

2009

# John D. Archer v. April Gauntly : Reply Brief of Appellant

Utah Supreme Court

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James Mewborn; Arthur; Chapman; Kettering; Smetak & Pikala; Attorneys for Union Pacific Railroad Company; E. Scott Savage; Casey K. McGarvey; Savage; Yeats & Waldron, P.C.; Attorneys for Brown's Crew Car of Wyoming, Inc. d/b/a Armaldillo Express; Peter Christensen; Ryan P. Atkinson; Strong & Hanni; Attorneys for April Gaultney.

Ralph C. Petty; Philip G. Arnold, Pro hac vice; Rossi Cox Vucinovich Flaskamp PC; Attorneys for John D. Archer.

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<b>UTAH SUPREME COURT</b>		
JOHN D. ARCHER,	)	
	)	
	)	
Appellant,	)	
vs.	)	Case No. 20090008
	)	Civil No. 060909436
APRIL GAULTNEY, an individual;	)	
BROWN'S CREW CAR OF WYOMING,	)	
INC. d/b/a ARMADILLO EXPRESS, a	)	
Wyoming Corporation; and UNION	)	
PACIFIC RAILROAD COMPANY, a	)	
Delaware Corporation,	)	
	)	
Appellees.	)	
	)	

Peter Christensen  
Ryan P. Atkinson  
Strong & Hanni  
ATTORNEYS FOR APRIL GAULTNEY

Philip G. Arnold, *Pro hac vice*  
Rossi Cox Vucinovich Flaskamp PC  
10900 NE 8<sup>th</sup> Street, Suite 1122  
Bellevue, WA 98004  
(425) 646-8003/Fax: (425) 646-8004  
**ATTORNEYS FOR JOHN D. ARCHER**

JUN 24 2009

UTAH SUPREME COURT

JOHN D. ARCHER,

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)

)

)

APRIL GAULTNEY, an individual; )  
BROWN'S CREW CAR OF WYOMING, )  
INC. d/b/a ARMADILLO EXPRESS, a )  
Wyoming Corporation; and UNION )  
PACIFIC RAILROAD COMPANY, a )  
Delaware Corporation, )

)

**REPLY BRIEF OF THE APPELLANT**

James Mewborn  
Arthur, Chapman, Kettering,  
Smetak & Pikala  
ATTORNEYS FOR UNION PACIFIC  
RAILROAD COMPANY

Ralph C. Petty, Utah No. 02595  
10 West Broadway, Suite 800  
Salt Lake City, Utah 84101  
(801) 220-0090/Fax: (801) 220-0907

E. Scott Savage  
Casey K. McGarvey  
Savage, Yeats & Waldron, P.C  
ATTORNEYS FOR BROWN'S CREW  
CAR OF WYOMING, INC. d/b/a  
ARMADILLO EXPRESS

Philip G. Arnold, *Pro hac vice*  
Rossi Cox Vucinovich Flaskamp PC  
10900 NE 8<sup>th</sup> Street, Suite 1122  
Bellevue, WA 98004  
(425) 646-8003/Fax: (425) 646-8004  
ATTORNEYS FOR JOHN D. ARCHER

Peter Christensen  
Ryan P. Atkinson  
Strong & Hanni  
ATTORNEYS FOR APRIL GAULTNE

## PARTIES

James Mewborn  
Arthur, Chapman, Kettering,  
Smetak & Pikala  
81 South Ninth Street, #500  
500 Young Quinlan Bldg  
Minneapolis, MN 55402-3214

ATTORNEYS FOR UNION  
PACIFIC RAILROAD  
COMPANY

E. Scott Savage  
Casey K. McGarvey  
Savage, Yeats & Waldron, P.C.  
70 S. Main St., Suite 500  
Salt Lake City, UT 84101

ATTORNEYS FOR BROWN'S  
CREW CAR OF WYOMING,  
INC. d/b/a ARMADILLO  
EXPRESS

Peter Christensen  
Ryan P. Atkinson  
Strong & Hanni  
3 Triad Center, #500  
Salt Lake City, UT 84180

ATTORNEYS FOR APRIL  
GAULTNEY

Ralph C. Petty, Utah No. 02595  
10 West Broadway, Suite 800  
Salt Lake City, Utah 84101  
(801) 220-0090/Fax: (801) 220-0907

Philip G. Arnold, *Pro hac vice*  
Rossi Cox Vucinovich Flaskamp PC  
10900 NE 8<sup>th</sup> Street, Suite 1122  
Bellevue, WA 98004  
(425) 646-8003/Fax: (425) 646-8004

ATTORNEYS FOR JOHN D. ARCHER

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## **I. INTRODUCTION**

Appellees attempt to cloud this appeal with sophistry, misrepresentation, and misapplication – but fail to rebut Archer. Appellees confuse rather than correct Archer’s straightforward application of the law. This Court should ignore Appellees’ strategy to dodge the legal standards under which the district court’s ruling should be reversed.

## **II. ARGUMENT**

### **A. The final written order is the appealable order – oral statements made from the bench are not the judgment of the court for purposes of appeal.**

Appellees spend much of their brief – not on the merits – but on the erroneous premise that Archer’s appeal is moot because he has not appealed every aspect of the oral statements made from the bench (as interpreted by Appellees) and defendants’ motion for summary judgment.<sup>1</sup> Contrary to Appellees’ premise, oral statements made from the bench:

- are **not** the judgment of the court;<sup>2</sup>
- are **not** appealable;<sup>3</sup> and
- are superseded by the formal written order.<sup>4</sup>

Here, the formal written order is the December 11, 2008 amended order granting defendants’ motion for summary judgment on the following grounds:

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<sup>1</sup> *Appellees’ Brief*, pp. 5-6; 10-12; 13-19.

