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FLORIDA SUPREME COURT
Case No. *Pending*

IVANA VIDOVIC MLINAR,
Petitioner/Plaintiff,
vs.

UNITED PARCEL SERVICE INC.
Respondent/Defendant,

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

4th DCA CASE NO.: 4D12-1332

LT CASE NO.: 50 2008 CA 036246 (PALM BEACH)

BRIEF OF PETITIONER ON JURISDICTION

PETITION FOR REVIEW OF OPINION OF FOURTH DISTRICT COURT OF APPEAL CERTIFYING CONFLICT WITH FIFTH DISTRICT COURT OF APPEAL AND AFFIRMING FINAL JUDGMENT OF THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

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PRELIMINARY STATEMENT

Plaintiff/Appellant Ivana Vidovic Mlinar is referred to as "Petitioner." 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." The present opinion is attached as the sole Appendix as required by Fla. R. App. P. 9.120. The Fourth District Court of Appeal (authored by Judge C. Taylor and noting concurrence without separate opinion by Judge J. Ciklin and Associate Judge Michael Robinson) was the second opinion rendered in the matter on December 4, 2013, vacating a prior opinion. It granted Plaintiff's Motion for Certification of conflict with *Braid Sales & Marketing. v. R & L Carriers*, 838 So. 2d 590 (Fla. 5th DCA 2003), but denied a motion for rehearing and rehearing en banc, affirming dismissal of the claims.

STATEMENT OF PROCEDURAL HISTORY

Petitioner appealed the Final Order rendered by the Fifteenth Judicial Circuit Court of Florida in and for Palm Beach County on January 30, 2012, which dismissed all four claims alleged against UPS with prejudice including (i.) Conversion, (ii.) Conspiracy (pursuant to Florida Statutes, chapter 772), (iii.) Misappropriation of identity (pursuant to section 540.08 of Florida Statutes) and (iv) a putative class action for fraudulent and deceptive trade practice (pursuant to

Section 817.02 of Florida Statutes). The claims include that UPS and co-defendant Cargo Largo were engaged in a conspiracy through which UPS purposely diverts goods to Cargo Largo to be sold as lost goods. The allegations included that UPS perpetuated this scheme by luring customers to third-party retailers, such as Pak Mail and the UPS Store. UPS's contracts with these third-party retailers allow it to give these customers a tracking number and require the retailer to use UPS as a preferred carrier, but both the third party contracts and the UPS Carmack-required tariffs state that UPS does not accept any liability for lost or damaged goods, as UPS contends such customers are not shippers and refuses to store or to track the customer's information. This procedure virtually guarantees its wholesaler, Cargo Largo, a steady stream of valuable but unclaimed "lost" goods. Petitioner alleges that she fell prey to this scheme when a tube package including her original oil on canvass paintings arrived at a gallery in Manhattan for a show (she had not sold the paintings as of yet). The tube had been cut open and the paintings were removed before arrival. UPS refused to deal with Mlinar as she was not the "shipper of record." The item was still not found after the lost goods claim was filed by Pak Mail, the third party retailer. Over one year later, Mlinar's paintings were sold as UPS lost goods by Cargo Largo. That and several other

sales catalogued and broadcast her name in association with the sale of the painting.

UPS filed a Motion to Dismiss the Amended Complaint and argued that all the claims were preempted pursuant to Carmack. The Motion to Dismiss attached the shipping tariffs it had published pursuant to 49 USC 14706; in other words, the tariffs which state that UPS has no liability to third-party customers were now used by UPS as an attempt to limit its liability to Carmack recovery and to effectively preempt Mlinar's state law claims.

The Order of Dismissal was based upon the finding that all claims alleged against UPS were preempted by the Carmack Amendment.

The first opinion of the Fourth District Court of Appeal (authored by Judge C. Taylor and noting concurrence without opinion by Judge J. Ciklin and Associate Judge Michael Robinson) affirmed the dismissal of Appellant's four claims against the interstate-shipper. Concluding that none of the misconduct alleged on the part of UPS was separate and distinct from the course of shipment, the opinion held that the Petitioners claims fell within the scope of Carmack as stated in *Smith v. United Parcel Serv.,* 296 F.3d 1244, 1248 (11th Cir.2002). The opinion concluded that Petitioner's claims included separate harm only, which the Fourth District held did not create an exception to Carmack.

Petitioner filed a consolidated Motion for Rehearing, Rehearing en banc, and for certification of conflict with *Braid Sales & Marketing. v. R & L Carriers*, 838 So. 2d 590 (Fla. 5th DCA 2003) and for certification as an issue of great importance.

The Motion argued that the original opinion failed to assess the actual misconduct alleged against UPS and instead, only discussed the allegations describing the harm Petitioner alleged that UPS's misconduct caused her career and her name. Petitioner argued that this failure to address the actual conduct of UPS rather than the harm caused to the Petitioner and the failure to assess the significance of the fact that UPS's tariffs did not include the Petitioner's claims rendered the opinion squarely in conflict with *Braid Sales & Marketing. v. R & L Carriers*, 838 So. 2d 590 (Fla. 5th DCA 2003).

