2013 IL App (1st) 121859-U

SECOND DIVISION
September 30, 2013

No. 1-12-1859

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JEFFREY J. ADAMS, Plaintiff-Appellee, v. NORTHEAST ILLINOIS REGIONAL COMMUTER RAILROAD CORPORATION, d/b/a METRA, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County, Illinois. 07 L 014436 The Honorable Charles R. Winkler and Thomas J. Lipscomb, Judges Presiding.

Justice Simon delivered the judgment of the court.
Presiding Justice Quinn and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *HELD*: Jury verdict on plaintiff railroad employee's negligence claim under Federal Employer's Liability Act was not against the manifest weight of the evidence and the evidence presented sufficient to overcome defendant railroad's motion for judgment notwithstanding the verdict where plaintiff presented evidence of a hole in the ballast where he fell and was injured, that work was being conducted in the area, the holes were not typical for the track areas, Metra was responsible for informing employees of dangerous conditions, and plaintiff was informed work was ongoing the day after his fall. Circuit court's refusal to tender defendant's special interrogatories to jury was not in error where requested special interrogatories were not in proper form or not absolutely irreconcilable with the general verdict. Circuit court's evidentiary rulings were not an

abuse of discretion.

¶ 2 Plaintiff Jeffrey Adams was injured on August 9, 2006, while performing his employment duties for defendant Northeast Illinois Regional Commuter Railroad Corporation (Metra) when he stepped into a hole in the ballast, the rock that supports the railroad track, ties, and rails. Plaintiff sustained serious injuries to his left knee requiring surgery and rehabilitation. Plaintiff filed the underlying complaint under the provisions of the Federal Employer's Liability Act (FELA) (45 U.S.C. §51, *et seq.*). Plaintiff alleged that Metra failed to: provide a reasonably safe work place; provide reasonably safe conditions for walking; enforce its safety rules; communicate changes in work conditions; and warn employees. Alternatively, plaintiff asserted that Metra failed to properly fill the holes in the ballast. Following a jury trial, the jury returned a verdict for plaintiff, awarding plaintiff a $603,445.60 monetary judgment for lost earnings, loss of normal life, pain and suffering and increased risk of future injury. The jury reduced the award 25% to $452,584.20 based on its finding of plaintiff's contributory negligence.

¶ 3 Metra filed a motion for judgment notwithstanding the verdict (judgment *n.o.v.*) or for a new trial, which was denied. Metra filed the instant appeal, asserting: the circuit court erred by rejecting Metra's proffered special interrogatories to the jury; Metra should have been granted judgment *n.o.v.* based on the evidence presented at trial; and that Metra is entitled to a new trial because the verdict is against the manifest weight of the evidence and the circuit court erred in allowing improper opinion and hearsay testimony. For the following reasons, we affirm the judgment of the circuit court.

¶ 4 I. BACKGROUND

¶ 5 Prior to trial, Metra filed several motions *in limine*. Of particular importance to this

appeal, Metra sought to exclude evidence regarding Metra's alleged use of an improper size of ballast in the area that plaintiff was injured. In addition, Metra sought to bar plaintiff's medical expert, Dr. Sarantopolous, from offering his opinion that plaintiff would likely require future knee replacement surgery.

¶ 6 With respect to the ballast issue, plaintiff had presented an expert during discovery who opined that Metra had provided an unsafe work environment by using larger "mainline" ballast instead of smaller "yard" ballast in the location plaintiff was injured. However, plaintiff indicated that he would not call this expert at trial. Furthermore, Metra cited to federal case law holding that FELA claims regarding ballast size are subsumed by Federal Railroad Safety Act regulations granting railroad's discretion in determining the size of ballast to use in a rail yard. See, 49 C.F.R. § 213.103. The court granted the motion to exclude the evidence of the size of the ballast.

