STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

KEITH HUBBARD,

Plaintiff-Appellee,

vs.

Supreme Court Case No. 127240
Court of Appeals Case No. 246165
Lower Court Case No. 01-115388-NO

NATIONAL RAILROAD PASSENGER CORPORATION, a/k/a AMTRAK, a District of Columbia corporation,

Defendant-Appellant,

and

SAUK TRAIL DEVELOPMENT, INC., a/k/a SAUK TRAIL HILLS DEVELOPMENT, ALLIED WASTE SYSTEMS, INC. a/k/a ALLIED WASTE INDUSTRIES, INC., and AUTO CLUB INSURANCE ASSOCIATION d/b/a AUTO CLUB INSURANCE COMPANY, and AUTO CLUB OF MICHIGAN INSURANCE GROUP,

27240

Defendants.

/

BRYAN J. WALDMAN
Sinas, Dramis, Brake, Boughton & McIntyre
Attorneys for Plaintiff-Appellee
3380 Pine Tree Road
Lansing, MI 48911-4207
(517) 349-7500

MARY C. O'DONNELL (P33479)
JOSEPH J. McDONNELL (P32056)
Durkin, McDonnell, Clifton & O'Donnell, P.C.
Attorneys for Defendant-Appellant Amtrak
645 Griswold, Ste. 3253
Detroit, MI 48226
(313) 963-3033

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SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL OF NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

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STATEMENT OF QUESTIONS PRESENTED

I. Whether the Wayne County Circuit Court properly dismissed plaintiff's negligent seat design claim under the Federal Employers' Liability Act where plaintiff failed to present the opinion of an expert that the locomotive cab seat was dangerous or defective.

II. Whether the Wayne County Circuit Court properly dismissed plaintiff's negligent seat design claim under the Federal Employers' Liability Act where plaintiff failed to present admissible evidence that the locomotive cab seat was dangerous or defective.

III. Whether federal law occupies the entire field regulating locomotive equipment, thus preempting plaintiff's FELA claim relating to locomotive equipment.

STATEMENT OF FACTS

Plaintiff-Appellee, Keith Hubbard ("plaintiff"), brought this suit against National Railroad Passenger Corporation ("Amtrak" or "the railroad") under both the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §51 et seq., and the Locomotive Inspection Act ("LIA"), 49 U.S.C. §20701 et seq., alleging injuries arising out of a minor crossing accident on May 18, 1998 at Lilly Road in Canton Township. The Lilly Road crossing features flashers and gates. In motor vehicle accident parlance, this incident was a "fender bender:" the side-view mirror of the locomotive was knocked off the side of the locomotive when the mirror "clipped" the rear of a truck stopped north of the crossing. The cause of this incident was the negligence of the never-identified driver of the truck, who stopped the truck with the rear of the truck near the crossing, then backed up as the train approached. After the locomotive mirror "clipped" the rear of the truck, plaintiff's attempt to exit his seat by diving to the floor allegedly caused him to fall, allegedly resulting in injury to his hip. After recuperating from a bruised hip for sixty days, plaintiff was released to return to work. However, he then began to treat for PTSD, which he claimed precluded his return to work for another year. In January 2000, after three months of work, plaintiff was diagnosed with a herniated disc. He retired with full benefits.

STATEMENT OF MATERIAL PROCEEDINGS

In his FELA suit in Wayne County Circuit Court, plaintiff filed his original Complaint under the FELA; in his second, he added a count under the LIA. In neither Complaint did plaintiff mention the only surviving claim, which is at issue in this application: negligent cab seat design. Rather, plaintiff first mentioned this theory in his Memorandum in Opposition to Amtrak's Motion for Summary Disposition. (Plaintiff's Memorandum, pg. 12). The essence of the claim is that the design of the cab car seat (i.e., the engineer's seat) is defective, unsafe or

dangerous because, in order to move it from its stationary position, it is necessary to pull up on a pin located between the engineer's knees, thus allowing the seat to swivel. This "pin pulling" takes only a moment. (Amtrak's Application, pgs. 12-14). Plaintiff claims this design, necessitating a moment to pull a pin, constitutes a defective or dangerous and unsafe design.

