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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)

CORRECTED INITIAL 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

Appellant/Plaintiff, Ivana Vidovic Mlinar, is referred to herein as "Vidovic," the name by which she is known as a professional artist. Appellee/Defendant, United Parcel Service Inc., is referred to as "UPS." Defendant Recovery Management Corp. d/b/a Cargo Largo is referred to as "Cargo Largo." Defendant Pak Mail of Wellington, Inc., is referred to as "Pak Mail." Defendant Aaron Anderson is referred to as "Anderson."

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. An electronic copy of the record has been attached as the Appendix in bookmarked pdf.

- The Opinion of the Fourth District Court of Appeal is attached as Tab O and referred to as "O. x," with x representing a page number.
- The Record from the Fifteenth Judicial Circuit is attached as Tab R, and referred to as "R. x."
- 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.

STATEMENT OF FACTS

Nature of the Case

Vidovic appeals the Opinion of the Fourth District Court of Appeals of Florida affirming the dismissal of Appellant's four claims against UPS with prejudice. (O. 6). The Second Amended Complaint included claims against UPS for Conversion, Criminal Activity, Violation of the Florida Deceptive and Unfair Trade Practices Act (FDUPTA), and Unauthorized Publication of Name or Likeness in Violation of Florida Statutes § 540.08. (R. 157-74.) The opinion certified conflict with *Braid Sales & Marketing. v. R & L Carriers*, 838 So. 2d 590 (Fla. 5th DCA 2003). (O. 6). This Court then accepted jurisdiction.

The case arises out of UPS's pre-existing and ongoing scheme wherein UPS first defrauds customers into buying a deceptive good (an inoperative UPS tracking number) and then steals the "unidentifiable" property. (R. 72-173, ¶¶ 53-55). Vidovic specifically alleges that the criminal activity began well before her shipment occurred, and that the scheme continued long after her empty package arrived in New York. (R. 72-173, ¶¶27-28, 36, 45, 52-53). In its published tariffs, UPS purposefully excluded Vidovic from those able to seek redress under the Carmack Amendment if the goods are lost or stolen. Nonetheless, in its motion to dismiss, UPS argued that all of Vidovic's state law claims were precluded by

limitations in the very Carmack Amendment recovery process from which it had expressly excluded her. (R. 208-24, 253-54).

Second Amended Complaint

Because the case was decided upon a motion to dismiss, Vidovic will limit her discussion of the facts to those allegations contained in her Second Amended Complaint, which described, in detail, acts of misappropriation, deception, and conspiracy by UPS.

The Misappropriation

Vidovic is a painter who created two large oil paintings entitled "Advice" and "The Messenger." (R. 159, ¶ 7). In November 2005, her paintings were brought to Pak Mail to be shipped by UPS; they were rolled and packaged inside of a fifty-one (51) inch long PVC pipe. (R. 159, ¶ 8). Each end of the pipe was closed with a tightly fitting PVC pipe cap and further secured with silver duct tape. (R. 159, ¶ 9).

Vidovic was to receive her paintings in New York, where they were to be exhibited and commemoratively printed in a national, galleried show. (R. 159-60, ¶ 10). The container was delivered to the proper address; however, the duct tape on the cover of one side of the PVC tube was sliced apart and the painting canvases had been removed. (R. 160; ¶ 11-12).

Vidovic immediately called UPS to report the missing paintings and explained the totality of the circumstances to UPS. UPS insisted that it would do nothing, and that she had to report the loss to Pak Mail. (R. 160, ¶13). Vidovic provided Pak Mail with the shipping receipt, pictures of both "Advice" and "The Messenger," and a copy of an appraisal reflecting that "Advice," alone, had been appraised at Twenty Thousand Dollars ($20,000). The paintings were labeled with the identity of the artist. (R. 161, ¶14). UPS never responded to her claim. (R. 161, ¶ 16).

Approximately two years later, in December 2007, Vidovic received a shocking telephone call from Anderson, stating that he had just acquired "Advice" from Cargo Largo's auction of UPS goods. (R. 162, ¶ 17). Anderson explained to Vidovic that he regularly purchased unclaimed or recovered luxury merchandise from UPS through Cargo Largo. (R. 27). He further explained that he was considered a "senior buyer" with Cargo Largo; therefore, he is given the first right of purchase in the fine art category. (R. 165, ¶ 25). He noted that many artists state a "loss" scenario similar to the one described to him by Vidovic. (R. 165, ¶ 27).

Significantly, the auctioneer at Cargo Largo was sure to inform the prospective buyers that the paintings were original Ivana Vidovic artwork that had come to Cargo Largo from UPS's lost goods. (R. 163, ¶ 22). In fact, Cargo Largo

provided Anderson with an acknowledgement of sale, identifying the painting and artist as "the original painting on canvas, 'Advice,' by Ivana Vidovic." (R. 163, ¶ 22).

