STATE OF MICHIGAN

COURT OF APPEALS

KEITH A. HUBBARD,

Plaintiff-Appellant,

v

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

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 AUTO 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UNPUBLISHED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.

ZAHRA, J. (*concurring in part and dissenting in part*).

I concur with the majority's conclusion that the trial court properly granted summary disposition in favor of defendant regarding plaintiff's Locomotive Inspection Act (LIA), 49 USC 20701 *et seq.*, claim. However, I respectfully dissent from the majority's conclusion that the trial court erred in summarily dismissing plaintiff's claim under the Federal Employers' Liability Act (FELA), 45 USC 51 *et seq.* "[A] FELA plaintiff is not impervious to summary judgment. If the plaintiff presents no evidence whatsoever to support the inference of negligence, the railroad's summary judgment motion is properly granted." *Lisek v Norfolk & Western R Co*, 30 F3d 823, 832 (CA 7, 1994). Here, the substance of plaintiff's claim is that defendant was negligent for allowing the train to be equipped with an engineer's seat that locked into position, thereby preventing him from quickly exiting the cab area in the case of an impending collision. Plaintiff's theory of liability is properly characterized as a claim involving an alleged design defect of the cab seat. Because such a theory presents technical issues that are beyond the common experience and understanding of the average juror, expert testimony is necessary to

establish a defect. See *In re Amtrak "Sunset Limited" Train Crash in Bayou Canot, Alabama, on September 22, 1993*, 188 F Supp 2d 1341, 1349 (SD Ala, 1999); *Thirkill v J B Hunt Transport, Inc*, 950 F Supp 1105, 1107 (ND Ala, 1996); *Rice v Cincinnati, New Orleans & Pacific R Co*, 920 F Supp 732, 736-738 (ED Ky, 1996); see also MRE 702. Plaintiff did not offer a qualified expert witness, but rather relied on his own testimony and that of other employees of defendant. Neither plaintiff nor his former coworkers were qualified to testify as design experts, so their testimony was insufficient to show a design defect. The cases on which plaintiff relies to support his position that he was not required to support his claim with qualified expert testimony, *Taylor v Illinois Central R Co*, 8 F3d 584 (CA 7, 1993), and *Sehlin v Chicago, Milwaukee, St Paul & Pacific R Co*, 686 P2d 492 (Wash App, 1984), are factually distinguishable. Given the lack of expert testimony to support plaintiff's theory of liability under the FELA, I conclude that the trial court properly granted defendant's motion for summary disposition of this claim.

/s/ Brian K. Zahra