (4th Cir. 2013).....	9
<i>Hammer v. Hammer</i> , 399 S.C. 100, 730 S.E.2d 874 (Ct. App. 2012).....	5
<i>Hodges v. Delta Airlines</i> , 44 F.3d 334 (5th Cir. 1995).....	13
<i>Huertas v. United Parcel Serv., Inc.</i> , 974 N.Y.S.2d 758 (N.Y. App. Div. 2013).....	8
<i>Kuehne v. UPS</i> , 868 N.E.2d 870 (Ind. Ct. App. 2007)	14
<i>Margolis v. United Airlines, Inc.</i> , 811 F. Supp. 318 (E.D. Mich. 1993).....	13
<i>Medical Park OB/GYN, P.A. v. Ragin</i> , 321 S.C. 139, 467 S.E.2d 261 (Ct. App. 1996)	9
<i>Morales v. TWA</i> , 504 U.S. 374 (1992).....	8, 9
<i>Morrow v. Fundamental Long-Term Care Holdings, LLC</i> , 412 S.C. 534, 773 S.E.2d 144 (2015)	10
<i>New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.</i> , 514 U.S. 645 (1995)	9
<i>Priester v. Cromer</i> , 388 S.C. 425, 697 S.E.2d 567 (2010)	5
<i>Priester v. Ford Motor Co.</i> , 562 U.S. 1254 (2011)	6
<i>Rowe v. N.H. Motor Transp. Ass'n</i> , 552 U.S. 364 (2008)	6, 11

<i>Sanchez v. Lasership, Inc.</i> , 937 F. Supp. 2d 730 (E.D. Va. 2013).....	10
<i>Smith v. Comair, Inc.</i> , 134 F.3d 254 (4th Cir. 1998)	9, 10
<i>Thompson v. UFP Eastern Div., Inc.</i> , 2012 U.S. Dist. Lexis 120129, 2012 WL 3686064 (D.S.C. 2012).....	12
<i>Wyeth v. Levine</i> , 555 U.S. 555 (2009)	6

Statutes

29 U.S.C. § 1144(a)	9
49 U.S.C. § 13102.....	15
49 U.S.C. § 14501(c)	passim
49 U.S.C. § 41713.....	6

Other Authorities

H. R. Conf. Rep. No. 103-677, p. 87 (1994).....	12
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Rules

Rule 12(b)(1), SCRCPP	5
Rule 12(b)(6), SCRCPP	5

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), SCRCF, 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), SCRCF, 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), SCRPC, 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), SCRPC, 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 Act² (“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 ERISA⁴ 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

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

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.

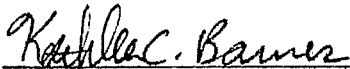
49 U.S.C. § 13102(10). “[T]he general preemption rule, § 14501(c)(1), ‘does not apply to the transportation of household goods.’” *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424, 435 (2002) (quoting § 14501(c)(2)(B)). “The Act [FAAAA] exempts certain measures from its preemptive scope, 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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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. and Rick Fogle are the Respondents

and

Rebecca McCutcheon Appellant

v.

United Parcel Service, Inc. and John Doe Defendants

Of Whom United Parcel Service, Inc. is the Respondent

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	1
FACTS	3
A. The Pleadings	3
B. Arguments Made to the Trial Court	4
C. Appellants' Motions for Reconsideration.....	7
STANDARD OF REVIEW	8
A. Rules 12(b)(1) and 12(b)(6), SCRCF	8
B. Rule 59, SCRCF	9
ARGUMENT	10
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	11
A. Legal Standard	11
B. Appellants Raised the Argument for the First Time in Their Rule 59 Motions for Reconsideration and Did Not Preserve It for Appeal	13
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.....	16
A. Appellants' State Law Claims Directly "Relate To" UPS's "Service"	16

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	20
III.	CONGRESS INTENDED FOR THE FAAAA'S PREEMPTION TO BE INTERPRETED AND APPLIED BROADLY, WHICH INCLUDES APPLICATION TO APPELLANTS' STATE LAW TORT CLAIMS	20
IV.	APPELLANTS' HOUSEHOLD GOODS EXCEPTION ARGUMENT SHOULD BE DEEMED ABANDONED AS IT IS MERELY CONCLUSORY AND LACKS SUPPORTING LEGAL AUTHORITY	23
V.	ALTERNATIVELY, THIS COURT SHOULD FIND THAT THE FAAAA'S HOUSEHOLD GOODS EXCEPTION IS INAPPLICABLE TO APPELLANTS' CLAIMS	24
	CONCLUSION	25

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Baird v. Charleston Cnty.</i> , 333 S.C. 519, 511 S.E.2d 69 (1999)	9
<i>BB & T v. Taylor</i> , 369 S.C. 548, 633 S.E.2d 501 (2006)	10
<i>Bower v. Egyptair Airlines Co.</i> , 731 F.3d 85 (1st Cir. 2013)	20, 22
<i>Brailsford v. Brailsford</i> , 380 S.C. 443, 669 S.E.2d 342 (Ct. App. 2008)	12, 16
<i>Brown v. United Airlines, Inc.</i> , 720 F.3d 60 (1st Cir. 2013)	20
<i>Charleston Cnty. Sch. Dist. v. Harrell</i> , 393 S.C. 552, 713 S.E.2d 604 (2011)	9
<i>Chew v. Newsome Chevrolet, Inc.</i> , 315 S.C. 102, 431 S.E.2d 631 (Ct. App. 1993)	8
<i>Columbia Venture, LLC v. Dewberry & Davis, LLC</i> , 604 F.3d 824 (4th Cir. 2010)	20
<i>Dan's City Used Cars, Inc. v. Pelkey</i> , 133 S. Ct. 1769 (2013)	10, 16, 18
<i>Deerskin Trading Post, Inc. v. United Parcel Serv. of Am., Inc.</i> , 972 F. Supp. 665 (N.D. Ga. 1997)	16, 17, 18, 21
<i>DiFiore v. Am. Airlines, Inc.</i> , 646 F.3d 81 (1st Cir. 2011)	23
<i>Dilts v. Penske Logistics, LLC</i> , 769 F.3d 637 (9th Cir. 2014)	24
<i>Dixon v. Dixon</i> , 362 S.C. 388, 608 S.E.2d 849 (2005)	12, 16
<i>Eldridge v. City of Greenwood</i> , 331 S.C. 398, 503 S.E.2d 191 (Ct. App. 1998)	20
<i>Fox v. Moultrie</i> , 379 S.C. 609, 666 S.E.2d 915 (2008)	21
<i>Gaines Motor Lines, Inc. v. Klaussner Furniture Indus., Inc.</i> , 734 F.3d 296 (4th Cir. 2013)	18
<i>Glasscock, Inc. v. U.S. Fidelity & Guar. Co.</i> , 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001)	13, 23, 24
<i>Herron v. Century BMW</i> , 395 S.C. 461, 719 S.E.2d 640 (2012)	11, 12, 13, 14, 15