<sup>2</sup> *State v. Gerrard*, 584 P.2d 885, 887 (Utah 1978); *Newton v. State Road Commission*, 463 P.2d 565, 567 (Utah 1970); citing *McCollum v. Clothier*, 241 P.2d 468, 472 (Utah 1952) (“Oral statements of opinion by the trial court inconsistent with the findings and conclusions ultimately rendered do not affect the final judgment.”) (Emphasis added).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

1. Neither Armadillo nor Union Pacific owed Plaintiff a duty to provide transportation equipped with rear seat head restraints.
2. The National Highway Traffic Safety Administration does not impose a duty on vehicle manufacturers to install rear seat head restraints and specifically considered and rejected imposing such a duty upon manufacturers. Imposing such a duty upon consumers such as Armadillo or Union Pacific would be inconsistent with the NHTSA manufacturing requirements, particularly in light of the absence of specialized knowledge of head restraints on the part of defendants in this case. Plaintiff's claims against Armadillo and Union Pacific based upon failure of Armadillo and Union Pacific to provide transportation with rear seat head restraints are therefore barred by the doctrine of conflict preemption.
3. Even if Armadillo and/or Union Pacific owed Plaintiff a duty, and Plaintiff's claims were not barred by the doctrine of conflict preemption, Plaintiff is unable to prove by a preponderance of the evidence that Plaintiff would not have suffered his injuries if there had been rear seat head restraints installed in the subject van. Indeed, Plaintiff's experts are unable to offer any opinions as to whether the existence of a rear seat head restraint would have prevented the Plaintiff's injuries.
4. There are no disputed material facts demonstrating any negligence on behalf of Armadillo's driver, Casey Sorensen.<sup>5</sup>

Neither the motion nor the oral statements made from the bench are appealable as the judgment of the court. The appealable order is the December 11, 2008 amended order – the order appealed by Archer – superseding any oral statements made from the bench. Appellees filed no counter-appeal to enlarge the focus of this appeal beyond the December 11, 2008 amended order.

Appellees try to squeeze implications out of the district court's oral statements to reach the improper conclusion that Archer has not appealed the issues of foreseeability,

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<sup>5</sup> R. 1605-1609; See, *Amended Order Granting Defendants Motion for Summary Judgment, Appellant Brief Addendum No. 10.*

causation, and the exclusion of the doctors' affidavits.<sup>6</sup> Appellees' implications fail because Archer **has** addressed these issues on appeal:

- Causation and the doctors' expertise are addressed in Appellant's brief – Issue "D" – whether orthopedic and spine surgeons have the medical expertise to render medical causation opinions regarding the injuries caused by the failure to provide rear seat head restraints in the vehicle transporting Appellant which was involved in a rear end collision.<sup>7</sup>
- Foreseeability is an element of the railroad's duty of care.<sup>8</sup> Appellees' duty is addressed in Issues "A" and "B" of Appellant's brief – whether Appellees owed a duty to Archer to provide transportation equipped with rear seat head restraints; and whether a rear seat head restraint is a safety device which, like other safety devices, is needed for a reasonably safe workplace.<sup>9</sup>

Archer has properly appealed the district court's summary judgment order, which the order on appeal.

**B. Archer has not waived anything – he may answer new issues set forth in the opposing brief.**

Appellees cite *State v. Reyes*<sup>10</sup> and *Anderson v. Wright*<sup>11</sup> for the improper assertion that Archer has waived his right to address the issues of foreseeability, causation, and the exclusion of the doctors' affidavits on appeal. Rule 24(c) of the Utah Rules of Appellate Procedure states that reply briefs may address any new matter set forth in the opposing brief.<sup>12</sup> Archer may therefore properly respond to these issues here.

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<sup>6</sup> Appellees' Brief, pp. 10-11 and 13.

<sup>7</sup> Appellant's Brief, p. 9.

<sup>8</sup> *Handy v. Union Pac. R. R. Co.*, 841 P.2d 1210, 1218 and 1219 (Utah App. 1992); citing *Mitchell v. Missouri-Kansas-Texas R.R.*, 786 S.W.2d 659, 661 (Tex. 1990).

<sup>9</sup> Appellant's Brief, p. 8.

<sup>10</sup> 40 P.3d 630 (Utah 2002).

<sup>11</sup> 273 P.2d 418 (Utah 1954).

<sup>12</sup> Rule 24(c) of the Utah Rules of Appellate Procedure.

*Reyes* was a criminal case in which the defendant was charged with rape and sodomy of a child.<sup>13</sup> The defendant filed a *pro se* motion and the trial court denied the motion.<sup>14</sup> On appeal before the Utah Supreme Court, the defendant failed to even address the court's denial of the motion in his brief, or at oral argument, and therefore waived those arguments.<sup>15</sup> Unlike *Reyes*, Archer has fully addressed the district court's order on appeal.

In *Anderson*, the plaintiffs were precluded from introducing evidence of fraud on appeal because they failed to plead fraud, did not amend their pleadings to show fraud, and showed no intention of changing the theory of their case to fraud.<sup>16</sup> Unlike *Anderson*, Appellant has not failed to plead any theory at issue on appeal.

