

NOTICE
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2016 IL App (5th) 140555-U

NO. 5-14-0555

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE ESTATE OF JAMES WEBB, JR., by Misty Webb, Special Administrator of the Estate of James Webb, Jr.,)	Appeal from the
)	Circuit Court of
)	Madison County.
Plaintiff,)	
)	
v.)	No. 08-L-1139
)	
UNION PACIFIC RAILROAD COMPANY and GUY WEBB,)	
)	
Defendants)	
)	
(Guy Webb, Defendant and Counterplaintiff-Appellant; Union Pacific Railroad Company, Defendant and Counterdefendant-Appellee).)	Honorable
)	A. A. Matoesian,
)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justice Welch concurred in the judgment.
Justice Goldenhersh dissented.

ORDER

¶ 1 *Held:* The circuit court did not err in allowing admission of evidence that standards and regulations for railroads at crossings, which were admitted into evidence by the plaintiff, did not apply to private crossings. The circuit court did not err in allowing the plaintiff's experts to testify that it was their opinion that the plaintiff's failure to stop at the stop sign at the crossing was the cause of the accident. The jury verdict finding 100% fault on the part of the plaintiff in causing the accident was not against the manifest weight of the evidence.

¶ 2 This appeal follows from the second trial in this matter. Following the first trial, this court reversed and remanded for a new trial. See *Estate of Webb v. Union Pacific R.R. Co.*, 2012 IL App (5th) 100607-U. Following the second trial, the circuit court entered judgment on a jury verdict on July 21, 2014, finding in favor of the counterdefendant, Union Pacific Railroad Company (Railroad), on the counterplaintiff's (plaintiff) cross-claim for personal injuries, based on its finding that the plaintiff was 100% at fault in causing those injuries. The plaintiff now appeals from the October 9, 2014, order of the circuit court of Madison County which denied his posttrial motion for a judgment notwithstanding the verdict (judgment *n.o.v.*), or in the alternative, motion for a new trial. On appeal, the plaintiff argues that the circuit court erred in denying his posttrial motion based on certain evidentiary rulings that he claims were prejudicial and an abuse of discretion. In addition, the plaintiff argues that the verdict is against the manifest weight of the evidence. For the following reasons, we affirm.

¶ 3

FACTS

¶ 4 This case originated as an action filed by the Estate of James Webb, Jr. (Estate), pursuant to the Missouri Wrongful Death Statute (Mo. Rev. Stat. § 537.080) in the circuit court of Madison County against the Railroad and the plaintiff. The case arose from a train-vehicle collision at a private railroad crossing in Iron County, Missouri. James Webb, deceased, was a passenger in a pickup truck that the plaintiff was driving. The Railroad filed a counterclaim for contribution against the plaintiff. The plaintiff then filed a counterclaim against the Railroad for contribution and a cross-claim alleging negligence on the part of the Railroad in causing his own personal injuries, which he

sustained in the crash. The Estate reached a good-faith settlement on its direct claims against the plaintiff for the limits of his automobile liability policy, and the Railroad's contribution claim against the plaintiff was also dismissed as a result of that settlement.

¶ 5 The circuit court later approved a settlement between the Estate and the Railroad, leaving only the plaintiff's cross-claim against the Railroad. The trial that is the subject of the present appeal commenced on July 16, 2014. The plaintiff's theory of the case is that the Railroad was negligent in one or more of the following ways: (1) failure to maintain a proper sight distance at the crossing; (2) failure to sound an adequate warning by blowing its whistle prior to reaching the crossing; and (3) failure to adequately maintain the road surface at the crossing. The circuit court granted the plaintiff's motions *in limine* to prevent the Railroad from arguing that federal or state statutes or regulations prohibited it from cutting back vegetation or blowing its horn at the crossing at issue. Evidence introduced during this trial, which is pertinent to the issues on appeal, is summarized as follows.

¶ 6 As this trial commenced, the plaintiff, in his opening statements, made it clear to the jury that the evidence would show that while federal law and current industry standards were only applicable to public crossings, the Railroad's omissions in this case would show that the Railroad adheres to standards of safety only where the government is there to force it to do so. The Railroad, in its opening statement, presented its theory of the case, which was that the sole cause of the accident was the plaintiff's failure to stop at the stop sign immediately preceding the railroad tracks. In addition, the Railroad argued that the plaintiff stopped on the tracks and then attempted to accelerate across the tracks,

instead of backing up.

