UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. Nos. 08-2263 & 08-2264

JEFFREY KLEIN and BRETT BIRDWELL,
v.
NATIONAL RAILROAD PASSENGER CORPORATION and
NORFOLK SOUTHERN CORPORATION,
Appellants

BRIEF OF *AMICI CURIAE* ENERGY OF ASSOCIATION OF PENNSYLVANIA and NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF APPELLANTS NATIONAL RAILROAD PASSENGER CORPORATION and NORFOLK SOUTHERN CORPORATION and IN SUPPORT OF REVERSAL OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(E.D. Pa. Civ. No. 04-CV-00955)

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STATEMENT OF INTERESTS AND SOURCE OF AUTHORITY TO FILE

The Energy Association of Pennsylvania ("Association") is a statewide trade association whose members are electric and natural gas distribution companies operating in Pennsylvania and subject to the jurisdiction of the Pennsylvania Public Utility Commission. Association members, the major regulated energy utility companies in the Commonwealth, provide service under the Public Utility Code to over eight million Pennsylvania industrial, commercial, and residential customers.[1] As possessors of land in Pennsylvania, which includes multiple utility substations, gas storage facilities, and gas and electric transmission facilities, Association members have an interest in ensuring that Pennsylvania premises liability law is applied correctly and not expanded inappropriately with respect to a landowner's liability to trespassers.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states, including Pennsylvania. The NAM's

[1] The Association's members include Allegheny Power; Citizens' Electric Co.; Columbia Gas Company of Pennsylvania; Dominion Peoples; Duquesne Light Co.; Equitable Gas Co.; Metropolitan Edison Co. – A FirstEnergy Company; National Fuel Gas Distribution Corp.; PECO Energy Co.; Pennsylvania Electric Co. – A FirstEnergy Company; Pennsylvania Power Co. – A FirstEnergy Company; Philadelphia Gas Works; Pike County Light & Power Co.; PPL Electric Utilities; UGI Penn Central Gas, Inc.; UGI Penn Natural Gas, Inc.; UGI Utilities, Inc. – Electric Division; UGI Utilities, Inc. – Gas Division; Valley Energy; and Wellsboro Electric Co.

mission is to enhance the competitiveness of manufacturers by shaping a legislative, regulatory, and judicial environment conducive to U.S. economic growth and to increase understanding about the vital role of manufacturing to America's economic future and living standards. Enhancing economic competitiveness and living standards cannot be achieved, however, if manufacturers are exposed to broad liability to trespassers. More than 100 NAM members in Pennsylvania possess multiple properties from which they operate and conduct business. As such, NAM has a significant interest in ensuring that the correct legal standard is applied in litigation involving trespassers.

Pursuant to Federal Rule of Appellate Procedure 29(b), and pending this Court's ruling on the Motion for Leave to File Amicus Curiae Brief filed contemporaneously herewith, the Association and the NAM, as Amici Curiae, file this brief in support of the position of Appellants, National Railroad Passenger Corporation ("Amtrak") and Norfolk Southern Corporation, as set forth in their briefs filed October 6, 2008. The Association and the NAM contend that the March 31, 2008, Order of the United States District Court for the Eastern District of Pennsylvania denying Amtrak's and Norfolk's *Motion for Judgment as a Matter of Law or, in the alternative, a New Trial and/or Remittitur*, should be reversed.

The Amici maintain that the District Court's decision represents an unprecedented and inappropriate expansion of Pennsylvania premises liability law

as it pertains to landowners and trespassers. The focus of this amicus brief, however, is limited to two aspects of that decision. First, the District Court essentially relieved plaintiffs of their burden to prove that the landowner, here Amtrak, knew or had reason to know of trespassers present on its property and in peril from a dangerous condition. The District Court concluded plaintiffs made this showing with evidence of trespassing generally in the vicinity of the accident site and of the track's location in an urban setting. No evidence was produced that trespassers had ever climbed a boxcar parked on the Lancaster track underneath an energized catenary line. Although actual knowledge is unnecessary, Pennsylvania law requires a close nexus between (1) the nature of the peril that exists on, or the dangerous condition of, the property, (2) the presence of trespassers on the property where the injury occurs, and near the peril or dangerous condition located thereon, and (3) the knowledge of the foregoing by the landowner. Evidence offered by plaintiffs, considered singularly or conjunctively, does not meet this standard.