The conspirators knew that Appellant did not consent to the initial distribution of the painting. (R. 170, ¶ 44). The initial and continued use of her name diminished its value. (R.169-171, ¶41-48). Anderson placed "Advice" and "The Messenger" for sale or for the exchange of a late model Mercedes. (R. 163, ¶ 26).

The Deception and Conspiracy

Vidovic alleged that UPS, Pak Mail, and Cargo Largo engaged in obtaining property by falsely impersonating and/or representing themselves as a shipping enterprise, systematically violating section 817.02 of the Florida Statutes. She sought recovery pursuant to section 772.104, which provides a civil remedy for criminal activity. She also stated claims for misappropriation of identity in violation of section 540.08 of the Florida Statutes, and deceptive and unfair trade practices in violation of section 501.211, based upon specific allegations of intentional wrongdoing.

Under the scheme, customers are first lured to outlet centers, such as Pak Mail, where they can drop off packages and select UPS shipment. (R. 172, ¶ 53(a)-(d)). UPS will allow these customers to be issued a tracking number,

something UPS will refuse to honor it if the package is either lost or, as in this case, is delivered with the contents removed. (R. 172, ¶ 53(e)-(f)). UPS excludes these customers from its general tariffs, which would require UPS to attempt to recover lost items and would otherwise serve to limit UPS shippers to some negotiated, declared liability for lost or damaged goods. (R. 172, ¶ 53(g)-(j)). UPS requires the third-party package center to input the size of the package into its WorldShip software but expressly forbids the outlet from uploading the customer's personal information into the computer. (R. 172, ¶ 53(h)). UPS, the lone would-be carrier in this scheme, refuses to pay any damages to third-party customers. (R. 172, ¶ 53(l)). Because no carrier accepts liability under the Carmack Amendment, the enterprise is not a "shipping enterprise," and Carmack does not apply. (*See* R. 168-169, ¶¶36-37).

The fact that UPS refuses to acknowledge any Carmack liability to third-party customers such as Vidovic was not only alleged in the Second Amended Complaint, but the exclusion was expressed in Tariff 1090 of the General Tariffs that UPS attached to its Motion to Dismiss. (R. 253-54).

> UPS Authorized Shipping Outlets or Commercial Counters (collectively referred to within this item as "Third-Party Retailers") are independently owned and operated businesses and are not agents of UPS. UPS assumes no liability other than to the Third-Party Retailer, as the shipper of the package, for lost, damaged, or delayed packages sent via the Third-Party Retailer. Any such liability to the Third-Party Retailer is subject to the limitations set forth in the applicable UPS Tariff or UPS Rate and Service Guide.

> All inquiries regarding packages shipped via Third-Party Retailers must be directed to the Third-Party Retailer. UPS will deal solely with the Third-Party Retailer in all matters concerning-packages shipped via a Third-Party Retailer, including but not limited to tracking/tracing requests, claims and guarantees, C.O.D. preparation and remittance; return of undeliverable packages and letters; proper packaging and labeling and billing.
>
> Even if UPS responds directly to Third-Party Retailer customers regarding tracking requests, UPS will not be liable to those customers. Third-Party Retailers are solely responsible for the issuance of any refunds and claims to those who shipped packages via the Third-Party Retailer.

The second element of the scheme includes UPS retaining Cargo Largo as its recovery contractor, charged with the search and return of "overgoods." (R. 171, ¶ 53(m)). Overgoods are "packages which become separated from their packaging." (R. 263, N. 21, and 359, ¶1 (b)). Searches are to be conducted based upon personal information that may be found therein. (R. 171, ¶ 53(m)). The lone consideration that Cargo Largo receives for the task of pairing overgoods with UPS customers is the opportunity to sell unclaimed product. The only payment UPS makes to Cargo Largo as a servicer of lost goods is a bonus based on percentages of found items, so-called "voids" of sale. (R. 171, ¶ 53(q)).

Based upon its refusal to extend any liability to outlet customers and its refusal to accept customer information, UPS is virtually guaranteed that it will never pay nearly as much to that servicer for locating lost-goods owners as it receives from the sale of "overgoods." (R. 171, ¶ 55). In any one year, UPS

makes more money from Cargo Largo's payment for goods than it has paid to the overgoods servicer for its efforts to find packages for UPS consumers over the last eight years. (R. 171, ¶ 53 (p)). In addition to the no-cost administrative support for its lost goods needs, UPS receives a per item payment from Cargo Largo and consignment payments. (R. 172, ¶ 53(o)).

Damages from the Tortious Conduct

Vidovic alleged that she was deceived into believing that she was a UPS customer, that her package was selected for theft, and that her identity was also misappropriated. (R. 19, 37, 43, 54, 58). The successive events caused her damages, including missed opportunity, property loss, injury to professional reputation, and other statutorily provided damages such as loss of royalty. (R. 166-73 including ¶¶ 34, 40-41, 48, and all ad damnum clauses).