**C. Regardless of the lack of prior complaints, UP has a duty to inspect, discover, and protect its employees and could have reasonably foreseen that transporting Archer without a head restraint could result in injury.**

Appellees argue that UP has no duty to Archer in this case because there were no prior complaints that the absence of rear seat head restraints was a hazardous condition.<sup>17</sup>

Appellees' argument fails for three reasons:

- It is UP's duty (not Archer's) to inspect, discover, and protect its employees from hazards in the workplace.<sup>18</sup>
- The prior-complaint standard applies to claims involving an **emotionally** unsafe workplace and does not apply here.<sup>19</sup>

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<sup>13</sup> *Reyes*, 40 P.3d at 361.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Anderson*, 273 P.2d at 340.

<sup>17</sup> *Appellees' Brief* at pp. 27-28.

<sup>18</sup> *Cazad v. Chesapeake & Ohio Ry. Co.*, 622 F.2d 72, 75 (4<sup>th</sup> Cir. 1980); *Williams v. Atlantic Coast Line R. Co.*, 190 F.2d 744, 748 (5<sup>th</sup> Cir. 1951).

- Appellees blindly assert – without citation to the record – that there were no prior complaints.<sup>20</sup>

Appellees cite *Adams v. CSX Transp.*,<sup>21</sup> for the improper proposition that UP has no duty without prior complaints.<sup>22</sup> *Adams* involved a claim for **emotional** injury under the FELA, and as articulated by *Adams*, this distinction is critical – the prior-complaints standard applies **only** to claims based on allegations of an **emotionally** unsafe workplace and does **not** define the threshold of actionable conduct for a **physically** unsafe workplace.<sup>23</sup> The instant case is about a physically unsafe workplace – the *Adams* prior-complaint standard does not apply.

UP has a duty of reasonable care to make inspections, and to discover and protect its employees from hazards in the workplace.<sup>24</sup> UP breaches its duty to provide a safe workplace when it knows or should know of potential hazards in the workplace, yet fails to exercise reasonable care to inform and protect its employees.<sup>25</sup> Actual notice of an unsafe condition is unnecessary to show foreseeability under FELA.<sup>26</sup>

Here, UP could have reasonably foreseen that transporting Archer without a head restraint could result in injury:

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<sup>19</sup> *Adams v. CSX Transp., Inc.*, 899 F.2d 536, 540 (6<sup>th</sup> Cir. 1990).

<sup>20</sup> *Appellees Brief*, p. 31.

<sup>21</sup> 899 F.2d 536, 540 (6<sup>th</sup> Cir. 1990).

<sup>22</sup> *Appellees Brief*, pp. 27-28.

<sup>23</sup> *Adams*, 899 F.2d at 540. (Emphasis added).

<sup>24</sup> *Cazad*, 622 F.2d at 75; *Williams*, 190 F.2d at 748.

<sup>25</sup> *Galloose v. Long Island R. Co.*, 878 F.2d 80, 84-85 (2<sup>nd</sup> Cir. 1989).

<sup>26</sup> *Williams v. National R.R. Passenger Corp.*, 161 F.3d 1059, 1063 (7<sup>th</sup> Cir. 1998); quoting *Nivens v. St. Louis Southwestern Ry. Co.*, 425 F.2d 114, 118 (5<sup>th</sup> Cir. 1970).

- UP admits that it was responsible for identifying and reducing the risk of reasonably foreseeable hazards in the workplace.<sup>27</sup>
- UP admits that rear-end collisions were reasonably foreseeable hazards in the workplace.<sup>28</sup>
- Before Archer's injury, UP knew that seat head restraints were important safety devices that reduced the risk of neck injuries in rear-end collisions.<sup>29</sup>

Appellees argue that UP had no duty because there is no evidence in the record that other railroads took action to ensure that their employees were provided rear seat head restraints.<sup>30</sup> Appellees ignore that UP itself had taken steps to provide headrests to their transported employees. UP transported crew members in vehicles with rear seat head restraints prior to the 2004 incident<sup>31</sup> and other UP locations restricted employees from using center seats, which did not have rear seat head restraints.<sup>32</sup>

**D. Issue "B" goes to the district court's ruling on UP's duty and is properly presented on appeal.**

Appellees assert, in footnote, that Archer may not present Issue "B" on appeal – whether a rear seat head restraint is a safety device which, like other safety devices, is needed for a reasonably safe workplace."<sup>33</sup> This issue goes directly to UP's non-delegable duty to provide a reasonably safe workplace and whether this duty extends to Armadillo's van, including rear seat head restraints or lack thereof.<sup>34</sup>

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<sup>27</sup> R. 893.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Appellees' Brief*, p. 27.

<sup>31</sup> R. 893-94.

<sup>32</sup> R. 893-94.

<sup>33</sup> *Appellees' Brief*, p. 24.

<sup>34</sup> *Appellant's Brief*, pp. 36-39.

**E. *Wier* is directly on point – whether UP should have listed rear seat head restraints as a mandatory safety feature in its agreement with Armadillo is a material issue of fact sufficient to defeat UP’s motion for summary judgment**

Appellees make several unsuccessful attempts to keep this Court from considering *Wier*.<sup>35</sup> Appellees blindly assert – without citation – that Archer cannot cite *Wier* on appeal because it was not cited in his brief before the district court.<sup>36</sup> Parties may cite to new and different authority on appeal – if not, there would be no reason to submit briefs on appeal – parties would simply rely on their district court briefing.<sup>37</sup>

Appellees assert that this Court is not bound by *Wier* because state courts are not bound by federal district court decisions on issues of federal law.<sup>38</sup> Contrary to Appellees’ argument – for over 90 years courts have held that **all** questions of law under FELA – including those in state court – are governed by federal decisions.<sup>39</sup>

Appellees recite a revisionist record to belie the straightforward application of *Wier*.<sup>40</sup> *Wier* held that:

- The railroad could have insisted that its employees be transported in vans with rear seat head restraints simply by listing headrests as a mandatory safety feature in its agreement with the van company;<sup>41</sup> and
- Whether the railroad should have taken such steps is a material issue of fact sufficient to defeat the railroad’s motion for summary judgment.<sup>42</sup>

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<sup>35</sup> *Appellees’ Brief*, p. 28.

