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2012 IL App (5th) 100607-U  
NO. 5-10-0607  
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).

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

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PRESIDING JUSTICE DONOVAN delivered the judgment of the court.  
Justices Welch and Wexstten concurred in the judgment.

**ORDER**

¶ 1 *Held:* In a case arising from a railroad crossing accident, the trial court abused its discretion when it permitted the plaintiffs' expert to refer to and to rely upon certain industry safety standards, regulations, and statutes to support their opinions on the Railroad's standard of care, but prohibited

the defendant railroad from presenting evidence and argument to show that the standards, regulations, and statutes were intended to address safety issues at public railroad crossings and were not binding at private crossings. We reverse and remand for a new trial.

¶ 2 The estate of James Webb, Jr. (Estate), filed an action pursuant to the Missouri Wrongful Death Statute (Mo. Rev. Stat. § 537.080) in the circuit court of Madison County, Illinois, against the defendant, Union Pacific Railroad Company (Railroad), and the defendant-counterplaintiff, Guy Webb. The case arose from a train-vehicle collision at a railroad crossing in Iron County, Missouri. James Webb was a passenger in a pickup truck that his brother, Guy Webb, was driving. The Railroad filed a contribution claim against Guy Webb. Guy Webb returned volley with cross/counterclaims against the Railroad for contribution and negligence. The Estate reached a good-faith settlement with Guy Webb for the limits of his auto liability policy, and the Railroad's contribution claim was dismissed. The plaintiffs' actions proceeded to trial on theories that the Railroad was negligent in one or more of the following ways: it failed to maintain a proper site distance at its crossing; it failed to sound an adequate warning by blowing its whistle prior to reaching the crossing; or it failed to adequately maintain the road surface at the crossing. Following the trial, the jury returned verdicts in favor of the Estate and Guy Webb and against the Railroad. The jury awarded \$30,000 in damages to the Estate and \$2.5 million to Guy Webb. The jury determined that Guy Webb was 50% at fault for failure to keep a proper lookout, and the trial court cut Guy Webb's award to \$1.25 million.

¶ 3 On appeal, the Railroad contends that the trial court made several errors in its evidentiary rulings and its instructions to the jury, and that it was unfairly prejudiced and deprived of a fair trial as a result of the cumulative effect of the errors. The Railroad claims that it is entitled to judgments notwithstanding the verdict, or alternatively a new trial on liability.

¶ 4 The basic facts of the accident are not in dispute. On the morning of August 23, 2007, James Webb, Jr., was a passenger in a 1994 Dodge Ram pickup truck that was being driven by his brother, Guy Webb. The men were traveling westbound on an unmarked private road north of Route AA in a rural area of Iron County, Missouri. The private road crossed over a set of railroad tracks. The Railroad owns the tracks and operates trains over them. The Railroad had posted stop signs and "private crossing" signs on both sides of the crossing. The crossing was not equipped with flashing lights or gates. A southbound train that was owned and operated by the Railroad collided with the pickup truck at the crossing. A Track Image Recorder was mounted on the engine of the train and its camera captured and recorded the accident. The video shows that the pickup truck first came into the camera's view as it approached the front rail of the tracks at the crossing. Initially, the pickup truck stopped at the tracks. Its front tires were on the first rail. Then the pickup appeared to roll backward, just off the rail, and then it moved forward so that the front wheels were between the rails. Just before the collision, the pickup disappears from the camera's view. James Webb, Jr., died at the scene. Guy Webb survived. He suffered significant injuries, including head trauma and brain injuries. He has no recollection of the accident and no memory for many hours before and after the accident.

¶ 5 This case was tried over a period of five days. There were several witnesses, including the train crew, members of the Railroad's maintenance and safety departments, the plaintiffs' retained experts, and Guy Webb. It is not necessary to provide a summary of all of the testimony. Instead, we will recount pertinent portions of the trial testimony as we consider the Railroad's claims.

