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IN THE SUPREME COURT OF FLORIDA

Case No.: SC14-54
Lower Case Nos.: 4D12-1332; 502008CA036246XXXXM

IVANA VIDOVIC MLINAR,

Petitioner,

v.

UNITED PARCEL SERVICES, INC.,

Respondent.

RESPONDENT'S JURISDICTIONAL ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

STATEMENT OF THE CASE AND FACTS

Petitioner's Statement of the Case and Facts exceeds the scope of the Fourth District's opinion[1]. Respondent offers the following as an alternative.

Petitioner Ivana Vidovic Mlinar is an artist who created two works of art. *Mlinar v. United Parcel Service, Inc.*, 129 So. 3d 406, 408 (Fla. 4th DCA 2013). Her husband took the paintings to Pak Mail, a third party retailer, to be shipped via United Parcel Service from Florida to New York. When the container arrived in New York, it was empty. *Id.* The duct tape had been sliced and the paintings had been removed. *Id.* Petitioner reported the loss to UPS and Pak Mail. *Id.* Months later, Pak Mail offered Petitioner $100 for the missing contents of the package. *Id.*

At some point, UPS sold the paintings to Cargo Largo, UPS's lost goods contractor. *Id.* Cargo Largo later auctioned the paintings. *Id.* An individual named Aaron Anderson purchased one of the paintings at the Cargo Largo auction. About two years after Petitioner lost possession of the paintings, she received a

[1] Petitioner's Brief on Jurisdiction contains arguments and facts that are outside the scope of Rule 9.120(d) of the Florida Rules of Appellate Procedure. Specifically, Petitioner includes facts that are not set forth in the Fourth District's opinion. Petitioner's Brief on Jurisdiction also goes beyond addressing solely the issue of jurisdiction and argues the merits of the underlying case. Only those relevant facts stated within the four corners of the opinion under review are to be considered by this Court in justifying invocation of this Court's jurisdiction. *See Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). While Respondent strongly disagrees with Petitioner's arguments on the merits, this Brief will address only the threshold issue of discretionary jurisdiction raised by the underlying District Court opinion.

telephone call from Anderson, who informed her that he had just purchased one of the paintings at the Cargo Largo auction sale. *Id.* He also informed her that the other painting was auctioned in the same lot but that he did not know the identity of the purchaser. *Id.* He eventually acquired the other painting and placed advertisements online in which he offered to sell or trade both paintings. *Id.*

Based on the above facts, Petitioner asserted four state law claims in her complaint: Conversion (Count I—against UPS, Cargo Largo, and Pak Mail), Profiting by Criminal Activity (Count II—against UPS, Cargo Largo, and Pak Mail), Unauthorized Publication of Name or Likeness (Count III—against UPS, Cargo Largo, and Anderson), and a claim under Florida's Deceptive and Unfair Trade Practices Act (Count IV—against UPS). The trial court dismissed all of Petitioner's claims against Respondent, United Parcel Service, Inc., ruling that the claims were preempted by the federal Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 14706. *See Mlinar,* 129 So. 3d at 409.

The Fourth District Court of Appeals affirmed the trial court's dismissal of Petitioner's state law claims because the claims arose from Respondent UPS's failure to deliver her package and were therefore preempted by the Carmack

Amendment[2]. *Id.* at 406. Petitioner attempted to escape Carmack Amendment preemption by alleging that her state law causes of action were separate and distinct from the loss or damage to a package during shipment. But because the wrongs sued upon all stemmed from UPS's loss of Petitioner's package, the various state law claims were likewise preempted. The Fourth District's opinion, relying upon well-settled federal case law, held:

- Petitioner's claim against UPS for conversion was preempted because it was predicated on UPS's failure to deliver Petitioner's goods;
- UPS's alleged unauthorized use of Petitioner's likeness in the resale of her paintings flowed directly from UPS's course of conduct in failing to deliver the paintings; and
- Petitioner's claims against UPS alleging fraud and deceptive conduct relating to the formation of the shipping contract are so closely related to the performance of the contract that they too are preempted.

Id. at 410-12.

In reaching this decision, the Fourth District applied the Eleventh Circuit Court of Appeals test for whether claims fall outside the scope of Carmack

[2] The Carmack Amendment limits a carrier's liability for property loss to "a value established by written or electronic declaration of the shipper or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation." *Mlinar v. United Parcel Serv., Inc.*, 129 So. 3d 406, 408 (Fla. 4th DCA 2013) (quoting 49 U.S.C. § 14706(c)(1)).

preemption, explaining that "separate and distinct conduct *rather than injury* must exist for a claim to fall outside the preemptive scope of the Carmack Amendment." *Id.* at 410 (quoting *Smith v. United Parcel Serv.*, 296 F.3d 1244, 1248 (11th Cir. 2002)). In *Braid Sales & Marketing, Inc. v. R & L Carriers, Inc.*, 838 So. 2d 590 (Fla. 5th DCA 2003) the Fifth District Court of Appeals also explored the scope of Carmack Amendment preemption. Under the *Braid Sales* test, a claim alleging an injury independent from the loss or damage to the goods is not preempted by the Carmack Amendment. 838 So. 2d at 593.