¶ 7 The court heard extensive argument concerning Dr. Sarantopolous' qualifications and whether there was sufficient foundation for him to opine that plaintiff would likely require future knee replacement. In his evidence deposition, Sarantopolous testified that he was a physiatrist, a specialist in physical medicine and rehabilitation, and that he treated plaintiff between December 8, 2006, and December 3, 2008. Sarantopolous testified that plaintiff presented with pain in his knee and numbness that plaintiff said resulted from a fall he suffered at work. Sarantopolous interviewed and examined plaintiff and reviewed the results of the MRI of his knee. He eventually referred plaintiff to an orthopaedic surgeon, Dr. Kuesis, who performed arthroscopic surgery and found damage to the menisci and other damage that might require eventual knee replacement.

¶ 8 Dr. Sarantopolous testified that if he felt a patient required surgery he would refer that patient to a surgeon and the ultimate decision as to treatment would be made by an orthopaedic surgeon. However, he was asked his opinion and he responded that it was highly likely that plaintiff would require a knee replacement. Dr. Sarantopolous explained that he based this opinion on his clinical evaluation, discussions with Dr. Kuesis, plaintiff's clinical history, the recommendation of lubricant injections in the knee, and his history treating other patients. The court was reluctant to allow the testimony at first because Sarantopolous was not a surgeon and his opinion was speculative, but ultimately allowed it because it was explained how he formed his opinion as a treating doctor and he properly limited his testimony with the key phrase "reasonable degree of medical certainty."

¶ 9 At trial[1], plaintiff testified that he had worked for Metra since June 1994. In 1996, he was promoted to the position of engine watchman at the Metra coach yard in Antioch, Illinois. As an engine watchman, plaintiff worked from 5:30 p.m. until 1:30 a.m. and was responsible for shutting down and servicing the six trains that utilized the Antioch yard. Plaintiff would

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[1] Appellant has failed to provide a complete record of proceedings for our review. Because only excerpts of trial testimony have been provided, we have prepared our background section with reference only to these excerpts. While plaintiff has not asserted any deficiencies in the record, defendant, as the appellant, was required to present a sufficiently complete record. For any doubts that arise from the incompleteness of the record, we will presume the jury's verdict had a sufficient factual basis and the circuit court conformed with the law where the record is inadequate. *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156-57 (2005).

complete "blue flagging," placing blue flags and blue lights onto trains that have come into the yard for the night and "derailing" the tracks so other trains were prevented from entering the tracks where the trains were idling. Plaintiff would meet with the train crew to determine any mechanical issues regarding the train, take readings, shut down the locomotive, and close the track.

¶ 10 In performing these duties, plaintiff would have to walk along the tracks for extended distances. Plaintiff testified that he would walk between the rails because the ballast was more firmly packed in this area and that was how he was trained to walk the rails. He admitted that the Metra rules prohibit walking between the rails except in certain unrelated situations. Plaintiff also admitted that he did not walk outside the rails after noticing the upset ballast and he did not use his flashlight or anything else to help navigate the area.

¶ 11 On August 9, 2006, plaintiff was performing his duties on Track 4 when he noticed ballast on top of the railroad ties while walking between the rails. Plaintiff walked toward the rail in an attempt to avoid the ballast but felt his foot slip into a hole under the rail causing him to fall to his hands and knees. Plaintiff felt pain in his left knee but was able to roll over and get up. Plaintiff noticed that the ballast was lower than the ties in the area. Plaintiff drove himself to the emergency room where he was given pain and anti-inflammatory medications and an immobilizer was placed on his leg.

¶ 12 Tom Opala testified that he was a night shift train yard foreman for Metra in 2006 and was plaintiff's supervisor at the time of the incident. Opala testified that he worked in the area where plaintiff fell the morning before and did not notice any holes, indentations, or piles of ballast. He examined the area the next day and saw that the area was disturbed. Because he did

not know why the area was disturbed, Opala contacted the liaison person for a large project that included installing rail anchors on tracks three and four on Monday, Tuesday and Wednesday (August 7 - 9, 2006) of that week. Opala testified that he felt that plaintiff would be the only employee affected and he wrote him a note, dated August 10, 2006, that stated: "I spoke to Jeff. K. and found out this week Monday Tuesday and Wednesday the Engring [*sic.*] Dept has been clearing out the spaces between the ties on Track 4 in the coach yd. to install rail anchors to keep the rail from moving in hot weather. FYI Tom Opala." The note was admitted into evidence over Metra's objection as a party admission.