Second, the District Court admitted evidence of prior incidents in which trespassers on other Amtrak properties were injured after getting on top of parked boxcars and contacting overhead catenary wires. All of these incidents occurred at locations distant from the Lancaster accident site, and were remote in time. This evidence was offered purportedly to show Amtrak's and Norfolk's knowledge that

parking a boxcar underneath an electrical line created a dangerous condition. In reality, however, this information was used as surrogate evidence supporting the plaintiffs' case and allowed the jury to determine that Amtrak and Norfolk knew, or had reason to know, that trespassers were climbing boxcars parked under energized lines at the Lancaster site.[2] In fact, this was the only "evidence" pointing to the defendants' knowledge of such acts, without which the plaintiffs would not have been able to meet their burden of proof. As such, the admission of this evidence was clearly outcome determinative and prejudicial. Moreover, in admitting the evidence, the District Court undertook no analysis, beyond its ipse dixit, to determine whether these prior incidents were substantially similar to the incident on August 10, 2002.

The upshot of the District Court's decision is expanded premises liability by imposing on landowners of multiple properties – including Association and NAM members – a new duty to anticipate trespassers and prepare for their presence. Such duty is contrary to Pennsylvania law. The costs associated with the increased liability exposure ultimately will be passed along to all Pennsylvanians in the form of higher prices for manufactured goods and higher utility rates at a time when Pennsylvanians already are burdened by inflation and rapidly rising energy costs.

[2] In this regard, Amtrak was held liable as a possessor of land while Norfolk was held liable under Restatement (Second) of Torts § 386 for allegedly creating a dangerous condition involving an unreasonable risk of harm.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE DISTRICT COURT BECAUSE ITS UNPRECEDENTED DECISION WILL SUBJECT ASSOCIATION AND NAM MEMBERS TO EXPANDED PREMISES LIABILITY.

A. Pennsylvania law requires a close nexus between the nature of the peril that exists on, or the dangerous condition of, the property; the presence of trespassers on the property where the injury occurs, and near the peril or dangerous condition located thereon; and knowledge of the foregoing by the landowner.

A trespasser is "'a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise.'" Rossino v. Kovacs, 718 A.2d 755, 756-57 (Pa. 1998) (quoting Restatement (Second) of Torts § 329). Possessors of land in Pennsylvania have no duty to anticipate the presence of trespassers or to take precautionary measures for their benefit. See Tedesco v. Reading Co., 24 A.2d 105, 107 (Pa. Super. Ct. 1942). Rather, the duty of care a landowner owes a trespasser is to refrain from willful or wanton misconduct. See Dudley v. USX Corp., 606 A.2d 916, 921 (Pa. Super. Ct. 1992) (citing Evans v. Phila. Transp. Co., 212 A.2d 440, 442 (Pa. 1965)); see also Estate of Zimmerman v. Se. Pa. Transp. Auth., 168 F.3d 680, 687 (3d Cir. 1999) (suppliers of electricity owe trespassers a duty of care to avoid willful or wanton misconduct (quoting Heller v. Consol. Rail Corp., 576 F. Supp. 6, 12 n.7 (E.D. Pa. 1982))).

The issue below was whether Amtrak's granting permission to Norfolk to park the boxcar underneath an energized wire constituted wanton misconduct. Quoting the Superior Court of Pennsylvania, this Court in Micromanolis v. Woods School, Inc., defined wanton misconduct:

> Wanton misconduct . . . means that an actor has intentionally done an act of an unreasonable character, in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to the consequences, and not a desire to bring them about; as such, actual prior knowledge of the particular injured person's peril is not required. It is enough that the actor realizes, or at least has knowledge of sufficient facts that would cause a reasonable man to realize, that a peril exists, for a sufficient time beforehand to give the actor a reasonable opportunity to take means to avoid the injured person's accident; the actor is wanton for recklessly disregarding the danger presented.

