

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DAMON L. HUBBARD,

Plaintiff-Appellant,

v

NORFOLK SOUTHERN RAILWAY  
COMPANY,

Defendant-Appellee.

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UNPUBLISHED  
September 17, 2013

No. 302325  
Wayne Circuit Court  
LC No. 08-124246-NO

Before: MURPHY, C.J., and JANSEN and MURRAY, JJ.

PER CURIAM.

In this action arising under the Federal Employers' Liability Act (FELA), 45 USC 51 *et seq.*, plaintiff appeals by right the circuit court's entry of judgment in favor of defendant following the jury's verdict of no cause of action. We affirm.

I

Plaintiff, a railroad conductor, filed the instant FELA action in the Wayne Circuit Court, alleging that he was injured at work by the negligence of defendant, his employer. Following extensive discovery, plaintiff and defendant filed numerous motions in limine. The matter was ultimately tried before a jury in October 2010.

The evidence showed that, prior to his accident, plaintiff had worked for defendant for approximately two years. On September 8, 2006, while on his way to work at 7:59 a.m., plaintiff drove his 2005 Pontiac Grand Prix into the path of an oncoming Amtrack passenger train at a private railroad grade crossing, owned and maintained by defendant, on the premises of defendant's railroad yard in Wayne, Michigan. It is undisputed that the same Amtrack passenger train passes through defendant's Wayne railroad yard, traveling from east to west, between 7:30 and 8:00 each morning. It is further undisputed that motorists are required to stop at a stop sign before proceeding through the grade crossing in question.

Gene Bressette worked for defendant and had been involved in the field of railroad safety for 27 years. Bressette testified that he had driven across the grade crossing where plaintiff's accident occurred "hundreds of times," and that it is often difficult to see oncoming trains in the morning. Indeed, Bressette testified that he was almost struck by the morning Amtrack train when driving across the very same grade crossing in June or July of 2003. According to

Bressette, even if a driver comes to a full stop at the grade crossing's stop sign, the driver must still creep forward, almost onto the tracks, in order to see whether any trains are approaching. Bressette claimed that he and other employees had voiced concerns regarding the safety of the grade crossing at several safety meetings between 2003 and 2005. Bressette testified that he had also made several verbal complaints to defendant's management concerning the safety of the grade crossing.<sup>1</sup>

The videotaped deposition of Albert "Dan" Cook was presented to the jury. Until 2007, Cook worked for defendant as a locomotive engineer. Cook worked with plaintiff in the Detroit area and believed that plaintiff was a good employee. Cook frequently traveled across the railroad grade crossing at issue to get to his worksite at the Wayne railroad yard. Cook testified that there were "absolutely" safety concerns associated with the grade crossing and that he had personally informed defendant's managers of those concerns. Among other things, Cook believed that the grade crossing had a "limited sight distance." Cook believed that flashing lights or gates should be installed at the crossing.

On the morning of September 8, 2006, as Cook pulled up to the grade crossing on his way to work, he was directly behind plaintiff's car. Cook testified that plaintiff came to a complete stop at the stop sign before "roll[ing] forward" onto the railroad tracks. Cook then saw the Amtrack train strike plaintiff's car and called 911. The weather conditions that morning were sunny and clear. After plaintiff's accident, Cook again raised the issue of grade-crossing safety. At a safety meeting on October 4, 2006, Cook again suggested the installation of gates or flashing lights at the grade crossing in question.

On cross-examination, defense counsel asked Cook whether there had ever been another train-automobile collision at the grade crossing in question. Cook responded, "I don't remember another accident of that nature." Cook admitted that "in the thousands of times" he had driven across the grade crossing in question, he had never been struck by a train.

Plaintiff testified that as he approached the grade crossing on the morning of September 8, 2006, he came to a "complete stop" at the stop sign, looked in both directions, and did not see any trains. He then crept forward slightly and looked in both directions again. Plaintiff then "crept out a little bit more and that was the last time I crept out because [by] the time I looked . . . the train was there." According to plaintiff, the Amtrack passenger train approached quickly and struck his automobile. Plaintiff testified that he had heard a train horn prior to the collision but could not "tell where that train horn was coming from." Plaintiff believed that if there had been additional safety devices such as flashing lights or gates, "we wouldn't be here today because I wouldn't have got hit by the train."

During his two years of employment with defendant, leading up to his accident on September 8, 2006, plaintiff had never personally complained to defendant about the safety of

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<sup>1</sup> On cross examination, defendant's attorney asked Bressette whether it was true that approximately 50 percent of all train-automobile collisions occur at grade crossings with flashing lights and gates. Bressette responded that this was "correct."

the grade crossing in question. Nor did plaintiff ever voice his concerns regarding the safety of the grade crossing to his union president. Plaintiff maintained that he was not in a rush or a hurry on the morning of September 8, 2006. He insisted that he had not seen the Amtrack train until his car was already in the middle of the tracks.