STATEMENT OF THE CASE

The FDUPTA claim was raised in the Second Amended complaint. *Compare* R. 40 and R. 171, adding ¶¶ 49-57. Prior to the filing of the unopposed Motion for Leave to File the Amended Complaint, UPS had previously answered the other three claims (Conversion, Criminal Activity, and Unauthorized Publication of Likeness) and had moved for summary judgment on those claims based upon its Carmack defense. (R. 16-25 and 46-64.)

Vidovic filed a Motion for Continuance, noting that the defendants had yet to respond to several outstanding discovery requests and that many of the requests were already the subject of orders granting Vidovic's Motions to Compel. (R. 100-142.) UPS cancelled the hearing on the Motion for Summary Judgment in recognition that there was outstanding discovery related to the issues raised in its Motion. (R. 152 and 255.)

When the allegations stated in the Amended Complaint were supported by discovery, Vidovic added the FDUPTA claim and the specific allegations of fraud contained therein. (*See* R. 171, adding ¶¶ 49-57.) Upon the filing of the Motion to Dismiss, UPS reiterated its Motion for Summary Judgment as a Motion to Dismiss. (R. 208-253.) Although the majority of authority cited by UPS pertained to summary judgment, UPS claimed that Vidovic could not avoid Carmack preclusion through "artful pleading." (R. 211). UPS attached its tariffs to the

motion, citing only certain portions, such as Tariff 510, which limits the time period for making claims to two years. (R. 211).

Vidovic replied that the claims were not precluded because the Tariffs do not apply to Vidovic pursuant to Tariff 1090; and the alleged misconduct is distinct from the delivery of goods. (R. 255). Vidovic argued that the motion to dismiss was an improper, premature motion for summary judgment; and further, that the motion was without merit, attaching evidence to support the allegations that were beyond the scope of Carmack. (R. 255).

The Circuit Court found that all four claims against UPS were precluded by the Carmack Amendment. Vidovic filed a Notice of Appeal. (R. 427). The Fourth District Court of Appeal issued an opinion affirming the dismissal. Upon a motion for rehearing, rehearing en banc, and/or to certify conflict, the court issued a substitute opinion that again affirmed dismissal with prejudice but certified the case to the extent it conflicted with *Braid Sales & Marketing v. R & L Carriers,* 838 So. 2d 590 (Fla. 5th DCA 2003). Vidovic filed a Notice to Invoke the Discretionary Jurisdiction, and the Court accepted jurisdiction.

SUMMARY OF THE ARGUMENT

The decision that all of Vidovic's claims are preempted by the Carmack Amendment allows UPS to reap the benefit of a defense that it previously renounced and cannot establish, disregards Vidovic's allegations of intentional misconduct separate and distinct from the delivery of goods, and thereby ultimately condones an alleged multi-party, pre-existing, and ongoing fencing operation – something that the drafters of the Carmack Amendment could never have intended.

The Fourth District Court of Appeal decision conflicts with the decision of the Fifth District Court of Appeal in *Braid Sales & Marketing v. R & L Carriers*, 838 So. 2d 590 (Fla. 5th DCA 2003), and other well-reasoned precedent, in two important ways. First, the Carmack Amendment is an affirmative defense on which a carrier bears the burden of demonstrating several elements, including that the shipper agreed to the limited liability set forth in its tariffs. But UPS's tariff expressly disclaims any liability to Vidovic, because she handed her paintings to a third-party retailer, Pak Mail. Thus, by the very terms of UPS's own tariff, a Carmack limitation does not apply. Second, the Carmack Amendment does not preempt claims of intentional misconduct that is distinct from the delivery of goods. The fraudulent, deceptive, and criminal scheme alleged in Vidovic's Second Amended Complaint began before Vidovic shipped her item and continued

for two years after the package was delivered (with its contents stolen). The unauthorized commercial exploitation of her name, in violation of a Florida statute, clearly has no relationship to shipping activity. Holding otherwise gives UPS license to misappropriate the intellectual property within any of the goods that a shipper or customer brings to UPS.

The decision below misconstrued Vidovic's argument as one based on the separate harm sustained. For example, the opinion notes that the harm caused by misappropriation of likeness is akin to the harm caused by slander. Thus, it viewed the argument against preemption as one based upon the contested separate harm test. While the appellate court acknowledged that claims based on conduct distinct from the delivery of goods are not preempted by the Carmack Amendment, it then improperly focused on the nature of the damages rather than the alleged misconduct. Clearly because distinct misconduct typically causes a distinct damage, it is illogical to overlook the nature of the misconduct simply because the nature of the harm may not be enough to defeat a Carmack defense.

As all four of Vidovic's claims fall outside the scope of any possible Carmack Amendment preemption, this Court should reverse the dismissal of UPS with prejudice, remand the case, and give Vidovic the opportunity to prove her allegations of intentional misconduct.