989 F.2d 696, 701 (3d Cir. 1993) (quoting Ott v. Unclaimed Freight Co., 577 A.2d 894, 897 (Pa. Super. Ct. 1990)); see also Evans, 212 A.2d at 443-44. To establish wanton misconduct, plaintiff must offer evidence that defendant knew or had reason to know of a trespasser's presence on the property and his peril at a time when the landowner could have taken action to avoid the accident. General evidence of trespassers on the landowner's property will not suffice.

In Evans, the plaintiff's decedent entered a subway station platform, fell mysteriously on the subway track, and was struck by one of defendant's trains. Evans, 212 A.2d at 441. Because the decedent was not invited or anticipated to be present on the tracks, he was deemed a trespasser for purposes of premises

liability. Id. At trial, the evidence revealed that the train's engineer saw an "object" lying on the tracks from a distance and traveling at a speed such that he could have stopped the train safely before striking the decedent. Id. at 443. The Court concluded that the evidence was sufficient to support a jury finding that the engineer committed wanton misconduct. "[I]t is clear that the evidence was sufficient to establish that the motorman was in possession of sufficient facts to put a reasonable man on notice of an impending peril and it was for the jury to say whether or not, having such knowledge, he acted with a reckless disregard for the safety of others." Id. at 445.

On the other hand, in Estate of Zimmerman, 168 F.3d at 688, this Court applied Pennsylvania law and held SEPTA not liable for the death of a homeless trespasser who sustained electrical contact injuries after climbing a catenary structure. Although SEPTA knew or should have known of trespassers entering its track area, SEPTA had no knowledge that trespassers had ever climbed the catenary structure. Id. Similarly, in Heller, 576 F. Supp. at 11, the plaintiff, who sustained electrical contact injuries after climbing a boxcar parked underneath an overhead wire, failed to introduce any evidence that the defendants knew, or had reason to know, of his presence on the boxcar until after the accident. And even if defendants knew or had reason to know of his presence, "it was not reasonably foreseeable to the defendants that the plaintiff would trespass upon its land, climb

upon its boxcar, and be injured by electrical wires 22 feet above the tracks." Id.; see also Tedesco, 24 A.2d at 108 (railroad not liable for injuries sustained by child struck by its train because, although children gathered and played regularly at the top of an embankment adjacent to the railroad tracks, there was no evidence children played on the tracks).

In this matter, plaintiffs offered no evidence that Amtrak knew or had reason to know that trespassers were present on its property and in a position of peril. Significantly, no evidence was adduced that trespassers had ever climbed boxcars stationed at the Lancaster tail track and, thus, were at risk of contacting energized catenary wires. Instead, plaintiffs introduced evidence that trespassers had been reported along the right of way within one mile of the accident site, that there was "pervasive graffiti" on buildings adjacent to and away from the tail track at the bottom of a steep embankment, and that the accident site was located in the vicinity of schools and in an "urban setting suggesting that pedestrian traffic was well known." Klein v. Nat'l R.R. Passenger Corp., Civ. A. No. 04-955, 2008 U.S. Dist. LEXIS 25990, at *9 (E.D. Pa. Mar. 31, 2008). Based on this evidence, and Amtrak's supposed "long time awareness" that teenage boys are disposed to climb parked boxcars, the District Court concluded Amtrak "appreciated the specific risk of harm to persons like [plaintiffs]." Id. at *9-10; see also id. at *7 ("It was enough that Amtrak should have realized that pulling the [boxcar] under the energized

catenary line, in a densely populated mixed residential-commercial-industrial area, was an unreasonable act in disregard of a known risk that would likely put someone in grave peril.").

