

2009

John D. Archer v. April Gauntly, Brown's Crew Car of Wyoming, Inc., Armadillo Express, Union Pacific Railroad Company : Brief of Appellee

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

---oo0oo---

John D. Archer,

Appellant,

Case No. 20090008-SC

Civil No. 0609069436

v.

April Gaultney, Brown's Crew Car of
Wyoming, Inc. dba Armadillo Express, and
Union Pacific Railroad Company,

Appellees.

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I. JURISDICTION

Appellees and Defendants Brown's Crew Car of Wyoming, Inc., d/b/a Armadillo Express ("Armadillo") and Union Pacific Railroad Company ("UP") (hereinafter collectively referred to as "Defendants") agree with Appellant and Plaintiff John D. Archer's ("Plaintiff") jurisdictional statement.

II. STATEMENT OF THE ISSUES

A. Whether the District Court properly exercised its discretion in making an evidentiary ruling that Plaintiff's medical doctors are not qualified as experts to render opinions as to whether the absence of a rear-seat head restraint caused or contributed to Plaintiff's injuries.

Standard of Review: The Supreme Court reviews the District Court's evidentiary ruling concerning the qualifications of an expert witness for abuse of discretion. *Carbaugh v. Asbestos Corp. Ltd.*, 2007 UT 65 ¶ 7, 167 P.3d 1063, 1065.

B. Whether the District Court correctly concluded as a matter of law that neither Armadillo nor Union Pacific owed Plaintiff a legal duty to provide him with transportation equipped with rear-seat head restraints pursuant to their duty to provide Plaintiff with a reasonably safe place to work.

Standard of Review: The Supreme Court reviews legal issues and the District Court's conclusions of law for correctness. *Ferree v. State*, 784 P.2d 149, 151 (Utah 1989).

C. Whether the District Court properly concluded as a matter of law that Plaintiff's claims against Armadillo and Union Pacific for their failure to provide transportation to

Plaintiff equipped with rear-seat head restraints are barred by the doctrine of conflict preemption.

Standard of Review: The Supreme Court reviews legal issues and the District Court's conclusions of law for correctness. *Id.*

III. STATUTES, RULES AND REGULATIONS

Plaintiff defers to the statutes, rules and regulations cited by Plaintiff in his brief, with the exception of 49 C.F.R. § 571.202 on the grounds that Plaintiff has set forth subsequent versions of the regulation which are not applicable to the subject claims. The regulations applicable to the time periods relevant to the Plaintiff's claims are set forth below.

49 C.F.R. § 571.202 (1998):

S1. Purpose and scope. This standard specifies requirements for head restraints to reduce the frequency and severity of neck injury in rear-end and other collisions.

* * *

S2. Application. This standard applies to passenger cars, and to multipurpose passenger vehicles, trucks and buses with a GVWR of 10,000 pounds or less.

S3. Definitions. "Head restraint" means a device that limits rearward angular displacement of the occupant's head relative to his torso line.

S4. Requirements.

* * *

S4.2. Each truck, multipurpose passenger vehicle and bus with a GVWR of 10,000 pounds or less, manufactured on or after September 1, 1991, shall comply with S4.3.

S4.3 Performance levels. Except for school buses, a head restraint that conforms to either (a) or (b) shall be provided at each outboard front designated seating position. . .

* * *

Id.

49 C.F.R. § 571.202 (2004):

§ 571.202 Standard No. 202; Head restraints; Applicable at the manufacturer's option until September 1, 2008.

S1. Purpose and scope. This standard specifies requirements for head restraints to reduce the frequency and severity of neck injury in rear-end and other collisions.

S2. Application. This standard applies to passenger cars, and to multipurpose passenger vehicles, trucks and buses with a 4,536 kg or less, manufactured before September 1, 2008. Until September 1, 2008, manufacturers may comply with the standard in this § 571.202, with the European regulations referenced in S4.3 of this § 571.202, or with the standard in § 571.202a.

S3. Definitions.

Head restraint means a device that limits rearward displacement of a seated occupant's head relative to the occupant's torso.

* * *

S4.1 Each passenger car, and multipurpose passenger vehicle, truck and bus with a 4,536 kg or less, must comply with, at the manufacturer's option. S4.2, S4.3 or S4.4 of this section.

S4.2 Except for school buses, a head restraint that conforms to either S4.2 (a) or (b) of this section must be provided at each outboard front designated seating position. . .

* * *

S4.4. Except for school buses, a head restraint that conforms to S4.4 (a) and (b) of this section must be provided at each outboard front designated seating position. . .

* * *

S4.5 Except for school buses, head restraints that conform to the requirements of § 571.202a must be provided at each front outboard designated seating position. If a rear head restraint (as defined in § 571.202a) is provided at a rear outboard designated seating position, it must conform to the requirements of § 571.202a applicable to rear head restraints. . .

* * *

Id.

IV. STATEMENT OF THE CASE

This case arises from a motor vehicle accident that occurred on September 26, 2004. The Plaintiff, an employee of the UP was one of six passengers in a 2001 Chevrolet Express van (“van”) owned and operated by Armadillo pursuant to its transportation agreement with UP. The van was rear-ended by a 1998 Honda Passport driven by April Gaultney (“Gaultney”), another defendant in the underlying action.

Plaintiff commenced this action against Defendants seeking damages for alleged permanent injuries to his neck and right shoulder. Plaintiff asserted, *inter alia*, a negligence claim against Armadillo and a Federal Employers Liability Act (“FELA”) claim against UP for their alleged failure to provide transportation to Plaintiff equipped with rear-seat head restraints, pursuant to their duty to provide him with a reasonably safe place to work. *R. at 106-17.*

Defendants moved for summary judgment on numerous grounds. *R. at 587-612*. As related specifically to the issues raised in this appeal, Defendants moved for summary judgment on the grounds that: 1) neither of the Defendants owed a duty to Plaintiff to provide him with transportation equipped with rear-seat head restraints as a matter of law; 2) Plaintiff cannot prove that his injury was foreseeable to Defendants based upon the undisputed facts; 3) Plaintiff's claims are barred as a matter of law by the doctrine of conflict preemption; and 4) Plaintiff is unable to prove, based upon the undisputed facts, that his injuries were caused or contributed to by the absence of a rear-seat head restraint.

Oral argument was presented to the District Court on September 22, 2008. *R. at 1633*. Based upon the parties' submissions and arguments, the Honorable Judge Judith S. Atherton, Judge of Third Judicial District, Salt Lake County, State of Utah, granted summary judgment in Defendants' favor on all grounds. *R. at 1633, pp. 29-30*. Plaintiff filed a motion to reconsider. *R. at 1490-1504*. The District Court denied Plaintiff's motion, and issued its order for summary judgment in Defendants' favor. *R. at 1602-09*.

Plaintiff has appealed the Court's order for summary judgment on the element of duty, the issue of conflict preemption, and the Court's evidentiary order pertaining to the qualifications of his medical doctor experts to render opinions as to whether the absence of a rear-seat head restraint caused or contributed to his injuries. App. Br. at 8-9. Plaintiff has not asserted that the District Court erred by entering summary judgment in Defendants' favor on the elements of foreseeability or causation, nor has he asserted that the Court erred by its evidentiary ruling excluding the affidavits submitted by Plaintiff and his experts, Drs. Gordon, Huntsman, and France. App. Br. at 9-10. Accordingly,

even if the Court reverses the District Court on all of the issues presented by Plaintiff, summary judgment on the elements of foreseeability and causation stand, and Plaintiff will be unable to prevail on his claims at trial. Thus, Plaintiff's appeal is moot, since the Court's ruling on the issues presented will not entitle him to a trial on his claims.

