

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

---

**THE ENERGY ASSOCIATION OF PENNSYLVANIA'S and THE  
NATIONAL ASSOCIATION OF MANUFACTURERS' REPLY TO  
APPELLEES' OPPOSITION TO THEIR MOTION FOR LEAVE TO FILE  
AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS NATIONAL  
RAILROAD PASSENGER CORP. and NORFOLK SOUTHERN CORP.**

NOW COME the Energy Association of Pennsylvania and the National Association of Manufacturers, by and through their counsel Rhoads & Sinon LLP, who, pursuant to Federal Rule of Appellate Procedure 27(a)(4), file this Reply to Appellees' Opposition to their Motion for Leave to File Amicus Curiae Brief in Support of Appellants National Railroad Passenger Corporation and Norfolk Southern Corporation:

**ARGUMENT**

On October 16, 2008, the Energy Association of Pennsylvania ("Association") and the National Association of Manufacturers ("NAM") filed a

Motion for Leave to File Amicus Curiae Brief in Support of Appellants National Railroad Passenger Corporation (“Amtrak”) and Norfolk Southern Corporation and their proposed amicus curiae brief. In their motion and brief, the Association and the NAM demonstrated that they met the requirements for submission of an amicus curiae brief: (1) interest in the appeal; (2) desirability of receiving their brief; and (3) relevancy of the matters asserted in their brief. See Fed. R. App. P. 29(b); Neonatology Assocs., Prof’l Ass’n v. Comm’r of Internal Revenue, 293 F.3d 128, 131 (3d Cir. 2002) (Alito, J.). Specifically, the Amici described their particular industries and explained the possible consequences to their members, possessors of land in Pennsylvania, from the District Court’s unprecedented and inappropriate expansion of Pennsylvania premises liability law as it pertains to landowners and trespassers. On October 27, 2008, Appellees filed an opposition to the Association’s and the NAM’s motion for leave to file an amicus curiae brief. The Association and the NAM respectfully submit that Appellees’ opposition is without merit. Nevertheless, the Amici believe a few points raised in Appellees’ opposition warrant a reply.

First, contrary to Appellees’ assertion, (see Appellees’ Opp’n to Mots. Leave File Brs. Amicus Curiae at 3), the Association and the NAM have not sought leave to file an amicus brief to contest the sufficiency of the evidence presented to the jury. Rather, as the Amici emphasized in their proposed brief, the District Court’s

interpretation of a landowner's duty to trespassers constituted a significant deviation from established Pennsylvania precedent, which 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. (See, e.g., Proposed Br. of Amici Curiae Ass'n & NAM at 9, 12, 15-17.) Because of the District Court's erroneous interpretation, evidence that otherwise would have been irrelevant and insufficient – such as reports of trespassers in the general vicinity of the accident site and prior accidents occurring at locations different from the accident site and remote in time – now assumes a prominent, and apparently dispositive, role in premises liability actions brought by trespassers. Against this backdrop, the Association and NAM explained how the District Court's decision 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.” (Id. at 13.) Clearly, the Amici's concerns are more acute than simply whether evidence presented by Appellees justified the jury's verdict.

Second, Appellees urge this Court to deny the Amici's motion because Amtrak and Norfolk are represented adequately by counsel. (Appellees' Opp'n to Mots. Leave File Brs. Amicus Curiae 3.) They also complain that the

Association's and the NAM's amicus brief raises facts "that were not submitted during the trial court proceedings." (Id. at 5) But neither ground justifies denying the Amici's motion. Indeed, regardless of the skill of a party's legal representation, amicus curiae briefs serve a useful function by bringing to the Court's attention matters outside the record that bear on the issues before it. As then-Judge Alito – now Justice Alito – observed in Neonatology Associates:

Even when a party is very well represented, an amicus may provide important assistance to the court. Some amicus briefs collect background or factual references that merit judicial notice. Some friends of the court are entities with particular expertise not possessed by any party to the case. Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group. Accordingly, denying motions for leave to file an amicus brief whenever the party supported is adequately represented would in some instances deprive the court of valuable assistance.

293 F.3d 128, 132 (3d Cir. 2002) (internal citation and quotations omitted). Here, the Association and the NAM set forth in their brief information regarding the characteristics and infrastructure of their members' respective industries in order to "explain the impact a potential holding might have on an industry . . . group." (See Proposed Br. of Amici Curiae Ass'n & NAM at 13-17 & n.5.) To indulge Appellees' entreaty and deny the Amici's motion will deprive this Court of valuable assistance as it decides the merits of this appeal. Accordingly, this Court

should reject Appellees' opposition and grant the motion for leave to file an amicus curiae brief.

### CONCLUSION

For the reasons stated in their motion and proposed amicus curiae brief, as well as this reply to Appellees' opposition, the Energy Association of Pennsylvania and the National Association of Manufacturers respectfully request that this Honorable Court grant their Motion for Leave to File an Amicus Curiae Brief in Support of Appellants National Railroad Passenger Corporation and Norfolk Southern Corporation and consider their amicus curiae brief in deciding the merits of this appeal.

Respectfully submitted,  
RHOADS & SINON LLP

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

Timothy J. Nieman  
Attorney I.D. No. 66024  
William C. Boak  
Attorney I.D. No. 203506  
Rhoads & Sinon LLP  
One South Market Square, 12th Floor  
P.O. Box 1146  
Harrisburg, PA 17108-1146  
717.233.5731  
Counsel for *Amici Curiae*  
Energy Association of Pennsylvania  
and National Association of  
Manufacturers

Of Counsel:  
Donna M.J. Clark  
V.P. and Gen. Counsel  
The Energy Association of Pennsylvania  
800 North Third St., Suite 301  
Harrisburg, PA 17102-2025

Quentin Riegel  
V.P., Litig. & Dep. Gen. Counsel  
National Association of Manufacturers  
1331 Pennsylvania Ave., NW 6th Floor  
Washington, D.C. 20004-1790

Date: October 31, 2008

## CERTIFICATE OF SERVICE

I hereby certify that I have this 31st day of October, 2008, caused to be served a true and correct copy of the foregoing Reply to Appellees's Opposition to the Motion for Leave to File Amicus Curiae Brief on the following via overnight delivery:

Joseph F. Roda, Esquire  
Jennifer S. Snyder, Esquire  
Roda & Nast, PC  
801 Estelle Drive  
Lancaster, PA 17601

William G. Ballaine, Esquire  
Landman, Corsi, Ballaine & Ford, P.C.  
120 Broadway, 27th Floor  
New York, NY 10271


Paul F.X. Gallagher, Esquire  
Gallagher & Rowan, P.C.  
1800 JFK Boulevard, Suite 1000  
Philadelphia, PA 19103

Nancy Winkleman, Esquire  
Ralph G. Wellington, Esquire  
Joel McHugh, Esquire  
Schnader Harrison Segal & Lewis LLP  
1600 Market Street, Suite 3600  
Philadelphia, PA 19103

Joan A. Zurbas, Esquire  
Southeastern Pennsylvania Transit Authority  
1234 Market Street  
Philadelphia, PA 19107

Louis P. Warchot, Esquire  
Daniel Saphire, Esquire  
50 F. Street, Northwest  
Washington, DC 20001

Ira L. Podheiser, Esquire  
David J. Hickton, Esquire  
Burns White & Hickton  
Four Northshore Center  
106 Isabella Street  
Pittsburgh, PA 15212

  
\_\_\_\_\_  
William C. Boak