Petitioner asks this Court to invoke discretionary jurisdiction under Article V, Section 3(b)(4) of the Florida Constitution based upon an alleged conflict between the test for determining the applicability of federal preemption that was used in the Fourth District's opinion and the test used in the Fifth District's decision in *Braid Sales*, 838 So. 2d 590 (Fla. 5th DCA 2003). Accepting jurisdiction is an unnecessary utilization of the Court's time and resources because there is no conflict between the Fourth District's opinion in this case and *Braid Sales*. In fact, Petitioner herself is unable to distinguish between the very tests she claims are in conflict.

SUMMARY OF ARGUMENT

Petitioner's assertion that the Fourth District's holding herein conflicts with the Fifth District's decision in *Braid Sales* is meritless. The Fourth District's decision does nothing more than apply well-established law to a particular set of facts—facts that point unmistakably to the very result the Fourth District reached.

This Court should decline review of this case because there is no actual conflict between the Fourth District's opinion and *Braid Sales*. Petitioner is unable to distinguish the purportedly conflicting tests in the Fourth District's opinion herein and *Braid Sales*. To wit, Petitioner admits that "*Braid's* holding…is unfortunately worded as though…the claim was not preempted both because the harm alleged was separate from the loss or damage to the good as well as because the conduct was distinct." (See Pet'r Jurisdictional Br. at p. 9). According to Petitioner, "*Braid's* exception was based not on the nature of the harm (which was indistinct), but the conduct (which was because it occurred after the shipment was complete). (*Id.*) But Petitioner's interpretation of *Braid Sales*, requiring "separate and distinct conduct," is the same standard applied by the Fourth District here when it held that "separate and distinct conduct rather than injury must exist for a claim to fall outside the preemptive scope of the Carmack Amendment." *Mlinar*, 129 So. 3d at 410.

Further, this is not the type of case that requires this Court to exercise its discretionary jurisdiction to resolve an important legal issue. The Fourth District's decision is consistent with applicable case law from other federal district courts and the Eleventh Circuit. It correctly applies decisional law to the facts and issues presented to it. The facts alleged would inevitably lead to the same result under the Fifth District's analysis in *Braid Sales* because, semantics aside, both the harms and conduct sued upon flow directly from the loss of Petitioner's paintings while in transit. Because no grounds for jurisdiction exist, this Court should deny review.

ARGUMENT

I. The Fourth District's decision merely restates well-settled principles of law; no purpose would be served by reviewing a case that reiterates established doctrines governing an interstate carrier's liability for property loss.

It is clear from the four corners of the opinion that the Fourth District followed and correctly applied long-standing legal principles when it concluded that Petitioner's claims (as presented through her varied allegations) were preempted by federal law; namely, the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 14706. The Fourth District's opinion leaves no conflict upon which jurisdiction may be premised and is in keeping with the well-settled breadth of authorities presented by both parties. As explained above, the Fourth District concluded that Petitioner's claims all arose from UPS's failure to deliver her package. This conclusion is consistent with both well-settled federal

law and Florida's Fifth District precedent interpreting that federal law. *See Circle Redmont, Inc., v. Mercer Transp. Co.*, 795 So. 2d 239 (Fla. 5th DCA 2001) (noting that the United States Supreme Court has interpreted the scope of the Carmack Amendment's preemption very broadly).

Petitioner's Jurisdictional Brief is scarce of case law supporting the preemption test she claims the Fifth District applied in *Braid Sales* and the Fourth District should have used in *Mlinar*. Both *Braid Sales* and *Mlinar* generally rely on the same body of federal case law regarding Carmack preemption. As the well-settled breadth of authorities hold: "The Carmack Amendment is designed to be the sole means of imposing liability against interstate shippers for loss or damage to the property they transport. It is not meant to co-exist with, but to preempt, state means of imposing liability arising out of the shipment of goods." *Bishop v. Allied Van Airlines*, No. 08-cv-2170-T-24-MAP, 2008 WL 5111302, at *1 (M.D. Fla. Dec. 4, 2008) (citing *Smith,* 296 F.3d at 1246); *see also Adams Express Co. v. Croninger*, 226 U.S. 491, 505 (1913) (Congress has completely preempted state regulation of the liability of common carriers; "the national law is paramount and supersedes all state laws as to the rights and liabilities" of carriers); *Straley v. Thomas Logistics, LLC*, No. 10-cv-2, 2010 WL 2231399, at *2 (W.D.N.C. Mar. 18, 2010) (stating "[t]here is little to no room to argue in this district that the

Carmack act has left any rock unturned in the state law arsenal of tort claims, including claims for intentional torts").

