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SUPREME COURT OF THE STATE OF FLORIDA

IVANA VIDOVIC MLINAR,
Appellant/Plaintiff,
vs.

UNITED PARCEL SERVICE INC.,
Appellee/Defendant,

RECOVERY MANAGEMENT CORP. d/b/a CARGO LARGO, PAK MAIL OF WELLINGTON, INC., and AARON ANDERSON,
Defendants.

CASE NO: SC14-54
LOWER TRIBUNAL Nos.
FOURTH DCA: 4D12-1332
15th JUD. CIR.: 502008CA036246 (PALM BEACH)

REPLY BRIEF OF APPELLANT

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEALS AFFIRMING FINAL JUDGMENT OF THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR PALM BEACH COUNTY

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PRELIMINARY STATEMENT

As before, citations to the Record on appeal follow the index of the Clerk of the Fourth District Court of Appeal, as provided on May 9, 2014. In addition, notations to the bookmarked record filed as an Appendix (which required filing in smaller volumes) are noted as follows.

- The Opinion of the Fourth District Court of Appeal is referred to as
  V. i: x (x representing the page number of volume)
  Tab 1: x (Tab 1 and x representing page of the Order).

- Vidovic's Initial Brief to the Fourth District Court of Appeal is referred to as
  V. i: x (x representing the page number of volume)
  Tab A (Initial Brief): x (x representing page number of Initial Brief).

- UPS's Answer Brief to the Fourth District Court of Appeal is referred to as
  V. i: x (x representing the page number of volume)
  Tab B (Answer): x (x representing page number of the Answer).

- Vidovic's Reply Brief to the Fourth District Court of Appeal is referred to as
  V. i: x (Volume I and x representing the page number of volume)
  Tab C (Reply): x (Tab C and x representing page number of the Reply).

- The Record from the Fifteenth Judicial Circuit is referred to by the Roman Numeral Volume Number and page number
  V. (ii-iv): R. x (x representing page number of the record.)

- Paragraphs within the Second Amended Complaint are referenced with a citation to a page of the Record, followed by "¶ x" to designate a paragraph number.

INTRODUCTION

Carmack is an affirmative defense. Thus, in order to achieve dismissal, UPS has the burden to prove that Carmack completely precludes the claims that are alleged. *See UPS Supply Chain Solutions, Inc. v. Megatrux Transp., Inc.*, 750 F.3d 1282, 1286 (11th Cir. 2014).

Instead of conceding that simple legal premise, UPS's answer confuses the issue by raising a new argument: The Carmack amendment preempts all claims alleging negligent bailment and limits such claims to a negotiated value. UPS now implies that even if Carmack's limiting effect on claims for negligent bailment does not completely preempt the independent tort claims alleged in this case, state courts are still somehow preempted from hearing claims against interstate carriers. This is plainly wrong as Carmack affords concurrent jurisdiction over all claims against carriers, even if the claim is within the scope of Carmack preemption. See 49 U.S.C. § 14706(d).

Additionally, the Answer misrepresents the prior proceedings, claiming that Vidovic's briefing on the issue of UPS's failure to prove the affirmative defense is a novel argument. UPS replies to Vidovic's **consistent** citations to *Braid Sales & Marketing. v. R & L Carriers*, 838 So. 2d 590 (Fla. 5th DCA 2003)—the opinion upon which this Court accepted conflict jurisdiction—with the same "red herring"

argument it made in its Answer below. Further UPS continues to ignore the remaining prerequisites for claiming the defense that are outlined in *Braid*, recently restated by the Eleventh Circuit in *UPS Supply Chain Solutions, Inc.*, 750 F.3d at 1286 (11th Cir 2014).

Finally, UPS's answer also ignores the allegations, insisting Vidovic approached Pak-Mail as an intermediary to UPS. In fact, she alleges that UPS lured her to go to Pak-Mail under the affirmative misrepresentation that she was a UPS customer. (V.iii, R. 172, ¶ 53(a)-(d)). The agreement included that UPS would "track" her package if lost. (V.iii, R. 172, ¶ 53(e)-(f)). UPS purposely denied any liability (Carmack or otherwise) to Vidovic after they stole her paintings and delivered her an empty package. (V.iii, R. 160, ¶13). UPS and its overgoods servicer, Cargo Largo, sold the paintings after she attempted to reclaim them, using the same protected likeness information she had attempted to give UPS in order to find the painting. (V.iii, R. 162, ¶ 17). The scheme to sell Vidovic and others a fake tracking number and to deny all liability to each shipper occurred before Vidovic's packages were ever accepted by UPS (V.ii, R. 172, ¶ 53(e)-(l), making the tariffs UPS attempts to use as a Carmack defense neither "downstream" nor "upstream" of Vidovic, but simply non-compliant.