<sup>36</sup> *Id.*

<sup>37</sup> Appellees cite several cases not used in their motion for summary judgment.

<sup>38</sup> *Appellees’ Brief*, p. 28.

<sup>39</sup> *Urie v. Thompson*, 337 U.S. 163, 174 (1949); *New York Central R. Co. v. Winfield*, 244 U.S. 147, 150 (1917).

<sup>40</sup> *Appellees Brief*, pp. 28-30.

<sup>41</sup> *Wier v. Soo Line RR Co.*, 1998 WL 474098 at \*4 (N.D. Ill.).

<sup>42</sup> *Id.*

Appellees duck UP's agreement with Armadillo and its list of mandatory safety equipment for Armadillo vehicles transporting UP employees.<sup>43</sup> Appellees do not even address the agreement, and tacitly concede that UP should have listed rear seat head restraints as a mandatory safety feature in the agreement.<sup>44</sup> Like *Wier*, whether UP should have taken such steps, is a material issue of fact sufficient to defeat a motion for summary judgment.

**F. *Mortensen* is analogous – the same arguments asserted by Appellees were rejected in *Mortensen*.**

Appellees misunderstand *Mortensen* to the extent that they attempt to distinguish it by using the very arguments **rejected** in that case.<sup>45</sup>

<u>The railroad in <i>Mortensen</i> argued that:</u>	<u>Appellees argue that:</u>
Because manufacturers were not required to install seat belts in California, the railroad had no duty to install them. <sup>46</sup>	Because manufacturers are not required to install rear seat head restraints, UP has no duty to require them. <sup>47</sup>
Because bus and taxicab companies had not installed seatbelts, the railroad had no duty to install them. <sup>48</sup>	Because there is no evidence on the record that other railroads require their employees to be transported with rear seat head restraints, UP has no duty to require them. <sup>49</sup>

<sup>43</sup> *Appellant's Brief*, p. 32; R. 226 and 230.

<sup>44</sup> *Appellant's Brief*, pp. 31-33; UP admits that it could have required rear seat head restraints in its agreement with Armadillo. R. 893.

<sup>45</sup> *Appellees' Brief*, p. 30-31.

<sup>46</sup> *Mortensen v. Southern Pacific Co.*, 245 Cal.App.2d 241, 244 (1966).

<sup>47</sup> *Appellees' Brief*, pp. 30-31.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*



*Mortensen* rejected Appellees' arguments and held that FELA liability attaches if UP knew, or in the exercise of due care should have known, "that prevalent standards of conduct were inadequate to protect its employees."<sup>50</sup>

**G. Appellees are not consumers – UP is a FELA employer and Armadillo is a common carrier.**

Appellees argue that: 1) they are consumers; and 2) that there is no difference between them and the general public.<sup>51</sup> Contrary to Appellees' arguments, UP is a FELA employer and Armadillo is a common carrier, and – by definition – there is a significant difference between them and the general public: UP is held to a non-delegable and continuing duty to provide its employees with a reasonably safe workplace<sup>52</sup> and Armadillo is held to a higher standard of care than the reasonably prudent person standard (a meticulous regard for possibilities which should ordinarily be ignored by the general public).<sup>53</sup>

Appellees assert that imposing a duty on UP and Armadillo here, will "open the floodgates" to claims against consumers and automobile dealerships.<sup>54</sup> Applying the facts of this case to the already existing FELA and common carrier duties will not open any floodgate. In fact, *Wier* was decided in 1998 and *Mortensen* in 1966 and there has been no flood. UP's FELA duty and Armadillo's common carrier duty do not apply to

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<sup>50</sup> *Mortensen*, 245 Cal.App. at 244; quoting, *Urie*, 337 U.S. at 178.

<sup>51</sup> *Appellees' Brief*, pp. 27 and 31-32.

<sup>52</sup> *Peyton v. St. Louis Southwestern Ry. Co.*, 962 F.2d 832, 833 (8<sup>th</sup> Cir. 1992); *Ragsdell v. Southern Pacific Transportation Co.*, 688 F.2d 1282, 1283 (9<sup>th</sup> Cir. 1982).

<sup>53</sup> *Lamb v. B&B Amusements Corp.*, 869 P.2d 926, 930 (Utah 1993); *Johnson v. Lewis*, 240 P.2d 498, 502 (Utah 1952).

<sup>54</sup> *Appellees' Brief*, p. 32.

the general public, consumers, or automobile dealerships, and a decision pertaining to Appellees will not affect these groups.