<i>Huertas v. United Parcel Serv. Inc.</i> , 974 N.Y.S.2d 758 (N.Y. Sup. Ct. 2013)	19
<i>I'On, L.L.C. v. Town of Mt. Pleasant</i> , 338 S.C. 406, 526 S.E.2d 716 (2000)	12, 15
<i>Kiawah Prop. Owners Grp. v. Public Serv. Comm'n.</i> , 359 S.C. 105, 597 S.E.2d 145 (2004)	12, 16
<i>Kuehne v. UPS</i> , 868 N.E.2d 870 (Ind. Ct. App. 2007).....	6, 7, 14
<i>Laffitte v. Bridgestone Corp.</i> , 381 S.C. 460, 674 S.E.2d 154 (2009)	20
<i>McNair v. Fairfield Cnty.</i> , 379 S.C. 462, 665 S.E.2d 830 (Ct. App. 2008).....	9
<i>Medical Park OB/GYN, P.A. v. Ragin</i> , 321 S.C. 139, 467 S.E.2d 261 (Ct. App. 1996).....	18
<i>Morales v. Trans World Airlines, Inc.</i> , 504 U.S. 374 (1992).....	10, 11, 19
<i>Mudd-Lyman Sales & Serv. Corp. v. United Parcel Serv., Inc.</i> , 236 F. Supp. 2d 907 (N.D. Ill. 2002)	20
<i>Omya, Inc. v. Vermont</i> , 33 F. App'x 581 (2d Cir. 2002)	5
<i>Plyler v. Burns</i> , 373 S.C. 637, 647 S.E.2d 188 (2007)	9
<i>Poch v. Bayshore Concrete Prods./S.C., Inc.</i> , 386 S.C. 13, 686 S.E.2d 689 (Ct. App. 2009).....	12, 13, 15
<i>Pollard v. Cnty. of Florence</i> , 314 S.C. 397, 444 S.E.2d 534 (Ct. App. 1994).....	9
<i>Rockwell v. United Parcel Serv., Inc.</i> , No. 2:99 CV 57, 1999 WL 33100089 (D. Vt. July 7, 1999).....	17
<i>Rowe v. New Hampshire Motor Transp. Ass'n</i> , 552 U.S. 364 (2008).....	11
<i>Rowe v. United Parcel Serv., Inc.</i> , No. CV-S-96-862-PMP, 1996 U.S. Dist. LEXIS 11266 (D. Nev. July 31, 1996).....	17
<i>Sanchez v. Lasership, Inc.</i> , 937 F. Supp. 2d 730 (E.D. Va. 2013)	18
<i>Smith v. Comair, Inc.</i> , 134 F.3d 254 (4th Cir. 1998)	18
<i>State v. Aldret</i> , 333 S.C. 307, 509 S.E.2d 811 (1999)	12, 14-15, 16

<i>State v. Illinois Cent. R.R. Co.</i> , 928 So. 2d 60 (La. Ct. App. 2005).....	20
<i>State v. Smith</i> , 276 S.C. 494, 280 S.E.2d 200 (1981)	9
<i>State v. Tyndall</i> , 336 S.C. 8, 518 S.E.2d 278 (Ct. App. 1999).....	23, 24
<i>Stevens & Wilkinson of S.C., Inc. v. City of Columbia</i> , 409 S.C. 563, 762 S.E.2d 693 (2014)	11, 12, 15, 16
<i>Susan R. v. Donald R.</i> , 389 S.C. 107, 697 S.E.2d 634 (Ct. App. 2010).....	12, 16
<i>TNS Mills, Inc. v. S.C. Dep't of Revenue</i> , 331 S.C. 611, 503 S.E.2d 471 (1998)	15
<i>Tobin v. Fed. Exp. Corp.</i> , 775 F.3d 448 (1st Cir. 2014).....	17, 21, 22, 23
<i>Town of Summerville v. City of North Charleston</i> , 378 S.C. 107, 662 S.E.2d 40 (2008)	8
<i>Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund</i> , 389 S.C. 422, 699 S.E.2d 687 (2010)	11
<i>Venable v. GKN Auto.</i> , 421 S.E.2d 378 (N.C. App. Ct. 1992).....	20
<i>Vieira v. United Parcel Serv., Inc.</i> , No. C-95-04697 CAL ARB, 1996 WL 478686 (N.D. Cal. Aug 5, 1996).....	17
<i>Wagman v. Fed. Exp. Corp.</i> , No. 94-1422, 1995 WL 81686 (7th Cir. Feb. 17, 1995)	17
<i>Watson v. Watson</i> , 319 S.C. 92, 460 S.E.2d 394 (1995)	8
<i>Weston v. Kim's Dollar Store</i> , 385 S.C. 520, 684 S.E.2d 769 (Ct. App. 2009).....	8
<i>Wilkinson v. E. Cooper Cmty. Hosp., Inc.</i> , 410 S.C. 163, 763 S.E.2d 426 (2014)	9
<i>Wine & Spirits Wholesalers v. Net Contents, Inc.</i> , 10 F. Supp. 2d 84 (D. Mass. 1998).....	17
<i>Wise Recycling, LLC v. M2 Logistics</i> , 943 F. Supp. 2d 700 (N.D. Tex. 2013)	20
Statutes	
49 U.S.C. §14501(c)	<i>passim</i>
49 U.S.C. §14706.....	2

Other Authorities

H.R. Conf. Rep. No. 103-677 (1994) 10

Rules

Rule 8(a)(1), SCRCF 9

Rule 12(b)(1), SCRCF 8, 20

Rule 12(b)(6), SCRCF 8, 9, 20

Rule 59, SCRCF..... *passim*

STATEMENT OF ISSUES ON APPEAL

- I. Whether Appellants' "relating to service" argument was waived because Appellants failed to preserve it for appeal?
- II. Whether the trial court correctly held that Appellants' claims based on a late package delivery are related to UPS's package delivery service and therefore preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA")?
- III. Whether the trial court correctly held that Congress intended for the FAAAA's preemptive scope to be broad and thereby encompass Appellants' state law tort claims?
- IV. Whether Appellants' "household goods" exception argument was abandoned for purposes of this appeal?
- V. Whether the trial court correctly held that Appellants' claims are preempted and the household goods exception to preemption is inapplicable?

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), SCRCF. (R. pp. 5-10).

On March 3, 2016, Appellants each filed separate (but identical) Rule 59(e), SCRCF, 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 Court²

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), SCRPC

“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), SCRPC, 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 *Huerfano 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), SCRPC, but do not affirmatively show subject matter jurisdiction”).

“In deciding a motion to dismiss pursuant to 12(b)(6), SCRPC, 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 Cnty. Hosp., Inc.*, 410 S.C. 163, 169-70, 763 S.E.2d 426, 430 (2014) (internal quotations and citations omitted).

B. Rule 59, SCRPC

An order on a Rule 59(e), SCRPC, 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), SCRPC, 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 FAAAAA 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. at 113, 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), SCRPC. (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

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.

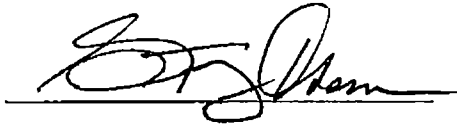
Alternatively, this Court should affirm the trial court's holding that Appellants' claims are preempted by the FAAAA and not exempted by the household goods exception. The FAAAA "expressly does not regulate a state's authority to . . . regulate the intrastate transport of household goods." *See Dilts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

A handwritten signature in black ink, appearing to read 'G. Troy Thames', is written over a horizontal line.