The Fourth District Court of Appeal entered an opinion denying the motions for rehearing and rearticulating its affirmance of the trial court dismissal of all of the claims; the second and present opinion notes some of the shared misconduct alleged on the part of both UPS and against co-conspirator Cargo Largo. The opinion does not, however, discuss the tariff issue or the misconduct which gave rise to the deceptive practice claim, the misconduct attributed to UPS alone. The opinion cited *Braid Sales & Marketing. v. R & L Carriers*, 838 So. 2d 590 (Fla. 5th

DCA 2003) as a case holding that Carmack did not preclude a claim based on separate harm and that the "separate harm" rule had been overruled by subsequent cases. The order granted the Petitioner's Motion for Certification of Conflict to the extent the opinion conflicted with *Braid Sales & Marketing. v. R & L Carriers*, 838 So. 2d 590 (Fla. 5th DCA 2003).

Petitioner's brief on jurisdiction includes two arguments: First, that the opinion misconstrues and so conflicts with the second portion of *Braid Sales & Marketing. v. R & L Carriers*, 838 So. 2d 590 593(Fla. 5th DCA 2003), which allowed a breach of contract claim because the conduct occurring after the act of shipment was complete was necessarily separate and distinct from claims ordinarily preempted by Carmack. Second, the Fourth District opinion in this matter conflicts with the second portion of the opinion in *Braid Sales & Marketing. v. R & L Carriers*, 838 So. 2d 590, 592 (Fla. 5th DCA 2003), which held that tariffs excluding any liability on the part of a carrier to a particular claimant cannot be used by that carrier as the predicate to a Carmack defense against claims by a third party.

ARGUMENT

Dismissal of the Petitioner's claims of intentional misconduct on the part of UPS pursuant to 49 U.S.C. 14706, which preempts recovery for packages lost or

destroyed in the course of shipment, contradicts the entirety of caselaw regarding a Carmack exception, including and most significantly the opinion of the Fifth District Court of Appeal in *Braid Sales & Marketing. v. R & L Carriers*, 838 So. 2d 590 (Fla. 5th DCA 2003).

Jurisdiction is sought pursuant to 9.030(a)2(A)(iv) and (vi). The Fourth District opinion granting the Motion to Certify conflict and containing the affirmation for which the Petitioner seeks review was rendered by the District Court of Appeal on December 4, 2013. No Motion for Rehearing was filed. Petitioner filed her Notice to Invoke Discretionary Jurisdiction to Review Decision pursuant to Fla. R. App. Pro. 9.120(c) via eDCA electronic filing on January 2, 2013, which was returned by the clerk for want of a certificate of service. A second Notice to Invoke Discretionary Jurisdiction to Review Decision was filed on January 3, 2013 and payment was sent via US Mail to the Clerk of the Florida Supreme Court with a copy of the Notice, as directed by the Clerk. This brief, filed on Monday January 13, 2013, is timely filed pursuant to 9.120(d).

A. UPS TARIFFS DENY ANY LIABILITY TO THE PROSPECTIVE CLASS, YET UPS CLAIMS THESE SAME TARIFFS ALLOW IT TO LIMIT ITS LIABILITY TO CARMACK RECOVERY ONLY

UPS bases its Carmack defense on the claim that Petitioner's recovery is preempted by Carmack, which would limit a shipper's recovery form the carrier to

the declared value of a package and require such recovery to be sought in federal court. In *Braid*, the Fifth District noted that the Carmack defense would ordinarily preclude a claimants recovery for damage or loss of items once the carrier demonstrated the applicability of the defense; in order to demonstrate that the Carmack defense is sustainable, the carrier must demonstrate that the shipment was covered by published tariffs which would limit the carrier's liability to the shipper in accordance with Carmack. 49 USC 14706 (a)-(c). See *Rohner Gehrig Co. v. Tri-State Motor Transit*, 950 F.2d 1079 (5th Cir. 1992) as cited by *Braid Sales & Mktg. v. R & L Carriers,* 838 So. 2d 590 (Fla. 5th DCA 2003.) (The tariff is the instrument through which the carrier publishes the limitations on recovery that it will maintain if the shipper's property is lost or stolen.)

Petitioner argued that since the tariffs proffered by UPS as a predicate to the defense state that Petitioner and any customer of a third party retail shipment center are not the shippers of record and deny any liability to the customer for loss or damage to goods, that the tariffs could not now be used to limit UPS liability those customers to the stated Carmack liability. Carmack does not allow a carrier to deny liability. The purpose of Carmack preemption was to coordinate interstate carrier liability to allow shippers to recover damages in accordance with a declared value. See *Atlantic C. L. R. Co. v. Riverside Mills*, 219 U.S. 186, 205 (U.S. 1911):

> If it is to be assumed that the ultimate power exerted by Congress is that of compelling cooperation by connecting lines of independent carriers for purposes of interstate transportation, the power is still not beyond the regulating power of Congress, since without merging identity of separate lines or operation it stops with 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.