V. RELEVANT FACTS

The District Court found the following facts to be undisputed and material to Defendants' motion, and based thereon, entered summary judgment in Defendants' favor. *R. at 1633, pp. 29-30.*

1. At approximately 5:45 a.m. on September 26, 2004, a motor vehicle accident occurred on Interstate Highway 15, near the intersection of 9000 South in the City of Sandy in Salt Lake County. *R. at 615-18.*

2. The accident occurred between a 2001 Chevrolet Express van operated by Casey Sorensen ("Sorensen"), an employee of Armadillo, and a 1998 Honda Passport, owned and operated by Gaultney. *Id.*

3. On the date of the accident, Armadillo had a contract to provide transportation services to UP employees pursuant to the "Agreement for Transportation Services" ("Agreement"). *R. at 620-22.*

4. At the time of the accident, Plaintiff was a UP employee, and was being transported by Armadillo in the course and scope of his employment from Salt Lake City to Milford. *R. at 272-74, 625.*

5. The van contained two individual front bucket seats, and three rows of bench seats. The two front seats were equipped with head restraints. However, the rear bench seats were not. *R. at 626.*
6. The van was not out of compliance with federal requirements. Federal regulations did not require that head restraints be installed on the rear seats. *R. at 651-52.*
7. Deven Neider was seated in the front passenger seat. Chuck Archer and Gordon Openshaw were seated on the first bench seat. Plaintiff was seated on the second bench seat. Ron Gates and John Bath were seated on the rear bench seat. All of these individuals were UP employees. *R. at 626-29.*
8. Immediately preceding the impact, Plaintiff was turned around, speaking to John Bath, who was seated on the passenger side of the rear bench seat. *R. at 632.*
9. At the time of impact, Plaintiff was still seated in a turned position, and he grabbed the back of the bench seat with his right arm, with his elbow pointing towards the rear. *R. at 942, 663.*
10. Neither Plaintiff nor Gaultney have any knowledge of anything that Sorensen did that caused or contributed to the accident. *R. at 630-31, 634, 642, 689.*
11. Plaintiff alleges that he suffered injuries to his neck and right shoulder due in part to the absence of a head restraint on his rear bench seat. *R. at 272-74.*
12. At the time the van was manufactured, the National Highway Safety Transportation Administration (“NHSTA”) did not require automobile manufacturers to install rear seat head restraints. *R. at 691-94 (citing 49 C.F.R. § 571.202 (1998)) (“FMVSS 202”).*

13. On March 14, 2005 (after the subject accident), the NHSTA amended 49 C.F.R. § 571.202 to change the manufacturing requirements for front seat head restraints, and imposed specific manufacturing requirements for head restraints voluntarily installed in rear seats. *R. at 696-98* (citing 49 C.F.R. § 571.202 (2005)). At that time the NHSTA specifically considered a proposal to mandate the installation of rear-seat head restraints, and expressly rejected that proposal. *R. at 702-03* (citing 69 F.R. 74848).

14. The NHSTA acknowledges that the use of properly manufactured head restraints reduces the possibility of neck injuries in rear-end collisions, but will not prevent all such injuries. (“The agency estimates that approximately 272,464 whiplash injuries occur annually. This final rule will result in approximately 16,831 fewer whiplash injuries, 15,272 involving front seat occupants and 1,559 involving rear seat occupants.”) *R. at 704; see generally R. 702-07.*

15. On the date of the incident, UP had a safety rule in place that required employees to “report, correct, or protect any unsafe condition or practice.” *R. at 806, 643-44.*

16. Rule 70.1 applied to Plaintiff at all times relevant to the accident. *R. at 643.*

17. Prior to the accident, Plaintiff had never raised any safety concerns to UP or Armadillo regarding the absence of rear-seat head restraints in Armadillo’s vehicles. *R. at 579.*

18. Prior to the accident, Plaintiff had never made a request to UP or Armadillo to be transported only in vehicles that were equipped with rear-seat head restraints. *R. at 636-37.*

19. Prior to the accident, Plaintiff never suggested to anyone at UP that it require Armadillo to utilize only vehicles that had rear seat head restraints. *R. at 637.*
20. Prior to the accident, Plaintiff was unaware of any other UP employee complaining about the absence of rear-seat head restraints in transportation vehicles. *R. at 639.*
21. At no time during his employment with the UP did Plaintiff ever ride in a vehicle provided by the UP that he believed was unsafe due to the absence of head restraints. *R. at 638.*
22. Prior to the accident, nobody had raised any safety issues or concerns to UP or to Armadillo regarding the absence of head restraints in any of Armadillo's fleet vehicles. *R. at 579, 571.*
23. There are a variety of types of head restraints manufactured for automobile vehicles. Some types of head restraints are good and some are not so good. *R. at 647, 810-11.*
24. There have been cases involving incidents where head restraints have failed, and have been ineffective. *R. at 647-48.*
25. In 2004, the NHSTA issued a report finding that the existing height requirements of head restraint systems being manufactured were ineffective at limiting the rearward movement of a person at least as tall as the average occupant. *R. at 706 (citing 69 F.R. 74848), 811.*
26. The effectiveness of an adjustable head restraint system could depend in part upon the adjustment of the head restraint and the height of the occupant. *R. at 655.*

27. An adjustable head restraint system was an available option for models similar to the subject van. *R. at 652-53, 656.*

28. Neither Dr. Paul France nor Dr. Blake Ashby, the biomechanical experts retained by Plaintiff and Defendants respectively, were able to locate or observe a van of the same make or model with head restraints installed on the rear bench seats. *R. at 653-54, 824, 809.*

29. The effectiveness of a head restraint system can be affected by the position of the person sitting in the seat. *R. at 655, 812.*

30. There are no known studies of the effectiveness of head restraints in relation to individuals seated in the turned manner in which Plaintiff was seated at the time of the accident. *R. at 649, 650.*

31. Although Plaintiff's treating physicians state or infer in their respective reports that Plaintiff's injuries were caused or contributed to by the absence of rear-seat head restraints in the van, at their respective depositions they conceded that they are not biomechanical or engineering experts, and that Plaintiff would likely have suffered the same injuries even if rear seat head restraints had been installed in the van. *R. at 835-36, 838-39, 841-42, 845-46, 847-48, 851-55, 1181-86.*

VI. SUMMARY OF ARGUMENT

The District Court entered summary judgment in Defendants' favor on all grounds raised in their motion. *R. at 1633, p. 30.* Specifically, the Court correctly concluded, based upon the undisputed facts, that: 1) Defendants did not owe a duty of care to Plaintiff to provide transportation equipped with head restraints pursuant to their duty to

provide Plaintiff with a reasonably safe place to work; 2) that Plaintiff's claims are barred by the doctrine of conflict preemption; and 3) that Plaintiff is unable to prove that the absence of a rear-seat head restraint caused or contributed to Plaintiff's injuries. *R. at 1605-09, 1633.*

Plaintiff has identified as points of error the District Court's order for summary judgment on the element of duty, the application of the doctrine of conflict preemption, and its evidentiary ruling that Plaintiff's medical doctors are not qualified to render opinions as to whether the absence of a rear-seat head restraint caused or contributed to Plaintiff's injuries. App. Br. 8-10. Plaintiff has not, however, articulated any point of error by the District Court's order for summary judgment on the issues of foreseeability or causation, nor has he asserted that the District Court erred in its evidentiary ruling excluding the affidavits submitted by Plaintiff and his experts, Drs. Gordon, Huntsman, or France. Accordingly, he has waived his right to do so, and this Court should not consider these rulings on appeal.

Even if this Court reverses the District Court on all points of error identified by Plaintiff, summary judgment on the elements of foreseeability and causation stand, and Plaintiff will not be entitled to a trial on his claims against Defendants.