**H. The doctrine of conflict preemption is inapplicable.**

Appellees misapply and misunderstand *Geier* and the doctrine of conflict preemption.<sup>55</sup> An “actual conflict” between state and federal law is **required** for the doctrine of conflict to preemption to apply.<sup>56</sup> As conceded by Appellees, “conflict preemption 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.’”<sup>57</sup>

The doctrine of conflict preemption and *Geier* do not apply for four reasons:

- **No installation.** Archer does **not** claim that Appellees should have installed rear seat head restraints. Archer claims that they should have used one of its many vehicles already equipped with rear seat head restraints. MVSA/FMVSS is about the manufacturers’ installation of head restraints.
- **No state obstacle.** This case presents two federal regulations (MVSA/FMVSS) and a 100 year old federal law (FELA). Appellees argue that the state law at conflict here is **this** Court’s future ruling in **this** case.<sup>58</sup> This reasoning is flawed for at least two reasons: One, this case involves a FELA duty, based entirely on federal law, not state law. Two, for conflict preemption to apply, it must be **impossible** to comply with both a state and federal requirement – that is, there must **already** be a state requirement in place that stands as an obstacle. This Court’s own decision cannot be used as an obstacle to its own decision. The absurdity of this concept illustrates Appellees misunderstanding of the doctrine of conflict preemption.

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<sup>55</sup> *Appellees’ Brief*, pp.33-39; *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000).

<sup>56</sup> *English v. General Electric Co.*, 496 U.S. 72, 79 (1990); *See also, Louisiana Public Service Com’n v. F.C.C.*, 476 U.S. 355, 368 (1986). (Emphasis added).

<sup>57</sup> *Appellees’ Brief* at p. 33; *English*, 496 U.S. at 79; quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). (Emphasis added).

<sup>58</sup> *Appellees’ Brief*, pp. 38-39.

- **Manufacturers.** MVSA and FMVSS apply exclusively to automobile manufacturers.<sup>59</sup> Archer is not suing an automobile manufacturer. This is a FELA case involving a railroad employer and a common carrier.
- **Optional.** Rear seat head restraints are **not** prohibited – they are **optional** for automobile manufacturers.<sup>60</sup> Thus, even if automobile manufacturer standards applied in this case, there would be no actual conflict. MVSA/FMVSS optional regulations do not stand as an obstacle to UP’s FELA duty and Armadillo’s common carrier duty.
- **Minimum.** MVSA and FMVSS impose **minimum** standards for automobile manufacturers and the MVSA specifically provides that a state may prescribe higher standards.<sup>61</sup> Appellees cite *Ray*<sup>62</sup> for the improper assertion that because rear seat head

restraints are optional under the NHSTA, this preempts Archer’s FELA claim.<sup>63</sup> In *Ray*, a Washington state law that banned oil tankers in excess of 125,000 DWT was preempted by a federal law that did not ban oil tankers in excess of 125,000 DWT – the federal law stated that a state may not impose higher standards than those prescribed by the federal law.<sup>64</sup> *Ray* is distinguishable for two reasons: 1) Unlike *Ray*, there is no state law in conflict; 2) Unlike *Ray* – where the federal law explicitly disallowed states to impose

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<sup>59</sup> See, *Johnson v. General Motors Corp.*, 889 F.Supp. 451 (W.D.Okl. 1995); *Carden v. General Motors Corp.*, 509 F.3d 227, 229-230 (5<sup>th</sup> Cir. 2007); *Urie*, 337 U.S. at 181; *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 352-53 (1943); *Peyton*, 962 F.2d at 833; *Ragsdell*, 688 F.2d at 1283.

<sup>60</sup> 49 CFR §§ 571.202 and 571.202a.

<sup>61</sup> The FMVSS is “a minimum standard for motor vehicle or motor vehicle equipment performance.” 49 U.S.C. § 30103(e); MVSA, 49 U.S.C. § 30103(b) provides that “... a State may prescribe a standard for a motor vehicle or motor vehicle equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise applicable standard under this chapter.”

<sup>62</sup> *Ray v. Atl. Richfield Co.* 435 U.S. 151 (1978)

<sup>63</sup> *Appellees’ Brief*, p. 37.

<sup>64</sup> *Ray*, 435 U.S. at 174-78.

higher standards – MVSA/FMVSS specifically provides that a state may prescribe higher standards.<sup>65</sup>

**I. Issue “D” – the doctors’ expertise – was one of the grounds for the district court’s order granting summary judgment and should be reviewed for correctness.**

Issue “D” on appeal is whether a medical doctor has the medical expertise to render medical causation opinions regarding injuries caused by the failure to provide rear seat head restraints in a rear end collision.<sup>66</sup> Appellees argue that this should be reviewed by the abuse of discretion standard because it was not a grant of summary judgment, but an evidentiary ruling.<sup>67</sup> Contrary to Appellees’ argument, the district court’s ruling on the doctors’ expertise was an element of the summary judgment order – the Order states:

Even if Armadillo and/or Union Pacific owed Plaintiff a duty, and Plaintiff’s claims were not barred by the doctrine of conflict preemption, Plaintiff is unable to prove by a preponderance of the evidence that Plaintiff would not have suffered his injuries if there had been rear seat head restraints installed in the subject van. **Indeed, Plaintiff’s experts are unable to offer any opinions as to whether the existence of a rear seat head restraint would have prevented the Plaintiff’s injuries.**<sup>68</sup>

Archer appealed the district court’s grant of summary judgment, including its ruling on the doctors’ competence to testify. This district court’s summary judgment order, which is the basis of Archer’s appeal, should be reviewed for correctness, giving

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<sup>65</sup> 49 U.S.C. § 30103(e); 49 U.S.C. § 30103(b).

<sup>66</sup> *Appellant’s Brief*, p. 9.

<sup>67</sup> *Appellees’ Brief*, p. 20.

<sup>68</sup> *R. 1605-1609*. (Emphasis added); *See, Amended Order Granting Defendants Motion for Summary Judgment, Appellant Brief Addendum No. 10*. (Emphasis added).

the district court's legal decision no deference.<sup>69</sup> When ruling on a motion for summary judgment, the district court must make many evidentiary decisions – what is relevant, what is material, etc. If this meant that summary judgment rulings were reviewed by the abuse of discretion standard, no case would be reviewed for correctness.