¶ 13 Brenda Simmons testified that she was employed by Metra as a carman at the Antioch yard. As a carman, Simmons inspects and repairs coach cars when they are parked in the yard overnight. Simmons testified that she was told to exercise caution on Track 4 on August 9, 2006, because there were holes in the ballast between the rails and plaintiff had stepped in one that night. She described the condition of the area that night as having holes in the ballast that were deeper than any normal depression and that she had never seen the conditions that bad before. Simmons testified that there was a job briefing before each shift where she was told what work needed to be done and if any special conditions existed at the yard. She was not told about the conditions of tracks three and four until after plaintiff was injured.

¶ 14 In an evidence deposition, Ken Rabe testified that he was Metra's supervisor of track maintenance for the Antioch yard. Rabe testified that the work going on at the Antioch yard at the time of plaintiff's fall involved workers digging out holes under the tracks by hand to install anchors onto the tracks and into the ground. The crews would then replace the ballast into the holes after installing the anchors. He did not know the workers' method as to how far in advance

they would dig the holes.

¶ 15 Viewing Exhibit 59, a picture of the area of Track 4 at issue that was taken after plaintiff fell, Rabe agreed that the ballast did not appear to be replaced to the proper level of the top of the railroad ties. He also opined that the condition did not appear to be created by the engineering work being conducted because the digging was completed with a pick axe. Rabe testified that he did not see enough disturbance in the ballast in the picture to think a worker with a pick axe created the hole. Rabe could not say why the ballast was not even with the railroad ties.

¶ 16 Rabe testified that the Metra rules required job briefings to advise employees of any changes in conditions in the yard and also required workers to exercise caution and watch where they were walking along the tracks. He testified that, if engineering work created unsafe conditions, he would have briefed Opala on that issue. It would then be Opala's job to brief his staff before they went to work in the yard. Rabe could not remember whether or not he conveyed any information to Opala concerning the work and conditions in the Antioch Yard around the date of plaintiff's fall.

¶ 17 During the jury instruction conference, Metra sought to tender the following special interrogatories to the jury:

> "1) Do you find that Metra provided the plaintiff with a reasonably safe place to work?
>
> 2) If you answered "NO" to Interrogatory No. 1 above, do you find that the plaintiffs claimed injuries resulted in whole or in part from Metra's failure to provide plaintiff with a reasonably safe place to work?
>
> 3) Do you find that Metra knew or reasonably should have known of the

complained of condition of Track 4 prior to the occurrence?

4) Did Metra provide the plaintiff with adequate notice of the rail anchor project in the Antioch Yard?

5) If you answered "NO" to Interrogatory No. 4 above, do you find that the plaintiff's claimed injuries resulted in whole or in part from Metra's failure to provide the plaintiff with adequate notice of the rail anchor project in the Antioch Yard?"

The circuit court refused to tender the special interrogatories to the jury. The court opined that Metra failed to provide any supporting case law for the interrogatories and that the jury instructions were sufficient to guide the jury in resolving the dispute.

¶ 18 With respect to plaintiff's claims, the jury was instructed:

"The plaintiff claims he was injured and sustained damages while he was engaged in the course of his employment by the railroad. The plaintiff further claims that the railroad violated the Federal Employers' Liability Act in that an officer, agent or other employee of the railroad was negligent because, A, it failed to provide a reasonably safe workplace; B, it failed to properly enforce its safety rules; C, it failed to appropriately warn its employees of unsafe working and/or walking conditions or it failed to properly fill holes in the ballast.