Defense counsel asked plaintiff several questions concerning his ability to drive a car. Plaintiff admitted that he frequently drives on the expressway. He stated that he has also driven to a hair salon where his cousin works, to Ann Arbor, to a gun range, and to a nightclub on West McNichols Road in Detroit. Defense counsel attempted to impeach plaintiff's credibility with evidence that, contrary to his earlier testimony, he had a MySpace page. Defense counsel pointed to several alleged untruths contained on plaintiff's MySpace page, including statements that plaintiff was a "college graduate" and that plaintiff was a "train driver." Plaintiff admitted that it was his MySpace page and that the statements in question were not actually true. Defense counsel then questioned plaintiff concerning his ability to engage in social functions and his ability to interact with people. Defense counsel asked plaintiff about photographs on his MySpace page that showed him with various "young ladies," as well as "motorcycles and . . . souped-up cars." Plaintiff admitted that he had been able to go on vacation to Myrtle Beach since his accident.

The videotaped deposition of Archie Burnham was then presented to the jury. Burnham is a consulting engineer who specializes in traffic safety. Burnham was the Director of Traffic Engineering and Safety for the Georgia Department of Transportation for 17 years. Burnham has also served as an advisor to the U.S. Department of Transportation on railroad grade-crossing safety issues. Burnham came to Michigan and inspected the grade crossing where plaintiff's accident occurred. Burnham believed that the sight distance at the grade crossing in question was "restricted," and that there was a limited opportunity for motorists to see oncoming high-speed trains. Burnham concluded that "the crossing merited at least bells and lights for active protection." In Burnham's opinion, "it was not reasonably safe" to have only a stop sign at the grade crossing.

Walt Wilson worked as a train master for defendant between 1999 and 2009. Among other things, Wilson was responsible for supervising defendant's Wayne railroad yard between 2003 and 2007. Wilson drove across the grade crossing in question many times, and believed that the grade crossing was safe. Wilson was satisfied that, from the position of the stop sign, a motorist could safely see in each direction to determine whether a train was approaching. In fact, Wilson believed that motorists could see "a pretty good distance" in both directions. Wilson could not recall any employee having complained about the safety of the grade crossing. Nor did any employee ever suggest to Wilson that the crossing needed flashing lights.

Officer Ryan Strong of the Wayne Police Department responded to the scene of the collision on the morning of September 8, 2006. Strong interviewed witnesses, surveyed the area, and gathered information. Strong stood near the stop sign and looked down the tracks. Strong described the grade crossing as "wide open" and testified that there was nothing to prevent a motor vehicle driver from seeing an approaching train. Strong testified that he was "not really sure how [plaintiff] couldn't have seen or heard the train." Strong admitted that he had never received training with respect to grade crossings and that grade-crossing safety was not within his field of expertise.

Strong was then asked whether, based on his experience and training, he believed that the grade crossing was “reasonably safe” on the morning of September 8, 2006. Plaintiff’s counsel objected, but Strong responded, “Yes.” The circuit court overruled the objection and remarked, “We’ll put it on the record later.” Thereafter, Strong again indicated that the grade crossing appeared to be “reasonably safe” when he was present on the morning of September 8, 2006.

Ronald Bedra is a District Claims Agent for defendant. Bedra has been a railroad claims agent since the 1980s, and has worked for defendant in that capacity 1999. Bedra never had any concerns about the safety of the grade crossing. He believed that a motor vehicle driver, from a position stopped at the stop sign, could safely look in each direction and see whether a train was approaching. Bedra could recall one or two employee complaints about the safety of the grade crossing in 2003 or 2004, but testified that there were no other complaints concerning the grade crossing between 2004 and plaintiff’s accident in September 2006.

Sometime after the accident, Bedra returned to the scene with a 2005 Pontiac Grand Prix that was substantially similar to plaintiff’s car. He drove it up to the stop sign at the grade crossing and looked down the tracks in both directions to determine whether there were any obstructions in his line of vision. As he was sitting in the driver’s seat, Bedra took photographs from inside the car. Bedra testified that from a position about four feet from the stop sign and about 17 feet from the tracks, he could see down the tracks to the right and left. Bedra testified that even from a position 23 feet from the tracks, it was easy for him to see oncoming trains. The photographs taken by Bedra were admitted into evidence.