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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,

FINAL REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
FACTS	1
ARGUMENT	2
I. THE COURT MAY CONSIDER ALL DESIGNATED DOCUMENTS	2
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	3
III. APPELLANTS' STATE LAW NEGLIGENCE CLAIMS DO NOT RELATE TO A UPS SERVICE WITHIN THE MEANING OF THE FAAAA	5
IV. CONGRESS DID NOT INTEND TO PREEMPT APPELLANTS' COMMON LAW NEGLIGENCE CLAIMS IN THIS CASE	9
V. APPELLANTS' HOUSEHOLD GOODS EXCEPTION ARGUMENT CONTAINS CITATION TO STATUTORY AND CASE LAW AND, THEREFORE, IS NOT CONCLUSORY	10
VI. THE HOUSEHOLD GOODS EXCEPTION APPLIES IN THIS CASE	11
CONCLUSION	12

TABLE OF AUTHORITIES

Cases

<i>Baird v. Charleston Cnty.</i> , 333 S.C. 519, 511 S.E.2d 69 (1999).....	3
<i>City of Columbus v. Ours Garage & Wrecker Serv.</i> , 536 U.S. 424 (2002).....	11
<i>Dan's City Used Cars, Inc. v. Pelkey</i> , 133 S. Ct. 1769 (2013).....	12
<i>Deerskin Trading Post, Inc. v. United Parcel Serv. Of Am., Inc.</i> , 972 F. Supp. 665 (N.D. Ga. 1997).....	7
<i>Eldridge v. City of Greenwood</i> , 331 S.C. 398, 503 S.E.2d 191 (Ct. App. 1998)	6
<i>Godfrey v. Oakland Port Servs. Corp.</i> , 230 Cal. App. 4th 1267 (Cal. App. 1st Dist. 2014).....	6
<i>I'On, L.L.C. v. Town of Mt. Pleasant</i> , 338 S.C. 406, 526 S.E.2d 716 (2000)	5
<i>Mass. Delivery Ass'n v. Coakley</i> , 769 F.3d 11 (1st Cir. 2014).....	6
<i>Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.</i> , 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006).....	3
<i>Rockwell v. UPS</i> , 1999 U.S. Dist. Lexis 22036, 1999 WL 33100089 (D. Vt. 1999)	8
<i>Sanchez v. Lasership, Inc.</i> , 937 F. Supp. 2d 730, 740 (E.D. Va. 2013).....	6
<i>Simons v. Longbranch Farms, Inc.</i> , 345 S.C. 277, 547 S.E.2d 500 (Ct. App. 2001)	3
<i>Vieira v. UPS</i> , 1996 U.S. Dist. Lexis 11223, 1996 WL 478686 (N.D. Cal. 1996).....	7
<i>Wagman v. Fed. Express Corp.</i> , 1995 U.S. App. Lexis 3111 (4th Cir. 1995).....	7

Statutes

49 U.S.C. § 13102(10).....	11
49 U.S.C. § 14501(c)	2, 4, 11

Other Authorities

Jean Hoefer Toal et al., <u>Appellate Practice in South Carolina</u> 432 (3d ed., South Carolina Bar 2016).....	10
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Rules

Rule 208(b)(7), SCACR.....	4
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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.

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), SCRCF, 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").

Ins. 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 Ins. 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 Ins. 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 *risks 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

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, as 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

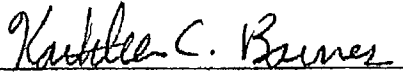
(2013) (“Concerned that state regulation impeded the free flow of trade, traffic, and transportation of interstate commerce, Congress resolved to displace certain aspects of the State regulatory process.” (internal quotation marks omitted)).

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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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.

RECORD ON APPEAL

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INDEX

	PAGE
Index.....	i
Notices of Appeal, May 6, 2016.....	1
Order Granting Defendants' Motion to Dismiss (McCutcheon), February 22, 2016.....	5
Order Granting Defendants' Motion to Dismiss (Eggleston), February 22, 2016.....	8
Order Denying Plaintiff's Rule 59(e) Motion to Reconsider, Alter, or Amend (McCutcheon), April 6, 2016.....	11
Order Denying Plaintiff's Rule 59(e) Motion to Reconsider, Alter, or Amend (Eggleston), April 6, 2016.....	12
Complaint (McCutcheon), September 18, 2014.....	13
Complaint (Eggleston), April 1, 2015.....	19
UPS Motion to Dismiss (McCutcheon), December 15, 2014.....	24
UPS Motion to Dismiss (Eggleston), May 4, 2015.....	26
UPS Memorandum of Law in Support of its Motion to Dismiss Plaintiff's Complaint (McCutcheon), February 19, 2015.....	28
McCutcheon's Memorandum in Opposition to Defendants' Motion to Dismiss, June 15, 2015....	41
Exhibit I.....	49
Eggleston's Memorandum in Opposition to Defendants' Motion to Dismiss, June 15, 2015.....	55
Exhibit I.....	63
Reply Brief in Support of UPS's Motion to Dismiss Plaintiff's Complaint (McCutcheon), September 10, 2015.....	69
Defendants' Memorandum of Law in Support of its Motion to Dismiss Plaintiff's Complaint (Eggleston), September 10, 2015.....	77
Letter from Defendants to Judge Murphy and attached proposed orders, January 29, 2016.....	96
Plaintiff's Rule 59(e), SCRCF, Motion to Reconsider, Alter, or Amend (McCutcheon), March 3, 2016.....	103

Plaintiff's Rule 59(e), SCRCP, Motion to Reconsider, Alter, or Amend, (Eggleston) March 3, 2016.....	112
Defendants' Response to McCutcheon's Rule 59(e), SCRCP, Motion to Reconsider, Alter, or Amend, March 21, 2016.....	121
Defendants' Response to Eggleston's Rule 59(e), SCRCP, Motion to Reconsider, Alter, or Amend, March 21, 2016.....	135
Transcript of Proceedings of September 28, 2015.....	149
Argument by Respondent.....	152
Argument by Appellants	157
Reply Argument by Respondent.....	161
Certificate of Counsel.....	167

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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MAY 06 2016

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable Maite Murphy

Case No. 2014-CP-38-01164

Rebecca McCutcheon, ... Appellant,

v.

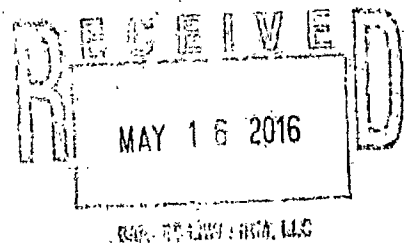
United Parcel Service, Inc. and John Doe, ... Defendants,

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

NOTICE OF APPEAL

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

[Signature block appears on the following page.]



Dated:

May 4, 2016

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

The Honorable Maite Murphy

Case No. 2015-CP-38-00354

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SC Court of Appeals

Cortland James Eggleston, ... Appellant,

v.

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

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

NOTICE OF APPEAL

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

[Signature block appears on the following page.]

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MAY 16 2016

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STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Rebecca McCutcheon,

Plaintiff,

vs.

United Parcel Service, Inc. and John
Doe.

Defendants.

) IN THE COURT OF COMMON PLEAS

)

) Case No.: 2014-CP-38-01164

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ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS

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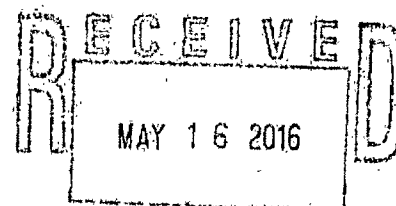
MAY 06 2016

SC Court of Appeals

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

FINDINGS OF FACT

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



BARNEY LAY FIRM, LLC

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CONCLUSIONS OF LAW

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

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

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

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

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

2 of 2 N/A

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

IT IS SO ORDERED.

St. George, South Carolina

Date Feb. 2, 2016

Maita Murphy
Maite Murphy
Presiding Judge

First Judicial Circuit

3 - 1 - 1

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG) Case No.: 2015-CP-38-00354
Cortland James Eggleston,)
Plaintiff,)
vs.) ORDER GRANTING DEFENDANTS'
United Parcel Service, Inc. and Rick) MOTION TO DISMISS
Fogle,)
Defendants.)