At the hearing on Amtrak's Motion for Summary Disposition (pursuant to MCR 2.116(c)(10)), the trial court gave plaintiff counsel every opportunity to produce evidence in support of his negligent cab seat design claim:

> The Court: All right. And on the seat, what else is there about the seat being unsafe other than your client and some of his co-employees saying it wasn't safe?
>
> ***

(Wayne County Circuit Court Motion Hearing before the Honorable Gershwin A. Drain, pg. 6, **Exhibit 1** hereto).

> The Court: Okay. What else do you have that you believe establishes a prima facie case with regard to crashworthiness and the seat being unsafe?
>
> ***

(Id., pg. 7).

> The Court: Mr. Waldman, do you have anything else, because see, as I read this memo (Exhibit 9 to Amtrak's Application for Leave to Appeal), some of the engineers and drivers have been complaining about the seat and the fact that it doesn't swivel and that you gotta remove an (sic) pin, but other than their complaints I don't know that there's anything that says that it's unsafe per se. And again, <u>you don't have any expert saying it's unsafe as it is</u>...

(Id., pg. 10) (emphasis added) (parenthetical material added for clarity).

After hearing further argument, the trial court held:

> ...I just don't really see that a prima facie case has been made out here on any of these theories, particularly in the absence of any kind of expert testimony showing that the seats were unsafe. So accordingly, the Court is going to grant the motion for summary judgment as to the counts contained in the Complaint related to Amtrak.

(Id., pg. 16) (emphasis added).

In the Court of Appeals, plaintiff glossed over the trial court's ruling that his negligent cab seat design claim lacked evidentiary support, particularly expert testimony. Plaintiff failed even to address the three "on-point" FELA cases cited by Amtrak in its Response Brief: *Rice v. Cincinnati, New Orleans & Pacific Ry. Co.*, 920 F. Supp. 732 (E. D. Ky 1996); *Thirkill v. Hunt Transport., Inc.*, 950 F. Supp. 1105 (N.D. Ala 1996); and *In re Amtrak "Sunset Limited" Train Crash in Bayou Canot, Alabama, on September 22, 1993*, 188 F. Supp. 2d 1341 (S. D. Ala 1999). Rather, he relied on two cases which are factually distinguishable: *Taylor v. Illinois Central R. Co.*, 8 F. 3d 584 (7th Cir. 1993); and *Sehlin v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 686 P. 2d 492 (Wash App. 1984).

Similarly, the Court of Appeals glossed over both the lack of expert testimony and the lack of admissible evidence to support the negligent seat design claim. Rather, the Court of Appeals "disagreed" with Amtrak's argument that expert testimony was required, citing to evidence Amtrak argued was inadmissible[1] and citing to a case on causation and foreseeability (*Gallick v. The Baltimore & Ohio Railroad Co.*, 372 U. S. 208 (1963)), which did not address the issue of whether expert testimony is required in a negligence seat design case under the FELA. The Court of Appeals did not address, let alone distinguish, the compelling FELA caselaw

[1] The Court of Appeals devoted one sentence, in a footnote, to Amtrak's admissibility arguments. (Court of Appeals Opinion, pg. 5, fn 4).

presented by Amtrak, e.g., *Rice, supra*, *Thirkill, supra*, and *In re Amtrak, supra*, that a negligent seat design claim required expert testimony.

ARGUMENT

STANDARD OF REVIEW

The Supreme Court reviews the grant or denial of a summary disposition motion *de novo*. *Maiden v. Rozwood*, 461 Mich. 109 (1999).