¶ 6 Before tackling the issues, we note that this crossing accident occurred in Iron County, Missouri, and that the case was tried in the circuit court of Madison County,

Illinois. At trial, the parties agreed that Missouri had the most significant relationship to this action, that Missouri law would govern matters of substance, and that Illinois law would govern matters of a clearly procedural nature. Accordingly the evidentiary issues were governed by the law of the forum. *People v. Saiken*, 49 Ill. 2d 504, 509, 275 N.E.2d 381, 385 (1971). Some differing views arose with regard to what was clearly procedural and what was clearly substantive in the area of jury instructions, and we will consider it more fully later in this order. When a question arises regarding whether a matter is substantive or procedural, the law of the forum is employed to determine which state's law applies. *Boersma v. Amoco Oil Co.*, 276 Ill. App. 3d 638, 645, 658 N.E.2d 1173, 1180 (1995). But it is useful to remember that a choice-of-law determination is required only where there is an actual difference between the relevant laws of the different states which will make a difference in the outcome of the case. *Townsend v. Sears, Roebuck & Co.*, 227 Ill. 2d 147, 155, 879 N.E.2d 893, 898 (2007).

¶ 7 Turning now to the first point on appeal, the Railroad contends that the trial court abused its discretion in refusing to allow it to present evidence, instructions, or argument to show that there are distinctions between public and private crossings and that a railroad's duty of care differs with the type or nature of the crossing. The Railroad asserts that the trial court erred in that it permitted the plaintiffs to refer to federal and state statutes and regulations, and industry standards recommendations, as evidence that the Railroad was negligent in operating its trains and in maintaining the subject crossing, but forbade the Railroad from cross-examining the plaintiffs' witnesses and presenting its own evidence and arguments to show that the statutes, regulations, and industry standards and recommendations address safety issues at public railroad crossings and are not binding at private crossings. The Railroad

claims that the erroneous rulings originated from the trial court's findings that for purposes of a railroad's duties under the common law, there is no distinction between a private crossing and a public crossing.

¶ 8           The case at bar was tried under a theory of common law negligence. Missouri courts have held that a railroad has a common law duty to use reasonable care to avoid injury at all crossings, public or private, by warnings or otherwise. *Dickerson v. Terminal R.R. Ass'n of St. Louis*, 284 S.W.2d 568 (Mo. 1955); *Boland v. St. Louis-San Francisco Ry. Co.*, 284 S.W. 141, 145 (Mo. 1926).

¶ 9           In *Boland*, a collision occurred between a locomotive engine and an automobile at a private farm crossing. In considering the duty of the railroad, the Missouri Supreme Court determined that though the state statute requiring the giving of signals at railroad crossings was not applicable to private crossings, the railroad was nevertheless "bound to exercise reasonable care in the operation of its train and to avoid injury to persons and animals at all crossings, private as well as public; and if by reason of peculiar or extraordinary circumstances surrounding a crossing and known to trainmen, ordinary prudence would require an alarm or signal to be given by an approaching train, then its omission is negligence." 22 R. C. L. 1005." *Boland*, 284 S.W. at 145.

¶ 10           In *Fowler v. Missouri, K. & T. R. Co.*, 84 S.W.2d 194, 196 (Mo. Ct. App. 1935), the plaintiff alleged that he could not see or hear approaching trains at a private crossing due to "bluffs, trees, the contour and formation of the land, the number, size and height of the weeds, trees and brush on defendant's right-of-way", and that it was the railroad's duty to blow a whistle or ring a bell a sufficient distance from the crossing to warn persons approaching the crossing of the approach of its train. The railroad claimed that it gave a whistle, but that even if it failed to do so, it was not

guilty of negligence because it was not required by law to sound a whistle or ring a bell at a private crossing, and was only required to give such warning at a public crossing. In considering the railroad's duties under the circumstances, the appellate court stated:

"The law is to effect, so far as statutory requirements are concerned, that it is not necessary to give such warning at a private crossing, but that it is only necessary at public crossings. [Citations.] However, regardless of the fact, if it be a fact, that the warning as a statutory warning was not required by the statute to be given by defendant as it approached the crossing in question, it was still required, under the common law, to give warning in the performance of its duty to plaintiff Orville Fowler and others with him. The conditions surrounding this crossing were such that it was bound to know that they were unusual and that the roadway was thereby rendered more dangerous by reason of the approach thereto than if the surrounding conditions had not existed; and it was its duty to have taken ordinary precautions such as were commensurate with and required by the circumstances to protect persons approaching the crossing for the purpose of crossing thereon, that might not have been required under other conditions." *Fowler*, 84 S.W.2d at 202.