ARGUMENT

Standard of Review

The standard of review of a trial court's order of dismissal is de novo. *See Wallace v. Dean*, 3 So. 3d 1035, 1045 (Fla. 2009); *see also MEBA Med. & Benefits Plan v. Lago*, 867 So. 2d 1184, 1186 (Fla. 4th DCA 2004) (applying de novo standard of review to dismissal based on federal preemption). For purposes of a motion to dismiss, allegations of the complaint are assumed to be true, and all reasonable inferences arising therefrom are allowed in favor of the plaintiff. *Wallace*, 3 So. 3d at 1042-43.

I. UPS FAILED TO PROVE ITS CARMACK AMENDMENT DEFENSE.

A. Carmack Is An Affirmative Defense Requiring UPS to Prove That UPS Maintained Tariffs Within the Guidelines of The Statute And That The Tariffs Apply to The Claims.

The Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 11706, was enacted in 1906 to establish a uniform national policy for interstate carriers' liability for property loss. *N.Y., N.H. & Hartford R. Co. v. Nothnagle*, 346 U.S. 128, 131 (1953). Carmack preemption only applies to claims made pursuant to the liability created by a bill of lading. *See Atlantic C. L. R. Co. v. Riverside Mills*, 219 U.S. 186, 205 (U.S. 1911). It creates an affirmative defense to claims made by shippers against common carriers for lost or damaged goods. *UPS Supply Chain Solutions, Inc. v. Megatrux Transp., Inc.*, 24 Fla. L. Weekly

Fed. C1333a, *3-4 (11th Cir. May 8, 2014), *see also Braid Sales & Mktg. v. R & L Carriers*, 838 So. 2d 590, *592 (Fla. 5th DCA 2003).

The burden of proving an affirmative defense based on the Carmack Amendment rests on the party that asserts the defense. *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)).

The Carmack Amendment prohibits carriers from restricting their liability in any manner other than as contemplated by the statute and requires that limitations be published with the Interstate Commerce Commission. 49 U.S.C. § 11706(a) and (c). *See Rohner Gehrig Co. v. Tri-State Motor Transit*, 950 F.2d 1079, 1082 (5th Cir. 1992); *Braid Sales & Mktg.*, 838 So. 2d at 592. Because Carmack only applies to those carriers and shippers who have privity through a bill of lading, it cannot be the lone carrier in a chain of a shipping contracts and then deny all liability. *See Atlantic C. L. R. Co. v. Riverside Mills*, 219 U.S. 186, 205 (U.S. 1911): Carmack includes "the requirement of oneness of charge, continuity of transportation and primary liability of the receiving carrier to the shipper, with the right of reimbursement from the guilty agency in the route." In *Braid Sales & Mktg. v. R & L Carriers*, 838 So. 2d 590 (Fla. 5th DCA 2003) the Fifth District Court of Appeal noted that, in order to establish a Carmack defense and limit a claimant's recovery to its stated tariffs, the carrier must provide the Court with

proof that it had maintained a tariff and that the tariff applied to the claim at issue. The appellate court held that, since the tariffs proffered by the carrier did not include the parties at issue, the defense was not proven. While the ICC has subsequently been abolished, and shippers are now required to publish rather than file the tariffs, the fundamental point of *Braid Sales & Mktg*. still applies: if the tariff does not include the claim at issue, there can be no Carmack preemption.

The Eleventh Circuit Court of Appeals recently decided *UPS Supply Chain Solutions, Inc. v. Megatrux Transp., Inc*., 24 Fla. L. Weekly Fed. C1333a (11th Cir. May 8, 2014), reiterating the carrier's burden to prove that the claim at issue is subject to the proffered Carmack Amendment limitation.

The court lists a four-step inquiry to determine whether a carrier has effectively limited 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. 24 Fla. L. Weekly Fed. C1333a, *3-4. UPS Supply Solutions had agreed to provide logistics support to its customer, Seagate. The contract with Seagate limited damages for the negligence of UPS Supply Solutions or any of its contractors to $100,000. UPS Supply Solutions then hired Megatrux as the carrier. The contract with

Megatrux stated that Megatrux would be liable for full liability for risk, delay, loss, or damage. Megatrux hired an unapproved contractor and Seagate's cargo, worth over $460,000, was essentially stolen. UPS then sued Megatrux for liability pursuant to the Carmack Amendment, breach of contract, negligence, attorney's fees pursuant to a Georgia statute, and punitive damages based on fraud. *Id*. at 1.

The district court allowed the claim for the full value of goods, because Megatrux could not rely on the limitations set forth in the contract between UPS and Seagate. That upstream contract, like the one in the present case between Pak Mail and Vidovic, does not include the carrier. *Id*. at 4. The district court did not allow the state law claims for attorneys' fees or punitive damages, because they thwarted the intent of the Carmack Amendment, which was to limit damages to actual loss in cases of negligence. UPS Supply Solutions appealed the attorney's fees ruling only. Megatrux appealed the decision that required them to pay full value.