I. THE WAYNE COUNTY CIRCUIT COURT PROPERLY DISMISSED PLAINTIFF'S NEGLIGENT SEAT DESIGN CLAIM UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT WHERE PLAINTIFF FAILED TO PRESENT THE OPINION OF AN EXPERT THAT THE LOCOMOTIVE CAB SEAT WAS DANGEROUS OR DEFECTIVE

In an FELA case alleging negligent or unsafe equipment, including an unsafe locomotive or cab car seat, an employee is required to present expert testimony in order to state a prima facie case. *Rice, supra*, *Thirkill, supra*, and *In re Amtrak, supra*.

In *Rice, supra*, plaintiff brought suit under the FELA claiming he suffered injuries when the railroad failed to provide him with a reasonably safe place to work. Specifically, the plaintiff in *Rice* claimed negligence based on the lack of a seatbelt and the size of the engineer's chair in relationship to the space in which it is situated (i.e., "that the engineer's chair is so large that it is unable to swivel without hitting either the wall or the engineer's console. Therefore, the plaintiff was unable to easily enter and exit the chair." *Rice* at 734).

At trial, plaintiff intended to offer the testimony of several co-workers "that the cab of the engine…is not properly designed…" The stated basis for plaintiff's cab testimony proffer was Fed. R. Evid. 702.[2] Id. at 736.

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[2] Plaintiff also alleged an unsafe crossing. He intended to proffer co-worker testimony as to the crossing under Fed. R. Evid. 701.

In considering the admissibility of this testimony, the district court began its analysis with *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), which lead to review of three Sixth Circuit cases: *Glaser v. Thompson Medical Co.*, 32 F. 3d 969 (6th Cir. 1994); *U.S. v. Thomas*, 74 F. 3d 676 (6th Cir. 1996); and *Cook v. American S. S. Co.*, 53 F. 3d 733 (6th Cir. 1995). Each case dealt with the level of scrutiny employed in analyzing proffered expert testimony.

After review of these cases, the district court in *Rice* held:

> Scrutinizing the proffered testimony of plaintiff's fellow trainmen as described in the motion in limine, it is readily apparent that they do not have the qualifications to offer expert opinion that the engine cab design is unsafe. Many factors would have to be considered beyond the size of the seat to offer such an opinion. What other ergonomic functions must the seat fulfill? If it were smaller, would this increase the engineer's fatigue or otherwise affect his or her performance? Such questions are beyond the expertise of the proffered trainmen and address themselves to an expert in ergonomics or engine design.
>
> The same is true of the testimony regarding the crossing. The law does not require gates at all crossings. A balancing of many factors, including the expense involved is required. See *Bridger v. Union Railway*, 355 F. 2d 382, 389 (6th Cir. 1966). These trainmen, although experienced on the railroad, do not have the expertise to offer reliable testimony on crossing design. To allow them to offer educated or uneducated guesses would be misleading to the jury rather than of assistance to it.

Id. at 737-738.

Following *Rice*, the Alabama district court in *Thirkill, supra*, affirmed summary judgment of an FELA claim based on train speed (which it held was preempted (Id. at 1107)) and on negligent locomotive design. The Court held:

> ...the record is void of expert testimony or other evidence to the effect that there was a defect in the design of the locomotive cab and/or the location of the brake valve. <u>Neither the plaintiff nor fellow crewmen are qualified to testify as design experts</u>.

(Id.) (emphasis added).

Consistent with the holdings in *Rice, supra* and *Thirkill, supra*, the Alabama district court granted summary judgment based on preemption and lack of expert testimony in the numerous death and personal injury actions involved in *In re Amtrak, supra*, a case arising out of an Amtrak derailment in Alabama. Plaintiffs alleged various theories, including train speed and car and locomotive design. The district court held that both the common law speed and design claims were preempted. As to the "crashworthiness" claims, the district court held:

> ...the claims against Amtrak concerning the...cars and locomotives present technical issues beyond the common understanding and experience of the average juror. Because the claims are unsupported by expert testimony, (plaintiffs) cannot establish a *prima facie* case to support the claims even if these claims were not preempted.

Id. at 1347 (citation omitted) (parenthetical material added for clarity).