¶ 11 Missouri courts have stated that under the common law, the duty of care owed by the railroad is to warn of its approach and to exercise ordinary care to avoid injury to persons and property by warnings or otherwise, and that each case must be considered on its own facts. *Koehler v. Burlington Northern, Inc.*, 573 S.W.2d 938, 943 (Mo. Ct. App. 1978). Whenever danger to persons or property may be reasonably anticipated, a railroad must signal the approach of its trains so as to alert those in a position of potential peril of its impending presence. *Koehler*, 573 S.W.2d at 943.

¶ 12 The next consideration is what evidence is properly admissible to establish the

railroad's common law duty of due care under the circumstances. The admission of evidence is within the sound discretion of the trial court, and a court of review will not reverse the trial court unless its discretion was clearly abused. *Sobczak v. General Motors Corp.*, 373 Ill. App. 3d 910, 926, 871 N.E.2d 82, 95 (2007).

¶ 13 In this case, the plaintiffs alleged that the Railroad did not act as a reasonable person would have in that it failed to properly maintain its crossing, it failed to maintain a proper sight distance at its crossing, or its crew failed to sound an adequate warning that the train was approaching the crossing. The plaintiffs identified Kenneth Heathington, Ph.D., P.E., and Charles Culver as experts who were expected to testify about the Railroad's duties to maintain its crossings and to sound adequate warnings as its trains approached crossings. Dr. Heathington is a licensed engineer who specializes in highway safety. Dr. Heathington has experience in human factors analysis regarding how drivers react to roadways and railroad crossings, and he has published on the subject of railroad crossing safety. He has investigated hundreds of railroad crossing accidents. Charles Culver is a certified locomotive engineer. He operated locomotives for Missouri Pacific and Union Pacific for more than 20 years.

¶ 14 During the trial, Dr. Heathington opined that the Railroad failed to provide an adequate site view at the crossing, to provide a more stable road surface at and near the crossing, and to provide an adequate warning of the train approach, and that these failures contributed to cause the accident. Dr. Heathington testified that sight deficiencies at the subject crossing made it an essentially blind crossing and unusually hazardous for approaching motorists, and that sight deficiencies caused or contributed to the accident. Dr. Heathington testified that a motorist's view to the left and the right of the crossing was diminished due to the grade of the road approaching the crossing, that both the grade and gravel road surface made it difficult to stop and

accelerate at and near the tracks, and that the grade and surface made the crossing unusually hazardous. He concluded that the grade and road surfaces did not comply with industry guidelines and that the grade and road surfaces contributed to cause the accident. Dr. Heathington testified that the train whistle was not blown until 3.9 seconds before impact, and that the driver did not have sufficient time to perceive the danger and to respond prudently and carefully. Throughout his testimony, Dr. Heathington referenced and relied upon the standards and recommendations by the American Association of State Highway and Transportation Officials (AASHTO), the Manual on Uniform Traffic Control Devices (MUTCD) and other regulations of the Federal Highway Administration, and regulations of the Federal Railroad Administration as support for his opinions. Dr. Heathington noted that the publications of these organizations and agencies evidence minimum standards of safe practice with regard to railroad crossings and reasonable safety precautions at railroad crossings, and he considered them in evaluating the subject crossing.

¶ 15 During the trial, Charles Culver opined that the Railroad's employees failed to keep a proper lookout and failed to sound a timely warning as the train approached the subject crossing. Culver relied on the Railroad's own rules to support his opinions and industry standards in support of his opinions. For example, Culver quoted one rule: "In case of doubt or uncertainty, take the safe course." Culver testified that under that rule, train crews are obligated to identify crossings which have dangerous conditions. Culver stated that the locomotive engineer had passed through the subject crossing hundreds of times and that he was aware that the crew's visibility of the crossing was limited because of a curve leading to the crossing and the amount of vegetation growing around the crossing. Culver testified that the engineer should have been mindful of these conditions and should have assumed that there would be



a vehicle approaching the crossing, and that he should have taken the safe course by sounding a warning 15 to 20 seconds before the train would occupy the crossing. Culver noted that though there was no whistle post for this crossing, there was no rule prohibiting the crew from sounding a warning at a crossing without a whistle post.