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MAY 06 2016

SC Court of Appeals

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

FINDINGS OF FACT

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

IT IS SO ORDERED.

St. George, South Carolina

Date Feb. 2, 2016

Maite Murphy
Maite Murphy
Presiding Judge

First Judicial Circuit

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

) IN THE COURT OF COMMON PLEAS
)

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

RECEIVED

MAY 06 2016

SC Court of Appeals

Rebecca McCutcheon,

Plaintiff,

vs.

United Parcel Service, Inc. and John Doe,

Defendants.

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

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

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

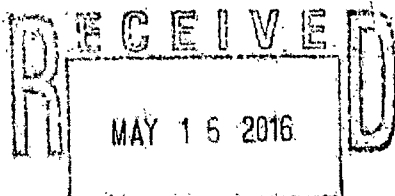
IT IS SO ORDERED.

01 George South Carolina

Date March 29, 2016

Kate Murphy
Maite Murphy
Presiding Judge

First Judicial Circuit



ROBERT L. FIGG, LLC

ATTEST: TRUE COPY

W. L. Figg
CLERK OF COURT
ORANGEBURG COUNTY, SC

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

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

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

IT IS SO ORDERED.

At: Georgetown, South Carolina
Date: March 29, 2016

Maite Murphy
Maite Murphy
Presiding Judge

First Judicial Circuit

ATTEST: TRUE COPY
W. [Signature]
CLERK OF COURT
ORANGEBURG COUNTY, SC

STATE OF SOUTH CAROLINA)
)
COUNTY OF ORANGEBURG)
)
Rebecca McCutcheon,)
)
Plaintiff,)
)
vs.)
)
United Parcel Service, Inc. and John)
Doe,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2014-CP-38- 01164

COMPLAINT
(Jury Trial Demanded)

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CLERK OF COURT
ORANGEBURG COUNTY

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

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

W. J. Brown
CLERK OF COURT
ORANGEBURG COUNTY

FACTUAL ALLEGATIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FOR A THIRD CAUSE OF ACTION
(LOSS OF CONSORTIUM)

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

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

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

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

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

LANIER & BURROUGHS, LLC

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

9.10, 2014

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)
Cortland James Eggleston,)

Plaintiff,)

vs.)

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

Defendants.)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2015-CP-38-00354

COMPLAINT

(Jury Trial Demanded)

ATTEST: TRUE COPY

Wynne B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

2015 APR -1 AM 11:19

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

1. That the Plaintiff is a citizen and resident of Orangeburg County, South Carolina.

2. That the Defendant, United Parcel Service, Inc., is, upon information and belief, a corporation organized and existing under the laws of a State other than the State of South Carolina. Further, Defendant UPS transacts business in Orangeburg County, South Carolina and is also a motor carrier as defined by South Carolina and Federal law, who is engaged in transporting of goods, materials, and medicine in and through Orangeburg County, South Carolina.

3. That Defendant Rick Fogle, who at the time of injury to the Plaintiff, was a substitute driver/delivery person for the Defendant UPS, is upon information and belief, a resident of one of the counties in the State of South Carolina.

4. That at all times relevant hereto, Fogle was acting as an agent, servant or employee of UPS and was acting within the course and scope of his agency, service or

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

FACTUAL ALLEGATIONS

5. That the Plaintiff is a Veteran who suffers from a thyroid condition, that if left untreated or untimely medicated, can cause congestive heart failure, *inter alia*.

6. Plaintiff received and has in the past received medications from the VA Hospital in Charleston ("VA Hospital") delivered by UPS to his residence.

7. For years the Plaintiff has received his medications from the VA Hospital, delivered by UPS to his address at 399 Rodeo Drive, Eutawville, South Carolina.

8. That on numerous prior occasions, said thyroid medication had been successfully delivered from the VA Hospital by UPS to Plaintiff's address, where he has resided for many years.

9. That on or about April 11, 2013, Plaintiff was expecting delivery of thyroid medication from the VA Hospital in Charleston, South Carolina via UPS.

10. That Plaintiff's thyroid medication failed to arrive.

11. Plaintiff is informed and believes that there were multiple communications between the VA Hospital and UPS between April 11, 2013 and April 15, 2013 regarding the delivery of said thyroid medication to the Plaintiff.

12. That on or about April 11, 2013, and the dates following, Defendant Fogle, acting as an agent, servant, or employee of Defendant UPS failed to timely deliver Plaintiff's medication.

13. That there were communications between Plaintiff and Defendant UPS regarding this delivery, wherein in Defendant UPS advised Plaintiff that his address did not exist or could not be located.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

LANIER & BURROUGHS, LLC



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

3-30
_____, 2015

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

)
)
)

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

Rebecca McCutcheon,
Plaintiff,

)
)
)

vs.

)

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

)
)
)
)
)

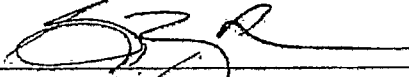
**DEFENDANT UNITED PARCEL
SERVICE, INC. NOTICE OF MOTION
AND MOTION TO DISMISS**

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

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

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

TURNER, PADGET, GRAHAM & LANEY



G. Troy Thames

Post Office Box 22129

Charleston, South Carolina 29413-2129

Telephone: 843-576-2829

Facsimile: 843-577-1647

E-mail: TThames@turnerpadget.com

Charleston, South Carolina

December 12, 2014

ATTORNEYS FOR DEFENDANT
UNITED PARCEL SERVICE, INC.

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

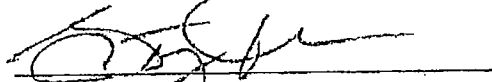
TO: SHANE M. BURROUGHS, ESQUIRE, ATTORNEY FOR PLAINTIFF:

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

Defendants crave reference to the appropriate law and any affidavits or

memoranda to be provided to the Court.

WILLSON JONES CARTER & BAXLEY, P.A.



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

Mount Pleasant, South Carolina
April 30, 2015

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

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

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

II. LEGAL STANDARDS

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

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

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

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

III. ARGUMENT

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

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

1. Federal Aviation Administration Authorization Act of 1994

The FAAAA provides in pertinent part:

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

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

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

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

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

2. Plaintiff’s State Law Claims are Preempted

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

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

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

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

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

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

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

3. This Court Lacks Subject Matter Jurisdiction

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

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

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

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

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

1. The Carmack Amendment

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

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

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

⁵ Where there is no South Carolina precedent construing 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.*, 674 S.E.2d 154, 162 (S. C. 2009).

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

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

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

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

2. Plaintiff’s State Law Claims are Preempted

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

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

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

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

⁷ See footnote 2, *supra*.

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

3. This Court Lacks Subject Matter Jurisdiction

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

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

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

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

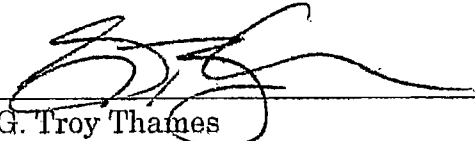
Additionally, or in the alternative, Plaintiff's Complaint should be dismissed pursuant to SCRCP 12(b)(6) because, as pled, Plaintiff has failed to state facts sufficient to constitute a cause of action. As explained more fully above, South Carolina federal courts applying Federal Rule of Civil Procedure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

IV. CONCLUSION

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

⁸ See footnote 5, *supra*.