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At the time of the occurrence the plaintiff was in the course of his employment. It was the duty of the railroad to use ordinary care to provide the plaintiff with a reasonably safe place in which to do his work."

¶ 19 The jury returned a verdict for plaintiff, awarding a $603,445.60 monetary judgment for lost earnings, loss of normal life, pain and suffering and increased risk of future injury. The jury reduced the award 25% to $452,584.20 based on its finding of plaintiff's contributory negligence. Metra filed a motion for judgment notwithstanding the verdict (judgment *n.o.v.*) or for a new trial, which was denied. This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 Plaintiff brought the underlying action pursuant to FELA, which was enacted in 1908 to provide a federal remedy for railroad workers who suffer personal workplace injuries. *Wilson v. Norfolk & Western Ry. Co.*, 187 Ill. 2d 369, 372 (1999). State tort remedies are preempted by FELA's statutory cause of action sounding in negligence, but federal and state courts exercise concurrent jurisdiction under FELA. *Fennell v. Illinois Central R.R. Co.*, 2012 IL 113812 ¶ 10; 45 U.S.C. § 56 (2000). While FELA is to be liberally construed to accomplish Congress' goals of protecting employees from injury caused "in whole or in part from the negligence" of the employer, thereby creating a lighter burden than an ordinary negligence action, an injured employee still must allege and prove negligence on the part of the employer. 45 U.S.C. § 54 (2012); *Wilson*, 187 Ill. 2d at 373. Although there is no assumption of risk by the employee or arguing a risk was "open and obvious," these factors may be part of the calculus a defendant argues in support of a finding of contributory negligence. *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 282-83 (2002).

¶ 22 Therefore, to succeed on a claim under FELA, a plaintiff must prove the elements of negligence, including duty, breach, foreseeability, and causation. *Lynch v. Northeast Regional Commuter R.R. Corp.*, 700 F.3d 906, 911 (2012). These elements need not be proven by direct

evidence, but may be sufficiently established with circumstantial evidence. *Id.* at 916. We consider each of Metra's arguments on appeal in turn.

¶ 23 A. Judgment Notwithstanding the Verdict

¶ 24 Metra claims that the court below erred in denying its motion for judgment *n.o.v.* A circuit court may only enter a judgment *n.o.v.* where all the evidence, viewed in the light most favorable to the nonmovant, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand. *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967). A motion for judgment *n.o.v.* presents a question of law as to whether there was a total failure to present evidence to prove a necessary element of the plaintiff's case. *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 178 (2006). This standard is a "high one" and "judgment *n.o.v.* is inappropriate if 'reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented.' " *Id.* quoting *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337, 351 (1995). We review the circuit court's ruling on such a motion *de novo*. *Id.* In so doing, we do not weigh the evidence or credibility of witnesses or substitute our judgment for that of the jury. *Id.*

¶ 25 Metra argues that plaintiff's case rests on acceptance of Opala's "single, hearsay note which, of itself, did not establish causation." Metra claims that plaintiff's argument relies on testimony that is pure conjecture and cannot overcome the evidence it provided in its case. Metra maintains that it provided extensive evidence that it had no knowledge or notice of any holes on Track 4. Furthermore, Metra argues that it demonstrated that no work had been conducted in the area of Track 4 at that time or that any work completed at that time would have caused the condition.

¶ 26 We agree with plaintiff that the circuit court did not err in denying Metra's motion for judgment *n.o.v.* Based on the record before this court with any inferences based on the incomplete record resolved in favor of plaintiff, the evidence does not so overwhelmingly favor Metra that there was a total failure by plaintiff to present evidence in support of his case. Plaintiff testified that he stepped into a hole in the ballast between the tracks that was not expected, causing him to fall and injure his knee. Simmons testified that she investigated the track area the night that plaintiff fell and found that the ballast was lower than it should have been near the railroad ties. Opala testified that he inspected the area both before and after plaintiff fell and noticed that the conditions had changed and there were holes in the ballast. He testified that he then contacted the liaison for the work project at the yard and was told that rail anchors were being installed on tracks three and four on Monday, Tuesday and Wednesday of that week. Opala testified that he felt that plaintiff would be the only person affected so he wrote him the note, dated August 10, 2006, informing him that track maintenance was going on that week on track 4.