Jonathan Hines is an assistant system road foreman for Amtrack. On the morning of September 8, 2006, Hines was riding in the front of the Amtrack locomotive that collided with plaintiff’s car. As the Amtrack train approached the grade crossing at defendant’s Wayne railroad yard, the engineer sounded the horn. Hines noticed that a Pontiac was stopped on the tracks. The engineer “blew two longs, one short and one long,” which is the “general crossing warning signal.” Hines testified that “as [the engineer] continued to blow [the horn], the vehicle continued to move forward.” The engineer “continued to blow the horn [and] put the break on.” At that point, the Pontiac “jerked forward, then jerked backward as if the driver was intending to back up off the crossing and that’s when we struck the car.” Hines believed that the engineer had been sounding the horn for at least 10 or 11 seconds before the collision occurred. Hines did not believe that plaintiff’s vehicle had stopped at the stop sign before proceeding onto the tracks.

The jury returned a verdict of no cause of action, specifically concluding that defendant had not been negligent with regard to the incident of September 8, 2006. On November 2, 2010, the circuit court entered judgment in favor of defendant consistent with the jury’s verdict.

On November 22, 2010, plaintiff moved for a new trial. Among other things, plaintiff argued that the jury’s verdict was against the great weight of the evidence and that the circuit court had committed several other errors, including in the admission of various pieces of evidence. Following oral argument on January 11, 2011, the circuit court denied plaintiff’s motion.

## II

“FELA provides the exclusive remedy for employees of interstate railroads to recover from a railroad for injuries incurred during the course of their employment.” *Campbell v BNSF R Co*, 600 F3d 667, 672 (CA 6, 2010); see also *Hughes v Lake Superior & Ishpeming R Co*, 263 Mich App 417, 422; 688 NW2d 296 (2004). “Congress enacted the FELA to provide a federal remedy for railroad workers who suffer personal injuries as a result of the negligence of their employer or their fellow employees.” *Atchison, Topeka & Santa Fe R Co v Buell*, 480 US 557, 561; 107 S Ct 1410; 94 L Ed 2d 563 (1987). “FELA is a fault system, allowing plaintiffs to recover only for those work-related injuries that are caused by the employer’s negligence.” *Hughes*, 263 Mich App at 423. However, “[a] primary purpose of [FELA] was to eliminate a number of traditional defenses to tort liability and to facilitate recovery in meritorious cases.” *Buell*, 480 US at 561.

For purposes of FELA, state courts have concurrent jurisdiction with the federal courts. 45 USC 56. Regardless of whether the FELA action is brought in state or federal court, any disputed factual issues must be resolved by a jury. See *Dice v Akron, Canton & Youngstown R Co*, 342 US 359, 363; 72 S Ct 312; 96 L Ed 398 (1952). The question for the jury is “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.” *Rogers v Missouri Pacific R Co*, 352 US 500, 506; 77 S Ct 443; 1 L Ed 2d 493 (1957). “A plaintiff bringing suit under the FELA . . . need only show that the injury resulted ‘in whole or in part’ from a violation of the FELA.” *Boyt v Grand Trunk Western R*, 233 Mich App 179, 187; 592 NW2d 426 (1998) (citation omitted).

“As a general matter, FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal.” *St Louis Southwestern R Co v Dickerson*, 470 US 409, 411; 105 S Ct 1347; 84 L Ed 2d 303 (1985); see also *Boyt*, 233 Mich App at 183 (observing that “[i]n state courts, a review of a claim arising under the FELA is to be made in accordance with federal law,” but “such a case is subject to state procedural rules”). It has long been held that in cases arising under FELA, “questions of procedure and evidence . . . [are] to be determined according to the law of the forum [state].” *Chesapeake & Ohio R Co v Kelly*, 241 US 485, 491; 36 S Ct 630; 60 L Ed 1117 (1916).

## III

We review for an abuse of discretion the circuit court’s decision to admit or exclude evidence. *Barnett v Hidalgo*, 478 Mich 151, 158-159; 732 NW2d 472 (2007). “An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes.” *Id.* at 158. However, when the circuit court’s decision to admit or exclude evidence “involves a preliminary question of law, the issue is reviewed de novo, and admitting evidence that is inadmissible as a matter of law constitutes an abuse of discretion.” *Id.* at 159.

We similarly review for an abuse of discretion the circuit court’s decision to grant or deny a motion in limine, *Bartlett v Sinai Hospital of Detroit*, 149 Mich App 412, 417-418; 385 NW2d 801 (1986), the circuit court’s determination that a witness is qualified to testify as an expert, *Mulholland v DEC Int’l Corp*, 432 Mich 395, 402; 443 NW2d 340 (1989), the circuit

court's decision to dismiss a juror for bias or partiality, *Harrison v Grand Trunk Western R Co*, 162 Mich App 464, 471; 413 NW2d 429 (1987), and the circuit court's decision to grant or deny a motion for a new trial, *Campbell v Dep't of Human Services*, 286 Mich App 230, 243; 780 NW2d 586 (2009).