¶ 16 Evidence of safety standards promulgated by industry, trade groups, and regulatory agencies may be admissible to aid the trier of fact in determining what reasonable safety precautions are called for and the standard of care in a negligence action. *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 297, 775 N.E.2d 964, 986 (2002); *Ruffiner v. Material Service Corp.*, 116 Ill. 2d 53, 57, 506 N.E.2d 581, 584 (1987). Evidence of safety standards, rules, regulations, and codes are admissible as evidence of the standard of care even though they are not binding. *Schultz*, 201 Ill. 2d at 298, 775 N.E.2d at 986. The standards may provide a basis for an expert's opinion as to what a reasonable person would do under the circumstances. *Schultz*, 201 Ill. 2d at 297-98, 775 N.E.2d at 986; *McShane v. Chicago Investment Corp.*, 235 Ill. App. 3d 860, 877-78, 601 N.E.2d 1238, 1250-51 (1992). But where standards, rules, regulations, and codes are not binding on a defendant, an expert may not testify that a defendant was bound to follow them or that a defendant violated them. *Schultz*, 201 Ill. 2d at 297-98, 775 N.E.2d at 986.

¶ 17 In this case, the trial court properly permitted the plaintiffs' experts to make reference to industry safety standards, federal regulations, and state statutes, including the Missouri statutory requirements for public crossing and the recommendations of AASHTO and MUTCD as evidence of what safety precautions are reasonable and feasible to maintain adequate sight distances and adequate surfaces at the subject crossing and what actions a reasonable person would take to provide an adequate and timely warning of an approaching train at this crossing. The standards, regulations,

and statutes were not offered to prove a violation by the Railroad, but as evidence of the Railroad's disregard of public safety. The plaintiffs had the burden to establish that the Railroad did not act as a reasonable person would have under the circumstances. It was permissible for the plaintiffs' experts to consider and rely upon the industry standards and regulations to support their opinions in regard to the duty of care. It is worth repeating that the experts may not testify that the Railroad was bound by those standards and regulations or that the Railroad violated any of them.

¶ 18 The trial court abused its discretion when it prohibited the Railroad from cross-examining the plaintiffs' experts and from offering its own affirmative evidence to establish that the statutes, regulations, and rules are intended to address safety issues at public crossings and that they are not binding at private crossings. The Railroad should have been permitted to submit evidence and argument to show that it was not required to apply the safety standards and recommendations at private crossings. Ultimately, the finder of fact is charged with deciding whether the Railroad met its common law duty of care under the circumstances of the case.

¶ 19 In summary, we find that Missouri courts have held that a railroad has a common law duty to exercise reasonable care in the operation of its trains and to avoid injury to persons and animals at all crossings, private as well as public; that the trial court properly permitted the plaintiffs to present expert testimony regarding nonbinding industry standards, regulations, and statutes as evidence of the Railroad's duty of care in this case; and that the trial court abused its discretion in prohibiting the Railroad from submitting evidence to show that it was not required to apply the safety standards and recommendations at private crossings, and that the Railroad's defense was unfairly prejudiced thereby. Accordingly, this case must be remanded for a new trial. Given that, we will consider the remaining issues and address matters that may

arise on retrial.

¶ 20 The Railroad contends that the trial court erred in barring it from presenting evidence, instructions, or argument that Guy Webb and James Webb, Jr., were impaired by drugs or alcohol at the time of the accident. The Railroad sought to introduce evidence that a urine screen, performed when Guy Webb was admitted to the emergency department after the accident, revealed the presence of methylenedioxymethamphetamine ("Ecstasy") in his system, and that a blood test revealed that James Webb, Jr., had a blood-alcohol level of .135 at the time of the accident. In pretrial discovery, the Railroad identified Christopher Long, Ph.D., a forensic toxicologist, as an expert and disclosed that Dr. Long was expected to testify that the actions of the pickup truck driver were consistent with behaviors of persons impaired by Ecstasy and that the actions of the passenger in the pickup truck were consistent with behaviors of persons impaired as a result of excessive consumption of alcoholic beverages.

