

STATE OF MICHIGAN
COURT OF APPEALS

KEITH A. HUBBARD,

Plaintiff-Appellant,

v

NATIONAL RAILROAD PASSENGER
CORPORATION, a/k/a AMTRAK,

Defendant-Appellee,

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
AUTOMOBILE CLUB OF MICHIGAN
INSURANCE GROUP,

Defendants.

UNPUBLISHED
September 7, 2004

No. 246165
Wayne Circuit Court
LC No. 01-115388-NO

Before: Neff, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition under MCR 2.116(C)(10), thereby dismissing plaintiff's claims under the Federal Employers' Liability Act (FELA), 45 USC 51 *et seq.*, and the Locomotive Inspection Act (LIA), 49 USC 20701 *et seq.* We affirm in part, reverse in part, and remand.

Plaintiff, a railroad engineer for defendant National Railroad Passenger Corporation, a/k/a Amtrak (hereinafter "defendant"), was injured when the train he was operating collided with a truck. Fortunately, a serious collision was averted and the train only struck the truck's side-view mirror. Because plaintiff feared a more violent collision, however, he attempted to exit the train's cab and reach the safety of the coach before impact. Plaintiff alleged that he was unable to quickly exit the cab car seat because it had locked in the forward position. As a result, he dove out of the seat and fell down on his hipbone, sustaining injuries.

On appeal, plaintiff argues that the trial court erred in summarily dismissing his claims under the FELA and LIA. We apply federal law in reviewing the substantive merits of plaintiff's claims, but the claims are subject to this state's procedural rules. *Boyt v Grand Trunk Western R Co*, 233 Mich App 179, 183; 592 NW2d 426 (1998).

This Court reviews de novo a trial court's decision on summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a plaintiff's claim. Summary disposition should be granted if, after considering the affidavits, depositions, admissions, and other documentary evidence submitted by the parties, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). All reasonable inferences are to be drawn in favor of the nonmovant. *Hall v McRea Corp*, 238 Mich App 361, 369-370; 605 NW2d 354 (1999).

Plaintiff first argues that the trial court erroneously granted defendant summary disposition of his FELA claim because he submitted sufficient proof to establish that defendant was negligent for allowing the train to be equipped with a seat that locked into position, thereby preventing him from timely exiting the cab seat in the event of a collision.¹ Irrespective of the substance of this claim, defendant argues that plaintiff's FELA claim is preempted by the LIA.

First, we note that defendant's argument does not implicate the preemption doctrine because plaintiff's cause of action involves no state law claim.² Rather, the issue involves the interaction of two federal statutes. *Weaver v Missouri Pacific R Co*, 152 F3d 427, 429 (CA 5, 1998). The LIA is supplemental to the FELA, and substantively amends it in regards to causes of action for violations of certain safety regulations. An action brought based on a LIA violation is litigated as an action under the FELA, and a violation of the LIA constitutes strict liability under the FELA. *Urie v Thompson*, 337 US 163, 189; 69 S Ct 1018; 93 L Ed 1282 (1949); *Green v River Terminal R Co*, 763 F2d 805, 810 (CA 6, 1985). Thus, where a plaintiff's FELA and LIA claims are based on the same theory of liability involving the same facts, recovery under the FELA is precluded if the plaintiff recovers under the LIA. But "compliance with the LIA and the accompanying regulations is not determinative of negligence under FELA." *Weaver, supra* at 430. Accordingly, plaintiff's FELA claim is not precluded merely because plaintiff also brought a claim under the LIA.

¹ In his complaint, plaintiff alleged other bases for defendant's negligence. Because plaintiff's appeal only involves defendant's alleged negligence regarding the design of the cab seat, we limit our review of the trial court's decision accordingly.

² The Boiler Inspection Act (BIA), 45 UCS 23 *et seq.*, is the LIA's predecessor. *Haworth v Burlington Northern & Sante Fe R Co*, 281 F Supp 2d 1207, 1211 (ED Wash, 2003). The BIA preempts all state law claims on subjects that are within its scope. *Napier v Atlantic Coast Line R Co*, 272 US 605, 611, 613; 47 S Ct 207; 71 L Ed 432 (1926); *Oglesby v Delaware & Hudson R Co*, 180 F3d 458, 460-461 (CA 2, 1999).

We now turn to the merits of plaintiff's FELA claim and decide whether the trial court properly concluded that summary disposition in favor of defendant was warranted as to this claim. The liability of common carrier railroads under the FELA is addressed in 45 USC 51, which provides, in relevant part:

Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . , for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. . . .

The FELA is a remedial statute designed to provide broad recovery for injured workers covered under the act. As such, it is to be liberally construed. However, the FELA is not a workers' compensation statute and does not make an employer the insurer of its employees' safety. An employer's liability stems from his negligence, not the injuries sustained. *Consolidated Rail Corp v Gottshall*, 512 US 532, 542-543; 114 S Ct 2396; 129 L Ed 2d 427 (1994).