#### IV

Plaintiff first argues that the circuit court abused its discretion by allowing Officer Ryan Strong of the Wayne Police Department to offer his opinion concerning whether the grade crossing where plaintiff was struck was "reasonably safe." We conclude that, although the circuit court abused its discretion insofar as it permitted Officer Strong to offer an expert opinion on this matter, Strong's testimony in this regard was admissible pursuant to MRE 701.

Defense counsel asked Officer Strong whether, based on his experience and training, he believed that the grade crossing where plaintiff was struck appeared to be "reasonably safe" on the morning of September 8, 2006. Strong responded in the affirmative. "A person may be qualified to testify as an expert witness by virtue of the person's knowledge, skill, experience, training, or education in the subject matter of the testimony." *Phillips v Deihm*, 213 Mich App 389, 401; 541 NW2d 566 (1995). MRE 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Although Officer Strong had previously investigated numerous automobile accidents, including train-automobile collisions, he specifically testified that he had never received training with respect to grade crossings or grade-crossing safety, and that grade-crossing safety was not within his field of expertise. In other words, Officer Strong essentially admitted that he was not qualified to testify as an expert on the issue of grade-crossing safety. See *Edry v Adelman*, 486 Mich 634, 643; 786 NW2d 567 (2010).

Nonetheless, we conclude that Officer Strong's opinion was admissible as lay testimony under MRE 701, which provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

In general, police officers may provide lay testimony under MRE 701 if it is based on their own perceptions and is not dependent on scientific, technical, or specialized knowledge. See, e.g., *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988); *Mitchell v Steward Oldford & Sons, Inc*, 163 Mich App 622, 629-630; 415 NW2d 224 (1987).

Officer Strong's testimony that the grade crossing appeared to be "reasonably safe" on the morning of September 8, 2006, was based on his own perceptions and was helpful to the jury's determination of a fact at issue. Strong stated that he personally surveyed the area and made observations. He specifically testified that he stood near the stop sign and looked down the tracks in both directions. He did not see anything on the tracks that would have obstructed plaintiff's view of oncoming trains. He also recalled, from his own observations, that the grade crossing was "wide open." Strong's testimony was rationally based on his own perceptions and consisted of reasonable conclusions that could have been made by any layperson after a casual inspection of the accident scene. *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 455-456; 540 NW2d 696 (1995). Accordingly, it constituted admissible lay testimony under MRE 701. *Mitchell*, 163 Mich App at 629-630.<sup>2</sup>

Plaintiff's additional argument that Officer Strong should not have been permitted to testify because he was not disclosed as an expert witness is unpreserved because plaintiff did not object on this ground. *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997). Nevertheless, this argument is also without merit. Contrary to plaintiff's argument on appeal, Strong was disclosed as a potential witness on defendant's witness list of March 17, 2009, and was also listed as an "Expert Witness[]" in the circuit court's final pretrial order of September 28, 2010. See MCR 2.401(C)(2); see also *State Hwy Comm v Redmon*, 42 Mich App 642, 645-646; 202 NW2d 527 (1972). We perceive no error with respect to this issue.

## V

Plaintiff next argues that the circuit court abused its discretion by permitting defendant to elicit testimony concerning the absence of previous accidents at the railroad grade crossing in question. Again, we disagree.

Relying on *Inman v Baltimore & Ohio R Co*, 361 US 138; 80 S Ct 242; 4 L Ed 2d 198 (1959), the circuit court ultimately decided to permit defendant to elicit testimony concerning the absence of prior accidents at the grade crossing. In *Inman*, 361 US at 140-141, a FELA case, the United States Supreme Court specifically cited the absence of prior accidents at a railroad crossing as one of its reasons for concluding that there was insufficient evidence of negligence by the defendant railroad. Plaintiff acknowledges the decision in *Inman*, but asserts that the *Inman* Court's language concerning the absence of prior accidents was obiter dictum. Plaintiff also argues that this issue must be governed by state law rather than federal law. See *Kelly*, 241 US at 491 (noting that, in FELA cases, "questions of procedure and evidence . . . [are] to be determined according to the law of the forum [state]"). We conclude that, even if this issue is controlled by state law, the challenged testimony regarding the absence of prior collisions was

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<sup>2</sup> Contrary to plaintiff's argument on appeal, *Miller v Hensley*, 244 Mich App 528; 624 NW2d 582 (2001), does not compel the opposite conclusion. In *Miller*, 244 Mich App at 531, this Court observed that the testimony of two investigating police officers concerning the causation of the plaintiff's traffic accident "was not rationally based on their own perceptions as required by MRE 701." In the instant case, on the other hand, Officer Strong's testimony was based entirely on his own observations.

admissible to show that defendant did not have actual or constructive notice of the allegedly dangerous conditions at the railroad grade crossing.