¶ 21 The plaintiffs filed motions *in limine* to bar the results of the urine screen, the results of the blood-alcohol test, and Dr. Long's opinions on impairment. In support, the plaintiffs noted that Dr. Long had testified that it is not possible to correlate the presence of Ecstasy in the urine with a degree of impairment of a person's mental faculties and motor skills. The plaintiffs also argued that Dr. Long was not trained in accident reconstruction or human factors analysis and that his opinions regarding the actions of the driver and passenger were based not on any generally accepted scientific methodology, but rather, on watching a six-second video of this accident. The plaintiffs argued that Dr. Long's opinions were speculative and that the results of the urine screen and the blood test were extremely prejudicial and offered little to nothing of probative value. The trial court granted the plaintiffs' motions *in limine*.

¶ 22 During trial, the Railroad requested that the trial court reconsider its rulings and made an offer of proof. The offer of proof included the transcript of Dr. Long's discovery deposition. Dr. Long testified that he had reviewed the video of the train accident and the results of Guy Webb's urine screen and that, in his opinion, the behaviors of the driver in the video were consistent with the behaviors of a person who was impaired by Ecstasy. But Dr. Long acknowledged that the drug was detected in a urine screen rather than a blood test and that it is not possible to correlate the presence of Ecstasy in the urine with any level of impairment. Dr. Long also acknowledged that the presence of Ecstasy in the urine screen could not be used to calculate when the drug was taken or what quantity was taken. Dr. Long testified that when he watched the video, he was able to see only the actions of the pickup truck itself, and not the movements of the driver. The video recorded the movements of the pickup truck from the perspective of the train's engine, for a period of about six seconds immediately before the collision. The visage, behavior, and actions of the driver are not visible. There were no eyewitnesses who claimed to have observed slurred speech, bloodshot eyes, a staggering gait, or other physical evidence to prove impairment of the driver. Dr. Long also acknowledged that he did not have expertise in accident reconstruction, human factors technology, and human reaction times. He stated that he had no knowledge of the characteristics of the pickup truck, for example whether it was an automatic or a manual transmission, and no knowledge of the road surface at and approaching the crossing. After considering the Railroad's offer of proof, the trial court affirmed its preliminary rulings and barred the evidence.

¶ 23 Expert testimony is generally admissible if the witness is qualified as an expert by knowledge, skill, expertise, training, or education and if the testimony will assist the trier of fact in understanding the evidence. *People v. Becker*, 239 Ill. 2d 215, 235,

940 N.E.2d 1131, 1142 (2010); *Bachman v. General Motors Corp.*, 332 Ill. App. 3d 760, 782, 776 N.E.2d 262, 283-84 (2002). The decision whether to admit expert testimony, both whether the expert is qualified to offer opinions on a particular subject and whether his testimony will assist the jurors in understanding the evidence, is within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *Becker*, 239 Ill. 2d at 235, 940 N.E.2d at 1142.

¶24 Although highly probative, evidence of alcohol consumption is also extremely prejudicial, and therefore, actual intoxication with impairment of physical or mental capabilities must be shown. *Sobczak*, 373 Ill. App. 3d at 925, 871 N.E.2d at 95. There must be impairment of mental or physical faculties with the resultant diminution in the ability to think or act with ordinary care. *Shore v. Turman*, 63 Ill. App. 2d 315, 323, 210 N.E.2d 232, 235-36 (1965). Evidence of a plaintiff's intoxication is relevant to the extent that it affects the care that he takes for his own safety and is therefore admissible as a circumstance to be weighed by the trier of fact in its determination of the issue of due care. *Sobczak*, 373 Ill. App. 3d at 925, 871 N.E.2d at 95; *Bielaga v. Mozdzeniak*, 328 Ill. App. 3d 291, 296, 765 N.E.2d 1131, 1135 (2002).

¶25 Based on the record, the trial court could have reasonably found that Dr. Long did not have qualifications or experiences that would place him in a better position than the jurors to determine, based on a review of the train video, whether the driver of the pickup truck acted with ordinary care under the circumstances, and that his testimony would not assist the jury in understanding the evidence. The trial court could have reasonably concluded that the results of the urine screen could not be used to demonstrate that Guy Webb was impaired at the time of the accident and that the evidence of Ecstasy in the urine was extremely prejudicial and offered little, if any,

probative value in regard to issues of impairment and contributory negligence. In this case, we find no abuse of discretion in the trial court's decision to bar the results of the urine screen and Dr. Long's opinion that Guy Webb was impaired at the time of the accident.