In the event the Court does not dismiss Plaintiff's appeal, it should affirm the rulings of the District Court, because they were not erroneous.

Specifically, the District Court's evidentiary ruling that Plaintiff's medical doctors are not qualified to render opinions as to whether the absence of a rear-seat head restraint caused or contributed to Plaintiff's injuries was reasonable based upon the doctors' lack

of experience, knowledge or training in head restraints and biomechanics, and the fact that Plaintiff's own biomechanical expert, who possesses the necessary qualifications to render such opinions, is unable to opine to any degree of probability that a head restraint would have prevented Plaintiff's injuries.

The District Court's order for summary judgment on the issue of duty was proper and must be affirmed. The District Court's order for summary judgment was correct because the undisputed facts demonstrate that: 1) Defendants had no knowledge that the absence of a rear-seat head restraint was an unsafe or hazardous condition; 2) there is no evidence that other similarly situated railroads and transport companies specifically provide transportation to railroad employees that are equipped with rear-seat head restraints; and 3) consumers such as Defendants should not be required to provide rear-seat head restraints in vehicles used to transport its employees where NHSTA does not mandate automobile manufacturers to install rear-seat head restraints in their vehicles.

Finally, the District Court correctly concluded that the doctrine of conflict preemption bars Plaintiff's claims against Defendants because the NHSTA specifically considered a proposal to require automobile manufacturers to install rear-seat head restraints and expressly rejected such an amendment, and the action of a state court imposing a duty upon Defendants as consumers of such automobiles to provide rear-seat head restraints in their vehicles would conflict with the objectives and purpose of FMVSS No. 202 established by the NHSTA.

VII. ARGUMENT

A. PLAINTIFF’S APPEAL SHOULD BE DISMISSED AS MOOT BECAUSE HE HAS NOT APPEALED THE DISTRICT COURT’S ORDER FOR SUMMARY JUDGMENT ON TWO ESSENTIAL ELEMENTS OF HIS CLAIM AND WOULD NOT BE ENTITLED TO A TRIAL ON HIS CLAIMS EVEN IF THIS COURT REVERSES THE DISTRICT COURT ON ALL OF THE ISSUES RAISED BY PLAINTIFF.

1. Plaintiff has waived his right to appeal any alleged errors by the District Court granting summary judgment in Defendants’ favor on the elements of foreseeability and causation, and its evidentiary ruling excluding the affidavits submitted by Plaintiff and his experts.

Plaintiff has appealed the District Court’s order for summary judgment on the element of duty, the application of the doctrine of conflict preemption and the Court’s evidentiary ruling that Plaintiff’s medical experts are not qualified to render opinions on the element of causation. App. Br. at 8-10. The Plaintiff has not, however, appealed the Court’s summary judgment order on the elements of foreseeability or causation, nor has Plaintiff appealed the Court’s evidentiary ruling excluding the affidavits submitted by Plaintiff and his experts, Drs. Gordon, Huntsman and France.

To properly raise an issue on appeal, the appellant must specifically identify the points of error of the lower court, and must provide argument, analysis and case law in his brief explaining the basis for the purported error. *See Maack v. Resource Design and Constr., Inc.*, 875 P.2d 570, 575 (Utah App. 1994). An appellate court will not consider issues raised for the first time in the appellant’s reply brief. *State v. Phathamavong*, 860 P.2d 1001, 1004 (Utah App. 1993). By failing to specify or identify the District Court’s order for summary judgment on the elements of foreseeability and causation, and the evidentiary ruling excluding the affidavits submitted by Plaintiff as points of error in

his brief, Plaintiff has waived his right to do so. *State v. Reyes*, 2002 UT 13, ¶ 2, 40 P.3d 630, 631; *Anderson v. Wright*, 273 P.2d 418, 419 (Utah 1954).

In their motion for summary judgment, Defendants presented numerous undisputed facts to support their argument that Plaintiff's evidence was insufficient to prove the elements of foreseeability and causation. *R. at 589-93*. In opposition thereto, Plaintiff submitted his affidavit, as well as affidavits from Drs. Gordon, Huntsman and France. *R. at 1276-80, 1398-1400, 1382-84, 1342-46*. In their reply brief, Defendants moved to strike Plaintiff's affidavits on the grounds that they were "sham affidavits" because they contained statements inconsistent with their deposition testimony, and on the grounds that they contained new opinions that the experts were not qualified to render and which were not timely disclosed, and contained statements that were inadmissible at trial. *R. at 1451-61*. The Court agreed with Defendants' arguments and struck the affidavits and did not consider them. *R. at 1633, at p. 29-30*. Nevertheless, Plaintiff relies upon and cites to statements contained in those affidavits in his brief, which were not considered by the Court, failing even to acknowledge the Court's ruling striking the affidavits on the numerous grounds asserted by Defendants.¹

¹ Plaintiff disingenuously cites to the pages in his opposition brief in support of these "Relevant Facts" as opposed to the evidentiary source of the statements, which are in whole or in part the affidavits submitted by Plaintiff and his experts. Specifically, the following "Relevant Facts" contained in Plaintiff's brief are taken entirely from the affidavits that the Court struck: 21, 26-8, 34-5, 37, 41-2, and 46. In addition, Plaintiff's "Relevant Fact" numbers 29-33 are based in part upon the affidavits that were struck by the Court. App. Br. at 17-20.

Even if this Court finds that the District Court abused its discretion in relation to its ruling on the qualifications of Plaintiff's experts, the affidavits of Plaintiff and Drs. Gordon, Huntsman and France were ruled inadmissible based upon the numerous grounds asserted by Defendants, and Plaintiff has not appealed that ruling by the Court. Inadmissible evidence cannot be considered by the Court in ruling on a motion for summary judgment. Utah R. Civ. P. 56(e) (2009); *Sandy City v. Salt Lake County*, 794 P.2d 482, 487 (Utah App. 1990), *rev'd in part on other grounds*, 827 P.2d 212 (Utah 1992).

The Plaintiff also has not appealed the Court's order for summary judgment on the elements of foreseeability and causation. App. Br. 8-9. Although it is anticipated that Plaintiff will argue that these orders are encompassed within his appeal, the points of error identified in Plaintiff's brief clearly fail even to reference such orders. Nor does Plaintiff provide any analysis as to such alleged erroneous orders.

Thus, even if this Court finds that the District Court abused its discretion in making its evidentiary ruling pertaining to the qualifications of Plaintiff's experts, such a finding will not affect the Court's order for summary judgment on the elements of foreseeability and causation.

2. The Court's order for summary judgment on the element of causation was correct based upon the material, undisputed admissible facts before it.