As to the Amtrak employees' FELA claims, the district court held that they were preempted, citing to *Thirkill, supra, Rice, supra* and *Key v. Norfolk So. Ry.*, 228 Ga. App. 305 (1997), which the Court stated held that "FELA claims of negligence as to locomotive design were preempted where locomotives complied with federal statute and regulations." Id. at 1349 (footnote omitted).

As to the requirement for expert testimony, the Court in *In re Amtrak* held that:

> Moreover, FELA claims, like common law negligence claims, must be supported by expert testimony where they involve issues (such as train speed and railcar design) beyond the common experience and understanding of the average jury.

Id. (citing to *Thirkill, supra* and *Simpson v. Northeast Ill. Reg'l Commuter R. R.*, 957 F. Supp. 136, 138-139 (N. D. Ill. 1997) which the Court described as granting "summary judgment for railroad where FELA plaintiff proffered no expert testimony to support his claim.").

The two cases cited by plaintiff both pre-date *Rice* and its progeny and are distinguishable. In *Sehlin v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 686 P. 2d 492 (Wash App. 1984), the Washington Court of Appeals did hold that "Historically, railroad workers are given an 'expert' status concerning railroad operations." Id. at 132 (citation omitted). However, the *Sehlin* holding is explicitly limited to "railroad operations;" the present case involves an alleged negligent or unsafe seat design--not railroad operations. Furthermore, the Court in *Sehlin* proceeded to require the witness to be qualified to testify to railroad operations. Here, even if the negligent design claim did not require expert testimony, neither plaintiff nor co-worker Black were qualified to testify about seat design.

Similarly distinguishable is *Taylor v. Illinois Central R. Co.*, 8 F. 3d 584 (7th Cir. 1993). The issue in *Taylor*, according to the Court, was "...whether a pile of large rocks are harder to stand on than a pile of smaller rocks." Id at 585-586. The Court affirmed the exclusion of testimony by a retained expert on the basis that it was not "manifestly unjust" to do so, given the simple issue for jury consideration. It goes without saying that analyzing rock size is much simpler than analyzing the safety of equipment such as an engineer's seat.

The rule in FELA cases requiring a plaintiff alleging negligent seat design to proffer expert testimony is consistent with the Michigan rule in state negligent design cases. In *Lawrenchuk v. Riverside Arena, Inc.*, 214 Mich. App. 431 (1996) where a roller skater sued for injuries allegedly sustained while stepping down from the rink area onto carpet at a roller rink, the Court of Appeals affirmed summary disposition on the design defect claim. The Court addressed the specific question of "...whether expert testimony is required to support a claim of defective design." After extensive analysis of caselaw, the Court of Appeals concluded that "A plaintiff who claims that a product was defectively designed has the burden of producing

evidence of the magnitude of the risk posed by the design, alternatives to the design, or other factors concerning the unreasonableness of the risk of a particular design." Id. at 435 (citation omitted).

In the present case, the district court gave plaintiff counsel repeated opportunities at the summary disposition motion hearing to proffer expert and admissible evidence to support the sole remaining claim of negligent seat design. Plaintiff counsel was finally forced to admit he had no expert testimony to support his negligent seat design claim. Rather, plaintiff counsel argued that the testimony of plaintiff Black, coupled with the Memorandum, constituted sufficient evidence to withstand summary disposition. This argument clearly fails to comply with the FELA rule requiring expert testimony in defective equipment, including defective seat design cases. As the Court in *Rice, supra* noted: "Many factors would have to be considered...," (*Rice* at 737) such as feasible alternatives and neither plaintiff nor Black has the expertise to address these multiple issues. Nor does either gentlemen possess the expertise to address the issues required to be addressed by the Court of Appeal in *Lawrenchuk, supra*.

Under federal FELA and Michigan caselaw, plaintiff's failure to proffer expert testimony in support of the seat design claim is fatal, requiring summary disposition.