The Utah Supreme Court explained that “as a matter of the sound administration of justice” the choice of the appropriate standard of review turns on whether the appellate court or the trial court is in a better position to decide the issue.<sup>70</sup> The U.S. Supreme Court stated that when the issue involves the credibility of witnesses and turns on an evaluation of demeanor, the trial court is in a better position to decide the issue.<sup>71</sup> Courts of appeals, on the other hand, are able to devote their primary attention to legal issues and decisional accuracy, employing multi-judge panels that permit reflective dialogue and collective judgment.<sup>72</sup>

This is an appeal of the district court's grant of summary judgment. There was no trial. There was no live testimony. The district court did not evaluate the doctors' demeanor or credibility. The district court ruled as a matter of law that Archer's medical doctors were unable to give medical causation opinions regarding injuries caused by the

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<sup>69</sup> See, *Kearns-Tribune Corp. v. Salt Lake County Commission*, 28 P.3d 686, 688 (Utah 2001).

<sup>70</sup> *State v. Thurman*, 846 P.2d 1256, 1266 (Utah 1993); quoting *Pierce v. Underwood*, 487 U.S. 552, 559-60 (1988).

<sup>71</sup> *Miller v. Fenton*, 474 U.S. 104, 114 (1985).

<sup>72</sup> *Salve Regina College v. Russell*, 499 U.S. 225, 231-32 (1991).

failure to provide rear seat head restraints in a rear end collision.<sup>73</sup> The district court does not have discretion to misapply the law.<sup>74</sup>

Appellees cite *Carbaugh v. Asbestos Corp. Ltd.*<sup>75</sup> for abuse of discretion review.<sup>76</sup> In *Carbaugh*, the issue regarding the admissibility of the doctor's testimony was found to be both evidentiary and a question of law and the issue was reviewed for correctness – the Court reversing the trial court's grant of summary judgment and holding the doctor's testimony admissible.<sup>77</sup>

**J. In the alternative, the district court abused its discretion in a ruling that exceeds the limits of reasonability – biomechanical experts testify to general causation; medical doctors to specific causation.**

The district court abused its discretion if the grant exceeds the limits of reasonability.<sup>78</sup> The “limits of reasonability” standard is specific to each case with no bright-line test.<sup>79</sup> The district court's summary judgment ruling – that Archer's experts are unable to offer **any** opinions as to whether the existence of a rear seat head restraint would have prevented Archer's injuries<sup>80</sup> -- exceeds the limits of reasonability.

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<sup>73</sup> R. 1605-1609; See, *Amended Order Granting Defendants Motion for Summary Judgment*, Appellant Brief Addendum No. 10.

<sup>74</sup> *State v. Petersen*, 810 P.2d 421, 425 (Utah 1991); 5 Am.Jur.2d *Appeal and Error* § 772 (1962).

<sup>75</sup> 167 P.3d 1063 (Utah 2007).

<sup>76</sup> *Appellees Brief*, pp. 1 and 20.

<sup>77</sup> *Carbaugh*, 167 p.3d at 1065 and 1068.

<sup>78</sup> *Price Development Company v. Orem City*, 995 P.2d 1237, 1242 (Utah 2000).

<sup>79</sup> *Overstock.com, Inc. v. SmartBargains, Inc.*, 192 P.3d 858, 865 (Utah 2008).

<sup>80</sup> R. 1605-1609; See, *Amended Order Granting Defendants Motion for Summary Judgment*, Appellant Brief Addendum No. 10.

Biomechanical experts are ordinarily not permitted to give opinions about the “precise cause of a specific injury.”<sup>81</sup> Biomechanical experts may render opinions as to general causation (the effect of the absence of a head restraint on the human body and the types of injuries that may result), but not as to specific causation (whether the absence of a head restraint caused Archer’s injuries).<sup>82</sup> An opinion on specific causation “requires the identification and diagnosis of a **medical condition**, which demands the expertise and specialized training of a **medical doctor**.”<sup>83</sup>

Here, Archer’s biomechanical expert Paul France Ph.D. rendered a general causation opinion:

A properly designed and positioned seat head restraint prevents hyper-extension of the cervical spine when used as intended, and would have likely prevent Mr. Archer’s neck from hyper-extending, if used in such a manner. Preventing hyper-extension significantly reduces the frequency and severity of cervical, upper thoracic, and upper shoulder injuries in the general population.<sup>84</sup>

Dr. Huntsman rendered specific causation opinions – “it is my opinion that the absence of a seat head restraint or head rest was very likely to be one of the medical causes of the neck injury and cervical myelopathy which require surgical intervention.”<sup>85</sup>

Dr. Gordon rendered a specific causation opinion – when asked if it was his opinion that the head restraint, or the lack of head restraint in this particular instance, was a causative

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<sup>81</sup> *Bowers v. Norfolk Southern Corp.*, 537 F.Supp.2d 1343, 1377 (M.D.Ga. 2007) (FELA case); quoting *Smelser v. Norfolk S. Ry. Co.*, 105 F.3d 299, 305 (6<sup>th</sup> Cir. 1997) (FELA case).

<sup>82</sup> *Bowers*, 537 F.Supp.2d at 1377.

<sup>83</sup> *Id.*

<sup>84</sup> *R.* 1549.