Defendants moved for summary judgment on the grounds that Plaintiff has insufficient evidence to prove the element of causation at trial. *R. at 604-08*. Specifically, Defendants argued that Plaintiff could not prove that the absence of a rear-

seat head restraint caused or contributed to his injuries, and that in order for the jury to find causation, it would be required to speculate as to the existence of a number of facts that have no evidentiary support. *Id.*

In support of their motion, Defendants presented undisputed admissible evidence including the report and deposition testimony of Dr. Paul France (Plaintiff's biomechanical expert) and Dr. Blake Ashby (Defendants' biomechanical expert), as well as deposition testimony of Plaintiff. *R. at 658-86, 646-57, 814-32, 808-12, 624-44.* Defendants also presented a 2004 report issued by the NHSTA pertaining to a proposed amendment to FMVSS No. 202 to require automobile manufacturers to install rear-seat head restraints. *R. at 700-804.*

The undisputed evidence demonstrates that Plaintiff's biomechanical expert, Dr. France, could not opine with any degree of probability that the absence of a rear-seat head restraint caused or contributed to Plaintiff's injury. *R. at 605-08.* At best, Dr. France opined that had UP provided transportation *equipped with a bucket seat design and rear-seat head restraints*, that "such changes would have *reduced the likelihood* for the impingement type shoulder injury and aggravation of Mr. Archer's cervical condition by significantly reducing neck motion and loading on the shoulder." *R. at 665* (emphasis added). Plaintiff has not alleged in his Amended Complaint that Defendants failed to provide him with a reasonably safe place to work by not providing him with transportation equipped with bucket seats. Rather, his claim is premised upon the alleged failure to provide him with a vehicle equipped with rear-seat head restraints. *R. at 110-11, 113-114.*

Further, Dr. France testified that there were *adjustable* rear-seat head restraints available as an option for the make and model of van involved in the accident, but that he was unable to locate or inspect such a head restraint. *R. at 652-54, 656.* Dr. France conceded that the effectiveness of an adjustable head restraint would depend upon the height of the occupant and the adjustment of the restraint at the time of impact. *R. at 655.* The NHSTA found that the manufacturing height requirements for head restraints in existence prior to and at the time of the subject accident were insufficient to prevent injury. Specifically, the 2004 NHSTA report states:

[T]he persistence of whiplash injuries in the current fleet of vehicles indicates that *the existing height requirement is not sufficient to prevent excessive movement of the head and neck relative to the torso for some people. Specifically, the head restraints do not effectively limit rearward movement of the head of a person at least as tall as the average occupant.*

R. at 706 (emphasis added and quoting 69 F.R. 74848).

Dr. France further conceded that the effectiveness of a head restraint can be affected by the position of the occupant at the time of the impact, and that he was unaware of any crash studies that discuss the effectiveness of any rear-seat head restraint where the passenger is seated in a turned manner similar to Plaintiff's position at the time of impact. *R. at 655, 649-50.* Dr. France was *unable* to opine that had the rear-seat head restraint system available for van been installed, it is *probable* that, despite his turned position at the time of impact, Plaintiff would not have suffered the same injuries. *R. at 665, 1343.*

For a jury to find for Plaintiff on the issue of causation, it must find that the acts or failure to act by Defendants "produced harm or set in motion events that produced the

harm in a natural and continuous sequence.” MUJI 1st Civ. 209. In order to make such a finding, a jury would be required to speculate as to the existence of numerous facts that have no evidentiary support, including: 1) the adjustable head restraint, as manufactured, would have been effective to prevent Plaintiff’s injury; 2) Plaintiff would have properly adjusted the head restraint; and 3) the head restraint would have been effective to prevent Plaintiff’s injuries in light of his turned body and neck position at the time of impact. Where a plaintiff cannot show, without speculation by a jury, that the injury was caused by the alleged breach of a duty, summary judgment on the issue of causation is appropriate. *Triesault v. Greater Salt Lake Bus. Dist.*, 2005 UT App 489, ¶ 14, 126 P.3d 781, 785 (citing *Thurston v. Workers Comp. Fund*, 2003 UT App 438, ¶¶ 12-16, 83 P.3d 391, 395).

These unknown factual variables make it impossible for Dr. France to opine to any degree of probability that Plaintiff would not have suffered his injuries had there been a rear-seat head restraint had been installed in the van. If Plaintiff’s biomechanical engineer cannot render such an opinion, the Plaintiff cannot meet his burden of proof on the element of causation.

As discussed above, the affidavits of Drs. France, Gordon and Huntsman submitted by Plaintiff in opposition to Defendants’ motion were struck by the Court for numerous reasons and were not considered by the Court. Thus, the only admissible evidence before the Court to prove the element of causation were the expert reports and deposition testimony of his medical doctors. The Court ruled, however, that Plaintiff’s

medical doctors were not qualified to render opinions as to whether the absence of a rear-seat head restraint caused or contributed to Plaintiff's injuries. *R. at 1633, at p. 29-30.*

Even if this Court finds that the District Court abused its discretion in its ruling on the qualifications of Plaintiff's experts, the evidence contained in the experts' respective reports and deposition testimony establishes, at best, that it was *possible* a rear-seat head restraint would have prevented Plaintiff's injuries. *R. at 835-36, 838-39, 841-42, 845-46, 847-48, 851-55, 1181-86.* The only opinions rendered to a degree of "medical probability" were contained in the affidavits of Drs. Gordon and Huntsman, which were excluded by the Court for numerous reasons, and such ruling has not been appealed. *R. at 1633, pp. 29-30.*

The only admissible evidence to be considered by this Court are the opinions rendered by Plaintiff's medical doctors set forth in their reports and testimony, which are stated in terms of possibilities, not medical probabilities. Plaintiff concedes that the standard for medical causation testimony is "to a reasonable degree of medical probability." App. Br. at p. 45. Accordingly, the admissible evidence provided by Plaintiff's medical doctor experts fails to meet the necessary standard for medical causation testimony, and is insufficient to establish causation as a matter of law. Thus, Plaintiff cannot prove the essential element of causation, and is not entitled to a trial on his claims.

B. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY RULING THAT PLAINTIFF'S MEDICAL DOCTORS ARE NOT QUALIFIED AS EXPERTS TO PROVIDE OPINIONS AS TO WHETHER THE ABSENCE OF A REAR-SEAT HEAD RESTRAINT CAUSED OR CONTRIBUTED TO PLAINTIFF'S INJURIES.

1. The Court's ruling on the qualifications of Plaintiff's experts is an evidentiary ruling, which this Court reviews for an abuse of discretion.

Plaintiff incorrectly states that the standard of review of the Court's evidentiary rulings, excluding his medical experts from rendering opinions due to the lack of qualifications is that of correctness. App. Br. at pp. 9-10. As set forth in Plaintiff's argument, the decision by a court of whether an expert is qualified to render opinions on particular matters is determined pursuant to Rule 702 of the Utah Rules of Evidence. App. Br. at 44. Thus, the District Court's ruling as to Plaintiff's medical experts' qualifications to render opinions as to causation is an evidentiary ruling which must be reviewed by this Court applying the abuse of discretion standard of review.

It is well established that district courts have great latitude in making evidentiary rulings, including ruling on an expert's qualifications under Rule 702. *Carbaugh*, 2007 UT 65 ¶ 7, 167 P.3d at 1065 (citations omitted). An appellate court reviews evidentiary rulings made by the district court utilizing an abuse of discretion standard. Under the abuse of discretion standard, an appellate court will not reverse a decision to exclude evidence unless "the decision exceeds the limits of reasonability." *State v. Hollen*, 2002 UT 35, ¶ 66, 44 P.3d 794, 803 (citations omitted). Plaintiff has failed to demonstrate that the District Court's ruling on Plaintiff's medical experts' qualifications exceeded the limits of reasonability.

2. The District Court did not abuse its discretion in ruling that Plaintiff's medical doctor experts are not qualified to render opinions as to whether the absence of a rear-seat head restraint caused or contributed to Plaintiff's injuries.

The District Court did not abuse its discretion in ruling that Plaintiff's medical experts are not qualified to render opinions as to whether the absence of a rear-seat head restraint caused or contributed to Plaintiff's injuries. Each of Plaintiff's medical experts lack the necessary expertise, knowledge or training pertaining to head restraints or biomechanics. *R. at 1383, 1387-89.* Moreover, each of Plaintiff's medical doctors conceded in their depositions that they are not biomechanical or engineering experts, and have no specialized knowledge of head restraints. *R. at 845-48, 851-55, 1181-86.*

In relation to the qualifications of Plaintiff's medical doctors to render opinions as to whether the absence of a rear-seat head restraint caused or contributed to his injuries, Defendants provided their proposed undisputed fact number 32 which stated:

32. Although Plaintiff's treating physicians state or infer in their respective reports that Plaintiff's injuries were caused or contributed to by the absence of rear seat head restraints in the van, at their depositions they concede that they are not biomechanical or engineering experts, and that Plaintiff would likely have suffered the same injuries even if rear seat head restraints had been installed in the van.

