

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2011-CA-000773-MR

JIMMIE R. POLLARD

APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT  
HONORABLE WILLIAM ENGLE, III, JUDGE  
ACTION NO. 04-CI-00652

CSX TRANSPORTATION, INC.

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, MAZE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Jimmie R. Pollard brings this appeal from a March 29, 2011, judgment of the Perry Circuit Court upon a jury verdict in favor of CSX Transportation, Inc., and dismissing Pollard's complaint. We affirm.

Pollard instituted the underlying action against CSX under the Federal Employers' Liability Act (FELA), codified in 45 U.S.C. §§ 51-60, and under the

Locomotive Inspection Act (LIA), codified in 49 U.S.C. §§ 20701-20703.<sup>1</sup> Pollard was employed by CSX as a locomotive engineer. While so employed, Pollard claimed that excessive vibration due to insecure cab seats in the locomotive and placement of controls on the locomotive caused or contributed to development of osteoarthritis in his lower back and left shoulder. In particular, Pollard asserted that CSX was negligent in the construction or maintenance of locomotive cab seats and in the placement of certain controls in the locomotive. Pollard also maintained that the cab seats in the locomotive violated the LIA (49 CFR 229.119(a))<sup>2</sup> as the seats were not securely mounted or braced and that such violation amounted to negligence per se. CSX denied all of Pollard's claims and argued that Pollard's osteoarthritis was not caused by any work-related activity.

The case was tried by a jury. During the jury trial, Pollard filed motions for directed verdict on the premise that the locomotive cab seats violated the LIA (49 CFR 229.119(a)) and that Pollard was not comparatively negligent under the FELA or the LIA. The circuit court denied both motions. CSX's motions for directed verdict were also denied. Ultimately, the jury unanimously found in favor of CSX, and judgment was rendered dismissing Pollard's complaint in its entirety. This appeal follows.

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<sup>1</sup> Under the Federal Employers' Liability Act (FELA), state courts share concurrent jurisdiction with federal courts over claims filed thereunder.

<sup>2</sup> 49 CFR 229.119(a) is a regulation adopted pursuant to the authority of the Locomotive Inspection Act (LIA).

Pollard contends that the circuit court erred by denying his motion for directed verdict of liability under the LIA. Specifically, Pollard maintains that he presented evidence proving that the locomotive cab seats he utilized at CSX “were loose, rocked back and forth, wobbled and tilted to one side.” Pollard’s Brief at 16. In such condition, Pollard argues that the cab seats violated 49 CFR § 229.119(a). 49 CFR § 229.119(a) requires locomotive cab seats to be “securely mounted and braced.” Pollard asserts that the undisputed evidence demonstrated that CSX locomotive cab seats were not securely mounted and braced, thus violating 49 CFR § 229.119(a). Consequently, Pollard believes that CSX’s violation of 49 CFR § 229.119(a) resulted in negligence per se under the LIA; hence, he was entitled to a directed verdict. According to Pollard, the jury only should have been instructed on causation under the LIA. We disagree.

To establish a violation of the LIA, the plaintiff may demonstrate either:

(1) that the railroad employer breached its “broad duty to keep all parts and appurtenances of its locomotives in proper condition and safe to operate without unnecessary peril to life or limb,” or (2) that the railroad employer has failed to comply with regulations issued by the FRA.

*CSX Transp., Inc. v. Miller*, 46 So.3d 434, 461-462 (Ala. 2010). Causation is shown if the violation of the LIA “played any part, even the slightest” in the injury. *Booth v. CSX Transp., Inc.*, 211 S.W.3d 81, 84 (Ky. App. 2006); *Miller*, 46 So. 3d 434. And, a claim for violation of the LIA must be brought under the FELA, as the

LIA does not provide “a right to sue.” *Coffey v. Northeast Illinois Reg’l Commuter R.R. Corp.*, 479 F.3d 472, 477 (7th Cir. 2007).

Under the FELA, a directed verdict is proper only in the rarest of instances. 2 *Comparative Negligence Manual* § 17:7 (3d ed. 2012).<sup>3</sup> Congress has imbued the jury with the primary role of deciding “whether the railroad was negligent” in an action under the FELA. 30 C.J.S. *Employers’ Liability* § 413 (2012). Consequently, “little evidence” is required to create a jury issue. *Id.* A directed verdict is proper only where “without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict.” *Cullinan v. Burlington N., Inc.*, 522 F.2d 1034, 1036 (9th Cir. 1975)(citation omitted). And, the evidence and any inferences must be viewed in a light most favorable to the nonmoving party. *Cullinan*, 522 F.2d 1034. Accordingly, we find no error in the denial of Pollard’s motion for directed verdict.

CSX argues that sufficient evidence existed from which jurors could have reasonably found the cab seats not violative of 49 CFR § 229.119(a) and specially argues:

Pollard’s LIA claim required proof that [CSX] violated the FRA safety regulation requiring “[c]ab seats” to be “securely mounted and braced.” 49 CFR § 229.119(a). The regulation is a *safety* regulation. It does not require that seats be comfortable or that they be immobile. It

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<sup>3</sup> A state court is required to apply federal law in all substantive matters under the FELA and to apply state law in procedural matters. The standard for a directed verdict is viewed as a substantive issue, thus requiring application of federal law. *Rice v. BNSF Ry., Co.*, 346 S.W.3d 360 (Mo. 2011); *Booth v. CSX Transp., Inc.*, 211 S.W.3d 81 (Ky. App. 2006); *see also* 6 *Litigating Tort Cases* § 71:10 (2011).

requires the seats to be “securely mounted and braced” so that the locomotive is safe to operate.

The evidence at trial would not have compelled a jury to conclude that the locomotives that Pollard operated had unsafe seats. Pollard, who was required to refuse any locomotive that violated the safety standard on cab seats, never refused a locomotive because of the condition of its seats. Although the minutes of the safety overlap committee reflected an abundance of complaints, from the trivial to the serious, nobody objected to the seats. And the testimony from Mitchell, the ergonomist, which showed that the level of seat vibration was substantially less than the levels at which there might be health effects, established that the seats were sufficiently “mounted and braced” for safety. In the face of this evidentiary record, the jury was permitted to conclude – as it did – that the seats did not violate federal safety regulations.

Pollard’s argument rests entirely on testimony that seats would sometimes tilt or wobble. But the jury was not required to accept that anecdotal evidence, which was not supported by a single photograph or formal complaint. And even if the jury did accept that testimony, it was not required to conclude that tilts or wobbles were sufficient to constitute a violation of the LIA, which protects against parts and appurtenances to locomotives that are not “safe to operate without unnecessary danger of personal injury.” 49 U.S.C. § 20701(1).

CSX’s Brief at 9-10 (citations omitted).

We agree with CSX. Considering the evidence in a light most favorable to CSX and all reasonable inferences therefrom, we believe that the jury could have reasonably concluded that the CSX cab seats were not violative of 49 CFR § 229.119(a). The trial court properly submitted the matter to the jury and the jury instructions correctly framed the issue.

Pollard also argues that the circuit court erred by failing to direct a verdict that Pollard was not comparatively negligent under the FELA. As the jury unanimously found CSX not liable under the FELA or the LIA, the issue regarding Pollard's negligence is moot. Any negligence on the part of Pollard would only be relevant if the jury found CSX negligent. Given the jury did not reach this issue nor was it necessary upon rendering a unanimous verdict for CSX, there exists no trial error for this Court to review.

For the foregoing reasons, the judgment upon a jury verdict of the Perry Circuit Court in favor of CSX is affirmed.

ALL CONCUR.

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