Initially, we note that there is conflict among the federal circuit courts regarding the quantum of evidence necessary to establish liability under the FELA in light of the Supreme Court's decision in *Rogers v Missouri Pacific R Co*, 352 US 500; 77 S Ct 443; 1 L Ed 2d 493 (1957). The following passage from *Rogers* has been the center of this debate:

The Missouri court's opinion implies its view that this is the governing standard by saying that the proofs must show that 'the injury would not have occurred but for the negligence' of his employer, and that '(t)he test of whether there is causal connection is that, absent the negligent act the injury would not have occurred.' That is language of proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury.

Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or in part' to its negligence. [*Id.* at 506-507; footnotes omitted.]

Plaintiff urges this Court to apply *Harbin v Burlington Northern R Co*, 921 F2d 129 (CA 7, 1990), which interpreted *Rogers* as applying a reduced standard of negligence and causation, while defendant argues that this Court should follow *Gautreaux v Scurlock Marine, Inc*, 107 F3d 331 (CA 5, 1997), which held that *Rogers* should be correctly interpreted as reducing the standard of proof as to causation only.

After reviewing relevant case law, it is apparent to us that *Gautreaux, supra*, correctly interpreted the United States Supreme Court's decision in *Rogers, supra*, as lowering the standard of proof required in regards to the causation element only. *Rogers* clearly states that a jury question arises when it can reasonably be concluded that the employer's *negligence caused* any part of the plaintiff's injury. *Id.* at 506. The Court did not address the elements of duty or breach of duty. This conclusion is also supported by other United States Supreme Court decisions issued subsequent to *Rogers*. See, e.g., *Gottshall, supra* at 543 (The Court noted that "we held in *Rogers, [supra,]* that a *relaxed standard of causation* applies under FELA." Emphasis added.); *Atchison, Topeka, & Sante Fe R Co v Buell*, 480 US 557, 562 n 8; 107 S Ct 1410; 94 L Ed 2d 563 (1987) ("Thus, for example, *with respect to causation*, we have held that 'the test of a jury case' under the [FELA] is 'simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'" Quoting *Rogers, supra* at 506; emphasis added.)

To establish a FELA claim, the plaintiff must present at least some evidence to support an inference of negligence on the employer's part. *Lisek v Norfolk & W R Co*, 30 F3d 823, 832 (CA 7, 1994). While what constitutes negligence under the FELA is a federal question, the act was founded in common-law, subject only to specific qualifications. *Gottshall, supra* at 543.

Those qualifications, discussed above, are the modification or abrogation of several common-law defenses to liability, including contributory negligence and assumption of risk. See 45 USC §§ 51, 53-55. Only to the extent of these explicit statutory alterations is FELA "an avowed departure from the rules of the common law." *Sinkler v Missouri Pacific R Co*, 356 US 326, 329; 78 S Ct 758; 2 L Ed 2d 799 (1958). Thus, although common-law principles are not necessarily dispositive of questions arising under FELA, unless they are expressly rejected in the text of the statute, they are entitled to great weight in our analysis. [*Id.* at 543-544.]

Therefore, to survive a motion for summary disposition, a plaintiff must first present sufficient evidence from which a reasonable jury could conclude that the employer was negligent, i.e., owed a duty and breached its duty, irrespective of causation.

Whether an employer is negligent is determined under the common-law "ordinary prudence" standard applicable to federal negligence actions. *Gautreaux, supra* at 335. Negligence is established where the evidence justifies a conclusion that the employer breached a duty to protect against foreseeable harms. *Hernandez v Trawler Miss Vertie Mae, Inc*, 187 F3d 432, 437 (CA 4, 1999). "[F]oreseeability of harm is an essential ingredient of Federal Employers' Liability Act negligence." *Gallick v Baltimore & O R Co*, 372 US 108, 117; 83 S Ct 659; 9 L Ed 2d 618 (1963). An employer's duty, and consequently any breach of that duty, is measured by what is reasonably foreseeable under the circumstances, i.e., in light of the facts that were known or should have been reasonably anticipated. *Id.* at 118.

Under the FELA, an employer has a general duty to provide its workers with a safe workplace. *McGinn v Burlington Northern R Co*, 102 F3d 295, 300 (CA 7, 1996). In this case, plaintiff asserts that defendant was negligent in failing to remove seats equipped with a locking mechanism installed in the cramped confines of certain cab cars, which plaintiff contends created an unreasonable risk of harm given the foreseeability of the engineers' need to exit the seat quickly in the case of an emergency. To establish this point, plaintiff presented the testimony of himself and a fellow engineer, Ronald Black, who both stated that the seat was unsafe as employed. Black also testified to numerous complaints that he had received or had become aware of by other engineers employed by defendant regarding their safety concerns about the locking cab car seat.³ Additionally, plaintiff provided an interoffice memo dated September 11, 1990, from Paul LaClair, plaintiff's supervisor, to Marshall Berryhill, an executive with defendant, which stated:

The following item has been brought to my attention as a safety concern of several of the Detroit and Chicago crew base engineers.