<sup>85</sup> *R.* 842.

factor with the shoulder injury, Dr. Gordon testified, “Yes. I think it contributed to it, yes.”<sup>86</sup>

Archer’s experts stayed within their defined causation-opinion roles – Dr. France opined as to general causation and Drs. Huntsman and Gordon opined as to specific causation. Appellees have it backwards – they argue that Archer’s medical doctors cannot give specific causation opinions – that this is the purview of Archer’s biomechanical expert, Dr. France.<sup>87</sup> This is in direct contradiction to the defined legal roles of experts regarding causation.<sup>88</sup> It would have been improper under the law, for Dr. France to give an opinion as to specific causation and identify and diagnose Archer’s medical condition. Drs. Huntsman and Gordon properly made this determination and the district court abused its discretion in its ruling that they could not render such opinions.

**K. The record is replete with evidence of medical causation including deposition testimony and evidence submitted by Appellees.**

Appellees blindly conclude, without citation, that “no expert can opine that Plaintiff probably would not have suffered his injuries had there been a rear seat head restraint installed.”<sup>89</sup> Appellees applied the wrong standards in their motion for summary judgment and have applied the wrong standards on appeal. Citing MUJI 1<sup>st</sup> Civ. 209, Appellees apply the wrong causation standard – “[f]or 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

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<sup>86</sup> R. 1493-1494.

<sup>87</sup> Appellees’ Brief, pp. 21-23.

<sup>88</sup> Bowers, 537 F.Supp.2d at 1377; quoting *Smelser*, 105 F.3d at 305.

<sup>89</sup> Appellees’ Brief, p. 31.



sequence.”<sup>90</sup> The FELA causation standard differs from common law proximate cause.<sup>91</sup> The terms “actual cause,” “proximate cause,” and “but for” have little or no meaning.<sup>92</sup> The FELA standard is whether UP’s negligence “played any part, even the slightest,” in causing Archer’s injuries.<sup>93</sup>

Appellees conceded medical causation by submitting the letters and depositions of Drs. Huntsman and Gordon into the record supporting their motion for summary judgment. In defendants’ summary judgment exhibit “O,” Dr. Huntsman stated, “it is my opinion that the absence of a seat head restraint or head rest was **very likely** to be one of the medical causes of the neck injury and cervical myelopathy which require surgical intervention.”<sup>94</sup> Drs. Huntsman and Gordon also testified at deposition to medical causation, as explained in Appellant’s Brief.<sup>95</sup>

**L. The doctors are qualified to render medical causation opinions in this case.**

Drs. Huntsman and Gordon are orthopedic surgeons, specializing in spine injury and surgery, and were Archer’s treating physicians.<sup>96</sup> Dr. Huntsman explained that the mechanism of injury in this case was hyper-extension of the neck (whiplash).<sup>97</sup> To exclude the opinions of Drs. Huntsman and Gordon means that the diagnosis and medical causation of whiplash injuries are outside the expertise of spine surgeons.

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<sup>90</sup> *Appellees’ Brief*, pp. 17-18.

<sup>91</sup> *Oglesby v. Southern Pacific Transp. Co.*, 6 F.3d 603, 607 (9<sup>th</sup> Cir. 1993).

<sup>92</sup> *Crane vs. Cedar Rapids & Iowa City Railroad Company*, 395 U.S. 164, 165 (1969).

<sup>93</sup> *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 506 (1956); *Oglesby* 6 F.3d at 606.

<sup>94</sup> R. 842. (Emphasis added).

<sup>95</sup> *Appellant’s Brief*, pp. 46-47.

<sup>96</sup> R. 896, 1493-94, 1539.

<sup>97</sup> R. 896.

The idea that seat head restraints prevent whiplash neck injuries is not novel or controversial. MVSA/FMVSS states that the purpose of seat head restraints is to reduce neck injuries.<sup>98</sup> UP admits that seat head restraints reduce neck injuries.<sup>99</sup> The NHSTA and Dr. France found that seat head restraints prevent hyper-extension of the neck.<sup>100</sup> Dr. Huntsman testified that a barrier behind the neck (head restraint) prevents the neck from excessive extension.<sup>101</sup>

Appellees cite *Keener*<sup>102</sup> for the improper proposition that orthopedic and spine surgeons Drs. Huntsman and Gordon do not have the expertise to render medical causation opinions regarding the injuries caused by the failure to provide a rear seat head restraint.<sup>103</sup> *Keener* is distinguishable for two reasons:

- The plaintiff in *Keener* sought to qualify a medical doctor as a biomechanical expert.<sup>104</sup> Unlike *Keener*, Archer is not attempting to qualify a medical doctor as a biomechanical expert. Dr. France is Archer's biomechanical expert. Drs. Huntsman and Gordon are orthopedic and spine surgeons and Archer's treating physicians.
- The doctor in *Keener* was unqualified because he lacked experience in spinal injuries and motor vehicle accidents<sup>105</sup> -- he practiced in the fields of ophthalmology (medical management of diseases in the eye) and pathology (study of health and disease).<sup>106</sup> Unlike *Keener*, Drs. Huntsman and Gordon are medical doctors specializing in orthopedic and spine surgery and have the medical expertise to render medical/specific causation opinions in this case involving neck, spine, and shoulder injuries.

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<sup>98</sup> 49 CFR § 571.202.

<sup>99</sup> R. 893.

<sup>100</sup> R. 891, 892, 896, 905, 996, 1343-46.

<sup>101</sup> R. 1492.

<sup>102</sup> *Keener v. Mid-Continent Cas.*, 817 So.2d 347 (La.App. 2002).

<sup>103</sup> *Appellees' Brief*, p. 23.

<sup>104</sup> *Keener*, 817 So.2d at 351.