As plaintiff correctly points out, “[i]t has long been established in Michigan that evidence of the absence of previous accidents should not be admitted to prove absence of negligence.” *Grubaugh v City of St Johns*, 82 Mich App 282, 287; 266 NW2d 791 (1978). This is because “[e]vidence of absence of accidents usually involves generally unreliable negative evidence . . . and does not tend directly to prove absence of negligence[.]” *Id.* at 289.

However, Michigan courts have permitted evidence of the absence of prior accidents to show a lack of notice or foreseeability. See, e.g., *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 470-471; 624 NW2d 427 (2000); *Etter v Mich Bell Tel Co*, 179 Mich App 551, 557; 446 NW2d 500 (1989); *Belfry v Anthony Pools, Inc*, 80 Mich App 118, 123-124; 262 NW2d 909 (1977). “[R]easonable foreseeability of harm is an essential ingredient of [FELA] negligence.” *Gallick v Baltimore & Ohio R Co*, 372 US 108, 117; 83 S Ct 659; 9 L Ed 2d 618 (1963). “[T]he essential element of reasonable foreseeability in FELA actions . . . requires proof of actual or constructive notice to the employer of the defective condition that caused the injury.” *Sinclair v Long Island R*, 985 F2d 74, 77 (CA 2, 1993). Even if this issue is governed by Michigan procedural and evidentiary law as plaintiff contends, we conclude that the challenged testimony regarding the absence of prior accidents was admissible for the purpose of establishing that defendant did not have actual or constructive notice of the conditions that purportedly led to plaintiff’s injuries. The circuit court did not abuse its discretion by permitting defendant to elicit testimony concerning the absence of prior collisions at the grade crossing.

## VI

Plaintiff argues that the circuit court abused its discretion by granting defendant’s motion in limine that sought to prohibit him from introducing or referring to certain state regulations and safety standards, as well as various federal regulations and Federal Highway Administration publications, related to the issue of railroad grade-crossing safety.

This issue was the subject of one of defendant’s numerous motions in limine. The circuit court determined that the regulations, standards, and government publications relied on by plaintiff pertained exclusively to *public* grade crossings rather than *private* grade crossings. Accordingly, the court ruled that the regulations, publications, and other materials were strictly irrelevant and inadmissible in this case. We agree with the circuit court.

There are clear distinctions between public railroad crossings and private railroad crossings, and a railroad’s duty of care depends upon the type of crossing. See *Wavle v Mich United R Co*, 170 Mich 81, 91; 135 NW 914 (1912); *Beasley v Grand Trunk Western R Co*, 90 Mich App 576, 586-588; 282 NW2d 401 (1979); see also *McAllister v Chesapeake & Ohio R Co*, 243 US 302, 307; 37 S Ct 274; 61 L Ed 735 (1917); *Kovacs v Chesapeake & Ohio R Co*, 134 Mich App 514, 527; 351 NW2d 581 (1984).

In particular, plaintiff asserts that the circuit court should have permitted him to introduce into evidence: (1) a Federal Highway Administration memorandum of March 17, 2006,

pertaining to the use and placement of signs at highway-rail grade crossings, (2) a 2002 Federal Highway Administration booklet entitled “Traffic Control Devices at Highway-Rail Grade Crossings,” and (3) the text of 23 CFR 646.214(b)(3), a federal regulation pertaining to the use of automatic gates and flashing lights at certain highway grade crossings. But plaintiff freely admits in his brief on appeal that the Federal Highway Administration memorandum and booklet pertain exclusively to “highway-rail grade crossings,” i.e., public grade crossings on public highways. Further, according to its plain language, 23 CFR 646.214(b)(3) pertains only to “highway” crossings and other highway projects that are completed using federal funds.

It is undisputed that plaintiff was injured at a *private* grade crossing. Despite plaintiff’s attempt to characterize the cited regulations, standards, and government publications as broadly applicable to grade-crossing safety in general, it is clear that these materials do not apply to private grade crossings such as the one where plaintiff was struck. See *Colbert v Union Pacific R Co*, 485 F Supp 2d 1236, 1241-1242 (D Kan, 2007). The circuit court properly determined that the regulations, standards, and government publications cited by plaintiff pertained only to public crossings, and that they were therefore irrelevant and inadmissible in this case. See MRE 401; MRE 402.

Nor were the regulations, standards, and government publications cited by plaintiff admissible for the limited purpose of impeachment. Plaintiff contends that he should have been permitted to introduce these regulations, standards, and government publications to impeach the opinion testimony of Officer Strong. However, to be admissible as impeachment material, evidence must still satisfy the relevancy threshold of MRE 401 and must not be unduly prejudicial, misleading, or confusing under MRE 403. See *Popp v Crittenton Hospital*, 181 Mich App 662, 664; 449 NW2d 678 (1989). The regulations, standards, and government publications identified by plaintiff applied exclusively to public railroad crossings on public highways, and were therefore irrelevant, even for impeachment purposes. The circuit court properly prohibited plaintiff from introducing these irrelevant materials into evidence.