The Eleventh Circuit held that Megatrux was unable to claim the Carmack limitation set forth by the upstream contract between UPS and its customer Seagate, but it reversed the district's decision regarding attorney's fees. The appellate court ruled that, because Megatrux did not have an agreement with Seagate, it could not reap the benefit of the limitation on damages between UPS Supply Chain Solutions and Seagate:

> In short, Megatrux failed to show that the shipper was given a reasonable opportunity to choose between two or more levels of liability or that it had obtained agreement to any level below the Carmack Amendment's default measure of full liability…. We therefore affirm the district court's finding of full liability. *Id*. *at* 4.

Thus, in order to establish its Carmack Amendment defense, UPS must not only prove that the customer agreed to a limitation with the logistics provider (in this case, Pak-Mail), but that the customer agreed to the limitation with the carrier, (in this case, UPS). *Id*. UPS must also prove that its tariffs comply with regulations. Carmack simply does not allow the carrier to exclude all manner of its own liability. *See Atlantic C. L. R. Co. v. Riverside Mills*, 219 U.S. 186, 205 (1911); 49 U.S.C. § 11706(a) and (c); *Rohner Gehrig Co. v. Tri-State Motor Transit*, 950 F.2d 1079, 1084-1085 (5th Cir. 1992); *Braid Sales & Mktg. v. R & L Carriers*, 838 So. 2d 590, 592 (Fla. 5th DCA 2003).

B. UPS's Exclusion of Any Liability to Third-Party Customers Precludes UPS from Establishing Carmack Amendment Preemption.

One of the tariffs identified by UPS as limiting its liability specifically excludes Vidovic from making ***any*** claim under the tariff. UPS, in fact, rejected Vidovic's request to have the stolen artwork investigated or to compensate her at all. It defies logic, and contradicts state and federal court precedent, to permit UPS to claim Carmack Amendment preemption under these circumstances.

The Fourth District's opinion fails to explain how tariffs that would exclude any liability to Vidovic when she attempted to make a claim with the company in the first instance can then be used to support dismissal of her state law tort claims based on Carmack Amendment preemption. The purpose of the Carmack Amendment was to coordinate interstate carrier liability, not to allow a carrier to deny liability. The carrier, as discussed above, must demonstrate that a compliant tariff applies. *See Atlantic C. L. R. Co. v. Riverside Mills*, 219 U.S. 186, 205 (1911). 49 U.S.C. § 11706(a) and (c); *Rohner Gehrig Co. v. Tri-State Motor Transit*, 950 F.2d 1079, 1084-1085 (5th Cir. 1992); *Braid Sales & Mktg. v. R & L Carriers*, 838 So. 2d 590, 592 (Fla. 5th DCA 2003). The defense is simply unavailable in this instance.

II. THE CLAIMS PLED BY VIDOVIC FALL OUTSIDE THE SCOPE OF THE CARMACK AMENDMENT.

A. Conduct That is Distinct from The Delivery of Goods Is Excluded from Carmack Preemption

While the scope of the Carmack defense may be broad, it does not include misconduct that is separate and distinct from the duty to perform agreed transportation. *Smith v. UPS*, 296 F.3d 1244, 1249 (11th Cir. 2002), *cited in UPS Supply Chain Solutions, Inc.*, 24 Fla. L. Weekly Fed. C1333a, *6 (11th Cir. May 8, 2014). In *Smith*, the intended recipients of goods sued UPS for several torts, including fraud and intentional infliction of emotional distress, when UPS refused

to deliver a package to his house. UPS responded that, because Mr. Smith routinely harassed its delivery person, it required the recipient pick up the package at its shipment center – conduct that it characterized as directly related to the delivery of goods. The Eleventh Circuit Court of Appeals noted that "only claims based on conduct separate and distinct from the delivery, loss of, or damage to goods escape preemption." 296 F.3d at 1248-49 (citations omitted). It then agreed with UPS that the Smiths' claim "results solely from the loss of and misdelivery of their goods."

In *UPS Supply Chain Solutions*, the Eleventh Circuit held that a carrier's use of an unauthorized contractor to deliver goods was distinct from the conduct included in losing goods:

> Specifically, UPS alleges that by subcontracting with Stallion, Megatrux was in direct violation of express terms of the MTSA. If proven, this breach would be separate and distinct from the loss of cargo and would have exposed UPS to legal jeopardy with its customer.

24 Fla. L. Weekly Fed. C1333a, *11. Like UPS Supply Chain Solutions' contract claim, Vidovic's four state law claims are beyond the reach of Carmack preemption, because each alleges conduct separate and distinct from the mere delivery of goods. The purposeful, deceptive, criminal activity alleged in the Second Amended Complaint, which started before Vidovic's paintings were ever placed into a PVC pipe and continued long after those paintings were stolen, bears

only a tangential relationship to the interstate shipping interests addressed by the Carmack Amendment. UPS may use its status as a well-known shipper to lure in customers, but the process by which it turns customers into victims has nothing to do with a legitimate shipping operation.