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February 17, 2015

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

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIRST JUDICIAL CIRCUIT
COUNTY OF ORANGEBURG)	CIVIL ACTION NO: 2014-CP-38-001164
)	
Rebecca McCutcheon,	PLAINTIFF'S MEMORANDUM
)	IN OPPOSITION TO DEFENDANTS'
vs.	MOTION TO DISMISS
)	
United Parcel Service, Inc., and)	
Rick Fogle,	
)	
Defendants.	
)	

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

FACTS

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

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

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

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

LEGAL STANDARD

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

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

ARGUMENT

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

A. Preemption

United States Supreme Court preemption jurisprudence provides: (1) the purpose of Congress is the ultimate touchstone in every preemption case; and (2) courts should begin with a presumption against preemption. Priester v. Cromer, 388 S.C. 425, 697 S.E.2d 567 (2010) (citing Wyeth v. Levine, 129 S. Ct. 1187, 1195, 178 L. Ed. 2d 51 (2009)). "Consideration of issues arising under the Supremacy Clause [of the U.S. Constitution] starts with the assumption that the historic police powers of the States are not to be superseded by . . . Federal Act unless that is the *clear and manifest purpose of Congress*." Omya, Inc. v. Vermont, 33 Fed. Appx. 581, 583 (2d Cir. Vt. 2002) (emphasis added.) (quoting Gipollone v. Liggett Group, 505 U.S. 504,

516, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992)).

In Priester, the South Carolina Supreme Court provides for preemption as follows:

A federal law may either expressly preempt a state law through specific language clearly stating its intent or it may impliedly preempt a state law through field preemption or conflict preemption. Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985). Field preemption occurs when the scheme of federal regulation is so pervasive that it is reasonable to infer that Congress left no room for the states to regulate. Id. On the other hand, conflict preemption occurs where compliance with both federal and state regulations is physically impossible or where the state regulation "stands as an obstacle to the accomplishment and execution of [429] the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941).

Priester v. Cromer, 388 S.C. 425, 428-29, 697 S.E.2d 567 (2010). While both the FAAAA and Carmack Amendment arguably preempt state law in certain instances, those instances are not applicable to the immediate case nor facts at hand. Congress did not intend for the FAAAA or Carmack Amendment 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.

B. FAAAA

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

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

In Omya, the United States Court of Appeals for the Second Circuit conducted thorough research into the Congressional intent behind §14501, finding that it "targets state economic regulation – in other words, regulation designed to regulate competition – and seeks to place the "motor carrier" industry on equal footing with the "air carrier" industry, which had enjoyed the benefits of federal preemption of state regulation for many years prior to the enactment of §14501. See H.R. Conf. Rep. No. 103-677, 103rd Cong., 2d Sess. 84 (1994), reprinted in 1994 U.S.S.C.A.N. 1715, 1755 ("The central purpose of this legislation is to extend to all affected carriers, air carriers and carriers affiliated with direct air carriers through common controlling ownership on the one hand and motor carriers on the other, the identical intrastate preemption of prices, routes, and services as that originally contained in . . . the Federal Aviation Act [for air carriers].")" Omya, Inc. v. Vermont, 33 Fed. Appx. 581, 583 (2d Cir. Vt. 2002). In evaluating the FAAAA, the court in Omya noted that §14501 is modeled after the preemption provision of the Airline Deregulation Act ("ADA"), and closely parallels it:

H.R. Conf. Rep. No. 103-677, [584] at 1757 (Section 14501 "is identical to the preemption provision deregulating air carriers . .

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

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

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

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

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

C. Carmack Amendment

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

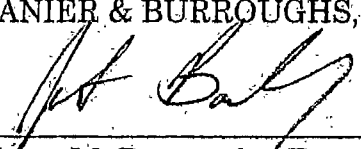
Therefore, the Carmack Amendment is wholly inapplicable to the case at hand because this case does not involve interstate commerce. Instead, this case involves intrastate delivery of medication from the VA Hospital in Charleston, South Carolina to the Plaintiff's residence in Orangeburg, South Carolina.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

CONCLUSION

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

Date: 6-15-15

LANIER & BURROUGHS, LLC


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

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

EUGELSTON, CORTLAND JAMES

7m<A>m

Ht(cm): 190.50 (01/15/2011)

DOB: [REDACTED]

Wt(kg): 83.82 (01/15/2013)

Rx #: 228424205

Orderable Item: METHIMAZOLE TAB

CMOP Drug: METHIMAZOLE 10MG TAB

*Dosage: 10MG

Verb: TAKE

Dispense Units: 1

Noun: TABLET

*Route: ORALLY

*Schedule: Q8H

Patient Instructions: FOR HYPERTHYROIDISM

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

Patient Status: OPT NSC

Issue Date: 04/10/13

Fill Date: 04/11/13

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

Last Release Date: 04/11/13

Lot #: 24067901

Expires: 04/11/14

MFG: Par

Days Supply: 60

QTY (TAB): 180

of Refills: 1

Remaining: 1

Provider: PARKER, KRISTINE U

Routing: Mail

Copies: 1

Clinic: CHS ENDOCRINE FELLOW PARKER

Division: VAMC CHARLESTON (534)

Pharmacist:

Patient Counseling: NO

Remarks:

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

Finished By: RUCH, BONNIE F

Filled By: CHISOLM, EBONIE S

Checked By: KOSCINSKI, BRANT A

Entry By: PARKER, KRISTINE U

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

Original Fill Released: 04/11/13

Routing: Mail

Refill Log:

#	Log Date	Refill Date	Qty	Routing	Lot #	Pharmacist
=====						
There are NO Refills For this Prescription						

Partial Fills:

#	Log Date	Date	Qty	Routing	Lot #	Pharmacist
=====						
1	04/15/13	04/15/13	30	Window	24066401	
=====						
Division: 534 RELEASED: 04/15/13						
REMARKS: ups holding prev packag						

Activity Log:

#	Date	Reason	Rx Ref	Initiator Of Activity
=====				
1	04/11/13	PATIENT INSTR. ORIGINAL		

EXHIBIT 1

049

Patient Information

Apr 15, 2013 10:24:42

Page: 1 of 1

EGGELSTON, CORTLAND JAMES

7mcA>m

Ht(cm): 190.50 (04/13/2013)

DOB: [REDACTED]

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

SEX: MALE

Non-VA Meds on File - Last entry on 05/27/12

Eligibility: NSC

RX PATIENT STATUS: OPT NSC

Disabilities:

133 RODEO DRIVE

PO BOX 955

HOME PHONE: [REDACTED]

EUTAWVILLE

CELL PHONE: 000-000-0000

SOUTH CAROLINA 29018

WORK PHONE:

Prescription Mail Delivery: Regular Mail

Allergies

Varified: PROPANOLOL HYDROCHLORIDE,

Remote:

Adverse Reactions

Pending Clinic Appointments:

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

JUL 10, 2013@08:00 CHS WARFARIN TELE TEAM 2-X *** Canceled ***

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

EGGELSTON, CORTLAND JAMES

199 RODEO DRIVE

DOB: [REDACTED]

PO BOX 265

EUTAWVILLE

PHONE: [REDACTED]

SOUTH CAROLINA 29048

ELIG: NSC

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

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

CrCL: 117.4(est.) (CREAT:0.75mg/dL 4/16/13)BSA: 2.19

DISABILITIES:

ALLERGIES: PROPRANOLOL HYDROCHLORIDE,

ADVERSE REACTIONS:

Patient Has Archived Prescriptions

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

REF

Rx#	Drug	ST	REM	Issued	Last Fill
22710264	METHIMAZOLE 10MG TAB	DE	0	07-26-12	07-26-12
QTY: 180 SIG: TAKE TWO TABLETS BY MOUTH EVERY 8 HOURS FOR HYPERTHYROIDISM					
22719877	METHIMAZOLE 10MG TAB	DE	0	08-14-12	11-30-12
QTY: 180 SIG: TAKE TWO TABLETS BY MOUTH EVERY 8 HOURS FOR HYPERTHYROIDISM					
\$22842420	METHIMAZOLE 10MG TAB	A	1	04-10-13	04-11-13
QTY: 180 SIG: TAKE ONE TABLET BY MOUTH EVERY 8 HOURS FOR HYPERTHYROIDISM					

Non-VA MEDS (Not Dispensed by VA)

SULINDAC 200MG TAB

Dosage: 200MG

Schedule: TWICE A DAY AFTER MEALS

Date Documented: 05/02/05

Status: Discontinued (05/27/12)

MULTIVITAMIN/MINERALS THERAPEUT CAP/TAB

Dosage: 1 TABLET

Schedule: ONCE A DAY

Date Documented: 06/27/12

Status: Active



CONSOLIDATED MAIL OUTPATIENT PHARMACY

Consolidated Mail Outpatient Pharmacy National Web Application

[Order Lookup](#) | [File a QA Report](#) | [Check QA Report Status](#) | [Form MOP-01 Staff](#)

Order Number: 534-75814-77 | Patient: EGGELETON, CORTLAND JAMES (*****0170) | QA Reporting Options for Entire Order: 534-75814-77 -> 3

Address Specified in Order: 399 RODEO DRIVE PO BOX 965 BUTAWVILLE, SC 29048

CMOP	Date/Time Received	Date/Time Completed	RX Number	Product Code	Order Status	NDC	Drug Name	Qty	Drug Cost	Package	Tr
Charleston (766)	2013-04-03 15:34:05	2013-04-03 10:45:38	22724041A (2of5)	M0086	Filled At CMOP Accepted by Medical Center Vista 4/3/2013 11:18:17 AM	20229003724	METOPROLOL TARTRATE 100MG TAB	63	\$1.52	205140060002591400071010122904A (USPS)	

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

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

Reviewed/Updated Data:

USPS

04/16/13 10:14:32

List Data

Page 1 of 1

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

Scriptpro dispensing info

NOTE DATED: 04/15/2013 16:30

LOCAL TITLE: PHARMACY INTERVENTION

STANDARD TITLE: PHARMACY E & M NOTE

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

Pharmacy Intervention:

Notes: Patient's spouse called concerned that overnight delivery of methimazole has still not been received and stated he's in the middle of a thyroid crisis. Confirmed with central pharmacy records and VA mailroom that rx was released to UPS on Thu 4/11/13. Confirmed address with patient's spouse. Pulled UPS records which states package being held because a correct street name is needed. Called UPS @ (1-800-742-5877) regarding held package with tracking number 1ZA39F190345938558. Spoke with Joseph @ UPS who contacted local driver to make contact with patient and redeliver today. Also provided another partial overnight deliver for tomorrow as backup since patient and spouse declined getting a partial supply from local pharmacy d/t transportation and financial issues. Case d/w Dr Charles in Bndo who spoke with patient to have patient come to VAMC ER for evaluation today.

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

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

SPECIALTY CLINICAL PHARMACIST

04/15/2013 16:42

EGGELSTON, CORTLAND JAMES

CHARLESTON VAMC

Printed: 04/16/2013 12:46

DOB: [REDACTED]

Pr Loc: 1BN MED B334-9

Vice SF 509

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF ORANGEBURG)

FIRST JUDICIAL CIRCUIT

CIVIL ACTION NO: 2015-CP-38-00354

Courtland James Eggleston,)

PLAINTIFF'S MEMORANDUM

vs.)

IN OPPOSITION TO DEFENDANTS'

MOTION TO DISMISS

United Parcel Service, Inc., and)

Rick Fogle,)

Defendants.)

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

FACTS

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

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

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

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

LEGAL STANDARD

Pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, a trial judge may dismiss a claim when the defendant demonstrates the plaintiff's

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

ARGUMENT

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

A. Preemption

United States Supreme Court preemption jurisprudence provides: (1) the purpose of Congress is the ultimate touchstone in every preemption case; and (2) courts should begin with a presumption against preemption. Priester v. Cromer, 388 S.C. 425, 697 S.E.2d 567 (2010) (citing Wyeth v. Levine, 129 S. Ct. 1187, 1195, 173 L. Ed. 2d 51 (2009)). "Consideration of issues arising under the Supremacy Clause [of the U.S. Constitution] starts with the assumption that the historic police powers of the States are not to be superseded by . . . Federal Act unless that is the *clear and manifest purpose of Congress*." Omva, Inc. v. Vermont, 33 Fed. Appx. 581, 583 (2d Cir. Vt. 2002) (emphasis added.) (quoting Cipollone v. Liggett Group, 505 U.S. 504, 516, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992)).

In Priester, the South Carolina Supreme Court provides for preemption as follows:

A federal law may either expressly preempt a state law through specific language clearly stating its intent or it may impliedly preempt a state law through field preemption or conflict preemption. Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985). Field preemption occurs when the scheme of federal regulation is so pervasive that it is reasonable to infer that Congress left no room for the states to regulate. Id. On the other hand, conflict preemption occurs where compliance with both federal and state regulations is physically impossible or where the state regulation "stands as an obstacle to the accomplishment and execution of [429] the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941).

Priester v. Cromer, 388 S.C. 425, 428-29, 697 S.E.2d 567 (2010). While both the FAAAA and Carmack Amendment arguably preempt state law in certain instances, those instances are not applicable to the immediate case nor facts at hand. Congress did not intend for the FAAAA or Carmack Amendment 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.

B. FAAAA

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

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

In Omya, the United States Court of Appeals for the Second Circuit conducted thorough research into the Congressional intent behind §14501, finding that it "targets state economic regulation – in other words, regulation designed to regulate competition – and seeks to place the "motor carrier" industry on equal footing with the "air carrier" industry, which had enjoyed the benefits of federal preemption of state regulation for many years prior to the enactment of §14501. See H.R. Conf. Rep. No. 103-677, 103rd Cong., 2d Sess. 84 (1994), reprinted in 1994 U.S.S.C.C.A.N. 1715, 1755 ("The central purpose of this legislation is to extend to all affected carriers, air carriers and carriers affiliated with direct air carriers through common controlling ownership on the one hand and motor carriers on the other, the identical intrastate preemption of prices, routes, and services as that originally contained in . . . the Federal Aviation Act [for air carriers].")." Omya, Inc. v. Vermont, 33 Fed. Appx. 581, 583 (2d Cir. Vt. 2002). In evaluating the FAAAA, the court in Omya noted that §14501 is modeled after the preemption provision of the Airline Deregulation Act ("ADA"), and closely parallels it:

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

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

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

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

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

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

C. Carmack Amendment

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

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

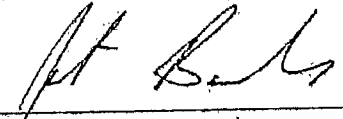
because this case does not involve interstate commerce. Instead, this case involves intrastate delivery of medication from the VA Hospital in Charleston, South Carolina to the Plaintiff's residence in Orangeburg, South Carolina. Moreover, at no time did the medication or vehicle(s) delivering it have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

CONCLUSION

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

Date: 6-15-15

LANIER & BURROUGHS, LLC


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

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

EGGELSTON, CORTLAND JAMES

7000A.m

PID: [REDACTED]
DOB: [REDACTED]

Ht(cm): 170.50 (04/15/2013)
Wt(kg): 89.82 (04/15/2013)