¶ 27 Considering this evidence, the jury had support to find for plaintiff. The jury found the testimony and evidence in support of plaintiff credible. That evidence showed that a hole was created sometime before plaintiff's shift on Wednesday, August 9, 2006, plaintiff fell in that hole, Metra knew that engineering work was occurring that week which could create holes in the ballast in the yard, the holes were not filled back to grade and loose ballast were not replaced, and that plaintiff was not advised of this until the day after his fall. Under the lighter burden for negligence cases under FELA and the high standard for judgment *n.o.v.*, the circuit court did not err in denying Metra's motion.

¶ 28 B. Manifest Weight of the Evidence

¶ 29 Based on its arguments above, Metra also claims that the jury's findings were unreasonable, arbitrary, and not based upon the evidence offered at trial. As such, it argues it is entitled to a new trial because the verdict was against the manifest weight of the evidence. *Snelson v. Kamm*, 204 Ill. 2d 1, 35 (2003). While not as high a standard as that for judgment *n.o.v.*, a verdict is against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary, and not based upon any of the evidence. *Id.* As addressed above, we find there was sufficient evidence to support the jury's verdict and we will " ' not usurp the function of the jury and substitute its judgment on questions of fact fairly submitted, tried, and determined from the evidence which did not greatly preponderate either way.' " *Id.* quoting *Maple v. Gustafson*, 151 Ill. 2d 445, 452-53. (1992).

¶ 30 C. Special Interrogatories

¶ 31 Section 2-1108 of the Illinois Code of Civil Procedure provides in full:

> "Unless the nature of the case requires otherwise, the jury shall render a general verdict. The jury may be required by the court, and must be required on request of any party, to find specially upon any material question or questions of fact submitted to the jury in writing. Special interrogatories shall be tendered, objected to, ruled upon and submitted to the jury as in the case of instructions. Submitting or refusing to submit a question of fact to the jury may be reviewed on appeal, as a ruling on a question of law. When the special finding of fact is inconsistent with the general verdict, the former controls the latter and the court may enter judgment accordingly." 735 ILCS 5/2-1108 (West 2010).

¶ 32 Our supreme court has explained the principles behind the special interrogatory as follows:

> "A special interrogatory serves 'as guardian of the integrity of a general verdict in a civil jury trial.' [Citation.] It tests the general verdict against the jury's determination as to one or more specific issues of ultimate fact. [Citation.] A special interrogatory is in proper form if (1) it relates to an ultimate issue of fact upon which the rights of the parties depend, and (2) an answer responsive thereto is inconsistent with some general verdict that might be returned. [Citation.] Special findings are inconsistent with a general verdict only where they are 'clearly and absolutely irreconcilable with the general verdict.' [Citation.] If a special interrogatory does not cover all the issues submitted to the jury and a 'reasonable hypothesis' exists that allows the special finding to be construed consistently with the general verdict, they are not 'absolutely irreconcilable' and the special finding will not control. [Citation.] In determining whether answers to special interrogatories are inconsistent with a general verdict, all reasonable presumptions are exercised in favor of the general verdict. [Citation.]" *Simmons v. Garces*, 198 Ill. 2d 541, 555-56 (2002).

¶ 33 A special interrogatory is proper when it consists of a single, direct question that is dispositive of an issue in the case such that it would, independently, control the general verdict. *Northern Trust Co. v. University of Chicago Hospitals and Clinics*, 355 Ill. App. 3d 230, 251 (2004). A special interrogatory may focus on only one element of a claim, but only if that element is dispositive of the claim at issue. Where there are two alternate theories of negligence

asserted, and the special interrogatory addressed only one, the special interrogatory was not in proper form. *Id.* We review *de novo* the question of whether the circuit court properly tendered or refused a requested special interrogatory to the jury. *Goranowski v. Northeast Illinois Regional Commuter R.R. Corp.*, 2013 IL App (1st) 121050, ¶ 4.