On the 9600 series cab cars, the engineers' seat has a locking devise to prevent the seat from swiveling. *This seat should be modified so that it always swivels and cannot be locked in position.*

The concern is should the situation arise that the engineer needs to vacate the cab in a hurry, he must first remember to unlock his seat, which delays his exiting the cab.⁴ [Emphasis added.]

Black was copied on this memo and testified that defendant did begin to replace locking seats with non-locking ones.

Defendant argues, and the trial court agreed, that despite this evidence, expert testimony was needed to establish that the seat was unsafe as designed. We disagree. Although the locking mechanism is a design feature, we do not believe that expert testimony is needed in order to survive a motion for summary disposition. While the seat design itself may have been safe, plaintiff's chief complaint with the seat design was that it was unsafe *as employed* by defendant given the foreseeability of the need to exit the seat quickly in the case of an emergency. Multiple users of the seat complained of the locking feature as being unsafe in this context, and one of defendant's own employees directed that these seats be replaced because of the specific safety concern plaintiff alleges was the cause of his injuries. We find this evidence to be sufficient in order to create a question of fact for the jury as to whether defendant was negligent. *Gallick, supra* at 118. Accordingly, we hold that the trial court erred in summarily dismissing plaintiff's FELA claim.

³ Beginning in 1994, Black was designated to handle concerns regarding defendant's cab cars in Detroit.

⁴ We note that there appears to be no hearsay concern regarding this memo as it would be admissible under MRE 801(d)(2), statement by a party-opponent, or possibly MRE 803(6), business records exception.

Next, we address the trial court's decision to grant defendant summary disposition in regards to plaintiff's LIA claim. There are two ways a rail carrier can violate the LIA: (1) by failing to comply with the regulations issued by the Federal Railroad Administration (FRA), or (2) by failing to keep all parts and appurtenances of its locomotives in proper condition and safe to operate without unnecessary peril to life or limb. *McGinn, supra* at 299.

Here, plaintiff alleges that the cab car seat was unsafe because it locked in the forward position. The LIA regulation which addresses cab car seats states in pertinent part, "Cab seats shall be securely mounted and braced." 49 CFR 229.119(a). This safety regulation only requires that the seat be securely attached and supported. *Sandstrom v Chicago & North Western Transportation Co*, 907 F2d 839, 840 (CA 8, 1990). Plaintiff presented no evidence that defendant violated this regulation and does not appear to contest this fact on appeal.⁵

Rather, plaintiff focuses on the second manner in which the LIA may be violated. The LIA also provides in part that a rail carrier may allow a locomotive to be used so long as its parts and appurtenances "are in proper condition and safe to operate without unnecessary danger of personal injury." 49 USC 20701(1). The act provides that rail carriers have an absolute duty to maintain the parts and appurtenances of their locomotives in a safe and proper condition. *McGinn, supra* at 299, citing *Lilly v Grand Trunk Western R Co*, 317 US 481, 485; 63 S Ct 347; 87 L Ed 411 (1943). "Thus, even if a carrier complies with the regulations, it may still violate the [LIA] if the parts or appurtenances of its locomotives are otherwise unsafe." *Mosco, supra* at 1091. The "parts and appurtenances" the LIA refers to are only those which constitute an "integral or essential part of a completed locomotive." It is clear that the cab car seat is an essential part of a completed locomotive.⁶ *Heiselmoyer v Pennsylvania R Co*, 243 F2d 773, 776 (CA 3, 1957).

As with his FELA claim, plaintiff asserts that the cab car seat is unsafe because it could prevent a timely exit if it locked in the forward position. Therefore, plaintiff argues that the seat is not "safe to operate without unnecessary danger of personal injury." 49 USC 20701(1). The prime purpose of the LIA is to protect railroad employees and others by requiring the use of safe equipment. *Lilly, supra* at 486. As discussed in conjunction with his FELA claim, plaintiff's cause of action involves the particular space in which this particular seat was employed. There has been no argument that the seat was unsafe to operate in its then-existing condition, nor that the seat interfered with the safe operation of the locomotive in general. We believe that, given the purpose of the LIA and the strict liability it imposes for a violation, the LIA was not intended to address plaintiff's safety concern in this case.⁷ Because plaintiff's complaint does not allege

⁵ Because the LIA regulation does not require any other features, it does not prevent plaintiff from sustaining a claim under the FELA. *Weaver, supra* at 430.

⁶ Because this case involves an integral piece of equipment which was already equipped with an additional device, namely the locking mechanism, it is distinguishable from those cases cited by defendant involving claims of railroad liability for failing to install additional safety devices. See *King, supra* at 1489-1490.

⁷ Our review of pertinent case law supports our conclusion. See *Lilly, supra* at 486-488; *King v Southern Pacific Transportation Co*, 855 F2d 1485, 1489 n 3 (CA 10, 1988) (compilation of
(continued...))

that the seat or the locking mechanism was not working properly or that some other factor prohibited it from working properly, plaintiff presented no evidence to establish that the seat was defective or unsafe in and of itself and even admitted that the seat was working properly on the day of the accident, we find that the trial court properly granted summary disposition in favor of defendant regarding plaintiff's LIA claim.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Janet T. Neff

/s/ Michael R. Smolenski

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cases).