B. Conversion

Count I of the Second Amended Complaint states a claim for conversion. UPS has argued that the act of converting goods during shipment is always protected by the Carmack Amendment, an argument adopted by the court below. But a review of well-reasoned cases analyzing Carmack preemption, and a consideration of the specific facts alleged by Vidovic, indicate that UPS has engaged in intentional misconduct that exposes it to tort liability. Perhaps the most complete, though succinct, analysis of preemption of conversion claims is found in the decision authored by J. Olson, Court of Common Pleas Allegheny County, Pennsylvania, *Lang v. Frontier Van Lines Moving & Storage, Inc*., GD 07-020428 (Pa. C. filed July 6, 2009):

> One of the state law claims that may escape preemption is conversion. Conversion, like other state and common law claims, is preempted unless there is "a true conversion, i.e., where the carrier has appropriated the property for its own use or gain." *Glickfeld v. Howard Van Lines, Inc.*, 213 F.2d 723, 727 (9th Cir. 1954). See e.g. *Deiro v. American Airlines, Inc*., 816 F.2d 1360, 1366 (9th Cir. 1987) ("(o)nly an appropriation of property by the carrier for its own use will vitiate the limits on liability."); Schultz v. Auld, 848 F. Supp. 1497, 1506 (D. Idaho 1993) ("With respect to conversion, (p)laintiff must show a true conversion has taken place in order to avoid Carmack Amendment

> preemption; the mere nondelivery of good is insufficient.") A "true conversion" has been defined as "a defendant's willful or intentional misconduct occasioning the nondelivery". *Art Masters Assoc., Ltd. v. United Parcel Serv.*, 77 N.Y. 2d 200, 566 N.Y.S.2d 184, 186 567 N.E. 2d 226, 228 (Ct. App. 1990). The burden of establishing that the carrier was responsible for the loss due to some willful or intentional conduct on its part rests upon the party asserting the conversion claim. *Lerakoli, Inc. v. Pan American World Airlines, Inc.*, 783 F.2d 33, 37 (2d Cir. 1986). See *Nippon Fire & Marine Ins. Co. v. Holmes Transp.*, 616 F. Supp. 610 (S.D.N.Y. 1985) ("Absent affirmative proof of (an actual) conversion, the rule of law is that plaintiffs recovery is limited to the agreed release value of (the missing or damaged goods).") Hence, "nothing short of intentional destruction or conduct in the nature of theft of the property will permit a shipper to circumvent the liability limitations" set forth in a bill of lading. *American Cyanamid Co. v. New Perm Motor Express, Inc.*, 979 F.2d 310, 315-16 (3d Cir. 1992). *Id*. as published in Pittsburgh Legal Journal, Vil. 158, No. 4, February 10, 2010.

Vidovic was, of course, denied the opportunity to establish that UPS "was responsible for the loss due to some willful or intentional conduct." But her Second Amended Complaint clearly alleges a "true conversion:" UPS willfully and intentionally took her paintings and did so for corporate gain.

In its trial court papers, UPS cited only one case that analyzed a conversion claim under the Carmack Amendment. In *Aircraft Instrument Radio Co. v. United Parcel Service Inc.*, 117 F.Supp. 2d 1032 (D. Kan. 2000). Plaintiff alleged that UPS had converted an airplane part. On UPS' motion for summary judgment – rather than a motion to dismiss – the court found that the undisputed facts showed "apparent negligence in losing and improperly disposing of the package," rather than "true conversion, i.e., where the carrier has appropriated the property for its

own use or gain." 117 F. Supp. 2d at 1036. The district court endorsed the view that, under the Carmack Amendment, "nothing short of intentional destruction or conduct in the nature of theft of the property will permit a shipper to circumvent the liability limitations in a released value provision." *Id*. (quoting *American Cyanamid v. New Penn Motor Express*, 979 F.2d 310, 315-16 (3rd Cir. 1992)). But a "true conversion" and an intentional theft is exactly what Vidovic has alleged. In other words, even the authority relied upon UPS establishes that dismissal was an error.