¶ 7 The plaintiff promptly introduced requests to admit to the jury wherein the Railroad admitted that there were no federal or state statutes or regulations that prohibited it from cutting back the vegetation and blowing its whistle at the crossing at issue. The plaintiff then presented the testimony of Dr. Kenneth Heathington, a civil engineer with a specialty in highway and safety engineering, who testified to omissions on the part of the Railroad which, in his opinion, contributed to cause the crash. Dr. Heathington testified that the Railroad's failure to cut back vegetation at this crossing caused reduced sight distances and that the Railroad's failure to require engineers to blow the whistle when approaching this crossing was a direct cause of the crash. Dr. Heathington testified that the Railroad violated industry standards in this regard. On cross-examination, Dr. Heathington admitted that the standards he was referencing do not apply to private railroad crossings. He also admitted that the accident would not have occurred if the plaintiff would have backed up after stopping on the tracks.

¶ 8 The plaintiff presented the testimony of Charles Culver, a railroad operations consultant and certified engineer, who testified that he reviewed the locomotive event recorder data and on-board video from the train immediately prior to the accident. Mr. Culver testified that the Railroad violated industry standards by failing to sound the horn at this crossing, which he characterized as a "blind crossing" due to the immediately preceding curve in the track. He testified that this omission was a violation of the Railroad's "General Code of Operating Rules No. 1.1.1" which requires the engineer to "always take the safe course." Mr. Culver testified that the Railroad previously required

the engineer to sound the horn at private crossings when the view was obstructed or when there were vehicles present at that crossing, but this rule had expired shortly before the accident and was no longer in effect. Mr. Culver testified it would cost very little for the Railroad to install a whistle post immediately preceding a crossing, which would remind the engineer to sound the horn.

¶ 9 On cross-examination, Mr. Culver testified that the standards in the industry had changed regarding sounding the horn at certain crossings due to noise pollution complaints. He testified that there are no statutory or regulatory obligations applicable to private crossings. He also testified that, from his review of the on-board video footage, the plaintiff stopped with his front wheels on the track, started to back up, and then tried to accelerate forward. He stated that the train did not have time to stop, and the truck may have been too noisy to hear the horn. On redirect, Mr. Culver testified there was no law or regulation prohibiting the train from blowing its horn prior to approaching the crossing at issue.

¶ 10 The plaintiff presented Dale Bray, the former director of public safety for the Railroad, as an adverse witness. Mr. Bray testified that the Railroad owned the crossing at issue and the crossing was not in the Railroad's vegetation program, meaning that the Railroad did not trim the vegetation at the crossing. Mr. Bray testified that the Railroad had former rules regarding cutting back vegetation at all crossings and blowing the horn at private crossings in certain situations but that these rules were not in effect at the time of the accident.

¶ 11 Gary Rolfes, manager of training and attendance for the Railroad, also testified as

an adverse witness. Mr. Rolfes testified that the Railroad's safety rules neither mandate nor prohibit sounding the horn prior to approaching a private crossing. He testified that the engineer did not violate any of the Railroad's rules and that the engineer sounded the whistle upon viewing activity at the crossing and placed the train in emergency status. He testified that if the plaintiff had stopped at the stop sign and looked, he would have seen the train.

¶ 12 Gary Thompson, director of track maintenance for the Railroad, testified that he inspected the track at the crossing at issue the day before the accident. He testified that signage at the crossing included a private crossing sign, a stop sign, and a blue sign containing a phone number people could call for complaints about the crossing. Previous testimony indicated that there had never been an accident or complaint about this crossing. The plaintiff testified he has no memory of the accident, although he remembers stopping at the stop sign immediately preceding the crossing in the past.

¶ 13 Joseph Blaschke, a transportation engineering consultant and accident reconstructionist, testified on behalf of the Railroad. Mr. Blaschke testified that existing statutes, regulations, and industry standards do not address safety at private crossings. He testified that the vegetation at the crossing at issue did not obstruct the view of the train from the stop sign at the crossing. He testified from his review of the on-board camera that the plaintiff stopped on the tracks approximately six seconds before impact and if the plaintiff had stopped at the stop sign, he would have seen the train and avoided the impact. On cross-examination, Mr. Blaschke admitted that there was nothing prohibiting the Railroad from using the statutes, regulations, and industry standards when addressing

safety at private crossings. He also attested that the Railroad did have a prior rule that would have required the vegetation to be cut back at the crossing at issue, and that he had no knowledge as to whether the plaintiff stopped prior to the stop sign.