<sup>105</sup> *Id.* at 353.

<sup>106</sup> *Id.* at 351.

**M. Appellees misrepresent the opinions of Dr. France and the NHSTA.**

Contrary to Appellees misrepresentations,<sup>107</sup> Dr. France stated that a properly designed and positioned seat head restraint prevents hyper-extension of the cervical spine when used as intended, and would have likely prevented Archer's neck from hyper-extending, if used in such a manner.<sup>108</sup>

Archer stated that if the vehicle transporting him at the time of his injury had a seat head restraint for him to use, he would have leaned back in the seat and looked forward, with his arms down.<sup>109</sup> Archer stated that before the impact from the collision, he had time to change his position and would have re-positioned himself to take advantage of a seat head restraint, had one existed.<sup>110</sup> It was Archer's custom to adjust seat head restraints before this collision, and he certainly would have followed any safety rule promulgated by the UP requiring such adjustments.<sup>111</sup>

Appellees argument regarding the NHSTA height requirements for head restraints is outside the scope of the order on appeal<sup>112</sup> and Appellees failed to cross-appeal on this issue.<sup>113</sup> Nevertheless, it is a red herring – the NHSTA did **not** say that the height requirements were insufficient to prevent injury<sup>114</sup> – the NHSTA stated that the new

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<sup>107</sup> *Appellees' Brief*, pp. 17 and 22.

<sup>108</sup> *R.* 1549.

<sup>109</sup> *R.* 895.

<sup>110</sup> *Id.*

<sup>111</sup> *R.* 896.

<sup>112</sup> *R.* 1605-1609; *See, Amended Order Granting Defendants Motion for Summary Judgment, Appellant Brief Addendum No. 10.*

<sup>113</sup> *Appellees' Brief*, p. 17.

<sup>114</sup> *Id.*

height requirements would be more effective to limit the movement of the head and neck.<sup>115</sup>

**N. Appellees misrepresent *Johnson* – Armadillo is held to a higher standard of care.**

Appellees only devote one paragraph to Armadillo and its higher standard of care,<sup>116</sup> in which they misrepresent *Johnson* by utilizing a partial quote<sup>117</sup> – “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 ...’”<sup>118</sup> The full quote compares the carrier’s duty to passengers for hire as opposed to the carrier’s duty to guests and the general public:

Although the test in both cases is the care of an ordinary, prudent person under the existing facts and circumstances, **the relationship of carrier to its passengers for hire is a circumstance which requires more foresight and greater caution than it owes to guests or the public generally.**<sup>119</sup>

Armadillo’s duty should not be measured by ordinary standards – “the law imposes on [it] a meticulous regard for possibilities which should ordinarily be ignored.”<sup>120</sup>

Appellees contend that no duty exists because there is no requirement for Armadillo to redesign its vehicles or install equipment.<sup>121</sup> Archer is **not** arguing that Armadillo should have redesigned its vehicles or install equipment. Armadillo should

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<sup>115</sup> *R.* 706.

<sup>116</sup> *Appellees’ Brief*, p. 25.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Johnson v. Lewis*, 240 P.2d 498, 502 (Utah 1952).

<sup>120</sup> *Johnson*, 240 P.2d at 502. (brackets added).

<sup>121</sup> *Appellees’ Brief*, p. 25.

have used one of its many vehicles already equipped by the manufacturers with rear seat head restraints.<sup>122</sup>

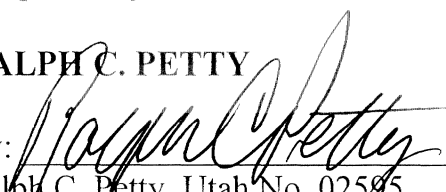
### III. CONCLUSION

The right to a jury trial is part and parcel of the remedy afforded to railroad workers under the FELA. The district court and Appellees misapplied, misinterpreted, and misunderstood the law – and the right to a jury trial was taken from Archer. Archer asks the Court to reverse the district court's ruling.

Dated: June 23, 2009

Respectfully submitted,

**RALPH C. PETTY**

By:   
Ralph C. Petty, Utah No. 02595  
10 West Broadway, Suite 800  
Salt Lake City, Utah 84101  
(801) 220-0900

**ROSSI COX VUCINOVICH  
FLASKAMP PC**

Philip G. Arnold, *Pro Hac Vice*  
10900 NE 8<sup>th</sup> Street, Suite 1122  
Bellevue, Washington 98004  
(425) 646-8003

**ATTORNEYS FOR PLAINTIFF**

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<sup>122</sup> *Appellant's Brief*, pp. 48-50.

**CERTIFICATE OF SERVICE**

I hereby certify that I served a true and correct copy of the **Reply Brief of the Appellant** on the date indicated below upon the individuals listed below:

- ☒ U.S. Mail (First Class)
- ☐ Express Mail
- ☐ Hand Delivery
- ☒ Facsimile
- ☐ Federal Express
- ☐ Messenger

Peter Christensen  
Ryan P. Atkinson  
Strong & Hanni  
3 Triad Center, #500  
Salt Lake City, UT 84180

James Mewborn  
Arthur, Chapman, Kettering, Smetak & Pikala  
81 South Ninth Street, #500  
500 Young Quinlan Bldg  
Minneapolis, MN 55402-3214

E. Scott Savage  
Casey K. McGarvey  
Savage, Yeats & Waldron, P.C.  
170 S. Main St., Suite 500  
Salt Lake City, UT 84101

Dated: \_\_\_\_\_

*June 23, 2009*

By: \_\_\_\_\_

*Raymond P. Petty*