II. THE WAYNE COUNTY CIRCUIT COURT PROPERLY DISMISSED PLAINTIFF'S NEGLIGENT SEAT DESIGN CLAIM UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT WHERE PLAINTIFF FAILED TO PRESENT ADMISSIBLE EVIDENCE THAT THE LOCOMOTIVE CAB SEAT WAS DANGEROUS OR DEFECTIVE

This Court clarified the requirements for a party responding to a summary disposition motion brought under MCR 2.116(C)(10) in *Smith v. Globe Life Ins. Co.*, 460 Mich. 446, 455 (1999):

> ...a party faced with a motion for summary disposition brought under MCR 2.116(C)(10) is, in responding to the motion, required

> to present evidentiary proofs creating a genuine issue of material fact for trial. Otherwise, summary disposition is properly granted. MCR 2.116(G)(4). (Emphasis added).

None of the evidence proffered by plaintiff in his summary disposition response in support of his negligent seat design claim met the requirements of the court rule and this Court's holding in *Smith*.

First, the testimony of plaintiff and co-worker Ronald Black that the seat was unsafe as employed was inadmissible. The opinions of these railroad workers are inadmissible where neither plaintiff nor Black were experts or listed as experts. Further, their opinions do not qualify as lay opinions under MRE 701. (Amtrak's Application, pg. 24). While the Michigan Rules of Evidence do permit the admission of lay witness opinion, they do so only to the extent that the opinion is rationally based on the perception of the witness. Here, plaintiff admitted his testimony was based on his opinion that cab cars are not "crashworthy" (Amtrak's Application, Exhibit 3, pg. 94), as distinct from an opinion on the seat, even though he admitted he had no actual knowledge of cab car strength. (Id.). Similarly, Black admitted he was not aware of any accidents involving the cab car structure presenting a danger to occupants. (Amtrak's Application, Exhibit 5, pgs. 41-42).

Further, as discussed in Section I above, lay testimony by trainmen as to improper design and safety is not admissible as either lay or expert testimony. (Amtrak's Application, pgs. 26-27). In support are: *Rice, supra*; *Thirkill, supra*; and *In re Amtrak, supra* (all cited by Judge Zahra in his dissent in the Court of Appeals' decision) as well as *Lawrenchuk, supra*. As discussed above, each of these cases is similar to the present case where the FELA plaintiff in each case sought recovery based on equipment not required by federal statute or regulation. In *Rice* and *Thirkill*, the respective courts flatly rejected the testimony of plaintiff and his co-

workers as to the unsafe condition. In *Rice*, the Court stated plaintiff and his co-worker "...do not possess the qualifications to offer expert opinions that the car design is unsafe." *Rice* at 737. In *Thirkill*, the Court held that "Neither the plaintiff nor fellow crewmen are qualified to testify as design experts." *Thirkill* at 1107.[3]

Thus, since neither plaintiff nor Black are experts or were designated as experts, any opinion by them that the seat is unsafe would not be admissible. Similarly, their lay opinion is not based on their perception and is therefore inadmissible. Finally, they lack the qualifications to give any testimony on safety and/or negligent seat design. Therefore, pursuant to *Smith, supra*, the testimony of plaintiff and Black is inadmissible.

Similarly, Black's testimony about numerous alleged complaints of engineers as to the safety concerns about the locking cab car seat cited by the Court of Appeals (pg. 5), is inadmissible. In citing to this testimony, the Court of Appeals stated (erroneously) that "Beginning in 1994, Black was designated to handle concerns regarding defendant's cab cars in Detroit." (Id., fn 3).

As Amtrak asserted in its Application, the alleged complaints are not only "vague" (Amtrak's Application, pg. 29), they are inadmissible hearsay. Further, under *Rice, supra*, *Thirkill, supra* and *In re Amtrak, supra*, since neither plaintiff nor Black is qualified as an expert as to seat safety and design, neither can testify as to the inadmissible hearsay statements of co-workers.