The Association and the NAM respectfully submit that the District Court's conclusion is contrary to Pennsylvania law. As the above-cited cases make clear, there must be a close nexus between (1) the nature of the peril that exists on, or the dangerous condition of, the property, (2) the presence of trespassers on the property where the injury occurs, and near the peril or dangerous condition located thereon, and (3) the knowledge of the foregoing by the landowner. Evidence offered by plaintiffs, considered singularly or conjunctively, does not meet this standard. The presence of "pervasive graffiti" on the building adjacent to the Amtrak right of way cannot support an inference that Amtrak knew such "artists" or anyone else were likely to climb a parked boxcar and place themselves in danger of contacting an overhead catenary line. Nor do reports of trespassing generally along Amtrak's track establish wanton misconduct where, as here, there is no evidence of trespassers climbing boxcars parked anywhere at this site, let alone underneath energized catenary wires. See Estate of Zimmerman, 168 F.3d at 688; Tedesco, 24 A.2d at 108. And to the extent the District Court predicated its conclusion on the fact that the accident site was situated within an urban environment, such conclusion is untenable and effectively imposes on landowners

of property in residential areas a duty to anticipate, or even expect, trespassers. In short, the District Court's determination departs from well-settled Pennsylvania law and represents a unnecessary expansion of premises liability.

B. Evidence of prior accidents occurring anywhere other than the property in question is insufficient to establish the requisite close nexus.

To plug the evidentiary hole in their case, plaintiffs offered evidence of prior accidents ostensibly to prove Amtrak's and Norfolk's knowledge of the dangers attendant to parking boxcars underneath energized catenary lines. None of these prior accidents, however, occurred at the Lancaster site in question. And all of the prior accidents were remote temporally. Under the circumstances, this evidence was highly prejudicial. Moreover, evidence of accidents occurring at one location, by itself, does not demonstrate that an accident occurring at a different location was caused by the landowner's conscious indifference to a known risk.

It is true that evidence of prior similar accidents may be, in certain cases, probative of both the existence and knowledge of dangerous conditions. See DiFrischia v. N.Y. Cent. R.R. Co., 307 F.2d 473, 476 (3d Cir. 1962); Nat'l Freight, Inc. v. Se. Pa. Transp. Auth., 698 F. Supp. 74, 77 (E.D. Pa. 1988). In premises liability cases, evidence of prior accidents usually concerns the property in question. As the Superior Court observed recently, "'evidence of similar accidents occurring at substantially the same place and under the same or similar circumstances may . . . be admissible to prove constructive notice of a defective or

dangerous condition and the likelihood of injury.'" Houdeshell v. Rice, 939 A.2d 981, 984 (Pa. Super. Ct. 2007) (quoting Stormer v. Alberts Constr. Co., 165 A.2d 87, 89 (Pa. 1960)).

But even when plaintiff proposes to offer such evidence, its admissibility is not guaranteed and courts scrutinize the evidence closely to ascertain whether in fact prior accidents are substantially similar to the accident in question. In this regard, the evidence must be relevant, and its probative value must not be substantially outweighed by its prejudicial effect. See Fed. R. Evid. 401; Fed. R. Evid. 403. "[W]here the requisite similarity of facts is not present, the probative value of such prior accident evidence will, in most circumstances, be outweighed by its prejudicial or misleading nature." Nat'l Freight, 698 F. Supp. at 77. In Whitman v. Riddell, 471 A.2d 521, 523-24 (Pa. Super. Ct. 1984), the Superior Court excluded evidence of thirty-six prior accidents at the intersection in question because there was no "common thread" linking the thirty-six prior accidents with each other or the accident in question. Likewise, in National Freight, 698 F. Supp. at 78, the District Court, applying Pennsylvania law, excluded evidence of three prior collisions at defendant's railroad crossing because of "substantial dissimilarities between the present and earlier occurrences"; the three accident reports contained no information regarding the speed of the trains or any indication that the tracks were obstructed from view, an allegation asserted by plaintiff.