In short, the Answer evades the whole point of the case: **Had Vidovic known that she could not rely on UPS to assist in locating the package and that she was sold a "fake" tracking number (one that UPS allows Pak Mail to sell) or had she foreseen that UPS would purposely steal her painting and then sell it by misappropriating her name, she never would have entrusted her packages to Pak Mail or to UPS. Furthermore, if she had known she would have no recourse against UPS for stealing her painting, she never would have declared a limited liability to Pak Mail.** Had any of those events been foreseeable to her (as they certainly were to the criminal conspirators she alleges set up the whole deceptive enterprise) she would not have trusted them with her paintings or her opportunity.

I. UPS'S NEW PREEMPTION ARGUMENT IS DEEPLY FLAWED

A. UPS Argues the Separate Misconduct Exception Applies to the Conversion Claim Only When the Allegations Defeat Preemption of All Claims

From the outset, UPS and the lower tribunals have stated that Vidovic could not raise state-based claims because Carmack preempts all claims for damages arising out of the loss or damage to goods. Vidovic has argued that Carmack preemption is not complete and does not limit claims alleging misconduct on the part of the carrier that is separate and distinct from the acts shipping of goods.

In other words, the Carmack defense that UPS has claimed until now is one of choice of law preemption: Carmack limits claims arising out of the loss or damage within interstate carriage of goods. Because Vidovic received a nominal amount of free shipping from Pak-Mail, after UPS refused to look for the painting it removed from Vidovic's packaging before it was delivered, UPS claims she can have no additional recovery because Carmack precludes it.

Vidovic, in citing to precedent, which admits that Carmack does not limit claims that allege separate misconduct, cited to the "true conversion test" in her briefing to date. Because Carmack does not attempt to preclude intentional tort claims that are unrelated to shipment, federal courts have determines that "true conversion claims" escape Carmack limitations. In answer, UPS argues that even if Plaintiff's allegations meet the true conversion test, the Court still lacks the ability to adjudicate the conversion claim, because it remains a Carmack claim, without Carmack limitation. This is semantic puffery.

There is no distinction between the test for separate conduct, which would allow the claimant to bring separate state torts, and true conversion, that would allow a claim to escape Carmack limitations. The true conversion test as set forth in *American Cyanamid Co. v. New Perm Motor Express, Inc.*, 979 F.2d 310, 315-16 (3d Cir. 1992) is set forth as "nothing short of intentional destruction or

conduct in the nature of theft of the property (which) will permit a shipper to circumvent the liability limitations set forth in a bill of lading." This is comparable to the intentional tort exception to Carmack generally, that is acknowledged in *Smith v. UPS*, 296 F.3d 1244 (11th Cir. 2002) and *Schwarz v. Nat'l Van Lines, Inc.*, Case No. 03 C 7096, 2004 WL 1166632 (N.D. Ill. May 21, 2004).

B. Carmack Expressly Grants Concurrent Jurisdiction to State Courts to Resolve Carmack Issues

UPS is essentially arguing that even if there are no limitations on the conversion claim (a circumstance which if true would mean there is no bar to bringing state claims either), the trial court does not have jurisdiction over the claims. UPS's new argument mistakes choice of law preemption (wherein a federal statute limits or supplants state-based causes of action that conflict with its provisions) as forum preemption (wherein a federal statute expressly prohibits state court adjudication of a federal claim).

Had this argument of lack of jurisdiction been the issue below (which it was not), the Fourth District Court of Appeal would have properly reversed an erroneous decision confusing choice of law and choice of forum preemption. *See Cordis Corp. v. O'Shea*, 24 So. 3d 576 (Fla. 4th DCA 2009) (denying a petition for writ of prohibition confusing an affirmative defense, which may have had some

limitation on a medical products injury claim, with an argument for lack of subject matter jurisdiction over the claim).