Further, it is undisputed that, contrary to the Court of Appeals statement (pg. 5, fn 3), Black was <u>not</u> part of a committee formed by Amtrak to review cab car complaints. (Amtrak's

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[3] The dispositive import of these cases is, perhaps, the motivation for plaintiff's attempts in his response to Amtrak's Application (pgs. iii, 1) to recharacterize his claim from the plaintiff-admitted and Court of Appeals-designated "negligent seat design" claim to a claim of general negligence under the FELA.

Application, pg. 15). The genesis of this unsupported and incorrect statement is plaintiff's Brief in the Court of Appeals. (Plaintiff's Brief, pg. 7). Unfortunately, the Court of Appeals adopted it as truth, without regard to Black's actual testimony. (Id., pg. 5, fn 3). According to his testimony, Mr. Black was a union member who was "on the local committee of adjustment." He testified, specifically, that it was not a safety committee, not a special committee and not a committee designated to compile complaints on cab cars. (Amtrak's Application, Exhibit 5, pg. 32). It was, according to Mr. Black, "just a union position." (Id.). Obviously, Mr. Black's status as a holder of a union position does not elevate his testimony relative to vague hearsay complaints to the level of admissible testimony.

The interoffice memo of September 11, 1990 suffers the same fate of being inadmissible. Other than the inadmissible testimony of plaintiff and Black (including hearsay), the only other additional evidence cited by the Court of Appeals in reversing summary disposition was the September 11, 1990 "Interoffice Memorandum," attached to Amtrak's Brief on Appeal, Exhibit 9. (Court of Appeals' decision, pg. 5). Amtrak raised numerous objections to the admissibility of this document: it was never authenticated; no witness laid any foundation for its admission; it could have been typed by anyone; it is not signed by Mr. LaClair; and it is clearly hearsay.

Further, this document is not admissible under either MRE 801(d)(2) or 803(6), as the Court of Appeals suggested. (Court of Appeals' decision, pg. 5, fn 4). This suggestion is wholly inconsistent with this Court's holding in *Smith, supra*, where there is and was no admissible testimony or affidavit by a qualified witness to establish the elements of either MRE 801(d)(2) or 803(6). The Court of Appeals, contrary to the Court's directives in *Smith, supra*, ignored the Michigan Rules of Evidence when it relied on the 1990 memorandum to support reversal of summary disposition on plaintiff's FELA negligent seat design claim.

For the foregoing reasons, plaintiff's failure to proffer admissible evidence requires summary disposition of his negligent seat design claim.

III. FEDERAL LAW OCCUPIES THE ENTIRE FIELD REGULATING LOCOMOTIVE EQUIPMENT, THUS PREEMPTING PLAINTIFF'S FELA CLAIM RELATING TO LOCOMOTIVE EQUIPMENT

There is no dispute that where federal law occupies the field of locomotive equipment and where the subject equipment is in compliance with that federal law, an FELA claim alleging negligence based on the use of that compliant equipment is preempted. This argument was not addressed by the Court of Appeals in its one paragraph discussion of Amtrak's preemption argument. (Court of Appeals' decision, pg. 2, last (fourth) paragraph), even though there is no dispute that the subject seat complies with law, statute and regulations. In its preemption discussion, the Court of Appeals initially notes that Amtrak's "...argument does not implicate the preemption doctrine because plaintiff's cause of action involves no state law claim. Rather, the issue involves the interaction of two federal statutes. *Weaver v. Missouri Pacific Railroad Co.*, 152 F. 3d 427 (CA 5 1998)." (Id.). The Court of Appeals, however, ignored all the cases cited by Amtrak in its appeal brief which were issued after *Weaver*, in which courts held that federal law did preempt FELA claims where the railroad was in compliance with federal law and/or regulations, as is the case here. See, e.g., *In re Amtrak, supra*; and *Norfolk Southern Ry. Co. v. Denson*, 644 50 2d 549 (Ala 2000). See, also, *Waymire v. Norfolk & Western Railway Co.*, 218 F. 3d 773 (7th Cir. 2000). The language in *In re Amtrak* is illustrative of this line of cases, ignored by the Court of Appeals here, that: "FELA claims of negligence as to locomotive design were pre-empted where locomotive complied with federal statute and regulations." (*In re Amtrak* at 1349, citing to *Key v. Norfolk So. Ry.*, 228 GA App 305 (1997).

