

No. 1-09-1867

**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).

SIXTH DIVISION  
APRIL 15, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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YVONNE WHITE, Special Administrator of )	Appeal from the
the Estate of DE'VON K. WHITE, Deceased,) )	Circuit Court of
Plaintiff-Appellant, )	Cook County.
)	
v. )	No. 06 L 13275
)	
NORTHEAST ILLINOIS REGIONAL COMMUTER )	The Honorable
RAILROAD CORPORATION, d/b/a METRA, )	Donald Suriano,
Defendant-Appellee. )	Judge Presiding.

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JUSTICE ROBERT E. GORDON delivered the judgment of the court.

PRESIDING JUSTICE GARCIA and JUSTICE CAHILL concurred in the judgment.

**O R D E R**

*HELD:* Where jury responded to special interrogatory by concluding that 10-year-old pedestrian was capable of contributory negligence in crossing railroad track when warning signals were activated, the evidence supported verdict in favor of railroad; the trial court's judgment was affirmed.

Plaintiff Yvonne White, special administrator of the estate

of De'Von K. White, brought a negligence action against defendant Northeast Illinois Regional Commuter Railroad Corporation, doing business as Metra (hereinafter Metra), in the death of her 10-year-old son, who was struck by a train. A jury found in favor of Metra. White now appeals *pro se*, raising several challenges to the jury's verdict. We affirm.

On January 20, 2009, White filed a complaint alleging that on August 26, 2002, De'Von was crossing the railroad tracks at 112th Place and Marshfield in Chicago and was struck and killed by a northbound train after he waited for a southbound train to clear the crossing. The complaint alleged that Metra failed to keep a proper lookout, failed to provide adequate warning of the approaching northbound train, and failed to apply the train's emergency brakes to avoid the accident upon seeing De'Von standing near the tracks.

Metra raised as an affirmative defense the contributory negligence of De'Von. White was permitted to submit a special interrogatory to the jury asking whether De'Von had the age, mental capacity and experience to act negligently. The jury returned a verdict in favor of Metra and responded affirmatively to the special interrogatory, indicating that De'Von was capable of negligent conduct. The trial transcripts included in the record on appeal are incomplete.

On February 3, 2009, the trial court entered judgment on the

jury's verdict. White now appeals that order and the court's order of June 16, 2009, denying her motion for a new trial.

Before addressing White's contentions on appeal, we consider Metra's assertion that White's brief does not comply with the supreme court rules. More precisely, Metra argues White's contentions are unsupported by legal argument or citations to relevant authority and that White has waived several arguments by failing to include them in her motion for a new trial. The insufficiency of White's brief does not affect this court's jurisdiction to decide the appeal, and we elect to dispose of this appeal on the merits. See, e.g., *Tannenbaum v. Lincoln National Bank*, 143 Ill. App. 3d 572, 575 (1986) (reviewing court could decipher issues that appellant intended to raise and also had benefit of opposing party's cogent brief).

White presents several discernible arguments, namely that: (1) the jury erred in returning a verdict in favor of Metra; (2) counsel for White should have exercised a challenge against a particular juror; (3) De'Von's age should have been taken into consideration because a presumption exists that a child between 6 and 14 years old cannot be contributorily negligent; and (4) improvements were made to the railroad crossing after the accident occurred.

First, as to White's challenge to the jury's verdict, this court will set aside a verdict only if it is contrary to the

manifest weight of the evidence. See *Stapleton v. Moore*, 403 Ill. App. 3d 147, 165 (2010). A finding is contrary to the manifest weight of the evidence when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary or not based on the evidence. *Vancura v. Katris*, 238 Ill. 2d 352, 374 (2010).

The record does not contain a full report of proceedings at trial, which would reflect all testimony presented. As the appellant, White has the burden of presenting a sufficiently complete record of the proceedings to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) (any doubts arising from incomplete record will be resolved against appellant).

Metra, in support of its own contentions, has attached purported excerpts of the trial transcripts to its brief by way of an appendix. However, the record on appeal cannot be supplemented by attaching documents to the appendix of a brief, and such documents are not properly before this court. *Whittmanhart, Inc. v. CA, Inc.*, 402 Ill. App. 3d 848, 852 (2010). Therefore, we consider White's assertions only to the extent they can be examined by using the record on appeal.

The record includes a transcript of a videotaped evidence deposition of Talaya Patterson that was played during the trial as part of White's case. Patterson testified she was riding in a car driven by Jerome Echols<sup>1</sup> that approached the crossing just before the train arrived. Both sets of crossing gates were down, the red lights were flashing, and Patterson could hear the train approaching. Patterson saw De'Von come out of a nearby store and run toward the railroad tracks as the lights were flashing. Patterson testified "you could tell he was anxious like he was trying to get somewhere." Patterson said De'Von began to cross the tracks after one train passed through the crossing, even though the gates remained down and the lights continued to flash. A train then went through the crossing from the opposite direction.

The record also includes portions of the trial testimony of Thomas Olsson, the Metra engineer who operated the train. Olsson testified he saw De'Von standing on the side of the tracks "in a safe place" and "not moving." Brian Heikkila, a locomotive expert testified on Metra's behalf that he investigated the accident and concluded the train's brakes were applied 115 feet before impact and the horn sounded six seconds before impact. Again, this court has not been provided with all of the testimony

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<sup>1</sup>Portions of Echols' trial testimony are appended to Metra's brief but are not part of the record on appeal.

on which the jury based its verdict. Nevertheless, the testimony reflected in the record before us does not support reversing the judgment below.

We next consider White's contention that her attorney should have excluded a juror because the juror's spouse worked for the Union Pacific Railroad. White has not provided a transcript of *voir dire* as part of the record on appeal, and this court therefore lacks any means to review that claim. Moreover, White did not raise this objection in her motion for a new trial and, thus, the issue is waived.

White also challenges the jury's conclusion on the special interrogatory that De'Von was capable of contributory negligence. White contends no medical testimony was presented as to De'Von's physical attributes. She asserts she had previously instructed her son to look both ways when crossing a railroad track.

De'Von was 10 years old when the accident occurred. When a child is between 7 and 14 years old, the trier of fact must consider the "age, capacity, intelligence, and experience of the child" in light of the rebuttable presumption that a child in that age range is incapable of negligence. *Appelhans v. McFall*, 325 Ill. App. 3d 232, 238 (2001). Here, the jury was given a special interrogatory to determine whether that presumption was rebutted in De'Von's case, and the jury responded "yes" when asked if De'Von had "the age, mental capacity and experience to

act negligently?" As White herself points out, the capacity of a child in these circumstances is a question of fact, and the record establishes that in this case, that question was decided by the jury as the trier of fact.

White's remaining contention, that subsequent improvements to the crossing were proof of Metra's negligence, cannot be legally supported. White describes various steps taken to improve safety at the rail crossing where the accident occurred. Evidence of those improvements is not presented in the record. Furthermore, proof of post-accident remedial measures generally cannot be admitted to establish prior negligence. *Herzog v. Lexington Township*, 167 Ill. 2d 288, 300 (1995) (noting exceptions where remedial steps are offered to prove ownership of property or feasibility of precautionary measures where either point is disputed); see also *Jablonski v. Ford Motor Co.*, 398 Ill. App. 3d 222, 263 (2010).

In conclusion, none of the arguments raised by White is legally viable. The record on appeal supports the jury's verdict in favor of Metra.

Accordingly, the judgment of the trial court is affirmed.

Affirmed.