¶ 14 Brian Heikkila, a railroad consultant, also testified on behalf of the Railroad. He testified that the engineer for the Railroad did not breach the standard of care. Over the plaintiff's objection, Mr. Heikkila testified that if the plaintiff had stopped at the stop sign, he would have had enough reaction time to see the train and remain in that position. On cross-examination, Mr. Heikkila admitted that he was not an accident reconstructionist or a human factors expert.

¶ 15 Bill Spieker, the engineer who was operating the train that collided with the plaintiff's vehicle, testified as to his training and experience as an engineer. He testified that he had operated the route that the train took on the day of the accident hundreds of times before and was familiar with all of the crossings. He testified that prior to the accident, he had never encountered a vehicle at that crossing. He testified that there was no way he could have avoided the collision and that he was in full compliance with all applicable rules and regulations.

¶ 16 After hearing all of the evidence, the jury was given instructions as to the definition of "negligence," "ordinary care," and the process to follow in reaching a verdict. The circuit court defined "negligence" for the jury as "a failure to exercise ordinary care," and "ordinary care" as "that degree of care that an ordinarily careful person would use under the same or similar circumstances." The circuit court then explained to the jury that it was required to assess a percentage of fault to the Railroad,

whether or not the plaintiff was partly at fault, if the jury believed: (1) the Railroad either failed to properly maintain the crossing, failed to maintain a proper sight distance at the crossing, or failed to sound an adequate warning before reaching the crossing; (2) the Railroad was thereby negligent; and (3) such negligence caused or directly contributed to cause damage to the plaintiff. In addition, the circuit court instructed the jury that it was required to assess a percentage of fault to the plaintiff, whether or not the Railroad was partly at fault, if the jury believed: (1) the plaintiff either failed to keep a careful lookout, failed to stop at the stop sign or failed to stop, look, and listen for the approaching train, or stopped on the tracks; (2) the plaintiff was thereby negligent; and (3) such negligence directly caused or contributed to cause any damage to the plaintiff.

¶ 17 Following a period of deliberation, the jury reached a verdict in which it found that the Railroad was 0% at fault for the accident and the plaintiff was 100% at fault. Based upon this verdict, the circuit court entered judgment in favor of the Railroad on July 21, 2014. On August 15, 2014, the plaintiff filed a motion for a judgment *n.o.v.* or, in the alternative, a new trial. On October 10, 2014, the circuit court denied the plaintiff's posttrial motion, and on November 7, 2014, the plaintiff filed a timely notice of appeal.

¶ 18 ANALYSIS

¶ 19 We begin our analysis with an outline of the applicable standards of review. Although the plaintiff's posttrial motion requested a judgment *n.o.v.* or, in the alternative, a new trial, the plaintiff's appeal addresses the circuit court's denial of his motion for a new trial. "A court's ruling on a motion for a new trial will not be reversed except in those instances where it is affirmatively shown that it clearly abused its discretion."

Maple v. Gustafson, 151 Ill. 2d 445, 455 (1992). "In determining whether the [circuit] court abused its discretion, the reviewing court should consider whether the jury's verdict was supported by the evidence and whether the losing party was denied a fair trial." *Id.* "Furthermore, it is important to keep in mind that '[t]he presiding judge in passing upon the motion for new trial has the benefit of his previous observation of the appearance of the witnesses, their manner of testifying, and of the circumstances aiding in the determination of credibility.'" *Id.* at 456 (quoting *Buer v. Hamilton*, 48 Ill. App. 2d 171, 173-74 (1964)). With these standards in mind, we turn to the plaintiff's contentions on appeal.

¶ 20 The plaintiff first argues that the circuit court erred in allowing the Railroad to admit evidence and argue that it had no duty at the crossing. We disagree with the plaintiff's characterization of this issue. Duty was not a factual issue that the jury was asked to determine. Whether a duty exists in a particular case is a question of law for the court to decide. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 430 (2006). The circuit court instructed the jury that negligence was the failure to exercise that level of care that an ordinarily careful person would use under the same or similar circumstances and asked the jury to determine whether the Railroad was negligent. Implicit in that instruction is the finding that the Railroad owed the plaintiff a duty of ordinary care. The issue that was left for the jury to decide is whether the alleged acts or omissions on the part of the Railroad amounted to a breach of the duty of ordinary care and if so, whether these acts or omissions caused the plaintiff's injuries. See *id.* (whether a defendant breached the duty and whether the breach was the proximate cause of the plaintiff's injuries are factual

matters for the jury to decide (citing *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 114 (1995))).