Petitioner argued that limiting liability to Carmack recovery when UPS's tariffs first sought to deny any such liability would not only create an impractical legal irony, it would be completely unjust as Petitioner claimed that the third-party exclusion was the vehicle through which UPS and Cargo Largo operate a complex fencing operation designed to guarantee Cargo Largo so many instances of valuable "unclaimed" lost goods, that UPS could effectively hand over its entire lost goods processing operations to its wholesaler, free of charge. The present opinion in this matter simply fails to address this issue and to assess whether UPS met its duty to establish the predicate of its defense; *Braid Sales & Marketing. v. R & L Carriers*, 838 So. 2d 590, 592, (Fla. 5th DCA 2003), squarely assesses issue.

B. ALLEGATIONS INCLUDED PRE AND POST-SHIPMENT INTENTIONAL MISCONDUCT INCLUDING BAIT AND SWITCH, CONSPIRACY WITH A WHOLESALER, AND MISAPPROPRIATION OF IDENTITY

Braid Sales & Marketing. v. R & L Carriers, 838 So. 2d 590, 593, (Fla. 5th DCA 2003) also held that a second claim based on the alleged breach of an oral

contract to repair the damages was not precluded. The Fifth District paraphrased the arguments before it as follows

> "*Braid* argued that since the claim was based upon conduct occurring after the shipment was completed, it was not legally precluded by the Carmack Amendment. R & L responded that dismissal was warranted because the Carmack Amendment provided the sole remedy and preempted all other federal or state claims and remedies relating to the loss or damage to cargo, citing to Rini v. United Van Lines, Inc., 104 F.3d 502 (1st Cir.1997)."

The *Braid* plaintiff argued that whether the claim escaped Carmack preemption depended upon the conduct alleged against the carrier. Essentially, the carrier stated that since no separate harm occurred, there was no recovery regardless of whether the conduct resulting in that harm was separate from the shipment. The Fifth District held to the contrary.

Admittedly, *Braid's* holding (*Braid Sales & Marketing. v. R & L Carriers*, 838 So. 2d 590 at 593 (Fla. 5th DCA 2003) is unfortunately worded as though the Fifth District held that 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. However, as noted by the *Braid* defendant, the damage alleged was in fact the damage to the goods; therefore, it is clear that *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).

The Fourth District Court of Appeal decision in this case recognized that Carmack allows recovery based upon "separate and distinct misconduct," stating as follows on page 3 of the attached opinion:

> Situations may exist, however, in which the Carmack Amendment does not preempt all state and common law claims. *Smith v. United Parcel Serv.,* 296 F.3d 1244, 1248 (11th Cir.2002). Claims that are "based on conduct separate and distinct from the delivery, loss of, or damage to goods escape preemption." *Id.* at 1249. For example, "no doubt exists that if a UPS driver intentionally assaulted and injured" a plaintiff, the Carmack Amendment would not preempt the cause of action.

However just as the Fourth District's opinion fails to discuss how the tariffs satisfy Carmack prerequisites, it never discusses the misconduct alleged against UPS, including its deliberate misuse of those tariffs and its agreements with the co-conspirators in this case. Indeed, some of the conduct alleged against UPS is discussed by the present opinion, including the same misconduct also alleged against Cargo Largo, who is not a carrier of goods at all. Although this shared misconduct cannot be fairly stated as inherent to the shipment and delivery of goods, this is the only misconduct assessed by the present opinion, which held that it was part of the course of shipment. In addition to that fact, the opinion does not assess the timing of any of the alleged misconduct, which is alleged to have begun well before this fated shipment began and is alleged to have ended nearly two years later

when the painting, which was not in the packing tube when UPS completed the shipment of Mlinar's packed tube to its New York destination, wound up being sold at auction and by sticker sale as a UPS lost item a year later.

STATEMENT OF IMPORTANCE

In this case, the UPS conspiracy is perpetuated by the fact that its tariffs SPECIFICALLY exclude Petitioner and shippers who bring packages to UPS through retail centers. The opinion, if allowed to stand, would give UPS license to first continue its use of tariffs to deny any liability to the putative class and to then use Carmack as a defense for any liability that might arise outside of Carmack. Such a holding would not only contradict the reasonable holding of *Braid Sales & Marketing. v. R & L Carriers*, 838 So. 2d 590 (Fla. 5th DCA 2003), which held that carriers could not limit liability by a contract which fails to even acknowledge liability, it would allow UPS license to claim the unfettered right to coopt any artist's or individual's work and to mass market it to the world as though the artist endorsed the sale.

DATED this 13th day of JANUARY, 2014.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by fax and United States Mail this 13th day of JANUARY, 2014, to all counsel on the attached list.

/s Mara R. P. Hatfield

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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