R. at 593.

At the hearing on Defendants' motion, the Court stated:

. . . and No. 32 regarding the doctor's opinions of causation. First, I am agreeing with counsel for the defendant with regard to the affidavits submitted with plaintiff's response. I'm not going to consider them. I don't believe that area of expertise is part of an M.D. So I have not considered those affidavits, and accordingly, I find there is no genuine issue of material fact in this case. Moreover, I am persuaded in all areas by defendant's position and I find the defendant is entitled to judgment as a matter of law. So I am granting the Motion for Summary Judgment in each instance.

R. at 1633, pp. 29-30.

The Court's ruling to exclude opinions by Plaintiff's medical experts on causation was based upon the lack of qualifications, knowledge and expertise of the doctors in relation to head restraints and the fact that Plaintiff's own biomechanical expert, who possesses such qualifications, conceded that not even he could not opine with any degree of probability that Plaintiff would not have suffered his injuries if a head restraint system had been installed. *R. at 1633, pp. 29-30, 603-08, 1451-62, 1467-69.*

Indeed, Dr. France, Plaintiff's designated expert in the field of biomechanical engineering and accident reconstruction, admitted that he was unable to opine with any degree of probability that a head restraint would have prevented Plaintiff's injury due to a number of variables, including whether the head restraint was properly manufactured, whether the restraint was properly adjusted, the position of the Plaintiff at the time of impact, and the Plaintiff's pre-existing medical condition. *R. at 665, 647-48, 1343.*

Where the Plaintiff's own biomechanical engineer, who has the necessary experience, training and knowledge, is unable to render opinions to any degree of probability as to whether the absence of a rear-seat head restraint caused or contributed to Plaintiff's injuries, it was reasonable for the Court to rule that Plaintiff's medical doctors, who clearly lack the necessary experience, training or knowledge of head restraints or biomechanics, are not qualified to render such opinions.

As Plaintiff correctly states, "[t]he standard for medical causation is that the physician must testify to a reasonable degree of medical probability." App. Br. at p. 45; *see also Keranen v. Nat'l R.R. Passenger Corp.*, 743 A.2d 703, 717 (D.C. 2000) (an expert's opinion must be stated in terms of probabilities, not possibilities) (citations

omitted). Although a medical doctor may have the training and experience needed to diagnose an injury that may result from a motor vehicle accident, they do not have the necessary qualifications to render opinions as to whether the absence of a rear-seat head restraint caused or contributed to such injuries. *See, e.g., Keener v. Mid-Continent Cas.*, 817 So.2d 347, 353 (La. Ct. App. 2002) (affirming trial court's refusal to permit physician, who had received one year of training in engineering and physics of motor vehicle accidents, to provide expert testimony on biomechanics and injury causation).

Based upon the information presented by the parties, the District Court's ruling that Plaintiff's medical doctors were not qualified to render opinions as to whether the absence of a rear-seat head restraint caused or contributed to Plaintiff's injuries was reasonable, and was not an abuse of discretion. Accordingly, this Court should affirm the District Court's evidentiary ruling excluding opinions of Plaintiff's medical experts.

C. THE DISTRICT COURT CORRECTLY CONCLUDED THAT NEITHER ARMADILLO NOR UNION PACIFIC OWED PLAINTIFF A LEGAL DUTY TO PROVIDE HIM WITH TRANSPORTATION EQUIPPED WITH REAR-SEAT HEAD RESTRAINTS.

Neither FELA nor negligence claims are immune to summary judgment, particularly where Plaintiff is unable to present prima facie evidence of each of the essential elements of his claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Christiansen v. Union Pac. R.R. Co.*, 2006 UT App 180, ¶ 6, 136 P.3d 1266, 1269.

Plaintiff has asserted a claim for negligence against Armadillo and a FELA claim against UP for failing to provide transportation equipped with rear-seat head restraints.

To prevail on a claim for negligence, a plaintiff must prove: 1) defendant owed a duty to plaintiff; 2) defendant breached its duty; 3) the breach was the proximate cause of plaintiff's injury; and 4) plaintiff suffered injuries or damages. *Webb v. University of Utah*, 2005 UT 80, ¶ 9, 125 P.3d 906. The elements of an FELA claim are substantially similar to the elements of a negligence claim. To prevail on an FELA claim, a plaintiff must prove all the elements of a negligence claim, including the elements of duty, breach, foreseeability and causation. *Handy v. Union Pac. R.R. Co.*, 841 P.2d 1210, 1218 (Utah App. 1992). Defendants moved for summary judgment on the grounds that Plaintiff could not prove the elements of duty, foreseeability and causation.²

1. Duty

Defendants do not dispute that pursuant to the FELA, a railroad owes a non-delegable duty to its employees to provide a reasonably safe place to work. In order for a plaintiff to prevail on an FELA claim, however, he must prove that the railroad breached its duty to exercise reasonable care in furnishing him with a safe place to work by failing to provide him with transportation equipped with rear-seat head restraints.

² In his "Statement of the Issues," Plaintiff's Issue "B" sets forth an issue that was never presented to the District Court for determination. Specifically, Issue "B" states "[w]hether a rear seat head restraint is a safety device which, like other safety devices, is needed for a reasonably safe work place." App. Br. at 8. This is a factual issue that must be determined by a jury only if the Court concludes that the railroad owed a duty, and that employee's injuries were foreseeable. The issues before the District Court were whether Defendants owed a duty to provide head restraints, and whether Plaintiff's injury was foreseeable. The Court was not asked to make a factual finding as to whether a head restraint constitutes a "safety device," nor did the Court make such a factual finding. Thus, it would be improper for this Court to consider an issue not presented to the District Court.

The FELA does not impose strict liability upon a railroad. *Id.* at 1215. “The Act does not purport to be a workers’ compensation statute. Nor does it render the employer the insurer of the employee’s safety.” *Id.* The basis of the railroad’s liability must be its negligence, not the mere fact that an injury has occurred. *Id.*; *see also Gill v. Pa. R.R. Co.*, 201 F.2d 718, 720-21 (3rd Cir. 1952).

Plaintiff argues that, as a common carrier, Armadillo was held to a higher standard of care than the “reasonably prudent person” standard in protecting its passengers. As this Court has acknowledged: “[T]he duty owing by the carrier to its passengers for hire is definitely greater than such carrier owes to guests and the general public.” *Johnson v. Lewis*, 240 P.2d 498, 502 (Utah 1952). However, the method of determining whether a carrier has fulfilled that duty “in both cases is the care of an ordinary, prudent person under the existing facts and circumstances” *Id.* The requirement of a “higher standard” is not the same as strict liability, nor a requirement that a common carrier engage in the redesign of vehicles to install equipment not required by the NHSTA.

Plaintiff’s claims against Defendants are premised upon an alleged duty of care to provide him with transportation equipped with rear-seat head restraints, which he contends is required pursuant to the railroad’s duty to provide him with a reasonably safe workplace. The determination of whether one owes a duty of care is a question of law to be determined by the Court. *Smith v. Bank of Utah, Inc.*, 2007 UT App 89, ¶ 7, 157 P.3d 817, 819. The analysis for determining whether a duty exists involves consideration of the same general facts as one would consider in determining the existence of foreseeability.