¶ 21 In the first appeal of this matter, after a previous jury trial, this court held that the Railroad was entitled to cross-examine witnesses and put on evidence to establish that the statutes, rules, and regulations are intended to address safety concerns at public crossings and that they are not binding at private crossings. See *Estate of Webb v. Union Pacific R.R. Co.*, 2012 IL App (5th) 100607-U. We are required to adhere to this holding, as it is the law of the case. See *Radwill v. Manor Care of Westmont, IL, LLC*, 2013 IL App (2d) 120957, ¶ 8 (quoting *Long v. Elborno*, 397 Ill. App. 3d 982, 989 (2010)). After reviewing the entire record, we conclude that the Railroad's manner of examining the witnesses did not violate this court's previous ruling and did not amount to prejudicial error. From the record, we believe it was made clear to the jury that all of the statutes, regulations, and standards introduced or referred to at trial simply did not apply to private crossings. The jury was told repeatedly through examination of witnesses, opening statements, and closing argument, that the laws neither required nor prohibited the Railroad from cutting back the vegetation at the crossing or sounding the train whistle at a particular time.

¶ 22 To the extent that the plaintiff argues that there was no instruction explaining that the absence of applicable laws does not negate the common law duty, we note that the plaintiff did not tender such an instruction. See *Auton v. Logan Landfill, Inc.*, 105 Ill. 2d 537, 549 (1984) ("A plaintiff cannot take the position on appeal that a case should have been presented to the jury with different instructions than those which were given unless

at trial he tendered instructions which set forth the statement of the law he contends, on appeal, would have been the proper one."). The jury was instructed that if it found that the alleged omissions on the part of the Railroad amounted to a breach of the standard of ordinary care and proximately caused the plaintiff's injuries, it should assign a percentage of fault to the Railroad. The evidence before the jury concerning applicable statutes, regulations, and standards was in conformity with this court's previous order and we find no basis to order a new trial.

¶ 23 The second issue raised on appeal is whether the circuit court erred in allowing the Railroad's expert witnesses to offer their opinions that the plaintiff was at fault for the accident because he failed to stop at the stop sign and had he stopped, he would have avoided the train. According to the plaintiff, this testimony amounted to improper accident reconstruction testimony because the experts were not qualified as experts in accident reconstruction. Furthermore, the plaintiff argues, the testimony was improper because the on-board video allowed the jury to act as eyewitnesses and the testimony did not assist the jury with any aspect of the accident that it could not itself assess. We find that the testimony of these experts does not afford a basis for ordering a new trial.

¶ 24 "The admission of evidence rests within the sound discretion of the circuit court and will not be reversed absent clear abuse." *Wade v. City of Chicago Heights*, 295 Ill. App. 3d 873, 883 (1998). "Reconstruction testimony attempts to recreate an accident." *Id.* The expert testimony complained of by the plaintiff did not attempt to recreate the accident at issue in giving their opinions on causation. See *id.* Rather, the testimony at issue focused on time and distance calculations to form an opinion as to whether the

plaintiff could have avoided the collision had he stopped at the stop sign. We find that the circuit court did not abuse its discretion in determining that these experts, a traffic engineering consultant and a railroad consultant, were qualified to give these opinions. We also note that the plaintiff, on cross-examination, elicited from these experts any potential weaknesses as to their qualifications.

¶ 25 We also find no fault in allowing the plaintiff's experts to testify as to causation despite the availability of the on-board video showing the collision. We do not agree with the plaintiff that this video should be treated as "eyewitness testimony" or that the complained-of expert testimony invaded the province of the jury on an ultimate issue. Even if the video was considered "eyewitness testimony," and the experts' opinions were considered as "reconstruction testimony," such testimony may be used in conjunction with one another if the expert testimony relies upon knowledge and application of principles of science beyond the ken of the average juror. *Palmer v. Craig*, 246 Ill. App. 3d 323, 327 (1993) (citing *Peterson v. Lou Bachrodt Chevrolet Co.*, 76 Ill. 2d 353, 359 (1979); *McGrath v. Rohde*, 53 Ill. 2d 56, 61 (1972)). In addition, "[t]here no longer exists an absolute prohibition against the admission of expert opinion testimony on an ultimate fact or issue" because "[s]uch testimony does not intrude on the jury's role as factfinder [as] the jury is not required to accept the expert's conclusion." *Wade*, 295 Ill. App. 3d at 882. For these reasons, we decline to disturb the jury's verdict on the basis of these experts' opinions as to the plaintiff's failure to stop at the stop sign.