The Court of Appeals, in citing to *Weaver, supra*, ignored the clear distinctions between *Weaver* and the present case. The first, sharp, distinction is that in *Weaver*, the railroad specifically conceded that preemption was not at issue (*Weaver* at 429); here, Amtrak has asserted federal preemption from its first pleading in the trial court. (See fn 6, pg. 2, *supra*). The second distinction is that the subject regulations in *Weaver* did not address the known danger at issue; here, the regulation--requiring a secure and braced seat (49 C.F.R. 229.141)--is directly implicated by plaintiff's claim that cab car seats should not be secured and braced. Further, there is no evidence of a history of injuries caused by the cab car seat.

Further, the Court of Appeals erred in its insistence that preemption is not implicated because it "involves no state law claim. Rather, the issue involves the interaction of two federal statutes." (Citing to *Weaver, supra*) (Court of Appeals Opinion, pg. 2). As the caselaw cited by Amtrak in its briefs made and continues to make clear, there can be and is preemption where two federal statutes interact. While some courts call the doctrine preemption, others call it preclusion or superseding (e.g., *Waymire, supra*). Regardless of nomenclature, the argument is the same: where the railroad is in compliance with a law, statute or regulation which covers or occupies the field of the area in question (here: locomotive/cab car seats), an FELA claim based on the complying item is preempted. To paraphrase the Seventh Circuit in *Waymire, supra* (at 777): to allow a plaintiff to argue negligent seat design under FELA but not allow a plaintiff to make the same argument under state law "would undermine the railroad safety uniformity intended by Congress..." Hence: preemption.

Clear federal decisional law requires dismissal of plaintiff's negligent seat design claim based on preemption.

RELIEF REQUESTED

For the foregoing reasons, National Railroad Passenger Corporation a/k/a Amtrak requests that this Honorable Court:

1. Grant leave to appeal;

2. Upon leave granted:

   a. Reverse the Court of Appeals' decision reversing, in part, the circuit court's judgment of January 8, 2003 granting summary disposition in favor of National Railroad Passenger Corporation; and

   b. Remand this matter to the Court of Appeals to enter an order affirming the circuit court's judgment of January 8, 2003 granting summary judgment in favor of National Railroad Passenger Corporation.

Respectfully submitted,

DURKIN, McDONNELL, CLIFTON
& O'DONNELL, P.C.

DATED: February 24, 2005

By: Mary C. O'Donnell

MARY C. O'DONNELL (P33479)
Attorney for Defendant-Appellant Amtrak
645 Griswold, Ste. 3253
Detroit, MI 48226
(313) 963-3033

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/

BRYAN J. WALDMAN
Sinas, Dramis, Brake, Boughton & McIntyre
Attorneys for Plaintiff-Appellee
3380 Pine Tree Road
Lansing, MI 48911-4207
(517) 349-7500

MARY C. O'DONNELL (P33479)
JOSEPH J. McDONNELL (P32056)
Durkin, McDonnell, Clifton & O'Donnell, P.C.
Attorneys for Defendant-Appellant Amtrak
645 Griswold, Ste. 3253
Detroit, MI 48226
(313) 963-3033

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CERTIFICATE OF SERVICE

I, DANIELLE M. HAYWARD, declare under penalty of perjury that on the date stated below I mailed a copy of *Supplemental Brief in Support of Application for Leave to Appeal of National Railroad Passenger Corporation (Amtrak)* to counsel of record by placing such

document in an envelope which bore fully prepaid postage and each of which was deposited in a United States mail box in the City of Detroit. The described envelope was appropriately addressed as follows:

Dated: February 24, 2005

Danielle M. Hayward