As this Court is well aware, state courts have an obligation to hear federal claims unless state jurisdiction over a federal claim is expressly ousted by the federal law. See *Haywood v. Drown*, 556 U.S. 729 (2009) (citing *Claflin v. Houseman*, 93 U.S. 130 (1876)) and *Howlett v. Rose*, 496 U.S. 356 (1990), both of which stand for the proposition that unless a federal statute expressly ousts state court jurisdiction over federal causes of action, the state is bound to hear those cases even if certain aspects of state law are supplanted by federal law. In other words, had this been the argument below, UPS would have had to demonstrate that the states were ousted of jurisdiction. No such attempt was made. In this case in particular, no such attempt could have been made as Carmack expressly affords concurrent jurisdiction. *See* 49 U.S.C. § 14706(d) [1] [2]

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[1] **(d) Civil actions.--**
(1) Against delivering carrier.--A civil action under this section may be brought against a delivering carrier in a district court of the United States or in a State court. Trial, if the action is brought in a district court of the United States is in a judicial district, and if in a State court, is in a State through which the defendant carrier operates.
(2) Against carrier responsible for loss.--A civil action under this section may be brought against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred.
(3) Jurisdiction of courts.--A civil action under this section may be brought in a United States district court or in a State court.

[2] Vidovic never cited this provision before because there has never been argument that the state court lacked jurisdiction

If the claims escape the limiting effect of Carmack, there is no preemption. It is interesting to note that subsection (d) provides that Carmack claims are against the delivering carrier (in this case, UPS) or the carrier alleged to be responsible for the loss (again, UPS). As cited before, the Complaint alleges that Vidovic's package went on the UPS truck intact and arrived in New York with paintings stolen. UPS denied Vidovic any help. The artwork was sold as a UPS lost good by its overgoods locator, Cargo Largo. According even to Carmack, the only possible defendant in a Carmack claim is UPS and UPS admittedly has not demonstrated how its acts are related to shipment or are covered by an allowable tariff—thus there is no applicable defense to claims erroneously dismissed.

II. UPS'S FAILURE TO PROVE ITS CARMACK DEFENSE IS NOT A NEW ISSUE BUT WAS RAISED IN ALL PROCEEDINGS

UPS has the burden to prove an applicable tariff but has not met its burden and cannot do so without going outside of the allegations of the complaint; so instead, the Answer attempts to treat that pivotal argument as a "new" aside, observing that the Petitioner "relies a good deal" on *Braid Sales & Mktg. v. R & L Carriers*, 838 So. 2d 590 (Fla. 5th DCA 2003). The Answer implies there is a lack of authority supporting the argument that the Defendant must prove its affirmative defense. There is not. *See Custer Med. Ctr. v. United Auto. Ins. Co*., 62 So. 3d 1086, 1097 (Fla. 2010) (citing *Braid Sales & Mktg. v. R & L Carriers*,

838 So. 2d 590 at 592 (Fla. 5th DCA 2003). In addition, the Answer completely overlooks the fact that this Court granted jurisdiction based on the Fourth District's certification of conflict with *Braid*.

Again, UPS's Answer does not succinctly state how any of those prerequisites have ever been met. In order to effectively limit its liability under the Carmack Amendment, a carrier must: (1) maintain a tariff within the prescribed guidelines of the Interstate Commerce Commission; (2) give the shipper a reasonable opportunity to choose between levels of liability; (3) obtain the shipper's agreement as to the choice of liability; and (4) issue a receipt or bill of lading prior to moving the shipment. *See UPS Supply Chain Solutions, Inc. v. Megatrux Transp., Inc.,* 750 F.3d 1282, 1286 (11th Cir. 2014). The only thing UPS ever did was lure Vidovic to Pak Mail and then deny her any services when the package contents were stolen.

The issue is hardly a novel argument. In her original memoranda responding in opposition to the Motion to Dismiss, Vidovic cited *Hughes Aircraft Co.v. N. Am. Van Lines, Inc.* 970 F.2d 609, 613 (9th Cir. 1992), which outlined the four prerequisites cited above. Vidovic then argued that UPS could not demonstrate compliance with those prerequisites and could not demonstrate the

defense because the tariffs it attached to the Motion to Dismiss were non-complaint. (V. iv, R. 269-70).