There must be some evidence of foreseeability of injury to establish a duty of care upon the railroad. *Handy*, 841 P.2d at 1218; *see also Gallick v. Baltimore & Ohio Railway Co.*, 372 U.S. 108, 117-18, 83 S.Ct. 659, 9 L.Ed.2d 618 (1963); *Green v. River Terminal Railway Co.*, 763 F.2d 805, 809 (6th Cir. 1985); *Richardson v. Missouri Pacific R. Co.*, 677 F.2d 663, 666 (8th Cir. 1981). Whether an injury was foreseeable must be determined based upon “what should have been anticipated and not merely what happened.” *Taylor v. Missouri Pacific Railroad Co.*, 510 S.W.2d 735, 737 (Mo.App. 1974). A railroad’s conduct must be measured by the degree of care that persons of ordinary, reasonable prudence would use under similar circumstances and by what those same persons would anticipate from a particular condition. *Handy*, 841 P.2d at 1218.

The undisputed evidence demonstrates that before the date of the accident, no employee had ever complained or otherwise expressed concern to UP or Armadillo about the absence of rear-seat head restraints in the vehicles utilized by Armadillo. UP had a specific safety rule that required its employees to “report, correct, or protect any unsafe condition or practice.” *R. at 806*. At no time prior to the subject accident, had any UP employee, including the Plaintiff, ever reported the absence of rear- seat head restraints as being an unsafe condition, let alone suggest that it could be unsafe. *R. at 571, 579, 636-637*.

Plaintiff relies upon general statements made by UP representative Michael Brazytis and Armadillo owner Russell Brown in their depositions regarding their general awareness that head restraints could prevent neck injuries. App. Br. at 33. As set forth in their respective affidavits, however, neither Mr. Brazytis nor Mr. Brown possess any

specific knowledge, training or education in automobile safety equipment, particularly head restraints. *R. at 571, 579-580.* As is true of most consumers, Defendants rely upon the U.S. Department of Transportation, the NHSTA and automobile manufacturers to evaluate and determine necessary safety equipment, and to install such equipment in motor vehicles. *Id.*

Plaintiff sought to create the appearance of a disputed issue of material fact by asserting numerous facts regarding what Defendants *could have* done. App. Br. at 32 - 33. Plaintiff presented no evidence to the Court, however, demonstrating that any other railroads take any of the proposed actions to ensure that the vehicles provided to their employees are equipped with rear-seat head restraints.³ Nor did he present any evidence demonstrating that Defendants had received any complaints or reports that the absence of rear-seat head restraints was a hazardous or unsafe condition.

One of the issues before the District Court on summary judgment was whether it was foreseeable to Defendants that the absence of rear-seat head restraints created an unreasonably unsafe work place so as to impose a duty upon them to take action. Simply because Defendants *could* have undertaken other actions does not mean that they had a duty under the FELA or common law to do so. Defendants can be held liable only for

³ Even if Defendants would have provided Plaintiff with transportation equipped with a bucket seat and a head restraint, Plaintiff presented no evidence that doing so would have made any difference in the injuries suffered by Plaintiff. Indeed, Plaintiff's biomechanical expert could not opine with any degree of probability that it would have had any affect upon Plaintiff's injuries. *R. at 1356.* Moreover, the jury would still have to speculate as to the existence of the facts that have no evidentiary basis in order to find in favor of the Plaintiff on the element of causation.

hazards that they reasonably could have foreseen. *Gallick*, 372 U.S. at 117. Defendants have no duty to undertake steps to protect against a hazard that was not reasonably foreseeable. See *Adams v. CSX Transp.*, 899 F.2d 536, 540 (6th Cir. 1990) (holding employee's injuries could not have been reasonably foreseen by the railroad where no similar complaints had previously been made and the employee had never complained to the railroad, depriving the railroad notice of the potential injury).

2. The federal district court's order in *Wier* is not binding and is distinguishable from the facts in this case.

In his brief, Plaintiff relies heavily upon the unreported case of *Wier v. Soo Line Railroad Co.*, 1998 WL 474098 (N.D. Ill. 1998). In the underlying action, Plaintiff did not cite to, let alone argue, the *Wier* case. Even if he had, state courts are not bound by decisions of federal district courts on issues of federal law. *Abela v. General Motors Corp.*, 469 Mich. 603, 606, 677 N.W.2d 325, 327 (2004) ("Although state courts are bound by the decisions of the United States Supreme Court construing federal law (citation omitted), there is no similar obligation with respect to decisions of the lower federal courts.") (citing *Winget v. Grand Trunk W.R. Co.*, 210 Mich. 100, 117, 177 N.W. 273 (1920) and 21 C.J.S. COURTS § 159, pp. 195-197; 20 AM JUR 2D, COURTS § 171, pp. 454-455).

Contrary to Plaintiff's argument, the facts and arguments before the Court in *Wier* were significantly different than those before the District Court in this case. In *Wier*, the federal district court denied the railroad's and transport company's motion for summary judgment on the grounds that there existed issues of disputed fact. *Wier* argued, as did

Plaintiff in this case, that the benefits of headrests were well known and recognized by federal safety standards, and based upon such common knowledge, the defendants owed a duty to provide transportation equipped with rear-seat head restraints. The opinion does not reflect that the defendants in that case provided any evidence to refute the purported “common knowledge.”⁴ Here, however, Defendants provided undisputed evidence from a report issued by the NHSTA demonstrating that any “common knowledge” possessed by Defendants was not accurate.

Moreover, since 1998, when the *Wier* order was issued, the NHSTA has conducted further testing, and has specifically concluded that the existing height requirements for head restraints manufactured prior to 2004 were ineffective at limiting the rearward movement of a person at least as tall as the average occupant. *R. at 706* (citing 69 F.R. 74848), 811. This significant fact, which was undisputed (*R. at 1633, p. 29*), was not before the federal district court in *Wier*. Indeed, the NHSTA findings demonstrate that, to the extent Defendants possessed some “common knowledge” regarding head restraints, such knowledge was not accurate.

Also, since the *Wier* order was issued in 1998, the NHSTA has specifically considered adopting a regulation requiring automobile manufacturers to install rear-seat head restraints, and has rejected the proposal. Thus, it would be a conflict for a state

⁴ It is significant to note that in *Wier*, the plaintiff’s mechanical engineer expert opined that plaintiff’s whiplash injury was a result of the absence of rear-seat headrests. *Wier*, at *2. Here, Plaintiff’s biomechanical expert, Dr. France, was unable to render an opinion that Plaintiff’s injuries were probably caused or contributed to by the absence of a rear-seat head restraint due to a number of factors, specifically including his pre-accident medical condition and the turned position he was in at the time of impact. *R. at 665*.

court to impose a duty upon consumers such as Defendants to provide transportation equipped with rear-seat head restraints, when the federal regulating agency has specifically declined a proposed amendment to require such equipment be installed by manufacturers. *See infra*, at p. 33.

3. The evidence presented in the *Mortensen* case is significantly different than the evidence before the District Court in this case.

Plaintiff also relies heavily upon the California state appellate court decision in *Mortensen v. Southern Pacific Co.*, 245 Cal.App.2d 241, 53 Cal.Rptr. 851 (1966). In *Mortensen*, the trial court granted the railroad's motion for nonsuit on the grounds that the evidence presented was insufficient to present jury questions on the issues of negligence and proximate cause under the FELA. *Id.* at 243. The appellate court reversed the trial court's order, finding that there was sufficient evidence from which a jury could reasonably find in the plaintiff's favor.