The District Court's admission of evidence of prior accidents is problematic because it dispenses with the close nexus requirement. None of the prior accidents occurred at the site in question. Although these plaintiffs adduced no evidence that Amtrak knew, or should have known that, trespassers along the Lancaster tracks were in peril, the District Court nevertheless allowed them to satisfy the evidentiary requirement by substituting evidence of accidents that occurred at different locations. This was improper. In Hansen v. PECO Energy Co., Civ. A. No. 98-1555, 1999 U.S. Dist. LEXIS 13388, at *2-3 (E.D. Pa. Aug. 25, 1999), plaintiff sued Amtrak and an electric company after he was injured climbing a catenary structure. The court rejected plaintiff's attempt to prove wanton misconduct with evidence that defendants were "aware that these catenary structures are climbable and that other incidents have occurred involving children and adults who have been injured while climbing up such structures." Id. at *21-22. Because plaintiff offered no evidence that defendants were aware that plaintiff or other trespassers had climbed the catenary structure in question, plaintiff was unable to prove wanton misconduct. Id.; cf. Hartel v. Long Island R.R. Co., 476 F.2d 462, 464 (2d Cir. 1973) (plaintiff may not demonstrate foreseeability of criminal assault at one train station with evidence of prior robberies that occurred at different stations).[3]

[3] Moreover, the District Court also erred by admitting evidence of prior accidents

C. The consequences of the District Court's decision.

The Association and the NAM are concerned that the District Court's decision, if affirmed, will impose on their members a heightened duty of care owed to trespassers and expose them to potentially expanded liability to trespassers injured on their property.[4]

As noted, Association members possess facilities from which they operate and distribute natural gas and electric service. This includes, but is not limited to, utility substations, natural gas "city gate" and "point of distribution" facilities, and electric transmission and distribution facilities, used for the distribution of natural gas or electricity to customers. Because members serve large geographic areas, multiple facilities are located strategically across Pennsylvania to deliver electricity or natural gas to customers reliably, safely, and efficiently.[5] And due to the

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without undertaking any analysis to determine that the prior incidents – all of which occurred over twenty years beforehand – were substantially similar to the accident in question. As this Court observed in Barker v. Deere & Co., 60 F.3d 158, 163 (3d Cir. 1995), "the district court must be apprised of the specific facts of previous accidents in order to make a reasoned determination as to whether the prior accidents are 'substantially similar.'" Rather than make a reasoned determination, the District Court simply concluded such similarity existed. See, e.g., Klein, 2008 U.S. Dist. LEXIS 15331, at *60-61. Prior accidents may appear similar, but there are characteristics unique to each location that a conclusory analysis is unable to appreciate.

[4] The Court should understand that the consequences of the District Court's decision will impact all landowners in Pennsylvania.

[5] For example, Association members who are electric distribution companies have constructed hundreds of substations and utilize thousands of miles of electric lines to distribute electricity in their service territories. According to Form 1 Reports

confluence of rapid growth of suburban development and increasing demands on the electric and natural gas distribution network, it is increasingly becoming difficult to separate these facilities from population centers.

Additionally, over 100 NAM members in Pennsylvania possess multiple properties from which they conduct business. Members may own multiple production facilities to manufacture finished goods or component goods incorporated into finished goods by other manufacturers. Or members may possess one or more manufacturing plants as well as a separate distribution center in which finished goods are transported and stored for later delivery to the buyer. But regardless whether the facility is utilized for production, distribution, or both,

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submitted to the Federal Energy Regulatory Commission in 2006, Association member Allegheny Power operates 266 transmission and distribution substations; Duquesne Light operates 184 substations; PECO operates 498 substations; PPL Electric operates 339 substations; Metropolitan Edison operates 192 substations; and Pennsylvania Electric operates 270 substations. And as of 2007, members Metropolitan Edison, Pennsylvania Electric, and PPL Electric had 32,000 miles of electric distribution lines across Pennsylvania. See also EEI 2008 Statistical Yearbook (reporting, as of 2007, that all Pennsylvania electric utilities, suppliers and generators, had 19,110 miles of electric transmission lines in service in Pennsylvania).

In addition, Association members who distribute natural gas operate in the aggregate thousands of city gate stations and point of delivery stations. According to data provided by the member companies, as of October 10, 2008, Columbia Gas operates 303 stations within its natural gas delivery system; Dominion Peoples operates 1,512 stations; Equitable Gas operates 1,640 stations; National Fuel Gas Distribution Corporation operates 103 stations; PECO energy operates 28 stations; Philadelphia Gas Works operates 9 stations; UGI Central Penn Gas operates 40 stations; UGI Penn Natural Gas operates 14 stations; UGI Utilities operates 31 stations; and Valley Energy operates 2 stations.

these facilities must be connected to the transportation infrastructure of highways, railroads, and, to a lesser extent, airports in order to receive raw materials and ship finished goods efficiently and reliably. This exigency has brought NAM members, similar to Association members, in closer proximity to population centers. New residential development has gravitated toward existing infrastructure, and members building new plants must of necessity locate in developed regions to tap into the transportation network.