Vidovic's Initial Brief to the Fourth District again outlined the requirement of the defense, citing *Braid* and other federal cases including *See Atlantic C. L. R. Co. v. Riverside Mills*, 219 U.S. 186, 205 (1911) and 49 U.S.C. § 11706(a) and (c) (V.i: 30-31/Tab A: 19-20]). Vidovic applied that legal principle to the allegations of her claim, arguing again that UPS failed to demonstrate its defense (because the Tariffs exclude the Vidovic). (V.i 41-42/Tab A (Initial Brief): 28-29). The fact that *Braid* was argued to the trial court and that Vidovic was directed to file the case post-argument via a Notice of Supplemental Authority was noted in the Statement of the Case in the Initial Brief to the Fourth District. (V.i: 25/Tab A (Initial Brief): 14). *See also* V. iv B: 25, R. 401 for the actual Notice of Filing).

In fact, UPS answered the Argument on page 20 of the Answer it filed in the Fourth District Court of Appeal in the exact same evasive fashion that it answers the argument in the current answer. UPS fixated on the fact that *Braid*, like the Eleventh Circuit in the recent *UPS Supply Chain Solutions*, 750 F.3d 1282 at 1286, continues to identify the ICC (the former Interstate Commerce Commission) in one of the prongs of the four point test used to determine of the

Carmack limitation defense is available. UPS then summarily stated "Any argument that UPS's tariff does not apply to Mlinar cannot be supported by valid law." (V.i: 75 Tab B (Answer Brief): 20).

As stated in Vidovic's Response to this argument in the Fourth District Court of Appeals, the argument regarding the abolition of the ICC is irrelevant; it is a "red herring", and UPS still refuses to demonstrate how its affirmative defense applies to the allegations in this case. (V.i: 95-96: Tab C (Reply Brief): 14-15.)

III. ATTEMPT TO PAINT PAK-MAIL AS AN INTERMEDIARY PURSUANT TO *KIRBY* IGNORES THE ALLEGATIONS

A. UPS Argues That Limitations Between Itself and Pak Mail Apply to Vidovic Despite Allegations Otherwise

UPS argues that Vidovic has no claim because she approached Pak Mail, that she was compensated for her loss pursuant to *that* relationship, and that her claimed injuries occurred as result of conduct that is in inseparable from UPS's shipping duties. Conversely, it seeks to support its affirmative defense by demonstrating a tariff that denied Vidovic any liability whatsoever. The argument completely ignores the allegations and as well as the citations to *UPS Supply Chain Solutions, Inc. v. Megatrux Transp., Inc.*, 750 F.3d 1282 (11th Cir. 2014),

which stated that in the face of independent misconduct, no party is limited to Carmack claims.

As noted by the Petitioner, *UPS Supply Chain Solutions* allowed breach of contract claims. The Eleventh Circuit noted that breach of an express contract term (in that case not to allow any unauthorized access) was clearly actionable because it was outside the scope of shipping mis-conduct. The opinion also noted that because the carrier (in that case Megatrux) entered into a contract with its direct customer (in that case UPS Services) that was an on-going contract, it was outside the scope of Carmack, which would cover one act of shipment. Therefore, the breach of contract was distinct from the conduct included in shipment.

Vidovic alleges that UPS lured her to a third-party carrier under the affirmative misrepresentation that she was a UPS customer and that UPS would "track" her package if lost and; then, UPS purposely denied any liability (Carmack or otherwise) to her after they stole her painting and purposely resold them, using the same sort of personal identity information that she had attempted to give UPS in order to find the painting (her name, the dimensions and the media and content of the paintings).

UPS now seeks to deny any liability to Vidovic because UPS claims that she obtained recovery from Pak Mail—admittedly, Vidovic's husband was provided

free shipping from Pak Mail, but Vidovic was never provided any of the UPS services that she had been led to expect she would receive. UPS denied the services based upon a standing agreement with its direct customer "Pak Mail" in which it removed itself from that liability. It cannot now claim that liability as proof of remedy. Pursuant to *UPS Supply Chain Solutions* this sort of circumstance-less contract is not related to an act of shipment and completely obviates the negotiated liability limitations that Carmack was intended to create. That exclusion is simply void and the acts of fraud it took to make Vidovic believe she was UPS customer and the misappropriation and thievery that took place afterwards were equally unrelated to shipment of any good.