## VII

Plaintiff next argues that defendant violated the circuit court’s ruling on one of his motions in limine by eliciting testimony from Gene Bressette that half of all grade-crossing accidents occur at crossings with gates and flashing lights. Plaintiff argues that, given defendant’s violation of the circuit court’s order, the court should have granted his request for a new trial. We do not agree.

Before trial, plaintiff sought to exclude defendant from introducing evidence that motorists routinely disregard or drive around gates, flashing lights, and other safety devices at railroad grade crossings. The circuit court granted plaintiff’s motion in limine in this regard, prohibiting defendant from introducing such evidence and ruling that it was irrelevant that other motorists might disregard gates and flashing lights. At trial, after learning that Bressette had worked in the field of railroad safety for 27 years, defendant’s attorney asked Bressette whether it was true that approximately 50 percent of all train-automobile collisions occur at grade crossings with flashing lights and gates. Bressette responded that this was “correct.”

“An order in limine is an instruction not to mention certain facts unless the court’s permission is first obtained.” *Zantop Int’l Airlines, Inc v Eastern Airlines*, 200 Mich App 344, 360; 503 NW2d 915 (1993). Through its ruling on plaintiff’s motion in limine, the circuit court had explicitly directed defendant not to introduce evidence concerning the occurrence of collisions at other grade crossings with gates and flashing lights. Nor had defendant sought and received permission from the court to ask Bressette about such accidents. Defense counsel violated the circuit court’s ruling on plaintiff’s motion in limine by asking Bressette about the occurrence of train-automobile accidents at other grade crossings with flashing lights and gates.

Nevertheless, the circuit court properly determined that defense counsel’s violation of the order in limine did not warrant a new trial. Defense counsel’s question was passing, brief, and not repeated. See *Taubitz v Grand Trunk Western R*, 133 Mich App 122, 129; 348 NW2d 712 (1984). Moreover, any prejudice flowing from defense counsel’s question could have been alleviated by a curative instruction. *Id.* We conclude that, as in *Taubitz*, defense counsel’s violation of the order in limine was harmless and did not result in prejudice to plaintiff. *Id.* The circuit court did not abuse its discretion by declining to order a new trial on this ground.

## VIII

Plaintiff additionally argues that the circuit court abused its discretion by granting defendant’s motion in limine that sought to preclude him from introducing evidence concerning the presence of safety devices, such as gates and flashing lights, at other nearby grade crossings on the same main track line. Again, we disagree.

This issue was raised in another of defendant’s motions in limine. The circuit court ultimately granted defendant’s motion, ruling that plaintiff could not introduce evidence concerning the presence of safety devices, such as gates and flashing lights, at other nearby grade crossings on the same main track line. Specifically, the court noted that the presence of gates and flashing lights at nearby grade crossings would be relevant only if it could be shown that those nearby crossings were otherwise similar to the crossing where plaintiff was struck and injured. Because the other grade crossings in the vicinity were *public* crossings, and therefore dissimilar from the *private* crossing where plaintiff was struck, the court ruled that the presence of safety devices at those crossings was not relevant to the issue of defendant’s negligence in this case.

We perceive no error in the circuit court’s ruling. As explained previously, there are distinct differences between public railroad crossings and private railroad crossings, and a railroad’s duty of care depends upon the type of crossing. See *Wavle*, 170 Mich at 91; *Beasley*, 90 Mich App at 586-588; see also *McAllister*, 243 US at 307; *Kovacs*, 134 Mich App at 527. Plaintiff made no effort to show that the other nearby grade crossings were otherwise similar to the private crossing where he was struck. Indeed, the uncontroverted evidence established that the other nearby grade crossings were all public. Therefore, any evidence concerning the presence of gates and flashing lights at those other crossings would have been irrelevant to the issue of defendant’s negligence vis-à-vis the private grade crossing at issue in this case. See MRE 401; MRE 402. We find no abuse of discretion.

## IX

Plaintiff argues that the circuit court should have granted a new trial on the ground that the jurors were improperly influenced by certain actions of expert witness Dr. Manfred Greiffenstein during trial. Plaintiff also contends that the circuit court abused its discretion by dismissing Juror No. 2. We cannot agree.

On the second-to-last day of trial, before the jury was called into the courtroom, the circuit court informed the attorneys that it had received a note from Juror No. 2. The note stated that, during a sidebar conference the previous day, while Dr. Greiffenstein was on the witness stand, Greiffenstein had taken out a book and held it in such a way that it was visible to the members of the jury. The book was entitled *Without Conscience—the Disturbing World of the Psychopaths Among Us*. In the note, Juror No. 2 expressed her concern that Greiffenstein may have been trying to sway the opinion of the jurors or “project a subliminal message” to the jurors by displaying the book.