Rx #: 22842420\$

Orderable Item: METHIMAZOLE TAB

CMOP Drug: METHIMAZOLE 10MG TAB

*Dosage: 10MG

Verb: TAKE

Dispense Units: 1

Noun: TABLET

*Route: ORALLY

*Schedule: Q8H

Patient Instructions: FOR HYPERTHYROIDISM

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

Patient Status: OPT NSC

Issue Date: 04/10/13

Fill Date: 04/11/13

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

Last Release Date: 04/11/13

Lot #: 24067901

Expires: 04/11/14

MFG: Par

Days Supply: 60

QTY (TAB): 180

of Refills: 1

Remaining: 1

Provider: PARKER, KRISTINE U

Routing: Mail

Copies: 1

Clinic: CHS ENDOCRINE FELLOW PARKER

Division: VAMC CHARLESTON (534)

Pharmacist:

Patient Counseling: NO

Remarks:

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

Finished By: RUCH, BONNIE F

Filled By: CHISOLM, EBONIE S

Checked By: KOSCINSKI, BRANT A

Entry By: PARKER, KRISTINE U

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

Original Fill Released: 04/11/13

Routing: Mail

Refill Log:

#	Log Date	Refill Date	Qty	Routing	Lot #	Pharmacist
There are NO Refills For this Prescription						

Partial Fills:

#	Log Date	Date	Qty	Routing	Lot #	Pharmacist
1	04/15/13	04/15/13	30	Window	24066401	
Division: 534 RELEASED: 04/15/13						
REMARKS: ups holding prev packag						

Activity Log:

#	Date	Reason	Rx Ref	Initiator Of Activity
1	04/11/13	PATIENT INSTR. ORIGINAL		



Patient Information

Apr. 16, 2013 10:21:42

Page: 1 of 1

EGGELSTON, CORTLAND JAMES

7mca>m

PID: [REDACTED]

Ht (cm): 170.53 (01/15/2013)

DOB: [REDACTED]

Wt (kg): 89.82 (01/15/2013)

SEX: MALE

Non-VA Meds on File - Last entry on 05/27/12

Eligibility: NSC

RX PATIENT STATUS: OPT NSC

Disabilities:

393 RODEO DRIVE

PO BOX 955

HOME PHONE: [REDACTED]

CELL PHONE: 000-000-0000

EUFAYVILLE

WORK PHONE:

SOUTH CAROLINA 29048

Prescription Mail Delivery: Regular Mail

Allergies

Verified: PROPRANOLOL HYDROCHLORIDE,

Remote:

Adverse Reactions

Pending Clinic Appointments:

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

JUL 10, 2013@08:00 CHS WARFARIN TELE TEAM 2-X *** Canceled ***

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

BOGERTON, CORTLAND JAMES

399 RODEO DRIVE

DOB: [REDACTED]

PO BOX 955

EUTAWVILLE

PHONE: [REDACTED]

SOUTH CAROLINA 29049

ELIG: NSC

WEIGHT(Kg): 89.82 (04/15/2013) HEIGHT(cm): 199.50 (04/15/2013)

CrCL: 117.4(est.) (CREAT:0.75mg/dL 4/16/13)BSA: 2.19

DISABILITIES:

ALLERGIES: PROPRANOLOL HYDROCHLORIDE.

ADVERSE REACTIONS:

Patient Has Archived Prescriptions

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

REF

Rx#	Drug	ST	RM	Issued	Last Fill
22710264	METHIMAZOLE 10MG TAB	DE		0 07-26-12	07-26-12
QTY: 180 SIG: TAKE TWO TABLETS BY MOUTH EVERY 8 HOURS FOR HYPERTHYROIDISM					
22719877	METHIMAZOLE 10MG TAB	DE		0 08-14-12	11-30-12
QTY: 180 SIG: TAKE TWO TABLETS BY MOUTH EVERY 8 HOURS FOR HYPERTHYROIDISM					
522342420	METHIMAZOLE 10MG TAB	A		1 04-10-13	04-11-13
QTY: 180 SIG: TAKE ONE TABLET BY MOUTH EVERY 8 HOURS FOR HYPERTHYROIDISM					

Non-VA MEDS (Not Dispensed by VA)

SULINDAC 200MG TAB

Dosage: 200MG

Schedule: TWICE A DAY AFTER MEALS

Date Documented: 05/02/05

Status: Discontinued (05/27/12)

MULTIVITAMIN/MINERALS THERAPEUT CAP/TAB

Dosage: 1 TABLET

Schedule: ONCE A DAY

Date Documented: 06/27/12

Status: Active

04/16/13 10:14:32

List Data

Page 1 of 1

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

Scriptpro dispensing info

NOTE DATED: 04/15/2013 16:30

LOCAL TITLE: PHARMACY INTERVENTION

STANDARD TITLE: PHARMACY E & M NOTE

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

Pharmacy Intervention:

Notes: Patient's spouse called concerned that overnight delivery of methimazole has still not been received and stated he's in the middle of a thyroid crisis. Confirmed with central pharmacy records and VA mailroom that rx was released to UPS on Thu 4/11/13. Confirmed address with patient's spouse. Pulled UPS records which states package being held because a correct street name is needed. Called UPS @ (1-800-742-5277) regarding held package with tracking number 1ZAL397130345933553. Spoke with Joseph @ UPS who contacted local driver to make contact with patient and redeliver today. Also provided another partial overnight deliver for tomorrow as backup since patient and spouse declined getting a partial supply from local pharmacy d/t transportation and financial issues. Case d/w Dr Charles in Endo who spoke with patient to have patient come to VAMC ER for evaluation today.

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

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

SPECIALTY CLINICAL PHARMACIST

04/15/2013 16:42

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

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

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

I. ARGUMENT

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

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

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

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

1. Plaintiff Avoids Applicable Case Law

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

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

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

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

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

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

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

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

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

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

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

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

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

3. The FAAAA's Household Goods Exception is Inapplicable

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

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

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

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

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

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

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

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

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

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

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

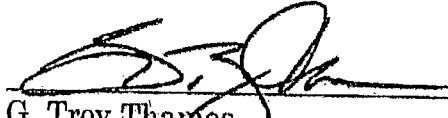
With respect to the Carmack Amendment, Plaintiff’s opposition simply contends that the Carmack Amendment’s preemption provision is inapplicable because the at-issue delivery did not involve interstate commerce. Plaintiff states that the package was shipped from the VA Hospital in Charleston, South Carolina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

II. CONCLUSION

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

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

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September 10, 2015

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

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Cortland James Eggleston,

Plaintiff,

vs.

United Parcel Service, Inc. and Rick
Fogle,

Defendants.

) IN THE COURT OF COMMON PLEAS

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

) DEFENDANTS UNITED PARCEL

) SERVICE, INC. AND RICK

) FOGLE'S MEMORANDUM OF LAW IN

) SUPPORT OF THEIR MOTION TO

) DISMISS PLAINTIFF'S COMPLAINT

)

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ORANGEBURG COUNTY, SC

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

I. INTRODUCTION

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

ORANGEBURG COUNTY, SC
CLERK OF COURT
Wingfield B. Clark
JANEST TRUETT CLARK

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

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

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

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

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

II. LEGAL STANDARDS

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

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

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

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

III. ARGUMENT

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

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

1. Federal Aviation Administration Authorization Act of 1994

The FAAAA provides in pertinent part:

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

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

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

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

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

2. Plaintiff's State Law Claims are Preempted

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

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

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

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

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

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

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

3. This Court Lacks Subject Matter Jurisdiction

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

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

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

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

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

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

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

1. The Carmack Amendment

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

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

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

⁴ Where there is no South Carolina precedent construing 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.*, 674 S.E.2d 154, 162 (S. C. 2009).