¶ 34 Metra argues that the circuit court erred in refusing to tender its five special interrogatories to the jury. Metra notes that a circuit court has no discretion to reject an offered special interrogatory that is in proper form. *McGovern v. Kaneshiro*, 337 Ill. App. 3d 24, 30 (2003). Metra asserts that plaintiff's entire case rests on a preliminary evaluation of whether Metra provided a reasonably safe workplace and the jury was instructed on this single duty. Therefore, it contends that it should have been allowed its special interrogatory 1 directed at this issue as well as interrogatories 2, 4 and 5.

¶ 35 Metra also argues that special interrogatory 3 was proper because it addressed the ultimate issue of notice. Metra contends that if the jury answered "no" to this interrogatory, it could not consistently find Metra liable because if it had no notice of the condition at issue it owed no duty of care to protect from that condition. It argues that the circuit court's conclusion that plaintiff's claim was one for active negligence and Metra's knowledge of the condition was not required was in error.

¶ 36 In *Goranowski*, this court recently rejected Metra's argument that special interrogatories 1, 2, 4 and 5 should have been tendered because they were dispositive of the issue of whether Metra provided a safe place to work. As plaintiff argues, this assertion fails because while the instructions presented a single duty under FELA for Metra to provide plaintiff "a reasonably safe place in which to do his work," they did not explain that the duty encompassed each plaintiff's

claims of breach. *Goranowski,* 2013 IL App (1st) 121050 at ¶ 8. As in that case, an answer of "yes" to the interrogatory would not be clearly irreconcilable with a general verdict because the jury could find Metra failed to properly enforce its rules, warn its employees or properly fill the holes in the ballast and the court correctly refused the interrogatories 1, 2, 4 and 5. *Id.* Furthermore, the two-part interrogatories necessarily fail under the rule addressed in *Northern Trust Co.* because they do not consist of a single direct question dispositive of the ultimate issue.

¶ 37 Special interrogatory 3 also was properly rejected. The circuit court found that notice was not required because plaintiff asserted claims of active negligence. Metra correctly notes that a bare allegation of active negligence does not obviate the notice requirement. *Holbrook v. Norfolk Southern Ry. Co.*, 414 F.3d 739, 745 (7th Cir. 2005). However, in *Holbrook*, the plaintiff failed to provide evidence that the condition causing his injury resulted from the defendant's actions. In this case, evidence was presented that Metra was working in the area and the hole in which plaintiff fell did not occur naturally. Where the dangerous condition is found to have been created by the employer, notice may be presumed. *Id.*, citing *Harp v. Illinois Central Gulf R.R. Co.*, 55 Ill. App. 3d 822 (1977). Furthermore, plaintiff's claim that Metra failed to properly enforce its safety rules did not require notice and special interrogatory 3 was properly refused by the circuit court.

¶ 38 D. Evidentiary Rulings

¶ 39 Metra finally argues that it is entitled to a new trial because the circuit court made several evidentiary errors. Metra contends that the circuit court erred in allowing Dr. Sarantopolous' testimony that plaintiff would likely require future knee replacement surgery. In addition, Metra argues the court erred in allowing the written note from Opala to plaintiff and Exhibit 60, a

picture of track 3 from the Antioch yard into evidence.

¶ 40 The decision of whether to admit expert testimony is within the sound discretion of the circuit court. *Snelson*, 204 Ill. 2d at 24. Specifically, the admissibility of expert testimony is established if the proffered expert is qualified by knowledge, skill, experience, training, or education, and the testimony will assist the trier of fact in understanding the evidence. *Musburger, Ltd. v. Meier*, 394 Ill. App. 3d 781, 800 (2009). If we determine the trial court erred in resolving an evidentiary issue, we will remand for a new trial only if the error was substantially prejudicial and affected the outcome of the trial. *Liberty Mutual Ins. Company v. American Home Assurance Company*, 368 Ill. App. 3d 948, 960 (2006).