¶ 26 The trial court also barred evidence that James Webb, Jr., was intoxicated at the time of the accident. A blood test indicated that at the time of the accident James Webb, Jr., had a .135 blood-alcohol level. In the deposition, Dr. Long testified that this blood-alcohol level represents consumption of approximately seven alcoholic beverages. Dr. Long opined that James Webb, Jr., was impaired and that this impairment precluded him from safely vacating the pickup truck prior to the collision. Dr. Long also opined that an unimpaired person would have been able to safely exit the vehicle prior to the collision, but he provided no scientific support for this opinion. Dr. Long could not state how long it would take an unimpaired, rational person to perceive that the approaching train posed a danger, to make a judgment to exit the vehicle, and to take action by performing tasks such as unlatching the seat belt and opening the door. He could not state how a blood-alcohol level of .135 would affect perception/reaction time under the circumstances.

¶ 27 Based on the record, the trial court could have reasonably concluded that Dr. Long lacked expertise in human factors and perception/reaction times and that he employed no special knowledge when he testified that a nonimpaired person would have safely exited the pickup prior to the collision and that alcoholic impairment prevented James Webb, Jr., from safely exiting the pickup prior to the collision. *Bielaga*, 328 Ill. App. 3d at 298, 765 N.E.2d at 1137. In this case, the trial court did not abuse its discretion in barring the results of the blood-alcohol test and Dr. Long's opinion that James Webb, Jr.'s impairment prevented him from safely exiting the

truck.

¶ 28 The Railroad next contends that the trial court erred in barring the causation opinions offered by Missouri State Highway Patrol Sergeant Matthew Renshaw. The Railroad argued that Sergeant Renshaw had extensive experience in investigating accidents and that his testimony would aid the jury in understanding the evidence. The Railroad submitted Sergeant Renshaw's evidence deposition in its offer of proof.

¶ 29 Sergeant Renshaw is a 20-year veteran of the Missouri Highway Patrol. In the deposition, Sergeant Renshaw testified that he is not certified in accident reconstruction and that he has not taken any accident reconstruction courses. Sergeant Renshaw stated that he had investigated approximately 1,800 motor vehicle accidents and 4 or 5 rail crossing accidents during his career. Sergeant Renshaw testified that he was dispatched to investigate this accident. As part of his investigation, he sketched a diagram of the scene and identified traffic signs posted near the crossing, the site of impact, and the final resting positions of the pickup truck and the train. Sergeant Renshaw noted that a stop sign and a private crossing sign were posted on each side of the crossing. Sergeant Renshaw testified that he stood near the stop sign for westbound traffic and that from this position he looked north in order to determine whether there were obstructions that would interfere with a westbound motorist view of an approaching southbound train. Sergeant Renshaw observed some brush near the crossing, but he did not think it presented a sight restriction and he did not attempt to take measurements of it. Sergeant Renshaw testified that he was aware that quadrant measurements were generally taken during the investigation of railroad crossing collisions for the purpose of determining sight distances, but he did not know how to perform quadrant measurements. He did not perform quadrant measurements at the

railroad crossing. Sergeant Renshaw concluded that there were no sight obstructions for westbound drivers at this crossing, that the pickup truck driver failed to yield the right-of-way to the train, and that the accident would not have occurred if the driver had yielded the right-of-way.

¶ 30 Whether an individual is an expert on a particular subject is a matter generally reserved to the sound discretion of the trial court, and its decision will only be reversed for an abuse of discretion. *Thurmond v. Monroe*, 159 Ill. 2d 240, 248, 636 N.E.2d 544, 548 (1994). An individual will be permitted to testify as an expert if his experience and qualifications afford him knowledge and the application of scientific principles that are not common to laypersons, and if such testimony will aid the trier of fact in reaching its conclusions. *Watkins v. Schmitt*, 172 Ill. 2d 193, 205, 665 N.E.2d 1379, 1385-86 (1996); *Bachman*, 332 Ill. App. 3d at 782, 776 N.E.2d at 283-84. In the case of an investigating officer's qualifications to give expert testimony on the cause of a crash, the issue often turns on the experience of the investigating officer. *Thurmond*, 159 Ill. 2d at 248-49, 636 N.E.2d at 548-49; *Favia v. Ford Motor Co.*, 381 Ill. App. 3d 809, 816, 886 N.E.2d 1182, 1188 (2008).