Despite best efforts by Association and NAM members, unauthorized entry by trespassers can occur. In fact, more recently, there has been a rise in a specific kind of trespass: unauthorized entry to steal aluminum, copper, steel, and other commercial metal property. Indeed, the problem has become so serious that the Pennsylvania General Assembly has recently passed, and the Governor has signed, legislation that would require scrap processors and recycling facility operators to collect certain information relating to the purchase of scrap material and restrict such operators from purchasing certain materials. See Scrap Material Theft Prevention Act, H.R. 1742, 192d Leg., Reg. Sess. (Pa. 2008) (Act 113).

The Amici provide this background to the Court so it may understand the challenges posed by the District Court's decision. First, by eliminating the requirement of a close nexus between the peril, the trespasser's presence, and the landowner's knowledge, the District Court has lowered the standard a plaintiff

must satisfy to show wanton misconduct. No longer must a plaintiff prove that the landowner was aware, or had reason to be aware, that a trespasser on its property was in peril such that the failure to act constitutes a conscious indifference to the safety of others. Instead, evidence of prior trespassing generally on an Association or NAM member's property, or even of trespassing in the vicinity of the member's property, could suffice to impute to the member knowledge of facts putting it on notice that trespassers are in imminent peril. This is so despite the absence of evidence that trespassers had ever meddled with that property in the manner causing the plaintiff-trespasser's injury. Equally alarming is the District Court's emphasis on a property's location within an urban environment. Applying the District Court's extreme view of premises liability, landowners will be charged with notice of trespassers simply because pedestrian traffic should be expected.

Second, and as a logical result of the District Court's jettisoning the close nexus requirement, knowledge by a landowner of prior accidents that occurred at other (dissimilar) properties will subject the landowner to liability for failing to take measures to protect the trespasser whom the landowner had no reason to suspect was present.[6] In other words, the landowner will be found to have

[6] Even more disturbing, and not expressly discussed by the lower court, is the very real possibility that knowledge of the landowner of trespassers may be inferred by accidents or events that occurred at other properties similar to, but not owned by, the landowner.

consciously disregarded a peril at one location simply because accidents occurred at a different location.

This aspect of the District Court's decision is particularly vexing to the Association and its members. To illustrate, as set forth supra note 5, the electric distribution network comprises a vast infrastructure of substations and electric lines dispersed geographically across Pennsylvania. Because each electric distribution company member operates hundreds of substations and maintains thousands of miles of electric line, it is unreasonable and unrealistic to expect such member to monitor its entire network for trespassing. In fact, it is conceivable that a member may never know that there were trespassers in or around a particular facility. But applying the District Court's reasoning, the fact that a trespasser was injured at a substation owned by an utility distribution company will subject that company to liability to a trespasser injured at one of its remaining substations notwithstanding the absence of any evidence of trespassing at that substation. In other words, an incident at one substation constitutes notice that trespassers are in peril at all substations, and failure to eliminate an alleged dangerous condition will be wanton misconduct.[7]

[7] Although this brief focused on the liability of possessors of land, the Amici note that the District Court's expansive reading of Restatement (Second) of Torts § 386 also will have adverse consequences beyond the parties to this action. Section 386 provides that non-possessors of land are liable for "creat[ing] or maintain[ing] upon the land a structure or other artificial condition which he should recognize as

In short, the District Court's decision effectively imposes a duty on landowners to anticipate the presence of trespassers because of trespassing in the general vicinity of a property, because of the property's location, and/or because trespassers have entered and sustained injury at other properties. Such a burdensome and onerous duty is not countenanced under Pennsylvania law and must be repudiated by this Court. And along with exposing Association and NAM members to increased liability, the District Court's decision could have substantial