As the Court noted in *Rotemi Realty, Inc. v. Act Realty Co.*, 911 So. 2d 1181, 1188 (Fla. 2005) the doctrine of stare decisis counsels courts to follow precedents unless there has been a significant change in circumstances after the adoption of the legal rule. Petitioner has failed to show any significant change in circumstances. As such, this Court should decline to accept jurisdiction and apply the doctrine of stare decisis which provides stability to the law and to the society governed by that law. *Id.*

II. The Fourth District's decision does not conflict with *Braid Sales & Marketing, Inc. v. R & L Carriers, Inc.*, 838 So. 2d 590 (Fla. 5th DCA 2003).

While a decision certified as being in direct conflict under Article V, § 3(b)(4) does not need to "expressly" conflict with another appellate decision, there still must be an actual conflict in the decisions of the district courts. *See Department of Law Enforcement v. House*, 678 So. 2d 1284 (Fla. 1996). Although conflict is certified by the Fourth District to the extent its opinion conflicted with *Braid Sales*, this Court is not required to reach the merits of the case simply because of that certified conflict. This Court may decide that the District Court decision at issue is distinguishable and there is no conflict to be resolved. *See, e.g.*, *State v. Lovelace*, 928 So. 2d 1176 (Fla. 2006) (discharging an earlier granted

review based on the certified conflict); *Renaud v. State*, 926 So. 2d 1241 (Fla. 2006) (declining to exercise discretionary review of certified conflict because no actual conflict exists); *Summit Claims Management v. Lawyers Express Trucking, Inc.*, 944 So. 2d 339 (Fla. 2006) (same).

Petitioner argues the Fourth District's opinion contradicts the second portion of *Braid Sales*, 838 So. 2d 590 even though three of the cases cited by *Braid Sales* were explicitly acknowledged and rejected by the Fourth District's opinion. *See Mlinar* 129 So. 3d at n.1 (explaining that "these cases are in the minority and two of them have been disapproved").[3] Therefore, *Braid Sales* is not in conflict with the Fourth District's opinion but rather, *Braid Sales* is partially premised upon case law that has been subsequently disapproved of or called into question by other courts.

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[3] In addition, the *Braid Sales* opinion refers to the requirement that carriers must file all tariffs with the Interstate Commerce Commission before any limitation of liability can apply to the recovery of damages in Carmack Amendment claims. The ICC was abolished in 1995 by the Interstate Commerce Commission Termination Act of 1995. *See* 40 U.S.C. § 10762 (1994) (repealed 1995), which, *inter alia*, relieved carriers of their obligation to file tariffs with the government. Today, carriers such as UPS must make their tariffs available to any shipper upon request. 49 U.S.C. §§ 13710(a)(1), 14706(c)(1)(B). This fact alone distinguishes *Braid Sales* from the case at hand. Petitioner's argument regarding the UPS tariff cannot serve as a proper basis for this Court's jurisdiction. The argument is inconsistent with federal law. *See Werner Enters., Inc. v. Westwind Mar. Int'l, Inc.*, 554 F. 3d 1319 (11th Cir. 2009) (where a third party enter into a shipping contract with a carrier on behalf of the goods' owner, recovery is limited by the tariff). The tariff argument was also not addressed by the Fourth District's opinion.

Moreover, Petitioner herself is unable to distinguish between the very standards she claims are in conflict. She cites *Braid Sales* as holding that "conduct occurring after the act of shipment was complete was necessarily separate and distinct from claims ordinarily preempted by Carmack." (See Pet'r Jurisdictional Br. at p. 9). Yet, the Fourth District's decision and the Eleventh Circuit precedent cited therein also look for "separate and distinct conduct" when assessing exceptions to Carmack Amendment preemption. To wit, the Fourth District observed "[c]laims that are 'based on conduct separate and distinct from the delivery, loss of, or damage to goods escape preemption.'" *Mlinar*, 129 So. 3d at 410.

Applying these standards, the Fourth District ultimately held that Petitioner's state law claims were sufficiently tied to the loss or damage to her goods and did not fall outside the preemptive scope of the Carmack Amendment. *Id.* at 410-12. Thus, whether analyzed under the preemption language used by the Fourth District here or by the Fifth District in *Braid Sales*, the ultimate result reached is the same because Petitioner's claims all stem from the loss of her artwork during shipment.

CONCLUSION

Respondent United Parcel Services, Inc. respectfully submits that the exercise of this Court's discretionary jurisdiction is unnecessary in this case.

DATED this 24th day of February, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via e-mail and U.S. Mail on this **24th** day of **February, 2014** upon:

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby files this certificate of compliance and hereby certifies that Respondent's Answer Brief on Jurisdiction is submitted in Times New Roman 14-point font.

/s/ Evan S. Gutwein
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