Notwithstanding the long line of cases explaining the significance of a "true conversion" to Carmack Amendment preemption, the Fourth District Court of Appeal found the distinction between true conversions and other conversions to be "unworkable in practice, " citing *Schultz v. Auld*, 848 F. Supp. 1497, 1506 D. Idaho 1993) O. 4. In fact, *Schultz* applied the "true conversion test;" rather than finding it unworkable, the Idaho District Court applied it the evidence and allegations at hand and then dismissed the claims.[1]

The Fourth came to its conclusion regarding the "true conversion" test by first noting "conversion is an intentional tort under Florida law " citing *Curd v. Mosaic Fertilizer, LLC*, 39 So.3d 1216, 1223 n. 4 (Fla. 2010). Thus, the District

[1] When reviewing the Motion to Dismiss, the Idaho District Court correctly noted that the claims could only be preempted on a Motion for Summary Judgment standard. *Schultz v. Auld*, 848 F. Supp. 1497, 1501 (D. Idaho 1993).

decided that ***all*** conversions alleged against any carrier should be preempted by the Carmack Amendment. It determined that to hold otherwise would undermine the Carmack Amendment's goal of creating a uniform national policy on a carrier's liability for property loss." Adopting this approach would, however, create a safe haven for unscrupulous carriers, who could embark upon a pre-conceived scheme to convert goods without fear of tort liability. This is not what the Carmack Amendment was intended to do.

In addition to the abhorrent policy that would evolve as a consequence of determining that all conversion claims survive preemption, the rationale utilized by the Fourth District Court of Appeal is deeply flawed.

First, the decision cites *Curd v. Mosaic Fertilizer, LLC*, 39 So.3d 1216, 1223 n. 4 (Fla. 2010) for the principle that conversion is an intentional tort. *Curd* and the rationale found therein, actually supports Vidovic's claims and reveals the inconsistency in the Fourth District's opinion. By its own assessment, the opinion concedes that the goal and structure of Carmack is akin to the economic loss rule, which would limit damages between contractual parties to economic damages, but would not apply to these claims.[2]

[2] The question of whether damages caused by intentional misconduct escape Carmack's limitations to either negotiated or actual damages is directly analogous to the question of whether a party raised an independent tort that would escape the otherwise applicable economic loss rule.

In *Curd v. Mosaic Fertilizer, LLC*, 39 So.3d 1216, 1223 (Fla. 2010), the Court reversed the Second District Court of Appeal's determination that negligence and strict liability claims brought against an alleged polluter were barred by the economic loss rule and general tort law principles because the fishermen plaintiffs did not own any property damaged by the pollution. This Court reversed that decision, noting that the economic loss rule is a bar to negligence claims only when the following are present:

> 1) where the parties are in contractual privity and one party seeks to recover damages in tort for matters arising out of the contract, or (2) where the defendant is a manufacturer or distributor of a defective product which damages itself but does not cause personal injury or damage to any other property. Id. at 1223.

The Court went on to note that "in (those) two situations, the economic loss rules would not prevent the bringing of an action and recovery for intentional torts, such as, fraud, conversion, intentional interference, civil theft, abuse of process, and other torts requiring proof of intent. Id. at 1223, N 4. (Fla. 2010). To the extent that *Curd's* summary definition of conversion as an intentional tort is applicable to the present claim, it supports the notion that such a claim is separate and distinct from the breach of bailment claims or negligence claims that Carmack preempts.

Even if the opinion of the Fourth District Court of Appeals were an accurate synopsis of conversion, deciding to rule out an entire cause of action because it

includes the element of intent is simply an irrational way to apply the "separate and distinct conduct" test that the Opinion acknowledges to be the appropriate test. If anything, the implication that all Florida conversion claims are in fact true conversion claims would favor a blanket rule allowing conversion claims rather precluding them. O. 4.

C. Criminal Activity

No court has held that claims for the civil recovery for damages caused by a pattern of criminal activity are preempted by Carmack. In *Schwarz v. Nat'l Van Lines, Inc.*, 03 C 7096, 2004 WL 1166632 (N.D. Ill. May 21, 2004), the northern district of Illinois reviewed several state law claims dismissing some in accordance with the contested "separate harm" test, It dismissed the criminal activity claim without prejudice because the claim required "two predicate acts of racketeering (committed within a ten-year time period)" and was not sufficiently pled.

The Fourth District Court of Appeals found that the "separate harm" was an invalid test. In fact, the test is still applied in several circuits including the Seventh Circuit. *See again Schwarz v. Nat'l Van Lines, Inc.*, 03 C 7096, 2004 WL 1166632 (N.D. Ill. May 21, 2004) citing *Gordon v. United Van Lines, Inc.*, 130 F.3d 282, 284 (7th Cir. 1997): "Nevertheless, in keeping with *North American Van Lines, Inc. v. Pinkerton Security Systems, Inc.*, 89 F.3d 452 (7th

Cir.1996), we also reaffirm that claims involving a separate and independently actionable harm to the shipper distinct from such damage are not preempted."

In addition, that portion of the opinion referring to the separate harm test oversimplifies the rationale of *Braid*. Like *UPS Supply Chain Solutions*, 24 Fla. L. Weekly Fed. C1333a, *11, *Braid* found that breach of an oral contract that was separate from the bailment contract included distinct conduct. *Braid Sales & Mktg. v. R & L Carriers*, 838 So. 2d 590, 593 (Fla. 5th DCA 2003).