The court questioned Juror No. 2 outside the presence of the other jurors. Juror No. 2 explained that, in her opinion, Greiffenstein’s behavior was odd. Juror No. 2 suggested that, given Greiffenstein’s training as a psychologist, he might have been trying to “relay[] a subliminal message.” While Juror No. 2 stated that she could still be fair and impartial, she explained that she “question[ed] [Greiffenstein’s] motive for whipping out a book in the middle of a proceeding” and “question[ed] . . . his judgment professionally.” The circuit court ultimately decided to dismiss Juror No. 2 because it was concerned that the experience would impact her decision-making processes and her determination of Greiffenstein’s credibility. Later, the circuit court individually polled the remaining jurors to make sure that they had not been influenced by Juror No. 2.

The circuit court did not abuse its discretion by refusing to order a new trial on the ground that the jurors were improperly influenced by seeing Greiffenstein’s book. Plaintiff correctly points out in his brief on appeal that, under certain circumstances, improper communications between jurors and witnesses may necessitate the granting of a new trial. See *People v Nick*, 360 Mich 219, 227; 103 NW2d 435 (1960); *Hranach v Proksch Construction Co*, 69 Mich App 540, 543; 245 NW2d 345 (1976). However, before a new trial will be ordered, “[p]rejudice must be shown” and “[a] mere possibility is not sufficient.” *Nick*, 360 Mich at 227.

In this case, there was no verbal communication between Greiffenstein and the jurors. Other than Juror No. 2, no juror reported having seen Greiffenstein’s book or having felt intimidated by Greiffenstein’s conduct. Moreover, apart from the note written by Juror No. 2, there was simply no evidence to suggest that Greiffenstein was attempting to improperly influence the jury. In a post-trial affidavit, Greiffenstein explained that he had “review[ed] [the] book” during the sidebar conference “in order to refresh my memory on key points.” However, Greiffenstein “categorically den[ied]” that he had intentionally displayed the book in an attempt to influence the jurors.

The mere possibility that the jurors were influenced by Greiffenstein’s behavior was simply insufficient to warrant the granting of a new trial. See *id.* The circuit judge was present throughout the proceedings. She was able to observe the jurors as well as the demeanor of

Greiffenstein. While Greiffenstein's conduct might have appeared suspect to Juror No. 2, we will not substitute our judgment for that of the circuit judge on this matter. *Hranach*, 69 Mich App at 543-544. We cannot conclude that the circuit court abused its discretion by refusing to order a new trial on this ground.

Nor did the circuit court abuse its discretion by dismissing Juror No. 2. A juror may be dismissed for cause if, among other things, he or she "is biased for or against a party or attorney," MCR 2.511(D)(2), "shows a state of mind that will prevent [him or her] from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be," MCR 2.511(D)(3), or "has opinions or conscientious scruples that would improperly influence [his or her] verdict," MCR 2.511(D)(4). It is within the sound discretion of the circuit judge to determine whether a juror is impartial and to dismiss a juror for cause. *Harrison*, 162 Mich App at 471.

Although Juror No. 2 maintained that she could still be fair and impartial, she also explained that she "question[ed] [Greiffenstein's] motive" and "question[ed] . . . his judgment professionally." It is clear from these statements that Juror No. 2 had formed opinions concerning Greiffenstein's credibility that would likely influence her verdict. MCR 2.511(D)(4). The circuit court did not abuse its discretion by dismissing Juror No. 2. See *Harrison*, 162 Mich App at 471.

## X

Plaintiff next argues that the circuit court abused its discretion when it overruled his objections and allowed defense counsel to ask him about the purchase of a firearm, his trips to the gun range, his attendance at bars and nightclubs, his vacations, and the photographs on his MySpace page. We disagree.

Before trial began, the circuit court granted plaintiff's motions in limine that sought to preclude defendant from introducing evidence of plaintiff's personal habits (including smoking, drug use, drinking, and gambling), as well as plaintiff's prior bad acts (including prior military arrests, misconduct in the army, general misconduct, and other similar behavior). We fully acknowledge that evidence of person's character is not admissible for the purpose of proving conformity therewith. MRE 404(a). Nor is evidence of a person's prior bad acts or other wrongs admissible to prove conformity therewith. MRE 404(b)(1). However, contrary to plaintiff's argument on appeal, defense counsel's questions concerning plaintiff's social, recreational, and firearm-related activities were not designed to elicit improper character or other-acts evidence.