Unlike this case, significant evidence was presented at trial in *Mortensen* demonstrating that: 1) although not yet required by law, that many other similarly situated fleet operators had installed seat belts in their vehicles; 2) issues of safety due to the absence of seatbelts had been raised to and discussed by the railroad's safety department over a six year period preceding the accident, and recommendations had been made to install and mandate the use of seatbelts; 3) the railroad had taken affirmative steps to install seat belts in all its motor vehicles weight one ton or less; and 4) expert testimony was presented that a seat belt would have prevented the deceased employee from being thrown from the vehicle, and that he would not have suffered the injuries that

caused his death had he not been ejected from the vehicle. *Id.* The appellate court concluded that such significant evidence would be sufficient to support a jury's verdict in the plaintiff's favor, and the order for nonsuit was reversed.

Plaintiff has presented no evidence in this case to support the imposition of a duty by Defendants to provide to Plaintiff transportation equipped with rear-seat head restraints. Rather, the undisputed evidence in this demonstrates that: 1) the NHSTA considered and rejected a law to require automobile manufacturers to install rear-seat head restraints; 2) prior to the accident, no UP employee had ever reported or complained that the absence of rear-seat head restraints was a hazardous condition; and 3) no expert can opine that Plaintiff probably would not have suffered his injuries had there been a rear-seat head restraint installed in the subject vehicle. Moreover, Plaintiff has provided no evidence demonstrating that other similarly situated railroads or carriers require that vehicles used to transport railroad employees be equipped with rear-seat head restraints.

Unlike the facts in *Mortensen*, the record here supports the District Court's order for summary judgment on the element of duty, and the Court's order should be affirmed.

- 4. The imposition of a duty upon a consumer such as Defendants to provide vehicles equipped with rear-seat head restraints when the NHSTA does not require manufacturers to provide such equipment would create precedent with significant consequences.**

Plaintiff seeks to impose a legal duty upon Defendants to provide transportation to railroad employees equipped with rear-seat head restraints. The risk of injury to a UP employee due to the absence of a head restraint is no different than the risk to any other individual riding in a motor vehicle without head restraints. To conclude that Defendants

owed a legal duty of care to provide Plaintiff with a motor vehicle equipped with head restraints, the same duty would arguably apply to other common carriers and the general public. Imposing such a duty would open the floodgates to claims against common carriers, individual consumers, and automobile dealerships, and would leave those consumers exposed to liability for injuries allegedly arising from the absence of head restraints, but leaving them with no remedy against manufacturers for not installing them. *See discussion of Geier v. American Honda Motor Company, infra* at p. 34.

The FELA is not a strict liability statute, and the railroad is not an insurer of its employees' safety. *Handy*, 841 P.2d at 1215. A railroad must act as would a reasonably prudent person under similar circumstances in providing its employees with a reasonably safe workplace. The undisputed evidence before the District Court establishes that: 1) prior to the accident, no safety complaints or reports had ever been received by Defendants regarding the absence of rear-seat head restraints; 2) the "common knowledge" of the benefits of head restraints that was purportedly possessed by Defendants was inaccurate, based upon findings made by NHSTA; and 3) no other similarly situated railroad undertakes steps to ensure its employees are provided with transportation equipped with rear-seat head restraints.

Based upon the undisputed facts, the District Court properly ruled that Defendants had no duty to provide transportation equipped with rear-seat head restraints to Plaintiff pursuant to their duty to provide Plaintiff with a reasonably safe place to work. Accordingly, the District Court's order for summary judgment on the element of duty must be affirmed

D. THE DISTRICT COURT CORRECTLY CONCLUDED AS A MATTER OF LAW THAT PLAINTIFF’S CLAIMS AGAINST ARMADILLO AND UNION PACIFIC FOR FAILURE TO PROVIDE TRANSPORTATION TO PLAINTIFF EQUIPPED WITH REAR-SEAT HEAD RESTRAINTS ARE BARRED BY THE DOCTRINE OF CONFLICT PREEMPTION.

Defendants moved for summary judgment on the grounds that Plaintiff’s claims are barred by the doctrine of conflict preemption. “Conflict pre-emption occurs ‘where it is impossible for a private party to comply with both state and federal requirements, . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *English v. General Electric Co.*, 496 U.S. 72, 79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941) (citations omitted)).

1. The Motor Vehicle Safety Act and FMVSS No. 202

In 1966, Congress enacted the Motor Vehicle Safety Act (“MVSA”). The purpose of the MVSA is to “reduce traffic accidents and deaths and injuries resulting from traffic accidents.” 49 U.S.C. § 30101 (2009). The MVSA prescribes motor vehicle safety standards intended to carry out the purpose of the Act. *Id.* The MVSA charges the Secretary of Transportation with the responsibility for establishing safety standards that meet the need for motor vehicle safety. 49 U.S.C. § 30111(a) (2009). The Secretary of Transportation delegated duties to the National Highway Traffic Safety Administrator (NHTSA) to carry out the MVSA. 49 C.F.R. § 1.50 (2009).

The NHTSA has *never* required automobile manufacturers to install rear-seat head restraints in vehicles. *See R. at 691-98* and 49 C.F.R. § 571.202. In fact, in 2004 the NHTSA specifically considered a proposed amendment to FMVSS No. 202 to require the

mandatory installation of rear-seat head restraints, and expressly rejected the proposed amendment. *R. at 702-03*. As for those manufacturers that choose to install rear-seat head restraints, the NHSTA amended FMVSS No. 202 to impose specific manufacturing requirements for the head restraints based upon its finding that head restraints being manufactured before 2004 were ineffective at limiting rearward head and neck movement of a person at least as tall as the average occupant. *R. at. 703*.

2. Conflict preemption as applied in *Geier v. American Honda Motor Co.*

Despite the fact that manufacturers are not required to install rear-seat head restraints, Plaintiff nevertheless contends that Defendants owed him a duty to provide transportation equipped with such equipment pursuant to their duty to provide him with a reasonably safe place to work. Based upon the U.S. Supreme Court's reasoning and holding in *Geier v. American Honda Motor Co.*, 529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000), Plaintiff would be barred from asserting any tort claim against Chevrolet, the manufacturer of the subject van, for the failure to equip it with rear-seat head restraints under the doctrine of conflict preemption. Conflict preemption applies because a state court's imposition of a duty upon a manufacturer to install rear-seat head restraints conflicts with 49 C.F.R. § 571.202, the applicable federal regulation, which does not mandate that manufacturers install such equipment in motor vehicles, and NHSTA specifically considered and rejected a proposed amendment to impose such a requirement. Plaintiff's claim that Defendants owed him a duty to provide transportation equipped with rear-seat head restraints should also be barred under the same principle.

In *Geier*, an injured motorist brought a negligence claim against American Honda for failing to equip its automobiles with a driver's side airbag. 529 U.S. at 865. In that case, FMVSS 208 applied, which required auto manufacturers to equip some, but not all, of their vehicles with passive restraints. *Id.* American Honda argued that the motorist's claims were preempted because it complied with the manufacturing requirements under the MVSA. The Supreme Court held that the motorist's claims were not expressly preempted under the preemption clause of the Act because the savings clause therein provides that compliance with a federal safety standard does not exempt any person from liability under common law. *Id.* at 867-68. The Court concluded, however, that ordinary preemption principles applied, and that the motorist's claims were in direct conflict with FMVSS 208. *Id.* at 874.

In reaching its conclusion, the Court analyzed the numerous considerations identified by the Department of Transportation in promulgating the rule permitting manufacturers to choose among a variety of different restraint systems. *See id.* at 874-81. Significant to the Court's analysis were the DOT's rejection of a proposed amendment to FMVSS 208, which would have imposed an "all airbag" standard, and the basis for its rejection of that standard—namely, to permit the industry time to overcome the safety problems and the high production costs associated with airbags. *Id.* As amended, FMVSS 208 provided for a gradual phase-in of passive restraints to permit manufacturers an opportunity to develop airbags and other passive restraint systems. *Id.*

The motorist's tort claim against the manufacturer depended upon the determination by the trial court that the manufacturer owed a duty to install an airbag when it manufactured the subject vehicle. The Supreme Court stated:

In effect, petitioners' tort action depends upon its claim that manufacturers had a duty to install an airbag when they manufactured the 1987 Honda Accord. ***Such a state law – i.e., a rule of state tort law imposing such a duty***—by its terms would have required manufacturers of all similar cars to install airbags rather than other passive restraint systems, such as automatic belts or passive interiors. It thereby would have presented an obstacle to the variety and mix of devices that the federal regulation sought. . . . It thereby also would have stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed. . . . Because the rule of law for which petitioners contend would have stood “as an obstacle to the accomplishment and execution of” the important means-related federal objectives that we have just discussed, it is pre-empted.