¶ 26 Finally, we address the plaintiff's argument that he is entitled to a new trial because the jury's verdict was against the manifest weight of the evidence. "A verdict is

against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary and not based upon any of the evidence.' " *Maple*, 151 Ill. 2d at 454 (quoting *Villa v. Crown Cork & Seal Co.*, 202 Ill. App. 3d 1082, 1089 (1990)). Here, we find ample evidence to support the jury's determination that the plaintiff was 100% at fault for this collision. The on-board video clearly shows the plaintiff's vehicle pass the stop sign without stopping and stop on the railroad tracks. A reasonable jury could certainly find that no matter what the Railroad did or did not do with regard to the vegetation at the site or sounding the train's horn, this collision would not have been avoided in this scenario. For this reason, we cannot say an opposite conclusion than that reached by the jury is clearly evident. The circuit court did not err in denying the plaintiff's motion for a new trial.

¶ 27

CONCLUSION

¶ 28 For the foregoing reasons, the judgment of the circuit court of Madison County is affirmed.

¶ 29 Affirmed.

¶ 30 JUSTICE GOLDENHERSH, dissenting.

¶ 31 I respectfully dissent from the majority opinion, and would reverse the trial court's judgment. Specifically, I disagree with the majority's conclusion that the trial court did not err in permitting the Railroad to admit evidence and allow argument that it owed no duty to take certain safety precautions at the crossing. After careful review, I conclude

the trial court abused its discretion in permitting the introduction of such evidence and argument.

¶ 32 The admission of evidence is an issue within the sound discretion of the trial court, and will not be disturbed by a reviewing court absent an abuse of discretion. *Wisniewski v. Diocese of Belleville*, 406 Ill. App. 3d 1119, 1179 (2011). Furthermore, an error in evidentiary rulings does not warrant a reversal unless the error was substantially prejudicial and affected the outcome of the trial. *Wisniewski*, 406 Ill. App. 3d at 1179.

¶ 33 Here, the majority indicates that an issue left for the jury to consider was whether the alleged acts or omissions of the Railroad amounted to a breach of the duty of ordinary care, and if so, whether these acts or omissions caused the plaintiff's injuries. However, after a review of the record, I find the Railroad elicited testimony which recited its legal conclusion that it owed no legal obligation to take certain safety precautionary measures at the crossing. It is well settled that an expert's testimony is inadmissible if it merely recites a legal conclusion. *Compton v. Ubilluz*, 353 Ill. App. 3d 863, 866 (2004).

¶ 34 At trial, the Railroad presented argument and elicited testimony that its conduct complied with Missouri law. Over the plaintiff's objection, the Railroad elicited testimony that it owed no duty under Missouri law to blow a whistle at the private crossing in question. Because the issue of whether the Railroad owed a duty at the crossing was a factual question for the jury to consider under Missouri law and the Railroad's position was contrary to the case, I find the Railroad's recitation of its legal conclusion that it owed no duty was substantially prejudicial to the plaintiff. In my opinion, the trial court abused its discretion in permitting such evidence and argument.

¶ 35 The majority ignores the instructions given from this court in the first appeal regarding this matter, which violates the law-of-the-case doctrine. The law-of-the-case doctrine protects the parties' settled expectations, ensures uniformity of decisions, preserves consistency throughout the course of a single case, effectuates proper administration of justice, and brings litigation to an end. *Radwill v. Manor Care of Westmont, IL, LLC*, 2013 IL App (2d) 120957, ¶ 8. Accordingly, this doctrine bars relitigation of an issue previously decided in the same case.

¶ 36 In the first appeal of this case, this court indicated that the case was tried under a theory of common law negligence employed by Missouri law. This court further indicated that Missouri courts have held that a railroad has a common law duty to use reasonable care to avoid injury at public and private crossing by warnings or otherwise, and that "[u]ltimately, the finder of fact is charged with deciding whether the Railroad met its common law duty of care under the circumstances of the case." *Estate of Webb v. Union Pacific R.R. Co.*, 2012 IL App (5th) 100607, ¶ 8, ¶ 18.

¶ 37 Notwithstanding this court's prior ruling in this case regarding Missouri common law negligence, the trial court permitted the Railroad to introduce evidence and argument that it owed no duty at the crossing in question. In my opinion, the trial court abused its discretion in allowing the Railroad to present this evidence and argument, as it was in violation of the law-of-the-case doctrine. For these reasons, I would reverse the trial court's judgment.