B. Because Vidovic Did Not Approach PakMail as An Intermediary, neither *Kirby* nor *Werner* Apply

In addition to the finding that allegations of breach of contract could constitute viable separate misconduct claims, Vidovic argued that *UPS Supply Chain Solutions* supports her claim because it illustrates the impropriety of the tariff system in Vidovic's allegations.

As noted by Vidovic's brief, *UPS Supply Chain Solutions* held that a downstream contractor, Megatrux, could not claim the upstream liability limitations that were narrower than the ones the carrier agreed to with UPS Supply Solutions, the shipper's intermediary. In that case, UPS Supply was a carrier

acting as an intermediary who agreed to provide logistics support to its customer, Seagate Technology. The contract between UPS Supply Solutions and Seagate limited UPS Supply's liability to $100,000 (except where the loss was due to gross negligence). UPS Supply expressly changed that term in the contract with sub-contractor Megatrux. The downstream contract between the carriers included that that Megatrux would be liable for the totality of any actual damage. The Eleventh Circuit found that Megatrux was therefore liability of the entirety of the downstream contract.

UPS's Answer Brief correctly notes that this latest Eleventh Circuit opinion, which stated that downstream carriers could not rely on contract arrangements that occurred upstream and were later changed downstream, expressly distinguished that set of circumstances from the prior precedent set forth in *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14 (2004) which held a downstream rail carrier (Norfolk) could claim the protections that were negotiated between the shipper's intermediary (ICC) and Norfolk, even though the shipper never agreed to the limitation. In that case, the train derailed and there was no allegation of wrongdoing on the part of any company.

Notably, the decision in *Kirby* turned upon the type of agency granted to the intermediary (ICC) and Kirby, the shipper. The *Kirby* Court noted the "**parties**

must have anticipated that a land carrier's services would be necessary for the contract's performance." In this case, the deceptive trade practice claim is premised on the fact that UPS encourages customers to go to places like Pak Mail with the anticipation that they will be a UPS customer, not that they will be denied UPS service after the package is stolen. This is completely distinct from the facts in *Kirby* where the shipper approached an intermediary to arrange an intricate travel plan; it was not induced by the carrier to go to that intermediary to "arrange" transit when the limitations of the carrier were already drafted.

Kirby and its progeny, *Werner Enters., Inc. v. Westwind Maritime Int'l, Inc*., 554 F.3d 1319, 1326 (11th Cir. 2009) are cited by UPS as supporting the application of the tariffs in this case. But both cases turned upon the fact that the claimant willingly approached intermediaries to become agents in shipments that later, though sheer mishap and negligence, went awry. It should first be noted that neither case deals with the sort of independent torts alleged here, which take the claims outside of the Carmack preemptive scope. However, leaving aside that issue for a moment and assessing what these cases mean to the question of whether the tariffs satisfy the prerequisite of the defense, both *Kirby* and *Werner* applied tariffs that were in put in place *downstream* of the original shipment deal made by the shipper and the intermediary because the shipper authorized the intermediary to

negotiate on its behalf. Together, *UPS Supply Chain Solutions* and *Kirby* stand for the proposition that any **subsequent** deal structured by an intermediary and a carrier becomes valid under the chain of carriage that Carmack was meant to create—whether that limits or broadens liability. Neither of these cases would allow, as Carmack does not allow, a defendant to proffer a predetermined exclusion of all future Carmack liability as the basis for asserting a Carmack defense.

CONCLUSION

The arrangement between UPS and its third party carriers is simply an invalid tariff scheme and the alleged misdeeds, fraud, criminal activity, conversion, and misappropriation of her identity are completely distinct from shipping.

The acts for which UPS is alleged to be liable are unrelated to shipment and completely independent of any failure to ship the contents within the package that it delivered. Indeed, none of the claims are within the scope of Carmack and the Defendant has failed to establish its defense. The tariff it seeks to proffer as the basis of a Carmack defense negates any Carmack liability whatsoever and simply does not support the defense. The decisions of the lower tribunals should be reversed and the matter remanded.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via E-serve and the portal this 21st day of JULY, 2014, to all counsel on the attached list.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(A)(2) of the Florida Rules of Appellate Procedure.

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