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involving an unreasonable risk of physical harm to others upon . . . the land." As Norfolk observes in its brief, this cause of action requires proof that the non-possessor knew or should have known of the risk to persons at the time the structure or condition was created. (Br. Appellant Norfolk Southern Corp. 28-31 (and quoting Tadjer v. Montgomery County, 487 A.2d 658, 663 (Md. Ct. Spec. App. 1985); Razink v. Krutzig, 746 N.W.2d 644, 651 (Minn. Ct. App. 2008)). Yet, the only evidence in this case to establish Norfolk's knowledge was evidence of Amtrak's knowledge of trespassing generally in the vicinity of the accident site and of the prior accidents occurring on Amtrak property different from the Lancaster site.

Allowed to stand, the District Court's decision regarding Section 386 will expose Association members to additional unwarranted liability. Association members distribute electricity across vast service territories, but they do not always own the property on which their infrastructure, such as transmission towers and lines, is located. In this regard, Association members enjoy nothing more than a right of way permitting them legally to erect transmission lines across another's property. Association members have no control over the property. Nor can they police the thousands of miles of transmission lines maintained throughout Pennsylvania and, thus, cannot know that their transmission lines pose an unreasonable risk of harm to trespassers. But this is irrelevant under the District Court's view, provided the plaintiff-trespasser adduces evidence of trespassing in the general vicinity of the transmission tower and/or of prior accidents occurring at transmission lines located elsewhere within the member's service territory.

The Association respectfully requests that this Court narrow the District Court's broad reading of Section 386.

economic ramifications. For Association and NAM members, such liability will inevitably extend to their customers, who ultimately will bear the financial impact of expanded premises liability through higher prices for utility service and finished goods.[8] Furthermore, NAM members will be deterred from expanding their business and constructing new plants (and thus creating new jobs) because of the enhanced liability exposure.

CONCLUSION

The lower court's decision has greatly expanded the liability of a landowner for trespasser injuries by basically stating that landowners should expect that trespassers will be in proximity of a known peril on the actual property where an injury occurs, without any prior evidence of same. Such a decision borders on strict liability. There is a clear need to rein in this decision and return to a just and workable basis for trespasser liability by ensuring, at the very least, that all of the following are present before liability can be found[9]: (1) a peril located, or dangerous condition exists, on the property; (2) that trespassers have previously been on the actual property in question, and near the actual peril or dangerous condition located thereon; and (3) knowledge of the foregoing by the landowner.

[8] For public utilities, this would take the form of applications for rate increases filed with the Public Utility Commission to cover the costs of this expanded liability (i.e., a cost of doing business).

[9] Not excluding other defenses that the defendant may have, such as comparative negligence, assumption of the risk, etc.

As such, the Association and the NAM respectfully request that this Court reverse the Order of the United States District Court for the Eastern District of Pennsylvania, entered March 31, 2008, denying Amtrak's and Norfolk's *Motion for Judgment as a Matter of Law or, in the alternative, a New Trial and/or Remittitur*.

Respectfully submitted,

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Date: October 15, 2008

CERTIFICATE OF COMPLIANCE

Pursuant to Third Circuit Local Appellate Rule 31.1(c), I hereby certify that the text of the electronic version of the foregoing Amicus Curiae Brief is identical to the text in the paper copies of the Brief. I also certify that Symantec Endpoint Protection has been run on the electronic version of the Amicus Curiae Brief and that no virus was detected.

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this Amicus Curiae Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because this Brief contains 5,096 words of text, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in a proportionately spaced typeface using Microsoft Word 2000/XP in 14-point Times New Roman.

/s/ Timothy J. Nieman
Timothy J. Nieman

Date: October 15, 2008

CERTIFICATE OF BAR ADMISSION

I hereby certify that I am a member in good standing of the Bar of this Court.

/s/ Timothy J. Nieman
Timothy J. Nieman

Date: October 15, 2008

CERTIFICATE OF SERVICE

I hereby certify that I have this 15th day of October, 2008, caused to be served one electronic version and ten true and correct copies of the foregoing Amicus Curiae Brief on this Court, and two true and correct copies of the foregoing Amicus Curiae Brief on the following via first-class mail, postage pre-paid:

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