During direct examination, plaintiff testified that because of his alleged disabilities, he was unable to perform basic tasks, do his own shopping, form social relationships, participate in recreational activities, and drive without supervision. He even testified that he was frequently unable to leave the house. By cross-examining plaintiff about his purchase of a firearm, his trips to the gun range, his attendance at bars and nightclubs, his vacations, and the photographs on his MySpace page, defense counsel was merely attempting to contradict plaintiff's claims that he was incapable of performing basic tasks and in need of 18-hour-a-day attendant care. "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." MRE 611(c). "A broad range of evidence may be elicited on cross-examination for the purpose

of discrediting a witness.” *Wischmeyer v Schanz*, 449 Mich 469, 474; 536 NW2d 760 (1995). “One of the elementary principles of cross-examination is that the party having the right to cross-examine has a right to draw out from the witness and lay before the jury anything tending or which may tend to contradict, weaken, modify, or explain the testimony or affect the credibility of the witness.” *Malicke v Milan*, 320 Mich 65, 70-71; 30 NW2d 440 (1948) (citation omitted). Counsel is free to contradict the testimony of his adversary’s witnesses on cross-examination so long as the contradictory material is germane to the issue and not collateral, irrelevant, or immaterial. *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995).

Defense counsel’s questions were germane, relevant, and material to the nature and extent of plaintiff’s alleged disabilities. It was defense counsel’s intent to contradict plaintiff’s earlier testimony by demonstrating that plaintiff was able to go on vacation, interact with other people, drive his automobile without supervision, engage in social functions, participate in recreational activities, and leave the house at night. Once plaintiff had opened the door during direct examination by placing in issue the nature and extent of his alleged disabilities, it was proper for defense counsel to draw out testimony tending to contradict plaintiff’s claims. See *Schwartz v Triff*, 2 Mich App 379, 383; 139 NW2d 907 (1966). Counsel’s questioning of plaintiff in this regard was appropriate and was properly within the scope of cross-examination. See MRE 611(c). The circuit court did not abuse its discretion by overruling plaintiff’s objections and allowing defense counsel to question plaintiff concerning his social, recreational, and firearm-related activities.

## XI

Plaintiff lastly argues that the circuit court should have granted his motion for a new trial on the ground that the jury’s verdict was against the great weight of the evidence. We disagree.

A new trial may be granted, on some or all the issues, if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e); *King v Taylor Chrysler-Plymouth, Inc.*, 184 Mich App 204, 210; 457 NW2d 42 (1990). “The jury’s verdict should not be set aside if there is competent evidence to support it . . .” *Id.* A verdict is against the great weight of the evidence only when the evidence preponderates so heavily against the verdict “that a miscarriage of justice would result from allowing the verdict to stand.” *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999). We give substantial deference to the circuit court’s determination that the jury’s verdict was not against the great weight of the evidence. *Guerrero v Smith*, 280 Mich App 647, 666; 761 NW2d 723 (2008).

There was more than sufficient evidence presented at trial to support the jury’s verdict of no cause of action. Numerous witnesses testified that the grade crossing was free of visual obstructions and that a motorist stopped at the stop sign would have been able to see an oncoming train approaching from either direction. Several of the photographs admitted into evidence supported the testimony in this regard. Furthermore, the undisputed evidence established that until plaintiff’s accident on September 8, 2006, there were no other train-automobile collisions at the grade crossing. The evidence also established that plaintiff had worked at defendant’s Wayne railroad yard numerous times and should have known that the same Amtrack train passed across the grade crossing between 7:30 and 8:00 each morning. We recognize that Gene Bressette and Dan Cook testified extensively that they were both concerned

about safety at the grade crossing. Similarly, Archie Burnham testified that, in his opinion, additional safety devices were required at the crossing. But, in the end, the jury's determination depended heavily on the credibility of plaintiff, himself, who offered inconsistent accounts of the accident and dubious claims concerning the extent of his alleged disabilities.

"It is the jury's responsibility to determine the credibility and weight of the trial testimony." *Id.* at 669. "The jury has the discretion to believe or disbelieve a witness's testimony, even when the witness's statements are not contradicted . . ." *Id.* This Court "must defer to the jury on issues of witness credibility." *Id.* It is apparent that the jury assigned greater weight to the testimony of the defense witnesses than it assigned to the testimony of plaintiff's witnesses. This it was entitled to do. The overwhelming weight of the evidence does not preponderate against the jury's determination that defendant was not negligent in maintaining the railroad grade crossing where plaintiff was struck. See *id.* at 670. Because the jury's verdict was not against the great weight of the evidence, the circuit court properly denied plaintiff's motion for a new trial. See *King*, 184 Mich App at 211-212.

Affirmed. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

/s/ William B. Murphy  
/s/ Kathleen Jansen  
/s/ Christopher M. Murray