Id. at 881-82 (quoting *Hines*, 312 U.S. at 67 (emphasis added); see also *International Paper Co. v. Ouellette*, 479 U.S. 481, 493, 107 S.Ct. 805, 93 L.Ed2d 883 (1987); *Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 156, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982) (finding conflict and preemption where state law limited the availability of an option that the federal agency considered essential to ensure its ultimate objectives).

The rationale supporting conflict preemption in *Geier* applies equally to the facts in this case.⁵ Here, Plaintiff sought to have a state court impose a duty upon Defendants to provide him with transportation equipped with rear-seat head restraints. At the time

⁵ Plaintiff states that the “[c]ourt specifically held that common law actions are pre-empted **only** to the extent that they **actually conflict** with federal requirements.” App. Br. at 41. The text that Plaintiff cites is in relation to the Court’s discussion of the application of express preemption under the MVSA. Defendants do not contend that Plaintiff’s claims are expressly preempted under the MVSA. Rather, Defendants assert that Plaintiff’s claims are barred by the doctrine of conflict preemption, which the Court discusses later in its opinion. *Geier*, 529 U.S. at 874-85.

the subject van was manufactured, FMVSS 202 did not require Chevrolet, the manufacturer, to install rear-seat head restraints in their vehicles. *R. at 691-94*. Even as amended, effective March 14, 2005, FMVSS 202 still did not require manufacturers to install rear seat head restraints in their vehicles. *R. at 696-98*. As in *Geier*, the NHTSA has specifically considered a proposal to require manufacturers to install rear-seat head restraints and rejected such a requirement for various reasons, including the high cost associated in such a requirement in comparison to the relative benefits such restraints would provide, safety concerns that the head restraints would obstruct the driver's view, and reduced vehicle utility. *R. at 703*.

A federal decision not to regulate has preemptive effect “where [the] failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute.” *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 178, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978) (citations omitted). Plaintiff incorrectly argues that *Geier* requires that only common law actions that actually conflict with federal requirements are preempted. App. Br. at 41-42. Certainly *Geier* discusses “actual” or “express” preemption of Plaintiff's claims, but Defendants here argue that “conflict preemption” is the principle that bars Plaintiff's claims.

Plaintiff contends that *Geier* is not applicable because he is not asserting a claim against Chevrolet, the manufacturer of the subject vehicle. App. Br. at 41-42. Defendants do not contend that circumstances in this case are the same as those in *Geier*. Rather, Defendants argue that based upon the rationale and holding in *Geier*, imposing a

duty upon consumers such as Defendants to provide rear-seat head restraints when the manufacturer is not required to do so, and imposing liability upon the consumer for breaching such a duty, is inconsistent and illogical.

The rationale supporting the finding of conflict preemption in *Geier* is equally applicable to the facts of this case. Manufacturers have no duty to equip vehicles with rear seat head restraints, based upon the specific considerations and conclusions reached by the NHSTA, who are experts in vehicle equipment safety. Defendants should not be required by law to provide safety equipment to Plaintiff that the manufacturer is not required to provide to Defendants as consumers.

3. The District Court's imposition of a duty to provide Plaintiff with transportation equipped with rear-seat head restraints pursuant to UP's duty to provide a reasonably safe place to work would constitute state law for purposes of conflict preemption.

Plaintiff argues that the District Court erred in concluding that FELA is preempted by the MVSA or the FMVSS. App. Br. 39-44. The District Court did not rule that the FELA is preempted by the MVSA or the FMVSA. Rather, the District Court ruled that Plaintiff's claim that Defendants owed him a *duty* to provide transportation equipped with rear-seat head restraints pursuant to its duty to provide a reasonably safe place to work is barred by conflict preemption.

Plaintiff argues that conflict preemption does not apply in this case because FELA is not a state law. App. Br. at 39. Defendants do not contend that FELA is in conflict with the MVSA or FMVSS. Rather, Defendants assert that a *state court's* imposition of a duty upon the Plaintiffs to provide to Plaintiff transportation equipped with rear-seat head

restraints where the federal governing agency responsible for establishing standards for the installation of safety equipment in motor vehicles has considered and expressly rejected imposing such a requirement upon automobile manufactures is in conflict with FMVSS No. 202, and therefore is barred by conflict preemption. *R. at 1470*. It is the state court action requested by Plaintiff which would constitute state law in conflict with FMVSS No. 202.

Substantive law creates, defines, and regulates the rights and duties of the parties which may give rise to a cause of action. *Brown & Root Indus. Serv. v. Indus. Comm'n of Utah*, 947 P.2d 671, 675 (Utah 1997) (emphasis added). Whether a duty exists is a question of law for the Court to determine. *Smith*, 157 P.3d at 819. By ruling that Defendants have a duty to provide Plaintiff with transportation equipped with head restraints pursuant to its duty to provide a reasonably safe place to work, the District Court would be defining the rights and duties of the parties giving rise to Plaintiff's cause of action. Therein lies the "state law" that conflicts with the objective and purpose of FMVSS 202 forming the grounds for the application of conflict preemption. *Geier*, 529 U.S. at 881-82. The District Court clearly understood this concept, and adopted Defendants' argument. *R. at 1633, pp. 20-21, 29-30*.

Based on the foregoing discussion, the District Court correctly decided that Plaintiff's claim based upon the alleged duty owed to him by Defendants to provide him with transportation equipped with rear seat-head restraints pursuant to its duty to provide a reasonably safe place to work is barred by the doctrine of conflict preemption.

VIII. CONCLUSION

As discussed above, Plaintiff's appeal should be dismissed as being moot, because even if he prevails on all of the stated issues, he has not appealed the Court's order for summary judgment on the elements of foreseeability and causation, nor its evidentiary ruling excluding the affidavits of his experts, Drs. Gordon, Huntsman, and France. Thus, even if the Court reversed the District Court on all issues identified by Plaintiff, the order for summary judgment on the elements of foreseeability and causation stand. If Plaintiff cannot prove these two essential elements of his claim, he is not entitled to a trial on his claims against Defendants.

As to the merits of the issues raised by Plaintiff on appeal, the District Court correctly ruled as a matter of law that Defendants did not owe a duty to provide Plaintiff with transportation equipped with rear-seat head restraints pursuant to their duty to provide him with a reasonably safe place to work. The District Court also correctly ruled as a matter of law that Plaintiff's claims against Defendants for failure to provide transportation with a rear-seat head restraint is barred by the doctrine of conflict preemption. Finally, the District Court's evidentiary ruling finding that Plaintiff's medical doctors are not qualified to render opinions as to the causal affect a rear-seat head restraint might have had on Plaintiff's injuries was reasonable and was not an abuse of discretion. Defendants respectfully request this Court to affirm the District Court on all issues raised by Plaintiff on appeal.

IX. ADDENDUM

No addendum is necessary pursuant to Utah. R. App. P. 24(a)(11).

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May, 2009, I caused a true and correct copy of the within and foregoing **BRIEF OF APPELLEES** to be mailed, postage prepaid, to the following:

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