¶ 31 Based on the record, the trial court could have reasonably found that Sergeant Renshaw lacked the knowledge, training, or experience to provide expert analysis on the cause of this railroad crossing accident and that the jury was presented with sufficient evidence, based on its view of the video and other testimony and evidence, to make its own factual determinations regarding obstructions and sight distances at the crossing. In this case, we cannot say that the trial court abused its discretion in excluding Sergeant Renshaw's testimony that there were no visual obstructions at the crossing and that the accident was caused by the pickup truck driver's failure to yield.

¶ 32 The Railroad also contends that the trial court abused its discretion when it



allowed the plaintiffs' experts, Charles Culver and Kenneth Heathington, to testify to opinions that were not identified in the plaintiffs' disclosures under Supreme Court Rule 213 (eff. Jan. 1, 2007) or the experts' discovery depositions.

¶ 33 Under Supreme Court Rule 213(f), litigants are required to disclose the subject matter, opinions, and conclusions of controlled expert witnesses who will testify at trial. Ill. S. Ct. R. 213(f) (eff. Jan. 1, 2007). Rule 213(g) limits the expert opinions at trial to the information provided in the Rule 213 disclosure and the discovery deposition. Ill. S. Ct. R. 213(g) (eff. Jan. 1, 2007). At trial, a witness may elaborate on a disclosed opinion or testify to logical corollaries to the disclosed opinion, but the trial testimony must be encompassed in the original opinion. *Bauer v. Memorial Hospital*, 377 Ill. App. 3d 895, 914, 879 N.E.2d 478, 496 (2007). The expert disclosure rules are intended to avoid surprise and to discourage strategic gamesmanship. *Spaetzel v. Dillon*, 393 Ill. App. 3d 806, 812, 914 N.E.2d 532, 538 (2009). The admission of evidence pursuant to Rule 213 is within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *Spaetzel*, 393 Ill. App. 3d at 812, 914 N.E.2d at 538; *Bauer*, 377 Ill. App. 3d at 914, 879 N.E.2d at 496. An error in the admission or exclusion of evidence does not require reversal unless one party has been unfairly prejudiced or the result of the trial has been materially affected. *Bauer*, 377 Ill. App. 3d at 914, 879 N.E.2d at 496.

¶ 34 The Railroad claims that the plaintiffs' experts offered several opinions at trial which were not disclosed as required under Rule 213. We have considered each of these contentions, but we will not unnecessarily lengthen this order by addressing each separately. After reviewing the plaintiffs' Rule 213 disclosures, the discovery depositions, and the trial testimony of the experts, we find that the opinions given during the trial were encompassed in the originally revealed opinions or constituted

elaboration on or logical corollaries to the revealed opinions. There was no abuse of discretion in allowing the testimony.

¶ 35 Next, the Railroad contends that the trial court erred in instructing the jury. The Railroad argues that the court gave inapplicable instructions, excluded necessary instructions, and included inconsistent instructions, and that as a cumulative result of the errors, the faulty instructions did not accurately reflect the applicable law, confused the jury, and deprived it of a fair trial.

¶ 36 In its brief, the Railroad makes numerous challenges to the trial court's decisions to give or to refuse jury instructions. Many challenges are naked contentions without citation to relevant authority and do not merit consideration. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). We need not consider claims that there is insufficient evidence to support particular instructions because this case is being remanded for a new trial. The Railroad has challenged the instructions given on the burden of proof, sole proximate cause, and forms of the verdict, arguing that these instructions involved procedural matters and that under choice-of-law principles, Illinois instructions rather than Missouri instructions should have been given. A choice-of-law determination is required only where there is an actual difference between the relevant laws of the different states. *Townsend*, 227 Ill. 2d at 155, 879 N.E.2d at 898. We have reviewed the parties' briefings in the trial court and on appeal, and we find the arguments lacking in meaningful analyses as to whether there are actual differences in the respective instructions of Missouri and Illinois and whether any differences would affect the outcome of the case. *Townsend*, 227 Ill. 2d at 155, 879 N.E.2d at 898. Therefore, we will not consider the issue further. Should the issue arise during the retrial, it can be properly addressed at that time.