Conversely, Fourth District's decision that Vidovic's Criminal Activity and FDUPTA claims failed to plead "separate conduct" never actually assessed the allegations in either claim and instead summarily concluded that the claims failed to alleged separate misconduct by citing *Gordon v. United Van Lines, Inc.*, 130 F.3d 282, 284 (7th Cir. 1997), which as noted above is a case that utilized the separate harm test. Regardless of whether the "separate harm" test is an inappropriate test, there is no question that claims seeking recovery for criminal activity are by definition "claims based on conduct separate and distinct from the delivery, loss of, or damage to goods (and) escape preemption." See *Smith v. UPS*, 296 F.3d 1244, 1249 (11th Cir. 2002).

D. FDUPTA

The Appellant's Fraudulent and Deceptive Trade Practice claim alleges that UPS directs customers to third-party outlets in order to originate their shipments

without openly disclosing the fact that UPS will deny any liability to such a customer. The deception is enhanced by the fact that the customer pays UPS's rates and is given a UPS tracking number. Meanwhile, UPS's tariffs and contracts with the third-party outlet expressly state that UPS has no obligation to respond to inquiries related to those tracking numbers and no liability to the customer.

Courts have held that deceptive trade practice claims are not preempted by Carmack — holdings noted by *Braid Sales & Mktg.*, 838 So. 2d 590 at 593 n.3; *see also Mesta v. Allied Van Lines Int'l, Inc.*, 695 F. Supp. 63, 65 (D. Mass. 1988)*; American Transfer and Storage Co. v. Brown*, 584 S.W.2d 284 (Tex. Civ. App. 1979), *rev'd on other grounds*, 601 S.W.2d 931(Tex. 1980). In this case, the alleged fraud is UPS's pretense that it is acting as the shipper and purposeful denial of any Carmack liability. UPS's argument that such conduct is connected to the delivery of good is another charade. The fact that the alleged fraud includes the false representation of itself and its third party outlet as an extension of the shipping industry vitiates any concern that the FDUPTA claim is "so closely related to the performance of the contract that they are preempted." The allegation of fraud in this case is distinguishable from those those opinions that held that FDUPTA claims are preempted such as *Rini v. United Van Lines, Inc.*, 104 F.3d 502, 505 (1st Cir. 1997), which held state statutes are preempted by the Carmack Amendment if they "in any way enlarge the responsibility of the carrier

for loss or at all affect the ground of recovery, or the measure of recovery."[3] Here the issue is that according to UPS's tariffs, no one is the carrier.

E. Misappropriation of Identity

Vidovic alleged that UPS not only commercially exploited her name without her consent, but that UPS was responsible for the several subsequent exploitations of her name by Cargo Largo and then by Aaron Anderson. Florida protects a person's name as a vestige of their likeness from being used for commercial purposes without his or her consent and provides a statutory civil remedy at § 540.08(1), Fla. Stat. (2007). The statute provides for damages, injunctive relief, and punitive damages.

The United States Supreme Court recognized that state law causes of action which remedy damage to a person (such as a personal injury claim) rather than damage to the person's cargo cannot be preempted by Carmack, even if the action giving rise to the liability of the carrier is one of simple negligence. *See Chicago, R. I. & P. R. Co. v. Marcher,* 248 U.S. 359, 363 (1919). UPS argued that Vidovic did not allege that UPS ever misappropriated her name. That argument ignores two clear allegations: (i) that UPS misappropriated Vidovic's name in the conveyance to Cargo Largo and/or through Cargo Largo when it auctioned the

[3] Again, it is striking that *Rini v. United Van Lines, Inc*., 104 F.3d 502, 505 (1st Cir. 1997), the case relied upon by the Fourth District Court of Appeals assessed the claims by virtue of a separate harm analysis rather than conduct.

painting as an original Ivana Vidovic work and as a UPS good, thereby creating the impression that Ivana Vidovic creates original oil paintings for UPS; and (ii) that Aaron Anderson and Cargo Largo continued the misuse of her name on the web, violations that were proximately caused by UPS conveying the paintings as if it held title (R. 169-170, ¶¶ 43-44.) This is the exact harm that section 540.08 is meant to address. In addition, because the claim is rooted in conspiracy, the defendants are alleged to jointly and severally liable for all damages. (R. 170-171, 487 and ad dendum clause). In fact, the joint and several liability included in allegations of intentional torts is another fact which would weigh in favor of finding that shared misconduct is by definition distinct and separate from delivery of goods.

CONCLUSION

For the foregoing reasons, the order dismissing the claims against UPS with prejudice should be reversed. The Defendant simply cannot establish the defense when its proffered tariffs exclude the claim at issue and the decisions below failed to review the allegations in the light most favorable to the Plaintiff.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via E-serve as an attachment to the Motion to File a Corrected Brief (Correcting Page Numbers) and the portal this 9h day of JUNE, 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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