¶ 41 After an extended hearing the circuit court ultimately denied Metra's motion *in limine* concerning Dr. Sarantopolous' testimony on plaintiff's likely future knee replacement. The court initially expressed concern that the testimony was improper because, as Metra asserted, Dr. Sarantopolous was not an orthopaedic surgeon and was not the medical professional that would ultimately decide whether the knee replacement would be undertaken. However, the court read over the evidence deposition transcript and determined that Dr. Sarantopolous properly explained how he reached his opinion and, most importantly to the circuit court, used the appropriate words limiting his opinion "to a reasonable degree of medical certainty" and allowed his testimony to be read to the jury.

¶ 42 We agree that this was not an abuse of discretion. Dr. Sarantopolous explained his credentials in working to rehabilitate injuries, including knee injuries. He testified to the type of injury suffered, various therapies and procedures undergone by plaintiff, his communications with plaintiff's surgeon, the surgeon's recommendation for knee lubricant injections, the typical

end result after a patient gets lubricant injections, and his history and experience treating patients in this area. Dr. Sarantopolous testified that, as a result of all of these factors, he opined to a reasonable degree of medical certainty that a knee replacement would eventually be necessary. He further limited his opinion by noting he was not a surgeon and would not ultimately make the decision for replacement surgery. This opinion was helpful to the jury to understand the nature and extent of plaintiff's injuries and properly supported by the testimony.

¶ 43 Next, Metra argues that the note written from Opala to plaintiff was inadmissible hearsay and the circuit court erred in allowing the note into evidence. Metra contends that the court's conclusion that the note was allowable as a party admission was in error. It argues that plaintiff was required to show that Jeff Klein, the source of information for Opala, made the admission about a matter within the scope of his employment. *Hallesh v. Coastal Building Maintenance Co.*, 269 Ill. App. 3d 887, 893 (1995). Metra asserts that plaintiff failed to meet this burden and the note should have been barred.

¶ 44 Plaintiff concedes that the note is double hearsay. However, he argues that under current case law following the scope of employment approach, statements made by an employee constitute admissible party admissions if made concerning a matter within the scope of employment and made during the existence of the employment relationship. *Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill. App. 3d 1060, 1065 (2001). Opala testified that, as foreman in charge of the Antioch yard, he was required to oversee the yard, the conditions of the yard, and inform his employees working in the yard of any possible safety issues they might encounter. This requirement to communicate to employees is also stated in Metra's safety rules. Opala testified that after plaintiff was injured, he investigated the track condition, contacted his liaison in charge

of a large project on the yard and was told that track work was being conducted that week. Opala passed this information along to plaintiff pursuant to his job requirements. Accordingly, the statements were made by current employees concerning matters within their scope of employment and the note was properly admitted.

¶ 45 Finally, Metra argues that the circuit court improperly allowed exhibit 60, a picture of track 3, into evidence. Metra argues that the use of the photograph violated the circuit court's ruling on Metra's motion *in limine* to bar any evidence or testimony concerning the use or choice of different sized ballast. However, as plaintiff argues, the photograph was not utilized to examine the size of the ballast or referenced for that fact in any way. Indeed, the only reference to exhibit 60 of record was during plaintiff's testimony to demonstrate the difference in the level of ballast compared to the railroad ties between tracks 3 and 4. There was no discussion of the type or size of ballast. Nor is there any evidence of record that Metra objected to the use of the photograph or regarding its introduction into evidence thereby waiving any objection. Accordingly, it cannot be said from a review of the record that allowing the photograph was an abuse of discretion, or even if it were, that Metra was prejudiced by its introduction.

¶ 46 III. CONCLUSION

¶ 47 For the foregoing reasons, the judgment of the trial court is affirmed.

¶ 48 Affirmed.