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

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

2. Plaintiff's State Law Claims are Preempted

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

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

⁶ See footnote 1, *supra*.

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

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

3. This Court Lacks Subject Matter Jurisdiction

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

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

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

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

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

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

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

IV. RESPONSE TO PLAINTIFF'S OPPOSITION

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

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

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

⁷ *See* footnote 4, *supra*.

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

1. Plaintiff Avoids Applicable Case Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. The FAAAA's Household Goods Exception is Inapplicable

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

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

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

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

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

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

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

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

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

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

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

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

V. CONCLUSION

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

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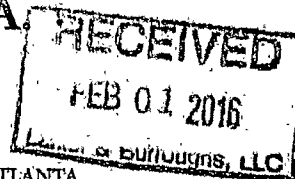
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September 10, 2015

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January 29, 2016

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

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

Dear Judge Murphy:

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

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.

G. Troy Thames

GTT/ajm

Enclosure

cc Justin Tyler Bamberg
Mr. Shane M. Burroughs

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Rebecca McCutcheon,

Plaintiff,

vs.

United Parcel Service, Inc. and John
Doe,

Defendants.

) IN THE COURT OF COMMON PLEAS

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) Case No.: 2014-CP-38-01164

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**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS**

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

FINDINGS OF FACT

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

IT IS SO ORDERED.

_____, South Carolina

Date _____, 2016

Maite Murphy
Presiding Judge

First Judicial Circuit

IN THE COURT OF COMMON PLEAS

Case No.: 2015-CP-38-00354

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

IT IS SO ORDERED.

_____, South Carolina

Date _____, 2016

Maite Murphy
Presiding Judge

First Judicial Circuit

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Rebecca McCutcheon,

Plaintiff,

v.

United Parcel Service, Inc. and John Doe,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 2014-CP-38-01164

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

FILED FOR RECORD
WINIFRED B. CLARK
CLERK OF COURT
ORANGEBURG, SC
2016 MAR -3 P 3:15

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

FACTUAL BACKGROUND

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

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

WINIFRED B. CLARK
CLERK OF COURT
ORANGEBURG COUNTY, SC

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

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

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

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

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

STANDARD

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

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

ARGUMENT

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

49 U.S.C. § 14501(c)(1) states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(B) arranged and paid for by another party.

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

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

CONCLUSION

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

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3.2, 2016

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 2015-CP-38-00354

PLAINTIFF'S RULE 59(e), SCRCF.

MOTION TO RECONSIDER, ALTER

FILED FOR RECORD
MINNIFIA B. CLARK
2016 MAR -3 P 3:
CLERK OF COURT
GRANDEBURG, SC

FACTUAL BACKGROUND

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

ATTEST: TRUE COPY

Wingya B. Cook
CLERK OF COURT

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

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

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

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

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

STANDARD

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

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

ARGUMENT

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

49 U.S.C. § 14501(c)(1) states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(B) arranged and paid for by another party.

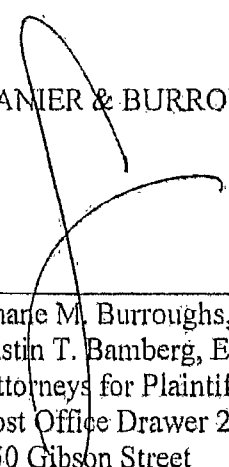
49 U.S.C. § 13102(10). Plaintiff's medication is a personal effect and property to be used in his dwelling. The transportation of the medication was arranged and paid for by the VA hospital, "another party." *Id.* Therefore, the medication meets the criteria for a household good that is excepted from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

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

CONCLUSION

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

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3.2, 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ORANGEBURG	)	Case No. 2014-CP-10-38-1164
Rebecca McCutcheon,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	DEFENDANT UNITED PARCEL SERVICE,
	)	INC.'S RESPONSE TO PLAINTIFF'S RULE
United Parcel Service, Inc. and John Doe,	)	59(e) MOTION TO RECONSIDER, ALTER,
	)	OR AMEND
Defendants.	)	
	)	
	)	

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

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

I. INTRODUCTION

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

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

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

II. RELEVANT PROCEDURAL HISTORY

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

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

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

III. LEGAL STANDARD

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

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

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

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

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

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

IV. ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶ See footnote 2, *supra*.

3. The FAAAA's Household Goods Exception is Inapplicable

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

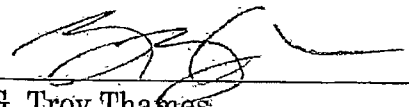
Plaintiff tellingly cites **no case law** in support of her position that the limited household goods exception applies here. None exists. The FAAAA provides for an exemption whereby states are not prohibited from enacting legislation which regulates intrastate transportation of household goods. *See*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

V. CONCLUSION

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

(signature page to follow)

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March 21, 2016

ATTORNEYS FOR UNITED PARCEL
SERVICE, INC.

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

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

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

I. INTRODUCTION

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

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

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

II. RELEVANT PROCEDURAL HISTORY

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

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

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

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

III. LEGAL STANDARD

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

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

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

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

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

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

IV. ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁷ See footnote 3, *supra*.

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

3. The FAAAA's Household Goods Exception is Inapplicable

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

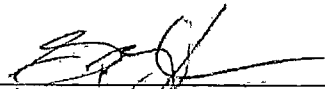
Plaintiff tellingly cites **no case law** in support of his position that the limited household goods exception applies here. None exists. The FAAAA provides for an exemption whereby states are not prohibited from enacting legislation which regulates intrastate transportation of household goods. *See*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

V. CONCLUSION

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

(Signature Page to Follow)

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March 21, 2016

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

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

COURT OF COMMON PLEAS

ORIGINAL

Rebecca McCutcheon

Plaintiff,

vs.

United Parcel Service, Inc.,
and John Doe,

Defendant,

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

MOTIONS

Courtland James Eggleston,

Plaintiff,

vs.

United Parcel Service, Inc.,

Defendant.

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

Orangenburg County Courthouse
September 28, 2015

BEFORE:

HONORABLE MAITE MURPHY, PRESIDING JUDGE.

APPEARANCES:

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

Shane M. Burroughs, Esquire
Attorney for Plaintiffs

TAKEN BY MELISSA R, SINGLETARY
CERTIFIED VERBATIM REPORTER

INDEX

	<u>PAGE</u>
Certificate of Service	18

(There were no Exhibits marked during this Motion)

1 The Court: All right. Gentlemen.

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

21 The Court: Is that correct, counsel?

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

24 The Court: All right. You may proceed.

25 Mr. Corkery: Good afternoon, Your Honor.

1 The Court: Good afternoon.

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

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

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

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

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

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

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

1 can relate to or preempted.

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

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

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

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

8 The Court: Do you have you both?

9 Mr. Thames: I have everything.

10 The Court: Thank you.

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

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

8 The Court: Mr. Burroughs.

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

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

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

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

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

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

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

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

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

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

14 The Court: Any reply.

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

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

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

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

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

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

9 Mr. Corkery: Thank you.

10 Mr. Burroughs: Thank you, Your Honor.

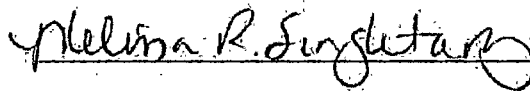
11 (End of Motion)
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CERTIFICATE

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

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

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



Melissa R. Singletary
Certified Court Reporter