¶ 37 A party is entitled to jury instructions that clearly and fairly instruct the jury on

each theory of the case that is supported by the evidence. The trial court has discretion to determine which issues are raised by the evidence presented and which jury instructions are warranted, and its determinations will not be disturbed absent an abuse of that discretion. *Thornhill v. Midwest Physician Center of Orland Park*, 337 Ill. App. 3d 1034, 1053, 787 N.E.2d 247, 262 (2003). The test for determining whether the trial court abused its discretion in instructing the jury is whether, considered as a whole, the instructions are sufficiently clear and fairly and accurately state the applicable law. *Thornhill*, 337 Ill. App. 3d at 1053, 787 N.E.2d at 262. Jury instructions should be viewed as a whole, and reversible error occurs only when serious prejudice to the complaining party's right to a fair trial has been proven. *Burlington Northern & Santa Fe Ry. Co. v. ABC-NACO*, 389 Ill. App. 3d 691, 716, 906 N.E.2d 83, 104 (2009).

¶ 38 In this case, we find that the instructions, when considered as a whole, were sufficiently clear and fairly and accurately stated the applicable law. There is no indication that the jury was confused or misled by the instructions. The Railroad has not established that it was prejudiced by the instructions as given. The parties and the trial court, on remand, should be mindful that our resolution of this point is limited to a finding that the Railroad has not established that it was prejudiced by the given instructions and that we have expressed no opinion on the propriety of any specific instruction that was either given or refused.

¶ 39 In its final point, the Railroad contends that the trial court erred in allowing the plaintiffs to question the Railroad's witnesses about track work performed at the crossing after the accident and its vegetation control program. The Railroad argues evidence of subsequent remedial measures is not admissible to prove negligence, and that there was no basis for the introduction of evidence that a railroad gang came

through the area about 13 months after the accident and placed new ties and laid asphalt to meet the higher rails at the crossing. The Railroad also asserts that the trial court erred in permitting the plaintiffs to question its director of public safety about whether vegetation at the crossing had been cut after the accident. The plaintiffs counter that subsequent remedial measures are admissible to establish ownership or control, or to prove the feasibility of precautionary measures. The plaintiffs argue that the evidence was relevant to the issues of the Railroad's control over the crossing and the feasibility of precautionary measures.

¶ 40 Illinois law permits evidence of postremedial measures to show control or feasibility of precautionary measures. *Herzog v. Lexington Township*, 167 Ill. 2d 288, 300-01, 657 N.E.2d 926, 932 (1995); *Maggi v. RAS Development, Inc.*, 2011 IL App (1st) 091955, 949 N.E.2d 731. The record shows that the Railroad's position on its control over the crossing was equivocal or at least unclear. The amended complaint alleges, in part, that the Railroad was responsible for operating the train and maintaining the subject crossing in a safe and proper manner so as to avoid severe injury and death to individuals traversing it. In its answer, the Railroad stated that these allegations were matters of law rather than fact, and then denied them and demanded strict proof. Additionally, the Railroad denied allegations that it was negligent in failing to maintain the crossing. In answers to certain requests for admission, the Railroad admitted that it owned the railroad tracks at the subject crossing and that it maintained the tracks at that crossing. Notwithstanding these admissions, the Railroad repeatedly argued that the crossing was a private crossing and that it had no duty to maintain it. The Railroad's control of the crossing and its duty to maintain the crossing remained contested issues during the trial.

¶ 41 Here, we have considered the Railroad's objections to the testimony in general.

We have not undertaken consideration of specific excerpts of testimony. Upon remand, the trial court will have to determine whether control remains an issue. We do not find that the trial court abused its discretion in permitting some evidence on the issue of the Railroad's control over and maintenance of the subject crossing. We note that the Railroad could have requested that the court give a limiting instruction on the use of this evidence, and it did not.

¶ 42           Accordingly, the judgment of the Madison County circuit court is reversed and the cause is remanded for a new trial.

¶ 43           Reversed; cause remanded.